

# MEMORANDUM

From: Margo Schlanger  
Date: December 9, 2015  
Re: The ADA/Rehab Act and solitary confinement

This memo analyzes the potential use of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (the Rehab Act, Rehabilitation Act, or Section 504) and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (the ADA or Title II), to argue against the use of solitary confinement or other very high-security housing for people with disabilities. The analysis under the ADA and the Rehabilitation Act is substantially similar. They impose five kinds of requirements that affect jails and prisons. These overlap, conceptually, but are usefully analyzed separately. They are:

- General prohibitions against discrimination
- Reasonable modifications
- Physical accessibility
- Integration mandate
- Communications-related requirements (not relevant here, and therefore not further discussed)

The basic takeaway from this memo is that automatic or categorical decisions to house people with disabilities in solitary confinement because of those disabilities are the most easily attackable as discriminatory. As housing decisions get more individuated, challenging the decisions gets harder, but there remains room to try under several theories. There is also a novel, but I think strong, argument that the conditions within solitary or high security housing must be reasonably modified to accommodate the special vulnerabilities of people with disabilities.

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It is followed by an Appendix, which includes relevant plaintiffs’ briefs and the like.

Note: there's really very little relevant authoritative law in this area. This memo errs on the side of including material that might be helpful—but it's mostly suggestive and orienting rather than strong precedent.

## I. Statutory framework

For state and local jails and prisons, both the Rehab Act and the ADA almost certainly apply.<sup>1</sup> Plaintiffs should probably plead both.<sup>2</sup> In the rare situation that only one of the statutes is available, it probably doesn't make a lot of difference. *See* 42 U.S.C. §§ 12201(a) (“nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title”); 12134(b) (“regulations . . . shall be consistent with . . . the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29”).

Section 504, 29 U.S.C. § 794(a), provides:

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency . . .

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<sup>1</sup> The ADA's Title II covers all non-federal jails and prisons: its definition of “public entity” includes state and local government agencies, without respect to federal support. 42 U.S.C. § 12131(1). Federal agencies, however, are not included under Title II. Instead, federal jails and prisons are covered by the Rehab Act. The Rehab Act also covers most state and local jails and prisons, because they receive federal financial assistance. *See* 29 U.S.C. § 794(b)(1)(A) (defining “program or activity” as “a department, agency, special purpose district, or other instrumentality of a State or of a local government”). For indexes to federal support, *see* <http://www.justice.gov/crt/possible-federal-sources-assistance-federally-assisted-programs-or-activities>, citing:

- Office of Management and Budget, USA Spending.gov, available at <http://www.usaspending.gov/>
- U.S. Department of Health and Human Services, Tracking Accountability in Government Grants System (TAAGS), available at <http://taggs.hhs.gov/index.cfm>
- Office of Justice Programs, OJP Grant Awards, available at <http://grants.ojp.usdoj.gov:85/selector/main>
- Single Audit Act and OMB Circular 133 database, available at <http://harvester.census.gov/sac/dissem/entity.html>

<sup>2</sup> Because the Rehab Act is Spending Clause legislation (rather than being authorized by the Fourteenth Amendment's Section 5), Rehab Act coverage may be helpful in damages actions to avoid the issue whether Congress was constitutionally authorized to make a state liable in damages for the conduct in question. *See Tennessee v. Lane*, 541 U.S. 509 (2004); *U.S. v. Georgia*, 546 U.S. 151 (2006). But in injunctive suits against state and local facilities, Rehab Act coverage may not add much; the ADA applies, the Section 5 issue is not relevant (because Eleventh Amendment immunity need not be abrogated), and the ADA covers the same ground as the Rehab Act but in more detail and occasionally a bit more strictly. On the other hand, there may be some lurking Commerce Clause issue. Play things safe; plead both if you can.

The Supreme Court has explained that this provision guarantees “meaningful access” to qualified individuals with a disability to federally conducted or supported programs, services, or activities. *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

Title II, 42 U.S.C. § 12132, similarly provides:

[N]o 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.

“[S]ervices, programs, or activities” encompass the operations of jails and prisons. *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 210–11 (1998).

So, to bring a lawsuit under the ADA and/or the Rehabilitation Act, prisoners with disabilities must show that they are: (i) disabled within the meaning of the statutes, (ii) “qualified” to participate in the relevant program, and (iii) excluded from, not allowed to benefit from, or subjected to discrimination in the program because of their disability. 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

*Disability.* Under both the ADA and Section 504, a person has a disability if: (i) a physical or mental impairment substantially limits one or more of his or her major life activities; (ii) he or she has a record of such an impairment; or (iii) he or she is regarded as having such an impairment. 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(2). Particularly relevant here, “mental” impairments are expressly included if they substantially limit major life activities. The ADA regulations on the definition of disability, at 28 C.F.R. § 35.104(1)(i), are quite capacious. Moreover, in the ADA Amendments Act of 2008, Congress clarified/broadened the definition. Under the ADAAA, an impairment constitutes a disability even if it (1) only substantially limits one major life activity; or (2) is episodic or in remission, if it would substantially limit at least one major life activity if active. ADA Amendments Act of 2008, Pub. L. No. 110-325 Sec. 3, 122 Stat. 3553, 3556. People with serious mental illness certainly have a disability; people with mental illness that is less serious probably do.

*Qualified individual.* The Rehab Act does not define “qualified individual with a disability,” but the ADA does. That definition, 42 U.S.C. § 12131(2), provides:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Reasonable modification is thus the Title II (and Title III) equivalent of the more familiar “reasonable accommodation” requirement in Title I.

*Discrimination.* It is evident from the statutory text that discrimination can mean categorical “exclu[sion] from participation in or . . . deni[al of] the benefits of the services, programs, or

activities of a public entity,” but the language “or be subjected to discrimination by any such entity” makes it clear that discrimination is also broader. The concept is further developed in caselaw and the ADA regulation, as discussed in Parts II and III of this memo.

## II. Regulations

Section 504’s regulations are issued by federal funding agencies. Given the subject matter, the two that are likely most relevant here are the DOJ “coordination regulation,” at 28 C.F.R. pt. 41, which is a sort of benchmark for all the others, and the DOJ Office of Justice Programs regulation, at 28 C.F.R. subpt. G § 42, 501-42.540, which governs DOJ funding of prisons. The Rehab Act regulations are essentially consistent with the ADA regulations. Generally, though, it’s the ADA regulations, at 28 C.F.R. pt. 35, that are most useful; they are newer, more detailed, and sometimes stricter. So that’s what I’ll analyze here. Note that they are legislative regulations, promulgated after notice and comment, and with explicit statutory authorization, 42 U.S.C. § 12134(a), so they are entitled to substantial deference. *See Olmstead v. L.C.*, 527 U.S. 581, 597-98 (1999) (“Because the Department is the agency directed by Congress to issue regulations implementing Title II, . . . its views warrant respect. We need not inquire whether the degree of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), is in order.”).

The ADA Title II regulation adds considerable detail to the statute’s non-discrimination requirement:

### A. **General prohibition against discrimination**

28 C.F.R. § 35.130 is the major source of law. It provides for both disparate treatment and disparate impact liability (see (b)(3)), and states in pertinent part:

- (a) No qualified individual with a disability shall, on the basis of 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 public entity.
- (b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—
  - (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
  - (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
  - (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
  - (iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals

with disabilities with aids, benefits, or services that are as effective as those provided to others; . . .

...  
(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration—

(i) That have **the effect** of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the **purpose or effect** of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; . . .

This same regulation develops the idea of “reasonable modifications,” and also includes what is usually called the “integration mandate.” See emphasized language below:

(b) (7) 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.

(8) A public entity shall not impose or apply eligibility criteria that screen out **or tend to screen out** an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in **the most integrated setting appropriate** to the needs of qualified individuals with disabilities. . . .

In guidance accompanying the original 1991 regulation, the Department of Justice explained that “integrated setting” means “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.” 28 C.F.R. pt. 35, App. B (1991), *available at* <https://www.law.cornell.edu/cfr/text/28/part-35/appendix-B>.

This regulation also includes an affirmative defense<sup>3</sup> relating to safety:

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

Finally, 28 C.F.R. § 35.139 adds the similar “direct threat” defense:<sup>4</sup>

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make 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.

## **B. Program Accessibility**

The requirement of physical accessibility gets separate treatment in the regulations. As developed there, for existing facilities the requirement is not accessibility for each and every facility, but to the public entity’s programs considered more generally. This is generally called “program accessibility,” and 28 C.F.R. § 35.149-35.152 are the “program accessibility” or “program access” provisions. 28 C.F.R. § 35.149 specifies:

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity’s facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity.

The rules are stricter for buildings that post-date the ADA. *See* 28 C.F.R. § 35.150-35.151. But even when facilities predate the (1990) ADA, the requirement is that “each service, program, or activity so that the service, program, or activity, when viewed in its entirety, [be] readily accessible to and usable by individuals with disabilities.” 28 C.F.R. § 35.150(a).

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<sup>3</sup> *Cf.* 28 C.F.R. pt. 35, App. A, at 589 (1994), available at <http://www.gpo.gov/fdsys/pkg/CFR-2013-title28-vol1/pdf/CFR-2013-title28-vol1-part35-appA.pdf> (“the burden of proof to demonstrate that such devices cannot be operated in accordance with legitimate safety requirements rests upon the public entity”).

<sup>4</sup> *See, e.g., Dadian v. Vill. of Wilmette*, 269 F.3d 831, 840 (7th Cir. 2001) (defendant has the burden of showing a direct threat).

Although § 35.150(a) may require a public entity to modify its existing facilities to be accessible to individuals with disabilities, it “does not necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities.” 28 C.F.R.

§ 35.150(a)(1). Under this subsection, a public entity is not required to take an action that it “can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.” 28 C.F.R. § 35.150(a)(3). However, a public entity “shall take any other actions” to “ensure that individuals with disabilities receive the benefits or services provided by the public entity.” *Id.*

Any decision not to take an action on such grounds must be made “after considering all resources available for use in the funding and operation of the service, program, or activity” and must be accompanied by a written statement of the reasons setting out the basis for the determination. *Id.* Notwithstanding the fundamental alterations and undue burden defenses available to public entities, “the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases.” Preamble to 1991 Title II Regulation, 56 Fed. Reg. 35708.

A very useful summary of all of this, with much more detail, is included in United States’ Memorandum of Law as Amicus Curiae on Issues under the Americans with Disabilities Act and Rehabilitation Act that are Likely to Arise on Summary Judgment or at Trial, *Miller v. Smith*, 6:98-cv-109-JEG (S.D. Ga., June 21, 2010), *available at* [http://www.ada.gov/briefs/miller\\_amicus.pdf](http://www.ada.gov/briefs/miller_amicus.pdf) (and in Appendix). Note that this brief was filed in June 2010, and there were new regulations—though not, I believe, different in pertinent part—published September 2010.

### **C. Prison/Jail Specific Program Access**

The program access subpart of the regulations includes specific provisions governing jails and prisons. 28 C.F.R. § 35.152. This section repeats the prior requirement of non-discrimination in program access, with specific reference to jails and prisons. It also increases the specificity of the integration mandate, emphasizing prison and jail housing. It provides, in pertinent part:

#### *(b) Discrimination prohibited.*

(1) Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or unusable by individuals with disabilities, 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 public entity.

(2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless it is appropriate to make an exception, a public entity—

- (i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;
- (ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

- (iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed; and
  - (iv) Shall not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.
- (3) Public entities shall implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing.

### III. Applicability to Solitary Confinement

So what has just been set out includes:

- General prohibition against discrimination—including:
  - categorical discrimination, which can be a matter of disparate treatment or disparate impact.
  - refusal to implement reasonable modifications to allow equal participation (bounded by the defense of fundamental alteration)
- Physical/program access requirements (bounded by fundamental alteration and undue financial/administrative burden defenses)
- Integration mandate
- All subject to the “legitimate safety requirements” and “direct threat” defenses.

Now to apply this set of ideas to the use of solitary confinement for people with disabilities—who, it should be noted, are likely to constitute a large portion of those in solitary confinement.

**Theory 1: When prisoners are isolated “because of” their serious mental illness, intellectual disability, or physical disability, that constitutes unlawful discrimination, depriving them unjustifiably of equal access to services and programs provided most other prisoners. 28 C.F.R. § 35.130(b)(1)(i)-(iv).**

This theory applies cleanly when a prison assigns people with disabilities to segregation cells without any additional factors. For example, in *Armstrong v. Brown*, 4:94-cv-02307, 2015 WL 496799 (N.D. Cal. Feb. 3, 2015), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0040.pdf> (and in the Appendix), the District Court held that the state was “regularly housing Armstrong class members [prisoners with mobility impairments] in administrative segregation due to lack of accessible housing, in violation of this Court’s previous orders and the Americans with Disabilities Act (ADA).” Similarly, in its findings letter under the Civil Rights of Institutionalized Persons Act (CRIPA), addressing conditions of confinement at the Pennsylvania State Correctional Institution at Cresson, the Department of Justice concluded that the ADA required Cresson to “modify its policies and practices so prisoners with serious mental illness or intellectual disabilities are not automatically or categorically housed in segregation and instead receive the services they need.” See Civil Rights Division, U.S. Dep’t of Justice, Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation (May 31, 2013), at pp. 33-34, *available at*



[http://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson\\_findings\\_5-31-13.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf) (and in the Appendix). The judicial finding in *Armstrong* sounded in disparate treatment; the DOJ's Cresson finding was a bit more ambiguous (the sentence before the one just quoted mentions "methods of administration that have the effect of subjecting prisoners with serious mental illness or intellectual disabilities to discrimination" which sounds more like disparate impact than disparate treatment).<sup>5</sup>

But what if the assignment is not directly motivated by the prisoner's disability (and the prison's inability to cope with that disability), but by some conduct *caused by* the disability? For example, what if the entity assigns a prisoner to segregation not because he has a serious mental illness, but because of misconduct whose origin is serious mental illness? An apparent minority of courts categorize this kind of decision as "because of disability," but more disagree.<sup>6</sup> These cases are mostly ADA Title I cases and Rehab Act cases. I haven't located any ADA Title II cases addressing the issue. Note that there's therefore a (very weak) argument that the plaintiffs are helped by the text of Title II prohibiting discrimination "by reason of such disability," rather than—like Section 504—"solely by reason of . . . disability."

The courts that have rejected ADA/Rehab Act liability on these kinds of allegations considered them to be making a (flawed) disparate treatment claim. The rulings have—sometimes explicitly—thus left open the alternative theories of disparate impact and reasonable accommodation/ modification. The most prominent example is the Supreme Court's decision in *Raytheon Co. v. Hernandez*, 540 U.S. 33 (2003), an ADA employment action in which the Court rejected the Ninth Circuit's holding that a particular policy (a ban on rehiring past employees who had been dismissed for misconduct) constituted disability discrimination when the misconduct in question was caused by a disability. The Court explained that this liability theory was properly considered not under disparate treatment but under disparate impact, which the plaintiff had failed to timely raise. Similarly, Judge Posner wrote in *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (1997), the most-cited of these misconduct cases, that disparate treatment was the wrong label for this kind of claim: "If [a dyslexic plaintiff] wants to show

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<sup>5</sup> When the Department of Justice restated its position in a subsequent filing, in *Coleman v. Brown*, it stated the position more firmly using disparate treatment language. See Response of the United States of America to Defendants' Motion in Limine No.4: To Exclude the Statement of Interest (Document 4919), *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (E.D. Cal. Nov. 12, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0041.pdf>.

<sup>6</sup> See Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 211-222 (2005). Professor Timmons catalogs the cases that have found that a response to disability-caused misconduct occurs "because of" disability, including: *Teahan v. Metro-North Commuter Railroad*, 951 F.2d 511 (2d Cir. 1991); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997); *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1134 (10th Cir. 2003); *McKenzie v. Dovala*, 242 F.3d 967, 974 (10th Cir. 2001); *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 (10th Cir. 1998). On the other side, finding that a response to disability-caused misconduct is *not* "because of" disability, she cites, inter alia: *Brumfield v. City of Chicago*, 735 F.3d 619, 630-31 (7th Cir. 2013); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1195 (Posner, J.) (7th Cir.1997); *Palmer v. Circuit Court of Cook Cnty.*, 117 F.3d 351, 352 (7th Cir.1997); *McElwee v. County of Orange*, 700 F.3d 635, 641 (2d Cir.2012); *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 172 (2d Cir.2006); *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir.1999); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 (9th Cir.1995); *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998).

instead that reading quickly is not a necessary qualification for the job in question—then he has to switch to the disparate-impact approach and challenge the qualification on the basis of its effect and its reasonableness rather than on the basis of its motivation.”

Both these opinions identified disparate impact as the appropriate theory when plaintiffs allege that a general rule or policy penalizing their conduct has the effect of discriminating against them because of their disability. So in the context of assignment of prisoners with disabilities to solitary confinement because of disability-related misconduct, would it make sense to frame the challenge as a disparate impact claim? That’s a harder question than it might seem.

It’s true that the Title II regulations’ two references to “effect[s]” unambiguously allow a disparate impact theory of liability. 28 C.F.R. §§ 35.130(b)(3)(i), (ii). These two provisions forbid “criteria or methods of administration” that have the “effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability,” or have the “purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities.” In addition, 28 C.F.R. § 35.130(b)(8)’s language similarly suggests a disparate impact approach: “A public entity shall not impose or apply eligibility criteria that screen out or **tend to screen out** an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.” (emphasis added) Disparate impact liability always allows defendants to defend a challenged neutral rule as justified notwithstanding its disproportionate effect, and this last provision includes text useful to understanding what kind of justification would be allowed in a Title II context.

In addition, courts have stated that ADA Title II disparate impact claims do state a private cause of action. *See, e.g., Ability Ctr. of Greater Toledo v. City of Sandusky*, 181 F. Supp. 2d 797, 798 (N.D. Ohio 2001) *aff’d*, 385 F.3d 901 (6th Cir. 2004); *Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006).

But as with other civil rights statutes in recent decades, disparate impact liability is nearly hypothetical; there are remarkably few examples of successful disparate impact litigation under *any* civil rights statute in the past 15-20 years, and I’m aware of just one under the ADA’s Title II—*Crowder v. Kitigawa*, 81 F.3d 1480 (9th Cir. 1996). In this case, the Ninth Circuit explained, as it struck down a dog quarantine that kept service-dog users from travelling to Hawaii, “Congress intended to prohibit . . . those forms of discrimination which deny disabled persons public services disproportionately due to their disability.”<sup>7</sup> I don’t advise a disparate impact claim because disparate impact cases are notoriously difficult to win. Courts are deeply suspicious of them.

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<sup>7</sup> In *Coleman v. Zatechka*, 824 F. Supp. 1360 (D. Neb. 1993), the district court cited some of the disparate impact language as it required the University of Nebraska to treat a student with a disability like other students in assignment of dormitory roommates, notwithstanding the University’s explanation that its exclusion of the plaintiff was not because of her disability but because of her need for occasional personal attendant care. But the challenged exclusion in that case operated only against students with disabilities, even though the proffered explanation was broader.

Under the ADA, much more typically, cases in this mode get analyzed not under the heading of disparate impact, but as failures to implement reasonable modifications. These types of liability are best considered as conceptually separate. *See Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006) (ADA Title II liability “may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant’s rule disproportionately impacts disabled people”); *McPherson v. Michigan High Sch. Athletic Ass’n*, 119 F.3d 453, 460 (6th Cir.1997) (“[T]here are two methods that would allow the plaintiff to demonstrate that the MHSAA’s actions were taken because of his disability: either (1) by offering evidence that learning disabilities were actually considered by the MHSAA in formulating or implementing the eight-semester rule, or (2) by showing that the MHSAA could have reasonably accommodated his disability, but refused to do so. In the alternative, it might be possible under the ADA for the plaintiff to rely on a disparate impact theory, but the plaintiff has specifically disavowed any reliance on a disparate impact theory, and it is not necessary for us to explore the availability and contours of such a claim in the ADA context.”); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276–77 (2d Cir. 2003) (“[A] claim of discrimination based on a failure reasonably to accommodate is distinct from a claim of discrimination based on disparate impact.”).

The reasonable modification theory that follows has much stronger precedent and basis in the regulations than a disparate impact theory.

**Theory 2: Failure to make reasonable modifications to policies, procedures, and practices to meet the needs of prisoners with disabilities results in their solitary confinement—which is unlawful for this reason. 28 C.F.R. § 35.130(b)(7).**

A failure to implement a reasonable modification needed by a person with a disability is a type of discrimination; the duty to implement reasonable modifications is, as already explained, an independent basis of liability. *See Tennessee v. Lane*, 541 U.S. 509 (2004) (describing the reasonable modification requirement as prophylactic). Under the ADA, a prison must “take certain proactive measures to avoid discrimination.” *See, e.g., Chisolm v. McManimon*, 275 F.3d 315, 324-25 (3d Cir. 2001).

While it’s best for a plaintiff to make a request for a reasonable modification, “[w]hen a disabled individual’s need for an accommodation is obvious, the individual’s failure to expressly ‘request’ one is not fatal to the ADA claim.” *Robertson v. Las Animas County Sheriff’s Dep’t*, 500 F.3d 1185, 1197 (10th Cir. 2007); *Hughes v. Colorado Dep’t of Corr.*, 594 F. Supp. 2d 1226, 1244-45 (D. Colo. 2009).

In this context, the relevant failures to make reasonable modifications might include claims like:

- Using solitary confinement as a routine management technique to cope with the difficulties presented by prisoners with disabilities.
- Treating behavior that manifests serious mental illness or intellectual disability as a disciplinary rather than mental health or habilitation matter.

- Denying opportunities for parole and access to programs and services to prisoners with serious mental illness who have incurred disciplinary infractions as a result of untreated mental illness.
- Failing to take account of mental illness or intellectual disability in making housing decisions, setting up a prisoner in a double cell in which conflict and violence are likely.
- Inadequate mental health care more generally, including a variety of obstacles to obtaining treatment. This argument was made by plaintiffs in *Anderson v. State of Colorado*, No. 10-cv-01005-WYD-KMT (D. Colo). See Plaintiff’s Response to Motion for Summary Judgment (July 21, 2011), available at <http://www.clearinghouse.net/chDocs/public/PC-CO-0017-0006.pdf> (and in Appendix), and Plaintiff’s Trial Brief (Apr. 23, 2012), <http://www.clearinghouse.net/chDocs/public/PC-CO-0017-0007.pdf> (and in Appendix).
- Within solitary or other kinds of special housing: eligibility and step-down type requirements for prisoners in solitary confinement or other high-security housing that are ill suited or even impossible for prisoners with disabilities, so that they cannot “obtain the same result [or] gain the same benefit” from these programs, 28 C.F.R. § 35.130(b)(1)(iii), or criteria that “screen out” prisoners with disabilities from “fully and equally enjoying” such program. 28 C.F.R. § 35.130(b)(8). These arguments were made in the briefs just cited, in *Anderson v. State of Colorado*, and also (by the same counsel and in front of the same judge) in *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM. See Plaintiff’s Response to Defendants’ Motion for Summary Judgment, (D. Colo. Dec. 26, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CO-0024-0001.pdf> (and in Appendix).
- Similarly, eligibility criteria for other kinds of programming or services—visits, phone calls, various property privileges, group therapy, etc.—that deprive prisoners with disabilities the opportunity to participate and benefit from those programs.
- Failing to accommodate prisoners’ particular (disability-related) vulnerability to the conditions of isolated confinement by softening those conditions. I really like this argument, which was made by the Plaintiffs in *Disability Advocates, Inc. v. New York State Office of Mental Health*, 1:02-cv-04002-GEL (S.D.N.Y.), described at <http://www.clearinghouse.net/detail.php?id=5560>). As Plaintiff’s counsel explained it to me, the argument ran as follows: “The stressful conditions of isolated confinement, and attendant lack of access to programs (including, among other things, post-release planning) has an impermissibly harsh and more frequent impact upon inmates with serious mental illness.” There was no ruling on the issue.

Conceptually, these are claims for reasonable modification of: the route **into** solitary; the conditions **in** solitary; the route **out of** solitary.

These kinds of claims have gotten some, albeit limited, support in district court opinions. See, e.g.:

- *May v. Sheahan*, No. 99-cv-0395, 1999 WL 543187 (N.D. Ill. 1999) (denying motion to dismiss because jail’s hospital shackling policy had more severe impact on disabled individuals).

- *Purcell v. Pa. Dep't of Corr.*, No. 00-cv-181J, 2006 WL 891449, at \*13 (W.D. Pa. Mar. 31, 2006) (a genuine issue of material fact existed as to whether a “reasonable accommodation” was denied when the DOC refused to circulate a memo to the staff concerning a prisoner’s disability (Tourette’s Syndrome) that explained that some of his behaviors were related to his condition, not intentional violations of prison rules).
- *Scherer v. Pa. Dep't of Corr.*, No. 3:04-cv-00191, 2007 WL 4111412, at \*44 (W.D. Pa. Nov. 17, 2007) (because the prisoner’s misconduct may have been a result of his mental illness, “the lack of modification of its disciplinary procedures to account for . . . [his] mental illness . . . possibly resulted in a violation of the ADA”).
- *Biselli v. Cty. of Ventura*, No. 09-cv-08694 CAS (Ex), 2012 U.S. Dist. LEXIS 79326, at \*44-45 (C.D. Cal. June 4, 2012) (finding that placement in administrative segregation based on conduct specifically linked to mental illness, without input from mental health staff, may constitute violation of the ADA) (note: not available via Westlaw, but the PACER version is included in Appendix).
- *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM, 2013 WL 3296569, at \*9 (D. Colo. July 1, 2013) (rejecting motion to dismiss for failure to state a claim given plaintiff’s argument “that he has been unable to complete the requirements of the leveling-out program successfully because of his mental impairment and because CDOC officials have prevented him from obtaining adequate treatment and accommodation so that he may progress out of solitary confinement”); see also Reporter’s Transcript: Hearing on Motion for Summary Judgment and Final Trial Preparation Conference, p. 41 (Feb. 25, 2014), available at <http://www.clearinghouse.net/chDocs/public/PC-CO-0024-0002.pdf> (and in Appendix) (rejecting defendants’ motion for summary judgment on the same claim).

**Theory 3: Housing people with disabilities in special housing or solitary confinement violates the integration mandate. 28 C.F.R. § 35.130(d); 28 C.F.R. § 35.152.**

When a prison houses prisoners with disabilities in special housing devoted to disabled prisoners (or in an infirmary, without actually providing medical care or treatment), it violates the dictates of 28 C.F.R. § 35.130(d) if it is not “the most integrated setting appropriate” to the prisoners’ needs. Many of these kinds of housing assignments are, if not quite solitary confinement, at least close to it. Similarly, it could violate 28 C.F.R. § 35.152(b)(2)(iii) (public entity “[s]hall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed”) if, for example, all the mental health housing was high security, so that prisoners who would otherwise have access to the gentler conditions in minimum or medium security were forced into harsher environments in order to get treatment. This argument was made in some detail by plaintiffs in *Disability Advocates, Inc. v. New York State Office of Mental Health*, 1:02-cv-04002-GEL (S.D.N.Y.), described at <http://www.clearinghouse.net/detail.php?id=5560>. As plaintiffs’ counsel explained it to me, the argument was:

Defendants’ disciplinary rules, policies, and practices must be reasonably modified to accommodate individuals with disabilities who cannot tolerate isolated confinement. See 42 U.S.C. § 12132(2); *Henrietta D.*, 331 F.3d at 273-74, 291 (failure to make reasonable accommodation to a public program constitutes discrimination under the ADA and

Rehabilitation Act). The stressful conditions of 23-hour isolated confinement have a particularly severe effect upon prisoners with serious mental illness, and are a principal cause of deteriorated mental health for many such prisoners. Defendants have failed to reasonably modify their disciplinary process so that penal consequences which are known to severely worsen the psychiatric conditions of prisoners with serious mental illness are not imposed. Defendants have not taken sufficient steps to alter the conditions of isolated confinement so that prisoners with serious mental illness will not suffer harm from such confinement, nor have they provided alternatives that do not injure prisoners with psychiatric disabilities.

As stated earlier, prolonged periods of isolated confinement cause severe harm to prisoners with serious mental illness. Though regulations now require hearing officers to consider mental health when imposing punishment, inmates with serious mental illness continue to receive SHU and keeplock sentences, while inmates with mental illness who were serving SHU terms handed down prior to the new regulations remain in SHU. The Case Management Committees (“CMCs”), which are authorized to recommend the transfer of inmates with mental illness out of SHU, have not ameliorated the problem . . . . Defendants’ failure to provide viable alternatives to limit the suffering of prisoners with mental illness in isolated confinement is a direct violation of the ADA and Rehabilitation Act.

In *Armstrong v. California*, the court found that the plaintiff prisoners, who had mobility impairments, were being housed in solitary confinement simply because there were no accessible cells available elsewhere. See *Armstrong v. Brown*, No. C 94-2307, 2015 WL 496799 (N.D. Cal. Feb. 3, 2015), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0040.pdf> (and Appendix). This, the district court held, violated the clear terms of the provisions in 28 C.F.R. § 35.152, which apply the integration mandate in the context of prisoner housing. *Id.*

More commonly, though, the confinement of prisoners with disabilities to solitary confinement isn’t because of a shortage of accessible cells elsewhere, but because prisoners choose to manage difficult disability-related behavior with solitary confinement rather than less harsh housing assignments and services. In this setting, the integration mandate argument is really context specific.

It seems unlikely to be enough for liability that the same word—“segregation”—is used to describe solitary confinement and the ADA violation in *Olmstead v. L.C.*, 527 U.S. 581 (1999), in which the Court required deinstitutionalization of people with disabilities who had been unjustifiably assigned to receive various state-provided services in segregated institutions rather than the community. If a prisoner who happens to have a disability is in a segregation unit that is “segregating” all the prisoners within, disabled and non-disabled alike, from the general population, that’s probably not sufficient for an *Olmstead* violation. Still, solitary confinement that *is* because of a prisoner’s disability seems plausibly non-integrated, in the sense meant under *Olmstead*. And one advantage of thinking about it this way is that the integration mandate effectively presumes harm, as a matter of regulatory interpretation. For more on *Olmstead* and its implementation, see Civil Rights Division, U.S. Dep’t of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities

Act and *Olmstead v. L.C.* (June 22, 2011), available at [http://www.ada.gov/olmstead/q&a\\_olmstead.pdf](http://www.ada.gov/olmstead/q&a_olmstead.pdf).

The plaintiffs in California's *Coleman* litigation, a class action of prisoners with serious mental illness, have made the fullest version of this argument that I've been able to find. (In the end, the District Court didn't address the argument, ruling entirely on constitutional grounds.) Here's what the *Coleman* plaintiffs' brief said:

The Americans with Disabilities Act (ADA) requires treatment in the most integrated setting appropriate to a disabled individual's needs and does not permit segregation imposed due to an individual's disability. *See* 42 U.S.C. § 12132 (“[N]o 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. § 12101(a)(2) (“historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem”); 42 U.S.C. § 12101(a)(5) (“individuals with disabilities continually encounter various forms of discrimination, including ... segregation, and relegation to lesser services, programs, activities, [etc.]”); 28 C.F.R. § 35.130(d) (“A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”); *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 597 (1999) (“Unjustified isolation ... is properly regarded as discrimination based on disability.”); *cf. Biselli v. Cty. of Ventura*, Case No. CV 09-08694 CAS (Ex), 2012 U.S. Dist. LEXIS 79326, at \*44-45 (C.D. Cal. June 4, 2012) (finding that placement in ASUs based on conduct specifically linked to mental illness, without input from mental health staff, may constitute violation of the ADA).

Notice of Motion & Motion for Enforcement of Court Orders & Affirmative Relief Re: Improper Housing & Treatment of Seriously Mentally Ill Prisoners in Segregation (Document 4580), *Coleman v. Brown*, 2:90-cv-00520-LKK-JFM (E.D. Cal. May 6, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0066.pdf>, and in Appendix.

And again in their post-trial brief:

“By warehousing class members in segregation units because appropriate beds and timely transfers cannot be provided, Defendants’ system fails to make the reasonable accommodations necessary for mentally ill prisoners to be housed and treated in the most integrated setting appropriate to their individual needs. In addition to violating the Eighth Amendment, these practices constitute illegal disability discrimination. *See* 42 U.S.C. §§ 12101(a)(2), (a)(5), 12132; 28 C.F.R. §§ 35.104, 35.130(b)(7), (d), 35.152(b)(2); *see also Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 597 (1999) (“Unjustified isolation ... is properly regarded as discrimination based on disability.”).

Plaintiffs’ Post-Trial Brief Regarding Enforcement of Court Orders and Affirmative Relief Regarding Improper Housing and Treatment of Seriously Mentally Ill Prisoners I Segregation

(Document 4985), *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (E.D. Cal. filed Jan. 21, 2014), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0065.pdf>, and in Appendix.<sup>8</sup>

If the integration mandate *does* apply, it should be relatively easy to demonstrate that solitary confinement not “appropriate to the needs” of prisoners with disabilities.

**Defense 1: Fundamental alteration/undue financial and administrative burden. 28 C.F.R. § 35.130(b)(7); 28 C.F.R. § 35.150(a)(3)**

If the theory of liability is failure to make reasonable modifications to various policies, practices, or procedures, 28 C.F.R. § 35.130(b)(7), or a failure to provide ready program accessibility, 28 C.F.R. § 35.150(a)(3), the prison could mount a defense that the requested modification would “fundamentally alter” the policy, practice, or procedure. The programmatic access regulation also offers an “undue financial and administrative burdens” defense. Just as “reasonable modification” is the analog/equivalent of Title I’s “reasonable accommodation” requirement, “fundamental[] alter[ation]” and “undue . . . burden” are the analogs/equivalents of Title I’s “undue hardship.”

Above, I listed some potential failures to make reasonable modifications. For each, prisons could make an argument that the requested reasonable modification would effectuate a “fundamental alteration” in the relevant program. The regulation dealing with program accessibility, 28 C.F.R. § 35.150(a)(3), specifies that:

- “[A] public entity has the burden of proving that compliance with §35.150(a) of this part would result in such alteration or burdens”
- “The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion.”
- “If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.”

Presumably the omission of this kind of language in the “reasonable modification” provision is because the word “reasonable” alone indicates some similar kinds of substantive (though not procedural) considerations.

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<sup>8</sup> The *Coleman* plaintiffs phrased this same conclusion in the language of “least restrictive environment” in their proposed order, at the end of this brief: “By failing to timely transfer class members to appropriate non-segregated settings and subjecting them to harsh custodial measures such as blanket strip searches and mental health treatment in cages, Defendants have failed to make the reasonable accommodations necessary to avoid disability discrimination and to ensure that prisoners with a mental disability are housed and treated in the least restrictive placement appropriate to their needs. See 28 C.F.R. §§ 35.104 (defining disability to include any “emotional or mental illness”), 35.130(b)(7),(d), 35.152(b)(2).”



**Defense 2: Legitimate safety requirements and direct threat. 28 C.F.R. § 35.130(h); 28 C.F.R. § 35.139.**

Against all of the asserted claims, prisons could defend by arguing that the prisoners housed in solitary confinement pose a “direct threat” to others. Similarly, the prison could argue that their decisions impose “legitimate safety requirements” for the safe operation of their services, programs, or activities, including classification, housing, and mental health services.

The “direct threat” defense had its origin in *School Board of Nassau County v. Arline*, 480 U.S. 273, 278-88 (1987), in which the Supreme Court held (without a statutory or regulatory textual hook) that a direct threat under Section 504 requires a showing of a “significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity’s modification of its policies, practices, or procedures.” This requirement was then codified for ADA Titles I (42 U.S.C. § 12113(b)) and III (42 U.S.C. § 12182(b)(3)), and incorporated into the Title II regulations (35 C.F.R. § 35.139).

The “legitimate safety requirement” language is new in the 2010 regulation; the 1991 Title II regulation did not include similar language. But the language was in the 1991 Title III regulation, *see* 56 Fed. Reg. 35,544 & 35,564 (July 26, 1991), and the Department of Justice’s 1993 ADA Title II Technical Assistance Manual at II-3.5200 included the same language now included in the regulation, making clear the Department’s view that public entities also have the right to impose legitimate safety requirements necessary for the safe operation of services, programs, or activities. The addition of the “legitimate safety” language in the 2010 Title II regulation was intended, the Department explained when it issued that regulation, to “incorporat[e] this longstanding position relating to imposition of legitimate safety requirements” and “[t]o ensure consistency between the title II and title III regulations.” 28 C.F.R. pt. 35, App. A (2010), *available at* [http://www.ada.gov/regs2010/titleII\\_2010/titleII\\_2010\\_regulations.htm](http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm).

The burden on public entities in denying an individual with a disability the opportunity to participate in and benefit from services, programs, and activities on the basis of direct threat is considered a “heavy burden,” and the same would presumably be true of legitimate safety criteria. *See, e.g., Lockett v. Catalina Channel Express, Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007); *Doe v. Deer Mt. Day Camp, Inc.*, 682 F. Supp. 2d 324, 347 (S.D.N.Y. 2010); *Celano v. Marriott Int’l, Inc.*, No. C 05-4004 PJH, 2008 WL 239306, at \*16 (N.D. Cal. Jan. 28, 2008). But of course, courts are very deferential to prison officials’ claims of danger.

The argument will then be whether the prison has “ensure[d] that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities,” 28 C.F.R. § 35.130(h), and whether the claim of direct threat is appropriately based on “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).

As the U.S. Department of Justice summarized all this in a brief filed in 2013:

To summarize the legal standards the United States believes are applicable, the segregation of prisoners with serious mental illness in solitary confinement may, under certain circumstances, violate both the ADA and the Eighth Amendment. In regards to the ADA, prisoners with disabilities cannot be automatically placed in restrictive housing for mere convenience. Title II requires prison officials, when considering housing determinations, to make individualized assessments of prisoners with serious mental illness or intellectual disabilities, and their conduct, relying on current medical or best available objective evidence, to assess: (1) the nature, duration, and severity of the risk; (2) the probability that the potential injury will actually occur; and (3) whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk. 56 Fed. Reg. 35,701 (1991); 75 Fed. Reg. 56,180 (2010); Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 278-88 (1987). Applying the Arline factors, the individualized assessment should, at a minimum, include a determination of whether the individual with a disability continues to pose a risk, whether any risk is eliminated after mental health treatment, and whether the segregation is medically indicated.

Response of the United States of America to Defendants' Motion in Limine No.4: To Exclude the Statement of Interest (Document 4919), *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (Nov. 12, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0041.pdf> (and Appendix).

**Defense 3: Placement in solitary is “necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others.” 28 C.F.R. § 35.130(b)(iv).**

Defendants might defend on the grounds that placement of prisoners with disabilities in solitary confinement or high-security mental health housing or the like is needed in order to provide adequate services to those prisoners, and therefore authorized by 28 C.F.R. § 35.130(b)(iv). But, as the Department of Justice argued in its Cresson findings letter, if that were the case, one would expect mental health professionals to play the lead role in making the assignment, and that the conditions of confinement would be set up to be as therapeutic as possible. In the absence of that kind of evidence, this defense is simply implausible. *See* Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation, *supra*, at 11-12.

**Theory 4: If prisoners are housed solitary confinement (perhaps to avoid a fundamental alteration in prison programs, or because of a concern about safety/direct threat), they cannot on the basis of disability be denied the equal—and equally effective—opportunity to participate in/benefit from services. 28 C.F.R. § 35.130(b)(i)-(iii).**

Accepting for sake of argument that solitary confinement or high security mental health housing is a lawful option, prisoners housed there are still entitled not to be denied access to various services/benefits/programs available to prisoners in that kind of housing on the basis of their disability. For example, suppose some prisoners in solitary confinement are allowed access to a step down program, or to certain property, privileges or whatever, if they avoid disciplinary offenses. Then the argument would be that prisoners with disabilities should, likewise, have

access to such programs/privileges. Making this argument brings up, again, all the same issues addressed under Theory 1, about what “on the basis of” (or “because of”) means. If, for example, a prisoner’s disability makes her incapable of complying with some given rule for 6 months straight, and that non-compliance leads to the denial of visiting privileges, the argument would be that the denial is “on the basis of disability.”

For the reasons already developed in depth, the most promising way to think about all this seems to me reasonable modification. This is how it was framed, in detail, in the two cases in Colorado already cited, *Anderson* and *Sardakowski* (see Appendix for briefs) (the passage is too long to quote, but well worth reading). But in part of the Cresson findings letter already mentioned, the Department of Justice framed this complaint using a theory of “equally effective . . . opportunity to participate.” That letter says: “For those prisoners with serious mental illness or intellectual disabilities who cannot be integrated into the general population, the Facility still has an obligation to provide the prisoners with the opportunity to participate in and benefit from mental health services and activities, and other services, programs, and activities to which prisoners without disabilities have access. See 28 C.F.R. § 35.130(b).” See *Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation*, *supra*, at 37.

#### IV. Strategic considerations

Apart from the legal issue of whether an ADA claim should succeed in the abstract is the question whether its assertion is strategically wise. The answer is, obviously, highly context-dependent. But just to list a few considerations:

The advantages of an ADA theory include:

- Equality is a powerful frame and can get at deprivations that are milder than those reachable by an Eighth Amendment deliberate indifference theory.
- The individuation of reasonable modification, direct threat, legitimate safety concern may all be very helpful in a system that deals in wholesale kind of way with prisoners with varying needs.
- There’s an argument with some (textual and caselaw) support that the Prison Litigation Reform Act attorneys’ fee cap doesn’t apply to ADA or Rehab Act claims.<sup>9</sup>

Disadvantages may include:

- Under the Eighth Amendment, the focus stays solidly on the toxicity of solitary confinement and how damaging it is to people with disabilities. The ADA may direct attention more to what got the prisoners into solitary, and that may be less favorable ground.

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<sup>9</sup> See *Armstrong v. Davis*, 318 F.3d 965, 973-74 (9th Cir. 2003) (fees in suits enforcing the Americans with Disabilities Act and the Rehabilitation Act are not limited by the PLRA because these statutes have fee provisions separate from § 1988); *Henderson v. Thomas*, 2013 WL 5493197, \*9 (M.D. Ala., Sept. 30, 2013) (same); *Beckford v. Irvin*, 60 F.Supp.2d 85 (W.D.N.Y. 1999) (same). See also *Edwin G. v. Washington*, 2001 WL 196760 (C.D.Ill., Jan. 26, 2001) (holding that fees sought as sanctions were not subject to PLRA); *Davis v. Rouse*, Civil Action No. 1:08-cv-03106, 2012 WL 3059569, at \*3 (D. Md. July 25, 2012) (same); *Scott v. Clarke*, No. 3:12-CV-00036, 2014 WL 1463755, at \*4 (W.D. Va. Apr. 15, 2014) (same).

- There is a DOJ administrative process under the Rehab Act. Under it, a prisoner alleging “disability on the basis of handicap” can go to the Department of Justice and complain. 28 C.F.R. § 39.170. (I haven’t spent much time looking at it, but this process seems to be geared towards employment complaints, rather than Title II matters.) The DOJ takes these complaints as informative, rather than investigating almost any of them. Several courts have nonetheless held that the PLRA’s exhaustion requirement compels resort to this procedure, in addition to state prison grievance procedures. That seems wrong (and the cases are all or nearly all pro se, so it hasn’t been briefed much), but it’s a potential pitfall that needs to be considered and managed.

Requiring use of DOJ process:

- *Trevino v. Woodbury County Jail*, No. C14-4051-MWB, 2015 WL 300267 (report and recommendation) (N.D. Iowa Jan. 22, 2015), *adopted without objection*, 2015 WL 2254931, \*6 note 5, *aff’d on other grounds*, --- Fed. Appx. ---, 2015 WL 7729545
- *William G. v. Pataki*, No. 03 Civ. 8331(RCC), 2005 WL 1949509, at \*5 (S.D.N.Y. Aug. 12, 2005)
- *Brown v. Cantrell*, No. 11-cv-00200-PAB-MEH, 2012 WL 4050300, at \*3 (D. Colo. Sept. 14, 2012)
- *Haley v. Haynes*, No. 2:10-cv-00122, 2012 WL 112946, at \*1 (S.D. Ga. Jan. 12, 2012)
- *Zoukis v. Wilson*, No. 1:14-cv-104- LMB-IDD, 2015 WL 4064682 (E.D. Va. July 2, 2015)
- *Cardenas-Uriarte v. USA*, No. 14-cv-00747-JPG-PMF, 2015 WL 5161316 (S.D. Ill. September 01, 2015)
- *Burgess v. Garvin*, No. 01-cv-10994-GEL, 2003 WL 21983006, at \*3 (S.D.N.Y. Aug. 19, 2003), *on reconsideration*, 2004 WL 527053 (S.D.N.Y. March 16, 2004)
- *William G. v. Pataki*, No. 03-cv-8331-RCC, 2005 WL 1949509, at \*5-6 (S.D.N.Y. Aug. 12, 2005)
- *Scott v. Goord*, No. 01-cv- 0847-LTS-AJP, 2004 WL 2403853, at \*7 (S.D.N.Y. Oct. 27, 2004)
- *Rosario v. N.Y. State Dept. of Correctional Services*, No. 03-cv-0 859-CLB, 2003 WL 22429271, at \*3 (S.D.N.Y. Sept. 24, 2003), *vacated and remanded*, 400 F.3d 108 (2d Cir. 2005) (per curiam).

Declining to require use of DOJ process:

- *O’Guinn v. Lovelock Correctional Center*, 502 F.3d 1056, 1062-64 (9th Cir. 2007)
- *Veloz v. New York*, 339 F.Supp.2d 505, 517–18 (S.D.N.Y. 2004), *aff’d*, 178 Fed.Appx. 39 (2d Cir. Apr. 24, 2006)
- *Degriffin v. Ricks*, No. 03-cv-6645-RWS, 2004 WL 2793168, at \*14 n.10 (S.D.N.Y. Dec. 6, 2004)
- *Singleton v. Perilli*, No. 03-cv-0227-DC, 2004 WL 74238, at \*4 (S.D.N.Y. Jan. 16, 2004) (dictum)



## APPENDIX: CITED BRIEFS AND OTHER DOCUMENTS

**Anderson v. State of Colorado**, No. 10-cv-01005-WYD-KMT (D. Colo.)

Plaintiff's Response to Motion for Summary Judgment (July 21, 2011), *available at* <http://www.clearinghouse.net/chDocs/public/PC-CO-0017-0006.pdf>.

Plaintiff's Trial Brief (Apr. 23, 2012), *available at*

<http://www.clearinghouse.net/chDocs/public/PC-CO-0017-0007.pdf>.

**Armstrong v. Brown**, 4:94-cv-02307 (N.D. Cal.)

Order Granting Motion for Further Enforcement, 2015 WL 496799 (Feb. 3, 2015), *available at* <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0040.pdf>.

**Biselli v. County of Ventura**, 09-cv-08694 CAS (Ex) (C.D. Cal.)

[Opinion,] 2012 U.S. Dist. LEXIS 79326, at \*44-45 (June 4, 2012).

**Coleman v. Brown**, 2:90-cv-00520-LKK-JFM (E.D. Cal.)

Notice of Motion & Motion for Enforcement of Court Orders & Affirmative Relief Re: Improper Housing & Treatment of Seriously Mentally Ill Prisoners in Segregation (Doc. 4580) (May 6, 2013), *available at* <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0066.pdf>.

Response of the United States of America to Defendants' Motion in Limine No.4: To Exclude the Statement of Interest (Doc. 4919) (Nov. 12, 2013), *available at*

<http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0041.pdf>.

Plaintiffs' Post-Trial Brief Regarding Enforcement of Court Orders and Affirmative Relief Regarding Improper Housing and Treatment of Seriously Mentally Ill Prisoners in Segregation (Doc. 4985) (Jan. 21, 2014), *available at*

<http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0065.pdf>.

**Cresson (Penn.):**

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