DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO City and County Building 1437 Bannock St., Room 203 Denver, CO 80202	DATE FILED: August 11, 2020 9:17 AM CASE NUMBER: 2019CV34492
Plaintiffs: KANDACE RAVEN, JANE GALLENTINE, TALIYAH MURPHY, AMBER MILLER, MEGAN GULLEY, LAVENYA KARPIERZ and CUPCAKE RIVERS, Plaintiffs, as representatives of themselves and all others similarly situated in this class action, **v.** **Defendants:** JARED POLIS, Governor of Colorado, *et al*	**▲COURT USE ONLY▲** Case Number: 19CV34492 Division: **CV** Courtroom: **203**

ORDER RE: DEFENDANTS' JOINT PARTIAL MOTION TO DISMISS

THIS MATTER comes now before the Court on Defendants The Colorado Department of Corrections (CDOC), Dean Williams, Travis Trani, Randolph Maul, MD., Sarah Butler, M.D., William Frost, M.D., and Darren Lish's, M.D. ("Defendants") Joint Partial Motion to Dismiss filed on March 30, 2020. Defendant Jared Polis, Governor of Colorado, joins Defendants in their Partial Motion to Dismiss as indicated in his Motion to Dismiss filed on March 30, 2020. Defendants move for partial dismissal of Plaintiffs' Amended Complaint pursuant to C.R.C.P. Rules 12(b)(1) and (5). Plaintiffs Kandice Raven, Jane Gallentine, Taliyah Murphy, Amber Miller, Megan Gulley, Lavenya Karpierz, and Cupcake Rivers, as representatives of themselves and all others similarly situated in this class action ("Plaintiffs") filed their Response to Defendant's Partial Motion to Dismiss on June 3, 2020. Defendants filed their Reply on July 15, 2020. The Court has reviewed the Motion, Response, Reply, and applicable law. For the following reasons, Defendants' Partial Motion to Dismiss is hereby GRANTED IN PART and DENIED IN PART.

BACKGROUND

This class action lawsuit concerns the treatment of transgender women held in custody within the CDOC. Plaintiffs are transgender women who are, have been, or will be confined at the CDOC. Plaintiffs claim to have been, to be, or will be discriminated against on the basis of their status as transgender women. Plaintiffs claim to be subjected to medical neglect and unreasonable risks of violence in the CDOC's care. Plaintiffs sued the CDOC and seven executive branch officials, including Governor Jared Polis and Executive Director Dean Williams, seeking declaratory and injunctive relief as well as monetary damages.

First, Defendants ask the Court to dismiss Plaintiffs' third and fourth claims for monetary damages, generally arguing 1) there is no implied cause of action under the Colorado Constitution, and 2) constitutional claims against Defendants in their individual capacities should be dismissed based on the qualified immunity doctrine. Second, Defendants argue Plaintiffs' third and fourth claims be dismissed in their entirety against Drs. Lish and Frost because they are former employees of the CDOC and cannot currently be sued as State officials. Third, Defendants argue Plaintiffs' first and second claims for relief brought under the Colorado Anti-Discrimination Act should be dismissed because a prison is not defined as a place of public accommodation. Lastly, Defendants argue the Court lacks subject matter jurisdiction because Plaintiffs did not submit a written notice of claims as required by C.R.S. § 24-10-109.

STANDARD OF REVIEW

"Motions to dismiss for failure to state a claim are disfavored and should not be granted if relief is available under any theory of law." *Colorado Ethics Watch v. Senate Majority Fund, LLC,* 269 P.3d 1248, 1253 (Colo. 2012) (en banc). A motion to dismiss under Rule 12(b)(5) serves merely to "test the formal sufficiency of the complaint." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). Dismissal is appropriate only where the factual allegations in the complaint, taken as true and viewed in the light most favorable to the plaintiff, do not present a right to relief above the speculative level or provide plausible grounds for relief. *See Warne v. Hall*, 373 P.3d 588 (Colo. 2016) (adopting the *Twombly/Iqbal* plausibility standard). "A complaint should not be dismissed for failure to state a claim so long as the plaintiff is entitled to some relief upon any theory of the law." *Walker v. Van Laningham*, 148 P.3d 391, 394 (Colo. App. 2006). The district court accepts all of the factual allegations in the complaint as true and views those allegations in the light most favorable to the plaintiff. *Prospect Dev. Co., Inc. v. Holland & Knight, LLP,* 2018 COA 107, ¶ 10, 433 P.3d 146, 149, cert. denied, No. 18SC619, 2019 WL 284434 (Colo. Jan. 22, 2019).

ANALYSIS

I. Plaintiffs' third and fourth claims are dismissed to the extent they seek monetary damages because no implied cause of action is identified under the Colorado Constitution.

Defendants argue Plaintiffs' third and fourth claims under the Colorado Constitution, § 29 (sex discrimination) and article II, § 20 (cruel and unusual punishment) should be dismissed to the extent they seek monetary damages because there is no implied action under the Colorado Constitution. Defendants argue that instead, such claims must be properly raised under 42. U.S.C. §1983. Plaintiffs argue that 42 U.S.C. §1983 does not provide an adequate remedy for Plaintiffs' claims because 1) Plaintiffs seek to sue the State of Colorado as well as State Officials in their official capacities responsible for violating the Colorado Constitution, while 42 U.S.C. §1983 only allows injunctive relief while prohibiting damages against officials in their official capacities for federal constitutional violations; 2) the federal prison litigation reform act prohibits damages under §1983 for a wide range of the injuries Plaintiffs have suffered; 3) the equality of the sexes provision in the Colorado Constitution provides for greater protections than the equal protection clause in the federal constitution; and 4) the Colorado Constitution's cruel and unusual punishment clause provides for greater protection than the eighth amendment.

A. An implied cause of action to enforce the provisions of the Colorado Constitution fails as a matter of law when a plaintiff has an existing and adequate remedy.

"The absence of a statutory relief for a constitutional violation does not, by itself, give rise to an implied damage remedy." *Bd. of Cty. Comm'rs of Douglas Cty. v. Sundheim,* 926 P.2d 545, 549 (Colo. 1996). The emergence of "special factors counselling hesitation" foreclosing the *Bivens* remedy has grown increasingly important and indicates a judicial willingness to defer the creation of new damage remedies to Congress. *See Schweiker v. Chilicky,* 487 U.S. 412, 423, 108 S. Ct. 2460, 2467, 101 L. Ed. 2d 370 (1988); *Bush v. Lucas,* 462 U.S. 367, 390, 103 S. Ct. 2404, 2417, 76 L. Ed. 2d 648 (1983). This is especially true when there are other, more appropriate, remedies available or when Congress has chosen to limit or deny a remedy altogether. *Sundheim,* 926 P.2d at 552.

Although the Court may recognize an implied cause of action, the Court declines, absent an identified implied cause of action by the legislature or by the Supreme Court of Colorado, to find one here. The Court notes that the Supreme Court of Colorado is in a more suitable position to determine the existence of an implied cause of action.

Colorado courts generally hold that no implied cause of action is necessary under the Colorado Constitution when other adequate remedies exist. Following the Board of County Commissioners' denial of property owners' application for a permit to board and train hunter horses commercially, the plaintiffs in *Sundheim* brought action alleging § 1983 violations and damages under the Colorado Constitution against the board, board members, the county's director of planning and community development, and adjacent property owners. *Id.* at 547.

The plaintiffs in *Sundheim* asked the Supreme Court of Colorado to recognize an implied cause of action to effectuate their due process rights under the Colorado Constitution. Interpreting United States Supreme Court cases, the Court found a judicial preference to defer the creation of new damage remedies to Congress. *Id.* at 552. Continuing, the Court found this especially true when Congress has chosen to limit or deny a remedy altogether. *Id.* The Court then concluded that because existing remedies § 1983 and the Colorado Rules of Civil Procedure properly balanced the needs of citizens, the State, and the courts, an implied remedy would be unnecessary. *Id.* at 553.

The Colorado Court of Appeals in *Rodgers v. Board of Cty. Comm'rs of Summit Cty.* reiterated the principle that a direct claim for damages under the Colorado Constitution will only lie where no other adequate remedy exists. *Rodgers v. Bd. Of Cty. Comm'rs of Summit Cty.,* 363 P.3d 713, 716 (Colo. App. 2013). Following *Sundheim* and *Rodgers,* the Court finds no implied cause of action exists under the Colorado Constitution for Plaintiffs' third and fourth claims. Although the plaintiffs in *Sundheim* brought claims under §1983 and the Colorado Constitution, the Court follows *Sundheim* and *Rodgers* holdings that a claim for damages under the Colorado Constitution will only lie when *no other* adequate remedy exists. The Court finds an *adequate* remedy, though perhaps not an *equal* remedy, exists under §1983.

B. Although Colorado's Equal Rights Amendment requires closer scrutiny, it provides no greater protections than the equal protection clause.

Colorado's Equal Rights Amendment (ERA) requires that legislative classifications based exclusively on sexual status receive the closest judicial scrutiny, compared to the Fourteenth Amendment Equal Protection Clause's intermediate scrutiny standard. *See People v. Green,* 183 Colo. 25, 28, 514 P.2d 769, 770 (1973)("[L]egislative classifications based solely on sexual status must receive the closest judicial scrutiny"). However, Colorado law is unclear as to how these greater protections relate to an implied cause of action analysis under the Colorado Constitution. The only Colorado law the Court finds is if §1983 provides an adequate remedy, there is no need for the Court to create an implied cause of action under the relevant provision.

C. Colorado's Cruel and Unusual Punishment Clause, Article II, § 20, provides no greater protections than the Eighth Amendment.

Article II, § 20 of the Colorado Constitution is identical to the Eighth Amendment. While Colorado courts generally accept the United States Supreme Court's approach to proportionality challenges, Colorado law demands a more nuanced analysis under § 20. However, neither Plaintiffs nor the Colorado Supreme Court in *Wells-Yates v. People* demonstrate that a more nuanced analysis results in greater protections than the Eighth Amendment. Rather, the Court in *Wells-Yates* merely explains that Colorado courts have distilled the abbreviated proportionality review into two principles. Moreover, Plaintiffs move on from this discussion after identifying the distinction and argue that it is the Court's responsibility to resolve questions of Colorado public policy, seemingly conceding that §20 really does not offer greater protections, but only demands a different analysis.

Regardless of the subtle distinctions in Colorado's approach under §20, Colorado courts appear to apply the same standard and protections as required by the Eighth Amendment. For example, the Colorado Court of Appeals in *People v. Cardenas* discussed §20 and the Eighth Amendment interchangeably with respect to the constitutionality of a restitution order as an excessive fine. *See People v. Cardenas,* 262 P.3d 913, 915 (Colo. App. 2011). The Colorado Court of Appeals in *People v. Stafford* also discussed the two provisions interchangeably, and never once distinguished Colorado's protections from that of the Eighth Amendment. *People v. Stafford,* 93 P.3d 572, 574 (Colo. App. 2004). Thus, §20 does not likely provide any greater protections than its federal counterpart.

D. Senate Bill 20-217

Furthermore, the Court is reluctant to recognize an implied cause of action under the Colorado Constitution against correctional officers because the legislature recently passed a bill creating a civil action for deprivation of rights by "peace officers" which does not include correctional officials. Senate Bill 20-217, signed on June 19, 2020, creates a civil action for deprivation of rights by a peace officer who,

> employed by a local government who, under color of law, subjects or causes to be subjected, including failing to intervene, any other person to the deprivation of any individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution, is liable to the injured party for legal or equitable relief or any other appropriate relief.

CO LEGIS 110 (2020), 2020 Colo. Legis. Serv. Ch. 110 (S.B. 20-217). The bill defines "peace officer" as,

> any person employed by a political subdivision of the state required to be certified by the P.O.S.T. board pursuant to section 16–2.5–102, a Colorado state patrol officer as described in section 16–2.5–114, and any noncertified deputy sheriff as described in section 16–2.5–103(2).

CO LEGIS 110 (2020), 2020 Colo. Legis. Serv. Ch. 110 (S.B. 20-217). CR.S. § 16-2.5-102 does not include CDOC staff to be certified by the P.O.S.T. The legislature chose not to include correctional officers in the definition of peace officers, thereby failing to create a recognized civil action against correctional officers for deprivation of rights. The Court will not recognize an implied cause of action that has not been recognized by Colorado courts and appears to be against the intent of the legislature.

II. The Colorado Governmental Immunities Act bars Plaintiffs' third and fourth claims sounding in tort.

Defendants argue this Court lacks subject matter jurisdiction over Plaintiffs' third and fourth claims for relief to the extent they seek monetary damages because they are barred by the Colorado Governmental Immunities Act (CGIA). Plaintiffs argue that the CGIA only applies to traditional torts, and therefore does not bar Plaintiffs' claims because they are based on the Colorado Constitution, or "constitutional torts." Plaintiffs argue that Colorado courts have recognized that the limitations in the CGIA do not apply to actions based on the Colorado Constitution. The CGIA states,

> A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section.

C.R.S. § 24-10-106. "Because the complaint's form is not determinative when evaluating whether a claim lies in tort or could lie in tort, we must examine the nature of the alleged injury and the relief the plaintiff seeks." *Casey v. Colorado Higher Educ. Ins. Benefits All. Tr.,* 2012 COA 134, ¶ 16, 310 P.3d 196, 201, as modified on denial of reh'g (Sept. 13, 2012). "When the injury arises either out of conduct that is tortious in nature or out of the breach of a duty recognized in tort law, and when the relief seeks to compensate the plaintiff for that injury, the claim likely lies in tort or could lie in tort for purposes of the CGIA." *Robinson v. Colorado State Lottery Div.,* 179 P.3d 998, 1003 (Colo. 2008). "[C]laims that could arise in both tort and contract are barred by the CGIA, while claims arising solely in contract are not subject to the CGIA." *Id.* at 1004. The Second Restatement of Torts distinguishes the purposes between a contractual claim and a tort claim.

> While the law of contracts gives to a party to a contract as damages for its breach an amount equal to the benefit he would have received had the contract been performed (see Restatement, Second, Contracts, Chapter 16 (Tent.Draft)), the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort. The law is able to do this only in varying degrees dependent upon the

> nature of the harm. Thus when the plaintiff has been harmed in body or mind, money damages are no equivalent but are given to compensate the plaintiff for the pain or distress or for the deterioration of the bodily structure.

Restatement (Second) of Torts § 901 (1979). The Court finds that Plaintiffs' third and fourth claims are barred by the CGIA because they may sound in tort. Plaintiffs' third and fourth claims seek relief from emotional distress and physical pain for Defendants' "reckless disregard to the serious medical and mental health needs of the class members and have subjected them to serious harms and serious risk of harm." Am. Compl. at ¶¶110, 116. Plaintiffs' claims sound in traditional tort and are not a breach of contract as argued by Plaintiffs. A claim sounding in tort provides damages for breach of duty, not because of a breach of contract. Plaintiffs' allegations against Defendants' for their treatment in state prison facilities resemble more a breach of duty of care than a breach of contract.

Moreover, the language Plaintiffs use in their third and fourth claim closely resemble language of traditional torts. For example, a tort for outrageous conduct causing severe emotional distress includes the following factors: 1) defendant engaged in extreme and outrageous conduct; 2) defendant engaged in the conduct recklessly or with the intent of causing the plaintiff severe emotional distress; and 3) the plaintiff incurred severe emotional conduct which was caused by the defendant's conduct. *Culpepper v. Pearl St. Bldg., Inc.,* 877 P.2d 877, 882 (Colo. 1994). Because Plaintiffs' third and fourth claims request monetary damages for emotional distress and physical harm for Defendants' conduct, the Court finds Plaintiffs' third and fourth claim may sound in tort and therefore are barred by the CGIA.

III. The Court declines to address Defendants' alternative argument that Defendants should be dismissed in their individual capacities based on the qualified immunity doctrine.

Defendants argue that, even if the Court finds an implied cause of action under the Colorado Constitution, Plaintiffs' state constitutional claims should be dismissed against Defendants in their individual capacities based on the qualified immunity doctrine. Whether qualified immunity applies to constitutional torts is an issue of first impression in Colorado. Both parties acknowledge this is an issue of first impression in Colorado and rely on outside jurisdictions to support their arguments. Because the Court has found no implied cause of action, it need not decide the issue of qualified immunity. If the Court has analyzed the implied cause of action incorrectly and the issue is remanded, the Court will hope that any reviewing court will give guidance on the qualified immunity claim.

IV. Plaintiffs' third and fourth claims are dismissed in their entirety against Defendants Drs. Lish and Frost.

Defendants argue Defendants Drs. Lish and Frost should be dismissed because, as former employees of CDOC, Drs. Lish and Frost have no official capacity and cannot be sued as State officials. Plaintiffs do not respond to Defendants' arguments regarding the dismissal of Drs. Lish and Frost. When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party. C.R.C.P. Rule 25(d)(1). Plaintiffs' Amended Complaint

states Dr. Frost is the former Chief Medical Officer of CDOC, and Dr. Lish is the former Chief of Psychiatry of CDOC. Am. Compl. at ¶¶20-21. Because Plaintiffs acknowledge that both Defendants are no longer employed in their official capacity by the CDOC, Plaintiffs may not bring suit against Drs. Lish or Frost. As required by C.R.C.P. Rule 25, Plaintiffs instead are required to substitute their successors. Accordingly, Plaintiffs' third and fourth claims are hereby DISMISSED in their entirety against Drs. Lish and Frost.

V. Plaintiffs' claims under the Colorado Anti-Discrimination Act (CADA)

A. A prison is a "public accommodation" according to *Pennsylvania Dep't of Corr. v. Yeskey.*

Plaintiffs bring their first and second claims for relief under the Colorado Anti-Discrimination Act (CADA) for discrimination in a place of public accommodation based on sex and transgender status, and discrimination in a place of public accommodation based on disability. Both claims rest on the argument that prisons, for the purposes of CADA, are defined as places of public accommodation and not, as Defendants argue, as public entities.

Part 6 of CADA prohibits discrimination on the basis of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, in places of public accommodation. C.R.S. § 24-34-601(2). At issue in this matter is whether prisons are classified as place of public accommodation and are therefore subject to the restrictions of part 6 of CADA. Part 6 of CADA defines "places of public accommodation" as,

> [A]ny place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor.

C.R.S. § 24-34-601(1). Part 6 of CADA explicitly states "'[p]laces of public accommodation' shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes." C.R.S. § 24-34-601(1). The statutory language itself does not list "prison" explicitly as a public accommodation or an exception, and the Court finds no previous Colorado case law defining prisons either way. The sole guidance provided by Colorado courts is "[w]henever possible, the CADA should be interpreted consistently with the Americans with Disabilities Act (ADA)." *Tesmer v. Colorado High Sch. Activities Ass'n,* 140 P.3d 249, 253 (Colo. App. 2006); *See* Colo. Div. Civil Rights Rule 60.1(A)("The law concerning handicap and/or disability is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act, as Amended, and the Fair Housing Act concerning disability").

"Whether Title II of the Americans with Disabilities Act of 1990 (ADA), which prohibits a 'public entity' from discriminating against a 'qualified individual with a disability' on account of that individual's disability, covers inmates in state prisons" was addressed by the Supreme Court of the United States in *Pennsylvania Dep't of Corr. v. Yeskey*. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 208, 118 S. Ct. 1952, 1953, 141 L. Ed. 2d 215 (1998). The ADA defines "public entity" as any state or local government, any department, agency, special purpose district, or other instrumentality of a State or States or local government, and the National Railroad Passenger Corporation, and any commuter authority. 42 U.S.C.A. § 12131.

In *Yeskey,* respondent, an inmate in a Pennsylvania correctional facility, was refused admission to Pennsylvania's Motivational Boot-Camp for First-Time Offenders because of his medical history. *Yeskey,* 524 U.S. at 208, 118 S. Ct. at 1953, 141 L. Ed. 2d 215 (1998). Respondent filed suit, alleging his exclusion from the Bootcamp violated the ADA. *Id.* The Supreme Court held "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.'" *Id* at 210. The Court based its holding on two threads of rationale.

First, the Court rejected petitioners argument that state prisons are exempt from Title II of the ADA because "state prisons do not provide prisoners with 'benefits' of programs, services, or activities' as those terms are ordinarily understood.'" *Id.* The Court instead reasoned that "modern prisons provide inmates with many recreational 'activities,' medical 'services,' and education and vocational 'programs,' all of which theoretically 'benefit' the prisoners." *Id.* The Court further stated, "The text of the ADA provides no basis for distinguishing these programs, services, and activities from those provided by public entities that are not prisons." *Id.* Second, the Court rejected Petitioners argument that prison inmates where not "eligible" to "participate" in ADA protections because they do not voluntarily seek a benefit from the state but are held in state prisons against their will. The Court reasoned that the words "eligible" and "participate" did not connote voluntariness, but even if they did, not all prison services, programs, and activities are excluded from the ADA because prisoners are free to choose participation, such as the free library.

Absent Colorado case law other than the Colorado Court of Appeals directing courts to interpret CADA consistently with the ADA, the Court follows *Yeskey* and finds that state prisons qualify as "places of public accommodation" under CADA. Even if the Court was not to follow *Yeskey,* the statutory language of C.R.S. § 24-34-601 is sufficiently broad to cover prisons. The statute includes places of public accommodation as "any place offering services, facilities, privileges, advantages, or accommodations to the public," including "any place to eat, drink, sleep, or rest, or any combination thereof." C.R.S. § 24-34-601(1). A state prison unquestionably offers services and facilities to inmates, and certainly provides food, drink, and a place to sleep. Moreover, the legislature listed one exception to the definition of public accommodation — a place that is principally used for religious purposes. The General Assembly did not see fit to include prisons in its very specific and short list of exclusions from the definition of places of public accommodation, leading to the interpretation that the General Assembly did not intend to exclude prisons from the definition. *See Showpiece Homes Corp. v. Assurance Co. of Am.,* 38 P.3d 47, 54 (Colo. 2001), as modified on denial of reh'g (Jan. 11, 2002)(finding that insurance companies and insurance transactions are subject to the broad scope of the Colorado Consumer Protection

Act because the General Assembly did not expressly exclude them from the statutory provisions).

Furthermore, the Court rejects Defendants' argument that a prison is a "public entity" under part eight of CADA. Part 8 of CADA protects groups and individuals from discrimination based on disability. C.R.S. § 24-34-802(1). Part 8 of CADA does not state or imply that prisons are defined as public entities. Nor does Part 8 of CADA define public entities at all, or state that public entities are different from public accommodations. Part 8 of CADA focuses on a discrimination against a certain group of individuals, not on the discriminator.

B. Plaintiffs' Amended Complaint brings claim two on behalf of only those class members who have gender dysphoria.

Next, Defendants move to dismiss Plaintiffs' second claim for relief under CADA to the extent that it includes class members who do not have an identified disability. Plaintiffs' second claim for relief is discrimination in a place of public accommodation based on disability, a violation of the Colorado Anti-Discrimination Act under C.R.S. § 24-34-601(2)(a). Plaintiffs' Amended Complaint limits this claim to only on behalf of all class members who have gender dysphoria. Therefore, Defendants' argument that Plaintiffs' second claim be limited to those members with an identified disability is moot.

C. The Court has subject matter jurisdiction because Defendants submitted a written notice of claims.

Finally, Defendants argue that the Court lacks subject matter jurisdiction over Plaintiffs' CADA claims because Plaintiffs failed to file a notice of claim as required by the CGIA. C.R.S. § 24-10-109(1) states,

> Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment, whether or not by a willful and wanton act or omission, shall file a written notice as provided in this section within one hundred eighty-two days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.

C.R.S. § 24-10-109(1). The notice must contain,

(1) the name and address of the claimant and the name and address of his attorney;
(2) a concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or even complained of;
(3) the name and address of any public employee if involved, if known;
(4) a concise statement of the nature and the extent of the injury claimed to have been suffered;
(5) a statement of the amount of monetary damages that is being requested.

C.R.S. § 24-10-109(2). If the claim is against the state or an employee thereof, the notice shall be filed with the attorney general. If the claim is against any other public entity or an employee therefor, the notice shall be filed with the governing body of the public entity or the attorney representing the public entity. C.R.S. § 24-10-109(3)(a). Relying on the Colorado Supreme Court holding in *Woodsmall v. Regional Transportation District,* Plaintiffs argue they "substantially complied" with the CGIA notice requirements. Plaintiffs' argument is based on two prongs: first, that they substantially complied with the CGIA notice requirements through filings in a separate federal case, *Saunders-Velez v. Colorado Department of Corrections, et al*; and second, substantial compliance through the delivery of 407/708 Confidential Submission for Settlement Purposes Only. *See* Response, Ex. 3.

In *Woodsmall,* the Colorado Supreme Court rejected a standard of strict compliance with the notice requirements of the CGIA and instead only required a standard of substantial compliance. The Court defined "substantial compliance" as requiring a claimant,

> within 180 days of the discovery of an injury, to file a written notice with the public entity and to make a good faith effort to include within the notice, to the extent the claimant is reasonably able to do so, each item or information listed in n section 24–10–109(2). In determining whether a claimant has substantially complied with the notice requirement, a court may consider whether and to what extent the public entity has been adversely affected in its ability to defend against the claim by reason of any omission or error in the notice.

Woodsmall v. Reg'l Transp. Dist., 800 P.2d 63, 69 (Colo. 1990). The Supreme Court in *Mesa County Valley School Dist. No. 51 v. Kelsey* further clarified "written notice," holding

> Because we interpret the term "written notice" in section 24–10–109(1) to mean written notice of a claim, we hold that any documents on which a plaintiff relies to satisfy the requirements of section 24–10–109(1) necessarily must assert a claim by including a request or demand that the defendant public entity or employee pay the plaintiff an award of monetary damages.

Mesa Cty. Valley Sch. Dist. No. 51 v. Kelsey, 8 P.3d 1200, 1204 (Colo. 2000). First, pleadings from a different case in federal court are insufficient to meet the CGIA notice requirements. Settlement documents from a separate matter do not put a government entity on notice of claims in a different matter with different plaintiffs.

> [T]he purposes of the written notice required by section 24–10– 109(1) . . . are to allow a public entity to investigate and remedy dangerous conditions, to settle meritorious claims without incurring the expenses associated with litigation, to make necessary fiscal arrangements to cover potential liability, and to prepare for the defense of claims.

Id. The Court finds that the document titled "407/708 Confidential Submission for Settlement Purposes Only" qualifies as substantial compliance with CGIA notice requirements. First, the document is written. Second, the document identifies the anticipated claimants and their location (presently incarcerated within custody of the

CDOC). Third, with each identified anticipated claimant the document describes a concise statement of the factual basis of the claims, including the dates, place, and circumstances of the acts providing the basis for the claims, including sexual assaults, requests for placement in female facilities, requests for transition-related surgery, attempted self-castration, rape, insufficient housing, and sexual harassment.

Fourth, the document contains statements with each identified potential claimant of the nature and the extent of the injury claimed to be suffered, including rape, sexual assault, sexual harassment, unequal treatment, depression, anxiety, and attempted self-castration. Fifth, although the document does not request a specific amount of damages, monetary damages are discussed in detail. The document contains an entire section labeled "Monetary Damages" which identifies anticipated levels of damages for class members. Response, Ex. C at 4. The document identifies a detailed plan on how to assess monetary damages for a complex class action and specifies "we will also be seeking attorney fees and costs." Response, Ex. C at 7.

The expanded definition of "written notice" by the Court in *Kelsey* only requires that the claimant "assert a claim by including a request or demand that the defendant public entity or employee pay the plaintiff an award of monetary damages." *Kelsey,* 8 P.3d at 1204. *Kelsey* does not require claimants to request a specific amount to satisfy the substantial compliance standard *or* the strict compliance standard. The Court notes, as the document specifies, that the complexity of this case and the number of claimants makes exact determination of monetary damages difficult at such an early stage. Lastly, although the document does not include the third requirement, the name and address of any public employee if involved, the Court finds that Plaintiffs have met the substantial compliance requirement by written notice detailed by the Colorado Supreme Court in both *Woodsmall* and *Kelsey.*

Defendants also argue the settlement correspondence only shows claimants *could have* brought claims, not that they were in fact making claims. The Court disagrees. The last paragraph of the document states,

> Finally, while we appreciate you and your client's willingness to engage in discussion, we are planning to move forward with filing the complaint if we cannot reach preliminary agreement on these matters soon. We have attached a draft of the class action complaint that we intend to file. It would certainly be our preference to engage in the type of cooperative litigation we have discussed to date. However, we believe that it is in our clients' best interest to move forward if we cannot reach such agreement.

Response, Ex. C. at 7. Defendants had a copy of the drafted complaint and were on notice that Plaintiffs intended to file such complaint if attempts at settlement failed. Lastly, Defendants argue none of the individuals Plaintiffs sent settlement correspondence to were authorized to personally accept service of a notice of claim pursuant to C.R.S. § 24-10-109(3). The relevant portion of the statute states,

> If the claim is against the state or an employee thereof, the notice shall be filed with the attorney general. If the claim is against any other public entity or an employee thereof, the notice shall be filed with the governing

> body of the public entity or the attorney representing the public entity. Such notice shall be effective upon mailing by registered or certified mail, return receipt requested, or upon personal service.

Because Defendants only argue none of the individuals Plaintiffs sent settlement correspondence to were authorized to personally accept service of a notice of a claim, without any explanation to who those individuals are or their positions, the Court cannot determine whether they were authorized under the statute to accept service.

CONCLUSION

The Court finds no implied cause of action under the Colorado Constitution regarding Plaintiffs' third and fourth claims. The Court also finds Plaintiffs' third and fourth claims are barred by the Colorado Governmental Immunities Act. Therefore, Plaintiffs' third and fourth claims are hereby DISMISSED to the extent they seek monetary damages. Plaintiffs' third and fourth claims are also hereby DISMISSED against Drs. Lish and Frost. The parties are ordered to substitute the successors for Drs. Lish and Frost. Defendants' request that the Court dismiss Plaintiffs' first and second claims under CADA is DENIED. The Court finds that prisons are included as a place of public accommodation, and that Plaintiffs provided written notice of claims to Defendants.

SO ORDERED this 11th day of August, 2020.

BY THE COURT:

Brian R. Whitney
District Court Judge