

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

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

4 JAMES SARDAKOWSKI,

5 Plaintiff,

6 vs.

7 TOM CLEMENTS, in his official capacity as Director of the
8 Colorado Department of Corrections; JOANIE SHOEMAKER, in her
9 official capacity as Deputy Director of Prisons, Clinical
10 Services for Colorado Department of Corrections; PAULA FRANTZ,
11 in her official capacity as Chief Medical Officer for Colorado
12 Department of Corrections; TRAVIS TRANI, in his official
13 capacity as Warden of the Colorado State Penitentiary; JAMES
14 MICHAUD, in his official capacity as Mental Health Program
15 Administrator for the Colorado Department of Corrections; JILL
16 LAMPELA, in her official capacity as Behavior Health Supervisor
17 for the Colorado State Penitentiary; STATE OF COLORADO,
18 DEPARTMENT OF CORRECTIONS,

19 Defendants.

20 REPORTER'S TRANSCRIPT
21 HEARING ON MOTION FOR SUMMARY JUDGMENT AND FINAL TRIAL
22 PREPARATION CONFERENCE

23 Proceedings before the HONORABLE R. BROOKE
24 JACKSON, Judge, United States District Court for the District
25 of Colorado, commencing at 2:02 p.m., on the 25th day of
February, 2014, in Courtroom A902, Alfred A. Arraj United
States Courthouse, Denver, Colorado.

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901 19th Street, Denver, CO, 80294, (303) 623-3080

APPEARANCES

1
2 LAURA ROVNER, LAUREN FONTANA, MARY DEWEY, ZACHARY
3 WOODWARD, VIRGINIA THOMPSON, University of Denver, 2255 East
4 Evans Avenue, Denver, CO 80208, for plaintiff.

5 CHRISTOPHER ALBER, Colorado Attorney General's
6 Office, 1300 Broadway, 10th Floor, Denver, CO 80203, for
7 defendants.

P R O C E E D I N G S

8
9 (In open court at 2:02 p.m.)

10 THE COURT: Mr. Alber, you're here all by yourself.

11 MR. ALBER: I am, Your Honor.

12 THE COURT: Against a cast of thousands.

13 12-cv-1326, Sardakowski vs. Clements. The original
14 name of the case, at least.

15 Appearances.

16 MS. ROVNER: Good afternoon, Your Honor. Laura Rovner
17 from the student law office for the plaintiff, Mr. Sardakowski.
18 I have with me today Lauren Fontana as well as student
19 attorneys Zachary Woodward, Mary Dewey, and Virginia Thompson.

20 THE COURT: And how about all these people in the
21 back, who are they? Is that the rest of the DU law school
22 student body?

23 MS. ROVNER: Some are also members of the clinic.
24 Some are parents. Some are siblings. Some I don't know.

25 THE COURT: Okay.

1 MR. ALBER: And good afternoon; Chris Alber appearing
2 on behalf of the defendants.

3 THE COURT: A little birdy just told me you had a
4 couple twins.

5 MR. ALBER: I did, Your Honor.

6 THE COURT: And that they're doing fine.

7 MR. ALBER: They are.

8 THE COURT: Congratulations.

9 MR. ALBER: Thank you very much.

10 THE COURT: All right. Have a seat.

11 Which of you lawyers or lawyers-to-be is going to
12 argue today for the plaintiff.

13 MS. DEWEY: Mary Dewey.

14 THE COURT: All right. Mary. The stage is yours.

15 MS. DEWEY: All right.

16 Good afternoon, Your Honor. Thank you for permitting
17 us to take the Court's time this afternoon with oral argument
18 on this.

19 As the Court has suggested, I want to turn very
20 quickly to disputes of material fact. Mr. Sardakowski is a
21 mentally ill and developmentally disabled man who has four
22 claims against the DOC, and there are disputed material facts
23 as to each of those four claims. And just briefly, those
24 claims are, first, an Eighth Amendment claim that defendants
25 are being deliberately indifferent by denying him adequate

1 mental-health care.

2 Second, and --

3 THE COURT: You real think that they've been
4 deliberately indifferent?

5 MS. DEWEY: Yes, thank you, Your Honor. There's
6 record --

7 THE COURT: That's a pretty serious charge.

8 MS. DEWEY: It is, Your Honor.

9 THE COURT: They've been treating him off and on for
10 years. How many different doctors? 17, something like that.
11 Medications. He's had individual therapy a little bit, he's
12 had group therapy, he's been moved around here and there. How
13 does that add up to deliberate indifference?

14 MS. DEWEY: Your Honor, we understand that
15 Mr. Sardakowski has seen numerous doctors. The Tenth Circuit
16 has stated specifically that the provision of ongoing treatment
17 does not establish the treatment is constitutionally adequate.
18 And the question for the Court here in this case is whether
19 Mr. Sardakowski's treatment meets minimum constitutional
20 standards.

21 For example, in Halpin v. Simmons, a 2002 case, the
22 court held that the mere provision of continuing medical
23 treatment regardless of the adequacy of that treatment does not
24 foreclose a claim for deliberate indifference.

25 And here there's record evidence before the Court that

1 Mr. Sardakowski has not received adequate treatment or
2 treatment at all for his serious mental-health needs, including
3 self-harm. Mr. Sardakowski engages in a particularly gruesome
4 form of self-mutilation. It involves tying ligatures around
5 his testicles. He is currently in residential treatment
6 program which defendants, as you know, claim provides
7 individual therapy and group therapy.

8 THE COURT: Well, you've got to give them credit,
9 don't you, for coming up with that program? That shows some
10 effort. Doesn't it?

11 MS. DEWEY: Your Honor, the fact is the program has
12 not provided treatment to Mr. Sardakowski specifically. Record
13 evidence shows that in that treatment program, Mr. Sardakowski
14 has not received a single individual therapy session. Since
15 his arrival a year ago. And in group sessions, which, as to
16 the group sessions -- for the individual therapy, there is a
17 dispute of material fact about whether he is indeed receiving
18 it. For group sessions, there's no dispute about whether they
19 occur. But certainly disputes of fact as to whether they are
20 capable of providing treatment to Mr. Sardakowski. And what
21 indeed occurs during these group sessions.

22 And there's record evidence before the Court that no
23 group clinician has ever addressed Mr. Sardakowski's self-harm
24 with him. Which is one of his most serious medical needs.

25 There's also record evidence that defendants are aware

1 that he continues to self-mutilate. And that no clinician has
2 addressed this issue with him in the residential treatment
3 program. They know about a serious medical need, and they have
4 disregarded it. That's the definition of deliberate
5 indifference.

6 At a minimum, there are disputes of fact about whether
7 group sessions are providing treatment at all for
8 Mr. Sardakowski's serious mental illness. There's evidence
9 before the Court on summary judgment that many of these group
10 sessions involve playing card games rather than any form of
11 meaningful mental-health treatment or therapy.

12 THE COURT: Do they think the card games are part of
13 the therapy?

14 MS. DEWEY: Dr. Burns, who is plaintiff's expert, has
15 testified that indeed group sessions may be helpful on some
16 level to Mr. Sardakowski for socialization. He's been in
17 isolation for four years. So to some extent, it may be helpful
18 for that. But it is her opinion that it does not provide
19 treatment of any sort, certainly not adequate treatment for his
20 serious mental-health needs, including self-harm.

21 THE COURT: Okay.

22 MS. DEWEY: Mr. Sardakowski's second claim is that
23 defendants are being deliberately indifferent to --

24 THE COURT: Before you leave the first claim, does
25 your claim boil down to what he wants is more individual

1 therapy and he's not getting it?

2 MS. DEWEY: Certainly defendants have framed the
3 question as a question about which is better, individual or
4 group therapy. The real question is whether the treatment that
5 he's receiving is constitutionally adequate. We understand --

6 THE COURT: Well, what does he want? What would make
7 it constitutionally adequate?

8 MS. DEWEY: First of all, it would address his actual
9 medical need. Which --

10 THE COURT: Well, yes, but be specific. What does he
11 want? What do you want for him, put it that way.

12 MS. DEWEY: Certainly.

13 We would want an individual treatment plan that would
14 address his individual mental-health needs. We would want that
15 individual treatment plan to include some form of individual
16 therapy. Which Dr. Burns has opined is essentially at this
17 point the only form of treatment that can address his
18 self-harm.

19 THE COURT: Who's Dr. Burns?

20 MS. DEWEY: Dr. Burns is plaintiff's expert, Your
21 Honor.

22 THE COURT: Where does he come from?

23 MS. DEWEY: She is the chief psychiatrist of the Ohio
24 Department of Corrections.

25 THE COURT: She.

1 All right. So individual treatment plan, and in your
2 brief, you said they might have one, but they won't show him
3 what it is?

4 MS. DEWEY: Indeed, there seems to be individual
5 treatment plans of some sort in his record, all CDOC in 30-6
6 depositions admitted that such plans were vague and did not
7 contain measurable goals. Mr. Sardakowski in his declaration
8 has stated that he has never seen these treatment plans. If
9 someone has discussed these plans with him, he was not aware
10 that that was what was happening. He, to be honest, does not
11 know what is in them or what the plan is for his treatment.

12 THE COURT: Right. But is it that he doesn't know
13 because he doesn't remember or doesn't understand or doesn't
14 want to know, or is it because they won't show him?

15 MS. DEWEY: Well, DOC has testified in 30(b)(6)
16 depositions that treatment plans are only appropriate for
17 discussion in individual one-on-one sessions. The record
18 evidence before the Court on summary judgment is that
19 Mr. Sardakowski has never received a confidential individual
20 one-on-one session with a clinician during his entire year in
21 the residential treatment program. So it's unclear how the
22 treatment plans would have been discussed with him.

23 Mr. Sardakowski has met very infrequently with his
24 clinicians for the purpose of file review. Which DOC has also
25 admitted is not therapy.

1 THE COURT: Didn't you say in your brief that there is
2 some requirement in their own rules about individual treatment
3 sessions that they're not following?

4 MS. DEWEY: Indeed there is.

5 The policy, the residential treatment plan policy
6 states that individual therapy is provided in the program,
7 although it doesn't state how often it should be provided. Dr.
8 Lampela, a 30(b)(6) deponent testified that individual therapy
9 sessions should be occurring weekly. Excuse me, I believe that
10 was in her individual deposition.

11 However, Kelly Wasko in her 30(b)(6) deposition
12 testified that if an inmate had, for example, been offered only
13 two individual sessions in a six-month period, that would
14 violate RTP policy. Indeed, Mr. Sardakowski, as the record
15 evidence before the Court shows, has not received any.

16 THE COURT: Well, if they were to say today, for
17 example, we promise you, Judge, that we'll give him a weekly
18 independent session, individual session, would that moot your
19 first claim?

20 Not that Mr. Alber's going to say that.

21 MS. DEWEY: Your Honor, I don't . . . it is
22 defendants' burden on mootness to show that they have
23 essentially remedied the constitutional violation.
24 Permanently. And I'm not sure I could say at this moment, I am
25 not an expert, I think I would need, we would need expert

1 testimony from Dr. Burns on what the issue of what precisely
2 Mr. Sardakowski needs. As well as testimony from the DOC as to
3 what's possible in the residential treatment program.

4 THE COURT: Do you think it's ultimately a matter of
5 medical judgment?

6 MS. DEWEY: Your Honor, certainly there are -- we do
7 have testimony from medical experts in this case. However, it
8 is the role of the Court to decide whether treatment that is
9 being provided meets minimal constitutional standards. And so,
10 you know, that can be based partly on expert testimony.
11 However, it's based partly on precedent. But it is the role of
12 the Court to make that determination about whether it meets
13 constitutional standards.

14 In addition, if DOC did provide a individual treatment
15 plan that included regular individual therapy sessions, there
16 would still be an issue of voluntary cessation.

17 Under the voluntary cessation to mootness, defendants
18 have the heavy burden of persuading the Court that the conduct
19 will not be restarted at the conclusion of the litigation.
20 This burden will only be met by changes that are permanent and
21 foreclose a reasonable chance of their recurrence of the
22 challenged conduct.

23 THE COURT: So you don't think it's good enough when
24 they just shift somebody from one facility to another? A habit
25 that they seem to have developed.

1 MS. DEWEY: Indeed, Your Honor. I do not.

2 And that is also an issue for Mr. Sardakowski's second
3 claim; this is about solitary confinement. But as to his first
4 claim for adequate mental-health treatment, the record shows
5 that Mr. Sardakowski has been shuffled in and out of
6 mental-health treatment programs before. He was shuffled in
7 and out of the OMI program, the offenders with mental illness
8 program at CSP. He's now been put in the residential treatment
9 program. But defendants have not -- essentially if they were
10 to create a treatment plan at this moment, defendants have not
11 met their burden in showing that he will remain in the
12 residential treatment program, that he will keep his treatment
13 plan, that it will actually be implemented.

14 As we've seen, they have policy that provides for
15 individual treatment, but it hasn't been implemented with
16 respect to Mr. Sardakowski.

17 And as to Mr. Sardakowski's second claim, his claim is
18 that defendants have violated the Eighth Amendment by being
19 deliberately indifferent to the risk of harm to him as a
20 mentally ill prisoner by keeping him in long-term solitary
21 confinement. And therefore they're being deliberately
22 indifferent to a substantial risk of serious harm to his health
23 and safety.

24 Other courts have found Eighth Amendment violations
25 where mentally ill prisoners are held in long-term solitary

1 confinement. Analogizing it to holding an asthmatic in a room
2 with little air. However, the merits of Mr. Sardakowski's --

3 THE COURT: It's okay, you're reading your sentences.
4 I'll let you finish and then I'll ask my question.

5 MS. DEWEY: The merits of Mr. Sardakowski's second
6 claim were not addressed by defendants; however, I can address
7 them here if that would be helpful. They were not addressed on
8 summary judgment.

9 THE COURT: So, Miss Dewey, your case, when you filed
10 it, was called Sardakowski vs. Clements.

11 MS. DEWEY: Yes.

12 THE COURT: That was Tom Clements, who was the
13 executive director of the CDOC. And Clements was known, I
14 think, generally as somebody who was trying to reform the DOC
15 and in particular to reduce, if not eliminate, administrative
16 segregation, particularly for mentally ill patients.

17 Do you agree?

18 Maybe you don't know.

19 MS. DEWEY: I do agree that Tom Clements certainly
20 made many statements to that effect.

21 THE COURT: Right. It was a tragedy, really, that he
22 was assassinated, ironic that he was killed by an ex-inmate
23 when he was doing, some would say, more than anyone before him
24 to try to reform things to the benefit of inmates.

25 So he was replaced by Mr. Raemisch, true?

1 MS. DEWEY: Yes.

2 THE COURT: So your lawsuit now is against Raemisch.

3 MS. DEWEY: Yes, Your Honor.

4 THE COURT: But you read the article in the *New York*
5 *Times*, I bet.

6 MS. DEWEY: I did, Your Honor.

7 THE COURT: What did you think?

8 MS. DEWEY: Your Honor, I, I, I do appreciate
9 Raemisch's expressions of concern about holding mentally ill
10 inmates in solitary confinement. I do believe that there is a
11 disconnect between his statements that there are only, that
12 there are not many mentally ill inmates left in solitary
13 confinement in the DOC and the reality on the ground.
14 Mr. Sardakowski is one of those inmates who is seriously
15 mentally ill, as the DOC has admitted. He remains in
16 conditions of solitary confinement, although DOC has removed
17 the label of administrative segregation from him.

18 However, it's not the label that matters, but the
19 actual conditions of confinement. So in this case
20 Mr. Sardakowski is not in administrative segregation. But he
21 is still in solitary confinement. And essentially defendants'
22 argument here is a mootness argument, that Mr. Sardakowski has
23 been removed from CSP, from administrative segregation, and
24 therefore cannot still be in solitary confinement.

25 The record evidence shows that his conditions are the

1 classic conditions of solitary confinement, recognized by
2 courts across the country. Plaintiff has offered evidence that
3 he spends the majority of his time alone in his cell. Up to 23
4 hours a day. Over 22 hours a day on average. He is
5 single-celled. He is alone in his cell. His cell is roughly
6 the same size as his cell in CSP, where he was in
7 administrative segregation.

8 THE COURT: Well, what are you asking the Court to do
9 about it?

10 MS. DEWEY: We would ask the Court to remove -- order
11 Mr. Sardakowski be removed from solitary confinement. Now,
12 that could be done in a number of ways. We would certainly
13 need testimony from the DOC as to what options would be
14 available. One of those ways would be transferring him out of
15 the residential treatment program, where he's currently in
16 solitary confinement, to a general population facility, for
17 example.

18 THE COURT: You think a guy like him ought to be in
19 general population?

20 MS. DEWEY: I'm not sure I could speak to that, Your
21 Honor. I'm not sure I have the facts before me.

22 THE COURT: Well, but based on the facts that you do
23 have before you, would you at least agree that he's a tough
24 customer? He is not an easy inmate for the DOC to deal with.

25 MS. DEWEY: Perhaps, Your Honor, although he was not

1 placed in administrative segregation for violent offenses. He
2 certainly is very mentally ill and in need of treatment. He's
3 been in isolation for a long time.

4 And one possibility for him, because another one of
5 his mental impairments is developmental disability, would be to
6 transfer him to the DD program or developmental disability
7 program. Which exists at two facilities in the DOC:

8 Centennial correctional -- excuse me, he's currently at
9 Centennial. There is the DD program at Colorado Territorial
10 Correctional Facility --

11 THE COURT: He tried that once before; did you know
12 that?

13 MS. DEWEY: Yes, he was previously in the DD program.

14 THE COURT: One of his several lawsuits that's
15 appeared in this court was about that. Was about going to
16 Territorial and being in their DD program.

17 MS. DEWEY: I'm not familiar with that lawsuit, I'm
18 sorry, Your Honor.

19 There's another DD unit at San Carlos Correctional
20 Facility, which is the DOC's psychiatric prison. So there are
21 certainly other possibilities and Mr. Sardakowski thus far in
22 the residential treatment program has been in the lower levels.
23 Which are the most restrictive levels. And the evidence we
24 have is that those levels constitute solitary confinement. We
25 don't have evidence about the upper levels of the residential

1 treatment program. Certainly there may be some possibility
2 that his conditions could be altered, he could spend more time
3 out of his cell within the residential treatment program. At
4 this point there's not evidence before the Court on that, but
5 certainly we could hear testimony on that possibility at trial.

6 THE COURT: You better watch out. They'll move him to
7 San Carlos.

8 MS. DEWEY: Excuse me, I'm sorry?

9 THE COURT: I'm just teasing you.

10 MS. DEWEY: We also know -- there's also record
11 evidence before the Court that Mr. Sardakowski's mental
12 condition has deteriorated while he's in solitary confinement.

13 THE COURT: That happens to anybody in solitary
14 confinement. Raemisch was saying his mental condition was
15 deteriorating in one day in solitary confinement. In the
16 article.

17 MS. DEWEY: Indeed.

18 THE COURT: I can't even imagine.

19 MS. DEWEY: Neither can I.

20 There is, there is evidence that Mr. Sardakowski in
21 particular has been substantially harmed. His self-harming
22 behaviors have increased to the point where he has been
23 hospitalized for his self-mutilation while in solitary
24 confinement. Dr. Burns has opined -- again, she is plaintiff's
25 expert -- that Mr. Sardakowski is at elevated risk. Of

1 self-harm and even suicide in solitary confinement.

2 THE COURT: The defendant, however, contends that a
3 lot of what he's doing is his own gaming the system.
4 Malingering, making threats to harm himself, harming himself,
5 just to gain whatever it is at the moment he wants to gain.
6 That's what they say.

7 MS. DEWEY: Your Honor, there are a couple issues with
8 that. The first is that there's simply not record evidence
9 before the Court on those issues from someone with knowledge.
10 Much of the evidence about malingering comes from Dr. Lish,
11 defendants' expert who has never met with Mr. Sardakowski. And
12 has no actual knowledge of his treatment.

13 At -- however, there's also evidence from Dr. Burns
14 that Mr. Sardakowski is not malingering; and even DOC, even
15 Dr. Lish himself has admitted that malingering does not
16 foreclose the presence of actual mental illness. At a minimum,
17 there's a factual dispute about whether indeed Mr. Sardakowski
18 is, is malingering. And at the same time DOC has admitted that
19 he's seriously mentally ill and in need of treatment. So at a
20 minimum, that's factual dispute and defendants have not met
21 their burden in showing the absence of a triable fact for
22 trial.

23 Mr. Sardakowski's -- returning to Mr. Sardakowski's
24 second claim. Defendants seem to -- defendants do argue in
25 their reply that Mr. Sardakowski's transfer may moot his claim.

1 Plaintiff's Eighth Amendment claim about solitary confinement
2 is not specific to any one facility. Instead it focuses on the
3 conditions of confinement in which he is held wherever he is
4 held in the DOC.

5 THE COURT: Do you think that it's unconstitutional
6 for the DOC to put anybody in solitary confinement?

7 MS. DEWEY: Your Honor, the claim in this case is that
8 it is unconstitutional to hold Mr. Sardakowski specifically,
9 given his severe mental illness, in solitary confinement, in
10 prolonged solitary confinement. It is specific to
11 Mr. Sardakowski. And indeed any relief that would be ordered
12 would need to be specific to Mr. Sardakowski under the
13 prisoners litigation appeal, the prisoner's litigation reform
14 act.

15 Mr. Sardakowski's third and fourth claims are claims
16 under the ADA. And section 504 of the Rehabilitation Act. His
17 claims are that defendants are discriminating against
18 Mr. Sardakowski on the basis of his disabilities. Which are
19 mental illness and developmental disability.

20 And I want to be really clear about what these claims
21 are about. They are specifically that defendants have
22 discriminated against Mr. Sardakowski by placing him in
23 solitary confinement based on behavior caused by his
24 disabilities. And the defendants continue to discriminate
25 against Mr. Sardakowski by failing to make modifications to the

1 only route out of solitary confinement, the leveling-out
2 programs, which include the residential treatment program.
3 Mr. Sardakowski's disabilities prevent him from progressing
4 through these programs without some modification. And
5 defendants' failure to make such modifications constitute
6 discrimination under the ADA and Rehabilitation Act.

7 And as defendants acknowledge in their motion, the ADA
8 and Rehabilitation Act analyses are the same.

9 There are two main elements for an ADA claim. The
10 first element asks whether Mr. Sardakowski is a qualified
11 individual with a disability. And the second element asks
12 whether defendants are discriminating against him on the basis
13 of that disability. And there are disputes of material fact as
14 to each of these elements.

15 As to element 1, whether he has a disability,
16 defendant -- excuse me. Under the ADA, you can show disability
17 by demonstrating that a person has a mental impairment that
18 substantially limits major life activities. So as to mental
19 impairment, defendants concede that Mr. Sardakowski is mentally
20 ill but contend that he is not developmentally disabled.

21 Plaintiff's evidence, on the other hand, shows that
22 Mr. Sardakowski is developmentally disabled --

23 THE COURT: Is that your Ohio doctor?

24 MS. DEWEY: Yes, Your Honor. Yes.

25 Among other evidence, there is Dr. Burns will testify

1 that he currently has a mental impairment that is developmental
2 disability. There are other ways to show disability under the
3 ADA. Another way is to show that the individual has been
4 regarded as having a mental impairment or has a record of
5 having such a mental impairment. And plaintiff has put forth
6 evidence of both. That Mr. Sardakowski has a record of
7 developmental disability and is regarded as developmentally
8 disabled in the DOC.

9 THE COURT: Why does it matter whether he's
10 developmentally disabled or not? Everybody agrees that he's
11 mentally ill.

12 MS. DEWEY: Indeed. The extent that's undisputed,
13 it's undisputed in plaintiff's favor. Dr. Burns's testimony is
14 that Mr. -- the combination of Mr. Sardakowski's mental illness
15 and developmental disability are the -- is the impairment
16 essentially that substantially limits some major life
17 activities. But he would be considered disabled under the ADA
18 just based on mental illness alone.

19 THE COURT: Right. So why are you, why are you
20 concerned about developmentally disabled?

21 MS. DEWEY: Your Honor, it goes to the second element
22 of the ADA claim, which is that -- it goes to the modifications
23 that Mr. Sardakowski would need in order to meaningfully
24 participate in the residential treatment program's leveling-out
25 aspect. Under the ADA definition of discrimination, which is

1 based on Justice Department regulations, the regulations
2 require state entities -- they have a affirmative obligation to
3 make reasonable modifications to programs, services, and
4 activities in order to allow disabled individuals to
5 meaningfully participate. And failure to make reasonable
6 modifications constitutes discrimination under the ADA. So the
7 developmental disability would go towards some of the
8 modifications that might be necessary for Mr. Sardakowski. But
9 certainly his claim could stand on mental illness alone.

10 THE COURT: Okay.

11 MS. DEWEY: There's also a dispute of fact about
12 whether Mr. Sardakowski's mental impairments substantially
13 limit his major life activities. Defendants claim that
14 Mr. Sardakowski can control his behavior. But they don't
15 specifically address this prong in their motion for summary
16 judgment. Plaintiff's evidence shows that there, that
17 Mr. Sardakowski is substantially limited in several major life
18 activities. Including some of those that are explicitly listed
19 in the ADA. Such as thinking and concentrating. The statute's
20 list of major life activities is not exhaustive, and therefore
21 he -- we know that he also has other substantial limitations
22 including impulse control. And there's record evidence before
23 the Court on those as well.

24 At a minimum, there's a material dispute of fact as to
25 whether Mr. Sardakowski has a mental impairment that

1 substantially limits major life activities under the ADA, such
2 that he is disabled.

3 And returning to the second element, which is whether
4 defendants are discriminating against Mr. Sardakowski on the
5 basis of his disabilities, defendants appear to claim that they
6 have not discriminated by providing a list of accommodations
7 that they have given him in the past for things like his
8 hearing disability. Because Mr. Sardakowski is hearing
9 disabled. For example, they list the vibrating watch that they
10 have given him.

11 THE COURT: That's the subject of another one of his
12 cases.

13 MS. DEWEY: And, Your Honor --

14 THE COURT: Which somehow got assigned to me. Really?
15 Were you responsible for that?

16 MS. DEWEY: I am not.

17 And frankly, those accommodations, as you noted,
18 perhaps they're part of another case. They have nothing to do
19 with the claims in this case. They certainly don't prove that
20 defendants are not discriminating against Mr. Sardakowski as it
21 relates to his mental illness and developmental disability
22 specifically.

23 And I want to address his abilities to progress
24 through the leveling-out program, which is the heart of this
25 claim.

1 THE COURT: The heart of it is what do you expect the
2 DOC to do that they're not doing. They've done all kinds of
3 things for this guy. What are they not doing that they should
4 by law do for him to get him through the leveling-out program,
5 for example?

6 MS. DEWEY: Indeed. There is no evidence that DOC has
7 ever made modifications to the leveling-out program to
8 accommodate Mr. Sardakowski's disabilities.

9 THE COURT: Well, they sure have. They created this
10 RTP after the OMI program so that people with mental illness
11 would have a route out or --

12 MS. DEWEY: It helps here --

13 THE COURT: -- into general population that isn't
14 available. That's the irony of your claim. They put him in a
15 program that's designed for mentally ill people. They in that
16 sense discriminated in his favor, right?

17 MS. DEWEY: There's a couple issues with that. For
18 one thing, there are leveling-out programs for people who are
19 not mentally ill in CSP. However, it helps to think of the
20 residential treatment program as serving essentially two
21 functions. One function is purportedly to provide
22 mental-health treatment as a mental-health treatment program.
23 The other function is as a leveling-out program, for inmates
24 with mental illness.

25 The -- Mr. Sardakowski's first claim for inadequate

1 mental-health treatment goes to the RTP's first function as a
2 mental-health treatment program. His ADA claim goes to its
3 function as a leveling-out program. And there's record
4 evidence before the Court that Mr. Sardakowski's mental
5 impairments render him unable to successfully participate in
6 the leveling-out aspect of the program regardless of the fact
7 that he is mentally ill and may be participating in the
8 mental-health treatment aspects of the program. There's record
9 evidence before the Court that he simply cannot exert control
10 over his behavior for the time periods necessary to progress
11 out.

12 For example --

13 THE COURT: Well, if that's the case, then how do you
14 expect the Court to put him in general population? Wouldn't I
15 be doing something that would be totally arbitrary and
16 capricious if I did that, if he can't control his behavior?

17 MS. DEWEY: It helps to understand what some of these
18 behavioral requirements are. And I'll just give you an
19 example. At one point he worked his way up to level 3 in the
20 RTP program, and one day he failed to clean his cell. He was
21 regressed back to level 1, back to day 1 of the program. It
22 was not an issue of a violent infraction. It was, it was an
23 infraction. But it served to send him all the way back to
24 step 1 where all of the progress that he had made over weeks or
25 months was lost at that point; and given his mental

1 impairments, when he goes back to step 1 after something like
2 that, he's just unable to conceptualize and comply with these
3 long-term goals for behavior, knowing that if he makes a
4 mistake at any step along the way, he may be back to square
5 one, and indeed that's happened to him several times.

6 He's cycled through this program, back in OMI, he was
7 up to level 5, he was regressed. He would go back up to
8 level 4, he was regressed. It's a cycle that he just can't
9 escape, given his mental impairments. And at a minimum --

10 THE COURT: What does the Court do about it then? He
11 gets up to level 4, level 5 and he goes back because of his
12 behavior. How can I fix that?

13 MS. DEWEY: There are several reasonable modifications
14 that could be made to the program. In order to accommodate his
15 disabilities. One modification would be to give him concrete,
16 short-term behavioral goals with frequent feedback. It
17 wouldn't require restructuring of the program. It would just
18 be giving him goals that he can understand. Instead of telling
19 him to have good behavior for a series of months, or years that
20 it would take to progress through all eight levels of the
21 program, it would be framing it in terms of days or weeks or
22 whatever is possible to do within the program.

23 THE COURT: They don't do that now, give them any
24 goals or feedback?

25 MS. DEWEY: Your Honor, there's record evidence that

1 they don't. He doesn't know what his goals are. The RTP
2 policy provides for targeted behavioral goals. I think that's
3 the term they use. And they claim that they use that for, to
4 sort of facilitate this progression process. Mr. Sardakowski
5 doesn't know what his goals are. No one has discussed it with
6 him.

7 It's very similar to the situation with the treatment
8 plan. He simply doesn't know on the one hand what's expected
9 of him other than very vague goals which are listed in some of
10 his treatment plans, such as decreased anger. And he doesn't
11 know how to do that. And so he is just at this point stuck in
12 a cycle where he can't get out because he's not able to comply
13 with the requirements of the program. Given his disabilities.

14 At a minimum, it's a fact dispute. About, first of
15 all, the extent to which his mental impairments affect his
16 ability to progress through the program. And about the
17 modifications that are necessary in order to allow him to
18 progress through the program.

19 A second modification might be not regressing him all
20 the way back to square one when he makes a mistake. So, for
21 example, on level 3, when he doesn't clean his cell, perhaps it
22 would look like working with him to address that specific
23 issue, well, keeping him on level 3 or perhaps only regressing
24 him to one level. These are all details that will need
25 testimony from expert witnesses as to what Mr. Sardakowski in

1 particular needs given his disability. And testimony from DOC
2 as to what's possible within the residential treatment program.

3 THE COURT: Well, should he be treated better than
4 other people with mental illness?

5 MS. DEWEY: The DOC as a state entity has a -- is
6 required to comply with the ADA.

7 THE COURT: Well, yes, everybody's required to comply
8 with the ADA. Even courts are.

9 MS. DEWEY: The ADA does impose an affirmative
10 requirement to make reasonable modifications to programs that
11 allow individuals with disabilities to participate.

12 THE COURT: Right, but my question was should he be
13 treated better than other people with mental illness who are
14 there in the RTP program.

15 In other words, you say he shouldn't be regressed all
16 the way back to level 1. Doesn't that give him preferential
17 treatment over somebody else who gets regressed back to
18 level 1?

19 MS. DEWEY: I think this goes to the heart of what the
20 ADA requires, which is that it's not about preferential
21 treatment. It's about accommodation for someone with
22 disabilities. And so other people may be able to successfully
23 progress through the program because they don't have the same
24 mental impairments that Mr. Sardakowski does. I don't have --
25 there isn't record evidence about whether other people are able

1 to comply with the program.

2 There is record evidence that Mr. Sardakowski in
3 particular, given his particular mental impairments, is unable
4 to participate in the program. And it also goes to the fact
5 that not all mental illness is the same. You could imagine a
6 program called the disability program where you have people in
7 wheelchairs and people with hearing disabilities and that
8 program might work really well for the people with hearing
9 disabilities but not so well for the people with -- in a
10 wheelchair. And so the simple fact is that Mr. Sardakowski may
11 be the person in the wheelchair who the program doesn't work
12 for him because of his particular form of mental illness and
13 his particular developmental disability.

14 At a minimum, there's a dispute of fact about what he
15 needs, whether he's able to progress through this program
16 without accommodations and if he needs those reasonable
17 modifications, what those reasonable modifications would look
18 like.

19 Defendants simply have not met their burden on summary
20 judgment of showing the absence of a triable fact under the
21 ADA.

22 Defendants in their reply -- or perhaps in their
23 motion argue that they are entitled to summary judgment on Mr.
24 Sardakowski's ADA claim because of their assertion that he has
25 not requested accommodations. And there are a couple issues

1 here. First of all, whether Mr. Sardakowski has requested
2 modifications to leveling-out programs is itself a dispute of
3 material fact. There's evidence before the Court on summary
4 judgment that shows he did request modifications.

5 THE COURT: And got most of them granted, right?

6 MS. DEWEY: He has had accommodations for other
7 disabilities granted; for example, for his hearing disability.
8 But he's filed grievances requesting modifications to the
9 level-out programs that were denied. And those grievances were
10 specifically related to this claim. Grievances about the
11 inability to progress through the program because of his
12 disabilities and requesting that DOC make reasonable
13 modifications, and those requests were denied.

14 THE COURT: Don't you think there's some limits to how
15 much a court should get itself involved in running a prison?

16 MS. DEWEY: Your Honor, courts -- I believe the
17 Supreme Court has stated in Brown v. Plata that when there is a
18 constitutional violation, courts may not allow constitutional
19 violations to continue simply because a remedy would involve
20 intrusion into the realm of prison administration. Indeed
21 there are -- these are complicated issues. However, there are
22 certainly issues -- it is the Court's role to determine if
23 there is a constitutional violation and if there is such a
24 violation, it is the Court's role to provide a remedy. And to
25 provide relief.

1 In this situation, there are numerous disputes of fact
2 about the elements of each of these claims. And defendants
3 have not met their burden in showing the absence of a dispute
4 of fact. If indeed this goes to trial and the Court finds in
5 plaintiff's favor, we can certainly examine what particular
6 kinds of remedies might be necessary at that point. At this
7 point there's simply not record evidence before the Court as to
8 what specific relief would look like without testimony of
9 experts, without input from DOC. However, the Supreme Court
10 has made clear that the Court's role is to remedy
11 constitutional violations and that they cannot avoid that role
12 simply because it involves intrusion into the realm of prison
13 administration.

14 And finally, I'd just like to return to the situation
15 at hand --

16 THE COURT: You're getting some help from your buddies
17 there.

18 MS. DEWEY: Yes, I am.

19 THE COURT: They pass you notes which are sort of
20 helpful and sort of not.

21 MS. DEWEY: Some of them are. Some of them aren't.
22 But I do appreciate them.

23 We have here Mr. Sardakowski who defendants admit is
24 seriously mentally ill. He's been in isolation for four years.
25 He's engaging in continuing self-mutilation. And record

1 evidence shows that he's not receiving treatment for it.

2 In a case such as this, there are disputes of material
3 fact as to whether Mr. Sardakowski has received adequate
4 treatment and as to whether he is still in solitary confinement
5 as to whether defendants have discriminated against him on the
6 basis of his disabilities. Defendants simply have not met
7 their burden to show that there are no factual disputes as to
8 the elements of any claim. And the disputes of material fact
9 on all four claims should preclude summary judgment.

10 Thank you.

11 THE COURT: Thank you, Ms. Dewey.

12 Mr. Alber.

13 MR. ALBER: Thank you, Your Honor.

14 I think really at the heart of this case, the case
15 that is just weeks upon trial, really is the issue of reform
16 and the reform that started with Mr. Clements, as the Court
17 pointed out, and is no doubt continuing on with Mr. Raemisch.
18 Certainly the Court has seen Mr. Raemisch's article in the *New*
19 *York Times*, and as I understand it, is currently, today,
20 testifying in front of some committee in Congress in Washington
21 about his experience. So that he can try to further reform the
22 Department in what is known as administrative segregation.

23 What will go --

24 THE COURT: And I totally applaud everything he's
25 doing. I think it's great. Truly great.

1 MR. ALBER: Worst --

2 THE COURT: But I still have to decide this case.

3 MR. ALBER: Sure.

4 And one of the major issues that will go in front of
5 this Court at trial, if it were to go to trial, is the
6 existence of the RTP program. What that represents in the
7 direction the Department is headed, what it represents for
8 mentally ill offenders, what it represented for mentally ill
9 offenders formally contained and confined in administrative
10 segregation.

11 The RTP program was a program that was designed to
12 address the very issue that they're complaining about, which is
13 the presence of mentally ill offenders within administrative
14 segregation. The program itself isn't without fault. It's
15 certainly not perfect at this point. It's ever changing, as
16 many programs often do, especially something of this magnitude.
17 Certainly there are some mistakes made along the way, are some
18 group sessions canceled due to other issues within the prison
19 that dictate that they be canceled? Sure. But the overall --

20 THE COURT: Well, if they have to be canceled for
21 other reasons, it's not a mistake, is it?

22 MR. ALBER: No, no. And that would not be a mistake,
23 but that's certainly one criticism here.

24 THE COURT: But the one thing that they pointed out
25 that's really concrete is an alleged discrepancy between what

1 is happening and what the policy is in terms of individual
2 sessions.

3 MR. ALBER: Certainly early on within the RTP program
4 and certainly it's not at issue that this program does focus
5 its resources more on group therapy rather than individual
6 therapy.

7 THE COURT: But if they have a policy that says
8 somebody needs individual sessions and was it Lampela that said
9 once a week and they're not giving individual sessions, then
10 isn't there a triable issue right there?

11 MR. ALBER: There hasn't been an issue here, and I
12 think that was a misstatement that offenders within the RTP
13 program are required to have individual therapy once a week.
14 It varies depending on the mental-health needs of the offender.

15 Certainly along the line when Mr. Sardakowski was
16 first admitted in the RTP program, there was a, a period of
17 time where he was not seen for individual therapy. Some of
18 that had to do with his refusal, some it had to do with other
19 issues. Some of those issues have not ironed out. He is
20 seeing mental health on an individual basis. In fact, most
21 recently on February 10, spent an hour seeing his primary
22 clinician. The clinician that the Court granted will testify
23 at trial just this morning. She saw him for individual session
24 most recently on February 10.

25 There are many things that she says Mr. Sardakowski

1 relayed within that --

2 THE COURT: Who is this clinician?

3 MR. ALBER: Her name is Dr., Dr. Diaz.

4 THE COURT: Ah. That's the one we had the little flap
5 about just endorsed.

6 MR. ALBER: Yes, we did.

7 And we'll get to talk with Dr. Diaz and the Court, if
8 this continues on, will be able to hear what she has to say
9 about the treatment she's providing, what Mr. Sardakowski says
10 about that treatment, and going forward what she is willing and
11 capable of doing.

12 THE COURT: When was he put in the RTP program and
13 transferred over to Centennial?

14 MR. ALBER: Roughly in February of last year.

15 THE COURT: So it's been a year.

16 MR. ALBER: It has been.

17 THE COURT: But the individual therapy session was
18 today? Or, no, not today, February 10.

19 MR. ALBER: It was early this month, and that was just
20 the most recent session.

21 And again, certainly --

22 THE COURT: They're claiming he didn't get any, and
23 you're claiming he did.

24 MR. ALBER: I'm claiming that there may be, there are
25 circumstances surrounding at this point what had happened in

1 the past.

2 THE COURT: Well, if he refused --

3 MR. ALBER: Certainly.

4 THE COURT: -- it's pretty hard to blame your people
5 for that.

6 MR. ALBER: I would agree.

7 I think the focus of this case and the trial shouldn't
8 necessarily be focused on so much of the history, the
9 mental-health treatment history that Mr. Sardakowski has had.
10 Certainly the Court mentioned that he has had lengthy
11 treatment, but where he is now and going forward what he could
12 be doing.

13 Mr. Sardakowski is in a program obviously specifically
14 designed for someone like him. It was the Department's
15 decision to place him there because they thought that might be
16 the best place for him rather than maybe general population or
17 maybe even in a DD program that was mentioned earlier where he
18 had had a stint in those programs and it was unsuccessful.

19 He certainly is in a place where the Department feels
20 he is best suited. He is engaging in treatment. He's engaging
21 in group treatment. He is proceeding along and apparently
22 doing fairly well. At the time of the filing of the motion, he
23 was at level 4. Currently he's now at level 5. And these
24 aren't so much levels based upon just solely behavior. They're
25 levels -- the overall goal of the program is to focus on

1 treatment. Providing that treatment in a group therapy,
2 providing the tools for these offenders to use within their
3 life and in present in prison environment given their mental
4 illness. And it allows -- it's much like, much like school.
5 Before you go -- before you get out of first grade, you got to
6 finish first grade before you go to second. And you've got to
7 exhibit the skills you need to get out of first grade. The
8 same is true with the levels.

9 THE COURT: I'm not sure. I read all the time about
10 these people that graduate from high school that can't read.

11 MR. ALBER: Well, that's --

12 THE COURT: Also known as NFL football players.

13 MR. ALBER: Touche, Your Honor.

14 What this case has turned into is an assault upon the
15 very reform that's taking place. I don't believe that the
16 Department's shifting and reform and placing him into this
17 program, while certainly in a restrictive environment, I don't
18 believe it's the same living conditions as it was across the
19 street at the Colorado State Penitentiary for him. There were
20 certainly testimony and evidence within this record to show
21 that it is different. I don't believe it's the same.

22 But I think . . . I don't believe that his transition
23 into this program, while unperfect, the program is currently,
24 exhibits deliberate indifference, on either the first claim,
25 and certainly their second claim, relating to the solitary

1 confinement.

2 Further, I think it also speaks, this transition
3 speaks and really moots their ADA rehab act claim, in that he's
4 specifically placed into a program specifically designed to
5 treat these individuals where not all of the mental-health
6 resources of the Department are focused in this program.
7 Obviously there are other needs throughout, throughout the
8 state. Many of its institutions.

9 But the Department has chosen to transfer the OMI
10 program or the former OMI program out of an environment of
11 administrative segregation into another facility where they can
12 utilize the unique characteristics of that prison to better
13 facilitate growth and treatment for these individuals. It
14 becomes less restrictive. My position is not that this
15 environment is completely unrestricted like in certain general
16 population settings. That's not the case. But it's certainly
17 less restrictive than it was.

18 And to say that that constitutes deliberate
19 indifference is simply not the case. His transfer into this
20 program certainly, I believe, moots out his ADA claim as well
21 as their second Eighth Amendment claim. And the documentation
22 evidence that the Court already has shows the Department's
23 treatment of Mr. Sardakowski has certainly been anything but
24 deliberately indifferent.

25 THE COURT: Speaking of evidence that the Court

1 already has, don't the -- doesn't the plaintiff have a point
2 when they say Lish's affidavit doesn't really qualify because
3 it's not providing evidence from personal knowledge?

4 MR. ALBER: I don't believe so. Their expert,
5 Dr. Burns, is the, I guess the current chief of psychiatry in
6 the Ohio DOC. She saw Mr. Sardakowski for a period of three
7 hours. To do her examination. The vast majority of her
8 opinions, of her assessment of his treatment all come from a
9 medical record, the same as Dr. Lish. So I suppose what's good
10 for the goose is good for the gander, and if you're going to
11 disregard Dr. Lish's opinions and assessment of his treatment,
12 the same, I suppose, should be true for Dr. Burns.

13 So I don't -- within the medical community, a record
14 review and a forensic examination of the treatment is perfectly
15 acceptable within the field.

16 Other than that, I will rest on the motion and the
17 subsequent reply.

18 THE COURT: Okay. Thank you.

19 Any rebuttal.

20 MS. DEWEY: A short one.

21 Your Honor, this case is not an assault on the reform
22 efforts taking place. It is about a long history of failure to
23 treat Mr. Sardakowski. And accommodate his particular
24 disabilities. And instead choosing to hold him in long-term
25 solitary confinement. And now, on the eve of trial, the DOC

1 claims that reforms are taking place --

2 THE COURT: Well, they are taking place. It's not
3 just a claim. It's a fact.

4 MS. DEWEY: There is no evidence, however, before the
5 Court about what those reforms are, how they will be
6 implemented, and how they will specifically apply to
7 Mr. Sardakowski and whether indeed they will affect his
8 conditions at all. Specifically what the reforms that are
9 taking place for administrative segregation, that's a label
10 that's been removed from Mr. Sardakowski. He's no longer in
11 administrative segregation, according to the DOC. But the
12 record evidence shows that despite this label change, his
13 conditions remain the same.

14 So to the extent the reforms to administrative
15 segregation are taking place, there's simply no evidence that
16 those reforms will apply to Mr. Sardakowski.

17 THE COURT: Well, technically, if I just go by your
18 complaint, your second claim is to get him out of
19 administrative segregation. Technically, they did.

20 MS. DEWEY: The complaint does address long-term
21 solitary confinements. Administrative segregation was the term
22 that was used at that time. They have since created this new
23 program with conditions that are essentially the same as those
24 in administrative segregation.

25 THE COURT: Although they say they aren't.

1 MS. DEWEY: And that is a dispute of material fact,
2 Your Honor, that will have to be decided at trial. Defendants
3 have not --

4 THE COURT: She just won't let me push her over.

5 MS. DEWEY: I want to address a couple of the points
6 that defendants' counsel made. One is a recent meeting with a
7 clinician that Mr. Sardakowski has had or Mr. Sardakowski's
8 purported refusals to engage in therapy.

9 There's simply no evidence before the Court about
10 Mr. Sardakowski's recent treatment, first of all. And to the
11 extent that Mr. Sardakowski has met with a clinician recently,
12 there's certainly a dispute of fact still about whether a
13 single meeting in a whole year in the residential treatment
14 program constitutes adequate treatment; and we have no record
15 evidence about what happened during that treatment session,
16 whether the clinician addressed self-harm with Mr. Sardakowski.
17 Certainly there is still disputes of fact about adequacy of
18 treatment.

19 There's no evidence before the Court that
20 Mr. Sardakowski has refused treatment. It's certainly a fact
21 that we would dispute. However, it's not in evidence before
22 the Court on summary judgment.

23 Defendants' counsel also stated that Mr. Sardakowski
24 was placed in RTP which is a program designed for someone like
25 him. The residential treatment program has utterly failed to

1 provide any treatment for Mr. Sardakowski's most serious
2 mental-health needs, including self-harm. It certainly hasn't
3 provided any individualized treatment for him.

4 And turning to Mr. Sardakowski's second claim,
5 defendants' counsel stated that he does not believe the
6 conditions are the same. That's a factual dispute. There's
7 record evidence from plaintiffs, record evidence before the
8 Court on summary judgment that the conditions are the same. So
9 to the extent that that's disputed, defendants have not met
10 their burden in showing that there's an absence of a dispute of
11 fact.

12 And finally, I'd like to address the ADA claim.
13 Mr. Sardakowski's claim under the ADA is not about
14 mental-health treatment. It's about his inability to progress
15 through the leveling-out programs without reasonable
16 modifications, apart from mental-health treatment. The
17 modifications he seeks are not mental-health treatment.
18 They're modifications to address his particular inability
19 because of his impairments to comply with the long-term
20 behavioral requirements of the program.

21 On all of these issues, there are many disputes of
22 material fact. As to each of the -- as the elements of all
23 four of Mr. Sardakowski's claims. And these disputes of fact
24 should preclude summary judgment.

25 Thank you.

1 THE COURT: All right.

2 Thank you.

3 The Court, with some assistance from my law clerk, has
4 reviewed your briefs. Your very long briefs. But even though
5 they were quite long, they were interesting and helpful. And I
6 think your argument has been very good.

7 I would say two things about this case, just globally.
8 One, I think the plaintiffs have a difficult case. And it's
9 become more difficult as time has passed because the DOC -- and
10 this is a good thing -- is making some changes. And as they
11 make changes, potentially the things that you're complaining
12 about are getting addressed. Not to your satisfaction, but
13 you've got a tough case.

14 The other thing I would say and I'll say this to
15 everybody in the room, is Mr. Sardakowski is a very lucky man
16 to have you for his attorney. Were it not for your clinic,
17 this case probably would have been over a long time ago.

18 Turning to the issues. It's relatively clear to me
19 that summary judgment has to be denied. That is not to say
20 that I think the plaintiffs necessarily are going to get
21 everything they want or even anything they want, but it is to
22 say, as Miss Dewey kept reminding me over and over, that there
23 are fact disputes and there truly are.

24 For example, on count one, where they are attempting
25 to convince me that the DOC is deliberately indifferent to

1 Mr. Sardakowski, which is a tough row to hoe, a fairly obvious
2 fact dispute on the record that I've got concerns individual
3 therapy. There's a dispute as to whether he's gotten
4 individual therapy; if so, how much he's gotten; and even a
5 dispute as to whether or not the alleged lack of individual
6 therapy is contrary to the CDOC's own policies and contrary to
7 the testimony of their own medical people.

8 There's the dispute about the group sessions. The
9 indication is that they're canceled between a quarter and a
10 third of the time. Well, is that for true situations that are
11 actual needs, or might it indicate some prioritization that
12 puts these group therapy sessions too low.

13 There is the indication that during these group
14 sessions, often it's a group of inmates just sitting around
15 playing cards. I don't know whether that's therapeutic or not.
16 It doesn't sound like mental-health treatment to me, but I need
17 to hear from the professionals on that.

18 There is a dispute concerning whether Mr. Sardakowski
19 is on the one hand being punished for his self-mutilation
20 behavior or whether he is being treated appropriately for it.

21 There is a dispute about whether a lot of this
22 behavior is simply malingering and things that he's done in
23 order to try to accomplish something that he wants versus the
24 true product of mental illness.

25 So I think there are enough fact disputes that the

1 first claim goes to trial.

2 I also think the second claim goes to trial. He's not
3 in administrative segregation anymore. But the plaintiffs are
4 saying that's just a label change; in all reality he still is.
5 And the defendants are saying, no, there are a lot of things
6 that are different. For example, he gets to exercise now,
7 something that I've expressed some opinions on in the past.
8 And the response is they just put him in a little cage,
9 something I've also expressed opinions on in the past. But I
10 think there are enough disputes about what is or isn't his
11 condition now and whether he's been singled out because of his
12 mental illness that I have to take a look at it based on the
13 actual evidence at trial, not on these papers.

14 As far as the ADA and the Rehabilitation Act are
15 concerned, I sometimes wonder why plaintiffs need to burden an
16 otherwise constitutional case with these statutory claims; but
17 there appear to me to be some genuine disputes of fact here as
18 well. Basically what Ms. Dewey was saying was that the problem
19 is that he's disabled -- developmentally disabled and they're
20 treating his mental illness perhaps, but not his developmental
21 disability. And she claims that, for example, he ought to
22 receive specific concrete goals that he can understand.

23 Well, I don't know if he is or isn't. I wouldn't take
24 his word for it. But I would like to see the evidence. This
25 is somewhat similar to what the Tenth Circuit has already gone

1 through in the Toevs case six years ago. She is arguing that
2 it isn't appropriate to regress him all the way back to the
3 beginning because of his developmental disability that's not
4 being treated. There is a dispute as to whether he's gotten
5 developmental disability. There's a dispute as to whether or
6 not it's been properly accommodated.

7 And furthermore, because this is a trial to the Court,
8 not a trial to a jury, there's very little for me to gain by
9 dismissing part of it, because we're going to have a trial on
10 other parts. And it would always be my preference in a close
11 case to resolve the close case in favor of deciding cases on
12 trial evidence and not on papers.

13 And therefore the motion for summary judgment is
14 denied and we'll look forward to going to trial, unless you
15 folks can reach some resolution between now and then.

16 I think I ruled on the other -- if I haven't -- I
17 have, the other motions that were pending.

18 MR. WOODWARD: Your Honor, you did rule on the other
19 motions that were pending. We just had a couple of issues for
20 the trial prep conference.

21 THE COURT: Okay. Go ahead.

22 THE REPORTER: If you could go to the lectern, please.

23 MR. WOODWARD: Certainly.

24 Well, the first issue, we reached stipulations just
25 right before this conference with defendants' counsel, so we

1 will just file those this evening, as soon as we leave, unless
2 you want a copy of them right now, which I can --

3 THE COURT: No, thank you.

4 MR. WOODWARD: Okay.

5 Modifications to the witness list as well. We'll file
6 that later tonight. We will not be calling four of our five
7 may-calls.

8 THE COURT: Okay.

9 How many witnesses do you have?

10 MR. WOODWARD: So, seven that we will certainly call,
11 and one that we may call.

12 THE COURT: Okay.

13 How long is it going to take to put that evidence on?

14 MR. WOODWARD: We anticipate about 20 hours of
15 testimony. However, there are --

16 THE COURT: I don't think so.

17 MR. WOODWARD: Okay. So this brings me into a related
18 issue, which is we have some joint witnesses that we intend to
19 call in our case in chief and Mr. Alber will also call. So
20 obviously we don't want to be presumptive and tell defendants
21 how they would run their case, but we were wondering if maybe
22 defendants would do their direct of those witnesses so that
23 they only had to appear once.

24 THE COURT: We'll probably want to do that.

25 Won't you, Mr. Alber.

1 MR. ALBER: Yeah, I would agree. I think --

2 THE COURT: Makes sense.

3 MR. ALBER: -- any of the joint or common witnesses, I
4 would just handle.

5 THE COURT: Who are your witnesses?

6 MR. WOODWARD: So Mr. Sardakowski and in our -- this
7 is document 150 --

8 THE COURT: You should try to keep his testimony
9 relatively brief.

10 MR. WOODWARD: Okay. And we certainly will. And we
11 have five hours on there. We will try to keep it brief, and it
12 should go faster than that, depending on certain factors,
13 including his medication.

14 We also have Dr. Lampela, Kristin Robinson --

15 THE COURT: Dr. Lampela is somebody I've had in court
16 before.

17 MR. WOODWARD: Okay.

18 THE COURT: She's good.

19 MR. WOODWARD: Kristen Robinson, who is a former
20 clinician of Mr. Sardakowski's. Kellie Wasko. Dr. Burns, who
21 Mary talked about. Angel Medina, who is another Department of
22 Corrections employee, and Dr. Greg Haney, who is our other
23 expert.

24 THE COURT: Okay.

25 MR. WOODWARD: And we have one may-call, Dr. Suzanne

1 Pinto.

2 THE COURT: Well, when I say 20 hours is unrealistic,
3 it really is. You need to try to get your case on in a couple
4 of days, if you can.

5 MR. WOODWARD: Okay.

6 THE COURT: And that includes cross.

7 How much time did we allocate for this case?

8 MR. WOODWARD: Five days, Your Honor.

9 THE COURT: Okay.

10 MR. WOODWARD: So then, that leads into one other
11 issue, which is Dr. Haney. You had granted a motion to allow
12 Dr. Haney to testify via televideo conference. Dr. Haney is
13 actually going to be in Guam working on a capital case at that
14 time. Due to the international date line, Guam is 17 hours
15 ahead of us. So we have arranged for Dr. Haney to testify at
16 6 a.m. on March 21 for him, which would be 1 p.m. March 20 for
17 us. So that is Thursday after lunch of the trial week, and we
18 know, we anticipate that certainly is going to be out of order,
19 so we wanted to ask the Court's permission to have him testify
20 to that then.

21 THE COURT: Do we have something else Thursday at
22 one o'clock?

23 THE COURTROOM DEPUTY: I'm sure we do.

24 THE COURT: Which Thursday is it?

25 MR. WOODWARD: Thursday, March 20.

1 THE COURTROOM DEPUTY: We actually have another trial.

2 THE COURT: Which trial is that?

3 THE COURTROOM DEPUTY: Capra.

4 THE COURT: The third week of it.

5 Second week?

6 THE COURTROOM DEPUTY: Second week of it.

7 THE COURT: Well, we may have to do a little juggling.

8 MR. WOODWARD: So that's a trial scheduled during the
9 same time that we have this trial scheduled.

10 THE COURT: I think the Capra case is starting on
11 Monday, but they're set for three weeks. It's a criminal case
12 that's a tax case. We'll see if they actually go to trial. If
13 they go to trial and they claim they need three weeks, they'll
14 probably need two weeks. So we may be late getting started on
15 your case. But don't worry, we'll accommodate your Guam
16 expert.

17 MR. WOODWARD: Okay. Thank you very much, and I hate
18 to bring up one more small wrinkle with Dr. Haney which is
19 testifying at 6 a.m., we anticipate he might have trouble
20 getting to a televideo conference center or a courthouse or
21 something, so we were going to ask the Court's permission to
22 have him testify via Skype.

23 THE COURTROOM DEPUTY: We don't have that capability.

24 THE COURT: I don't know how we would do that.

25 MR. WOODWARD: We would plug one of our computers in

1 and have it run through one of our laptops.

2 THE COURT: And we all gather around the table and
3 look at your laptop?

4 MR. WOODWARD: I was anticipating that it would come
5 up on a screen, but in the alternative --

6 THE COURT: No.

7 Will it?

8 THE COURTROOM DEPUTY: If they use their system, they
9 should be able to do it. I just know from the court's side, we
10 don't do it. We're not allowed to use Skype within our system.
11 Whether it's a security issue or not, I was just told by IT
12 that we're not allowed to bring it up on our computers.

13 THE COURT: But does that mean he can or can't put it
14 on our screens?

15 THE COURTROOM DEPUTY: I believe as long as it's on
16 their laptop and they have the capability, we don't have Wifi
17 or anything, so you'd have to have a card, an Internet card to
18 do it.

19 MR. WOODWARD: Okay.

20 THE COURTROOM DEPUTY: But I believe that's still --
21 it's new for me, Your Honor.

22 THE COURT: Well, if it's new for you, what you do
23 think it is for me.

24 THE COURTROOM DEPUTY: I'm sure we can make to work.

25 THE COURT: I had to look at a video the other day for

1 a case, and I ran into a problem right away. I had to have my
2 law clerk come into my office and show me how to put the
3 cassette in my computer. So that's what you're dealing with.

4 MR. WOODWARD: And we'll go above and beyond to make
5 sure that we make it work on our side, Your Honor.

6 THE COURT: Okay. We'll keep you up to date as best
7 we can on what's going on with the Capra case and whether that
8 means we have to delay the start of this case.

9 MR. WOODWARD: Certainly, and we appreciate that. And
10 just one more thing which is demonstratives. We've disclosed
11 all the underlying data to defendants for demonstratives. We
12 don't have the demonstratives put together. We anticipate
13 having three or four of them. And we have just proposed to
14 defendants to have those finished and exchanged a week before
15 trial and we wanted to ask the Court if that was okay.

16 THE COURT: Fine with me, if it's okay with Mr. Alber.

17 MR. ALBER: That's okay, Your Honor.

18 MR. WOODWARD: Then that's all I have related to the
19 trial preparation, Your Honor.

20 THE COURT: Okay.

21 Anything else?

22 MR. ALBER: Your Honor, I just have one small issue.

23 THE COURT: Okay.

24 MR. ALBER: One of the motions the Court granted this
25 morning or earlier today was plaintiff's motion to amend the --

1 THE COURT: To do what?

2 MR. ALBER: Was plaintiff's motions to amend the
3 exhibit list, to add some more, more of the current updated
4 mental-health records.

5 THE COURT: They put that it was unopposed.

6 MR. ALBER: It was.

7 THE COURT: Okay.

8 MR. ALBER: However. They were seeking just to add
9 some of those exhibits to their list. I would seek the same,
10 to add all of the records to the defendants' exhibits. To the
11 extent that they're not joint exhibits.

12 THE COURT: Well, they couldn't very well oppose that,
13 could they.

14 MR. ALBER: No. And I believe they represented that
15 they don't. I just wanted to address it with the Court or at
16 least question whether I should file a written motion.

17 THE COURT: No. You're fine.

18 MR. ALBER: Okay. Thank you.

19 THE COURT: Anything else?

20 MR. WOODWARD: Nothing more from plaintiff, Your
21 Honor.

22 THE COURT: Okay.

23 See you at trial.

24 (Recess at 3:22 p.m.)

25 REPORTER'S CERTIFICATE

1 I certify that the foregoing is a correct transcript
2 from the record of proceedings in the above-entitled matter.
3 Dated at Denver, Colorado, this 20th day of March, 2014.

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5 s/Kara Spitler _____
6 Kara Spitler
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