

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

WILLIAM THORPE, *et al.*,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

Civil Case No. 2:20-cv-00007-JPJ-PMS

**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’
MOTION FOR LEAVE TO FILE AN AMENDED ANSWER**

Defendants’ motion—filed without notice and nearly four months after the deadline for seeking leave to amend the pleadings—requests permission to assert three new affirmative defenses against Plaintiffs’ four-year-old claims under the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“RA”). Defendants claim that leave to amend should be granted because it was supposedly impossible for them to determine the applicability of their new defenses until after Plaintiffs served an expert report from their ADA expert, Richard Wells. But Defendants have known about the existence and scope of Plaintiffs’ ADA and RA claims since Plaintiffs filed their complaint in 2019. ECF No. 1. Moreover, the information that Defendants claim they learned from Mr. Wells’s report—*i.e.*, the policies and practices that Plaintiffs contend are “insufficient” under the ADA and RA and the “specific relief” that they seek—was disclosed to Defendants in interrogatory responses served in 2022. ECF No. 331, at 6–7. Tellingly, Defendants make only passing reference to those interrogatory responses in their opening brief. *Id.*

Because Defendants have long known about the scope and basis of Plaintiffs’ ADA and RA claims, Defendants do not meet the good cause standard for untimely amendments under Federal Rule of Civil Procedure 16. Defendants also fail to meet the standard for amendment set forth in Federal Rule of Civil Procedure 15, as Defendants’ proposed amendment—to be filed after the close of fact discovery—would prejudice Plaintiffs’ ability to investigate the factual bases for Defendants’ new defenses. For these and other reasons, Defendants’ motion should be denied.

FACTS

On May 6, 2019, Plaintiffs filed a putative class action complaint, alleging that, among other things, Defendants’ administration of VDOC’s “Step-Down Program” violated their constitutional and statutory rights. *See* ECF No. 1. Among other causes of action, Plaintiffs’ complaint asserted claims under the ADA and RA on behalf of putative classes of inmates with mental health disabilities (the “Disabilities Classes”) based on Defendants’ alleged (i) failure to provide proper services to inmates with mental health disabilities, (ii) selection of criteria that disproportionately prevent inmates with mental health disabilities from progressing through the Step-Down Program, and (iii) failure to reasonably accommodate disabled inmates. *Id.* ¶¶ 202, 214–17, 220, 251–58, 260–64. Plaintiffs’ complaint identified Gary Wall, Brian Cavitt, Steven Riddick, and Dmitry Khavkin as putative class representatives for the Disabilities Classes. *Id.* ¶ 214.

On September 14, 2021, Defendants served their First Set of Interrogatories and Requests for Production on Plaintiffs. *See* Ex. 1 (Defs.’ First Set of Interrogatories and RFPs). As relevant here, Defendants’ Interrogatory No. 4 asked Plaintiffs to “[i]dentify, with specificity, the minimum changes that You believe the Virginia Department of Corrections would need to make

to its policies or procedures for housing inmates with mental health needs, in order to protect that [sic] Your Eighth and Fourteenth Amendment rights.” *Id.* at 3. Interrogatory No. 9 similarly asked Plaintiffs to “[i]dentify, with specificity, the minimum changes that You believe the Virginia Department of Corrections would need to make to its policies and procedures for housing inmates with Your disability, in order to protect Your Eighth and Fourteenth Amendment rights.” *Id.* at 9.

Plaintiffs served their initial responses to Defendants’ Interrogatories on November 29, 2021, and served supplemental responses on June 6, 2022. Ex. 2 (Class Pl. Wall’s Answers & Objs. to Defs.’ First Set of Interrogatories) & Ex. 3 (Class Pl. Wall’s Supp. Resps. & Objs. to Defs.’ First Set of Interrogatories, Interrogatories 4 & 9). As is relevant here, in response to Interrogatory Nos. 4 and 9, the representatives of the Disabilities Classes—Messrs. Wall, Cavitt, Riddick, and Khavkin—identified 16 proposals that they believe would “cure the constitutional and statutory deficiencies with the Step-Down Program as it relates to individuals with mental health disabilities.” *See, e.g.*, Ex. 3, at 2–5.¹ Specifically, Messrs. Wall, Cavitt, Riddick, and Khavkin stated that Defendants should:

- Provide adequate and regular assessment of mental health disabilities;
- Promptly and adequately evaluate individuals placed in segregation to determine the appropriateness of their placement in light of any signs or symptoms of mental disability;
- Meaningfully and regularly evaluate all individuals placed in segregation for signs or symptoms of mental disabilities, and consider the results of such evaluations in determining whether and for how long an individual will be held in segregation;

¹ While Defendants’ Interrogatory Nos. 4 and 9 asked Plaintiffs to identify the ways in which the Step-Down Program violated Disabilities Class members’ “Eighth and Fourteenth Amendment rights,” Plaintiffs’ response addressed the Step-Down Program’s “constitutional and *statutory* deficiencies.” *See* Ex. 3, at 2.

- Meaningfully review the necessity of long-term segregation for prisoners with signs of symptoms of mental disabilities with greater frequency, giving special consideration to the impact of segregation on the mental health and wellbeing of prisoners with mental disabilities;
- Grant mental-health providers and medical staff autonomous or meaningful decision-making authority relating to the housing assignment, classification, progression, and retention of prisoners in and through the Step-Down Program, including prisoners with mental disabilities;
- Provide meaningful real-time access to mental-health providers, treatment, and medicine, including for both acute and chronic care;
- Perform mental health evaluations, therapy, and treatment in a confidential setting;
- Provide consistent and meaningful group therapy and group programming in long-term segregation, including to individuals with mental disabilities;
- Provide reasonable alternatives to long-term segregation to individuals with mental disabilities, including diversion of individuals with mental disabilities, including intellectual disabilities, from progression programs (like the Step-Down Program) in appropriate cases;
- Provide a clear, transparent, and achievable means for prisoners with mental disabilities to progress out of segregation;
- Modify the restrictions and privileges of segregation for people who have mental disabilities;
- Accommodate prisoners with mental disabilities who are nonetheless retained in long-term segregation with fewer restrictions, including but not limited to, more out-of-cell time, increased mental health treatment and other programming, relaxation of strict property restrictions, and a reduction in the use of strip searches;
- Not evaluate prisoners who face difficulties completing tasks such as the Challenge Series or workbook series, or complying with behavior goals, because of a mental disability on the same criteria as prisoners without those disabilities or barriers, and when such prisoners fail to complete programming, not continue to hold them in long-term segregation;

- Accommodate prisoners who cannot comply with institutional rules due to their mental disabilities within the disciplinary infraction category of the Step-Down Program, accounting for the unique stressors segregation causes;
- Have mental health staff formally review disciplinary infractions to determine whether the violations are related to a prisoner's mental disability, as well as whether it is necessary to place the prisoner in segregation in response to the violation; and
- Otherwise make allowances for the particular circumstances of prisoners with mental disabilities.

Id. at 2–5.²

Written discovery ended on February 28, 2023, and fact witness depositions closed on April 14, 2023. ECF Nos. 189 & 262. Plaintiffs then timely served their expert reports, including a report from ADA expert Richard Wells. *See* ECF No. 331-1.

ARGUMENT

To justify amending their answer at this late stage, Defendants must satisfy both Rule 16 (to modify the scheduling order) and Rule 15(a) (to amend their answer). Because Defendants have not met their burden under either rule, their motion should be denied.

A. Defendants Have Failed to Show Good Cause to Modify the Scheduling Order.

Federal Rule of Civil Procedure 16(b)(4) requires good cause to modify a scheduling order. To establish good cause, the moving party “‘must show that, despite due diligence, it could not have reasonably met the scheduled deadlines.’” *Southern v. Bishoff*, 675 F. App’x 239, 249 (4th Cir. 2017) (quoting 3 James Wm. Moore et al., *Moore’s Federal Practice* § 16.14[1][a],

² Plaintiffs served two additional supplemental responses to Defendants’ interrogatories, on February 28, 2023, and April 14, 2023, respectively. These supplemental responses did not update Plaintiffs’ responses to Interrogatory Nos. 4 and 9, but they repeated the answers that Plaintiffs served on June 6, 2022. Because Defendants received Plaintiffs’ answers to Interrogatory Nos. 4 and 9 *multiple* times, they plainly knew about Plaintiffs’ responses.

p. 16–75 (3d ed. 2016)). “In evaluating diligence, courts focus mainly on the timeliness of the motion to amend and the reasons for its tardy submission.” *Green v. AMF Bowling Centers, Inc.*, 2020 WL 6204297, at *4 (D. Md. Oct. 21, 2020) (internal quotations omitted). Generally, if the “moving party knew of the underlying conduct giving rise to a claim [or defense] but simply failed to raise it in an initial [pleading], then the party has not acted diligently, and thus cannot establish good cause under Rule 16.” *Id.* (internal quotations omitted). Courts are within their discretion to deny motions to add affirmative defenses to an answer when the defendant had sufficient information to raise them in a timely fashion. *See Foodbuy, LLC v. Gregory Packaging, Inc.*, 987 F.3d 102, 118 (4th Cir. 2021).

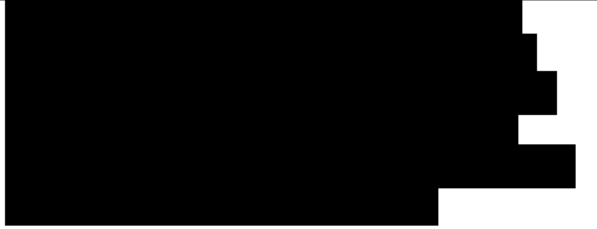
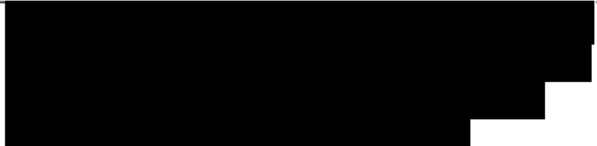
Defendants have not met their burden. Defendants’ motion hinges on the argument that, before Mr. Wells served his expert report, Defendants “did not know that Plaintiffs would serve a purported expert report from an individual purporting to opine on the requirements of the ADA Title II and the RA, whether VDOC meets those requirements, and if not, what extensive and specific relief Plaintiffs claim is warranted.” ECF No. 331, at 6. This is disingenuous.

Defendants have been on notice that Plaintiffs are asserting ADA and RA claims since Plaintiffs filed their complaint more than four years ago. ECF No. 1, ¶¶ 202, 214–17, 220, 251–58, 260–64 (alleging that Defendants violate the ADA and RA by, among other things, “fail[ing] to account for prisoners’ mental illness in periodic reviews of their solitary confinement,” failing to “provide mentally ill prisoners or prisoners with mental health disabilities with alternative means to progress out of solitary confinement,” and failing to provide “equal access to prison activities, programs, and services”). And they knew (or should have known) that Plaintiffs would offer evidence in support of their claims over the course of fact and expert discovery. Indeed, Plaintiffs served numerous discovery requests—including requests for production,

interrogatories, and requests for admission—concerning Defendants’ policies and procedures for identifying and tracking inmates with mental health disabilities as well as any accommodations granted to such individuals in the Step-Down Program. *See* Ex. 4 (Class Pls.’ Third Set of RFPs) at 5–9; Ex. 5 (Class Pls.’ First Set of Interrogatories to Def. VDOC) at 6–7; Ex. 6 (Class Pls.’ Third Set of Interrogatories to Def. VDOC) at 8–9; Ex. 7 (Pls.’ RFAs to Def. VDOC) at 8–21.

To the extent Defendants’ argument is based on their claimed surprise Plaintiffs would serve an *expert report* in support of their claims, Defendants have once again have failed to establish good cause. A party almost *never* knows the identities of the opposing party’s experts—or the subjects of their testimony—until the expert disclosure deadline. And here, there is no dispute that Plaintiffs complied with the relevant expert deadlines. *See, e.g., Bonasera v. Penn. Nat’l Mut. Casualty Ins. Co.*, 2021 WL 825917, at *2 (S.D. Ohio Mar. 4, 2021) (denying motion to amend answer based on information purportedly disclosed in expert report); *F.D.I.C. v. Horn*, 2015 WL 1611995, at *12 (E.D.N.Y. Apr. 8, 2015) (same).

The content of Mr. Wells’s report also fails to establish good cause for amending the scheduling order. Defendants contend that, before Mr. Wells served his report, they did not know the ways in which Plaintiffs would claim the Step-Down Program violates the ADA and RA. ECF No. 331, at 7. But the deficiencies identified in Mr. Wells’s report are substantially identical to those Plaintiffs identified in their interrogatory responses. The following chart illustrates the overlap:

Deficiencies Identified in Mr. Wells's Report ³	Deficiencies Identified in Plaintiffs' Interrogatory Responses ⁴
	"[VDOC should] [m]eaningfully and regularly evaluate all individuals placed in segregation for signs or symptoms of mental disabilities, and consider the results of such evaluations in determining whether and for how long an individual will be held in segregation."
	"[VDOC should] [m]eaningfully review the necessity of long-term segregation for prisoners with signs or symptoms of mental disabilities with greater frequency, giving special consideration to the impact of segregation on the mental health and wellbeing of prisoners with mental disabilities."
	"[VDOC should] [p]rovide a clear, transparent and achievable means for prisoners with mental disabilities to progress out of segregation." "[VDOC should] [m]odify the restrictions and privileges of segregation for people who have mental disabilities." "[VDOC should] [a]ccommodate prisoners with mental disabilities who are nonetheless retained in long-term segregation with fewer restrictions" "[VDOC should] [a]ccommodate prisoners who cannot comply with institutional rules due to their mental disabilities within the disciplinary infraction category of the Step-Down Program"
	"[VDOC should] [h]ave mental health staff formally review disciplinary infractions to determine whether the violations are related to a prisoner's mental disability"

³ See ECF No. 331 (quoting ECF No. 331-1, ¶ 15).

⁴ See Ex. 3, at 2–5.

Likewise, Defendants contend that they “did not know the extensive relief Wells would recommend in his report with regard to the scope of the accommodations sought.” ECF No. 331, at 6. But once again, the accommodations that Mr. Wells proposes are substantially identical to the accommodations that Plaintiffs requested in their interrogatory responses. For example:

Accommodations Proposed in Mr. Wells’s Report ⁵	Accommodations Proposed in Plaintiffs’ Interrogatory Responses ⁶
[REDACTED]	“Grant mental-health providers and medical staff autonomous or meaningful decision-making authority relating to the housing assignment . . . of prisoners in and through the Step-Down Program, including prisoners with mental disabilities.” “Provide reasonable alternatives to long-term segregation to individuals with mental-health disabilities”
[REDACTED]	“Modify the restrictions and privileges of segregation for people who have mental disabilities.” “Provide meaningful real-time access to mental-health providers, treatment, and medicine, including for both acute and chronic care.” “Accommodate prisoners with mental disabilities who are nonetheless retained in long-term segregation with fewer restrictions, including but not limited to, more out-of-cell-time, increased mental health treatment and other programming, relaxation of strict property restrictions, and a reduction in the use of strip searches.”

⁵ See ECF No. 331 (quoting ECF No. 331-1, ¶ 196).

⁶ See Ex. 3, at 2–5.

Accommodations Proposed in Mr. Wells's Report ⁵	Accommodations Proposed in Plaintiffs' Interrogatory Responses ⁶
[REDACTED]	“Provide adequate and regular assessment of mental disabilities.” “Meaningfully and regularly evaluate all individuals placed in segregation for signs and symptoms of mental disabilities” “Have mental health staff formally review disciplinary infractions to determine whether the violations are related to a prisoner's mental disability”
[REDACTED]	“Perform mental health evaluations, therapy, and treatment in a confidential setting.”
[REDACTED]	“Accommodate prisoners who cannot comply with institutional rules due to their mental disabilities within the disciplinary infraction category of the Step-Down Program, accounting for the unique stressors segregation causes.”
[REDACTED]	“Otherwise make allowances for the particular circumstances of prisoners with mental disabilities.”

Plaintiffs' interrogatory responses provided more than enough information for Defendants to plead affirmative defenses relevant to Plaintiffs' ADA and RA claims. *See, e.g., Horn*, 2015 WL 1611995, at *12 (denying motion for leave to amend answer based on purportedly new information contained in expert report because factual basis for expert's opinion was disclosed in response to interrogatories); *see also Bonasera*, 2021 WL 825917, at *2 (denying motion for leave to amend based on purportedly new information contained in expert report because defendant “already had a basis for asserting crossclaims” based on allegations in plaintiff's complaint). Remarkably, while Defendants make passing reference to these interrogatory responses in their motion, they strategically *excised* Plaintiffs' responses to Interrogatory Nos. 4 and 9 from the materials they submitted to the Court. *See* ECF No. 331-2.

Defendants do not explain why they waited *more than a year* after receiving Plaintiffs' discovery responses—and *more than four months* after the close of fact discovery—to move to amend their answer. Defendants' unexplained delay merits the denial of their motion. *See Deasy v. Hill*, 833 F.2d 38, 41 (4th Cir. 1987) (“[A] motion to amend should be made as soon as the necessity for altering the pleading becomes apparent. A party who delays in seeking an amendment is acting contrary to the spirit of the rule.” (quoting 6 Wright & Miller, Federal Practice and Procedure § 1488 (1971))).

B. Defendants' Untimely Amendment Would Be Prejudicial to Plaintiffs.

Even assuming Defendants could satisfy Rule 16's good cause standard—which they cannot—the Court should deny them leave to amend their Answer pursuant to Rule 15 of the Federal Rules of Civil Procedure because Defendants' proposed amendment “would be prejudicial to [Plaintiffs].” *Franks v. Ross*, 313 F.3d 184, 193 (4th Cir. 2002).

As explained above, Defendants' proposed amendment is prejudicial because it significantly limits Plaintiffs' ability to develop evidence in response to Defendants' new defenses. Although expert discovery will continue through August 16, 2023, fact discovery closed over four months ago, and Plaintiffs can no longer obtain factual evidence to rebut Defendants' new defenses. *See, e.g., Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 379 (4th Cir. 2012) (affirming denial of motion for leave to amend where “a significant amount of discovery had already been conducted”); *Union Pac. Rr. Co. v. Oglebay Norton Minerals, Inc.*, 2017 WL 10841702, at *7 (W.D. Tex. Nov. 15, 2017) (denying motion for leave to amend pleadings after the close of fact discovery because opposing party “has not performed discovery” with respect to such claims). Defendants' untimely request to amend also prevents Plaintiffs from addressing Defendants' affirmative defenses in their opening expert reports. While Defendants suggest that Plaintiffs can depose any expert who submits a response

to Mr. Wells's report, that is plainly no substitute for the ability to investigate the factual bases underlying Defendants' purported theories of the case and to submit expert testimony addressing their defenses. Plaintiffs should not be punished for Defendants' unexplained delay.

CONCLUSION

For the reasons above, the Court should deny Defendants' Motion for Leave to File an Amended Answer.

Dated: June 26, 2023

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 26th day of June, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants.

/s/ Jared Frisch

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