UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK

GEORGE RILEY, et al.,	:	HON. DICKINSON R. DEBEVOISE, U.S.S.D.J.
Plaintiff,	:	Civil Action No. 06-0331 (DRD)
v.	:	
DEVON BROWN, et al.,	:	
Defendants.	:	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, PURSUANT TO FED.R.CIV.P. 12(b)(6), OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, PURSUANT TO FED.R.CIV.P. 56

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PRELIMINARY STATEMENT

Plaintiffs' Complaint alleges allege the State Defendants have failed to protect Plaintiffs, inmates of the Adult Diagnostic and Treatment Center ("ADTC"), from other state inmates they come in contact with during medical, court, and other transports outside of the ADTC facility, which allegedly resulted in the Plaintiffs voluntarily forgoing medical treatment and court appearances due to their alleged fear of being physically assaulted by these other state inmates during transports.

The Complaint is now moot because the New Jersey Department of Corrections updated the Standard Operating Procedures of Central Transportation on July 1, 2006, to include specific, permanent procedures regarding the transport, escort and holding of ADTC inmates. The specific procedures state that: (1) when inmates of the East Jersey State Prison ("EJSP") are to be picked up with the same transport vehicle as ADTC inmates, EJSP inmates are to be picked up first; (2) when transporting ADTC inmates with inmates of other institutions, the ADTC inmates are to be seated on the front row bench seat within the inmate compartment, the second row bench seat will remain empty and all other inmates will be seated in the last row; (3) ADTC inmates are to be held separate from all other inmates at the St. Francis Medical Center and New Jersey State Prison ("NJSP"); (4) holding ADTC inmates at the Garden State Youth Correctional Facility ("GSYCF") should be avoided as much as possible, however, if it is unavoidable, the ADTC inmates are to be

held in one of the cells separate from all other inmates; (5) when transporting ADTC inmates for court or hearings, the ADTC inmates must be held in a separate holding cell away from other state or county inmates; and (6) the ADTC inmates will not be identified as being from the ADTC, but rather, they will be identified by name and number only. Therefore, the concerns raised by Plaintiffs in their Complaint have all been addressed by these updated Standard Operating Procedures rendering Plaintiffs' Complaint moot.

Additionally, the Plaintiffs' Complaint should be dismissed because Plaintiffs failed to properly exhaust their administrative remedies pursuant to the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a), prior to bringing suit.

Moreover, Plaintiffs' Complaint should be dismissed because it is based upon an impermissible theory of respondeat superior.

Furthermore, Plaintiffs have failed to set forth valid claims of: 1) failure to protect under the Eighth Amendment, 2) a violation of their due process rights under the Fourteenth Amendment, 3) Equal Protection under the Fourteenth Amendment, 4) a denial of legal access, 5) discrimination in violation of the New Jersey Law Against Discrimination, and 6) discrimination in violation of the Americans with Disabilities Act.

In sum, the defendants' Motion to Dismiss, or in the alternative, for Summary Judgment, should be granted.

PROCEDURAL HISTORY

Plaintiffs filed a Motion for Temporary Restraining Order on January 18, 2006 and brought a Complaint pursuant to 42 U.S.C. § 1983 on January 27, 2006, against State Defendants, Devon Brown, Former Commissioner of the New Jersey Department of Corrections, and William Plantier, Director of the Division of Operations for the New Jersey Department of Corrections, which was served on Defendants Brown and Plantier by Waiver of Service on February 9, 2006. Defendants Brown and Plantier opposed Plaintiffs' motion asserting that Plaintiffs failed to satisfy the elements necessary to impose preliminary restraints. On March 16, 2006, the Court entered a Preliminary Injunction against the Defendants Brown and Plantier.

On May 1, 2006, a Motion to Dissolve the Preliminary Injunction was filed on behalf of the Defendants Brown and Plantier. In response, Plaintiffs filed a Motion to Postpone the Automatic Stay of the Preliminary Injunction that took place on June 1, 2006, pursuant to 18 U.S.C. § 3626(e)(2). Additionally, Plaintiffs filed a Motion for a Second Preliminary Injunction Upon the Automatic Termination of the First Preliminary Injunction, which occurred on June 16, 2006, pursuant to 18 U.S.C. § 3626(a)(2). Oppositions to Plaintiffs' Motions were filed on behalf of Defendants Brown and Plantier on June 5, 2006.

On June 21, 2006, the Court entered an Order and Opinion dismissing as moot the Defendants' Motion to Dissolve the Preliminary Injunction and the Plaintiffs' Motion to Postpone the Automatic Stay of the Preliminary Injunction because the preliminary injunction automatically expired on June 16, 2006; and granting Plaintiffs' Motion for a Second Preliminary Injunction.

On July 19, 2006, the Court granted the Defendants' Motion to Extend Time to Answer the Complaint. The Defendants' Answer is due by August 17, 2006. This Motion to Dismiss in Lieu of an Answer, or in the alternative for Summary Judgment, follows.

STATEMENT OF FACTS

A. Inmate Transportation

There were 1,975 transports of inmates housed at the Adult Diagnostic and Treatment Center ("ADTC"), from January 2004 through May 2006. See Affidavit of Loretta C. Brancato, dated August 16, 2006, (hereinafter "Brancato Aff."), Exhibits C and E. Of those 1,975 ADTC inmate transports, only four alleged incidents occurred involving an assault or verbal harassment of an ADTC inmate by a state inmate from another institution, while under the custody and care of the New Jersey Department of Corrections; while 99.8% were completed without incident. See Brancato Aff., Exhibits C and E; and Affidavit of Melissa Matthews, dated August 15, 2006, (hereinafter "Matthews Aff."), ¶¶ 29 and 31.

A review of all Administrative Remedy Forms filed from January 2004 through May 31, 2006 by state inmates housed at the ADTC revealed no additional complaints with regard to any assault or harassment of ADTC inmates during transports with the exception of those four alleged incidents.[1] See Matthews Aff., ¶¶ 29 and 31.

Those state inmate transports conducted by the Central Transportation Unit ("Central Transportation") are governed by the

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[1] These reported incidents were the alleged assault of former inmate Todd Becka on July 20, 2004 during a medical transport (Chavers Aff., Exhibit A), the alleged assault of inmate Cornwell on May 24, 2005 in the GSYCF holding cell during his return trip from a medical appointment (Matthews Aff., Exhibits B), the alleged verbal harassment of inmate Braun on December 13, 2005 during the return trip from a court appearance (Matthews Aff., Exhibit D); and the alleged verbal harassment of Randall Venzie on April 7, 2006 in the GSYCF holding cell during his return trip from a court appearance (Matthews Aff., Exhibit R).

There were two other administrative remedy forms filed by ADTC inmates who alleged only that they were identified as ADTC inmates by DOC officers during transport. See Matthews Aff., ¶¶ 32 and 33. Inmate Michael Davidson filed a grievance form on May 3, 2006 alleging that he was identified during a transport by a state inmate who had seen the transport roster. See Matthews Aff., Exhibit S. However, upon investigation, it was determined that the state inmate could not have seen the transport roster because the transport paperwork was secured by the transport officers up front with them and the inmate did not have access to the paperwork at any time. Id.

Inmate Javier Ramirez filed a grievance form on March 23, 2006 alleging that while he was held in the GSYCF holding cell, an officer came in and asked "Who's going to Avenel ADTC?" and inmate Ramirez identified himself. See Matthews Aff., Exhibit S. Although inmate Ramirez further contends that he was then left alone with the inmates in the holding cell, he does not allege that he was subject to any verbal harassment or physical assault. Id. Upon investigation, the officer reported that he did not recall entering the holding area and asking that question. Id. The officer further stated that doing what Ramirez alleged had never been a practice of his in the past or present. Id.

Central Transportation Standard Operating Procedures. See Affidavit of Loretta C. Brancato, dated August 16, 2006, (hereinafter "Brancato Aff."), ¶ 2. On July 1, 2006, the New Jersey Department of Corrections amended its Central Transportation Standard Operating Procedures to include specific, permanent procedures to be adhered to when transporting, escorting or holding inmates housed at the Adult Diagnostic and Treatment Center ("ADTC"). Id., ¶¶ 2 and 4, Exhibit A, 40-41. These procedures regarding transporting, escorting or holding ADTC inmates are not temporary policy changes for the Department of Corrections, but rather permanent additions to the Central Transportation Standard Operating Procedures. Id., ¶ 4.

Inmate transports are scheduled with Central Transportation by either the institution in which the inmate is housed, Correctional Medical Services, or the court. Id., ¶ 5. Correctional Medical Services is responsible for notifying Central Transportation of an inmate's medical appointment and the need for a transport. Id., ¶ 6. Inmates' court appearances are scheduled with Central Transportation when Central Transportation receives a Writ or Court Order to produce an inmate at a court. Id., ¶ 7. The institutions in which an inmate in need of transport for any purpose other than medical or court, are responsible for notifying Central Transportation of the need for a transport. Id., ¶ 8.

Central Transportation then compiles all requests for transports for the following week and creates a schedule for the pick-up of inmates going out to and returning from appointments or appearances. See Brancato Aff., ¶ 9. The inmates of those institutions in close proximity to one another are transported together. Id., ¶ 10. For example, inmates of East Jersey State Prison ("EJSP") and the ADTC are transported together because those institutions are physically located next to one another. Id., ¶ 12. When a transportation unit is scheduled to pick up inmates from both the ADTC and EJSP, the ADTC inmates will be picked up first. Id., ¶ 13 and Exhibit A at 40.

Once all inmates have been picked-up from their institutions, they are all brought to Albert C. Wagner Youth Correctional Facility ("ACWYCF"), where the transporting officers use the transportation schedule and the inmates' names and numbers to separate the inmates by their destinations and place the inmates on a vehicle which is to proceed to their particular destinations. See Brancato Aff., ¶ 17. For example, at ACWYCF, all the inmates needing to go to Ocean County Court are put on the same vehicle which goes to Ocean County Court. Id., ¶ 18. It is the same for each destination; all those inmates heading to a particular destination are transported together to that destination. Id., ¶ 19.

When transporting ADTC inmates with other state inmates, the ADTC inmates are to be seated on the front row bench seat within the inmate compartment, the second row bench seat will remain empty, and all other inmates will be seated in the last row. See Brancato Aff., ¶ 14 and Exhibit A at 40. Additionally, the transporting officers are not to identify ADTC inmates as being from the ADTC and will identify ADTC inmates by name and number only. Id., ¶ 15 and Exhibit A at 41. The transporting officers are provided with a schedule of transports, which lists the inmates' names and numbers, and is used to verify the inmates are on the correct transport vehicle to proceed to their destinations. Id., ¶ 16.

When a transport occurs after 1:00 p.m., Central Transportation uses the Admission and Discharge Intake Area Tank 1 at GSYCF as a holding cell for inmates being transported from various locations across the State and returning to their home institution. See Brancato Aff., ¶ 20. The inmate is brought to the GSYCF holding cell to await a transport to their destination. Id., ¶ 21. However, holding ADTC inmates in GSYCF will be avoided as much as possible by making every effort to return ADTC inmates to the ADTC prior to 1:00 p.m. Id., ¶ 22 and Exhibit A at 41. When the transport of an ADTC inmate after 1:00 p.m. is unavoidable and the ADTC inmate must be held at the GSYCF, the ADTC inmate will

be kept in a separate cell from all other inmates. Id., ¶ 23 and Exhibit A at 41.

When an inmate is transported to a medical appointment, he or she is escorted by an officer who remains with the inmate at the appointment. See Brancato Aff., ¶ 24. During medical appointments or outpatient testing at the St. Francis Medical Center, ADTC inmates will be held in holding cells separate from all other inmates. Id., ¶ 25 and Exhibit A at 41. During appointments at the New Jersey State Prison ("NJSP"), the ADTC inmates will be kept separate from all other inmates at all times, including intake holding cells for holding purposes and intake holding cells for strip search purposes. Id., ¶ 26 and Exhibit A at 41.

When an inmate is transported to a court appearance, he or she is escorted to the court and depending on the court and remand schedule, the transporting officer may remain with the inmate or remand the inmate to the custody of that court. See Brancato Aff., ¶ 27. If the inmate is remanded to that court, the transporting officer will leave the inmate in the custody of the county and return for the inmate when the court notifies Central Transportation that the inmate's business with the court has concluded. Id., ¶ 28. When transporting ADTC inmates for court appearances, the ADTC inmates will be held in a separate holding cell away from other state or county inmates. Id., ¶ 29 and Exhibit A at 41.

On return to their institutions from a transport, inmates are brought to ACWYCF, the transporting officers use their transport schedule and the inmates' names and numbers to separate the inmates by their institutions and place the inmates on a transport vehicle to return to their institutions. See Brancato Aff., ¶ 30. Again, inmates of institutions that are near one another are transported together. Id., ¶ 31. Therefore, inmates of EJSP and ADTC are transported back to those institutions on the same vehicle with the ADTC inmates seated on the front row bench seat, the second row bench seat remaining empty, and the EJSP inmates seated in the last row. Id., ¶ 32 and Exhibit A, 40.

During all transports, inmates are shackled with leg irons, belly chains and wrist shackles that are secured to the belly chain. See Brancato Aff., ¶ 33 and Exhibit A, 25. Additionally, all inmates are kept under constant surveillance during and awaiting transport. Id., at ¶ 34 and Exhibit A, 30 and 33.

B. Actions Taken When Inmate-on-Inmate Altercations Occur

When an Administrator of a Correctional Institution or designee learns of an inmate-on-inmate altercation, he or she shall notify the Special Investigations Division ("SID"), which shall make an immediate inquiry to determine the facts of the situation. N.J.A.C. 10A:21-5.1(a). The SID shall then investigate and prepare written reports regarding any inmate-on-inmate altercations brought to its attention. N.J.A.C. 10A:21-8.5(a). If an inmate is found

to have threatened or assaulted another inmate, they are subject to disciplinary charges.[2] N.J.A.C. 10A:4-1.1 et seq.

C. Grievance Procedure

The administrative grievance procedure has been established to give the inmate population a way to bring complaints and problems to the attention of the Administration at the ADTC. See Matthews Aff., ¶ 12. Pursuant to the ADTC Inmate Handbook, the Administrative Remedy Forms are available to all ADTC inmates through their Housing Unit Officer, Unit Social Worker or the Law Library. Id., Exhibit J. Once the inmate completes the form and submits it to the Office of the Executive Assistant in Charge of Remedy Forms, the form is then given to the appropriate supervisor for a response. Id. When the inmate receives the response to the Administrative Remedy Form, his remedies have been exhausted. Id.

Those Administrative Remedy Forms filed by Plaintiffs were reviewed. See Matthews Aff., ¶ 19. Although Plaintiffs Cornwell, Macrina, Riley, and Gibbs have all filed Administrative Remedy Forms on various issues, they never filed an Administrative Remedy Form regarding the allegations in Plaintiffs' Complaint. Id., Exhibits K, N, O, and P. Plaintiff Vansciver has not filed any

[2]Assaulting any person; threatening another with bodily harm or with any offense against his or her person or his or her property; and fighting with another person are all prohibited acts under N.J.A.C. 10A:4-4.1. If an inmate is found guilty of any of these prohibited acts, they are subject to the sanctions set forth in N.J.A.C. 10A:4-5.1(a).

Administrative Remedy Forms in the last two years. See Matthews Aff., ¶ 23.

D. Alleged Incidents During Transports

Only four incidents were reported within the last two and a half years regarding an ADTC inmate being verbally harassed or assaulted by a state inmate from another institution during or awaiting transport. Those alleged incidents are as follows:

1. Facts Specific to Former Inmate Todd Becka, Non-Party to this Matter

On July 20, 2004, former inmate Todd Becka, SBI# 014241C, was being transported from the ADTC to New Jersey State Prison ("NJSP") for a medical trip, when he reported to the transporting officers that he had been "kicked in the head" by a state inmate sitting in the rear seat two rows behind him. See Affidavit of Caprice L. Chavers, dated April 28, 2006, (hereinafter "Chavers Aff."), Exhibit A.) All inmates in the vehicle were secured in leg restraints and were under constant supervision. Id. The supervising officer did not witness any altercation that verified inmate Becka's claim of assault. Id. Nevertheless, Becka was brought to the medical department of NJSP. Id. Upon evaluation, the physician noted Becka's head appeared normal and prescribed Motrin for Becka's complaints of tenderness and mild pain. Id.

Senior Corrections Officer, J.M. Coons, the transporting officer, wrote a special report regarding Becka's allegations, which was forwarded from the Central Transportation Unit to the

Special Investigations Division, which then investigated the matter. See Chavers Aff., Exhibit A.

2. Facts Specific to Plaintiff Paul Cornwell

Plaintiff Cornwell, an ADTC inmate, alleged that during his return from a medical trip on May 24, 2005, he was injured by a state inmate while in the GSYCF holding cell awaiting transport. See Plaintiffs' Memo of Law at 5. Cornwell alleged that he was placed in the holding cell, his wrist shackles were removed[3] and an officer allegedly announced that Cornwell was from "Avenel," then left the holding area to watch as Cornwell was physically assaulted by a state inmate. See Plaintiffs' Complaint.

However, Plaintiff Cornwell told a different story immediately after the incident. See Matthews Aff., Exhibit B. Following the incident, Cornwell stated that the state inmate "asked me where I was from and I stated ADTC, and he began hitting me and pulling at my chain." Id. Cornwell told a medical staff member that, "Another inmate asked me where I was from and I told him I was from Avenel . . . " Id. Cornwell did not advise that an officer indicated that he was from Avenel. Id.

Senior Corrections Officer ("SCO") Musso observed the altercation involving Plaintiff Cornwell and immediately notified Center Control of a Code #33. See Matthews Aff., Exhibit B.

[3]Pursuant to Central Transportation's SOP, leg irons must remain on inmates in the GSYCF holding cell awaiting transport. See Brancato Aff., Exhibit A at 25.

Center Control then announced the Code #33 for additional officers to respond and assist in the removal of the inmates. Id. The officers quickly entered the holding area and removed the inmates. Id. Both inmates were brought to the medical department. Id.

Plaintiff Cornwell suffered a contusion to his left eye, reddened area of the back of his head, a bloody nose and an abrasion to his right elbow. See Matthews Aff., Exhibit B. The other inmate suffered scrapes to his knees. Id. An investigation was conducted and the other inmate was issued a disciplinary charge for assaulting another inmate. See Affidavit of Donald Mee, dated May 1, 2006, (hereinafter "Mee Aff."), Exhibit A. The disciplinary charge was amended by the Disciplinary Hearing Officer to fighting with another person, to which the inmate pleaded guilty and was sanctioned to fifteen days' detention, 180 days' loss of commutation credit, suspended for sixty days, 180 days' administrative segregation, suspended for sixty days, and 15 days' loss of recreational privileges. Id., Exhibit A.

3. Facts Specific to Plaintiff Inmate Peter Braun

Plaintiff Braun, an ADTC inmate, alleged that on December 13, 2005, he was subjected to verbal harassment by a state inmate during his return transport from court. See Plaintiffs' Memo of Law at 15-16. Braun did not advise anyone from the DOC of this incident. Rather, on December 13, 2005, officers noticed that Braun was agitated after his court trip and reported their

observations to their supervisor. See Matthews Aff., Exhibit D. Braun was then brought to the medical department in the ADTC. Id. Braun stated to medical staff that during his transport another inmate grabbed him by the shirt, verbally accosted him and searched him for jewelry. Id. He further stated that he did not report the alleged incident to the officers because he was not physically assaulted. Id.

4. Facts Specific to Inmate Randall Venzie, Non-Party to this Matter

On April 7, 2006, inmate Randall Venzie was placed in the GSYCF holding cell during his return transport from a Cape May County Court appearance. See Matthews Aff., Exhibit R. Inmate Venzie alleges that in the holding cell the other state inmates surmised that he was from the ADTC and began verbally harassing him. Id. Inmate Venzie further alleges that Officer Masi then came into the holding cell and demanded that each inmate tell him where they were to be transported to; thus, confirming inmate Venzie was from the ADTC. Id. Thereafter, inmate Venzie alleges he was subject to further verbal harassment while kept in the holding cell and during the transport to the ADTC. Id. At no point was inmate Venzie physically assaulted by the other state inmates. Id.

5. Facts Specific to Plaintiffs' Nine Additional Declarations

Plaintiffs have supplied this Court with nine declarations of ADTC inmates in support of their Motion for a Second Preliminary

Injunction and relied upon by Plaintiffs in their opposition to the State Defendants' Motion to Dissolve. Five of those declarations fail to assert any new allegations of verbal harassment or physical assault while under the custody and control of the New Jersey Department of Corrections during transports or being held in a holding cell awaiting transports.[4] See Declarations of Paul Bechold, Michael Davidson, Robert Pilkington, James J. Krivacska, John Thomas, William Dean and Phillip Disabella. Two of the nine declarations indicate that the ADTC inmates were subject to verbal harassment only after other state inmates identified them as ADTC inmates. See the Declarations of Ramoncito Ramos and Randall Venzie.

Only the Declaration of Keith Gardner, an ADTC inmate, alleges a physical assault by another state inmate while he was waiting in the GSYCF holding cell for a return trip to the ADTC on May 5, 2006. See Declaration of Keith Gardner. However, inmate Gardner

[4]The Declaration of James Krivacska provides no new allegations of verbal harassment or physical assault during or awaiting transport than alleged in his earlier declaration. The Declaration of Paul Bechold alleges suffering verbal harassment by other state inmates while being held in a holding cell in the Passaic County Jail. The Declaration of Michael Davidson alleges that a state inmate knew he was from the ADTC because that state inmate allegedly saw the transport roster. See the Declaration of Michael Davidson and Matthews Aff., Exhibit S. However, the investigation revealed that at no time did the state inmate have access to the transport roster as it was secured by the transport officers and in the front of the van with them. See Matthews Aff., Exhibit S.

was never held in the GSYCF holding cell on May 5, 2006. See Brancato Aff., ¶¶ 39-49 and Exhibits G, H and I.

The daily transport schedule shows that inmate Gardner was the only ADTC inmate to be picked up from the ADTC and dropped off at the Middlesex County Court on May 5, 2006. See Brancato Aff., ¶ 39 and Exhibit G. The trip ticket for Gardner's return trip from his Middlesex County Court appearance indicates that two inmates were picked up from the Middlesex County Court. Id., ¶ 43 and Exhibit H. The trip ticket further indicates that one of those inmates was brought directly back to "1500", which is the code for the ADTC, and the other was brought directly back to "1700", which is the code for the East Jersey State Prison. Id., ¶ 44 and Exhibit H. Because Gardner was the only ADTC inmate picked up and brought back from the Middlesex County Court on May 5, 2006, the inmate listed on the trip ticket as picked up from the Middlesex County Court at 1:18 p.m. and dropped off at the ADTC at 2:30 p.m. is Gardner. Id., ¶¶ 45 and 46; and Exhibits G and H. Additionally, the ADTC log book for Friday, May 5, 2006 indicates that inmate Gardner was received by the ADTC at 14:34 (2:34 p.m.) from a court transport. See Matthews Aff., Exhibit U.

Furthermore, any inmate placed in the GSYCF holding cell has his name listed in the GSYCF holding cell log book. See Brancato Aff., ¶ 48. The GSYCF holding cell log book for May 5, 2006 does

not have Gardner listed as an inmate who was placed in the GSYCF holding cell on that date. Id., ¶¶ 47-49, Exhibit I.

E. Devon Brown, Former Commissioner of the New Jersey Department of Corrections

Devon Brown has not been employed by the New Jersey Department of Corrections as the Commissioner since January 9, 2006. Affidavit of D. Craig Stevens, dated August 17, 2006, ¶ 2. In fact, Devon Brown is no longer employer by the New Jersey Department of Corrections in any capacity. Id., ¶ 3.

STANDARD OF REVIEW

A. The Rule 12(b)(6) Standard

The Court has authority to dismiss a suit for failure to state a claim upon which relief can be granted if the Complaint clearly demonstrates that plaintiff cannot prove any set of facts that would entitle it to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

B. Summary Judgment Standard

Summary Judgment is proper in any case where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A defendant who seeks summary judgment on a plaintiff's cause of action must demonstrate the absence of a genuine issue of material fact by either (1) submitting summary judgment evidence that negates the existence of a material element of plaintiff's claim or (2) showing there is no

evidence to support an essential element of plaintiff's claim. See Celotex Corp., 477 U.S. at 322-23.

LEGAL ARGUMENT

POINT I

Plaintiffs' Complaint must Be Dismissed as Moot.

Plaintiffs' Complaint has become moot because the New Jersey Department of Corrections Central Transportation Unit updated its Standard Operating Procedures on July 1, 2006 to include specific, permanent procedures to be adhered to when transporting, escorting or holding inmates housed at the Adult Diagnostic and Treatment Center ("ADTC"). Id., ¶¶ 2 and 4, Exhibit A, 40-41.

"An actual controversy must exist at all stages of federal court proceedings, both at the trial and appellate levels. If events subsequent to the filing of the case resolve the dispute, the case should be dismissed as moot." Chemerinsky, Erwin, *Federal Jurisdiction* § 2.5.1 (4th Ed. 2003). The Supreme Court explained that "mootness [is] the 'doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" United States Parole Commn. v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)).

A court also must determine whether the facts underlying a dispute are still operative and thus whether a judgment by the

court would provide meaningful relief. Wilmington Firefighters Local 1590 v. City of Wilmington Fire Dept., 824 F.2d 262, 266 (3d Cir. 1987). If the requested relief is unavailable, then the court's opinion would be merely advisory and will not be rendered. [Id.] Generally, a case is moot when: (1) the specific alleged violation at tissue has ceased and it is not reasonably likely that it will occur again; and (2) the effects of the alleged violation have been eliminated by other interim relief or events. New Jersey Turnpike Authority v. Jersey Cent. Power and Light, 772 F.2d 25, 30 (3d Cir. 1985). More than mere speculation that the wrong may resume is required to "shield a case from a mootness determination." Bunting v. Mellen, 541 U.S. 1019, 124 S.Ct. 1750, 1752 (2004).

On July 1, 2006, the New Jersey Department of Corrections Central Transportation Unit updated its Standard Operating Procedures to include the additional protections sought by the Plaintiffs in their Complaint. See Brancato Aff., Exhibit A at 40-41. These procedures are a permanent addition to the Central Transportation Standard Operating Procedures, which has changed the way the ADTC inmates are transported, escorted and held awaiting transport. See Brancato Aff., ¶ 4.

Additionally, Plaintiffs' claims against Defendant Brown are moot because Devon Brown is no longer employed by the New Jersey

Department of Corrections and therefore, any injunctive relief issued against Devon Brown would be pointless.

Therefore, there has been a change in circumstances such that there is no longer a genuine conflict between the parties and Plaintiffs' Complaint is moot.

POINT II

Plaintiffs' Complaint Is Barred by Their Failure to Exhaust Their Administrative Remedies.

Plaintiffs Complaint must be dismissed because they have failed to properly exhaust their administrative remedies. The PLRA requires prisoners asserting a claim under 42 U.S.C. § 1983 to first exhaust administrative remedies. See 42 U.S.C. § 1997e(a). Specifically, § 1997e(a) provides that:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

The exhaustion requirement applies to prisoners who were in custody at the time they filed their original complaint. Porter v. Nussle, 531 U.S. 516, 524 (2002). Exhaustion is mandatory. Booth v. Churner, 532 U.S. 731 (2002). Exhaustion must be total; that is, a complaint raising any unexhausted claim must be dismissed in its entirety even if the complaint also alleges exhausted claims. Rivera v. Whitman, 161 F.Supp. 2d 343 (D.N.J. 2001). 42 U.S.C. §

1997e(a) contains no futility exception that would excuse a failure to exhaust. Booth, supra, 532 U.S. at 741 n. 6.

The Supreme Court recently held that the PLRA requires "proper exhaustion." Woodford v. Ngo, 126 S.Ct. 2378, 2387 (2006). The Court stated that "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without some orderly structure on the course of its proceedings." Id. at 2386.

a. The Exhaustion Requirement Applies to Plaintiffs.

42 U.S.C. § 1915 provides that "[a]s used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." In assessing whether the exhaustion requirement applies to plaintiff, a court must look to his status at the time he filed his complaint. See Ahmed v. Dragovich, 297 F.3d 201, 210 (3d Cir. 2002).

In this case, the record is undisputed that all Plaintiffs were prisoners incarcerated with the New Jersey Department of Corrections at the time they filed their Complaint. See Matthews Aff., Exhibits A, C, E, F, G, H and I).

b. Remedies Outlined In The New Jersey Department of Corrections Inmate Handbook Meet The Definition of An "Administrative Remedy" Within § 1997e (a)'s Exhaustion Requirement.

The Third Circuit in Concepcion v. Morton, 306 F.3d 1347 (3d Cir. 2002) held that the PLRA's exhaustion requirement applies to the grievance procedure set forth in a New Jersey Department of Correction's inmate handbook. Concepcion, 306 F.3d at 1348-1349. Thus, based on Concepcion, the Plaintiffs were obligated to properly exhaust all available administrative remedies, such as those provided by the Inmate Handbook of the ADTC.

c. The Record Shows That Plaintiffs Failed To Exhaust Their Available Administrative Remedies.

All Administrative Remedy Forms filed by each plaintiff were reviewed. See Matthews Aff., ¶19. Plaintiff Braun was the only inmate to file an Administrative Remedy Form regarding the incident he was personally involved in on December 13, 2005. Id., at Exhibit L. Although Plaintiffs Braun and Krivacska filed Administrative Remedy Forms regarding their concerns for their safety during transports; they did not file any Administrative Remedy Forms concerning their other claims of violations of the Fourteenth Amendment right to substantive and procedural due process, Fourteenth Amendment right of equal protection, New Jersey Law Against Discrimination, and the Americans with Disabilities Act. See Matthews Aff., Exhibits L and M.

Additionally, although Plaintiffs Cornwell, Macrina, Riley and Gibbs have all filed Administrative Remedy Forms on various issues, they never filed an Administrative Form regarding any of the claims in Plaintiffs' Complaint. See Matthews Aff., Exhibits K, N, O and P. Finally, Plaintiff Vansciver has not filed any Administrative Remedy Forms in the last two years, let alone any with regard to the claims in the Complaint. See Matthews Aff., ¶23.

d. "Total Exhaustion" Is The Rule Under Section 1997e(a).

This Court has held that a prisoner must exhaust all of the claims that make up his federal civil action before he may file a civil rights suit in federal court. Rivera v. Whitman, supra, 161 F.Supp. 2d at 337, 341 (D.N.J. 2001) abrogated on other grounds, Ray v. Kertes, 285 F.3d 287, 293 n.6 (3d Cir. 2002). The Court held that "the plain language of section 1997e(a), as well as the legislative intent and policy interests behind it, compels a 'total exhaustion' rule." Id. at 343.

In this case, some Plaintiffs pursued their administrative remedies with regard to only some of the allegations contained in their Complaint, while others failed to pursue their administrative remedies with regard to all of the allegations contained in their Complaint. See Matthews Aff., Exhibits K, L, M, N, O and P. Because Plaintiffs' Complaint contains exhausted and unexhausted claims, the entire Complaint should be dismissed without prejudice

for Plaintiffs' failure to properly exhaust their administrative remedies as required by 42 U.S.C. § 1997e(a).

POINT III

Plaintiffs' Complaint Is Barred as a Matter of Law Because a 42 U.S.C. § 1983 Claim Cannot Be Premised upon a Theory of Respondeat Superior.

Plaintiffs' Complaint must be dismissed as to Defendants, Devon Brown, Former Commissioner of the New Jersey Department of Corrections, and William Plantier, Director of the Division of Operations for the New Jersey Department of Corrections because it is based on an impermissible theory of respondeat superior.

Supervisory liability under 42 U.S.C. § 1983 cannot be predicated solely upon a theory of respondeat superior. See Polk County v. Dodson, 454 U.S. 312, 325 (1981).

> A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior. Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity. [Rode v. Dellarciprete, 845 F. 2d 1195, 1207 (3d Cir. 1988) (citations omitted).]

"Actual knowledge and acquiescence" suffice for supervisory liability because together they "can be equated with 'personal direction' . . . ." Robinson v. City of Pittsburgh, 120 F. 3d at 1294 (citation omitted). Furthermore, while knowledge can be inferred from circumstances, Baker v. Monroe Twp., 50 F.3d 1186,

1194 (1995), it nevertheless must be actual knowledge. See Id. at 1201 n.6 (Alito, C.J. concurring and dissenting).

Accordingly, because the record is completely devoid of any evidence that the Defendants Devon Brown and William Plantier participated in the alleged violation of Plaintiffs' constitutional rights or had actual knowledge and acquiesced to another person's violation of their rights, Plaintiffs' Complaint must be dismissed.

Furthermore, as Defendant Brown is no longer employed by the New Jersey Department of Corrections, any injunctive relief granted on the basis of his alleged knowledge and acquiescence is moot.

POINT IV

Plaintiffs Cannot Show That Defendants Brown and Plantier Failed to Protect Them in Violation of the Eighth Amendment as There Is No Substantial Risk of Harm to Plaintiffs to Which Defendants Brown and Plantier Acted with Deliberate Indifference.

Plaintiffs' Complaint must be dismissed because they cannot establish a failure to protect claim under the Eighth Amendment.

To establish a failure to protect claim, an inmate must show that: (1) "he is incarcerated under conditions posing a substantial risk of serious harm;"and (2) the defendant prison official acted with deliberate indifference. Farmer v. Brennan, 511 U.S. 825, 834-837 (2004). A prison official is deliberately indifferent when he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the

inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. An official's failure to alleviate a significant risk that should have been recognized, and was not, does not constitute a violation of the Eighth Amendment. Farmer, 511 U.S. at 838. Therefore, Plaintiffs' claims that Defendants Brown and Plantier failed to protect them is without merit and should be dismissed.

A "pattern of violence" does not exist with regard to the alleged harassment or assaults of ADTC inmates by other state inmates during transport. In fact, of the 1,975 ADTC inmate transports, from January 2004 through May 31, 2006, only four alleged incidents occurred involving an assault or verbal harassment of an ADTC inmate by a state inmate from another institution, while under the custody and care of the New Jersey Department of Corrections. See Matthews Aff., ¶¶ 29 and 31.

A review of all Administrative Remedy Forms[5] filed from January 2004 through May 31, 2006 by state inmates housed at the ADTC revealed no additional complaints with regard to any assault

[5]The administrative grievance procedure has been established to give inmates a direct avenue to bring complaints and problems to the attention of the DOC Administration. See Matthews Aff. ¶12 and Exhibit J. Plaintiffs attempt to argue that the absence of an inmate filing a grievance form does not equate to the absence of an incident having occurred during or awaiting transport. However, the PLRA and its interpreting caselaw consistently require inmates to file grievance forms with the DOC Administration so the DOC has the ability to address the situations prior to the inmates going to court. See 42 U.S.C. § 1997e(a); and Woodford, supra, 126 S.Ct. at 2387.

or harassment of ADTC inmates during transports with the exception of those four incidents. See Matthews Aff., ¶¶ 29 and 31.

Although unfortunate, these random incidents are also very rare and unconnected to any behavior on the part of prison officials, and in no way are indicative of a "pattern of violence" or deliberative indifference. Rather, there is no evidence to support a finding of a "pattern of violence" nor the creation of an unreasonable risk that would support a failure to protect claim.

Not only are inmate-on-inmate altercations involving ADTC inmates during transport quite rare, but the DOC has implemented procedures to provide even further protection for ADTC inmates during or awaiting transports, which make the types of altercations complained of by Plaintiffs even less likely to occur. See Brancato Aff., Exhibit A, 40-41. Therefore, the DOC should be given the discretion it is entitled by the courts. It is an extraordinarily difficult task to conduct the transportation of inmates to and from institutions. See generally, Turner v. Safley, 482 U.S. 78, 84-85 (1987). "[T]he judiciary is 'ill equipped to deal with the increasingly urgent problems of prison administration and reform' and should therefore give significant deference to judgments made by prison officials in establishing, interpreting, and applying prison regulations." Fraise v. Terhune, 283 F.3d 506, 515 (3d Cir. 2002) (quoting Turner, 482 U.S. at 84-85).

Moreover, as Defendant Brown is no longer employed by the New Jersey Department of Corrections, any injunctive relief granted on the basis of his alleged failure to protect Plaintiffs is moot.

Therefore, Plaintiffs are unable to establish an Eighth Amendment claim and their Complaint should be dismissed.[6]

POINT V

Plaintiffs Do Not Possess A Liberty Interest In The Condition Of Their Confinement And Therefore Cannot Sustain A Cognizable 42 U.S.C. § 1983 Action Predicated Upon the Fourteenth Amendment Due Process Clause.

Plaintiffs cannot establish a claim that the Defendants Brown and Plantier disregarded an excessive risk to the health and safety of ADTC inmates during court and medical trips and that such conduct has deprived them of their substantive and procedural due process rights under the Fourteenth Amendment. See Plaintiffs' Complaint, 40-41. Under the Due Process Clause, liberty interests are limited to circumstances exceeding the sentence "in an unexpected manner." Sandin v. Conner, 515 U.S. 472, 484 (1995). Thus, the Due Process Clause does not create a liberty interest in being free from "every change in the conditions of confinement having a substantial adverse impact on the prisoner" or from

[6]Also, Plaintiffs Eighth Amendment claims based upon verbal harassment must be dismissed because claims of harassment are not cognizable under 42 U.S.C. § 1983 and do not rise to the level of a constitutional violation. See Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987); Prisoners' Legal Association v. Roberson, 822 F.Supp. 185, 189 (D.N.J. 1993); and Murray v. Woodburn, 809 F.Supp. 383 (E.D.Pa. 1993).

transfers from one cell to another or one prison to another, so long as conditions remain "'within the normal limits or range of custody which the conviction has authorized the State to impose.'" Id. at 478, (quoting Meachum v. Fano, 427 U.S. 215, 225 (1976)).

POINT VI

Plaintiffs Cannot Establish an Equal Protection Claim Because They Are Not a Member of a Suspect Class and the State Defendants' Transportation Procedures Are Rationally Related to a Legitimate State Purpose.

Plaintiffs cannot establish an equal protection claim under the Fourteenth Amendment because they are not members of a suspect class and the inmate transportation procedures are rationally related to a legitimate state purpose. Plaintiffs claim to be members of a suspect class, which would require strict scrutiny of their claims. It is inconceivable that inmates convicted of sex offenses and found to be compulsive and repetitive offenders would give rise to a suspect class, and no court has so held. Therefore, the prison authorities' actions must be upheld if they are rationally related to a legitimate state purpose. Hluchan v. Fauver, 480 F.Supp. 103, 109 (D.N.J. 1979), aff'd 659 F.2d 1067 3d Cir. 1981). Therefore, Plaintiffs' Equal Protection claim must be dismissed because the manner in which the transports are conducted is rationally related to legitimate state purposes and Plaintiffs cannot show that Defendants Brown and Plantier acted arbitrarily.

POINT VII

Plaintiffs Cannot Establish a Legal Access Claim Because the State Continues to Provide Plaintiffs with Safe Transports to Their Court Appearances and Is Not in Any way Prohibiting Them from Accessing the Courts.

Plaintiffs allege that Defendants Brown and Plantier knowingly disregarded an excessive risk to the health and safety of ADTC inmates during and awaiting transports, and, in doing so,Defendants Brown and Plantier failed to act reasonably to protect ADTC inmates from the substantial risk of serious bodily harm or injury, which has deterred Plaintiffs from exercising their rights to seek redress of grievances and to have access to the courts. This claim is without merit, especially given the updated Central Transportation Standing Operating Procedures for transporting ADTC inmates.

It is well established that "prisoners have a fundamental right to access to the courts which requires prison authorities to provide adequate law libraries or adequate assistance from persons trained in the law." Ingalls v. Florio, 968 F.Supp. 193, 202 (D.N.J. 1997)(citing Bounds v. Smith, 430 U.S. 817 (1977)). However, in order to successfully establish a legal access claim, a prisoner must show that he suffered an "actual injury" as a result of an inadequate law library or inadequate legal assistance. Lewis v. Casey, 518 U.S. 343, 349 (1996). The United States Supreme Court in Casey instructs that an inmate must demonstrate

that he was "hindered in his efforts to pursue a [nonfrivolous] legal claim" in order to meet the "actual injury" requirement. Id. at 351-353. Finally, Casey instructs that an inmate can only establish "actual injury" where his alleged hindered legal action concerned a direct or collateral attack upon his sentence, or a challenge to his conditions of confinement. Id. at 354-355.

Despite the alleged acts of Defendants Brown and Plantier deterring Plaintiffs from exercising their rights to seek redress of grievances and to have access to the courts, Plaintiffs have prolifically continued to use correspondence, administrative remedy forms and complaints, such as the instant written Complaint, to address their concerns. In fact, Plaintiffs set forth in this complaint that some of them filed a few Administrative Remedy Forms to address the concerns outlined in the complaint. See e.g., Abany v. Fridovich, 862 F.Supp. 615, 621 (D.Mass. 1994)("Not only does plaintiff not allege any facts indicating that his speech was chilled, but also that the fact that this suit was filed further suggests that their speech was not chilled."). Plaintiffs' actions defeat any claim that they suffered adverse action sufficient to rise to the level of a constitutional violation.

POINT VIII

Plaintiffs' Claims Against the Defendants Brown and Plantier Pursuant to the New Jersey Law Against Discrimination Are Barred by the Eleventh Amendment.

Plaintiffs' claims against Defendants Brown and Plantier under the New Jersey Law Against Discrimination are barred by the Eleventh Amendment.

"Under the Eleventh Amendment, a federal court is prohibited from hearing a suit against a state unless the state has consented to such a suit." Camden County Recovery Coalition v. Camden City Bd. of Educ. for Public Sch. Syst., 262 F.Supp. 2d 446, 448 (D.N.J. 2003). The Eleventh Amendment provides that: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

The Eleventh Amendment also prohibits suits against a state by its own citizens and suits against a state agency or department. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). Thus, even where the state is not a named party to the action, the suit will be barred so long as the state is the real party in interest. Camden County Recovery Coalition, supra, 262 F.Supp. 2d at 448. "Therefore, absent waiver, neither a State, nor agencies under its control may be subjected to lawsuits in federal court." Doe v. Div. of Youth and Family Servs., 148 F.Supp. 2d 462, 483

(D.N.J. 2001). Moreover, regardless of whether the suit is for monetary damages or injunctive relief, the Eleventh Amendment bars suits against a state in federal court. Camden County Recovery Coalition, supra, 262 F.Supp. 2d at 448.

Therefore, Plaintiffs' Complaint against Defendants Brown and Plantier is barred by the Eleventh Amendment.

POINT IX

Plaintiffs' Claims Under the ADA Are Barred by the Eleventh Amendment

Plaintiffs' claims under the Americans with Disabilities Act ("ADA") are barred by the Eleventh Amendment as Plaintiffs have failed even to allege conduct on the part of Defendants Brown and Plantier that actually violated the Fourteenth Amendment.

The Supreme Court has held that "insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." United States v. Georgia, 126 S. Ct. 877, 882 (2006). In Georgia, the plaintiff alleged that he was confined for 23-to-24 hours per day in a 12-by-3-foot cell in which he could not turn his wheelchair around. 126 S. Ct. at 880. He alleged that the lack of accessible facilities rendered him unable to use the toilet and shower without assistance, which was often denied. Id. On multiple occasions, he had injured himself in attempting to transfer from his wheelchair to the shower or toilet on his own, and on several other occasions,

he had been forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste. Id. He also claimed that he had been denied physical therapy and medical treatment, and denied access to virtually all prison programs and services. Id. Therefore, the Supreme Court determined that plaintiff's claims in Georgia were based, at least in large part, on conduct that independently violated the provisions of §1 of the Fourteenth Amendment. Id. at 882. The unanimous opinion of the Court goes no further than that, and does not hold that Title II can abrogate Eleventh Amendment immunity by conduct that does not independently constitute an actual violation of the Fourteenth Amendment.

The Supreme Court, in Georgia, stated that the "lower courts" are best situated to determine on a claim-by-claim basis, (1) which aspects of a state's alleged conduct would violate Title II; (2) to what extent such conduct would also violate the Fourteenth Amendment; and (3) insofar as such misconduct would violate Title II but would not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid. 126 S. Ct. at 882.

As set forth more fully in Points V and VI, Plaintiffs cannot show that the conduct of Defendants Brown and Plantier actually violated the Fourteenth Amendment. Therefore, Title II of the ADA does not abrogate state sovereign immunity in this matter because

Defendants' conduct does not independently constitute an actual violation of the Fourteenth Amendment and Plaintiffs' ADA claim is barred by the Eleventh Amendment.

POINT X

Plaintiffs Have Not Established a Prima Facie Showing of an Americans with Disabilities Act Violation.

Even if, arguendo, Plaintiffs' ADA claim were not barred by the Eleventh Amendment, Plaintiffs' claim under the ADA must still be dismissed because Plaintiffs cannot show they have been discriminated against. Plaintiffs allege that Defendants Brown and Plantier have failed to provide a safe and secure environment in which Plaintiffs may exercise their constitutional rights of access to medical treatment on the basis of their predisposition to compulsively and repetitively commit sexual offenses.

The ADA prohibits discrimination of disabled persons by denying any benefit or service offered by a public entity due to a person's disability. See, 42 U.S.C. §§ 12131, et seq. Specifically, § 12132 states:

> Subject to the provisions of this title, 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.

To establish violation of Title II of the ADA plaintiff must show: (1) that he or she is qualified individual with disability,

(2) that he or she was either excluded from participation in or denied benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by a public entity; and (3) that such exclusion, denial of benefits, or discrimination was by reason of plaintiff's disability. See, 42 U.S.C. 12131, et seq.; See also, Tyler v City of Manhattan 849 F. Supp. 1429 (D.C. Kan. 1994).

a. Plaintiffs are Not "Disabled" Pursuant to the ADA.

The Supreme Court has held that the ADA extends to disability discrimination against state prison inmates. Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212; 213 (1998). Thus, pursuant to the holding in Yeskey, as inmates, Plaintiffs are considered a "qualified individuals." However, as a prerequisite to an ADA claim, Plaintiffs must show not only that they are qualified individuals, but also that they suffer from a disability. Mahon v. Crowell, 295 F.3d 585, 589 (6th Cir. 2002).

As defined in § 12102(2), a "disability" is:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

The phrase "substantially limits" means "considerably" or "to a large degree." Toyota Motor Manuf., Kentucky, Inc. v. Williams, 534 U.S. 184, 196 (2002). Major life activities are those "of

central importance to daily life." Id. They include such functions as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id. at 195. The predisposition to compulsively and repetitively commit sexual offenses is not a disability under the ADA.

Therefore, Plaintiffs do not have a disability under the definition of the ADA and cannot succeed on the merits of their ADA claim.

b. Plaintiffs Were Not Denied Meaningful Access to Any Program, Benefit or Service

Plaintiffs have failed to satisfy the second prong of a violation of Title II of the ADA because they have not shown that they were excluded from participation in or denied benefits of any services, programs or activities offered by Defendants Brown and Plantier or that they were otherwise discriminated against by the State Defendants. See, 42 U.S.C. 12131, et seq.; see also, Tyler v City of Manhattan, supra. In fact, Defendants Brown and Plantier have continually provided Plaintiffs with safe transports to and from medical appointments and court appearances. Therefore, Plaintiffs are not being discriminated against.

CONCLUSION

Because Plaintiffs did not state a claim upon which relief can be granted, the Court should dismiss the suit.

Respectfully submitted,

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