IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-01005-WYD-KMT

TROY ANDERSON,

Plaintiff,

v.

STATE OF COLORADO, DEPARTMENT OF CORRECTIONS, SUSAN JONES, in her official capacity as warden of Colorado State Penitentiary, and TOM CLEMENTS, in his official capacity as Executive Director of the Colorado Department of Corrections,

Defendants.

PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT (Doc. 48)

Plaintiff, through counsel, responds to Defendants' Motion for Summary Judgment (Doc. 48).

INTRODUCTION

RESPONSE TO MOVANT'S STATEMENT OF MATERIAL FACTS

1. General Conditions within Colorado State Penitentiary (CSP)

1-13. Undisputed.

14. Partially Disputed. CDOC programs and the locations of those programs consistently change. In 2010, the OMI and PRO-Unit Programs were exclusively at CCF. Lampela Dep. 74:12-17, 77:18-78:10; Exh. 4 to Doc. 47 at 5. Now, the CDOC asserts that the OMI Program is active at CSP and CCF, Lampela Dep. 77:18-78:10, and the PRO-Unit has moved to Sterling Correctional Facility. Defendant's SOF ¶ 14, Jones Dep. 26:22-27:5. Furthermore, successful progression into the PRO-Unit does not guarantee transfer to Sterling, Jones Dep. 26:22 - 27:5, nor does successful

completion of the OMI Program guarantee transfer out of CSP. Lampela Dep. 140:5-11.

15. Disputed. The main fact considered for progression is whether prisoners have, or have not, received negative chrons, Robertson Decl. Ex. 20 (OM 659-100 at Anderson 004637); Jiminez Dep. 146:9-17; Jones Dep. 225:15-25, which are given for such a wide variety of reasons they are not reflective of behavior or program compliance. *See infra* ¶¶ 292-316.

16-20. Undisputed.

21. Disputed. Mr. Anderson has remained in administrative segregation (also referred to as "ad seg" herein) because he has received negative chrons. *See* Jiminez Dep. 146:9-17; *see e.g.* Robertson Decl. Ex. 39 (Review from 2/8/11). While some of these chrons are for potential violence or threat of violence, others are for minor concerns, such as "sticking his nose in other peoples (sic) business." Robertson Decl. Ex. 1 (Administrative Segregation Classification Review for Troy Anderson, 9/13/02).

22. Partially disputed. Mr. Anderson fears that he poses a security risk to others. Anderson Decl. ¶ 162. Yet, he believes if he was offered necessary mental health treatment he could prevent this behavior. *Id.* ¶¶ 9, 69, 162.

23. Undisputed that Mr. Anderson has progressed and regressed in the Quality of Life ("QOL") Program. Disputed that his regression was because of his high propensity for violence, as some of the reasons he regressed were negative chrons for more minor events such as "ratlining," (a common practice of sending notes to other prisoners), Robertson Decl. Ex. 2 (Administrative Segregation Classification Review for Troy Anderson, 5/13/05), and "not returning items that were passed," Robertson Decl. Ex. 3 (Administrative Segregation Classification Review for Troy Anderson, 1/16/2007).

24. Undisputed that the Quality of Life program was designed to assist in behavior modification

of prisoners with violent propensities. Disputed that the program provides any appropriate or adequate assistance, including mental health treatment, to actually allow prisoners with violent propensities to successfully modify behavior. Anderson Decl. ¶ 109; *see also* Patterson Decl. at ¶¶ 17-20.

25-26. Undisputed.

27. Undisputed that he continues to engage in verbally aggressive behavior. Disputed that he continues to engage in physically assaultive conduct. Mr. Anderson has not hurt any individual in over ten years. Anderson Decl. ¶ 113; *see also, e.g.,* Robertson Decl. Ex. 38 (Administrate Segregation Classification Reviews dated 7/14/10, 8/13/10, 9/11/10, 10/11/10, 11/10/10). His only non-verbal charge in the past ten years was for "attempt[ing] to grab" an officer through the food port. *Id.* (11/10/10 review); Anderson Decl. ¶ 113.

28-42. Undisputed.

43. Disputed. CSP has an outdoor area specifically designed for offender recreation. Exh. 7 to Doc. 47, 1704, 1707; Jones Dep. 250:24-251:12.

44. Disputed. CSP was specifically designed to provide outdoor recreation and did actually provide such recreation for a period of approximately eight years. Dep. of Larry Reid in *Dunlap v. Zavaras*, 09-cv-01196-CMA-MEH ("Reid *Dunlap* Dep.") 47:20-48:7; Jones Dep. 251:24-252:17.

45-46. Undisputed.

47. Disputed. Because offenders are fully restrained whenever they are out of an enclosed cell or area, Dennis Dep. 34:1-6, it is not clear why moving to different locations in the institution increases the risk to those present.

48. Partially disputed. Recreation usually lasts less than an hour. Exh. 2 to Doc. 47 ¶¶ 41, 43. Often, recreation is canceled. *Id.* ¶44. Both the size of the indoor recreation room and the fact that

no outdoor recreation is offered violate the ACA standards, and the DOC is aware of these violations. Reid *Dunlap* Dep. 115:3-16; Shoemaker Dep. 66:22-67:18.

49-50. Undisputed.

51. Disputed. Former Warden of CSP, Larry Reid, testified that the door to the exercise room, which exits to an interior day hall, is one inch above the floor, allowing interior air to enter the exercise room. Reid *Dunlap* Dep. 19:13-14.

52-53. Undisputed.

54. Partially disputed. Offenders can only feel indirect sunlight or see out of the window if they push themselves up into the cement in which the grates are recessed. Exh. 2 to Doc. 47, ¶ 56.

55-56. Undisputed.

57. Disputed. In order to progress, Mr. Anderson needs to go without receiving negative chrons, which are often do not relate to whether the prisoner is program and behaviorally compliant. Martin Decl. ¶¶ 11-12. Examples of why individuals have not progressed are negative chrons for "being disrespectful after being skipped at lunch," Robertson Decl. Ex. 7 (Administrative Segregation Classification Review for Troy Anderson, 05/02/2008), "reckless eyeballing," Bueno Decl. ¶ 18, and "avoiding general conversation," Biraldi Decl. ¶ 12.

58. Partially Disputed. *See supra* ¶14.

59. Undisputed.

60. Disputed. Mr. Anderson has suffered from ADHD since childhood. Patterson Decl. ¶ 6. Dr. Peggy Steele reported that Mr. Anderson "has a history of ADHD as a child." Robertson Decl. Ex. 8 (Clinical Note, 03/28/2006).

61-62. Undisputed.

63. Partially disputed. Effexor is not commonly prescribed for ADHD. Att. 3 to Patterson

Dec. at 26 (listing drugs commonly used for ADHD treatment and not including Effexor).

64-68. Undisputed.

69. Disputed. Mr. Anderson also indicated, in a grievance dated February 12, 2007, that the Effexor had "almost no discernable effects" on his ADHD, and that he was hoping to try another medication. Robertson Decl. Ex. 21 (Grievance, Anderson 000884).

70. Partially disputed. Although sometimes referred to as "Dr." Waters, Travis Waters has no M.D. and is a physician's assistant (PA). Att. 1 to Exh. B to Doc. 48. (Note PA Travis Waters is a different person than Dr. James Waters who performed Mr. Anderson's neuropsych evaluation in 2000 and 2001. *See generally* Psychological and Neurological Evaluation of Troy Anderson by James H. Waters, Ph.D. ("Waters Report") at 13505 (Robertson Decl. Ex. 15)).

71-72. Undisputed.

73. Disputed. Mr. Anderson requested to restart taking the medication on February 20, 2007, only eight days after deciding to go off of this medication. Robertson Decl. Ex. 9 (Ambulatory Health Records, 2/20/2007).

74. Partially disputed. PA Waters did not taper Mr. Anderson off of Effexor; instead, he ceased all distribution of Effexor immediately (Att. 7 to Ex. B to Doc. 48), causing much pain to Mr. Anderson during medication withdrawal and relapses into some of his mental health issues. Robertson Decl. Ex. 22 (Grievance, Anderson 000858-59).

76-80. Undisputed.

81. Undisputed.

82. Disputed. At this meeting, Mr. Anderson stated that his untreated mental illnesses made it difficult to interact appropriately with staff and that "he is not attempting to abuse or manipulate the system" regarding getting medication. Robertson Decl. Ex. 10 (Clinical Note, 7/6/2007).

83-84. Undisputed.

85. Disputed. The provider is the only individual who can file a direct appeal to the denial and he did not do so. However, Mr. Anderson filed a grievance challenging the formulary board decision, which was his only recourse. Robertson Decl. Ex. 19 (Grievance, Anderson 000873-79).

88. Partially disputed. The FDA does not approve of desipramine as treatment for ADHD. It is not as effective as many other available medications, including stimulants. Patterson Decl. ¶ 22; Patterson Decl. Att. 3 at 26.

89. Undisputed.

91. Partially disputed. Mr. Anderson made this statement at one session in November 2007, but he does not currently feel that he is in a "good mood most of the time." Anderson Decl. ¶ 128.

92. Undisputed.

93. Partially disputed. Mr. Anderson thought increasing his desipramine would assist him. However, it was raised so high without proper monitoring by the Department that the drug, at times, exceeded therapeutic levels and was potentially dangerous. Patterson Decl. ¶ 21.

94-100. Undisputed.

101. Partially disputed. No clinical session occurred this day, rather, the comment was elicited during a cell-side administrative segregation round. Robertson Decl. Ex. 11 (Clinical Note, 9/30/2008). The conversation lasted no more than fifteen minutes. *Id.*

102-05. Undisputed.

106. Disputed. Dr. Snyder, not Mr. Anderson, noted improved mood swings and irritability. Robertson Decl. Ex. 12 (Ambulatory record, 6/4/2009). Dr. Snyder also noted that Mr. Anderson thought that his moods were getting worse. *Id.*

107-16. Undisputed.

117. Partially disputed. Mr. Anderson did say that he was "alright" but continued by describing problems he was having with his mental health, including "having problems still with concentration, also with irritability." Robertson Decl. Ex. 13 (Ambulatory Record 6/8/10).

118-20. Undisputed.

121. Disputed. The record reflects a "positive 'remarkable change' in [Mr. Anderson's] behavior after being prescribed Ritalin, even though he only took Ritalin for a few months." Waters Report at 13505.

122-29. Undisputed.

130. Partially disputed. Dr. Koprivnokar met with Mr. Anderson on January 7, 2011. Robertson Decl. Ex. 14 (Ambulatory Record, 1/7/2011). Furthermore, Mr. Anderson continued to complain of irritability and an inability to concentrate. *Id.*

131-36. Undisputed.

137. Disputed. Mr. Anderson's prescription tapered him off of Wellbutrin.

138-140. Undisputed.

STATEMENT OF ADDITIONAL MATERIAL FACTS

Mr. Anderson has a history of mental health disabilities dating back to childhood.

141. Ever since he was a young child, Mr. Anderson has suffered from severe mental illness. Anderson Decl. ¶¶ 20-23; Patterson Decl. ¶¶ 7-8; Waters Report at 13505.

142. There are numerous reports written by mental health professionals documenting the existence of Mr. Anderson's mental health illnesses and disabilities. Patterson Decl. ¶¶ 7-8; Waters Report; Robertson Decl. Ex. 16 (Report of Jeff Metzner, M.D., ("Metzner Report") at Anderson00046-49).

143. Mr. Anderson began treatment for mental health issues starting at age five. Waters Report at

13503. He began treatment for bedwetting at age 5 with when his parents treated his bedwetting with Tofranil, which is the antidepressant imipramine. *Id.* at 13503. His parents noticed positive behavioral side effects. *Id.* at 13505.

144. Over the years, Mr. Anderson has been diagnosed and assessed with many mental health concerns, including Attention Deficit Hyperactivity Disorder, Anti-Social Personality Disorder, Intermittent Explosive Disorder, bipolar disorder, cognitive disorder, a seizure disorder and polysubstance dependence. Patterson Decl. ¶ 8; Waters Report at 13505-07, 13511-12, 13518-24.

145. According to Mr. Anderson and his parents, outside of a proper therapeutic setting, he has never been able to control his emotions and anger, Anderson Decl. ¶ 39, which has resulted in family dysfunction and Mr. Anderson being incarcerated for 25 of his 42 years. *Id.* ¶¶ 42-43.

146. Throughout his childhood Mr. Anderson struggled with mental illness and suicidal ideations. *Id.* ¶¶ 20-23.

147. In 1980, at age ten, Mr. Anderson took an automatic pistol from his father's gun collection intending to commit suicide. *Id.* ¶ 21.

148. Over the past thirty years, Mr. Anderson has had several suicide attempts. On multiple occasions he cut himself severely enough to require stitches. *Id.* ¶¶ 25-26, 35, 38, 67.

149. While he currently does not have active suicidal ideations, he still thinks about killing himself every day. He says he does not take action because he is worried it would hurt his family and because he hopes to make positive changes through this lawsuit. *Id.* ¶ 141.

150. During times his behavior improved, but this only occurred when he was receiving consistent therapy and appropriate medications in a therapeutic setting. *Id.* ¶ 40.

151. When he was discharged from each location, his medications were discontinued and his behavior would deteriorate. *Id.* ¶ 41.

Everyone who encounters Mr. Anderson recognizes his severe mental health concerns.

152. In May 1987, a warrant was issued for Mr. Anderson's arrest for aggravated armed robbery and theft. Robertson Decl. Ex. 17 (Fort Logan Discharge Summary, at Anderson000031).

153. Following his arrest, he was placed in custody. However, because his probation officer and his guardian ad litem were concerned about his mental health issues and his suicidality, they requested he receive mental health evaluation. *Id.* As a result, sent for mental health testing to Fort Logan Mental Health Center. *Id.* The Center recommended continued treatment and therapy. *Id.* at Anderson000032.

154. Following testing, he was placed at the Closed Adolescent Treatment Center, where he was assessed to be psychotic. Metzner Report at Anderson000047.

155. In 1990, following his discharge from the Treatment Center, Mr. Anderson was again arrested. Metzner Report at Anderson000046. As part of this case, the judge ordered a mental health evaluation to assess Mr. Anderson's competency. *Id.* This psychiatrist's report to the court urged continued work for his diagnosis, medication therapy and treatment. *Id.* at Anderson000049.

156. Following his sentencing, Mr. Anderson was placed at the Mount View School, and within seven days attempted suicide. Waters Report at 13510.

157. Mr. Anderson was later transferred to into CDOC custody at Fremont Correctional Facility, in 1991 was placed at Centennial Correctional Facility, and in 1993 was placed in administrative segregation at CSP. Waters Report at 13511.

158. Based on his erratic behaviors and mental health concerns while incarcerated at CSP, Mr. Anderson was send to San Carlos Correctional Facility ("SCCF"), a CDOC facility for individuals with severe mental illness, for evaluation in October 1996. Waters Report at 13511-12.

159. Mr. Anderson largely refused mental health treatment, Anderson Decl. ¶ 51, and was shortly

returned to CSP. Waters Report at 13512.

160. In 1997, at age twenty-seven, Mr. Anderson was released from CSP. Anderson Decl. ¶ 55; Robertson Decl. Ex. 23 (Housing Quarters Sheet, Anderson 001734).

161. For the next year, Mr. Anderson was incarcerated intermittently. Anderson Decl. ¶ 57. He used illegal drugs to self-medicate his mental health issues, including methamphetamines, to which he became addicted. *Id.* ¶ 57; *see also id.* at ¶¶ 32-33.

162. Throughout this time, Mr. Anderson reports hearing voices that command him and degrade him. Waters Report at 13512-13.

163. In December 1998, Mr. Anderson was arrested by Commerce City Police. Robertson Decl. Ex. 24 (Diagnostic Narrative Summary). While he attempted to escape arrest, he eventually surrendered. Anderson Decl. ¶ 58.

164. When asked for a statement at the presentence interview for his convictions in 2000, Mr. Anderson told the judge that he wished he could have done more to get treatment so none of the events would have happened. *Id.* ¶ 63.

165. In 2000, Adams County Judge Richter, in his recommendations at Mr. Anderson's sentencing on March 20, 2000, advised CDOC that Mr. Anderson needed mental health services and recommended that he be sent to SCCF to be evaluated and given such services as part of the sentence. Robertson Decl. Ex. 25 (Prendergast, Alan. "Head Games." *Denver Westword News*, September 21, 2006, at P1910); Anderson Decl. ¶ 64.

Since his incarceration in 2000, Mr. Anderson has consistently been seeking care.

166. During this same time, Mr. Anderson began to recognize how much he had done wrong in his life and was aware of his significant need for mental health services. Anderson Decl. ¶ 69.

167. He was so determined to begin gaining help that he took a plea deal in another case where

he pled guilty for offenses in exchange for the state agreeing to pay for him to get a neuropsych evaluation. Anderson Decl. ¶¶ 64-65.

168. As a result of this plea deal, Dr. Waters completed a neuropsych evaluation of Mr. Anderson. *See generally* Waters Report.

169. Since his reincarceration, Mr. Anderson has repeatedly and sincerely expressed his regret at hurting or attempting to hurt others, including the police and correctional officers. Anderson Decl. ¶¶ 7-10.

170. He made up his mind that as he returned to CDOC he wanted to improve his mental illness and learn to control his anger. *Id.* ¶ 69.

171. He also decided that, if he could not control his anger, he would rather stay isolated and alone than take the risk of hurting someone else. *Id.* ¶¶ 62, 162.

172. Mr. Anderson has not hurt another individual since that time, over ten years ago. *Id.* ¶ 113; Robertson Decl. Ex. 4 (Administrative Review, Anderson 013759).

CDOC has provided inadequate mental health care.

173. Despite the Court's recommendation that Mr. Anderson be sent to SCCF for mental health care, Mr. Anderson was sent directly to CSP after entering the system through the Denver Reception and Diagnostic Center ("DRDC") (where everyone enters CDOC). Robertson Decl. Ex. 25; Anderson Decl. ¶¶ 68-70

174. Defendants sent him to CSP despite being aware of Mr. Anderson's severe mental health concerns and his need for services. *See generally* Defs.' Resps. to Pl.'s Second Set of Interrogs., No. 15 (Robertson Decl. Ex. 31).

175. After a few months at CSP, Defendants moved Mr. Anderson to SCCF to be treated for his mental health issues. Robertson Decl. Ex. 23 (Housing Quarters Sheet, Anderson 001734); *id.* Ex.

26 (San Carlos Treatment Plan, Anderson 000174).

176. While at SCCF, Mr. Anderson worked with mental health staff, who reported that he was noticeably less angry, irritable, and combative. Robertson Decl. Ex. 27 (San Carlos Discharge Summary, Anderson 000157).

177. While at SCCF, Mr. Anderson's medications were adjusted when medical staff determined that some of his prescriptions had side effects that made him more unstable and combative. Anderson Decl. ¶ 77; Robertson Decl. Ex. 27 (San Carlos Discharge Summary, Anderson 000157). Defendants acknowledged that Mr. Anderson's behavior had been impacted by these prescriptions. Robertson Decl. Ex. 27 (San Carlos Discharge Summary, Anderson 000157).

178. Despite this progress, Mr. Anderson was returned to CSP a few months after his arrival at SCCF. Robertson Decl. Ex. 23 (Housing Quarters Sheet, Anderson 001734).

179. He was returned due to no fault of his own, and against the wishes of his therapists. Robertson Decl. Ex. 28 (Mental Health Contact 11/2000, Anderson 000559).

180. The return was ordered by custody staff as part of a prisoner "trade out," meaning that CDOC needed the extra bed at SCCF. *Id.*

181. Initially, Mr. Anderson was frustrated after being removed and refused treatment, but he later began asking for help. Anderson Decl. ¶¶ 81-82; Robertson Decl. Ex. 29 (Mental Health contact 11/2000, Anderson 000557 (noting his frustration at transfer)).

182. Since that time, Mr. Anderson has consistently sought treatment and asked for help for his concerns. Anderson Decl. ¶ 130.

183. Even CDOC employees have admitted that they believe he is earnestly seeking help, and is sincere at his efforts to improve. *See* Lampela Dep. 73:6-8; Lish Dep. 120:6-8; Koprivnikar Dep. 156:16-17.

184. Though Mr. Anderson has repeatedly asked for help, Defendants have not provided him with adequate care. Anderson Decl. ¶ 130; Patterson Decl. at ¶ 14; Patterson Dep. 237:7-10.

185. He has seen a large number of providers and has rarely received consistent care, *see, eg.* Admissions Defs.' Resps to Pl.'s Third Requests for Admissions No. 25 (Robertson Decl. Ex. 32), despite CDOC's awareness of the importance of continuity of care, Lampela Dep. 115:8-116:1. Indeed, Defendants' psychiatric expert, who works for the CDOC, concedes that there is not a lot of continuity of care by psychiatrists at the CDOC. Lish Dep. 25:12-23.

186. Mr. Anderson sees a psychiatrist, who provides a diagnosis and prescribes his medications, and a therapist, with whom he has talk therapy. Anderson Decl. ¶ 85.

187. While Dr. Lampela, the head of the OMI program believes it is essential for these two individuals to communicate, Lampela Dep. 106:14-108:3, Mr. Anderson's providers do not communicate. Koprivnikar Dep. 27:11-13, 157:2-6. She also states that Mr. Anderson's treatment plan, as written, is insufficient. Lampela Dep. 109:17-110:9.

188. At least once, Mr. Anderson went over six months without seeing a therapist, despite repeatedly requesting care. Anderson Decl. ¶ 88.

189. In the past seven months, Mr. Anderson has had three "primary" therapists. Defs.' Resps to Pl.'s Third Requests for Admissions No. 25 (Robertson Decl. Ex. 32).

190. Each has told him that they are his "permanent" therapist, and then each has switched after a few months. Anderson Decl. ¶¶ 85, 93-94.

Dr. Patterson opined that Mr. Anderson's care is inadequate, in part because he is denied necessary medications.

191. Dr. Patterson, a psychiatrist who specializes in correctional medicine, opined that Mr. Anderson's mental health care is inadequate. Patterson Decl. at ¶ 14; Patterson Dep. 237:7-10.

192. Dr. Patterson diagnosed Mr. Anderson with adult-ADHD NOS and noted that ADHD has been in his record since he was a child. Patterson Decl. at ¶ 7; *see also* Koprivnikar Dep. 16:17-17:4; Lish Decl. ¶ 36. Dr. Patterson also diagnosed him with personality disorders including antisocial personality disorder and personality disorder not otherwise specified with narcissistic and borderline features. Patterson Decl. ¶ 8.

193. Dr. Patterson opined that Mr. Anderson will not be able to progress in his therapy until his ADHD is controlled enough such that he can concentrate and pay attention, which would, in turn, permit him to benefit from therapy designed to treat his personality disorder. Patterson Decl. ¶ 17, 23; Patterson Dep. 143:20 - 144:16.

194. As such, Dr. Patterson opined that adequate mental health treatment for Mr. Anderson would include a comprehensive treatment plan involving psychological therapy, psychiatric therapy, supervision from housing and correctional staff, as well as medication. Patterson Decl. ¶¶ 18-19. Mr. Anderson has not been adequately treated for his complex mental health disorders and behaviors, including the fact that he has not been offered an adequate and substantial trial of an FDA-approved, non-formulary medication for his ADHD. Paterson Decl. ¶¶ 14-15.

195. A psychostimulant is the proper medication for Mr. Anderson and cognitive behavioral therapy is the appropriate therapy. Patterson Dep. 190:3-5; *see also id.* 247:7-10 ("I'm just opining that a competent, adequate assessment of Troy Anderson indicates that he has ADHD; that the primary treatment for his ADHD has been withheld from him."); 270:19 - 271:12 (adequate mental health treatment would have required trying a psychostimulant, then a non-psychostimulant that has been approved by the FDA for ADHD such as Strattera, and if those are not effective, a second or third line medication such as Wellbutrin).

196. Dr. Patterson, when asked to evaluate the treatment Mr. Anderson had received for his

antisocial personality disorder, stated "I don't think I'd call it treatment. He has had contact with staff, with clinicians, with psychiatrists and with case managers." Patterson Dep. 233:3-8.

197. Proper treatment would require, at the very least, that Defendants address any verbal threats from a clinical as well as disciplinary perspective. *Id.* 233:3 - 234:18; *see also id.* 271:13 - 272:8 (personality disorders are treatable; Defendants have not offered the time or intensity of therapy necessary to treat Mr. Anderson's personality disorders).

198. Dr. Patterson opined that the medication treatment of choice for adult ADHD has been stimulant medications, particularly methylphenidate (Ritalin or Concerta) and amphetamine / dextroamphetamine preparations including Adderall XR and Focalin XR, both of which have been demonstrated to have superior efficacy compared to the non-stimulant Strattera or the antidepressants Wellbutrin and desipramine. Patterson Decl. ¶ 22; Patterson Decl. Att. 3 at 26-28; *see also* Koprivnikar Dep. 25:8-11, 146:7-21, 149:18-22.

199. There are numerous notations in Mr. Anderson's records which indicate that he would like to be put on Ritlin, or another FDA approved stimulant medication for the treatment of ADHD. Lish Decl. ¶ 49.

200. While all three of Mr. Anderson's therapists have informed Mr. Anderson that he requires medication for his ADHD, Anderson Decl. ¶ 99, none of them communicated with the psychiatrist actually responsible for his medications. Koprivnikar Dep. 27:11-13.

201. None of his therapists sought these medications otherwise, as they all told Mr. Anderson he will only receive stimulant medication if it is added to the formulary. Anderson Decl. ¶¶ 99-100.

202. In addition to these individuals, many other providers during Mr. Anderson's time in CDOC have told him that they believe he requires stimulant, or at least other, medications for his mental health concerns. Anderson Decl. ¶ 99.

The P&T Committee and the Composition of the Formulary

203. The CDOC maintains a formulary of medications which CDOC providers are expected to abide by. Koprivnikar Dep. 31:18 - 33:7; Ex. 30 at 1.

204. The Pharmaceutical and Therapeutic Committee ("P&T Committee") determines which medications are on the formulary. Koprivnikar Dep. Ex. 30 at 3.

205. The P&T committee meets approximately once a month. *Id.*

206. At each meeting, a different class of medication -- for example, endocrinology or HIV medications -- is discussed. Koprivnikar Dep. 48:1-12.

207. Each type of medication is referred to as a "class" and the review devoted to that class as a "class review." *Id.* 48:24 - 49:12; Ex. 30 at 3.

208. The class of psychiatric medications is discussed approximately once a year. *Id.* 48:13-18.

209. There are no stimulant medications on the CDOC formulary, including Ritalin which is a stimulant commonly used for the treatment of ADHD. *Id.* 132:7-9; 139:2-5; Patterson Decl. Att. 3 at 26.

210. Besides stimulants, there are no other general categories of medications that are not on the formulary list. Koprivnikar Dep. 152:2-8.

211. Strattera is not a stimulant, but is commonly used to treat symptoms of ADHD. *Id.* 151:3-13.

212. Strattera is not on the formulary list. *Id.* 151:3-15.

213. Wellbutrin used to be on the formulary, but was taken off because it was being abused. *Id.* 39:12-18; 80:25 - 81:7.

214. There were also safety concerns associated with the abuse concerns for Wellbutrin. *Id.* 68:8-12.

215. "Wellbutrin is now [on the] formulary, but it's still a security issue." *Id.* 69:25 - 70:12.

216. When the P&T Committee meets, there are "usually some changes." *Id.* 77:20 - 78:6.

217. A couple of medications are taken off the formulary each year. *Id.* 78:24 - 79:3.

218. When the Department wants or needs to, there are other ways to remove medications from the formulary list besides the formal P&T Committee procedure. *Id.* 83:21 - 84:7.

219. Dr. Koprivnikar does not recall a discussion when Wellbutrin was previously taken off the list. *Id.*

220. Medication was removed by the previous Chief Medical Officer Cary Shames without discussion. *Id.*

221. For example, the antipsychotic medication Geodon was substituted for Abilify without a doctor advocating for one or the other. Dr. Koprivnikar believes this was "more of a cost and availability discussion." *Id.* 50:25 - 51:15.

222. Medications may be removed from the formulary based on efficiency, space, and agreements between the pharmacy and distribution companies. *Id.* 85:24 - 86:9.

223. "There have been instances where older medications have been . . . deleted from the list, but it's more because you can only have a certain size to your formulary and the pharmacy can only maintain a certain quantity of medications." *Id.* 76:5-9.

224. Dr. Frantz, the chief medical officer, testified that Wellbutrin was added to the formulary during the November, 2010, meeting. Frantz Dep. 7:6-9; 32:6-10. However, Dr. Koprivnikar testified that Wellbutrin was not added during a P&T Committee meeting and that she was surprised to see it had been added. Koprivnikar Dep. 79:7 - 80:1.

225. Wellbutrin was added at the request of the chief psychiatrist, Dr. Hogan, and there was no discussion of it at the meeting. Frantz Dep. 32:18 - 33:9; 35:6-21.

226. Mr. Anderson's psychotherapist, Mr. Kirkman, told him that the only reason that Wellbutrin was added to the formulary was this lawsuit. Anderson Dec. ¶ 123.

The Non-Formulary Committee and The Requests for Strattera and Wellbutrin for Mr. Anderson

227. The non-formulary committee is a panel of psychiatrists who are provided the task of reviewing psychiatric requests from other psychiatrists for medications that are not found on CDOC's formulary. Lish Decl. ¶ 20.

228. Dr. Koprivnikar is a member of the non-formulary committee. Koprivnikar Dep. 11:13 - 12:1.

229. Although there have been non-formulary requests for Ritalin, only one has been approved. *Id.* 132:10 - 133:23.

230. When stimulants are requested through the non-formulary process, they are generally denied. *Id.* 143:5-7.

231. In 2004, a non-formulary request was submitted for Strattera for Mr. Anderson. *Id.* 167:22-25 & Ex. 34.

232. This request was denied. Defs.' Resp. to Pl.'s First Requests for Admission, No. 8 (Robertson Decl. Ex. 33).

233. CDOC testified that the reason why it was denied was that it was improperly submitted, however, the physican did not try to resubmit the paperwork and there was no follow-up. *Id.*; Koprivnikar Dep. 170:15 - 171:6.

234. Mr. Anderson never received notice of his denial of Strattera and was never given any reason why he could not have this requested medication. Anderson Decl. ¶ 101.

235. Mr. Anderson was not permitted to appeal this denial, as non-formulary requests can only be

appealed by the physician. Koprivnikar Dep. 128:16-24.

236. Because it was not on the formulary, on August 2, 2007, Dr. Wescot submitted a non-formulary request to the non-formulary committee for Wellbutrin, which request was ultimately denied. Lish Decl. ¶¶ 19-20; Movant's Statement of Material Facts ¶¶ 83-84.

237. Dr. Wescot's request was denied because Mr. Anderson was not in a GED program and was not a facility disruption problem. Koprivnikar Dep. 158:17 - 159:2.

238. For a long time, the Department admits that adult ADHD was not a priority and that it was only treated when individuals were trying to receive a GED. Koprivnikar Dep. 159:24 - 160:2. For example, during the tenure of Chief Medical Officer Shames, he imposed guidelines for the approval of medication for ADHD: "the person had to be furthering their education, like their GED or working on college course, or they had to be a management problem. That was the only time ADHD was treated." *Id.* 159:18 - 160:2.

239. These requirements for medication for ADHD are different from the ones used now. *Id.* 159:18-22.

240. Dr. Shames's policy was not codified. *Id.* 160:19-23.

241. Dr. Shames did not really believe that ADHD was a problem or should be treated. *Id.* 160:17-18.

Mr. Anderson's Grievance Concerning the Denial of Wellbutrin.

242. Only a provider can request non-formulary medication. *Id.* 110:5-8.

243. The only "appeal" from a denial of a non-formulary request is to resubmit the request to the committee. *Id.* 127:10 - 128:9.

244. The physician may also appeal to the Chief Medical Officer, but this is so rare that Dr. Koprivnikar could not recall a time it had happened. *Id.* 129:6 - 130:1.

245. The only recourse for an inmate to request that a prescription be resubmitted to the non-formulary committee is the grievance process. *Id.* 128:16 - 129:2.

246. Mr. Anderson filed a step 1 grievance relating to the denial of the non-formulary request for Wellbutrin on August 23, 2007. Robertson Decl. Ex. 19 at ANDERSON000877.

247. This step 1 grievance was denied on September 6, 2007. *Id.* at ANDERSON000878.

248. Mr. Anderson filed a step 2 grievance relating to the denial of the non-formulary request for Wellbutrin on September 12, 2007. *Id.* at ANDERSON000875.

249. This step 2 grievance was denied on September 24, 2007. *Id.* at ANDERSON000876.

250. Mr. Anderson filed a step 3 grievance relating to the denial of the non-formulary request for Wellbutrin on October 3, 2007. *Id.* at ANDERSON000874.

251. This step 3 grievance was denied on August 7, 2008. *Id.* at ANDERSON000873.

252. Dr. Patterson opined that the non-formulary review process was deeply flawed and is concerning. Patterson Decl. ¶ 16; *see also* Patterson Dep. 240:18 - 242:20.

253. He explained that there did not appear to be adequate responses given to providers, nor are there adequate safeguards to ensure that individuals receive necessary medications. *Id.* 117:6 - 118:17 (discussing providers and following up), 248:5 - 250:3 (discussing the formulary and getting appropriate meds to patient)

254. Defendants acknowledge that Mr. Anderson has adult ADHD, Koprivnikar Dep. 106:7-10, and are aware that stimulant medications are the most effective for his ADHD, *id.* 105:1-4, 107:16-18), yet they deny these to Mr. Anderson, *see* Lish Dep. 80:18 - 81:11.

255. CDOC has a blanket policy of denying stimulant medications to everyone within their custody. Koprivnikar Dep. 152:2-8; *see also* Defs.' Resps. to Pl.'s First Requests for Admission No. 14 (Robertson Decl. Ex. 33) (no stimulants on formulary).

256. CDOC says that they do this because they are concerned about security. Koprivnikar Dep. 153:11-18; *see also id.* 67:24-27; 67:16 - 69:2; Lish Dep. 105:5-106:9.

257. Defendants admit that they could crush and float the medication, which is effective at preventing other addictive medications from being a problem. Koprivnikar Dep. 70:13 - 71:4; Lish Dep. 133:2-6.

258. Crushing and floating is a practice where medications are ground up and then are placed into water. Koprivnikar Dep. 70:20-24. It is done to because it prevents prisoners from cheeking medications. *Id.* 70:25 - 71:4.

259. Defendants identified multiple other practices they use to prevent offenders from passing and abusing medications, including mouth checks and supervised administration and ingestion of medication. *Id.* 71:19 - 72:5; Frantz Dep. 28:5 - 29:4.

260. A few individuals in the CDOC receive stimulant medication, one of whom is at CSP. Koprivnikar Dep. 132:12-13, 133:6-14.; *see* Robertson Decl. Ex. 30 (Chart, Anderson 000887-88).

261. Defendants are aware that the one individual in CSP was prescribed Ritalin, a stimulant, because he has ADHD. Koprivnikar Dep. 134:7-17. However, Defendants are unaware of the reasons why a stimulant was initially prescribed instead of a non-stimulant. *Id.* The other CDOC offender on Ritalin suffers from depression, not ADHD. *Id.*

262. Juveniles are also permitted to receive stimulant medications because the Defendants want to "give them every opportunity to stay out [of prison]." *Id.* 25:21 - 26:3; *see also id.* 147:2-9.

263. Dr. Patterson stated that he has toured numerous other correctional institutions and that they do permit stimulant medications, and take care of any security concerns by crushing and floating the medication. Patterson Decl. at ¶ 25.

264. Dr. Patterson opined that crushing and floating medications is a standard and common

practice and is not burdensome. *Id.* ¶ 26.

265. Indeed, everyone in CSP receiving Wellbutrin, including Mr. Anderson, currently receives that medication in crush and float form. Koprivnikar Dep. 70:17-24.

266. Mr. Anderson does not have any history of abusing, selling, or hoarding medications during his time in CDOC. Lish Dep. 42:5 - 43:12.

267. CDOC has stated that in order for Mr. Anderson to receive stimulant medication he would need to have to "significant behavioral issues" and his "behavior would have to be pretty extreme." Koprivnikar Dep. 26:4-22.

268. Apparently, if Mr. Anderson were "[t]earing up [his] cell, being assaultive with the officers, being assaultive with other offenders, throwing things, breaking things…," he would be prescribed Ritalin for his ADHD, Koprivnikar Dep. 26:6-9, but no offender has *ever* satisfied these criteria, *id.* at 26:21-24.

269. Not permitting Mr. Anderson access to these medications is in contrast to most individuals in CDOC, who receive the medications that their providers order for them. Korpivnikar Dep. 29:4-10; 138:16-18; 138:22 - 139:1. Not receiving a requested medication is "atypical." *Id.* 138:19-21.

270. Dr. Patterson opined that this basis for denial is not compelling from a medical standpoint, and that the fact that juveniles receive stimulant medications indicates that this can be accomplished safely. Patterson Dep. 113:11 - 115:2, 225:4-15.

271. It is Dr. Patterson's opinion that if Mr. Anderson had been adequately treated, he probably more likely than not would have been out of segregation years ago, Patterson Dep. 146:14-17, and that had he been placed on Ritalin five years ago, he would not be in segregation now, *id.* 148:1-3.

272. While Mr. Anderson was "placed" in the OMI program in December 2010, Defs.' Resps. to Pl.'s Second Set of Interrogs., No. 6 (Robertson Decl. Ex. 31), he was not placed in an active pod

until recently, Lampela Dep. 18:16-22 (noting he was in an inactive pod as of late April).

273. Furthermore, Mr. Anderson does not feel comfortable participating in the programs afforded to prisoners in the OMI program because he does not feel that his mental health issues have been treated adequately enough to prepare him for those situations. Anderson Decl. ¶¶ 132-34.

Mr. Anderson suffers severe effects of his mental illness that are serious and impact his ability to perform major life activities.

274. Mr. Anderson reports that his anger comes on suddenly and intensely and that the only technique he has for keeping it under control is to walk away. Anderson Decl. ¶¶ 110, 115.

275. Because of his explosive anger and inability to control his emotions he cannot, and has never been able to fully, interact with others. *Id.* ¶¶ 111, 116.

276. After an event passes he is able to calm down and then feels devastated for what he said to other people and for threatening people. *Id.* ¶ 117.

277. The fact that he does this over and over again makes him in despair; he feels depressed and suicidal. *Id.* ¶ 117.

278. Dr. Patterson notes that this pattern is typical of someone with antisocial personality behavior and personality disorder not otherwise specified with borderline and narcissistic features. Patterson Decl. ¶ 8.

279. Even though, more than anything else, Mr. Anderson wants to be able to be around people and to have normal conversations, he is afraid of being put into situations where his anger explodes and he is not able to control it. Anderson Decl. ¶ 13, 132.

280. He does not wish to be removed from isolation until he receives treatment for his mental health conditions and he knows that he can manage them. *Id.* ¶¶ 161-62.

281. Mr. Anderson reports that he cannot concentrate in therapy and that he cannot learn. *Id.* ¶ 129.

282. Dr. Patterson noted that his thought process is interrupted and cannot be focused. *See* Patterson Decl. at ¶ 9.

283. Mr. Anderson writes that his mind is always going, and that he cannot calm it down. Anderson Decl. ¶ 118.

284. All he wants is the appropriate medication so he can receive cognitive behavioral therapy to help him gain control of his mental health conditions. *Id.* ¶¶ 125-27.

285. Mr. Anderson wants to be in a safe and supportive environment, and to receive adequate care. *Id.* ¶¶ 13, 130, 161.

As a result of these behaviors resulting from his mental illness Mr. Anderson is held at CSP, the most restrictive prison in CDOC.

286. Mr. Anderson is held in CSP, a prison devoted entirely to housing individuals in solitary confinement. Robertson Decl. Ex. 35 (OM 650-100).

287. Mr. Anderson is in CSP at least in part because of his mental illness and disability. Patterson Decl. ¶ 10-11; Patterson Dep. 140:18 - 141:5 (negative chrons due to ADHD).

288. Conditions at CSP are the most restrictive of any prison in CDOC. Jones Dep. 16:11 - 17:3; Bueno Decl. ¶¶ 34-59.

289. Significantly, Mr. Anderson spends more than 23 hours a day alone in his cell, and is never able to communicate face-to-face with other human beings, unmediated by barriers or shackles. Anderson Decl. ¶¶ 3, 137; Robertson Decl. Ex. 35 (OM 650-100).

290. CSP severely restricts the educational opportunities available, the job possibilities, the items available in the canteen, the property allowance, the number of visits and phone calls, and the

amount of recreation received. *See* Bueno Decl. ¶¶ 34-59; Anderson Decl. ¶¶ 142, 144, 152-154; *see also infra* ¶¶ 319-35.

291. The conditions at CSP are so controlled and restrictive, they even preclude Mr. Anderson from hanging up a picture of his family, and only permit him to own two books, which he can only exchange annually. Jones Dep. 99:6-15 & Ex. 15 (IA 850-06); Exh. 2 to Doc. 47, ¶ 28.

The review process to progress out of CSP is inadequate.

292. To progress out of CSP, a prisoner must work his way through multiple levels. Robertson Decl. Ex. 35 (OM 650-100).

293. The main factor that determines progression through these levels is whether a person has received negative chrons. Jones Dep. 225:15-226:14; Robertson Decl. Ex. 20 (Anderson 004637); *see* Jiminez Dep. 146:9-17.

294. If a prisoner has received one negative chron in the prior ninety days, he will not progress in the Quality of Life Program. Jiminez Dep. 146:9-17; Robertson Decl. Ex. 35 (OM 650-100 at PAGE.); Mondragon Decl. ¶ 11 & Att. 2.

295. A negative chron can be given by any staff member, at any time, for behavior they consider to be negative. Defs.' Resp. to Pl.'s First Interrogs, No. 8 (Robertson Decl. Ex. 37).

296. The staff member records the negative chron into a system-wide database. Jiminez Dep. 47:11-13; 93:22-94:19.

297. Yet, sometimes even when there is a negative behavior a chron won't be issued. Jiminez Dep. 105:20-106: 4. The issuance of chrons of any sort is "unpredictable" and might not be done because a staff member is busy or because the "phone could ring." *Id.*

298. There are no written standards that explain what a chron is. Defs.' Resp. to Pl.'s First Interrogs, No. 8 (Robertson Decl. Ex. 37); Jiminez Dep. 103:3-8.

299. Negative chrons are often given for vague and ambiguous reasons. Martin Decl. ¶¶ 11-12.

300. For example, Mr. Anderson has received negative chrons for such behavior as: "being disrespectful after being skipped for lunch" (9/2/2008 – P000243), "complaining to staff" (*id.*); and "sticking his nose into other peoples (sic) business" (Robertson Decl. Ex. 1 (Administrative Segregation Classification Review for Troy Anderson, 9/13/02).

301. Other prisoners have received negative chrons for vague accusations, such as: "dirty looks," Ekin Decl. ¶ 11; "being uncooperative," Mondragon Decl. ¶ 16; "avoiding general conversation," Biraldi Decl. ¶ 12; and "not talking to correctional officers," Thill Decl. ¶ 15.

302. Mr. Anderson is rarely told when he receives a negative chron, Anderson Decl. ¶ 168, and there is no requirement that staff do so. Defs.' Resps. to Pl.'s Third Set of Requests for Admission No. 28 (Robertson Decl. Ex. 32). Generally, he is only aware of the chron when he is denied progression to a new level. Anderson Decl. ¶ 168 ; *see also* Biraldi Decl. ¶¶ 8-9; Ekin Decl. ¶¶ 6-7.

303. There is no ability to challenge negative chrons, or even just to receive clarification about what the specific event or behavior was. Mondragon Decl. ¶¶ 9-10 & Att. 1; Thill Decl. ¶ 10.

304. Chrons are not grievable. Mondragon Decl. ¶¶ 9-10 & Att. 1.

305. Every thirty days, Mr. Anderson receives a form indicating that he was reviewed. *See, e.g.,* Robertson Decl. Ex. 38 (Administrate Segregation Classification Reviews dated 7/14/10, 8/13/10, 9/11/10, 10/11/10, 11/10/10); Jiminez Dep. 123:17-24.

306. He receives no notice of this review and has no ability to put forth evidence or be heard in any way. Anderson Decl. ¶ 166.

307. Ms. Darla Jiminez, a former case manager of Mr. Anderson explained that, in reality, what this means is his caseworker looked at his record for new negative chrons and entered these onto a form. Jiminez Dep. 123:17-124:4, 125:17-21.

308. There is no discussion between staff members about Mr. Anderson and no meeting takes place in connection with this review. Jiminez Dep. 123:17-124:2.

309. Rather, the main consideration as to what will come on or off the form is whether there is space available on the computerized form. Jiminez Dep. 135:8-24; 136:3-19; 140:7-23.

310. Once the caseworker has filled out the form, she sends it to the other "committee members" for signature. Jiminez 144:8-145:2.

311. The only corrections Ms. Jiminez ever received were for typos. *Id.*

312. The form that Mr. Anderson receives denying or granting him progression contains no information or direction as to what he should do in the future. Anderson Decl. ¶ 170; *see, e.g.,* Robertson Decl. Ex. 38 (Administrate Segregation Classification Reviews dated 7/14/10, 8/13/10, 9/11/10, 10/11/10, 11/10/10).

313. Rather, the forms received each month are nearly identical, with only a few words changing each month. *See, e.g., id*; Anderson Decl. ¶ 169; *see also* Thill Decl. ¶¶ 11, 13 & Atts. 1 & 2.

314. Steve Martin, Plaintiff's expert in corrections, has extensive experience in correctional administration, with specific expertise in the management of high security inmates administratively classified and housed in segregated settings, and the operation of maximum security prisons in which they are confined. Martin Decl. ¶ 2.

315. Mr. Martin opined that this review system is arbitrary and insufficient, as it makes Mr. Anderson's confinement status dependent on subjective standards employed by whatever official or officials may be in a position at a particular time to exercise his/her own personal judgment. Martin Decl. ¶ 11. Absent clear standards and an opportunity to participate in the process, Mr. Anderson is left to wonder and speculate about what he may do to improve his quality of life. Martin Decl. Att. 2 at 13.

316. Further, Mr. Martin opined that, under this system, Mr. Anderson is unable to determine what it is he must do to realize or effectuate a diminution of these restrictions, which is antithetical to principles of fundamental fairness as applied in correctional setting. *Id.* ¶ 12.

Privileges and Benefits Available to Mr. Anderson and Other Inmates

317. According to CDOC's regulations, "[u]se of administrative segregation is a preventive and management assignment process and is to be distinguished from punitive and disciplinary segregation." Robertson Decl. Ex. 18 (AR 600-02, Offender Classification, Administrative Segregation).

318. Warden Susan Jones was Defendants' Rule 30(b)(6) designee on the topic of privileges and benefits made available by CDOC to inmates in general population and administrative segregation settings, including eligibility, reasons for offering privileges, and whether the privileges and benefits pose a security risk. Jones Dep. 5:20 - 6:12 & Ex. 9 at 2.

319. The CDOC classifies inmates into five custody levels. Administrative segregation is the highest security. Close custody is the second highest. Minimum is the lowest. Jones Dep. 15:1-9; 18:9-20 & Ex. 10 at 2.

320. There are a number of items that inmates in close custody -- the level just under administrative segregation -- may possess that those in administrative segregation may not. For example, inmates such as Mr. Anderson who are in levels 1, 2 or 3 of the CSP Quality of Life Program are permitted only two books and are prohibited from having the following: a clock radio; personal (non facility-issue) underwear, socks, sweatpants, gym shorts, t-shirts, tennis shoes, thermal shirts or drawers; a fan; or a photo album. Jones Dep. 104:11-15 & Ex. 15 Att. B at 2.

321. Inmates in the OMI program have the same privileges as the level they were in in the Quality of Life program. Lampela Dep. 119:19 - 121:2.

322. Inmates in the close custody worker program at CSP are permitted to have: five books; a clock radio; and personal (non facility-issue) underwear, socks, sweatpants, gym shorts, t-shirts, tennis shoes, thermal shirts or drawers. Jones Dep. Ex. 15, Att. B at 2.

323. Inmates in close custody at the San Carlos Correctional Facility ("SCCF") are permitted to have:

a. An address book;

b. An alarm clock;

c. 15 books (5 recreational; 10 educational or religious);

d. a calculator, solar power;

e. an extension cord;

f. a fan;

g. a file box;

h. a notebook;

i. a photo album;

j. a radio;

k. a bathrobe;

l. personal (non facility-issue) underwear, socks, sweatpants, gym shorts, tennis shoes, thermal shirts or drawers; and

m. a typewriter.

Jones Dep. 74:20 - 75:5 & Ex. 12 at ANDERSON010363

324. Warden Jones testified that it would be possible to add typewriters to the Quality of Life program on an inmate-by-inmate basis. Jones Dep. 85:10-25.

325. Inmates at SCCF are permitted to take correspondence courses, whereas inmates at CSP are

not. Jones Dep. 89:14 - 91:11 & Ex. 14.

326. The reason Mr. Anderson is not permitted to take correspondence courses is because he is housed at CSP. Jones Dep. 95:3-5.

327. It would be possible, if they had the staff, to deliver correspondence courses at CSP in much the same way that courses such as drug and alcohol courses are currently provided there. Jones Dep. 93:25 - 94:24.

328. Some inmates at Sterling Correctional Facility are permitted to have art supplies. Inmates such as Mr. Anderson in levels 1, 2 or 3 of the CSP Quality of Life Program are not permitted to have art supplies besides colored pencils. Jones Dep. 113:7 - 114:3; 115:14-18, Ex. 15, Att. B at 2 & Ex. 16 at ANDERSON011068.

329. Inmates in higher levels of administrative segregation at Sterling Correctional Facility will have access to computers and computer programming instruction, while inmates at CSP do not. Jones Dep. 134:7 - 135:22.

330. As of April 4, 2011, inmates incarcerated at CSP were not eligible for any type of earned time due to their status as administrative segregation offenders. Resp. to RFA No. 16 (Robertson Decl. Ex. 36).

331. This denial effectively added years to Mr. Anderson's sentence and likely will make the difference between being paroled and dying at CSP. *See, e.g.,* AR 550-12, Earned Time Credit, available at http://www.doc.state.co.us/sites/default/files/ar/0550_12_0.pdf (showing up to 30% of sentence can be reduced).

332. As of April 4, 2011, inmates in the OMI program at CSP were not eligible for any type of earned time due to their status as administrative segregation offenders. Resp. to RFA No. 17 (Robertson Decl. Ex. 36).

333. Since July 1, 2011, inmates in administrative segregation have been eligible to receive earned time if he meets the criteria of the applicable section or "any modified criteria developed by the department." Colo. Rev. Stat. §§ 17-22.5-302(1.3); 17-22.5-405(8). The legislation does not contain any provision for a retroactive award of earned time. 2011 Colo. Legis. Serv. Ch. 289 (S.B. 11-176).

334. As of July 8th, 2011, Mr. Anderson now may receive a few days of good time credit each month, however, this is still significantly less than prisoners in general population prisons. *See* Executive Directive 22-11, available at http://www.doc.state.co.us/sites/default/files/0550_12_07082011.ED_pdf (listing maximum awards as one or two days per month for specific assessments).

335. Inmates that progress out of administrative segregation, including the OMI program at CSP, into a non-administrative segregation facility, are not ordinarily credited with any retroactive earned time that would have been earned but for their status as administrative segregation offenders. Resp. to RFA No. 19 (Robertson Decl. Ex. 36).

336. Officials should make an individualized determination, rather than an absolute blanket prohibition, especially under the circumstances where his situation is based on a mental impairment. Martin Dep. 87:19 - 88:3.

337. Plaintiff's expert Mr. Martin opined that there is no basis to deny in blanket fashion virtually all privileges and benefits based solely on Plaintiff's confinement status in Administrative Segregation. Martin Decl. ¶ 5.

338. Detainees in special management units should be afforded basic living conditions that approximate those provided to the general population, consistent with the safety and security considerations that are inherent in more controlled housing, and in consideration of the purpose for which each detainee is segregated. Martin Dep. 115:7-13.

339. Absent an individualized determination that provision of a particular privilege or benefit

represents a security or safety risk, those privileges and benefits provided to inmates not housed in Administrative Segregation should be provided Plaintiff. Martin Decl. ¶ 5.

340. In other words, to the extent permitted by legitimate security and operational requirements associated with segregated housing, inmates separated based on administrative needs (vis-à-vis disciplinary separation) should be afforded privileges and benefits parallel to those offered similarly classified general population inmates. *Id.*

341. Mr. Martin's opinion includes, but is not limited to, such privileges and benefits as additional reading materials, additional phone calls, additional visits, additional canteen food items, access to electronic canteen items, additional clothing items, and access to educational/ vocational training materials. *Id.*

342. Although Plaintiff is housed at CSP and has been assessed to pose certain safety and security risks if housed at a general population facility, his administrative confinement status alone does not provide a basis for blanket loss of virtually all privileges and benefits. Martin Decl. ¶ 9.

343. Plaintiff has not been found guilty of an act of institutional violence in approximately ten years. *Id.*

344. Moreover, Plaintiff has not, of record, posed a safety or security risk while utilizing CSP's limited recreational facilities. *Id.*

345. If Plaintiff was to be granted additional privileges or benefits, much like those available to inmates at other high security facilities, the vast amount of these would be limited for use in a secure cell subject to all security precautions the facility wishes to impose, *e.g.*, unannounced cell searches. Therefore, there is no legitimate penological justification for denying plaintiff access to increased privileges or benefits, absent an individual determination that a particular privilege or benefit represents a security or safety issue. *Id.*

ARGUMENT

In considering a motion for summary judgment, the Tenth Circuit "repeatedly has emphasized that [courts] must draw all inferences in favor of the party opposing summary judgment." *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1096 (10th Cir. 1999). The non-movant is given 'wide berth to prove a factual controversy exists.'" *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 966 (10th Cir. 2002). The "moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment." *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002) (internal quotation omitted). "'If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything.'" *Id.*

I. Plaintiffs' Claims Relating to Wellbutrin Are Not Time-Barred.

In 2007, Mr. Anderson's doctor submitted a non-formulary request for Wellbutrin, which was denied. Facts ¶ 236. Mr. Anderson timely grieved the denial – the only avenue available to him -- and pursued it through all three steps. *Id.* ¶¶ 245-50. His step 3 grievance was finally denied on August 7, 2008. *Id.* ¶ 251. Because the request was first denied in August, 2007, Defendant argues that the two-year statute of limitations has passed on any claim Mr. Anderson would have to be administered the drug Wellbutrin. Doc. 48 at 19.[1] Defendants raised this same argument in their Motion to Dismiss, Doc. 5 at 5; this Court denied the motion, stating that "it is unclear from the face of the Complaint when the appeal process was complete . . .." Doc. 37 at 7. Mr. Anderson's

[1] Although none of Mr. Anderson's claims is limited solely to the request for Wellbutrin, Defendants' statute of limitations argument addresses only that request. Because Defendants have the burden of production in a motion for summary judgment, *see Trainor*, 318 F.3d at 979, Plaintiff addresses only the argument they raised.

grievance process concluded on August 7, 2008, well within the limitations period asserted by Defendants. *See* Doc. 48 at 18 (asserting that claims accruing prior to May 3, 2008 are barred). Plaintiffs' claims relating to the prescription of Wellbutrin are thus not time-barred.

II. Plaintiffs' Claims Relating to Wellbutrin Are Not Moot.

Wellbutrin was added to the formulary in late 2010, Mr. Anderson's doctor prescribed it, and he began taking it. Movants' Statement of Material Facts ("DF") ¶¶ 127-28. Defendants argue that, because of this, any claim for the denial of this drug is moot. Given the ease with which Wellbutrin could be removed from the formulary and the prescription discontinued, however, this claim is not moot. "'[V]oluntary cessation of a challenged practice'" cannot moot a claim unless "'subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 193 (2000) (citations omitted). Defendants have the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* at 189.

Defendants cannot satisfy this "heavy burden." Wellbutrin has been on and off the formulary, generally without discussion. Facts ¶¶ 213-15; 224-26. Medications can be removed from the formulary for a variety of reasons, and have, in the past, been removed without discussion. *Id.* ¶ 222. Mr. Anderson's doctor's non-formulary request for the drug and Mr. Anderson's grievance were denied. *Id.* ¶¶ 236-51. Defendants have not asserted that Wellbutrin will remain on the formulary or that any future non-formulary request would be granted; nor could they not credibly do so. Defendants have not satisfied the "heavy burden" of persuading the Court that Mr. Anderson will not, in the future, be denied Wellbutrin.

III. Plaintiff Is Entitled to Damages Under the ADA and RA.

Plaintiff agrees that his claim for damages under the ADA and RA are governed by the

Prison Litigation Reform Act requirement that he show a physical injury. 42 U.S.C. § 1997e(e). However, it is at least a disputed issue of fact whether he has met this standard. Mr. Anderson has alleged that the lack of outdoor exercise has caused his muscles to grow weaker, and has limited his ability to perform physical exercise. Doc. 47-2 ¶ 73; *see, e.g.*, *Kettering v. Harris*, 2009 WL 508348 , at *8, 26 (D.Colo. Feb. 27, 2009) (finding sufficient injury due to plaintiff's testimony that prolonged restraint in emergency restraint chair prevented his legs from working properly upon release).

IV. There is a disputed issue of fact concerning whether the periodic reviews of Mr. Anderson's continued CSP placement satisfy due process.

A. Mr. Anderson has a protected liberty interest in avoiding placement at CSP.

Defendants concede for summary judgment that Mr. Anderson has a liberty interest at CSP. Doc 48 at 22; *see also Trainor*, 318 F.3d at 979.

B. There is a disputed issue regarding whether the procedures are sufficient to satisfy due process requirements.

The next question is what process is afforded to Mr. Anderson. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). Mr. Anderson does not contest the adequacy of the process by which he was initially placed at CSP. Rather, he argues that Defendants violate due process because they deny him the right to meaningful periodic reviews of his status. Doc. 1 at 29-30. Due process ensures that the procedures in place are adequate to protect against erroneous deprivations of liberty, *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974). These protections are particularly important in the context of ad seg, which can be "a pretext for indefinite confinement of an inmate." *Toevs v .Reid*, __F.3d __, 2011 WL 2437782, at *11 (10th Cir. June 20, 2011)(citing *Hewitt v. Helm*, 459 U.S. 460, 477 n.9 (1983)).

1. Defendants' failure to provide notice and an opportunity to be heard creates a factual issue about the adequacy of the periodic reviews.

While periodic reviews require fewer procedural protections than the initial transfer to segregation, the fundamental requirements of due process still apply. *Toevs*, 2011 WL 2437782 at *5-7; *Hewitt*, 459 U.S. 476 & n.8. Notice and an opportunity to be heard are among the most important procedural mechanisms to avoid erroneous deprivations. *Wilkinson*, 545 U.S. at 225-26. Citing no specific authority, Defendants argue that Mr. Anderson is not required to receive notice of his reviews or have an opportunity to be heard regarding his retention in segregation. *See generally* Doc. 48 at 23. The Court has rejected this argument and explained that a person must receive notice of the reasons he continues to be segregated, must have an opportunity to be heard, and must be given reasons for any continued restrictions. *Hewitt,* 459 U.S. at 476 & n.8. Defendants' periodic reviews do not meet this standard: they fail to provide notice of these reviews, and do not permit Mr. Anderson to be heard or to give input into the review. Facts ¶ 306. Based on these failings alone, the reviews are inadequate to protect Mr. Anderson's rights.

2. The Tenth Circuit has recently declared CSP's periodic reviews are inadequate because they do not provide reasons for lack of progression.

In *Toevs*, the Tenth Circuit determined, as a matter of law,[2] that CSP was denying the Plaintiff meaningful periodic reviews. *Id.* at *7. Specifically, the panel determined that the reviews were inadequate because they "never informed [the Plaintiff] of the reasons why he was

[2] Even if this Court does not agree that this is established as a matter of law, any dispute about the meaningfulness of periodic reviews should be permitted to proceed to a fact-finder who can weigh the credibility of the witness at trial. "A plaintiff who can introduce evidence that the decision has already been made and any hearing would be a sham is entitled to go forward with a procedural due process claim." *Ryan v. Illinois Dep't of Children and Family Servs.*, 185 F.3d 751, 762 (7th Cir. 1999); *see also Williams v. Norris*, 277 F. App'x 647, 649 (8th Cir. 2008) (in a prison segregation case, the court concluded that "there remains an unresolved fact issue on this record as to whether Williams actually received meaningful reviews, rather than sham reviews, as he contends").

recommended for or denied progression, so that he would have a guide for his future behavior." *Id.* at *7. The record demonstrates that Mr. Anderson is subject to the same reviews as Mr. Toevs was, Facts ¶¶ 292-316, and that he also did not receive reasons for his progress or lack thereof at CSP Facts ¶ 312. Thus, it is apparent that a reasonable fact-finder could conclude that Mr. Anderson's reviews lacked meaning, making summary judgment on this issue inappropriate.

"[B]ecause of the potentially unlimited span of the confinement" in ad seg, periodic reviews must be meaningful. *Rhinehart v. Gomez*, 1998 WL 118179 at *4 (N.D. Cal. March 2, 1998); *see also Hewitt*, 459 U.S. at 477 n.9[3]. The Tenth Circuit recently explained that "a 'meaningful' review is one that evaluates the prisoner's current circumstances and future prospects, and, considering the reason(s) for his confinement to segregation, determines, without preconception, whether that placement remains warranted." *Toevs*, 2011 WL 2437782 at *6. Because "the goal of the placement is behavior modification, the review should provide a guide for future behavior." *Id.* at *6.

In addition, these reviews are meaningless because they are based on the arbitrary and unreliable "chron" system. Facts ¶¶ 295-301. Despite the arbitrary nature of this system, negative chrons are determinative of progress out of CSP; if a prisoner receives even one negative chron, he will not be permitted to progress in the QOL program for at least ninety days. Facts ¶¶ 293-94. Further, this process lacks basic procedural protections. The prisoner does not know he received a negative chron until he has already been denied progression, and never has any opportunityto challenge the alleged behavior. Facts ¶¶ 302-03. Correctional expert Steve Martin notes that this process is subjective and arbitrary, and that it fails to provide guidance to Mr. Anderson, leaving him

[3] *See also Sourbeer v. Robinson*, 791 F.2d 1094, 1101 (3d Cir. 1986) (meaningfulness is the "most fundamental" right of due process); *Horton v. Zavaras*, 2010 WL 3341259, at *9 (D. Colo. June 11, 2010) (the "provision of periodic, *but meaningless*, reviews of [a prisoner's] status should not weigh against a conclusion that his segregation was indeterminate") (emphasis added).

to wonder and speculate about what he may do to improve his quality of life. Facts ¶¶ 314-15.

As the chrons determine whether an individual will progress out of ad seg, the "reviews" themselves are rote and meaningless. There is no meeting or discussion; rather, the case manager simply checks to see if the prisoner has received any additional negative chrons and, if he has, denies him progression. Facts ¶¶ 294, 305, 307. The case manager then routes a completed the form to the other committee members, who sign it without substantive comment or additions. Facts ¶¶ 310-11. Accordingly, these periodic reviews are inadequate.

V. There is a disputed material issue of fact concerning whether the medication non-formulary review comports with due process.

Mr. Anderson's second due process claim alleges that he has a liberty interest in receiving medications that he was prescribed by his CDOC physicians, and that he is being denied these medications based on a process that is inadequate. The touchstone of the liberty interest inquiry is whether a condition "imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995).

A. Mr. Anderson has a protected liberty interest in receiving necessary medication.

Prison officials are required to provide adequate health care for those within their custody. *See generally Estelle v. Gamble,* 429 U.S. 97, 104 (1976). It is atypical for an inmate or class of inmates to be denied an entire category of medication necessary to address their mental illness. Facts ¶ 269. Because this type of medication is necessary and, in Mr. Anderson's case, because its lack may be keeping him in ad seg, Facts ¶ 271, its denial is a significant hardship. *See Sandin*, 515 U.S. at 483-84. Mr. Anderson has a liberty interest in avoiding denial of necessary medications. Defendants cite no support for their assertion that this is not a protected due process right. *See generally* Doc. 48 at 24.

B. There is a disputed issue regarding whether the non-formulary review procedures are adequate to protect this interest.

The non-formulary review process is inadequate to ensure that individuals are receiving necessary medications. Requests for non-formulary medications are determined based only on a form submitted by the physician requesting the medication. *See* Facts ¶¶ 227-28. When a medication is denied, reasons are not consistently provided to the prescribing doctor or to the prisoner. Facts ¶¶ 233-34, 236-37, 252-53. The inmate's only recourse is the grievance process. *Id.* ¶¶ 243-45. The reasons that medications are granted or provided are, on their face, not always clear or reasonable. *See*, *e.g.*, *id.* ¶¶ 261, 270. This review process is inadequate to protect a prisoner's significant interest in receiving necessary medications.

VI. Mr. Anderson did not receive adequate mental health care.

In order to establish an Eighth Amendment violation for a condition of confinement, a prisoner must demonstrate that: 1) the condition of confinement is sufficiently serious; and 2) that the prison staff was aware of the risk or condition, but were deliberately indifferent. *Farmer v. Brennan*, 511 U.S. 825, 828-29, 834 (1994).

A. Mr. Anderson has serious mental health concerns.

Defendants concede for the purpose of summary judgment that Mr. Anderson has a serious mental health condition. Doc. 48 at 25; *see also Trainor*, 318 F.3d at 979. The Supreme Court has determined that denial of adequate medical or mental health care is a sufficiently serious condition under the Eighth Amendment. *Estelle*, 429 U.S. at 290; *Ramos v. Lamm*, 639 F.2d 559, 575 (1980).

B. CSP has continually failed to provide Mr. Anderson with adequate care.

The second prong of the Eighth Amendment inquiry requires that a prisoner demonstrate that the prison was deliberately indifferent to a serious need. *Mata v. Saiz*, 427 F.3d 745, 752 (10th

Cir. 2005). Generally, that requires showing that the prison officials were aware of the situation and that they failed to respond reasonably. *Id.*; *see also Perkins v. Kansas Dep't. of Corr.*, 165 F.3d 803, 809-10 (10TH Cir. 1999) (deliberate indifference is a question of fact). While Defendants are correct in pointing out that "matters for medical judgment, such as whether one treatment is preferable to another are beyond the [Eighth] Amendment's purview," Doc. 48 at 26, prison officials are not entitled to deny care that is standard for the community, that is more effective, and that was recommended, simply by calling it a "matter of medical judgment." *See Ramos*, 639 F.2d at 575.

Here, Defendants have consistently and repeatedly—for a period of approximately a decade—denied Mr. Anderson the standard of care treatment for his mental health condition. In order to benefit from cognitive therapy, Mr. Anderson must be able to focus and concentrate, something his severe ADHD prevents him from doing. Fact ¶ 193. Stimulant medications are the standard treatment for adult ADHD, have been shown more effective than any other treatment, and are regularly used in the community. *Id.* ¶¶ 88, 121, 195, 198, 202, 209, 205. Defendants, and specifically Mr. Anderson's psychiatrist, admit that he would likely benefit from stimulant medication. *Id.* ¶ 202. Yet, Defendants continue to deny these medications to Mr. Anderson.

CDOC's alleged basis for denying necessary medications—that providing them would create a security risk—is inadequate and their actions demonstrate deliberate indifference to Mr. Anderson's treatment. These medications are commonly provided at other prisons, Facts ¶¶ 263-64, and nearly all security concerns can be addressed by giving "crush and float" orders (a practice already in use within CSP), *id.* ¶¶ 257-58. In addition, CDOC provides other medications that it admits raise security concerns. *Id.* ¶¶ 213-15, 257-59, 262.

Finally, beyond the failure to provide necessary medications, Defendants have been deliberately indifferent by failing to provide other components of adequate mental health treatment

to Mr. Anderson, including an adequate treatment plan, a comprehensive approach, and continuity of care. Facts ¶¶ 185, 187, 194-98. Thus, a reasonable fact-finder could conclude that the security risk is insufficient or false, and that Defendants are deliberately indifferent in denying Mr. Anderson needed and standard medications and other required care.

VII. Defendants are violating the Eighth Amendment by denying, and continuing to deny, Mr. Anderson any outdoor access for the last eleven years.

Mr. Anderson's claim that Defendants have violated his Eighth Amendment right to be free from cruel and unusual punishment by denying him outdoor access is discussed extensively in his Motion for Partial Summary Judgment. Doc. 47. In Defendants' Motion, they claim that denial of outdoor access is not a serious deprivation, but cite no caselaw that would indicate that total deprivation from outdoor access for a prolonged period—here, more than a decade—would not be sufficiently serious. Doc. 48 at 27-28. Defendants argue that they did not act with deliberate indifference because this was a matter within their discretion. Doc. 48 at 28. However, once a condition is viewed as "sufficiently serious" under the Eighth Amendment, it is no longer discretionary. *See DeSpain v. Uphoff*, 264 F.3d 965, 974 (2001) (prison officials are required to provide "humane conditions" with "basic necessities"; otherwise termed sufficiently serious conditions). While prison officials are given significant and wide discretion, they are limited by the Constitution and are not at liberty to deprive prisoners of significant human needs. *Id.*

VII. Plaintiff's ADA and Rehabilitation Act Claims.

Title II of the ADA prohibits discrimination on the basis of disability by public entities. 42 U.S.C. § 12132. The Rehab Act prohibits such discrimination by recipients of federal funding. 29 U.S.C. § 794. The plaintiff must allege that "(1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or

activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability." *Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007).

Defendants assume that Mr. Anderson has a mental impairment that rises to the level of a disability. Doc. 48 at 31. This is well-supported in the record. Facts ¶¶ 141-65; 192; 254; 274-83. He is qualified because he is an inmate of CDOC who, with reasonable modifications, would meet the essential eligibility requirements for participation in the programs at issue. 42 U.S.C. § 12131(2) (defining "qualified individual"). Defendants have discriminated against Mr. Anderson by segregating him based on his disability, denying him benefits and services, providing him benefits and services that are not equal to those afforded others, and refusing to make reasonable modifications to their policies to avoid discrimination. *See, e.g.*, 28 C.F.R. § 35.130(b)(1)(i), (ii), (b)(7) & (d); *see also Alexander v. Choate*, 469 U.S. 287, 301 (1985).[4]

Mr. Anderson asserts that CDOC violates the ADA and RA under three different theories. **First**, CDOC's policy of denying access to the most common medications for his disability (ADHD) discriminates against individuals with that disability. **Second**, CDOC refuses to provide the reasonable accommodation (in the form of treatment and medication) necessary to permit Mr. Anderson to be integrated with other prisoners. **Third**, if -- even with proper medication and treatment -- his mental illness requires that he be kept in ad seg, he is qualified for a number of programs and benefits that he is now being denied based solely on that placement. Because that is tantamount to denying him these programs and benefits based on his disability, it constitutes illegal discrimination under the ADA and RA. The second and third theories are alternatives: either Mr. Anderson must be integrated into general population (and receive the accommodations necessary to

[4] "Reasonable modification" and "reasonable accommodation" are identical standards. *Robertson*, 500 F.3d at 1195 n.8.

accomplish this) or, if he must be segregated based on his disability, he is entitled to receive the same services as nondisabled inmates not requiring segregation.

Defendant argues that Mr. Anderson's claim is medical malpractice, and is therefore not actionable under the ADA or RA. To the contrary, claims of discrimination relating to medical treatment may be actionable under the ADA. *Rashad v. Doughty*, 4 Fed. App'x 558, 560 (10th Cir. 2001); *United States v. Georgia*, 546 U.S. 151, 157 (2006) ("deliberate refusal of prison officials to accommodate [an inmate's] disability-related needs in such fundamentals as . . . medical care, and virtually all other prison programs constitute[s] 'exclu[sion] from participation in or . . . deni[al of] the benefits of' the prison's 'services, programs, or activities'"). Mr. Anderson's ADA and RA claims do not seek adequate medical treatment *per se*; rather, these claims seek reasonable modifications that would permit him to be integrated with other prisoners and/or to receive programs and services he is being denied based on his disability.

Defendants asserted these same grounds in their unsuccessful motion to dismiss. Doc. 5 at 13-14. In their current motion, rather than address the arguments Plaintiff made in his earlier opposition brief, Doc. 9 at 10-15, or attempt to explain or distinguish the cases he cited, Defendants repeat verbatim the argument from their Motion to Dismiss, adding only the conclusory assertions that Plaintiff has received adequate mental health treatment and been fully accommodated by this treatment. *Compare* Doc. 5 at 13-14 *with* Doc. 48 at 29-31.

A. Defendants Violate the ADA and RA by Limiting Access to the Most Common And Effective Medications for ADHD.

The most common and effective medications for ADHD are stimulants. Facts ¶¶ 195, 198, 200. The nonstimulant Strattera is also effective, though not as effective as stimulants, and Wellbutrin and desipramine are also prescribed at times . *Id.* ¶ 198. From the time he entered CSP

until late last year, none of these medications was available to Mr. Anderson: none was on the formulary, and non-formulary requests for Wellbutrin and Strattera had been denied. *Id.* ¶¶ 209-14; 231-37. In November, 2010, Defendants added Wellbutrin to the formulary, *id.* ¶ 224, though, as explained in Section II above, there is no guarantee that Wellbutrin will remain available to him. Ultimately, although Mr. Anderson has indicated that he would like to be put on stimulants, *id.* ¶ 199, the formulary still contains no stimulant medications, and non-formulary requests for such medications are generally denied. *Id.* ¶¶ 209, 230. No other class of medications besides stimulants are completely absent from the formulary. *Id.* ¶ 210. Because the most common and effective medications for ADHD are not on the formulary and are generally not available through non-formulary requests, CDOC discriminates against individuals with Mr. Anderson's disability.

"Access to prescription medications is part of a prison's medical services and thus is one of the 'services, programs, or activities' covered by the ADA." *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 286-87 (1st Cir. 2006). CDOC's restrictions on the medications most commonly used to treat Mr. Anderson's disability thus do not constitute "a medical 'judgment' subject to differing opinion – [they are] outright denial[s] of medical services." *See id.* at 287; *see also Hughes v. Colo. Dep't of Corr.*, 594 F. Supp. 2d 1226, 1241 (D. Colo. 2009) (prisoner may state a claim for "discriminatory exclusion from generally available medical services"); *McNally v. Prison Health Servs.*, 46 F. Supp. 2d 49, 58 (D. Me. 1999) (ADA claim alleged based on denial of access to prescription medication).

B. CDOC violates the ADA and RA by Failing to Provide Treatment Sufficient to Integrate Mr. Anderson With Other Prisoners.

"Unjustified isolation . . . is properly regarded as discrimination based on disability." *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999), *see also Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180-81 (10th Cir. 2003) (same). In *Olmstead*, the Supreme Court held that reasonable modifications may be

required to ensure maximum appropriate integration. *Id.*, 527 U.S. at 603-04; *see also Fisher*, 335 F.3d at 1181 (public entities required "to 'make reasonable modifications'. . . in order to avoid the discrimination inherent in the unjustified segregation of the disabled."). Mr. Anderson remains segregated from general population because Defendants have not treated his mental illness.

Defendants assert that Mr. Anderson has received adequate treatment and medication, and refer generally to a declaration that recites his treatment history since 2006. Doc. 48 at 31 (citing Lish Decl. ¶¶ 5-50). Plaintiffs dispute a number of Dr. Lish's assertions, *see* Facts ¶¶ 60, 63, 72, 82, 88, 91, 93, 98, 101, 106, 110, 117, 121, 130, as well as the conclusion drawn in Defendants' motion. Dr. Patterson opined that Mr. Anderson has not been adequately treated for his complex mental health disorders and behaviors including the fact that he has not been offered an adequate and sustained trial of an FDA approved non-formulary medication for his ADHD. *Id.* ¶ 194. More importantly, he concluded that, if Mr. Anderson had been adequately treated, he more likely than not would have been out of segregation years ago and that had Mr. Anderson "been placed on Ritalin five years ago, I don't think he would be in segregation now." *Id.* ¶ 271.

Defendants are incorrect in arguing that this is a medical malpractice claim: Mr. Anderson is not seeking adequate treatment *per se*, but rather the reasonable modification of CDOC's policies so that he receives treatment sufficient to permit him to be integrated with other prisoners. This is an actionable request for reasonable modification under the ADA and RA. For example, in *Rouse v. Plantier*, 997 F. Supp. 575, 582 (D. N.J. 1997), *vacated on other grounds*, 182 F.3d 192 (3d Cir. 1999), the court held that the plaintiffs had stated a claim under the ADA when they argued that the failure of the defendant prison to treat their diabetes had "excluded [them] from participating in prison

programs."[5] Like the plaintiffs in *Fisher*, who were entitled to reasonable modifications to the state's prescription drug policy to ensure they could remain integrated in the community, 335 F. 3d at 1181-82, Mr. Anderson is entitled to a reasonable modification to permit him to be integrated into the general population of the prison. Where denial of treatment is tantamount to a denial of a reasonable modification of policies that results in segregation and exclusion from other programs, it constitutes an actionable disability discrimination under the ADA and RA.

C. In the Alternative, CDOC Violates the ADA and RA by Refusing the Reasonable Modification of Providing Mr. Anderson Access to Programs Available to Non-Segregated Inmates.

If the Court should hold that Mr. Anderson is not entitled to the reasonable modifications discussed above or if such measures should prove insufficient to permit Mr. Anderson to be integrated with other prisoners, it may be necessary to continue to house him in ad seg. Because this placement is based on conduct caused by his disabilities, Facts ¶ 287 -- and thus for analytical purposes, on the disability itself[6] -- it cannot be used as a basis for denying him access to benefits or programs available to other non-segregated prisoners. In light of the professed administrative, rather than punitive, purpose of ad seg, *id.* ¶ 317, it is improper to withhold services from Mr. Anderson based on behavior that he cannot control and that CDOC will not provide the treatment to help him control.

A decision that it is necessary to house Mr. Anderson in ad seg is like a decision to segregate

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[5] In the employment context, an employer must consider whether a mentally disabled employee's misconduct can be remedied through a reasonable accommodation. If so, then the employer should attempt the accommodation." *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1088 (10th Cir. 1997).

[6] *See McKenzie v. Dovala*, 242 F.3d 967, 974 (10th Cir. 2001) (holding that "the ADA's anti-discrimination provision 'does not contemplate a stark dichotomy between "disability" and "disability-caused misconduct,"' but rather protects both" and that "the ADA protects [an employee] from adverse employment action based on conduct related to her illness so long as she does not pose a 'direct threat.'" (Internal quotations omitted)).

prisoners who use wheelchairs for security reasons or because certain facilities are more accessible than others. While segregation of individuals with disabilities is never preferable, where courts have held it to be necessary, they have further held that such prisoners may not be denied access to programs and benefits available in other units. For example, in *Pierce v. County of Orange*, 526 F.3d 1190 (9th Cir. 2008), the Ninth Circuit upheld a decision not to "mainstream" prisoners with mobility and dexterity disabilities. *Id.* at 1220. Because the accessible but segregated facilities had fewer programs, however, "disabled detainees -- solely by virtue of their status as disabled -- [had] no possibility of access to the superior services" in other, inaccessible, facilities. *Id.* at 1221. As a result, the court held, any educational, recreational or other program offered to nondisabled inmates had to be made "similarly available" to the disabled plaintiffs. *Id.* at 1222.[7]

There are a number of programs and services for which Mr. Anderson would be qualified but for his placement in ad seg, that is, but for his disability. Facts ¶¶ 320-26. And the fact that he is in ad seg cannot be used to deem him "unqualified." *See Alexander*, 469 U.S. at 301 ("The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled."). Although Defendants do not challenge this in their Motion, Plaintiff has submitted evidence that demonstrates that his requested accommodations are reasonable. Facts ¶¶ 327-45. Defendants put on no evidence or arguments concerning any defenses to the reasonable modification requirement; as such, Plaintiff does not have an obligation to address them. *See Trainor*, 318 F.3d at 979.

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[7] *See also Love v. Westville Corr. Ctr.*, 103 F.3d 558 (7th Cir. 1996) (holding that denying quadriplegic prisoner housed in infirmary access to educational and other programs violated the ADA); cf. *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1031 (D. Kan. 1999) (accommodating amputee prisoner in an accessible but isolated cell "would have effectively confined plaintiff to a small area with no opportunity to move about, without the privileges enjoyed by the other inmates, in a segregated area of the jail used for punishment of inmates – all on account of his disability.").

CONCLUSION

Because of the numerous material and disputed facts, this Court should deny Defendants' Motion for Summary Judgment on all claims.

DATED: July 21, 2011

Respectfully submitted,

STUDENT LAW OFFICE

/s/ Brittany Glidden
Brittany Glidden
Laura L. Rovner
University of Denver Sturm College of Law
2255 E. Evans Ave., Suite 335
Denver, Colorado 80208
Tel: (303) 871-6140
Fax: (303) 871-6847
E-mail: bglidden@law.du.edu

/s/ Amy F. Robertson
Amy F. Robertson
Fox & Robertson, P.C.
104 Broadway, Suite 400
Denver, CO 80203
Tel: 303-595-9700
Fax: 303-595-9705
Email: arob@foxrob.com

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

Chris W. Alber
chris.alber@state.co.us

/s/Caitlin R. Anderson
Caitlin R. Anderson