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United States District Court, N.D. California.

Derrick CLARK, et al., Plaintiffs,
v.
STATE of California, et al., Defendants.

No. C96–1486–FMS. | Oct. 1, 1996.

Developmentally disabled state prisoners brought suit on behalf of themselves and all developmentally disabled prisoners for injunctive relief under Rehabilitation Act (RA) and Americans with Disabilities Act (ADA), and under § 1983 for violation of their constitutional rights. State officials moved to dismiss. The District Court, Fern M. Smith, J., held that: (1) state officials were not immune from suit; (2) prisoner stated claims for violation of RA, ADA, and Eighth Amendment; but (3) prisoners failed to state claim, under § 1983, for violation of their due process rights.

Granted in part and denied in part.

Opinion

ORDER DENYING IN PART, GRANTING IN PART, DEFENDANTS' MOTION TO DISMISS

SMITH

ISSUES

***1** Defendants' motion to dismiss requires the Court to consider (1) whether plaintiffs have standing to bring their claims; (2) whether Section 504 of the Rehabilitation Act of 1973 ("IRA" or "Section 504"), 29 U.S.C. § 794, and Title II of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12131–34, are applicable to state prisons; (3) whether the Eleventh Amendment immunizes defendants from a su,it based on the RA or the ADA; and (4) whether plaintiffs sufficiently pled their claims under the RA, ADA, and 42 U.S.C. § 1983 (" § 1983") to survive a motion to dismiss.

INTRODUCTION

Plaintiffs, Derrick Clark and Ambrose Woods, two developmentally disabled state prisoners, brought suit on behalf of themselves and all developmentally disabled prisoners confined at various correctional facilities operated by the State of California through the California Department of Corrections for injunctive relief under the RA and the ADA. Plaintiffs also brought a claim under § 1983 for violations of their Sixth, Eighth, and Fourteenth Amendment rights. Defendants, the State of California, the California Department of Corrections, and various-California state officials being sued in their official capacities, have filed a motion to dismiss plaintiffs, first, second, and part of plaintiffs, third causes of action pursuant to Federal Rule of Civil Procedure 12(b)(6).[1]

BACKGROUND

The facts set forth in this section are based on plaintiffs, allegations and are presumed true for purposes of this motion.

Plaintiff Derrick Clark ("Clark") is currently incarcerated at Pelican Bay State Prison. Clark has been incarcerated at San Quentin State Prison; California State Prison, Solano; Correctional Training Facility, Soledad; and Mule Creek State Prison. Clark is developmentally disabled and has an I.Q. of less than 60. Clark can neither read nor write, except to sign his name. Plaintiff Ambrose Woods ("Woods") is currently incarcerated at North Kern State Prison and was previously incarcerated at Pelican Bay State Prison. He is also developmentally disabled and a slow learner and, like Clark, has difficulty understanding prison rules and disciplinary procedures.

Clark, Woods, and similarly situated class members cannot obtain necessary and adequate accommodations, protection, and services because of their disabilities. For instance, Clark was denied medication because of his "stupidity" and, although recommended for placement in Category K, a designation for prisoners with mental retardation, he was denied access to the program. Woods was denied access to work and education programs and was rejected from a reading program because of his "stupidity." Furthermore, because they are less able to comply with prison rules and procedures, they are more likely to be forced into isolation or segregation and to be

deprived of good time credits and other services, benefits, and privileges available to non-disabled prisoners. Plaintiffs also claim that they have been subjected to a variety of administrative proceedings, including disciplinary actions, without adequate assistance to help them understand the proceedings and the rights implicated by them. Clark and Woods are also more likely to be physically and mentally abused by the general prison population because of their disabilities.

***2** Plaintiffs seek injunctive and declaratory relief, demanding: that defendants ensure that disabled inmates are apprised of and understand the administrative proceedings to which they are subjected and the rights implicated thereunder; that defendants grant disabled inmates access to educational programs, medical services, and other activities generally open to non-disabled prisoners; and that defendants take reasonable steps to ensure the health and safety of disabled inmates.

DISCUSSION

1. The Legal Standard.

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *North Star Int v. Arizona Corp. Comm'n,* 720 F.2d 578, 581 (9th Cir.1983) Dismissal of an action pursuant to Rule 12(b)(6) is appropriate only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.,* 950 F.2d 1478, 1482 (9th Cir.1991) (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46). In reviewing the motion, the Court must assume all factual allegations to be true and must construe them in the light most favorable to plaintiff, the nonmoving party. *North Star,* 720 F.2d at 580. Legal conclusions, however, not be taken as true merely because they are cast in the form of factual allegations. *Western Mining Council Watt,* 643 F.2d 618, 624 (9th Cir.), *cert. denied,* 45 1031 (1981).

II. Plaintiffs' Standing to Seek Injunctive and Declaratory Relief.

[1] [2] The Supreme Court has developed a three-part test for standing, a constitutional prerequisite inherent in Article III's "case or controversy" requirement. The first element is "injury in fact:" plaintiff must have suffered ..."an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent', not 'conjectural, or 'hypothetical.' " *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559–61 (1992). The second and third elements of the test are causation and redressability. *Id.*

In this case, the RA, ADA, and § 1983 create the legal rights that plaintiffs allege were violated by defendants. *See infra,* parts III., IV., V., VI. Plaintiffs allege they are denied access to programs, benefits, and activities because of their disabilities. Plaintiffs also allege that they are treated differently than non-disabled inmates because of their disabilities. Plaintiffs further allege that they are more susceptible to physical and mental abuse because they are disabled, Although by no means detailed, the plaintiffs, complaint contains a few examples of the direct and actual injuries allegedly incurred by Clark and Woods. Furthermore, defendants are the cause of the injuries, and action by this Court could redress plaintiffs' alleged injuries. Accordingly, this Court finds that Clark and Woods have standing to pursue their RA, ADA, and § 1983 claims.

Defendants argue that Clark and Woods do not have standing to pursue claims based on injuries to other developmentally disabled prisoners who are incarcerated in different prisons. This argument is premature. Defendants have confused plaintiffs, standing with their adequacy to serve as class representatives, which is a question more appropriately addressed in connection with the class certification determination.

III. Application of the RA and the ADA to State Prisons.

A. The RA.

***3** **[3]** Despite clear Ninth Circuit authority that the RA applies to state prison facilities, *Bonner v. Lewis,* F.2d 559, 562 (9th Cir.1988), defendants ask this Court to conclude otherwise. Since *Bonner,* defendants argue, the Supreme Court has changed the review of the applicability of federal statutes to states so that absent a clear indication of congressional intent to apply the RA to state prisons, a court cannot assume Congress intended to do so. *See Gregory va Ashcroft,* 501 U.S. 452, 460–461 (1991) (applying "plain statement rule").

Defendants cite two cases to support their claim that *Bonner* was wrongly decided because it failed to apply the plain statement rule. In *Hale v. Arizona,* 993 F.2d 1387, 1393, 1395 (9th Cir.) (*en banc), cert. denied,* U.S. 946 (1993), the Ninth Circuit refused to extend the Federal Labor Standards Act to state inmates required by

state law to work at hard labor. In *Jeldness v. Pearce,* F.3d 1220, 1225 (9th Cir.1994), the Ninth Circuit held that Title IX, an anti-discrimination statute, applied to state prisons. In both *Hale* and *Jeldness,* the court relied partially on a review of statutory construction and congressional intent. *Hale,* 993 F.2d at 1392; *Jeldness,* 30 F.3d at 1225.

Defendants contend that the *Bonner* Court focused solely on the expansive language of the RA, thereby violating the scope of review as spelled out in *Hale* and *Jeldness.* The plain statement rule "announced" in *Gregory* however, has long been a part of this country's jurisprudence; thus, defendants take too far a leap in concluding that the Ninth Circuit did not take this rule into account when deciding *Bonner. See United States v. Bass,* 404 U.S. 336, 349 (1971) (requirement of clear statement in traditionally sensitive areas); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (intention should be clear if Congress intends to pre-empt historic powers of the states). Although not explicitly stated, the *Bonner* Court did look for Congressional intent to apply the RA to state prisons. For instance, the court found that the plain language of the RA and its implementing regulations, 28 C.F.R. § 42.503(f), confirms that Section 504 applies to state prisons. *Bonner,* 857 F.2d at 562.

According to defendants, the *Bonner* Court's reliance on the Department of Justice's "DOJ") implementing regulations was inappropriate because the plain language rule requires the Court to look at congressional intent, an intent not properly gleaned from an interpretation by an executive branch agency, such as the DOJ. According to the Supreme Court, however, when Congress explicitly delegates its authority to "construe the statute by regulation," as was done with the RA, 29 U.S.C. § 794(a), a court must give the regulations "controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton,* 467 U.S. 822, 834 (1983); *see also School Bd. of Nassau County v. Arline,* 480 U.S. 273, 279–280 (198 (emphasizing that federal regulations are "an important source of guidance on the meaning of § 504") (quoting *Alexander v. Choate,* 469 U.S. 287, 304 n. 24 (1985)). Ninth Circuit therefore properly looked to the RA's implementing regulations in *Bonner.*

***4** Defendants also claim that *Bonner* is inapposite because that ruling relied, in part, on the Ninth Circuit's determination that the RA's goal of rehabilitation mirrors the goals of Arizona's prison system, *see Bonner,* 857 at 562, while it is defendants, contention that the only goal of California's prison system is punishment. Plaintiffs cite numerous statutes in the California Penal Code and Regulations, however, which indicate that the goal of many prison programs is much broader than that. Defendants' contention does not change the precedential authority of *Bonner.*

In short, defendants, challenges to *Bonner v. Lewis* are unavailing; therefore, the Court concludes that the RA applies to state prisons.

B. The ADA.

[4] Defendants again argue that if this Court applies the plain statement rule, it should find that the ADA does not apply to state prisons. The Court does not agree. First, the plain language of the statute indicates that the ADA expands the reach of the federal anti-discrimination policy of the RA to "any public entity". Second, as it did with the RA, Congress explicitly delegated its authority to the DOJ to create implementing regulations for the ADA. 42 U.S.C. § 12134(a). The DOJ's regulations explicitly state that state correctional facilities are governed by the ADA. 28 C.F.R. § 35.190(b)(6).

Consequently, because of the expansive language of the ADA and the DOJ's implementing regulations, the Court finds that the ADA applies to state prisons. This result is consistent with the ADA's legislative history, which "indicates that Congress intended judicial interpretation of the RA [to] be incorporated by reference when interpreting the ADA."*Collings v. Longview Fibre Co.,* 63 F.3d 828, 832 n. 3 (9th Cir.1995), *cert. denied,*116 S.Ct. 711 (1996).

The Court must also reject defendants' argument that federal courts should not immerse themselves in the running of integral state functions, such as the state prison system. Although most federal judges would strongly prefer not to take on such supervisory oversight, there is validity to the Department of Justice's argument that, "[w]hile federal courts have acknowledged that deference is due to the decision of state officials, the courts cannot abdicate their duties to enforce important civil rights protections." United States Amicus Curiae Memorandum of Law in Support of Defs., Motion for Summary Judgment, *Armstrong v. Wilson,* No. 94–2307 (Wilken, J.) (N.D. Cal filed Sept. 20, 1996); *see Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 546–47 (1985) (states are not immune from federal regulation of their "integral state functions").

IV. Defendants' Immunity From Suit on Plaintiffs' ADA and RA Claims.

Defendants argue that plaintiffs, RA and ADA claims against the state defendants should be dismissed because states are immune from liability in federal court under the Eleventh Amendment.[2]

[5] [6] The Eleventh Amendment generally bars citizen suits against a state and its agencies and instrumentalities. *Seminole Tribe of Fla. v. Florida,* S.Ct. 1114, 1124–25, 1127–28 (1996); *Francheschi v. Schwartz,* 57 F.3d 828, 831 (9th Cir.1995) (California Municipal court is arm of state protected from lawsuit by 11th Amendment immunity); *Bennett v. California,* 406 F.2d 36, 39 (9th Cir.1969), *cert. denied,*394 U.S. 966 (1969) (State agencies such as the California Adult Authority and California Department of Corrections are arms of the State.). Eleventh Amendment immunity can, however, be waived by the state or expressly abrogated by Congress. *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 240–241 (1985).

***5** [7] To abrogate state immunity, Congress must (1) unequivocally express its intent to abrogate the immunity, and (2) act pursuant to a valid exercise of power. *Seminole Tribe,* 116 S.Ct. at 1123–32. An exercise of power is valid if Congress acts pursuant to a constitutional provision granting Congress the power to abrogate. *Seminole Tribe,* 116 S.Ct. at 1125. In *Seminole Tribe,* the Supreme Court held that the Fourteenth Amendment grants Congress the power to enact laws abrogating states, immunity under the Eleventh Amendment. *Id.*

As plaintiff and defendant agree, both the ADA and the RA contain expressions of an unequivocal intent by Congress to abrogate state immunity. 42 U.S.C. § 12202; 42 U.S.C. § 2000d–7(a)(1). The first prong of the *Seminole* test is, therefore, satisfied. The remaining question is whether-Congress enacted the ADA and the RA pursuant to the Fourteenth Amendment, in which case immunity would be effectively abrogated, or whether Congress acted pursuant to another constitutional provision, in which case states would remain immune from suit.

A. Plaintiffs' RA Claim.

[8] Defendants claim that the RA was enacted pursuant to Congress's spending power rather than the Fourteenth Amendment, primarily because the statute applies only to those entities that receive federal funds. Defendants also argue that the RA was modeled after Title VI and Title IX, two statutes previously determined to have been passed pursuant to the Spending Clause. Defendants then conclude that Congress does not have the authority to abrogate state immunity from suits brought under the RA.

Given the similarity of the RA to the ADA, *see infra,* part IV.B., and indications by the Supreme Court, however, this Court concludes that the RA was passed, at least in part, pursuant to the Fourteenth Amendment. In *Atascadero,* 473 U.S. at 244 n. 4, the Supreme Court accepted the point, conceded by the parties, that the RA was enacted under the Fourteenth Amendment and proceeded to use that assumption as a basis for part of its interpretation of the RA. Because the issue was not in dispute, however, *Atascadero* did not definitively an the question. Further support for this Court's interpretation of the source of the RA is found in *Welch v. Texas Dep't of Highways and Pub. Transp.,* 483 U.S. 468, 472 n. 2 (1987), in which the Supreme Court noted, in dicta, that "[t]he RA was passed pursuant to § 5 of the Fourteenth Amendment."

Other courts have also followed the Supreme Court's lead. For instance, in *Department of Education Katherine D.,* 531 F.Supp. 517, 530 (D.Haw.1982), *aff'd in part, rev'd in part on other grounds,*727 F.2d 809 (9th Cir.1983), *cert. denied,*471 U.S. 1117 (1985), the court stated: "The legislative history of ... section 504 leaves no doubt that [it] was enacted pursuant to Congress' power under the 5th section of the Fourteenth Amendment...." *See also, Miener v. Missouri,* 673 F.2d 969, 974 n. 4 (8th Cir.1982), *cert. denied,*459 U.S. 909 (1982) (stating without deciding that Section 504 arguably rests on Congress' power to secure the guarantees of the Fourteenth Amendment); *Brotherhood of Locomotive Engineers v. New Jersey Transit Rail Operations, Inc.,* 618 F.Supp. 1456, 1457 (S.D.N.Y.1985) (noting that *Atascadero* concerned a statute [the RA] enacted in furtherance of equal protection, as authorized by the Fourteenth Amendment).

B. Plaintiffs, ADA Claim.

***6** The ADA was enacted to help Congress enforce the Fourteenth Amendment; the act expressly states this purpose. 42 U.S.C. § 12101(b)(4). Defendants argument that the affirmative obligations imposed on the states by the ADA are outside the scope of the Fourteenth Amendment because the Fourteenth Amendment was intended to ensure equal treatment, not equal opportunity,

is unpersuasive.

First, the Supreme Court has confirmed that the Fourteenth Amendment's Equal Protection Clause gives Congress the power to protect people with disabilities from discrimination. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446–47 (1985). Second, both the ADA and RA are, as required by § 5 of the Fourteenth Amendment, "appropriate legislation" to enforce the Equal Protection Clause. *See Katzenbach v. Morgan,* 384 U.S. 641, 649–50, 651 (1966) (legislation must be (1) plainly adapted to the end of enforcing the Equal Protection Clause, and (2) not prohibited by, but rather consistent with, the "letter and spirit" of the constitution).

The ADA, as well as the RA, are designed to prevent discrimination based on disability by government or other public actors. Both statutes are aimed at preventing discrimination based on disability in programs, services, and activities provided by covered entities. Both statutes, therefore, may be regarded as having been enacted to enforce the protections of the Equal Protection Clause.

Both the ADA and RA are also consistent with the "letter and spirit" of the Constitution. Section 5 of the Fourteenth Amendment authorizes Congress to amplify the Fourteenth Amendment's substantive protections. *See City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 490 (1989) (O'Connor, J., concurring and dissenting) (Congress, power to enforce the Fourteenth Amendment includes "the power to ... adopt prophylactic rules to deal with those situations" that threaten principles of equality.). Consequently, Congress may enact laws designed to ensure equality notwithstanding the possible disparate effect those laws may have on various groups.[3]

In sum, because the RA and ADA were enacted pursuant to the Fourteenth Amendment, Congress satisfied the second prong of the *Seminole* test and properly abrogated Eleventh Amendment immunity.[4][5]

V. Sufficiency of Allegations Under the RA and ADA.

[9] Plaintiffs claim that defendants violated Section 504 of the RA and Title II of the ADA by denying them access to and the benefits of education, work programs, and other activities solely because of their disabilities. Section 504 of the RA provides, in pertinent part:

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

29 U.S.C. § 794(a). Title II of the ADA provides, in pertinent part:

> ***7** Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

The Court will analyze the sufficiency of plaintiffs' allegations under the RA and the ADA jointly because "[t]he remedies, procedures, and rights under Title II of the ADA are the same as under the RA."*Bullock v. Gomez,* 929 F.Supp. at 1303 n. 3.[6]

To prove an RA violation, Clark and Woods must demonstrate that: (1) they are handicapped persons; (2) they are otherwise qualified for the benefit they seek; (3) the relevant program receives federal financial assistance; and (4).defendants' refusal to provide a service or grant access to a program impermissibly discriminates against them on the basis of their physical handicaps. *Bonner v. Lewis,* 857 F.2d at 562–63.

Defendants apparently do not dispute that Clark and Woods are disabled within the meaning of the PA and the ADA or that California state prisons receive federal financial assistance. "To be 'qualified' a handicapped person must meet 'the essential eligibility requirements for the receipt of [program] services." ' *Bonner v. Lewis,* 857 F.2d at 563 (quoting 28 C.F.R. § 42.540(i)(2)). The *Bonner* Court concluded that prison inmates were "qualified (sometimes required) to participate in activities such as disciplinary hearings rehabilitation, medical services, and other prison activities." *Id.* The Court also finds that plaintiffs, complaint sufficiently alleges both the denial of benefits and access to programs as well as the discriminatory basis for that denial. Consequently, the plaintiffs have satisfied their pleading burden as to their RA and ADA claims.

VI. Sufficiency of Allegations Under § 1983.

To state a claim under § 1983, Clark and Woods must show that defendants acted under color of law, and that defendants' conduct deprived plaintiffs of a constitutional right. *West v. Atkins,* 487 U.S. 42, (1988). The parties do not dispute that the prison officials acted under color of law. The parties do dispute, however, whether defendants violated plaintiffs, constitutional rights. The Court must decide, therefore, whether the plaintiffs have sufficiently pled the deprivation of a constitutionally protected liberty interest under the Due Process Clause, whether plaintiffs sufficiently pled a violation of their equal protection rights, and whether plaintiffs sufficiently pled that they were subjected to cruel and unusual punishment.

A. Fourteenth Amendment.

1. Liberty Interests Created by the Due Process Clause and the State.

Interests protected by the Due Process Clause may arise from two sources—the Due Process Clause itself or state law. *Meachum v. Fano,* 427 U.S. 215, 223–27 (1976). Due process claims in the prison context generally pertain to liberty.

***8** [10] Changes in conditions so severe as to affect the sentence imposed in an unexpected manner implicate the Due Process Clause itself, whether or not they are authorized by state law. *Sandin v. Conner,* 115 S.Ct. 2293, 2300 (1995) (citing *Vitek v. Jones,* 445 U.S. 480, 493 (1980) (transfer to mental hospital), and *Washington v. Harper,* 494 U.S. 210, 221–22 (1990) (involuntary administration of psychotropic drugs)). A state may not impose such changes without complying with the minimum requirements of due process. *Sandin,* 115 S.Ct. at 2300.

[11] As the *Sandin* standard indicates, liberty interests arising from the Due Process Clause itself are very limited in the prison context. Plaintiffs due process claims are based on the deprivation of good time credits and placement in segregation. Plaintiffs' claims do not meet the threshold requirement imposed in order to state a successful due process claim because receiving punishment after a disciplinary hearing is part of prison life and does not change the sentence itself in an unexpected manner.

[12] Deprivations that are less severe or more closely related to the expected terms of confinement, however, may also amount to deprivations of a procedurally protected liberty interest, provided state statutes or regulations narrowly restrict the power of prison officials to impose the deprivation, and the liberty in question is one of "real substance." *Sandin,* 115 S.Ct. at 2297–2302. *See Gotcher v. Wood,* 66 F.3d 1097, 1100–01 (9th Cir.1995) (looking at both language of regulation and substance of deprivation to determine whether prisoner has interest protected by the Due Process Clause after *Sandin*). "Real substance" is generally limited to freedom from (1) restraint that imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," or (2) state action that "will inevitably affect the duration of [a] sentence." *Sandin* at 2300, 2302.

California's regulations concerning discipline provide explicit standards that fetter official discretion, and thus meet the "narrowly restrict" prong of the *Sandin* test. *See Walker v. Sumner,* 14 F.3d 1415, 1419 (9th 1994) (Nevada's prison discipline regulations, which are similar to California's, create a liberty interest.). Under California Code of Regulations title 15, § 3320(1), officials must find that a preponderance of the evidence substantiates a charge before guilt may be found and punishment assessed. Absent such a finding, the inmate may not be placed in isolation or segregation or lose good-time credits. *See also*Cal.Code Regs. tit. § 5, § 332 (requiring notice), § 3320(b) (requiring hearing).

Plaintiffs, deprivation must also satisfy the "real substance" prong of the *Sandin* test. Plaintiffs claim that they suffer an atypical and significant hardship because they are more likely to be deprived of good time credits or placed in segregation after disciplinary proceedings, for which they are not given adequate assistance.

***9** The Ninth Circuit has found that the loss of good-time credits is a deprivation of "real substance" which entitles prisoners to due process. *Gotcher v. Wood,* 66 F.3d, 1097, 1100–1101 (9th Cir.1995) (liberty interest created when regulation limits circumstances under which credits may be taken away).[7]

Whether placement in segregation creates a liberty interest, however, is a more complicated question. Prior to *Sandin,* in *Toussaint v. McCarthy,* 801 F.2d 1080, 1098 (1986), *cert. denied,*481 U.S. 1069 (1987), the Ninth Circuit held that California statutes and prison regulations created a liberty interest in freedom from administrative

segregation.

That case, however, did not analyze whether segregation was a sanction of "real substance," an important omission given *Sandin,* because the determination of whether a liberty interest has been created depends largely on factual issues, such as the conditions and length of confinement, which vary from case to case. *See Gotcher,* 66 F.3d at 1101 (record insufficient to determining whether placement in segregation was an atypical and significant hardship); *Mujahid v. Meyer,* 59 F.3d 931, 932 (9th Cir.1995) (despite prior case law determining disciplinary regulations created liberty interest, under *Sandin,* no liberty interest when inmate placed in disciplinary segregation for 14 days).

[13] In this case, plaintiffs have misconstrued the requirements of *Sandin,* and have consequently failed to state a due process claim. Without alleging a specific instance in which they were placed in segregation for an extreme and disproportionate time or with abhorrent conditions, for example, plaintiffs have failed to plead an atypical and significant hardship as required. Similarly, without alleging a specific instance in which they were deprived of good time credits, plaintiffs have failed to allege state action that would inevitably affect the duration of their sentences. *Sandin* requires the Court to focus on the result of a process, not on the process itself. The Court reaches the question of what process is due only after it decides that a liberty interest was created.

[14] Furthermore, the mere likelihood or potentiality of losing credits or placement in segregation is not enough to state a claim under *Sandin. See City of Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983) (establishing that plaintiff seeking injunctive relief premised upon an alleged past wrong must demonstrate a "real and immediate" threat of repeated future harm to satisfy the injury in fact prong of the standing test).

Plaintiffs', however, may be able to amend their complaint so as to plead a due process violation sufficiently. Plaintiffs' § 1983 due process claim is dismissed with leave to amend in order to substantiate the claim.

2. Equal Protection.

[15]"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe,* 457 U.S. 202, 216 (1982)). A plaintiff alleging denial of equal protection under § 1983 must prove purposeful discrimination by demonstrating that he "receiv[ed] different treatment from that received by others similarly situated," and that the treatment complained of was under color of state law. *Van Pool v. City and County of San Francisco,* 752 F.Supp. 915, 927 (N.D.Cal.1990) (citations omitted), *aff'd sub nom., O'Shea v. City and County of San Francisco,* 966 F.2d 503 (9th Cir.1992).

***10** Courts have held that in order to present an equal protection claim a prisoner must allege that his treatment is invidiously discriminatory in comparison to that received by other inmates. *See More v. Farrier,* F.2d 269, 271–72 (8th Cir.) (absent evidence of invidious discrimination, federal courts should defer to judgment of prison officials), *cert. denied,*114 S.Ct. 74 (1993).

[16] In this case, plaintiffs have satisfied their pleading burden as to their equal protection claims. First, plaintiffs allege that defendants, acted under color of state law. Second, plaintiffs allege numerous occasions in which they are treated differently than other prisoners. For instance, they are more likely to be punished than other prisoners because they do not understand prison rules and regulations. Plaintiffs also allege they are denied access to rehabilitation programs while no such restriction applies to non-disabled prisoners. Although plaintiffs will eventually have to prove such claims, their allegations are sufficient to survive a motion to dismiss. Furthermore, whether defendants, treatment of plaintiffs is invidiously discriminatory is a question of fact not appropriately addressed at this time.

B. Sixth Amendment.

[17] Plaintiffs apparently argue that their Sixth Amendment rights are violated because they are not given assistance to understand disciplinary hearings. Because prisoners do not generally enjoy a Sixth Amendment right to counsel in connection with disciplinary proceedings, however, plaintiffs, argument is subsumed by their due process claims. As described above, it is only after a court decides that a liberty interest has been created that a court will ask what process is due. The Sixth Amendment alone simply does not apply to post-conviction disciplinary proceedings.

C. Eighth Amendment.

[18] [19] A prisoner may state a 9 1983 claim under theEighth Amendment against prison officials where the officials acted with "deliberate indifference" to the threat of serious harm or injury to an inmate by another prisoner. *See Farmer v. Brennan,* 114 S.Ct. 1970, (1994); *Berg v. Kincheloe,* 794 F.2d 457, 459 (9th Cir.1986). To prove deliberate indifference, a prisoner must show that a prison official knew that the prisoner faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it. *Farmer,* 114 S.Ct. at 1979, 1981. Neither negligence gross negligence, nor reckless disregard on the part of prison officials is sufficient to state a claim under § 1983. *Id.* at 1978 & n. 4; *see also Estelle v. Gamble,* 429 U.S. 97, 106 (1976) (establishing that deliberate indifference requires more than negligence).

[20] Plaintiffs allege that prison officials knew that Clark and Woods, as disabled prisoners, were substantially more susceptible to physical and mental abuse, and took no reasonable steps to protect them, even depriving them of programs and activities that would have helped Clark and Woods avoid the alleged injuries. Plaintiffs' complaint sufficiently alleges a violation of the Eighth Amendment to state a § 1983 claim.

CONCLUSION

***11** For the foregoing reasons, defendants, motion to dismiss plaintiffs, RA and ADA claims is DENIED. Defendants, motion to dismiss plaintiffs' § 1983 claim is DENIED as to plaintiffs, equal protection and Eighth Amendment claims. Defendants' motion to dismiss plaintiffs' § 1983 due process claim is GRANTED, but plaintiffs are granted leave to amend their complaint within 30 days as to their due process claim.

SO ORDERED.

1 The named individual defendants are Pete Wilson, Governor; Joseph Sandoval, Secretary of Youth and Corrections; James Gomez, Director of the Department of Corrections; Kyle S. McKinsey, Deputy Director for Health Care Services; Nadim Khoury, M.D., Assistant Deputy Director for Medical Service; and John S. Zil, M.D., Chief, Psychiatric Services (although parties have informally agreed that defendant Zil does not serve in the official capacity as alleged in the complaint, and the parties intend to substitute the proper state official for Dr. Zil at a later date).

2 This Court will not address any potential sovereign immunity defense to plaintiffs' § 1983 claim, which defendants failed to raise in their brief.

3 It is also true, as defendants contend, that the ADA was partly enacted pursuant to the Commerce Clause. Congress, however, may enact legislation pursuant to more than one of its constitutional powers. *See EEOC v. County of Columet,* 686 F.2d 1249, 1253 (7th Cir.1982). Furthermore, the Fourteenth Amendment, rather than the Commerce Clause, is the traditional constitutional authority for legislation proscribing state conduct. *See id.*

4 Because this Court has already decided that defendants are not immune to suit, this Court need not consider *Ex parte Young,* 209 U.S. 123 (1908), and progeny.

5 The reasoning and conclusion above are consistent with this courts, opinion in *Armstrong v. Wilson,* No. 2307 (Wilken, J.) (N.D. Cal. filed Sept. 20, 1996), a case which involved similar facts to the case now before this Court. That case held that the RA and ADA are applicable to state prisons and that the Eleventh Amendment did not immunize the state entity defendants from suit under the RA and ADA.

6 Any differences in the standards are not critical at this stage of the proceedings.

7 Because this Court has already decided the issue of standing in favor of plaintiffs, the Court will not address defendants' argument that plaintiffs' failure to specify such an instance means they do not have standing to challenge disciplinary actions.

The Court also disagrees with defendants' argument that plaintiffs' Fourteenth Amendment claims which implicate the loss of good time credits must be brought as habeas actions after exhausting state administrative remedies. This principle generally applies when prisoners are seeking to reinstate good time credits that have already been taken away, a remedy plaintiffs have not asked this Court to consider. *See United States v. Checchini* 967 F.2d 348, 350 (9th Cir.1992).

Heck v. Humphrey, 114 S.Ct. 2364 (1994), cited by defendants, did bar a claim of unconstitutional

deprivation of time credits because such a claim necessarily called into question the lawfulness of the duration of the plaintiff's sentence. *Sheldon v. Hundley,* 83 F.3d 231, 233 (8th Cir.1996). A § 1983 claim "for using the wrong procedure .... not for reaching the wrong result (i.e., the denial of good-time credits)," however, is cognizable. *Gotcher v. Wood,* 66 F.3d at 1099 (citing *Heck,* 114 S.Ct. at 1270). In this case, because plaintiffs' due process claim is directed toward the procedure, not the result, plaintiffs' claim is cognizable.

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