IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

TRACY MILLER,

Plaintiff,

vs.

RONALD KING; JOHNNY SIKES; THE GEORGIA DEPARTMENT OF CORRECTIONS, and THE STATE OF GEORGIA,

Defendants.

CIVIL ACTION NO.: CV698-109

ORDER

Plaintiff, who is currently incarcerated at the Georgia Diagnostic and Classification Prison in Jackson, Georgia, filed an action[1] pursuant to 42 U.S.C. § 1983, the Rehabilitation Act ("RA"), 29 U.S.C. § 701, *et seq.*, and Title II of the American with Disabilities Act of 1990, 42 U.S.C. § 12131, *et seq.*, ("ADA"), arising out of his confinement at Georgia State Prison in Reidsville, Georgia ("GSP"), and Augusta State Medical Prison in Grovetown, Georgia ("ASMP"). Defendants previously filed a Motion to Dismiss, which the undersigned granted in part and denied in part. The undersigned converted the following portions of Defendants' Motion to Dismiss into claims for summary judgment relief: 1) whether Plaintiff exhausted his administrative remedies prior to filing his Complaint, as amended; 2) whether Plaintiff suffered an actual injury resulting from his access to courts claim; and 3) whether Plaintiff's claims are barred by *res judicata*. The undersigned also allowed the parties to submit argument as to

[1] See Docket Entry Number 219 for a detailed account of this case's procedural history.

whether Title II of the ADA abrogates a state's sovereign immunity in those situations where conduct violates Title II but does not independently violate the Constitution. The parties have responded, and the United States of America ("United States") filed a Brief as Intervenor on the issue of abrogation.

STATEMENT OF THE CASE

Plaintiff asserts that Defendant Sikes deprived him of medical care, and that Sikes, the State of Georgia, and the Georgia Department of Corrections are responsible for failing to provide him with reasonable accommodations for his disability and confinement to a wheelchair. (Doc. No. 38, pp. 3-4). In his Amended Complaint, Plaintiff sets forth Eighth Amendment claims based upon the alleged deprivation of his serious medical needs as a wheelchair-bound paraplegic and upon the alleged deficient accommodation of his disability. (Doc. No. 198, p. 15). He also asserts that his Fourteenth Amendment right to equal protection of the law has been violated, contending that "[w]heelchair-bound inmates . . . are not provided the same privileges as similarly-situated able-bodied inmates." (Id. at 17). Plaintiff additionally contends that Defendants have taken action against him in retaliation for his having filed complaints and lawsuits and have interfered with his access to the courts, all in violation of his First Amendment rights. (Id. at 18-19). Plaintiff asserts that he has been excluded from receiving adequate medical care and accessible facilities and services by reason of his disability, in violation of Section 504 of the RA. (Id. at 19-21). Finally, Plaintiff asserts violations of Title II of the ADA by acts of discrimination and retaliation. (Id. at 21-23).

Defendants contend[2] Plaintiff's § 1983, RA, and ADA claims are barred by *res judicata*. Defendants also contend that Plaintiff has not shown he suffered any actual injury in order to sustain his access to the courts claim. Defendants further contend that Title II is not valid legislation under § 5 of the Fourteenth Amendment for Title II claims that do not independently violate the Constitution. Finally, Defendants contend that Plaintiff's requests for injunctive relief should be dismissed as moot.

STANDARD OF REVIEW

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving part[ies are] entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1223 (11th Cir. 2004). An issue of fact is "material" if it might affect the outcome of the case, and an issue of fact is "genuine" when it could cause a rational trier of fact to find in favor of the nonmoving party. Hickson Corp. v. Northern Crossarm Co., Inc., 357 F.3d 1256, 1259-60 (11th Cir. 2004). The court must determine "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 1260 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

The moving parties bear the burden of establishing that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1298 (11th Cir. 2003). Specifically, the

[2] Defendants initially asserted that Plaintiff failed to exhaust his administrative remedies involving claims which arose from Plaintiff's incarceration at ASMP. However, Defendants moved to dismiss this ground of their Motion, and the undersigned granted this motion by Order dated August 6, 2009. (Doc. No. 332).

moving parties must identify the portions of the record which establish that there are no genuine issues of material fact. Hickson, 357 F.3d at 1260 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). When the nonmoving party would have the burden of proof at trial, the moving parties may discharge their burden by showing that the record lacks evidence to support the nonmoving party's case or that the nonmoving party would be unable to prove his case at trial. Id. In determining whether a summary judgment motion should be granted, a court must view the record and all reasonable inferences that can be drawn from the record in a light most favorable to the nonmoving party. Acevado v. First Nat'l Bank, 357 F. 3d 1244, 1247 (11th Cir. 2004).

DISCUSSION AND CITATION TO AUTHORITY

I. *Res Judicata*

Defendants contend that Plaintiff alleges in this case that Defendants failed to provide him with adequate medical treatment, such as: physical therapy (which caused atrophy in his leg and back pain), leg braces, catheters on a regular basis, and neurological evaluations. Defendants also contend that Plaintiff alleges that the K-Building at GSP is not equipped for the disabled, he was denied access to the chapel, law library, and recreation, and he was not transferred by wheelchair-accommodating vans. Defendants allege that Plaintiff also asserts that he was placed in isolation and not allowed any time out of his wheelchair. Finally, Defendants allege that Plaintiff asserts that he was transferred from prison to prison, which affects his ability to file suit and interferes with his legal material. Defendants aver that the § 1983 claims Plaintiff sets forth in this cause of action are barred by *res judicata*.

Defendants contend that Plaintiff previously filed Miller v. Johnson, et al., CV697-144, which dealt with the same issues alleged in this Complaint. Defendants aver that, in Johnson, Plaintiff asserted that the defendants in that case deprived him of orthopedic shoes, leg braces, physical therapy, adequate facilities for a paraplegic in K-Building and housing outside of K-Building. Plaintiff also asserted claims for being in isolation, retaliation, the taking his legal materials, and the denial of medical treatment, which caused his leg to atrophy and eyesight to deteriorate. Defendants allege that these are the same claims as those in the present case against the GSP Defendants. Defendants assert this Court granted judgment as a matter of law to some of the defendants on some of the issues, and the remaining issues were decided by a jury in favor of the defendants. Defendants also assert the Eleventh Circuit Court of Appeals affirmed this Court's decision. Defendants note that, while the parties in the matter currently before the Court and Johnson are "slightly different", both of these cases were brought against GSP and its staff. (Doc. No. 255, p. 20). According to Defendants, the staff members involved in both lawsuits "worked together in some capacity at [GSP] in regards to overseeing the daily life activities and confinement conditions of [Plaintiff], including care and treatment." (Id.). Defendants contend that, if the parties are different but are alleged to work together to cause injury, they are in privity with each other for claim preclusion purposes.

Defendants also contend that Plaintiff filed Miller v. Garner, et al., CV699-83, and that Garner concerned Plaintiff's claim that he was denied equal protection of the law because he was denied access to the law library, church services, and recreation time at GSP. Defendants aver that Plaintiff claimed in Garner that GSP is ill-equipped to

handle his medical needs, that staff were deliberately indifferent to his medical needs (which caused him physical and emotional harm), he was denied medical services and follow-up care, and that staff retaliated against him. Defendants assert that Plaintiff makes these same allegations in this cause of action. Defendants contend that this Court granted defendants summary judgment on some of Plaintiff's claims in Garner, a jury found in favor of the defendants on the remaining issues, and the Eleventh Circuit affirmed the judgment of this Court.

Plaintiff asserts Defendants waived this affirmative defense by failing to bring it in ten (10) years of litigation. Plaintiff alleges that Defendants raised this defense in its latest Answer, but, at best, the *res judicata* defense relates to those claims he brought in his most recent Amended Complaint, not those claims he raised originally. However, Plaintiff asserts, *res judicata* is not a viable defense on the merits. Plaintiff contends that the State may claim the benefit of a prior adjudication in favor of a Department of Corrections' official in his or her official capacity. Plaintiff also contends that individuals sued in their official capacity may be able to claim the benefit of a prior adjudication in favor of the State or other employees in their official capacity, depending on the circumstances. Plaintiff also contends, however, that State employees sued in their individual capacities cannot claim the benefit of prior adjudications in favor of the State or other State employees in any capacity. Based on these contentions, Plaintiff alleges that the only Defendants in this case who can benefit from the adjudication in CV697-144 are GSP and Lisa Johnson, and the only Defendants who can benefit from the adjudication in CV699-83 are GSP, and Garner, Donald, Paris, and Smith in their official capacities. Plaintiff asserts that he did not raise any ADA claims and no cognizable

claims under the RA in Johnson. Plaintiff also asserts that he only raised § 1983 claims in the Garner case. Plaintiff states that the ADA and RA involve substantially different rights, duties, and defenses from section 1983. Plaintiff avers that nothing about Johnson and Garner speak to his present claims for relief pursuant to the ADA and RA for wheelchair-accommodating facilities and proper medical treatment or for damages under these Acts. Plaintiff also avers that the allegations in Garner and Johnson related to events which occurred at GSP, and thus, cannot bar his § 1983 claims against ASMP. Plaintiff contends that these previous judgments cannot bar claims based on later facts or conduct of the Defendants, even if they are of the same nature as the conduct about which Plaintiff complained previously. Plaintiff contends that the filing date of a complaint or an amended complaint are the triggering dates, not the dates of judgments.

"*Res judicata*, or claim preclusion, bars a subsequent claim when a court of competent jurisdiction entered a final judgment on the merits of the same cause of action in a prior lawsuit between the same parties." Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1356 (11th Cir. 1998). Under Georgia law, "[t]hree prerequisites must be satisfied before *res judicata* applies– (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction." Roth v. Gulf Atlantic Media of Georgia, 244 Ga. App. 677, 679, 536 S.E.2d 577, 579 (2000).[3]

[3] In Pleming, the Eleventh Circuit noted there is a split in this Circuit as to whether state or federal law is applicable under *res judicata*. In Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499 (11th Cir. 1984), the Court found that a federal court reviewing the preclusive effect of a prior federal judgment applies federal common law. However, in NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1999), the Court concluded that federal courts should apply the law of the state in which they sit with respect to the doctrine of *res judicata*. The Court also noted in Pleming that both the federal and Georgia principles of *res judicata*

A. Miller v. Johnson, CV697-144

On November 21, 1997, Plaintiff filed Case Number CV697-144 and set forth claims pursuant to § 1983 and the RA against: Lisa Johnson, John Brady, CO Joiner, Delores Sharp, Annette Thompson, SMU Manager Murray, Stan Dansby, and CO II Hughes. Plaintiff's Complaint was initially dismissed by Order dated April 9, 1998, but the Eleventh Circuit reversed and remanded the cause of action. Plaintiff asserted Defendants Johnson, Brady, and Murray violated the Eighth Amendment and the RA by placing him in a solitary confinement cell which did not accommodate his disabilities and by denying him access to orthopedic shoes and braces and physical therapy from September 5, 1997, through January 26, 2000. Plaintiff also asserted Defendants Joiner and Murray interfered with his access to the courts by confiscating or destroying his legal materials on September 7 and October 2, 1997. Plaintiff also asserted that Defendants Sharpe and Thompson[4] filed false disciplinary reports against him. The undersigned permitted service of Plaintiff's Complaint on Defendants Johnson, Brady, and Murray, as well as on Defendant Sharpe on Plaintiff's privacy claims and Defendant Dansby on Plaintiff's due process claims. By Order dated November 27, 2001, the undersigned granted summary judgment to the following Defendants on the following claims: Defendant Dansby on Plaintiff's due process claims because Plaintiff did not exhaust his administrative remedies; Defendants Johnson and Murray on Plaintiff's classification and movement to another area of GSP; Defendants Johnson, Murray, and Brady were granted qualified immunity regarding Plaintiff's claims concerning the leg

require the cause of action in the first and second lawsuits to be the same. Pleming, 142 F.3d at 1356, n.1. It is proper to apply Georgia law in the case at hand.

[4] Defendant Thompson was dismissed by Order dated April 27, 2001. (CV697-144, Doc. No. 81).

brace and orthopedic shoes issues; Defendant Murray on Plaintiff's physical therapy claim; and all Defendants in their official capacities for monetary damages. (CV697-144, Doc. No. 96). A jury returned a verdict in favor of the remaining Defendants as follows: Defendant Sharpe on Plaintiff's exposure/privacy claims; Defendant Brady as to the condition of Plaintiff's cell and his role in placing Plaintiff in that cell; and Defendants Johnson and Brady on Plaintiff's denial of physical therapy claim. (Id. at Doc. No. 114). The Eleventh Circuit Court of Appeals affirmed this Court's decision and found Plaintiff's appeal to be frivolous. (Id. at Doc. No. 127).

B. Miller v. Garner, CV699-83

Plaintiff originally filed this cause of action in the Northern District of Georgia on September 4, 1997, and the case was transferred to this Court on March 24, 1999. Plaintiff named as defendants in that case: Garner, the Commissioner of the Georgia Department of Corrections; A.G. Thomas, the Deputy Commissioner of the Georgia Department of Corrections; Joseph Paris, the Medical Director; the Department of Corrections, State of Georgia Classification Members; Johnny Sikes, the Warden at GSP, and Dr. Jacob. The undersigned noted in a Report and Recommendation dated June 2, 1999, that the claims Plaintiff set forth in CV699-83 were essentially the same as the allegations he set forth in CV698-109.[5] Defendants Jacob and the Department of Corrections Classification Committee Members were dismissed by Order dated July 1, 1999, based on the lack of service. The undersigned recommended that Defendants Garner and Thomas be granted summary judgment for Plaintiff's monetary damages claims in their official capacities and that Defendants Paris and Sikes be granted

[5] The Court did not *sua sponte* raise the issue of *res judicata* in the early proceedings of this case, and Defendants have not brought forth this affirmative defense until the Motion presently before the Court.

summary judgment based on Plaintiff's retaliation and transfer claims. The Honorable B. Avant Edenfield adopted this recommendation as the opinion of the Court. After a jury trial, Defendants Garner and Thomas received a verdict in their favor based on Plaintiff's retaliation and supervisory liability claims; Defendant Sikes received a verdict in his favor on Plaintiff's remaining claims; and all remaining Defendants received a verdict in their favor on Plaintiff's deliberate indifference, due process, and discrimination claims. The Eleventh Circuit affirmed this judgment.

To the extent Plaintiff brought specific claims in this case against the named Defendants which were previously asserted in CV697-144 and CV699-83, Defendants' Motion is **granted**. The remainder of Defendants' Motion based on res judicata grounds is **denied** at this time. The Court cannot ratify Defendants' seeming notion that, if Plaintiff brought certain claims in the past and this Court has made a ruling as to those claims, the claims in his present lawsuit must be dismissed based on *res judicata* principles, no matter who the Defendants are in this case and who they were in Plaintiff's previously filed cases. In addition, Defendants did not assert with any specificity which claims against which Defendants should be dismissed based on *res judicata*.

II. Actual Injury/Access to the Courts

Defendants contend that Plaintiff has not shown that he suffered actual injury to a non-frivolous claim as a result of their actions, and, accordingly, his access to the courts claim must be dismissed. Defendants assert that Plaintiff's claims regarding his civil lawsuits and inadequate legal research capabilities are without merit because Plaintiff has not been prevented from presenting or prosecuting his cases in court. Defendants

allege that Plaintiff has filed 41 lawsuits since he was incarcerated and 226 grievances since 1996 and has tried and appealed two cases, Johnson and Garner. Defendants allege that Plaintiff does not identify lawsuits in which he has been denied access to the courts and has not identified non-frivolous lawsuits which have been dismissed because of their actions. Defendants contend that Plaintiff's lack of up-to-date legal research materials is not grounds for relief.

Plaintiff asserts that the claims he set forth in paragraphs 74 through 81 of his Amended Complaint do not merely allege he was denied access to the courts, but that Defendants retaliated against him and generally denied his First Amendment rights. Plaintiff also asserts that, even if he cannot show he suffered an actual injury, his First Amendment claims still survive, and the Defendants' Motion on this issue would narrow his claims. Plaintiff admits that he has been able to file lawsuits and habeas corpus petitions, and he has lost several of his civil rights actions and several others have been dismissed and his habeas corpus petitions have been denied. According to Plaintiff, his ability to file causes of actions does not speak to "whether he has been impeded or hindered in his attempt to successfully prosecute either habeas or civil rights actions." (Doc. No. 264, p. 20). Plaintiff contends that, whenever he is transported, as well as on other occasions, prison officials confiscate his papers or destroy his legal materials. Plaintiff also contends that he has not been able to access legal materials at all times because the law library was not wheelchair accessible. Plaintiff specifically contends that he has lost habeas corpus petitions because the law library was not wheelchair accessible and was unaware of new laws that would allow him to pursue new claims in successive habeas corpus petitions. Plaintiff alleges that prison officials have interfered

with his privileged mail, as well as with conversations and meetings with his appointed attorneys. Plaintiff contends that these actions prevent him from being able to convey crucial information to counsel in a timely manner and that the right to communicate with an attorney is "a corollary of the right to access to the courts[.]" (Id. at 21). Finally, Plaintiff asserts that, because he has been labeled a "frequent filer", prison officials essentially have told him they can do anything to him they want because he is not allowed to file a lawsuit, even one alleging that he is in imminent danger of serious physical harm.

"Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment." Chappell v. Rich, 340 F.3d 1279, 1282 (11th Cir. 2003) (citing Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002)). In order to pass constitutional muster, the access allowed must be more than a mere formality. Bounds v. Smith, 430 U.S. 817, 822 (1977); Chappell, 340 F.3d at 1282. The access must be "adequate, effective, and meaningful." Bounds, 730 U.S. at 822. However, a prison's duty to provide its inmates with the ability to access the courts does not mean the prison must provide a means for its inmates "to *litigate effectively* once in court." Lewis v. Casey, 518 U.S. 343, 354 (1996) (emphasis in original). For an inmate to state a claim that he was denied access to the courts, he must establish that he suffered "actual injury" by showing that the defendant's actions hindered his ability to pursue a nonfrivolous claim. Christopher, 536 U.S. at 415; Jackson v. State Bd. of Pardons & Paroles, 331 F.3d 790, 797 (11th Cir. 2003). The pursuit of claims which are protected are those in which a plaintiff is attacking his sentence, directly or collaterally, or

challenging the conditions of his confinement. See Lewis v. Casey, 518 U.S. 343 (1996). Stated another way, the "only specific types of legal claims [which] are protected by this right [are] the nonfrivolous prosecution of either a direct appeal of a conviction, a habeas petition, or a civil rights suit." Hyland v. Parker, 163 F. App'x 793, 798 (11th Cir. 2006) (citing Bass v. Singletary, 143 F.3d 1442, 1445 (11th Cir. 1998)). There is no issue of material fact when the non-moving party has failed to prove the existence of an element essential to his case. Regions Bank v. Provident Bank, Inc., 345 F.3d 1267, 1279 (11th Cir. 2003). "Actual injury" is an essential element to a claim asserting the denial of access to the courts. See Christopher, 536 U.S. at 415.

A review of the evidence before the Court reveals that Plaintiff has not shown he has suffered an actual injury to the non-frivolous pursuit of a direct appeal, a habeas petition, or a civil rights suit based on the Defendants' actions or inaction. In Plaintiff's Amended Complaint, his access to the courts claim is raised in a very general manner, and Plaintiff does not assert *how* Defendants' actions denied him access to the courts. In fact, Plaintiff's First Amendment allegations read more like retaliation claims than claims asserting the denial of access to the courts. Additionally, in Plaintiff's Declaration, he states that on several occasions, his legal papers were confiscated and/or destroyed (Doc. No. 265, ¶ 29); however, Plaintiff makes no showing that this confiscation caused an injury to a pending case or prevented him from filing anew. Plaintiff also states in his Declaration that he has been labeled a "frequent filer" and has been informed that he cannot file civil rights suits, even if he alleges that he is in imminent danger of serious physical injury. (Id. at ¶ 31). Plaintiff overlooks the fact that this Court labeled Plaintiff as a frequent filer and cautioned him about filing future

lawsuits. Moreover, Plaintiff further states that he was unsuccessful in pursuing a habeas petition in 1996. (Id. at ¶ 33). Plaintiff was informed by the Tattnall County Superior Court that this petition was successive and that he did not show that the State failed to disclose evidence or that any other impediment existed which prevented him from raising the allegations in that petition in his first petition. (Doc. No. 265-13, p. 9). Again, this does not reveal that Defendants did anything which caused an actual injury to a non-frivolous cause of action. Finally, Plaintiff states that he was unaware of certain new rules at the time he filed his habeas claims because the law library at GSP was not wheelchair-accessible. However, even accepting this as true, this does not show that Plaintiff suffered an actual injury to the pursuit of a non-frivolous case as a result of Defendants' actions. Plaintiff has not overcome his burden of establishing the existence of a genuine issue of material fact as to whether Defendants denied his access to the courts. This portion of Defendants' Motion is **granted**.

III. Title II Claims That do not Independently Violate the Constitution

Defendants request that the Court find that sovereign immunity is not abrogated in those situations where conduct violates Title II of the ADA but does not independently violate the Constitution. According to Defendants, under Supreme Court authority, Section 5 of the Fourteenth Amendment does not authorize legislation that is intended to deter conduct that does not violate the Constitution. Defendants contend that Congress intended to abrogate Eleventh Amendment immunity through its enactment of the ADA and that United States v. Georgia, 546 U.S. 151 (2006), "settled the question of the validity of Congress' authority as it relates to Title II claims where constitutional rights are at issue." (Doc. No. 255, p. 28) (emphasis in original). Defendants assert

that Plaintiff cannot establish a pattern of facially constitutional discrimination against disabled prisoners regarding the provision of public services, programs, and activities. Defendants allege that Georgia established that there was a widespread pattern of discrimination regarding the provision of public services, programs, and activities to the disabled in state prisons, but there is no evidence of a pattern of discrimination that does not also violate the Constitution. Defendants state that the analysis of whether there is a historic pattern of facially constitutional discriminatory conduct must be focused on the prison setting. Defendants aver that, even if a pattern of facially constitutional discrimination were established in this case, applying Title II to such claims is not a congruent and proportional remedy to the targeted violation. In addition, Defendants contend that Title II's requirements of free and unfettered access to and participation in services, programs, or activities of a public entity is inconsistent with the nature of incarceration and goes far beyond the Constitution's requirements. Defendants allege that a finding that disabled prisoners have claims under the ADA separate and apart from the Eighth Amendment "would lighten the burden of proof that is applied to prisoner cases from a deliberate indifference standard to a simple denial of services standard." (Id. at 34).

The United States asserts that this Court should decline to consider the constitutionality of Title II and the statutory provision abrogating states' Eleventh Amendment immunity to Title II claims because it is not necessary to do so. The United States alleges that Plaintiff asserts substantively identical claims against the State Defendants under Title II and Section 504 of the RA. According to the United States, the Eleventh Circuit has held that Title II and Section 504 impose identical anti-

discrimination and accommodation requirements on entities such as the State Defendants. The United States also states that the Eleventh Circuit has held that a State agency that receives federal financial assistance does not enjoy Eleventh Amendment immunity to claims under § 504 because it waives this immunity as a condition of receipt of federal financial assistance. The United States contends that, because the State Defendants are subject to suit under section 504 of the RA and that section provides Plaintiff with identical protection to that afforded under Title II, this Court should not consider the State's challenge to the constitutionality of Title II and the provision abrogating States' Eleventh Amendment immunity.

The United States also states Congress unequivocally expressed its intent to abrogate States' sovereign immunity to claims under the ADA and that Congress did so through the valid exercise of its power under § 5 of the Fourteenth Amendment.[6] The United States asserts Congress can remedy past violations of constitutional rights as well as enact prophylactic legislation that proscribes facially constitutional conduct to prevent and deter unconstitutional conduct. The United States also asserts that Congress can prohibit practices that are discriminatory in effect, if not intent, to carry out the objectives of the equal protection clause. The United States further asserts that state prison operations are no exception to Congress' power. The United States contends that Title II is appropriate section 5 legislation in the prison administration setting because it is reasonably designed to remedy past and to prevent future unconstitutional treatment of disabled inmates and deprivation of their constitutional rights in the operation of state penal systems. The United States alleges that this Court should follow the analysis the Supreme Court employed in Lane v. Tennessee, 541 U.S.

[6] Plaintiff adopts the arguments proffered by the United States for this issue. (Doc. No. 264, p. 22).

509 (2004), and Ass'n of Disabled Americans, Inc. v. Florida International University, 405 F.3d 954 (11th Cir. 2005), and conclude that Title II is valid Fourteenth Amendment legislation, as applied in the context of prison administration. The United States asserts that Title II enforces the Equal Protection clause's prohibition of arbitrary treatment based on irrational stereotypes or hostility, as well as the heightened constitutional protection afforded to a variety of constitutional rights arising in the prison context. The United States avers that the Supreme Court has made it clear that a court must consider the full array of constitutional rights implicated by disability discrimination in a given context, regardless of whether every one of those rights is implicated by the facts of a case. The United States notes that, although incarceration "necessarily entails the curtailment of many of an individual's constitutional rights, the Supreme Court has repeatedly held that prisoners must 'be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.'" (Doc. No. 263, p. 7) (quoting Hudson v. Palmer, 468 U.S. 517, 523 (1984)). The United States contends that Title II's reasonable accommodation requirement is a valid means of targeting violations of constitutional rights and/or preventing and deterring constitutional violations throughout the range of government services, many of which implicate fundamental constitutional rights. The United States also contends that the historical predicate of unconstitutional disability discrimination in the provision of public services, including prisons, justifies prophylactic legislation under § 5 of the Fourteenth Amendment. Finally, the United States asserts that Title II is a congruent and proportional means of protecting the constitutional rights of prisoners with disabilities.

"Title II of the ADA provides that 'no qualified individual with a disability shall by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'" Georgia, 546 U.S. at 153 (citing 42 U.S.C. § 12132). "A 'qualified individual with a disability' is defined as 'an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.'" Id. (citing 42 U.S.C. § 12131(2)). The ADA defines 'public entity' to include 'any State or local government' and 'any department, agency, . . . or other instrumentality of a State.'" 42 U.S.C. § 12131(1). The Supreme Court, in Pennsylvania Dep't of Corrs. v. Yeskey, 524 U.S. 206, 210 (1998), concluded that the term "public entity" includes state prisons. The purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It prohibits discrimination against the disabled in the areas of employment (Title I); public services, programs and activities (Title II); and public accommodations (Title III). Lane, 541 U.S. at 516-17.

The Eleventh Amendment renders the States immune from "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." However, Congress may abrogate the State's Eleventh Amendment immunity.[7] "To determine whether it

[7] At least one court has stated that determining the abrogation issue prior to determining whether a plaintiff sets forth a valid Title II claim renders the court's decision advisory. See Guttman v. Khalsa, 446

has done so in any given case, [a court] 'must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority.'" Lane, 541 U.S. at 517 (quoting Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000)). The first inquiry is answered easily in the affirmative in causes of action brought pursuant to Title II of the ADA. This Act provides: "[a] State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. The second inquiry requires analyzing whether Congress' abrogation of sovereign immunity "for private suits under Title II of the ADA is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment." Ass'n for Disabled Americans, Inc., v. Florida Int'l Univ., 405 F.3d 954, 957 (11th Cir. 2005).

"Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in § 1[8] by enacting appropriate legislation." Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 365 (2001) (internal punctuation and citation omitted). "'When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 of the Fourteenth Amendment authorizes it to enact

---

F.3d 1027 (10th Cir. 2006). However, the better course, in the undersigned's estimate, is to resolve the abrogation issue before addressing the validity of a plaintiff's Title II claims. It is only after the abrogation issue, in the context of facially constitutional conduct, is settled that the Court will know whether it needs to address the substantive issue before it. In addition, the Supreme Court and the Eleventh Circuit directed this Court to resolve the abrogation issue. Only for purposes of the abrogation issue presently before the Court, the undersigned presupposes Plaintiff is a "qualified individual" within the meaning of the ADA.

[8] Section 1 of the Fourteenth Amendment provides that, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.'" Disabled Americans, 405 F.3d at 957 (quoting Lane, 541 U.S. at 520). Congress' enforcement power "'includes the authority both to remedy and deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" Garrett, 531 U.S. at 365. Legislation passed pursuant to section 5 of the Fourteenth Amendment is valid if there is "'congruence and proportionality between the injury to be prevented or remedies and the means adopted to that end.'" Id. (quoting City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997)). A three-step analysis is employed to determine whether Title II of the ADA meets the congruence and proportionality requirements for conduct that does not violate the Constitution. See Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 484 (4th Cir. 2005) (as quoted in Chase v. Baskerville, 508 F. Supp. 2d 492, 499 (E.D. Va. 2007)). "Under this analysis, [a court] must determine: (1) the constitutional right or rights that Congress sought to enforce when it enacted the ADA, (2) whether there was a history of unconstitutional discrimination to support Congress's determination that prophylactic legislation was necessary, and (3) whether Title II is an appropriate response to this history and pattern of unequal treatment." Id.

Under the first step of the congruence and proportionality analysis, this Court must identify the right or rights implicated under the facts before the Court. In this case, Plaintiff asserts that many programs, services, and activities at GSP and ASMP are not accessible to inmates who are in wheelchairs but are available to inmates who are not in wheelchairs. Plaintiff also asserts the programs, services, and activities include the

law library, dining hall, yard call, physical activities, and medical services. Plaintiff contends the law library, dining hall, yard call, physical activities, and medical services at both prisons lack wheelchair-accessible toilets and water fountains and that wheelchair-bound inmates cannot enter these facilities without assistance, which is often denied due to inadequate staffing and indifference. (Doc. No. 198, ¶¶ 64-99). Plaintiff's allegations arguably identify several of "the constellation of rights applicable in the prison context", Georgia, 546 U.S. at 162 (Stevens and Ginsburg, JJ., concurring), such as the First Amendment rights to access to the courts and the free exercise of religion, the Eighth Amendment right to be free from cruel and unusual punishment, and the Fourteenth Amendment right to equal protection of the law.

Having delineated which rights are at stake, it must be considered whether Congress pointed to a history of unconstitutional conduct in enacting Title II.[9] In Lane, the Supreme Court stated that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state [public] services and programs[.]" 541 U.S. at 524. The Lane court implicitly determined the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities", including "judicial findings . . ., and statistical, legislative, and anecdotal evidence" was sufficient "to justify Congress' exercise of its prophylactic power[.]" Id. at 528-29. The undersigned is satisfied based on Lane,

[9] To say there is a split in the Circuits as to whether the history relied upon in enacting Title II should be considered as a whole or in response to a particular setting at Step Two is a gross understatement. The undersigned, however, agrees with the Eighth Circuit's approach and concludes that it is the proper course to look at the history of unconstitutional discrimination in the provision of public services and programs, not just in a prison setting. See Klingler v. Director, Dept. of Rev., State of Mo., 455 F.3d 888, 895-96 (8th Cir. 2006) (noting the Circuits' split and finding the Lane and Garrett decisions require consideration of Title II as a whole).

Disabled Americans,[10] and the anecdotal evidence proffered by the United States in its Brief, that Congress was justified in exercising its enforcement power under § 5 of the Fourteenth Amendment in response to a history and pattern of unconstitutional conduct.

Finally, it must be determined whether Title II is an appropriately tailored response to the history and pattern of unequal treatment in the context of a prison setting. Even in the face of a "clear record of unconstitutional discrimination, Congress's authority under § 5 extends only to enforcing, not redefining, constitutional protections." Chase, 508 F. Supp. 2d at 500 (citing City of Boerne, 521 U.S. at 519, 532). In other words, Congress' remedy "may not work a 'substantive change in the governing law.'" Lane, 541 U.S. at 520 (quoting City of Boerne, 521 U.S. at 519).

Title II is not an appropriately tailored response to a history and pattern of unequal treatment in the context of a prison setting, particularly in light of Plaintiff's contentions in this case.[11] Plaintiff asserts he and other wheelchair-bound inmates do not have access to certain services or facilities at GSP and ASMP which implicate

[10] The Eleventh Circuit stated in Disabled Americans that "[t]he Lane Court, in analyzing the second prong of [this analysis], specifically noted that Congress 'documented a pattern of unequal treatment in the administration of a wide range of public services, programs[,] and activities, including the *penal system*, public education, and voting.'" 405 F.3d at 958 (quoting Lane, 541 U.S. at 524) (emphasis supplied). However, the Lane court actually noted that the "decision of other courts" documented this pattern of unequal treatment. 541 U.S. at 524. It is not clear whether Congress relied on those court decisions noted by the Supreme Court in Lane in passing Title II, but the undersigned finds this evidence useful in the historical framework the second prong of the congruence and proportionality analysis requires.

[11] While there is a split among the Circuits as to how a Step Two analysis should proceed, as noted above, this does not appear to be the case in a court's undertaking in Step Three of its analysis. See Klingler, 455 F.3d at 897 (Title II does not validly abrogate sovereign immunity in the context of surcharges on parking placards); Toledo v. Sanchez, 454 F.3d 24, 40 (1st Cir. 2006) ("Title II, as it applies to the class of cases implicating the right of access to public education, constitutes a valid exercise of Congress' § 5 authority[.]); Hale v. Mississippi, 2007 WL 3357562, at *8 (S.D. Miss. Nov. 9, 2007) ("Title II is not a 'congruent and proportional" response in the context of state prisons."). In Toledo and Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524 (3d Cir. 2007), the First and Third Circuit Courts of Appeals determined Title II of the ADA was an appropriate use of § 5 legislative powers within the public education context. See Toledo, 454 F.3d at 40; Bowers, 475 F.3d at 555-56.

constitutional rights (e.g., the lack of access to the law library or medical services and treatment). However, to require the State of Georgia to provide more than the minimum of life's necessities would be to rewrite the Constitution. See Chase, 508 F. Supp. 2d at 503 (quoting Hudson v. McMillian, 503 U.S. 1, 9 (1992), for the proposition that "'only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation.'").

Moreover, a State's classification of its prisoners "cannot [be deemed to] run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Garrett, 531 U.S. at 367 (internal citation omitted). The "burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. In the context of prisons, the "requirements of Title II surpass the rights secured by the Constitution", thus making a "substantive change in the governing law." Hale, 2007 WL 3357562, at * 8 (pointing to Garrett's reasoning that the accommodation duty required by the ADA far exceeds what is constitutionally required in that it does not require, as the Constitution does, that the complaining party negate reasonable bases for the employer's decision). Thus, Title II validly abrogates sovereign immunity within a prison's walls only to the extent it reaches conduct that also violates the Constitution.[12] This portion of Defendants' Motion is **granted**.

[12] In reaching this conclusion, the undersigned is ever mindful of a court's deference to the discretion of prison authorities and state Correctional Departments in the administration of its prisons. The undersigned is mindful, as well, that the courts in Hale and Chase found that Title II did not validly abrogate sovereign immunity in instances where prisoners sought relief after being denied services to which they were not constitutionally entitled. These cases likely present different scenarios than that before this Court; nonetheless, the outcome of the abrogation issue before this Court should be the same, as finding sovereign immunity to be abrogated based on the present facts would redefine constitutional protections in a prison setting. See City of Boerne, 521 U.S. at 519.

IV. Mootness of Injunctive Relief Claims

Defendants assert that Plaintiff's claims for injunctive relief should be dismissed as moot because Plaintiff is no longer housed at GSP or ASMP. Plaintiff contends that his claims for injunctive relief should not be dismissed as moot because these claims are capable of repetition. Plaintiff alleges that it is reasonable to assume that he could be transferred back to GSP or ASMP in the future and could be subjected to the same conditions as he has in the past.

Under Article III of the Constitution, federal courts may only hear "cases or controversies." Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). "A [claim] is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." See Ethredge v. Hail, 996 F.2d 1173, 1175 (11th Cir.1993). A claim can still be considered if a court lacks "assurance that there is no reasonable expectation that the alleged violation will recur," or, as it is commonly stated, the situation is "capable of repetition, yet evading review[.]" DiMaio v. Democratic Nat'l Committee, 555 F.3d 1343, 1345 (11th Cir. 2009). "However, once a prisoner has been transferred, injunctive relief with respect to his confinement at his former place of incarceration is no longer available." Hampton v. Federal Correctional Institution, 2009 WL 1703221, *3 (N.D. Ga. June 18, 2009) (citing McKinnon v. Talladega County, 745 F.2d 1360, 1363 (11th Cir.1984)); Hailey v. Kaiser, 201 F.3d 447, *3 (10th Cir. 1999) (Table).

Plaintiff has been transferred to the Georgia Diagnostic and Classification Prison from ASMP and GSP. While the undersigned recognizes that, under the law, Plaintiff's

claims for injunctive relief should be dismissed, the undersigned also recognizes that Plaintiff could very well be transferred back to GSP or ASMP before the resolution of this case. Accordingly, the Court defers ruling on this portion of Defendants' Motion at this time.

CONCLUSION

Based on the foregoing, Defendants' Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part.

SO ORDERED, this 21st day of September, 2009.

JAMES E. GRAHAM
UNITED STATES MAGISTRATE JUDGE