

**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.

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

**DEFENDANTS' MOTION, AND MEMORANDUM IN SUPPORT OF MOTION,
TO EXCLUDE THE REPORT AND TESTIMONY
OF PLAINTIFFS' PROPOSED EXPERT RICHARD WELLS**

The Federal Rules of Evidence allow for introduction of expert testimony only if it is relevant and reliable. Fed. R. Evid. 702. Plaintiffs proffer Richard Wells, a purported expert in the field of state prison and county jail/detention facility operations, to provide testimony regarding whether the Virginia Department of Corrections (“VDOC”) complies with the requirements imposed by the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“RA”) in its design and implementation of the Step-Down Program. The opinions he offers in this case fail to meet established standards for reliability and admissibility. Accordingly, his report (the “Report” or “Wells Rep.”), Ex. 1, and related testimony should be stricken.

First, Wells offers opinions that he is unqualified to give. Wells is not qualified to opine on whether VDOC sufficiently identifies persons with mental health disabilities, as he has no expertise in the field of mental health. Similarly, he is not qualified to testify about the alleged “under-identification” of mentally disabled individuals at VDOC because he is not a statistician and does not purport to have any expertise in statistics. Opinions on these matters should be stricken.

Second, Wells does not rely on sufficient data or a reliable methodology to support any conclusions regarding named Plaintiffs Steven Riddick, Dmitry Khavkin, Brian Cavitt, and Gary Wall, the only named Plaintiffs asserting disability-related claims in this case (the “Disability Plaintiffs”). Although Wells purports to cite data supporting his conclusion that VDOC is systemically violating the ADA and RA, he does not tie these opinions to any alleged discrimination suffered by the Disability Plaintiffs. These opinions should be stricken as unreliable and irrelevant.

Third, the Report and related testimony should be excluded because Wells improperly offers legal conclusions in the guise of expert opinions. The Report is replete with legal conclusions on ultimate issues that are not helpful to the jury. Indeed, Wells essentially opines that Defendants discriminated against Plaintiffs and failed to provide required accommodations—a wholly impermissible conclusion for expert testimony. These legal conclusions should be excluded.

Finally, the Report and related testimony should be excluded because Wells offers opinions that are not relevant to this case, including on claims that Plaintiffs have not raised or for which they cannot seek relief under the ADA or RA. Specifically, Wells offers opinions regarding Defendants’ alleged violation of ADA and RA regulations, despite that no private right of action exists for such supposed violations.

As set forth more fully below, the opinions and conclusions offered by Wells are neither reliable nor relevant. Accordingly, the Report and Wells’s related testimony should be stricken entirely.

LEGAL STANDARDS

“The proponent of [an] expert bears the burden of demonstrating the admissibility of the expert’s testimony “by a preponderance of proof.” *Metamining, Inc. v. Barnette*, No. 2:12CV00024, 2013 WL 3245355, at *9 (W.D. Va. June 26, 2013) (Jones, J.) (quoting *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 n.10 (1993)). The Federal Rules of Evidence allow admission of expert testimony if it meets four conditions:

- a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702; *Daubert*, 509 U.S. 579. As such, Rule 702 “imposes a special gatekeeping obligation on the trial judge to ensure that an expert’s testimony both rests on a *reliable* foundation and is *relevant* to the task at hand.” *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021). These standards apply to any purported expert claiming “technical or other specialized knowledge,” even if the expert testimony is not strictly scientific in nature. *Nease v. Ford Motor Co.*, 848 F.3d 219, 230 (4th Cir. 2017).

As a first step, expert testimony is relevant if it has “a valid scientific connection to the pertinent inquiry.” *Belville v. Ford Motor Co.*, 919 F.3d 224, 232 (4th Cir. 2019). Opinions that are not relevant to a fact at issue must be excluded. *Sardis*, 10 F.4th at 281. If a proponent establishes relevance of expert testimony, then courts consider its reliability. District courts must “ensure that the proffered expert opinion is ‘based on scientific, technical, or other specialized *knowledge* and not on belief or speculation, and inferences must be derived using scientific or other valid methods.’” *Nease*, 848 F.3d at 229 (emphasis in original) (quoting *Oglesby v. Gen.*

Motors Corp., 190 F.3d 244, 250 (4th Cir. 1999)). In assessing reliability, *Daubert* provides several guideposts to consider, including whether a theory or technique can be tested; whether it has been subjected to peer review and publication; whether there is a high known error rate; and whether the technique enjoys general acceptance in the relevant scientific community. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). Expert opinion evidence based on assumptions not supported by the record should be excluded. *Tyger Constr. Co. Inc. v. Pensacola Const. Co.*, 29 F.3d 137, 143 (4th Cir. 1994).

ARGUMENT

I. The opinions Wells offers outside his field of expertise should be disregarded.

“An expert witness may not offer an opinion where the subject matter goes beyond the witness’s qualifications and area of expertise.” *Young v. Swiney*, 23 F. Supp. 3d 596, 611 (D. Md. 2014); *see also Robinette v. Wal-Mart Stores, Inc. Store #650*, No. 2:15CV00003, 2016 WL 8737153, at *3–5 (W.D. Va. Feb. 5, 2016) (Jones, J.) (excluding expert who had “no specialized training or professional experience” in the relevant subject). Wells, who was retained as a purported expert in prison operations, was designated by Plaintiffs to opine on the design and administration of VDOC’s Step-Down Program and on whether it complies with the ADA and RA. Wells Rep. ¶¶ 3, 11. But numerous opinions he offers stray well beyond this subject. These opinions should be excluded.

A. Wells’s opinions on the incidence of VDOC inmates with mental illness should be excluded.

Wells offers his opinion that “VDOC is not adequately or appropriately identifying incarcerated persons with mental illness . . . upon intake or while housed at [Red Onion State Prison].” Wells Rep. ¶ 95. *See also id.* ¶ 78 (opining that VDOC “is under-identifying people with mental illness among its populations”; *id.* ¶ 75 (similar). Concluding that the incidence of mental

illness is lower among VDOC inmates than among inmates across the country (as reported in a single 2014 study), *id.* ¶ 78 & n.88, and lower than he has seen in other prison systems, *id.* ¶ 214, he then uses that variance to posit a series of opinions, such as that “VDOC’s current intake and screening process is not adequate to identify mentally ill individuals,” *id.* ¶ 78.

But Wells conducted no statistical analysis, nor did he offer any, to back up his threshold opinion that VDOC is “under-identifying” mentally disabled individuals in its custody. Instead, for that contention, Wells points to a single journal article that does not support his opinion. Rather, the article summarily states that “at least half of prisoners have *some mental health concerns*.” Wells Rep. ¶ 78 n.88 (emphasis added). Wells then contrasts that information with data in a VDOC report identifying approximately 25 percent of VDOC inmates as having “mild mental impairment” and approximately 2 percent having “serious mental impairment.” Wells Rep. ¶ 78 n.89. Wells’s superficial observation lacks any sound methodological basis and is flawed because he is comparing apples to oranges: having “some mental health concerns” is not the same as being diagnosed with a “mild mental impairment,” much less a “serious mental impairment.” Thus, Wells’s conclusion that VDOC is under-identifying mentally disabled inmates is not only unreliable but meaningless.

In any event, Wells is not qualified to offer such an opinion, inasmuch as he is not a statistician and does not purport to have any expertise in statistics. Courts regularly exclude the testimony of purported experts without relevant expertise. *See EEOC v. Freeman*, 778 F.3d 463, 470 (4th Cir. 2015) (Agee, J., concurring) (rejecting statistical testimony that “amounted to a homemade methodology, crafted by a witness with no particular expertise to craft it”) (citations omitted); *Kadel v. Folwell*, 620 F. Supp. 3d 339, 365 (M.D.N.C. 2022) (excluding as unreliable statistical testimony by a purported expert who “is not a statistician and does not discuss in his

report how he came to [his] conclusions, what data he relied upon, or what methodology he applied to that data”).

Moreover, Wells has no methodology (other than simply comparing the alleged incidence of mental illness) to support these opinions, and, critically, does not specify the inputs or controls he employed to make a statistically meaningful comparison. *See, e.g., id.* ¶ 214 (not identifying the “numbers of identified mentally ill incarcerated persons” in “other prison / jail systems I have worked with or monitored” that supposedly make a “compar[ison]” with VDOC useful). “[C]ourts often caution experts against drawing broad conclusions from incomplete data.” *Freeman*, 778 F.3d at 468 (Agee, J., concurring). And this Court has observed its gate-keeping function in that regard, excluding testimony based on analysis that does not identify relevant factors affecting the analysis. *See, e.g., Metamining, Inc.*, 2013 WL 3245355, at *10 (excluding expert who “cite[d]no formula by which he derived the lease premiums, permit values or discount factors that were essential to his conclusions”).

So too here, Wells’s opinions are “connected to . . . data only by [his] *ipse dixit*,” and “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit [such] opinion evidence.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). *See also* Fed. R. Evid. 702 advisory committee’s note (noting that a trial court’s gatekeeping function requires more than simply “taking the expert’s word for it”). In circumstances like these, exclusion of expert testimony is appropriate. *See, e.g., Herold v. Hajoca Corp.*, 864 F.2d 317, 321–22 (4th Cir.1988) (upholding district court’s ruling to exclude statistical evidence that did not compare the plaintiff with others who were similarly situated to the plaintiff but instead relied on broader, “region-wide statistics”); *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248 (4th Cir. 2005) (upholding district

court’s exclusion of expert testimony relying on “statistical analysis . . . based on comparisons that were not relevant”).

B. Wells’s opinions on medical and psychological subjects should be excluded.

Wells also is not a clinician. He plainly admits it: “As a non-clinician, my professional experiences with disabled incarcerated persons (including mentally ill incarcerated patients) is one from a supervision, access, and ultimately from a monitoring standpoint, as opposed to being from a clinical perspective.” Wells Rep. ¶ 168. He doubled-down on that concession in his rebuttal report, where he emphasized that his purpose “was not to diagnose any particular Plaintiff with a disability” because he “do[es] not have a medical or mental health background that would qualify [him] to do so.” Wells Rebuttal Rep. ¶ 41. Accordingly, his opinions on clinical matters should be excluded. *See, e.g., Clarendon Regency IV, LLC v. Equinox Clarendon, Inc.*, No. 120CV01433RDAIDD, 2022 WL 5101691, at *4 (E.D. Va. Oct. 4, 2022) (excluding expert who “admit[ted] that she ha[d] no [relevant] experience”).

Notwithstanding Wells’s conceded lack of clinical expertise, he offers clinical opinions relating to the “mental health classification system that VDOC has developed.” Wells Rep. ¶ 81. According to Wells, VDOC’s system “does not allow for accurate identification of disabilities based on mental impairments.” *Id.* Despite not being a clinician, Wells offers numerous opinions in support of his conclusion. For instance, he opines that “suicidal thoughts and behavior are symptoms of major depressive disorder, post-traumatic stress disorder, bipolar disorder, schizophrenia, and other mental disorders that are qualifying disabilities under the ADA”¹—and that VDOC’s policy “diminishes the seriousness of this symptom if it has not occurred within the

¹ Wells’s opinions should be stricken not only for his lack of qualifications but also to the extent they constitute legal conclusions as to ADA-covered “disabilities.”

two years preceding intake[, which] is both dangerous and insufficient to adequately identify disabilities under the ADA.” Wells Rep. ¶ 84. Wells also testifies—based on his admittedly non-clinical experience—that “there are several DSM diagnoses that rise to the level of disabilities, such as depression, generalized anxiety disorder, and post-traumatic stress disorder,” and opines that “VDOC’s language of ‘mild impairment’ would suggest that such impairments do not interfere with major life activities.” Wells Rep. ¶ 85.

Similarly, Wells opines that “requiring incarcerated persons to actively participate in discussion of their feelings in a group setting may be particularly fraught for an incarcerated person suffering from depression, anxiety, or PTSD, to name just some mental impairments” *Id.* Again, Wells is not qualified to offer this testimony, as he admittedly is not a clinician and has no medical or psychiatric expertise to offer this sort of assessment.²

Furthermore, Wells does not explain how his experience leads to his ability to arrive at these conclusions, which likewise warrants exclusion. When expert testimony is not “strictly scientific in nature, but rather experiential,” courts must still assume their gatekeeping role. *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836, 2021 WL 6690337, at *3 (E.D. Va. Aug. 16, 2021). While the district court’s task “in examining the reliability of experiential expert testimony

² Wells also opines that inmates lack privacy when completing the Challenge Series workbooks that are required to move through the Step-Down Program. Wells Rep. ¶ 175. Without identifying the experience of any Plaintiff or inmate at VDOC, Wells posits that the lack of privacy “can expose an incarcerated person’s weakness in the context of prison, particularly maximum security prison, rendering this level of assistance an unreasonable accommodation.” *Id.* Not only does Wells lack qualifications to opine on the supposed effect on any particular inmate of this alleged lack of privacy, but the record evidence he cites in support of his assertion does not support his opinion. Specifically, Wells cites to testimony from Amee Duncan, who worked as an ADA coordinator for VDOC, for the proposition that “assistance can only be delivered in a public setting, at the cell door.” Wells Rep. ¶ 175 n.313 (citing Mar. 14, 2023 Duncan Dep. at 107:14–17). But Duncan did not testify that assistance is “only” offered at the cell door, and Wells cites no testimony regarding whether accommodations could or could not be made to offer privacy.

is . . . somewhat more opaque” than scientific expert testimony, the district court must nevertheless require a witness who relies on experience to “explain how [his] experience leads to the conclusion reached, why [his] experience is a sufficient basis for the opinion, and how [his] experience is reliably applied to the facts.” *Id.* Courts must do so to “make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Id.*

Because Wells does not explain what experience he has that allows him to draw the conclusions he does, his opinions should be excluded.

II. Wells did not apply a reliable methodology and does not rely on sufficient facts or data in forming any opinions regarding the Disability Plaintiffs.

The focus of Wells’s Report is on how VDOC is allegedly systemically violating the ADA and RA at Red Onion and Wallens Ridge State Prisons. But, despite these sweeping accusations, he never connects these opinions to the actual experiences of Plaintiffs Riddick, Khavkin, Cavitt, and Wall, the only named Plaintiffs asserting disability-related claims. *See* Compl. (ECF No. 1) ¶¶ 251, 256, 260. Wells has not suggested that any of these Disability Plaintiffs requested a reasonable accommodation under the ADA, much less that they were refused that accommodation (assuming they were even entitled to one as qualifying individuals with disabilities). *See Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 465 (4th Cir. 2012) (noting that the defendant medical school was not “obliged to accommodate [the student’s] disability until he ‘provided a proper diagnosis . . . and requested specific accommodation’”). Wells does not rely on sufficient data and does not apply a proper methodology to render his opinions here. All this warrants exclusion of the Report, given that “there is simply too great an analytical gap between the data and the opinion proffered.” *Joiner*, 522 U.S. at 146.

There are many examples of decisions, including by this Court, rejecting expert testimony that does not meet Rule 702’s requirements that opinions be “based upon sufficient facts or data,” “the product of reliable principles and methods,” and the “reliabl[e] appli[cation of] the principles and methods to the facts of the case.” *See* Part I.A *supra*. But the exclusion of expert testimony in *Williams v. Ill. Dep’t of Corr.*, No. 3:19-CV-739-MAB, 2023 WL 1472246 (S.D. Ill. Feb. 2, 2023), is especially instructive here. Like this case, *Williams* involved mental health and disability allegations in a prison system. There, a plaintiff brought suit after her son Dontrell Williams’s suicide in prison. *Id.* at *1 (describing claim that defendants were aware that the deceased had mental health issues “but failed to provide him with adequate care and treatment due to systemic deficiencies within the IDOC”). In relevant part, the Court excluded testimony of an expert the plaintiff proffered with experience “in corrections from an administrative and operational standpoint.” *id.* at *11.

The court held that the expert’s “opinion that the systemic deficiencies affected the care Dontrell received in the IDOC and contributed to his death must . . . be excluded because he did not employ an identifiable or reliable methodology in formulating this opinion.” *Id.* at *14. The expert’s “report discusses problems with the IDOC generally but conspicuously *does not connect those problems to Dontrell’s personal experience* in any way, shape, or form.” *Id.* (emphasis added). The court noted that it is “critical under Rule 702 that there be a link between the facts or data the expert has worked with and the conclusion the expert’s testimony is intended to support.” *Id.* at *14. Accordingly, the court rejected the expert’s position that the deficiencies in defendant’s “mental health services were so severe and pervasive that Dontrell *must have* been impacted.” *Id.* at *15 (emphasis added). Excluding his testimony, the court held that the expert “failed to connect

the dots between the systemic deficiencies that existed in the IDOC as a whole and the personal experience of Dontrell and his ultimate death.” *Id.*

As in *Williams*, Wells’s opinions here amount to “nothing more than an inferential leap, untethered from any explanation or facts regarding [Plaintiffs’] own personal experience.” *Id.* Wells does not connect any purported dots between the systemic ADA violations that allegedly exist at VDOC with any alleged discrimination suffered by Riddick, Cavitt, Khavkin, or Wall. He simply assumes that, because he believes VDOC failed to comply with the ADA in a number of ways, the Disability Plaintiffs bringing ADA and RA claims *ipse dixit* were subjected to and affected by the same violations. His failure to connect the two propositions with any supporting data or facts renders his conclusions unreliable. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194 (4th Cir. 2001) (“As the Supreme Court has repeatedly held, nothing . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”) (citations omitted); *Freeman*, 778 F.3d at 468 (Agee, J., concurring) (referring to the “common-sense idea” that “expert work should not be considered ‘[w]hen the assumptions made by [the] expert are not based on fact.’” (quoting *Tyger Consrt. Co.*, 29 F.3d at 144)).

Nor does Wells explain how he can justify his blanket opinions regarding the four Disability Plaintiff based on his experience. *In re Zetia*, 2021 WL 6690337, at *6–7. Thus, Wells’s opinion regarding supposed systemic issues at VDOC should be excluded because they do not support the ADA and RA claims of the Disability Plaintiffs.³

³ To the extent Wells suggests that disabled individuals are not required to make requests for accommodations because “VDOC should have policies and procedures that encourage staff to proactively identify people with disabilities and provide accommodations,” Wells Rep. ¶ 108, this is not the law. *See Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 465 (4th Cir. 2012) (under ADA Title II, defendant was not required to accommodate plaintiff’s disability until he “provided a proper diagnosis . . . and requested specific accommodation”).

III. Wells offers opinions that are not relevant to the claims at issue in this case.

The opinions Wells offers on irrelevant subjects—and there are a variety of them—also should be excluded. The Court has a “gatekeeping responsibility to ‘ensure that an expert’s testimony . . . is relevant to the task at hand.’” *Nease*, 848 F.3d at 229 (quoting *Daubert*, 509 U.S. at 597). As this Court has noted, it must “ensure the proffered testimony will help ‘the trier of fact to understand the evidence or to determine a fact in issue.’” *Acosta v. Vinoskey*, 31 F. Supp. 3d 662, 666–67 (W.D. Va. 2018) (quoting *Daubert*, 509 U.S. at 591). “This is essentially a relevancy inquiry; the expert’s theory and method must have a relevant relationship with the facts at issue in the case, described by the Supreme Court as a ‘fit.’” *Kristensen ex rel. Kristensen v. Spotnitz*, No. 3:09-cv-00084, 2011 WL 4380893, at *3 (W.D. Va. Sept. 21, 2011) (citation omitted). Many of Wells’s opinions do not “fit” here because they do not concern any material fact in dispute.

Wells’s Report contains numerous opinions that are not relevant to Plaintiffs’ ADA and RA claims. As Plaintiffs recently reiterated, their ADA and RA claims are based on three discrete assertions:

- Defendants’ alleged failure to provide proper services to inmates with mental health disabilities,
- Defendants’ alleged selection of criteria that disproportionately prevent inmates with mental health disabilities from progressing through the Step-Down Program, and
- Defendants’ alleged failure to reasonably accommodate disabled inmates.

See Pls’ Opp’n to Defs.’ Mot. for Leave to Amend Their Answer at 2, ECF No. 340. Plaintiffs do *not* allege, however, that VDOC violates the ADA or the RA through any alleged failure to:

- (a) provide compliant ADA training (*see* Wells Rep. ¶¶ 141–162);
- (b) provide a compliant “tracking” system for disabled individuals (*id.* ¶¶ 109–120);

- (c) provide adequate notice of ADA processes and rights under the ADA and RA pursuant to 28 C.F.R. § 35.106 (*id.* ¶¶ 61–70);
- (d) provide a grievance procedure that satisfies the “ADA’s requirement that public entities provide a meaningful complaint process that provides for a prompt and equitable resolution to ADA-related complaints” (*id.* ¶¶ 15, 131–140);
- (e) post the ADA Coordinator’s contact information (*id.* ¶ 216); and
- (f) have a policy in place that sets out the ADA coordinator’s responsibilities (*id.* ¶ 52).

Plaintiffs do not allege in their Complaint that VDOC violated the ADA in any of these regards.

See generally ECF No. 1. Yet, as noted above, Wells offers testimony on each of these subjects.

All that testimony should be excluded because Defendants’ conduct in these respects is not at issue in this case. Courts regularly exclude as irrelevant any expert testimony about claims that were not raised. For instance, in *Sanchez v. Bos. Sci. Corp.*, No. 2:12-CV-05762, 2014 WL 4851989, at *36 (S.D.W. Va. Sept. 29, 2014), the court excluded expert opinions where the “only basis for [the] opinions on the adequacy of BSC’s product labeling is violation of the FDCA and FDA regulations.” *Id.* at *36. But a violation of those regulations was “not probative to the claims at issue” because plaintiff there did not bring a claim under the FDCA or FDA. *Id.*

Furthermore, even if Plaintiffs had attempted to assert ADA claims based on the deficiencies Wells perceives—*e.g.*, VDOC’s failure to “track” disabled individuals or post the ADA Coordinator’s contact information—courts have determined that there is no cognizable claim under the ADA for any of these alleged shortcomings. The statutory language in ADA Title II contains no requirements governing training, tracking, grievance procedures, notice posting, and ADA coordinator responsibilities for public entities. *See Waller v. City of Danville, Virginia*, 515 F. Supp. 2d 659, 665 (W.D. Va. 2007) (court found “no basis in the Act’s text supporting a failure to train claim under [Title II of] the ADA). Wells admitted as much at deposition, conceding that

he was not aware of any ADA requirement that VDOC must assign or train employees other than facility ADA coordinators to identify disabilities or request reasonable accommodations for them, *see* Deposition of Richard Wells (“Wells Dep.”) at 18:14–19:8, Ex. 2; that VDOC must have policies procedures and practices in place setting out the facility coordinators responsibilities, *id.* at 23:16–25:8; that VDOC must have a comprehensive tracking system to monitor compliance with ADA requirements, *id.* at 56:3–57:23; or that VDOC must have “an ADA-specific grievance procedure for incarcerated persons who seek to challenge or appeal an ADA accommodations decision,” *id.* at 61:12–62:6. Thus, Wells’s opinions on these topics are doubly irrelevant.⁴

Finally—if all that were not enough—Wells conceded he had no evidence that any of these perceived “violations” affected any named Plaintiff in any way. At deposition he admitted he could not identify a single named Plaintiff who lacked a meaningful opportunity to read the ADA contact information posted by the showers, the notice of rights information posted on notification boards in the housing units, or the ADA contact or notice of rights information provided to inmates in orientation packets. Wells Dep. at 36:13–37:15, 38:23–39:16. He also could not identify any named Plaintiff who complained that VDOC failed to offer an ADA-specific grievance procedure. *Id.* at 62:7–14.

⁴ To the extent Wells is opining that Defendants violated the “methods of administration” regulation in Title II of the ADA, which addresses policies and procedures of public entities, his opinions on VDOC’s purported failure to comply with this regulation is still irrelevant. The DOJ’s “methods of administration” regulation provides that a public entity may not adopt any criteria or policies that have “the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(3). Again, Plaintiffs do not cite this regulation in their Complaint. *See* ECF No. 1. Even so, there is no Title II “stand-alone claim based purely” on the alleged failure to comply with Title II regulations, as there is no “private right of action to enforce implementing regulations which impose ‘an obligation beyond the statutory mandate.’” *Brown v. Dep’t of Pub. Safety & Corr. Servs.*, 383 F. Supp. 3d 519, 555 (D. Md. 2019).

For all these reasons, Wells's opinions on these policies are irrelevant to Plaintiffs' actual ADA and RA claims in this case and therefore should be excluded.

IV. Wells improperly offers legal conclusions.

The Report also should be excluded to the extent that Wells improperly provides legal conclusions in the guise of expert opinions. The Fourth Circuit recognizes “that it does not help the jury for an expert to give testimony that states a legal standard or draws a legal conclusion by applying law to the facts, because it supplies the jury with no information other than the witness's view of how the verdict should read.” *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011) (cleaned up). “Legal conclusions or testimony that merely tells the jury what result to reach is not likely to assist the jury in its determination and is excludable.” *Stradtman v. Republic Servs., Inc.*, No. 1:14CV1289 JCC/JFA, 2015 WL 1930498, at *2 (E.D. Va. Apr. 28, 2015).

While an opinion that “embraces an ultimate issue” is not necessarily objectionable under Federal Rule of Evidence 704(a), district courts in the Fourth Circuit have the responsibility to “distinguish opinion testimony that embraces an ultimate issue of fact from opinion testimony that states a legal conclusion,” which is not permitted. *United States v. Barile*, 286 F.3d 749, 760 (4th Cir. 2002). “The best way to determine whether opinion testimony contains legal conclusions, ‘is to determine whether the terms used by the witness have a separate, distinct, and specialized meaning in the law different from that present in the vernacular.’” *Id.* Thus, courts hold that conclusory testimony using terms “with considerable legal baggage”—such as that a defendant “engaged in ‘discrimination’”—“nearly always invades the province of the jury” and should be excluded. *Id.*; see also *In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 629 (S.D.W. Va. 2013) (excluding expert testimony that products were “‘not reasonably safe’ or that [the manufacturer] ‘failed to warn’” as impermissible legal conclusions).

The Wells Report is littered with “opinions” that are impermissible legal conclusions. The topic headings in the Report preview the plethora of impermissible legal conclusions that permeate the entire report. *See* Wells Rep. at 27 (“VDOC ADA Policies and Procedures Fall Below the ADA’s Minimum Requirements”); *id.* at 32–106 (“VDOC Does Not Meet The Requirements of the Americans with Disabilities Act and Rehabilitation Act”); *id.* at 66 (“VDOC’s Accommodations Request and Determination Processes Do Not Comply with ADA Requirements”); *id.* at 83 (“VDOC’s Grievance and Appeals Process is Insufficient to Meet ADA Requirements”); *id.* at 100 (“VDOC Fails to Accommodate Mentally Impaired Incarcerated Persons’ Progression through the Step-Down Program”).

Within these sections, and elsewhere throughout the Report, Wells expounds on these legal conclusions, which impermissibly advised what verdict should be rendered. For instance, in his “Summary Opinions,” Wells states in conclusory fashion that it is his “opinion that VDOC does not meet the requirements of the Americans with Disabilities Act and Rehabilitation Act,” and then lists various reasons in support. *Id.* ¶ 15. Wells opines that “VDOC’s staff is not adequately trained on the requirements of the ADA or VDOC’s own ADA-related policies,” which “*results in discrimination.*” *Id.* ¶ 15(d) (emphasis added). He states that “VDOC’s policies and procedures fail to identify and track people with disabilities and provide adequate accommodations during their incarceration,” which “*results in a failure to comply with the ADA’s non-discrimination mandate.*” *Id.* ¶ 15(b) (emphasis added). Wells then asserts that “people with mental health disabilities housed in the Step-Down Program do not receive *adequate accommodations for their disabilities.*” *Id.* ¶ 15(c) (emphasis added). Likewise, Wells claims that “VDOC’s intake procedures are not sufficient to identify people with disabilities, including mental health disabilities, and do not result in *adequate identification of accommodations needs.*” *Id.* ¶ 15(a)

(emphasis added). The use of these terms with considerable legal baggage—such as “discrimination” and “non-discrimination mandate” and “adequate accommodations”—are pure legal conclusions that should be excluded. *See Georges v. Dominion Payroll Servs., LLC*, No. 3:16CV777, 2018 WL 2088751, at *3 (E.D. Va. May 4, 2018) (excluding expert testimony that “amounts to impermissible legal conclusions that are not helpful”).

Wells expounds on his summary opinions with more legal conclusions throughout the remainder of his report. Consider the following further examples:

- VDOC is not “fulfilling its obligations under the ADA” because inmates’ “*‘accommodation needs’ are not met during intake screening,*” Wells Rep. ¶ 75 (emphasis added);
- VDOC’s “tracker does not lend itself to staff proactively providing accommodations,” which “*must inevitably result in people with disabilities going without necessary accommodations,*” *id.* ¶ 130 (emphasis added);
- “It is my opinion that by failing to train staff on these issues, *it is virtually impossible for staff to comply with the ADA and provide equal access,*” *id.* ¶ 162 (emphasis added);
- “VDOC policy thereby *refuses mentally impaired incarcerated persons equal access* to the benefits of the Step-Down program,” *id.* ¶ 180 (emphasis added);
- mentally impaired inmates are “*discriminated against in the status ratings in a perfect world,*” *id.* ¶ 183 (emphasis added);
- “Despite *the clear discriminatory impact of the Status Rating Chart* on mentally impaired incarcerated persons, accommodations are limited,” *id.* ¶ 185 (emphasis added);
- “Without meaningful mental health participation or mental health staff involvement in program decision-making such as for progression within a pathway, *in my opinion this violated [the] ADA in that equal access was not afforded to mentally ill participants,*” *id.* ¶ 189 (emphasis added);
- “Ultimately, *this is paramount to discrimination* under the ADA, as progression opportunities are not equal for mentally ill incarcerated persons,” *id.* ¶ 190 (emphasis added);

- “With regard to deficiencies in the Step-Down program specifically, VDOC policies and procedures and practices at ROSP *do not comply with the ADA or RA*,” *id.* ¶ 219 (emphasis added).

Such statements pervade Wells’s Report. The Report, and any testimony related to these “opinions,” should be excluded.

CONCLUSION

The opinions Wells offers in the Report are neither reliable nor relevant. Accordingly, the Court should exclude the Report and any related testimony.

September 8, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

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