FACTS IN THE RECORD

Fred Stein lived in the State of Bohemia with his wife and three children. Mr. Stein had been a professional piano player for 25 years. In 2017, he began to notice that he was losing sensation in his fingers. He went to see his neurologist, Dr. Julie Green. Dr. Green conducted an extensive battery of tests to try to determine what was causing the loss of sensation. After several months, Mr. Stein could no longer play the piano. He was even having trouble holding a fork. Dr. Green suspected there was nerve damage or carpal tunnel syndrome.

Faced with not being able to play the piano, Mr. Stein became depressed. Dr. Green recommended that Mr. Stein see Dr. Simon Freed, who is a board-certified psychiatrist. Dr. Freed provided therapy and prescribed the anti-depressant medication, Zoneout. The medication and therapy only afforded Mr. Stein minimal relief from his depression. Dr. Freed suggested that Mr. Stein get a dog that would serve as a companion and perhaps help with his depression. Mr. Stein adopted a shelter dog, a pit bull named Astro.

Astro was unruly. Mr. Stein enrolled Astro in a dog obedience class that was supposed to last three months at the K-9 Marine Corp. Astro learned how to respond to basic commands, such as fetching a stick, sitting up, and rolling over. Dr. Freed noted in Mr. Stein’s medical records, “Patient appears more relaxed and less depressed since obtaining service dog three weeks ago.” Mr. Stein trained Astro to retrieve his anti-depression medication bottle from the bathroom when he snapped his fingers three times and used the command “Medication Time.” Astro would respond appropriately about 50% of the time by jumping on the counter and bringing the bottle to Mr. Stein.

In 2018, Albright Pharmaceuticals (Albright) was in the process of testing an experimental drug for nerve numbness, Flexjoy. Albright received FDA approval to conduct a double-blind study on Flexjoy at the Marsden Clinic in the State of Riverdale. The Marsden Clinic is one of the leading research institutions in the country. The Marsden Clinic is a nonprofit

1 A double-blind study is one in which neither the participants nor the experimenters know who is receiving a particular treatment. This procedure is utilized to prevent bias in research results. Double-blind studies are particularly useful for preventing bias due to demand characteristics or the placebo effect.
corporation organized and operating under the laws of the State of Riverdale. It has an annual budget in 2020 of $250 million dollars. Between 2017-2020 it typically received $30-$40 million in government research grants each year.

Dr. Green had completed her residency program in Neurology at the Marsden Clinic. Although the enrollment period had passed, Dr. Green prevailed on Bonnie Bell, the Marsden Clinic Administrator, to waive the deadline and enroll Mr. Stein in the Flexjoy study. There is a distance of 1,200 miles from Mr. Stein’s home in Bohemia to the Marsden Clinic in the State of Riverdale. One month prior to the completion of the dog obedience class, Mr. Stein took Astro with him to the Marsden Clinic. Astro received no further training from the K-9 program.

At the front door to the Marsden Clinic, there was a sign which read, “No Pets Allowed, Service Animals Welcome.” Bonnie Bell advised Mr. Stein about the no-pet policy after seeing Astro on his leash standing next to him. Mr. Stein replied, “This is Astro, he’s my service dog.” Ms. Bell replied, “I’ve worked here since 1997 – I have never seen a pit bull service dog before. We have children and pregnant women in our facility. People are scared of pit bulls. I was even bitten once. I’m sorry, but your dog can’t be in here with you.” Mr. Stein stated that he would not participate in the study without having Astro present to provide support to him.

As an alternative, Ms. Bell offered to allow Astro to be tied up with access to food and water outside the Clinic at the security guard station. This was not acceptable to Mr. Stein. He and Astro went back to Bohemia without participating in the drug study on Flexjoy.

In 2019, Albright Pharmaceuticals announced the results of the double-blind Flexjoy study. In the group of 100 test subjects who received Flexjoy over the six-month study, 52% reported a significant decrease in numbness. 18% reported a moderate or minor decrease in numbness, and the other 30% reported no decrease in numbness at all. Pending the results of nerve conduction studies on this group, the FDA approved Flexjoy for use in patients experiencing numbness in the fingers.

After returning to Bohemia, Mr. Stein continued to experience numbness in his hands. He has been unable to return to playing the piano. His income as a piano player dropped 100% from 2019-2020. Mr. Stein’s psychiatrist has reported that he was “frustrated and upset at not being able to participate in a drug study.” Dr. Green was later hired as an adjunct faculty position at the Marsden Clinic in the Neurology Department in 2020.
PROCEDURAL HISTORY OF PRESENT CASE

Fred Stein filed a lawsuit in District Court for the District of Riverdale alleging two causes of action:

1. A civil rights action under 29 U.S.C. § 794 for violation of the Rehabilitation Act of 1973 seeking monetary damages for emotional distress against the Marsden Clinic as well as declaratory and injunctive relief.

2. A civil rights action under 42 U.S.C. § 12181 for violation of Title III of the Americans with Disabilities Act seeking declaratory and injunctive relief against the Marsden Clinic to compel it to modify its policies, practices, and procedures to allow him to have his service animal, Astro, with him on future admissions to the facility.

The Marsden Clinic filed a 12(b)(6) motion to dismiss both causes of action on the following grounds:


2. Plaintiff lacks standing to pursue an injunction because, even assuming he was harmed in the past by the policy with respect to its service animal policy, there is no likelihood that he will suffer harm in the future.

The District Court denied the motion to dismiss in its entirety on September 30, 2020. On October 11, 2020, the Marsden Clinic appealed that denial to the 14th Circuit Court of Appeals. On December 3, 2020, the 14th Circuit reversed the District Court, and granted the motion in its entirety. Mr. Stein petitioned the United States Supreme Court for a writ of certiorari on January 17, 2020. The petition was granted on March 1, 2021.
APPENDIX 1

MARSDEN CLINIC NOTICE: Discrimination is Against the Law

Marsden Clinic complies with applicable federal civil rights laws and does not discriminate on the basis of race, color, creed, religion, gender, marital status, sexual orientation, gender identity or expression, veteran's status, status with regard to public assistance, national origin, disability, or age in admission to, participation in, or receipt of the services and benefits under any of its programs and activities.

- Marsden Clinic:
  - Provides free aids and services to people with disabilities to effectively communicate such as:
    - Qualified sign language interpreters
    - Written information in other formats (large print, audio, accessible electronic formats, other formats)
  - Provides free language services to people whose primary language is not English, such as:
    - Qualified interpreters
    - Information written in other languages

If you need these services, please contact the Office of Patient Experience. If you believe that Marsden Clinic has failed to provide these services or discriminated in another way on the basis of race, color, creed, religion, gender, marital status, sexual orientation, gender identity or expression, veteran's status, status with regard to public assistance, national origin, disability, or age in admission to, participation in, or receipt of the services and benefits under any of its programs and activities, you can file a grievance with the Office of Patient Experience.

You can file a grievance in person or by mail. If you need help filing a grievance, Marsden Clinic Office of Patient Experience is available to help you.
APPENDIX 2

State of Riverdale Civil Code Revised Statute 25.623:
It shall be unlawful for any person or entity to interfere with the right of a disabled person to utilize a Service Animal in a place of public accommodation open to members of the public.

State of Riverdale Civil Code Revised Statute 25.624:
Service Animals are defined as dogs that are individually trained to do work or perform tasks for people with disabilities. Service Animals are working animals, not pets. The work or task a dog has been trained to provide must be directly related to the person’s disability. Dogs whose sole function is to provide comfort or emotional support do not qualify as Service Animals.

State of Riverdale Civil Code Revised Statute 25.625:
In places of public accommodation where it is not obvious that a person with a disability has a dog which is a Service Animal, staff may ask: (1) is the dog a Service Animal required because of a disability?; and (2) what work or task has the dog been trained to perform? Staff are not allowed to request any documentation for the dog, require that the dog demonstrate its task, or inquire about the nature of the person's disability.
APPENDIX 3

State of Riverdale Health & Safety Code 30.115:
Except as otherwise provided by law, it shall be unlawful for a hospital, physician’s office, or medical provider to permit an animal to remain within the premises where such medical services are being provided to a patient.
MEMORANDUM AND ORDER

GONSALES, District Judge

The facts of the case are delineated in the record. Citation is made to the facts to the extent appropriate to understand this Court’s decision.

Plaintiff, Fred Stein (“Stein”) brings this civil rights action against the Marsden Clinic (“Clinic”) alleging two causes of action. First, under 29 U.S.C. § 794 for violation of the Rehabilitation Act of 1973, Stein seeks monetary damages for emotional distress caused by the incident. Stein also seeks declaratory and injunctive relief. Second, under 42 U.S.C. §12181, Stein seeks declaratory and injunctive relief to compel Clinic to modify its policies, practices, and procedures to allow him to have his service animal, Astro, with him on future admissions to the facility.

Clinic filed a 12(b)(6) motion to dismiss both counts. With respect to the first cause of action, Clinic argues that emotional distress damages are not available as a remedy under the

2 Monetary damages are not available to private persons as a remedy under Title III of the ADA. See 42 U.S.C. §36.504
Rehabilitation Act of 1973. Clinic also asserts that monetary damages to Stein are remote and speculative. As to both the first and the second cause of action, Clinic asserts that Stein lacks standing for an injunction because he resides 1200 miles away from Clinic with no danger of a future violation and is no longer receiving medical care or services. Having reviewed the pleadings on file, the Court denies the motion to dismiss as to both counts.

**DISCUSSION**

**ISSUE ONE: Claim Under 29 U.S.C. § 794**

“Rehabilitation Act § 504 forbids organizations that receive federal funding, including public schools, from discriminating against people with disabilities.” 29 U.S.C. § 794(b)(2)(B); *Mark H. v. Lemahieu*, 513 F.3d 922, 929 (9th Cir. 2008); *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015, 1020 (9th Cir. 2002). Section 504 provides that “no otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a); see also 34 C.F.R. § 104.4. “If an organization that receives federal funds violates Rehabilitation Act § 504 intentionally or with deliberate indifference, it may be liable for compensatory damages.” *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010).

Courts have traditionally interpreted Rehabilitation Act claims by the same standard as ADA claims because both of these statutes share the common goal of providing protection from discrimination to disabled persons. “Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act (29 U.S.C. § 794), and is to be interpreted consistently with that provision.” *Wong v. Regents of the University of California*, 192 F.3d 807, 811 n.26 (9th Cir. 1999).

“Discrimination claims under the Rehabilitation Act are governed by the same standards used in ADA cases … and therefore we will discuss these two claims together.” *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000) (internal citation omitted). The key distinction being that the defendant must be a recipient of federal funding in order to incur liability under the Rehabilitation Act.

Title III of the ADA prescribes, as a “[g]eneral rule”: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods,
services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a); see PGA Tour, Inc. v. Martin, 532 U.S. 661, 676 (2001).

The first prong is whether Plaintiff is disabled for purposes of the ADA. The most recent definition is set forth in the ADA Amendments Act of 2008 (ADAA).

The ADAA defines a disability as: “(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment[.]” 42 U.S.C. § 12102(1); see also 29 C.F.R. § 1630.2(g). “Mental impairment” means “[a]ny mental or psychological disorder, such as an intellectual disability … organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. § 1630.2(h). ‘[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,’ as well as operations of major bodily functions.


Mr. Stein appears to meet the legal definition of disability. Whether or not his depression substantially impairs the major life activity of thinking, he certainly has a record of such impairment. This is documented in the record by his psychiatrist, Dr. Freed. In addition to, or in the alternative, Mr. Stein has a record of having numbness in his hands. Sensory deprivation can constitute a substantial impairment of a major life activity. This impairment is contained in the record through his neurologist, Dr. Green. It was through Dr. Green that Mr. Stein was admitted into the Flexjoy clinical trial. The Court concludes that Clinic also regarded Stein as disabled with the condition of numbness in his hands.

There seems no question that the medical facility operated by Clinic is a business establishment and place of public accommodation open to the public subject to 42 U.S.C. § 12181(7). Tamara v. El Camino Hosp., 964 F. Supp. 2d 1077, 1083 (N.D. Cal. 2013). The court is satisfied that Astro was a service animal. Similar to the plaintiff’s dog in Tamara, Astro was capable of retrieving objects directly related to Stein’s disability. The record reflects Astro was retrieving bottles of his medication.

The Clinic argues that Astro lacked sufficient training to be a service dog. It cites the fact that Astro didn’t complete the three-month obedience school he was enrolled in. Formal
certification of service animal training has been rejected by the only circuit appellate court to consider the issue. In C. L. v. Del Amo Hosp., Inc., the court concluded:

We hold that the ADA prohibits certification requirements for qualifying service dogs for three reasons: (1) the ADA defines a service dog functionally, without reference to specific training requirements, (2) Department of Justice ("DOJ") regulations, rulemaking commentary, and guidance have consistently rejected a formal certification requirement, and (3) allowing a person with a disability to self-train a service animal furthers the stated goals of the ADA, for other training could be prohibitively expensive.

992 F.3d 901, 910 (9th Cir. 2021).

As to the issue of whether the Rehabilitation Act permits Stein to recover monetary damages for emotional distress for the denial of the use of his service animal at the Clinic, the Court finds persuasive authority from the 11th Circuit, Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173 (11th Cir. 2007).

In deciding what remedies, if any, are available under any statute, we begin our analysis, as we must, with the language of the statute itself. In this case, however, the statutory language does not take us far. Section 505(a)(2) of the Rehabilitation Act of 1973, as amended in 1978, simply provides that "[t]he remedies . . . set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . under [§ 504]." 29 U.S.C. § 794a(a)(2). However, Title VI, 42 U.S.C. § 2000(d) et seq., which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance, does not by itself expressly provide for a private cause of action, much less delineate specific judicial remedies.

and acceptance of its terms, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the ‘contract.’ *Barnes*, 536 U.S. at 185–86 (2002). Indeed, the holding that punitive damages were precluded was because punitive damages were historically unavailable as a contract remedy.

In other words, has the clinic agreed to not discriminate against the disabled as an implicit condition of accepting federal funds? The Supreme Court has drawn a distinction between unintentional acts and intentional acts and decided that only intentional acts of discrimination merit monetary damages.

“Our adoption of the intentional discrimination standard was premised upon the provisions of the ADA and the Rehabilitation Act requiring the remedies available under those statutes to be construed the same as remedies under Title VI of the Civil Rights Act of 1964. *Chumbley v. Ferguson*, 157 F.3d 901, 673 (5th Cir. 1998) (citing 42 U.S.C. § 12133(ADA); 29 U.S.C. § 794a(a)(2) (Rehabilitation Act)). The Supreme Court established in *Guardians Association* and most recently confirmed in *Alexander v. Sandoval*, 531 U.S. 1049 (2001), that "private individuals c[an] not recover compensatory damages under Title VI except for intentional discrimination."

For purposes of obtaining monetary damages under the Rehabilitation Act, Plaintiff must demonstrate that the defendant has acted with deliberate indifference." Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that the likelihood. " *Sandoval*, 531 U.S. at 1139. The federal right at issue here was plaintiff’s right is to have his service animal present with him at the clinic. Plaintiff put the clinic administrator, Bonnie Bell, on notice that Astro was his service animal. As the administrator, Ms. Bell had authority to address Mr. Stein’s request to have the use of his service animal. Ms. Bell’s comments suggest her refusal to allow Astro in the facility were motivated by her own belief that a pit bull could not be a service animal. In addition, she drew upon and referenced her own previous negative experience with that specific breed of dog. Ms. Bell was factually aware Mr. Stein had a disability because he was participating in the clinical trial. A plaintiff can satisfy the first element of the claim by showing that he alerted the defendant to his need for accommodation and the second element by showing that the defendant failed to act as “a result of conduct that is more than negligent, and involves an element of deliberateness.”
After Mr. Stein self-identified Astro as a service animal, the administrator could have satisfied concerns about Astro’s status by following the Department of Justice guidance and asking, “what task is your dog trained to perform?” The administrator’s offer to allow the service animal to be tied up outside the clinic put the dog at risk and continued to deny Mr. Stein access to his service animal. Where a medical facility administrator becomes aware of the need for a requested accommodation and still refuses to provide it, it raises a triable issue of fact as to whether the defendant acted with deliberate indifference. See Mullen v. S. Denver Rehab., LLC, Civil Action No. 18-cv-01552-MEH (D. Colo. May 20, 2020).

The court is satisfied at this stage of the pleadings that sufficient facts have been plead to establish deliberate indifference. The Clinic can still move for summary judgment following discovery on the grounds that its conduct did not rise to the level of deliberate indifference.

In adopting the reasoning and holding of Sheely, this court is mindful that numerous courts across the country have implicitly reached a similar conclusion regarding the availability of emotional distress damages for intentional Rehabilitation Act violations. This includes the First, Second and Seventh Circuits. See Bax v. Doctors Med. Ctr. of Modesto, n.22. Within the Ninth Circuit, one district court has agreed with Sheely, whereas the Ninth Circuit itself has not addressed the issue.

The court acknowledges that contrary authority exists in Cummings v. Premier Rehab Keller, P.L.L.C., 948 F.3d 673, 679 (5th Cir. 2020)). However, the court finds that imposing emotional distress damages is foreseeable to defendant as a result of accepting federal funds. Moreover, the court disagrees with Cummings’ characterization of emotional distress damages as being similar to punitive damages and therefore unavailable generally in breach of contract actions. Emotional distress damages are well recognized as a type of compensatory damage for victims of discrimination. In Bryant v. Aiken Regional Medical Centers Inc., the plaintiff sued for employment discrimination. 333 F.3d 536 (4th Cir. 2003). The jury found in favor of plaintiff. She was awarded $50,000 in emotional distress damages based upon plaintiff’s own testimony concerning the nature and extent of her emotional distress following the adverse employment action. The jury made a separate award of punitive damages against the employer.
On appeal, the Fourth Circuit upheld the award of emotional distress damages and overturned the award of punitive damages, finding insufficient proof of employer misconduct.

**ISSUE TWO: Are Plaintiff’s Claims For Declaratory And Injunctive Relief Moot?**

Defendant asserts that even if its conduct violated the ADA and the Rehabilitation Act, the unlawful conduct is not subject to repetition in the future. Plaintiff was present for a clinical trial, which has concluded. Plaintiff resides 120 miles from the Marsden Clinic and receives his regular medical care close to home. “[A] defendant seeking dismissal on mootness grounds under the doctrine of voluntary cessation bears the extremely heavy burden of showing that it is absolutely clear that he will not revert to his old ways. But whether a permanent injunction is appropriate — a question that we do not address and upon which we express no opinion — turns on whether the plaintiff can establish by a preponderance of the evidence that this form of equitable relief is necessary.” *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1183 n.10 (11th Cir. 2007)

Defendant has presented no evidence, and none exists on the face of the operative complaint suggesting any permanent change in the policy of the clinic which gave rise to the discriminatory conduct. The clinic administrator is presumably still present. A defendant’s assertion that it has no intention of reinstating the challenged practice ‘does not suffice to make a case moot’ and is but ‘one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts.’” *Sheely*, 505 F.3d at 1184 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

Plaintiff correctly notes that Dr. Green, his treating neurologist, is still working at the Marsden Clinic. While the clinical trial has ended, it is foreseeable that Mr. Stein will need future treatment at the Marsden Clinic. Thus, plaintiff’s faces the continuing prospect of discriminatory conduct. This issue can be revisited by the court on summary judgment if sufficient evidence is presented.

**CONCLUSION**

In light of the authority cited above, defendant’s motion to dismiss on both grounds is denied.
FRED STEIN,
Plaintiff

v.

MARSDEN CLINIC,
Defendant

BEFORE WEINER, C.J., CRANDELL, AND YAMAMOTO, JJ.

MEMORANDUM AND ORDER

This case is before the court on appeal by defendant Marsden Clinic from the District Court’s denial of its motion to dismiss the claim for emotional distress damages under the Rehabilitation Act of 1973 and the denial of dismissal of the claims for declaratory and injunctive relief on the grounds of mootness under the ADA.

In ruling on a Rule 12(b)(6) motion, courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Wayne Land & Mineral Grp. LLC v. Delaware River Basin Comm’n, 894 F.3d 509, 526–27 (3d Cir. 2018) (internal quotation marks and citations omitted). In order to survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility means "more than a sheer possibility that a defendant has acted
unlawfully." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

As set forth in the record, plaintiff’s claims arise from his exclusion from clinical trials at the Marsden Clinic with his pit bull Astro. The first issue before the court is whether emotional distress damages are available to plaintiff under the Rehabilitation Act of 1973. Relying chiefly upon *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007), the District Court concluded that such damages are available. For the reasons set forth below, we conclude that the District Court’s interpretation of available remedies under the Rehabilitation Act was erroneous.

**ISSUE ONE**

"To state a § 504 claim, "the plaintiff must establish that disability discrimination was the sole reason for the exclusion or denial of benefits." *Wilson v. City of Southlake*, 936 F.3d 326, 330 (5th Cir. 2019). Further, pursuant to § 1557 of the ACA, "an individual shall not, on the ground prohibited under ... [§ 504 of the Rehabilitation Act], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a)." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673, 676 (5th Cir. 2020).

*Barnes v. Gorman* sets forth the analytical framework for resolving this question. "The Court has ‘repeatedly’ likened Spending Clause legislation to contract law—‘in return for federal funds, the [recipients] agree to comply with federally imposed conditions.’” 536 U.S. 181, 186 (2002) (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); see, e.g., *Pennhurst*, 451 U.S. at 17 (holding that Spending Clause legislation is like a "contract," in that "[t]he legitimacy of Congress’ power to legislate under the spending power ... rests on whether the [federal-funding recipient] voluntarily and knowingly accepts [the contract’s] terms”).

In order to be liable for damages for emotional distress under the Rehabilitation Act, the recipient of the federal funding has to be on notice that such damages may attach for intentional discriminatory conduct. In deciding whether emotional distress damages are available under the Rehab Act, the Fifth Circuit identified the "fundamental question in evaluating damages in the context of Spending Clause legislation [as] whether ‘the funding recipient is on notice that, by

Historically, emotional distress damages have not been available for a breach of contract. The traditional rule is that emotional distress damages are not recoverable on a breach of contract claim. See Wynn v. Monterey Club, 111 Cal. App. 3d 789, 799 (1980). However, in line with the cases cited in Travelers, emotional distress damages may be recoverable but only when "the express object of the contract is the mental and emotional well-being of one of the contracting parties." Travelers Indem. Co. v. Newlin, Case No.: 20cv765-GPC(DEB), at *22 (S.D. Cal. Apr. 2, 2021).

We find no evidence in the record to support a conclusion that Marsden Clinic was on notice that it was at risk for emotional distress damages as part of the benefit of the bargain in receiving federal funds for its programs, services, and activities. As the Cummings court noted, damages for emotional distress are not ordinarily a part of breach of contract remedies. Cummings, 948 F.3d at 677. Since we find that Marsden was not on notice of emotional distress damage liability at the time it accepted federal funding, we hold that emotional distress damages are not recoverable by plaintiff. We reject the notion advanced in Sheely, that the foreseeability of emotional distress damages flowing from the breach of the agreement provides a basis for recovery. The motion to dismiss therefore is granted as to the remedy of emotional distress damages in the complaint.

**ISSUE TWO**

The second issue before this court is whether Plaintiff has standing to pursue declaratory and injunctive relief against the Marsden Clinic. Federal courts may adjudicate only actual cases or controversies, see U.S. Const. Art. III, § 2, and may not render advisory opinions as to what the law ought to be or affecting a dispute that has not yet arisen. Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240 (1937). Because Article III's “standing” and “ripeness” requirements limit subject matter jurisdiction, they are properly challenged under a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss. Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010); see also Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).
“To establish injury in fact to support standing, a plaintiff must show that he/she suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” Spokeo Inc. v. Robins, 578 U.S. 330, 339 (2016) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).” Hodges v. King’s Hawaiian Bakery W., Inc., 21-cv-04541-PJH, at *6 (N.D. Cal. Nov. 8, 2021). In the present case, Plaintiff has articulated facts showing that there has been an invasion of his legally protected interest under the Rehabilitation Act in his right to have his service animal at the Clinic. The Clinic Administrator interfered with that right.

But it is not the presence or “absence of a past injury” that determines Article III standing to seek injunctive relief; it is the imminent “prospect of future injury.” Chapman v. Pier 1 Imports, Inc., 631 F.3d 939, 951 (9th Cir. 2011) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 n.2 (1992)).” In Ervine v. Desert View Regional Medical Center Holdings, LLC, the plaintiff and his wife were hearing impaired residents of Nevada. 753 F.3d 862, 868 (9th Cir. 2014). Plaintiffs alleged that Mrs. Ervine was denied effective communication under the ADA by virtue of the refusal to provide American Sign Language interpreters during her treatment at a medical facility in California. Id. Mr. Ervine was denied the benefit of being able to understand the treatment provided to his wife. Id. Mrs. Ervine subsequently died. Id. Mr. Ervine sought an injunction to compel the defendant to provide him with effective communication for future visits. Id.

Defendants filed a motion to dismiss arguing that Mr. Ervine had failed to demonstrate that he would face a risk of future harm because he failed to allege he intended to seek treatment in California again at the same facility. Ervine, 753 F.3d at 868. In granting the motion to dismiss, the court noted:

Mr. Ervine has not shown a real and immediate threat that he will be denied effective communication by Desert View or Dr. Tannoury either as a patient in his own right or as a companion to another patient. Because Mr. Ervine's complaint is “jurisdictionally defective” and he has failed to introduce any evidence to cure the defect, he lacks standing to bring his ADA claims. The district court should therefore have dismissed the claims for lack of jurisdiction. Id. (internal citations omitted).
return to seek either future medical care or participation in clinical trials. The fact that Dr. Green remains on staff at Marsden is a relevant fact but it is not sufficient to establish a risk of future harm to Mr. Stein. In the absence of a likelihood or intent to actually treat with her or any other Marsden Clinic provider, Mr. Stein faces no risk of being denied the right to have his service animal with him in violation of the ADA. Thus, the motion to dismiss should have been granted. We reverse the judgment of the District Court.