BLANK ROME, LLP
A Pennsylvania LLP
Mayling C. Blanco (NJ ID: 040732006)
301 Carnegie Center, 3rd Floor
Princeton, NJ 08540
Phone: (609) 750-7700
Fax: (609) 750-7701
mblanco@blankrome.com
Attorneys for Plaintiff

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
Alexander Shalom (NJ ID: 021162004)
Rebecca Livengood (NJ ID: 028122012)
89 Market Street, 7th Floor
P.O. Box 32159
Newark, NJ 07102
Tel: (973) 642-2086
Fax: (973) 642-6523
Attorneys for Plaintiff

P.D. (a pseudonym), Plaintiff, v. Middlesex County, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY DOCKET NO. MID-L-003811-14 CIVIL ACTION

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

STANDARD OF REVIEW 2

ARGUMENT 3

I. DESPITE PLAINTIFF'S RELEASE FROM MCACC, THE COURT MAY GRANT INJUNCTIVE AND DECLARATORY RELIEF BECAUSE THE SOLITARY CONFINEMENT OF A DEVELOPMENTALLY-DISABLED AND MENTALLY-ILL PRETRIAL DETAINEE IS AN ISSUE OF GREAT PUBLIC IMPORTANCE THAT IS CAPABLE OF REPETITION YET EVADING REVIEW. 3

A. The Issue in the Case Will Evade Review Unless the Court Addresses its Merits. 3

B. The Issue in the Case is Capable of Repetition. 5

C. The Issue in this Case is of Great Public Concern. 8

D. The Federal Class-Action Lawsuit Filed Against Defendant Does Not Provide an Adequate Alternative Venue to Obtain the Injunctive and Declaratory Relief P.D. Seeks. 10

1. The federal case is not a companion case. 11

2. The complaint in this case focuses on P.D.'s mental illness in ways that the federal case does not. 12

3. P.D.'s claims are most amenable to adjudication in a New Jersey forum because the Article I, Paragraph 1 standard may differ from the Fourteenth Amendment standard. 12

II. WHILE PLAINTIFF IS NOT ESTOPPED FROM PROSECUTING A CLAIM UNDER ARTICLE I, PARAGRAPH 12, SUMMARY JUDGMENT ON THAT LIMITED CLAIM IS PROPER BECAUSE, AS A PRETRIAL DETAINEE, PLAINTIFF'S RIGHTS ARE PROTECTED BY ARTICLE I, PARAGRAPH 1. 15

III. MIDDLESEX COUNTY VIOLATED P.D.'S RIGHT UNDER ARTICLE I, PARAGRAPH 1 TO BE FREE FROM PUNISHMENT BEFORE AN ADJUDICATION OF GUILT. 18

A. Article I, Paragraph 1 of the New Jersey Constitution Precludes Punishment Before an Adjudication of Guilt...18

B. The Conditions of Administrative Segregation and Disciplinary Detention Were Not Different In Any Meaningful Way for P.D., and Both Constituted What is Commonly Described as Solitary Confinement...................21

C. The Use of Administrative Segregation Was Excessive and Arbitrary in Relation to Any Concern to Safety or Order P.D. Presented................................25

1. There is a genuine issue as to the material fact of whether the use of administrative segregation in SNU and C-Pod as a consequence for P.D. was arbitrary...27

2. There is at least a genuine issue as to the material fact of whether the use of C-Pod as a consequence for P.D. was excessive......................30

a. These Deprivations Were Excessive in Relation to the Needs of the Facility...31

i The jail has offered no specific explanation for why such an extended period in administrative segregation was necessary. 31

ii The deprivations were not necessary and a more therapeutic response would have ensured orderly and safe operation of the facility.......................................32

b. Spending Nearly Seven Months in Solitary Confinement Inflicted Excessive Harm on P.D. Due to His Disability..............34

i PD has a mental illness, which made him particularly vulnerable to the harms associated with solitary confinement...35

ii In order to ensure that the conditions were not excessive, the jail would have had to conduct actual mental health screenings prior to placing P.D. in administrative segregation and during his confinement there..36

iii There is a genuine dispute about whether P.D. experienced the harms associated with solitary confinement of mentally-ill inmates. 39

3. P.D.'s Case Differs From *McMillan*. 41

144453.00601/104222641v.1

D. Even if the Court Finds that the Conditions in C-Pod Did Not Constitute Punishment, Middlesex County Nevertheless Violated P.D.'s Rights Under Article I, Paragraph 1 by Failing to Provide Him with Adequate Procedural Protections Either Before Assigning Him to C-Pod or During His Time There. 43

IV. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO DEFENDANT'S LIABILITY UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION. 48

A. New Jersey Courts Interpret the LAD in Light of Federal Anti-Discrimination Laws, in this Case, Title II of the Americans with Disabilities Act....................49

B. Ample Evidence in the Record Supports the Conclusion That Defendant Failed to Make Reasonable Modifications for P.D.'s Disability. 51

1. There is a genuine issue as to the material fact of whether P.D. had an equal opportunity to benefit from or participate in the services the jail offered. 52

2. The record supports the contention that MCACC violated the integration mandate....................54

3. There is a genuine issue as the material fact of whether P.D. presented a "direct threat," such that Defendant was excused from providing reasonable modifications for P.D. under the LAD. 55

V. A GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING WHETHER DEFENDANT'S TREATMENT OF P.D. WAS EGREGIOUS, SO SUMMARY JUDGEMENT IS INAPPROPRIATE FOR P.D.'S PUNITIVE DAMAGES CLAIM UNDER THE LAD. 56

CONCLUSION....................59

TABLE OF AUTHORITIES

Page(s)

Cases

Alternative Sys. Concepts, Inc. v. Synopsys, Inc.,
374 F.3d 23 (1st Cir. 2004) 16

Bd. Of Educ. v. Twp. Council of East Brunswick,
48 N.J. 94 (1966) 8

Bell v. Wolfish,
441 U.S. 520 (1979) 16, 18, 19, 20

Bullington v. Missouri,
451 U.S. 430 (1981) 27

Burlington Northern R. Co. v. Maintenance of Way Employees,
481 U.S. 429 (1987) 6

Cain v. New Jersey State Parole Bd.,
78 N.J. 253 (1978) 7

California Coastal Comm'n v. Granite Rock Co.,
480 U.S. 572 (1987) 6

Casey v. Lewis,
834 F. Supp. 1477 (D. Ariz. 1993) 17

Cavuoti v. N.J. Transit Corp.,
161 N.J. 107 (1999) 57-58

Chisolm v. McManimon,
275 F.3d 315 (3d Cir. 2001) 50, 52

City of Atlantic City v. California Ave. Ventures, LLC,
23 N.J. Tax 62 (App. Div. 2006) 16

Coleman v. Brown,
Doc. No. 4378 (E.D. Cal. Mar. 14, 2013) 41

Coleman v. Wilson,
912 F. Supp. 1282 (E.D. Cal. 1995) 17

Dale v. BSA,
160 N.J. 562 (1999), *rev'd on other grounds*, 530 U.S. 640 (2000) 57

Davis v. Ayala,
-- U.S. --, 135 S. Ct. 2187 (2015) 8, 9, 17, 20, 23, 25

Demery v. Arpaio,
378 *F*.3d 1020 (9th Cir. 2004) 4

DeShawn v. Safir,
156 F.3d 340 (2d Cir. 1998)....7

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978)....4

Fuchilla v. Layman,
109 N.J. 319 (1988) 49

Gerstein v. Pugh,
420 U.S. 103 (1975)....4

Gilbert v. Gladden,
87 N.J. 275 (1981) 3

Greenberg v. Kimmelman,
99 N.J. 552 (1985) 13, 18

Grigoletti v. Ortho Pharmaceutical Corp.,
118 N.J. 89 (1990) 50

Halvorsen v. Villamil,
429 N.J. Super. 568 (App. Div. 2013) 33

Hewitt v. Helms,
459 U.S. 460 (1983)....32, 43

Honig v. Doe,
484 U.S. 305 (1988)....6

Hovsons, Inc. v. Township of Brick,
89 F.3d 1096 (3d Cir. 1996)....49

Hudson v. Palmer,
468 U.S. 517 (1984)....20

In re D.C.,
146 N.J. 31 (1996) 14

In re Geraghty,
68 N.J. 209 (1975) 8

In re Grady,
85 N.J. 235 (1981) 14

Jackson v. Concord Co.,
54 N.J. 113 (1969) 49

John F. Kennedy Mem'l Hosp. v. Heston,
58 N.J. 576 (1971) 8

Jones v. Aluminum Shapes,
339 N.J. Super. 412 (App. Div. 2001) 50

Judson v. Peoples Bank & Trust Co.,
17 N.J. 67 (1954) 2

Langley v. Coughlin,
715 F. Supp. 522 (S.D.N.Y. 1988) 17

Lockett v. Catalina Channel Express, Inc.,
496 F.3d 1061 (9th Cir. 2007) 56

Madrid v. Gomez,
889 F. Supp. 1146 (N.D. Cal 1995) 17

Mathews v. Eldridge,
424 U.S. 319 (1976)..45, 46, 48

Matter of Commitment of N.N.,
146 N.J. 112 (1996) 3

McMillan v. Cicchi,
No. A-2698-13T4, 2014 N.J. Super. Unpub. LEXIS 1780
(App. Div., July 21, 2014) 18, 22, 41, 42, 43

Md. State Conference of NAACP Branches v. Md. Dept. of State,
72 F. Supp. 2d 560 (D. Md. 1999)..7

Mejia v. New Jersey Dep't of Corr.,
446 N.J. Super. 369 (2016) 25

Morris v. Travisono,
499 F. Supp. 149 (D.R.I. 1980)..17

Murphy v. Hunt,
455 U.S. 478 (1982)..6

New Jersey Coalition Against The War In The Middle East v. J.M.B Realty,
138 N.J. 326 (1994) 13

Nicolas v. Ocean Plaza Assoc.,
388 N.J. Super. 571 (App. Div. 2006) 49

Olmstead v. L.D.,
527 U.S. 581 (1999)..51

People ex rel. Vivekanathan,
2013 COA 143M (Colo. Ct. App. 2013) 7

Press-Enterprise Co. v. Superior Court of Cal., Riverside County,
478 U.S. 1 (1986)..6

Presta v. Peninsula Corridor Joint Powers Bd.,
16 F. Supp. 2d 1134 (N.D. Cal. 1998) 52

Rendine v. Pantzer,
141 N.J. 292 (1995) 56-57

Right to Choose v. Byrne,
91 N.J. 287 (1982) 13

Robinson v. Cahill,
62 N.J. 473 (1973) 14

Ruiz v. Johnson,
37 *F. Supp*. 2d. 855 (S.D. Tex. 1999), *rev'd on other grounds*, 243 *F*.3d 941
(5th Cir. 2001), *adhered to on remand*, 154 *F. Supp*. 2d 975 (S.D. Tex. 2001)......................17

Russman v. Board of Educ. of Enlarged City Sch. Dist. of City of Watervliet,
260 F.3d 114 (2d Cir. 2001)...3, 4

Sandin v. Conner,
515 U.S. 472 (1995)...24, 43, 45

Sawyer v. First City Financial Corp.,
124 Cal. App. 3d 390 (Cal. App. 4th Dist. 1981) 12

School Board of Nassau County v. Arline,
480 U.S. 273 (1987)..56

Slade v. Hampton Rds. Reg'l Jail,
407 F.3d 243 (4th Cir. 2005) 4, 6

State v. Baker,
81 N.J. 99 (1979) 13

State v. Eckel,
185 N.J. 523 (2006) 13

State v. Gerald,
113 N.J. 40 (1988) 14

State v. Gilmore,
103 N.J. 508 (1986) 13, 15

State v. Hogan,
144 N.J. 216 (1995) 15

State v. Hunt,
91 N.J. 338 (1982) 13

State v. Jarbath,
114 N.J. 394 (1989) 28

State v. Johnson,
127 N.J. 458 (1992) 14

State v. K.P.S.,
221 N.J. 266 (2015) 18

State v. Marshall,
130 N.J. 109 (1992) 14, 15

State v. Novembrino,
105 N.J. 95 (1987) 13

State v. Perricone,
37 N.J. 463, *cert. denied*, 371 U.S. 890 (1962) 3

State v. Pierce,
136 N.J. 184 (1994) 13

State v. Ramseur,
106 N.J. 123 (1987) 15

State v. Schmid,
84 N.J. 535 (1980) 14

Steinberg v. Sahara Sam's Oasis,
226 N.J. 344 (2016) 2

Tennessee v. Lane,
541 U.S. 509 (2004)....................52

Thigpen v. City of East Orange,
408 N.J. Super. 331 (App. Div. 2009) 56

Thomas v. County of Los Angeles,
978 F.2d 504 (9th Cir. 1992) 7

Twp. of Montclair v. County of Essex,
288 N.J. Super. 568 (App. Div. 1996) 3

United States Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 6

Weinreich v. Los Angeles County Metro. Transp. Auth.,
114 F.3d 976 (9th Cir. 1997) 50

Wilkinson v. Austin,
545 U.S. 209 (2005) 43-47

Withers v. Levine,
615 F.2d 158 (4th Cir. 1980) 4

Statutes

42 U.S.C. §§ 12131–12135 50

N.J.S.A. 2A:162-22a(2)(a) 5

N.J.S.A. 10:5-4 49

N.J.S.A. 10:5-12 (f)(1) 49

Other Authorities

28 C.F.R. § 35.130(b)(7) 50

28 C.F.R. § 35.130(d) 51, 54, 55

28 C.F.R. § 35.139(b) 56

28 C.F.R. § 35.152 .....51, 54, 55

28 C.F.R. § 35.160(a) 52

Alex Kozinski, *Worse than Death*, 125 YALE L.J. F. 230 (2016), available at:
http://www.yalelawjournal.org/forum/worse-than-death 10

American Bar Association*, ABA Criminal Justice Standards on the Treatment of Prisoners* (February 2010), available at:
http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html 10

American Psychiatric Association, *APA Position Statement on Segregation of Prisoners with Mental Illness* (2012), available at: http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06c_APA_ps2012_PrizSeg.pdf 10

"Anders Breivik case: How bad is solitary confinement?" *BBC News* (April 20, 2016), available at: http://www.bbc.com/news/world-europe-35813348 9

The Arthur Liman Pub. Interest Program & Ass'n. of State Corr. Adm'rs, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* (2015), available at: http://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf 10

Barack Obama*, "*Barack Obama: Why we must rethink solitary confinement" *The Washington Post* (January 25, 2016), available at: https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html 9

Benjamin Weisermarch, "Overhaul of Solitary Confinement Is Approved for New York's Prisons" *The New York Times* (March 31, 2016), available at: http://www.nytimes.com/2016/04/01/nyregion/overhaul-of-solitary-confinement-is-approved-for-new-yorks-prisons.html?_r=0 9

Carrie Johnson, "Solitary Confinement Is What Destroyed My Son, Grieving Mom Says" *NPR* (April 18, 2016), available at: http://www.npr.org/2016/04/18/474397998/solitary-confinement-is-what-destroyed-my-son-grieving-mom-says 9

Corinne Ramey, "Rikers Curbs Use of Solitary Confinement" *Wall Street Journal* (April 20, 2016), available at: http://www.wsj.com/articles/rikers-curbs-use-of-solitary-confinement-1461207601 9

Craig Haney, *Mental Health issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinq. 124 (2003) 35

David Cole, "Albert Woodfox and the Case Against Solitary Confinement" *The New Yorker* (February 23, 2016), available at: http://www.newyorker.com/news/news-desk/albert-woodfox-and-the-case-against-solitary-confinement 9

David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 Mich. L. Rev. First Impressions 124 (2016) 10

"Editorial: Obama got serious on solitary. But is N.J. still torturing people?" *The Star Ledger* (January 31, 2016), available at: http://www.nj.com/opinion/index.ssf/2016/01/obama_got_serious_on_solitary_but_is_nj_still_tort.html 10

Eric Lanes, *The Association of Administrative Segregation Placement and Other Risk Factors with the Self-Injury-Free Time of Male Prisoners*, 48 J. of Offender Rehabilitation 529 (2009) 35

Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol'y, 325 (2006) 8

Haney, *Mental Health issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinquency 1 (January 2003) 36

Hank Kalet, "Solitary Confinement in New Jersey's Prisons: Cruel and Usual Punishment" *NJ Spotlight* (August 13, 2015), available at: http://www.njspotlight.com/stories/15/08/12/solitary-confinement-in-new-jersey-s-prisons-cruel-and-usual-punishment/ 9

Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 Crim. Behav. and Mental Health 85 (1997) 35

Holly A. Miller, *Reexamining Psychological Distress in the Current Conditions of Segregation*, 1 J. Of Correctional Healthcare 39 (1994) 35

Joane Martel, *Telling the Story: A Study in the Segregation of Women Prisoners*, 28 Soc. Just. 196 (2001) 36

Juliet Eilperin, "Obama bans solitary confinement for juveniles in federal prisons" *The Washington Post* (January 26, 2016), available at: https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html 9

Keri Blakinger, "Activists Turn to Lawsuits and Legislation to Fight Solitary Confinement in New Jersey" *Solitary Watch* (March 4, 2016), available at: http://solitarywatch.com/2016/03/04/ activists-turn-to-lawsuits-and-legislation-to-fight-solitary-confinement-in-new-jersey/ 9

Marie VanNostrand, Ph.D., *New Jersey Jail Population Analysis* (March 2013), available at: https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf 4

N.J.A.C. 4:46-2 2

N.J.A.C. 10A:31-22.5 47

N.J.A.C. 10A:31-22.6 47

N.J. Const. Art. I, Para. 1 ....1, 11, 12, 15, 18, 43, 59

N.J. Const. Art. I, Para. 12 ....1, 15, 16, 59

National Commission on Correctional Health Care, *Policy Statement: Solitary Confinement (Isolation)* (April 10, 2016), available at: http://www.ncchc.org/solitary-confinement 10

Paige St. John, "State prisons are relying less on solitary confinement as punishment" *The Los Angeles Times* (July 12, 2015), available at: http://www.latimes.com/local/politics/la-me-ff-pol-solitary-confinement-20150713-story.html 9

Patricia B. Sutker, et al., *Cognitive Deficits and Psychopathology Among Former Prisoners of War and Combat Veterans of the Korean Conflict*, 148(1) Am. J. of Psychiatry 67 (1991) 35

Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441 (2006) 35

Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 Soc. Just. 8 (1988) 35

S. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707 (1983) 14

Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 Cardozo L. Rev. 1 (2012) 55

Stanley L. Brodsky & Forest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 Forensic Rep. 267 (1988) 35

U.S. Const. Amend. IV 13

U.S. Const. Amend. VIII 8, 15, 16, 17

U.S. Const. Amend. XIV 11, 12, 13, 18, 45

William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) 14

PRELIMINARY STATEMENT

This case involves a matter of great public concern – may a jail, in the absence of a specifically-articulated security need, keep a developmentally-disabled, mentally-ill prisoner in solitary confinement pre-trial for nearly seven months in response to behavior caused by his disability, with no meaningful mental health clearance before he enters and limited ongoing monitoring thereafter?

Plaintiff P.D. contends that the use of solitary confinement by Defendant Middlesex County Adult Correctional Center ("MCACC") was excessive in relation to any legitimate government interest – particularly in light of the harm he suffered due to his disability – in violation of Article I, Paragraph 1 of the New Jersey Constitution. Placing P.D. in solitary confinement also reflected a lack of the reasonable modifications and integration required by New Jersey's Law Against Discrimination ("LAD"). This LAD violation involved participation or willful indifference by upper management, and it was especially egregious, thus warranting punitive damages.

As discussed herein, P.D. agrees that Article I, Paragraph 1, and not Article I, Paragraph 12, is the source of his right to be free from this use of solitary confinement under the New Jersey Constitution, and so summary judgment is proper on his Article I, Paragraph 12 claim (Point II). But because P.D. has identified genuine issues of material fact with respect to his Article I, Paragraph 1 claim (Point III); his LAD claim (Point IV); and his claim for punitive damages under the LAD (Point V), summary judgment on these points is improper. P.D. also notes that his claims for declaratory and injunctive relief are not moot, as discussed below (Point I).

As courts around the country, including the United States Supreme Court, have observed, when solitary confinement is used with mentally-ill inmates, it inflicts considerable suffering on

this vulnerable population. As ample evidence in the record demonstrates, the use of solitary confinement here also ran afoul of New Jersey statutory and constitutional protections.

STANDARD OF REVIEW

Summary judgment pursuant to *Rule* 4:46-2 is inappropriate where "the evidence of record – the pleadings, depositions, answers to interrogatories, and affidavits – together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact . . . ." *Steinberg v. Sahara Sam's Oasis*, 226 *N.J.* 344, 366 (2016) (quotation marks omitted). Thus, where there is a genuine issue of material fact, summary judgment is improper. *See id.*

In assessing a motion for summary judgment, the Court is to view the facts in the light most favorable to the non-moving party. *See id.* at 349–50. The moving party bears the burden, and "[t]he papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Judson v. Peoples Bank & Trust Co.*, 17 *N.J.* 67, 75 (1954).

ARGUMENT

I. DESPITE PLAINTIFF'S RELEASE FROM MCACC, THE COURT MAY GRANT INJUNCTIVE AND DECLARATORY RELIEF BECAUSE THE SOLITARY CONFINEMENT OF A DEVELOPMENTALLY-DISABLED AND MENTALLY-ILL PRETRIAL DETAINEE IS AN ISSUE OF GREAT PUBLIC IMPORTANCE THAT IS CAPABLE OF REPETITION YET EVADING REVIEW.

In New Jersey, courts may adjudicate controversies that are otherwise moot when they are either capable of repetition yet evading review or involve matters of great public concern. *See, e.g.*, *Matter of Commitment of N.N.,* 146 *N.J.* 112, 124 (1996) ("The issues posed by this case involve significant matters of public policy, are extremely important, and undoubtedly will recur in cases that are likely to be mooted before adjudication"); *Gilbert v. Gladden*, 87 *N.J.* 275, 296 (1981) ("[T]here remains an actual controversy because the Governor and Legislature can continue to follow this practice," and as such, the issue is capable of repetition.); *Twp. of Montclair v. County of Essex*, 288 *N.J. Super.* 568, 571 (App. Div. 1996) (reaching the merits after tax bill was paid, because though controversy was technically moot, case involved an issue of great public importance, capable of repetition yet evading review). This case concerns an issue of significant public concern that is capable of repetition yet evades review. As such, under either theory, the Court can grant injunctive and declaratory relief despite P.D.'s release from jail.

A. The Issue in the Case Will Evade Review Unless the Court Addresses its Merits.

A dispute evades review "if it could not be entirely litigated before . . . becoming moot[.]" *Russman v. Board of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 *F.*3d 114, 119 (2d Cir. 2001).[1] For the purpose of this inquiry, "entirely litigated" includes

[1] P.D. notes that New Jersey law controls the Court's jurisdiction in this case, and as discussed below, allows the Court to hear the case even if the dispute is technically moot. *See, e.g.*, *State v. Perricone*, 37 *N.J.* 463, 469, *cert.*

"prosecution of appeals as far as the Supreme Court." *Id.* Courts have not placed firm limits on when a challenged action will be so short in duration as to evade review. But courts have found actions lasting less than eighteen months to be too short to allow judicial review. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 *U.S.* 765, 774 (1978) (concluding that eighteen months was too short of a time frame "to obtain complete judicial review"); *Withers v. Levine*, 615 *F.*2d 158, 161 (4th Cir. 1980) (finding that a prisoner's housing assignment for 60 to 90 days "does not provide sufficient time to litigate the adequacy of measures to provide such prisoners" with protection from sexual assault).

Indeed, "[a]s the Supreme Court has explained, '[p]retrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted.'" *Demery v. Arpaio*, 378 *F.*3d 1020, 1027 (9th Cir. 2004) (*quoting Gerstein v. Pugh*, 420 *U.S.* 103, 111 n.11 (1975)); *see also Slade v. Hampton Rds. Reg'l Jail*, 407 *F.*3d 243, 249 (4th Cir. 2005) (noting that the "evading review" inquiry "is easily answered in [plaintiff's] favor" because of the temporary nature of pretrial detention).

The timeline of this case illustrates the problems with litigating pretrial conditions cases prior to a detainee's release. Despite diligent efforts by all counsel and oversight from the Court, dispositive motions have yet to be decided some two-and-a-half years after P.D. filed his complaint (nor has a trial occurred or have appeals been decided). While some pretrial detainees might sit in jail for longer than two-and-a-half years, that period is almost three times longer than the average period people in New Jersey wait in jail before trial. Marie VanNostrand, Ph.D., NEW JERSEY JAIL POPULATION ANALYSIS (March 2013), page 12, available at:

---

denied, 371 *U.S.* 890 (1962). Federal law does not control on the jurisdictional question, but sheds light on the initial mootness inquiry.

https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf (finding average length of stay for those awaiting trial to be 314 days). Indeed, under New Jersey's new pretrial justice scheme, scheduled to go into effect on January 1, 2017, only the rarest of defendants would be incarcerated for longer than two years before trial. *See N.J.S.A.* 2A:162-22a(2)(a).

The transient nature of pretrial detention renders cases challenging the conditions of confinement for individual detainees nearly incapable of review during a plaintiff's time in pretrial custody.

B. The Issue in the Case is Capable of Repetition.

P.D. was released from the MCACC on July 16, 2014. MSJ, procedural history ¶ 13. But his return to the jail, unfortunately, seems likely. As Defendant's psychological expert, Dr. Paul Appelbaum, observed, P.D. "has now many years of a spotty track record, a track record marked by periodic behavioral outbursts that get him rehospitalized or sometimes arrested. And I don't see any reason to believe that he's not at risk for that continuing to happen in the future." Response to Motion for Summary Judgment (hereinafter "RMSJ"), Ex. 1 – Appelbaum Tr., 195:2–14.

When P.D. is returned to the MCACC, it is virtually certain that Defendant will again place him in disciplinary detention, administrative segregation, or both. Indeed, as the Defendant's corrections expert, Martin Horn, explained, the only tool that the jail had to address P.D.'s behavior involved segregating him, either in C-Pod or in the Special Needs Unit (SNU). RMSJ, Ex. 2 – Horn Transcript at 180:12-182:16. As Horn opined: "The jail was confronted with an individual whose illness led to inappropriate and disruptive behavior within the jail. . . . The jail had an obligation . . . [to keep P.D. and other prisoners safe] . . . The jail was obligated to rely on the tools at its disposal – SNU, medical, and Admin Segregation." RMSJ, Ex. 3 – Horn

Report at 7. Given the probability of P.D.'s reincarceration and the virtual certainty of his placement in C-Pod, the issues for which P.D. seeks injunctive and declaratory relief are not just capable of repetition, they are likely to recur.

To demonstrate that this issue is not moot, P.D. need not prove certitude of recurrence. He must only show either a "'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur." *Murphy v. Hunt*, 455 *U.S.* 478, 482 (1982). As the United States Supreme Court has explained, "we have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable." *Honig v. Doe*, 484 *U.S.* 305, 318 n.6 (1988) (citing *Burlington Northern R. Co. v. Maintenance of Way Employees*, 481 *U.S.* 429, 436, n.4 (1987) (parties "reasonably likely" to find themselves in future disputes over collective bargaining agreement); *California Coastal Comm'n v. Granite Rock Co.*, 480 *U.S.* 572, 578 (1987) ("likely" that respondent would again submit mining plans that would trigger contested state permit requirement); *Press-Enterprise Co. v. Superior Court of Cal., Riverside County*, 478 *U.S.* 1, 6 (1986) ("It can reasonably be assumed" that newspaper publisher will be subjected to similar closure order in the future); *United States Parole Comm'n v. Geraghty*, 445 *U.S.* 388, 398 (1980) (case not moot where litigant "faces some likelihood of becoming involved in same controversy in the future") (dicta)).

P.D.'s mental illness and history of arrests make the likelihood of his reincarceration categorically different than the risks of reincarceration in typical cases. *See Slade*, 407 *F.*3d at 249 (finding no likelihood of repetition "[b]ecause we presume that [petitioner] will abide by the criminal laws of Virginia in the future"). Simply put, based on past behavior and current diagnoses, and in the absence of continued therapeutic treatment, there is no basis for presuming that P.D. will be able to conform his conduct to the law in the future: even Defendant's experts

agree that is so. *See, e.g.*, RMSJ, Ex. 1 – Appelbaum Tr. 195:2–14 (explaining that there is no reason to believe that P.D. won't continue to face hospitalization and arrest in the future); RMSJ, Ex. 3 – Horn Report, at p. 4 (noting that P.D.'s psychological problems resulted in behavior that "frequently resulted in a law enforcement response."). That a particular action has happened multiple times is relevant in determining whether the action is likely to occur again. *See, e.g.*, *Thomas v. County of Los Angeles*, 978 *F.*2d 504, 507 (9th Cir. 1992) (holding that "possibility of recurring injury ceases to be speculative when actual repeated incidents are documented"); *Md. State Conference of NAACP Branches v. Md. Dept. of State*, 72 *F. Supp.* 2d 560, 564–65 (D. Md. 1999) (likelihood of recurrence can be found in past injuries and pattern and practice evidence); *DeShawn v. Safir*, 156 *F.*3d 340, 344–45 (2d Cir. 1998) (likelihood of recurrence where challenged policy was an official policy of defendant's).

P.D.'s risk of forthcoming incarceration is similar to the risk of a seriously mentally-ill person's risk of future hospitalization. *See People ex rel. Vivekanathan*, 2013 *COA* 143M, P25-P33 (Colo. Ct. App. 2013) (Hawthorne, J., dissenting) (explaining that patient's history of mental health hospitalization makes future hospitalization "capable of repetition"). To acknowledge the likelihood of P.D.'s future arrests and incarceration is not to show insufficient faith in him; it is to be realistic about the limitations of his medical care and personal capacity that Defendant's experts acknowledge.

Moreover, New Jersey courts have deemed questions of jail practices to be capable of repetition yet evading review even where the plaintiff is no longer incarcerated. *See Cain v. New Jersey State Parole Bd.*, 78 *N.J.* 253, 255 (1978) (inmates' release from county correction center did not render moot actions challenging the denial of parole eligibility since wrong alleged was one capable of repetition yet evading review).

The harm suffered by P.D. is likely to recur. Because the harm is capable of repetition yet evading review, the Court can address the claims for injunctive and declaratory relief despite P.D.'s release from the MCACC.

C. The Issue in this Case is of Great Public Concern.

Separate and apart from issues that are capable of repetition yet evading review, New Jersey courts have recognized that even when an issue is technically moot, substantial public interest in its resolution may require a decision on its merits. *In re Geraghty*, 68 *N.J.* 209, 212 (1975); *see also John F. Kennedy Mem'l Hosp. v. Heston*, 58 *N.J.* 576, 579 (1971) ("The controversy is moot. . . . Nonetheless, the public interest warrants a resolution of the cause."); *Bd. Of Educ. v. Twp. Council of East Brunswick*, 48 *N.J.* 94, 109 (1966) ("[P]ublic interest called strongly for our determination of the meritorious issues controverted before us by the parties.").

Solitary confinement is an issue of great public concern. Last year, United States Supreme Court Associate Justice Anthony Kennedy predicted that courts would soon need to confront whether the long-term use of solitary confinement violates the Eighth Amendment's prohibition on cruel and unusual punishment. *See Davis v. Ayala*, -- U.S. --, 135 *S. Ct.* 2187, 2210 (2015) (Kennedy, J., concurring).[2] As Justice Kennedy observed, "research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price." *Id.* (citing Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y, 325 (2006)).

While Justice Kennedy noted that "the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest," *id.* at 2209, he also pointed to "indications of a new and growing awareness in the broader public of the subject of corrections

---

[2] While P.D. contends that the long-term use of solitary confinement does violate the Eighth Amendment, this Court need not make so broad a pronouncement in this case. Indeed, as described in Part III, *infra*, P.D. would prevail under a far less sweeping rule.

and of solitary confinement in particular," *id.* at 2210, and since *Ayala* was decided, interest in solitary confinement has grown in state, national, and international press; in legal academia; and among professional associations related to corrections.

Some news stories have focused on people who have spent significant time in solitary confinement.[3] Others have focused on solitary confinement reforms that have been ushered in by court settlements or administrative actions.[4] Perhaps the issue that received the most attention was the effort by President Barack Obama to change the way solitary is used in federal prisons.[5] Discussions of solitary confinement in New Jersey have also increased in the last eighteen months.[6]

---

[3] *See, e.g.*, Carrie Johnson, "Solitary Confinement Is What Destroyed My Son, Grieving Mom Says" *NPR*, April 18, 2016, available at: http://www.npr.org/2016/04/18/474397998/solitary-confinement-is-what-destroyed-my-son-grieving-mom-says (addressing case of nineteen-year-old Kalief Browder, who committed suicide after spending more than two years in solitary confinement); "Anders Breivik case: How bad is solitary confinement?" *BBC News*, April 20, 2016, available at: http://www.bbc.com/news/world-europe-35813348 (discussing the European Court of Human Rights' finding that Norwegian mass killer Anders Breivik's human rights had been violated by long-term solitary confinement without appropriate consideration of his mental health); David Cole, "Albert Woodfox and the Case Against Solitary Confinement" *The New Yorker*, February 23, 2016, available at: http://www.newyorker.com/news/news-desk/albert-woodfox-and-the-case-against-solitary-confinement (detailing release of prisoner who served more than forty four years in solitary confinement).

[4] *See, e.g.*, Corinne Ramey, "Rikers Curbs Use of Solitary Confinement" *Wall Street Journal*, April 20, 2016, available at: http://www.wsj.com/articles/rikers-curbs-use-of-solitary-confinement-1461207601 (discussing reductions in the use of solitary confinement in New York City's jail); Benjamin Weisermarch, "Overhaul of Solitary Confinement Is Approved for New York's Prisons" *The New York Times*, March 31, 2016, available at: http://www.nytimes.com/2016/04/01/nyregion/overhaul-of-solitary-confinement-is-approved-for-new-yorks-prisons.html?_r=0 (landmark settlement to reduce the use of solitary confinement in New York State approved by Federal Judge Shira A. Scheindlin); Paige St. John, "State prisons are relying less on solitary confinement as punishment" *The Los Angeles Times*, July 12, 2015, available at: http://www.latimes.com/local/politics/la-me-ff-pol-solitary-confinement-20150713-story.html (addressing reductions in the use of solitary in California state prisons).

[5] *See, e.g.*, Juliet Eilperin, "Obama bans solitary confinement for juveniles in federal prisons" *The Washington Post*, January 26, 2016, available at: https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html (addressing restrictions on solitary for both juveniles and adults). President Obama authored an op-ed piece in the *Washington Post* questioning the use of solitary confinement. *See* Barack Obama, "Barack Obama: Why we must rethink solitary confinement" *The Washington Post*, January 25, 2016, available at: https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

[6] *See, e.g.*, Hank Kalet, "Solitary Confinement in New Jersey's Prisons: Cruel and Usual Punishment" *NJ Spotlight*, August 13, 2015, available at: http://www.njspotlight.com/stories/15/08/12/solitary-confinement-in-new-jersey-s-prisons-cruel-and-usual-punishment/ (lengthy examination of solitary confinement in New Jersey); Keri Blakinger, "Activists Turn to Lawsuits and Legislation to Fight Solitary Confinement in New Jersey" *Solitary Watch*, March 4, 2016, available at: http://solitarywatch.com/2016/03/04/ activists-turn-to-lawsuits-and-legislation-to-fight-solitary-confinement-in-new-jersey/ (exploring two lawsuits, including this one, and proposed legislation in New Jersey);

The legal academy has kept up with the increased attention devoted to solitary confinement.[7] Other professional associations have also recognized that how long, and under what circumstances, jails and prisons impose solitary confinement is important because of the significant harm it causes, especially to prisoners with mental illness.[8] This April, the National Commission on Correctional Health Care (NCCHC), an organization that represents physicians who work in prisons and jails, issued a policy statement on solitary confinement calling for a limit on its use after 15 days.[9] In issuing its position statement, the NCCHC reflects the growing national conversation about the overuse of solitary confinement; it also joined countless other national groups that have already called for the abolition, or at least the significant reform, of solitary confinement.[10]

D. The Federal Class-Action Lawsuit Filed Against Defendant Does Not Provide an Adequate Alternative Venue to Obtain the Injunctive and Declaratory Relief P.D. Seeks.

Defendant contends:

"Editorial: Obama got serious on solitary. But is N.J. still torturing people?" *The Star Ledger*, January 31, 2016, available at: http://www.nj.com/opinion/index.ssf/2016/01/obama_got_serious_on_solitary_but_is_nj_still_tort.html (editorial urging reform of New Jersey's use of solitary confinement).

[7] *See, e.g.,* David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124 (2016); Alex Kozinski, *Worse than Death*, 125 YALE L.J. F. 230 (2016), available at: http://www.yalelawjournal.org/forum/worse-than-death; The Arthur Liman Pub. Interest Program & Ass'n. of State Corr. Adm'rs, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* (2015), available at: http://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf.

[8] *See, e.g.*, American Psychiatric Association, *APA Position Statement on Segregation of Prisoners with Mental Illness* (2012), available at: http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06c_APA_ps2012_PrizSeg.pdf ("Prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates"); National Alliance on Mental Illness, *NAMI Policy Statement Against the Use of Solitary Confinement on Individuals with Mental Illness* ("NAMI opposes the use of solitary confinement and equivalent forms of extended administrative segregation for persons with mental illnesses").

[9] National Commission on Correctional Health Care, *Policy Statement: Solitary Confinement (Isolation)*, (April 10, 2016) available at: http://www.ncchc.org/solitary-confinement.

[10] *See, e.g.*, American Bar Association*, ABA Criminal Justice Standards on the Treatment of Prisoners,* Standard 23-3.8 (February 2010) available at: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html ("Conditions of extreme isolation should not be allowed regardless of the reasons for a prisoner's separation from the general population").

> the injunctive and declaratory relief sought by plaintiff in this case would be more appropriately brought in the companion class-action case filed in Federal Court, *C-Pod Inmates of MCACC, Azariah Lazar, Luis Borrero, Hector Amengual, Sean Pershing, Tyson Ratliff, Jonathan Rodriguez, Terrence Edwards, Damani Harris and Patrick O'Dwyer v. Middlesex County*, Docket No. 3:15-cv-7920 ("C-Pod Case").
>
> [MSJ at 31.]

There are at least three problems with this suggestion. First, the C-Pod Case is not a "companion case" with this case. It is a case with a common defendant. Second, this case raises claims that are not addressed in the C-Pod Case, and the C-Pod Case raises claims that are not addressed in this case – P.D. seeks different declaratory and injunctive relief from that sought in the federal case. Third, this case requires resolution in a New Jersey, rather than a federal, forum, because the legal analysis under Article I, Paragraph 1 of the State Constitution differs from analysis under the Fourteenth Amendment of the United States Constitution.

1. The federal case is not a companion case.

When P.D. filed the complaint in this matter, counsel filed a certification pursuant to *R.* 4:5-1. MSJ, Ex. 1. In that certification, counsel indicated that "the matter in controversy is not the subject of any other actions pending in any court . . . ." *Id.* That remains true today. The matter in controversy in this case is whether P.D. – who suffers from developmental disability and mental illness – was appropriately housed in solitary confinement in C-Pod, or whether that placement violated constitutional and statutory requirements. This case does not require the Court to determine whether the conditions in C-Pod always violate the State Constitution. It only asks whether, under the unique facts of this case, P.D.'s housing violated the Constitution and the laws of New Jersey.

A defendant cannot compel dismissal of claims in one case because it has violated other plaintiffs' rights and subjected itself to suit in others. That some of P.D.'s counsel also serve as

co-counsel in the federal complaint (MSJ, Ex. 5 – Notice of Appearance) is also of no moment: lawyers may represent a variety of clients, all of whom are entitled to independent adjudications of their complaints. *Cf. Sawyer v. First City Financial Corp.*, 124 *Cal. App.* 3d 390, 399–403 (Cal. App. 4th Dist. 1981) (evaluating *res judicata* issue by examining two cases to determine if they raise independent causes of action, not whether they have common counsel). P.D. is entitled to have his rights vindicated – and his particular claims addressed – regardless of the presence of other suits raising other claims against a common defendant.

2. *The complaint in this case focuses on P.D.'s mental illness in ways that the federal case does not.*

The complaint filed in this case is replete with references to P.D.'s psychiatric conditions. *See, e.g.*, MSJ, Ex. 1, at ¶¶ 7, 8, 9, 10, 17, 18, 19, 20, 25, and 34. Indeed, P.D.'s mental illness is the cornerstone of the Article I, Paragraph 1 claim at the center of the dispute: "The confinement of Plaintiff, a pre-trial detainee with a history of mental illness, in solitary confinement for an extended period of time, violates Article I, Paragraph 1, of the New Jersey Constitution." *Id.* at ¶ 25. In contrast, the complaint in the C-Pod Case makes only passing reference to mental illness (introduction, ¶¶ 24 and 40) and does not contend that any plaintiff's mental health status impacts the constitutional analysis. *See* MSJ, Ex. 5 – Federal Complaint.

The Court need not make as sweeping a declaration as plaintiffs in the C-Pod Case seek in order to grant P.D. relief here: even if the solitary confinement conditions in C-Pod do not violate constitutional norms generally, P.D. is entitled to relief if the conditions are unconstitutional as applied in his case.

3. *P.D.'s claims are most amenable to adjudication in a New Jersey forum because the Article I, Paragraph 1 standard may differ from the Fourteenth Amendment standard.*

The test under Article I, Paragraph 1 is generally the same as the test under the

Fourteenth Amendment. *See, e.g.*, *Greenberg v. Kimmelman*, 99 *N.J.* 552, 568–69 (1985). The State Constitution, however, provides greater protection than its federal counterpart in some contexts. It is well established that the United States Supreme Court's interpretation of the Federal Constitution "establish[es] not the ceiling but only 'the floor of minimum constitutional protections'" that this state's residents enjoy. *State v. Eckel*, 185 *N.J.* 523, 538 (2006) (*quoting State v. Gilmore*, 103 *N.J.* 508, 524 (1986)). The function of the State Constitution, then, is to serve both "as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law." *State v. Hunt*, 91 *N.J.* 338, 346 (1982) (internal quotation marks omitted). *See also State v. Baker*, 81 *N.J.* 99, 126, n.8 (1979) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.") (internal quotation marks omitted).

Thus, New Jersey's courts have routinely invoked the State Constitution where federal law has been insufficiently protective of the rights of New Jersey citizens. *See, e.g., New Jersey Coalition Against The War In The Middle East v. J.M.B Realty*, 138 *N.J.* 326 (1994) (State constitutional free speech protections broader than the First Amendment); *State v. Pierce*, 136 *N.J.* 184, 208–13 (1994) (pat-down search permissible under the Fourth Amendment violated the State Constitution); *State v. Novembrino*, 105 *N.J.* 95 (1987) (refusing to adopt good faith exception to exclusionary rule as the United States Supreme Court had done); *Gilmore*, 103 *N.J.* at 522–23 (State Constitution imposes greater restriction than the federal Equal Protection Clause on using peremptory challenges to dismiss potential jurors for race-based reasons); *Right to Choose v. Byrne*, 91 *N.J.* 287 (1982) (State Constitution safeguards greater individual rights to

health and privacy); *In re Grady*, 85 *N.J.* 235, 249 (1981) (recognizing greater right to privacy under the State Constitution); *State v. Schmid*, 84 *N.J.* 535, 560 (1980) (recognizing a greater right of free speech on private university campus); *Robinson v. Cahill*, 62 *N.J.* 473, 482 (1973) (finding a right to education under the State Constitution). *See generally* S. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

Here, the State Constitution independently restricts the use of solitary confinement of pretrial detainees with serious mental illnesses, even if the federal Constitution does not. The State Constitution diverges from the federal Constitution to protect additional rights in matters of particular state interest. *See, e.g.*, *State v. Marshall*, 130 *N.J.* 109 (1992) ("capital punishment is a matter of particular state interest or local concern and does not require a uniform national policy.") (quotation marks omitted); *State v. Johnson*, 127 *N.J.* 458, 473–74 (1992) (matters of particular state concern warrant reliance on state constitution).

This case involves two matters of particular state interest and local concern that implicate the state's traditions and public attitudes – the treatment of vulnerable people and criminal justice more generally. *See, e.g., In re Grady*, 85 *N.J.* at 259 ("The *parens patriae* power of our courts derives from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of an innate legal disability."); *In re D.C.*, 146 *N.J.* 31, 47–48 (1996) ("Under the *parens patriae* theory, the state draws on the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves . . . .") (quotation marks omitted); *see also State v. Gerald*, 113 *N.J.* 40, 76 (1988) ("Resort to a state-constitutional analysis is especially appropriate" in criminal justice matters because they

are "of particular state interest or local concern and do[] not require a uniform national policy.'") (quoting *State v. Ramseur*, 106 *N.J.* 123, 167 (1987)). Indeed, the New Jersey Supreme Court has often parted ways with the United States Supreme Court and interpreted the State Constitution to provide broader constitutional protections for criminal defendants. *See, e.g.*, *State v. Hogan*, 144 *N.J.* 216, 231 (1995) (finding greater state constitutional guarantee of indictment by a grand jury); *Marshall*, 130 *N.J.* at 208–10 (State Constitution provides greater equal protection rights to criminal defendants facing the death penalty); *Gilmore*, 103 *N.J.* at 523-24 (recognizing greater rights to a jury representative of the community with respect to peremptory challenges).

This is, in short, a paradigmatic example of a case in which the State Constitution may be vital in protecting the rights of New Jerseyans. Because criminal justice in general, and the protection of vulnerable populations in particular, are core areas of state concern, the protections of the State Constitution are especially important and may diverge from federal constitutional protections. As a result, P.D.'s claims can be most appropriately adjudicated in a state forum.

II. WHILE PLAINTIFF IS NOT ESTOPPED FROM PROSECUTING A CLAIM UNDER ARTICLE I, PARAGRAPH 12, SUMMARY JUDGMENT ON THAT LIMITED CLAIM IS PROPER BECAUSE, AS A PRETRIAL DETAINEE, PLAINTIFF'S RIGHTS ARE PROTECTED BY ARTICLE I, PARAGRAPH 1.

Defendant asserts, "under principles of Judicial Estoppel, Defendant is entitled to summary judgment on Count II of P.D.'s complaint." MSJ at 34. Defendant correctly notes that during oral argument on P.D.'s Order to Show Cause, Plaintiff's counsel acknowledged that "the Eighth Amendment is not the applicable protection. . . . So to that end, we are relying on Article I, Paragraph 1 of the State Constitution rather than Article I, Paragraph 12." MSJ, Ex. 2. While Defendant is incorrect that the procedural history here could give rise to judicial estoppel,[11]

[11] The case to which Defendant cites explains that the test for judicial estoppel (MSJ at 34) is one adopted from the Court of Appeals for the First Circuit: "First, the estopping position and the estopped position must be directly inconsistent, that is, mutually exclusive. Second, the responsible party must have succeeded in persuading a court to

estoppel is unnecessary, because Plaintiff agrees that the Eighth Amendment is not a source of rights for pretrial detainees, and so summary judgment is proper with respect to P.D.'s Article I, Paragraph 12 claim. The United States Supreme Court has been clear that:

> the Due Process Clause rather than the Eighth Amendment [applies] in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be "cruel and unusual" under the Eighth Amendment.
>
> [*Bell v. Wolfish*, 441 *U.S.* 520, 535 n. 16.]

As such, summary judgment is proper with respect to P.D.'s claims under Article I, Paragraph 12 (Point II, 1 of the MSJ).

Of course, that does not mean that Eighth Amendment jurisprudence becomes irrelevant. As the Court further explained: "*A fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Bell*, 441 *U.S.* at 545. Therefore, the Eighth Amendment and Article I, Paragraph 12, while not providing independent bases for relief here, nevertheless provide the baseline of the conditions under which pretrial detainees may be constitutionally housed.[12]

Indeed, P.D.'s argument that the conditions of administrative segregation were unconstitutional as applied to someone with his level of mental illness and cognitive functioning finds support in Eighth Amendment jurisprudence: Before Justice Kennedy reminded the nation that, in the words of Dostoyevsky, "[t]he degree of civilization in a society can be judged by

---

accept its prior position." *City of Atlantic City v. California Ave. Ventures, LLC*, 23 *N.J. Tax* 62, 68 (App. Div. 2006) (*quoting Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 *F.*3d 23, 33, (1st Cir. 2004). In this case, while P.D.'s Complaint asserting an Article I, Paragraph 12 violation is "directly inconsistent" with the concession at oral argument, the second prong of the test is not satisfied. The Order to Show Cause was withdrawn prior to any judicial determination. MSJ, Ex. 4. Judge Francis never ruled on the Order to Show Cause, so it cannot be said that P.D. "succeeded in persuading a court to accept its prior position." As a result, judicial estoppel is not proper.

[12] Plaintiff notes that Article I, Paragraph 12 is not inherently limited to the contours of the Eighth Amendment (*see*, *supra*, Point I, D, 3), but he does not contend that Article I, Paragraph 12 provides a source of rights independent from the Eighth Amendment in this case.

entering its prisons," *Ayala*, 135 *S. Ct.* at 2210 (Kennedy, J., concurring), courts throughout the country had repeatedly recognized that placing people with serious mental illnesses in prolonged solitary confinement subjects them to an unreasonable risk of harm and therefore constitutes cruel and unusual punishment. *See*, *e.g.*, *Ruiz v. Johnson*, 37 *F. Supp.* 2d. 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 *F.*3d 941 (5th Cir. 2001), *adhered to on remand*, 154 *F. Supp*. 2d 975 (S.D. Tex. 2001) ("Conditions in . . . administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiff's class made up of mentally-ill prisoners."); *Madrid v. Gomez*, 889 *F. Supp.* 1146, 1265–66 (N.D. Cal 1995) (describing impact of placing mentally-ill prisoners in solitary confinement as "the mental equivalent of putting an asthmatic in a place with little air to breathe"); *Coleman v. Wilson*, 912 *F. Supp.* 1282, 1320–21 (E.D. Cal. 1995) (use of solitary confinement to house mentally-ill inmates violates the Eighth Amendment because, *inter alia*, mentally-ill inmates are placed in solitary confinement "without any evaluation of their mental status" and "because such placement will cause further decompensation"); *Casey v. Lewis*, 834 *F. Supp.* 1477, 1549–50 (D. Ariz. 1993) (noting that "lockdown damages, rather than helps, mentally ill inmates" and that often "inmates are locked down because of the behavior resulting from their mental illness" and finding the inappropriate use of lockdown to violate the Eighth Amendment); *Langley v. Coughlin*, 715 *F. Supp*. 522, 540 (S.D.N.Y. 1988) (holding that evidence of prison officials' failure to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" states an Eighth Amendment claim); *Morris v. Travisono*, 499 *F. Supp.* 149, 160 (D.R.I. 1980) (noting that "[e]ven if a person is confined to an air conditioned suite at the Waldorf Astoria, denial of meaningful human contact for such an extended period may very well cause severe psychological injury").

III. MIDDLESEX COUNTY VIOLATED P.D.'S RIGHT UNDER ARTICLE I, PARAGRAPH 1 TO BE FREE FROM PUNISHMENT BEFORE AN ADJUDICATION OF GUILT.

A. Article I, Paragraph 1 of the New Jersey Constitution Precludes Punishment Before an Adjudication of Guilt.

As the United States Supreme Court has explained, "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell*, 441 *U.S.* at 535. Though the New Jersey Supreme Court has not considered *Bell* in the jail context, Article I, Paragraph 1 of the New Jersey Constitution provides due process protections similar to or greater than those provided by the federal Constitution. *See, e.g.*, *Greenberg v. Kimmelman*, 99 *N.J.* 552, 568 (1985) (Though the phrase "due process" does not appear in Article I, Paragraph 1 of the New Jersey Constitution, "[n]onetheless, article 1, paragraph 1, like the fourteenth amendment, seeks to protect against injustice . . . To this extent, article 1 safeguards values like those encompassed by the principles of due process."); *State v. K.P.S.*, 221 *N.J.* 266, 281 (2015) ("Article I, Paragraph 1 of our State Constitution provides due process protections that may exceed those guaranteed by the Federal Constitution."); *see also*, *e.g.*, *McMillan v. Cicchi*, 2014 *N.J. Super. Unpub. LEXIS* 1780, at *1 (App. Div., July 21, 2014) (applying *Bell* to pre-trial detainee's due process claims against New Jersey jail where plaintiff did not specify constitutional source).

Jails do have "legitimate interests that stem from [the] need to manage the facility in which the individual is detained," including an interest in "maintain[ing] security and order at the institution . . . ." *Bell*, 441 *U.S.* at 540. The *Bell* Court thus recognized a "distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Id.* at 537. That distinction turns on "whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate

governmental purpose." *Id.* at 538. In determining whether the conditions are "for the purpose of punishment," and "[a]bsent a showing of an expressed intent to punish," courts are to look to "whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears *excessive in relation to* the alternative purpose assigned to it." *Id.* (emphasis added) (internal quotation marks and alterations omitted). A restriction also amounts to punishment if it "is *not reasonably related* to a legitimate goal – if it is *arbitrary* or *purposeless*." *Id.* at 539 (emphasis added). Thus, in identifying whether punishment has been inflicted on pretrial detainees in violation of the Constitution, a court considers whether a particular consequence was either excessive in relation to the legitimate government interest that motivated it or whether it was arbitrary and purposeless in relation to that interest.

Here, there is a genuine dispute as to the material fact of whether the hardships imposed on P.D. through his confinement in C-Pod were excessive or arbitrary in relation to the stated purpose of maintaining order and security in the facility. *See* MSJ at 45 ("[T]he restrictions . . . were reasonably related to the legitimate governmental interests of maintaining institutional safety, security, and order."). Ample evidence supports the contention that imposing nearly seven months of solitary confinement was excessive in relation to the safety purpose, both because the confinement was not necessary to ensure safe and orderly operation of the facility, and because, in light of P.D.'s disability, it caused P.D. disproportionate harm. Moreover, with respect to some of the time that P.D. spent in solitary confinement, there is an issue of fact as to whether the discipline was arbitrary – that is, whether it bore a rational relationship to the purposes of the discipline.

The plaintiff recognizes that considerations of "safeguarding institutional security" are "peculiarly within the province and professional expertise of corrections officials, and, in the

absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Bell*, 441 *U.S.* at 547–48. Nevertheless, where, as here, the record shows an exaggerated or arbitrary response, courts bear the responsibility of identifying such conduct as unconstitutional. *See, e.g.*, *Hudson v. Palmer*, 468 *U.S.* 517, 537 (1984) ("The courts of this country quite properly share the responsibility for protecting the constitutional rights of those imprisoned for the commission of crimes against society.") (O'Conner, J., concurring); *Ayala*, 135 *S.Ct.* at 2210 ("In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.") (Kennedy, J., concurring).

Here, where the inquiry is whether the MCACC, run by Middlesex County, imposed discipline that was excessive in relation to its institutional interests, Middlesex County is wrong that:

> [a]ny suggestion by Plaintiff of alternatives to placing him in Administrative Segregation in C pod, such as MCACC officials could have monitored him more closely or less restricted his movements and communication opportunities with other prisoners, impermissibly conflicts with the admonition that the MCACC does not have to resort to less restrictive alternatives in how it operates the MCACC.
>
> [MSJ at 42.]

Indeed, the Court's required inquiry examines just that: inherent in the question of whether the use of discipline was excessive is the question of whether MCACC should have used a less restrictive alternative. While MCACC is not required to use the *least* restrictive alternative, it is

required to show that the discipline it used was not excessive. As described below, a genuine dispute exists as to this question.

B. The Conditions of Administrative Segregation and Disciplinary Detention Were Not Different In Any Meaningful Way for P.D., and Both Constituted What is Commonly Described as Solitary Confinement.

As an initial matter, there was no meaningful difference between the classifications of "administrative segregation" and "disciplinary detention" during the time P.D. spent in C-Pod and SNU. As MCACC's Captain Robert Grover described it, the differences between administrative segregation and disciplinary detention are: use of the phone, visits, ordering commissary, and spending recreation in the cage near the television, as opposed to the cage far from the television. *See* RMSJ, Ex. 24 – Grover Tr. at 81:8–17; Counterstatement of Material Facts (hereinafter "Facts") at ¶ 56. None of these differences amounted to meaningful human contact or stimulation for P.D.

First, with respect to the phone, Defendant contends, "PD also made telephone calls while housed in C pod, during his hour of recreation, to his father and to his attorneys." MSJ at 24. In support of this proposition, Defendant cites P.D.'s deposition. As is clear throughout the record, P.D.'s limited intellectual capacity makes him an unreliable historian, and his memories often differ from objectively verifiable facts. *See* Facts at ¶ 4.

Here, P.D.'s account of regularly calling his father conflicts with the record: while P.D. was in C-Pod, there was a restraining order in place preventing him from contacting his father. *See* MC166. Though P.D. contacted his father through his social worker, *see* RMSJ, Ex. 14, MC7, there is no evidence of other phone calls, and Defendant concedes P.D. received no personal visitors. MSJ at 24.

P.D.'s sporadic attempts to make phone calls to his public defender, and, beginning in June – after eight months of incarceration – to his attorney from the ACLU-NJ, do not constitute

meaningful human interaction. *Cf. McMillan*, 2014 *N.J. Super. Unpub. LEXIS* 1780, at *11 (concluding that confinement in C-Pod was not "solitary" because of "the contact plaintiff is allowed with family and friends through almost daily telephone calls and weekly video visits[.]").

The absence of family members to call exacerbated the social isolation that P.D. otherwise experienced in administrative segregation. Defendant's experts claim that P.D. was able to speak to other inmates both while in the recreation cage and while in his cell in administrative segregation. *See* Facts at ¶ 60. But the record shows that communications of this kind, if any, did not amount to meaningful human contact.

First, contrary to Horn's assertion, there is no distinction between disciplinary detention and administrative segregation in the ability of inmates in C-Pod to speak to each other – in both circumstances, that ability is limited by jail policies and by the physical layout of the facility. With respect to the recreation cages, identical policies for administrative segregation and disciplinary detention prohibit inmates from speaking to each other while in the cages. *See* Facts at ¶ 61. Though Warden Cranston testified that this regulation is not enforced, *see* RMSJ, Ex. 22 – Cranston Tr. at 68:1, this means, at best, that inmates are able to speak to each other while in the cages when the guards allow them to break this rule, and Plaintiff's corrections expert, Eldon Vail,[13] reported that the regulations were "indeed sometimes enforced." RMSJ, Ex. 32 – Vail Report at 17.

Next, the communication from cell to cell, as P.D. told Dr. Appelbaum, was limited: "You're yelling back and forth, you're not sitting down or having a conversation." RMSJ, Ex. 50 – Audio Recording of Appelbaum Interview, 34:09 of Interview. Yelling is necessary because each cell in C-Pod has a solid metal door with a narrow window. *See* RMSJ, Ex. 33 –

[13] Vail's C.V. is attached here at RMSJ, Ex. 51.

photographs MC4563; MC4578. Plaintiff's psychiatric expert, Dr. Stuart Grassian,[14] identifies these doors as "the harshest of these [kinds of doors found in solitary units], allowing the least amount of ventilation and the greatest barrier to sound transmission." RMSJ, Ex. 29 – Grassian Report at 7. Moreover, the sound that does come through these doors is often, as Dr. Grassian describes it, "*noxious* stimulation" – ambient, chaotic noise that may "*worsen* the psychiatric toxicity of the situation." Grassian Report at 5 (emphasis in original). Thus, P.D. did not have an opportunity for meaningful contact with other inmates while in administrative segregation or disciplinary detention.

Third, commissary did not provide P.D. a respite from the near-constant state of isolated boredom that characterized his time in administrative segregation. Neither the unhealthy snacks nor the books and puzzles that P.D. would have had access to in commissary during administrative segregation, *see* Facts at ¶¶ 57, 62, would have provided social contact for P.D. Moreover, the record suggests that P.D.'s recollection of doing puzzles is another instance where his memory differs from the established facts. The record suggests that P.D. would have had limited capacity to use books and puzzles, as he has only a slight ability to read or write. *See* Facts at ¶ 5. In addition to expert testimony – from both P.D.'s and Defendant's experts – and statements of the MCACC's director of mental health, psychologist Dr. Dennis Sandrock, as to these limitations, *see id.*, the record contains a medical complaint P.D. drafted, in which he wrote "paNe Blede Naeose" to describe what a doctor reported as "I have pain in my leg and a couple of days ago I woke up and had blood on my pillow." *See* RMSJ, Ex. 288 – Request for Medical, MC288.

---

[14] Dr. Grassian has studied the psychiatric effects of solitary confinement for decades. One of his publications is attached here as RMSJ, Ex. 35. His C.V. is attached as RMSJ, Ex. 52. *See also Ayala*, 135 *S. Ct.* at 2210 (Kennedy, J., concurring) (citing to Dr. Grassian's work on the effects of solitary confinement).

Finally, with respect to the television condition, the television available to inmates in administrative segregation is on the outside of the recreation cage. *See* Facts at ¶ 59. Inmates are able to view it through the metal fence of the cage for whatever portion of the one hour, up to five days per week they spend there. This does not constitute meaningful human contact.

Thus, the differences between administrative segregation and disciplinary detention were minor, and they did not mitigate the harms P.D. suffered while in administrative segregation. *Cf. Sandin v. Conner*, 515 *U.S.* 472, 476 n.2 (1995) ("Single-person cells comprise the [Special Housing Unit] and conditions are substantially similar for each of the three classifications of inmates housed there.").

Indeed, both sets of conditions meet widely-accepted definitions of solitary confinement. As Dr. Grassian notes,

> [C]onditions experienced by inmates in various prison solitary confinement settings generally bear some similarities (a cell of roughly fifty to eighty square feet; approximately twenty-two and one-half hours per day locked in the cell; about one hour per day of yard exercise, five out of the seven days each week) . . . .
>
> [RMSJ, Ex. 35 – Psychiatric Effects of Solitary Confinement.at 346.]

This definition comports with that used in a Colorado study that Defendant's psychiatric expert described as "the largest, most carefully-done, controlled study of the effects of segregation in a modern American correctional facility." RMSJ, Ex. 1, Appelbaum Tr. at 34:17–20. *See* RMSJ, Ex. 36, *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation*, at 2 ("Across prison systems, different terms are used to describe the same concept: administrative segregation . . . the defining feature . . . [of] this model is single-cell confinement for 23 hr per day, with 1 hr allowed out of cell for showers and exercise."). The study also explicitly equates "administrative segregation" with "solitary confinement." *See id.* at 3.

MCACC Warden Mark Cranston's understanding also confirms that the administrative segregation conditions at MCACC meet the national definition of solitary confinement: "I have been immersed in the issue of solitary confinement, punitive segregation, restrictive housing, whatever it is called, I have been involved in it. It really doesn't matter to me what the name of it is at this point, but 23-hour lock down." RMSJ, Ex. 22 – Cranston Tr. at 129:4–9.

This assessment is consistent with courts' recognition nationally that the conditions referred to as "administrative segregation" in the corrections context are commonly referred to as "solitary confinement." *See, e.g.*, *Ayala*, 135 *S. Ct.* at 2208 (Kennedy, J., concurring) ("Ayala has served the great majority of his . . . custody in 'administrative segregation' or, as it is better known, solitary confinement."); *Mejia v. New Jersey Dep't of Corr.*, 446 *N.J. Super.* 369, 375 (2016) (describing petitioner's brief as "raising the argument that he . . . was particularly vulnerable to the negative effects of long-term solitary confinement in administrative segregation").

P.D. does not claim that his rights turn on whether the conditions are referred to as "solitary confinement," instead, he notes that the conditions in administrative segregation amount to solitary confinement in order to shed light on the harm he suffered by reference to the nationally-recognized harms associated with solitary confinement.

C. The Use of Administrative Segregation Was Excessive and Arbitrary in Relation to Any Concern to Safety or Order P.D. Presented.

P.D. does not argue, as Middlesex County contends, that he has a right to a particular classification, MSJ 42, or a classification decision free from error, MSJ 36; instead, he maintains that the conditions of his confinement amounted to punishment because they were either excessive or arbitrary in relation to the purpose of maintaining safety in the facility. According to Middlesex County:

> It is clear that Plaintiff's movement to C pod on Administrative Segregation status was *as a result of his actions* which resulted in charges, his numerous placements within the facility that became unsuitable, and the MCACC's concern over the safety of the corrections officers, other inmates, and the security of the jail. Accordingly, Plaintiff's placement in C pod on Administrative Segregation status on February 19, 2014 was not punitive in nature and Plaintiff cannot establish the necessary showing of an expressed intent to punish.
>
> [MSJ at 39-40 (emphasis added).]

This misstates the inquiry: the question before the Court is not whether the movement to C-Pod was a *result* of P.D.'s actions, it is whether that movement – that result – was *excessive or arbitrary* in relation to the challenge to legitimate government interests P.D.'s actions posed. As the record demonstrates, there is a genuine dispute as to this question of material fact.

P.D. spent all but a few days between December 29, 2013 and July 16, 2014 in administrative segregation, either in C-Pod or SNU, where he spent 23–24 hours per day alone in a small cell, with little to no meaningful human contact. The charges he received between December 29 and April 20 were entirely non-violent: P.D. was sent to C-Pod in December after trying to break the sink in his cell, *see* Facts at ¶¶ 36–37, he received a suspended sentence for being asleep in his cell on January 13, *see id.* at ¶ 39, and he received a suspended sentence on February 17 for putting toilet paper in the hatch on his cell door. *See id.* at ¶ 46–48. He was placed in a cell with a roommate on April 18, and on April 20, he received a charge of fighting, *see id.* at ¶ 51, and then he spent the rest of his time, until July 16, in administrative segregation in C-Pod. *See id.* at ¶ 53. He did not receive another violent charge after April 20 – the only charge he received was on June 20, for flooding his cell by putting a shampoo bottle in the toilet. *See id.* at ¶ 52.

The jail's use of administrative segregation in response to P.D.'s conduct was thus at times arbitrary, because it bore no relation to the jail's interest in security or order within the facility, and it was consistently excessive in relation to any threat P.D. posed.

1. *There is a genuine issue as to the material fact of whether the use of administrative segregation in SNU and C-Pod as a consequence for P.D. was arbitrary.*

Evidence in the record supports the conclusion that classifying P.D. under administrative segregation and moving him to C-Pod and to SNU following the incidents related to the sink in his cell and the hatch in his cell door were arbitrary. These instances reflect the indiscriminate use of administrative segregation as a punishment rather than a calibrated response to threats to security, because P.D.'s placement in administrative segregation for the sink and hatch infractions did not advance any legitimate disciplinary interest. The only non-punitive disciplinary interests that Middlesex County could seek to advance by putting P.D. in administrative segregation are incapacitation, general and specific deterrence, and rehabilitation. *See, e.g.*, *Bullington v. Missouri*, 451 *U.S.* 430, 443 n.16 (1981) (The purposes of criminal consequences "have often been defined as including deterrence, retribution, incapacitation, rehabilitation, and community condemnation . . . ."). Putting P.D. in C-Pod for the December 29, 2013 infraction related to the sink and the February 17, 2014 infraction related to the hatch in the door served none of these aims.

Most importantly, putting P.D. in C-Pod in response to damage he caused to the hatch in his cell door and to his sink did not incapacitate him, because the C-Pod cells contain both door hatches and sinks. *See* Facts at ¶¶ 7–8. It appears from the record that the hatch to which the allegations refer is the covered slot in the doors throughout the jail through which meals are served and medications delivered when the units are on "lock down," and that was used for serving meals to P.D. at the time because he was in administrative segregation in SNU. *See* Facts

at ¶ 41, 46. C-Pod doors have identical hatches through which meals and medication are delivered. *See* Facts at ¶ 8. Thus, putting P.D. in C-Pod did not incapacitate him from interfering with the hatches in cell doors. Likewise, placement in C-Pod did not incapacitate P.D. from interfering with the functioning on the sink/toilet unit. Indeed, while in C-Pod, he received a charge for flooding the cell by tampering with the toilet. *See* Facts at ¶ 52. Putting P.D. in C-Pod in response to charges about damage to the hatch and sink could have no incapacitating effect, as the jail officials, who were familiar with the layout of the cells, knew.

Moreover, as the jail staff recognized repeatedly, putting P.D. in C-Pod for long periods had no deterrent effect. Dr. Sandrock explicitly recognized that P.D. did not have the intellectual capacity to take responsibility for his behavior. *See* Facts at ¶ 27. These observations are consistent with Dr. Grassian's observation that placement in C-Pod is an ineffective deterrent for someone with P.D.'s intellectual capacity:

> For impaired individuals such as P.D., it is important that the consequence of disruptive behavior occur quickly (within minutes or hours) – otherwise the link between the behavior and the consequence is so remote that the individual learns nothing from the consequence. Moreover if there is a negative consequence, it should be brief in duration, and it should not involve simply deprivation of anchoring, engaging stimulation[.]
>
> [RMSJ, Ex. 29 – Grassian Report at 27.]

The record also fails to show how putting P.D. in C-Pod acted as a general deterrent. Unlike criminal trials, disciplinary consequences in jail are not public. Moreover, Dr. Sandrock's note that "[l]ay people who have observed him in the facility see him as a child in a man's body," Facts at ¶ 28, suggests that the source of his behavioral outbursts – his limited cognitive functioning and related mental disability – was apparent to others in the facility, and thus diminished the general deterrent impact of seeing him disciplined. *See State v. Jarbath*, 114 *N.J.*

394, 405 (1989) (Recognizing the lack of personal deterrence where the defendant lacks the cognitive ability to appreciate the consequences of her actions, and concluding "the absence of any personal deterrent effect greatly undermines the efficacy of a sentence as a general deterrent.").

Finally, there is no evidence whatsoever that Middlesex County used C-Pod as a rehabilitative environment. Though Dr. Sandrock observed relatively early in P.D.'s time in the facility that he was "responsive to supportive counseling," RMSJ, Ex. 17 – MC262, there is no evidence that he received counseling for his anger or therapeutic visits while he was in lock-up in SNU or in C-Pod. Nor did P.D. receive rehabilitation through psychiatric care. P.D. was not referred to a medical doctor for psychiatric follow-up when he entered the facility, contrary to the standard of care for either inpatient or outpatient medical facilities. *See* Facts at ¶ 23–24. Though P.D. agreed to start psychiatric medication on February 19, 2014, and thus was taking medication for nearly five months, largely while in C-Pod, he saw a psychiatrist only once while he was in the facility. *See* Facts at ¶ 25. Without ongoing medical treatment for P.D.'s bipolar disorder and intermittent explosive disorder, it was impossible for P.D. to experience the rehabilitation necessary to correct his behavior. As Dr. Grassian explained: "[W]arehousing [P.D.] for stretches of time away in restrictive housing gave him no opportunity to learn and hopefully avoid repeating the behavior (what set it off, how he feels when he is about to go off, what he might have done instead of engaging in the disruptive behavior, etc.)." RMSJ, Ex. 29 – Grassian Report at 27. Instead, "such confinement inevitably causes unnecessary suffering and worsens emotional reactivity and impulsivity, and ultimately decreas[es] the individual's ability to cope in the general population of the jail . . . ." *Id.*

Rather than using C-Pod as an intervention to correct P.D.'s disruptive behavior within the jail, Middlesex County used the conditions of solitary confinement indiscriminately as a punishment because solitary confinement was the primary disciplinary tool the jail had. This tool was deployed arbitrarily – its use bore no relation to the legitimate interests of the jail in responding to misconduct. This type of indiscriminate use of solitary confinement has been well-documented. *See, e.g.*, RMSJ, Ex. 2 – Horn Tr. at 182:4–16 (Conceding that he has said, "There's an adage that if the only tool in your belt is a hammer every problem starts to look like nail . . . We put too many people in solitary because we . . . had no other response."). Indeed, Warden Cranston acknowledged the approach of "thinking that segregation is the only way of dealing with somebody." *See* RMSJ, Ex. 22, Cranston Tr. at 130:24–131:4. Though Warden Cranston testified that he has "come full circle" from this approach, he did not begin working at MCACC until June of 2014, when P.D. had already been in solitary confinement in C-Pod for several months. *See id.*, Cranston Tr. at 12:3–13.

2. *There is at least a genuine issue as to the material fact of whether the use of C-Pod as a consequence for P.D. was excessive.*

In the alternative, if the Court does not find that the record demonstrates a genuine issue of material fact as to whether the use of C-Pod was an arbitrary response to P.D.'s conduct, there is at least a genuine issue of material fact as to whether the use of C-Pod was excessive in relation to any threat P.D. posed. The excessive nature of the use of administrative segregation is evident in two ways: first, the deprivations were not necessary to advance MCACC's interests in security and orderly operation of the facility, and second, they imposed a disproportionate harm because of P.D.'s disability, which the jail knew about but did not mitigate.

a. These Deprivations Were Excessive in Relation to the Needs of the Facility.

Evidence in the record demonstrates that there is at least a genuine dispute about the material fact of whether the deprivations of being in C-Pod were excessive in light of the institutional safety interest. Middlesex County has described the interest advanced by C-Pod as "the legitimate governmental interests of maintaining institutional safety, security, and order." MSJ at 45.

i The jail has offered no specific explanation for why such an extended period in administrative segregation was necessary.

P.D. spent nearly seven months in administrative segregation in conditions that amounted to solitary confinement for five offenses, one of which was sleeping, and only one of which involved any allegations of violence. The jail offered no explanation at the time for why such an extensive period of isolation was necessary.

The Classification Committee's letters to P.D. about his administrative segregation status contained boilerplate language. *See* Facts at ¶ 42. Nowhere in these letters did the Classification Committee explain the reason that administrative segregation was necessary for the safety or orderly operation of the facility.

Joyce Pirre, the head of the Classification Committee, testified that in determining whether someone can be removed from administrative segregation, the Classification Committee looks at whether the person has "any more disciplinary charges," is "taking his medication," and has "had an incident report written on him." *See* Facts at ¶ 44.

As discussed above, P.D. took medication from February 19 on, RMSJ, Ex. 41 –MC268, and between May 5 and June 6, he had no disciplinary infractions or incident reports. He thus complied with the precise terms Pirre established as necessary to be removed from administrative segregation, and yet he was not removed. P.D. does not argue that Pirre's

description of what the Classification Committee was looking for created a liberty interest of the kind described in *Hewitt v. Helms*, 459 *U.S.* 460 (1983), but it is instructive of the need, from the perspective of the facility, of keeping P.D. in administrative segregation. The record suggests that the Middlesex County did not need to do so, and the County does not point any to specific facts demonstrating an ongoing need for months-long confinement in administrative segregation. Its failure to do so shows that this consequence was excessive in light of the legitimate needs of the MCACC.

ii <u>The deprivations were not necessary and a more therapeutic response would have ensured orderly and safe operation of the facility</u>.

Eldon Vail, a corrections expert retained by P.D. in this case, concluded after an extensive review of the record that P.D.'s confinement in administrative segregation was not necessary for the orderly operation of the facility.[15] Vail reviewed records from P.D.'s confinement in MCACC along with other discovery and deposition testimony, *see* RMSJ, Ex. 32 – Vail Report at 5-6; *see also id.* at Ex. 2, and he conducted a tour of the facility during which he interviewed four current C-Pod inmates in a confidential setting. *See id.* at 6.

Vail observed,

> P.D.'s behavior in the jail can best be described as disruptive. There is little evidence of violence . . . where he flipped a table over in the SNU, the punches he threw were into the air. The level of threat in all of his misbehavior reports is minimal. Yet, the extreme response on the part of MCACC to P.D[.]'s behavior in every circumstances was to return him to and/or keep him in segregation for most of his incarceration, which put him at significant risk of serious harm. In reality he was just a disabled individual having trouble adjusting to the rules of the jail – rules that were developed assuming all inmates would be able to immediately comply – clearly a challenge for someone like P.D.

[15] Vail has nearly thirty-five years of corrections experience, including seven years as the Deputy Secretary for the Washington State Department of Corrections and four years as the Secretary of the Department of Corrections for the state of Washington. *See* RMSJ, Ex. 32 at 1.

[*Id.* at 12.]

Indeed, this extreme use of isolated confinement may be counter to the safety concerns of the facility: Vail noted the "progressive recognition in the field of corrections that the impact on individuals placed in segregation can be counter-productive to the inmate's mental health, creating additional misbehavior problems . . . increasing the risk to facility security and increasing the risk of harm to individual inmates." *See id.* at 15. Vail concluded that instead, P.D. "should have been provided regular and on-going treatment in a structured and supportive living unit. Had that been done, it is likely that he could have managed without jail staff resorting to placing him in segregation and the harmful effects of that environment could have been avoided." *Id.* at 24.

Vail's analysis and conclusions, combined with other evidence cited herein showing that Middlesex County's disciplinary measures against P.D. were excessive and thus punitive, contributes to the conclusion that there is a genuine dispute as to the material fact of the excessiveness of Middlesex County's discipline. *See, e.g.*, *Halvorsen v. Villamil*, 429 *N.J. Super.* 568, 579 (App. Div. 2013) (reversing grant of summary judgment to the defendant because the plaintiff's "expert report . . . when combined with direct and circumstantial evidence of record . . . would allow a jury to reasonably and legitimately" rule in favor of the plaintiff).

Indeed, Warden Cranston testified that his experience working at Rikers Island showed him that solitary confinement was not a necessary response to ensuring the safety of the facility. *See* Facts at ¶ 70. Warden Cranston said that when he arrived at MCACC, his assessment was that "we can do better in the way we ran our restrictive housing unit," *id.*, and that reductions in the use of restrictive housing could be done without compromising safety at the facility. *See id.*

Thus, as both Vail and Cranston observe, MCACC's use of solitary confinement was not necessary for the safe operation of the facility; indeed, in exacerbating disruptive behavior, it may have made the facility less safe. Because this use of solitary was not necessary to respond to any safety threat or threat to order that P.D. posed, it was excessive in relation to the jail's legitimate interests.

b. Spending Nearly Seven Months in Solitary Confinement Inflicted Excessive Harm on P.D. Due to His Disability.

It is not possible to assess whether the disciplinary measures MCACC employed were excessive without assessing the impact of those measures on P.D. in light of his mental health and cognitive ability. Because P.D. has bipolar disorder and limited cognitive functioning, solitary confinement imposed suffering on him beyond the suffering someone of average mental health and intellectual functioning might have experienced.

i <u>PD has a mental illness, which made him particularly vulnerable to the harms associated with solitary confinement</u>.

As Middlesex County concedes, P.D. "has been diagnosed as suffering from bipolar disorder, intermittent explosive disorder and cognitive impairments, and has been previously hospitalized for psychiatric evaluation and treatment on several occasions." MSJ at 4. P.D.'s medical records reflect these diagnoses, and when he entered the facility, P.D. reported that he had a history of bipolar disorder. *See* Facts at ¶ 21. In addition to bipolar disorder, P.D. has "borderline intellectual functioning," which was also known to MCACC when P.D. entered. *See id.* He is currently involuntarily committed at Trenton Psychiatric Hospital, where he is taking medication for bipolar disorder. *See* Facts at ¶ 76.

Academics studying solitary confinement have identified a series of harms associated with the practice. Dr. Grassian has identified a syndrome associated with solitary confinement characterized by hypersensitivity to external stimuli; hallucinations; panic attacks; difficulties with thinking, concentration, and memory; intrusive obsessional thoughts, including fantasies of revenge; overt paranoia; and problems with impulse control. *See* RMSJ, Ex. 6, *Psychiatric Effects of Solitary Confinement*.[16] As described in Part I.C, *supra*, the legal, corrections, medical, and psychological communities have also expressed concern about these harms.

---

[16] These effects are widely acknowledged in academic literature. *See, e.g.*, Craig Haney, *Mental Health issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124 (2003) (documenting hallucinations, increased anxiety, loss of impulse control, severe and chronic depression); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8 (1988) (hallucinations); Holly A. Miller, *Reexamining Psychological Distress in the Current Conditions of Segregation*, 1 J. OF CORRECTIONAL HEALTHCARE 39, 48 (1994) (anxiety); *see generally* Stanley L. Brodsky & Forest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988) (anxiety); Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 CRIM. BEHAV. AND MENTAL HEALTH 85, 91 (1997) (revenge fantasies, rage, irrational anger; blunting of affect); Eric Lanes, *The Association of Administrative Segregation Placement and Other Risk Factors with the Self-Injury-Free Time of Male Prisoners*, 48 J. OF OFFENDER REHABILITATION 529, 532 (2009) (self-mutilation); *see also* Patricia B. Sutker, et al., *Cognitive Deficits and Psychopathology Among Former Prisoners of War and Combat Veterans of the Korean Conflict*, 148(1) AM. J. OF PSYCHIATRY 67, 67-72 (1991) (intolerance of social interaction); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441,

As has been extensively documented, the harms of solitary confinement are particularly acute for people with mental illness. As Dr. Grassian explained, inmates with cognitive limitations have greater difficulty than normal in administrative segregation, because while "[i]ndividuals with intact intellectual functioning have an ability to generate stimulation *internally*, by reading, thinking," etc., "inmates who are intellectually impaired experience a much more profound void of stimulation . . . ." RMSJ, Ex. 29 – Grassian Report at 16 (emphasis in original). Those with "psychiatric and neuropsychological difficulties," such as bipolar disorder, also suffer disproportionately in solitary confinement, because they "tend to be stimulation-seeking, requiring a constant flow of external stimulation in order to maintain an adequate state of alertness." *Id.* Without such stimulation, they "are particularly prone to psychiatric and behavioral deterioration." *Id.* These effects have been widely recognized. *See, e.g.*, Haney, *Mental Health issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 1, 124 (January 2003).

ii In order to ensure that the conditions were not excessive, the jail would have had to conduct actual mental health screenings prior to placing P.D. in administrative segregation and during his confinement there.

There is at least a genuine issue as to the material fact of whether the jail had adequate screening procedures to ensure that people with mental illness did not go into administrative segregation or remain there when due to mental illness, they experience significant hardship.

The mental health screening throughout the jail was insufficient to ensure that people with mental illness did not suffer disproportionately. The initial intake screening policies and procedures routinely failed, and failed in P.D.'s case, to result in adequate medical follow-up – when P.D. entered the facility, if an inmate had a diagnosed psychiatric illness but was not taking

495-496 (2006) (same); and Joane Martel, *Telling the Story: A Study in the Segregation of Women Prisoners*, 28 SOC. JUST. 196, 209 (2001) (persistent rage).

medication, there was no necessary follow-up with a doctor. *See* Facts at ¶ 14. This practice falls below the standard of care in both inpatient and outpatient psychiatric facilities. *See id.*

The procedures for determining whether an inmate's mental health allowed him to go to administrative segregation were likewise deficient. Dr. Sandrock, the mental health director at MCACC, testified that at the time P.D. was in MCACC, the Classification Committee's decision to put someone in C-Pod was not subject to mental health approval. *See* Facts at ¶ 14.

Though P.D.'s file from MCACC contains references to times he was "medically cleared for lock-up," *see, e.g.*, Facts at ¶ 16, the medical clearance, by policy and practice, failed to provide a meaningful mental health screen. Amponsah testified that he was conducting a mere medical "triage," *see id.*, whereby, "[i]f they don't have a medical problem, then the patient is stable to return to their housing unit." *Id.* Amponsah does not assess mental health himself before concluding that someone is medically cleared for lock-up. *See id.* It is unclear from Amponsah's deposition testimony whether mental health assessments happen before medical clearance for lock-up. Amponsah suggested at times that the mental health inquiry is entirely distinct from the medical clearance for lock-up inquiry, see RMSJ, Ex. 48 – Amponsah Tr. at 47:15–25, while at other times, Amponsah suggests that Dr. Sandrock had a role in determining whether someone who presented mental health concerns could return to a particular unit. *See id.* at 143:22–144:4 But it is clear from Dr. Sandrock's testimony that whether P.D. went to C-Pod was *not* up to him. *See* RMSJ, Ex. 6 – Sandrock Tr. 75:11-18.

Moreover, it is clear from Amponsah's testimony that when he said "medically clear for lock-up," he was not considering specifically whether P.D. was psychologically capable of going to C-Pod; instead, he was considering only whether he was medically fit to return to *any* unit. *See* Facts at ¶ 19. The fact that P.D. was "medically cleared for lock up" or "medically cleared to

return to his unit" thus did not reflect a psychological determination that he could withstand the deprivations of administrative segregation in general or C-Pod specifically – the nursing staff didn't look for those things, and Dr. Sandrock, who might have been capable of doing so, did not have the authority to make such a determination. And even if any assessment of mental health capacity for administrative segregation had taken place during nurse-conducted medical screenings, that assessment would not have affected classification, as Amponsah testified that he has no interaction with Pirre in her role running the Classification Committee at all. *See id.* at 90:16–91:10.

Moreover, any ongoing mental health interventions while P.D. was in administrative segregation were reactive. As Vail summarized the record of mental health interactions with P.D., "[i]nstead of . . . structured treatment . . . the only evidence . . . in the record of mental health involvement with P.D. was crisis management. When he had behavior problems mental health staff responded but that is the only record . . . of his interactions with clinicians." RMSJ, Ex. 32 – Vail Report at 24. This is true, even though, as mentioned above, Dr. Sandrock characterized P.D. as, 'responsive to supportive counseling.'" *Id.* (quoting RMSJ, Ex. 17 – MC262). Indeed, the Defendant appears to concede that P.D. did not have regular therapeutic meetings with mental health staff while he was in administrative segregation. Defendant says,

> A nurse is in C pod three times per day dispensing medication and to speak with inmates. Further, social workers are in C pod once each week . . . assisting inmates with issues. Finally, inmates can go to the Medical unit based upon their submission of sick call slips, nursing and staff observations, or requests by the inmate or medical personnel.
>
> [MSJ at 14.]

The social work meeting notes show that those meetings primarily allowed P.D. to call his lawyer; there is no evidence of therapeutic intervention at all. *See, e.g.*, RMSJ, Ex. 14, MC7, 9, 11.

iii <u>There is a genuine dispute about whether P.D. experienced the harms associated with solitary confinement of mentally-ill inmates</u>.

There is evidence that P.D. experienced these harms. There is no dispute that P.D. experienced some degree of deprivation of stimuli. Even by Dr. Appelbaum's account, P.D.'s activities in C-Pod consisted of "'chilling,' reading magazines . . . doing crossword puzzles with a pencil he was allowed to have, and filling out commissary forms." RMSJ, Ex. 28 – Appelbaum Report at 3. Because "chilling" is not an activity in and of itself, the activities P.D. described include exclusively reading and writing, which, as described above, P.D. has little facility for. There is a genuine dispute about the degree of meaningful stimulation he could thus have received from such activities. *Compare* RMSJ, Ex. 29 – Grassian Report at 28 *with* RMSJ, Ex. 1 – Appelbaum Tr. at 77–79.

His interpersonal interactions, as Dr. Appelbaum described them, included getting haircuts, talking to the nurses through the port in his door when they did "rounds," meetings with a jail social worker, and meetings with his attorneys. With respect to the activities Dr. Appelbaum describes, the record shows that these took place for very short amounts of time, insufficient to ameliorate the isolation and boredom of solitary confinement. His interpersonal interactions, as Dr. Appelbaum described them, included getting haircuts, talking to the nurses through the port in his door when they did "rounds," meetings with a jail social worker, and meetings with his attorneys. With respect to these interactions, the record shows that these took place either infrequently or for short amounts of time, insufficient to ameliorate the isolation and boredom of solitary confinement. *See* Facts at ¶ 68.

It is not surprising, then, that P.D. reported some of the symptoms that have been associated with solitary confinement, including racing thoughts, revenge fantasies, and depression. *See* Facts at ¶ 72.

In Vail's assessment, this typical reaction to isolation also motivated P.D.'s conduct: "Had he been successful [in stuffing toilet paper into the hatch], this would have given him the ability to better see into the unit and communicate with others. In my option, this action by P.D. was very likely simply an effort to fulfill his need for human contact." *See* RMSJ, Ex. 32 – Vail Report at 10-11.

There is also evidence in the record support the conclusion that P.D. made a suicide threat shortly before he left the facility. On July 6, he was found with a white string around his neck, yelling to a guard, "Officer, officer, officer, I'm going to kill myself," and he was put on suicide watch. *See* Facts at ¶ 53. Dr. Sandrock concluded based on his interview with P.D. that P.D. had not been serious about trying to kill himself, but noted that P.D. was "frustrated with being on C-Pod for so long." *Id.* As Dr. Appelbaum conceded, people who have made suicide attempts in the past sometimes later downplay the seriousness of those attempts. *See* RMSJ, Ex. 1 – Appelbaum Tr. at 147.

His experiences after release also support the idea that he experienced characteristic psychological and psychiatric harms associated with solitary confinement while he was in administrative segregation. As Dr. Grassian notes, after leaving MCACC, "P.D. spiraled downhill. He seems to have been much angrier, much more irritable than he had been before his incarceration." RMSJ, Ex. 29 – Grassian Report at 29. He was living in hotel rooms and in his car, had a manic episode during which he went for four days without sleeping, and he expressed homicidal ideation, which he had not done in the past. *See* Facts at ¶ 74. These effects are

consistent with those Dr. Grassian and others have observed in people who have experienced psychiatric and psychological harm while in solitary confinement. *See* RMSJ, Ex. 29 – Grassian Report at 19.

In light of this suffering, and correction officials' awareness of the challenges people with mental illness face while in solitary, Vail concluded that the disciplinary reaction was exaggerated in response to the threat P.D. posed. He cited several experts in the field of corrections and psychology who have observed psychiatric dangers associated with solitary confinement. Vail cites Dr. Craig Haney,[17] Dr. Terry Kupers,[18] and the American Psychiatric Association, as all raising concerns that, as Dr. Haney has testified, "segregated housing places prisoners at grave risk of psychological harm," and "[t]here is widespread agreement that mentally ill prisoners are particularly susceptible to this risk of harm." RMSJ, Ex. 32 – Vail Report at 13 (quoting Expert Declaration of Craig Haney, *Coleman v. Brown*, Doc. No. 4378, at No. 38 (E.D. Cal. Mar. 14, 2013)). Vail observed, "the conditions of confinement for P.D. and all the other inmates in C-Pod in the MCACC are precisely the conditions that concern the APA, Dr. Kupers, and Dr. Haney." *Id.* at 15.

3. *P.D.'s Case Differs From McMillan.*

Defendant cites *McMillan v. Cicchi*, No. A-2698-13T4, 2014 *N.J. Super. Unpub. LEXIS* 1780 (App. Div. July 21, 2014) as involving the same deprivations as those P.D. alleges and contends, "[t]he Appellate Court was . . . very specific that these conditions do not amount to punishment and . . . deference to jail officials was owed." MSJ at 41. As an initial matter, the Chancery Division's decision in *McMillan* was unpublished, as was the Appellate Division's

[17] Vail describes Dr. Haney as "a professor of psychology at the University of California at Santa Cruz [and] one of the foremost authorities on the use of segregation and the mentally ill in the country . . . ." RMSJ, Ex. 32 – Vail Report at 13

[18] Vail describes Dr. Kupers as one of the "foremost psychiatric experts on the impacts of segregation on the mentally-ill prisoner." *Id.* at 14.

affirmance of that decision. That case involved a different plaintiff and a different factual record from the case now before the Court, and so its value is, at best, persuasive. Nevertheless, *McMillan* differs in critical ways from the instant case, and those differences highlight that the punishment inflicted on P.D. was excessive.

McMillan involved an inmate at MCACC who had been charged along with 24 co-defendants in a 79-count indictment with being a member of "the Bloods Criminal Street Gang" and having committed crimes of violence. *McMillan*, 2014 *N.J. Super. Unpub. LEXIS* 1780, at *1. The plaintiff was confined in administrative segregation and he conceded that being placed in general population would create "significant security risks . . . for plaintiff, other inmates, sheriff's officers, MCACC employees and visitors." *Id.* at *6. The conditions he complained of involved 23 hours per day alone in his cell five days per week and 24 hours per day in his cell on weekends and holidays, but he had daily phone contact with family and friends and weekly videoconference visits. *Id.* at *3–4. The jail also arranged for "clergy of his faith to visit plaintiff in his cell [and] to have the librarian regularly provide him with books of his choosing . . . ." *Id.* at *9. There was no allegation that the plaintiff in *McMillan* suffered from any mental illness or cognitive limitations.

Due to the demonstrated security concerns associated with gang activity, the Appellate Division in *McMillan* concluded, "the purpose of [the] restrictions is not punitive, but rather serves the legitimate purpose of fostering plaintiff's safety, as well as that of other inmates, correction officers, and civilian staff at the jail and maintaining security at the facility." *Id.* at *12.

Unlike in *McMillan*, Middlesex County here articulated no specific security need for keeping P.D. in administrative segregation for several months. Moreover, the conditions in

which P.D. was confined were different from those the plaintiff experienced in *McMillan*. Most importantly, P.D. suffers from intellectual disability, bipolar disorder, and intermittent explosive disorder. These mental health concerns significantly exacerbated the suffering he experienced in C-Pod, as described above. Finally, P.D. did not have access to the contact with family and friends that the plaintiff in McMillan had, which would have helped alleviate that suffering.

The differences between *McMillan* and P.D.'s case demonstrate the arbitrariness and excessiveness of subjecting P.D. to indefinite administrative segregation for largely nuisance offenses – P.D.'s case did not involve the need to prevent potentially serious gang-related violence within the jail, instead, it involved a cognitively-impaired man whose disability made it difficult to conform his conduct to the rules. Unlike in *McMillan*, Middlesex County has not shown why administrative segregation was a reasonable response to threats P.D. posed, if any.

D. Even if the Court Finds that the Conditions in C-Pod Did Not Constitute Punishment, Middlesex County Nevertheless Violated P.D.'s Rights Under Article I, Paragraph 1 by Failing to Provide Him with Adequate Procedural Protections Either Before Assigning Him to C-Pod or During His Time There.

As the United States Supreme Court explained in *Sandin v. Conner*, "States may under certain circumstances create liberty interests which are protected by the Due Process Clause." 515 *U.S.* 472, 484 (1995). The Court in *Sandin* departed from *Hewitt v. Helms*, 459 *U.S.* 460 (1983) by holding that those interests could no longer be created by states' regulations; instead, the protected liberty interest is the "freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 *U.S.* at 484. In *Wilkinson v. Austin*, 545 *U.S.* 209 (2005), the Court identified freedom from solitary confinement as such a protected interest. The Court considered conditions of confinement in a "Supermax" prison in Ohio. Explaining that the conditions amounted to "a highly restrictive form of solitary confinement," *id.* at 214, the Court described an environment

similar in many ways to administrative segregation at MCACC. Like in MCACC, "[i]nmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day . . . During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells." *Id.* Like the cells in C-Pod, the cells had "solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates." *Id.* As in C-Pod, "[a]ll meals are taken alone in the inmate's cell instead of in a common eating area." *Id.* And as with administrative segregation, "placement in [the unit] is for an indefinite period of time, limited only by an inmate's sentence." *Id.* at 214–15.

There are, of course, differences between the facilities as well. The decision to put someone in segregation in the Supermax facility was reviewed annually, while in Middlesex County it was reviewed monthly. *See* Facts at ¶ 42. In the Supermax facility, "[a] light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline." *Wilkinson*, 545 *U.S.* at 214. The lights in C-Pod seem to turn off at night, though inmates do not control them, *see* RSMJ, Ex. 2, at 114:22–23, and P.D. was found guilty of an institutional charge for sleeping when he was supposed to be awake for a cell check. *See* RMSJ, Ex. 15 – MC285, 90. The Supreme Court noted that "[o]pportunities for visitation are rare" in the Supermax, and, "in all events are conducted through glass walls." *Wilkinson*, 545 *U.S.* at 214. As Defendant concedes, P.D. did not have any visitors while he was in administrative segregation, but videoconferences with visitors were allowed weekly, and phone calls were allowed while in the recreation cages. Finally, in *Wilkinson*, placement in segregation disqualified "an otherwise eligible inmate for parole consideration," *id.* at 224, while P.D. does not contend that at MCACC, placement in administrative segregation forecloses an inmate's ability to leave the facility.

Importantly, the *Wilkinson* Court noted that inmates retained a Fourteenth Amendment right to due process before entering the solitary confinement unit there even if the use of such confinement was necessary to ensure the safety of the facility: the "harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance." *Id.* at 224.

Here, the conditions in administrative segregation involved "'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Id.* at 223 (quoting *Sandin*, 515 *U.S.* at 484). While the conditions in administrative segregation were in some ways less egregious than the conditions in the Supermax facility considered in *Wilkinson*, the baseline against which those conditions are compared – the "ordinary incidents of prison life" – is different too. In *Wilkinson*, the plaintiffs were convicted prisoners whose comparison was prison, while here, P.D. was a pretrial detainee for whom the ordinary incidents of life in confinement were those less restrictive incidents of life in a jail.

P.D. thus had a protected liberty interest in avoiding solitary confinement, and so was entitled to procedural protections according to the framework *Wilkinson* described. *Wilkinson* relied on the framework from *Mathews v. Eldridge*, 424 *U.S.* 319 (1976) in evaluating the procedural protections provided. That framework considers: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 *U.S.* at 335.

Though the *Wilkinson* Court, in applying these factors, found the procedural protections to be sufficient, their application involves different considerations here. First, the private interest in the instant case is distinct from the interest the *Wilkinson* Court considered in two ways – first, as noted above, P.D. was a pretrial detainee, and so the "attendant curtailment of liberties," *Wilkinson*, 545 *U.S.* at 225, is more minimal for him than it would be for a convicted prisoner. Second, P.D. suffers from serious mental illnesses – bipolar disorder and intellectual disability – that exacerbated his suffering in solitary confinement and so heightened his interest in avoiding it.

Most importantly, the second *Mathews* factor weighs more heavily in favor of P.D. than it did the plaintiffs in *Wilkinson*. Here, one additional necessary procedural protection was a confirmation by mental health staff that P.D. was psychologically fit for administrative segregation prior to his placement there, along with ongoing psychological monitoring that could result in his removal if he became unfit to remain there. These protections are essential to avoiding the erroneous deprivation of keeping mentally-ill inmates in solitary confinement. The initial assessment was not done in a fashion that could have enabled P.D. to avoid administrative segregation, because, as described above, the mental health staff was not required to "clear" inmates to go to administrative segregation during P.D.'s confinement. Similarly, mental health staff were not permitted to override custody decisions after an inmate had been placed in administrative segregation. There would thus be enormous value in the additional procedurals safeguard of requiring a psychologist or psychiatrist to approve of placement in administrative segregation prior to allowing someone to go there and monitoring it after placement. Indeed, MCACC recognizes the value of such a safeguard, because it has put that very practice in place since P.D.'s time there. *See, e.g.*, RMSJ, Ex. 6 – Sandrock Tr. at 75:11–18.

Moreover, in *Wilkinson*, the Supreme Court observed that the inmate was able to appear in person to contest the placement. *See Wilkinson*, 545 *U.S.* at 216. Here, Middlesex County contends that its policy for reviewing classification decisions allows for prisoner input. *See* MSJ at 13. The policy provides that, in compliance with *N.J.A.C.* 10A:31-22.5, "all sentenced inmates shall be given 48 hours notice prior to their classification hearing and shall have the opportunity to appear and participate in their hearing," and, in compliance with *N.J.A.C.* 10A:31-22.6, "all sentenced inmates shall be given the opportunity to appeal the decision of the Classification Committee to the adult county correctional facility Administrator or designee." *See* RMSJ, Ex. 53 – Classification manual, at MC312. As discussed below, that policy is not followed in practice.

Several practices of MCACC impeded P.D.'s ability to appear in front of the Classification Committee. First, prisoners are not told when the Classification Committee will review his classification. *See* RMSJ, Ex. 43 – Pirre Tr. 53:15–17.

Next, the policy and practice of the jail is to require appeals to be submitted in writing, and, as discussed above, P.D. is unable to read and write fluently. In support of the proposition that inmates have the opportunity to appeal classification decisions, Defendant cited the Inmate Handbook. *See* MSJ 13. Defendant did not cite to a specific provision within the Handbook, and the only provision that appears to address appeals concerns appeals from disciplinary decisions. *See* Ex. 57, Inmate Handbook, MC 421. This provision informs inmates that appeals of disciplinary decisions "must be submitted in writing . . . ." *Id.* The Classification Committee decisions P.D. received also informed him that he could appeal classification determinations in writing. *See, e.g.*, RMSJ, Ex. 38, MC37. Though Pirre testified that a prisoner who cannot read or write may receive assistance from a social worker in appealing a classification decision, *see*

RMSJ, Ex. 43, Pirre Tr. 55:25–56:21; 75:5–10, it is clear from Pirre's testimony and the written record from P.D.'s time in C-Pod that when he asked his social worker to help him meet with the Classification Committee to review his determination, he was continuously denied access. *See* Facts at ¶ 43.

Thus, while the policy purported to allow for written appeals, and while the stated practice was for inmates who could not write to ask social workers for assistance, in fact, the ability to appear in person in Classification Committee meetings was sporadically granted. Without a reliable practice for in-person review, the Classification Committee decisions did not reflect the ongoing necessity of confinement in C-Pod and were instead inclined to continue the *status quo* without a meaningful assessment of necessity, as the *pro forma* letters P.D. received about his continued confinement show. *See* Facts at ¶ 42.

Finally, with respect to the third *Mathews* factor, the State's interest, there is at least a genuine issue as to the nature of that interest. It appears that Middlesex County has already put in place a requirement of approval by mental health staff prior to placing inmates in administrative segregation, *see* RMSJ, Ex. 6, Sandrock Tr. at 75:11–18, suggesting that this procedure is not cost-prohibitive. With respect to in-person review, Middlesex County has never contended that there is any prohibitive cost associated with the practice; instead, the County maintains that it currently employs that practice, a contention not born out by the record. Thus, the State has demonstrated no substantial interest in avoiding these additional procedural protections.

IV. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO DEFENDANT'S LIABILITY UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION.

P.D. contends that Defendant violated his rights under the New Jersey Law Against Discrimination ("LAD") by failing to provide reasonable modifications for his disability and by failing to ensure appropriate integration with non-disabled inmates. Summary judgment on

P.D.'s LAD claim is inappropriate because questions of LAD violations are by their nature fact-sensitive, *see Nicolas v. Ocean Plaza Assoc.*, 388 *N.J. Super.* 571, 588 (App. Div. 2006), and genuine issues of material fact exist in this case as to P.D.'s LAD claim, as discussed herein. Indeed, the core LAD inquiry here – whether MCACC made reasonable modifications for P.D.'s disability – is generally a question of fact for the jury. *See, e.g.*, *Hovsons, Inc. v. Township of Brick*, 89 *F.*3d 1096, 1101 (3d Cir. 1996).

Because ample evidence in the record supports the conclusion that Defendant put P.D. in administrative segregation for behavior caused by his disability, failed to make reasonable modifications for P.D. and failed to provide services to him in an integrated setting, thereby denying him the benefits of the jail's programs and services by reason of his disability, Defendant's motion for summary judgment on P.D.'s LAD claim should be denied.

A. New Jersey Courts Interpret the LAD in Light of Federal Anti-Discrimination Laws, in this Case, Title II of the Americans with Disabilities Act.

Under *N.J.S.A.* 10:5-12 (f)(1), it is unlawful discrimination "for any owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof . . . ." *N.J.S.A.* 10:5-4 also provides that "[a]ll persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation" without discrimination on the basis of disability. The LAD is to be construed liberally, for "the overarching goal of the Law is nothing less than the eradication of the cancer of discrimination." *Fuchilla v. Layman*, 109 *N.J.* 319, 334 (1988) (internal quotation marks omitted). *See also, e.g.*, *Jackson v. Concord Co.,* 54 *N.J.* 113 (1969).

In interpreting the LAD's protections, "[i]t is well-settled law in New Jersey that our state courts . . . should look to federal anti-discrimination cases 'as a key source of interpretive authority.'" *Jones v. Aluminum Shapes*, 339 *N. J. Super.* 412, 421 (App. Div. 2001) (

quoting *Grigoletti v. Ortho Pharmaceutical Corp.*, 118 *N.J.* 89, 97 (1990)). The federal statutory analogue to the LAD for inmates' claims is Title II of the Americans with Disabilities Act (ADA), 42 *U.S.C.* §§ 12131–12135. *See Jones*, 339 *N. J. Super.* at 425; *Chisolm v. McManimon*, 275 *F.*3d 315, 325 (3d Cir. 2001) ("Title II of the ADA applies to services, programs, and activities provided within correctional institutions.").

Title II of the ADA provides that "no qualified individual with a disability shall, by reason 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." 42 *U.S.C.* § 12132. Specifically, the regulations require prisons and jails to make reasonable modifications for inmates with disabilities:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.
>
> [28 *C.F.R.* § 35.130(b)(7).]

To prevail on a claim under the LAD according to the standard set forth in Title II jurisprudence, a plaintiff must show that:

> (1) he is a 'qualified individual with a disability'; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.
>
> [*Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 *F.*3d 976, 978 (9th Cir. 1997).]

The ADA also contains an "integration mandate," which provides that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities . . . ." 28 *C.F.R.* § 35.130(d). *See also* 28 C.F.R. § 35.152 (integration mandate for program access in jails and prisons); *Olmstead v. L.D.*, 527 *U.S.* 581, 600 (1999) ("unjustified institutional isolation of persons with disabilities is a form of discrimination").

B. Ample Evidence in the Record Supports the Conclusion That Defendant Failed to Make Reasonable Modifications for P.D.'s Disability.

Defendant failed to provide P.D. with reasonable modifications in compliance with Title II, and thus excluded him from programs and benefits on the basis of his disability, when it subjected him to long-term solitary confinement as a result of conduct arising from his disability, and when MCACC kept P.D. in administrative segregation in spite of the fact that he experienced ongoing harms as a result of his disability while he was there.

Defendant concedes the jail is a place of public accommodation, MSJ at 47, and it does not contest that P.D. is a qualified individual with a disability within the meaning of the LAD or the ADA. *See* MSJ at 4; 47–50.

Instead, Defendant argues that it is entitled to summary judgment because (1) "Plaintiff was given an equal opportunity to benefit or participate in the services provided at MCACC," or was treated in an "atypical" fashion because he only served part of his administrative segregation term in C-Pod, *see* MSJ at 49, and (2) because the ADA regulations do not require jails to provide services to inmates to individuals who "pose[] a direct threat to the health or safety of others," and "after the myriad of infractions and attempts to house PD in units other than C pod, there was a rational basis for PD's placement in C pod." *Id.* at 48–49. Thus, the defendant

appears to rely on the second part of the test – P.D. was not in fact excluded from services – and on the "direct threat" defense available under the ADA.

1. *There is a genuine issue as to the material fact of whether P.D. had an equal opportunity to benefit from or participate in the services the jail offered.*

The claim that P.D. had an "equal opportunity to benefit or participate in the services" in the jail because he was treated similarly to non-disabled inmates ignores the anti-discrimination principles at the core of the ADA and LAD. These statutes recognize that "failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion," and so the Acts impose on places of public accommodation the responsibility "to take reasonable measures to remove . . . barriers to accessibility." *Tennessee v. Lane*, 541 *U.S.* 509, 532 (2004). *See also, e.g.*, *Presta v. Peninsula Corridor Joint Powers Bd.*, 16 *F. Supp.* 2d 1134, 1136 (N.D. Cal. 1998) ("[A] person with a disability may be the victim of discrimination precisely because she did not receive disparate treatment when she needed accommodation. In the context of disability, therefore, equal treatment may not beget equality, and facially neutral policies may be, in fact, discriminatory . . . ."). In keeping with this principle, the ADA requires that "'where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity,' a public entity must furnish 'appropriate auxiliary aids and services.'" *Chisolm*, 275 *F.*3d at 325 (quoting 28 *C.F.R.* § 35.160(a)).

The record supports the conclusion that Defendant excluded P.D. from programming and services based on his disability by failing to make a reasonable accommodation for that disability.

As described in Part III.B, while in administrative segregation, P.D. was denied access to meaningful human interaction, freedom of movement, external stimulation, outdoor recreation,

congregate religious worship, and other services, programs, and activities of the jail. Under the LAD, Defendant was required to make the reasonable accommodation of taking P.D.'s disability into account in making housing and disciplinary decisions and not classifying or housing him in a way that would exclude him from programming because of conduct caused by his disability. As is clear from his evaluation of P.D., Dr. Sandrock recognized that P.D.'s behavioral outbursts were caused by his disability. *See* Facts at ¶ 27 (reporting that P.D.'s "neurological and psychiatric condition . . . significantly affects his judgment . . . and impulse control," and conceding that he "does not present with an overtly criminal or antisocial character," instead, he is "a primitive, simple, reactive, impulsive, immature male who is poorly equipped to delay gratification or tolerate frustration."). In spite of recognition by jail officials that P.D.'s disability caused his outbursts, Defendant nevertheless disciplined him by sending him to units where he did not have equal access to services, *see, e.g.*, Facts at ¶¶ 26–55, and so he was excluded from programming and services by reason of his disability.

Defendant's contention that P.D. "was housed in C pod for only a portion of" the time in which he was on administrative segregation status is irrelevant to the LAD inquiry, because Defendant has not shown how P.D.'s placement in SNU while on administrative segregation afforded him greater access to the jail's programming than did his placement in C-Pod. Moreover, for nearly four months of his time in MCACC, P.D. was indeed housed in C-Pod. Thus, in spite of P.D.'s disability, and for behavior that was caused by it, P.D. ultimately received the most restrictive long-term placement available to the jail: administrative segregation in C-Pod. It is clear from the record that any initial modification for P.D.'s disability was ultimately rejected in favor of confinement in C-Pod that ignored the particular needs of his disability.

While P.D. was in administrative segregation, Defendant again failed to make a reasonable accommodation by failing to provide him with therapeutic services. Though Dr. Sandrock recognized that P.D. would benefit from therapeutic intervention, RMSJ, Ex. 17 – MC262, and from placement in a residential placement with easy access to medical care, *see* RMSJ, Ex. 8 – MC279; RMSJ, Ex. 6 – Sandrock Tr. 84:1 – 5, P.D. was nevertheless placed in SNU on administrative segregation and in C-Pod without any evidence of therapeutic intervention for several months at a time. Quite the opposite – P.D. was subjected to the stimulus-deprived environment of C-Pod, in spite of the jail's knowledge of his cognitive limitations. *See* RMSJ, Ex. 4 – MC212; Ex. 45 – Oct. 18, 2013 Dr. Sandrock Notes, MC283. This deprivation of stimulation, exacerbated by P.D.'s limited cognitive functioning, caused P.D. disproportionate harm, as discussed in Part III.C.2.b, *supra*, and amounted to a denial of services because of P.D.'s disability.

A genuine issue of material fact thus exists as to the questions of whether Defendant made reasonable accommodations in its placement and disciplinary decisions for P.D. and in the services he received while in administrative segregation. There is ample evidence to support the contention that it did not, and that the placement and dearth of programming amounted to a denial of programming based on P.D.'s disability. As such, summary judgment is inappropriate on this point.

2. *The record supports the contention that MCACC violated the integration mandate.*

P.D. also maintains that Middlesex County violated his rights under the LAD by failing to ensure appropriate integration with non-disabled inmates in violation of 28 *C.F.R.* § 35.130(d) and 28 *C.F.R.* § 35.152. The ADA's integration mandate reflects a concern that segregation has a

harmful effect on those with disabilities, including mental illness. By restricting P.D. to solitary confinement, MCACC entirely failed to house him in an integrated setting.

The regulations place the burden on the institution to provide services to people with disabilities in integrated settings unless the institution shows that such integration is not appropriate. *See* 28 *C.F.R.* § 35.152 (noting that institutions "shall" follow the integration mandate principles "[u]nless it is appropriate to make an exception"). *See also* Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012). MCACC has not shown why administrative segregation was "the most integrated setting appropriate" under 28 C.F.R. § 35.130(d) or why it was "appropriate to make an exception" under 28 *C.F.R.* § 35.152.

In light of the evidence P.D. cites for the lack of integration he experienced due to his placement in administrative segregation, *see* Part III.B, *supra*, and for the lack of necessity for such isolation, *see* Part III.C.a.ii, *supra*, genuine issues of material fact exist as to whether Defendant violated LAD by failing to provide services to P.D. in an integrated setting.

3. *There is a genuine issue as the material fact of whether P.D. presented a "direct threat," such that Defendant was excused from providing reasonable modifications for P.D. under the LAD.*

Defendant contends that it was not required to provide reasonable modifications for P.D. because he presented a "direct threat." MSJ at 48–49. To prevail on a "direct threat" defense, a defendant must show that it determined there was a threat after conducting an:

> individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

[28 C.F.R. § 35.139(b). *See also School Board of Nassau County v. Arline*, 480 *U.S.* 273, 278–88 (1987).]

This is a "heavy burden." *Lockett v. Catalina Channel Express, Inc.*, 496 *F.*3d 1061, 1066 (9th Cir. 2007) ("it is clear that ultimately the entity asserting a 'direct threat' as a basis for excluding an individual bears a heavy burden of demonstrating that the individual poses a significant risk to the health and safety of others."). As demonstrated in Part III.C.2.a.ii, *supra*, there is a genuine issue of material fact as to whether P.D. presented a "direct threat," such that Defendant would have been justified in failing to provide reasonable accommodations for his disability.

V. A GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING WHETHER DEFENDANT'S TREATMENT OF P.D. WAS EGREGIOUS, SO SUMMARY JUDGEMENT IS INAPPROPRIATE FOR P.D.'S PUNITIVE DAMAGES CLAIM UNDER THE LAD.

Defendant contends that P.D.'s punitive damages claims must be dismissed. With respect to P.D.'s constitutional claims, Defendant is correct: punitive damages are unavailable against municipal defendants under the New Jersey Civil Rights Act. *Thigpen v. City of East Orange,* 408 *N.J. Super.* 331, 344 (App. Div. 2009) As such, summary judgment is proper on Defendant's Point IV, A. MSJ at 51.

With respect to LAD, however, the statutory scheme permits punitive damages, and a genuine issue of material fact exists as to whether punitive damages for Defendant's LAD violations are warranted here. The New Jersey Supreme Court has set forth "two distinct conditions that must be met as prerequisites to the award of punitive damages in a discrimination suit under the LAD." *Rendine v. Pantzer*, 141 *N.J.* 292, 313 (1995). A plaintiff must show: "(1) 'actual participation in or willful indifference to the wrongful conduct on the part of upper

management' and (2) 'proof that the offending conduct [is] "especially egregious."'" *Cavuoti v. N.J. Transit Corp.*, 161 *N.J.* 107, 113 (1999) (*quoting Rendine*, 141 *N.J.* at 314).[19]

As to the first inquiry, Defendant does not dispute that to the extent P.D. was subjected to wrongful conduct, it was the result of policies and practices that had been adopted by the MCACC at the highest level. *See* MSJ 52-53 (arguing only that conduct was not egregious; not that "upper management" was not involved in the critical decision making).

As to the second inquiry, in order to prevail on a punitive damages claim under the LAD, P.D. must show that Defendant's conduct represented a "wanton and willful disregard of the rights of another." *Cavuoti v. New Jersey Transit Corp.*, 161 *N.J.* 107, 121, n.2 (1999). That is, P.D. must show that Defendant's failure to make reasonable modifications for P.D. (Point IV, B, *supra*) reflected "knowledge of a high degree of probability of harm and reckless indifference to the consequences." *Id.* There exists a genuine dispute as to this material issue.

As noted in Point II, *supra*, as far back as the 1980s and 1990s, courts throughout the country recognized that subjecting mentally-ill prisoners to solitary confinement caused significant harm. This understanding has been recognized in the corrections field. RMSJ, Ex. 32 – Vail Report at 15. Indeed, Warden Cranston recognized both the harm caused and the ability to accommodate mental ill prisoners before he came to the MCACC. *See* Facts at ¶ 70. Defendant's own corrections expert explained that almost two decades ago, he instituted procedures to exclude mentally-ill inmates from segregation:

> I . . . asked my mental health staff to tell me whether an individual was so mentally ill that placing that individual in segregated housing . . . was contraindicated. And . . . whether or not their acting out behavior was the result of their mental illness and, if so,

[19] While both *Rendine and Cavuoti* are employment discrimination cases, and though it is clear that punitive damages may also be awarded in public accommodation cases, *Dale v. BSA*, 160 *N.J.* 562, 580 (1999) (noting that Dale sought punitive damages), *rev'd on other grounds*, 530 *U.S.* 640 (2000), New Jersey courts have not set forth a separate standard for public accommodation cases such as this one.

> if it was treatable. And so we can find alternative ways of dealing with it.
>
> [RMSJ, Ex. 2 – Horn Tr. 46:2-11.]

Horn thus acknowledged dual rationales for that policy: to determine whether "the behavior [was] a manifestation of their mental illness" and to learn whether "the placement [will] be particularly harmful." *Id.* at 46:12-23.

The fact that corrections leaders – including the Warden and Defendant's own expert – had been making reasonable accommodations for mentally-ill prisoners to exclude them from the harmful conditions of solitary confinement for years before P.D. was refused such accommodations raises the inference that the MCACC was aware "of a high degree of probability of harm and reckless[ly] indifferen[t] to the consequences" of ignoring it. *Cavuoti*, 161 *N.J.* at 121, n.2. As such, summary judgment is inappropriate as to the claim for punitive damages under the LAD.[20]

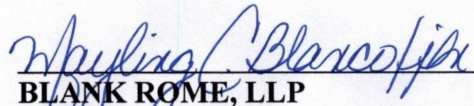
[20] P.D. also notes that he has also made claims for actual damages, which are not addressed by Defendant's motion for summary judgment. These claims will thus remain before the Court regardless of the disposition of Defendant's summary judgment motion regarding punitive damages.

CONCLUSION

For the reasons discussed herein, summary judgment is appropriate only with respect to P.D.'s Article I, Paragraph 12 claim and his claim for punitive damages for Defendant's constitutional violations. But with respect to P.D.'s claim under Article I, Paragraph 1 of the New Jersey Constitution, and the LAD, summary judgment is improper. P.D. has identified genuine issues of material fact concerning these claims, such that he may be entitled to declaratory relief, injunctive relief, and actual damages as to both claims, as well punitive damages pursuant to the LAD. P.D. thus asks that with respect to those claims, Defendant's motion be denied.

Respectfully Submitted,

Dated: December 6, 2016



BLANK ROME, LLP
A Pennsylvania LLP
Mayling C. Blanco (NJ ID: 040732006)
301 Carnegie Center, 3rd Floor
Princeton, NJ 08540
Phone: (609) 750-7700
Fax: (609) 750-7701
mblanco@blankrome.com

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
Alexander Shalom (NJ ID: 021162004)
Rebecca Livengood (NJ ID: 028122012)
89 Market Street, 7th Floor
P.O. Box 32159
Newark, NJ 07102
Tel: (973) 642-2086
Fax: (973) 642-6523
ashalom@aclu-nj.org
rlivengood@aclu-nj.org

Attorneys for Plaintiff