

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

IOWA PROTECTION AND
ADVOCACY SERVICES, INC.,

Plaintiff,

vs.

TANAGER PLACE and TANAGER,
INC.,

Defendants.

No. C 04-0069

ORDER

TANAGER PLACE,

Counterclaim Plaintiff,

vs.

IOWA PROTECTION AND
ADVOCACY SERVICES, INC.,

Counterclaim Defendant.

TANAGER PLACE,

Third-Party Plaintiff,

vs.

SYLVIA PIPER,

Third-Party Defendant.

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I. INTRODUCTION

In this case, the court addresses the power of Iowa Protection and Advocacy Services, Inc. (“IP&A”) to enter a private, non-profit psychiatric medical institution for

children (“PMIC”) to investigate an allegation of neglect and abuse.

II. FACTUAL BACKGROUND

A. Iowa Protection and Advocacy Services

IP&A is a private, non-profit Iowa corporation with the federal mandate to “investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.” 42 U.S.C. § 10805(a)(1)(A). Included in this mandate is IP&A’s right to enter facilities providing treatment, 42 U.S.C. § 10805(a)(3), and to access the residents’ records under certain circumstances. 42 U.S.C. § 10805(a)(4). IP&A is funded entirely by federal dollars. It does not report to any state or federal governmental entities regarding its work and no state or federal governmental entities direct IP&A or participate in IP&A’s decision-making process, although the U.S. Department of Health and Human Services does require an annual accounting of federal dollars spent.

Sylvia Piper is the Executive Director of IP&A. Prior to becoming Executive Director, Ms. Piper was the Deputy Director of IP&A. Before that, she held the position of Public Relations and Training Manager, which involved management and organizational duties, obtaining funding for IP&A, and directing training programs for individuals outside IP&A. *See* Pl. Ex. 1. She has worked for IP&A in some capacity since 1991. *See id.* Ms. Piper’s previous work experience is unrelated to working with individuals with psychiatric medical conditions and/or children. *See id.*

David Parr is an Advocacy Coordinator for IP&A, a position he has held since February 2003. *See* Pl. Ex. 16. His duties include overseeing and coordinating staff, conducting quality assurance for all advocacy case work, maintaining a monitoring schedule for facility visits, and serving as a central point coordinator for all case activity between non-legal, legal and administrative staff. *See id.* Prior to that, Mr. Parr was a

Disability Rights Advocate/Investigator with IP&A for about one year. *See id.* His job duties in that position included providing timely probable cause investigations and direct advocacy experience, establishing and maintaining a presence in assigned facilities and monitoring conditions and systemic issues, and identifying and reporting to advocacy service team significant issues, problems or concerns in institutions, community based programs and regions. *See id.* Prior to working at IP&A, Mr. Parr worked at Goodwill Industries with physically, mentally, and emotionally disabled adults and economically disadvantaged adults. *See id.*

Nancy Simon has been a Disability Rights Advocate/Investigator for IP&A since 2002. Her job duties include investigating violations of civil rights, abuse or neglect, and suspicious deaths. *See Pl. Ex. 11.* Her previous work experience was in the military and adult corrections. *See id.*

Matthew Olsen is a Disability Rights Advocate/Investigator for IP&A, a position he has held since March 2003. His job duties include conducting investigations and monitoring visits to facilities across Iowa. *See Pl. Ex. 19.* Prior to working at IP&A, Mr. Olsen was a Youth Service Worker at the Iowa Juvenile Home for about one and one-half years. *See id.* In that position he worked with delinquent youth by instructing them about independent living skills, de-escalating intense situations, and counseling them. *See id.* From August 1999 to January 2000, Mr. Olsen also worked for Alternative Services as a caseworker. *See id.* That position required him to counsel families and individuals in crisis, to monitor clients, and to protect the rights of children. *See id.* Mr. Olsen volunteered with the Family Service League in 1997 and 1998, where he mentored at-risk youth. *See id.*

IP&A's Investigations Manual does not include a section on how to interview children. *See Pl. Ex. 14, Investigations Manual.* IP&A's Primer instructs investigators

how to interview people with developmental disabilities and people with psychiatric disabilities, but it does not address interviewing children with these disabilities (in fact, it does not address interviewing children at all). *See id.*, The Primer, at 39-47. None of the materials provided to the court demonstrate the investigators or other staff members working at IP&A have any skills or have received any training relating to interviewing children with psychiatric disabilities. *See generally id.*

B. Tanager Place and Tanager, Incorporated

Tanager, Inc. is a private, non-profit Iowa corporation that provides a variety of residential programs for children at Tanager Place, Cedar Rapids, Iowa. Tanager Place has several inpatient and outpatient programs, including a PMIC, a shelter program, an intermediate care facility for the mentally retarded (“ICFMR”), and a summer camp.

The PMIC program is an inpatient program created to develop a higher level of care for children suffering from serious emotional disturbances and psychiatric problems that would not lend themselves to treatment on an outpatient basis or in a foster care situation. Every child admitted to the PMIC must be admitted by a psychiatrist and the admission must be approved by the Iowa Foundation of Medical Care. Only two higher levels of care exist for children in Iowa: acute care, which is very limited in Iowa, and institutional care, such as the Mental Health Institutes (“MHI”) in Independence and Cherokee. Tanager Place’s PMIC program is very intensive, with most of each day structured around therapeutic involvement, recreational activities, school work, and family work activities, all of which are designed to assist the residents in obtaining specific goals based on their individual situations. All of the children in the PMIC program receive psychiatric care. There are four units, or cottages, in the program. Each unit has its own therapist who works with the residents and their families. The PMIC program has a capacity of sixty individuals, ranging in age between five and eighteen years old, with the average resident

about twelve years old. A variety of staff members work with the residents in PMIC, including youth service workers, treatment counselors, therapists, nurses, special education teachers, and psychiatrists.

The emergency youth shelter is a fifteen-bed facility that houses children ages zero to eighteen who have been removed from their homes by the Iowa Department of Human Services (“DHS”) because of an immediate threat of physical harm, those who are found on the street and need a place to stay while DHS makes a determination regarding placement, and individuals who need a place to stay while awaiting placement in a different level or facility. Shelter residents do not necessarily have psychiatric care as an element of their stay at Tanager Place.

The ICFMR is an eight-bed facility designed to work with children who have psychiatric behavioral problems and low intellectual functioning.

Camp Tanager is a residential summer camp program for children from low-income families. Camp Tanager includes two different camp programs: one camp for children with hemophilia, located at the University of Iowa medical school, and one camp for children with diabetes, run in conjunction with Linn County pediatricians and local hospitals. Camp Tanager has a capacity of seventy-two individuals.

George Estle is the Chief Executive Officer of Tanager Place. He has been employed at Tanager Place since July 1980. During that time, he held the positions of Director of Professional Services and Associate Executive Director prior to his current position. Prior to working at Tanager Place, he worked for DHS in Dubuque, Iowa, held the position of Director of Social Work Services in AR Gold Hospital in Maine, worked as a clinical social worker at the MHI in Independence, Iowa, and was on the faculty of the social work department at the University of Northern Iowa. At DHS and the MHI, Mr. Estle worked with children with mental health issues, family issues, and behavioral

problems.

Rick Larsen, M.D., a psychiatrist, is the Medical Director at Tanager Place. He is responsible for the psychiatric and medical care of the residents in all of the programs at Tanager Place. He meets with each resident in PMIC at least once every four weeks, and he meets with some PMIC residents as often as once each week. During the meetings, Dr. Larsen prescribes medications and determines if other medical care is appropriate. Most of the Tanager Place residents have more than one medical or psychiatric diagnosis, and on average, the number of diagnoses per resident is three or more. The residents suffer from various disorders such as schizophrenia, learning disabilities, personality problems, anxiety, oppositional defiant disorder, depression, bipolar disorder, and eating disorders. A majority of the residents at Tanager Place have been sexually and/or physically abused and many have been neglected by parents with drug addictions or mental illness.

C. Relevant Incidents

On May 29, 2004, Tanager Place reported as missing R.J., a juvenile resident of the PMIC at Tanager Place. It is not disputed that R.J. was an individual with mental illness within the meaning of 42 U.S.C. § 10802(4). R.J. had a history of running away from Tanager Place. On May 29, 2004, R.J. left Tanager Place when staff members would not let him climb onto a roof to retrieve a Frisbee he had previously thrown there.

On June 1, 2004, Judy Price, Director of Quality Improvement at Tanager Place, telephoned IP&A to inform them R.J. had run away and may have drowned in the Cedar River. Following the telephone call, IP&A determined probable cause existed on the issue of whether R.J. had been subjected to abuse and neglect at Tanager Place. Consequently, IP&A sent a letter by facsimile to Tanager Place outlining IP&A's federal authority and advising that IP&A "is conducting an investigation based on a determination that probable

cause exists to believe that abuse or neglect of a resident or residents has occurred or is likely to occur.” Pl. Ex. 4. IP&A also asked for a list of the residents, the names of the residents’ guardians, and the guardians’ contact information. Pl. Ex. 13. The request was not limited to the residents of the PMIC facility.

On June 2, 2004, Ms. Simon and Mr. Olsen from IP&A arrived at Tanager Place and requested access to the facility to conduct an investigation into R.J.’s disappearance and/or death. When the investigators arrived at Tanager Place, they presented Mr. Estle with the letter IP&A had faxed to the facility the day before, outlining IP&A’s federal authority and requesting specific information.¹ They did not indicate whether they had received permission from R.J.’s family to look at his psychiatric file.² Tanager Place spoke to R.J.’s guardians before allowing IP&A to review R.J.’s psychiatric file. Mr. Estle allowed the investigators access to R.J.’s files and residence and allowed them to interview Tanager Place staff; however, Mr. Estle denied the investigators access to any of the residents of Tanager Place. The investigators marked the documents in R.J.’s psychiatric file of which they wanted copies. They were also given the copies they requested of the relevant policies of Tanager Place. They toured and photographed the facilities including Dutton Cottage, where R.J. had resided. Ms. Simon and Mr. Olsen requested they be allowed to interview two residents whose names were chosen at random by the IP&A investigators from the list of Dutton Cottage residents. Mr. Estle informed

¹ The parties did not clarify at trial whether the letter presented to Mr. Estle on June 2 was a copy of Plaintiff’s Exhibit 4 or Plaintiff’s Exhibit 13, both of which were faxed to Tanager Place on June 1. Both letters set forth IP&A’s federal authority. Only Plaintiff’s Exhibit 13 requests specific information.

² During the hearing, it was clear IP&A staff members did not hold a consistent opinion as to whether IP&A had to contact the parent or guardian of a resident before viewing the resident’s file.

them it would be necessary to speak with the treatment team prior to allowing the investigators access to any residents, and the treatment team members had already left for the day.

Also on June 2, 2004, A. Edie Bogzcyk, Legal Advocacy Director for IP&A, spoke with Vernon Squires, legal counsel for Tanager Place. Ms. Bogzcyk asked if IP&A would be allowed to interview the residents. Mr. Squires stated that he was not restricting IP&A's access. Mr. Squires further stated that he did not think Mr. Estle would allow IP&A to interview any of the residents.

On June 3, 2004, the investigators returned to Tanager Place and renewed their request to interview the two residents of Tanager Place they had randomly selected to interview on June 2 and obtained the copies of documents that they had requested on June 2. Mr. Estle believed the investigators had given up their request to interview the residents so he had not spoken with the treatment team prior to the investigators' renewed request. After speaking with the treatment team, Mr. Estle allowed the investigators to interview one resident on that date. They were not allowed to interview C.S., one of the two residents requested, because she was too medically fragile at that time to talk with the investigators. The investigators did not ask to interview any other residents. Instead, IP&A filed this lawsuit that afternoon.

On June 16, the court held a hearing on the preliminary injunction and urged the parties to cooperate.

On June 29, 2004, the attorneys hired to represent IP&A, Sharon Malheiro and Heather Lee Palmer, received from Mr. Squires a letter which had the names and ages of the twelve residents at the Dutton Cottage at Tanager Place, along with the names and addresses of their parents or guardians. Pl. Ex. 6 at 3.

On or about July 6, 2004, IP&A started a second probable cause investigation at

Tanager Place regarding a resident who ran away from Tanager Place and subsequently was raped. Again, two IP&A investigators went to Tanager Place with no advance notice and asked to see the resident's file.

On July 7, 2004, Ms. Malheiro sent a letter on behalf of IP&A to Mr. Squires, setting forth IP&A's position that, depending on the direction the investigation took, IP&A was not limited to interviewing the twelve children who had resided in Dutton Cottage with R.J.. Pl. Ex. 7. The letter also stated IP&A investigators wanted to interview all twelve children listed in the letter.

On July 8, 2004, Mr. Squires replied to Ms. Malheiro's letter by facsimile and mail. Pl. Ex. 9. The letter stated, "[a]fter reviewing the Dutton Cottage residents' current emotional status and speaking with their guardians, Tanager Place is willing to permit interviews of the following residents on Friday, July 9, 2004," followed by a list of four names. *Id.* The letter further set forth the conditions for the interviews: a Tanager Place therapist was required to be present for the interviews, each child was to be allowed to end the interview at any time, and the interviews were all to take place between 9:00 a.m. and noon.

Also on July 8, 2004, Ms. Piper decided IP&A investigators would not proceed with the four interviews because of Tanager Place's restrictions.

Because the parties had agreed to communicate through their attorneys, Ms. Piper conveyed to Ms. Malheiro late in the afternoon on July 8, 2004 that IP&A would not be interviewing any residents on July 9, 2004. At 3:16 p.m. on July 9, 2004, Ms. Malheiro faxed to Mr. Squires a letter informing him IP&A investigators would not be conducting interviews on that date because of the restrictions placed on them. Def. Ex. L. By that time, Tanager Place had disrupted the routines of the four residents who were scheduled to be interviewed between 9:00 a.m. and noon.

III. PROCEDURAL BACKGROUND

IP&A filed a Complaint against Tanager Place and Tanager, Inc. (together, “Defendants”) in this court on June 3, 2004. The Complaint alleges that following R.J.’s absence from Tanager Place and possible drowning, Defendants interfered and continue to interfere with IP&A’s right to meaningful and timely access to the other residents of Tanager Place in violation of the Protection and Advocacy for Mentally Ill Individuals Act of 1986³ (the “PAMII Act”), 42 U.S.C. § 10801, *et seq.* IP&A alleges that by denying IP&A’s investigators access to the residents of Tanager Place, Defendants are substantially interfering with IP&A’s ability to carry out its statutory duty. IP&A seeks injunctive and declaratory relief. First, IP&A asks the court for a preliminary injunction enjoining Defendants, their agents and employees, from denying IP&A full and immediate unaccompanied access to the residents of the facility. Next, IP&A moves the court to permanently enjoin Defendants from denying IP&A full and immediate unaccompanied access to the residents of the facility operated by Defendants if a complaint is received and/or IP&A determines probable cause exists to believe abuse, death or neglect occurred. Finally, IP&A requests that the court enter a declaratory judgment stating Defendants’ policies, regulations, practices and conduct of interfering with and denying IP&A proper and immediate access violate the PAMII Act.

On June 14, 2004, Tanager Place filed a Counterclaim against IP&A, alleging: (1) IP&A’s investigation at Tanager Place on June 2-3, 2004 constituted an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments; (2) the PAMII Act is unconstitutional as applied by IP&A in this case; and (3) the PAMII Act is

³ The PAMII Act was amended and re-authorized by Congress in 1991 under the title, “Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991.” *See* Pub. L. No. 102-173, § 1, 105 Stat. 1217, 1217 (1991).

unconstitutional on its face.⁴

On June 16, 2004, the court held a hearing on IP&A's request for a preliminary injunction. The preliminary injunction focused on Tanager Place's denial of access to a resident, C.S. At that time, IP&A withdrew its request for a preliminary injunction, relinquishing its assertion the investigators had a right to interview C.S.

IP&A filed an Amended Complaint July 15, 2004. The Amended Complaint is substantially similar to the original Complaint except IP&A no longer seeks a preliminary injunction. Further, IP&A added an allegation that by refusing to produce the requested list of all residents, the names of the residents' guardians, and the guardians' contact information and by denying IP&A's investigators access to the residents of Tanager Place, Defendants have substantially interfered with and continue to substantially interfere with IP&A's ability to carry out its statutory duty. Therefore, IP&A moves the court to permanently enjoin Defendants from denying IP&A full and immediate unaccompanied access to the residents of the facility operated by Defendants if a complaint is received and/or IP&A determines probable cause exists to believe abuse, death or neglect occurred. IP&A requests the court enter a declaratory judgment stating Defendants' policies, regulations, practices and conduct of interfering with and denying IP&A proper and immediate access violate the PAMII Act.

A trial was held on July 20, 2004. IP&A was represented by Sharon Malheiro and Heather Lee Palmer of Davis, Brown, Koehn, Shors & Roberts, P.C. of Des Moines, Iowa. Defendants were represented by Vernon Squires of Bradley & Riley, P.C. of Cedar

⁴ Tanager Place also filed a slander counterclaim against IP&A and joined Sylvia Piper in the suit as a third-party defendant on that claim. The court severed the slander claim from the rest of the case and does not rule on the slander claim in this Order.

Rapids, Iowa.⁵

IV. PAMII ACT

The court finds it appropriate to discuss the history and purpose of the PAMII Act and the statutory authorization granted to IP&A pursuant to the PAMII Act prior to addressing the merits of IP&A's claims.

A. History and Purpose

Congress originally enacted legislation involving protection and advocacy for individuals with developmental disabilities in response to conditions discovered at New York's Willowbrook State School for persons with developmental disabilities. *See Ala. Disabilities Advoc. Prog. v. J.S. Tarwater Dev. Ctr.*, 97 F.3d 492, 494-96 (11th Cir. 1996) ("Disturbed by the inhumane and despicable conditions . . . Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act . . . to protect the human and civil rights of this vulnerable population."); *Pa. Protection & Advoc., Inc. v. Houstoun*, 228 F.3d 423, 425 (3d Cir. 2000) ("Congress found that funding was needed for [independent advocacy] organizations, because the mentally ill were vulnerable to abuse, injury, and neglect and because the states' response to these problems was often inadequate.").

The purposes of the PAMII Act are "to ensure that the rights of individuals with mental illness are protected" and "to assist States to establish and operate a protection and advocacy system for individuals with mental illness which will . . . protect and advocate the rights of such individuals through activities to ensure the enforcement of the

⁵ During trial, Tanager Place objected to the admission of Plaintiff's Exhibit 17 on relevance grounds. The court indicated it would rule on the objection in its decision and indicate to the parties whether the court had relied upon Plaintiff's Exhibit 17 in making its ruling. The court sustains the objection. Plaintiff's Exhibit 17 was in no way considered in the court's ruling.

Constitution and Federal and State Statutes” 42 U.S.C. § 10801(b)(1), (b)(2)(A). The PAMII Act provides funding for states to establish independent organizations that monitor and protect the rights of the mentally ill. *Pa. Protection & Advoc.*, 228 F.3d at 425 (citing 42 U.S.C. § 10803). “These organizations are intended to ‘investigate incidents of abuse and neglect of individuals with mental illness’ and to take appropriate action to ‘protect and advocate the rights of such individuals.’” *Id.* (quoting 42 U.S.C. § 10801(b)). Such organizations are commonly referred to as a “P & A system.” Defendants do not contest the general applicability of the PAMII Act to IP&A’s request for access to the residents at Tanager Place and for access to a list of the residents’ names, the residents’ guardians’ names, and guardians’ contact information.

B. Statutory Authority Granted to IP&A

The PAMII Act grants substantial investigative authority to state P & A systems. In pertinent part, section 10805 provides that “[a] system established in a State under section 10803 of this title to protect and advocate the rights of individuals with mental illness shall . . . have the authority to . . . investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred[.]” 42 U.S.C. § 10805(a)(1)(A). The authority of a P & A system also is governed by Chapter I of Title 42 of the Code of Federal Regulations, adopted by the United States Department of Health and Human Services. In order to investigate incidents of abuse or neglect when a P & A system either receives a complaint or has probable cause to believe that such incidents have occurred, the P & A system is given the authority to have “reasonable unaccompanied access residents at all times necessary to conduct a full investigation of an incident of abuse or neglect.” 42 C.F.R. § 51.42(b). The regulations promulgated pursuant to the PAMII Act further provide:

a P & A system shall have reasonable unaccompanied access to . . . residents at reasonable times, which at a minimum shall include normal working hours and visiting hours. Residents include adults or minors who have legal guardians or conservators. P & A activities shall be conducted so as to minimize interference with facility programs, respect residents' privacy interests, and honor a resident's request to terminate an interview.

42 C.F.R. § 51.42(c).

A P&A system was established in Iowa pursuant to the Iowa Code, which recognizes the protection and advocacy agency designated in the state under the PAMII Act “as an agency legally authorized and constituted to ensure the implementation of the purposes of this chapter for populations under its authority and in the manner designated by [the PAMII Act] and in the assurances of the governor of the state.” Iowa Code § 135C.2(4). IP&A was designated the P&A system in Iowa on April 29, 1991. *See* Pl. Ex. 3. Therefore, IP&A has all of the authority granted to P & A systems by the PAMII Act.

IP&A has a right to interview Tanager Place residents as provided by 42 C.F.R. § 51.42(b). The statute does not require IP&A to get permission from a resident's guardian prior to interviewing the resident. *See* 42 C.F.R. § 51.42. The only limitation on IP&A's ability to interview a resident is that the person “might be reasonably believed by [IP&A] to have knowledge of the incident under investigation.” 42 C.F.R. § 51.42(b).

IP&A may view a resident's records if: (1) the resident or resident's guardian has authorized IP&A to do so; (2) the resident, due to physical or mental condition, including death, is unable to authorize IP&A's access, the resident does not have a guardian other than the State of Iowa, and IP&A has developed probable cause the resident has been or may be subjected to abuse or neglect; or (3) IP&A has determined there is probable cause to believe a resident's health or safety is in serious and immediate jeopardy and IP&A has

made a good faith effort to contact the resident's guardian, IP&A has made a good faith effort to offer assistance to the resident's guardian to resolve the situation, and the guardian has failed or refused to act on the resident's behalf. 42 C.F.R. § 51.41(b).

C. Probable Cause

Tanager Place contends IP&A lacked probable cause, as traditionally defined in Fourth Amendment search and seizure analysis, to conduct an investigation at Tanager Place. Therefore, Tanager Place argues, IP&A committed trespass by entering the facility and demanding access to records, residents, and all areas of the facility.

In the context of Fourth Amendment searches, "probable cause" is defined as a "fair probability that contraband or evidence of a crime [would] be found" at the location to be searched. *U.S. v. Carpenter*, 341 F.3d 666, 671 (8th Cir. 2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Such a determination must be made by a neutral magistrate considering the totality of the circumstances. *Gates*, 462 U.S. at 238.

For purposes of the PAMII Act, Congress has defined "probable cause" as:

reasonable grounds for belief that an individual with mental illness has been, or may be at significant risk of being subject to abuse or neglect. The individual making such determination may base the decision on reasonable inferences drawn from his or her experience or training regarding similar incidents, conditions or problems that are usually associated with abuse or neglect.

42 C.F.R. § 51.2. A determination of probable cause may result from "P & A system monitoring or other activities, including observation by P & A system personnel, and reviews of monitoring and other reports prepared by others whether pertaining to individuals with mental illness or to general conditions affecting their health or safety." 42 C.F.R. § 51.31(g).

In light of Congress' explicit definition of "probable cause" for purposes of the

PAMII Act, the court finds the standard Fourth Amendment definition of “probable cause” does not apply. *See* 42 C.F.R. § 51.2 (defining “probable cause” for purposes of the PAMII Act). Furthermore, Congress described how probable cause may be established, which the court finds indicative of Congress’ intent that the standard Fourth Amendment procedures do not apply. *See id.*; 42 C.F.R. § 51.31(g). The court finds Congress specifically intended P & A systems such as IP&A to be able to enter into a facility and investigate alleged abuse without having to follow the standard Fourth Amendment procedures such as obtaining a search warrant from a neutral magistrate. *See* 42 C.F.R. § 51.2 (stating the individual determining probable cause may rely upon reasonable inferences, the individual’s experience or training regarding similar incidents, or conditions or problems usually associated with abuse or neglect). Grafting a probable cause standard comparable to the standard utilized under the Fourth Amendment onto searches conducted by P & A systems pursuant to the PAMII Act would substantially frustrate Congress’ goal of protecting impaired individuals. Therefore, the court finds IP&A did not need to establish probable cause as that term generally is used in a Fourth Amendment context and did not need to obtain a search warrant from a neutral magistrate prior to investigating the incident at Tanager Place. The court next turns to the issue of whether IP&A established probable cause to investigate as that term is defined in the PAMII Act.

In this case, based on the telephone call from Ms. Price, IP&A alleges it established probable cause R.J. was subjected to abuse and neglect by Tanager Place and its staff, which caused him to run away from the facility and possibly drown. Tanager Place argues the probable cause letter provided to Tanager Place June 1, 2004 (Pl. Ex. 4) does not establish probable cause and, therefore, IP&A lacks authority to investigate in this case. The court finds it was reasonable for IP&A investigators to believe, based on the

conditions or problems usually associated with abuse or neglect, such as running away and drowning, that R.J. was subjected to abuse and neglect by Tanager Place and its staff.⁶

The court notes IP&A is authorized to investigate incidents of abuse and neglect if the incidents are reported to it, even if IP&A has no other information upon which to base probable cause. 42 U.S.C. § 10805(a)(1)(A). In this case, Ms. Price, an employee at Tanager Place, called IP&A to report R.J.'s disappearance and possible drowning. Therefore, notwithstanding the question of probable cause, IP&A was entitled to begin an investigation at Tanager Place. Because IP&A was authorized to conduct an investigation at Tanager Place, the court finds IP&A did not trespass when it entered the facility and requested access to records, residents, and all areas of the facility.

Because IP&A is authorized to conduct its investigation based on probable cause and the report from Ms. Price, IP&A is entitled to "reasonable unaccompanied access residents at all times necessary to conduct a full investigation of an incident or abuse or neglect." 42 C.F.R. § 51.42(b). IP&A's access to residents is limited to only that which is *reasonable*. The court must therefore find the appropriate balance between the parties' varying interests and decide what is "reasonable" in this case.

D. Unreasonable Actions or Requests

1. Interference by Tanager Place

The court finds Tanager Place violated the PAMII Act and interfered with IP&A's statutory rights (and continues to do so) in three ways. First, Tanager Place failed to promptly provide IP&A with a written statement of the reasons Tanager Place denied

⁶ The court agrees the June 1, 2004 letter does not set forth the basis upon which IP&A established probable cause to investigate, but IP&A is not required to alert Tanager Place to the purpose of its investigation. IP&A sent the letter to Tanager Place to inform Tanager Place that IP&A investigators would be arriving at Tanager Place to conduct an investigation.

IP&A investigators the opportunity to interview residents who might reasonably be believed to have knowledge of the incident. *See* 42 C.F.R. § 51.43 (“Access to . . . residents shall not be delayed or denied without the prompt provision of written statements of the reasons for the denial.”). Second, Tanager Place refused to allow IP&A investigators to interview residents without the therapist present. *See* 42 C.F.R. § 51.42(b) (“The P & A system shall have reasonable unaccompanied access to residents at all times necessary to conduct a full investigation of an incident of abuse or neglect.”); 42 C.F.R. § 51.42(d) “Unaccompanied access to residents shall include the opportunity to meet and communicate privately with individuals regularly, both formally and informally, by telephone, mail and in person.”). Third, Tanager Place refused to allow IP&A investigators to meet with any resident whose parent or guardian did not give permission to interview the resident. *See* 42 C.F.R. § 51.42 (no requirement a parent or guardian must give permission prior to IP&A interviewing a resident, including a minor resident who has a legal guardian, for the purpose of investigating an incident).

2. IP&A’s Conduct which Exceeded Statutory Boundaries

The court finds IP&A exceeded its statutory rights during its investigation at Tanager Place (and continues to do so) in four ways. First, IP&A demanded access to R.J.’s records prior to contacting R.J.’s parent or guardian. *See* 42 C.F.R. § 51.41(b) (allowing IP&A access to records of a deceased individual only where the following three elements are satisfied: (1) the individual is unable to authorize IP&A to have such access; (2) the individual does not have a legal guardian other than the State; and (3) a complaint or report has been received and IP&A has determined there is probable cause to believe the individual has been subject to abuse or neglect). Second, IP&A failed to work cooperatively with Tanager Place to interview residents where doing so would not in any way interfere with their investigation. *See* 42 C.F.R. § 51.31(c) (“Wherever possible, the

[P & A] program should establish an ongoing presence in residential mental health care or treatment facilities, and relevant hospital units.”); 42 C.F.R. § 51.31(d) (“Program activities should be carried out in a manner which allows program staff to: . . . (2) Interact regularly with staff providing care or treatment; . . . and (4) Communicate with family members, social and community service workers and others involved in providing care or treatment.”). Third, IP&A failed to confine its investigation to only interviewing residents reasonably believed to have knowledge of the incident. IP&A requested a list of all Tanager Place residents and their parents or guardians rather than just a list of the PMIC residents because IP&A investigators failed to educate themselves in advance about Tanager Place. *See* 42 C.F.R. § 51.42(b) (stating the authority to have reasonable unaccompanied access to residents includes the opportunity to interview individuals who might be reasonably believed by IP&A to have knowledge of the incident under investigation). Finally, IP&A failed to provide adequate training to its investigators regarding how to interview children with psychiatric difficulties and on the use of restraints. *See* 42 C.F.R. § 51.27 (stating a P & A system shall provide training for program staff including at a minimum (1) training to work with family members of clients served by the program where the individual with mental illness is a minor and (2) training to conduct full investigations of abuse or neglect).

3. Unreasonable Acts Relating to Requested Interviews

The court next addresses the parties’ actions regarding the requested interviews of the Dutton Cottage residents. Ms. Piper admitted at trial Tanager Place’s decision not to allow IP&A investigators to interview the residents until its medical and clinical personnel had evaluated the residents’ mental stability was a reasonable position to take. *Crt. Rptr.*

Notes at 50-51.⁷ On June 3, 2004, the investigators were permitted to interview one of the two residents with whom they had requested interviews on June 2. They were denied access to the second resident, C.S., because the treatment team had determined she was too medically fragile to give an interview. When IP&A requested interviews with the twelve residents of Dutton Cottage, the trained medical staff at Tanager Place determined four of the twelve residents of Dutton Cottage were mentally, physically and emotionally able to give interviews and those residents were available for interviews on July 9, 2004 between 9:00 a.m. and noon. IP&A opted not to interview the residents because Tanager Place had placed conditions on the interviews which IP&A found unacceptable: a therapist was to sit with the residents at the interviews,⁸ IP&A could only interview the residents between 9:00 a.m. and noon, and only four of the twelve children were presented for interviews without a detailed explanation as to why the other eight residents were unavailable.⁹ The four residents were removed from their daily routines to wait for IP&A

⁷ The court relies on the court reporter's notes because no official transcript is available.

⁸ IP&A objected to Tanager Place's requirement a therapist be present for the interviews. The investigators normally conduct conversational interviews, asking the children if they mind talking to the investigators, and if the children are willing, ask the individuals if there is a comfortable place they would like to go to talk. Next, they ask if they would like to select someone with whom they feel comfortable to sit with them during the interview. Ms. Piper stated this style of interview is used so the individuals making the selections feel in charge of their environments, and it gives them a much better opportunity to converse.

⁹ At trial, Mr. Estle explained of the remaining eight residents of Dutton Cottage, one had been interviewed already by IP&A on June 3, one was C.S., whom IP&A had withdrawn its request to interview, one child was away from Tanager Place on a scheduled home visit, two DHS guardians did not want their wards interviewed, two parents did not
(continued...)

investigators, who never arrived to interview them. IP&A was hopeful the court would rule in its favor and allow its investigators unaccompanied access to Tanager Place. Therefore, they chose not to require the four residents to give two interviews, once with the restrictions imposed by Tanager Place and once under IP&A's preferred conditions, thus disrupting the residents' routines more than necessary.

The court finds unreasonable IP&A's position regarding the four residents available for interviews on July 9, 2004. Ms. Piper stated it is important to follow the trail before it becomes cold, but she and IP&A staff members opted not to interview the four children, even with restrictions, in order to get some information soon after the incident. Furthermore, the court finds inconsistent IP&A's claim it did not want to disrupt the four residents' routines twice to interview them under the conditions set by Tanager Place and later without restrictions, but disrupted the residents' routines by failing to call and cancel prior to the time the interviews were scheduled to occur on July 9, 2004.

Mr. Estle is concerned the investigators are poorly trained to interview children with psychiatric problems, and to understand the stress interviews cause the residents. He is concerned that the investigators appear to have no protocols and the investigation appears to have no parameters. He is concerned that the interviews could have an adverse effect on the therapeutic atmosphere of Tanager Place because the interviews could cause such disruption that the children's behaviors could escalate to such a point that they would not be able to remain at Tanager Place, instead requiring even a higher level of care.

Dr. Larsen believes the IP&A investigators are poorly trained, poorly educated and

⁹(...continued)

want their children interviewed, and the final resident's medical condition prevented him or her from being interviewed. None of this was explained to IP&A in the July 8, 2004 letter. *See* Pl. Ex. 9.

inexperienced to consider the things he is held accountable for every time he makes a decision to allow or not allow the children to do something. Dr. Larsen expressed concern it would be unsafe for C.S. to give an interview when IP&A requested one because she does not trust adults quickly due to her past experiences. He indicated other residents would have difficulty giving interviews because they are children who already have psychiatric illnesses and are trying to deal with the new issue of the loss of their fellow resident. The residents' level of functioning changes from one month to another, and the time following R.J.'s disappearance was especially difficult. Tanager Place residents acted out, causing an escalation in the amount of property destruction, physical aggression and arguments. Dr. Larsen is concerned interviews with IP&A investigators will interfere with the residents' predictable and consistent routines, the basis for every other therapeutic thing Tanager Place's staff does for its residents, and Tanager Place's ability to assist the residents will be completely undermined.

The court agrees that the IP&A investigators and staff, with the possible exception of Mr. Olsen, do not have the credentials or experience necessary to fully appreciate the stresses interviews of this nature could cause to Tanager Place residents who are already grieving the loss of a fellow resident. In return, Tanager Place has made little effort to educate the investigators about this issue except when hauled into court. Mr. Estle is trying to place limitations on the investigation and the interviews which he is not entitled to do under the PAMII Act. Mr. Estle's concern the investigation might extend into programs other than PMIC appears unwarranted, as there is no indication IP&A is requesting information about or asking to interview any individuals beyond the PMIC program and there is no indication anyone outside of the PMIC program would have any information regarding R.J.

E. Reasonable Actions or Requests

Because one party may consider its actions or requests to be reasonable while the other party finds those actions or requests unreasonable, the court will try to provide more guidance for the parties as to what IP&A may do in pursuing its investigation and what Tanager Place may do to keep its residents in as normal a routine as possible. IP&A investigators may arrive at Tanager Place for the purpose of beginning or continuing an investigation. Once at Tanager Place, the investigators must request access to the particular area of the facility they wish to visit, and they must request to speak with the particular staff members and/or residents they wish to interview. *See* 42 C.F.R. § 51.42(b) (“Such access [to the facilities, staff members and residents who might be reasonably believed by the system to have knowledge of the incident under investigation] shall be afforded, *upon request*, by the P & A system. . . .” (Emphasis added)). The treatment team at Tanager Place shall be given time to determine whether a resident is medically, physically, mentally and emotionally capable of giving an interview. IP&A and Tanager Place shall decide upon a mutually acceptable time to interview the resident, taking into account the resident’s routine and whether treatment team members are immediately available to meet with the resident to make a determination. If the treatment team has determined a resident is able to give an interview, IP&A investigators may choose to interview the resident by telephone, mail or in person, and Tanager Place shall not require that a staff member accompany the resident during the interview. *See* 42 C.F.R. § 51.42(d) (defining “unaccompanied access to residents” as including the opportunity to meet with the individuals regularly, formally or informally, by telephone, mail and in person). Should IP&A choose not to interview a resident at the agreed-upon time, IP&A shall give notice to Tanager Place. At a minimum, notification requires that IP&A to call Tanager Place no later than one hour prior to the time the interview is

scheduled to take place. If the treatment team has determined a resident is medically, physically, mentally or emotionally unable to give an interview, or if a resident is otherwise unable to give an interview to IP&A investigators at the time requested, Tanager Place must promptly provide a written letter of explanation to IP&A. *See* 42 C.F.R. § 51.43 (“Access to . . . residents shall not be delayed or denied without the prompt provision of written statements of the reasons for the denial.”). IP&A shall give Tanager Place a written request for the contact information of the parents or guardians of specific residents¹⁰ if IP&A decides it needs that information to further its investigation. In response to such a request from IP&A, Tanager Place promptly shall provide IP&A with the names and addresses of the residents’ parents or guardians. IP&A investigators shall contact a resident’s parent or guardian before requesting access to a resident’s file. *See* 42 C.F.R. § 51.41(b).

V. PERMANENT INJUNCTION & DECLARATORY RELIEF

A. Legal Standard

“A court must consider the following factors in determining whether to issue a permanent injunction: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other

¹⁰ The court finds unreasonable IP&A’s request for the list of all residents’ names and their parents’ or guardians’ contact information. IP&A’s authority to access residents during an investigation is limited to interviewing only those residents “who might be reasonably believed by the [IP&A] system to have knowledge of the incident under investigation.” *See* 42 C.F.R. § 51.42(b). While IP&A’s authority to request records is not so limited, the court finds unreasonable a request for records of a resident who is not reasonably believed to have knowledge of the incident under investigation. It is highly unlikely that residents in the shelter, summer camp, and ICFMR would have knowledge of the incident involving R.J. and also somewhat unlikely residents of the other PMIC cottages would have knowledge of the incident.

parties; (3) whether the movant proves actual success on the merits; and (4) the public interest.” *Forest Park II v. Hadley*, 336 F.3d 724, 731 (8th Cir. 2003). The party seeking the injunction has the burden of establishing these factors. *Davis v. Francis Howell Sch. Dist.*, 103 F.3d 204, 205-06 (8th Cir. 1997).

The court has been granted the statutory authority to provide IP&A with declaratory relief if it is appropriate to do so in this case:

In a case of actual controversy within its jurisdiction, [except certain exclusions which do not apply here], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).

B. Analysis

The court next turns to the question of whether a permanent injunction is appropriate. First, IP&A has demonstrated a threat of irreparable harm in the event Tanager Place does not provide reasonable access to its residents as ordered above. Specifically, IP&A would not be able to function pursuant to the PAMII Act if required to adhere to the limitations placed on it by Tanager Place. If all facilities IP&A monitors and investigates were to place limitations on IP&A’s ability to function as required by the statute, IP&A would not be able to effect its statutory purpose of acting as a “watch dog.”

Second, after balancing the harm to IP&A with the injury granting an injunction would inflict on Tanager Place or any residents, the court finds the evidence weighs in favor of granting the injunction. The importance of allowing IP&A to conduct thorough investigations of possible abuse and neglect of mentally ill individuals outweighs the

comparatively minimal interference with the everyday activities of Tanager Place and its residents. Furthermore, the court finds Tanager Place and its residents should favor the uncovering of any actual abuse or neglect, because it would create a more effective treatment facility for the residents and their families.

Third, IP&A has proven actual success on the merits of its claim Tanager Place prevented and continues to prevent it from carrying out its statutory obligations under the PAMII Act. Generally, this includes (1) IP&A's right to interview residents without restrictions other than the treatment team's decision a resident is physically, mentally, or emotionally unable to give an interview and (2) IP&A's right to obtain contact information for the residents' guardians whom it might be reasonably believed by IP&A to have knowledge of the incident under investigation.

Finally, the public interest weighs in favor of granting IP&A the power it needs to conduct probable cause investigations without limitations by facilities it monitors and investigates. Therefore, the court finds a permanent injunction is appropriate in this case.

IP&A also requests the court enter a declaratory judgment stating Defendants' policies, regulations, practices and conduct of interfering with and denying IP&A proper and immediate access violate the PAMII Act. The court finds Defendants' policies, regulations, practices and conduct of interfering with and denying IP&A proper and immediate reasonable access, as set forth above, violate the PAMII Act. However, as explained fully above, not all of Defendants' actions relating to the pending probable cause investigation violate the PAMII Act.

IV. CONSTITUTIONALITY OF PAMII ACT AS APPLIED

Tanager Place argues the PAMII Act is unconstitutional as applied in this case. Specifically, Tanager Place argues IP&A's investigatory acts constitute state action and therefore, IP&A is subject to the Fourth Amendment's requirement that a search warrant

be issued by a neutral magistrate based on a traditional definition of probable cause. Because IP&A failed to conform to the limits of the Fourth Amendment, Tanager Place argues, IP&A's investigation was and continues to be unconstitutional. Tanager Place also argues it has a reasonable expectation of privacy from governmental intrusion such as that which occurred in this case.

IP&A contends private, non-profit entities which receive state and federal grants are not considered government entities for purposes of the Fourth Amendment. Therefore, IP&A argues, its investigators did not need a search warrant in order to investigate an incident at Tanager Place.¹¹

A. Government Actor

Tanager Place argues IP&A is a government actor for purposes of the Fourth Amendment. In support of its argument, Tanager Place alleges there exists a nexus between IP&A and the government, IP&A has a symbiotic relationship with the government, IP&A has enlisted government action to enforce its claimed mandate, and IP&A's purported functions are traditionally reserved to the state. IP&A responds it is not a government actor and, therefore, did not need a search warrant to investigate an incident at Tanager Place.

"The Fourth Amendment prohibits, *inter alia*, unreasonable searches and seizures by government actors." *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 536 (8th Cir. 1999). The United States Supreme Court and the Eighth Circuit Court of Appeals have expressly determined the constraints of the Fourth Amendment do not apply to purely private activity. *U.S. v. Garlock*, 19 F.3d 441, 442 (8th Cir. 1994) (citing *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)). However, "the government can exercise such

¹¹ IP&A did not address the "reasonable expectation of privacy" issue in its brief or at trial.

control over a private actor that a ‘private’ action can fairly be attributed to the government for purposes of the Fourth . . . Amendment.” *Id.* at 443. Tanager Place, as the party challenging the allegedly governmental action, must show that, “in light of all the circumstances,” IP&A “acted as an instrument or agent of the government.” *Id.* (quoting *Skinner v. Railway Executives’ Ass’n*, 489 U.S. 602, 614 (1989)). Tanager Place may meet its burden by demonstrating that “‘the government exercised such coercive power or such significant encouragement that it is responsible’ for [IP&A’s] conduct, or that the exercised powers are the ‘exclusive prerogative of the government.’” *Id.* (quoting *Fidelity Fin. Corp. v. Fed. Home Loan Bank*, 792 F.2d 1432, 1435 (9th Cir. 1986)).

Applying the analysis set forth in *Garlock*, the court finds IP&A is not acting as an instrument or agent of the government. IP&A is not directly controlled by the government. There is no evidence the government, either federal or state, exercised such coercive power or such significant encouragement that it is responsible for IP&A’s conduct. First, there is no evidence that any traditional law enforcement agency knew of IP&A’s investigation in this case. *Cf. id.* (finding no government action because there was no evidence any traditional law enforcement agency knew of the investigation conducted by bank employees prior to the defendant’s confession). Second, the government exercised absolutely no control over the manner in which IP&A conducted its investigation. *Cf. id.* (determining bank employees were not government actors for purposes of the Fourth Amendment where the government exercised no control over the manner in which the bank maintained its internal security). Third, government officials did not use IP&A to target Tanager Place. *See id.* (distinguishing government action in the form of government officials directing private parties to target a particular suspect from the facts of that case). Rather, Congress merely directed IP&A, as a P & A system created under the PAMII Act, to investigate incidents of abuse and neglect of individuals with mental illness if the

incidents are reported to the system or if there is probable cause to believe that the incidents occurred. 42 U.S.C. § 10805(a)(1)(A). The regulations do not address the specific manner in which IP&A conducts its investigations. “[T]he mere fact that an individual’s job involves the investigation of crime does not transform him into a government actor.” *Garlock*, 19 F.3d at 443-44 (citations omitted). The only connections between the government and IP&A are that IP&A is government-funded and IP&A exists because of the federal PAMII Act. IP&A is a private, non-profit corporation, not a government agency. To follow the analysis of Tanager Place would result in the absurd notion that any private group which receives federal funding is a government actor for purposes of the Fourth Amendment, regardless of the fact the government is not otherwise involved in the organization.

Case law from the United States Court of Appeals for the Eighth Circuit provides further support for the court’s determination IP&A is not a government actor. In *Nichols v. Metropolitan Center for Independent Living, Inc.*, 50 F.3d 514 (8th Cir. 1995), the Eighth Circuit Court of Appeals ruled the defendant, a non-profit corporation qualified as a center for independent living was not a government actor because it was not directly controlled by the government, even though it depended upon the government for nearly all of its funding, it performed uniquely public functions, and it was subject to extensive governmental regulation and licensing. *Id.* at 517-18. The court finds *Nichols* to be valid precedent in this case on the issue of whether IP&A is a government actor. IP&A depends entirely upon federal funding. It performs a uniquely public function of investigating abuse and neglect even though it is separate from traditional law enforcement and does not have all of the investigatory tools which are at the disposal of law enforcement agencies. IP&A had to be designated by state law as the P & A system in the State of Iowa. All of IP&A’s authority is granted by federal and state law. The Eighth Circuit Court of Appeals

has opined these factors alone do not support a finding that IP&A acted as a government agent. *See id.*

The court finds Tanager Place has failed to meet its burden of proving, in light of all the circumstances, IP&A acted as an instrument or agent of the government. Because a purely private search occurred in this case, the Fourth Amendment does not apply. Therefore, the court finds the PAMII Act is not unconstitutional even though it authorizes IP&A to conduct searches and seizures which Tanager Place believes to be unlawful in light of the Fourth Amendment.

B. Reasonable Expectation of Privacy

Even if the court were to conclude the Fourth Amendment applies in this case, Tanager Place is protected under the Fourth Amendment only to the extent it has a reasonable expectation of privacy from the intrusion of government actors.

“The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes.” *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311 (1978). Therefore, the ban on warrantless searches extends to business premises as well as private residences. *Id.* at 312. The Supreme Court has ruled that warrantless searches are generally unreasonable in the context of commercial premises. *Id.* (citing *Camara v. Mun. Ct.*, 387 U.S. 523, 528-29 (1967)). A businessperson has a constitutional right to conduct business free from unreasonable entries by government officials upon the private property of the business. *Id.* (citing *See v. City of Seattle*, 387 U.S. 541, 543 (1967)). “[T]he Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations.” *Id.* (citing *See*, 387 U.S. at 543). The Court opined, “[i]f the government intrudes on a person’s property, the privacy interest suffers whether the government’s motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards. It therefore appears that unless

some recognized exception to the warrant requirement applies, *See v. City of Seattle* would require a warrant to conduct [an] inspection. . . .” *Id.* at 312-13.

The Supreme Court has determined most industries have a reasonable expectation of privacy from the government. In *Marshall*, the Supreme Court determined warrantless inspections authorized by Congress to enforce the Occupational Safety and Health Act of 1970 (“OSHA”) were not reasonable. *Id.* at 307. The Court opined,

[T]he element that distinguishes these enterprises [which are heavily regulated] from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. “A central difference between those cases [*Colonnade* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.”

Id. at 313 (quoting *Almeida-Sanchez*, 413 U.S. at 271). The Court relied upon the fact that the employees working at the business were not prohibited from reporting OSHA violations. *Id.* at 314. “What [employees] observe in their daily functions is undoubtedly beyond the employer’s reasonable expectation of privacy. The Government inspector, however, is not an employee. . . . The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents.” *Id.* at 315.

Nevertheless, “a business, by its special nature voluntary existence, may open itself to intrusions that would not be permissible in a purely private context.” *G.M. Leasing Corp. v. U.S.*, 429 U.S. 338, 353 (1977). Certain industries have such a history of oversight by the government that no reasonable expectation of privacy could exist for a

business owner in the industry. *Marshall*, 436 U.S. at 313. “[W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.” *Id.* Heavily regulated industries, such as liquor and firearms, fall within the “certain carefully defined classes of cases” which are distinguished from ordinary businesses by a long tradition of close government supervision. *Id.* (quoting *Camara*, 387 U.S. at 528). Thus, any individual who chooses to enter such an industry is aware of the extensive government supervision via licensing and regulations and accepts the burdens as well as the benefits of their trade. *Id.* (quoting *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 271 (1973)).

The United States Supreme Court and the Eighth Circuit Court of Appeals have delineated some industries as being so heavily regulated that the traditional Fourth Amendment protections do not apply because they do not have a reasonable expectation of privacy from government intrusion. The Supreme Court upheld a warrantless search of a locked storeroom during business hours, pursuant to the inspection procedure authorized by the Gun Control Act of 1968: “When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.” *U.S. v. Biswell*, 406 U.S. 311, 316 (1972). The Supreme Court also ruled constitutional Congress’ decision to create such powers of inspection under the liquor laws as Congress deems necessary, determining the general restrictive procedures of the Fourth Amendment did not apply because the liquor industry is so heavily regulated. *U.S. v. Colonnade Catering Corp. v. U.S.*, 397 U.S. 72, 77 (1970). The Eighth Circuit Court of Appeals determined that because the prescription drug industry is heavily regulated at virtually every phase of manufacturing, a businessperson in the industry has no reasonable expectation of privacy from government intrusion. *U.S. v. Jamieson-McKames Pharms.*,

Inc., 651 F.2d 532, 537-39 (8th Cir. 1981). The Eighth Circuit Court of Appeals distinguished *Marshall* by determining the class intended to be protected by OSHA regulations is comprised of employees who are in the work place and are free to report violations at any time; the protected class in the drug manufacturing industry is the consuming public who have no way of learning of violations other than becoming ill from ingesting defective products. *Id.* at 538. Thus, the Eighth Circuit Court of Appeals reasoned, the enforcement needs of drug industry regulations are substantially more critical than those before the Supreme Court in *Marshall*. *Id.*

Because the Fourth Amendment only prohibits unreasonable searches and seizures, “reasonableness is still the ultimate standard.” *Marshall*, 436 U.S. at 315-16 (quoting *Camara*, 387 U.S. at 539). “The reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute.” *Id.* at 321. The Supreme Court indicated that there could be industries other than liquor and firearms, covered by regulatory schemes applicable only to them, where regulation is so pervasive that the exception to the warrant requirement could apply. *Id.*; see also *Jamieson-McKames Pharms., Inc.*, 651 F.2d at 537 (extending the exception to the prescription drug manufacturing industry). The Eighth Circuit Court of Appeals has determined, “the nature of the federal or public interest sought to be furthered by the regulatory scheme is important to [the] analysis [of whether a warrantless search is reasonable].” *Jamieson-McKames Pharms., Inc.*, 651 F.2d at 537.

Tanager Place, as a PMIC, is subject to substantial regulation. Iowa Code Chapter 135H sets forth the regulatory scheme regarding PMICs. See Iowa Code §§ 135H.1-.16. The purpose of the substantial regulations is “to provide for the development, establishment, and enforcement of basic standards for the operation, construction, and maintenance of a psychiatric medical institution for children which will ensure the safe and

adequate diagnosis and evaluation and treatment of the residents.” *Id.* at § 135H.2. The class sought to be protected by the substantial regulations set forth in Iowa Code Chapter 135H is children under twenty-one years of age with mental, emotional, medical or behavior problems who require substantial long-term psychiatric services. *See id.* at § 135H.1(8), (9), (11) (defining “PMIC,” “psychiatric services,” and “resident”). The regulations include licensure and personnel requirements, *id.* at §§ 135H.4-.9, provide for scheduled inspections by the Department of Inspections and Appeals and inspections upon receipt of a complaint of an alleged statutory or regulatory violation, *id.* at § 135H.12, and establish civil and criminal penalties for operating a PMIC without a license, *id.* at §§ 135H.15-.16. Furthermore, IP&A is authorized to monitor and inspect PMIC facilities in order to investigate incidents of abuse and neglect of individuals with mental illness. 42 U.S.C. § 10805(a)(1); 42 C.F.R. § 51.42. The protected class is comprised of individuals unlikely to be able to protect themselves and to report statutory violations or allegations of abuse and neglect. The court finds the nature of the public interest sought to be furthered by regulating PMICs is substantial enough to justify warrantless searches. By choosing to engage in the heavily regulated business of housing and treating mentally ill children, Tanager Place has no reasonable expectation of privacy from governmental intrusions. Thus, even if IP&A is considered a government actor subject to the restrictions of the Fourth Amendment, the warrantless search was reasonable, and thus, constitutional. The court denies Tanager Place’s request the court declare unconstitutional the PAMII Act as applied in this case.

VII. CONSTITUTIONALITY OF PAMII ACT ON ITS FACE

Tanager Place next presents a facial challenge to the constitutionality of the PAMII Act. Specifically, Tanager Place contends the PAMII Act is unconstitutional for the following reasons: (1) the definition of “probable cause” is vague; (2) a P & A system,

rather than a neutral magistrate, determines whether probable cause exists; (3) a statute cannot invest a governmental agency with such sweeping rights of entry, inspection and seizure; and (4) the PAMII Act allows a P & A system to broaden its probable cause investigation throughout the course of the investigation.

Where a party asserts a facial constitutional challenge to a statute, the specific facts of the case are not relevant. *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 519 (8th Cir. 1999). “A ‘facial’ challenge, in this context, means a claim that the law is ‘invalid *in toto* -- and therefore incapable of any valid application.’” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)).

A. Vagueness of “Probable Cause” Definition

Tanager Place alleges the PAMII Act is unconstitutional because the definition of “probable cause” contained in the regulations is vague. “In a facial challenge to the . . . vagueness of a law, a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). “[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.” *Id.* at 495 n.7 (quoting *U.S. v. Mazurie*, 419 U.S. 544, 550 (1975)). “The root of the vagueness doctrine is a rough idea of fairness.” *Colten v. Ky.*, 407 U.S. 104, 110 (1972); *accord Poole v. Wood*, 45 F.3d 246, 249 (8th Cir. 1995). The degree of vagueness which is constitutionally permissible in a particular statute depends in part on the nature of the statute. *Village of Hoffman Estates*, 455 U.S. at 498. For example, economic regulations are subject to a less strict test for vagueness than statutes which inhibit the exercise of constitutionally protected rights such as free speech and association. *Id.* at 498-99. The Supreme Court has upheld a greater degree of

vagueness in cases involving statutes which create civil, not criminal, penalties because the consequences of vagueness are less severe. *Id.* at 498-99.

For purposes of the PAMII Act, Congress has defined “probable cause” as:

reasonable grounds for belief that an individual with mental illness has been, or may be at significant risk of being subject to abuse or neglect. The individual making such determination may base the decision on reasonable inferences drawn from his or her experience or training regarding similar incidents, conditions or problems that are usually associated with abuse or neglect.

42 C.F.R. § 51.2. A determination of probable cause may result from “P & A system monitoring or other activities, including observation by P & A system personnel, and reviews of monitoring and other reports prepared by others whether pertaining to individuals with mental illness or to general conditions affecting their health or safety.”

42 C.F.R. § 51.31(g).

Because Tanager Place does not allege a First Amendment challenge to the PAMII Act, the court must examine the vagueness challenge in light of the facts of this case. *See Village of Hoffman Estates*, 455 U.S. at 494. The statute is intended to create a private group in each state who will protect mentally ill individuals from abuse and neglect. As set forth above, the statute does not implicate the Fourth Amendment because IP&A is not a government actor; even if IP&A is a government actor, Tanager Place does not have a reasonable expectation of privacy from governmental intrusion. Therefore, the statute does not inhibit the exercise of constitutionally protected rights. Because IP&A is not a governmental entity, the only potential “penalties” to Tanager Place are the pursuit by IP&A of administrative, legal and other remedies to ensure the protection of individuals with mental illness. *See* 42 U.S.C. § 10805(a)(1)(B).

The court finds the definition of “probable cause,” when considered in light of the

facts of this case, is not unconstitutionally vague. The regulations promulgated pursuant to the PAMII Act set forth the standard for determining probable cause, as well as the grounds upon which the individuals can rely in making such a determination. In this case, IP&A investigators determined, based upon a phone call from an individual working at Tanager Place, there exists probable cause R.J. was subjected to abuse or neglect, which caused him to run away from Tanager Place and, ultimately, drown. The court finds the PAMII Act is not unconstitutional because the definition of “probable cause” is vague.

B. P & A System Determines Whether Probable Cause Exists

Tanager Place next challenges the constitutionality of the PAMII Act on the grounds that the PAMII Act authorizes a P & A system, rather than a neutral magistrate, to determine the existence of probable cause.

The Supreme Court has determined, “[t]he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search.” *Marshall*, 436 U.S. at 323. The Court stressed,

a warrant would . . . advise the [business] owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. These are important functions for a warrant to perform, functions which underlie the Court’s prior decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes.

Id. at 323-24.

P & A systems are not executive or administrative officers. They are private non-profit corporations designated by the state to protect and advocate for the rights of mentally ill individuals. Courts have consistently rejected attempts to require a neutral magistrate to determine probable cause where a private group purports to act on the basis of probable cause under the PAMII Act. *E.g. Iowa Protection & Advoc. Services, Inc. v. Gerard*

Treatment Progs., L.L.C., 152 F. Supp. 2d 1150, 1159 (N.D. Iowa 2001); *Ala. Disabilities Advoc. Prog. v. J.S. Tarwater Developmental Ctr.*, 894 F. Supp. 424, 428-29 (M.D. Ala. 1995); *Ariz. Ctr. for Disability Law v. Allen*, 197 F.R.D. 689, 693 (D. Ariz. 2000); *Ctr. for Legal Avoc. v. Earnest*, 188 F. Supp. 2d 1251, 1257 (D. Colo. 2002), *rev'd on other grounds*, 320 F.3d 1107 (10th Cir. 2003); *Office of Protection & Advoc. for Persons with Disabilities v. Armstrong*, 266 F. Supp. 2d 303, 321 (D. Conn. 2003); *cf. Md. Disability Law Ctr., Inc. v. Mt. Washington Pediatric Hosp., Inc.*, 664 A.2d 16, 25 (Md. App. 1995) (determining the Developmental Disabilities Assistance and Bill of Rights Act authorizes a P & A system to determine probable cause to investigate incidents of abuse and neglect of persons with developmental disabilities).

A policy reason exists for supporting the independence of P & A systems in determining probable cause. The Eleventh Circuit Court of Appeals has pointed out:

[U]nlike criminal law probable cause, the consequence of a P & A's determination of probable cause is not an indictment or an accusation, but rather a civil investigation. . . . In the P & A probable cause process, the interests of three parties are implicated -- those of the facility, those of the individual who may have been subject to abuse and his or her family, and those of the P & A, which has an obligation and mandate to protect from abuse the individual(s) and others who are similarly situated. In this balance, the facility's interests surely are less viable and of less import than those of the individual and the P & A. The facility can claim no interest in avoiding investigations of harm or injury to a person with a disability. Minor inconveniences to staff or some disruption of the facility's routine hardly rise to the level of the liberty interest that is generally at issue in a criminal investigation. *Michigan Protection & Advocacy Service, Inc. v. Miller*, 849 F.Supp. 1202, 1208-09 (W.D.Mich.1994) (defendants' objections that the P & A access to facility for children will interfere with programming have no merit). Indeed, one

would suppose that a facility's legitimate interests are served when abuse and neglect are uncovered and can be corrected. Likewise, when a P & A makes a finding of probable cause, no liberty interest of the developmentally disabled person is threatened, as it is precisely that individual's interest that the P & A seeks to protect. *See United States v. Allis-Chalmers*, 498 F.Supp. 1027, 1031 (E.D.Wis.1980) (occupational safety agency may have access to employees' health records since agency "is acting *on behalf of* the very employees" the company claims it is seeking to protect by alleging that access violated employees' privacy).

Ala. Disabilities Advoc. Prog., 97 F.3d at 498-99 (emphasis in original).

The requirement that IP&A convince a neutral magistrate probable cause exists prior to having access to Tanager Place residents, records and employees is burdensome and unnecessary. IP&A must have sufficient means of access in order to adequately fulfill its role of protecting mentally ill individuals from abuse and neglect. To conclude otherwise would frustrate the purpose of the PAMII Act to establish an effective system to protect and advocate for the rights of individuals with disabilities. The court finds the PAMII Act is not unconstitutional because it authorizes P & A investigators, rather than a neutral magistrate, to determine the existence of probable cause.

C. PAMII Act Authorizes Overly Broad Rights of Entry, Inspection And Seizure

Tanager Place states another court in the Northern District of Iowa determined the PAMII Act gives a P & A system "'overriding' authority to obtain access to patients and their records, notwithstanding a guardian's 'refusal or failure to act on behalf of the individual' upon the request of the P & A for permission for such access." *Gerard Treatment Progs., L.L.C.*, 152 F. Supp. 2d at 1165. Tanager Place argues a statute cannot constitutionally invest a governmental agency with such sweeping rights of entry, inspection and seizure.

Tanager Place removes the quotation from its context. The court in *Gerard* was dealing with section 10805(a)(4)(C), which authorizes a P & A system access to a resident's records where a complaint has been received by the P & A system or there is probable cause to believe the health or safety of the resident is in serious and immediate jeopardy and (1) a resident's parent or guardian has been contacted by the P & A system, (2) the P & A system has offered to assist the parent or guardian to resolve the situation, and (3) the parent or guardian has failed or refused to act on behalf of the resident. 42 U.S.C. § 10805(a)(4)(C). The purpose of granting access to records when the resident's parent or guardian will not act on behalf of the resident is to protect the resident by investigating actual or potential abuse or neglect. The court finds such access is reasonable because authorization to obtain records against the parent's or guardian's permission¹² is limited to those situations in which a complaint has been received by the system or the system has probable cause to believe the health or safety of the resident *is in serious and immediate jeopardy*. *See id.* (emphasis added). Preventing a P & A system from investigating in such situations would defeat the purpose of creating P & A systems to protect mentally ill individuals. The court finds the PAMII Act is not unconstitutional because it grants P & A systems access to the records of a mentally ill individual against the wishes of the individual's parent or guardian in the limited situations that a complaint has been received by the system or the system has probable cause to believe the health or safety of the resident is in serious and immediate jeopardy.

¹² The court is not referring to situations in which a resident grants access to his or her records but the resident's parent or guardian denies such access. In that situation, a P & A system would have authorization to access a resident's records under 42 U.S.C. § 10805(a)(4)(A) (granting access to records of a resident if the resident has authorized the P & A system to have such access).

D. P & A System Can Broaden Probable Cause Investigation

Finally, Tanager Place challenges the constitutionality of the PAMII Act on the grounds that it impermissibly allows a P & A system to broaden its probable cause investigation during the course of the investigation. Specifically, Tanager Place argues the Fourth Amendment does not allow a governmental actor to search and seize on such broad terms.

As the court determined in Part VI-A, the P & A systems are not government actors and, thus, the Fourth Amendment protections from unreasonable searches and seizures are not implicated. Additionally, as determined in Part VI-B, the Fourth Amendment protects Tanager Place from *unreasonable* searches and seizures, and Tanager Place has no reasonable expectation of privacy from governmental inspections and investigations. Therefore, the argument Tanager Place asserts is inapplicable in this case.

The purposes of the PAMII Act are “to ensure that the rights of individuals with mental illness are protected” and to assist states in creating and operating P & A systems “which will (A) protect and advocate the rights of [mentally ill] individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes; and (B) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or there is probable cause to believe that the incidents occurred.” 42 U.S.C. § 10801(b). Tanager Place suggests a P & A system should be required to set forth the parameters of its probable cause investigation prior to arriving at a facility to investigate abuse or neglect and never investigate beyond those limits. Following this argument to its logical conclusion, a P & A system would be limited to the original parameters created before having spoken with one individual or having read one record even if, in the course of the investigation, the P & A system determined the scope of the investigation into abuse or neglect should be broadened based on speaking with a

resident or employee or reading a record. Such a requirement would substantially frustrate the purposes of the PAMII Act. The court finds the PAMII Act is not unconstitutional because it allows a P & A system to broaden its probable cause investigation during the course of the investigation.

VIII. CONCLUSION

IT IS ORDERED Defendants Tanager Place and Tanager, Inc. are permanently enjoined, as follows:

- (1) Defendants shall provide IP&A with reasonable access to the residents of Tanager Place in Cedar Rapids, Iowa in conformity with the court's order as set forth above;
- (2) To the extent possible, all activities by IP&A shall be conducted so as to minimize interference with Tanager's Place's programs and any inconvenience or distress to residents;
- (3) Both parties are to act in good faith in determining:
 - (a) the residents' medical, physical, mental and emotional ability to give interviews;
 - (b) a mutually acceptable time for interviews of the residents; and
 - (c) the need to cancel any interviews with residents, and a cancelling party is ordered to give at least one hour's notice of cancellation prior to the time the interview is set to begin.
- (4) This permanent injunction shall be binding upon the parties to this action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this Order.

DATED this 30th day of September, 2004.



LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA