IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

LAW PROJECT FOR PSYCHIATRIC RIGHTS, Inc., an Alaskan non-profit corporation, Plaintiff, vs. STATE OF ALASKA, *et al.*, Defendants,	)

Case No. 3AN 08-10115CI

OPPOSITION TO JUDGMENT ON THE PLEADINGS

Plaintiff, the Law Project for Psychiatric Rights (PsychRights®), opposes the Motion for Judgment on the Pleadings (Motion) filed by defendants State of Alaska, *et al.*, (State). Eliminating extraneous matter, the State's sole ground for the motion is the assertion that PsychRights lacks "citizen-taxpayer," standing because there are better parties to bring this suit. This is false. No one else has or is likely to bring such an action and no one else is in a position to competently assert the legal claims made herein.

I. Standards for Considering Motions for Judgment on the Pleadings

Civil Rule 12(c) provides:

> **(c) Motion for Judgment on the Pleadings**. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters out-side the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A decision granting a motion for judgment on the pleadings is not a final judgment under Civil Rule 58. When the decision adjudicates all unresolved claims as to all parties, the judge shall direct the appropriate party to file a proposed final judgment. The proposed judgment must be filed within 20 days of service of the decision, on a separate document distinct from any opinion, memorandum or order that the court may issue.

In *Prentzel v. State, Dept. of Public Safety*,[1] the Alaska Supreme Court held a movant for judgment on the pleadings can prevail only if the "pleadings contain no allegations that would permit recovery if proven." The Alaska Supreme Court in *Prentzel* also made clear that "a party should be permitted to amend if there is no showing that amending would cause injustice," reversing the superior court's denial of such a motion.[2]

In *Hebert v. Honest Bingo*,[3] which was cited by the State, the Alaska Supreme Court reversed the granting of a motion for judgment on the pleadings, saying:

> [A] Rule 12(c) "motion only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain."

The Court also held"

> When a court considers a motion for judgment on the pleadings, it must "view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party."[4]

II. Standing

The only legal ground actually asserted in the State's Motion for Judgment on the Pleadings is the affirmative defense that PsychRights lacks standing. In *Hebert*, the Alaska Supreme Court discussed the special situation posed when a motion for judgment on the pleadings is based solely on an affirmative defense.[5]

> A Rule 12(c) motion based solely upon an affirmative defense poses a special situation because a plaintiff is not permitted to reply to affirmative defenses or new material contained in the defendant's answer absent a court order to the contrary. Accordingly, judgment on the pleadings is inappropriate if the defendant seeks

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[1] 53 P.3d 587, 590, (Alaska 2002).
[2] 53 P.3d at 590-91.
[3] 18 P.3d 43, 46 (Alaska 2001), footnote omitted.
[4] 18 P.3d at 46-47, footnote omitted.
[5] 18 P.3d at 47, footnotes omitted.

> relief based upon any factual matters raised in the answer to which the plaintiff has not had an opportunity to respond: "Thus, when material issues of fact are raised by the answer and defendant seeks judgment on the pleadings on the basis of this matter, his motion cannot be granted."

The seminal case for "citizen-taxpayer" standing in Alaska is *Trustees for Alaska v Alaska Department of Natural Resources*,[6] in which the Alaska Supreme Court laid out the requirements as follows:

> First, the case in question must be one of public significance. . . . Second, the plaintiff must be appropriate in several respects. For example, standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit. The same is true if there is no true adversity of interest, such as a sham plaintiff whose intent is to lose the lawsuit and thus create judicial precedent upholding the challenged action. Further, standing may be denied if the plaintiff appears to be incapable, for economic or other reasons, of competently advocating the position it has asserted

A. Citizen-Taxpayer Standing

(1) Pleading Citizen-Taxpayer Standing

The State raises that PsychRights did not include a specific allegation of citizen-taxpayer standing. In *Hebert*, the Court said:[7]

> [J]udgment on the pleadings is appropriate where the defendant raises an affirmative defense that is supported by the undisputed facts. For example, when the statute of limitations is alleged as a bar to the plaintiff's claims, a Rule 12(c) motion may be an appropriate avenue for relief if the statute of limitations defense is apparent on the face of the complaint and no question of fact exists

Assuming *arguendo*, that the Amended Complaint is technically insufficient for failing to include the allegation that PsychRights has citizen-taxpayer standing, PsychRights will be

[6] 736 P.2d 324, 329-30 (Alaska 1987), footnotes omitted.
[7] *Id.*, footnote omitted.

moving for leave to amend the Complaint to do so. Allowance of such an amendment appears to be mandatory.[8]

(2) This Case is of Public Significance

The State does not dispute that this case raises issues of public significance.[9] This can not be seriously disputed.

(a) Psychiatric Drugs Are Being Pervasively Prescribed to Children & Youth in State Custody and Through Medicaid In Spite of the Lack of Scientific Support for the Practice

Attached hereto as Exhibit 1 is a copy of the CriticalThinkRx Curriculum, which is funded by the Attorneys General Consumer & Prescriber Education Grant Program, overseen by the Attorney General offices of Florida, New York, Ohio, Oregon, Texas, Vermont and two rotating states (CPGP).[10] The CriticalThinkRx Curriculum was specifically developed to inform non-medically trained professionals working in child welfare and mental health and was the result of systematic literature searches selecting materials based on relevance and accuracy.[11]

Among the CriticalThinkRx findings are:

> "Basic empirical support of efficacy in children is lacking for most individual [psychotropic] medication classes and no studies have established the safety and efficacy of combination treatments in children."[12]

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[8] *Prentzel*, 53 P.3d at 590-91; *Fomby v. Whisenhunt*, 680 P.2d 787, 790 (Alaska 1984).
[9] Motion for Judgment on the Pleadings, page 16.
[10] Exhibit 1, p. 2. The funds available to the CPGP came from the settlement of a lawsuit against the manufacturer of the anticonvulsant Neurontin for the illegal marketing of Neurontin for unapproved ("off-label") use. *Id*.
[11] *Id*.
[12] Exhibit 1, p, 17, CriticalThinkRx Curriculum, citing to Bhatara, V., Feil, M., Hoagwood, K., Vitiello, B., & Zima, B. (2004), National trends in concomitant psychotropic

In spite of this, the number of children and youth in the United States administered these drugs tripled during the 1990s and is still rising in this decade.[13] Seventy-five per cent of all psychiatric medication use in children is for uses not approved by the Food and Drug Administration (FDA).[14]

> "The bottom line is that the use of psychiatric medications [in children] far exceeds the evidence of safety and effectiveness."[15]

Psychotropic drugs given to children and youth increase behavioral toxicity, causing apathy, agitation, aggression, mania, suicidal ideation and psychosis, leading to additional mental illness diagnoses and more psychiatric drugging.[16]

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medication with stimulants in pediatric visits: Practice versus knowledge. Journal of Attention Disorders, 7(4), 217-226; Jensen, P.S., Bhatara, V.S., Vitiello, B., Hoagwood, K., Feil, M., and Burke, L.B. (1999). Psychoactive medication prescribing practices for U.S. children: Gaps between research and clinical practice. Journal of the Academy of Child and Adolescent Psychiatry, 38(5), 557-565; Martin, A., Sherwin, T., Stubbe, D., Van Hoof, T., Scahill, L., & Leslie, D. (2002). Use of multiple psychotropic drugs by Medicaid-insured and privately insured children. Psychiatric Services, 53(12), 1508; Vitiello, B. (2001). Psychopharmacology for young children: Clinical needs and research opportunities. Pediatrics, 108(4), 983-989

[13] Exhibit 1, page 16, citing to Olfson, M., Blanco, C., Liu, L., Moreno, C., & Laje, G. (2006). National trends in the outpatient treatment of children and adolescents with antipsychotic drugs. Archives of General Psychiatry, 63(6), 679-685; Olfson, M., Marcus, S.C., Weissman, M.M., & Jensen, P.S. (2002). National trends in the use of psychotropic medications by children. Journal of the American Academy of Child and Adolescent Psychiatry, 41(5), 514-21; and Zito, J. M., *et al*., (2003), Psychotropic practice patterns for youth: A 10-year perspective. Archives of Pediatric & Adolescent Medicine, 157(1), 17-25.

[14] Exhibit 1, page 17, citing to Vitiello, B. (2001). Psychopharmacology for young children: Clinical needs and research opportunities. Pediatrics, 108(4), 983-989; and Zito, J. M., *et al*., (2003), *supra*.

[15] Robert Farley, The 'atypical' dilemma: Skyrocketing numbers of kids are prescribed powerful antipsychotic drugs. Is it safe? Nobody knows, *St. Petersburg Times*, July 29, 2007, quoting Ronald Brown, Chair, 2006 American Psychological Association Task Force on Psychotropic Drug Use in Children.

Children in foster care are 16 times more likely to receive psychotropic drugs than their non-foster care counterparts.[17] Children in welfare settings, such as those enrolled in Medicaid, are two and three times more likely to be given psychiatric drugs than children in the general community.[18]

These alarming facts apply to Alaska as the State admits in its Answer.[19] From April 1, 2007, through June 30, 2007, at least the following number of Alaskan children and youth under the age of 18 received the following psychiatric drugs through Medicaid:

- second generation neuroleptics -- 1,033
- first generation neuroleptics -- 15
- stimulants -- 1,578
- supposedly non-stimulant drugs such as Strattera --293
- antidepressants -- 871
- anticonvulsants marketed as "mood stabilizers" -- 723
- noradrenergic agonists, most likely Clonidine to counteract problems caused by the administration of neuroleptics -- 470[20]

In fact, Facing Foster Care in Alaska (FFCA), the statewide group of foster Youth and Alumni in Alaska,[21] held a statewide retreat in November of 2008, and issued its report, "Mental Health Services and Foster Care," (FFCA Report) in which they state:

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[16] Exhibit 1, page 18, citing to Safer, D. J., Zito, J. M., & dosReis, S. (2003). Concomitant psychotropic medication for youths. American Journal of Psychiatry, 160(3), 438-449.
[17] Zito, J. M., *et al.* (2003), supra.
[18] Exhibit 1, page 20, citing to Breland-Noble, A.M., Elbogen, E.B., Farmer, E.M.Z., Dubs, M.S., Wagner, H.R., & Burns, B.J. (2004). Use of psychotropic medications by youths in therapeutic foster care and group homes. Psychiatric Services, 55(6), 706-708; Raghavan, R., Zima, B. T., Andersen, R. M., Leibowitz, A. A., Schuster, M. A., & Landsverk, J. (2005). Psychotropic medication use in a national probability sample of children in the child welfare system. Journal of Child and Adolescent Psychopharmacology.Special Issue on Psychopharmacoepidemiology, 15(1), 97-106.
[19] Paragraphs 229-235 of the Amended Complaint herein and the State's Answer pertaining thereto.
[20] *Id*.

> In their 2008 Policy Agenda, FFCA members called for Decreased use of Psychotropic Medication for Alaska's foster youth. Many of Alaska's youth and alumni complain about being prescribed psychotropic medications after entering the foster care system for symptoms of depression, anxiety, trauma, attachment issues, and misbehavior. The youth and alumni of FFCA feel that these are all normal symptoms of child maltreatment and dealing with all that comes out of being placed in foster care. There has been a national focus on the use of psychotropic medications being over-prescribed for children and youth in foster care. FFCA members have also complained about side-effects caused by these medications resulting in a decreased ability to focus on their education as well as function in everyday society. The youth and alumni of FFCA would like to see that the prescription of psychotropic medications for Alaska's foster children and youth is decreased and reviewed more closely.[22]

Among the comments in the FFCA Report made about children and youth in foster care being given psychiatric drugs are:[23]

- Too young for drugs
- Worse Afterwards
- Makes you Worse
- Lies & deception
- In hell
- Messes with life
- No Choice
- Constant Labeling
- False Accusations
- No advocating What-so-ever
- Guinea pigs
- Other alternatives
- No reason
- Forced
- Over-mediating
- Prolific diagnosis
- Taking away childhood
- Normality-shouldn't we be like this?

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[21] FFCA defines "Youth" as "a young person in foster care" and "Alumni" as "a person who was in foster care at some point during their life." Exhibit 2, p. 7

[22] Exhibit 2, p. 4, emphasis added.

[23] Exhibit 2, p. 3.

Interestingly, the solutions suggested by the FFCA Youth and Alumni correspond closely to those the scientific evidence set forth in the CriticalThinkRx Curriculum and incorporated into the Amended Complaint herein show are effective.

There is no doubt this case raises issues of public importance.

(3) There is No More Directly Affected Plaintiff Likely to Bring Suit For A Systemic Injunction Against The Improper Psychotropic Drugging of Alaskan Children and Youth In State Custody or Paid For Through Medicaid.

PsychRights satisfies the citizen-taxpayer standing requirement that there be no more directly affected plaintiff likely to bring suit. The State asserts "there is no reason to presume [a minor Medicaid recipient or child in state custody who has been prescribed or is taking psychotropic medication] would not sue."[24] This fundamentally misconstrues the lawsuit by ignoring that individual affected persons may not be able to obtain the relief requested. Individuals can assert the right that they, or their child or ward, not be subjected to such inappropriate psychiatric drugging and perhaps even obtain a declaratory judgment to that effect. However, the most important relief requested is the injunction against the State improperly administering or paying for the administration of psychotropic drugs to any Alaskan children or youth. This was one of the reasons PsychRights brought this action in its own name, and did not name any other plaintiffs.

(b) The State Would Not Be a Proper Plaintiff

The State asserts:

> To the extent [PsychRights] purports to represent the general public interest of children in state custody . . ., representation of the general public interest of children

[24] Motion for Judgment on the Pleadings, pages 17-18.

> in state custody "rests with the Attorney General for the State of Alaska, the Department, and/or the parents and guardians of individual children in state custody or the children themselves -- not [PsychRights]."[25]

Would that it were so that the Alaska Attorney General was protecting the legal rights of children and youth in State custody and through Medicaid from the improvident, largely ineffective, and harmful administration of psychotropic drugs. Instead, it is defending the indefensible.

Would that it were so that the Department of Health and Social Services was fulfilling its obligations with respect to the improper administration of psychotropic medication to children and youth of whom it has seized custody and paying for through Medicaid.

The State's attention was directed to the CriticalThinkRx Curriculum on June 11, 2008, which was two and one half months before this action was even filed,[26] yet when answering the Amended Complaint on these same facts,[27] responded it was without sufficient information to admit or deny them.[28] Instead, the State asserts it is powerless to stop the harm to children and youth of whom it has seized custody:

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[25] Motion for Judgment on the Pleadings, pages 14-15.
[26] Exhibit G to Amended Complaint.
[27] The vast majority of the allegations in the Amended Complaint regarding (1) the FDA Drug Approval Process, (2) Undue Drug Company Influence Over Prescribing Practices, (3) Pediatric Psychotropic Prescribing, (4) Neuroleptics, (5) Antidepressants, (6) Stimulants, (7) Anticonvulsants Promoted as "Mood Stabilizers," and (8) Evidence-Based, Less Intrusive Alternatives: Psychosocial Interventions, as well as (9) the "CriticalThinkRx Specifications," come from the CriticalThinkRx Curriculum.
[28] Answer, ¶s 38- 84, 86-92, 94-106, 108-110, 113-132, 134-135, 138, 140-143, 145-148, 152, 154-158, 162-163, 166-167, 169-181, 186, 190-199, 201-211.

> A reading of the Complaint makes obvious that the true subject of plaintiff's grievances is not the Department, but prescribers of psychotropic pharmaceuticals, the pharmaceutical companies which produce and market them, and the overall culture of pediatric psychiatry. The implication that the Department possesses meaningful authority and control over these matters-or is in any realistic position to administer the relief requested even if the court were to order it-is a fiction.[29] . . .
>
> Insofar as plaintiff disagrees with the practice of pediatric psychiatry and the culture of pharmaceutical marketing and prescribing practices related to psychotropic medication, those matters are not within the Department's meaningful control.[30]

As set forth below, it is not only within the State's control to stop the immense harm caused by the administration of psychotropic drugs to children and youth in its custody, it is its obligation to do so. It is clear from the State's abdication of responsibility that this Court must step in to protect these most vulnerable of Alaskan children and youth from the harm being inflicted upon them through the State's abdication of responsibility.

At pages 3-4 of its Motion for Judgment on the Pleadings, citing to AS 47.10.084, AS 47.12.150, and AS 47.30, the State asserts only parents or the courts can authorize the administration of psychotropic medication, going on to say:

> In short, the administration of psychotropic medication to children in Alaska is a decision left to the parent or legal guardian of the child, or to the superior court. None of the named defendants is permitted to prescribe, authorize, or administer psychotropic medication to any child in the state absent consent from that child's parent, legal guardian, a superior court judge, or, in some circumstances, the child himself or herself. The named defendants simply do not administer psychotropic medication to children in custody in the manner portrayed by plaintiffs Complaint. Rather, there exist well-established statutory schemes-none of which is referenced in the Complaint-to seek individual approval to make such decisions.[31]

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[29] Motion for Judgment on the Pleadings, page 2.
[30] Motion for Judgment on the Pleadings, page 20.
[31] Motion for Judgment on the Pleadings, page 5

First, this is clearly untrue because AS 47.10.084(a) provides that when parental rights have been terminated the State assumes the parents' residual right to give consent.

Second, the State is clearly wrong on the law regarding its responsibility under AS 47.12.150 even if parental rights have not been terminated. In *Matter of A.E.O*,[32] in another context, the Alaska Supreme specifically rejected the State's interpretation that the existence of residual parental rights and responsibilities relieved it of the same responsibilities:

> The term "subject to" in section .084(a) best connotes the idea that the state's responsibility is subordinate to that of the parent, not that it is eliminated because the parents are also responsible.

Frankly, the State's interpretation that AS.47.10.84 divests it of responsibility for the psychiatric drugging of children and youth in its custody doesn't make sense.

As set forth above, *Matter of A.E.O.* rejects the State's interpretation of the language in another context. Accepting the State's interpretation creates a conflict within AS 47.10.084. AS 47.10.084 provides in pertinent part:

> (a) When a child is committed under AS 47.10.080(c)(1) to the department, . . . or committed to the department or to a legally appointed guardian of the person of the child under AS 47.10.080(c)(3), a relationship of legal custody exists. This relationship imposes on the department and its authorized agents or the parents, guardian, or other suitable person the responsibility of physical care and control of the child, . . . the right and duty to protect, nurture, train, and discipline the child, the duty of providing the child with . . . medical care . . .. These obligations are subject to any residual parental rights and responsibilities . . .. When parental rights have been terminated . . . the responsibilities of legal custody include those in (b) and (c) of this section. . . .
>
> (b) When a guardian is appointed for the child, the court shall specify in its order the rights and responsibilities of the guardian. . . . The rights and responsibilities

[32] 816 P.2d 1352, n9 (Alaska 1991).

> may include, but are not limited to, having the right and responsibility of . . . consenting to major medical treatment . . ..
>
> (c) When there has been transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities. These residual rights and responsibilities of the parent include, but are not limited to . . . consent to major medical treatment except in cases of emergency or cases falling under AS 25.20.025, . . . except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section. In this subsection, "major medical treatment" includes the administration of medication used to treat a mental health disorder.[33]

As the Alaska Supreme Court held in *A.E.O.*, the proper way to interpret this is that the "subject to" does not divest the State of its "right and duty to protect, nurture, train, and discipline the child, the duty of providing the child with . . . medical care . . ."

It is also the State's responsibility to provide the proper non-psychopharmacological approaches identified in PsychRights Amended Complaint in compliance with its AS 47.10.084(a) "duty to protect, nurture, train, and discipline" when that is in the child or youth's best interests, instead of immediately reaching for the pill bottle.[34]

In addition to these statutory obligations, the State has the constitutional obligation to protect children in its custody. The United States Supreme Court has held if a state,

> fails to provide for his basic human needs-e.g., food, clothing, shelter, medical care, and reasonable safety-it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.[35]

Third, it is PsychRights understanding, the "consents" are virtually always obtained because one or more of the defendants seek such consent (or court order). In seeking such

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[33] Emphasis added.
[34] *See*, AS 47.10.084(a). §A(1) of PsychRights Amended Complaint seeks this relief.
[35] *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200, 109 S.Ct. 998, 1005 (1989).

consents from parents and guardians, and for that matter, court orders, the State provides the parents and guardians with inaccurate information in order to obtain the consents and court orders.[36] In addition, it is PsychRights' understanding parents are often subjected to extreme pressure to agree to the psychiatric drugging of their children.[37] The State's protestations of non-involvement are disingenuous.

It is clearly the State's responsibility to prevent the children and youth in its custody from being harmed by inappropriate psychiatric drugging. It is shameful the State is abdicating its responsibility when it should be working to correct the problem. If, as the State asserts through the Attorney General, that "representation of the general public interest of children in state custody rests with the Attorney General for the State of Alaska," it should not be using the full weight of its office to defending the defendants indefensible position, but instead insisting the State fulfill its statutory, constitutional, and moral duty to the children and youth of Alaska.

In *Trustees for Alaska*, the Alaska Supreme Court rejected the possibility that the United States Attorney General might bring suit as a sufficient basis for finding it was "a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit" and thereby divest Trustees for Alaska of standing.[38] Here, it is clear the

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[36] §A(iii) of PsychRights' Prayer for Relief is "the person or entity authorizing administration of the drug(s) is fully informed of the risks and potential benefits." This includes parents giving consent under AS 47.10.084(c).

[37] PsychRights also understands parents are often threatened that they will have no chance of getting their child(ren) back if they don't consent to the psychotropic drugs. These facts are expected to be established through discovery.

[38] 736 P.2d 330.

State is not likely to be such a plaintiff and if it did file such a suit, it would be acting as exactly the type of sham plaintiff that is not permitted.[39]

(c) No Affected Child or Youth, Parent or Guardian Is Likely to Sue

The State asserts "there is no reason to presume [a minor Medicaid recipient or child in state custody who has been prescribed or is taking psychotropic medication] would not sue."[40] This is a far cry from *Trustees for Alaska's* requirement of "likely to sue" as the grounds for divesting PsychRights of citizen-taxpayer standing.[41] It is also untrue. There is every reason to presume that neither the children or youth themselves, nor parents or guardians parties, would sue.

First, none have. In *Ruckle v. Anchorage School Dist.*,[42] cited by the State, the Alaska Supreme Court affirmed dismissal because a more directly affected plaintiff already had filed suit. In *Trustees for Alaska*,[43] itself, the Alaska Supreme Court, citing to *Carpenter v. Hammond*[44] and *Coghill v. Boucher*,[45] made it very clear that no one else having filed suit is a strong indication that no one else is likely to file suit.

Second, these children and youth, as well as their parents, lack the resources to do so, and are subject to severe retribution if they tried. They are uniformly poor and otherwise disadvantaged. Guardians are perhaps sometimes in a different situation, but

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[39] *Id*.
[40] Motion for Judgment on the Pleadings, pages 17-18.
[41] 736 P.2d at 329.
[42] 85 P.3d 1030, 1035 (Alaska 2004).
[43] 736 P.2d at 330.
[44] 667 P.2d 1204, 1210 (Alaska 1983), as cited in *Trustees for Alaska* 736 P.2d at 330.
[45] 511 P.2d 1297 (Alaska 1973).

often, the guardian is the State itself. With respect to non-state guardians for adults, PsychRights knows of a case where a guardian was not allowed to object to forced psychiatric drugging of her ward, and another one where the guardian, the wife of the ward, was removed as guardian because she didn't want him forced to take psychiatric drugs. Part of the discovery planned by PsychRights is to flesh out the State's overwhelming influence if not outright coercion of parents and guardians. Guardians are simply not usually in a position to mount such a lawsuit.

It is known that children and youth attempting to assert their rights are punished therefor. The FFCA Report on Mental Health Services evidences, "one member commented that he did know his rights, but if he did refuse medication he would be placed in North Star."[46] It is also known that if parents don't "toe the line" they are told they will have no chance of reunification.

Third, the potential for being subjected to an award of attorney's fees against them, is a powerful disincentive to bringing such a lawsuit.[47]

Fourth, the State is almost certain to assert children and youth in state custody do not have the right to bring such a lawsuit on their own behalf.

(4) PsychRights Satisfies the Adversity Requirement

In *Trustees for Alaska*, the Alaska Supreme Court described the adversity requirement as follows:

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[46] Exhibit 2, p.4.
[47] *See*, discussion of this issue in §II.B., below.

> [Standing may be denied] if there is no true adversity of interest, such as a sham plaintiff whose intent is to lose the lawsuit and thus create judicial precedent upholding the challenged action

The State does not contest that PsychRights is sufficiently adverse, conceding PsychRights is a "legitimate public advocacy organization."[48]

The Alaskan not-for profit corporation, tax-exempt,[49] public interest law firm of Law Project for Psychiatric Rights was founded in late 2002 to mount a strategic litigation campaign against forced psychiatric drugging and electroshock.[50]

> The impetus was the book *Mad in America: Bad Science, Bad Medicine, and the Enduring Mistreatment of the Mentally Ill*, by Robert Whitaker. PsychRights recognized this as a possible roadmap for demonstrating to the courts that forced psychiatric drugging is not achieving its objectives but is, instead, inflicting massive amounts of harm.[51]

"In 2006, due to what can only be considered an emergency, PsychRights adopted strategic litigation against the enormous and increasing amount of psychiatric drugging of children as a priority."[52] Because it is the adults in their lives rather than they who are making the decisions, children are essentially forced to take psychiatric drugs[53] and thus this lawsuit fits squarely within PsychRights' mission.

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[48] Motion for Judgment on the Pleadings, p. 16.
[49] *See*, Internal Revenue Services Advance Ruling Letter, dated April 1, 2003, and Public Charity Ruling Letter, dated July 11, 2007, which can be downloaded from the Internet at http://psychrights.org/CorpSec/501c3.pdf and http://psychrights.org/about/Finances/IRSPublicCharityLtr073007.pdf, respectively.
[50] J. Gottstein, "Involuntary Commitment and Forced Psychiatric Drugging in the Trial Courts: Rights Violations as a Matter of Course," 25 Alaska L. Rev. 51, 53 (2008).
[51] *Id*.
[52] *Id*, n. 2.
[53] *See*, also Exhibit 2, p. 4 (older youths will be hospitalized and drugged against their will there if they exercise right to refuse the drugs).

PsychRights has been successful in pursuing its mission. First, it won *Myers v. Alaska Psychiatric Institute*,[54] in which the Alaska Supreme Court held Alaska's forced drugging statute unconstitutional for failing to require the court to find the drugging to be in the person's best interest and there is no less intrusive alternative. Next, it won *Wetherhorn v. Alaska Psychiatric Institute*,[55] in which the Alaska Supreme Court held it was unconstitutional to involuntarily commit someone as gravely disabled unless, the level of incapacity is so substantial that the respondent is incapable of surviving safely in freedom. In the preface of the 2007 pocket section of his five-volume treatise on mental health law, noted scholar Michael Perlin stated the following:

> *Wetherhorn* . . . reflects how seriously that state's Supreme Court takes mental disability law issues. Last year, we characterized its decision in *Myers v. Alaska Psychiatric Institute*, as "the most important State Supreme Court decision" on the question of the right to refuse treatment in, perhaps two decades. This year, again, the same court continues along the same path, in this case looking not only at the "grave disability issue," but also building on its *Myers* decision.

Of course, it takes a litigant to bring a case to the Alaska Supreme Court in order to give the Court an opportunity to rule. Until PsychRights commenced its strategic litigation campaign, it appears the attorneys appointed to represent psychiatric respondents in involuntary commitment and forced drugging cases failed to bring even one appeal.[56]

Most recently, in *Wayne B.*,[57] the Alaska Supreme Court required strict compliance

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[54] 138 P.3d 238 (Alaska 2006).
[55] 156 P.3d 371 (Alaska 2007).
[56] "Involuntary Commitment and Forced Psychiatric Drugging in the Trial Courts," *supra*., 25 Alaska L. Rev. at 53.
[57] 192 P.3d 989 (Alaska 2008).

with Civil Rule 53(d)(1)'s transcript requirement, invalidating the longstanding practice of the superior court, in Anchorage at least, of approving the recommendations of probate masters in involuntary commitment and forced drugging cases without having such a transcript.[58]

Currently, PsychRights has two cases on appeal to the Alaska Supreme Court, *W.S.B. v. Alaska Psychiatric Institute*,[59] in which the issue is whether it is permissible for the Superior Court to close the court file to the public when the respondent has elected to have the hearing open to the public as was his right under AS 47.30.735(b)(3) and desires to have the court file open to the public as well, and *William S. Bigley v. Alaska Psychiatric Institute*,[60] in which PsychRights asserts Mr. Bigley is constitutionally entitled to the provision of an available less intrusive alternative to being forced to take psychotropic drugs against his will.[61]

PsychRights has adversity.

(5) PsychRights is Able to Competently Advocate the Position Asserted

Because of the improvident, largely ineffective and counterproductive, and extremely harmful yet pervasive administration of psychiatric drugs by the State of Alaska of children and youth of whom it has seized custody and through Medicaid payments, PsychRights filed this action seeking declaratory and injunctive relief that Alaskan

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[58] The Court did hold where the superior court "actually listens" to the recording the failure to have a transcript is cured. 192 P.3d at 991.
[59] Case No. S-13015.
[60] Case No. S-13116.
[61] Mr. Bigley also raised other issues, such as the denial of due process in having less than one business day's notice to defend against the forced drugging petition there.

children and youth have the right to prevent defendants from authorizing the administration of or paying for the administration of psychotropic drugs to them unless and until:

(i) evidence-based psychosocial interventions have been exhausted,

(ii) rationally anticipated benefits of psychotropic drug treatment outweigh the risks,

(iii) the person or entity authorizing administration of the drug(s) is fully informed of the risks and potential benefits, and

(iv) close monitoring of, and appropriate means of responding to, treatment emergent effects are in place.[62]

PsychRights is able to competently advocate this position.[63]

Counsel for PsychRights in this action is James B. (Jim) Gottstein, Esq., the founder, President and CEO of PsychRights, where he works *pro bono* to advance PsychRights' mission.[64] Mr. Gottstein has been practicing law in Alaska since 1978, when, in addition to being admitted to the Alaska bar, he was admitted to practice before the United States District Court, District of Alaska and the Ninth Circuit Court of Appeals.[65] Mr. Gottstein was admitted to the United States Supreme Court in 1994.[66]

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[62] *See*, ¶1 of Amended Complaint and §A of PsychRights' Prayer for Relief.
[63] In reviewing the status of the pleadings, PsychRights realized it should add to the relief requested to effectuate ¶22 of the Amended Complaint, to wit that the State be enjoined from paying for outpatient psychiatric drugs for anything other than indications approved by the Food and Drug Administration (FDA) or included in the following compendia: (a) American Hospital Formulary Service Drug Information, (b) United States Pharmacopeia-Drug Information (or its successor publications), or (c) DRUGDEX Information System. A motion to amend the complaint to include this relief will be forthcoming shortly.
[64] 25 Alaska L. Rev at 51.
[65] Exhibit 3, p.1.
[66] *Id*.

Mr. Gottstein represented the class of people diagnosed with serious mental illness in *Weiss et al v. Alaska,*[67] the lawsuit over the State of Alaska's illegal misappropriation of the one million acre federal land grant in trust first for the necessary expenses of the mental health program, resulting in a settlement in 1994 valued at approximately $1.3 Billion and creation of the Alaska Mental Health Trust Authority.[68]

From 1998 to 2004, Mr. Gottstein was appointed to and served on the Alaska Mental Health Board,[69] which, among other things, is the state agency charged with planning mental health services funded by the State of Alaska.[70] In 2007, Mr. Gottstein was appointed by the Chief Justice of the Supreme Court to the Probate Rules Subcommittee on Involuntary Commitments and the Involuntary Administration of Psychotropic Medication established to recommend court rules to govern these proceedings.[71]

In 2008, Mr. Gottstein published the law review article, Involuntary Commitment and Forced Psychiatric Drugging in the Trial Courts: Rights Violations as a Matter of Course,[72] in which he documented the lack of efficacy, life shortening and threatening, and otherwise extremely harmful nature of the neuroleptics, which is the class of drugs normally forced on adults faced with court proceedings to force them to take psychiatric drugs against their will, and identified a number of ways in which Alaskans' fundamental

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[67] 4FA 82-2208Civ.
[68] *Weiss v. State*, 939 P.2d 380 (Alaska 1997).
[69] Exhibit 3, p. 1.
[70] AS 47.30.666.
[71] Exhibit 4.
[72] 25 Alaska L. Rev. 51.

liberty rights in being free of psychiatric confinement and unwanted psychiatric drugs are improperly infringed by the courts of Alaska.

Psychiatrists ought to be able to rely on the information they receive through medical journals and continuing medical education.[73] The State ought to be able to trust that psychiatrists recommending the administration of psychiatric drugs are basing these recommendations on reliable information. Unfortunately, neither of these things which ought to be true are true. Thus, one of the key questions in this case is why psychiatrists are prescribing and custodians are authorizing the administration of harmful psychotropic drugs of little or no demonstrated benefit to children and youth. The answer is that the pharmaceutical companies have been very effectively illegally promoting their use. Section V of PsychRights' Opposition to Motion to Stay Discovery describes some of this and rather than repeat it here, PsychRights hereby incorporates it herein as though fully set forth, including exhibits.

As set forth in the discovery plan set forth by PsychRights in its Opposition to Motion to Stay Discovery, establishing through discovery the bases upon which psychotropic drugs are prescribed to Alaskan children and youth in state custody and through Medicaid is an essential part of this litigation. For example, at page 21 of PsychRights' Opposition to Stay of Discovery, it stated:

[73] They should be skeptical, however, about "information" provided by drug companies.

> Even with respect to the stimulants, such as Ritalin, which have been approved for children and youth, the truth is there is a lack of data supporting long-term efficacy or safety,[74]

In other words, PsychRights has cited studies that show such practice is improvident and it is necessary to establish upon what bases psychiatrists and others prescribers are prescribing stimulants to Alaskan children and youth. PsychRights can conduct this discovery.

Interestingly, in the short time since PsychRights filed its Opposition to Motion to Stay Discovery, the Washington Post ran a story on just this subject:

> New data from a large federal study have reignited a debate over the effectiveness of long-term drug treatment of children with hyperactivity or attention-deficit disorder, and have drawn accusations that some members of the research team have sought to play down evidence that medications do little good beyond 24 months.
>
> The study also indicated that long-term use of the drugs can stunt children's growth.
>
> The latest data paint a very different picture than the study's positive initial results, reported in 1999.
>
> One principal scientist in the study, psychologist William Pelham, said that the most obvious interpretation of the data is that the medications are useful in the short term but ineffective over longer periods but added that his colleagues had repeatedly sought to explain away evidence that challenged

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[74] Citing to ¶s 154, 156-165 of the Amended Complaint herein; APA Working Group on Psychoactive Medications for Children and Adolescents. (2006); and Report of the Working Group on Psychoactive Medications for Children and Adolescents. Psychopharmacological, psychosocial, and combined interventions for childhood disorders: Evidence-base, contextual factors, and future directions, Washington, DC: American Psychological Association; National Institute of Mental Health Multimodal Treatment Study of ADHD Follow-up: 24-Month Outcomes of Treatment Strategies for Attention-Deficit/Hyperactivity Disorder, MTA Cooperative Group, *American Academy of Pediatrics*, 113;754-761 (2004)

> the long-term usefulness of medication. When their explanations failed to hold up, they reached for new ones, Pelham said.
>
> "The stance the group took in the first paper was so strong that the people are embarrassed to say they were wrong and we led the whole field astray," said Pelham, of the State University of New York at Buffalo. Pelham said the drugs, including Adderall and Concerta, are among the medications most frequently prescribed for American children, adding: "If 5 percent of families in the country are giving a medication to their children, and they don't realize it does not have long-term benefits but might have long-term risks, why should they not be told?"[75]

Indeed, why haven't the psychiatrists and other prescribers been telling people the truth about these drugs?

As set forth above and in the Opposition to Motion to Stay Discovery, the answer is the drug companies have provided the psychiatrists with inaccurate information. PsychRights will develop this in discovery and through presenting the evidence to this Court. It also seems worth noting here that it is virtually inconceivable that any parent or guardian, or any child or youth, not represented by PsychRights would or could effectively pursue this information, which further buttresses the argument in §II.A.(3) that no other plaintiff is likely to adequately pursue the claims in this action.

B. Interest-Injury Standing

The State argues that PsychRights has not claimed interest-injury standing and it is correct about that. PsychRights could move to amend the Complaint to add individual children and youth, their parents, or guardians, or any combination thereof, to achieve such interest-injury standing, but is reluctant to do so. The original Complaint did not include

[75] Exhibit 5, p. 1.

such plaintiffs for a number of reasons, which PsychRights carefully considered before filing the Complaint in this action.

First, as set forth above, the most important relief requested is for systemic relief, especially an injunction, to which individual affected parties would appear not entitled. Naming PsychRights as the plaintiff allows the lawsuit to narrowly tailor the requested relief to the deprivation of rights suffered by Alaskan children & youth in State custody and enrolled in Medicaid.

Second, while PsychRights anticipates being the prevailing party, it seems unfair to expose such plaintiffs to the possibility of attorney's fee awards against them. Counsel has experience with the Alaska Attorney General obtaining attorney's fees against people on welfare who unsuccessfully sought to vindicate their rights in court and understands it is the Attorney General Office's policy to always seek fees against non-prevailing parties, even if they can't afford them.

Until 2003, such plaintiffs named in this action could expect to be found public interest litigants and exempt from such an award. In 2003, however, in ch. 86, § 2(b), SLA 2003, codified at AS 09.60.010 (b)-(e), the Legislature abolished the public interest exception from Rule 82 awards against non-prevailing parties. Under AS 09.60.010(c)(2) an award against such plaintiffs is still not allowed for attorney's fees devoted to claims concerning constitutional rights and under (e) relief can be granted for "undue hardship."

This case raises constitutional claims, as well as substantial non-constitutional claims, thus potentially subjecting such individual plaintiffs to an award of attorney's fees

against them. This would potentially subject the named plaintiffs to an award of attorney's fees.

Even though PsychRights expects to be the prevailing party and even though the undue hardship exemption under AS 09.60.010(e) seems applicable, PsychRights feels it needs to consider the other possibilities and decided this was another reason not to name individual children and youth, their parents or guardians. It just seemed unfair to expose them to the possibility of having to carry another big brick on their already heavy load.

Should this Court decide that PsychRights does not have citizen-taxpayer standing to bring this suit, PsychRights will consider whether to amend the Complaint to add such named plaintiffs or whether to appeal instead. It is a conundrum because any delay in granting the requested relief is doing great harm to Alaskan children and youth. However, as set forth above, PsychRights has citizen-taxpayer standing and no such amendment is necessary.

III. The Motion is Untimely

Finally, Civil Rule 12(c) requires that a motion for judgment on the pleadings be brought "within such time as not to delay the trial" and the State's Motion for Judgment on the Pleadings is untimely, especially when considered in conjunction with its contemporaneously filed Motion to Stay Discovery.

This action was filed September 2, 2008 and the State filed its Answer to the Amended Complaint on or around October 14, 2008. The instant Motion for Judgment on the Pleadings was not filed until on or around March 12, 2009, some six months after this action was commenced and five months after the State's Answer was filed.

PsychRights commenced efforts to conduct discovery in January, with which the State originally cooperated, but then at the last minute filed its Motion to Stay Discovery contemporaneously with the filing of the instant Motion for Judgment on the Pleadings. In its Motion to Stay Discovery, the State seeks to stay discovery pending determination of the instant Motion for Judgment on the Pleadings.

In support of its Motion for Expedited Consideration of the State's Motion to Stay, the State submitted an affidavit swearing to the following:

> In preparing for Mr. Campana's deposition, counsel began to review the underlying Complaint more extensively and developed concerns about engaging in further discovery at that time.[76]

The trial is set to commence February 1, 2010, and pretrial deadlines are looming. Decision on this motion may potentially take some time. If discovery remains stayed, it will likely delay the trial and prejudice PsychRights. Frankly, in light of the State's concurrent Motion to Stay Discovery, and what seems to PsychRights to be a patently unmeritorious Motion for Judgment on the Pleadings, it is hard to see how it was made for any reason other than to obstruct and delay the conduct of discovery and thereby jeopardize the trial date and/or prejudice PsychRights' ability to present its case.

IV. Conclusion

Because PsychRights has citizen-taxpayer standing, the State's Motion for Judgment on the Pleadings should be **DENIED**. To the extent that there may be some

[76] Affidavit of Elizabeth Bakalar, dated March 12, 2009.

technical deficiency in the Amended Complaint, PsychRights should be allowed leave to amend.

DATED: March 31, 2009.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein
ABA # 7811100

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

LAW PROJECT FOR PSYCHIATRIC RIGHTS, Inc., an Alaskan non-profit corporation, Plaintiff, vs. STATE OF ALASKA, *et al.*, Defendants,	)

Case No. 3AN 08-10115CI

EXHIBITS TO
to
OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

1. June, 2008, CriticalThinkRx Curriculum, June, 2008.
2. Facing Foster Care in Alaska Report on Mental Health Services, November 2008.
3. Curriculum Vitae of James B. (Jim) Gottstein, Esq., September 12, 2008.
4. Appointment of James B. Gottstein to the Probate Rules Subcommittee on Involuntary Commitments and the Involuntary Administration of Psychotropic Medication, June 28, 2007.
5. Washington Post Article, "Debate Over Drugs For ADHD Reignites Long-Term Benefit For Children at Issue," March 27, 2009.