SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
PHILLIP LEWIS PALEY
JUDGE

MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903 - 0964

February 10, 2017

Alexander Shalom, Esquire
Rebecca Livengood, Esquire
American Civil Liberties Union
Of New Jersey Foundation
89 Market Street, 7th Floor, P.O. Box 32159
Newark, New Jersey 07102

Mayling C. Blanco, Esquire
Blank Rome, LLP
Carnegie Center, 3rd Floor
Princeton, New Jersey 08540

Susan K. O'Connor, Esquire
Hoagland, Longo, Moran, Dunst & Doukas, LLP
40 Paterson Street, P.O. Box 480
New Brunswick, New Jersey 08903

Re: P.D. (a pseudonym) v. Middlesex County
Docket No. MID-L-3811-14

BACKGROUND: This matter arises out of the incarceration of P.D., an adult male, in the Middlesex County Adult Correctional Center ("ACC").

On October 17, 2013, P.D. was arrested for aggravated assault and placed in the ACC, in lieu of bail, pending trial. P.D. is forty-seven, with a long history of developmental disabilities and mental illness, including, but not limited to, bipolar disorder, intermittent explosive disorder, and cognitive impairment. He was previously hospitalized for psychiatric evaluation and treatment and has often been prescribed medication for those problems. As will be seen, P.D. remained at the ACC until July 16, 2014.

If you require any accommodations as a result of a disability, please call 732-519-3686

ACC employed the following procedure at the relevant times. Upon arrival, each inmate was taken to Receiving and Discharge, where, as part of the review of the inmate's commitment, the inmate is questioned initially. At that time, each inmate was committed to the facility and given a copy of a handbook containing ACC's behavioral guidelines; outlining institutional rules and distinguishing between major rule violations ("asterisk" charges) or minor violations ("non-asterisk" charges). The distinctions between the two are based on the New Jersey Administrative Code, N.J.A.C. §§ 10A:4-4.1(A) and 10A:4-5.1(a). For example, asterisk charges include murder, assault, fighting, and tampering with prison locks. If an asterisk charge is lodged, the inmate can request a pre-detention hearing. Punishment for an asterisk charge is more severe than for other charges. Non-asterisk violations, such as misuse of the mail, have lighter punishments—for example, fifteen days of detention.

Once the inmate receives the handbook, the inmate was taken to the Medical Unit for full medical screening. Employees of CFG Health Systems, LLC ("CFG"), a contractor providing medical, mental health, and dental services to ACC inmates, conduct the screening. Screening includes both physical and mental health tests. If the screeners conclude that mental health issues exist, Dennis H. Sandrock, Ph.D., a mental health professional, or the mental health staff (on weekends), assess those issues, providing custodial recommendations, and appropriate follow-up, including interviews.

Following medical screening, an inmate was typically cleared for placement in the general inmate population and housed in N Unit pending a full objective jail classification, as performed by other CFG employees (the "Classification

Committee").[1] The placement's specifics depend on the inmate's history with the ACC, medical history, and criminal record. Inmates placed in the N Unit are classified into one of the following categories: (1) Full Minimum Custody; (2) Minimum Custody; (3) Medium Custody; (4) Maximum Custody; (5) Administrative Segregation ("Ad Seg"); (6) Disciplinary Detention; (7) Protective Custody; (8) 15 Minute Watch; (9) 30 Minute Watch; (10) High Visibility – med; (11) High Visibility – psych; (12) Low Visibility – med; (13) Low Visibility – psych; (14) Withdrawal Protocol; (15) a job-based classification; or (16) assignment to an outside detail. The Committee considers the inmate's gender, age, size, offense, prior incarceration, and behavior, including whether the inmate is aggressive or passive and whether the inmate has a history of substance abuse, physical issues, mental issues, prior confinement, and security. The parties dispute the degree of P.D.'s participation in the classification process during 2013-2014.

Once classified, each inmate was housed in one of the following housing units: A, B, C, D, E, Female, Medical, Special Needs Unit ("SNU"), and work release. Both Upper A and Lower B housed medium-maximum custody inmates. Lower A housed maximum custody inmates. Upper B housed inmates charged with sexual offenses. The C-Pod unit was split into three classifications: (1) inmates placed on disciplinary status; i.e., inmates charged with violations of ACC rules; (2) inmates placed in Ad Seg; i.e., removal of inmates from the general population, based on the ACC's determination that the inmate needed protection from other inmates or posed an imminent threat of danger to the safety or security of the institution; and (3) inmates placed in voluntary or involuntary protective custody.

---

[1] The Classification Committee consisted of the Director of Social Services, a psychologist (Dr. Sandrock), a Medical Unit representative (Dr. Demary), a social worker, a Custody Sergeant, and an Intelligence/Gang Sergeant.

Both classification and housing status can change over the course of an inmate's incarceration.

As to C-Pod: C-Pod is a restrictive housing unit. Inmates, whether placed in Ad Seg or disciplinary detention, are housed alone in a cell with a bed, a toilet, a mattress, a pillow, and a sink. The cell door has a small hatch, closed and locked, that only opens for meals or medications. Each inmate housed in C-Pod on Ad Seg is subject to: (1) thirty minute checks by corrections officers; (2) three checks a day concerning the security of their cells ("window wall checks"); (3) religious personnel visits; (4) legal visits; and (5) services, including commissary, laundry, mail, hair, library, and educational materials.

Inmates in C-Pod were allowed five hours of recreation time per week, spent in a nearby enclosure. The five hours includes time for showers; for visitors; for telephone use ; for communicating with other nearby inmates or for watching television. Only one prisoner can occupy an enclosure near his cell at any one time. Inmates in C-Pod may receive visits from social workers; inmates may visit the Medical Unit to address medical or dental needs.

On October 17, 2013, P.D. underwent a physical and mental health assessment, as described above. The medical screeners noted that he was bipolar and had a history of taking psychiatric medications. They concluded that his mental health required routine follow-up. Nonetheless, P.D. was approved for general population housing and was assigned to N Unit pending plenary classification.

On October 20, 2013, three days later, the Committee transferred P.D. from N Unit to Lower D, a medium- to maximum-custody security unit, pending the availability of more suitable placement. On October 23, 2013, P.D. was transferred to K Unit, a minimum- to medium- custody housing unit, where he remained until November 11, 2013, when a corrections officer reported that he was wandering and

talking to himself during a Unit lockdown, making him unsuitable for placement in K Unit. He was returned to N unit.

At that time, Dr. Sandrock evaluated P.D. and found that he was hyperactive and needed frequent redirection and supervision. Accordingly, on November 12, 2013, P.D. was transferred to the SNU, with a designation of low visibility thirty-minute watch. Thirteen days later, on November 25, 2013, ACC charged P.D. with conduct that disrupts regular order and two counts of refusing an order, because he had overturned a table within the SNU. He was thereafter transferred to the Medical Unit and placed on high visibility fifteen-minute psychiatric watch. The following day, Dr. Sandrock evaluated P.D., noting that his cognitive limitations impaired his ability to follow rules. P.D. was transferred from the Medical Unit to C-Pod on November 26, 2013, and placed on disciplinary detention with thirty-minute watch. At a hearing on the pending charges, the ACC Disciplinary Committee found P.D. guilty of all charges, sentencing him to ten days of disciplinary detention.[2]

On December 6, 2013, Dr. Sandrock transferred P.D. from disciplinary detention in C-Pod to the SNU and removed him from thirty-minute watch. On December 8, 2013, while in C-Pod, P.D. was charged with sexually assaulting another inmate; an asterisk charge. On the same date, P.D. was transferred to the Medical Unit and placed on fifteen-minute watch. P.D. denied the sexual assault allegations during a December 10 consultation with Dr. Sandrock. Following that consultation, Dr. Sandrock cleared P.D. for removal from low visibility psychiatric

[2] During disciplinary detention, an inmate may not watch television, have visits, use the telephone, or order from the commissary. Each detained inmate was housed alone, spent at least twenty-three hours of each day in his cell, and could not visit the law library, school, or attend group worship services. Inmates in disciplinary detention were permitted one recreational hour outside of their cells per day only, five days per week.

watch and for transfer to the Upper Level of Unit B, a unit typically housing sexual offenders, for pre-hearing detention.

On December 12, 2013, the Disciplinary Committee found P.D. not guilty of sexual assault and transferred him to general population housing. However, on December 29, 2013, P.D. again received asterisk charges for attempting to destroy or damage government property. P.D. was found guilty of those charges; he was assigned fifteen days of disciplinary detention in C-Pod, until January 13, 2014. On January 13, 2014, while still on disciplinary detention status, P.D. was charged with conduct that disrupts the security or orderly running of the facility - an asterisk charge - after he failed to respond to an officer's call for him to "cuff up" during a routine window wall check. Subsequently, P.D. was told in writing that the Committee had placed him on Ad Seg because of his behavior. The written memorandum also stated that his status would be reviewed monthly and informed him of his right to appeal. Dr. Sandrock determined that P.D.'s Ad Seg status would best be served in the SNU, rather than in C-Pod. P.D. was transferred to the SNU and placed on thirty-minute watch on January 15, 2014.

On February 17, 2014, while in SNU, P.D. was charged with tampering with a locking device, an asterisk charge. He was found guilty of that charge at a hearing the following day and received a fifteen-day suspended sentence. On February 19, 2014, following another evaluation by Dr. Sandrock, P.D. agreed to take psychiatric medication and was transferred to C-Pod, but he remained on Ad Seg, with a thirty-minute psychiatric watch. On April 18, 2014, the Committee removed P.D. from Ad Seg status in C-Pod, transferring him to SNU on a thirty-minute psychiatric watch. Thereafter, while housed in SNU, P.D. was charged and found guilty of having an altercation with another inmate and misusing his medication. As a result, on April 21, 2014, P.D. was removed from SNU and returned to C-Pod, Ad Seg, with a 15-day disciplinary detention and 15-day suspended sentence.

On May 21, 2014, pursuant to court order, P.D. was examined to determine his competency to stand trial. The examiner concluded that P.D. suffered from mood disturbances and intermittent explosive disorder, stabilized through medication.

P.D. remained in C-Pod in Ad Seg until July 6, 2014, when he was found with a string around his neck, and transferred to the Medical Unit and placed on suicide watch. Dr. Sandrock evaluated P.D. on July 7, 2014. P.D. advised Dr. Sandrock that he was not suicidal and had not attempted to commit suicide. Dr. Sandrock removed P.D. from suicide watch, but kept P.D. in the Medical Unit on a high visibility watch. The next day, July 7, 2014, P.D. was removed to a low visibility watch. By order of a court, P.D. was discharged from the ACC on July 15, 2014.

P.D. had sued Middlesex County ("defendant") on June 25, 2014, before the events summarized in the preceding paragraph. He contended that his placement within the ACC violates his rights under the Due Process Clause of the New Jersey State Constitution, Article I, paragraph 1; under the Clause Prohibiting Cruel and Unusual Punishment pursuant to Article 1, paragraph 12 of that Constitution; and under the New Jersey Law Against Discrimination ("LAD") [N.J.S.A. 10:5-1 et seq.].

Middlesex County now moves for summary judgment as to three claims: P.D.'s request for injunctive and declaratory relief; P.D.'s constitutional claims; and P.D.'s claims under LAD, including his claim for punitive damages. As stated below, there is no opposition to the County's application for summary judgment as to cruel and unusual punishment.

MOTION RELATING TO INJUNCTIVE RELIEF: Defendant contends that P.D.'s request for injunctive and declaratory relief, prohibiting defendant from housing P.D. in Lower-C housing or any housing unit where he is held in "solitary confinement," is moot, because P.D. is no longer incarcerated at the ACC. Mootness refers to the requirement that a live case or controversy exist at all stages

of review. See Roe v. Wade, 410 U.S. 113, 125 (1973) ("The usual rule . . . is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated.").

OPPOSITION TO MOTION RELATING TO INJUNCTIVE RELIEF: There are two exceptions to the mootness doctrine: (1) where a case presents an issue that is capable of repetition, yet likely to evade review; and (2) where a case involves an issue of great present concern. See, e.g., In re N.N., 146 N.J. 112, 114 (1996) ("Although a decision with regard to N.N. is moot, a decision by this Court is necessary because the issues posed involve significant matters of public policy, are extremely important and undoubtedly will recur.").

A dispute is capable of repetition, yet evades review, where the challenged action has too short a duration to allow full litigation prior to cessation or expiration, and where there exists a reasonable expectation that the complaining party will be subject to the same action again. See Spencer v. Kemna, 523 U.S. 1, 17 (1998). Cases involving pretrial detention, such as this case, are unlikely to be fully litigated prior to cessation, because pretrial detention is "by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted." Gerstein v. Pugh, 420 U.S. 103, 110, n.11 (1975).

ANALYSIS OF MOTION RELATING TO INJUNCTIVE RELIEF: At oral argument, counsel represented that, following P.D.'s release, he has remained in custody at another institution that houses mentally ill inmates. He has not resided at the ACC since July 2014; although P.D.'s counsel, Alexander Shalom, Esquire, represented that P.D. is a life-long resident of Middlesex County, save for institutional confinement. Under such circumstances, are his claims for injunctive and declaratory relief moot?

As noted above, Spencer v. Kemna, supra, at 17, recognizes two exceptions to the mootness doctrine. See also Gerstein v. Pugh, supra, at 110, n.11. P.D.'s history is illustrative: while P.D. was incarcerated for nearly nine months, this civil case has remained pending for substantially more than two years. Given present caseloads, judicial vacancies, and all the other administrative problems confronting civil courts, it is unreasonable to expect a trial to be scheduled much before eighteen months. Certainly, P.D. has met the first exception to the mootness doctrine.

As to the second: P.D. must demonstrate either a "reasonable expectation" or "demonstrated probability" that he will be incarcerated at the ACC, and thus, subject to similar events as occurred here—in effect, the same controversy. See Murphy v. Hunt, 455 U.S. 478, 482 (1982). To support that position, P.D. relies on defendant's psychological expert, Dr. Paul Appelbaum, who opines that, based on P.D.'s past record of behavioral issues that "get him rehospitalized or sometimes arrested," P.D. is at risk for future incarceration. P.D. further notes that another defense expert, Martin Horn, has concluded that, should P.D. be incarcerated in the ACC again in the future, the only methods available to address P.D.'s behavioral outbursts are through "SNU, medical, and Ad[] Seg[]." At oral argument, the court compared this thinking to that incorporated within the jurisprudence relating to N.J. R. Evid. 404(b), which, in effect, prohibits the use of propensity evidence at trial, subject to specific, and clear, limits. To rule that P.D.'s past behavior is determinative is to ignore the positive results often achieved by medical and psychiatric treatment. It is not conceivable that this issue can be resolved by considering P.D.'s past behavior alone. P.D., accordingly, has not demonstrated any "reasonable expectation" or "demonstrated probability" that P.D. will return to the ACC in the future. Therefore, P.D.'s claims for injunctive and declaratory relief do not fall within the second exception to the mootness doctrine raised in Spencer v. Kemna, supra.

Clearly, the public has a strong interest regarding the housing of the mentally ill suspected of committing crimes. See Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) ("There are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular."). Notwithstanding, it is the plaintiff's burden to prove a strong likelihood that he will be re-incarcerated in Middlesex County. He has failed to meet that burden, as the defense argues. Its motion for summary judgment as to injunctive relief is granted.

MOTION AS TO DUE PROCESS: P.D. claims that the conditions of ACC's Ad Seg were unconstitutional as applied to someone with his mental illness and limited cognitive functioning, and, accordingly, violated his right not to be deprived of liberty without due process of law. See Article I, Paragraph 1 of the New Jersey Constitution.[3] Defendant now seeks summary judgment, arguing that: (1) P.D. cannot establish the requisite intent to punish on the part of the ACC; and (2) regardless of that intent, P.D.'s placement in Ad Seg was reasonably related to ACC's legitimate governmental interest in maintaining security.

P.D.'S OPPOSITION: P.D. maintains that Ad Seg, as applied to him, is tantamount to punishment, because it was excessive and arbitrary in relation to any safety concern posed by P.D.

ANALYSIS: The purpose of the summary judgment procedure is to provide an efficient and inexpensive means of disposing of a litigated matter. Pursuant to Rule 4:46-2, if it appears that no genuine issue of material fact is presented, it is for the court to determine the motion on the applicable law. See Judson v. People's Bank

---

[3] P.D. has conceded that summary judgment is proper as to his Article I, Paragraph 12 claim, because Paragraph 1, rather than Paragraph 12, applies to claims brought by pretrial detainees. See Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) ("The Court of Appeals properly relied on the Due Process Clause rather than the Eighth Amendment in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished.").

& Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). Our Supreme Court has held that, when deciding whether a genuine issue of material fact exists, the trial court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). A judge is to decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533, (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). After passage of "adequate time to complete the discovery, summary judgment should be granted 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Brill, supra, at 533.

Article I, Paragraph 1 of the New Jersey Constitution provides due process protections that are analogous to those provided under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. See Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985) (explaining that although the phrase "due process" does not appear in Article 1, Paragraph 1 of the New Jersey Constitution, "[n]onetheless, article 1, paragraph 1, like the fourteenth amendment, seeks to protect against injustice and . . . encompasse[s] . . . principles of due process."). The Fourteenth Amendment's Due Process Clause "protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

As to whether pre-trial detention constitutes a due process violation, Bell, supra, is instructive. There, the Court explained that when a pretrial detainee challenges an aspect of his detention, the relevant consideration is "the detainee's

right to be free from punishment, . . . and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point." Id. at 534. When, as here, the detainee's challenge to "the constitutionality of conditions or restrictions of pretrial detention" implicates only the detainee's constitutional right not to be deprived of liberty without due process of law, "the proper inquiry is whether those conditions amount to punishment of the detainee." Id. at 535. Specifically, the Court explained:

> The factors identified in Mendoza-Martinez [372 U.S. 144 (1963)] provide useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word. A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. See Flemming v. Nestor, supra, at 613-617. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Kennedy v. Mendoza-Martinez, supra, at 168-169; see Flemming v. Nestor, supra, at 617. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless –a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees. See ibid. Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility. Cf. United States v. Lovasco, 431 U.S. 783, 790 (1977); United States v. Russell, 411 U.S. 423, 435 (1973). Bell, supra, 538-39.

Unquestionably, jails have a legitimate governmental interest in maintaining security, which, in turn, requires that certain constraints be imposed on inmates. See

Bell, supra, at 540 ("Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial."); see also Stevenson v. Carroll, 495 F.3d 62, 69 (3d Cir. 2007) ("[A] showing by the prison officials that a restrictive housing assignment is predicated on a legitimate managerial concern and is therefore not arbitrary or purposeless, will typically foreclose the substantive due process inquiry."). Of course, that does not mean that that discretion is unlimited. Restrictions having no reasonable relation to the prison's interest in maintaining safety and order—i.e., that are arbitrary or purposeless - constitute punishment, and thus, violate a pretrial detainee's due process rights. See Bell, supra, 538-39.

Here, there is a genuine dispute of material fact as to whether the restraints imposed on P.D. during his incarceration were arbitrary or excessive in relation to the ACC's need to preserve order and security. The courts afford correctional centers broad discretion in determining how to ensure institutional security, in accordance with the above authority, including: (1) the necessity of housing certain inmates outside of the general population, (2) whether and to what extent housing a prisoner with an established history of mental illness in Ad Seg is excessive in relation to that goal, (3) where the institution is aware of the prisoner's mental illness, (4) and other similar issues. These issues are fact-sensitive. The finder of fact—jury or judge—can best determine whether the conditions of Ad Seg imposed against P.D. were excessive in light of the threat he posed to jail security. While P.D. may face a heavy burden to prove his case, there is no basis to deprive him of that opportunity. Summary judgment is denied as to P.D.'s due process claim.

MOTION FOR SUMMARY JUDGMENT AS TO LAW AGAINST DISCRIMINATION: P.D. alleges that, by failing to provide reasonable

accommodations for his mental illness, and by failing to house P.D. with non-disabled inmates, defendant violated his rights under the LAD. P.D. maintains that his placement in C-Pod deprived him of requisite medical treatment based on his disability, in effect failing to accommodate his disability reasonably. There is no dispute that P.D. is a disabled person for purposes of the LAD. Defendant now moves for summary judgment, averring that there is no evidence demonstrating that P.D. was treated differently from non-disabled inmates.

OPPOSITION TO DISCRIMINATION CLAIM: The defense argues that P.D. cannot show discrimination against him based on his mental illness by subjecting him to Ad Seg. P.D. committed numerous "asterisk charges," for which he, like any inmate who offends similarly, was housed in Ad Seg. More than once P.D. received a suspended sentence, which supports an inference that P.D. was treated better than other inmates were. No reasonable factfinder could conclude that P.D. was discriminated against based on his mental illness.

ANALYSIS OF MOTION RELATING TO LAD CLAIM: LAD claims are governed by N.J.S.A. 10:5-12(f)(1) and N.J.S.A. 10:5-4. N.J.S.A. 10:5-12(f)(1) provides that is unlawful discrimination "[f]or any owner … manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof . . .." Similarly, under N.J.S.A. 10:5-4, "[a]ll persons shall have the opportunity to obtain … all the accommodations, advantages, facilities, and privileges of any place of public accommodation … " without discrimination on the basis of disability.

" … [I]n New Jersey … our state courts, in interpreting LAD, should look to federal anti-discrimination cases 'as a key source of interpretive authority.'" Jones v. Aluminum Shapes, 339 N.J. Super. 412, 421-22 (App. Div. 2001) (quoting

Grigoletti v. Ortho Pharm. Corp., 118 N.J. 89, 97 (1990)). Here, the parties agree that the federal analogue to P.D.'s LAD claims is Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131-12135. See Chisolm v. McManimon, 275 F.3d 315, 325 (3d Cir. 2001) ("Title II of the ADA applies to services, programs and activities provided within correctional institutions."). Title II of the ADA provides, in pertinent part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To prove a violation of Title II of the ADA, P.D. must show:

> (1) he [is] a 'qualified individual with a disability'; (2) he was either excluded from participation in, or denied the benefits of, . . . [defendant]'s services, programs, or activities, or was otherwise discriminated against by . . . [defendant]; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.

Lasky v. Moorestown Tp., 425 N.J. Super. 530, 538 (App. Div. 2012) (quoting Weinreich v. L.A. County Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997)).

Title II requires jails to make reasonable accommodations for inmates with disabilities. Specifically, pursuant to 28 C.F.R. § 35.130 (b)(7)(i), "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." Similarly, "the applicable regulations under the LAD require places of public accommodation to provide reasonable accommodations." Lasky, supra, at 539. Specifically, N.J.A.C. 13:13-4.3 prohibits an owner, superintendent, agent or employee of any place of public accommodation from refusing, withholding from or denying an individual, either directly or indirectly, on account of that person's disability or perceived

disability, access to any of the accommodations, advantages, facilities or privileges of any place of public accommodation.

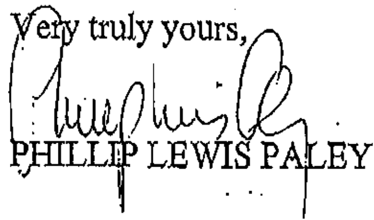
To prevail on his LAD claims, a plaintiff must demonstrate that: (1) he is a qualified individual with a disability [as noted, not disputed here]; (2) he was denied the participation in, or benefits of, the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) his exclusion, denial of benefits, or discrimination was based on his disability. Only the finder of fact can determine if and to what extent accommodations provided by the ACC to P.D., a mentally ill inmate, were "reasonable." Lasky, supra, at 539. The finder of fact can assess the credibility of experts as well as that of P.D.. Therefore, summary judgment is inappropriate on P.D.'s LAD claim. Defendants' application for summary judgment, accordingly, is denied.

CROSS-MOTION FOR SUMMARY JUDGMENT: P.D. contends that the violation of his constitutional rights is based on a policy, practice, or custom of the ACC. At oral argument, his counsel averred that ACC's housing and classification policy did not consider an inmate's mental health or cognitive limitations, except in very limited circumstances, such as acute suicidality. This systemic oversight prevented ACC from adequately accommodating inmates—such as P.D.—suffering from mental infirmities; thus violating their constitutional rights. Treating P.D. in the same manner as other inmates did not cure these constitutional deficiencies but, rather, may have exacerbated them.

ANALYSIS: The court views this issue in the same matter as the claim brought under the LAD: fundamentally, it is a question for the finder of fact. Therefore, P.D.'s application for summary judgment on the cross-motion is denied.

The court greatly appreciates the quality of the arguments presented by all counsel. A form of order conforming to this ruling accompanies this letter, which will be faxed to all counsel as a courtesy.

Very truly yours,



PHILLIP LEWIS PALEY

Plp: hs

Encl.

Phillip Lewis Paley, J.S.C.
Superior Court of New Jersey
Middlesex County Courthouse
56 Paterson Street
New Brunswick, NJ 08903
732-519-3535

FILED
FEB 10 2017
Hon. Philip Lewis Paley

P.D. (a pseudonym), Plaintiff, v. Middlesex County Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY DOCKET NO. L-3811-14 CIVIL ACTION ORDER

THIS MATTER having been opened to the court on motions by the American Civil Liberties Union of New Jersey Foundation, attorneys for plaintiff, for partial summary judgment, and Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys for defendant, for summary judgment, and the court having considered the moving papers and any opposition submitted thereto, the arguments of counsel, and for good cause shown;

IT IS on this **10th** of February, 2017, **ORDERED AND ADJUDGED:**

1. Defendant's motion for summary judgment is **GRANTED** as to plaintiff's request for injunctive and declaratory relief;
2. Defendant's motion for summary judgment is **DENIED** as to as to plaintiff's constitutional claims;
3. Plaintiff's cross-motion for summary judgment is **DENIED**.

A copy of this order will be mailed to all parties.

PHILLIP LEWIS PALEY, J.S.C.