

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DORN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF
CORRECTIONS (“MDOC”); HARESH
PANDYA, individually and in his official
capacity as the Regional Medical Officer for the
Southern Region of MDOC; JEFFREY STIEVE,
individually and in his official capacity as the
Chief Medical Officer of the MDOC; THOMAS
FINCO, individually and in his official capacity
as Correctional Facilities Administration Deputy
Director of the MDOC; DANIEL H. HEYNS,
individually and in his official capacity as
Director of the MDOC; and BILL SCHUETTE,
in his official capacity as Attorney General of
Michigan,

Defendants.

CASE NO. 1:15-cv-359

HON. PAUL L. MALONEY

ORAL ARGUMENT REQUESTED

**BRIEF IN SUPPORT OF PLAINTIFF’S MOTION FOR RECONSIDERATION
OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF ISSUES FOR APPEAL**

Chris E. Davis (P52159)
Mark A. Cody (P42695)
MICHIGAN PROTECTION AND
ADVOCACY SERVICE, INC.
4095 Legacy Parkway, Suite 500
Lansing, Michigan 48911-4263
Phone: (517) 487-1755
E-Mail: cdavis@mpas.org
E-Mail: mcody@mpas.org

Richard Saenz*
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall St., 19th Floor
New York, NY 10005
Phone: (212) 809-8585
E-Mail: rsaenz@lambdalegal.org

Scott A. Schoettes
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
105 West Adams, Suite 2600
Chicago, IL 60603-6208
Phone: (312) 663-4413
E-Mail: sschoettes@lambdalegal.org

*Application for admission pending

Attorneys for Plaintiff

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CONCISE STATEMENT OF ISSUES PRESENTED

1. By accepting federal financial assistance, does the State of Michigan waive Eleventh Amendment sovereign immunity for claims under the Rehabilitation Act?
2. If conduct alleged as a violation of the Americans with Disabilities Act (ADA) also constitutes an actual violation of equal protection under the Fourteenth Amendment, is sovereign immunity abrogated for the ADA claim?
3. Do the contents of the Michigan Department of Corrections policy regarding sexual misconduct on the part of people living with HIV and the conduct of the individual defendants in enforcing that policy sufficiently allege an actual violation of due process and thereby abrogate sovereign immunity under the ADA?
4. If Dorn's motion for reconsideration of the dismissal of the Rehabilitation Act claim is denied, is certification of that issue for interlocutory appeal appropriate?

INTRODUCTION

Plaintiff John Dorn (“Dorn”) respectfully requests, under Federal Rule of Civil Procedure 54 and Local Rules of Civil Procedure and Practice of the United States District Court for the Western District of Michigan 7.4(a), reconsideration of three aspects of the Court’s decision on Defendants’ motion(s) to dismiss. In the alternative, if the Court denies the motion for reconsideration, Plaintiff requests that the Court certify these issues for interlocutory appeal under Federal Rule of Civil Procedure 54.

At the heart of this case is John Dorn’s contention that he was discriminated against and denied due process by the Michigan Department of Corrections’ (“MDOC”) policies and Defendants’ actions in enforcing those policies. The MDOC has a policy directive that codifies illegal discrimination against inmates living with HIV by severely curtailing their liberty interests without adequate justification in the wake of any sexual misconduct. First Am. Compl. ¶¶ 40-49, PageID.87-90 (citing MDOC Policy Directive 03.04.120 (“Policy Directive”)); Pl.’s Response, PageID.175-176. To justify such disparate treatment of people living with HIV, the Rehabilitation Act requires a defendant to show that the individual presents a *significant risk* to the health or safety of others. *See Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (citing *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287 n.16 (1987)). In contrast, the Policy Directive sets up an “any risk” standard, making that policy unlawful on its face. First Am. Compl. ¶¶ 40, 42, PageID.87-88 (quoting the Policy Directive: “If it is determined that the behavior *could* transmit HIV . . .” (emphasis added)); Pl.’s Response, PageID.176.

The Policy Directive also creates a presumption that HIV “could be” transmitted through any sexual penetration or even attempted penetration—which flies in the face of the science of HIV transmission—and offers no meaningful opportunity to rebut that presumption. First Am.

Compl. ¶¶ 40, 47, PageID.87-88, 89-90; Pl.’s Response, PageID.175. To add insult to injury, the individual defendants did not provide Dorn even with the deficient process outlined in the Policy Directive. First Am. Compl. ¶¶ 25-29, 45-49, PageID.83-84, 89-90; Pl.’s Response, PageID.175-176. Before anyone had adjudicated the allegations of misconduct or—more important—“determined that the behavior could transmit HIV,” Dorn had been reclassified to administrative segregation and was kept there for nearly a year. First Am. Compl. ¶¶ 25-29, 45-49, PageID.83-84, 89-90; Pl.’s Response, PageID.170. Because Dorn had no chance to challenge the Policy Directive, no meaningful opportunity to rebut the scientifically inaccurate presumption contained therein, and was deprived of even the inadequate process set forth in the Policy Directive, he must be given the opportunity to challenge the policies and conduct of the Defendants in this court.

First, Plaintiff asks this Court to reconsider its determination that the MDOC and MDOC personnel acting in an official capacity are entitled to sovereign immunity under the Eleventh Amendment (U.S. CONST. amend. XI) for claims under the Rehabilitation Act (29 U.S.C. § 701, *et seq.*). Controlling law makes clear that by accepting federal financial assistance, the state waives sovereign immunity for claims under the Rehabilitation Act. For this reason, Plaintiff’s Rehabilitation Act claim should be reinstated.

Second, Plaintiff asks this Court to reconsider its decision that the MDOC and MDOC personnel acting in an official capacity were entitled to sovereign immunity with respect to Plaintiff’s claim under the Americans with Disabilities Act (“ADA”) (42 U.S.C. § 12101, *et seq.*). In its decision, the Court correctly noted that sovereign immunity applied unless the alleged claims are actual violations of the Fourteenth Amendment (U.S. CONST. amend. XIV). But in analyzing Plaintiff’s claim, the Court considered only if Plaintiff had sufficiently alleged a

violation of due process. The grounds for abrogation, however, are not narrowly confined to only the due process clause of the Fourteenth Amendment. Controlling law makes clear that an actual violation of any part of the Fourteenth Amendment—including the equal protection component—is sufficient to abrogate sovereign immunity. Because Plaintiff's ADA claim is one that sounds in equal protection as much as it does in due process, and the conduct underlying that equal protection violation has been sufficiently pled, the ADA claim should be reinstated as well.

Third, Plaintiff also asks the Court to reconsider its dismissal of the ADA claim as one that sounds in due process. It seems the Court did not fully understand the bases for Plaintiff's due process claim when it concluded that Plaintiff had not alleged an actual violation of due process sufficient to support the abrogation of sovereign immunity under the ADA. Properly understood, Plaintiff's claim is that the Policy Directive regarding sexual conduct on the part of HIV-positive individuals is *itself* a violation of due process and that the conduct of the prison officials in attempting to enforce that unjust policy compounded its inherent due process problems. Plaintiff was not given any meaningful opportunity to challenge the inherently unjust policy directive or to demonstrate how the actions of prison officials exacerbated the already unreasonable dictates of the directive. For those reasons, Plaintiff's ADA claim should be reinstated and he should be permitted to prove the actual due process violation described in his complaint.

Should this Court deny Plaintiff's motion for reconsideration regarding dismissal of the Rehabilitation Act claim, Plaintiff respectfully requests that the Court certify that issue for interlocutory appeal. In the event, the Court does this, Plaintiff requests that the Court simultaneously allow for appellate review of all other aspects of its decision on the motion to dismiss that will substantially affect the contours of the case upon remand.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 54 states that: “[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” FED. R. CIV. P. 54(b). In the Sixth Circuit, a party seeking reconsideration of an interlocutory order must show (1) an intervening change in the controlling law, (2) new evidence previously not available, or (3) a need to correct error to prevent manifest injustice.

Louisville/Jefferson Cty. Metro Gov’t v. Hotels.com, L.P., 590 F.3d 381, 389 (6th Cir. 2009).

Under Local Rule 7.4(a), to prevail on a motion for reconsideration, the movant must “demonstrate a palpable defect by which the Court and the parties have been misled” and that “a different disposition of the case will result from the correction” of the defect. W.D. Mich. LCivR 7.4(a); *see, e.g., Bray v. Dog Star Ranch, Inc.*, No. 1:08-CV-1005, 2010 WL 1418429, at *1 (W.D. Mich. Apr. 7, 2010); *Boussum v. Scutt*, No. 09-CV-12929, 2009 WL 5166194, at *1 (E.D. Mich. Dec. 21, 2009).

In reconsidering Defendants’ Motion to Dismiss, the Court must accept the allegations in Dorn’s complaint as true, and construe the complaint in his favor. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint should not be dismissed if it presents “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. A complaint satisfies the plausibility standard when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

STATEMENT OF FACTS

For this motion for reconsideration, Plaintiff will rely upon the statement of facts contained in Plaintiff's Brief in Response to Defendants' Motion to Dismiss ("Pl.'s Response"). The additional procedural facts are as follows:

Plaintiff filed his Complaint on April 2, 2015. Compl., PageID.1-22. Plaintiff filed a First Amended Complaint on May 27, 2015. First Am. Compl., PageID.75-96. On June 8, 2015, Defendants MDOC, Pandya, Finco, Heyns and Schuette filed a motion to dismiss and supporting brief. Br. in Support of Defs.' Mot. to Dismiss ("Defs.' Brief"), PageID.101-126. Two weeks later, Defendant Stieve filed a motion to dismiss and supporting brief making nearly all of the same arguments. Def. Stieve's Mot. to Dismiss, PageID.128-129; Br. in Support of Def. Stieve's Mot. to Dismiss ("Def. Stieve's Brief"), PageID.130-153. Collectively, Defendants argued, *inter alia*, that the MDOC and Pandya, Finco, Heyns, and Stieve, while acting in their official capacities, are entitled to sovereign immunity for claims under both the Rehabilitation Act and the Americans with Disabilities Act (ADA). Defs.' Brief, PageID.109-113. On July 6, 2015, Plaintiff filed a brief in response to the motion to dismiss. Pl.'s Response, PageID.154-180. Defendants filed a reply brief on July 25, 2015. Defs.' Reply to Pl.'s Resp. in Opp. to Motion to Dismiss, PageID.181-191. On June 6, 2017, the Court issued its opinion and order dismissing the ADA and Rehabilitation Act claims based on the state's assertion of sovereign immunity. Opinion on Def.'s Mot. to Dismiss ("Opinion"), PageID.193-214.

ARGUMENT

The opinion of this Court contains three errors that merit reconsideration. Each of these errors constitutes a "palpable defect" the correction of which will alter the disposition of the case and avoid a manifest injustice. Plaintiff respectfully requests that the Court reconsider its

decisions on these issues and reinstate his Rehabilitation Act and ADA claims for the reasons set forth below.

I. By Accepting Federal Financial Assistance, the State Waives Sovereign Immunity for Claims Under the Rehabilitation Act.

The Court erred when it held that Defendants are entitled to sovereign immunity for claims under the Rehabilitation Act. “It is settled that states waive their Eleventh Amendment immunity when they accept federal funds.” *Tanney v. Boles*, 400 F. Supp. 2d 1027, 1047 (E.D. Mich. 2005) (citing *Gean v. Hattaway*, 330 F.3d 758, 775 (6th Cir. 2003), and *Nihiser v. Ohio Envtl. Protection Agency*, 269 F.3d 626, 628 (6th Cir. 2001)). In *Nihiser v. Ohio Envtl. Protection Agency*, the Sixth Circuit described the Rehabilitation Act’s “long history of scrutiny under the Eleventh Amendment[,]” the U.S. Supreme Court’s rejection of arguments that the original text had adequately manifested an intent to condition participation in the federally funded programs upon waiver of sovereign immunity, and the subsequent amendments adopted by Congress expressly to establish such a waiver. *Nihiser*, 269 F.3d at 628 (citing 42 U.S.C. § 2000d-7 (“A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suits in Federal court for a violation of section 504 of the Rehabilitation Act of 1973.”)). Based on those amendments, the Sixth Circuit concluded that “a plaintiff may sue a State under Section 504 of the Rehabilitation Act.” *Nihiser*, 269 F.3d at 628. In a subsequent opinion discussing its holding in *Nihiser*, the Sixth Circuit stated that Ohio’s acceptance of federal funds had “unambiguously waived Eleventh Amendment immunity against Rehabilitation Act claims.” *Carten v. Kent State Univ.*, 282 F.3d 391, 398 (6th Cir. 2002) (holding that plaintiff’s Rehabilitation Act claims against state actors in their official capacities was not barred). Therefore, waiver of sovereign immunity through the acceptance of federal financial assistance is well-established and controlling law in the Sixth Circuit.

In its opinion on the motion to dismiss, the Court did not address the fact that Plaintiff alleged MDOC was a recipient of federal funds or that, as a result, the Defendants had waived sovereign immunity for claims under the Rehabilitation Act. Although this Court correctly stated that “Eleventh Amendment immunity is not absolute” and that waiver of sovereign immunity creates one of the circumstances under which an individual can sue a state, the Court did not contemplate that the state could waive sovereign immunity through conduct other than direct consent to a particular suit or class of suits. Opinion, PageID.198 (“The State has not consented to Dorn’s suit, so it has not waived sovereign immunity.”)

The waiver issue was further muddled by Defendant’s argument that claims under the Rehabilitation Act “substantively mirror” those brought under the Americans with Disabilities Act. Defs.’ Brief, PageID.109 (citing *Roetter v. Mich. Dep’t of Corr.*, 456 Fed. Appx. 566, 569 (6th Cir. 2012), *Doe v. Salvation Army in the U.S.*, 531 F.3d 355, 357 (6th Cir. 2008), and *McPherson v. Mich. High Sch. Athletic Ass’n*, 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*)). While true that claims under the Rehabilitation Act and the Americans with Disabilities Act are substantively similar, Defendants misapplied these statements to the issue of sovereign immunity. *See, e.g., Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 455 (5th Cir. 2005) (declining to decide ADA sovereign immunity question since Rehabilitation Act claim was nearly identical, was not defeated by sovereign immunity, and would go forward regardless). Sovereign immunity is not part of the “substantive claims” under those statutes and the issue of waiver of sovereign immunity for claims under the Rehabilitation Act is not addressed by the Sixth Circuit in any of the cases cited by the Defendants. As *Nihiser* and *Carten* make clear, the issue of sovereign immunity is assessed very differently under the Rehabilitation Act and the ADA. The ADA does not purport to abrogate sovereign immunity through a waiver based on the

receipt of federal funds, but the Rehabilitation Act does precisely that. *Compare* 29 U.S.C. § 794(a) (hinging liability on receipt of federal financial assistance) *with* 42 U.S.C. § 12112(a).

The court's dismissal of the Rehabilitation Act claim is a "palpable defect" the correction of which will alter the disposition of this case. Plaintiff has properly alleged Defendant MDOC's receipt of federal financial assistance (First Am. Compl. ¶63, PageID.92), and sovereign immunity is therefore not a valid defense to a claim under the Rehabilitation Act. The misapplication of sovereign immunity for the Rehabilitation Act claim has resulted in the dismissal of this entire claim from the lawsuit, a manifest injustice if allowed to stand. Opinion, PageID.206. Moreover, the standard by which a Rehabilitation Act claim of disability discrimination is assessed is very different than the standard for a constitutional violation of equal protection, which is the standard that will be applied under the ADA should the Court reinstate that claim. (*See* Section II, *infra.*) By correcting this defect now and reinstating Plaintiff's Rehabilitation Act claim, the Court will affect the disposition of this motion, the course of the litigation, and likely the ultimate disposition of the case.

II. Defendants Are Not Entitled To Sovereign Immunity With Respect to the ADA Claim

A. Plaintiff Has Alleged Conduct That Constitutes an Actual Violation of the Equal Protection Clause, Which Is Sufficient to Abrogate Sovereign Immunity Under the ADA.

The Court erred when it concluded that Plaintiff had failed to plead conduct amounting to an actual violation of the Equal Protection Clause of the Fourteenth Amendment and that, as a result, Defendants were entitled to sovereign immunity for claims under the ADA. Abrogation of sovereign immunity under Title II of the ADA is not limited to claims asserting an actual violation of the Due Process Clause, but instead may be staked to any actual violation of the Fourteenth Amendment. In *U.S. v. Georgia*, the Supreme Court stated that "insofar as Title II

[of the ADA] creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” *U.S. v. Georgia*, 546 U.S. 151, 159 (2006).

Though *Georgia* was adjudicating a claim asserting a violation of the Eighth Amendment as incorporated under the Due Process Clause of the Fourteenth Amendment, the parameters of valid abrogation set by the Court were in no way confined to that context. *Id.* (identifying actual constitutional violations “under either the Eighth Amendment or some other constitutional provision” as valid grounds for abrogation of sovereign immunity under Title II of the ADA); *see also id.* at 160-61 (Stevens, concurring) (“[O]ur opinion does not suggest that this [the Eighth Amendment] is the only constitutional right applicable in the prison context and therefore relevant to the abrogation issue.”). On remand in *Georgia*, the district court was instructed to “determine in the first instance, on a claim-by-claim basis, which aspects of the State’s alleged conduct violated Title II; (2) to what extent such misconduct also violated *the Fourteenth Amendment*; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress’s purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.” *Id.* at 160 (Scalia, majority opinion) (emphasis added); *see also Mingus v. Butler*, 591 F.3d 474, 482 (6th Cir. 2010) (holding that Georgia’s three-part test for abrogation under the ADA is required). Under the third part of that test, one reason abrogation might be “nevertheless valid” is conduct giving rise to an actual violation of other constitutional provisions. *See Georgia*, 546 U.S. at 161 (Stevens, concurring).

Unfortunately, Defendants once again led the Court astray by citing a case that does not properly articulate or apply controlling Sixth Circuit law. Defs.’ Brief, PageID.111 (citing *Babcock v. Michigan*, No. 12-CV-13010, 2014 WL 2440065 (E.D. Mich. May 30, 2014)). In

Babcock, the court decided that “[b]ecause the disabled are not a suspect class for equal protection purposes, Plaintiff must identify a due process violation” in order to state an actual constitutional violation to which a valid abrogation of sovereign immunity under the ADA could be staked. *See Babcock*, 2014 WL 2440065, at *3 (citing to *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 811 (6th Cir.2002) (*Popovich II*)).

The Defendants reliance on *Babcock* is misplaced for multiple reasons. First, *Popovich II* arguably was abrogated by the U.S. Supreme Court in *Georgia*. 546 U.S. at 154; *see also Mingus*, 591 F.3d at 482 (noting the district court’s holding that *Georgia* abrogated *Popovich II*). Second, *Babcock* wrongly assumes that a violation of equal protection requires the plaintiff to be a member of a “suspect class,” with the attendant application of heightened scrutiny, and that such a violation could not be predicated instead on the failure to survive rational basis scrutiny. *See Mingus*, 591 F.3d at 483 (holding that plaintiff may validly abrogate sovereign immunity via an equal protection violation predicated on the lack of a rational basis for the defendants actions); *see also Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (noting that Title II seeks to enforce a prohibition on “irrational” disability discrimination (as well as other constitutional guarantees that are subject to more searching judicial scrutiny)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (holding zoning ordinance was irrational and a violation of equal protection after rejecting suspect class status for those with mental disabilities). Third, the Defendants do not consider the possibility that Dorn could identify a subset of disabled individuals—such as people living with HIV—who do constitute a suspect class and are therefore entitled to heightened scrutiny in an equal protection analysis. *See, e.g., Rose, Henry, The Poor as a Suspect Class under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407 (2010).

Because this Court was misled into believing that a valid abrogation of sovereign immunity must be predicated on a violation of due process, the Court did not analyze Plaintiff's ADA claim as a potential violation of equal protection. *See* Opinion, PageID.199-206 (analyzing Plaintiff's ADA claim as one sounding in due process, not in equal protection). Not only did Plaintiff allege in his complaint a violation of the ADA that clearly sounds in equal protection, but Plaintiff also argued the claim as one of discrimination in his response brief. First Am. Compl. ¶¶ 25, 27, 29, 51-55, PageID.83, 84, 90-91; Pl.'s Response, PageID.176 ("Defendants have violated the ADA and the Rehabilitation Act, as well as violated Dorn's rights under the Fourteenth Amendment, and thus, Defendants are liable for money damages."). Furthermore, the Defendants understood that Plaintiff's claim sounded in equal protection ("[H]e claims that he was treated differently than his sexual partner ... due solely to his HIV status."), and they stated as much in their opening brief. Defs.' Brief, PageID.111 ("The plaintiff's claim sounds in equal protection."). When properly analyzed as a potential violation of equal protection,¹ the Plaintiff's ADA claim clearly is not subject to dismissal based on sovereign immunity.

The determination that Plaintiff's ADA claim is subject to dismissal based on sovereign immunity is a "palpable defect." Like the error with respect to the dismissal of the Rehabilitation Act claim based on sovereign immunity, this defect led to the dismissal of an entire claim. Opinion, PageID.199 Correction of this defect will alter the disposition of the motion to dismiss, the course of the litigation, and the ultimate resolution of the case. To avoid

¹ Defendants' contention that Plaintiff has failed to allege a violation of equal protection because Plaintiff and his sexual partner were not "similarly situated" based on the existence of the very disability upon which the Plaintiff's ADA claim is predicated (HIV) makes no sense. It would vitiate every claim of disability discrimination if such claims could be defeated based on the fact that the plaintiff has a disability that those in the comparator class do not. Furthermore, it is not enough to say that the Policy Directive requires differential treatment of those living with HIV, because at the heart of the Plaintiff's claim is the contention that the Policy Directive and the statute upon which it is based are discriminatory.

the manifest injustice that would result from dismissal of the ADA claim, Plaintiff respectfully requests that his ADA claim be reinstated and that he be permitted to pursue this claim based on the legal theory that the policies and conduct of the Defendants constitutes an actual violation of equal protection.

B. Defendants' Enforcement of the Policy Directive Is Sufficient to Establish the Actual Violation of Due Process Necessary to Abrogate Sovereign Immunity Under the ADA.

The Court also erred when it concluded that Plaintiff had failed to plead conduct amounting to an actual violation of the Due Process Clause of the Fourteenth Amendment and that, as a result, Defendants were entitled to sovereign immunity for claims under the ADA. In the opinion, the Court addresses the substance of the due process claim in the context of whether Plaintiff has alleged an actual constitutional violation sufficient to establish sovereign immunity. Opinion, PageID.199-206. While Plaintiff disagrees with some of the Court's characterization of the relevant law regarding whether an "atypical and significant hardship" was imposed by Dorn's placement in administrative segregation—as well as the Court's assessment of the factual allegations in light of that case law—the Court ultimately reaches the conclusion that Plaintiff "has pleaded facts that permit a plausible inference of an atypical and significant hardship." Opinion, PageID.204. Recognizing that the liberty interest has been sufficiently pled, the Court then turns to the question of whether Plaintiff was afforded sufficient protection of that liberty interest. Opinion, PageID.204. It is the Court's analysis of this aspect of the ADA claim sounding in due process that merits reconsideration.

The Court has misconstrued the gravamen of Plaintiff's due process claim—which is that the Policy Directive itself created a violation of due process. There are certainly aspects of the manner in which the Policy Directive was implemented by the individual defendants that

contributed to the due process violation, but the heart of Plaintiff's claim is that the Policy Directive itself denies an HIV-positive individual due process. First Am. Compl. at ¶¶ 40-42, 70-73, PageID.87-88, PageID.93-94; Pl.'s Response, PageID.175-176 . The due process problem with the Policy Directive is the very low bar for administrative segregation created by the "could transmit HIV" standard, combined with the explicit presumption that any behavior involving "actual or attempted sexual penetration" can transmit HIV. First Am. Compl. at ¶¶ 40-42, 70-73, PageID.87-88, PageID.93-94; Pl.'s Response, PageID.160. Until this lawsuit, Plaintiff was not given any meaningful ability to rebut that presumption or to challenge the fundamental unfairness of the Policy Directive (or the statute behind it).

Now, within the context of the lawsuit, Plaintiff is again being denied the opportunity to challenge either the substance of the Policy Directive or the manner in which it was applied to him. The Court's description of the applicable MDOC policy is missing the very component Plaintiff alleges created the violation of due process. Opinion, PageID.200. The opinion states that "MDOC policy calls for administrative segregation when a prisoner satisfies two conditions: (1) HIV infection and (2) guilty of sexual conduct." Opinion, PageID.200 That is not an accurate statement of the dictates of the policy, because it is missing any description of the required inquiry into whether the alleged misconduct "could transmit HIV." First Am. Compl. ¶ 40, PageID.87-88 (quoting Policy Directive). Whether that standard satisfies due process, whether Plaintiff was given the opportunity to rebut the presumption that the sexual conduct alleged could transmit HIV, and whether in fact there was a significant risk of HIV transmission as a result of the alleged conduct are absolutely central to Plaintiff's case. First Am. Compl. at ¶¶ 40-49, PageID.87-90; Pl.'s Response, PageID.170, 175-176. Like the individual defendants who determined Plaintiff would be reclassified to administrative segregation without even

considering whether the alleged conduct *could result in the transmission of HIV*, the Court is denying Plaintiff meaningful review of the Defendants' purported determination regarding that question or the Policy Directive underlying it.

As with the other two issues addressed by this brief, the Court's holding with respect to whether Plaintiff can establish an actual violation of due process and thereby validly abrogate sovereign immunity creates a "palpable defect" in its ruling. Dismissal of the ADA claim on these grounds will also affect the contours of the litigation as it moves forward and the ultimate disposition of the case. To avoid this manifest injustice, Plaintiff respectfully requests that the ADA claim be reinstated and that he be permitted to pursue this claim based on the theory that the policies and conduct of the Defendants constitutes an actual violation of due process.

III. The Issues Raised in This Motion for Reconsideration Are Appropriate to Certify for Interlocutory Appeal.

If the Court denies this motion for reconsideration with respect to the Rehabilitation Act claim, Plaintiff respectfully requests that the Court certify that issue for interlocutory appeal. If the Court grants the request for interlocutory appeal with respect to the Rehabilitation Act claim, Plaintiff requests that any other issue decided in the opinion and order regarding the motion to dismiss that will affect the contours of the litigation be certified for interlocutory appeal alongside the Rehabilitation Act issue.

The Sixth Circuit "in its discretion may permit an appeal to be taken from an order certified for interlocutory appeal if (1) the order involves a controlling question of law, (2) a substantial ground for difference of opinion exists regarding the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation." *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002). In this instance, all three of the issues raised by this motion for reconsideration meet the first two prongs of the standard—they involve

a controlling question of law (in fact, one that resulted in the dismissal of a claim) and there exists substantial ground for difference of opinion regarding the correctness of those decisions. Plaintiff has explained in detail above the reasons he believes the Court's rulings are in error on these subjects.

Keeping in mind, however, that “[a]n interlocutory appeal should only be granted in exceptional circumstances and should be used sparingly to avoid protracted and expensive litigation[.]” *Cardwell v. Chesapeake & Ohio R.R. Co.*, 504 F.2d 444, 446 (6th Cir.1974), Plaintiff is seeking certification only if the Court denies his motion for reconsideration on the Rehabilitation Act claim. Of the issues presented in this motion for reconsideration, denial of Plaintiff's request with respect to the Rehabilitation Act is most likely to result in protracted and expensive litigation, because the parties would proceed through discovery and on to trial without the claim on which Plaintiff has the greatest likelihood of success on the merits. And because the law is very clear on the sovereign immunity issue with respect to the Rehabilitation Act (*see* Section I, *supra*), Plaintiff would stand the best chance of success on appeal after judgment with respect to the dismissal of this claim on the motion to dismiss. Success on appeal with respect to this issue would, at that late date, send the parties back into discovery and toward a new trial on this one issue. To avoid this result, and advance the most expedient ultimate termination of the litigation, it makes sense to certify this issue for immediate interlocutory appeal.

Though Plaintiff strongly believes the other issues raised by this motion for reconsideration enjoy a strong likelihood of success on appeal, discovery on those claims likely would be subsumed within discovery on the Rehabilitation Act claim, and success on the Rehabilitation Act claim likely would provide the Plaintiff with most—if not all—of the relief he is seeking. For those reasons, Plaintiff is not seeking certification on any other issues or claims.

However, should the Court choose to certify the Rehabilitation Act issue for interlocutory appeal, Plaintiff believes it would make sense to include in that certification order any portions of the Court's decision on the motion to dismiss that would substantially shape the contours of the litigation upon remand, including the two ADA claim issues raised in this motion for reconsideration. In the interests of judicial economy, it makes most sense to resolve and clarify the issues for trial in just one trip to the Sixth Circuit.

CONCLUSION

For the reasons set forth above, Dorn respectfully requests that this Court reinstate his claims under the Rehabilitation Act and ADA. If the Court denies the motion for reconsideration on the Rehabilitation Act claim, Plaintiff respectfully requests that the issue be certified for interlocutory appeal.

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Respectfully Submitted,

/s/ Scott A. Schoettes

Chris E. Davis (P52159)
Mark A. Cody (P42695)
MICHIGAN PROTECTION AND
ADVOCACY SERVICE, INC.
4095 Legacy Parkway, Suite 500
Lansing, Michigan 48911-4263
Phone: (517) 487-1755
E-Mail: cdavis@mpas.org
E-Mail: mcody@mpas.org

Scott A. Schoettes
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
105 West Adams, Suite 2600
Chicago, IL 60603-6208
Phone: (312) 663-4413
E-Mail: sschoettes@lambdalegal.org

Richard Saenz*
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall St., 19th Floor
New York, NY 10005
Phone: (212) 809-8585
E-Mail: rsaenz@lambdalegal.org

*Application for admission pending

Attorneys for Plaintiff