# HOOPER, LUNDY & BOOKMAN, INC.

## MEMORANDUM

**TO:** **FILE NO:** 12490.907

**FROM:** Stephen K. Phillips; Greg B. Sherman

**DATE:** January 5, 2009

**RE:** Evaluation of Proposed Medical and Mental Health Beds Under the Americans with Disabilities Act

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## INTRODUCTION

On behalf of the California Prison Receiver ("Receiver"), we have examined whether the inmates that would use the 5,000 medical beds and 5,000 mental health beds proposed by the Receiver are protected under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA"). The ADA provides 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. As noted in *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997), the Supreme Court, Third, Seventh and Ninth Circuit Court of Appeals have determined that prison medical care and health facilities are benefits of a public entity to which ADA protection applies.

## CONCLUSIONS

Based on the analysis set forth in this memorandum of law, we conclude:

- An estimated 99% of the proposed 5,000 long-term medical beds are for inmates who are functionally impaired in one of three ways:
    - They require "extensive assistance" or are "totally dependent" in performing one or more Activities of Daily Living ("ADLs"); or
    - They are "permanently limited" in performing one or more Prison Activity of Daily Living ("PADLs") and require the level of care provided in a medical bed; or
    - They have a cognitive impairment in decision-making, short-term or long-term memory, or making themselves understood, and the cognitive impairment, either by itself or in combination with other medical conditions, qualifies the inmate as disabled under the ADA.

- An estimated 1% of the proposed long-term medical beds are for inmates who have a complex combination of conditions which, taken together, warrant long-term care.

- 99-100% of the inmates in the long-term medical beds would qualify as disabled under the ADA.

- The proposed 5,000 mental health beds are for inmates who:

  - require mental health care at the Enhanced Outpatient Program ("EOP") level of care, because they have a serious mental disorder or an inability to function in the general population; or

  - require mental health care at the intermediate or acute care level, because they have a serious mental disorder and either exhibit marked impairment and dysfunction in ADLs requiring 24-hour inpatient care, are a danger to self or others as a consequence of a serious disorder or are unable to carry out adequately one or more PADLs.

- All of the EOP inmates in the mental health beds would qualify as disabled under the ADA.

- All of the inmates placed in an Intermediate Care Facility would qualify as disabled under the ADA.

- Inmates placed in the acute mental health beds qualify as disabled under the ADA so long as their acute symptoms are a manifestation of an ongoing or chronic mental illness.

## FACTUAL BACKGROUND

The original Order Appointing Receiver conferred upon the Receiver all of the powers of the Secretary of the California Department of Corrections and Rehabilitation over the delivery of medical care and suspended the Secretary's exercise of those powers for the duration of the Receivership. Order Appointing Receiver at 2, *Plata v. Schwarzenegger*, No. C01-1351 (N.D.Cal. Feb. 14, 2006).

The Receiver has determined that if the prison health care system is to be brought up to federal Constitutional standards, extensive renovation of existing facilities and substantial new construction is required. California Prison Health Care Receivership Corp., *Achieving a Constitutional Level of Medical Care in California's Prisons*, June 6, 2008, p. 27 ("Plan of Action"). As a result, the Receiver seeks expanded prison health facilities and housing for

approximately 10,000 existing California Department of Corrections and Rehabilitation ("CDCR") inmates whose medical or mental condition require separate, long-term housing to facilitate appropriate, cost-effective access to necessary health care services. *Id.* Approximately half of the proposed housing and facilities will be for medical services and the other half will be for mental health services. *Id.*

**A. Medical Beds**

The proposed medical beds will serve inmates "requiring extensive assistance or totally dependent in at least one ADL or with permanent limitation in at least one PADL or with any cognitive problem (in decisionmaking, short term or long term memory, or making themselves understood)." Abt Associates, Inc., *Chronic and Long-Term Care in California Prisons: Needs Assessment*, August 31, 2007, p. 29 ("Abt Report"). ADLs include grooming, dressing, bathing, toileting, ambulation and eating. *Id.* at 23. PADLs include placing oneself on the floor during alarms, hearing orders, standing for count, getting to the dining hall, climbing to the top bunk, and climbing stairs. *Id.* at 24. The data for these determinations was gathered March-June 2007 by CDCR staff and contractor teams led by Abt Associates. The teams collected data on all patients in CDCR "medical beds" (infirmary-type beds) and community hospitals, as well as on a random sample of CDCR inmates. Inclusion in the Abt Associates long-term care category - and thus inclusion in the Receiver's proposed medical beds - was based primarily on having a physical or cognitive impairment in functioning, not just being a certain age or having a given disease such as AIDS. After including inmates in the medical long-term care category, Abt Associates used an algorithm to assign inmates to one of three levels of care. Abt Associates then estimated the number of beds needed currently and in the future. A small percentage of inmates – 4% of the initial medical beds counts, leading to 1% of the final total estimate – was included because of a complex combination of conditions which, taken together, warrant long-term care. *Id*.

The proposed medical beds will provide three levels of care, akin to the three levels of care in many community elder care facilities. Plan of Action, p. 27. Approximately 75 percent of the medical beds will be "specialized general population" beds, commonly known as sheltered living or congregate care in the community. Abt Report, at p. 8. Patients in these beds will have functional impairments and chronic conditions that require ready access to medical care, assistance with ADLs as needed, and exemption from the physical challenges of being in general population, such as climbing stairs, but will not require daily care from a Registered Nurse. Examples would be patients with advanced chronic obstructive lung disease causing a limitation in walking and wheelchair-bound patients with spinal chord injuries.

Approximately eighteen percent of the medical beds will consist of "low-acuity" beds for patients who have nursing needs (*e.g.*, wheelchair-bound patients with wounds that need routine dressing, or stroke patients who need help dressing). Plan of Action, p. 27. The level of care provided in "low-acuity medical beds" is analogous to the care provided in a board-and-care or

an assisted living facility. Abt Report, at p. 8. As such, inmates placed in low-acuity beds require the availability of a Registered Nurse for 8 to 16 hours per day to assess, monitor and manage medical treatment such as IV hydration, IV antibiotics, wound care, and assistance with ADLs. *Id.*

The remaining medical beds will be "high-acuity" beds for patients that require nursing home level of care (*e.g.*, patients with complicated wounds that need nursing attention daily, pre/post transplant, patients undergoing chemotherapy, and patients who are completely bed bound.) Plan of Action, at p. 27. Inmates in high-acuity beds require a Registered Nurse to be available 24-hours per day to assess, monitor and manage complex or high-risk medication regimens or blood transfusion, complex wound care, and to provide extensive assistance with ADLs. Abt Report, at p. 8.

**B. Mental Health Beds**

Approximately ninety percent of the proposed mental health beds will be for inmates that qualify for the "enhanced outpatient program" ("EOP"), which is a form of sheltered living for mentally ill inmates that provides them with special programming and protection. Plan of Action, p. 27. The remaining mental health beds will be intermediate and acute care mental health beds, which are for more intensive care needs than EOP patients. *Id.*

To be eligible for CDCR's Mental Health Services Delivery System ("MHSDS") treatment at the EOP level of care, an inmate must suffer from a severe mental impairment. CDCR, *Mental Health Services Delivery System*, Sept. 2006, p. 12-4-1 ("CDCR Report"). Moreover, EOP inmate-patients generally suffer from "serious mental illness that is of long duration with moderate to severe and persistent functional impairments." *Id.* at p. 12-1-7. As such, inmates in the EOP program generally require assistance with ADLs, including eating, grooming, personal hygiene, and ambulation, as a result of a serious mental disorder. *Id.*, at p. 12-1-6.

To receive MHSDS treatment at any level of care, an inmate must either:

- "have current symptoms and/or require treatment for one of the following serious mental disorders: schizophrenia, delusional disorder, schizophreniform disorder, schizoaffective disorder, brief psychotic disorder, substance-induced psychotic disorder, psychotic disorder due to a general medical condition, psychotic disorder not otherwise specified, major depressive disorders, or bipolar disorders I and II; or

- "require mental health intervention to protect life and/or treat significant disability/dysfunction in an individual diagnosed with or suspected of having mental disorder."

*Id.* at 12-1-5.

To receive treatment at the EOP level of care, the individual must demonstrate:

- "an acute onset or significant decompensation of a serious mental disorder characterized by increased delusional thinking, hallucinatory experiences, marked changes in affect, and vegetative signs with definitive impairment reality testing and or judgment; and/or

- "Inability to function in General Population based upon: (a) a demonstrated inability to program in work or educational assignments, or other correctional activities as a consequence of a serious mental disorder; (b) the presence of dysfunction or disruptive social interaction as a result of serious mental disorder; or (c) An impairment in the activities of daily living including eating, grooming and personal hygiene, maintenance of housing area, and ambulation, as a consequence of serious mental disorder."

*Id.* at p. 12-1-6.

Inmates that require mental health care at the intermediate or acute care level have a serious mental disorder and either exhibit marked impairment and dysfunction in ADLs requiring 24-hour inpatient care, are a danger to self or others as a consequence of a serious disorder or are unable to carry out adequately one or more PADLs. *Id*. at 12-6-2.

## ANALYSIS

### I. Applicability of the ADA

The ADA seeks to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (2008). Specifically and pertinent to the application of the ADA to prison inmate benefits, the ADA provides 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 (2008). Thus, to state a claim under the ADA for discrimination by a public entity, a plaintiff must allege: (1) he or she is disabled; (2) he or she is otherwise qualified and (3) a public official's actions either (a) excluded his or her participation in or denied him or her the benefits of a service, program or activity; or (b) otherwise subjected him or her to discrimination on the basis of his or her disability. *Duffy v. Riveland*, 98 F.3d 447, 455 (9th Cir. 1996); *Sanders v. Ryan*, 484 F.Supp.2d 1028, 1037 (D.Ariz. 2007) (*citing Duffy*).

"State prisons fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.'" *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 210 (1998) (citations omitted); *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997) (ADA applies to prisons operated by the state of California).[1] Moreover, the provision of medical services to inmates are "benefits" to which the ADA applies. *Pennsylvania Dept. of Corrections*, 524 U.S. at 210*; Armstrong*, 124 F.3d at 1024. Thus, under the ADA, an inmate with a "disability" may not be excluded from or denied prison health care services on the basis of his or her disability.

Moreover, on September 25, 2008, the President signed the ADA Amendments Act of 2008 into law. Among other things, this legislation redefines the term "disability," sets forth rules of construction for the term "disability," and rejects prior Supreme Court case law that sought to narrow the definition of the term "disability" under the ADA. Significantly, Congress found that the courts have incorrectly denied individuals the protections of the ADA. ADA Amendments Act of 2008, Pub. L. No. 110-325, Sec. 2(a)(6), 110th Cong. (2008) ("ADA Amendments"). The ADA Amendments become effective on January 1, 2009.

## II. Disabled Under the ADA

To receive the protections afforded by the ADA, an individual must suffer from a "disability." Accordingly, the determination of whether an individual has a disability is key to any ADA analysis.

Under the ADA, the term disability means,

> [W]ith respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such impairment; or

[1] The *Armstrong* litigation required the CDCR to develop a remedial plan to ensure compliance with the ADA. The resulting remedial plan established the following policy: "No qualified inmate or parolee with a disability as defined in Title 42 of the United States Code Section 12102 shall, because of that disability, be excluded from participation or be denied the benefits of services, programs, or activities of the Department or be subjected to discrimination." (CDCR, *Armstrong Remedial Plan*, Jan. 31, 2001, p. 1)

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(1) (2008).

**A. Physical or Mental Impairment that Substantially Limits One Or More Life Activities**

The first definition of disability stated above contains three elements: (1) physical or mental impairment; (2) major life activity and (3) substantially limits. 42 U.S.C. § 12102(2)(A) (2008); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 194-95 (2002). Each element is interpreted by regulation.

1. Physical or Mental Impairment

The term "physical or mental impairment" means:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (2008); *Fraser v. Goodale*, 342 F.3d 1032, 1038 (9th Cir. 2003).

2. Major Life Activity

The term "major life activity" means: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (2008). This list of major life activities is intended to be illustrative, rather than exhaustive. *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998)

The ADA Amendments expand the definition of "major life activities." ADA Amendments, at Sec. 4(a)(2). Under the ADA Amendments, the term "major life activities" includes, but is not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *Id.* Additionally, the term "major life activities" now includes the operation of "major bodily functions" including, but not limited to, "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological,

brain, respiratory circulatory, endocrine, and reproductive functions." *Id.* Finally, the ADA Amendments provide that the definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of the Act." *Id.* at Sec. 4(a)(4)(A).

3. Substantially Limits

Regulation defines the term "substantially limits" to mean:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (2008).

Further, the following factors should be considered in determining whether an individual is substantially limited: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact of the impairment. 29 C.F.R. § 1630.2(j)(2) (2008). Thus, "[w]hile the Act 'addresses substantial limitations on major life activities, not utter inabilities' . . . it concerns itself only with limitations that are in fact substantial." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999) (citations omitted).

However, the ADA Amendments make significant changes to the above-referenced regulations and Supreme Court case law interpreting the term "substantially limits." First, the ADA Amendments provide that the regulatory definition of "substantially limits" as "significantly restricted" is "inconsistent with congressional intent, by expressing too high a standard." ADA Amendments, at Sec. 2(a)(8). Second, the ADA Amendments reject the Supreme Court's interpretation of "substantially limited" as set forth in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), because the interpretation required a greater degree of limitation than was intended by Congress. *Id.* Specifically, it rejects the holdings in *Toyota Motor Mfg., Kentucky, Inc.* that the terms "substantially" and "major" in the definition of disability "need to be interpreted strictly to create a demanding standard for qualifying for disabled," and that to be substantially limited in performing a major life activity "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Id.* at Sec. 2(b)(4). Finally, the ADA Amendments found that as a result of these standards, lower courts have incorrectly found

that people "with a range of substantially limiting impairments are not people with disabilities." *Id.* at Sec. 4(2)(b)(5).

The ADA Amendments also set forth rules of construction for applying the term "substantially limits." First, the ADA Amendments provide that an impairment that substantially limits one major life activity need not limit other life activities to be considered a disability. *Id.* at Sec. 4(a)(4)(C). Second, the ADA Amendments explain that an "impairment that is episodic or in remission is a disability if it would substantially limit a major life activity. *Id.* at Sec. 4(a)(4)(D). Third, overturning Supreme Court precedent[2], Congress stated that the determination as to whether an impairment substantially limits a major life activity should be made without regard to the ameliorative effects of mitigating measures. *Id.* at Sec. 4(a)(4)(E).

**B. Record of Such Impairment**

The second definition of "disability" provides that an individual has a disability if that person has a record of an impairment that substantially limits a major life activity. 42 U.S.C. § 12102(1) (2008). Having a "record of such impairment" means an individual "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k) (2008). Many types of records, including educational, medical, and employment records, may contain information about an individual's impairment so as to satisfy the definition of disability. Appendix to 29 C.F.R. § 1630.2(k) (2008).

Having a "record of disability" was included in the definition of disability in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Appendix A to 28 C.F.R. § 35.104; Appendix B to 28 C.F.R. § 36.104. However, an individual need not establish any actual impairment to have a record of such impairment. *Johnson v. American Chamber of Commerce Publishers, Inc.*, 108 F.3d 818, 819 (7th Cir. 1997).

Because the determination of whether an individual has a "record of impairment" is a question of fact related to each individual, this memorandum does not endeavor to determine whether individuals utilizing the proposed medical and mental health beds have a "record of impairment."

[2] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)

### C. Regarded As Having Such Impairment

The third definition of "disability" provides that an individual has a disability if that person is "regarded as having such an impairment." 42 U.S.C. § 12102(2)(C) (2008). This section is intended to protect people from a range of discriminatory actions that are based on myths, fears, and stereotypes about disability, which occur even when a person does not have a substantially limiting impairment. *Mastio v. Wausau Service Corp.*, 948 F. Supp. 1396, 1415 (E.D. MO. 1996.)

Although regulations interpret what is means to be "regarded as having a disability," the ADA Amendments substantially change the standard set forth in the regulations.[3] The ADA Amendments provide that an individual meets the requirement of being regarded as having such an impairment if "the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." ADA Amendments, at Sec. 4(a)(2). Thus, to be "regarded as disabled," an individual must show that he or she has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment.

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[3] 29 C.F.R. section 1630.2(l) provides that an individual is "regarded as having an impairment" if the individual:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. section 1630.2(b) defines "covered entity" as "an employer, employment agency, labor organization, or joint labor management committee."

The meaning of "regarded as having a disability" under the ADA Amendments requires a showing that an individual has been subject to an action prohibited under the ADA. ADA Amendments, at Sec. 4(a)(3). As such, an inmate's mere presence in one of the proposed medical beds or mental health beds cannot, by itself, establish the elements of an individual who is "regarded as" disabled. Accordingly, this memorandum does not seek to determine whether inmates who use the proposed medical and mental health beds are "regarded as" disabled.

## III. The Proposed Medical Beds

An estimated 99% of the proposed medical beds are for inmates who fall into one of three categories of functional impairments or chronic diseases: (1) inmates that require extensive assistance or are totally dependent in at least one ADL; (2) inmates who have a permanent limitation in at least one PADL; and (3) inmates with cognitive problems with regard to decision-making, memory and making themselves understood. Abt Report, at p. 29. Further, each of these inmates must require a level of care that is provided in the medical beds (*e.g.* specialized general population, low-acuity or high-acuity). *Id.* at 8.

### A. Inmates that Require Extensive Assistance or Are Totally Dependent In At Least One ADL

As set forth below, inmates with functional impairments or chronic diseases that require extensive assistance or are totally dependent in at least one ADL are disabled for the purposes of the ADA, because they suffer from an impairment that substantially limits a major life activity.

#### 1. Impairment

The universe of impairments that may afflict inmates who require extensive assistance or are totally dependent in performing at least one ADL is broad, as illustrated in the Abt Report. However, the definition of "impairment" is also broad, covering all physical conditions that affect bodily systems. 29 C.F.R. § 1630.2(h)(1) (2008). Thus, case law demonstrates a wide breadth of medical conditions that qualify as "impairments." For example, on Mar. 14-15, 2007, CDCR medical staff conducted a census of all occupied medical beds in the prison system. Abt Report, at p. vii. This census found that inmates in medical beds had an average of 3.8 disease diagnoses. *Id.* at 12. The census found that the top ten diagnoses among inmates in medical beds to be: (1) hypertension; (2); diabetes; (3) hepatitis C; (4) heart disease; (5) chronic obstructive pulmonary disease; (6) major depression disorder; (7); cancer; (8) epilepsy; (9) low back pain; and (10) anemia. Each of these conditions constitutes an "impairment" under the ADA. 29 C.F.R. § 1630.2(h); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 208 (1998) (hypertension); *Nawrot v. CPC Intern.*, 277 F.3d 896, 903 (7th Cir. 2002) (diabetes); *Powell v. City of Pittsfield*, 221 F.Supp.2d 119, 145 (D.Mass. 2002) (hepatitis C); *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 960 (8th Cir. 2000) (heart disease); *Ogborn v. United Food and Commercial Workers Union, Local No. 881*, 305 F.3d 763, 767 (7th Cir. 2002) (depression);

*Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 190 (5th Cir. 1996) (cancer); *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686 (4th Cir. 1997) (epilepsy); *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 640-642 (2d Cir. 1998) (back pain). Anemia is an impairment, because it is a physiological disorder or condition affecting the hemic bodily system. 29 C.F.R. § 1630.2(h)(1) 2008. Similarly, chronic obstructive pulmonary disease is an impairment because it is a physiological disorder or condition affecting the respiratory system. *Id.*

Thus, "[a]n impairment need not appear on a specific list of disorders to qualify as a disability, nor must it affect those aspects of person's life that have a public or economic character." *Hines v. Chrysler Corp.*, 231 F.Supp.2d 1027, 1036 (D.Colo 2002). As such, inmates with functional impairments or chronic diseases that require placement in a medical bed that provides "ready access to health care service," have physiological disorders or conditions that affects a bodily system. 16 C.F.R. 1630.2(h). Moreover, given the broad definition of impairment and its applicability to any number of medical conditions, any condition rendering an inmate unable to perform one or more ADLs will also qualify as an impairment.

2. Major Life Activities

Major life activities include, but are not limited, to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." ADA Amendments, at Sec. 4(a)(2). Additionally, the term "major life activities" also includes the operation of "major bodily functions" including, but not limited to, "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory circulatory, endocrine, and reproductive functions." *Id.*

ADLs include grooming, dressing, bathing, toileting, ambulation and eating. Abt Report, at p. 23. Each of the above-referenced ADLs is a major life activity. ADA Amendments, at Sec. 4(a)(2) (major life activities include caring for oneself, eating, walking, bladder function, and bowel function); *Lawson v. CSX Transp. Inc.*, 245 F.3d 916, 923 (7th Cir. 2001) (eating is a major life activity); *Epstein v. Kalvin-Miller*, Inc., 100 F.Supp.2d 222, 225 (S.D.N.Y. 2000) (walking is a major life activity).

Moreover, an ADL is an "everyday routine[] generally involving functional mobility and personal care, such as bathing, dressing, toileting, and meal preparation." Stedman's Medical Dictionary, 28th Edition, Lippincott Williams & Wilkins (2006); *see also* 42 C.F.R. § 483.25 (2008) (activities of daily living include bathing, dressing, grooming, transferring and ambulating, toileting, eating, and use of speech, language, or other functional communication system). As such, ADLs are by their nature activities conducted daily to meet a person's basic needs (living).

3. Substantially Limits

Under existing regulation and case law,[4] the general test for substantial limitation is that one must be unable to perform a major life activity that the average person in the general population can perform, or be significantly limited in the condition, manner, or duration under which the individual can perform that activity as compared to an average person in the general population. 29 C.F.R. § 1630.2(i), (j)(1); *Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 833 (8th Cir. 2001). Further, three factors should be considered in determining whether a limitation is substantial: (1) the nature and severity of impairment, (2) the duration or expected duration of impairment, and (3) the permanent or long-term impact of the impairment. 29 C.F.R. § 1630.2(j)(2); *Williams v. Philadelphia Housing Authority Police Dept.* 380 F.3d 751, 765 (3d Cir. 2004).

An inmate that requires "extensive assistance" or is "totally dependent" in one or more ADLs suffers from a substantial limitation. ADLs are "everyday routines generally involving functional mobility and personal care, such as bathing, dressing, toileting, and meal preparation. An inability to perform these renders one dependent on others, resulting in a self-care deficit." Stedman's Medical Dictionary, 28th Edition, Lippincott Williams & Wilkins, (2006). Individuals with "self-care deficits" are unable to perform major life activities that the "average person" can perform because they are unable to care for themselves. 29 C.F.R. § 1630.2(j)(1)(i) (2008). Thus, the need for "extensive assistance" or "total assistance" indicates a substantial limitation.

The substantiality of a limitation is also indicated by the level of care an inmate requires. Inmates who require "extensive assistance" or are "totally dependent" for one or more ADLs and require a high-acuity or low-acuity medical bed need a high level of care. High-acuity beds provide inmates a level of care analogous to the care provided at a skilled nursing facility. Abt Report, at p. 8. Inmates that require this level of care are substantially limited. *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1010 (3d Cir. 1995) ("[n]o one would be able to meet a nursing home's admissions requirements in the absence of some handicapping condition necessitating nursing home care.").

Low-acuity beds provide inmates a level of care akin to the care provided at an assisted living facility. Abt Report, at p. 8. In general, "assisted living facilities" provide supportive services to patients in "carrying out activities of daily living, such as bathing, dressing, eating,

[4] The ADA Amendments significantly reduce the showing an impaired individual must make to demonstrate a "substantial limitation." As a result, existing case law requires a showing of "substantial limitation" that is greater than the showing required under the amended statute.

getting in and out of bed or chairs, walking, going outdoors, using the toilet" and other activities. 12 U.S.C. § 1715w(b)(6). Low-acuity beds are also characterized by ready access to medical care, including the availability of a Registered Nurse for 8 to 16 hours per day, the provision of IV hydration, the provision of IV antibiotics, and wound care. Abt Report, at p. 8. Thus, an assignment to a low-acuity bed indicates a substantial limitation marked by the need for medical treatment and ready availability of skilled medical staff.

Specialized general population medical beds provide ready access to medical care, assistance with ADLs as needed, and exemption from the physical requirements of general population inmates, such as climbing stairs. Assignment to a specialized general population bed indicates limitations that are sufficiently substantial to necessitate separate, long-term housing and readily available access to medical care. Abt Report, at p. 8. Moreover, the need for separate, long-term housing and the chronic nature of the conditions afflicting inmates requiring specialized general population beds (*e.g*, HIV/AIDS, vision impairments, hearing impairments, frailty due to old age or medical condition) indicate that their impairments are expected to have a permanent or long-term impact. 29 C.F.R. § 1630.2(j)(3)(i) (2008) (duration of the impairment is a factor to consider in determining whether an impairment is substantially limiting); 29 C.F.R. § 1630.2(j)(3)(iii) (2008) (long-term impact of the impairment is a factor to consider in determining substantial impairment). Thus, because inmates in specialized general population beds require separate housing and ready access to medical care and because the nature of their impairments are chronic, inmates in specialized general population medical beds suffer from substantially limiting impairments.

### B. Permanently Limited in PADLs

A PADL is an activity that is necessary for independent functioning while in prison. Williams, et al., *Being Old and Doing Time: Functional Impairments and Adverse Experiences of Geriatric Female Prisoners*, The American Geriatrics Society, 2006. PADLs such as standing for head count, hearing orders from staff, climbing stairs, and climbing to the top bunk are analogous to the major life activities of standing, hearing, climbing stairs and getting in and out of bed.

#### 1. Impairment

Inmates who cannot perform PADLs may be impaired because of conditions such as strokes, arthritis, amputations, hearing loss or vision loss. As set forth above, inmates with functional impairments or chronic diseases that require placement in a medical bed that provides "ready access to health care service," have physiological disorders or conditions that affect a bodily system. 16 C.F.R. 1630.2(h). Moreover, given the broad definition of impairment and its applicability to any number of medical conditions, any condition rendering an inmate unable to perform one or more PADLs will also qualify as an impairment.

2. Major Life Activity

A limitation in performing one or more PADLs indicates a limitation in one or more of the following activities: (1) standing, (2) walking, (3) hearing, (4) climbing stairs, and (5) getting in and out of bed. Each of the activities implicated by a limitation in a PADL is a major life activity. *Gallimore v. Newman Machine Co., Inc.*, 301 F.Supp.2d 431, 437 (M.D.N.C. 2004) (standing is a major life activity); *Epstein v. Kalvin-Miller, Inc.*, 100 F.Supp.2d 222, 225 (S.D.N.Y. 2000) (walking is a major life activity); *Sussle v. Sirina Protection Systems Corp.*, 269 F.Supp.2d 285, 299 (S.D.N.Y. 2003) (climbing stairs qualifies as a major life activity); 29 C.F.R. § 1630.2(i) (hearing is a major life activity). "Major life activities refer to those activities that are of central importance to daily life." *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002). Under this definition, the ability to get in and out of bed is a major life activity.

The PADL of placing oneself on the floor for alarms does not correspond to an explicitly recognized major life activity, but may be akin to the major life activity of "bending," which is included in the ADA Amendments' definition of a major life activity. ADA Amendments, at Sec. 4(a)(2). Further, the "determination of whether an individual has a disability is not necessarily based on the . . . impairment the person has, but rather on the effect of that impairment on the life of the individual." *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999). The inability of an inmate to properly respond to alarms has a real and dramatic effect on that individual's life. Thus, the PADL of placing oneself on the floor is a major life activity for an inmate.

3. Substantially Limits

As noted above, one category of medical beds is reserved for inmates with a permanent limitation in a PADL. Although the term "permanently limited" does not necessarily equate to the term "substantially limited" for the purposes of the ADA, the determination that an inmate requires the level of care provided in the proposed medical beds indicates the substantially limiting nature of the inmate's impairment. The determination that an inmate requires placement in a medical bed because of his "permanent limitation" indicates that the limitation is substantially limiting.

With regard to the PADL of standing for count, existing case law requires a showing that the impairment restricts an individual's ability to stand as compared to the average person. For example, in *Gallimore v. Newman Machine Co., Inc.*, 301 F.Supp.2d 431, 437 (M.D.N.C. 2004), the court determined that an employee was not substantially limited in the major life activity of standing even though he could not stand for more than 45 minutes as result of a hip replacement. The court reasoned that such limitation did not substantially restrict the employee in his ability to stand as compared to the average person in the general population. *Id.* at 446. Unlike the employee in *Gallimore*, those inmates who are permanently limited in the PADL of standing for count are substantially restricted in their ability to stand as compared to an average inmate that is

able (and required) to stand for count. This deficiency is demonstrated by an inmate's placement in a medical bed, because placement in a medical bed indicates an impairment that is sufficiently severe to require removal from the general prison population. Thus, inmates placed in long-term medical beds because of a functional impairment or chronic disease that "permanently limits" their ability to stand are substantially limited in a major life activity.

With regard to the PADLs of getting to the dinning hall and climbing stairs, existing case law establishes that walking long distances or climbing stairs without getting fatigued are "moderate limitations on major life activities [that] do not suffice to constitute a 'disability' under the ADA." *Weber v. Strippit, Inc.*, 186 F.3d 907, 914 (8th Cir.1999). However, an inmate that has a "permanent limitation" in the PADLs of walking and climbing stairs that is sufficiently severe to require separate housing in a long-term medical bed is more than "moderately" limited in his or her ability to walk or climb stairs. This is because an inmate that only has a moderate limitation in the PADLs of getting to the dining hall or climbing stairs would not qualify for placement in a long-term medical bed. Abt Report, at p. 8 ("if need for supervision or limited assistance is the inmate's only reason for not being in regular GP, then that inmate can be in sheltered housing with ADLs provided by cellie, buddy system, or inmate helper program"). Accordingly, inmates that are "permanently limited" in the PADLs of getting to the dining hall and climbing stairs and also require the level of care provided in a medical bed are substantially limited.

An inmate that has a permanent limitation with regard to the PADL of hearing orders must demonstrate substantial hearing loss. "A hearing loss approaching deafness is 'a physical or mental impairment that substantially limits one or more of [her] major life activities.'" *Bryant v. Better Business Bureau of Greater Maryland, Inc.*, 923 F.Supp. 720, 743 (D.Md. 1996) (citations omitted). As noted above, the severity of an inmate's "permanent limitation" is demonstrated by the inmate's need for separate long-term housing in a medical bed. For example, an inmate with only moderate hearing loss would not qualify for a medical bed at even the lowest level of care (specialized general population bed) because that individual would not be suffering a hearing impairment "preventing residence" in the regular population. Abt Report, at p. 8. As a result, placement in a medical bed indicates a substantially limiting hearing impairment.

Moreover, the ADA Amendments significantly reduce the showing an impaired individual must make to demonstrate a substantial limitation. The ADA Amendments included the following findings and purposes related to the interpretation of the term "substantially limited":

- "[T]he case of *Toyota Motor Mnf., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation intended by Congress." ADA Amendments, at Sec. 2(a)(7).

- "[T]he current Equal Opportunity Employment Opportunity Commission ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent by expressing too high a standard." ADA Amendments, at Sec. 2(a)(8).

- One purpose of the Act is to "reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures." ADA Amendments, at Sec. 2(b)(2).

The case law discussed above is based on Supreme Court precedent that has been rejected by Congress as requiring too high of a showing to demonstrate substantial limitation. ADA Amendments, at Sec. 2(a). Thus, even if there were some question as to whether the care offered in specialized general population beds is sufficient to demonstrate substantial limitation under exiting case law (which there is not), such a showing is certain to satisfy the lower standard needed to establish the "substantially limits" prong under the ADA Amendments. *Id.* at Sec. 3(a)(4(A) ("The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.").

### C. Cognitive Disability

Cognitive impairments in decision-making, memory, and making oneself understood may, either by themselves or in conjunction with other medical problems, substantially limit an individual in major life activities. Although not all cognitive problems are severe enough to constitute disabilities under the ADA, any cognitive problem that either by itself or in conjunction with one or more other medical problems also requires the level of care provided in a high-acuity medical bed, a low-acuity medical bed, or a specialized general population bed qualifies the inmate as disabled under the ADA.

#### 1. Impairment

A cognitive deficit is a "kind of organic brain syndrome," and "an organic brain syndrome is listed as an example of a mental or psychological disorder which constitutes an impairment under the ADA." *Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C.*, 115 F.Supp.2d 127, 131 (D.Mass. 2000). As such, cognitive deficits, such as memory loss, impaired decision-making and impaired communication skills, are impairments under the ADA.

#### 2. Major Life Activity

As discussed above, the ADA Amendments provide a revised definition of "major life activity." The new definition of "major life activities" includes activities such as speaking,

learning, concentrating, thinking, and communicating. ADA Amendments, at Sec. 4(a)(2). The definition also provides that the operation of major bodily functions, including neurological function and brain function, are major life activities. *Id.* An individual with impaired decision-making, memory loss and impaired communication skills is limited in the major life activities of thinking, concentrating and communicating and also has an impairment in neurological or brain function. *Brown v. Cox*, 286 F.3d 1040, 1045 (8th Cir. 2002) ("The ability to perform cognitive functions on the level of an average person certainly falls within" the definition of major life activity.). As a result, cognitive deficiencies, such as impaired decision-making, memory loss, and difficulty making oneself understood, affect major life activities. *Id.*

3. Substantially Limits

An inmate who has a cognitive problem that by itself requires placement in a medical bed has a cognitive problem that is substantially limiting. To be "substantially limiting" a cognitive deficiency must be severe enough that it causes the individual to be unable to perform a major life activity that an average person can perform. 29 C.F.R. § 1630.2(i), (j)(1) (2008); *Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 833 (8th Cir. 2001). Thus, a cognitive problem is not a disability if it is merely "mild, reversible, and short-lived." *Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C.*, 258 F.3d 30, 34 (1st Cir. 2001). However, a mild cognitive problem in combination with one or more other medical problems may qualify the individual as disabled under the ADA.

The level of care provided to inmates with cognitive problems in medical beds indicates either the substantially limiting nature of the cognitive problem itself or the substantially limiting nature of the cognitive problem in conjunction with one or more other medical problems. Thus, an inmate with a cognitive problem who requires placement in a high-acuity medical bed is likely to suffer from cognitive impairments alone or in conjunction with one or more other medical problems that cause the individual to be unable to perform a major life activity that an average person can perform and to require the medical care available in a high-acuity bed. Abt Report, at p. 17. Inmates with cognitive problems who suffer from this level of impairment are unable (*e.g.*, substantially limited) to perform major life activities that the average person can perform. 29 C.F.R. § 1630.2(j) (2008) (Stating that the term substantially limited means either unable to perform a major life activity that the average person in the general population can perform or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity). As such, individuals with cognitive impairments who require the level of care provided in high-acuity medical beds are substantially impaired.

An inmate with cognitive problems who requires placement in a low-acuity medical bed is likely to suffer from cognitive problems that either by themselves or in combination with other medical problems cause the inmate to be unable to perform major life activities that the average

person can perform but to require only the medical care available in a low-acuity medical bed . Abt Report, at p. 17; 29 C.F.R. § 1630.2(j)(1) (2008). However, the presence in a long-term medical bed signifies cognitive impairments that are permanent or have long-term impact either by themselves or in conjunction with one or more other medical problems. 29 C.F.R. § 1630.2(j)(3)(i) (2008) (duration of the impairment is a factor to consider in determining whether an impairment is substantially limiting); 29 C.F.R. § 1630.2(j)(3)(iii) (2008) (long-term impact of the impairment is a factor to consider in determining substantial impairment). As such, individuals with cognitive impairments that require the level of care provided in low-acuity medical beds are still substantially impaired, even if their medical needs are not as great as individuals with cognitive impairments who are assigned to a high-acuity medical bed.

An inmate with cognitive problems who requires placement in a specialized general population medical bed, although not as severely impaired as inmates that require treatment in a high-acuity or low-acuity medical bed, still suffers from cognitive problems that either by themselves or in conjunction with other medical problems prevent them from residing in the general prison population. *Id.* at p. 8. Thus, these impairments cannot in their totality be characterized as "mild, reversible or short lived." *Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C.*, 258 F.3d 30, 34 (1st Cir. 2001). The inmate's presence in a long-term medical bed signifies cognitive impairment that by itself or in conjunction with other medical problems is permanent or has long-term impact. 29 C.F.R. § 1630.2(j)(2) (2008) (Stating that the nature and severity of the impairment, the duration or expected duration of the impairment and the permanent or long-term impact, or the expected permanent or long-term impact, of or resulting from the impairment should be considered in determining whether an individual is substantially limited in a major life activity). As such, placement in a specialized general population bed signifies that an inmate has a substantially limiting cognitive impairment or cognitive impairment combined with other medical problems.

In sum, the determination to place an inmate with a cognitive problem in a long-term medical bed signifies that an inmate has an impairment or combination of impairments that substantially limits major life activities. As such, these inmates suffer from a "disability" under the ADA.

## IV. Mental Health Beds

### A. Enhanced Outpatient Program ("EOP") Beds

Approximately ninety percent of the proposed mental health will be EOP beds. Plan of Action, p. 27. An inmate must suffer from a severe mental impairment to be eligible for MHSDS treatment at the EOP level of care. CDCR Report, at p. 12-4-1.

1. Impairment

By definition, inmates that are eligible for MHSDS services and require treatment at the EOP level of care suffer from a "mental impairment." A mental or psychological disorder, including emotional or mental illness, qualifies as a physical or mental impairment. 29 C.F.R. § 1630.2(h)(2) (2008) (Mental impairment means any "mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."). As described above, to receive treatment through the MHSDS, an inmate must either be diagnosed with a "serious mental disorder" or be suffering from an acute episode in which mental health intervention is necessary to "protect life" and/or "treat significant disability/dysfunction" in an individual diagnosed or suspected of having a mental disorder. CDCR Report, at p. 12-1-5. Each of the mental disorders that qualify for MHSDS treatment are conditions that qualify as mental impairments. *Franklin v. U.S. Postal Service*, 687 F.Supp. 1214, 1218 (S.D.Ohio 1988) (schizophrenia); *Den Hartog v. Wasatch*, 129 F.3d 1076, 1081 (bi-polar disorder); *Olsen v. General Elec. Astrospace*, 966 F.Supp. 312, 316 (D.N.J. 1997) (depression and other mental disorders may be disabilities under the ADA). As a result, inmates in the EOP program suffer from mental health impairments.

2. Major Life Activities

Inmates in the EOP program require assistance with ADLs, including eating, grooming, personal hygiene, and ambulation, as a result of a serious mental disorder. CDCR Report, at p. 12-1-6. Eating, grooming, personal hygiene and ambulation are each major life activities. ADA Amendments, at Sec. 4(a)(2) (eating, walking and caring for oneself are major life activities); *Lawson v. CSX Transp. Inc.*, 245 F.3d 916, 923 (7th Cir. 2001) (eating is a major life activity); *Epstein v. Kalvin-Miller*, Inc., 100 F.Supp.2d 222, 225 (S.D.N.Y. 2000) (walking is a major life activity). As such, inmates that require treatment at the EOP level of care have an impairment that adversely affects their ability to perform a major life activity. *Brady v. Wal-Mart Stores, Inc.*, 43 F. Supp.2d 652, 656 (S.D.Miss 1998) (if "a person can perform normal activities of daily living despite his alleged impairment, then the individual is not substantially limited in a major life activity").

3. Substantially Limits

Inmates that require an EOP level of care suffer from "acute onset or significant decompensation of a serious mental disorder characterized by increased delusional thinking, hallucinatory experiences, marked changes in affect, and vegetative signs with definitive impairment reality testing and or judgment." CDCR Report, at p. 12-1-6 (emphasis added). These conditions generally result in a Global Assessment Functioning ("GAF") score of less than 50. *Id.* "A GAF score is used to report 'the clinician's judgment of the individual's overall level of functioning.' GAF scores of 41 to 50 reflect '[s]erious symptoms (*e.g.*, suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social,

occupational, or school functioning (*e.g.*, no friends, unable to keep a job).'" *Hudson v. Barnhart*, 345 F.3d 661, 663 n.2 (8th Cir. 2003) (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 34 (4th ed. Text Revision 2000). A GAF score of 30 to 40 indicates that an individual has some impairment in reality testing or communication, or major impairment in several areas such as work, school, family relations, judgment, thinking, or mood. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 34 (4th ed. Text Revision 2000).

Inmates eligible for the EOP level of care generally exhibit an inability "to program in work or educational assignments, or other correctional activities," an "inability to respond to staff directions," or "an impairment in the activities of daily living." *Id.* at 12-1-6. These observed functional impairments further demonstrate an inmate's inability to perform major life activities that the "average person" can perform. 29 C.F.R. § 1630.2(j) (2008).

EOP patients also tend to have "serious mental illness that is of long duration with moderate to severe and persistent functional impairments." CDCR Report, at p. 12-1-6. Thus, an inmate's presence in the EOP program indicates a mental impairment of "long duration" marked by "persistent" functional impairments. Accordingly, the duration and long-term impact of an EOP patient's severe mental impairment indicates that the impairment is substantially limiting. 29 C.F.R. § 1630.2(j)(3)(i) (2008) (duration of the impairment is a factor to consider in determining whether an impairment is substantially limiting); 29 C.F.R. § 1630.2(j)(3)(iii) (2008) (long-term impact of the impairment is a factor to consider in determining substantial impairment).

Ultimately, inmates that qualify for the EOP must exhibit behavior, caused by a severe mental impairment, that results in prison medical staff concluding that the inmate is not capable of performing the tasks necessary to survive in the general inmate population. Thus, inmates that qualify for the EOP level of care necessarily suffer from a "disability" under the ADA.

### B. Intermediate Care Facilities

Referral to an inpatient program, like an Intermediate Care Facility, indicates that the inmate is so severely disturbed or suicidal that their treatment cannot be met by a MHSDS program. CDCR Report, at p. 12-6-1.

#### 1. Impairment

To be admitted to an Intermediate Care Facility, an inmate must have a "major (serious) mental disorder with active symptoms." CDCR Report, at p. 12-6-7. As discussed above, a "major mental disorder" is an impairment. 29 C.F.R. § 1630.2(h)(2) (2008) (Mental impairment means any "mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."). As such, a serious

mental disorder requiring inpatient care at an Intermediate Care Facility is an impairment under the ADA.

2. Major Life Activity

Inmates that require the level of care provided at the Intermediate Care Facility have demonstrated that they are "unable to adequately function within the structure of the CDCR EOP Level of Care" or have "serious to major impairment of functioning in most life areas." CDCR Report, at p. 12-6-7. Both existing regulations and the ADA Amendments provide that caring for oneself is a major life activity. 29 C.F.R. § 1630.2(i); ADA Amendments, at Sec. 4(a)(2). Inmates that require the level of care provided in Intermediate Care Facilities have generally demonstrated an impairments in most life areas, including performing ADLs and communicating, even with the assistance provided at the EOP level of care. As such, placement in an inpatient facility indicates that an inmate suffers from mental impairments that affect major life activities.

3. Substantially Limited

Intermediate Care Facilities provide "highly structured inpatient psychiatric care with 24-hour nursing supervision due to a major mental disorder." CDCR Report, at p. 12-6-7. Moreover, Intermediate Care Programs are designed to provide "longer-term" treatment for inmates. *Id.* Inmates placed in Intermediate Care Facilities are "unable to adequately function within the structures of the CDCR EOP Level of Care." *Id.* Accordingly, inmate placed in Intermediate Care Facility can neither function at the level of an average inmate, nor even at the level of an inmate that has been removed from the general population and placed in the EOP program due to a mental impairment. 29 C.F.R. § 1630.2(j)(1)(i) (substantially limited means "[u]nable to perform a major life activity that the average person in the general population can perform"). The inability to adequately function, even with the substantial assistance provided at the EOP level of care, demonstrates that inmates placed in Intermediate Care Facilities are substantially limited by their mental impairments.

**C. Acute Mental Health Beds**

1. Impairment

Inmates placed in acute mental health beds suffer "impairment of functioning with signs and symptoms that may be attributed to either acute major mental disorder or an acute exacerbation of a chronic major mental illness." CDCR Report, at p. 12-6-2. Both "major mental disorder[s]" and "chronic major mental illness" fall within the ADA's definition of mental impairment because they are mental or psychological disorders. *See* 29 C.F.R. § 1630.2(h)(2) (2008) (Mental impairment means any "mental or psychological disorder, such as

mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.").

2. Major Life Activities

An inmate that requires placement in an acute mental health bed has symptoms that render the inmate unable to carry out the normal routines of the institution, or unable to provide for his basic needs or use the supportive treatment resources available to him. CDCR Report, at p. 12-6-2. An inmate that cannot "provide for his basic needs" or adequately carry out the normal routines of this institution is limited in a major life activity. 29 C.F.R. § 1630.2(i); ADA Amendments, at Sec. 4(a)(2) (caring for oneself is a major life activity).

3. Substantially Limited

An inmate requiring treatment in any CDCR inpatient program exhibits "marked impairment and dysfunction" in ADLs, communication and social interaction. CDCR Report, at p. 12-6-2. As such, inmates placed in an acute mental health bed generally require significant assistance with ADLs. *Id.* at 12-1-6. The need for extensive assistance to accomplish ADLs demonstrates an inability to perform tasks an average person can perform. 29 C.F.R. § 1630.2(j) (2008) (Stating that the term substantially limited means either unable to perform a major life activity that the average person in the general population can perform or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity). Thus, inmates placed in acute mental health beds are substantially limited.

However, treatment in acute mental health beds is generally limited to 30 to 45 days. CDCR Report, at p. 12-6-2. Case law prior to the enactment of the ADA Amendments found that "intermittent, episodic impairments are not disabilities." *Vande Zande v. Wisconsin Dep't of Administration*, 44 F.3d 538, 542 (7th Cir. 1995); *McDonald v. Com. of Pa., Dep't of Public Welfare*, 62 F.3d 92, 96 (3d Cir. 1995); *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 380 (3d Cir. 2002). Accordingly, one may argue that an inmate that requires treatment in the Acute Psychiatric Program is not disabled because his impairment is akin to a "broken leg" (*e.g.*, temporary).

However, the ADA Amendments provide that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." ADA Amendments, at Sec. 4(a)(4)(D). Moreover, there is no set number of days that defines whether an impairment is or is not a disability under the ADA. Duration is but one factor for a court to consider, because the determination of whether an individual has a disability is an individualized inquiry." *McWilliams v. Latah Sanitation, Inc.*, 554 F.Supp.2d 1165, 1174 (D.Idaho 2008).

Thus, the ADA Amendments and recent case law contemplate an ongoing or chronic condition that is characterized by acute episodes of substantial impairment as a disability.

Accordingly, provided that an inmate's mental health crisis is a manifestation of an ongoing mental illness, that individual is disabled under the ADA.