

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA**

JOSHUA DUNN, ET AL.,)
)
 Plaintiffs,)
)
 v.)
)
 JEFFERSON DUNN, ET AL.,)
)
 Defendants.)

Civil Action Number:
2:14-cv-00601-MHT-TFM

**PLAINTIFFS’ SUPPLEMENTAL BRIEF IN SUPPORT OF
CLASS CERTIFICATION FOR PHASE 1**

COME NOW the Plaintiffs, pursuant to this Court’s Order for supplemental briefing as it relates to class certification for Phase 1 (Doc. 499), and submit the following information related to the questions raised in the Order to support Plaintiffs’ motion for class certification:

1.a. 28 C.F.R. § 35.130(B)(3) Is Privately Enforceable Through the ADA and § 504

Plaintiffs allege and will prove that Defendants have violated, and continue to violate, the Americans with Disabilities Act and § 504 of the Rehabilitation Act (collectively, “the ADA”). Plaintiffs will prove the violations of the ADA in part by proving that the ADOC fails to take actions set forth in the regulations and that these actions, if taken, would prevent many of the individual instances of exclusions and discrimination currently occurring.

Plaintiffs will prove that Defendants have violated the “methods of administration” provision of the ADA, 28 C.F.R. § 35.130(b)(3), by failing to establish a method to identify and track prisoners with disabilities. This inability to identify and track prisoners with disabilities causes “the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.” Quite simply, if the ADOC does not know who has a disability, or does not share this information internally as inmates move from facility to facility, the ADOC will not know to accommodate those individuals.

28 C.F.R. § 35.130(b)(3) is privately enforceable because the regulation “does not create any rights that do not exist under the ADA.” *Brantley v. Maxwell-Jolly*, 656 F.Supp.2d 1161, 1175-76 (N.D. Cal 2009). The regulation simply prohibits a public entity from employing a method of administration that has the effect of subjecting individuals with disabilities to discrimination. Because the regulation falls within the scope of the ADA’s prohibition against disability-based discrimination, the regulation is enforceable through the private right of action contained in the statute. *See Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008); *see also Dillery v. City of Sandusky*, 398 F.3d 562, 567 (6th Cir. 2005) [“if the regulation simply effectuates the express mandates of the controlling statute, then the regulation may be enforced via the private cause of action available under that statute”]. Many, if not most, courts addressing claims brought under 28 C.F.R.

§ 35.130(b)(3) have found that a plaintiff may properly state a claim under the regulation. *Brantley*, 656 F. Supp. 2d at 1176, citing *Frederick L. v. Department of Public Welfare*, 157 F. Supp. 2d 509, 538-39 (E.D.Pa.2001) (“The ADA regulations at issue here are merely rules for the implementation of the statutory directives; they do not prohibit otherwise permissible conduct”); *Crabtree v. Goetz*, 2008 WL 5330506 at *24 (M.D.Tenn. Dec. 19, 2008) (ruling that plaintiffs had standing to enforce 28 C.F.R. § 35.130(b)); *Pennsylvania Prot. and Advocacy, Inc. v. Pennsylvania Dept.*, 402 F.3d 374, 385 (3rd Cir. 2005) (remanding action for consideration of plaintiffs’ discriminatory administration claim under 28 C.F.R. § 35.130(b)).

1.b. The ADA Violations that Arise Due to the ADOC Methods of Administration Can Be Resolved in One Stroke

Plaintiffs’ claims relating to ADOC’s methods of administration of the ADA are of a common nature and have a classwide resolution – they can indeed be resolved in one stroke.

At the end of the day, Plaintiffs seek accommodations for their disabilities. Defendant can create a system to provide these accommodations. The Court can order it to do so. The mechanisms set out in the ADA implementing regulations provide guidance on how to do this: ADOC should have an ADA accommodation request process and grievance procedure, properly trained ADA coordinators, and

a method for identifying prisoners with disabilities in order to begin the discussion of potential accommodations.

What Plaintiffs seek is not novel. In *Henderson*, this Court certified a class of HIV+ prisoners of ADOC. *Henderson v. Thomas*, 289 F.R.D. 506 (M.D. Ala. 2012). There, the court found that “the named plaintiffs’ legal claim—that the defendants are engaged in disability discrimination in violation of the ADA and Rehabilitation Act—is identical to the class’s claim.” *Id.* at 511 (citing *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 n.14 (11th Cir. 2000) (noting that “a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences”) (internal quotation marks omitted)). This court found that the discriminatory policies of the ADOC against prisoners with HIV could be addressed in a state-wide class action. *Henderson*, 289 F.R.D. at 511. Each plaintiff and class member was experiencing the discrimination of the policy, despite the varied ways the policy impacted the individual named plaintiffs. *Id.* at 510-11.

Although Plaintiffs here have different disabilities, ADOC policies, specifically the lack of an adequate means to request and oversee accommodations by prisoners with disabilities, affects the Named Plaintiffs similarly. Here, like in *Henderson*, the Plaintiffs are all impacted by the same systemic issue, despite the varied ways each of them is denied accommodation.

1.c. The Methods of Administration Elements Are Elements of Class Certification, Not Distinct Elements of an ADA Claim

Since the previous questions have been answered in the affirmative, the Court requests that Plaintiffs detail “the elements that plaintiffs must prove in order to prevail on a so-called methods-of-administration ADA claim.” Doc. 499 at 2.

The ADA regulations prohibit public entities from using methods of administration “[t]hat have the effect of . . . discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(3)(i) (“methods of administration regulation”). As described above, violations of the regulations are privately enforceable as support for Plaintiffs’ allegations that ADOC violates the ADA. The methods of administration regulation specifically is “merely [a] rule[] for the implementation of the statutory directives [of the ADA].” *Frederick L.*, 157 F. Supp. 2d at 538. The regulation itself “does not create rights that do not exist under the ADA”; instead, it “merely prohibits public entities from employing methods of administration which have the effect of discriminating against qualified disabled individuals on the basis of their disabilities.” *Schwarz v. The Vill. Charter School, Inc.*, No. 5:12-cv-177-Oc-34PL, 2016 WL 787934, at *18 (M.D. Fla. Feb. 29, 2016) (quoting *Brantley*, 656 F. Supp. 2d 1161, 1175-76 (N.D. Cal. 2009)); *see also Frederick*, 157 F. Supp. 2d at 538 (explaining that a failure to comply with the regulatory terms is evidence of a violation of the ADA itself).

Because a violation of the methods of administration regulation itself is not a separate violation, the elements that the plaintiffs need to prove mirror those for any other ADA violation. The elements are: (1) the plaintiff is an individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) the plaintiff was either excluded from participation in or denied the benefits by the public entity; and (4) such exclusion, denial of benefits or discrimination was by reason of the plaintiff's disability. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 208, 118 S. Ct. 1952, 1953, 141 L. Ed. 2d 215 (1998).

Plaintiffs will show that the ADOC's methods of administration result in the exclusion of the putative ADA subclass members from receiving the benefits of the services, programs, or activities of the ADOC. The methods of administration are not themselves an element of the violation of the ADA. Rather, they provide a common cause of the exclusions from the benefits, and fixing them will provide a common remedy to the ongoing, systemic violations of the ADA.

2. Plaintiffs Properly Request that the Court Order ADOC to Develop and Implement a Plan that Will Remedy the ADA Violations Plaintiffs Will Prove

Plaintiffs in this case seek class-wide injunctive and declaratory relief. Plaintiffs ask this Court to order ADOC to develop and implement a plan to eliminate the substantial risk of harm that Plaintiffs and members of the putative

class suffer due to ADOC's unlawful policies and practices with regard to persons with disabilities. Doc. 210 at 135. More specifically, Plaintiffs identify five remedies that this Court could order on behalf of the putative class as a whole. Doc. 493 at 14. First, the Court can order ADOC to develop an ADA transition plan. Second, the Court can order ADOC to develop and implement a system by which prisoners with disabilities may request accommodations as well as a system whereby prisoners can properly grieve ADA-related complaints. Third, the Court can order ADOC to develop and implement a system in which it can identify and track persons with disabilities throughout their incarceration. Fourth, the Court can order ADOC to train its employees and agents on the requirements of the ADA. And, finally, the Court can order ADOC to employ someone—an ADA coordinator—to ensure that ADOC is complying with the ADA. *Id.* In short, the Court can order Defendant to craft a plan to remedy the systemic ADA violations Plaintiffs will prove. *See Henderson*, 913 F.Supp.2d at 1317.

Although Plaintiffs' five remedies are consistent with the implementation provisions of the ADA, they are not merely exhortations to obey the law. They are narrowly tailored remedies for addressing the specific harms Plaintiffs will prove. Such relief is appropriate in a case of this nature. *See id.* Indeed, this court made a similar order in *Henderson*. There, plaintiffs challenged a policy of segregating HIV+ prisoners. *Id.* Implementing regulations of the ADA require “the most

integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). The court found that ADOC’s segregation policy violated the ADA, and gave ADOC the opportunity to craft a remedy to ensure that the treatment of plaintiffs “must depend upon an individual-by-individual assessment of these prisoners that honors each prisoner’s rights under the ADA.” *Id.* at 1318. The remedy required ADOC to satisfy the requirements of the regulation for which plaintiffs had proven a violation.

Here, the Court is presented with a prisons conditions case. Such a case is subject to the provisions of the Prison Litigation Reform Act (“PLRA”). Under the PLRA, relief must be “narrowly drawn” and “extend no further than necessary to correct the violation of the Federal right.” 18 U.S.C. §3626(a)(1)(A); *see also Henderson*, 913 F. Supp. 2d at 1317. The relief ordered must be “the least intrusive means necessary.” *Id.* Courts have found that the “least intrusive” provision of the PLRA is satisfied where prison officials are ordered to “draft and promulgate a plan” which leaves prison officials the discretion to determine the details of how to deliver the relief ordered. *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010); *see also Lewis v. Casey*, 518 U.S. 343, 363 (1996) (finding that the district court erred by not issuing an order which gave prison officials “the responsibility for devising a remedial plan.”); *Bounds v. Smith*, 430 U.S. 817, 832-33 (1977) (finding that the district court “scrupulously respected the

limits on their role” by ordering prisoner officials to “devise a remedy for the violation.”); *Armstrong v. Davis*, 275 F.3d 849, 883 (9th Cir. 2001) (explaining that “[a]llowing defendants to develop policies and procedures to meet the ADA’s requirements is precisely the type of process that the Supreme Court has indicated is appropriate for devising a suitable remedial plan in a prison litigation case.”); *Pierce v. County of Orange*, 761 F.Supp.2d 915, 954 (C.D. Cal. 2011) (finding that “the least intrusive means to compel the County to remedy the physical barriers and disparate provision of programs, services, and activities to disabled detainees [in the county jail] is to allow the County [jail officials] to draft a proposed plan that will address and correct each and every physical barrier identified... and that will ensure that disabled detainees are provided with equal access to programs, services, and activities”).

In this case, the Plaintiffs are asking this Court for relief that is consistent with the requirements of the PLRA. Rather than asking the Court to “thrust itself into prison administration,” Plaintiffs are asking that the Court order Defendant ADOC to develop and implement a plan that will remedy its violations under the ADA. *See Bounds*, 430 U.S. at 832. Such a request is “narrowly drawn” and “extend[s] no further than necessary” to correct ADOC’s violations of the ADA. *See* 18 U.S.C. §3626(a)(1)(A). The request allows ADOC, rather than Plaintiffs or this Court, to determine in the first instance the details of how it will comply with

the law. Once ADOC devises such a plan, Plaintiffs will have the opportunity to object and the Court will resolve any disputes. *See Pierce*, 761 F.Supp.2d at 954. Once the disputes are resolved and the plan is final, “the Court will approve the plan and that will become the [final] injunctive relief ordered.” *Id.*

For the reasons set forth above, it is within the Court’s authority and appropriate, under the PLRA, to issue an order requiring ADOC to develop a plan to remedy its violations.

3.a. ADAP Has Associational Standing to Represent the Members of the Putative Class

The Alabama Disabilities Advocacy Program (“ADAP”) filed this suit against the ADOC for rights violations under the ADA suffered by inmates with disabilities, who are ADAP’s constituents. ADAP is Alabama’s designated Protection and Advocacy (“P&A”) agency charged with protecting the legal rights of persons with disabilities in this State. *See e.g.*, 42 U.S.C. § 15001(b)(2), 29 U.S.C. § 794e(a)(1); *see also Ala. Disabilities Advocacy Program v. SafetyNet Youthcare, Inc.*, 65 F. Supp. 3d 1312, 1314 (S.D. Ala. 2014) (“ADAP is Alabama’s designated, federally funded program authorized by Congress to protect and advocate for the civil rights of persons with disabilities in Alabama.”). ADAP has associational standing to represent the members of the Phase I putative class, because the putative class members are ADAP’s constituents.

Standing doctrine addresses “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975). An association has standing to sue on behalf of its members when three things occur: (1) its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim nor relief requested require the participation of individual members. *See Hunt v. Washington State Apple Comm’n*, 432 U.S. 333, 343 (1977). In *Doe v. Stincer*, the Eleventh Circuit stated: “It is enough for the representative entity to allege that one of its members or constituents has suffered an injury that would allow it to bring suit in its own right.” 175 F. 3d 879, 884-85 (11th Cir. 1999) (finding that, if a constituent had standing, the P&A would have associational standing for claims under the Protection and Advocacy for Mentally Ill Individuals Act and the Protection and Advocacy of Individual Rights Act) (internal citations omitted). The Eleventh Circuit looks for a close nexus between the organization and its members on one side and the alleged injury as a result of the defendant’s conduct on the other. *Stincer*, 175 F. 3d at 884-85.

The nexus here is between ADAP, which represents individuals with disabilities, and harms to individuals with disabilities in ADOC prisons caused by ADOC’s violations of the ADA, through its failure to remove architectural barriers in its facilities, denial of access to its programs and services, and refusal to provide

auxiliary aids and services. Because ADAP has constituents who have suffered violations under the ADA and have standing to sue, a nexus exists. *See Stincer*, 175 F.3d at 885-86.

The Supreme Court has affirmed the ability of P&As to pursue litigation to vindicate the rights of those it protects. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247 (2011) (Virginia P&A filed suit against Virginia's department of mental health pursuant to the DD Act). The Court held: "in addition to pressing its own rights, a P&A system may 'pursue administrative, legal, and other remedies on behalf of' those it protects." *Stewart*, 563 U.S. at 251 (internal citation omitted); *see also* 42 U.S.C. § 15044(b). As Alabama's P&A, ADAP specifically alleged its claims according to its authority on behalf of itself and on behalf of the individuals it is charged with protecting. *See* Doc. 210 at ¶52.

The Eleventh Circuit recognized that P&As have associational standing in *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 497 (11th Cir. 1996); *see also Stincer*, 175 F.3d at 886 (finding that a P&A organization "may sue on behalf of its constituents like a more traditional association may sue on behalf of its members"). In *Tarwater*, ADAP filed suit against the Alabama Department of Mental Health pursuant to its authority under the Developmental Disabilities Assistance and Bill of Rights Act to obtain records of two (2) former institutionalized persons. Like the plaintiff in *Hunt*, ADAP is an

organization designated by the government to protect a specific, vulnerable segment of society. *See generally Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1108-13 (9th Cir. 2003) (applying the *Hunt* factors to determine that the Oregon P&A had associational standing under PAIMI to pursue claims against Oregon’s Department of Human Services); and *Mississippi Prot. & Advocacy Sys., Inc. v. Cotten*, 929 F.2d 1054, 1058-59 (5th Cir. 1991) (“The state cannot satisfy the requirements of [the Act] by establishing a protection and advocacy system which has this authority in theory, but then taking action which prevents the system from exercising that authority.”).

Historically, litigation has been recognized as a crucial tool for P&As to protect against and remedy violations on behalf of those P&As are charged with protecting. *See, e.g., Hawaii Disability Rights Ctr. v. Cheung*, 513 F.Supp.2d 1185, 1194 (D. Haw. 2007) (“To ensure such protection, the P&A System is given the express authority to pursue legal, administrative, and other appropriate remedies to guarantee protection of, and advocacy for, the rights of the developmentally disabled individuals within the State.”) (internal citation and quotations omitted); *Naughton v. Bevilacqua*, 458 F. Supp. 610, 616 (D.R.I. 1978), *aff’d*, 605 F. 2d 586 (1st Cir. 1979) (“[T]he advocacy agency and a private right of action are crucial to protect the rights secured by the Act.”).

3.b. ADAP’s Claims, and the Relief It Seeks, Are Coextensive with Those of the Putative Subclass

For the reasons stated above, ADAP's claims and the relief it seeks are essentially coextensive with that of the putative class. Regardless of the Court's determination of class certification, ADAP independently has associational standing as Alabama's P&A to pursue its claims for the same systemic violations and relief sought by the putative class.

A difference between the claims for which ADAP is seeking relief and the claims of the class would arise only if the Court were to certify a class smaller than the proposed subclass. As discussed below, the Court could certify sub-classes of the putative ADA sub-class in a variety of ways. If the Court were to do so, there might be constituents of ADAP whose particular issues did not fall squarely within the sub-classes. In that event, ADAP would still have standing to pursue such claims, although the sub-classes would not.

4. The Court Should Not Create Subclasses

Establishing subclasses for Phase 1 is neither necessary nor efficient. The ADA violations asserted by Plaintiffs have a common cause that ties them together and means they can be addressed with "one stroke." The ADA violations all come back to the ADOC's failure to have a system to accommodate prisoners with disabilities. Because ADOC does not know who in its custody has a disability, does not have a process for prisoners to request an accommodation, and does not have designated personnel trained to evaluate and respond to requests for

accommodations, the putative class members are denied accommodations. Although the accommodations that they are denied vary from person to person and facility to facility, the common thread amongst them all is failure to create a system to provide accommodations. For any set of subclasses, the Court would be presented with the same evidence regarding the lack of system for accommodation for each subclass, resulting in a repetitious presentation of evidence.

If the Court believes sub-classes are appropriate, Plaintiffs respectfully request the Court to consider certifying the following subclasses:

1. Prisoners who have one or more disabilities and are now, or in the future will be, in the custody of ADOC who have been denied access to services or programs solely due to their disability.
2. Prisoners who have one or more disabilities and are now, or in the future will be, in the custody of ADOC who have been denied reasonable modifications to accommodate their disabilities.
3. Prisoners who have one or more disabilities and are now, or in the future will be, in the custody of ADOC who have been denied auxiliary aids and services to accommodate their disabilities.
4. Prisoners who have one or more disabilities and are now, or in the future will be, in the custody of ADOC who need removal of architectural barriers to accommodate their disabilities.

These subclasses track the recognized types of ADA violations. Together they should cover all persons with disabilities. While there would be evidence of each of the subclasses attempting to receive accommodations in the absence of a process, the type of the accommodations requested would be more similar

between ADA subclasses created in this manner than if there one single ADA subclass.

Certifying subclasses by disability or ADOC facility could be potentially problematic. Although named Plaintiffs have experienced common instances of disability discrimination, such as lack of an adequate accommodation request process, named Plaintiffs have a variety of disabilities and certifying subclasses based upon disability would likely prove to be unwieldy. Also, many persons with disabilities have multiple disabilities and would fall into multiple subclasses. Their evidence would be redundant, but would have to be presented for each subclass of which they were a member. Moreover, as discussed above, there would likely be persons with disabilities who fell outside the subclasses whose claims could nonetheless be brought by ADAP.

Nor would it be helpful to certify subclasses by ADOC facility. ADOC moves prisoners between facilities for a wide range of reasons. Many of the proposed class representatives have spent time at multiple facilities. They have encountered the same difficulties in obtaining accommodations at multiple facilities. Such subclasses would result in plaintiffs and class members providing evidence regarding the claims of multiple subclasses.¹

¹ One possible variation on subclasses by facility would be to have a subclass of persons at Hamilton and Tutwiler, and another for persons at all other facilities. Hamilton and Tutwiler both have an ADA request and grievance

5. Dismissal of Named Plaintiffs Will Not Alter the Presentation of Claims and Evidence at Trial

The Court asked Plaintiffs to brief how the potential dismissal of Named Plaintiffs who have been released from physical custody of ADOC will affect the claims or evidence presented in this case. Doc. 499 at 4-5. The short answer is that it will not.

ADOC unlawfully discriminates against the Plaintiffs and putative subclass members by failing to accommodate prisoners with disabilities, thereby excluding them from programs and services. Doc. 492 at 1-2. Every Plaintiff and every putative subclass member suffer the same violation of the ADA: the failure of the ADOC to create a mechanism to obtain an accommodation results in the denial of accommodations. Given the systemic nature of the claims presented, the dismissal of Named Plaintiffs Pearson, Hagood, and Moore will not alter the class claims or the evidence presented, so long as the Court certifies the class as requested. The same is true via ADAP's associational standing to pursue its claims. *See supra*, Question 3.

Named Plaintiffs Pearson, Hagood, and Moore have claims that are relevant to one or more systemic violations that Plaintiffs seek to prove. Their dismissal would not preclude admission of any evidence relating to their claims, including

process, unlike all other facilities. They have both been architecturally remediated for ADA compliance more substantially than the other facilities. However, subclasses created along these lines would still have the problem of persons being transferred among facilities and thus the need for the same witness to present evidence on both subclasses.

their individual testimony, as that evidence remains relevant to the systemic claims regardless of whether they are Named Plaintiffs or simply witnesses testifying about ADOC practices regarding its failures to make ADA accommodations.

For example, Plaintiffs will present evidence that ADOC fails to make its facilities architecturally accessible to prisoners with disabilities. Doc. 492 at 8-9. Accordingly, Plaintiffs will present evidence that Mr. Hagood, who uses wheelchair, was housed in dormitories that were not wheelchair accessible. This evidence will be relevant to the claims of the class or ADAP, regardless of whether Mr. Hagood remains a plaintiff. Similarly, Plaintiffs claim that ADOC fails to ensure effective communication for prisoners with disabilities. In support of this claim, Plaintiffs will present evidence that Mr. Pearson, who is deaf, was not provided with a sign language interpreter, regardless of whether Mr. Pearson remains a plaintiff.

If the Court does not certify the class as proposed or otherwise limits ADAP's presentation of its claims, and instead certifies various subclasses, the dismissal of some of these Named Plaintiffs might affect the claims and evidence presented. Specifically, if the Court were to certify subclasses defined by a specific disability, dismissing Named Plaintiff Moore would leave a subclass of prisoners with visual impairments without a class representative because Plaintiff Moore is the only remaining Named Plaintiff who is blind. However, if the Court

were to certify subclasses by type of ADA violation to which the subclass members were subjected, Plaintiff Moore, as a person who is blind who experienced the architectural barriers, would be able to testify about ADOC's failures to accommodate him.

Dated: May 25, 2016

Respectfully Submitted,

/s/ Maria V. Morris

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CERTIFICATE OF SERVICE

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