

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 12-cv-01326-RBJ-KLM

JAMES SARDAKOWSKI,

Plaintiff,

v.

TOM CLEMENTS, et al.,

Defendants.

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff James Sardakowski, through counsel, responds to Defendants' Motion for Summary Judgment. Doc. 113.

INTRODUCTION

James Sardakowski is a mentally ill and developmentally disabled prisoner currently housed in solitary confinement at Centennial Correctional Facility (CCF) in Canon City, Colorado. He asserts four claims in this case. In Claim One, Mr. Sardakowski asserts that the Colorado Department of Corrections (CDOC) has denied him adequate mental health care in violation of his Eighth Amendment right to be free from cruel and unusual punishment. Claim Two alleges that because he is a severely mentally ill individual, CDOC's housing of him in prolonged solitary confinement causes him to suffer unnecessary pain and harm in violation of the Eighth Amendment. Finally, as an individual with a disability within the meaning of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, Mr. Sardakowski asserts that Defendants have discriminated against him on the basis of his disability by refusing to adopt

reasonable modifications to the rules, policies and practices that are necessary to enable him to progress out of solitary confinement (Claims Three & Four).

Defendants' motion seeks summary judgment on all four of Mr. Sardakowski's claims. As set forth below, because there are numerous and substantial disputed issues of material fact in this case, Defendants' Motion should be denied.

OBJECTIONS TO STATEMENT OF UNDISPUTED MATERIAL FACTS¹

Objection 1. This statement is an opinion from Dr. Lish's affidavit. Doc. 113, Ex. A-2. Dr. Lish is Defendants' rebuttal expert. In his deposition, Dr. Lish testified that he had provided a complete list of his rebuttal opinions. This opinion is not included among them, and is therefore improper. *Frederick v. Swift Transp. Co.*, 616 F.3d 1074, 1082-83 (10th Cir. 2010) (affirming district court's exclusion of expert's opinion that fell outside the scope of the expert designation).

Objection 2. The evidence cited—Dr. Lish's affidavit—is insufficient to support this assertion because Dr. Lish has no personal knowledge of the fact asserted. Defendants have provided no other evidence to support this assertion, other than Dr. Lish's self-serving affidavit. Self-serving affidavits "cannot form the basis for granting summary judgment." *Ambraziunas v. Hatch*, 23 F. Supp. 2d 1202, 1204 (D. Colo. 1998). To the extent that Plaintiff has admitted any of these purportedly "undisputed" facts, he has done so based on other evidence in the record establishing the alleged facts as truly undisputed.

Objection 3. Dr. Lish based the statements in his affidavit on his "review of relevant mental health records and [his] general knowledge and experience as a CDOC Psychiatrist and Chief of Psychiatry." Doc. 113, Ex. A-2, at ¶ 7. This statement relates to events described in mental health

¹ These seven objections are relied on by Plaintiff throughout his response to Defendants' Undisputed Facts. In an effort to conserve space, Plaintiff lists them here and subsequently cites to each objection by number in each response where it is applicable.

records. Rather than cite to the relevant mental health records, Defendants cite to Dr. Lish's characterization of those mental health records. Dr. Lish's characterization is inconsistent with the relevant mental health records.

Objection 4. Dr. Lish based the statements in his affidavit on his "review of relevant mental health records and [his] general knowledge and experience as a CDOC Psychiatrist and Chief of Psychiatry." Doc. 113, Ex. A-2, at ¶ 7. Undersigned counsel has reviewed the mental health records produced for the stated time period, and was unable to locate any document consistent with Dr. Lish's assertion.

Objection 5. Defendants cite to evidence that is not admissible. Defendants cannot produce admissible evidence to support this fact. FED. R. CIV. P. 56(c)(1)(B); *Wright-Simmons v. City of Okla. City*, 155 F.3d 1264, 1268 (10th Cir. 1998).

Objection 6. This is not a statement of fact that can be admitted or denied. This is an argument.

Objection 7. This is not material. Defendants do not rely on this assertion in their argument.

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS ("RSUMF")²

1-13. **Admit.**³

14. **Admit in part, deny in part, and without sufficient information to admit or deny in part.**

- a) Admit that Mr. Sardakowski's TABE reading score was 8.4 in April 2008. Without sufficient information to admit or deny Mr. Sardakowski's TABE language and math scores. Obj. 4.
- b) Admit that Mr. Sardakowski achieved his GED in August 2008 while incarcerated within CDOC.

² Plaintiff respectfully notes that many of Defendants' undisputed facts contain multiple facts within a single paragraph, which sometimes necessitates a longer response with subparts.

³ Any fact that Plaintiff admits is admitted for the purposes of Defendants' Motion only.

- c) Admit that in August 2009 Mr. Sardakowski was assigned an MR/DD code of 2. Deny that that in August 2009 Mr. Sardakowski received any assessment or testing as the basis for lowering his MR/DD code to 2 from 4. Obj. 3. The mental health records from August 2009 state that Mr. Sardakowski's DD code was lowered "to more accurately reflect current DD needs" and references testing done several years before. Ex. #1, Mental Health Contact Dated 08/26/2009. There is no reference to assessment or testing in August 2009. *Id.*

15. Admit in part and deny in part.

- a) Deny that Mr. Sardakowski has received substantial mental health treatment while incarcerated at CDOC. Obj. 6. Mr. Sardakowski has received and continues to receive inadequate mental health treatment in CDOC. Ex. #2, Burns Dec., at ¶¶ 11, 14-20, 23.
- b) Admit to the dates that Mr. Sardakowski was housed in DRDC, FLCF, SCF, and CCF.
- c) Deny that Mr. Sardakowski was housed in SCCF during the time period specified. Mr. Sardakowski was housed in SCCF from November 2006 to October 2007 and from October 2008 to March 2009. Ex. #3, Programs Query Dated 05/10/2013. Note that Mr. Sardakowski was housed on the "2 Left DD Unit" from March 2007 to October 2007. *Id.*; Ex. #4, Sardakowski Dec., at ¶ 56.
- d) Deny that Mr. Sardakowski was housed in CTCF DD Program during the time period specified. Mr. Sardakowski was housed in CTCF from October 2007 to October 2008, but he was in the DD program only from November 8, 2007 to March 31, 2008. Ex. #, Programs Query Dated 05/10/2013.
- e) Deny that Mr. Sardakowski was housed in the CSP OMI Program during the time period specified. Mr. Sardakowski was housed in CSP from December 2009 to February 2013, but

he was in the OMI Program only from November 22, 2010 to October 26, 2011 and from August 13, 2012 to October 5, 2012. *Id.*

- f) Admit that Mr. Sardakowski was admitted to the CTCF infirmary in April 2008, March 2012, and May 2012.
- g) Deny that Mr. Sardakowski received mental health treatment at CTCF in March 2012 and May 2012. In the CTCF infirmary, Mr. Sardakowski was placed and held in four-point restraints, in a totally helpless position, a situation highly reminiscent of his childhood sexual abuse, for extended periods of time. Ex. #2, Burns Dec., at ¶ 19; Ex. #4, Sardakowski Dec., at ¶¶ 113, 116. He did not receive therapy while in four points. Ex. #5, Lampela 30(b)(6) Dep. at 141:4-7; Ex. #4, Sardakowski Dec., at ¶ 115.
- h) Admit that Mr. Sardakowski has been on numerous mental health watches while at Sterling Correctional Facility and Colorado State Penitentiary.

16. Without sufficient information to admit or deny. Obj. 2.

17. Admit.

18. Admit in part and deny in part.

- a) Admit that an offender declaring an emergency constitutes a mental health crisis, but note that a “mental health emergency” may also be initiated by CDOC staff. Ex. #5, Lampela 30(b)(6) Dep.at 139:2-7.
- b) Deny that an offender declaring a mental health emergency always results in an urgent face-to-face evaluation by a CDOC mental health clinician. Ex. #4, Sardakowski Dec, at ¶ 109.
- c) Admit that Mr. Sardakowski has declared mental health crises throughout his CDOC incarceration.

19. Admit.

20. **Without sufficient information to admit or deny.** Obj. 2 and 4.

21. **Without sufficient information to admit or deny.** Obj. 2 and 4.

22. **Admit.**

23. **Admit.**

24. **Admit in part and without sufficient information to admit or deny in part.**

- a) Without sufficient information to admit or deny that in July 2009, Mr. Sardakowski reported “feeling positive.” Obj. 2 and 4. Admit the remaining facts.

25. **Admit in part and deny in part.**

- a) Admit that in August 2009, *mental health notes indicate* that Mr. Sardakowski was pretending to be asleep. However, at this time Mr. Sardakowski did not have hearing aids, and his hearing disability often prevented him from realizing that CDOC staff were speaking to him/addressing him. Ex. #4, Sardakowski Dec., at ¶ 83; Ex. #6, Accommodation Resolution.
- b) Deny that in August 2009, Mr. Sardakowski reported thoughts of cutting himself “out of frustration.” Obj. 3. Mr. Sardakowski is noted to have said that he may have made a statement to staff out of frustration, not cut himself for that reason. Ex. #7, Mental Health Note Dated 08/04/2009.
- c) Admit the remaining facts.

26. **Admit.** However, these events occurred in September 2009. Ex. #8, Mental Health Note Dated 09/01/2009.

27. **Admit in part and deny in part.**

- a) Deny that Mr. Sardakowski was attempting to use mental health staff to achieve a desired move. Obj. 3 and 5. A mental health clinician noted that “I/M *appears* to be attempting to

use mental health to manipulated desired move.” Ex. #9, Mental Health Note Dated 09/03/2009, 3. Inmates do not control their movement throughout CDOC facilities. Ex. #10, Medina Dep. at 36:17-38:10 (explaining that the decision to transfer an inmate from one facility to another involves at least “custody-control staff, program staff, clinical staff,” and Central Classification at Offender Services). Admit the remaining facts.

28. Admit in part, deny in part, and without sufficient evidence to admit or deny in part.

- a) Deny that Mr. Sardakowski wanted to be at CSP or in segregation. Obj. 2 and 3. Mr. Sardakowski indicated that he refused to pay rent or sex for protection, and that he would *rather* be in CSP or seg. Ex. #11, Mental Health Note Dated 10/19/2009, 1.
- b) Deny that mental health notes indicate that other offenders were taunting Mr. Sardakowski about his crime. Obj. 2 and 3. One of the correctional officers was telling other offenders about Mr. Sardakowski’s underlying crime. *Id.*
- c) Without sufficient evidence to admit or deny that in November 2009, Mr. Sardakowski admitted making up a story to move from one pod to another, and that he refused to speak when not given what he wanted. Obj. 2 and 4.
- d) Admit that the mental health note indicates the remaining statements.

29. Admit.

30. Admit.

31. Admit.

32. Without sufficient evidence to admit or deny Mr. Sardakowski’s statements. Obj. 2 and 4.

Admit the remaining facts.

33. **Admit in part, deny in part.** Deny that Mr. Sardakowski spit at staff. Mr. Sardakowski was wearing a spit mask at the time of the incident. Ex. #4, Sardakowski Dec., at ¶ 120 & Attach. A. Admit the remaining facts.

34. **Admit.**

35. **Admit.** Mr. Sardakowski began a hunger strike because he was not being given a snack. Medical had ordered that Mr. Sardakowski be given snacks with his medication as it taking it on an empty stomach was making him faint and dizzy. Ex. #12, Mental Health Note Dated 10/11/2012.

36. **Admit.**

37. **Without sufficient information to admit or deny.** Obj. 2, and 4.

38. **Admit** that 11/20/06 mental health note makes these statements.

39. **Admit.**

40. **Deny.** Mr. Sardakowski was recommended to move to the SCCF DD Unit and CTCF DD SO Program on March 14, 2007. Ex. #13, DD Referral Form, 2. Obj. 2 and 4.

41. **Admit.**

42. **Admit.**

43. **Admit.**

44. **Admit.**

45. **Admit.**

46. **Admit.**

47. **Admit in part and without sufficient evidence to admit or deny in part.**

- a) Admit that mental health notes indicate that Mr. Sardakowski recounted a time he attempted suicide in county jail by tying a pair of boxers around his neck.

b) Without sufficient evidence to admit or deny that on 10/18/2007, mental health notes indicate a move to CTCF/DD program. Obj. 2 and 4.

48. **Admit in part, deny in part.** Deny that the 11/19/2007 mental health notes indicate possible medical issues. Ex. #14, Mental Health Contact Dated 11/19/2007. Obj. 2 and 4. Admit the remaining facts.

49. **Deny.** On 1/9/2008 mental health notes indicate that Mr. Sardakowski states he feels that Zoloft is making his symptoms of depression worse. Ex. #15, Mental Health Contact Dated 01/09/2008. Obj. 3.

50. **Admit in part, deny in part.**

- a) Deny that 2/22/2008 mental health notices indicate he “enjoys activities at CCF.” Ex. #16, Mental Health Note Dated 02/22/2008. Obj. 2 and 4.
- b) Deny that on 2/22/2008 mental health notes indicate that “medication helpful.” Mr. Sardakowski states that an increase Zoloft and a *decrease* in Prolixen was helpful. *Id.* Obj. 3.
- c) Admit the remaining facts.

51. **Admit that the mental health note indicates those statements.**

52. **Admit in part and deny in part.**

- a) Admit that on 4/24/2008 mental health notes indicate that Mr. Sardakowski’s GED instructor reported that he is doing well in the class and has passed tests.
- b) Deny that on 4/24/2008 mental health notes indicate “infirmity for suicidal ideation.” Ex. #17, Mental Health Note Dated 04/24/2008. Obj. 2 and 4.

53. **Deny.**

- a) Deny that the records indicate no assault. Records indicate that Mr. Sardakowski’s was taken to St. Thomas Hospital after a possible sexual assault. Mr. Sardakowski had been taken from

a cell with a known sexual offender. Mr. Sardakowski said he thought it was consensual but he was “not sure what really happened.” Ex. #18, St. Thomas Hospital Emergency Provider Record; Ex. #19, Ambulatory Health Record Dated 04/25/2008. Obj. 2, 3, and 7.

- b) Deny that on 4/25/2008 Mr. Sardawkoski “won’t go to SCCF.” An offender has no control over his placement in a facility. Ex. #20, Mental Health Contact Dated 04/25/2008; Ex. #10, Medina Dep. at 36:17-38:10 (explaining that the decision to transfer an inmate from one facility to another involves at least “custody-control staff, program staff, clinical staff,” and Central Classification at Offender Services). Obj. 3 and 7.
- c) Deny that on 4/25/2008 the mental health notes indicate Mr. Sardakowski was “demanding,” refused breakfast, demanded a PBJ, described consensual sex, or was “bright, positive, upbeat, humorous.” Mr. Sardakowski requested breakfast that day. Ex. #20, Mental Health Contact Dated 04/25/2008. Obj. 2 and 4.

54. **Deny** that on 6/20/2008 mental health notes indicate “stopped meds.” Mental health notes indicate that Mr. Sardakowski stated that he stopped taking all medication except for Buspar. Ex. #21, Mental Health Note Dated 06/20/2008. Obj. 3.

55. **Admit.**

56. **Admit that the mental health notes indicate these statements.**

57. **Admit in part and deny in part.**

- a) Admit that a 9/2/2008 mental health note indicates that Mr. Sardakowski passed his GED test.
- b) Deny that Mr. Sardakowski passed his GED “off meds.” Obj. 2 and 4. The only mental health record produced for September 2, 2008, does not include any information about Mr. Sardakowski’s medication. Ex. #22, Mental Health Note Dated 09/02/2008. Mr.

Sardakowski was taking psychiatric medication when he prepared for and took the GED test. He had been off psychiatric medication for only a few days at the time he received his GED results. Ex. #4, Sardakowski Dec., at ¶ 67.

58. **Admit that the mental health notes indicate these statements.**

59. **Admit.**

60. **Admit that the mental health notes indicate these statements.**

61. **Admit.**

62. **Admit.**

63. **Admit that the mental health notes indicate these statements.**

64. **Deny in part and without sufficient information to admit or deny in part.**

a) Deny that between 11/13/2008 through 11/30/2008 mental health notes indicated “not psychotic.” On 11/13/2008 Mr. Sardakowski spoke of how he is suffering from “psychological torture.” Ex. #23, Mental Health Note Dated 11/13/2008.

b) Without sufficient information to admit or deny that from 11/13/2008 through 11/30/2008 mental health notes indicate: On mental health watch; reported as depressed, sad frustrated. Mental health documents with these dates were not produced. Obj. 2 and 4.

65. **Admit.**

66. **Deny.** On 6/14/2009 it is noted that Mr. Sardakowski’s current diagnosis included Axis 1 Schizoaffective disorder. Ex. #24, Mental Health Note Dated 06/14/2009, 1. On 7/20/2009 it is noted that Mr. Sardakowski’s current diagnosis includes Schizoaffective disorder. Ex. #25, Mental Health Contact 07/20/2009. On 8/21/2009 it is noted that Mr. Sardakowski’s current diagnosis includes Schizoaffective disorder. Ex. #26, Mental Health Contact Dated 08/21/2009. Obj. 2 and 3.

67. **Deny.** On 1/15/2009 it is noted in Mr. Sardakowski's ambulatory health record that while Seroquel "makes his delusions less," it is hard to be by himself all day because it seems as if the voices are louder. Ex. #27, Ambulatory Health Record Dated 01/15/2009. Obj. 2 and 3.

68. **Admit that the mental health notes indicate these statements.**

69. **Admit in part, deny in part.**

- a) Admit that the mental health notes indicate these statements.
- b) Deny it was unlikely that Mr. Sardakowski was experiencing auditory or visual hallucinations. Mr. Sardakowski has been hearing voices and experiencing visual hallucinations for years. Ex. #4, Sardakowski Dec., at ¶¶ 180-182; Ex. #2, Burns Dec., at ¶ 4.

70. **Admit that the mental health notes indicate these statements.**

71. **Admit in part and deny in part.**

- a) Deny that mental health notes on 4/6/2009 indicate that Mr. Sardakowski was demanding to see a psychiatrist. Ex. #28, Mental Health Note Dated 04/06/2009. Obj. 2 and 4.
- b) Deny that mental health notes on 4/6/2009 indicate that Mr. Sardakowski was threatening to stop medications. *Id.* Obj. 2 and 4.
- c) Admit that the mental health notes indicate the remaining statements.

72. **Admit that the mental health notes indicate these statements.**

73. **Admit in part, deny in part.**

- a) Admit that the mental health notes indicate these statements.
- b) Deny that Mr. Sardakowski was manipulating staff. Mr. Sardakowski left the medication line was because he was hearing voices that told him that he would be attacked, and was later not allowed to re-enter the med line. Ex. #29, Mental Health Note Dated 05/19/2009.

74. **Deny in part, without sufficient information to admit or deny in part.**

- a) Deny that Mr. Sardakowski does not need help from Mental Health. Ex. #2, Burns Dec., at ¶¶ 8, 9, 11, 16-25.
- b) Without sufficient information to admit or deny whether the mental health records indicate the statements listed. Obj. 2 and 4.

75. Admit that the mental health records indicate these statements.

76. **Deny.** Mental Health notes produced by Defendants for 06/01/2009 nowhere indicate that Mr. Sardakowski made a threat or a statement to force a move to CSP/SCCF for a single-cell when request for CTCF was denied. Ex. #30, Mental Health Note Dated 06/01/2009. Obj. 2, and 4.

77. Admit in part, deny in part.

- a) Admit that on 6/17/2009, Clinician Hotz recorded this opinion in a mental health note.
- b) Deny that Mr. Sardakowski was manipulating the system or abusing mental health services. Ex. #2, Burns Dec., at ¶ 18.

78. Admit in part, deny in part.

- a) Admit that the mental health notes indicate these statements.
- b) Deny that Mr. Sardakowski was misusing mental health crises. Ex. #2, Burns Dec., at ¶ 18.

79. Admit.

- a) Admit that in a 6/30/2009 staffing note Case Manager Payne stated his opinion that Mr. Sardakowski “is running a con.” Obj. 5 . Paragraph 83 of Defendants’ Ex. A-2 is hearsay and cannot be considered for summary judgment. *See Wright-Simmons v. City of Okla. City*, 155 F.3d at 1268.
- b) Admit that in the same meeting Mr. Payne stated that Mr. Sardakowski said he could not read then proceeded to read a wall poster. Obj. 5. *Id.* However, Mr. Sardakowski sometimes

says that he is illiterate when asked to read out loud, as he is embarrassed that he will not read aloud correctly. Ex. #4, Sardakowski Dec., ¶ 65.

80. Admit in part and deny in part.

- a) Deny that in 7/7/2009 SCF mental health note no psychosis was observed. Note states “He reported auditory/visual hallucinations saying, ‘Even in daytime I can see a bulky shadow in the corner of my cell,’; “I have been hearing a morning dove singing . . . since 11/2008.”

Ex. #31, Mental Health Note Dated 07/07/2009, 2. Obj. 2 and 3.

- b) Admit that the mental health notes indicate the remaining statements.

81. Admit the mental health notes indicate these statements.

82. Without sufficient information to admit or deny. Obj. 2 and 4.

83. Admit that the mental health notes indicate these statements.

84. Admit that the mental health notes indicate these statements.

85. Without sufficient information to admit or deny. Obj. 2 and 4.

86. Admit that on 9/4/2009 mental health notes recite that Mr. Sardakowski made these statements.

However, the same mental health note indicated that Mr. Sardakowski stated that he would behave for three days, then kill himself when released from mental health watch. Ex. #32, Mental Health Contact Dated 09/04/2009.

87. Admit that the mental health notes indicate these statements. However, these events are described in a mental health note dated 9/6/2009.

88. Admit that the mental health notes indicate these statements. However, the phrases “‘self-harming = self soothing’, knows how to hurt himself safely; pressured for sex, pills and canteen from other offenders” are not from Dr. Wilson’s letter; these phrases are contained in an incident report from and a mental health note from 9/18 written by clinician Hotz.

89. **Deny.** Mr. Sardakowski was put on metal health watch due to “claims of feeling suicidal.”

Ex. #33, Mental Health Note Dated 10/19/2009, 1.

90. **Admit in part, without sufficient information to admit or deny in part.**

- a) Admit that on 10/21/2009 mental health notes report: “he stated that if correctional staff attempts to move him he will engage in self-harming behaviors.”
- b) Admit that on 10/21/2009 Clinician Willson characterized Mr. Sardakowski as “belligerent” in mental health notes.
- c) Without sufficient information to admit or deny whether Mr. Sardakowski made a statement about extra fruit. Obj. 2 and 4.

91. **Without sufficient evidence to admit or deny.** Undersigned counsel cannot find any mental health document dated 11/12/2009 in those that Defendants have produced. Obj. 2 and 4.

92. **Admit that mental health records indicate these statements.**

93. **Without sufficient information to admit or deny.** Undersigned counsel cannot find any mental health document dated 2/10/2010 in those that Defendants have produced. Obj. 2 and 4.

94. **Admit in part, deny in part.**

- a) Admit that mental health notes indicate these statements.
- b) Deny that Mr. Sardakowski thinks clearly. Ex. #2, Burns Dec., at ¶ 9 (“His intellectual deficits include problems with reasoning, judgment and problem-solving skills as clinically assessed as well as via intelligence testing.”); *see also id.* at ¶ 25.

95. **Admit that mental health notes indicate these statements.**

96. **Admit in part, deny in part.** Deny that the 6/16/2010 mental health note contains language referring to Mr. Sardakowski’s anger at Seroquel being stopped, or an admission to cheeking/selling

medication. Ex. #34, Mental Health Contact Dated 06/16/2010. Admit that the mental health notes indicate the remaining statements.

97. **Admit in part, deny in part.**

- a) Deny that on 11/02/2010, mental health notes indicate mental health issues. The 11/02/2010 mental health note states: “no MH issues.” Ex. #35, Mental Health Contact Dated 11/02/2010 (emphasis added). Obj. 3. Admit that the mental health notes indicate the remaining statements.

98. **Deny** that Mr. Sardakowski was in the OMI program at this time. Ex. #3, Programs Query Dated 05/10/2013.

99. **Admit.**

100. **Admit.**

101. **Without sufficient information to admit or deny.** Defendants have not produced any mental health document dated 1/27/2011. Obj. 2 and 4.

102. **Admit in part, deny in part.**

- a) Deny that on 3/23/11 mental health note indicates that Mr. Sardakowski’s primary diagnosis is antisocial personality disorder. The 3/23/11 mental health note does not mention any diagnosis. Ex. #36, Mental Health Note Dated 03/23/2011. Obj. 2 and 3.
- b) Deny that Mr. Sardakowski thought CSP was good for him. Ex. #4, Sardakowski Dec., at ¶¶ 101, 110-113, 117, 123.
- c) Admit that the mental health notes indicate the remaining statements.

103. **Admit that the mental health notes indicate these statements.**

104. **Admit that the mental health notes indicate these statements.**

105. **Admit that the mental health notes indicate these statements.**

106. **Admit that the mental health notes indicate these statements.**

107. **Admit that the mental health notes indicate these statements.**

108. **Admit in part, deny in part.**

a) Deny that Mr. Sardakowski was malingering. Mr. Sardakowski was administered an industry-standard test for malingering, and the test results indicated that he was not malingering. Ex. #37, Mental Health Providers Recommendation Regarding Disability Status; Ex. #38, Psychological Testing Report, 2.

b) Admit that mental health notes indicate the remaining statements.

109. **Admit that the mental health notes indicate these statements.**

110. **Admit that the mental health notes indicate these statements.**

111. **Admit in part, deny in part.**

a) Deny that Mr. Sardakowski has in-depth process thinking abilities and good understanding and intellect. Ex. #2, Burns Dec., at ¶ 9; Ex. #39, Pinto Dec. at ¶ 3, Attach. A, Pinto Report, 11 (hereinafter “Pinto Report”).

b) Deny that Mr. Sardakowski was faking and playing dumb at CSP. Mr. Sardakowski was held under extremely restrictive conditions at CSP, was put on mental health watch multiple times, and was sent from CSP to the CTCF infirmary to be four-pointed. Ex. #4, Sardakowski Dec., at ¶¶ 92-123; Ex. #40, Haney Dep. at 103:14-25 (“Mr. Sardakowski is living in a dirty, smelly cell by himself, and he’s been in something very similar to that since December of 2009. If he’s malingered his way into that, he’s very bad at it.”).

c) Admit that the mental health notes indicate the remaining statements.

112. **Without sufficient information to admit or deny.** Undersigned counsel cannot find any mental health document dated 8/23/11 in those that Defendants have produced. Obj. 2 and 4.

113. Admit in part, deny in part.

- a) Deny that Mr. Sardakowski was malingering deafness. Mr. Sardakowski has a hearing disability for which he has been provided hearing aids. Ex. #4, Sardakowski Dec., at ¶¶ 11, 83; Ex. #6, Accommodation Resolution.
- b) Deny that 9/22/11 mental health note contains any diagnosis. Ex. #41, Mental Health Contact Dated 09/22/2011. Obj. 2 and 3.
- c) Admit that the mental health notes indicate the remaining statements.

114. Without sufficient information to admit or deny. Defendants have not produced any mental health document dated 11/4/11. Obj. 2 and 4.

115. Admit that the mental health notes indicate this statement.

116. Admit that the mental health notes indicate these statements.

117. Admit that the mental health notes indicate these statements.

118. Admit that the mental health notes indicate these statements.

119. Admit that the mental health notes indicate these statements.

120. Admit that 3/02/12 mental health note states that Mr. Sardakowski was pleasant; it also states that he said he was Jesus and commanded clinician to worship him. Ex. #42, Mental Health Contact Dated 03/02/2012.

121. Admit in part, deny in part.

- a) Deny that 3/12/12 mental health notes indicate any statement by Mr. Sardakowski about beating Mental Health in their own game. The only statements by Mr. Sardakowski indicated in the records are regarding his hearing aids. Ex. #43, Ambulatory Health Record Dated 03/12/2012.
- b) Admit that the mental health notes indicate the remaining statements.

122. Admit in part, deny in part.

- a) Deny that being in four-point restraints is therapy for Mr. Sardakowski. Ex. #4, Sardakowski Dec., ¶¶ 113-115 (explaining four-pointing process and that, “Four-pointing makes me feel subhuman, like I’m some type of wild animal that needs to be controlled and tamed”); Ex. #2, Burns Dec., at ¶ 19 (four-pointing holds Mr. Sardakowski “in a totally helpless position, a situation highly reminiscent of his childhood sexual abuse, for extended periods of time”).
- b) Admit that the mental health notes indicate these statements.

123. Admit that the mental health notes indicate these statements. Mr. Sardakowski’s desire to be moved out of solitary confinement comes as no surprise, given the especially detrimental effect solitary confinement has on mentally ill individuals. Ex. #44, Haney Dec., at ¶ 8.

124. Deny. The 3/19/12 mental health note states that “[Mr.] Sardakowski will remain in ambulatory restraints due to his continued expressed plan to kill himself.” Ex. #45, Mental Health Contact Dated 03/19/2012. Obj. 2 and 3.

125. Admit that the mental health notes indicate these statements.

126. Admit that Mr. Sardakowski stated that he would rather be in the CTCF infirmary than at CSP because “he has felt safe in the Infirmary and has not had thoughts to self harm.” Ex. #46, Mental Health Note Dated 03/20/2012.⁴

127. Deny. The 3/21/12 Mental Health note indicates that Mr. Sardakowski was “encouraged in maintaining value in his goal of getting re-classified and sent to CTCF for the PDP.” Ex. #47, Mental Health Contact Dated 03/21/2012. After being in four-point restraints for three days, Mr. Sardakowski contracted with a clinician to “be good for 60 days” so that he could go the DD program. Ex. #4, Sardakowski Dec., at ¶¶ 116-117; Ex. #47, Mental Health Contact Dated

⁴ The text in Exhibit #46 is partially cut off. Defendants produced this document to Plaintiff in this format.

03/21/2012. Mr. Sardakowski behaved according to the contract for 60 days, but was not transferred to the DD program. *Id.* at ¶ 119; Ex. #3, Programs Query Dated 05/10/2013. Obj. 2 and 3.

128. **Admit that the mental health notes indicate these statements.** Despite contracting with a clinician to behave appropriately in order to be transferred to the DD program, Mr. Sardakowski was not transferred to the DD program. *See* ¶ 127, *supra*.

129. **Admit in part, deny in part.**

- a) Admit that the mental health notes indicate these statements.
- b) Deny that the listed diagnoses are correct. Ex. #2, Burns Dec., at ¶¶ 8, 26.

130. **Deny.** 5/10/12 mental health note makes no mention of banging head or restraint helmet. Ex. #48, Mental Health Note Dated 05/10/2012. Obj. 2 and 3.

131. **Admit.**

132. **Admit in part, deny in part.**

- a) Admit that the mental health notes indicate these statements, though not all statements are included in the 5/28/2012 record.
- b) Deny that Mr. Sardakowski received treatment while in four-point restraints. Ex. #5, Lampela 30(b)(6) Dep. at 141:4-7; Ex. #4, Sardakowski Dec., at ¶ 115.

133. **Admit.**

134. **Admit in part, deny in part.**

- a) Admit that a DD program referral is indicated in June 2012.
- b) Deny that Mr. Sardakowski was transferred to the DD program thereafter. Mr. Sardakowski was housed in CSP from December 2009 until February 2013, when he was moved to the RTP at CCF. Ex. #3, Programs Query Dated 05/10/2013.

135. Admit in part, deny in part.

- a) Deny that Mr. Sardakowski can control the medication he receives from CDOC psychiatric providers. Ex. #49, Lish Expert Dep. at 44:4-45:8 (“You don’t just tell patients what they’re going to get, nor do you just give patients whatever they want.”); Ex. #4, Sardakowski Dec., at ¶ 168.
- b) Admit that the mental health notes indicate these statements.

136. Admit in part, deny in part.

- a) See Response to ¶135(a).
- b) Admit that the mental health notes indicate these statements.

137. Admit. Despite being recommended for the DD program, Mr. Sardakowski was not transferred to the DD program because “[i]t was determined since he is in Ad-Seg at CSP he would stay there.” Ex. #50, Mental Health Note Dated 07/25/2012.

138. Admit that the mental health notes indicate these statements.

139. Admit in part, deny in part.

- a) Deny that Mr. Sardakowski was manipulating the CDOC mental health system. While the mental health note indicates that Mr. Sardakowski stated that he was manipulating the system to see his aunt before she died, he was referencing his attempt to get his sentence overturned and be released from prison. Ex. #51, Mental Health Note Dated 08/02/2012.
- b) Deny that being placed in four-point restraints helps Mr. Sardakowski. Ex. #4, Sardakowski Dec., at ¶¶ 113-114 (explaining four-pointing process and that it “makes me feel subhuman, like I’m some type of wild animal that needs to be controlled and tamed”); Ex. #2, Burns Dec., at ¶ 19.
- c) Admit that the mental health note indicates these statements.

140. Admit in part, deny in part.

- a) Deny that Mr. Sardakowski could control his movement to San Carlos Correctional Facility. A transfer to San Carlos involves a “status” assignment of RTP, and Mr. Sardakowski has no control over the “status” assigned to him by CDOC. Ex. #10, Medina Dep. at 49:13-25. An inmate might be sent to San Carlos if CDOC staff determines that he has “decompensated severely.” *Id.* at 109:8-15. CDOC staff decides whether a placement at San Carlos is appropriate, and the clinical chief makes the final determination regarding a transfer to the facility. *Id.* at 110:21-111:15.
- b) Admit that the mental health notes indicate these statements. Obj. 5 regarding the description of Mr. Sardakowski as demanding and agitated.

141. Admit in part, deny in part.

- a) Deny that Mr. Sardakowski could control his movement between pods. Ex. #52, Mental Health Note Dated 08/13/2012 (“MH confirmed that [Mr. Sardakowski] is not a candidate to transfer into another pod.”).
- b) Admit that the mental health note indicates these statements.

142. Admit in part, deny in part.

- a) Deny that Mr. Sardakowski could mandate his transfer into the OMI program. While an inmate could request to be placed in the OMI program, CDOC staff still had to determine that he met the OMI program qualifications before he could be placed there. Ex. #5, Lampela 30(b)(6) Dep. at 23:13-22.
- b) Admit that the mental health note indicates these statements.

143. Admit that the mental health records indicate these statements.

144. Admit in part, deny in part.

- a) Admit that the mental health note includes these diagnoses.
- b) Deny that these are the only diagnoses indicated. The note says, “Per Dr. Shepard on 7/17/12, [Mr. Sardakowski’s] more appropriate diagnosis is Schizoaffective D/O.” Ex. #53, Mental Health Note Dated 09/27/2012. Obj. 3.

145. Admit in part, deny in part.

- a) Deny that Mr. Sardakowski can control his movement between facilities. Ex. #10, Medina Dep. at 36:17-38:10 (explaining that the decision to transfer an inmate from one facility to another involves at least “custody-control staff, program staff, clinical staff,” and Central Classification at Offender Services).
- b) Deny that Mr. Sardakowski’s thought process was organized and logical. Ex. #2, Burns Dec., at ¶ 9.
- c) Admit that the mental health note indicates these statements.

146. Admit that mental health note indicates these statements.

147. Admit that the mental health notes indicate these statements. Obj. 5 with respect to the clinician’s paraphrasing of Mr. Sardakowski’s statements and the opinion that he is distorting facts. Paragraph 151 of Defendants’ Ex. A-2 is hearsay and cannot be considered for summary judgment. *See Wright-Simmons*, 155 F.3d at 1268.

148. Deny. The only mental health record produced to Plaintiff dated October 12, 2012, contains none of these statements by Mr. Sardakowski. Ex. #54, Mental Health Watch Directives Dated 10/12/2012. Obj. 2 and 3.

149. Without sufficient information to admit or deny. Undersigned counsel cannot find any mental health note dated 10/14/12 in those that Defendants have produced. Obj. 2 and 4.

150. Admit that the mental health note indicates these statements.

151. **Admit in part, deny in part.**

- a) Deny that 10/22/12 mental health note contains information regarding housing situation or tying off testicles. Ex. #55, Mental Health Note Dated 10/22/2012. Obj. 2 and 3.
- b) Admit that the mental health note indicates the remaining statements.

152. **Admit that the mental health note indicates these statements.**

153. **Admit that the mental health note indicates these statements.** Obj. 5 with respect to the clinician's statement that Mr. Sardakowski "could be heard throughout the facility screaming and yelling."

154. **Deny.** The only mental health record produced for November 3, 2012, does not contain this information. Ex. #56, Mental Health Watch Orders Dated 11/03/2012. Obj. 2 and 3.

155. **Deny.** The only mental health record produced for November 4, 2012, does not contain this information, and indicates only that Mr. Sardakowski's ongoing Mental Health Watch would be continued for at least another 24 hours. Ex. #57, Mental Health Watch Orders Dated 11/04/2012. Obj. 2 and 3.

156. **Without sufficient information to admit or deny.** Undersigned counsel cannot find any mental health note dated 11/15/12 in those that Defendants have produced. Obj. 2 and 4.

157. **Without sufficient information to admit or deny.** Undersigned counsel cannot find any mental health note dated 12/07/12 in those that Defendants have produced. Obj. 2 and 4.

158. **Without sufficient information to admit or deny.** Undersigned counsel cannot find any mental health note dated 12/13/12 in those that Defendants have produced. Obj. 2 and 4.

159. **Without sufficient information to admit or deny.** Undersigned counsel cannot find any mental health note dated 1/08/13 in those that Defendants have produced. Obj. 2 and 4.

160. **Without sufficient information to admit or deny.** Undersigned counsel cannot find any mental health note dated 1/25/13 in those that Defendants have produced. Obj. 2 and 4.

161. **Admit.**

162. **Admit.** Obj. 5 to clinician's description of what the note said. Paragraph 166 of Defendants' Ex. A-2 is hearsay and cannot be considered for summary judgment. *See Wright-Simmons*, 155 F.3d at 1268.

163. **Admit that the mental health note indicates these statements.** Obj. 5 to clinician's description of Mr. Sardakowski's statements. Paragraph 167 of Defendants' Ex. A-2 is hearsay and cannot be considered for summary judgment. *See Wright-Simmons*, 155 F.3d at 1268.

164. **Without sufficient information to admit or deny.** Undersigned counsel was unable to locate a mental health note dated 5/14/13 within produced documents. A 5/14/2013 mental health note was never produced. Obj. 2 and 4.

165. **Without sufficient information to admit or deny.** Undersigned counsel cannot find any mental health note dated 5/21/13 in those that Defendants have produced. Obj. 2 and 4.

166. **Deny.** The only mental health record that has been produced for May 30, 2013, does not contain this information. Ex. #58, Mental Health Note Dated 05/30/2013. Obj. 2 and 3.

167. **Admit in part, deny in part.**

- a) Deny that Mr. Sardakowski has no psychosis. Ex. #2, Burns Dec., at ¶ 8.
- b) Admit that the mental health note indicates these statements. Obj. 5 with respect to the clinician's opinion of how Mr. Sardakowski was feeling.

168. **Admit.** (Assuming that the mental health note referenced is actually from August 20, 2013, not 2012.) Obj. 5 with respect to clinician's description of Mr. Sardakowski's group participation and

cooperation with peers. Paragraph 172 of Defendants' Ex. A-2 is hearsay and cannot be considered for summary judgment. *See Wright-Simmons*, 155 F.3d at 1268.

169. **Admit.** Obj. 5 with respect to clinician's description of level progression, group attendance, cooperation with peers, and paraphrasing of Mr. Sardakowski's statement. Paragraph 173 of Defendants' Ex. A-2 is hearsay and cannot be considered for summary judgment. *See Wright-Simmons*, 155 F.3d at 1268).

170. **Admit in part, deny in part.**

- a) Admit that on September 19, 2013, CDOC staff indicated that Mr. Sardakowski was ready for level progression.
- b) Deny that Mr. Sardakowski was progressed to Level 4 on or around that date. He was not progressed to Level 4 until November 19, 2013. Doc. 113, Ex. A-7, at ¶ 6.

171. **Admit in part, deny in part, and without sufficient knowledge to admit or deny in part.**

- a) Plaintiff is without sufficient knowledge to admit or deny whether diagnoses change over time when providers get to know their patients. Defendants offer no evidence to support this fact. Obj. 1 and 2.
- b) Plaintiff is without sufficient knowledge to admit or deny whether diagnoses change over time in a prison environment. Defendants offer no evidence to support this fact. Obj. 2.
- c) Admit that Mr. Sardakowski's diagnosis has changed over time.
- d) Deny that Mr. Sardakowski has had any one provider long enough for that provider to "get to know" Mr. Sardakowski. Ex. #4, Sardakowski Dec., at ¶ 160; Ex. #2, Burns Dec. at ¶ 16.

172. **Admit in part, deny in part.**

- a) Admit that Mr. Sardakowski's diagnosis has changed over time. Obj. 2.

b) Deny that Mr. Sardakowski's diagnosis has evolved over time. Defendants mischaracterize an inconsistent diagnosis as an evolution of his diagnosis. Obj. 2 and 3.

173. **Admit** that Mr. Sardakowski was given this diagnosis, among others, in 2006. Obj. 2.

Defendants specify no precise date for when this diagnosis occurred.

174. **Admit** that Mr. Sardakowski was given this diagnosis, among others, in 2006. Obj. 2.

Defendants specify no precise date for when this diagnosis occurred.

175. **Admit** that Mr. Sardakowski was given this diagnosis in 2007, though it was among other diagnoses that year including schizoaffective disorder (SAD) and borderline intellectual functioning.

Ex. #59, Mental Health Contact Dated 05/29/2007. Obj. 2. Defendants specify no precise date for when this diagnosis occurred.

176. **Admit** that Mr. Sardakowski was given this diagnosis, among others, in 2008. Obj. 2.

Defendants specify no precise date for when this diagnosis occurred.

177. **Admit** that Mr. Sardakowski was given this diagnosis, among others, in 2008. Obj. 2.

Defendants specify no precise date for when this diagnosis occurred.

178. **Admit** that Mr. Sardakowski was given this diagnosis, among others, in 2008. Obj. 2.

Defendants specify no precise date for when this diagnosis occurred.

179. **Admit** that Mr. Sardakowski was given this diagnosis, among others, in 2009. Obj. 2.

Defendants specify no precise date for when this diagnosis occurred.

180. **Admit in part, deny in part.**

a) Admit that Mr. Sardakowski was given this diagnosis, among others, in 2009. Obj. 2.

Defendants specify no precise date for when this diagnosis occurred.

b) Deny that Mr. Sardakowski was malingering. Mr. Sardakowski was administered an industry-standard test for malingering, and the test results indicated that he was *not*

malingering. Ex. #37, Mental Health Providers Recommendation Regarding Disability Status; Ex. #38, Psychological Testing Report, 2.

181. Admit in part, without sufficient information to admit or deny in part, and deny in part.

- a) Admit that Mr. Sardakowski had this diagnosis, among others, in 2009. Obj. 2. Defendants specify no precise date for when this diagnosis occurred.
- b) Without sufficient information to admit or deny whether mental health note indicates Plaintiff is “using Mental Health for secondary gain;” no specific mental health note is indicated. Obj. 2.
- c) Without sufficient information to admit or deny whether mental health notes describe Plaintiff as “attention seeking;” no specific mental health note is cited. Obj. 2.
- d) *See* RSUMF ¶ 180(b).

182. Admit in part, deny in part.

- a) Admit that Mr. Sardakowski was given this diagnosis, among others, in 2009. Obj. 2. Defendants specify no precise date for when this diagnosis occurred.
- b) *See* RSUMF ¶ 180(b).

183. Admit in part, without sufficient information to admit or deny in part, deny in part.

- a) Admit that Mr. Sardakowski was given this diagnosis, among others, in 2010. Obj. 2. Defendants specify no precise date for when this diagnosis occurred.
- b) Without sufficient information to admit or deny whether it is “noted” that Mr. Sardakowski is “stable off medication;” as no note is cited by Defendants. Obj. 2.
- c) *See* RSUMF ¶ 180(b).

184. Admit in part, without sufficient knowledge to admit or deny in part, deny in part.

a) Admit that Mr. Sardakowski was given this diagnosis, among others, in 2010. Obj. 2.

Defendants specify no precise date for when this diagnosis occurred.

b) Without sufficient information to admit or deny whether Mr. Sardakowski is noted as “calm” and “insightful,” as no note is cited by Defendants. Obj. 2.

c) See RSUMF 180(b).

185. **Admit** that Mr. Sardakowski was given this diagnosis, among others, in 2010. *See* ¶ 183 *supra*.

Obj. 2. Defendants specify no precise date for when this diagnosis occurred.

186. **Admit in part, deny in part, and without sufficient information to admit or deny in part.**

a) Admit that the mental health records indicate these statements.

b) Without sufficient information to either admit or deny whether there are “several admissions.” Obj. 2. It is unclear what “as to malingering, there are ‘several admissions’” entails and in what capacity these admissions were made as Defendants cite to no underlying evidence.

c) Admit that a letter was found in Mr. Sardakowski’s cell. Obj. 2.

d) Deny that the letter explains “how to malingering to get changes and attention.” Ex. #40, Haney Dep. at 107:8-109:21. Obj. 2 and 3.

e) Plaintiff is without sufficient information to admit or deny whether a note indicates Mr. Sardakowski is “stable, with improvement...talkative, appropriate, likes program” because there is no date or indication of which mental health note the quoted material alludes to.

Obj. 2.

f) See RSUMF ¶ 180(b).

187. **Admit in part, without sufficient information to admit or deny in part.**

- a) Admit that Mr. Sardakowski was given this diagnosis, among others, in 2012. Obj. 2.

Defendants specify no precise date for when this diagnosis occurred.

- b) Without sufficient information to admit or deny that it was noted that Mr. Sardakowski was hoarding medication, as no note is cited by Defendants. Obj. 2.

188. **Admit** that Mr. Sardakowski was given this diagnosis, among others, in 2012. Obj. 2.

Defendants specify no precise date for when this diagnosis occurred.

189. **Deny.** Obj. 1.

- a) The current diagnosis from P.A. Travis Waters is Borderline Personality Disorder, not Anti-Social Personality Disorder. Ex. #60, Ambulatory Health Record Dated 11/12/2013 at 3.
- b) Deny that either ASPD or BPD is Mr. Sardakowski's primary diagnosis. Ex. #61, Burns Dep. at 19:11-17; Ex. #2, Burns Dec., ¶¶ 17-19.

190. **Admit.**

191. **Deny in part and without sufficient information to admit or deny.**

- a) Without sufficient information to admit or deny whether there are no notes in Mr. Sardakowski's file expressing concern for Mr. Sardakowski's treatment or lack thereof. Obj. 2 and 3. As noted throughout, Dr. Lish references many mental health notes that were never produced by Defendants. *See, e.g.,* ¶¶ 156-160, *supra*.
- b) Without sufficient information to admit or deny whether CDOC clinicians regularly express concern that inmate should be receiving more or different treatment. Obj. 2. Defendants have not provided any mental health notes for other prisoners in which CDOC clinicians express concern that an inmate should be receiving more or different treatment.

192. **Deny.**

- a) Obj. 1, 2, 3, and 6. To the extent that Mr. Sardakowski has engaged in what Defendants characterize as “threats and intimidation,” this has resulted in punishment for Mr. Sardakowski, not his mental health needs being met. Ex. #62, SCF Disposition of Charges; Ex. #63, Denver Complex Disposition of Charges. Mr. Sardakowski usually has to resort to some sort of self-harm or attention seeking behavior in order to get his needs met, but this underlines a larger issue, which is that Mr. Sardakowski’s needs have never been met. Ex. #2, Burns Dec., ¶ 20. Even threats of self-harm from Mr. Sardakowski result in his being punished. Ex. #62, SCF Disposition of Charges; Ex. #64, CSP Disposition of Charges, 2. Mr. Sardakowski is not able to have his needs met by simply asking to see Mental Health. Ex. #65, ChronLog Dated 06/13/2013 (indicating that on January 15, 2009, a mental health clinician described Mr. Sardakowski as “sooo needy”); Ex. #61, Burns Dep. at 109:13-110:1.

193. Admit in part and deny in part.

- a) Admit that Mr. Sardakowski’s mental illness and some of its origins predate his incarceration at CDOC.
- b) Deny that all origins of Mr. Sardakowski’s mental illness predate his incarceration at CDOC. Obj. 1 and 2. Solitary confinement is the origin of some of Mr. Sardakowski’s current mental illness symptoms. Ex. #2, Burns Dec., at ¶ 11. For example, Mr. Sardakowski describes that people do not understand what he is talking about. Ex. #44-2, Haney Expert Report at ¶ 93. Because of his long-term social isolation, Mr. Sardakowski is unable to communicate with other people; his social reality has been altered due to lack of meaningful social interaction. Ex. #40, Haney Dep. at 144:2-146:11.
- c) Deny that the expressions of Mr. Sardakowski’s mental illness predate his incarceration at CDOC. Obj. 1 and 2. Mr. Sardakowski did not engage in head banging nor did he bite

himself until after he was incarcerated in administrative segregation at CDOC. Ex. #4, Sardakowski Dec., at ¶ 192. Ex. #44, Haney Dec., at ¶ 13.

194. Admit in part, Deny in part, and without sufficient information to admit or deny.

- a) Deny that Mr. Sardakowski is able to dictate his movement within CDOC. Ex. #10, Medina Dep. at 36:17-42:21; 87:2-24. Obj. 2. Mr. Sardakowski has been disciplined for mental health crises involving self-harm, which contributed to his placement in administrative segregation and has extended his time there. Ex. #2, Burns Dec., at ¶¶ 18, 27; Ex. #40, Haney Dep. at 103:14-25 (“Mr. Sardakowski is living in a dirty, smelly cell by himself, and he’s been in something very similar to that since December of 2009. If he’s malingered his way into that, he’s very bad at it.”).
- b) Deny that Mr. Sardakowski uses mental health crises to combat boredom. Obj. 2. Mr. Sardakowski declares mental health crises as a way to get the attention and care that he needs. Ex. #40, Haney Dep. at 108:20-109:21.
- c) Admit that CDOC considers Mr. Sardakowski’s reporting of mental health symptoms as abuse of mental health services. Obj. 1 and 2.
- d) Deny that Mr. Sardakowski’s reporting of mental health symptoms constitutes an abuse of mental health services. Ex. #61, Burns Dep. 61:16-62:7, 113:24-116:23; Ex. #2, Burns Dec., at ¶ 18 (“Reporting of mental health symptoms should not be considered an ‘abuse of mental health services,’ but Mr. Sardakowski has been punished for the same.”).

195. Admit in part, deny in part and without sufficient information to admit or deny in part.

- a) Admit that Mr. Sardakowski has admitted to exaggerating psychiatric symptoms in order to receive the treatment he needs. Ex. #40, Haney Dep. at 108:20-110:2. Obj. 2.

- b) Deny that Mr. Sardakowski has admitted to faking psychiatric symptoms in order to “manipulate his movement to and from various facilities and units.” Obj. 2 and 3. Mr. Sardakowski cannot control his movement around CDOC. Ex. #10, Medina Dep. 36:17-42:21; 87:2-24.
- c) Admit that a letter was found in Mr. Sardakowski’s cell. Obj. 2.
- d) Without sufficient information to admit or deny that the letter described how to “act crazy.” Obj. 2. Obj. 5 to Dr. Lish’s description of what the letter says.
- e) Admit that these behaviors could be consistent with a diagnosis of malingering; however, Mr. Sardakowski was administered an industry-standard test for malingering, and the test results indicated that he was *not* malingering. Ex. #37, Mental Health Providers Recommendation Regarding Disability Status; Ex. #38, Psychological Testing Report, 2.
- f) Admit that the presence of malingering does not rule out the presence of an actual mental illness.

196. Admit in part, deny in part, and without sufficient information to admit or deny in part.

- a) Admit that Mr. Sardakowski sometimes uses self-harm for stress relief.
- b) Deny that stress relief is the only reason that Mr. Sardakowski engages in self-harming behavior. Mr. Sardakowski uses self-harm to cope with hearing voices and other symptoms of his mental illness. Ex. #4, Sardakowski Dec., at ¶ 187; Ex. #2, Burns Dec., at ¶ 11.
- c) Without sufficient information to admit or deny Mr. Sardakowski’s statement that “feeling pain is the only thing that helps me.” Obj. 2. Dr. Lish—who did not meet with Mr. Sardakowski in order to prepare his affidavit and has never met Mr. Sardakowski (Ex. #49, Lish Expert Dep. at 35:4-9; Lish Affidavit, Doc. 113, Ex. A-2 at ¶¶ 194-95) —does not

identify a source for this statement in his affidavit. Doc. 113, Ex. A-2, ¶ 201. Dr. Lish's affidavit provides no information regarding the context or timeframe for this statement. *Id.*

- d) Without sufficient information to admit or deny the statement regarding individuals with borderline personality disorder. Obj. 1.

197. Admit in part and deny in part.

- a) Admit that Mr. Sardakowski's mental health crises relate to CDOC's failure to meet Mr. Sardakowski's mental health needs.
- b) Deny that Mr. Sardakowski's mental health crises relate to "frustration" rather than genuine symptoms of mental illness. Obj. 2. Ex. #4, Sardakowski Dec., at ¶¶ 69, 81, 89, 104, 112; Ex. #2, Burns Dec., at ¶¶ 11, 18-19.
- c) Deny that Mr. Sardakowski's mental health crises have not been related to psychotic episodes. Mr. Sardakowski ties off his testicles to cope with hearing voices, Ex. #4, Sardakowski Dec., at ¶ 187; Ex. #2, Burns Dec., at ¶ 11, and this has led to mental health watch and four-pointing. Ex. #4, Sardakowski Dec., at ¶ 104, 108, 112, 121, 189.

198. Admit in part, deny in part, and without sufficient information to admit or deny in part.

- a) Deny that Mr. Sardakowski can control his behavior when it suits him to do so. Obj. 1 and 2. Mr. Sardakowski's serious mental illness impairs his ability to control his behavior. Ex. #2, Burns Dec., at ¶ 13; Ex. #4, Sardakowski Dec., at ¶¶ 173, 175. Many of the behaviors for which Mr. Sardakowski has been punished are symptoms of his mental illness. Ex. #2, Burns Dec., at ¶ 18.
- b) Admit that Mr. Sardakowski obtained his GED.
- c) Without sufficient information to admit or deny that Mr. Sardakowski stated "I have anger issues." Obj. 2. Dr. Lish—who did not meet with Mr. Sardakowski in order to prepare his

affidavit (Ex. #49, Lish Expert Dep. at 35:4-9) —does not identify a source for this statement in his affidavit. Doc. 113, Ex. A-2, at ¶ 201. Dr. Lish’s affidavit provides no information regarding the context or timeframe for this statement. Doc. 113, Ex. A-2, at ¶ 203.

199. **Admit in part, deny in part, and without sufficient information to admit or deny in part.**

- a) Admit that mental health records indicate that Mr. Sardakowski’s IQ score in 2006 was 84, but note that Mr. Sardakowski’s 2005 Full Scale IQ score was 69. Ex. #39-A, Pinto Rpt, 11.
- b) Without sufficient information to admit or deny Mr. Sardakowski’s TABE score of 6.4. Obj. 4.
- c) Deny that Mr. Sardakowski received his GED while off medication. Mr. Sardakowski received his GED *results* while he was off psychiatric medication, but Mr. Sardakowski was taking psychiatric medication when he prepared for and took the GED test. Ex. #4, Sardakowski Dec., at ¶ 67. He had been off psychiatric medication for only a few days at the time he received his GED results. *Id.*
- d) Deny that he was living independently at the time of his arrest. Obj. 2. Mr. Sardakowski was receiving SSI and was unable to independently support himself at the time of his arrest. Ex. #4, Sardakowski Dec., at ¶ 37. He had been living in his own apartment for only two months. *Id.* Ex. #61, Burns Dep. 27:5-28:9.
- e) Admit that Mr. Sardakowski’s current MR/DD score is 2.
- f) Deny that an MR/DD code of 2 indicates that Mr. Sardakowski is not currently identified as an individual with any need for developmental disability treatment. CDOC policy states that an MR/DD code of 2 indicates “low developmental disability needs,” but that

offenders with this code should be referred for treatment if behavior problems are noted.

Ex. #66, DD Code Clinical Standard, 27.

- g) Deny that Mr. Sardakowski does not have a developmental disability. Obj. 1. Mr. Sardakowski has been diagnosed with an intellectual disability. Ex. #2, Burns Dec., at ¶ 9; Ex. #39-A, Pinto Report, 11. He was placed in special education classes as a child. Ex. #4, Sardakowski Dec., at ¶ 6; Ex. #39-A, Pinto Report, 3; Ex. #67, Diagnostic Narrative Summary. He has been placed in multiple CDOC programs for inmates with developmental disabilities. Ex. #4, Sardakowski Dec., at ¶¶ 56, 63-64; Ex. #13, DD Referral Form.
- h) Without sufficient information to admit or deny the comments of mental health professionals who have worked with Mr. Sardakowski. Obj. 2. Dr. Lish's affidavit does not provide any information regarding the source(s) of these comments or the timeframe in which they were made. Doc. 113, Ex. A-2, at ¶ 204.

200. Admit in part, deny in part, and without sufficient information to admit or deny in part.

- a) Admit that Mr. Sardakowski is seriously mentally ill.
- b) Deny that Mr. Sardakowski's presentation is consistent with a personality disorder with both antisocial and borderline traits. Obj. 1. Dr. Lish stated in his deposition that he did not diagnose Mr. Sardakowski; indeed, he has never met Mr. Sardakowski. Ex. #49, Lish Expert Dep. at 34:14-21; 35:3-9; Lish Affidavit, Doc. 113, Ex. A-2, at ¶¶ 194-195. Mr. Sardakowski's symptoms are most consistent with schizoaffective disorder. Ex. #2, Burns Dec., at ¶ 8.
- c) Without sufficient information to admit or deny the statements of "the vast majority of mental health professionals who have worked with" Mr. Sardakowski. Obj. 2. Defendants have not identified statements of mental health providers that would support this broad assertion by Dr. Lish. *See* Doc. 113, Ex. A-2, ¶ 205. Mr. Sardakowski has been diagnosed

with schizoaffective disorder by CDOC mental health providers. Ex. #53, Mental Health Note Dated 09/27/2012; Ex. #68, Mental Health Contact Dated 05/29/2007.

- d) Without sufficient information to admit or deny the statements regarding treatment of personality disorders. Obj. 1. These statements do not relate to Dr. Lish's rebuttal expert opinions, and are therefore improper.
- e) Without sufficient information to admit or deny that "[j]ails and prisons are filled with personality-disordered individuals who are resistant to treatment." Obj. 2 and 7. Defendants have provided no evidence regarding the prevalence of personality disorder among incarcerated populations and no evidence that anyone is resistant to treatment.

201. Admit in part, deny in part, and without sufficient information to admit or deny in part.

- a) Admit that there is debate about whether Mr. Sardakowski has a diagnosis of a psychotic disorder such as schizoaffective disorder.
- b) Without sufficient information to admit or deny the findings of the "vast majority" of psychiatrists who have evaluated Mr. Sardakowski. Obj. 2. Defendants do not identify any statements of psychiatrists that support this broad assertion by Dr. Lish. *See* Doc. 113, Ex. A-2, at ¶ 205. Multiple psychiatric providers have diagnosed Mr. Sardakowski with psychotic disorders including schizoaffective disorder. *E.g.*, Ex. #53, Mental Health Note Dated 09/27/2012; Ex. #68, Mental Health Contact Dated 05/29/2007.
- c) Deny that Mr. Sardakowski has been evaluated by 19 psychiatrists. The 19 "psychiatric providers" identified by Dr. Lish in ¶ 18 are not all psychiatrists. Ex. #69, Lish 30(b)(6) Dep. at 28:17-21, 30:4-6. Furthermore, Defendants have provided no evidence that the psychiatric providers listed actually "evaluated" or diagnosed Mr. Sardakowski. Interactions between psychiatric providers and inmates frequently take place via video conferencing and involve

only routine monitoring of medications. Ex. #4, Sardakowski Dec., at ¶ 167; Ex. 69, Lish 30(b)(6) Dep. at 53:20-54:23.

- d) Deny that the only evidence of psychotic symptoms is Mr. Sardakowski's self-report. Ex. #61, Burns Dep. at 19:18-21:17; Ex. #39-A, Pinto Report, 1 ("In the middle session, he was clearly . . . disoriented and psychotic. He appeared to be responding to internal stimuli and to be struggling to engage and maintain.").
- e) Deny that there are no notes describing behavior consistent with a disorganized, psychotic individual. Ex. #61, Burns Dep. at 19: 18-23, 21:18-22.
- f) Deny that there have not been notes describing sustained mood episodes. Mr. Sardakowski has remained on mental health watch for days at a time due to self-harming behavior. Ex. #70, Mental Health Note Dated 10/31/2012 ("[W]e spoke of the fact that he'd been in MH Watch for several days.").
- g) Without sufficient information to admit or deny that "[m]ood lability, anger, auditory hallucinations and transient paranoid thoughts are a common symptom of individuals with borderline personality disorder, particularly those with a history of trauma during childhood and adolescence." Obj. 1.

202. Admit in part and without sufficient information to admit or deny in part.

- a) Admit that Mr. Sardakowski has been prescribed antipsychotic, mood-stabilizing, and antidepressant medications during his incarceration in CDOC.
- b) Deny that Mr. Sardakowski has been "consistently" prescribed psychotropic medications. *See* Doc. 113, at ¶ 17.

- c) Deny that antipsychotic, mood-stabilizing, and antidepressant medications are frequently prescribed to individuals with borderline personality disorder. Obj. 1. Personality disorders are not ordinarily treated with medication. Ex. #61, Burns Dep. at 152:6-23.
- d) Without sufficient information to admit or deny the treatment Mr. Sardakowski would have received if he had received a different diagnosis. Obj. 1 and 2.
- e) Admit that CDOC psychiatric staff have met with Mr. Sardakowski on multiple occasions.
- f) Admit that Mr. Sardakowski has been prescribed Seroquel by CDOC psychiatric staff.

203. Admit in part, deny in part, and without sufficient information to admit or deny in part.

- a) Deny that CDOC mental health staff has been diligently attempting to treat Mr. Sardakowski. Mr. Sardakowski has received almost no mental health treatment in CDOC apart from medication. Instead, CDOC staff have repeatedly disciplined and isolated Mr. Sardakowski for behaviors that are manifestations of his mental illness, including self-harm. Ex. #62, SCF Disposition of Charges; Ex. #64, CSP Disposition of Charges, 2; Ex. #2, Burns Dec., ¶¶ 11, 18-19, 27; Ex. #4, Sardakowski Dec., ¶ 197.
- b) Admit that Mr. Sardakowski was sent to SCCF twice, that he participated in the DD program at CTCF, that he was placed in the OMI program at CSP, and that he is currently placed in RTP in CCF.
- c) Deny that Mr. Sardakowski is receiving meaningful mental health treatment other than medication in RTP. Ex. #2, Burns Dec., at ¶¶ 11, 20; Ex. #4, Sardakowski Dec., at ¶¶ 152, 154, 158, 161, 164, 165, 171, 200. Mr. Sardakowski has received only one individual therapy-type meeting with a mental health clinician since his arrival in RTP. Ex. #71, Robinson Dep. at 192:13-16; Ex. #4, Sardakowski Dec., at ¶ 164. That meeting did not qualify as individual therapy because it was not confidential; it took place in the dayhall within earshot of other

prisoners' cells. Ex. #, Sardakowski Dec., at ¶ 164; Ex. #, Burns Dec., at ¶ 16. Mr.

Sardakowski does not know the contents of his individual treatment plan because no one has ever discussed it with him. Ex. #4, Sardakowski Dec., at ¶ 154, 200.

- d) Without sufficient information to admit or deny that these programs represent the highest level of mental health services available within CDOC. The programs listed represent range of services for varying disorders and levels of acuity. RTP at SCCF, for example, offers a higher level of mental health care than RTP at CCF. Ex. #72, Wasko Dep. at 182:23-183:8. Thus, Plaintiff is unable to admit that both SCCF and RTP represent the highest level of mental health services in CDOC. The DD program at CTCF was a program for inmates with developmental disabilities; it did not offer mental health services. Ex. #4, Sardakowski Dec., at ¶ 64.

204. Admit in part and deny in part.

- a) Admit that Mr. Sardakowski's mental health could improve with therapy.
- b) Deny that Mr. Sardakowski has not been willing to undertake therapy. Mr. Sardakowski has not had the opportunity to participate in therapy because therapy has not been offered to him. Ex. #4, Sardakowski Dec., at ¶ 164; Ex. #2, Burns Dec., at ¶ 16. Mr. Sardakowski believes discussing self-harm and other issues in a confidential setting can help him, Ex. #4, Sardakowski Dec., at ¶ 176, and he is willing to open up to CDOC mental health staff with whom he has developed a trusting relationship. *Id.* at ¶ 162. However, he has not been treated by any single mental health provider long enough to form a therapeutic relationship. Ex. #4, Sardakowski Dec., at ¶¶ 160-161; Ex. #2, Burns Dec., at ¶ 16.
- c) Deny that Mr. Sardakowski has antisocial personality disorder or borderline personality disorder. Ex. #, Burns Dep. at 64:4-17, 186:15-18; Ex. #, Burns Dec., at ¶ 17. Mr.

Sardakowski was never diagnosed with a personality disorder during his extensive history of mental health treatment prior to his incarceration. Ex. #39-A, Pinto Report, 17.

- d) **Without sufficient information to admit or deny** that antisocial personality disorder and borderline personality disorder cannot be “fixed” with medication. Obj. 1.

205. Admit in part and without sufficient information to admit or deny in part.

- a) Admit that Mr. Sardakowski progressed to Level 4, but note that this progression occurred only one week before Defendants filed their Motion for Summary Judgment. Doc. 113, Ex. A-7, at ¶ 6. He has been regressed from Level 4 in the past after only one week. Ex. #73, Level Review. He has never progressed beyond Level 4. Ex. #4, Sardakowski Dec., at ¶ 136; Ex. #44, Haney Dec., at ¶ 16.
- b) Admit.
- c) Deny that “during his most recent psychiatric encounter he reports that his medications are helping quite a bit to manage his moods and he is happy and compliant with his current regimen.” Obj. 4. The last record produced by Defendants documenting a psychiatric encounter indicated that P.A. Waters was changing Mr. Sardakowski’s medications. Ex. #60, Ambulatory Health Record Dated 11/12/2013.

206. Admit.

207. Admit in part and deny in part.

- a) Admit that RTP replaced the OMI program.
- b) Admit that Exhibit A-3 states that the RTP is a program in which offenders with mental illness receive individual and group therapy, educational programs, and recreational activities.
- c) Deny that Mr. Sardakowski has received individual therapy in the RTP. Mr. Sardakowski has received only one individual meeting with a mental health clinician since his arrival in the

RTP. Ex. #4, Sardakowski Dec., at ¶ 164; Ex. #71, Robinson Dep. at 192:13-16. That meeting did not qualify as individual therapy because it was not confidential; it took place in the dayhall within earshot of other prisoners' cells. Ex. #, Sardakowski Dec., at ¶ 164; Ex. #2, Burns Dec., at ¶ 16.

208. **Admit that this is what the policy states.**

209. **Admit that this is what the policy states.**

210. **Admit that this is what the policy states.**

211. **Admit in part and deny in part.** Deny that the lower levels in RTP at CCF are less restrictive than the lower levels of OMI at CSP. Ex. #44, Haney Dec., at ¶ 14; Ex. #4, Sardakowski Dec., at ¶¶ 134-135, 137-139. Mr. Sardakowski is restrained whenever he leaves his cell on RTP Levels 1-3 and whenever he leaves his unit on RTP Level 4. Ex. #4, Sardakowski Dec., at ¶ 142; Ex. #74, RTP Restraint Matrix. The privileges that inmates receive in RTP levels 1-3 are identical to those in OMI levels 1-3. Ex. #75, Lampela Dep. at 216:21-217:21. Both CSP and CCF are designated “Level V Facilities”—the highest security level for CDOC facilities. Ex. #76, AR 600-01, 3-4. Apart from access to outdoor exercise at CCF, Ex. #4, Sardakowski Dec., at ¶ 134, the physical plant of the two facilities is the same. Ex. #72, Wasko Dep. at 120:3-18. Admit the remaining facts.

212. **Deny.** Ex. #44, Haney Dec., at ¶¶ 14-16; Ex. #4, Sardakowski Dec., at ¶¶ 141-143; 147, 156, 159. Mr. Sardakowski spends less than 6 hours per week out of his cell. Ex. #, Sardakowski Dec., at ¶ 141, and at most, three hours per week of purportedly therapeutic group activities. *Id.* at ¶ 156; Ex. #71, Robinson Dep. 131:12-14. However, many of these group sessions are cancelled due to lockdowns and staff shortages. *Id.*; Ex. #77, RTP Group Cancellation Chart.

213. **Without sufficient information to admit or deny in part, deny in part.**

- a) Without sufficient information to admit or deny that such meetings take place. Defendants have produced no records of any meeting among RTP staff relating to Mr. Sardakowski when he was referred to RTP in February 2013.
- b) Deny that RTP staff met with Mr. Sardakowski when he was referred to the program to discuss why he was referred or what his goals were. Ex. #4, Sardakowski Dec., ¶¶ 133, 154.

214. **Admit.**

215. **Admit in part, and deny in part, and without sufficient information to admit or deny in part.** Obj. 2. Defendants did not provide a citation or any evidence to support this assertion.

- a) Admit that offenders in RTP receive group therapy.
- b) Deny that Mr. Sardakowski has received individual therapy in RTP. Ex. #4, Sardakowski Dec., at ¶ 164; Ex. #2, Burns Dec., at ¶ 16.
- c) Without sufficient information to admit or deny whether other prisoners in RTP receive individual therapy.

216. **Admit.**

217. **Admit** that therapy varies between RTP levels. Without sufficient information to admit or deny whether therapy is more “advanced” at higher levels.

218. **Deny.** Mr. Sardakowski was progressed to Level 4 without completing the Level 3 curriculum. Ex. #4, Sardakowski Dec., at ¶ 153.

219. **Admit.**

220. **Deny.** *See* Response to ¶ 218.

STATEMENT OF ADDITIONAL DISPUTED MATERIAL FACTS (“SADMF”)

Mr. Sardakowski Has Been Diagnosed with Serious Mental Illness and Developmental Disabilities

1. In 2005, while incarcerated at the Adams County Detention Center awaiting trial, Mr. Sardakowski was evaluated by Dr. Suzanne Pinto, a forensic psychologist. Dr. Pinto gave Mr. Sardakowski a primary diagnosis of Axis I Bipolar Disorder, mixed, severe with psychotic features and Post Traumatic Stress Disorder. This diagnosis was based on three interviews, tests, and record review. Ex. #39-A, Pinto Report, 1, 17.
2. “It is notable that Mr. Sardakowski has never been given an Axis II diagnosis of Antisocial Personality disorder or Narcissistic Personality disorder out of recognition that his violence and acting out is not in his control and is secondary to his severe mental illness.” *Id.* at 17.
3. As part of the 2005 evaluation, Mr. Sardakowski was also administered a WAIS III test and was found to have an Full Scale IQ score of 69, putting him in the mildly mentally retarded range. *Id.* at 11.
4. Mr. Sardakowski’s low scores in several areas “indicated clear intellectual liabilities. . . . Comprehension specifically measures judgment or common sense . . . His low scores indicate that his social judgment, social conventionality and his ability to use facts in a pertinent and emotionally relevant manner are extremely compromised. Picture completion is a test that requires concentration, reasoning, cognition, judgment, and delay of impulses. Perception is poor. Picture Arrangement is a test that requires the interpretation of social situations, including an ability to plan, comprehend and to look at the big picture. Mr. Sardakowski lacks the ability to anticipate the consequences of initial acts or situations and the ability to interpret social

situations. He shows a poor ability to see meaningful continuity in his life and to anticipate, judge and understand the possible antecedents and consequences of events.” *Id.* at 11.

5. Mr. Sardakowski was placed in special education as a child due to his “slowness, his learning disabilities, his behavior, and his ADHD. He had a difficult time with comprehension, reading, and focusing.” *Id.* at 3; *see also* Ex. #4, Sardakowski Dec., at ¶ 6.
6. Mr. Sardakowski is “extremely impaired in terms of his ability to think logically, coherently, and to realistically perceive other people and events. . . . Situational stress is likely to make more demands upon his limited adaptive capacities than he is able to respond to thereby reducing his effectiveness in making decisions He is likely to have less control over his feelings than most people.” Ex. #39-A, Pinto Report, 11.
7. Mr. Sardakowski has poor impulse control and poor judgment. *Id.* at 1.
8. CDOC assigns prisoners Developmental Disability (DD) codes on a scale of 1 to 5, with 5 representing the lowest level of functioning. Ex. #69, Lish 30(b)(6) Dep. at 89:24-91:4.
9. CDOC diagnosed Mr. Sardakowski with a DD score of 4 for most of 2007-2009 while he was incarcerated at CTCF, SCCF, and SCF. Ex. #78, Mental Health Notes DD Code 4.
10. The CDOC determines an offender’s DD score based on mental health observations regarding adaptive functioning, IQ tests, and additional testing. Ex. #5, Lampela 30(b)(6) Dep. at 84:24-85:22.
11. Although CDOC typically administers the Vineland Test to determine whether an individual has a developmental disability, it was not administered to Mr. Sardakowski. Ex. #5, Lampela 30(b)(6) Dep. at 85:11-25.

12. Due to Mr. Sardakowski's reading disability, he reads slowly to identify the important words in a paragraph. It is embarrassing for Mr. Sardakowski to read out loud when sees something for the first time. Ex. #4, Sardakowski Dec., at ¶ 65.
13. As a symptom of his mental illnesses, Mr. Sardakowski has consistently heard voices in his head since he was between 7-9 years old. Ex. #2, Burns Dec., at ¶ 4. Mr. Sardakowski hears voices at all times that he is awake. Medication makes the voices quieter and easier for Mr. Sardakowski to ignore, but medication does not make the voices go away. Ex. #4, Sardakowski Dec., at ¶¶ 13, 177-78, 180.
14. As a way of coping with the stress of the voices, Mr. Sardakowski at times resorts to self-harm, including tying off his testicles, biting himself, and banging his head. Ex. #4, Sardakowski Dec., at ¶¶ 187, 192; Ex. #2, Burns Dec., at ¶ 11.
15. In May 2013, after having reviewed his mental health records provided by CDOC and performing an in-person psychiatric evaluation of Mr. Sardakowski, Dr. Burns diagnosed him as having an intellectual disability and "a serious mental illness with mood and psychotic features, most likely schizoaffective disorder." Ex. #2, Burns Dec., at ¶¶ 8-9.
16. Mr. Sardakowski "is highly vulnerable on many fronts: limited intellectual capacity, psychiatric illness, psychologically traumatized, hearing impaired, and highly immature and naïve regarding survival in adult prison." Ex. #2, Burns Dec., at ¶ 20.
17. Mr. Sardakowski is a victim of sexual abuse. Ex. #4, Sardakowski Dec., at ¶ 8; Ex. #79, Mental Health Crisis Note 06/14/2009 at 2.
18. Mr. Sardakowski has never been able to support himself or live independently. During the only two months that he lived in his own apartment—the two months leading up to his arrest—he

received SSI and was not working. Ex. #4, Sardakowski Dec., at ¶ 37; Ex. #2, Burns Dep. 27:5-28:9.

CDOC's Response to Mr. Sardakowski's Self-Harm

19. Mr. Sardakowski has an extensive history of self-harm documented in his CDOC mental health records, including suicide attempts and repeated self-injury involving “tying off” his testicles. Ex. #80, Mental Health Note Dated 05/26/2012; *see also* Ex. #4, Sardakowski Dec., at ¶¶ 101-103; 187-191.
20. Mr. Sardakowski has attempted suicide on numerous occasions. Ex. #4, Sardakowski Dec., at ¶¶ 18, 52, 84, 89; Ex. #80, Mental Health Note Dated 05/26/2012.
21. Mr. Sardakowski continues to self-harm by tying off his testicles nearly weekly in RTP. Ex. #4, Sardakowski Dec., at ¶¶ 150, 190-191; Ex. #60, Ambulatory Health Record Dated 11/12/2013.
22. Mr. Sardakowski is at elevated risk of continued self-injury as well as the possibility of suicide due to his psychotic thought processes. Ex. #2, Burns Dec., at ¶ 25.
23. CDOC recognizes the need to provide specialized treatment for inmates who engage in self-harming and suicidal behavior. Ex. #81, CDOC “Offenders with Mental Illness” Report Dated 01/31/2013, at 14 (“It is imperative that the Department create a self-injurious unit to provide immediate and specialized assessment and treatment for offenders who engage in self-harming behavior.”).
24. No CDOC mental health clinician has ever addressed Mr. Sardakowski’s tying-off behaviors with him. Ex. #5, Lampela 30(b)(6) Dep. at 105:25-106:8; Ex. #4, Sardakowski Dec., at ¶ 200.
25. CDOC staff have punished Mr. Sardakowski for self-harming with disciplinary infractions for “misuse of clinical services,” among other charges. Ex. #4, Sardakowski Dec., at ¶ 197; Ex. #64, CSP Disposition of Charges; Ex. #2, Burns Dec., at ¶ 18.

26. The Code of Penal Discipline (COPD) is the written policy of the CDOC that establishes procedures, responsibilities, specific prohibitions, and sanctions for violation of those prohibitions. Ex. #82, AR 250-54(III)(A).
27. COPD charges and incident reports negatively affect Mr. Sardakowski's RTP level progression. Ex. #4, Sardakowski Dec., at ¶ 199; Ex. #5, Lampela 30(b)(6) Dep. at 117: 4-8.
28. In response to Mr. Sardakowski's self-harm, CDOC has subjected him to punitive conditions on "mental health watch." Ex. #4, Sardakowski Dec., at ¶¶ 104-105, 109, 112, 119-120 and Attachment A, 121; Ex. #2, Burns Dec., at ¶ 18.
29. After harming himself, Mr. Sardakowski has been chained to a bed with immobilizing four-point restraints, wearing a diaper, for days at a time in conditions highly reminiscent of his childhood sexual abuse. Ex. #4, Sardakowski Dec., at ¶¶ 112-113, 121; Ex. #2, Burns Dec., at ¶ 19.
30. During mental health watch and four-pointing, mental health staff did not provide therapy to Mr. Sardakowski or discuss the self-harming behaviors that led to his placement in restraints. Ex. 5, Lampela 30(b)(6) Dep. at 141: 4-7; Ex. #4, Sardakowski Dec., at ¶¶ 107-108, 115, 122.
31. Mr. Sardakowski has been afraid to report his ongoing self-harm to mental health staff for fear of being further punished for it. Ex. #4, Sardakowski Dec., at ¶¶ 198-199; Ex. #60, Ambulatory Health Record Dated 11/12/2013.
32. In October of 2013, Mr. Sardakowski told the RTP psychiatric provider, Physician Assistant Travis Waters, that he was continuing to self-harm by tying off his testicles, and that he was afraid to report self-harm to mental health staff because he could be punished for it. PA Waters did not discuss Mr. Sardakowski's self-harm with him, nor did he appear to write anything down about it. Ex. #4, Sardakowski Dec., at ¶ 198.

33. In November of 2013, Mr. Sardakowski again told PA Waters that he was continuing to tie off.
Ex. #60, Ambulatory Health Record Dated 11/12/2013.

Lack of Individualized Treatment in RTP

34. Mr. Sardakowski requires individual, confidential treatment to deal with his psychological trauma, history of sexual abuse, and ongoing self-harming behaviors. Ex. #2, Burns Dec., at ¶¶ 13, 16, 22.

35. Individual contact with a mental health counselor must be more frequent than monthly in order to establish a trusting therapeutic relationship. Ex. #2, Burns Dec., at ¶ 16.

36. Individual therapy must be confidential. Ex. #5, Lampela 30(b)(6) Dep. at 135:19-22; Ex. #2, Burns Dec., at ¶¶ 16, 20.

37. Mr. Sardakowski has been offered only one individual therapy-type session with a mental health clinician since his arrival in the RTP in February 2013. Ex. #71, Robinson Dep. at 192:13-193:5; Ex. #4, Sardakowski Dec., at ¶ 164. That meeting was not confidential because it took place in the dayhall within earshot of other inmates' cells. Ex. #4, Sardakowski Dec., at ¶ 164.

38. All of Mr. Sardakowski's other individual contacts with mental health clinicians were for the purpose of allowing him to review his mental health records. Ex. #4, Sardakowski Dec., at ¶¶ 164-165.

39. Meeting with a clinician for records review is not therapy. Ex. #5, Lampela 30(b)(6) Dep. at 135:7-15.

40. Each inmate in the RTP is supposed to get one individual therapy session per week. Ex #75, Lampela Dep. at 162:17-19. Offering an inmate only two opportunities to meet one-on-one with a clinician during a six month period violates RTP policy, Ex. #72, Wasko Dep. at 107:22-

108:3, and is “woefully insufficient” given the complexity and severity of Mr. Sardakowski’s condition. Ex. #61, Burns Dep. at 189:1-4; Ex. #2, Burns Dec., at ¶ 16.

41. According to CDOC, the RTP utilizes individual treatment plans with “targeted behavior goals” that are discussed with inmates in one-on-one meetings. Ex. #5, Lampela 30(b)(6) Dep. at 33:9-35:24; Ex. #72, Wasko Dep. at 104:19-105:11.

42. Mr. Sardakowski does not know the contents of his individual treatment plan because RTP clinicians have never discussed it with him. Ex. #4, Sardakowski Dec., at ¶ 154. Mr. Sardakowski does not know if he has any goals as part of his treatment plan. *Id.*

43. Mr. Sardakowski’s individual treatment plans in the RTP are “vague” and do not contain objective and measurable goals. Ex. #5, Lampela 30(b)(6) Dep. at 46:24-47:23.

44. Mr. Sardakowski’s treatment plan does not address his self-harming behaviors. Ex. #71, Robinson Dep. at 219:2-5.

RTP Group Sessions

45. Group therapy is the primary form of treatment offered in the RTP. Ex #5, Lampela 30(b)(6) Dep. at 16:24-17:6.

46. Defendant Jill Lampela was involved in creating and implementing the OMI Program and the RTP. Ex. #75, Lampela Dep. at 33:4-18; 43:10-44:10.

47. Defendant Jill Lampela acknowledged that vulnerable inmates are not comfortable sharing in a group setting because other inmates may use sensitive information against them, and that individual therapy is important for those vulnerable inmates. Ex. #75, Lampela Dep. at 125:17-128:13.

48. Mr. Sardakowski’s history of sexual victimization and “tying off” behaviors are not subjects that Mr. Sardakowski is able to discuss openly with other inmates who can use the information

against him, taunt him, and otherwise bully him. Ex. #2, Burns Dec., at ¶ 23; Ex. #4, Sardakowski Dec., at ¶ 158.

49. Group sessions are not sufficient to treat Mr. Sardakowski's serious mental health needs. Ex. #2, Burns Dec., at ¶ 23.

50. In the first six months of 2013, 27% of scheduled RTP group sessions were canceled, with the most frequently cited reasons being "staff shortage," "other/unknown," and "facility lockdowns." Ex #77, RTP Group Cancellation Chart; *see also* Ex. #4, Sardakowski Dec., at ¶ 156.

51. At most, Mr. Sardakowski is supposed to receive three group sessions in the RTP each week; due to cancellations, however, Mr. Sardakowski spends less than three hours per week in group sessions of any kind. Ex. #4, Sardakowski Dec., at ¶ 156; Ex. #71, Robinson Dep. 131:12-14.

52. The group sessions that do take place often involve playing card games rather than engaging in therapeutic activity. Ex. #4, Sardakowski Dec., at ¶ 156; Ex. #71, Robinson Dep. 128:13-129:16.

Conditions in the Lower Levels of RTP are Solitary Confinement

53. The term "administrative segregation" is a term of art used by CDOC, and is interchangeable with other terms such as "solitary confinement," "isolated housing," and "segregation," all of which describe the same conditions of confinement. Ex. #44, Haney Dec., at ¶ 11.

54. CDOC continues to operate CSP as an "administrative segregation" facility with 630 beds available for administrative segregation prisoners. Ex. #83, Monthly Population and Capacity Report Dated 11/30/2013.

55. CDOC continues to operate Sterling Correctional Facility with 128 beds available for administrative segregation prisoners. CDOC Monthly Population and Capacity Report, CDOC Office of Planning and Analysis (Nov. 30, 2013).
56. An inmate's status determines the degrees of barrier, mobility, and supervision required for that inmate. Ex. #10, Medina Dep. at 51:3-13.
57. When an inmate has an "RTP status," correctional staff will identify and interact with that inmate based on his level within the RTP. Ex. #10, Medina Dep. at 54:11-22, 55:4-8.
58. Mr. Sardakowski is identified and viewed for CDOC management purposes as "RTP status, level 4." Doc. 113, Ex. A-7, Hart Aff., at ¶ 6.
59. The CDOC is free to change an inmate's status, custody level, and facility based on a reclassification that takes place yearly for each inmate or when there is an incident involving the inmate. Ex. #10, Medina Dep. at 43:13-17, 45:12-17.
60. Mr. Sardakowski's conditions of confinement in the lower levels in the RTP are the same as his conditions in administrative segregation at CSP, except that inmates in RTP receive outdoor recreation. Ex. #4, Sardakowski Dec., at ¶¶ 93, 134, 137-140, 144; Ex. #72, Wasko Dep. at 85:18-24; Ex. #44, Haney Dec., at ¶ 16.
61. Mr. Sardakowski's cell at CCF is basically the same as his cell at CSP in that it is roughly the same size and contains a similar bunk, sink/toilet unit, solid door, and small window. Ex. #4, Sardakowski Dec., at ¶ 134.
62. Mr. Sardakowski is housed individually with no cellmate. Ex. #75, Lampela Dep. at 212:13-16; Ex. #72, Wasko Dep. at 79:5-13.
63. In every level of the RTP in which he has been housed, Mr. Sardakowski eats all of his meals alone in his cell. Ex. #4, Sardakowski Dec., at ¶ 144; Ex. #44, Haney Dec., at ¶ 16.

64. Mr. Sardakowski is restrained anytime that he leaves his cellblock or unit. Ex. #4, Sardakowski Dec., at ¶ 142; Ex. #74, RTP Restraint Matrix.
65. Mr. Sardakowski gets out of his cell about one hour per day on average. He exercises alone in a cage that he likens to a “dog run.” Ex. #4, Sardakowski Dec., at ¶¶ 141, 142; Ex. #44, Haney Dec., at ¶ 14.
66. Dr. Joel Dvoskin was a CDOC consulting psychologist during the creation of the OMI Program and shortly after the creation of the RTP. Ex. #75, Lampela Dep. at 233:14-234:17.
67. Dr. Dvoskin recommends 20 hours of out of cell time per week, at a minimum, for all incarcerated mentally ill prisoners. Ex. #40, Haney Dep. at 128:14-22. The higher levels of the RTP, which Mr. Sardakowski has never reached, are less restrictive in terms of out-of-cell time and interaction with other offenders. Ex. #84, RTP AR 650-04, Section (IV)(C)(1)(b); Ex. #4, Sardakowski Dec., at ¶ 136.

Mr. Sardakowski’s Disabilities Prevent Him From Progressing Through the RTP Without Accommodations.

68. Mr. Sardakowski has been stuck in Levels 1-4 of the RTP since his enrollment in the program in February 2013. Ex. #44, Haney Dec., at ¶ 16; Ex. #4, Sardakowski Dec., at ¶ 136.
69. Mr. Sardakowski has trouble focusing on and achieving long term goals, an issue that he has told mental health staff about. He becomes stressed about time periods greater than two weeks, and has difficulty controlling his anxiety until he explodes. This has hindered his ability to progress through the RTP level system. Ex. #4, Sardakowski Dec., at ¶¶ 130-131, 173-174; Ex. #85, Grievance Dated 12/26/2011; Ex. #86, Mental Health Note Dated 02/18/2012 (Referring to the time frames in the solitary confinement leveling-out programs, Mr.

Sardakowski stated, “tell me two months it’s like telling me a billion years.”); Ex. #87, Grievance Dated 6/22/2013.

70. Mr. Sardakowski’s mental illness impairs his ability to control his behavior. Ex. #4, Sardakowski Dec., at ¶ 173, 175; Ex. #2, Burns Dec., at ¶ 13.
71. The RTP is a behavioral-based level system that requires specific behavior and curriculum goals to be met, and approval of a mental health clinician before an offender advances to the next level. Ex. #84, RTP AR 650-04, Section (IV)(C)(1).
72. Mr. Sardakowski does not know what the requirements are to progress through levels in the RTP because the program itself constantly changes. Ex. #4, Sardakowski Dec., at ¶ 172; Ex. #5, Lampela 30(b)(6) Dep. at 35:2-9.
73. Mr. Sardakowski’s serious mental illness and developmental disability affect his ability to progress through the RTP. Ex. #2, Burns Dec., at ¶ 13.
74. Mr. Sardakowski believes that he could get to higher levels in the RTP if he could have short-term goals. Ex. #4, Sardakowski Dec., at ¶ 174; Ex. #47, Mental Health Note Dated 03/21/2012.
75. Mr. Sardakowski has filed numerous and grievances regarding his inability to progress through CDOC’s solitary confinement leveling-out systems due to his mental illness and developmental disability. Ex #88, Grievance Dated 02/13/2012; Ex. #89, Grievance Dated 03/08/2012; Ex. #85, Grievance Dated 12/26/2011.
76. In a grievance dated February 13, 2012, Mr. Sardakowski wrote: “Since being taken off meds I’ve been edgy. In the past two weeks I’ve been placed on special controls twice for stuff like not being able to talk to case manager . . . been getting [in] arguments with staff [for] no reason

other than I'm edgy. I've lost my level more than once in two weeks or so." Ex. #88, Grievance Dated 02/13/2012.

77. In another grievance dated March 8, 2012, Mr. Sardakowski wrote: "Since I've been taken off [meds] I've hurt myself many times, sometimes up to 5 times a day to get stress, depression, anger out of my mind. I've been getting many C.O.P.D.s for my bad behavior. This is causing me to regress out of C.S.P." Ex. #89, Grievance Dated 03/08/2012.

78. In a grievance dated December 26, 2011, Mr. Sardakowski asked prison staff for "some other way to progress out of C.S.P." Ex. #85, Grievance Dated 12/26/2011.

79. In a grievance dated June 22, 2013, he wrote, "This RTP AR 650-04 does not work for me, due to its based on behavioral [requirements] and [my] behavior is iffy at best. I don't know what's wrong with me, but telling me I'll get off RTP to real GP [general population] is a joke due to the aforesaid reason." Mr. Sardakowski then asks for an individualized plan. Ex. #87, Grievance Dated 06/22/2013.

80. CDOC is aware that a prisoner's mental illness could prevent him from progressing past Level 4 in the RTP. Ex. #72, Wasko Dep. at 136:18-21.

81. On at least one occasion in the past, CDOC has made modifications to a leveling out program in order to accommodate an offender with mental illness. Ex. #75, Lampela Dep. at 287:12-288:24.

82. In a December 8, 2010, CDOC meeting with Dr. Dvoskin about the OMI program, Defendants discussed keeping time periods for level progression short in order to ensure achievability. Dr. Dvoskin stated, "The OMI program will fail if the time frames are too long." Ex. #90, Meeting Minutes Dated 12/08/2010, 9.

83. Despite Dr. Dvoskin's advice, Joy Hart, the Behavioral Health Supervisor for RTP, adjusted curriculum requirements for RTP level progression so that prisoners stay in each level for a longer period of time. Ex. #75, Lampela Dep, at 40:2-4, 41:10-17; 138:19-139:7; Ex. #5, Lampela 30(b)(6) Dep. at 108:11-20.
84. CDOC could make reasonable modifications to its program policies to allow Mr. Sardakowski meaningful participation in RTP. Ex. #72, Wasko Dep. at 137: 8-22.
85. CDOC has not made reasonable modifications to its leveling out programs to accommodate Mr. Sardakowski's mental illness and developmental disability. Ex. #85, Grievance Dated 12/26/2011.
86. During his confinement in CSP, Mr. Sardakowski was transferred in and out of the OMI Program two times. Ex. #3, Programs Query Dated 05.10.2013.
87. "CDOC has placed and retained Mr. Sardakowski in highly structured isolated settings and 'level-based programs' that, because of his very severe disabilities, he is utterly incapable of succeeding in or benefitting from. His inability to progress through the steps or 'levels' of these programs serves as the justification for his continued isolation and further painful and counterproductive deprivation." Ex. #44, Haney Dec., at ¶ 17.

CDOC Knows that Holding Mentally Ill Prisoners Like Mr. Sardakowski in Solitary Confinement Risks Causing Them Harm.

88. "Because Mr. Sardakowski is a mentally-ill and cognitively-impaired prisoner with severe disabilities that interfere with his ability to control his thoughts and actions for extended periods of time, dating back to his early childhood, he is uniquely ill-suited for placement in the especially harsh conditions of confinement in the CDOC ad seg units where he has been housed. These units that are governed by very rigid and all-encompassing rules and regulations

that Mr. Sardakowski lacks the capacity to adhere to, ensuring the he will experience continued and debilitating pain and suffering.” Ex. #44, Haney Dec., at ¶ 20.

89. In December 2013, Rick Raemisch, the Executive Director of CDOC, stated that putting inmates in solitary confinement for long spans of time “multiplies or manufactures mental illness.” Ex. #91, *Denver Post* Article.

STANDARD OF REVIEW

Summary judgment is only appropriate if the record contains no evidence of a genuine issue of material fact and demonstrates that the moving party is entitled to judgment as a matter of law. *Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1997). The “moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment.” *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002) (internal quotation omitted). “Even when . . . the moving party does not have the ultimate burden of persuasion at trial, it has both the initial burden of production on a motion for summary judgment and the burden of establishing that summary judgment is appropriate as a matter of law.” *Id.*

In considering a motion for summary judgment, “the court must review the record in the light most favorable” to the nonmoving party. *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1437 (10th Cir. 1987). In doing so, courts “must draw all inferences in favor of the party opposing summary judgment.” *O’Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1096 (10th Cir. 1999). The Tenth Circuit has emphasized that the nonmovant is given “wide birth to prove a factual controversy exists.” *Ulissey v. Shvartsman*, 61 F.3d 805, 808 (10th Cir. 1995). “Where different ultimate inferences may be drawn from the evidence presented by the parties, the case is not one for summary judgment.” *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984).

ARGUMENT

I. **Genuine Disputes of Material Fact Preclude Summary Judgment on Plaintiff's Claim that CDOC Has Failed to Provide Him Adequate Mental Health Care (Claim One).**

Prisoners have an Eighth Amendment right to adequate treatment for mental illness, including psychological or psychiatric care. *Ramos v. Lamm*, 639 F.2d 559, 574-75 (10th Cir. 1980). Deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Ramos v. Lamm*, 639 F.2d at 575. This standard encompasses both the objective and subjective components of an Eighth Amendment claim. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

A. **It is undisputed that Mr. Sardakowski has a serious mental illness.**

The objective component of an Eighth Amendment claim is met if a prisoner has a serious medical need. *Estelle*, 429 U.S. at 104. In the Tenth Circuit, it is well established that mental illness is a serious medical need. *Ramos*, 639 F.2d at 574.

It is undisputed that Mr. Sardakowski is seriously mentally ill. RSUMF, ¶ 200(a). In their Motion for Summary Judgment, Defendants argue only that they have not been deliberately indifferent; they make no argument that Mr. Sardakowski is unable to meet the objective prong of the Eighth Amendment for this claim.⁵ Doc. 113 at 30-35. By not making this argument in their Motion, Defendants waived it. *United States v. Martinez*, 518 F.3d 763, 768 (10th Cir. 2008); *Sutherland v. Indep. Sch. Dist. No. 40 of Nowata Cnty., Okla.*, No. 12-CV-636-JED-PJC, 2013 WL 1975644 at *6 (N.D. Okla. May 13, 2013).

⁵ Defendants go on to argue that Mr. Sardakowski is malingering, but concede that he also has a serious mental illness. Doc. 113 at 32. Plaintiff disputes that he is malingering. CDOC testing to determine the presence of malingering indicated that Mr. Sardakowski was not malingering. RSUMF ¶ 195(e). Plaintiff also disputes that Mr. Sardakowski has malingered mental illness in order to dictate movement within CDOC. RSUMF ¶ 194(a) ("Mr. Sardakowski is living in a dirty, smelly cell by himself, and he's been in something very similar to that since December of 2009. If he's malingered his way into that, he's very bad at it.").

B. A reasonable factfinder could conclude that Defendants are deliberately indifferent by denying Mr. Sardakowski adequate mental health treatment.

The subjective component of an Eighth Amendment claim is met if prison officials are deliberately indifferent to a prisoner's serious medical need. *Self v. Crum*, 439 F.3d at 1230 (quoting *Estelle*, 429 U.S. at 104). A prison official is deliberately indifferent when he “knows of and disregards an excessive risk to inmate health or safety.” *Id.* at 1231 (quoting *Farmer*, 511 U.S. at 837). In the context of medical care, prison officials are deliberately indifferent when they are aware of a serious medical need and fail to provide adequate treatment for that need. *Sealock v. Colorado*, 218 F.3d 1205, 1211 (10th Cir. 2000).

i. Defendants are aware that Mr. Sardakowski has a serious mental illness that requires treatment.

Defendants concede that Mr. Sardakowski is seriously mentally ill. *See* RSUMF, ¶ 200(a). Thus, they are certainly aware of his serious mental illness. Mr. Sardakowski's CDOC mental health records reference a long history of psychiatric treatment and multiple diagnoses of serious mental illness. RSUMF ¶¶ 6, 9, 173-189. Mr. Sardakowski has been housed at San Carlos Correctional Facility, the CDOC facility for prisoners with acute mental health needs. RSUMF ¶ 203(b). He has also been placed in several CDOC programs for mentally ill inmates, including the RTP where he is currently housed. RSUMF ¶ 203(b). Defendants do not appear to dispute that they know that Mr. Sardakowski is seriously mentally ill and in need of treatment. *See* Doc. 113 at 30-35.⁶

⁶ Defendants are also aware of the harm caused by putting inmates in solitary confinement for long spans of time, as Defendant Raemisich has acknowledged that doing so “multiplies or manufactures mental illness.” SADMFF ¶ 89.

- ii. **Plaintiff has put forth sufficient evidence for a reasonable factfinder to conclude that Defendants have failed to provide adequate mental health treatment for Mr. Sardakowski's serious mental illness.**

Numerous genuine issues of material fact remain in dispute regarding the mental health treatment that Defendants have provided to Mr. Sardakowski. These disputed issues preclude summary judgment on Mr. Sardakowski's claim that he has received constitutionally inadequate treatment. Taking the facts in the light most favorable to the nonmoving party, a factfinder could conclude that Defendants have failed to provide adequate treatment for Mr. Sardakowski's serious mental illness in violation of the Eighth Amendment.

- a. **A reasonable factfinder could conclude that Defendants failed to provide adequate mental health care by denying Mr. Sardakowski individualized treatment other than medication.**

Defendants assert that there is no triable issue of fact as to the adequacy of treatment because Mr. Sardakowski has been placed in the RTP, provided group therapy, and prescribed psychotropic medication. *See* Doc. 113 at 33. But the provision of ongoing treatment does not establish that the treatment is adequate. *Halpin v. Simmons*, 33 F. App'x 961, 964 (10th Cir. 2002) (“The mere provision of continuing medical treatment, regardless of the adequacy of that treatment, does not foreclose a claim for deliberate indifference to medical needs.”); *see also Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999) (noting that “the fact that [a plaintiff] has seen numerous doctors [does not] necessarily mean that he has received treatment for serious medical needs”). Defendants' assertions are insufficient to that establish as a matter of law that the treatment provided to Mr. Sardakowski is constitutionally adequate.

Other courts have held that prisons must provide mentally ill inmates with individual psychiatric counseling as part of a minimally adequate mental health treatment program. *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1577 (D. Idaho 1984) (“Treatment must involve

psychiatric and psychological counseling for those inmates in need of counseling.”); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1336, 1339 (S.D. Tex. 1980), *rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982) (finding inadequate treatment where “individual, one-to-one therapy sessions occur very infrequently” (less than once every two months) and were conducted in the cellblock areas); *c.f.* *Dudley v. Mobley*, 5:02CV00097JFF, 2006 WL 666710 (E.D. Ark. Mar. 15, 2006) (finding no Eighth Amendment violation where counselors were available to work with an inmate on his problems on an individual basis). Merely prescribing psychotropic medication, without providing therapy, does not constitute adequate treatment. *Balla*, 595 F. Supp. at 1577 (“Wholesale prescription of psychotropic drugs is an unacceptable means of dealing with psychiatric disorders. This statement should not be read to prevent the use of psychotropic drugs, merely that the prescription of these drugs cannot supplant the necessity of psychiatric counseling.”); *c.f.* *Beckford v. Portuondo*, 151 F. Supp. 2d 204, 218 (N.D.N.Y. 2001) (finding no Eighth Amendment violation where an inmate received “significant psychotropic medication, bi-weekly individual therapy sessions, and monthly medical reviews”); *Wickner v. Larson*, CIV. 09-940 DWF/JJK, 2010 WL 98940 (D. Minn. Jan. 11, 2010) (finding no Eighth Amendment violation where Defendants treated Plaintiff’s mental health conditions through both therapy and medication).

Here, genuine issues of material fact remain in dispute regarding the adequacy of the treatment Mr. Sardakowski has received. The level and quality of treatment provided to Mr. Sardakowski in the RTP are heavily disputed, including and especially with regard to the provision of individualized therapy. Defendants assert that offenders in the RTP receive individual therapy (Doc. 113 ¶ 207), though they have not – and cannot – demonstrate that Mr. Sardakowski in particular has received individual therapy. Deposition testimony from his assigned clinician, among other evidence, reveals that Mr. Sardakowski has not received a single individual therapy session since arriving in the

RTP in February 2013. SADMF ¶¶ 36-39. While Defendants argue that Mr. Sardakowski is unwilling to undertake therapy, record evidence demonstrates that Defendants have not made therapy available to him. *Id.*; see also RSUMF ¶ 204(b). Although Mr. Sardakowski has had one individual therapy-type meeting with a mental health clinician,⁷ SADMF ¶ 37, that meeting does not qualify as therapy because it was not confidential—it took place in the “dayhall” within earshot of other inmates’ cells. SADMF ¶¶ 36-37. Individual therapy must be confidential and frequent enough to establish a trusting therapeutic relationship. SADMF ¶ 35-36. Inmates in the RTP are supposed to receive one individual therapy session per week. SADMF ¶ 40. CDOC officials admit that offering an inmate only two opportunities to meet one-on-one with a clinician during a six month period violates RTP policy, SADMF ¶ 40. Here, the evidence shows that Mr. Sardakowski has been offered only one such opportunity in over 10 months, SADMF ¶¶ 36-39. Mr. Sardakowski has had no other opportunity to participate in individual therapy since his arrival in the RTP. SADMF ¶¶ 38-39.

Moreover, Mr. Sardakowski has not received any other form of individualized treatment in the RTP apart from psychotropic medication. SADMF ¶¶ 42-44. Defendants claim that the RTP utilizes individual treatment plans with “targeted behavior goals” that are discussed with inmates in one-on-one meetings. Doc. 113 ¶ 209; SADMF ¶ 41. However, Mr. Sardakowski does not know what is in his treatment plan because the RTP clinicians have never discussed it with him. SADMF ¶ 42. He does not know if he has any goals as part of his treatment plan. *Id.* CDOC acknowledges that Mr. Sardakowski’s treatment plans are “vague” and do not contain measurable goals. SADMF ¶ 43. His treatment plan also fails to address his ongoing self-harming behaviors. SADMF ¶ 44. A

⁷ The other “individual contacts” noted in Mr. Sardakowski’s mental health file have been for the purpose of allowing Mr. Sardakowski to review his mental health file. SADMF ¶ 38. As CDOC acknowledges, meeting with an inmate for records review is not therapy. SADMF ¶ 39.

reasonable factfinder could conclude that CDOC's failure to implement a meaningful individual treatment plan for Mr. Sardakowski constitutes inadequate treatment of his serious mental illness.

Defendants also claim that because group therapy is offered in the RTP, they are not deliberately indifferent to his serious mental health needs. Doc. 113 at 34. However, record evidence demonstrates that group sessions are inadequate to treat Mr. Sardakowski's serious mental health needs. SADMf ¶¶ 34, 40, 48-52. Mr. Sardakowski is a victim of sexual abuse, and he engages in self-harming behaviors that involve tying ligatures around his testicles. SADMf ¶¶ 17, 19, 21. These are not subjects that he is able to discuss openly around other prisoners. SADMf ¶ 48. Mr. Sardakowski is also highly vulnerable in a correctional setting because of his limited intellectual capacity, psychiatric illness, psychological trauma, and hearing impairment. SADMf ¶ 16. Defendant Jill Lampela, who was involved in creating and implementing the OMI Program and the RTP, acknowledged that vulnerable inmates are not comfortable sharing in a group setting because other inmates may use sensitive information against them, and that individual therapy is especially important for those vulnerable inmates. SADMf ¶¶ 46-47. A reasonable factfinder could conclude that RTP groups are not an appropriate or effective treatment method for addressing Mr. Sardakowski's serious mental health needs. Additionally, even if group therapy could address Mr. Sardakowski's needs, CDOC's own records show that over a quarter of scheduled group sessions are canceled, with "staff shortage" being the most frequently cited reasons for cancellation. SADMf ¶ 50. The group sessions that do take place often involve playing card games rather than engaging in therapeutic activity. SADMf ¶ 52. The record evidence shows that Mr. Sardakowski spends fewer than three hours per week participating in group sessions of any kind. SADMf ¶ 51.

Taking the facts in the light most favorable to the nonmoving party, a reasonable factfinder could conclude that Defendants' failure to provide Mr. Sardakowski with individual therapy or any

other individualized treatment apart from medication constitutes inadequate treatment of his serious mental illness. *See Balla*, 595 F. Supp. at 1577; *Ruiz v. Estelle*, 503 F. Supp. at 1336, 1339. Mr. Sardakowski needs individual counseling to address issues of sexual trauma, victimization, and self-harming behavior. SADMf ¶ 34. Defendants acknowledge that “Mr. Sardakowski’s mental health could improve with therapy.” Doc. 113 at 34. Despite this, Defendants have not provided Mr. Sardakowski with any opportunity for confidential, one-on-one therapy since he arrived in the RTP in February 2013. SADMf ¶¶ 36-37. Given the complexity and severity of his mental illness, the single individual session provided to Mr. Sardakowski in over ten months in the RTP is grossly insufficient. SADMf ¶¶ 34, 37, 40. The RTP’s frequently-canceled group sessions are not adequate treatment for Mr. Sardakowski’s serious mental health needs because he cannot discuss his abuse history and self-harm in group settings. SADMf ¶¶ 48-50. A reasonable factfinder could conclude that the complete lack of individual therapy provided to Mr. Sardakowski in the RTP falls below minimum constitutional standards for adequate care. *See Balla*, 595 F. Supp. at 1577; *Ruiz v. Estelle*, 503 F. Supp. at 1336, 1339.

b. A reasonable factfinder could conclude that Defendants failed to provide adequate care by punishing Mr. Sardakowski’s self-harming behaviors rather than treating them.

Prison officials’ constitutional duty to provide individual therapeutic intervention is particularly clear where an inmate’s mental illness manifests itself in self-harming behaviors and suicide attempts. *Balla*, 595 F. Supp. at 1577 (“Psychiatric counseling of [inmates who have attempted suicide] is of paramount importance.”); *Indiana Protection and Advocacy Servs. Comm’n v. Comm’r, Indiana Dep’t of Corr.*, 2012 WL 6738517, at *17, 23 (S.D. Ind. Dec. 31, 2012). In *Indiana Protection*, the court was particularly troubled by the prison’s response to inmates who were engaging in self-harm, including suicide threats or attempts. The court found an Eighth Amendment violation

where the prison merely segregated prisoners in response to self-harm and suicide threats or attempts, without providing therapeutic intervention to address the underlying mental illness. 2012 WL 6738517, at *17, 23 (S.D. Ind. Dec. 31, 2012). The court observed that “[t]he prisoner’s symptoms . . . will likely intensify unless [suicide watch] is accompanied by appropriate therapy.” *Id.* at *17. Additionally, courts have held that prison officials violate minimum constitutional standards when they mischaracterize self-harm as malingering and punish self-harming behaviors rather than provide therapy. *See Ruiz v. Estelle*, 503 F. Supp. at 1334, 1339 (holding that the prison’s mental health care system was constitutionally inadequate and finding that “[w]ith constructive psychotherapy virtually non-existent on the units, a large number of inmates resort to self-mutilations and suicide attempts, as dramatic cries for help. [Prison] officials have often characterized [self-mutilation and suicide attempts] as attempts to ‘manipulate the system’ and have punished the suicide-prone inmates, rather than making provision for mental health professionals to counsel with or otherwise supervise them.”).

Here, Plaintiff has put forth evidence that, at a minimum, demonstrates that there is a factual dispute as to whether CDOC provides treatment to address Mr. Sardakowski’s self-harm. Defendants’ failure in this regard is particularly troubling where, as here, they recognize the need to provide specialized treatment for inmates who engage in self-harming and suicidal behavior. *See* SADMf ¶ 23. Citing several completed suicides, CDOC’s January, 2013 report to the Colorado legislature stated: “It is imperative that the Department create a self-injurious unit to provide immediate and specialized assessment and treatment for offenders who engage in self-harming behavior.” *Id.* Mr. Sardakowski has an extensive history of self-harm documented in his CDOC mental health records, including suicide attempts and repeated self-injury involving “tying off” his testicles. SADMf ¶ 19-20. Despite this, Mr. Sardakowski has not been placed in a “self-injurious

unit” (if any such unit exists in CDOC). CDOC has failed to provide Mr. Sardakowski with any mental health treatment to address his self-harming behavior. SADMf ¶¶ 24, 44, 48. His tying off behavior has never been addressed in Mr. Sardakowski’s rare one-on-one meetings with mental health clinicians, SADMf ¶ 24, nor is it addressed in his individual treatment plan. SADMf ¶ 44. RTP groups sessions do not provide treatment for self-harm because Mr. Sardakowski cannot discuss tying off in a group setting. SADMf ¶ 48-49.

Rather than provide treatment when Mr. Sardakowski has reported self-harm, CDOC staff have punished him with disciplinary infractions for “misuse of clinical services.” SADMf ¶ 25. He has also been subjected to punitive conditions on “mental health watch” (SADMf ¶ 28), and held in immobilizing four-point restraints where he is chained to a bed for days at a time in conditions highly reminiscent of his childhood sexual abuse (SADMf ¶ 29). During these episodes, mental health staff did not provide therapy to Mr. Sardakowski or discuss the self-harming behaviors that led to his placement in restraints. SADMf ¶ 30.

Mr. Sardakowski continues to self-harm by tying off his testicles nearly weekly in the RTP (SADMf ¶ 21), and he is at an elevated risk of continued self-injury and even suicide (SADMf ¶ 22). Because he has been punished rather than treated for self-injurious behaviors in the past, Mr. Sardakowski is now afraid to report his ongoing self-harm to mental health staff. SADMf ¶ 31. Mr. Sardakowski nevertheless did tell the RTP psychiatric provider, Mr. Waters, that he was continuing to tie off his testicles, and also expressed his fear that reporting this self-harm to mental health staff would result in punishment. SADMf ¶¶ 32-33. Despite CDOC’s knowledge of Mr. Sardakowski’s ongoing self-harm, Mr. Sardakowski has still not received treatment for it in the RTP. SADMf ¶¶ 24, 44, 48.

Taking the facts in the light most favorable to the nonmoving party, a reasonable factfinder could conclude Defendants have violated the Eighth Amendment by punishing rather than treating Mr. Sardakowski's self-harming behaviors. *See Ruiz v. Estelle*, 503 F. Supp. at 1334, 1339; *Indiana Protection*, 2012 WL 6738517, at *17, 23. Despite their knowledge of Mr. Sardakowski's history of suicide attempts and ongoing self-harm, Defendants have failed to address his self-harming behavior in therapy or individual treatment plans. SADMf ¶¶ 24, 32-33, 44. Instead, CDOC staff have responded to self-harm by disciplining Mr. Sardakowski and subjecting him to punitive conditions and restraints. SADMf ¶¶ 25, 28-29. A reasonable factfinder could conclude that punishing rather than treating self-harm constitutes inadequate treatment of Mr. Sardakowski's serious mental illness. *See Ruiz v. Estelle*, 503 F. Supp. at 1334, 1339; *Indiana Protection*, 2012 WL 6738517, at *17, 23.

Finally, in their Motion, Defendants attempt to characterize their failure to provide adequate treatment as a "disagreement" about which course of treatment is "preferable." (Doc. 113 at 31-32.) While it is true that a mere disagreement over the correct course of treatment does not establish an Eighth Amendment violation, *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999), not every challenge to the adequacy of treatment is a mere disagreement over the course of treatment. *Hunt*, 199 F.3d at 1224 (reversing district court's grant of a motion to dismiss upon finding that facts alleged by the plaintiff reflected more than "a mere disagreement with his medical treatment."). When seriously mentally ill prisoners have decompensated to the point that they are repeatedly mutilating their bodies, serious psychiatric intervention is needed. *Indiana Protection*, 2012 WL 6738517, at *17. As set forth above, at a minimum, genuine issues of material fact remain regarding the adequacy of the treatment provided to Mr. Sardakowski, precluding summary judgment on his inadequate treatment claim. Furthermore, a reasonable factfinder could conclude that the treatment Mr. Sardakowski has received fails to address his serious mental health needs and falls below the

constitutional standard of adequate care. As a result, this Court should deny Defendants' Motion for Summary Judgment with respect to Claim One.

II. Mr. Sardakowski's Claim that Defendants Have Violated the Eighth Amendment by Placing and Retaining Him in Solitary Confinement (Claim Two) Is Not Moot.⁸

Defendants argue that their transfer of Mr. Sardakowski, a seriously mentally ill prisoner, to the RTP has rendered moot his claim that Defendants are subjecting him to cruel and unusual punishment by retaining him in solitary confinement (Claim Two). *See* Doc. 113 at 39. But a case is moot only if events "make[] it impossible for the court to grant *any* effectual relief whatever to a prevailing party." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (emphasis added) (internal quotation omitted). The "central inquiry" of the mootness doctrine is whether any relief can still be granted. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1122 (10th Cir. 2010). Simply put, if a party still suffers the effects of an alleged violation, relief can be granted, and the case is not moot. *See Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979).

A defendant bears the burden of showing that a plaintiff's claim has been mooted. *WildEarth Guardians v. Pub. Serv. Co. of Colorado*, 690 F.3d 1174, 1183 (10th Cir. 2012). There may be instances where a defendant cannot show mootness due to unresolved factual issues. *Id.* ("[S]ometimes mootness relies on contested facts, particularly where the likelihood of future harm is at issue. In such cases, the defendant may be unable to show mootness.") *See also Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 190 (2000) (reversing lower courts' finding of mootness due to unresolved factual issues over whether factory had been in compliance with environmental

⁸ Defendants offer no substantive challenge to the merits of Claim 2, so Plaintiff makes no response other than to Defendants' mootness argument. By not making this argument in their motion, Defendants waived it. *United States v. Martinez*, 518 F.3d 763, 768 (10th Cir. 2008); *Sutherlin v. Indep. Sch. Dist. No. 40 of Nowata Cnty., Okla.*, No. 12-CV-636-JED-PJC, 2013 WL 1975644 at *6 (N.D. Okla. May 13, 2013).

regulations). Mootness, therefore, is a heavy burden for the defendant to overcome, especially at the summary judgment stage when there are unresolved factual issues. *Id.*

A. Because Mr. Sardakowski Remains in Long-Term Solitary Confinement in the RTP, His Claim is Not Moot.

Mr. Sardakowski's second claim is that placing and retaining him, an individual with serious mental illness, in administrative segregation violates his right to be free from cruel and unusual punishment.⁹ "Administrative segregation" is a term of art used by CDOC to describe a status in which prisoners are held in harsh and isolating conditions of confinement – conditions that are commonly referred to as "solitary confinement" or just "segregation." (SADMF ¶ 53). Defendants assert that Plaintiff's second claim has been mooted because they have transferred Mr. Sardakowski to a facility where he is no longer under "administrative segregation" status. Doc. 113 at 39. But the only change to Mr. Sardakowski's conditions is the name Defendants use to describe them; they have not altered his actual conditions of confinement in any meaningful way. As set forth below, in the RTP, Mr. Sardakowski remains in long-term solitary confinement where his day-to-day conditions are functionally equivalent to those in "administrative segregation." Thus, this Court is still able to grant declaratory¹⁰ and injunctive relief on Claim Two.

The terms "long-term solitary confinement" and "segregation" are not precisely defined, but courts, prison officials, and correctional mental health experts have recognized a cluster of features that are common to these units. In *Indiana Protection*, a class action brought by mentally ill prisoners

⁹ For cases that have addressed this claim see, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146 (1995); *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (1999); *Jones El v. Berge*, 164 F. Supp. 1096 (2001); see also, *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988), where even before *Madrid*, a federal court had observed in connection with an Illinois state prison that "the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total."

¹⁰ Defendants' argument that Plaintiff's claims for retrospective declaratory relief should be dismissed based on sovereign immunity is moot; Plaintiff's claims for retrospective declaratory relief were dismissed at the motion to dismiss stage. Doc. 101 at 2; Doc. 92 at 11.

held in solitary confinement, the court highlighted the salient features of segregation¹¹: The vast majority of the prisoner's time is spent alone in his cell (up to 22+ hours per day); cells contain a toilet/sink unit; cells are small (usually less than 90 square feet); cell doors are solid with a tray slot for food; meals are eaten in the cell; inmates recreate alone for one hour, five days per week in a confined area; prisoners are allowed out of cell for short periods (15 minutes or less) for showers and phone calls; and prisoners are restrained any time they are out of their cells. 2012 WL 6738517 at *3-5; *see also* Ex. #, Haney Dec., Attach. B, Haney Report, ¶ 13 (noting that “solitary confinement” is a “term of art in correctional practice” that refers to “conditions of extreme (but not total) isolation from others” and describing those conditions). Additionally, courts have held that inmates in segregation for more than six months are considered to be held in long term solitary confinement or segregation. *Indiana Protection*, 2012 WL 6738517 at *6; *Madrid v. Gomez*, 889 F. Supp. 1146, 1227 (N.D. Cal. 1995). The overall effect is summed up concisely by the *Indiana Protection* court: “Although prisoners in segregation may leave their cells for recreation, showers, visits and medical and mental health appointments, they are generally otherwise confined in their single cells.” *Id.* at *7.

Examining the characteristic features of solitary confinement, it is apparent that almost every condition of Mr. Sardakowski's confinement is the same now as it was when he filed his amended complaint. During all times since he filed his complaint, including in the RTP, Mr. Sardakowski spends the majority of his day in his cell, up to 23 hours per day. SADMf ¶ 65. He is single-celled. SADMf ¶ 62. His cell contains a toilet/sink unit and is roughly the same dimensions as it was in CSP. SADMf ¶ 61. Additionally, Mr. Sardakowski eats his meals alone in his cell, next to where he

¹¹ *Indiana Protection* makes a distinction between disciplinary segregation and administrative segregation, but the conditions of confinement are the same for both. *Indiana Protection*, 2012 WL 6738517, at *2.

uses the toilet. SADMF ¶¶ 61-63. He is restrained and escorted anywhere he goes, including recreation, medical, and legal visits. SADMF ¶ 64. He exercises alone in a cage. SADMF ¶ 65. Mr. Sardakowski has been in these characteristic solitary confinement conditions since he arrived at CSP on December 23, 2009, and he remains in those conditions today.

Defendants assert that because Mr. Sardakowski has been moved from CSP to CCF and is now on “RTP status” instead of “administrative segregation status,” he is no longer held in solitary confinement. Doc. 113 at 36. The fact remains, however, that “administrative segregation status” and “RTP status” – and any other term the CDOC decides to use in the future to describe the same conditions – are functionally equivalent with respect to Mr. Sardakowski. According to CDOC, an inmate’s status determines the degrees of barrier, mobility, and supervision required for the inmate. SADMF ¶ 56. When an inmate has an “RTP status,” correctional staff will identify and interact with the inmate based on his level within the RTP. SADMF ¶ 57. At present, this means that Mr. Sardakowski is identified and viewed for management purposes by the CDOC and its employees as “RTP status, level 4.”¹² SADMF ¶ 58. But it is the conditions of confinement that matter, not the label placed upon them, and even at Level 4 of the RTP, Mr. Sardakowski remains in conditions that are solitary confinement.

To the extent that Defendants are asserting that the lower levels of RTP are not solitary confinement because the RTP policy provides for increased out-of-cell time, this too is a factual dispute. Much of the alleged increase in out of cell time at the RTP does not actually take place due to staff shortages and facility lock downs.¹³ SADMF ¶¶ 50-51. As for therapy in CCF, Mr.

¹² Plaintiff only addresses RTP levels 1-4, as Plaintiff has never been in any level above 4.

¹³ Dr. Dvoskin, RTP’s consulting psychologist, endorses a recommendation of 20 hours of out of cell time per week, *at a minimum*. SADMF ¶¶ 66-67. This translates to almost 3 hours per day out of cell, every day. Mr. Sardakowski receives far less time out of cell per day.

Sardakowski receives, at most, one-hour group sessions three days per week with other prisoners from his unit. SADMf ¶ 51. Due to the frequent cancellations, these group sessions constitute little additional out of cell time for Mr. Sardakowski. In short, Mr. Sardakowski's conditions of confinement have not changed in any meaningful way, and he remains in solitary confinement despite the fact that he has been moved to the RTP at CCF. SADMf ¶¶ 60-65. As a result, Mr. Sardakowski's second claim is not moot.

Additionally, as part of their mootness argument, Defendants cite *McAlpine v. Thompson* and *Green v. Branson*,¹⁴ for the proposition that transfer from a specific prison facility moots a claim for injunctive relief from the transferring facility. Doc. 113 at 39-40. Plaintiff's second claim is not specific to any one facility and instead focuses on the conditions of confinement in which he is held; consequently, transfer from one facility to another does not, in and of itself, moot Plaintiff's second claim. Doc. 62 at 30-32. In *Abdulbaseeb v. Calbone*, a prisoner seeking access to a special religious diet appealed summary judgment by the district court in a suit against prison officials at the Oklahoma Department of Corrections (ODOC). 600 F.3d 1301, 1306 (10th Cir. 2010). Though the prisoner had been transferred to another facility within the ODOC, the Tenth Circuit court held that "the courts may still fashion some effective relief" and reversed the district court's grant of summary judgment. *Id.* at 1312. Central to the court's reasoning was that the director of the ODOC, who was the "final policymaking authority," was a defendant. *Id.* Because the prisoner was still within the

¹⁴ Additionally, *McAlpine* and *Green* are distinguishable because both concern inmates who were released on parole. *McAlpine v. Thompson*, 187 F.3d 1213, 1214-15 (10th Cir. 1999); *Green v. Branson*, 108 F.3d 1296, 1299 (10th Cir. 1997). Both courts determined that injunctive relief would be inappropriate on mootness grounds because there was no reasonable expectation that the challenged conditions of confinement would be repeated—the courts refused to assume that parolees would violate the conditions of their release end up again in the same prison. *McAlpine* 187 F.3d at 1217; *Green* 108 F.3d at 1300-01. This is not the situation for Mr. Sardakowski; he is still within the CDOC system and capable of being transferred back to CSP at any time.

ODOC system, he was still governed by the policies of the ODOC, and therefore, the courts would be able to grant injunctive relief, keeping the prisoner's case from being moot. *Id.*; see also *Randolph v. Rodgers*, 170 F.3d 850, 856-57 (8th Cir. 1999) (holding that "injunction was issued against Missouri's Department of Corrections, which controls both prisons and the funding necessary to provide [accommodation]" so claim was not moot). Because Mr. Sardakowski remains under the control of CDOC, and because the CDOC Director is a defendant and has the power to change policy concerning Mr. Sardakowski's conditions of confinement, Plaintiff's second claim is not moot.

Relatedly, Defendants appear to argue that if this Court were to hold that Defendants violated Mr. Sardakowski's rights by retaining him in solitary confinement, the Court is precluded from awarding Mr. Sardakowski an injunction that does not correspond exactly to that sought in the complaint. The Tenth Circuit has rejected that argument, too. In *Rezaq v. Nalley*, the Tenth Circuit held that "a case is not moot when there is some possible remedy, even a partial remedy *or one not requested by the plaintiff*." 677 F.3d 1001, 1010 (10th Cir. 2012) (emphasis added). This holding is consistent with Federal Rule of Civil Procedure 54(c), which provides that a final judgment other than a default judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c); see also *In re Lorazepam & Clorazepate Antitrust Litigation*, 531 F.Supp. 2d 82, 100 (D.D.C. 2008) (under Rule 54(c), adherence to particular legal theories suggested by pleadings is subordinated to the court's duty to grant the relief to which the prevailing party is entitled, whether it has been demanded or not).

If the Court finds that Defendants have violated Mr. Sardakowski's rights, it may craft injunctive and declaratory relief in whatever way it deems necessary to address the violation. *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940 (7th Cir. 2006) (prevailing plaintiff is entitled to relief proper to his claim even if he did not request that relief because circumstances bearing on

feasibility of particular forms of relief often change between initiation of suit and rendition of final judgment). And because the possibility of even partial relief precludes a finding of mootness, Mr. Sardakowski's Eighth Amendment claim is not moot even if the Court grants relief not specifically requested by him. Courts are "concerned only with the question whether any relief can be ordered;" the available remedy does not need to be "fully satisfactory." *Church of Scientology of Cal.*, 506 U.S. at 12-13 & n.6 (emphasis added) (internal quotation omitted). Even the possibility of a "partial remedy" is "sufficient to prevent [a] case from being moot." *Id.*; see also *Mills v. Green*, 159 U.S. 651, 653 (1895) (case not moot if it is possible to grant "any effectual relief whatever"). Because there is still relief that can be granted to Mr. Sardakowski, Claim Two is not moot.

B. The Doctrine of Voluntary Cessation Precludes a Finding that Mr. Sardakowski's Claim is Moot.

Even if this Court were to find that CDOC did change Mr. Sardakowski's conditions of confinement such that he is no longer held in segregation, the Court still has jurisdiction over Mr. Sardakowski's second claim because it falls under an exception to the mootness doctrine: voluntary cessation of an alleged illegal practice. See *Rio Grande Silvery Minnow*, 601 F.3d at 1115. CDOC voluntarily removed Mr. Sardakowski from administrative segregation at CSP, but is free to transfer Mr. Sardakowski back to administrative segregation at CSP (or elsewhere) at any point.

"One exception to a claim of mootness is a defendant's voluntary cessation of an alleged illegal practice which the defendant is free to resume at any time." *Chibuhuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 892 (10th Cir. 2008). That the defendant voluntarily stops the practice at issue does not deprive a federal court of "its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "The rule that 'voluntary cessation of a challenged practice rarely moots a federal case'...traces to the principle that a party should not be

able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.”

Unified Sch. Dist. No. 259, Sedgwick Cnty., Kan v. Disability Rights Ctr. Of Kan., 491 F.3d 1143, 1149 (10th Cir. 2007) (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n. 1 (2001)). “In other words, this exception exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct.” *Chihuahuan Grasslands Alliance* 545 F.3d at 892.

For a defendant’s voluntary actions to moot a claim, two elements must be satisfied: “(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Additionally, the party asserting mootness bears the “heavy burden of persua[ding]” the Court that the conduct will not be restarted at the conclusion of the litigation. *Friends of the Earth, Inc.*, 528 U.S. at 189 (internal citations omitted). “Such a burden will typically be met only by changes that are permanent in nature and that foreclose a reasonable chance of recurrence of the challenged conduct.” *Sedgwick County v. Disability Rights*, 491 F.3d 1143, 1149 (10th Cir. 1007) (citing *Friends of the Earth*, 528 U.S. at 190). Here, Defendants have not met this high burden with respect to either element.

A review of Mr. Sardakowski’s confinement history in CDOC demonstrates that he has been shuffled between administrative segregation and other mental health programs twice before. SADMf ¶ 86. And there is nothing to suggest that Mr. Sardakowski’s transfer to CCF is permanent—he could be transferred to any facility, including CSP, at any time based on the CDOC’s security assessment of him. SADMf ¶ 59. Defendants point to no evidence that demonstrates that their voluntary cessation is permanent and thus sufficient to “irrevocably eradicate[] the effects of the alleged violation.” On the contrary, CDOC continues to operate CSP

as an administrative segregation institution for over 600 prisoners, and it holds over a hundred others in solitary confinement at Sterling Correctional Facility and other CDOC facilities. SADM ¶¶ 54-55. Defendants could transfer Mr. Sardakowski to an administrative segregation unit at any time, and thus have not overcome their burden to show that their voluntary cessation will not be abandoned at some later date. *See Oakley v. Estate of Clements*, 2013 WL 422940 at *6 (D. Colo. Aug. 15, 2013) (holding that plaintiff's transfer out of CSP did not moot claims relating to that facility based on the possibility that he could be transferred back into it.)

Finally, Plaintiff notes that the policy behind injunctive relief is parallel to the policy of the voluntary cessation exception to the mootness doctrine. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (holding that the case was not moot because it was in the public's interest to have the "legality of the practices settled" and an injunction was appropriate to prevent future violations). Where Defendants have the ability to relocate prisoners and rename conditions of confinement, and the substance of those conditions remains unchanged by Defendants' voluntary conduct, the voluntary cessation exception precludes a finding of mootness; injunctive relief is appropriate to ensure that any alleged violation will not recur.

III. A Reasonable Factfinder Could Conclude that Plaintiff is entitled to relief under the ADA and Rehabilitation Act (Claims Three & Four).

A review of facts in the light most favorable to Mr. Sardakowski demonstrates that there are triable issues of fact as to whether CDOC has discriminated against Mr. Sardakowski on the basis of his mental illness and developmental disability by failing to make reasonable modifications to CDOC policies and practices that would allow him to progress out of solitary confinement.

Plaintiff's claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) (Claims Three and Four) therefore should be permitted to proceed to trial.¹⁵

In arguing that these claims should be dismissed on summary judgment, Defendants first contend that Plaintiff's ADA and RA claims are moot, and in the alternative, that the claims fail because (1) Mr. Sardakowski is not disabled; (2) he has not made a request for modification to the policies, practices or procedures in any of the "leveling-out" programs within the CDOC; and (3) his disabilities have been fully accommodated by virtue of being prescribed medication and placed in RTP. Doc. 113 at 39-42, 44-45. Because the record demonstrates that material factual disputes exist with respect to each of these assertions, Defendants' motion should be denied.

A. Defendants' Decision to Transfer Mr. Sardakowski to the RTP Does Not Moot His ADA or RA Claim Because Mr. Sardakowski Continues to Suffer the Effects of the Alleged Violation.

Defendants first assert that their transfer of Mr. Sardakowski into the RTP has mooted his ADA and RA claims because Plaintiff's claims concerned administrative segregation at CSP. Doc. 113 at 39-40. As with Claim Two, Defendants misconstrue Plaintiff's ADA and RA claims, which are not facility-specific. Rather, they pertain to his inability to progress through CDOC's solitary confinement "leveling out" programs absent accommodations for his disabilities. Doc. 62 at ¶ 192. Mr. Sardakowski still suffers the effects of CDOC's ADA and RA violations because he remains in the lower levels of the RTP, where he is housed in solitary confinement without reasonable modifications that would enable him to progress out of those conditions. SADMF ¶¶ 60, 68-69, 74,

¹⁵ While § 504 of the Rehabilitation Act applies to recipients of federal funds, "as a general matter, courts have construed the Rehabilitation Act and the Disability Act similarly. Further, Congress has indicated that the Disability Act should be interpreted in a manner consistent with the Rehabilitation Act. In particular, cases considering the applicability of the statutes to prisons have treated the two together." *Montez v. Romer*, 32 F. Supp. 2d 1235, 1239 (D. Colo. 1999) (citations omitted). The arguments that follow apply to Plaintiff's claims under both the ADA and the Rehabilitation Act.

84-85. As set forth above,¹⁶ because there is declaratory and injunctive relief that this Court can grant that will “have some effect in the real world,” (*Rio Grande Silvery Minnow*, 601 F.3d at 1110), Mr. Sardakowski’s ADA and RA claims are not moot. Additionally, as with Claim Two, Defendants could choose to remove Mr. Sardakowski from the RTP and put him back in administrative segregation at any time. Consequently, the voluntary cessation exception to mootness precludes a conclusion that Mr. Sardakowski’s ADA and RA claims are moot because Defendants have not shown that the “challenged conduct cannot reasonably be expected to start up again.” *Friends of the Earth*, 528 U.S. at 189.

B. Material Issues of Disputed Fact Preclude Summary Judgment on Mr. Sardakowski’s ADA & Rehabilitation Act Claims.

Under Title II of the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. In order to obtain relief under Title II, plaintiff must demonstrate that (1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity’s services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability. *Robertson v. Las Animas County Sheriff’s Dep’t*, 500 F.3d 1185, 1193 (10th Cir. 2007). Here, Defendants argue only that Mr. Sardakowski is not disabled and that even if he is, CDOC has not discriminated against him on the basis of his disability. Doc. 113 at 41-42, 44-45. Because there are material factual disputes as to both of these elements, Claims 3 and 4 should proceed to trial.¹⁷

¹⁶ See Section II, *supra* at 68-76.

¹⁷ Defendants do not appear to dispute that Mr. Sardakowski is “qualified,” nor do they dispute that CDOC is a “public entity” for ADA purposes, and that it receives federal financial assistance under the RA. They

1. There Are Disputed Issues of Fact as to Whether Mr. Sardakowski Has a Disability Within the Meaning of the ADA & the RA.

In order to prove that an individual merits relief under the ADA, that individual first must demonstrate that he has a disability within the meaning of the statute. 42 U.S.C. § 12132. In 2008, Congress passed the ADA Amendments Act of (“ADAAA”), 110 P.L. 325, 122 Stat. 3553, which broadened the definition of “disability” to make it easier for disabled persons to obtain protection under the Act. 110 P.L. 325 § 4(a)(4)(A) (“[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act”). The ADA defines “disability” as (1) a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) record of such impairment; or (3) being regarded as having such impairment. 42 U.S.C. § 12102(1). The Department of Justice regulations implementing Title II of the ADA state that a physical or mental impairment means “[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 28 C.F.R. § 35.104(1)(i)(B). The ADA specifies that “major life activities” include, *inter alia*: reading, concentrating, learning, thinking, and communicating. 42 U.S.C. § 12102(2)(A).

a. Mr. Sardakowski Has Mental Impairments.

A reasonable factfinder could conclude that Mr. Sardakowski is disabled within the meaning of the ADA. First, Defendants concede that Mr. Sardakowski has a “mental impairment” by virtue of their acknowledgement that he has a serious mental illness. Doc. 113 ¶ 200. Additionally, a

have therefore conceded these points for purposes of summary judgment, thus waiving their right to argue otherwise in their reply. *U.S. v. Martinez*, 518 F.3d 763, 768 (10th Cir. 2008); *Sutherlin v. Indep. Sch. Dist. No. 40 of Nowata Cnty., Okla.*, No. 12–CV–636–JED–PJC, 2013 WL 1975644 at *6 (N.D. Okla. May 13, 2013).

reasonable factfinder could conclude that Mr. Sardakowksi also has a developmental disability.¹⁸

Plaintiff has been diagnosed on multiple occasions throughout his life with a developmental disability. SADMf ¶¶ 3, 15. Indeed, CDOC’s own mental health staff gave Plaintiff a DD code of 4 out of 5, 5 being the most severe, for most of 2007-2009 while he was incarcerated at CTCF, SCCF, and SCF. SADMf ¶¶ 8-9. And Defendants themselves have placed Mr. Sardakowski in CDOC programs specifically designed for prisoners with developmental disabilities both at SCCF and CTCF. RSUMf ¶ 15(c) & (d).

Outside psychiatrists and psychologists have also diagnosed Mr. Sardakowski with developmental disabilities. Based on psychological testing and in-person evaluations, forensic psychologist Dr. Pinto evaluated Mr. Sardakowski in 2006 while he was incarcerated in the Adams County Detention Center and diagnosed him as mildly mentally retarded, with a Full Scale IQ score of 69. SADMf ¶¶ 1, 3. More recently, Plaintiff’s expert, Dr. Kathryn Burns, met with Mr. Sardakowski and after an extensive evaluation, found his presentation consistent with an intellectual disability. SADMf at ¶ 15.

In claiming that Mr. Sardakowski’s mental impairments do not rise to the level of a disability, Defendants allege that he successfully received his GED while off medication, and that he was “living independently” at the time of his arrest. Doc 113 at 41-42. Although Plaintiff had been off his medication for roughly one week when he received his GED test *results*, he was fully medicated while studying for and completing his GED tests at CTCF. RSUMf ¶ 199(c). Additionally, the record evidence shows that Plaintiff has never supported himself or lived independently. SADMf ¶ 18. During the only two months that he lived in his own apartment—the two months leading up to

¹⁸ Although Defendants argue that Mr. Sardakowski is developmentally *delayed* rather than developmentally disabled (Doc. 113 at 41), it is unclear what Defendants intend the significance of this distinction to mean regarding whether Mr. Sardakowski is disabled within the meaning of the disability rights statutes.

his arrest—he received SSI and was not working. *Id.* A reasonable factfinder could conclude that both Mr. Sardakowski’s developmental disability and his serious mental illness constitute “mental impairments” within the statutory definition of disability. 42 U.S.C. § 12102(1).

b. Mr. Sardakowski’s Mental Impairments Substantially Limit Him In Several Major Life Activities.

Additionally, there is a triable issue of fact regarding whether Mr. Sardakowski’s serious mental illness and developmental disability “substantially limit” one or more of his major life activities.¹⁹ The ADA states that “major life activities” include, *but are not limited to*, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A).

The record evidence demonstrates that Mr. Sardakowski’s mental illness and developmental disability substantially limit several of his major life activities, including concentrating, reading, thinking, communicating, learning, impulse control, and interacting with others.²⁰ *See, e.g.*, RSUMF ¶ 94(b) (“His intellectual deficits include problems with reasoning, judgment and problem-solving skills as clinically assessed as well as via intelligence testing”); RSUMF ¶ 193(b) (“Because of his long-term social isolation, Mr. Sardakowski is unable to communicate with other people; his social reality has been altered due to lack of meaningful social interaction”); SADMF ¶ 4 (Mr. Sardakowski had low scores on an intelligence tests that measured “concentration, reasoning, cognition, judgment, and delay of impulses. . . . Mr. Sardakowski lacks the ability to anticipate the consequences of initial acts or situations and the ability to interpret social situations”); SADMF ¶ 6

¹⁹ Defendants do not appear to address this aspect of the definition of disability in their argument.

²⁰ While Defendants address only developmental disability in their argument (Doc. 133 at 41-42), Plaintiff seeks relief from discrimination based on both his developmental disability and mental illness (Doc. 62 ¶ 182).

(“Mr. Sardakowski is “extremely impaired in his ability to think logically, coherently, and to realistically perceive other people and events”); SADMf ¶ 7 (Mr. Sardakowski has poor impulse control and judgment); SADMf ¶ 12 (Mr. Sardakowski has a reading disability).

Defendants appear to question the genuineness of Mr. Sardakowski’s impairments by asserting that he exhibits disingenuous behaviors and symptoms. Doc 113 at 32, 41-42. While Defendants concede that Plaintiff is seriously mentally ill, they simultaneously allege that Plaintiff is able to control his behavior when it suits him to do so. Doc. 113 ¶¶ 198, 200. But the record evidence shows that Mr. Sardakowski has little control over his behavioral symptoms stemming from his mental illness. SADMf ¶ 2 (Mr. Sardakowski’s “acting out is not in his control and is secondary to his severe mental illness”); SADMf ¶ 70 (“Mr. Sardakowski’s mental illness impairs his ability to control his behavior”). Certainly Defendants have not demonstrated that Mr. Sardakowski is able to control his concentrating, reading, thinking, communicating, learning, impulse control, and interacting with others, which is their burden on summary judgment. *See Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002).

At minimum, a genuine issue of material fact remains in dispute regarding whether Mr. Sardakowski’s serious mental illness substantially limits major life activities. Taking the facts in the light most favorable to the nonmoving party, the record evidence demonstrates that Mr. Sardakowski has significant mental impairments in the form of mental illness and developmental disabilities, and those impairments substantially limit his thinking, concentrating, communicating, interacting with others, reading, caring for himself, and other major life activities. Plaintiff also meets the alternate definitions of “disability” under the ADA, in which a person is considered disabled if he can demonstrate that (1) he has a record of an impairment that substantially limits a major life activity, or (2) that he is regarded as having such an impairment. 42 U.S.C. § 12101(2)-(3).

Here, there is ample evidence of a record of Mr. Sardakowski's mental and developmental disabilities. SADMf ¶¶ 1, 3, 4-9, 12-15. Additionally, CDOC itself has placed plaintiff in multiple DD programs, as well as OMI and RTP, which are created for prisoners with mental illness, demonstrating that they regard Plaintiff as disabled. RSUMF ¶ 15(c) & (d). A reasonable factfinder could therefore conclude that he has a disability within the meaning of the ADA and RA.

2. A Reasonable Factfinder Could Conclude that Defendants Have Discriminated against Plaintiff on the Basis of his Disability by Failing to provide Reasonable Accommodations.

Finally, there are genuine issues of material fact as to whether Defendants have discriminated against Mr. Sardakowski on the basis of his disability. More specifically, there is a factual dispute as to whether CDOC has denied Mr. Sardakowski meaningful access to its "leveling out" programs by failing to modify them to accommodate his disabilities. As the Tenth Circuit has held, "the ADA requires more than physical access to public entities, it requires public entities to provide 'meaningful access' to their programs and services." *Robertson* 500 F.3d at 1195.

The Title II regulations flesh out the reasonable modification mandate in some detail. Under those regulations, a public entity "shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.30(b)(7).²¹ The regulations further specify that a state entity discriminates against a person with a disability if it:

- Provide[s] 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,

²¹ Defendants have not argued that Mr. Sardakowski's requested modifications would fundamentally alter the RTP in their Motion, and thus they have waived any such argument. *Martinez*, 518 F.3d at 768; *Sutherland*, 2013 WL 1975644, at *6.

or to reach the same level of achievement as that provided to others; 28 C.F.R. § 35.130(b)(1)(iii).

- Utilize[s] criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; 28 C.F.R. § 35.130(b)(3)(i).
- Impose[s] or appl[ies] eligibility criteria that screen out or tend to screen out an individual with a disability . . . 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. 28 C.F.R. § 35.130(b)(8).

Here, the evidence demonstrates a triable issue of fact as to whether CDOC has discriminated against Mr. Sardakowski in these ways.

Specifically, the RTP, where Mr. Sardakowski is currently housed, is a behavioral-based level system that requires specific behavior and curriculum goals to be met, and approval of a mental health clinician before a prisoner advances to the following level. SADMF ¶ 71. The lower levels of the program, where Mr. Sardakowski has been housed for nearly a year, are solitary confinement conditions. SADMF ¶¶ 60-65. Higher levels are less restrictive in terms of out-of-cell time and interaction with other prisoners. SADMF ¶ 67. A reasonable factfinder could conclude that Plaintiff, due to his mental illness and developmental disability, has been stuck in levels 1-4 of levels of RTP since being placed in the program nearly a year ago, and prior to that was similarly unable to progress beyond the lowest levels of CDOC's other solitary confinement leveling-out programs in CSP and OMI. SADMF ¶¶ 68-69, 87. The record evidence demonstrates, for example, that Mr. Sardakowski has trouble concentrating on long-term goals, a frustration he has expressed to the mental health staff at CDOC. Referring to the time frames in the solitary confinement leveling-out programs, Plaintiff stated, "tell me two months it's like telling me a billion years." SADMF ¶ 69.

Mr. Sardakowski's placement and retention in solitary confinement conditions only serve to exacerbate his mental illness and his ever-increasing anxiety, stress, and depression result in episodes

during which he bangs his head into the wall, bites his hands and lips, ties off his testicles, and attempts to take his life in various ways. SADMf ¶¶ 14, 20; RSumf ¶ 193. Mr. Sardakowski's self-harming behaviors and suicide attempts have resulted in disciplinary charges and fines for abuse of clinical services, which in turn produce level regressions that assure Mr. Sardakowski's continued placement in the lower levels of the solitary confinement leveling out programs in CDOC. SADMf ¶¶ 25-27. Dr. Haney explains this vicious circle in his declaration:

The CDOC has placed and retained Mr. Sardakowski in highly structured isolated settings and "level-based programs" that, because of his very severe disabilities, he is utterly incapable of succeeding in or benefitting from. His inability to progress through the steps or "levels" of these programs serves as the justification for his continued isolation and further painful and counterproductive deprivation.

SADMf at ¶ 87.

In short, because of his mental illness and developmental disabilities, which impact his ability to concentrate on long-term goals, and his self-harming behaviors that result in punishment, Mr. Sardakowski cannot progress through RTP as it is currently structured. SADMf ¶¶ 68-71, 73-74, 76-79. CDOC has discriminated – and continues to discriminate – against him by failing to make reasonable modifications to RTP and other leveling out programs that are necessary to allow him to "obtain the same result [or] gain the same benefit" from these programs. 28 C.F.R. § 35.130(b)(1)(iii); SADMf ¶¶ 84, 85. CDOC similarly discriminates against him by using "eligibility criteria" that "screen out" Mr. Sardakowski from "fully and equally enjoying" CDOC's leveling-out programs. 28 C.F.R. § 35.130(b)(8); SADMf ¶¶ 71, 73, 74. Mr. Sardakowski has presented evidence from which a factfinder could conclude that he has been precluded from meaningful participation in those programs that would permit him to progress out of solitary confinement, and therefore that Defendants have discriminated against him on the basis of his disability.

Defendants claim that they have not discriminated against Mr. Sardakowski because they put him in RTP and have prescribed medications for him.²² Doc 113 at 44-45. This misconstrues Plaintiff's claims. Mr. Sardakowski's *placement* in the RTP has nothing to do with the discrimination that he has been subjected to *within* it; Plaintiff has been denied meaningful participation in RTP because of CDOC's failure to make reasonable modifications to the program that would enable him to participate in and benefit from it. SADMf ¶¶ 84, 85. Defendants' argument is akin to a person opening the door at the top of a flight of stairs and telling a wheelchair user, "You may come up." Under the ADA and RA, this is not sufficient. Public entities are required to "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 modification would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7).

In fact, although Defendants admit that they *could* make reasonable modifications to their program policies to allow Mr. Sardakowski meaningful participation in leveling out programs (SADMf ¶¶ 81, 84), no such modification has been made for Mr. Sardakowski. SADMf ¶ 85. Indeed, Defendants have discussed the need for implementing such concepts, such as keeping the time periods of the then-OMI (now-RTP) short in order to ensure achievability. SADMf ¶ 82 ("The OMI program will fail if the time frames are too long."). Other such individualized measures could be taken by CDOC to modify Plaintiff's level progression requirements and make them shorter and easier to achieve. SADMf ¶ 84. A reasonable factfinder could conclude that changing the level

²² In their Motion, Defendants recount the history of ADA accommodations in CDOC, as well as accommodations that they claim Mr. Sardakowski has received for some of his other disabilities, such as his hearing loss. Doc. 113 at 42-44. Without conceding that he has actually received such accommodations, Mr. Sardakowski notes that all of these facts are immaterial, as his claims here concern a failure to provide reasonable modifications to CDOC's solitary confinement leveling out programs. Doc 62 at ¶ 190.

progression requirements is a feasible undertaking, as it has been done by CDOC before.²³

SADMF ¶ 81.

Finally, Defendants assert that Plaintiff has not made an accommodation request for modifications to the policies, practices, or procedures in the CSP “leveling out” program or any other level program within the CDOC. Doc 113 at 44. This is wrong. Mr. Sardakowski has filed numerous grievances regarding his inability to progress through level programs due to his mental impairments. SADMF ¶ 75. For example, in a grievance dated February 13, 2012, Mr. Sardakowski states: “Since being taken off meds I’ve been edgy. In the past two weeks I’ve been placed on special controls twice for stuff like not being able to talk to case manager . . . been getting [in] arguments with staff [for] no reason other than I’m edgy . . . I’ve lost my level more than once in two weeks or so.” SADMF ¶ 76. In another grievance sent on March 10, 2012, Mr. Sardakowski states, “Since I’ve been taken off [meds] I’ve hurt myself many times, sometimes up to 5 times a day to get stress, depression, anger out of my mind. I’ve been getting many C.O.P.D.s for my bad behavior. This is causing me to regress out of C.S.P.” SADMF ¶ 77. In a grievance dated December 26, 2011, Mr. Sardakowski asks for “some other way to progress out of C.S.P.” SADMF ¶ 78.

More recently, in a grievance dated July 3, 2013, he wrote, “This RTP AR 650-04 does not work for me, due to its based on behavioral [requirements] and [my] behavior is iffy at best. I don’t know what’s wrong with me, but telling me I’ll get [out] of RTP to real GP [general population] is a joke due to the aforesaid reason.” Mr. Sardakowski then asks for an individualized plan. SADMF ¶ 79. Even if Mr. Sardakowski had not grieved this issue, “[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

²³ Ironically, Joy Hart, a Behavioral Health Supervisor for the RTP, has adjusted progression through the RTP levels so that prisoners stay in each level for a *longer* period of time. Presumably CDOC could reverse this change. SADMF ¶ 83.

claim.” *Robertson*, 500 F.3d at 1197; *Hughes v. Colorado Dep't of Corr.*, 594 F. Supp. 2d 1226, 1244-45 (D. Colo. 2009).

In short, the record is replete with factual disputes regarding whether CDOC has discriminated against Mr. Sardakowski, a person with multiple disabilities, by failing to make modifications to rules, policies, and practices that would enable him to participate in and achieve the same benefit from Defendants’ solitary confinement leveling-out programs. The Court should therefore deny summary judgment on Claims Three and Four.

CONCLUSION

For the reasons set forth above, this Court should deny Defendants’ Motion in its entirety.

Respectfully submitted this 26th day of December, 2013.

s/ Laura Rovner
Laura Rovner

s/Lauren Fontana
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CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2013, I electronically filed the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF following:

Chris Alber
Chris.Alber@state.co.us

I also sent a copy of Conventionally Filed Exhibit 4-A, via U.S. Mail, postage pre-paid, to:

Chris Alber
Colorado Department of Law
Office of the Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203

STUDENT LAW OFFICE

/s/ Laura Rovner

Laura Rovner