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**PLEASE TAKE NOTICE** that as soon as counsel may be heard, the undersigned will apply to the U.S. District Court for the District of New Jersey, at the U.S. Courthouse in Newark, New Jersey, for an order striking insufficient defenses and redundant, immaterial, impertinent, or scandalous matter from Defendant's Answer.

**PLEASE TAKE FURTHER NOTICE** that the undersigned will rely on the attached memorandum of law.

**PLEASE TAKE FURTHER NOTICE** that oral argument is requested.

A form of Order is provided herewith.

Dated: Trenton, New Jersey  
August 25, 2011

s/ William Emmett Dwyer

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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**DISABILITY RIGHTS NEW JERSEY, INC.,**  
a New Jersey non-profit corporation,

Plaintiff,

- against -

**JENNIFER VELEZ**, in her official capacity as  
Commissioner, State of New Jersey Department  
of Human Services,

Defendant.

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HON. DICKINSON R. DEBEVOISE,  
U.S.D.J.

Civil Action No. 2:10-cv-3950-DRD-  
MAS

**MEMORANDUM OF LAW IN  
SUPPORT OF PLAINTIFF'S  
MOTION TO STRIKE  
DEFENSES**

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Plaintiff Disability Rights New Jersey, Inc. (“Plaintiff”), respectfully submits this Memorandum of Law in support of its motion for an Order, pursuant to Federal Rule of Civil Procedure 12(f), striking certain defenses included in the Answer of Defendant Jennifer Velez (“Defendant”), filed on August 4, 2011 (the “Answer”), and awarding Plaintiff costs, including attorneys’ fees, and such other relief as this Court deems just and proper.

### **PRELIMINARY STATEMENT**

Defendant’s Answer includes fifty so-called “Separate Defenses.” A large number of these Defenses are simply – and plainly – irrelevant to this litigation and, as such, only serve to harass Plaintiff by introducing potential complexities into the case that are unwarranted and without any basis. Despite Plaintiff’s efforts to apprise Defendant of these facially inadequate and legally inappropriate defenses – which number thirty-three – Defendant has agreed to withdraw only two of them. Consequently, Plaintiff is compelled to bring this motion in order to excise from the litigation the frivolous and immaterial defenses pled by Defendant.

### **BACKGROUND**

#### **A. Plaintiff’s Complaint for Declaratory Judgment and Prospective Injunctive Relief.**

As a reminder to the Court, Plaintiff is *not* seeking monetary damages of any type in this litigation. Rather, Plaintiff’s Complaint is brought against Defendant *in her official capacity* and seeks: (i) a declaratory judgment that Defendant’s current practices and procedures (embodied in A.B. 5:04) for forcibly medicating Plaintiff’s constituents – patients in New Jersey psychiatric hospitals – on a non-emergency basis — violate the federal Constitution and federal statutes; and (ii) *prospective injunctive relief* mandating that Defendant implement certain practices and procedures that are designed to provide the constitutional and federal statutory rights to which Plaintiff’s constituents are entitled. Specifically, Plaintiff seeks injunctive relief

requiring Defendant to provide patients who refuse the non-emergency administration of psychotropic medication with meaningful due process protections – including legal counsel, notice and a hearing before a New Jersey court judge – before these patients may be involuntarily medicated.<sup>1</sup> (*See* Compl., Relief Requested, ¶¶ 1-8.)

Plaintiff’s claims depend on a purely legal analysis of A.B. 5:04, federal constitutional rights, and the requirements of the Americans with Disabilities Act (the “ADA”) and the Rehabilitation Act (the “RA”). Although the Complaint references the experiences of individual patients in order to illustrate Defendant’s violations of these patients’ constitutional and statutory rights, this case in no way puts at issue the diagnoses or medical conditions of such patients or treatment decisions made by Defendant with respect to such patients. In other words, this case is not about whether any individual patient should or should not be involuntarily medicated, and Plaintiff does not ask the Court to substitute its judgment for that of medical personnel. The allegations in the Complaint regarding the experiences of constituent representatives and Defendant’s deficiencies simply do not form a separate cause of action but instead illustrate how and why Defendant’s involuntary medication practices violate the constitution and federal statutes.

Rather, at issue here is what procedural checks must be implemented to safeguard patients’ rights to refuse unwanted medication. Indeed, the Court has explicitly held that damages and individual treatment decisions are irrelevant to this litigation:

Defendants liberally mischaracterize the allegations of Plaintiff’s complaint, claiming that “Plaintiff seeks to redress injuries allegedly suffered by patients, rather than injuries to itself.” This is incorrect. ***Plaintiff’s complaint does not***

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<sup>1</sup> Additionally, Plaintiff’s requested relief includes the requirement that the institution seeking to medicate a patient involuntarily should have the burden to show that the proposed treatment is narrowly tailored and that adverse side effects and less intrusive alternative treatments have been considered. (*See* Compl., Relief Requested, ¶ 6(e).)

*seek redress of any past misconduct or damages for the benefit of any particular individual. Plaintiff does not ask the Court to overturn individual treatment decisions or to order that specific individuals be free from medication.* Rather, Plaintiff argues that the constitutional rights of psychiatric patients in New Jersey hospitals are being violated on an ongoing basis and asks that this Court order injunctive relief to halt to what it sees as unlawful and unconstitutional practices.

*Disability Rights N.J., Inc. v. Velez*, Civ. No. 10-3950, 2011 WL 2976849, at \*12 (D.N.J. July 20, 2011) (citation omitted; emphasis added).

**B. Defendant’s Frivolous and Irrelevant “Separate Defenses.”**

On August 4, 2011, Defendant filed her Answer, which includes fifty so-called “Separate Defenses.” In a blatant attempt to unnecessarily complicate the issues and needlessly expend the Court’s and Plaintiff’s time and resources on extraneous matters, a large percentage of these defenses are plainly irrelevant to the lawsuit. As noted above, Plaintiff’s Complaint does not ask for monetary damages; rather it seeks only a declaratory and prospective injunctive relief. Despite this fact (and the Court’s ruling referenced above), Defendant’s Answer contains numerous defenses that are solely concerned with damages. Equally as troubling, although the Complaint names Defendant only in her official capacity (*see* Compl. ¶ 20), Defendant asserts defenses related to issues of immunity and lawsuits against public officials acting in their individual – and not official – capacities that are plainly not applicable here.

In an attempt to avoid motion practice and taxing the resources of the Court, Plaintiff sent Defendant a letter on August 9, 2011, explaining why thirty-one of the fifty Separate Defenses were defective and should be withdrawn. (*See* Declaration of Michael Reisman (“Reisman Decl.”), Ex. A.) On August 18, 2011, Defendant responded with a letter to Plaintiff offering to withdraw two of the fifty asserted defenses, but refusing to withdraw any of the other defenses. (*See* Reisman Decl., Ex. B.) Consequently, Plaintiff now brings this motion.

## ARGUMENT

The Court has discretion to “strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). A party moving to strike a pleading must generally show that the allegations have no possible relation to the controversy, may prejudice the parties, or may confuse the issues. *See Clark v. The Prudential Ins. Co. of Am.*, Civ. No. 08-6197, 2011 U.S. Dist. LEXIS 27030, at \*16 (D.N.J. Mar. 15, 2011) (Debevoise, J.) (striking defense).

A Defense pled by a defendant is insufficient if “it is not recognized as a defense to the cause of action.” *Tonka Corp. v. Rose Art Indus., Inc.*, 836 F. Supp. 200, 217 (D.N.J. 1993) (AJL) (citation and internal quotation marks omitted) (striking defense). Additionally, a Defense previously rejected by the court at the motion to dismiss stage is insufficient and may be stricken. *See In re Merck & Co., Inc. Vytarin ERISA Litig.*, Civ. No. 08-CV-1974(DMC), 2010 WL 2557564, at \*2 (D.N.J. June 23, 2010).

Moreover, a defendant must provide adequate notice of the basis for defenses it asserts in its answer. *See Robinson v. Johnson*, 313 F.3d 128, 134-35 (3d Cir. 2002) (explaining that one reason Rule 8(c) requires a defendant to plead an affirmative defense in the answer is to give the plaintiff “notice and the opportunity to demonstrate why the affirmative defense should not succeed”). To this end, “[d]efenses that are nothing more than bare bones conclusory allegations can be stricken.” *Fed. Deposit Ins. Corp. v. Modular Homes, Inc.*, 859 F. Supp. 117, 120-21 (D.N.J. 1994); *see also United States v. Sensient Colors, Inc.*, 580 F. Supp.2d 369, 381, 388 (D.N.J. 2008) (striking affirmative defenses where defendant failed to provide adequate notice of the basis for them). Further, a defense may be stricken where it is redundant or merely recapitulates denials in a defendant’s answer. *See id.* at 378 (striking as redundant affirmative defense that concerned whether plaintiff could prove its prima facie case).

As discussed below, the majority of Defendant's defenses clearly are not recognized as a defense to the causes of action contained in the Complaint or have been rejected by this Court. Specifically, Defendant asserts redundant, immaterial and scandalous defenses that relate to: (i) monetary damages; (ii) failure to state a claim and lack of standing; (iii) qualified immunity; (iv) sovereign immunity; (v) absolute immunity; (vi) failure to exhaust administrative remedies; (vii) Defendant's intention to file a Rule 11 motion for sanctions; (viii) a lack of deliberate indifference on the part of Defendant; (ix) Defendant's claim that psychiatric patients are not entitled to due process rights; (x) *respondeat superior*; and (xi) statutes of limitations and repose. Consequently, in order to prevent Defendant from confusing the issues in this litigation and prejudicing Plaintiff through the needless expenditure of resources related to the litigation of these defenses, they should be struck from Defendant's Answer. *See Clark*, 2011 U.S. Dist. LEXIS 27030, at \*16; *La. Sulphur Carriers, Inc. v. Gulf Resources & Chemical Corp.*, 53 F.R.D. 458, 460 (D. Del. 1971) (striking affirmative defense as prejudicial to plaintiff where defense would "substantially complicate the discovery proceedings and the issues at trial").

**I. DEFENSES PERTAINING TO MONETARY DAMAGES SHOULD BE STRICKEN.**

Defendant's Separate Defenses Nos. 1, 2, 3, 8, and 9 have no place in this litigation. All of these defenses pertain to negligence, monetary damages and apportionment of such damages among various parties:

- **FIRST SEPARATE DEFENSE:** If Plaintiff's constituents suffered damages, the same were caused by their sole negligence.
- **SECOND SEPARATE DEFENSE:** If Plaintiff's constituents suffered damages, the same were caused by third persons over whom this Defendant had no control.
- **THIRD SEPARATE DEFENSE:** The incident which forms the basis of this litigation and which allegedly caused the injuries and damages to Plaintiff's constituents was

proximately caused or contributed to by the fault of third parties not parties to this suit. The responsibility of this Defendant and the right of Plaintiff and/or Plaintiff's constituents to recover in this litigation can only be determined after the percentages of responsibility of all parties to this litigation have been determined. Accordingly, this Defendant seeks an adjudication of the percentage of fault of Plaintiff's constituents and each and every person whose fault contributed to this incident.

- EIGHTH SEPARATE DEFENSE: This Defendant's conduct was not the proximate cause of Plaintiff's constituents['] alleged damages.
- NINTH SEPARATE DEFENSE: The alleged damages complained of were due to unavoidable circumstances and causes beyond the control or fault of this Defendant.

The Complaint, as noted by the Court, does not seek any type of damages, monetary or otherwise: "***Plaintiff's complaint does not seek*** redress of any past misconduct or ***damages*** for the benefit of any particular individual." *Velez*, 2011 WL 2976849, at \*12 (emphasis added).<sup>2</sup> Consequently, these defenses – which appear to be tailored to a slip-and-fall case – have no possible relationship to this dispute and can only confuse the issues here. Were Defendant allowed to inject these issues in this case, Plaintiff would be prejudiced by having to go through burdensome discovery on irrelevant issues. *See Tonka*, 836 F. Supp. at 218 ("Motions to strike save time and expense . . . by making it unnecessary to litigate claims which will not affect the outcome of the case").<sup>3</sup>

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<sup>2</sup> Defendant, in the August 18, 2001 letter sent to Plaintiff, asserted that "[d]amages do not only refer to monetary compensation, but also refer to loss or harm resulting from injury to person, property, or reputation." (Reisman Decl., Ex. B at 1.) Not so. Damages are defined as follows: "Money claimed by, or ordered to be paid to, a person as compensation for loss or injury." Black's Law Dictionary 416 (8th ed. 2007). Plaintiff makes no such claim in this litigation.

<sup>3</sup> Further demonstrating her obfuscatory approach to this litigation, Defendant recently issued her initial disclosures, in which she declared her intention to call upon at least 38 witnesses to testify, even though Magistrate Judge Shipp's scheduling order called for each party to take only ten depositions. (*See* August 10, 2011 Scheduling Order, ¶ 6.) Moreover, not only is Defendant's Answer filled with frivolous defenses, it is replete with evasive responses to the Complaint. Defendant claims in her Answer (filed one year after she received the Complaint) that she "is ***without knowledge or information*** sufficient to form a belief as to the truth of" basic facts alleged in the Complaint concerning the agency over which

Further, Separate Defense No. 3 is repetitive of the Separate Defense No. 2, as they both allege that some unknown third party is responsible for the money damages Plaintiff does not seek, providing an independent ground for striking one or both of those defenses. *See Sentient Colors*, 580 F. Supp.2d at 378 (striking defense that referred to unspecified statutes). Moreover, Separate Defense 9 is the type of “bare bones” pleading that fails to provide adequate notice and has been stricken by courts in this District. *See Modular Homes*, 859 F. Supp. at 120-21 (striking defenses based on vague allegations); *Sensient Colors*, 580 F. Supp.2d at 381, 388 (striking defenses for which defendant failed to provide adequate notice). Accordingly, these defenses should be stricken under Fed. R. Civ. P. 12(f).

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Defendant presides. (Answer ¶¶ 21; 23; 33; 34; 49; 174) (emphasis added)). Such basic facts to which Defendant improbably pleads ignorance are: “[t]he Department of Human Services operates state inpatient psychiatric facilities and is responsible for discharge planning, placement, and follow up for individuals residing in such facilities” (Compl. ¶ 21; Answer ¶ 21); “[t]he Department of Human Services is a recipient of federal funds and administers state mental health programs” (Compl. ¶ 23; Answer ¶ 23); “Defendant Department of Human Services operates five inpatient psychiatric hospitals in New Jersey, the so-called ‘State hospitals’” (Compl. ¶ 33; Answer ¶ 33); “Defendant Department of Human Services also funds most of the cost of indigent inpatient care at six ‘County’ psychiatric units and hospitals” (Compl. ¶ 34; Answer ¶ 34); the contents of the *New Jersey Division of Mental Health Services Psychopharmacological Practice Guidelines for the Treatment of Schizophrenia* and Department of Human Services Division of Mental Health Services Administrative Bulletin 3:35 (Compl. ¶ 49; Answer ¶ 49); and “Defendant Department of Human Services operates and funds State and County hospitals that allow the forcible, non-emergency medication of psychiatric patients pursuant to the Three-Step Process” (Compl. 174; Answer ¶ 174). Although each of the above facts is easily confirmed on a public internet site that Defendant maintains (<http://www.state.nj.us/humanservices/dmhs/home/index.html>), Defendant wishes to expend the resources of Plaintiff and the Court by litigating them.

**II. DEFENSES PERTAINING TO PREVIOUSLY DECIDED ISSUES SHOULD BE STRICKEN.**

Defendant's Separate Defenses Nos. 4, 29, and 34 through 37 also have no place in this litigation. These defense rehash arguments Defendant unsuccessfully raised in her motion to dismiss:

- **FOURTH SEPARATE DEFENSE:** Plaintiff's Complaint fails to state a cause of action upon which relief can be granted.
- **TWENTY-NINTH SEPARATE DEFENSE:** Plaintiff and/or Plaintiff's constituents have failed to state a claim upon which relief can be granted under Section 504 of the Rehabilitation Act of 1973 (Section 504).
- **THIRTY-FOURTH SEPARATE DEFENSE:** Plaintiff and/or Plaintiff's constituents have failed to state a claim upon which relief can be granted under the Due Process Clause of the Fourteenth Amendment of the United States Constitution in accordance with 42 U.S.C. § 1983.
- **THIRTY-FIFTH SEPARATE DEFENSE:** Plaintiff and/or Plaintiff's constituents have failed to state a claim upon which relief can be granted under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution in accordance with 42 U.S.C. § 1983.
- **THIRTY-SIXTH SEPARATE DEFENSE:** Plaintiff and/or Plaintiff's constituents have failed to state a claim upon which relief can be granted under the First Amendment of the United States Constitution in accordance with 42 U.S.C. § 1983.
- **THIRTY-SEVENTH SEPARATE DEFENSE:** Plaintiff and/or Plaintiff's constituents have failed to state a claim upon which relief can be granted under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132.

The Court has already determined that the Complaint does, in fact, state claims for relief against Defendant on each of the grounds noted in these defenses. *See Velez*, 2011 WL 2976849, at \*21. Consequently, these defenses should be stricken. *See, e.g., Gross v. Best Plastics, LLC*, Civ. No. 10-1028, 2010 WL 5325915, at \*8 (D.N.J. Dec. 17, 2010) (granting motion to strike affirmative defenses where such defenses, based on court's prior ruling, were "unavailing") (Debevoise, J.); *Merck*, 2010 WL 2557564, at \*2 (striking "failure to state a claim" defenses where court already ruled that the Complaint adequately pled certain claims). Additionally,

Separate Defenses Nos. 29 and 34 through 37 are redundant of Separate Defense No. 4, providing another reason for striking these defenses. *See Sentient Colors*, 580 F. Supp.2d at 378.

Separate Defense No. 38 is a similarly blatant attempt to relitigate an issue that the Court has already decided. In this defense, Defendant repeats her unsuccessful standing argument:

- THIRTY-EIGHTH SEPARATE DEFENSE: Plaintiff lacks standing to sue for the claims asserted.

Once again, the Court has already ruled on this issue, holding that “*Defendants’ standing arguments fail*. Plaintiff may assert claims for injunctive relief based on failures to follow appropriate laws and regulations in New Jersey psychiatric hospitals.” *Velez*, 2011 WL 2976849, at \*14 (emphasis added). Consequently, Defendant lacks any legitimate basis to assert Separate Defense No. 38.

### **III. DEFENSES PERTAINING TO THE DOCTRINE OF QUALIFIED IMMUNITY SHOULD BE STRICKEN.**

Defendant’s Separate Defenses Nos. 7, 12, 13, 17, 18, 22, 28, 41, 43, 45, and 46 also should be stricken. The defenses are all premised on, or relate to, the doctrine of “qualified immunity” which is wholly inapplicable to this litigation:<sup>4</sup>

- SEVENTH SEPARATE DEFENSE: This Defendant’s conduct was performed in good faith and in accordance with the U.S. Constitution, the Americans with Disabilities Act and the Rehabilitation Act.
- TWELFTH SEPARATE DEFENSE: This Defendant, in carrying out its duties, acted in good faith and without malicious intent to deprive Plaintiff’s constituents of their Constitutional rights.
- THIRTEENTH SEPARATE DEFENSE: No malicious intent of causing a deprivation of Plaintiff’s constituents’ Constitutional rights has been factually set out against this Defendant.

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<sup>4</sup> To the extent that Separate Defenses Nos. 45 and 46 are assertions of sovereign immunity, they are also addressed in Point IV below.

- SEVENTEENTH SEPARATE DEFENSE: Without admitting Plaintiff's constituents' civil rights were violated, this Defendant avers that the alleged conduct did not violate clearly established statutory and/or constitutional rights of which a reasonable person would have known.
- EIGHTEENTH SEPARATE DEFENSE: At all times relevant hereto, this Defendant was protected by a qualified privilege and as such Plaintiff and/or Plaintiff's constituents are barred from any recovery herein.
- TWENTY-SECOND SEPARATE DEFENSE: At all times relevant to this litigation, this Defendant acted in good faith and entertained an honest, reasonable belief that this Defendant's actions were reasonable and necessary thereby precluding Plaintiff and/or Plaintiff's constituents from maintaining any causes of action for violation of civil rights.
- TWENTY-EIGHTH SEPARATE DEFENSE: This Defendant is entitled to the defense of qualified immunity.
- FORTY-FIRST SEPARATE DEFENSE: This Defendant is a public official of the State of New Jersey and at all times was acting pursuant to the lawful authority invested in her by the State. All acts so performed were the result of the appropriate exercise of this Defendant's discretion.
- FORTY-THIRD SEPARATE DEFENSE: This Defendant did not know, and was not reasonably expected to know, that any actions taken by her with respect to Plaintiff's constituents, at all times relevant hereto, were in violation of Plaintiff's constituents' constitutional, statutory or other rights.
- FORTY-FIFTH SEPARATE DEFENSE: The challenged conduct of this Defendant is and was a reasonable exercise of State governmental power to achieve a legitimate public purpose.
- FORTY-SIXTH SEPARATE DEFENSE: This Defendant is a State employee acting in her official capacities and as such cannot be sued under 42 U.S.C. § 1983.

The defense of "qualified immunity" must, as a matter of law, fail here. It is settled law that qualified immunity "is available only for individual capacity claims for damages." *Brandt v. Monte*, 626 F. Supp. 2d 469, 478 n. 11 (D.N.J. 2009) (citing *Kentucky v. Graham*, 473 U.S. 159, 167 (1985)). Not only does the Complaint lack a claim for damages, it contains only official

capacity claims. Thus, whether Defendant's conduct violated "clearly established"<sup>5</sup> rights is of no consequence. *See id.* at 478.

Likewise, whether Defendant acted with "malice" or in "good faith"<sup>6</sup> is immaterial to the litigation. Certainly, these are not elements of any of Plaintiff's claims. Rather, "malice" and "good faith" would only be relevant in order to defeat a defense of qualified immunity, which is, of course, not relevant here. *See, e.g., Forbes v. Township of Lower Merion*, 313 F.3d 144, 148 (3d Cir. 2002) ("Qualified immunity is defeated if an official ... 'took [an] action with the malicious intention to cause a deprivation of constitutional rights or other injury.'") (*quoting Wood v. Strickland*, 420 U.S. 308, 322 (1975)); *Monteiro v. City of Elizabeth*, 436 F.3d 397, 407 (3d Cir. 2006) (Fisher, J., dissenting) ("[Q]ualified immunity protects those who overstep constitutional boundaries but nevertheless act in objective good faith.") (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)).<sup>7</sup>

Additionally, to the extent that Defendant's Separate Defense No. 43 (relating to lack of knowledge of constitutional violations) is meant to apply to Plaintiff's ADA and RA claims, it fails as a matter of law. The relevant knowledge required by the statutes is of the

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<sup>5</sup> *See* Separate Defense No. 17.

<sup>6</sup> *See* Separate Defenses Nos. 12, 13, and 22 (which are redundant).

<sup>7</sup> In a letter to Plaintiff, Defendant contended that the defense of "good faith" is relevant due to "the entire tenor of" the Complaint. (*See* Reisman Decl., Ex. B at 2.) Not only is a defense based on the purported "tenor" of the Complaint invalid, Plaintiff's allegations regarding the experiences of constituent representatives and Defendant's deficiencies do not, as explained above and recognized by the Court, form a separate cause of action. Rather these allegations are included in the Complaint to illustrate how and why Defendant's involuntary medication practices violate the constitution and federal statutes. Moreover, to the extent that Defendant's Answer broadly denies the Complaint's allegations regarding Defendant's actions and omissions (*see, e.g.,* Answer ¶ 180), the Defenses addressed in this Section are redundant and should be stricken on that independent basis. *See Sensient Colors*, 580 F. Supp.2d at 378.

disability, not the violation of rights. *See, e.g., Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (“[T]he plaintiff must demonstrate that defendants know or should be reasonably expected to know of his disability.”) Because Defendant cannot credibly claim that she is unaware of the disabilities afflicting Plaintiff’s constituents, this defense cannot possibly succeed. Similarly, if this defense is meant to implicate qualified immunity, it must also fail because, as stated above, qualified immunity is only available in suits for damages and is, therefore, plainly not applicable here.

#### **IV. DEFENSES PERTAINING TO THE DOCTRINE OF SOVEREIGN IMMUNITY SHOULD BE STRICKEN.**

Defendant’s “Separate Defenses” Nos. 31, 32, and 48 are likewise irrelevant to the causes of action in this lawsuit. These defenses are based on a claim of sovereign immunity, which also, as a matter of law, is inapplicable here:<sup>8</sup>

- THIRTY-FIRST SEPARATE DEFENSE: Plaintiff’s and/or Plaintiff’s constituents’ ADA claims against the State Defendants must be dismissed as the State Defendants are immune from suit.
- THIRTY-SECOND SEPARATE DEFENSE: Plaintiff’s Complaint, and certain relief Plaintiff and/or Plaintiff’s constituents have sought in this action, are barred by the Eleventh Amendment of the United States Constitution.
- FORTY-EIGHTH SEPARATE DEFENSE: This Defendant has not waived sovereign immunity.

Under established Supreme Court precedent, “suits for injunctive relief against state officials brought to end *ongoing violations* of federal law are not barred by the Eleventh Amendment.” *Walker v. Beard*, No. 07-1241, 2007 WL 2064323 at \*2 (3d Cir. July 19, 2007) (emphasis added) (citing *Ex Parte Young*, 209 U.S. 123 (1908)); *Wheeling & Lake Erie R. Co. v. Public Utility Comm’n of Com. of Pa.*, 141 F.3d 88, 104 (3d Cir. 1998) (“The doctrine of *Ex*

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<sup>8</sup> To the extent Separate Defense No. 31 is an assertion of absolute immunity, it is also dealt with in Point V below.

*Parte Young* permits suits against state officials acting in their official capacity – notwithstanding the States’ immunity under the Eleventh Amendment – if the suit seeks *prospective* declaratory and/or injunctive relief.”) (Garth, J., dissenting). There can be no argument that the Complaint adequately alleges that the violations of the rights of Plaintiff’s constituents are present and ongoing. Moreover, the *Ex Parte Young* doctrine applies to Plaintiff’s constitutional claims as well as to its ADA and RA claims. *See, e.g., MCI Telecommunication Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 506 (3d Cir. 2001) (“The [*Ex Parte Young*] doctrine applies both to violations of the United States Constitution and to violations of federal statutes.”); *Hindes v. Fed. Deposit Ins. Corp.*, 137 F.3d 148, 165 (3d Cir. 1998) (“The principle which emerges from *Young* and its progeny is that a state official sued in his official capacity for prospective injunctive relief is a person within section 1983, and the Eleventh Amendment does not bar such a suit.”); *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 179 (3d Cir. 2002) (“federal ADA claims for prospective injunctive relief against state officials are authorized by the *Ex parte Young* doctrine”).<sup>9</sup>

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<sup>9</sup> In a letter to Plaintiff, Defendant suggested that these Defenses are valid because the *Ex Parte Young* doctrine does not permit a claim for a declaratory judgment that the prior conduct of state officers violated federal law in the past. (Reisman Decl., Ex. B at 2.) Defendant apparently continues to labor under fundamental misconceptions about the nature of this litigation. As the Court has noted, “Plaintiff’s complaint does not seek redress of any *past* misconduct or damages for the benefit of any particular individual.” *Velez*, 2011 WL 2976849, at \*12 (emphasis added). Rather, Plaintiff seeks a declaratory judgment that Defendant’s *current* involuntary medication procedures constitute a *continuing violation* of federal constitutional and statutory law, the type of declaratory judgment claim that is well within the purview of the federal courts. *See Hindes*, 137 F.3d at 166 (“The type of prospective relief permitted under *Young* is relief intended to prevent a continuing violation of federal law.”); *Zahl v. N.J. Dep’t of Law & Public Safety*, Civ. Action No. 06-3749(JLL), 2008 U.S. Dist. LEXIS 24022, at \*63-64 (D.N.J. Mar. 26, 2008) (finding that plaintiff alleged an ongoing violation of federal law).

Separate Defense No. 32 should be stricken for the additional reason that, to the extent it refers generically to “certain relief” Plaintiff seeks, it fails to provide Plaintiff with anything close to the required adequate notice of the defense. *See Robinson*, 313 F.3d at 134-35 (defendant must provide adequate notice of defenses); *Modular Homes*, 859 F. Supp. at 120-21; *Sensient Colors*, 580 F. Supp.2d at 381, 388.

**V. DEFENSES PERTAINING TO THE DOCTRINE OF ABSOLUTE IMMUNITY SHOULD BE STRICKEN.**

Defendant’s Separate Defenses Nos. 39 and 41 also are, as a matter of law, immaterial to this litigation. These defenses assert, or are premised upon, the doctrine of absolute immunity:

- THIRTY-NINTH SEPARATE DEFENSE: This Defendant is entitled to absolute immunity.
- FORTY-FIRST SEPARATE DEFENSE: This Defendant is a public official of the State of New Jersey and at all times was acting pursuant to the lawful authority invested in her by the State. All acts so performed were the result of the appropriate exercise of this Defendant’s discretion.

It is well-established that a “substantial number of courts of appeals, *including the Third Circuit* . . . have held that absolute immunity is a bar to damages only, and not to prospective or injunctive relief.” *Acierno v. Cloutier*, 40 F.3d 597, 607, n.8 (3d. Cir. 1994) (emphasis added). As the Complaint makes clear, Plaintiff is not seeking any monetary damages but, rather, is seeking only prospective injunctive and declaratory relief. Thus, to the extent the above-noted defenses rely on a theory of absolute immunity, they are inapplicable to this lawsuit.<sup>10</sup>

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<sup>10</sup> In her August 18 letter, Defendant asserts that “the legislative body of the State is responsible for enacting statutes and appropriating funds, which encompasses the relief that [Plaintiff] seek[s].” (Reisman Decl., Ex. B at 2). Aside from being a gross mischaracterization of the Complaint, this assertion is utterly irrelevant to the question of whether Defendant can be enjoined from involuntarily medicating individuals in violation of their constitutional and statutory rights. Moreover, Defendant undoubtedly has the power to allocate financial and human resources within the state psychiatric hospital system, and has already in this case, at

**VI. THE DEFENSE PERTAINING TO EXHAUSTION OF ADMINISTRATIVE REMEDIES SHOULD BE STRICKEN.**

Separate Defense No. 15, which relates to exhaustion of administrative remedies, is also without any legal merit and has no place in this litigation:

- FIFTEENTH SEPARATE DEFENSE: Plaintiff and/or Plaintiff's constituents have failed to exhaust all applicable administrative remedies and are therefore barred from recovery.

Under established Supreme Court precedent, exhaustion of administrative remedies is *not* required before filing a suit under 42 U.S.C. § 1983. *See, e.g., Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982) (“[W]e conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.”) Moreover, “[n]either Title II of the ADA nor the Rehabilitation Act include a requirement that a plaintiff exhaust his or her administrative remedies before filing suit in federal court.” *Smith v. City of Philadelphia*, 345 F. Supp. 2d 482, 486 (E.D. Pa. 2004). Separate Defense No. 15 should be stricken for the additional reason that, to the extent it refers generically to “administrative remedies” without specifying any such purported remedies, it fails to provide Plaintiff with notice of the defense. *See Robinson*, 313 F.3d at 134-35; *Modular Homes*, 859 F. Supp. at 120-21; *Sensient Colors*, 580 F. Supp.2d at 381, 388.

In her August 18 letter, Defendant agreed that Plaintiff is not required to exhaust administrative remedies prior to instituting suit under 42 U.S.C. § 1983, and has stated that she will withdraw this defense. (*See Reisman Decl.*, Ex. B at 3.) Should Defendant fail to withdraw this defense, however, it should be stricken because it has no possible relation to this case, could

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presumably considerable taxpayer expense, retained private attorneys to represent her. At a minimum, therefore, Defendant should be able to hire additional lawyers to represent indigent psychiatric patients in medication refusal hearings, which is one of the elements of the relief Plaintiff seeks.

only serve to confuse the issues, and would prejudice Plaintiff by introducing irrelevant matters into discovery. *See, e.g., Clark*, 2011 U.S. Dist. LEXIS 27030, at \*16.

**VII. THE PURPORTED DEFENSE RESERVING THE RIGHT TO APPLY FOR RULE 11 SANCTIONS AND ALLEGING PLAINTIFF'S "BAD FAITH" AND "INTENT TO HARASS" SHOULD BE STRICKEN.**

The allegations contained in Separate Defense No. 16 do not constitute a defense at all but rather comprise a grab-bag of desperate and baseless attacks on Plaintiff's integrity:

- **SIXTEENTH SEPARATE DEFENSE:** This Defendant reserves the right to apply to this Court for the imposition of sanctions against Plaintiff and counsel, pursuant to Rule 11, and to make an application for counsel fees and costs of suit, pursuant to Section 1988 of Title 42 of the United States Code Annotated on the basis that the within cause of action is without merit, is frivolous and has been instituted by Plaintiff in bad faith and with the intent to harass this Defendant and to cause her to incur great expenses in defense of same, all to this Defendant's damage.

As an initial matter, a motion for sanctions (which Defendant has neither served nor filed) is not a defense. *See Kraus Indus., Inc. v. Moore*, Civil Action No. 06-00542, 2007 WL 2744194, at \*10 (W.D. Pa. Sept. 18, 2007) (dismissing cause of action seeking sanctions); *Krisa v. Equitable Life Assurance Soc'y*, 113 F. Supp.2d 694, 708 (M.D. Pa. 2000) (striking affirmative defense that alleged violation of Rule 11). Moreover, the Court has already determined that Plaintiff states claims against Defendant for violations of the Due Process Clause of the Fourteenth Amendment, the right of access to the courts, the right to counsel, the First Amendment, the ADA, and the RA. *See Velez*, 2011 WL 2976849, at \*21. Therefore, Defendant lacks any basis for asserting that this action is frivolous. Additionally, Defendant's unfounded allegations are scandalous and injurious to Plaintiff's reputation, providing another reason for striking this purported defense. *See Radasci v. Borough of Brentwood*, Civil Action

No. 07-00483, 2007 WL 2463397, at \*1 (W.D.Pa. Aug. 28, 2007) (striking inflammatory and opprobrious matter).<sup>11</sup>

### **VIII. THE DEFENSE PERTAINING TO DELIBERATE INDIFFERENCE SHOULD BE STRICKEN.**

Defendant's Separate Defense No. 19 also has no place in this litigation as it is premised on the assertion that the Complaint lacks an allegation that Defendant acted with deliberate indifference:

- NINETEENTH SEPARATE DEFENSE: Without admitting Plaintiff's constituents' civil rights were violated, Plaintiff and/or Plaintiffs constituents['] claims are not actionable inasmuch as there is no evidence or allegation that the alleged governmental misconduct was the result of deliberate indifference by this Defendant.

Once again, this defense is wholly irrelevant to the litigation. The Complaint, of course, does not contain any claim of deliberate indifference. Indeed, the Complaint does not even allege a cause of action, such as an Eighth Amendment claim relating to the medical needs of

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<sup>11</sup> Defendant appears unable (or unwilling) to distinguish between a defense and a Rule 11 motion, writing in her August 18 letter to Plaintiff that she will not withdraw Separate Defense 16 because "Defendant has the right to assert defenses that concern the taxpayer's right to recoup expenses and fees." (Reisman Decl., Ex. B at 3). To be clear, Defendant has not made a Rule 11 demand and has not served Plaintiff with a Rule 11 motion. Moreover, not only is a motion for sanctions not a defense, *see Krisa*, 113 F. Supp.2d at 708, the Answer lacks any pleaded or inferable facts that support Defendant's scurrilous character attacks on Plaintiff. It is obvious from the face of Defendant's Answer that she cannot succeed on a defense based on an unfounded assertion that Plaintiff brought this suit to harass her and cause her expense. *See Tonka*, 836 F. Supp. at 219 (striking unfounded defense). Notably, several months ago Defendant chose to multiply her litigation costs by hiring private lawyers to represent her, even though she was already represented by the Attorney General. Although Defendant and doctors in State psychiatric hospitals may wrongly believe that civil rights suits impair patients' treatment, *see Disability Rights N.J., Inc. v. Velez*, Civ. No. 10-3950, 2011 WL 2937355, at \*5 (July 19, 2011), Plaintiff's view is that this litigation will result in outcomes beneficial to patients and may actually save taxpayers money in the long run. (*See Compl.* ¶¶ 164-172.) In any event, were Defendant truly concerned with guarding the public fisc, she would not have allowed her private counsel to lard her Answer with dozens of insufficient, immaterial, redundant and scandalous defenses.

Plaintiff's constituents, that implicates the doctrine of deliberate indifference. *See, e.g., Foreman v. Bureau of Prisons*, No. 06-1274, 2007 WL 108457, at \*3 (3d Cir. Jan. 16, 2007) ("Thus, in deciding if the individual defendants are entitled to qualified immunity [on Foreman's claim for a violation of his Eight Amendment rights], this Court must determine whether they acted with deliberate indifference to Foreman's serious medical needs.").

Defendant agrees that deliberate indifference is improper and has stated that she will withdraw Separate Defense No. 19. (*See* Reisman Decl., Ex. B at 3.)<sup>12</sup> Should Defendant fail to withdraw this defense, it should be stricken because it has no possible relation to this litigation, could only serve to confuse the issues, and would prejudice Plaintiff by introducing irrelevant matters into discovery.

**IX. THE DEFENSE THAT PSYCHIATRIC PATIENTS ARE NOT ENTITLED TO DUE PROCESS RIGHTS SHOULD BE STRICKEN.**

Defendant's Separate Defense No. 25 contends that Plaintiff's constituents are not entitled to due process:

- TWENTY-FIFTH SEPARATE DEFENSE: Plaintiff's constituents was not [sic] due procedural due process.

This assertion, is patently without basis, as the Court made clear in its ruling on Defendant's motion to dismiss:

There can be no doubt that all patients in New Jersey, including patients with severe mental illness or injury, have the right to participate meaningfully in the course of their treatment, to be free from unnecessary or unwanted medication, and to have their rights to personal autonomy and bodily integrity respected by agents of the state.

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<sup>12</sup> Although Defendant has admitted that that Separate Defense No. 19 is impertinent, Defendant misleadingly asserted that she "agree[d]" with Plaintiff that the standard in this case is professional judgment. (*See* Reisman Decl., Ex. B at 3.) On the contrary, Plaintiff has never claimed that the professional judgment standard controls this case.

*Velez*, 2011 WL 2976849, at \*2; *see also id.* at \*10 (“[D]ecisions of the Supreme Court have confirmed that the [Constitutional] rights enjoyed by individuals not convicted of a crime are at least as great as those of prisoners.”) Thus, this defense has no basis in law and should be stricken from Defendant’s answer.<sup>13</sup>

Separate Defense No. 25 should be stricken for the additional and independent reasons that it is redundant of Defendant’s denials (*see, e.g.*, Answer ¶¶ 52; 54; 60; 180), and it is the type of “bare bones” pleading that fails to provide adequate notice and has been stricken by courts in this District. *See Modular Homes*, 859 F. Supp. at 120-21; *Sensient Colors*, 580 F. Supp.2d at 381, 388.

**X. THE DEFENSE PERTAINING TO THE DOCTRINE OF *RESPONDEAT SUPERIOR* SHOULD BE STRICKEN.**

Defendant’s claims in Separate Defense No. 47 are also immaterial to the lawsuit.

These claims relate to the doctrine of *respondeat superior*:

- FORTY-SEVENTH SEPARATE DEFENSE: This Defendant cannot be held liable under the doctrine of *respondeat superior*.

Once again, Defendant has proffered a wholly irrelevant defense. The Complaint does not contain any claim or cause of action that is premised on the doctrine of *respondeat superior*. Consequently, this defense has no place in Defendant’s answer.

In her August 18 letter to Plaintiff (*see* Reisman Decl., Ex. B at 3), Defendant attempted to justify the Defense based on *respondeat superior* by citing *Monell v. Dep’t of Social Servs. of the City of N.Y.*, 436 U.S. 658 (1978), and *Black v. Stephens*, 662 F.2d 181 (3d Cir.

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<sup>13</sup> Apparently recognizing the inadequacy of this defense, Defendant wrote to Plaintiff that “Defendant is still entitled to raise the defense that plaintiff and it’s [sic] constituents are not entitled to the extent of the procedural due process that they seek.” (*See* Reisman Decl., Ex. B at 3.) Defendant’s attempt informally to modify Separate Defense No. 25 after she filed her Answer does not alter the conclusion that the Defense is inadequate and should be stricken.

1981). These cases stand for the proposition that a plaintiff suing a local government must prove the liability of the governmental entity separate from the liability of its employees. *Monell* and *Black* are inapplicable to this case, however, because here the Defendant is a *state* official, not a local government, and because *Plaintiff does not seek monetary damages*, as did the plaintiffs in both *Monell* and *Black*. Defendant further argued that because *respondeat superior* is not an element of any of Plaintiff's claims it is a valid defense. (See Reisman Decl., Ex. B at 3). This logic is unavailing. Under Defendant's theory, it would be perfectly appropriate to assert a wholly irrelevant defense (and thus needlessly complicate the litigation), such as the fair use doctrine under copyright law, in a litigation, such as a civil rights lawsuit, where it has absolutely no relevance.

**XI. THE DEFENSE BASED ON THE STATUTE OF LIMITATIONS AND/OR STATUTE OF REPOSE SHOULD BE STRICKEN.**

In Separate Defense No. 5, Defendant refers to unspecified statutes of limitation and repose:

- FIFTH SEPARATE DEFENSE: Plaintiff's cause of action is barred by the applicable Statute of Limitations and/or Repose.

Separate Defense No. 5 should be stricken because Defendant has failed to specify the applicable statute of limitations and/or statute of repose. See *Sensient Colors*, 580 F. Supp.2d at 378. Once again, this is the type of ambiguous and "bare bones" pleading that fails to provide adequate notice and has been stricken by courts in this District. See *Modular Homes*, 859 F. Supp. at 120-21; *Sensient Colors*, 580 F. Supp.2d at 381, 388. Accordingly, this Defense should be stricken under Fed. R. Civ. P. 12(f).

**CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that this Court grant this motion and strike the defenses referenced above from Defendant's Answer, pursuant to Fed. R. Civ. P. 12(f), and award Plaintiff costs, including attorneys' fees, and such other relief as this Court deems just and proper.

Dated: Newark, New Jersey  
August 25, 2011

s/ William Emmett Dwyer  
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August 9, 2011

**By Email and Federal Express**

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*Re: Disability Rights New Jersey, Inc. v. Velez, 2:10-cv-03950-DRD-MAS*

Dear Ms. Beaty and Ms. O'Connor:

On August 4, 2011, Defendant Jennifer Velez, in her official capacity as Commissioner, State of New Jersey Department of Human Services ("Defendant"), filed her answer ("Answer") to the Complaint of Plaintiff Disability Rights New Jersey ("Plaintiff") in the above-referenced matter. The Answer contains fifty (50) purported "Separate Defenses." Please be advised that Plaintiff hereby demands that Defendant withdraw the specific Separate Defenses identified in this letter and file — no later than August 18, 2011 — an Amended Answer that does not contain such defenses. Should Defendant fail to comply with this demand, Plaintiff shall move, pursuant to Fed. R. Civ. P. 12(f), to strike the Separate Defenses listed herein. Additionally, Plaintiff may seek sanctions and costs pursuant to Fed. R. Civ. P. 11.

Stephanie Beaty, Esq.  
Susan K. O'Connor, Esq.  
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**1. "Separate Defenses" Nos. 1, 2, 3, 8, 9**

These purported defenses pertain to monetary damages and consequently, are entirely inappropriate. As Defendant is well aware, the Complaint does not seek any type of damages, monetary or otherwise. Instead, the sole relief sought by the Complaint is prospective injunctive relief.

**2. "Separate Defenses" 4, 29, 34, 35, 36, 37, 38**

These purported defenses are also completely improper. Separate Defenses 4, 29, and 34-37 all are premised on the argument that the Complaint "fails to state a claim upon which relief can be granted." Again, as Defendant certainly knows, the Court, in a written opinion, has determined that the Complaint does, in fact, state numerous claims for relief against Defendant. *See Disability Rights New Jersey, Inc. v. Velez*, Civ. No. 10-3950, 2011 WL 2976849, at \*21 (D.N.J. July 20, 2011). Indeed, the Court held that, with the exception of Count IV, each of the Complaint's eight Counts constituted a valid claim for relief against Defendant. *See id.*; *see also Gross v. Best Plastics, LLC*, Civ. No. 10-1028, 2010 WL 5325915, at \*8 (D.N.J. Dec. 17, 2010) (granting motion to strike affirmative where such defenses, based on court's prior ruling, were "unavailing") (Debevoise, J.).

Separate Defense 38 asserts that "Plaintiff lacks standing to sue for the claims asserted." Here, too, the Court conclusively decided this question. As Judge Debevoise held, "Defendants' standing arguments fail. Plaintiff may assert claims for injunctive relief based on failures to follow appropriate laws and regulations in New Jersey psychiatric hospitals." *Velez*, 2011 WL 297684914, at \*14. Consequently, there is no legitimate basis for Defendant to assert Separate Defense 38.

**3. "Separate Defenses" 12, 13, 17, 18, 22, 28, 41, 43, 45, 46, 48**

These purported defenses are all premised on, or relate to, the doctrine of "qualified immunity." The defense of "qualified immunity," however, is inapplicable here as a matter of law. The courts are clear: qualified immunity "is only available for individual capacity claims for damages." *Brandt v. Monte*, 626 F. Supp. 2d 469, 470 n. 11 (D.N.J. 2009) (*citing Kentucky v. Graham*, 473 U.S. 159, 167 (1985)). Not only does the Complaint lack a claim for damages, it contains only official capacity claims. Thus, whether Defendant's conduct violated "clearly established"<sup>1</sup> rights is of no consequence. *See id.* at 470.

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<sup>1</sup> *See* Separate Defense 17.

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Likewise, whether Defendant acted with “malice” or in “good faith”<sup>2</sup> is immaterial to the litigation. Certainly, these are not elements of any of Plaintiff’s claims. Rather, “malice” and “good faith” would only be relevant in order to defeat a defense of qualified immunity, which is, of course, not relevant here. *See, e.g., Forbes v. Township of Lower Merion*, 313 F.3d 144, 148 (3d Cir. 2002) (“Qualified immunity is defeated if an official ... ‘took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.’”) (*quoting Wood v. Strickland*, 420 U.S. 308, 322 (1975)); *Monteiro v. City of Elizabeth*, 436 F.3d 397, 407 (3d Cir. 2006) (“[Q]ualified immunity protects those who overstep constitutional boundaries but nevertheless act in objective good faith.”).

#### 4. Separate Defenses 31, 32, 48

These three purported separate defenses are all based on a claim of sovereign immunity.<sup>3</sup> But sovereign immunity clearly does not apply in this litigation. Under established Supreme Court precedent, “suits for injunctive relief against state officials brought to end ongoing violations of federal law are not barred by the Eleventh Amendment.” *Walker v. Beard*, No. 07-1241, 2007 WL 2064323 at \*2 (3d Cir. July 19, 2007) (citing *Ex Parte Young*, 209 U.S. 123 (1908)); *Wheeling & Lake Erie R. Co. v. Public Utility Com'n of Com. of Pa.*, 141 F.3d 88, 104 (3d Cir. 1998) (“The doctrine of *Ex Parte Young* permits suits against state officials acting in their official capacity—notwithstanding the States’ immunity under the Eleventh Amendment—if the suit seeks prospective declaratory and/or injunctive relief.”).

The *Ex Parte Young* doctrine applies to Plaintiff’s Section 1983 claims as well as to its claims under Title II of the American Disabilities Act and Section 504 of the Rehabilitation Act of 1973. *See e.g., MCI Telecommunication Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 506 (3d Cir. 2001) (“The [*Ex Parte Young*] doctrine applies both to violations of the United States Constitution and to violations of federal statutes”); *Hindes v. F.D.I.C.*, 137 F.3d 148, 165 (3d Cir. 1998) (“The principle which emerges from *Young* and its progeny is that a state official sued in his official capacity for prospective injunctive relief is a person within section 1983, and the Eleventh Amendment does not bar such a suit”); *Koslow v. Commonwealth of Pennsylvania* 302 F.3d 161,179 (3d Cir. 2002) (“federal ADA claims for prospective injunctive relief against state officials are authorized by the *Ex parte Young* doctrine”).

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<sup>2</sup> *See* Separate Defenses 12, 13, 22.

<sup>3</sup> To the extent Separate Defense 31 is an assertion of absolute immunity, it is dealt with in Section 5.

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**5. "Separate Defenses" 39, 41**

These so-called separate defenses assert, or are premised upon, the doctrine of absolute immunity. Here, too, this doctrine is not applicable in this lawsuit. "Absolute immunity has only been sparingly recognized by the Supreme Court, which has refused to extend it 'any further than justification would warrant' even when recognizing absolute immunity for judicial, prosecutorial, and legislative functions." *Boone v. Pennsylvania Office of Vocational Rehabilitation*, No. Civ. 1:CV-04-0588, 2005 WL 2562286, at \*8 (M.D. Pa. 2005) (quoting *Burns v. Reed*, 500 U.S. 478, 486-87 (1991).) Indeed, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials [sued for monetary damages] in the exercise of their duties." *Burns*, 500 U.S. at 486-487. As the Complaint makes clear, Plaintiff is not seeking any monetary damages. Moreover, the challenges that form the basis of Plaintiff's claims do not implicate the narrow scope of absolute immunity. The Complaint does not challenge any judicial, prosecutorial or legislative functions of the Defendant. Thus, whether or not Plaintiff's actions "were the result of the appropriate exercise of [her] discretion"<sup>4</sup> is irrelevant to this action as that is a test for the applicability of absolute official immunity. *See Barr v. Matteo*, 360 U.S. 563, 575 (1959) (stating that one part of the test for absolute immunity is whether the challenged action is "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively")

**6. "Separate Defense" 15**

This purported separate defense, which asserts that Plaintiff or Plaintiff's constituents have "failed to exhaust all applicable administrative remedies," is also without any legal merit and has no place in this litigation. Under established Supreme Court precedent, exhaustion of administrative remedies is not required before filing a suit under 42 U.S.C. § 1983. *See, e.g., Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 516 (1982) ("[W]e conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.") Moreover, "[n]either Title II of the ADA nor the Rehabilitation Act include a requirement that a plaintiff exhaust his or her administrative remedies before filing suit in federal court." *Smith v. City of Philadelphia*, 345 F. Supp. 2d 482, 486 (E.D. Pa. 2004).

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<sup>4</sup> See Separate Defense 41.

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**7. "Separate Defense" 16**

The allegations contained in this paragraph do not constitute a defense at all but rather form a grab-bag of desperate and baseless attacks on Plaintiff's integrity. As Defendant is well aware, the Court has already determined that Plaintiff states claims against Defendant for violations of the Due Process Clause of the Fourteenth Amendment, the right of access to the courts, the right to counsel, the First Amendment, the Americans with Disabilities Act, and the Rehabilitation Act. *See Velez*, 2011 WL 2976849, at \*21. Therefore, Defendant lacks any basis for asserting that this lawsuit is frivolous. Moreover, Defendant's unfounded allegations are scandalous, providing another reason for striking this purported defense. *See Radasci v. The Borough of Brentwood*, Civil Action No. 07-00483, 2007 WL 2463397, at \*1 (W.D. Pa. Aug. 28, 2007) (striking inflammatory and opprobrious matter).

**8. "Separate Defense" 19**

This so-called separate defense is premised on the assertion that there is no evidence or allegation that the alleged misconduct was "the result of deliberate indifference by the Defendant." Once again, this defense is wholly irrelevant to the litigation. The Complaint does not contain any claim of deliberate indifference. Indeed, the Complaint does not even allege a cause of action, such as a claim for false arrest or a violation of the Eighth Amendment of the Constitution that implicates the concept of "deliberate indifference." *See, e.g., Foreman v. Bureau of Prisons*, No. 06-1274, 2007 WL 108457, at \*3 (3d Cir. Jan. 16, 2007) ("Thus, in deciding if the individual defendants are entitled to qualified immunity [on Foreman's claim for a violation of his Eight Amendment rights], this Court must determine whether they acted with deliberate indifference to Foreman's serious medical needs.").

**9. "Separate Defense" 25**

This purported separate defense contends that "Plaintiff's constituents was [*sic*] not due procedural due process." This assertion is patently without basis, as the Court made clear in denying in relevant part Defendant's motion to dismiss:

There can be no doubt that all patients in New Jersey, including patients with severe mental illness or injury, have the right to participate meaningfully in the course of their treatment, to be free from unnecessary or unwanted medication, and to have their rights to personal autonomy and bodily integrity respected by agents of the state.

*Velez*, 2011 WL 2976849, at \*2; *see also id.* at \*10 ("[D]ecisions of the Supreme Court have confirmed that the [Constitutional] rights enjoyed by individuals not convicted of a crime are at

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Susan K. O'Connor, Esq.  
August 9, 2011  
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least as great as those of prisoners.”) Thus, this defense has no basis in law and should be stricken from Defendant’s answer.

**10. “Separate Defense” 43**

This supposed separate defense alleges that Defendant “did not know, and was not reasonably expected to know, that any actions taken by her with respect to Plaintiff’s constituents . . . were in violation of [their] constitutional, statutory or other rights.” To the extent that this defense is meant to apply to Plaintiff’s Rehabilitation Act claims, it fails as a matter of law. The relevant knowledge required by Section 504 of the Rehabilitation Act is of the disability, not the violation of rights. *See, e.g., Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (“[T]he plaintiff must demonstrate that defendants know or should be reasonably expected to know of his disability.”) Because Defendant cannot credibly claim that she is unaware of the disabilities afflicting Plaintiff’s constituents, this defense cannot possibly succeed. Similarly, if this defense is meant to implicate qualified immunity<sup>5</sup>, it must also fail because, as stated in Section 2 above, qualified immunity is only available in suits for damages and is, therefore, plainly not applicable here.

**11. “Separate Defense” 47**

Defendant claims in this supposed separate defense that it “cannot be held liable under the doctrine of *respondeat superior*.” Once again, Defendant has proffered a wholly irrelevant defense. The Complaint does not contain any claim or cause of action that is premised on the doctrine of *respondeat superior*. Consequently, this defense has no place in Defendant’s answer.

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<sup>5</sup> *See Downey v. Coalition Against Rape and Abuse, Inc.*, 143 F. Supp. 2d 423, 448 (D.N.J. 2001) (“If the law was not clearly established, then the official could not be reasonably expected to know the law forbade the subject conduct, and the qualified immunity defense must be sustained.”)

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Susan K. O'Connor, Esq.  
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Should you have any questions, please do not hesitate to contact me. Additionally, please note that Plaintiff's decision not to include certain of the Separate Defenses in this letter is not an admission that any of those defenses are valid. Plaintiff expressly reserves its rights to challenge each and every "Separate Defense" at the appropriate time during the course of this litigation.

Yours truly,

A handwritten signature in black ink, appearing to read "Michael D. Reisman", with a long horizontal line extending to the right.

Michael D. Reisman

cc: Gerard A. Hughes, Esq. (by email)  
Christopher J. Killmurray, Esq. (by email)  
Brian J. Chabarek, Esq. (by email)  
William Emmett Dwyer, Esq. (by email)  
Robert S. Cohen, Esq. (by email)  
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ATTORNEYS at LAW

August 18, 2011

Michael D. Reisman, Esq.  
Kirkland & Ellis, LLP  
601 Lexington Avenue  
New York, NY 10022-4611  
BY EMAIL (HARD COPY TO FOLLOW)

**Re: Disability Rights New Jersey (DRNJ) v. Jennifer Velez**  
Our File No.: 5818958 - SO  
Claim No.: 10-02845  
Docket No.: 2:10-cv-3950(DRD/MAS)

Dear Mr. Reisman:

I am in receipt of your correspondence, dated August 9, 2011, concerning the answer filed on behalf of Defendant, Velez, in connection with the above captioned matter. Please accept the following response to the same.

1. Defenses 1, 2, 3, 8 and 9

You allege that these defenses pertain to monetary damages. They do not. Damages do not only refer to monetary compensation, but also refer to loss or harm resulting from injury to person, property, or reputation. In the complaint, you are specifically alleging that patients at the five (5) State mental hospitals have been harmed, damaged, or "suffered injuries" by the application of A.B. 5:04. (See e.g. ¶¶ 18, 119, 140 and 171 of the complaint). As such, we will not be withdrawing these defenses.

2. Defenses 4, 28, 34, 35, 36, 37, and 38

You allege that these defenses have already been determined by Judge Debevoise in his opinion concerning the State's motion to dismiss. I agree that Judge Debevoise addressed the issues of standing and whether Plaintiff has stated a claim. However, the Defendant is still entitled to assert these defenses, as not to do so may constitute a waiver which may affect the ability to appeal these issues and/or Judge Debevoise's opinion, should this Defendant so choose, at the conclusion of the trial of this matter. Accordingly, the defenses will not be withdrawn.

3. Defenses 12, 13, 17, 18, 22, 28, 41, 43, 45, 46 and 48

You allege that these defenses address good faith immunity or some variation thereof which is not relevant to this matter, as there are no individual capacity claims. I do not believe that the

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defenses cited by you all concern qualified immunity. As such, I will assume that your inclusion of Defenses 41, 43, 45, 46 and 48 was in error. However, if you interpreted these particular defense as part of the good faith defense, the rationale which follows will apply. With respect to the "good faith" defenses, designated as paragraphs 12, 13, 18, 22 and 28, given the allegations in your complaint, the defense of good faith is relevant and appropriate. In the complaint, it is alleged that the employees of this Defendant threaten (¶¶ 9, 122, 132), coerce (¶ 93), forcibly drug patients (¶¶ 75, 80) fail to address patient's concerns or comply with A.B. 5:04 (¶¶ 73, 82, 86, 88, 90, 99, 123, 131, 132, 134, 158-162), are ineffective (¶¶ 83, 96, 107), have wantonly abandoned safeguards (¶ 91) and have physically manhandled patients. (¶ 132). Although no longer a valid claim, given Judge Debevoise's rulings on the motion to dismiss, paragraph 203, which sets forth the allegation that the "Defendants intentionally created a system in which Plaintiff's constituents are given fewer rights than people with medical conditions, prison inmates....." encapsulates the entire tenor of the complaint and the alleged failures of the State's employees. Accordingly, these defenses will not be withdrawn.

#### 4. Defenses 31, 32, and 48

You allege that Plaintiff is seeking prospective injunctive relief only and, as such, sovereign immunity is inapplicable. As you are aware, the Eleventh Amendment bars civil rights suits brought under §1983, as well as claims under the ADA and other federal statutes, brought against a State in federal court. See e.g. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 104 (1984) and Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 375 (2001). There is an exception to this immunity, first enunciated in Ex parte Young, which permits claims brought against state officials in their official capacities for prospective injunctive relief. Alden v. Maine, 527 U.S. 706, 757 (1999). However, first I believe that Plaintiff will have to establish a prima facie case of constitutional and/or statutory violation, which it has not done. Further, the Ex parte Young exception does not permit judgments against state officers declaring that they have violated federal law in the past, which is part of the relief requested in the complaint. (see. e.g. Prayer for Relief, ¶¶ 1, and 2). See also Zahl v. Dept. of Law & Public Safety, 2008 U.S. Dist. LEXIS 24022 at \*24 (D.N.J. 2008)(Linares, J.) Finally, paragraph 8 of the Complaint's prayer for relief seeks any other relief deemed "just and proper", which is not solely defined as prospective relief. Accordingly, the defenses will not be withdrawn.

#### 5. Defenses 39 and 41

You allege that the defense of absolute immunity is unavailable to this defendant. However, as indicated above, Commissioner Velez is being sued in her official capacity, which is the same as an action against the State. The legislative body of the State is responsible for enacting statutes and appropriating funds, which encompasses the relief that you seek. As such, Defense 39 will not be withdrawn. As to Defense 41, which is not based upon absolute immunity, please see my response above.

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6. Defense 15

You allege that the Plaintiff is not required to exhaust administrative remedies prior to instituting suit under 42 U.S.C. §1983, the ADA or the R.A. I agree and will withdraw this defense.

7. Defense 16

You allege that the defense asserting an intention to bring R. 11 sanctions and seek prevailing party fees under §1988 is scandalous and an attack on Plaintiff's integrity. The Defendant has the right to assert defenses that concern the taxpayer's right to recoup expenses and fees. Further, your request to have this defense withdrawn at this time is premature, as it is simply too early to determine whether "the defense asserted could not possibly prevent recovery under any pleaded or inferable set of facts." Tonka Corp. v. Rose Art Industries, 836 F. Supp. 200, 218 (D.N.J. 1993).

8. Defense 19

You allege that deliberate indifference is irrelevant to this litigation. I agree that the standard in this case is whether the "decision by the professional is such a substantial departure from accepted professional judgment, practices or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." Rennie v. Klein, 720 F. 2d. 266, 268 (3d. Cir. 1983). Accordingly, this particular defense will be withdrawn and refiled accordingly.

9. Defense 25

You allege that the defense that plaintiff's constituents are not due procedural due process should be stricken, given Judge Debevoise's ruling on the motion to dismiss. However, given that the burden of proof was on the Defendant at the time of the motion to dismiss, obligating Judge Debevoise to accept as true all of plaintiff's allegations, the Defendant is still entitled to raise the defense that plaintiff and it's constituents are not entitled to the extent of the procedural due process that they seek. As such, this defense will not be withdrawn.

10. Defense 43

I believe that this defense was previously addressed above.

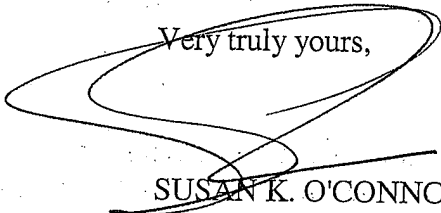
11. Defense 47

You allege that the defendant cannot be held liable under the Doctrine of Respondeat Superior. I agree, which is why this defense was asserted. See e.g. Monell v. Dept. of Social Services, 436 U.S. 658 (1978) and Black v. Stephens, 662 F.2d 181, 191 (3rd Cir. 1981) cert. den. 455 U.S. 1008, rehearing denied 456 U.S. 950 (A plaintiff is required to prove the liability of a municipal entity separate from the liability of its employee, and cannot use the Doctrine of Respondeat Superior to impose said liability.) Accordingly, it will not be withdrawn.

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In your correspondence, you advise that if all of the defenses, of which you take issue, are not withdrawn, you intend to file a motion to strike under Fed. R. Civ. P. 12(f). . With the exception of Defense 15 and 19, as pled in the Defendant's answer, which I have agreed to withdraw and re-file if necessary, it does not appear that any of the defenses which you take issue are "unworthy of consideration and should be stricken". Clark v. The Prudential Insurance Company, 2011 U.S. Dist. LEXIS 27030 at \*16 (D.N.J. 2011) (Debevoise, J.)(citations omitted). Further, I believe that any such motion, at this juncture, is a "premature evaluation of a defense's merits." United States v. Sensient Colors, Inc. 580 F. Supp. 2d. 369, 374 (D.N.J. 2008). However, if you intend to file the motion, please advise. I will then await the disposition of any motion to strike before filing an amended answer, as detailed above, so that the answer does not have to be amended twice. If you do not intend to file a motion, based upon the above responses, please advise and I will file an amended answer in accordance with this correspondence.

Very truly yours,



SUSAN K. O'CONNOR

SO:rk

cc: William Emmett Dwyer, Esq. @ Disability Rights New Jersey, Inc. [BY EMAIL (HARD COPY TO FOLLOW)]

Stephanie Beaty, Esq. @ State of New Jersey/ DHS [10-02845] [BY EMAIL (HARD COPY TO FOLLOW)]

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*Attorneys for Plaintiff Disability Rights New Jersey, Inc.*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

|   |   |                                 |
|---|---|---------------------------------|
|   |   |                                 |
| <b>DISABILITY RIGHTS NEW JERSEY, INC.,</b>          | : | HON. DICKINSON R. DEBEVOISE,    |
| a New Jersey non-profit corporation,                | : | U.S.D.J.                        |
|   | : |                                 |
| Plaintiff,  | : | Civil Action No. 2:10-cv-03950- |
|   | : | DRD-MAS                         |
| - against -   | : |                                 |
|   | : | <b>ORDER</b>                    |
|   | : |                                 |
| <b>JENNIFER VELEZ</b> , in her official capacity as | : |                                 |
| Commissioner, State of New Jersey Department        | : |                                 |
| of Human Services                                   | : |                                 |
|   | : |                                 |
| Defendant.  | : |                                 |
|   | : |                                 |
|   |   |                                 |

This matter having been opened to the Court by Plaintiff Disability Rights New Jersey, Inc. (“Plaintiff”) for an Order striking the defenses of Defendant Jennifer Velez (“Defendant”); and the Court having considered the submissions of the parties; and, for good cause shown;

**IT IS** on this \_\_\_\_\_ day of \_\_\_\_\_, 2011

**ORDERED** that Plaintiff's motion to strike Defendant's defenses is granted; and it is further

**ORDERED** that Defendant is to pay the reasonable costs and attorneys' fees incurred by Plaintiff in preparing its motion.

**ORDERED** that Defendant will have twenty-one (21) days from the date of this Order to submit an amended Answer in conformity with this Order.

---

Hon. Dickinson R. Debevoise, U.S.D.J.

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*Attorneys for Plaintiff Disability Rights New Jersey, Inc.*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

---

**DISABILITY RIGHTS NEW JERSEY, INC.,**  
a New Jersey non-profit corporation,

Plaintiff,

- against -

**JENNIFER VELEZ**, in her official capacity as  
Commissioner, State of New Jersey Department  
of Human Services,

Defendant.

---

HON. DICKINSON R. DEBEVOISE,  
U.S.D.J.

Civil Action No. 2:10-cv-03950-DRD-  
MAS

**CERTIFICATION OF SERVICE**

I hereby certify that Plaintiff's Notice of Motion to Strike Defenses, Memorandum of Law in support of the Motion, Declaration of Michael D. Reisman, Esq. with two accompanying exhibits, and a proposed form of Order, have been filed on the Court's ECF system and a copy of the aforementioned papers has been sent by Federal Express on August 25, 2011 to:

Honorable Dickinson R. Debevoise, U.D.S.J.  
U.S. District Court  
District of New Jersey  
Martin Luther King, Jr. Federal Building & U.S. Courthouse  
50 Walnut Street  
Newark, NJ 07101

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Respectfully submitted,

s/ William Emmett Dwyer  
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