UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians and next friends of Bradley J. Jensen, et al.,

Plaintiffs,

vs.

Minnesota Department of Human Services, an agency of the State of Minnesota, et al.,

Defendants.

File No. 09-CV-01775-DWF-FLN

MEMORANDUM OF LAW IN SUPPORT OF RULE 12 MOTION TO DISMISS VARIOUS CLAIMS AGAINST STATE DEFENDANTS

INTRODUCTION

In July, 2009, Plaintiffs filed an Amended Complaint spanning fifty pages and setting out Twenty Three (Counts I-XXIII) separate counts alleging various theories for recovery of damages and injunctive relief under federal and state law against State Defendants in their official and individual capacities.[1] The Amended Complaint also notices the intent of Plaintiffs to seek class action status, presumably on all claims.

State Defendants filed an Answer to the Amended Complaint on July 1, 2010 and, pursuant to Order of Magistrate Judge Noel, discovery is proceeding on issues relative to class certification.

[1] "State Defendants" refers to Minnesota Department of Human Services, an agency of the State of Minnesota; Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Douglas Bratvold, individually, and as Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; and State of Minnesota.

At this stage of the proceedings, however, and as set forth in greater detail below, State Defendants respectfully request that the Court dismiss various claims brought by Plaintiffs for relief as barred as a matter of law by the Eleventh Amendment or otherwise under federal or state law.

ARGUMENT

I. STANDARD OF REVIEW.

A party may challenge a Court's subject matter jurisdiction at any time, under Rule 12(b)(1), Federal Rules of Civil Procedure, since such a defense may not be waived. *See Moubry v. Independent School District No.* 696, 951 F. Supp. 867, 882 (D. Minn. 1996), citing *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 95 (1981); *Bueford v. Resolution Trust Corp.,* 991 F.2d 481, 485 (8th Cir. 1993)("Lack of subject matter jurisdiction * * * cannot be waived[;][it] may be raised at any time by a party to an action, or by the court *sua sponte.*").

"In order to properly dismiss an action under Rule 12(b)(1), the challenging party must successfully attack the Complaint, either upon its face or upon the factual truthfulness of its averments." *Moubry v. Independent School Dist. No. 696,* supra at 883, citing *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir. 1993); *Osborn v. United States,* 918 F.2d 724, 729 n. 6 (8th Cir. 1990).

In addition, Rule 12(c), Federal Rules of Civil Procedure, allows parties to move for a Judgment on the Pleadings, "[a]fter the pleadings are closed, but within such time as not to delay the trial." The standard upon which Rule 12(c) Motions are decided is akin to that of a Motion to Dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure.

See Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990) ("[W]e review this 12(c) motion under the standard that governs 12(b)(6) motions."), citing *St. Paul Ramsey County Med. Ctr. v. Pennington County,* 857 F.2d 1185, 1187 (8th Cir. 1988); *see also Flora v. Firepond, Inc.,* 260 F.Supp.2d 780, 784 (D. Minn. 2003), *aff 'd*, 383 F.3d 745 (8th Cir. 2004). As a result, a "[j]udgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." *Faibisch v. University of Minnesota,* 304 F.3d 797, 803 (8th Cir. 2004), citing *United States v. Any & All Radio Station Transmission Equip.,* 207 F.3d 458, 462 (8th Cir. 2000). A disputed fact is "material," if it must inevitably be resolved, and that resolution will determine the outcome of the case. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Jenkins v. Southern Farm Bureau Casualty,* 307 F.3d 741, 744 (8th Cir. 2002) ("A fact is material if its determination in favor of the non-moving party could affect the result in the case."); *Herring v. Canada Life Assurance,* 207 F.3d 1026, 1028 (8th Cir. 2000).

When making such determinations, the Court will accept as true, "all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the non-moving party." *Syverson v. Firepond, Inc.,* 383 F.3d 745, 749 (8th Cir. 2004), quoting *United States v. Any & All Radio Station Transmission Equip.,* supra at 462. However, the Court need not accept as true, wholly conclusory allegations, or unwarranted factual inferences. *See Hanten v. School Dist. of Riverview Gardens,* 183 F.3d 799, 805 (8th Cir. 1999); *Springdale Educ. Ass'n v. Springdale School Dist.,* supra at 651. Moreover, in treating the factual allegations of a Complaint as true, the

Court "do[es] not, however, blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott v. City of Omaha,* supra at 1488, citing *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir. 1987).

II. PLAINTIFFS' CLAIMS FOR DAMAGES AND RETROACTIVE EQUITABLE RELIEF AGAINST THE STATE, STATE AGENCIES, AND DOUG BRATVOLD IN HIS OFFICIAL CAPACITY UNDER THE FOURTEENTH AMENDMENT AND 42 U.S.C. § 1983 ARE BARRED BY THE ELEVENTH AMENDMENT.

Plaintiffs seek damages from the State Defendants in Count I, alleging violations of the Fourteenth Amendment as enforced through 42 U.S.C. § 1983 ("Section 1983").

Absent consent or Congressional enactment to the contrary, the Eleventh Amendment bars actions for damages against a state in federal court, as well as suits for retroactive equitable relief. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Green v. Mansour*, 474 U.S. 64, 68 (1985). When an action is barred by the Eleventh Amendment, a federal court must dismiss it. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 64-65, 73 (1996); Fed. R. Civ. P. 12(h)(3).

The State of Minnesota has not waived its immunity in this case. *See* Minn. Stat. § 1.05 (2008). Therefore, to the extent that Plaintiffs seek monetary damages from State Defendants in their official capacities, their claims are barred by the Eleventh Amendment and should be dismissed.

42 U.S.C. § 1983 provides in pertinent part:

> Every *person* who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (emphasis added). It is well settled that neither the State, a state agency, nor public officials acting in their official capacities are "persons" for purposes of Section 1983. *See Will,* 491 U.S. at 71 (affirming dismissal of state court Section 1983 action against state agency); *see also Hafer v. Melo*, 502 U.S. 21, 27-28 (1991). Suing a state officer in his or her "official capacity" is merely another form of suing the State. *See Kentucky*, 473 U.S. at 159. Accordingly, Plaintiffs' Section 1983 claims for monetary damages against State Defendants, including Defendant Doug Bratvold in his official capacity, also must be dismissed.

III. PLAINTIFFS' CLAIMS FOR DAMAGES AGAINST DEFENDANT BRATVOLD UNDER TITLE II OF THE ADA AND SECTION 504 OF THE REHAB ACT SHOULD BE DISMISSED.

In Counts VI and VII, Plaintiffs seek damages against Defendant Bratvold in his individual capacity based upon alleged violations of Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504"). These claims fail as a matter of law.

A. Claims For Damages Under Title II Of The ADA Are Not Available Against Individuals.

In Count VI, Plaintiffs assert their Title II claim against Doug Bratvold, in his individual and official capacities. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

"Individuals in their personal capacities, however, are not subject to suit under Title II, which provides redress only from public entities." *See Baribeau v. City of Minneapolis*, 596 F.3d 465 at 484 (8th Cir. 2010) (citing to *Alsbrook v. City of Maumelle,* 184 F.3d 999, 1005 n. 8 (8th Cir. 1999).

Therefore, dismissal is proper on Plaintiffs' claim in Count VI based upon Title II of the ADA against the Doug Bratvold in his individual capacity.

B. Claims For Damages Under Section 504 Are Not Available Against Defendant Bratvold In His Individual Capacity.

In Count VII, Plaintiffs assert their Section 504 claims against Doug Bratvold, in his individual and official capacities. As with the ADA, Section 504 does not authorize claims against Defendant Bratvold in his individual capacity. *See Alsbrook v. City of Maumelle,* 184 F.3d 999, 1011 (8th Cir. 1999), *cert. dismissed,* 529 U.S. 1001 (2000); *R.P. ex rel. K.P. v. Springdale Sch. Dist.,* No. 06-5014, 2007 WL 552117 at *5 (W. D. Ark. Feb. 21, 2007). Nor may Plaintiffs maintain a Title II claim under the enforcement authority of Section 1983 as allowing a plaintiff to bring a section 1983 claim based on violations of Title II against a defendant who could not be sued directly under Title II, as this would improperly enlarge the relief available for violations of Title II. *See Alsbrook,* 184 F.3d at 1011-12.

Accordingly, the Court should dismiss all Section 504 claims in Count VII against Defendant Bratvold in his individual capacity.

IV. PLAINTIFFS' STATE LAW CLAIMS AGAINST STATE DEFENDANTS, INCLUDING DEFENDANT BRATVOLD IN HIS OFFICIAL CAPACITY, ARE BARRED BY THE ELEVENTH AMENDMENT OR BY STATE LAW.

Plaintiffs seek money damages for alleged violations of the Minnesota Constitution as well as numerous Minnesota Statutes, Rules, and Minnesota common law. *See generally*, Counts III, IV, VIII, and X through XXII. In Count V, Plaintiffs further seek declaratory relief regarding Minn. Stat. § 245.825 and Minn. R. 9525.2700-.2810.

A. Various State Law Claims For Damages Are Barred By The Eleventh Amendment Against All State Defendants, including Defendant Bratvold in his official capacity.

All state law based claims against the State Defendants, including Defendant Bratvold in his official capacity, are barred by the Eleventh Amendment. *See Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100-01, 104 (1984) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.")

This Court recently addressed a similar issue in *Minnesota Pharmacists Association, et al., v. Pawlenty,* 690 F. Supp 2d. 809, 815-16 (D. Minn. 2010), and dismissed several claims premised under state law based on the protections afforded by the Eleventh Amendment and *Pennhurst*. There, this Court found the immunity afforded a state in federal court extends to agencies of the state. "That Plaintiffs here seek only declaratory and injunctive relief does not evade this immunity. *Id.* ("This jurisdictional bar applies regardless of the nature of the relief sought.") *Id.* at 815.

Finally, this Court held that "while the Supreme Court has long recognized an exception to Eleventh Amendment immunity permitting suits in federal court against state officials alleged to have violated federal law, at least where the relief sought is only injunctive, *Ex Parte Young,* 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), that exception does not extend to allow such suits based on pendent state-law claims even if the relief sought is limited to prospective injunctive relief. *Minnesota Pharmacists* at 815.

Counts III, IV, V, VIII, and X through XXII should be dismissed against State Defendants, including Defendant Bratvold in his official capacity.

B. Various State Law Claims For Damages Are Unsupported By State Law Against All State Defendants, including Defendant Bratvold in his official and/or individual capacity.

Even if the Court were to find that some state law claims survive under *Pennhurst*, many of the claims set out in the Amended Complaint fail as a matter of Minnesota law, including many claims against Defendant Bratvold in both his official and individual capacities.

1. Minnesota Constitution does not provide a cause of action for damages.

Plaintiffs allege in Count III that Defendants' acts and omissions deprived Plaintiffs of rights, privileges, or immunities secured or protected by the Article I, Section 7 of the Constitution of the State of Minnesota, and allege in Count IV a violation of Article I, Section 5 of the Minnesota Constitution, "causing Plaintiffs and Class Members damages in an amount to be proven at trial."

However, Minnesota does not have a statute similar to 42 U.S.C. § 1983 that enables a person to sue for money damages for alleged allegations under the Minnesota Constitution. *See Riehm v. Engelking*, 2007 WL 37799 (D. Minn. 2007) citing to *Guite v. Wright,* 976 F. Supp. 866, 871 (D. Minn. 1997) (holding that unlike 42 U.S.C. § 1983, Minnesota has no statutory scheme providing for private actions based on violations of the Minnesota constitution). *See also Mitchell v. Steffen*, 487 N.W.2d 896, 905 (Minn. Ct. App. 1992) (relief in form of money damages under the state constitution "unquestionably [would] be barred by the doctrine of sovereign immunity"), *aff'd*, 504 N.W.2d 198 (Minn. 1993), *cert. denied*, *Steffen v. Mitchell*, 510 U.S. 1081 (1994).

Because Plaintiffs' damages claims under the Minnesota Constitution would fail as a matter of law, it is therefore appropriate to dismiss these damages claims in Counts III and IV against all State Defendants, including Defendant Bratvold in both his official and individual capacities.

2. Fraud claims must be dismissed.

Plaintiffs allege Fraud, Misrepresentations and Reckless Misrepresentation in Count XX, Negligent Misrepresentation in Count XXI, and violations of Consumer Fraud and Deceptive Trade Practices in Count XXII.

In *Bernstein v. Extendicare Health Services*, 607 F. Supp. 2d. 1027, 1032 (D. Minn. 2009) this Court dismissed fraud claims based on statements that a nursing home will comply with or exceed "applicable laws," or that it has established "rigorous standards," or similar statements that services provided will be "high quality." This Court found such statements to be puffery, adding:

> Further, the statement in the admissions agreement that services will be provided 'as required by law' is a redundancy. Nursing homes are required by law to provide certain services under a comprehensive regulatory scheme. The admission agreement's recitation of that fact does not create a promise independent of the legal obligations already imposed by State and Federal laws and regulations.

Id.

This Court further noted that while it is possible that the Defendants are violating state laws and regulations and are not providing adequate care to residents, "a consumer protection action simply is not the path to resolution of those issues and [the Complaint fails to] state a cause of action. *Id.* The claims in Counts XX and XXI are properly dismissed against all State Defendants, including Defendant Bratvold in both his official and individual capacities, at this stage of the proceedings.

Further, there is no viable cause of action against the State under the Minnesota Consumer Fraud Act ("MCFA") (Count XXII). The MCFA prohibits "any person" from engaging in fraudulent conduct. *See* Minn. Stat. § 325F.69, subd. 1. The term "person" is defined as "any natural person or a legal representative, partnership, corporation (domestic and foreign), company, trust, business entity, or association, and any agent, employee, salesperson, partner, officer, director, member, stockholder, associate, trustee, or cestui que trust thereof." Minn. Stat. § 325F.68, subd. 3 (2008).

In *First National Bank of the North, et al., v. Miller Schroeder Financial, Inc.*, 709 NW 2d. 295, 299 (2006) *rev. denied* (Minn. April 26, 2006), the Minnesota Court of Appeals held that this definition does not encompass the state as an entity. There, the Court held, "Our analysis of the plain language of the statute establishes that the

Minnesota Consumer Fraud Act does not apply to the state as an entity." The fraud claims based upon alleged violations of the Minnesota Consumer Fraud Act should also be dismissed against the State Defendants, including Defendant Bratvold in his official capacity.

Plaintiffs also seek damages for alleged deceptive trade practices in Count XXII. However, in Minnesota, the "sole statutory remedy for deceptive trade practices is injunctive relief." *Buetow v. A.L.S. Enterprises, Inc.*, 2010 WL 1957489 (D. Minn. 2010) (citing to *Simmons v. Modern Aero, Inc.,* 603 N.W.2d 336, 339 (Minn. Ct. App. 1999). Moreover, "[b]ecause the MDTPA provides injunctive relief for a person likely to be damaged, it provides relief from future damage, not past damage." *Gardner v. First Am. Title Ins. Co.,* 296 F.Supp.2d 1011, 1020 (D. Minn. 2003) (quoting *Lofquist v. Whitaker Buick-Jeep-Eagle, Inc.,* No. C5-01-767, 2001 WL 1530907 at *2 (Minn. Ct. App. Dec. 4, 2001).

All claims in Count XXII based upon alleged violations alleged violations regarding deceptive trade practices should be dismissed against all State Defendants, including Defendant Bratvold in both his official and individual capacities.

3. Claims under Minn. Stat. §§ 253B.03, 144.651, 626.557, 626.5572, 245.825, and Minn. R. parts 9525.2700 to 9525.2810, must be dismissed.

In Count X Plaintiffs seek money damages for alleged violations of Minn. Stat. § 245.825 and Minn. R. 9525.2700-.2810; in Count XI, Plaintiffs seek money damages for alleged violations of Minn. Stat. § 144.651 (Patients' Bill of Rights); and in Count XII, Plaintiffs seek money damages for alleged violations of Minn.

Stat. §§ 253B.03, subd. 1 and 245.825; in Count XIII, Plaintiffs seek money damages for alleged violations of Minn. Stat. §§ 626.557 and .5572. All these claims are properly dismissed against State Defendants, including Defendant Bratvold in both his official and individual capacities.

a. Minn. Stat. § 253B.03.

In Count XII, Plaintiffs seek damages in part based on an alleged violation of Minn. Stat. § 253B.03. But the Minnesota Court of Appeals has previously concluded that Minn. Stat. § 253B.03, part of the Minnesota Commitment and Treatment Act ("commitment act"), does not provide a private cause of action.

In Minnesota, whether a statute creates a cause of action is a question of statutory interpretation. *Becker v. Mayo Foundation,* 737 N.W.2d 200, 207 (Minn. 2007). Further, courts should avoid imputing a cause of action where a statute has explicitly provided an alternative remedy. *Id.*

A statute gives rise to a cause of action only if "the language of the statute is explicit or it can be determined by clear implication." *Id.* We consider three factors in determining whether a cause of action can be implied: 1) whether the appellants are among the "special class of persons for whose benefit the statute was enacted," 2) whether the legislature indicated its intent regarding a private remedy, and 3) whether inferring a private remedy would be consistent with the statute's purpose. *Alliance for Metropolitan Stability v. Metropolitan Council,* 671 N.W.2d 905, 916 (Minn. App. 2003); s*ee also Flour Exch. Bldg. Corp*., 524 N.W.2d 496, 499 (Minn. Ct. App. 1994), *rev. denied* (Minn. Feb. 14, 1995) (setting out three factor test for determining intent to create

a private cause of action).

In *Kunshier v. Minnesota Sex Offender Program*, No. A09-0133, 2009 WL 3364217 at *6-7 (Minn. Ct. App. Oct. 20, 2009) *rev. denied* (Minn. Dec. 15, 2009), the Court of Appeals applied the *Alliance* three-factor analysis. Because there is no statutory language indicating that the legislature intended to create a private cause of action for alleged violations of the act, the Court found that there was no viable private cause of action under Section 253B. *See id.* at *6; *see also Semler v. Ludeman*, Nos. A08-1477, A08-1537, 2009 WL 2497697 at *3 (Minn. Ct. App. Aug. 18, 2009) *rev. denied* (Minn. Oct. 28, 2009) (same); *Woodruff v. Ludeman*, No. A06-1659, 2007 WL 4390446 at *1-2 (Minn. App. Dec. 18, 2007) (same).

Claims in Count XII based on alleged violations of section 253B are improper and should be dismissed against all State Defendants, including Defendant Bratvold in both his official and individual capacities..

b. Minn. Stat § 144.651.

Plaintiffs rely on Minn. Stat. § 144.651 for its claims in Count XI. Just as with Section 253B, however, the Minnesota Patients Bill of Rights does not provide a private cause of action.

In *Semler v. Finch*, No. A06-1178, 2007 WL 1976751 (Minn. Ct. App. July 10, 2007) *rev. denied* (Minn. Sept. 18, 2007), the Minnesota Court of Appeals applied the three-prong test in *Flour Exchange* and rejected a claim under the patient bill of rights:

> We find that the Minnesota Patients Bill of Rights does not provide a private cause of action.

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> By giving the commissioner of health exclusive authority to enforce the patients bill of rights and expressly stating that issuance of a correction order will not enlarge or alter a private action, the legislature demonstrated that it did not intend to create a new private cause of action.

Id. at *2 (internal citations omitted).

In *Semler v. Ludeman*, 2009 WL 2497697 at *3, the Court of Appeals relied on the decision in *Becker v. Mayo Foundation*, 737 N.W.2d 200 at 207, where the Minnesota Supreme Court held that whether a statute creates a cause of action is a question of statutory interpretation. "A statute gives rise to a cause of action only if 'the language of the statute is explicit or it can be determined by clear implication,' and that 'courts should avoid imputing a cause of action where a statute has explicitly provided an alternative remedy.'" *Id.* Because the patients' bill of rights vests exclusive authority with the commissioner of health to address violations of the enumerated rights, the legislature has provided a remedy for rights and for that reason did not establish a cause of action under the statute. *Semler v. Ludeman*, 2009 WL 2497697 at *3; *see also Semler v. Ludeman*, 2010 WL 145275 at *29 (D. Minn. Jan. 8, 2010) (recognizing that Minnesota Patient Bill of Rights does not provide for a private cause of action); *Kunshier v. Minnesota Sex Offender Program*, 2009 WL 3364217 at *7 (holding that because the statute has grievance procedures to enforce its provisions and authorizes the commissioner of the department of health to remedy any substantial violations of the statute by issuing correction orders, the legislature did not intend for patients to have a private cause of action under this act).

Claims in Count XI based on alleged violations of section 144.651 are improper and should be dismissed against all State Defendants, including Defendant Bratvold in both his official and individual capacities..

c. Minn. Stat. §§ 626.557 and 626.5572.

In Count XIII, Plaintiffs allege negligence for violations of Minn. Stat. §§ 626.557 and 626.5572. Again, however, the Minnesota Supreme Court in *Becker v. Mayo Foundation***,** 737 N.W.2d 200 at 208-9, concluded that the plain language of the statute indicated that the legislature chose to impose criminal, but not civil, penalties on mandatory reporters who fail to report; that the statute does not create civil liability.

Count XIII is properly dismisses as against all State Defendants, including Defendant Bratvold in both his official and individual capacities.

d. Minn. Stat. § 245.825 and Minn. R. 9525.2810.

In Count X, Plaintiffs seek damages for alleged violations of Minn. Stat. § 245.825 and Minn. R. 9525.2810. These claims also necessarily fail as a matter of law.

Minn. Stat. § 245.825 provides that DHS shall promulgate rules governing the use of aversive and deprivation procedures in all licensed facilities and licensed services serving persons with developmental disabilities. *See* Minnesota Rules parts 9525.2700 to 9525.2810 (use of aversive and deprivation procedures in licensed facilities serving persons with developmental disabilities)("Rule 40"). Nothing in 245.825 provides for a cause of action for money damages to address alleged violations. Minn. Rule 9525.2780, subp. 7, provides, in part:

> A person or the person's legal representative may initiate an appeal under Minnesota Statutes, section 256.045, subdivision 4a, for issues involving the use of a controlled procedure and related compliance with parts 9525.0015 to 9525.0165 and 9525.2700 to 9525.2810.

The Amended Complaint fails to allege that any appeals were filed, but even if an appeal had gone forward, the rule does not provide a private cause of action for damages or otherwise.

Moreover, Minn. Rule 9525.2810 further sets out the penalty for noncompliance, but does not provide for money damages.[2] Utilizing the analysis of the courts in *Becker*, *Kunshier*, *Semler*, and *Woodruff*, no private cause of action is authorized under these statutes or rules. As such, the claims in Count X should be dismissed at this time.

Because there is no private cause of action under Minn. Stat. §§ 253B.03, 144.651, 245.825, and Minn. R. 9525.2700-.2810, Counts X, XI, XII, and Count XIII are properly dismissed at this stage of the proceedings against State Defendants, including Defendant Bratvold in both his official and individual capacities.

V. CLAIMS BASED UPON ALLEGED VIOLATIONS OF 42 C.F.R. 482.13 MUST BE DISMISSED.

In Count IX, Plaintiffs allege violations of 42 C.F.R. 482.13 at METO because "METO participated in the Medicaid program thereby subjecting METO to the federal patients' bill of rights, codified at 42 C.F.R. 482.13. However, 42 C.F.R. 482.13, by its very language is limited to hospitals and METO is not, nor has it ever been, a hospital.

[2] Rule 9525.2810 provides, "If a license holder governed by parts 9525.2700 to 9525.2810 does not comply with parts 9525.2700 to 9525.2810, the commissioner has the authority to take enforcement action pursuant to Minnesota Statutes, chapter 245A and section 252.28, subdivision 2."

Because 42 C.F.R. 482.13 does not apply to METO, the claim in Count IX should be dismissed against all State Defendants.

Even if the federal patient bill of rights did apply to METO, several federal courts have also declined to extend a private cause of action under other Patients' Bill of Rights' statutes. *See Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 994-95 (1st Cir. 1992); *Smith v. Au Sable Valley Cmty. Mental Health Servs.*, 431 F. Supp. 2d 743, 750-51 (E.D. Mich. 2006). Plaintiffs have set forth no basis upon which to suggest that Congress intended to create a private cause of action for damages under 42 C.F.R. 482.13.

As there is no private cause of action under 42 C.F.R. 482.13, Count IX should be dismissed against State Defendants, including Defendant Bratvold in both his official and individual capacities, on this basis as well.

VI. PLAINTIFFS' CLAIMS UNDER THE EIGHTH AMENDMENT MUST BE DISMISSED.

In Count II, Plaintiffs allege that Defendants are obligated to operate and implement METO and safeguard patients in the METO program in a manner that does not infringe upon their federal rights, including the right to be free from cruel and unusual punishment guaranteed pursuant to the Eighth Amendment, as enforced pursuant to 42 U.S.C. § 1983.

The Eighth Amendment applies only to individuals who are in custody as punishment for a criminal conviction. The Eighth Amendment's proscription against "cruel and unusual *punishments*" does not apply to civilly committed detainees, because they are not being punished for criminal offenses. *See Rousseau v. Service*,

2008 WL 920470 (D. Minn. 2008) *citing to Revels v. Vincenz,* 382 F.3d 870, 874 (8th Cir. 2004) ("because an involuntarily committed psychiatric patient is confined for treatment rather than incarcerated for the purpose of punishment following conviction, the Eighth Amendment does not apply").

Because Plaintiffs were civilly committed, and not confined for a criminal conviction, claims asserted under the Eighth Amendment do not apply and Count II should be dismissed against all State Defendants, including Defendant Bratvold in both his official and individual capacities.[3]

CONCLUSION

Based upon the forgoing, and for the reasons set forth above, these various claims as set forth in Amended Complaint should be dismissed at this stage of the proceedings as against all State Defendants including Defendant Bratvold in his official and/or individual capacities.

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[3] State Defendants acknowledge that the due process clause of the Fourteenth Amendment provides pre-trial detainees essentially the same protections as those provided to convicted prisoners under the Eighth Amendment. *See Butler v. Fletcher*, 465 F.3d 340, 344 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2128 (2007). Federal courts have also found that the legal status of a civilly committed person is much like that of a pre-trial detainee, and that a civilly committed detainee's due process rights must therefore be comparable to those of a pre-trial detainee. *See Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (recognizing similarity between due process rights of civilly committed detainees and those of pre-trial detainees). Therefore, the constitutional guaranty of due process protects civilly committed detainees from conditions that would be considered "cruel and unusual punishment" for convicted criminals.

Dated: July 19, 2010.

Respectfully submitted,

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