UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF TRENTON

NEW JERSEY PROTECTION AND ADVOCACY, INC., A New Jersey non profit corporation Plaintiff, v. JAMES DAVY, In his Official Capacity as Commissioner of the Department of Human Services. Defendant.	The Honorable Stanley R. Chesler, U.S.D.J. Civil Action Civil Action No. 05-1784 (SRC)

BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

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PROCEDURAL HISTORY

On or about, April 5, 2005 Plaintiff, New Jersey Protection and Advocacy, Inc., filed this suit against Commissioner James Davy, Department of Human Services, in the United States District Court for the District of New Jersey, Trenton Vicinage. On or about May 3, 2005, the Office of the Attorney General, the designated agent for service for Commissioner Davy, was served with Plaintiff's complaint. On or about May 19, 2005 Plaintiff filed an amended complaint. On or about May 23, 2005, the Office of the Attorney General was served with the Amended Complaint.

Defendant's responsive pleading was due on June 6, 2005. On or about June 2, 2005, Defendant moved for a clerk's extension pursuant to Fed. R. Civ. P. 6(b)(1). On June 3, 2005, Defendant's request for a clerk's extension was granted and the answer became due on June 21, 2005. On June 20, 2005, Defendant moved, with consent of counsel for Plaintiff, for an extension of time of fifteen days to answer, move or otherwise reply.

Commissioner Davy, now moves to dismiss the instant action on the basis that Plaintiff has failed to state a cause of action for which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

STATEMENT OF FACTS

For purposes of this a motion to dismiss, Commissioner Davy accepts the facts, but not the legal conclusions set forth in the Amended Complaint.

ARGUMENT

POINT I

PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED SINCE PLAINTIFF DOES NOT HAVE STANDING TO ASSERT CLAIMS ON BEHALF OF ITS CONSTITUENTS.

Plaintiff, NJP&A lacks standing to assert claims on behalf of "persons with mental illness who have been confined to state psychiatric hospitals within New Jersey whom a court of this State has adjudicated as no longer meeting the statutory requirement for involuntary commitment to a state psychiatric hospitals," see Amended Complaint ¶5 (hereinafter, "Implied Plaintiffs"), contained in the amended complaint. Without standing, the Article III case and controversy requirement is absent and the entire complaint should be dismissed for want of subject matter jurisdiction or for failure to state a claim.

"Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III [of the United States Constitution]." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) citing Allen v. Wright, 468 U.S. 737, 751 (1984). When a plaintiff's asserted injury arises from the government's allegedly unlawful action against someone else, much more is needed to assert standing than when the plaintiff is himself the object of government action. Id. at 561-562. Such is the case here, where

Plaintiff attempts to assert standing on behalf of individuals with mental illness rather than itself. Further, despite Plaintiff's status as a protection and advocacy organization under 42 U.S.C. §10801 et seq., it does not have associational standing to sue on behalf of these individuals, since they are not members of New Jersey Protection & Advocacy. Therefore, the Court should dismiss plaintiff's complaint for lack of standing.

When established, lack of standing deprives a Court of subject matter jurisdiction. Clevenger v. First Option Health Plan of N.J., 208 F. Supp.2d, 463, 467 (D. N.J. 2002). Thus, a challenge to standing is equivalent to a subject matter jurisdiction challenge. Ibid. Although Fed. R. Civ. P. 12(b)(1) allows a court to dismiss a complaint for lack of subject matter jurisdiction, it should ordinarily be analyzed under the standard for a motion to dismiss for failure to state a claim set forth in Fed. R. Civ. P. 12(b)(6), Ibid. (citing Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406 (3d Cir.), cert. den. 501 U.S. 1222 (1991).

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, the reviewing court must accept all well pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Schrob v. Catterson, 948 F.2d 1402 (3d Cir. 1991); Rogin v. Bensalem Twp., 616 F.2d 680, 685 (3d Cir. 1980). A district court must also accept as true any and all

reasonable inferences derived from those facts. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 (3d Cir. 1994). A motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief may be granted merely tests the legal sufficiency of the Complaint. Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). A court may not dismiss the complaint for failure to state a claim "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); D.P. Enterprises, Inc. v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984). It is not necessary that the complaint plead evidence, and it is not necessary to plead the facts that serve as a basis for the claim. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977).

Even though "all well-pled allegations are accepted as true and reasonable inferences are drawn in the plaintiff's favor, the Court may dismiss a complaint where, under any set of facts which could be shown to be consistent with a complaint, the plaintiff is not entitled to relief." Mruz v. Caring, Inc., 39 F. Supp.2d 495, 500 (D. N.J. 1999) (citing, Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Rule 12(b)(6) authorizes a court to dismiss a claim on a dispositive issue of law as this procedure streamlines litigation by dispensing

with needless discovery and fact-finding. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989).

In this matter, Plaintiff attempts to bring an action "on behalf of individuals with mental illness who reside in state psychiatric hospitals within New Jersey whom a court of this State has adjudicated as no longer being a danger to themselves or others by reason of mental illness." See Amended Complaint ¶5 (hereinafter "Implied Plaintiffs"). Thus, Plaintiff seeks to redress injuries allegedly suffered to the implied plaintiffs, its "constituents", rather than injuries to itself. Although an association may sue to redress injuries suffered by its members without a showing of injury to itself, the association must satisfy a three-part test to establish associational standing. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977). First, the association must demonstrate that its members would otherwise have standing to sue in their own right; second, it must show that the interests it seeks to protect are germane to the organization's purpose; and third, it must establish that neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit. Id. at 343.

While Plaintiff has the authority to pursue administrative, legal, and other remedies on behalf of individuals with mental illness, pursuant to 42 U.S.C. §10805(a)(1)(B), it must still satisfy the Article III requirements for standing in order to

assert associational standing. See United Food and Commercial Workers Union v. Brown Group, Inc., 517 U.S. 544 (1996). In United Food, supra, the Supreme Court considered associational standing under an explicit congressional grant of standing, such as the grant contained in 42 U.S.C. §10805(a)(1)(B). It held that the first two prongs of the test developed in Hunt, supra, are Article III requirements which must always be satisfied to establish standing under the Constitution, notwithstanding any congressional grant. Id. at 555-558. In contrast, the third prong is not required by Article III and may therefore be eliminated by Congress. Ibid. Therefore, despite its congressional grant of authority to pursue legal action on behalf of its constituents, Plaintiff must demonstrate, first, that its members would otherwise have standing to sue in their own right, and, second, that the interests it seeks to protect are germane to the organization's purpose.

Here, Plaintiff fails to satisfy the first prong of the Hunt test since the implied plaintiffs are not members of New Jersey Protection & Advocacy. Rather, they are "constituents" who bear no characteristics of membership in the Organization. Although an association's constituents need not be "members" of the association in the technical sense, they must possess the indicia of membership in order for the organization to assert associational standing. Hunt, supra, 432 U.S. at 344. In Hunt, supra, the Washington State

Apple Advertising Commission challenged the constitutionality of a North Carolina statute which prohibited the display of Washington State apple grades on closed containers shipped into the state. North Carolina argued that the Commission did not have associational standing to sue on behalf of Washington State apple growers, since the Commission itself did not actually produce or ship apples but rather promoted Washington apples in the market through advertising. Id. at 341. Therefore, according to the state, the Washington apple producers were not "members" of the commission. Ibid. The Court, however, held that the while the apple growers and dealers were not "members" of the Commission in the traditional sense, they possessed all of the "indicia of membership" in an organization. Id. at 344. Specifically, the Court noted that "[the apple producers] alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of [the] lawsuit, through assessments levied upon them." Id. at 344-355.

In contrast, not only are Plaintiff's constituents in this matter not members of the New Jersey Protection & Advocacy, but they do not possess any of the indicia of membership in the Organization. First, the individuals with mental illness on behalf of whom Plaintiff attempts to assert standing do not elect the members of New Jersey Protection & Advocacy. Second, they do not serve as employees or representatives of the Organization. Third,

they do not finance the activities of New Jersey Protection & Advocacy. Rather, the Organization is federally funded through allocations by the Secretary of Health and Human Services. See 42 U.S.C. § 10803. Therefore, Plaintiff cannot assert associational standing on behalf of its constituents, since these constituents play absolutely no membership role in the Organization.

Accordingly, in Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Board of Trustees, 19 F.3d 241 (5th Cir. 1994), the United States Court of Appeals for the Fifth Circuit held that a Texas advocacy group, comparable to New Jersey Protection & Advocacy, did not satisfy the first prong of the Hunt test for associational standing since its constituents were not members of the group. In that case, the Association for Retarded Citizens of Dallas filed suit against state defendants asserting that the state's transfer of six developmentally disabled minors to a temporary group home caused the children irreparable injury. Id. at 243. The court held that the advocacy group could not assert standing on behalf of the minors, since the individuals were not members of the group. Id. at 244. It noted that "[t]he organization [bore] no relationship to traditional membership groups because most of its 'clients'... [were] unable to participate in and guide the organization's efforts." Ibid. Therefore, according to the court, the advocacy group did not establish that its members would have standing to sue

in their own right, as required by Hunt, supra, 432 U.S. 333. Ibid.

Similarly, in this matter, the individuals on behalf of whom Plaintiff attempts to assert standing do not in any way direct the activities of New Jersey Protection and Advocacy. Rather, Plaintiff is a federally-funded organization which is entirely self-guided. Thus, Plaintiff's constituents bear absolutely no indicia of membership in the organization and Plaintiff cannot satisfy the first prong of the Hunt test for associational standing. Therefore, Plaintiff's complaint should be dismissed for lack of standing.

While other courts have permitted organizations established under the Protection and Advocacy for Mentally Ill Individuals Act ("PAMII"), 42 U.S.C. § 10801, to assert associational standing on behalf of their constituents, See Doe v. Stincer, 175 F.3d 879 (11th Cir. 1999); Oregen Advocacy Center v. Mink, 322 F.3d 1101 (9th Cir. 2003); Risinger v. Concannon, 117 F. Supp.2d 61 (D. Me. 2000); Brown v. Stone 66 F. Supp. 2d 412 (E.D.N.Y. 1999); Trautz v. Weisman, 846 F. Supp. 1160 (S.D.N.Y. 1994); Rubenstein v. Benedictine Hospital, 790 F. Supp. 396 (N.D.N.Y. 1992); E.K. v. New York Hospital-Cornell Medical Center, 600 N.Y.S.2d 993 (N.Y. Sup. 1992), these courts ignore the Constitutional requirement that such organizations demonstrate that their members would otherwise have standing to sue in their own right. In Stincer, supra, the court

considered whether the Advocacy Center for Persons with Disabilities, the PAMII designated organization in Florida, had standing to bring a claim on behalf of mentally ill persons in the state. Despite the Florida Attorney General's argument that the Advocacy Center lacked standing because it was not suing on behalf of any members of the Advocacy Center, the court held that the fact that the Center had constituents rather than members did not deprive it of Article III standing. Id. at 886. It observed that Congress designated the Advocacy Center to "serve a specialized segment of the community which is the primary beneficiary of its activities, including prosecution of this type of litigation," and therefore individuals with mental illness had the "indicia of membership" in the Center. Ibid.

The Stincer court, however, mistakenly relied on the Advocacy Center's congressional grant of standing under 42 U.S.C. § 10801 to conclude that the Center's constituents had the "indicia of membership" in the organization. Id. at 886. Thus, the court ignored the United States Supreme Court's decision in United Food, supra, 517 U.S. at 555-558, which held that the first two prongs of the Hunt test are Article III requirements which must always be satisfied to establish standing under the Constitution, notwithstanding any congressional grant. Accordingly, the court failed to thoroughly inquire as to whether the Advocacy Group's members had the "indicia of membership" in the organization, as

required by Hunt, supra, 432 U.S. 333. As demonstrated in the matter before this Court, such analysis reveals that Plaintiff's constituents play absolutely no membership role in the organization. Therefore, Plaintiff is constitutionally prohibited from asserting association standing on behalf of these individuals.

Furthermore, Plaintiff has not demonstrated that its constituents, even if considered "members" by the Court, would have standing to sue in their own right, as required by Hunt, supra, 432 U.S. 333. It is well-established that "the irreducible constitutional minimum of standing" contains three elements: (1) the plaintiff must have suffered an 'injury in fact' - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. Lujan, supra, 504 U.S. at 560-561.

Here, Plaintiff seeks to assert standing on behalf of individuals with mental illness who reside in state psychiatric hospitals whom a court of this state has adjudicated as no longer being a danger to themselves or others by reason of mental illness. See Plaintiff's Amended Complaint at ¶4. Plaintiff states that "on any given day nearly 50% of the individuals in New Jersey's psychiatric hospitals are on CEPP status." Id at ¶23. Thus,

Plaintiff baldly asserts that all individuals who reside in state psychiatric hospitals on CEPP status have standing to sue on their own behalf, without offering any allegations which support that these individuals satisfy "the irreducible constitutional minimum of standing." See Lujan, supra, 504 U.S. at 560.

In fact, a countless number of the individuals on behalf of whom Plaintiff seeks to assert standing do not satisfy the constitutional requirement for standing. First, many of these individuals have suffered no injury at all. Plaintiff's statistics are misleading since they fail to account for the fact that the 50% figure which Plaintiff cites is not a stagnant figure. Rather, many of the individuals on CEPP status are discharged from the hospital, while being replaced by other patients then put on CEPP status. Second, many of these individuals cannot attribute their CEPP status to any alleged failure on the part of the State to develop community placements. Instead, these individuals choose to remain in psychiatric hospitals rather than seeking community placements. Third, these individuals will not benefit from any favorable decision from the Court, since there is no injury to redress in the first place.

Therefore, a significant number of individuals on behalf of whom plaintiff seeks to bring this compliant do not have standing to sue on their own right. Accordingly, Plaintiff cannot assert

associational standing on behalf of these individuals and its complaint must be dismissed.

POINT II

COMMISSIONER DAVY IS IMMUNE FROM SUIT UNDER TITLE II OF THE ADA AND SECTION 504 OF THE REHABILITATION ACT.

A. Congress Failed to Abrogate State Sovereign Immunity under the Title II of the ADA and Section 504 of the Rehabilitation Act.

1. Congress Failed to Abrogate State Sovereign Immunity under the Title II of the ADA.

To the extent that the complaint seeks relief from Commissioner Davy pursuant to Title II of the ADA and Section 504 of the Rehabilitation Act the suit is constitutionally barred because the State of New Jersey and its officials are immune from the suit. The Eleventh Amendment to the United States Constitution makes explicit reference to the States' immunity from suits:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. [U.S. Const. Amend. XI].

The phrase "Eleventh Amendment immunity" is

> something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by [the Supreme Court] make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ... except as altered by the plan of the

> Convention or certain constitutional Amendments. [Alden v. Maine, 527 U.S. 706, 712-13 (1999)].

Congress does have a limited authority to abrogate the States' sovereign immunity and subject non-consenting States to suit in federal court pursuant to the Enforcement Clause of the Fourteenth Amendment. Tennessee v. Lane, 541 U.S. 509, 517 (2004); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59 (1996). In assessing whether Congress has validly abrogated the States' sovereign immunity, the court must answer two questions: (1) whether Congress has unequivocally expressed its intent to abrogate the immunity and (2) whether Congress acted pursuant to a valid exercise of power. Lane, supra, 541 U.S. at 517; Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 635 (1999) (hereinafter "Florida Prepaid"); Seminole Tribe, supra, 517 U.S. at 55. Although in enacting the ADA and the Rehabilitation Act, Congress unequivocally expressed its intent to abrogate the immunity of the States, see 42 U.S.C. § 12202 (ADA) ("A state shall not be immune under the Eleventh Amendment"); 42 U.S.C. § 2000d-7(a)(1) (Rehabilitation Act) ("A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973."), the second prong of the test--whether Congress acted pursuant to a valid exercise of power--has not been met for either of the statutes. Both statutes were passed pursuant to the Fourteenth Amendment.

In Boerne v. Flores, the Supreme Court provided the framework for examining the scope of Congress's authority under the Fourteenth Amendment. 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act of 1993 ("RFRA") was beyond Congress's authority to abrogate the states' sovereign immunity); See also Lane, supra, 541 U.S. 520; Board of Trustees v. Garrett, 531 U.S. 356 (2001) (holding that Title I of the ADA exceeded Congress's authority to abrogate the states' sovereign immunity) (hereinafter "Garrett"). In Lane and Garrett, the Court reiterated and applied the Boerne framework. Lane, supra, 541 U.S. 522-534; Garrett, supra, 531 U.S. 356. The Boerne framework rests on the basic principle that the Court is the ultimate authority on the scope of the Fourteenth Amendment. Garrett, supra, 531 U.S. 356. Thus, Congress may not define or declare the rights under the Fourteenth Amendment -- Congress's power under § 5 is limited to the remedial power of enforcing the provisions of the Fourteenth Amendment. Boerne, supra, 521 U.S. at 520 (citing South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)). A statute that crosses the line beyond Congress's § 5 power and makes a substantive change in the governing law, cannot be upheld. Ibid. The Court noted that line is not always easy to draw, but required that there must be:

> a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. [Ibid.]

Accord Lane, supra, 541 U.S. at 520.

In Boerne, the Court concluded that Congress crossed the line when it passed RFRA because (1) it was enacted without any findings on the existence of widespread violations of any constitutional right that the Supreme Court has recognized, and (2) RFRA created rights that far exceeded any the Supreme Court has previously read the First Amendment to provide. Boerne, supra, 521 U.S. at 532, 117. Accord Florida Prepaid, supra, 527 U.S. at 640-48, 119 (holding the Patent and Plant Variety Protection Remedy Clarification Act did not abrogate states' immunity because the legislative history for the statute failed to identify a pattern of patent infringement by the States, let alone a pattern of constitutional violations and the statute conferred rights more expansive than those provided by the Due Process Clause of the Fourteenth Amendment).

In deciding Boerne, the Court contrasted RFRA to two earlier Voting Rights Act cases in which Congress properly used its § 5 enforcement power - South Carolina v. Katzenbach, 383 U.S. 301 (1966) (rejecting an attack on most of the geographically restricted provisions of the Voting Rights Act) and Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding a provision of the Voting Rights Act that invalidated New York's English-literacy voter-qualification rule). The Boerne Court found that the keys to determining that Congress properly used its § 5 powers in enacting

the Voting Rights Act, were: (1) before passing the Voting Rights Act, Congress thoroughly documented a history of obvious Fifteenth Amendment violations by the states' laws; (2) the legislative history indicated that the Act's primary purpose was to vindicate the Fifteenth Amendment rights that the southern state's voting laws and practices were defeating; and (3) Congress took measures specifically tailored to remedy the constitutional violations, specifically: (a) the measures were limited to prohibiting patently unconstitutional conduct and establishing policing mechanisms for future violations; (b) they applied only to states where Congress found constitutional violations were the most common; and (c) the Act contained termination provisions to relieve jurisdictions that complied with the Constitution from the Act's restraints. Boerne, supra, 521 U.S. at 532.

In Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), decided after Boerne, the Court further explained the "congruence and proportionality" framework and concluded that the Age Discrimination in Employment Act ("ADEA") is not appropriate enforcement legislation because the substantive requirements the ADEA imposes on state governments are far greater that any restrictions that could have been imposed by the Equal Protection clause of the Fourteenth Amendment. Kimel, supra, 528 U.S. at 82. To reach this conclusion, the Court compared the analysis of an age discrimination claim under the Equal Protection Clause which would

only receive rational basis scrutiny with a presumption of constitutionality, thus upholding age classifications in many instances, to the analysis of an ADEA claim, where the burden for the state was much higher, which in effect disallowed the classification in many instances. Ibid. Moreover, the Kimel Court examined the legislative record to consider the appropriateness of the remedial measures in light of the evil presented, Id. at 89, noting that "Congress never identified any pattern of age discrimination by the states [as opposed the findings Congress did make as to discrimination by private sector employers], much less any discrimination by states whatsoever that rose to the level of constitutional violation." Ibid. As the Boerne Court had explained, specific finding such as made before passing the Voting Rights Act were necessary. Boerne, supra, 521 U.S. at 532.

In Lane, the Court altered the Boerne analysis by allowing a statute to be considered part by part, for congruence and proportionality. In Boerne, Kimel, and Garrett the Court considered the whole of the statute, and its sweeping nature, when determining congruence and proportionality. See Boerne, supra, 521 U.S. at 532 (noting "Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments" as part of the basis for

the determination that RFRA is not congruent and proportional to Congress's Fourteenth Amendment powers); Kimel, supra, 528 U.S. at 83 (holding that the "requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act"); Garrett, supra, 531 U.S. at 372 (finding that the "[reasonable] accommodation duty [in Title I of the ADA] far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an "undue burden" on the employer."). In Lane the Court held that although Title II "reaches a wide array of official conduct in an effort to enforce a wide array of constitutional guarantees, that wide array does not negatively impact on congruence and proportionality analysis, but requires that Title II be examined in light of the particular issue on review. Lane, supra, 541 U.S. at 530-31.

The first step is to identify the Fourteenth Amendment "evil" or "wrong" that Congress intended to remedy, remembering that the principle by which the propriety of any §5 legislation must be judged is with reference to the historical experience it reflects. Florida Prepaid, supra, 527 U.S. at 640. With the ADA Congress intended to remedy discrimination against the disabled. Title II of the ADA specifically prohibits discrimination by pubic entities. In enacting the ADA Congress did make substantial findings about

many forms of discrimination against the disabled, but like in Kimel, Congress did not make any findings about particular state laws or specific state actions which violated the Constitution. See Garrett, supra, 531 U.S. 356; Alsbrook v. City of Maumelle, supra, 184 F.3d 999, 1009-1010 (8th Cir. 1999) ("In the present case, it cannot be said that Title II identifies or counteracts particular state laws or specific state actions which violate the Constitution. . . . We do not think that the legislative record of the ADA supports the proposition that most state programs and services discriminate arbitrarily against the disabled."); See also, Lavia v. Pennsylvania Dep't of Corr. , 224 F.3d 190, 204 (3d Cir 2000) (ADA Title I); Erickson v. Board of Governors of State Coll. & Univ For Northeastern Ill., 207 F.3d 945, 951 (7th Cir. 2000); (ADA Title I) Stevens v. Illinois Dep't of Transp., 210 F.3d 732, 739-40 (7th Cir. 2000) (ADA Title I), cert. denied, 531 U.S. 1190 (2001). The Stevens court put its finger on an important issue in examining the ADA. "[V]irtually every State in the Union has promulgated state statutes prohibiting discrimination against the disabled ...." 210 F.3d at 739-40. Congress found no evidence that the states were ignoring or violating their own laws. Id.

New Jersey has laws protecting persons with mental illness and preventing discrimination against them. N.J.S.A. 30:4-24.1 and 24.2 set forth the civil right and rights of patients who are mentally ill. This includes a requirement similar to the ADA, in

that patients are entitled to "the least restrictive conditions necessary to achieve the purposes of treatment." N.J.S.A. 30:4-24.2(e)(2) (enacted in 1965 and amended in 1975, many years prior to the enactment of the ADA). In addition, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., prohibits discrimination against the disabled, including the mentally ill, and provides for civil damages and other judicial relief.

Given the lack of evidence of state laws passed specifically to discriminate against the disabled -- as state laws did prior to the Voting Rights Act -- given the state legislative response to the plight of the disabled and the lack of any evidence of a pattern of discrimination by state actors against the disabled, it cannot be shown that either the ADA or Section 504 of the Rehabilitation Act are proportional responses to the evil identified.

Moreover, the ADA does not meet the other "congruence and proportionality" standards outlined in Boerne and Lane. The central issue is whether Congress, consistent with the Fourteenth Amendment, could increase the level of judicial scrutiny for states' actions that incidentally burden disabled persons. See Garrett, supra 531 U.S. 356; Alsbrook, 184 F.3d at 1009. Under the Boerne framework, § 5 enactments must target unconstitutional state action, however, the Constitution has given state governments significant latitude in dealing with the problems of the disabled.

Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698, 706 (4th Cir. 1999). The Supreme Court has never found the disabled to be a suspect or even a quasi-suspect class, thus state action discriminating against the disabled is subject to only a rational basis review. See Garret, supra, slip op. at 7-8 (citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985)). Rational basis review is not searching-- "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." Heller v. Doe, 509 U.S. 312, 321 (1993); See also Garrett, supra, 531 U.S. 356; Mill v. Maine, 118 F.3d 37, 47 (1st Cir. 1997).

By contrast, the ADA prohibits distinctions built on generalizations--even if those generalizations would pass rational basis review. Under ADA, a state's actions are no longer presumptively valid if rationally related to the interests they serve, instead, the state must make "reasonable accommodations" for the disabled -- and only once the state can show that it cannot "reasonably accommodate" will the courts validate the state's chosen policy. See 42 U.S.C. §12101, et seq. Such "searching judicial scrutiny" is incompatible with rational basis review. Coolbaugh v. Louisiana, 136 F.3d 430,441 (5th Cir.)(Smith, J., dissenting), cert. denied 525 U.S. 819 (1998); See also Garrett, supra, 531 U.S. 356; Lavia, supra, 224 F.3d at 200; Amos v.

Maryland Dep't of Corrections, 178 F.3d 212, 225 (4th Cir. 1999)(Williams, J., dissenting); Alsbrook v. City of Maumelle, supra, 184 F.3d 999, 1011 (8 th Cir. 1999); Erickson, 207 F.3d at 949; Stevens, 210 F.3d at 738. The reasonable accommodations provisions of the ADA redefine the Equal Protection Clause, transforming it from a prohibition on invidious state action "into a charter for positive rights." Bane v. Virginia Dep't of Corrections, 110 F. Supp.2d 469, 476 (W.D.Va. 2000) (holding that Title II of the ADA is not valid enforcement litigation under Congress's § 5 powers). Particularly in the area of placement in the most integrate setting, the ADA far surpasses any constitutional protection.

Thus, the analysis must now turn to the issue in the complaint -- whether Commissioner Davy, in following state supreme court case law, IMO S.L., 94 N.J. 128 (1933), is otherwise violating the ADA, its implementing regulations, and Section 504, by not providing services to the implied plaintiffs in the most integrated setting as required in Olmstead v. L.C., 527 U.S. 581 (1999) and Frederick L. v. Dep't of Pub. Welfare, 364 F.3d 487 (3d. Cir. 2004)[1] See Amended Complaint, Count II, ¶¶ 11, 15. Employing the

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[1] The Olmstead plaintiffs did not bring a claim under Section 504 of the Rehabilitation Act. See L.C. & E.W. v. Olmstead et al., Civil Action No. 1:95-cv-1210-MHS, 1997 WL 148674, *2 (N.D. Ga. Mar. 27 1997)). In its analysis in Federick L., the Third Circuit noted that in Helen L. v. Didario 46 F.3d 325, 330-32 (3d Cir.1995), the ADA and Section 504 were construed to be similar in their language and purpose. The bulk of the Third Circuit's

analysis of Lane here, shows that what is sometimes termed the "integration mandate" of the ADA could in no way be considered congruent and proportional to the remedies available under the Fourteenth Amendment, and thus, in this application, Congress lacked the power to abrogate the State's Eleventh Amendment sovereign immunity from suit.

Olmstead and its Third Circuit progeny have gone far beyond the remedies available under the Fourteenth Amendment. Olmstead v. L.C., 527 U.S. 581 (1999), is a plurality decision in which six justices agreed that under Title II of the Americans with Disabilities Act, specifically, 42 U.S.C. §12132 ("ADA"),[2] and 28 C.F.R. 35.130(d),[3] held that when a State's treating professionals have determined that a person can be served in the community, the State is responsible to make such placement or show justification why it need not under the ADA "fundamental alterations"

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opinion then focused on the ADA /Olmstead analysis. Frederick L., supra, 364 F.3d at 492-501 (3d. Cir. 2004).

[2] 42 U.S.C. §12132 provides:
Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

[3] 28 C.F.R. 35.130(d) provides:
A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

provisions.[4] Id. at 587. The Olmstead defendants had raised a cost-based fundamental alterations defense. The Court held that a fundamental alterations defense can only be established if, in the allocation of "available resources," placement of the individual would be inequitable, given the State's responsibilities "to provide care and treatment for its large and diverse population of persons with mental disabilities" and thus the State need not place that individual. Olmstead, supra, 527 U.S. at 604. In Frederick L. v. Dep't of Pub. Welfare. 364 F.3d 487 (3d. Cir. 2004), the Third Circuit further interpreted the fundamental alterations defense to require that a state show a comprehensive plan. Most recently, on March 24, 2005, in Pennsylvania Prot. and Advocacy, Inc. v. Dep't of Pub. Welfare, 402 F.3d 374 (3d Cir. 2005), the Third Circuit further established the parameters for a cost-based fundamental alterations defense holding, as a matter of law, that the state could not raise a lack of resources as a fundamental alterations defense unless it could show it had already established and implemented a state-wide plan for deinstitutionalization. Id. at 381-382[5]

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[4] 28 C.F.R. §351.30(b)(7) provides in pertinent part:
A public entity shall make reasonable modifications . . . unless [it] can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.

[5] While not at issue in this motion to dismiss, assuming arguendo that the Court does not dismiss this suit, Commissioner Davy's will argue, in part, that state meets the Constitutional,

By contrast, nowhere in the Fourteenth Amendment jurisprudence concerning persons with disabilities is there a substantive requirement that states immediately move persons who wish to be moved from institutions or in the alternative develop and implement specific plans to move all such persons. This requirement far exceeds the constitutional requirement enunciated in Cleburne, supra, which in this context would simply require that the manner in which the state delivers services to person with mental illness be rationally related to a legitimate government end and that a legitimate government end cannot be to harm this politically unpopular group. See Cleburne, supra 473 U.S. at 446. A legitimate government end could be to conserve scarce financial resources. Olmstead and Frederick L., however, condition the State’s reliance on the rational goal of conserving scarce state resources on creating and implementing a statewide plan for deinstitutionalization.

In sum, neither the ADA nor the Section 504 to the extent that they concern placement in the most integrated setting under Olmstead and Frederick L. are proper enforcement legislation and thus Congress could not have abrogated the states' immunity and the states are immune from suit under the ADA.

ADA, Section 504, Olmstead, Frederick L., and PP&A obligations.

2. Congress Failed to Abrogate State Sovereign Immunity under Section 504.

Similarly, the Section 504 of the Rehabilitation Act has not been found to meet the Bourne test for congruence and proportionality such that it is a valid exercise of Congress's powers under the Fourteenth Amendment. See A.W. v. Jersey City Public Schools, 341 F.3d 234, 239 (3d Cir. 2003) (not reaching the issue of abrogation) (citing Koslow v. Pennsylvania, 302 F.3d 161, 170 (3d Cir 2002). Particularly here, when the Rehabilitation analysis is identical to the ADA analysis, it becomes clear that for abrogation analysis, they must be treated the same way.

Further, while Koslow, supra, relying on Supreme Court case law concludes that the state's immunity is impliedly waived as to Section 504 the Rehabilitation Act, that analysis is suspect in light of the specific language of the Rehabilitation Act, and the recent Third Circuit decisions interpreting Olmstead, and Lane, supra.

B. The State Did Not Waive Sovereign Immunity by Accepting Funds under Section 504 of the Rehabilitation Act.

"State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." College Savings Bank, supra, 527 U.S. at 682. (citations omitted). Thus, the Supreme Court has made very clear that "'the test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" Id. at 675 (quoting

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985)). A waiver of sovereign immunity must be "unequivocally expressed in statutory text, and will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996) (internal citations omitted). If ambiguous, a statute must be construed in favor of immunity. See United States v. Williams, 514 U.S. 527, 531 (1995). If a statute that supposedly waives immunity has a "plausible" alternate reading, a finding of waiver must be rejected. United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992). A "plausible" alternate reading is enough to establish that a "reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." Id.

The Court has vigorously reaffirmed the principle that a purported "waiver" of State sovereign immunity will be "strictly and narrowly construed" against waiver. See Lane v. Pena, supra, 518 U.S. at 192; Williams, 514 U.S. at 531; Nordic Village, 503 U.S. at 33; Ardestani v. I.N.S., 502 U.S. 135, 137 (1991). This principle of strict statutory construction against waiver applies whether or not the legislation in question is remedial. See id. If the text of the statute itself does not clearly and unambiguously contain a waiver provision, courts cannot find waiver even if such an interpretation would foster the general purpose of the statute. See Ardestani, supra, 502 U.S. at 138. Nor may courts look to the legislative history to find a waiver of sovereign

immunity if such a provision is not expressly stated in the text of the statute itself. See Lane v. Pena, supra, 518 U.S. at 192.

Accordingly, if Congress intends to condition receipt of funds on the States' waiver of sovereign immunity, Congress must unequivocally express the conditions of receipt and what conduct violates those conditions so that the States may enter into the agreement fully aware of the consequences. See Barnes v. Gorman, 536 U.S. 181, 186-88 (2002); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) (citing Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)). "[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court." Atascadero, 473 U.S. at 246-47. The State must make a "clear declaration" that it intends to submit itself to the federal courts' jurisdiction. College Savings Bank, supra, 527 U.S. at 679.

As Justice Scalia explained "there is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress' expressing unequivocally its intention that if the State takes certain action [e.g., accepting federal funds] it shall be deemed to have waived that immunity." Id., at 680-81.

Courts may not rely solely on the conditions expressed in a Congressional Act on the waiver of sovereign immunity. Id. Without a clear declaration by the States of consent, such language merely constitutes an implied or constructive waiver, and not

evidence of the "clear declaration" from the States required by the Supreme Court. Id.

Based on these exacting standards, the Court articulated certain restrictions on the spending power that "guide" the waiver analysis. College Savings Bank, supra, 527 U.S. at 676 (citing South Dakota v. Dole, 483 U.S. 203 (1987)). First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" Id. (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937)). Second, Congress must unambiguously "condition the States' receipt of federal funds," on the States' consent to the federal condition so that the States may "'exercise their choice knowingly, cognizant of the consequences of their participation.'" Id. (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). Third, "conditions on federal grants" must be related "'to the federal interest in particular national projects or programs.'" Id. at 207-8 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

The Court also instructed "that other constitutional provisions may provide an independent bar to the conditional grant of federal funds." Id. at 208 (citing Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985) (additional citations omitted)). Finally, the Court stated that the financial assistance offered by Congress may not "'pass the point at which

'pressure turns into compulsion.'" Id. at 203 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

As will be established below, Congress did not make its intent to have States waive their sovereign immunity clear under Section 504. Nor did the State did not make a clear declaration that it knowingly and voluntarily consented to suit in Federal court under Section 504. Indeed, based on the text and history of Section 504 and its expansion of rights under Frederick L., supra, the State could not make a knowing and voluntary waiver of immunity as required by the Supreme Court. Section 504 and its recent expansion fo rights under Frederick L. clearly fails the exacting standards announced above by the Supreme Court and, thus, the ruling below should be reversed.

1. Congress Failed to Clearly Condition Receipt of Federal Funds on the States' Waiver of Sovereign Immunity.

In the Rehabilitation Act, Congress used the language of abrogation, not waiver. The Rehabilitation Act states:

> A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act. [42 U.S.C. §2000d-7(a)(1).]

That language is identical to the abrogation language in other federal statutes. See e.g. 20 U.S.C. §1403 (Individuals with Disabilities Education Act). "It is a general rule of statutory construction that where Congress has clearly stated its intent in

the language of a statute, a court should not inquire further." Brookside Veneers, Ltd. v. United States, 847 F.2d 786, 788 (Fed. Cir.), cert. denied, 488 U.S. 943 (1988) (citations omitted). In the Rehabilitation Act, Congress clearly stated its intent to abrogate State sovereign immunity through its §5 enforcement powers of the Fourteenth Amendment.

2. The State Could Not Knowingly Waive its Constitutional Immunity from Suit in Federal Court for Violations of Frederic L. under the Rehabilitation Act Because Those Violations Were Unknown at the Time the State Accepted Federal Funds.

The State of New Jersey could not knowingly waive its Constitutional right of immunity from suit in Federal court under for violations of Frederick L. under the Rehabilitation Act, because those violations were unknown at the time that the state accepted federal funds.

Similarly, in Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn, 280 F.3d 98 (2d Cir. 2001) , the Second Circuit held that the State of New York could not knowingly waive its sovereign immunity against suit under Section 504 when it accepted Federal funds for SUNY. Garcia, supra, 280 F.3d at 114. Specifically, the court found that:

> At the time that New York accepted the conditioned funds, title II of the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress's Commerce Clause authority. Indeed, the ADA expressly provided that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from

> an action in [a] Federal or State court of competent jurisdiction for a violation . . ." 42 U.S.C. §12202. Since, as we have noted, the proscriptions of Title II and §504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, College Savings Bank, 527 U.S. at 682, since by all reasonable appearances state sovereign immunity had already been lost. [Id. (additional citation omitted)].

The Garcia Court also offered an intelligent criticism of other courts finding that mere acceptance of federal funds constitutes a waiver of sovereign immunity. See id., at 115, n. 5 (citing Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997)). Significantly, the Second Circuit noted that:

> These cases are unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds. None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required in College Savings Bank, 527 U.S. at 682. [Id.]

Similarly, here, the State of New Jersey could not be expected to understand that it was relinquishing its right to sovereign immunity for violations of Federick L., supra, by accepting funds under the rehabilitation act because those sweeping obligations were not in existence when the state accepted the funds. . . . .

Finally, The waiver analysis for a statute as sweeping as the Rehabilitation Act, where the waiver is based on the acceptance of any federal funds, whatsoever, is due to be revisited in light of

Tennessee v. Lane, supra. The analysis in Lane requires that each particular application of a statute be examined to determine if Congress had the power to abrogate immunity with regard to that particular allegation. Lane, supra, 541 U.S. at 531. Similarly, a state's knowing and intelligent waiver should be analyzed based on the allegations, and whether the State was aware that acceptance of federal funds could subject it to suit for that particular allegation.

C. The State's Immunity from Suit Extends to Commissioner Davy.

Absent consent by a state, suits for money damages against a state official in his official capacity are barred by the Eleventh Amendment. Hans v. Louisiana, 134 U.S. 1 (1890), cited in Pennhurst State School and Hosp. V. Halderman, 465 U.S. 89, 99 (1984). See also, Kentucky v. Graham, 473 U.S. 159 (1985) (Eleventh Amendment barred official capacity action for damages in § 1983 suit); Edelman v. Jordan, 415 U.S. 651 (1974) (suit against state office for retroactive monetary relief, which requires payment of funds from the state treasury is barred by the Eleventh Amendment). It is well established that although the Eleventh Amendment explicitly provides immunity only to the state, a state official is also immune from suit when the state is the real party in interest. Cory v. White, 457 U.S. 85, 93 (1982); Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 464 (1945). "[A] suit against state officials that is in fact a suit against a state is barred

regardless of whether it seeks damages or injunctive relief." Pennhurst, supra, 465 U.S. at 101-102; See also Hunter v. Supreme Court of New Jersey, 951 F. Supp. 1161, 1178 (D. N.J. 1996), aff'd. 118 F.3d 1575 (3d Cir. 1997) ("With respect to state officials sued in their official capacities, the Eleventh Amendment precludes a federal court from awarding retrospective damages because the state is the real party in interest; in other words, any damage award would be paid from the state treasury, in contravention of the Eleventh Amendment.")

When a plaintiff only seeks prospective injunctive relief, the request "is ordinarily sufficient to invoke the Ex Parte Young Doctrine." Koslow v. Commonwealth of Pennsylvania, 302 F. 3d 161, 179 (3rd Cir. 2002), citing Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281(1997). Accord Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002) ("In determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.") In order to obtain injunctive relief a complaint would have to allege that such violation of federal law occurred by an official acting within his or her official capacity. See Koslow, supra, 302 F. 3d at 179 (3rd Cir. 2002); Hindes v. FDIC, 137 F.3d 148, 165 (3d Cir. 1998).

In the instant matter, Plaintiff's claim is not only for injunctive relief. <u>See</u> Complaint ¶C (seeking per diem -penalty); ¶D, (seeing attorney fees). The <u>per diem</u> penalty and the attorney fees are not the type of "'forward-looking' relief cognizable under <u>Ex parte Young</u>," <u>Koslow</u>, <u>supra</u>, 302 <u>F.</u> 3d at 179, and must be dismissed. For these parts of the complaint, the real party in interest in the instant matter is this state's treasury. Plaintiff's prayer for relief seeking to have the Court impose a monetary penalty on the state each time someone is not placed within 60 days of being determined to no longer meet the commitment standard, see Amended Complaint, C, is attempting to obtain monetary damages from the state treasury.

Further, the claim for attorney fees under 42 <u>U.S.C.</u> §1988 is a way in which plaintiffs seek monetary damages to be paid from the State treasury, and this claim too, should be dismissed. Although under suits pursuant to 42 <u>U.S.C.</u> § 1983, a prevailing party may be entitled to attorney's fees under 42 <u>U.S.C.</u> § 1988, <u>Hutto v. Finney</u>, 437 <u>U.S.</u> 678, 693-694 (1978), Plaintiff in this matter is not entitled to such fees. In Hutto, the court allowed for the payment of fees because the award of costs was limited to "compensating a successful litigant for the expense of his suit." <u>Id.</u> at 697 n. 27. The <u>Hutto</u> court stated that such fees were allowed even if Congress did not engage expressly state that it intended to abrogate the State's Eleventh Amendment immunity. The

Hutto court, however, reached its decision to award attorney's fees without engaging in the analysis later used by the Supreme Court in Boerne, supra. Since the Hutto's court analysis falls short of the required analysis under Boerne, Plaintiff is not entitled to attorney's fees or other costs of suit. The complaint specifically sues Commissioner Davy in his official capacity thus, to the extent that the complaint seeks any form of monetary damages that can only be provided by the state treasury, those claims against Commissioner Davy should be dismissed as being barred by the Eleventh Amendment.

POINT III

PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED AS COMMISSIONER DAVY ACTING IN HIS OFFICIAL CAPACITY IS NOT A PERSON FOR THE PURPOSES OF 42 U.S.C. § 1983.

A cause of action pursuant to Section 1983 cannot be maintained against a state official as that state official is not a person for the purposes of 42 U.S.C. § 1983. The claim against Commissioner Davy cannot be maintained as he is being sued in his official capacity. 42 U.S.C. §1983, by its own terms, limits the types of defendants against whom suits can be brought. 42 U.S.C. §1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

> injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [42 U.S.C. § 1983].

The United States Supreme Court recognized this limitation in Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989), holding that "a State nor its officials acting in their official capacities are not 'persons' under § 1983." The court noted that while "state officials literally are persons... a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." Ibid. (citing, Brandon v. Holt, 469 U.S. 464, 471 (1985)). Thus, a suit against a state official is "no different from a suit against the State itself." Ibid. (citing, Kentucky v. Graham, 473 U.S. 159, 165-166 (1985); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n. 55 (1978).

In Will, the Plaintiff, alleging that he had been denied a promotion within the Department of State Police, filed suit in Michigan state court against the Department and against the Director of the state police in his official capacity. A Section 1983 claim was later included. The Michigan Supreme Court held that the State is not a person under Section 1983 and that a state official is not a person. Since the "Eleventh Amendment does not

apply in state courts," these facts placed "squarely" before the United States Supreme Court the question of whether a state official is a person under the statutory provisions of Section 1983. Will, supra, 491 U.S. at 61. The Supreme Court answered the question in the negative. Id. at 71.

In addition, "[o]fficial-capacity suits, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Graham, supra, 473 U.S. at 165 (citing Monell, supra, 436 U.S. at 690, n. 55). The Supreme Court in Graham stated that

> while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." [Id. at 165-66.]

Thus, where a plaintiff seeks to recover damages from the governmental entity itself, a cause of action under Section 1983 against the official cannot be maintained.

In the instant matter, Plaintiff has sued James Davy, Commissioner of the Department of Human Services. (See Complaint, ¶7). James Davy, is the Commissioner of the New Jersey Department of Human Services and pursuant to N.J.S.A. 30:1-2 he is the head of the Department and its principal executive officer. Plaintiff has sued Commissioner Davy in his official capacity only. Ibid.

Conclusion

For the forgoing reasons, the complaint should be dismissed in its entirety.

Respectfully submitted,
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