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)

PLAINTIFF NEW JERSEY PROTECTION AND ADVOCACY, INC.'S BRIEF IN OPPOSITION TO MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6)

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Plaintiff, New Jersey Protection & Advocacy, Inc. ("NJP&A"), hereby submits this memorandum of law in opposition to Defendant's motion to dismiss for lack of standing and sovereign immunity.

I. INTRODUCTION

This case was filed by the Plaintiff on behalf of approximately one thousand individuals who are illegally confined in New Jersey's psychiatric hospitals. Rather than meet the substantive issue of the case, the Defendant instead filed a 12(b)(6) Motion to Dismiss the Amended Complaint challenging the Plaintiff's standing, claiming immunity, and alleging that the relief the plaintiff seeks is improper. By this Brief in Opposition, the Plaintiff will show that the issue of standing has been addressed favorably for plaintiffs such as this one, that the Defendant does not have immunity from suit, and that the requested relief can be granted.

II. FACTS

A. Nature of the Case

In this case, NJP&A seeks to vindicate the rights of approximately one thousand of its constituents who are detained in New Jersey's state psychiatric hospitals and who no longer require hospitalization. The state courts have concluded that these individuals are appropriate for community living, and they remain in state hospitals only because there are no community placements available. This case was brought to compel the Defendant to provide community placements for individuals currently residing in state psychiatric hospitals—individuals who have been adjudicated by the Superior Court as no longer meeting the standards for civil commitment. The New Jersey Supreme Court, recognizing the constitutional prohibitions on detaining individuals who no longer meet civil commitment standards, created a special status for such individuals, Conditional Extension Pending Placement ("CEPP"), which enables the State to continue to hold a patient while the State develops an appropriate community

placement for the individual. The Defendant, however, has used CEPP status to confine individuals for excessive periods of time and has failed to implement an effective plan for the discharge of these individuals into the community and the provision of community-based services. Instead, patients with CEPP status remain confined indefinitely to New Jersey mental institutions in the same manner as those patients who are required to be civilly committed. NJP&A, charged with the responsibility of advocating on behalf of New Jersey residents with mental illnesses, has brought this action to protect the liberty rights of its wrongfully detained constituents.

B. The New Jersey Protection & Advocacy, Inc.

NJP&A is a non-profit federally funded agency that has been designated since 1994 to serve as New Jersey's protection and advocacy system for people with disabilities. Affidavit of Sarah Mitchell, Exh. A. Pursuant to this designation, NJP&A serves as the agency to implement, on behalf of the State of New Jersey, the Protection and Advocacy System for Individuals with Mental Illness established under 42 U.S.C §§ 10801-10807. Complaint at ¶1. NJP&A is part of a nationwide network of protection and advocacy agencies located in all fifty states, the District of Columbia, Puerto Rico, and the federal territories. The protection and advocacy system comprises the nation's largest provider of legally based advocacy services for people with disabilities. Complaint at ¶2. NJP&A has statutory authority to pursue legal, administrative and other appropriate remedies to ensure the protection of individuals with mental illness who are or will be receiving care and treatment in New Jersey pursuant to the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), 42 U.S.C. § 10801 et seq. Complaint at ¶3. NJP&A is pursuing this action to protect and advocate the rights and interests of "individuals with mental illness" as that term is defined in 42 U.S.C. § 10802. Specifically, NJP&A brings this action on behalf of individuals with mental illness who are 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 hospital. Complaint at ¶4. These individuals have each suffered injuries, or will suffer such injuries, that would allow them to bring suit against the Defendant in their own right. The NJP&A only seeks equitable remedies for the release of wrongfully detained individuals and to prevent future patients from being wrongfully detained.

III. NJP&A HAS STANDING TO SUE

A. NJP&A has Associational Standing to Assert Claims on Behalf of Individuals with Mental Illness

1. Federal Statute Expressly Confers NJP&A with Standing to Bring Claims to Protect the Interests of Individuals with Mental Illnesses

Congress has expressly charged protection and advocacy systems ("P&A systems") with the authority and responsibility to protect individuals who have a mental illness under the Protection and Advocacy for Individuals with a Mental Illness Act (PAIMI), 42 U.S.C. 10801, *et seq*. In order to ensure P&A systems protect such individuals, Congress only funds P&A systems that meet certain requirement in the PAIMI. 42 U.S.C. § 10803 ("The Secretary shall make allotments under this subchapter to eligible systems to establish and administer systems (1) which meet the requirements of section 10805"). The system requirements set forth in § 10805 of PAIMI state that an eligible P&A system shall:

> (1) have the authority to-
>
> (A) investigate incidents of abuse neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred; [and]
>
> (B) pursue administrative, legal and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State.; and

42 U.S.C. § 10805 (a)(1). Thus, the provision of federal funds is conditioned upon the State's assurances that the P&A system has the authority to pursue legal remedies to ensure the protection of those with mental illnesses. That is precisely what NJP&A is pursuing in this case.

In response to a flurry of wasteful litigation challenging the standing of P&A systems to bring suits such as the one here, Congress specifically affirmed that they indeed have such standing:

> The Committee heard testimony about the waste of scarce resources that are expended on litigating the issue of whether P&A systems have standing to bring suit. The Committee wishes to make it clear that we have reviewed this issue and have decided no statutory fix is necessary because the current statute is clear that P&A systems have standing to pursue legal remedies to ensure the protection of and advocacy for the rights of individuals with . . . disabilities within the State. The Committee has reviewed and concurs with the holdings and rationale in Goldstein v. Coughlin, 83 F.R.D. 613 (1979) and Rubenstein v. Benedictine Hospital, 790 F.Supp. 396 (N.D.N.Y. 1992).

Senate Report 103-120, 103rd Congress, 1st Session, pp. 39-40 (August 3, 1993) (reprinted at 1994 U.S.C.C.A.N. 164, 202-203 (emphasis added)). Thus, to the extent allowable under the Constitution, Congress has clearly given P&A systems standing to bring actions on behalf of their constituents.

2. NJP&A has Associational Standing to Assert Claims on Behalf of Individuals with Mental Illness

While PAIMI is express in granting standing to eligible systems to bring legal actions in their own names on behalf of their constituents, standing must still satisfy Article III requirements. Courts throughout the country have reaffirmed the standing of P&A systems under PAIMI and other similar statutes. These courts have done so finding that P&A systems, and similar organizations, have standing to assert claims on behalf of their members or constituents.

The test for associational standing was set forth by the Supreme Court in Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977). The Supreme Court established a three part test to determine whether an organization has associational standing to bring a cause of action on behalf of its constituency. For an organization to have such standing (1) its members must have standing to sue on their own, (2) the interests it seeks to protect must be germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested may require the participation of individual members in the lawsuit. Hunt, 432 U.S. at 343. The last prong of the test is not constitutionally required, but is merely prudential—i.e., judicially imposed—and hence can be done away with by Congress. See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 556-57 (1996) ("UFCW"). Courts have recognized that under PAIMI, Congress has done just that. Thus, only the first two prongs of Hunt must be satisfied to establish organizational standing.

The Defendant does not challenge that NJP&A's interests to protect wrongfully detained psychiatric patients is germane to the organizations purpose. Instead, it contends only that NJP&A fails to satisfy the first associational standing requirement set forth in Hunt, supra. Its argument is twofold. First, it argues that "the implied plaintiffs are not 'members' of the NJP&A, but rather are 'constituents' who bear no characteristics of membership in the NJP&A and do not possess any 'indicia of membership' as required by Hunt." Def.'s Br. at pp. 6-7. The Defendant's position is simply that NJP&A cannot have standing because it does not have any "members" that would have standing in their own right. Second, the Defendant argues that even if the NJP&A constituents are considered members, they could not bring a suit in their own names. Both of these arguments fail.

a. NJP&A Constituents are Members for Associational Standing Purposes

Courts throughout the United States, save one, have concluded that P&A systems have associational standing under PAIMI and similar statutes regardless of whether the P&A systems have "members." Recently, the Ninth Circuit addressed this precise standing issue involving an Oregon P&A system that sued on behalf of mentally incapacitated criminal defendants. In Oregon Advocacy Center v. Mink, 233 F.3d 1101 (9th Cir. 2003), the P&A system alleged that the Department of Human Services was violating the P&A system's constituents' constitutional rights by unreasonably delaying their transfers from county jails to treatment facilities. The P&A system sought affirmative injunctive relief forcing the Department of Human Services to place mentally incapacitated defendants in a timely fashion. The Department of Human Services challenged the P&A system's standing alleging, *inter alia*, that "OAC's constituents are not 'members' of OAC." The Court outright rejected this "overly formalistic" argument and stated that given "OAC's statutory mission and focus under PAMII [PAIMI], its constituents—in this case, the mentally incapacitated defendants—are the functional equivalent of members for purposes of associational standing." Id. at 1110. After an in-depth analysis of PAIMI, Hunt, and UFCW, supra, the Court held that the "OAC [P&A system] meets the constitutional requirements for standing, and prudential requirements pose no obstacle. OAC has standing to sue on behalf of its constituents—the mentally incapacitated defendants." Id. at 116.

In Doe v. Stincer, 175 F.3d 879 (11th Cir. 1999), the Eleventh Circuit addressed this same standing issue. The Attorney General in Stincer argued that the plaintiff could not satisfy the first prong of Hunt because "it has no members who would have standing to bring suit in their own right." Id. at 884. The Attorney General insisted that "because the first prong of

Hunt is a mandate of Article III, even assuming that the [P&A system] has standing under PAIMI, PAIMI's grant of standing offends Article III." Id. The Eleventh Circuit outright rejected this argument and, as in Mink, supra, the Court concluded that the "Advocacy Center [P&A system under PAIMI] may sue on behalf of its constituents like a more traditional association may sue on behalf of its members." Id. at 886. The Court, however, remanded the matter for further development of the factual record in order to determine whether any of the plaintiff's actual constituents had been injured by the state activity complained of.

Many other courts have recognized that P&A systems have organizational standing to bring a lawsuit in the interest of protecting their constituents. See e.g. N.A.M.I. v. Essex County Bd. of Freeholders, 91 F. Supp. 2d 781, 787 (D.N.J. 2000) (noting that PAIMI expressly provides for advocacy of patients' rights through state P & A systems); Risinger v. Concannon, 117 F. Supp. 2d 61 (D. Me. 2000) (holding that Maine's P & A system had associational standing to sue on behalf of its constituents, emotionally or mentally impaired minors, where it was alleged that the state failed to properly implement federal screening and treatment requirements); Trautz v. Weisman, 846 F. Supp. 1160 (S.D.N.Y. 1994) (holding that an advocacy group under PAIMI had standing against the operators of an adult care facility, alleging dirty and dangerous conditions and reasoning that PAIMI's grant to pursue legal remedies is directed to entities that contract with the state under PAIMI); Michigan P&A Serv., Inc. v. Babin, 799 F. Supp. 695, 702 n.12 (E.D. Mich. 1994), aff'd, 18 F.3d 337 (6th Cir. 1994) (conferring standing on PAIMI organization to litigate Fair Housing Act case on behalf of individuals who have developmental disabilities); Unzueta v. Schalansky, 2002 WL 1334854 (D. Kan. 2002) (holding that a P & A system under PAIMI can have associational standing to bring an action on behalf of an individual with a mental illness, regardless whether the claim would

require the participation of individual constituents); Disability Law Center v. Millcreek Health Center, 339 F. Supp. 2d 1280 (D. Utah 2004); Brown v. Stone, 66 F.Supp. 2d 412 (E.D.N.Y. 1999); Rubenstein v. Benedictine Hosp., 790 F.Supp. 396 (N.D.N.Y. 1992); E.K. New York Hosp.-Cornell Med. Ctr., 600 N.Y.S. 2d 993 (1992).

The lone case that stands in contrast to the cases noted above is Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Board of Trustees, 19 F.3d 241 (5th Cir. 1994) ("Dallas"). Not surprisingly, the Defendant relies almost exclusively on this case. In Dallas, the Fifth Circuit dismissed the plaintiff's action for lack of standing because the association's constituents were not "members" of the group. The Court stated without any analysis (statutory or organizational) that the plaintiff organization "bears no relationship to traditional membership groups because most of its 'clients' - handicapped and disabled people - are unable to participate and guide the organization's efforts." Id. at 244. As noted below in detail, this is not the case with respect to the participation and guidance of the NJP&A. As required by federal law, the NJP&A board of directors includes people with mental illness and their family members, and 60% of NJP&A's PAIMI Advisory Council is comprised of such individuals. See infra at 10. Moreover, the Fifth Circuit's hyper-technical analysis of associational standing has never been followed, only criticized. See e.g. Stincer, 175 F.3d at 885 ("we cannot subscribe to the Fifth Circuit's reasoning because we think that, as was the case in Hunt, the fact that the Advocacy Center has constituents rather than members does not deprive it of Article III standing"); Risinger v. Concannon, 117 F. Supp. 2d 61, 71 (D. Me. 2000) (describing Dallas as a "cursory analysis that did not account for the nonmembership status of the organization in Hunt").

b. NJP&A's Constituents Have an Indicia of Membership in the Organization

Although the case law is clear that constituents of P&A systems are members for the purpose of standing, the Defendant argues on factual grounds that the NJP&A constituents lack the indicia of membership in the organization. In doing so, the Defendant goes well beyond the scope of what is alleged in the Amended Complaint and manufactures facts that are not on this record (nor within the personal knowledge of the Defendant). Def.'s Br. at 9-10. For example, Defendant argues with no support that the NJP&A's constituents do not elect members of the NJP&A, are not employees or representatives of the NJP&A and do not finance the NJP&A. Def.'s Br. at 7-8. Based upon these three unsupported facts, the Defendant insists that the NJP&A fails the Hunt test and does not have associational standing to bring this action.

The Defendant's interpretation of Hunt incorrectly presupposes that the types of indicia of membership referenced in Hunt are the only indicia of membership that can confer associational standing. The Court in Hunt, however, did not hold that functional membership (and therefore associational standing) can only be established by proof of constituent elections, employment and/or financing. Rather, the Court focused on the conclusion to which this fact driven indicia of membership led it: that the "Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests." Id. at 345. To fixate on the particular indicia of membership that the Apple Advertising Commission happened to have would be precisely the kind of formalistic reasoning the Court deplored. See id. (refusing to "exalt form over substance"). Indeed, "[n]o court has ever required an organization to satisfy each and every indicia of membership. Rather, it is enough that members possess sufficient indicia to satisfy the purposes that under gird the concept of associational standing – 'that the organization is sufficiently identified with and subject to the

influence of those it seeks to represent as to have a personal stake in the outcome of the controversy.'" Envtl. Conservation Org. v. City of Dallas, 2005 U.S. Dist. LEXIS 15502 (D. Tex., July 26, 2005) (quoting Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101, 1111 (9th Cir. 2003)).

The Defendant's attack of NJP&A's standing goes well beyond the four corners of the Amended Complaint which, in and of itself, serves as a basis to deny the Defendant's motion. However, in an exercise of caution, NJP&A takes the time here to rebut the unsubstantiated facts upon which the Defendant so heavily relies. See Def.'s Br. at pp. 12. Individuals in New Jersey's psychiatric hospitals most certainly have an indicia of membership or functional membership in the NJP&A and are involved at all levels of the organization:

- The NJP&A has an advisory council that guides it "on policies and priorities to be carried out in protecting and advocating the rights of individuals with mental illness." 42 U.S.C. § 10805(a)(6)(A). The council must and does "include . . . individuals who have received or are receiving mental health services." Id. at § 10805(a)(6)(B). At least sixty percent (60%) of the council is "comprised of individuals who have received or are receiving mental health services or who are family members of such individuals." Id. The council's chairperson is and must be "an individual who has received or is receiving mental health services or who is a family member of such an individual." Id. at § 10805(a)(6)(C). Working with NJP&A's governing authority, the advisory council "develop[s] the annual priorities" of the organization's operations. Id. § 10805(c)(2)(B).

- The NJP&A has a Board of Directors, which is "responsible for the planning, design, implementation, and functioning of the system," id. § 10805(c)(2)(A), and "jointly develop[s] the annual priorities of [the organization] with the advisory council." Id. § 10805(c)(2)(B). This also provides an opportunity for the constituency to direct plaintiff's efforts. Moreover, the PAIMI requires that the Board's members "broadly represent or are knowledgeable about the needs of the clients served by" the NJP&A. Id. § 10805(c)(1)(B). The statute itself interprets this "to include individuals who have received or are receiving mental health services and family members of such individuals." Id. Thus, the PAIMI requires active participation by constituents or relatives of constituents in the operation and guidance of the NJP&A.

- Finally, the indicia of membership can be seen through the NJP&A's grievance procedure. Unsatisfied clients have access to a grievance system

> which is designed to "assure that individuals with mental illness have full access to the services of [plaintiff] and . . . to assure that [plaintiff] is operating in compliance with the provisions of [PAIMI]." 42 U.S.C. § 10805(a)(9). Thus, if despite the representation on the advisory council and Board of Directors, the constituency still feels unrepresented, it may make its voice heard through the grievance process.

The implementing regulations are even more explicit in the constituency's involvement. They require the Board to be "a significant representation of individuals with mental illness who are, or have been eligible for services, or have received or are receiving mental health services." 42 C.F.R. § 51.22(b)(2) (2004). The advisory council's chairperson must also be a member of the governing board, further increasing the influence of the constituency on plaintiff's operations. Id. § 51.22(b)(3). Of the seventeen members of the NJP&A's board, the majority are individuals with a disability or family members of an individual with a disability. See Sarah Mitchell Affidavit at ¶ 7. As such, the NJP&A certainly represents individuals confined in New Jersey's psychiatric hospitals and provides the means by which they can express their collective views and protect their collective interests. Hence, NJP&A has associational standing under Hunt.

c. NJP&A's Members or Constituents Have Standing to Sue in Their Own Right.

The Defendant, in his final standing argument, claims that NJP&A constituents lack standing because they have not been injured and some of them would "choose to remain in psychiatric hospitals rather than seeking community placements." Def. Br. at p. 11-12. In framing its argument, however, the Defendant actually concedes that at least some of NJP&A's constituents have suffered injury sufficient for standing:

- "a significant number of individuals on behalf of whom plaintiff seeks to bring this complaint do not have standing to sue on their own right."
- "a countless number of the individuals on behalf of whom Plaintiff seeks to assert standing do not satisfy the constitutional requirement for standing."

- "many of these individuals have suffered no injury at all."
- "many of the individuals on CEPP status are discharged from the hospital."
- "many of the these individuals cannot attribute their CEPP status to any alleged failure on the part of the State."

Def.'s Br. at p. 12 (emphasis added). The care the Defendant takes not to use absolutes with respect to injuries suffered by NJP&A's constituents is an acknowledgement that there are constituents that have been injured and do have standing.

Moreover, NJP&A has alleged sufficient injury by its constituents to establish standing. Complaint at ¶¶ 4-5. These allegations must be accepted as true in considering this motion to dismiss. Instead of accepting the facts as alleged in the complaint, the Defendant attempts to introduce new facts. These "facts" are not facts at all—the Defendant has absolutely no support for his contention that NJP&A's constituents have "suffered no injury at all" or "cannot attribute their CEPP status to any alleged failure on the part of the State." Def. Br. at p. 12. These bald allegations cannot support a dismissal of NJP&A's claims for lack of standing.

IV. COMMISSIONER DAVY IS NOT IMMUNE FROM SUIT BECAUSE PLAINTIFF'S ADA AND REHABILITATION ACT §504 CLAIMS FOR PROSPECTIVE RELIEF ARE PERMITTED UNDER EX PARTE YOUNG DOCTRINE

Although the Eleventh Amendment generally immunizes states from suits brought by citizens in federal court, it is a basic principle of American federalism that a citizen may bring a private suit in federal court to enjoin a state official from violating the Constitution or the laws of the United States. Under Ex parte Young, 209 U.S. 123 (1908), and its progeny, a state's Eleventh Amendment immunity from private suit will not bar a federal court from granting prospective equitable relief against a state official who, acting in his official capacity, violates federal law. Id. at 155-56; see also Bd. of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356,

374 n.9 (2001) (holding that state officials may be sued under Ex parte Young doctrine to enforce Title I of the ADA).

Following this principle, every Circuit Court of Appeals that has ruled on the issue has held that where, as in this case, a state official is sued in his or her official capacity for ongoing violations of Title II of the ADA, the state official is subject to liability thereto under the doctrine of Ex parte Young. See Miller v. King, 384 F.3d 1248, 1264 (11th Cir. 2004) ("[W]e join our sister circuits in holding that the Eleventh Amendment does not bar ADA suits under Title II for prospective injunctive relief against state officials in their official capacities."); McCarthy v. Hawkins, 381 F.3d 407, 417 (5th Cir. 2004) (allowing plaintiff to proceed with Title II claim under Ex parte Young); Henrietta D. v. Bloomberg, 331 F.3d 261, 289-90 (2nd Cir. 2003) (affirming district court's denial of state's motion to dismiss plaintiff's Title II claim); Miranda B. v. Kitzhaber, 328 F.3d 1181, 1187-88 (9th Cir. 2003) ("Title II's statutory language does not prohibit Miranda B.'s injunctive action against state officials in their official capacities."); Bruggeman ex. rel. Bruggeman v. Blagojevich, 324 F.3d, 906, 913 (7th Cir. 2003) (allowing Ex parte Young action and noting there is "no relevant difference between Title I and Title II, which governs access to services"); Carten v. Kent State Univ., 282 F.3d 391, 396-97 (6th Cir. 2002) (holding that state officials "are public entities insofar as they represent the state when acting in their official capacity"); Randolph v. Rodgers, 253 F.3d 342 (8th Cir. 2001) (citing Garrett and holding that Ex parte Young permits injunctive action against a state official in his official capacity and does not require Title II of the ADA to provide explicit authority to sue state officials in their official capacity); see also Koslow v. Pennsylvania, 302 F.3d 161, 178 (3d Cir. 2002) (Third Circuit holding that an action for violation of Title I of the ADA may be brought under Ex parte Young).

Similarly, the Circuit Courts of Appeals have repeatedly held that a private suit for prospective equitable relief against a state official acting in his official capacity in violation of § 504 of the Rehabilitation Act may proceed under Ex parte Young. See Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 498 (4th Cir. 2005) (concluding that "the Rehabilitation Act. . . does not suggest a congressional intent to foreclose an Ex parte Young action for violation of § 504"); McCarthy v. Hawkins, 381 F.3d at 417 (allowing plaintiff to proceed with §504 claim under Ex parte Young); Henrietta D., 331 F.3d at 290 (affirming a state official's liability for ongoing violations of the Rehabilitation Act under Ex parte Young); Miranda B., 328 F.3d. at 1189 (allowing plaintiff to proceed with her § 504 claim under Ex parte Young); Randolph, 253 F.3d at 349 ("We agree with the District Court that the Ex parte Young Rehabilitation Act claim may proceed against [defendant].").

Here, the Defendant's assertion that Commissioner Davy is immune from suit for violation of Title II of the ADA and § 504 of the Rehabilitation Act is simply incorrect because the suit is brought under Ex parte Young. "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.'" Verizon Maryland, Inc. v. Public Service Comm'n of Maryland., 535 U.S. 635, 642-43 (2002) (quoting Idaho v. Coeur d' Alene Tribe of Idaho, 521 U.S. 261, 296 (1997)). The face of the Amended Complaint could not be more clear in this regard: First, Commissioner James Davy, in his official capacity, is the sole named defendant, and it is beyond dispute that the Amended Complaint alleges his ongoing violation of federal law. See Am. Compl., Counts I, II, III. Second, NJP&A seeks prospective injunctive relief compelling the Defendant to deinstitutionalize individuals wrongfully confined under CEPP

status and to provide plaintiff with monthly reports of his agency's progress under such a program. Am. Compl., at pp. 20-21. Therefore, on these grounds alone NJP&A must be permitted to proceed with this case under Ex Parte Young.

Thus, Defendant's 14-page argument that Congress failed to abrogate Eleventh Amendment immunity under Title II and § 504 is totally irrelevant because Eleventh Amendment immunity is inapplicable to Ex Parte Young claims. It is applicable only where the plaintiff has sued the state entity itself or where the plaintiff seeks retrospective relief, i.e. money damages. See Green v. Mansour, 474 U.S. 64, 68-69 (1985) (distinguishing Ex parte Young cases from cases where plaintiffs seek compensatory damages). In fact, Defendant's Congressional abrogation argument is nothing more than a red herring. This is not a case for retrospective compensatory damages because NJP&A has made no demand for damages. Indeed, in his brief, Defendant implicitly acknowledges that NJP&A's demands for orders to deinstitutionalize improperly-confined CEPP status individuals and make progress reports to NJP&A are prospective and thus pursuable under Ex parte Young doctrine. See Def. Br. at p. 34-36 (arguing that only NJP&A's prayers for attorney fees and a per diem penalty fall outside the Ex parte Young exception to Eleventh Amendment immunity); Am. Compl., Relief Requested, ¶¶ B, E. Accordingly, because NJP&A seeks prospective relief for Defendant's ongoing violation of Title II and § 504, this case falls squarely within the above line of Ex parte Young cases and must survive the present Motion to Dismiss.

A. NJP&A Only Seeks Prospective Relief

Prospective relief under Ex parte Young includes any forward-looking injunctive or declaratory relief so long as "[i]t does not impose upon the State 'a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.'" Verizon, 535 U.S. at 646 (quoting Edelman, 415 U.S. at 668); see also; Koslow, 302 F.3d at 179 ("[F]ederal

ADA claims for prospective injunctive relief against state officials are authorized by the Ex parte Young doctrine."). Thus, only when damages or retroactive relief are sought for past conduct, a state's sovereign immunity under the Eleventh Amendment bars the suit. Edelman, 415 U.S. at 677; Green, 474 U.S. at 68-69.

This does not mean that prospective relief under an Ex parte Young suit must come without future cost to a state treasury. To the contrary, fiscal consequences to state treasuries may be the necessary result of compliance with the prospective relief afforded in an Ex parte Young action. See Edelman, 415 U.S. at 667-68 ("State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct."). Indeed, the Supreme Court has repeatedly held that "[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra." Id. at 668; see also, Milliken v. Bradley, 433 U.S. 267, 289 (1977) ("[The prospective-compliance exception of Ex parte Young and reaffirmed by Edelman] permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."); Hutto v. Finney, 437 U.S. 678, 690 (1978) (applying this principle and citing to Edelman and Milliken).

In this case, NJP&A makes four specific prayers for relief, all of which are prospective:

> 1. *An order requiring that Defendant promptly take such steps as are necessary to enable Plaintiff's constituents to receive services in the most integrated setting appropriate to their needs;*

2. *An order requiring Defendant to pay a per diem monetary penalty for each day beyond the sixtieth day that the State continues to confine individuals deemed by a court to be suitable for return to the community;*

3. *An award of prevailing party costs, disbursements and attorney fees pursuant to, inter alia, 42 U.S.C. § 1988; and*

4. *An injunction ordering the Defendant to provide monthly reports to the Plaintiff that include information such as the number of individuals on CEPP status, their names, and other information the Plaintiff may require pursuant to its federal mandates.*

Am. Compl. at p. 21. As explained above, it is undisputed that NJP&A's first demand, an order requiring Defendant to deinstitutionalize CEPP-status individuals, and the fourth, an injunction ordering the Defendant to provide monthly progress reports regarding such deinstitutionalization and other information, are prospective equitable relief pursuable under Ex parte Young, and these alone are sufficient to sustain the Amended Complaint. Moreover, Defendant's challenge to the validity of NJP&A's demands for a per diem contempt penalty and attorney fees and costs is no basis for dismissing the Amended Complaint.

B. Defendant's Arguments That NJP&A's Demands for a Per Diem Contempt Penalty and Attorneys' Fees and Costs Are Retrospective Do Not Change The Fact That This Action Can Proceed Pursuant to Ex parte Young

Defendant's argument that NJP&A's demands for a per diem contempt penalty and attorneys' fees are retrospective is inappropriate at this point in the litigation because this issue revolves around the propriety of alternative remedies, not the validity of the Amended Complaint. It is a firmly established principle of our civil procedure that plaintiffs may seek alternative remedies and that "the selection of an improper remedy in the Rule 8(a)(3) demand for relief will not be fatal to a party's pleading if the statement of the claim indicates the pleader may be entitled to relief of some other type." Wright & Miller, Federal Practice and Procedure: Civil 3d § 1255 (2004); see also Bontkowski v. Smith, 305 F.3d 757, 762 (7th Cir. 2002)

("[E]ven if the district court was right that [plaintiff] is seeking relief to which he's not entitled, this would not justify dismissal of the suit."). Although NJP&A maintains that its demand for a per diem contempt penalty for future violations by the Defendant is prospective relief, to avoid any questions in this regard, NJP&A will voluntarily strike this prayer for relief. NJP&A, however, reserves the right to petition the Court at a future date for an appropriate remedy to enforce any judgment in NJP&A's favor.

NJP&A will not strike, however, its demand for attorneys' fees. The Supreme Court was clear in Hutto v. Finney, supra, that attorneys' fees are recoverable in an Ex Parte Young action. In Hutto, the Supreme Court made two distinct rulings with respect to the award of attorney fees in a federal court action against a state official acting in his official capacity. First, the Court affirmed the District Court's award of attorneys' fees under the ancillary effect doctrine established in Ex parte Young, Edelman and Milliken. Hutto, 437 U.S. at 689-93. Second, the Court affirmed the Eighth Circuit's award of supplemental attorney fees based on a Congressional abrogation analysis. Id. at 693-700.

Here, the defect in the Defendant's argument is that he fails to distinguish these two rulings. See Def. Br. at pp. 36-37. In essence, the Defendant argues that Hutto is no basis for the award of attorney fees in this action because Hutto's Congressional abrogation analysis was superseded by the rules established in Boerne v. Flores, 521 U.S. 507 (1997). While that may be a colorable defense in a Congressional abrogation case, the argument is simply inapposite to this case because, as established above, this is an Ex parte Young action. Accordingly, the first ruling in Hutto based on Ex parte Young, Edelman and Milliken is controlling here. See Hutto, 437 U.S. at 691-92. Under this rule, attorney fees and costs of suit in this Ex parte Young action are awardable because they are an ancillary effect of the

Defendant's future compliance with federal law. Id.; see also Missouri v. Jenkins, 491 U.S. 274, 279 (1989) ("[A]n award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment"); S.D. Farm Bureau, Inc. v. South Dakota, 197 F.R.D. 673, 679-80 (D.S.D. 2000) ("A departure from the Ex parte Young exception is not applicable in this case based on the fact that plaintiffs are seeking to recover costs and reasonable attorney fees. The argument of the State that this is an attack on the State treasury is rejected."). Because NJP&A brings this action under Ex parte Young, its demand for attorney fees and costs of suit is prospective and certainly not grounds for a dismissal of the Amended Complaint.

V. COMMISSIONER DAVY IS A PERSON FOR PURPOSES OF 42 U.S.C. § 1983 BECAUSE THIS SUIT IS BROUGHT UNDER THE EX PARTE YOUNG DOCTRINE

Because this is an Ex parte Young action for prospective relief, Defendant is indisputably subject to 42 U.S.C. § 1983 liability. To support this assertion, it is not necessary to look further than Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989), the only case that Defendant relies upon to argue otherwise. In Will, the Supreme Court made it crystal clear that a state official sued in his official capacity for injunctive relief will be deemed a person in a § 1983 case:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State. This distinction is commonplace in sovereign immunity doctrine, and would not have been foreign to the 19th-century Congress that enacted § 1983.

Will, 491 U.S. at 71 n.10 (citing Ex parte Young) (internal quotations and citations omitted); see also Zahran v. N.Y. Dep't. of Educ., 306 F. Supp. 2d 204, 209 (N.D.N.Y. 2004) (citing Will and ruling that "[i]t is well established that neither the state nor its agencies, including the DOE, can be sued under Section 1983 unless the relief sought is prospective and injunctive in nature.");

South Dakota Farm Bureau, 197 F.R.D. at 682 ("The Court agrees with plaintiffs' assertion that Will did not overrule Ex parte Young."); Morgan v. Ellerthorpe, 785 F. Supp. 295, 299 (D.R.I. 1992) ("[A]lthough Will, precludes § 1983 suits for money damages or other forms of retrospective relief against states or state officials acting in their official capacities, it does not prohibit suits for injunctive or declaratory relief."); Medical Malpractice Joint Underwriting Ass'n v. Paradis, 756 F. Supp. 669, 678 (D.R.I. 1991) (same).

Defendant's contention that he is immunized from this suit because in his official capacity he is not a "person" under § 1983 is incorrect because Defendant ignores that NJP&A is seeking only prospective relief under Ex parte Young. NJP&A's demand for such relief places this action squarely under the principle articulated in Will that a state official sued in his official capacity for prospective relief is a person under § 1983 and subject to liability thereto. Thus, the Defendant is not immune from § 1983 liability, and Count I of the Amended Complaint must not be dismissed.

VI. CONCLUSION

For the foregoing reasons, NJP&A respectfully requests that this Court deny the Defendant's motion to dismiss in its entirety.

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