

**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' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO EXCLUDE THE TESTIMONY OF LENARD VARE**

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PRELIMINARY STATEMENT

Plaintiffs respectfully move to exclude the report and testimony of Defendants' proffered expert, Lenard Vare, regarding (i) whether the policies, procedures, and practices underlying the Virginia Department of Correction's ("VDOC") restrictive housing program (the "Step-Down Program") comply with the Americans with Disabilities Act ("ADA"), and (ii) whether certain of the named Plaintiffs have qualifying disabilities under the ADA. Mr. Vare's opinions should be excluded in their entirety on two independent bases.

First, Mr. Vare's testimony should be excluded because he lacks the qualifications necessary to opine on VDOC's compliance with the ADA, or the nature and severity of Plaintiffs' disabilities. A self-described "Corrections Consultant and Expert," Mr. Vare has only "ancillary" experience with ADA-related issues and admits that he generally relies on the counsel of others—not his own independent judgment—to assess issues of ADA compliance. *See* Ex. 1 (Expert Report of Lenard Vare [hereinafter "Vare Rep."]) at 94; Ex. 2 (Vare Tr.) at 56:8–57:6, 63:19–64:11, 81:21–82–14, 303:2–9. Mr. Vare is similarly unqualified to opine on Plaintiffs' mental health disabilities. Mr. Vare is not a medical or mental health professional and therefore lacks the education and training necessary to diagnose mental health conditions or evaluate their impact on an individual. Whatever experience Mr. Vare has with prison administration, it is simply not relevant to the medical and mental health–related issues on which he is being offered as an expert.

Second, Mr. Vare's opinions should be excluded because they are the result of unreliable methods. Mr. Vare's report is devoid of any identifiable methodology used to arrive at his opinions. Nor could Mr. Vare identify any such methodology at his deposition. Instead, Mr. Vare claims that VDOC's Step-Down Program complies with the ADA because the facility that

currently houses the program—Red Onion State Prison (“ROSP”)—has received accreditation status from the American Correctional Association (“ACA”). Ex. 1 (Vare Rep.) at 76–77, 82–83, 86–87, 90–93. Mr. Vare admits, however, that ACA accreditation is not a proxy for ADA compliance and that an institution can be accredited by the ACA and still be noncompliant with the ADA. Ex. 2 (Vare Tr.) at 216:10–217:19, 228:17–230:5. In other words, ACA accreditation status says nothing about an institution’s compliance with the ADA, meaning that Mr. Vare’s opinions based on ACA accreditation are inherently unreliable.

Mr. Vare also purports to rely on statements made to him by VDOC officials during a June 2023 visit to ROSP. But Mr. Vare admits that he destroyed his notes of those conversations and remembers very little about his discussions. Indeed, when asked about the particulars of his conversations with VDOC officials—or even the names of the persons with whom he spoke—Mr. Vare was unable to respond. *See, e.g., id.* at 251:9–252:11, 253:22–254:7, 256:20–257:1, 261:10–12, 263:18–264:1, 271:19–272:6, 278:11–279:5. Mr. Vare’s inability to remember the substance of his conversations with VDOC officials is particularly troubling, given that numerous such officials have given deposition testimony in this case that is *inconsistent* with Mr. Vare’s opinions. Mr. Vare makes no effort to square statements allegedly made to him during his trip to ROSP with this deposition testimony.

For all these reasons, Mr. Vare’s opinions fail under *Daubert* and should be excluded.

FACTUAL BACKGROUND

I. Procedural History

Plaintiffs filed this action against VDOC and several individual defendants (collectively, “Defendants”), alleging, *inter alia*, that VDOC violates the ADA: (1) by failing to ensure that people with mental health disabilities have access to, are permitted to participate in, and reap the benefits of, programs, services, and activities, (2) by discriminating against individuals on the

basis of their mental health disabilities by failing to make reasonable modifications to the policies, practices, and procedures underlying the Step-Down Program, and (3) by failing to ensure that inmates with qualified mental health disabilities are housed in the most integrated setting appropriate to their needs. ECF No. 1 at ¶¶ 250–58; *see also* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7); 28 C.F.R. § 35.152(b)(1)–(2). Plaintiffs also allege that VDOC violates Section 504 of the Rehabilitation Act (“RA”): (1) by discriminating against people with mental health disabilities solely on the basis of their disabilities, and (2) by failing to reasonably accommodate people with mental health disabilities in its facilities, programs, activities, and services. ECF No. 1 at ¶¶ 259–64; *see also* 29 U.S.C. § 794.

On May 26, 2023, Plaintiffs served an expert report authored by Richard Wells, a 39-year veteran of the corrections field who has: worked in prisons, trained correctional officers, served as a corrections administrator, and overseen ADA compliance as a state correctional department’s subject matter expert. Mr. Wells now often works as a court-appointed monitor in prisons to ensure their compliance with the ADA. Ex. 3 (Expert Report of Richard Wells [hereinafter “Wells Rep.”]) at ¶¶ 3–10 & app. A.

In his opening report, Mr. Wells assessed VDOC’s policies, practices, and procedures insofar as they relate to inmates with mental health disabilities and identified areas where VDOC’s policies and practices are inconsistent with the policies and practices implemented by other penological institutions to comply with their obligations under the ADA and RA. *See generally id.* In forming his opinions, Mr. Wells drew on his extensive experience developing and conducting ADA audits on behalf of prisons and other penological institutions; serving as departmental statewide instructor for ADA-related cases at the California Department of Corrections and Rehabilitation; developing and delivering ADA training to corrections

professionals; and serving as a court-appointed monitor in connection with prison-related ADA settlements and implementation plans. *Id.* at ¶¶ 2–10, 14 & app. A. Mr. Wells has been admitted to testify as an expert on ADA-related issues in several state and federal proceedings. *Id.* at app. A.

On July 3, 2023, Defendants served a report by Mr. Vare, in which Mr. Vare purported to respond to Mr. Wells’s opinions “regarding whether the Virginia Department of Corrections . . . complies with the Americans with Disabilities Act.” Ex. 1 (Vare Rep.) at 1. In his report, Mr. Vare purports to offer opinions based on his experience as a corrections professional, his review of the deposition testimony and documents produced in the case, and a June 20, 2023 visit to ROSP. *Id.* at 6. Based on this information, Mr. Vare offers seven opinions in his report. Specifically, Mr. Vare opines that:

- ACA accreditation and associated audits “ensure continued compliance with ADA requirements.” *Id.* at 76.
- None of the named Plaintiffs have or had qualifying disabilities. *Id.* at 77.
- Each of the named Plaintiffs “posed a considerable direct safety and security threat,” such that VDOC did not need to accommodate any of the named Plaintiffs, and that Plaintiffs’ recommendations for VDOC to comply with the ADA would require “extensive modifications” at “potentially tremendous additional cost and risk.” *Id.* at 82.
- VDOC’s intake procedures are sufficient to identify people with disabilities. *Id.* at 86.
- There is no tracking mandate in the ADA and VDOC has not violated the ADA’s non-discrimination mandate. *Id.* at 89.
- VDOC staff are adequately trained in the requirements of the ADA and on VDOC’s own ADA-related policies. *Id.* at 90.
- VDOC’s grievance procedure provides a meaningful complaint process that provides for a prompt and equitable resolution to ADA-related complaints and complies with the ADA’s requirements. *Id.* at 92.

II. Mr. Vare's Purported Qualifications

In contrast to Mr. Wells, Mr. Vare has—by his own admission—only “ancillary” experience with ADA-related issues. Ex. 2 (Vare Tr.) at 81:21–82:14, 303:2–9. Mr. Vare is a self-described “Corrections Consultant and Expert” but has never been retained to provide expert testimony on the ADA, nor has he ever consulted on ADA-related issues. *See* Ex. 1 (Vare Rep.) at 94–100; Ex. 2 (Vare Tr.) at 18:18–19:4, 20:12–17, 21:4–14, 38:16–20, 39:5–18.

Although Mr. Vare claims to have “managed the implementation of policies and procedures related to the ADA” while working as a corrections professional, Ex. 1 (Vare Rep.) at 3, Mr. Vare clarified the scope of his responsibilities during his deposition, *see generally* Ex. 2 (Vare Tr.) at 56:8–64:11. Specifically, Mr. Vare testified that, notwithstanding what he wrote in his report, he never developed or drafted any ADA-related policies while working as a corrections professional. *Id.* at 56:8–58:11. Nor did he ever assess whether a policy, practice, or procedure complied with the ADA. *Id.* at 62:12–63:18. On the contrary, Mr. Vare testified that, to the extent he was ever presented with a question about ADA compliance, he relied on the advice of attorneys, not his own independent judgment or personal expertise, to determine whether a policy complied with the ADA. *Id.* at 63:19–64:11.

III. Mr. Vare's Purported Methodology

Mr. Vare claims that his opinions are based principally on (1) statements made to him during a June 2023 visit to ROSP, (2) his review of certain documents and deposition testimony, and (3) ROSP's accreditation by the ACA, an industry trade association that represents the interests of “corrections professionals.”¹ Ex. 1 (Vare Rep.) at 6, 34–54. Notwithstanding this

¹ *See About Us: Our History & Mission*, Amer. Corr. Ass'n, https://www.aca.org/ACA_Member/ACA/ACA_Member/AboutUs/AboutUs_Home.aspx (“ACA is the oldest association developed specifically for practitioners in the correctional profession.”);

catalog of materials, Mr. Vare was unable to answer basic questions about the source of his opinions or explain how the materials he reviewed are relevant to ADA-related issues.

For example, Mr. Vare testified that he spent approximately five hours visiting ROSP in June 2023, during which time he met with ROSP's Warden, Associate Warden, Chief of Housing and Programming, Operations Manager, Institutional Program Manager, and Supervising Mental Health Clinician. Ex. 2 (Vare Tr.) at 236:3–21; Ex. 1 (Vare Rep.) at 54–55. Mr. Vare claims to have taken notes during his visit, but he admits that he destroyed his notes on the way home from his trip, discarding them in a trash can at the Oklahoma City airport. Ex. 2 (Vare Tr.) at 237:21–238:15, 240:20–241:8. Without his notes, Mr. Vare remembers very little about his trip to ROSP. During his deposition, Mr. Vare could not identify the speaker of any unattributed statement in his report, nor could he remember the details of any conversation he had with anyone at ROSP. *Id.* at 251:9–252:11, 253:22–254:7, 256:20–257:1, 261:10–12, 263:18–264:1, 271:19–272:6, 278:11–279:5. Indeed, over the course of his deposition, Mr. Vare responded that he did not know, did not recall, or did not remember more than 90 times. *See generally id.*

see also Off. of Sen. Elizabeth Warren, *The Accreditation Con: A Broken Prison and Detention Facility Accreditation System That Puts Profits Over People* (2020), <https://www.warren.senate.gov/imo/media/doc/The%20Accreditation%20Con%20-%20December%202020.pdf>, at 2 (“The ACA’s dual role as an advocate for the private prison industry and the organization responsible for overseeing conditions at facilities run by private prison companies creates an irreconcilable conflict of interest. The ACA advocates for and lobbies on behalf of private prisons, supporting the prison-industrial complex and acting as the voice for corrections.” (internal quotations and citation omitted)); *Judge’s Reasons for Quitting Prison Ratings Body*, N.Y. TIMES (Aug. 8, 1982), <https://www.nytimes.com/1982/08/08/us/judge-s-reasons-for-quitting-prison-ratings-body.html> (“The commission has another, equally disturbing, conflict of interest. The American Corrections Association is made up of state and Federal corrections officials—the group whose performance the commission is charged with evaluating.”).

With respect to the information that he *did* remember—namely, ROSP’s ACA accreditation status—Mr. Vare conceded its substantial irrelevance to issues of ADA compliance. As Mr. Vare admitted at his deposition, ACA accreditation is not a proxy for ADA compliance. *Id.* at 216:10–217:19, 228:17–230:5. This is because ACA accreditation is based not on an institution’s compliance with the ADA, but on its compliance with ACA standards, the vast majority of which have nothing to do with the ADA. Indeed, [REDACTED]

[REDACTED]

[REDACTED]

Mr. Vare’s failure to remember the facts underlying his opinions or explain their significance to the case is particularly troubling given the many instances in which the record evidence contradicts his report. For example:

- Mr. Vare opines that VDOC is compliant with the ADA, *see* Ex. 1 (Vare Rep.) at 76–77, 90–92, but he does not address VDOC’s admission that it did not implement a policy for managing inmates with disabilities until July 1, 2016 and that such policy was implemented “to be in compliance with federal law,” Ex. 6 (Va. Dep’t of Corr.’s Objections and Answers to Plaintiffs’ Request for Admissions) at No. 29; Ex. 7 (King 30(b)(6) Tr.) at 139:11–13. Plaintiffs’ ADA and RA claims concern the period from 2012 to present, meaning that VDOC’s policies for managing inmates with disabilities *before* 2016 are highly relevant to the case. *See* ECF No. 1 at ¶¶ 207, 214, 216, 250–64.
- Mr. Vare opines that VDOC staff are adequately trained on ADA requirements. Ex. 1 (Vare Rep.) at 90–92. But Mr. Vare fails to address (i) VDOC’s admission that, prior to 2016, correctional staff received no ADA-specific training and that ADA training only became mandatory in July 2016; (ii) testimony from VDOC employees that they do not remember ever attending an ADA training program, before or after 2016; and (iii) testimony from a VDOC employee that he has not attended an ADA training program in several years. *See, e.g.,* Ex. 6 (Va. Dep’t of Corr.’s Objections and Answers to Plaintiffs’ Request for Admissions) at No. 32; Ex. 7 (King 30(b)(6) Tr.) at 125:18–21; Ex. 8 (Kiser Tr.) at 248:20–249:12; Ex. 9 (Elam Tr.) at 10:17–20, 44:7–10, 44:22–45:4; Ex. 10 (McDuffie Tr.) at 82:4–83:4, 378:2–379:3. Mr. Vare also fails to address the testimony of a VDOC recreation supervisor who, after her VDOC training, mistakenly believed that she did not need to know how to accommodate inmates with disabilities “because that’s not really our role.” Ex. 11 (Mefford Tr.) at 23:11–16, 28:7–29:6, 31:11–15.

- Mr. Vare opines that ACA accreditation and audits “ensure continued compliance with ADA requirements.” Ex. 1 (Vare Rep.) at 76. But Mr. Vare fails to address [REDACTED]
- Mr. Vare opines that VDOC’s intake procedures are sufficient to identify people with disabilities. Ex. 1 (Vare Rep.) at 86–89. But he does not address testimony from a former VDOC Regional Mental Health Clinical Supervisor that, during the mental health screening at intake, psychology associates do not always ask for past mental health records. Ex. 12 (Lee Tr.) at 20:8–15, 49:12–20. Nor did he reference testimony from the current ROSP and Wallens Ridge State Prison psychiatrist who stated that the mental health screening that ROSP inmates receive does not account for factors that should be considered to properly identify mental health conditions. Ex. 10 (McDuffie Tr.) at 82:4–83:4, 254:6–9, 256:16–257:13.
- Mr. Vare opines that VDOC’s grievance procedure “provide[s] a meaningful complaint process that provides for a prompt and equitable resolution to ADA-related complaints.” Ex. 1 (Vare Rep.) at 92–93. But Mr. Vare fails to address testimony from plaintiffs *and at least one VDOC employee* that inmates at Level S have difficulty accessing grievance forms. Ex. 13 (Cornelison Tr.) at 313:10–14; Ex. 14 (Mukuria Tr.) at 217:18–22, 218:8–11; Ex. 15 (Duncan Tr.) at 8:15–18, 31:22–32:3. He also fails to address testimony that VDOC policy allows ADA-related grievances to be returned to the inmate if they do not expressly reference the Facility ADA Coordinator, and that such policy does not require staff to provide an explanation of how to properly route the grievance. Ex. 7 (King 30(b)(6) Tr.) at 212:11–214:14.

ARGUMENT

The party proffering expert testimony has the burden of proving its admissibility.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592 n.10 (1993); *Doe v. Russell Cnty. Sch. Bd.*, 292 F. Supp. 3d 690, 719 (W.D. Va. 2018) (Jones, J.). In determining the admissibility of expert testimony, the district court serves as the gatekeeper, determining whether an expert is qualified, and if so, whether the proffered testimony “rests on a reliable foundation and is relevant to the task at hand.” *Daubert*, 509 U.S. at 597; *Nease v. Ford Motor Co.*, 848 F.3d 219, 229 (4th Cir. 2017). Mr. Vare’s opinions fail to meet this standard.

I. Mr. Vare Is Not Qualified to Offer Expert Testimony on the ADA.

To qualify as expert testimony, a witness’s opinion must be based on scientific, technical, or other specialized knowledge, *not on belief or speculation*. Fed. R. Evid. 702; *Daubert*, 509 U.S. at 590 (“[K]nowledge’ connotes more than subjective belief or unsupported speculation.”); *Donalds v. Ethicon, Inc.*, -- F.4th --, 2023 WL 2446703, at *3 (4th Cir. Mar. 10, 2023); *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021).

Here, Mr. Vare maintains that his opinions “are formed based on [his] education, knowledge, and experience, and from the perspective of a former prison warden and jail administrator.” Ex. 1 (Vare Rep.) at 6. An expert who seeks qualification based on his or her experience—as opposed to scientific or technical knowledge—must clear a high hurdle. To be qualified based on his or her experience, an expert must “explain how [his or her] experience leads to the conclusion reached, why [his or her] experience is a sufficient basis for the opinion, and how [his or her] experience is reliably applied to the facts.” *United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007) (quoting Fed. R. Evid. 702 advisory committee’s note to 2000 amendments); *United States v. McLean*, 695 F. App’x 681, 684 (4th Cir. 2017) (same). As explained below, Mr. Vare has provided none of the requisite information.

A. Mr. Vare Is Not Qualified to Opine on Whether VDOC’s Policies, Procedures, or Practices Are Consistent with the ADA.

Mr. Vare claims that he is qualified to testify as an expert on ADA compliance issues because he purportedly “managed the implementation of policies and procedures related to the ADA” while serving as a corrections administrator “overseeing operations over state prisons and a county jail facility.” Ex. 1 (Vare Rep.) at 3. In his deposition, however, Mr. Vare disclaimed any specialized expertise gained from this experience. For example, while Mr. Vare was a member of teams that worked on ADA-related issues, he testified that whenever he was asked to

determine whether a specific prison policy was “compliant with the Americans with Disabilities Act,” he would send the policy “to the attorneys in the county counsel’s office and **they would review it to make sure it met the standards.**” Ex. 2 (Vare Tr.) at 63:19–64:11 (emphasis added). In other words, Mr. Vare’s experience in “implement[ing] policies and procedures related to the ADA” consists of sending those policies *to other people* and then relying on *other people’s expertise* to decide whether a policy is ADA-compliant. This is plainly insufficient to qualify Mr. Vare as an ADA expert.

Indeed, Mr. Vare testified repeatedly that ADA-related issues were “ancillary” to his work as a prison official and have been “ancillary” to his work as a consultant and expert-for-hire. *Id.* at 81:21–82:14, 303:2–9; *see Robinette v. Wal-Mart Stores, Inc. Store #650*, 2016 WL 8737153, at *4 (W.D. Va. Feb. 5, 2016) (Jones, J.) (excluding proffered expert testimony where purported expert had “no specialized training or professional experience” in the subject matter of his testimony and his prior expert work in similar cases was limited to matters within his expertise). In fact, at various points during his deposition, it was unclear whether Mr. Vare even understood what ADA compliance is. For example, Mr. Vare testified that he previously served as an expert witness in *Brothers v. Board of County Commissioners*, where he supposedly “mention[ed]” that “some ADA-related violations [had] occurred.” Ex. 2 (Vare Tr.) at 18:7–17. In fact, *Brothers* did not involve any ADA claims, Mr. Vare’s report did not mention any ADA violations, and Mr. Vare was not admitted to testify about any issues related to the ADA. *Id.* at 18:18–19:4, 20:7–17; *see generally* Compl., *Brothers v. Bd. of Cnty. Comm’rs*, No. 5:21-cv-00418-SLP, ECF No. 1 (W.D. Okla. Apr. 29, 2021); Ex. 16 (Expert Report of Lenard Vare, *Brothers v. Bd. of Cnty. Comm’rs*, ECF No. 81-4). That Mr. Vare does not understand what is—and is not—relevant experience refutes his claim of expertise.

B. Mr. Vare Is Not Qualified to Opine Whether Inmates Have Qualifying Disabilities.

In addition to his opinions about VDOC's compliance with the ADA, Mr. Vare also purports to opine on whether Plaintiffs "ha[ve] any impairment that [rises] to the level of a disability" or that requires an accommodation under the ADA. Ex. 1 (Vare Rep.) at 81. Mr. Vare is plainly unqualified to offer these opinions. As he conceded in his report and at his deposition, Mr. Vare has "no medical or mental health background that would qualify" him to evaluate or diagnose anyone's medical or mental health condition or assess the accommodations they might need in light of their condition. *Id.* at 77; Ex. 2 (Vare Tr.) at 94:12–16, 106:6–16, 116:15–118:21. This, standing alone, is sufficient grounds to exclude his proffered testimony. *See, e.g., Norman v. Leonard's Express, Inc.*, 2023 WL 3034606, at *3 (W.D. Va. Apr. 21, 2023) (endorsing principle that a non-physician life-care planner could not opine about the necessity of specific medical treatments and procedures because they were outside the scope of his area of expertise); *Payne v. Gen. Motors Corp.*, 2002 WL 449756, at *3 (W.D. Va. Mar. 21, 2002) (Jones, J.) (acknowledging that motion to exclude testimony about plaintiff's injuries from purported expert who was not a medical doctor and had no medical background "has merit"); *Belo v. City of High Point*, 1998 WL 66617, at *3 (4th Cir. 1998) (affirming exclusion of testimony about medical causation from proffered expert who "had no medical, physics, or engineering training or expertise").

II. Mr. Vare's Opinions Should Be Excluded Because They Are Based on Unreliable Methods and Mr. Vare Is Unable to Adequately Explain Them.

Even if Mr. Vare is qualified to opine on ADA-related issues—which he is not—the vast majority of Mr. Vare's opinions should be excluded because they are based on unreliable methods that Mr. Vare is unable to explain. *See, e.g., Doe*, 292 F. Supp. 3d at 718 (excluding expert testimony where expert's report lacked "any explanation for the basis of his challenged

opinions”). In the few instances where Mr. Vare is capable of explaining his opinions, his analysis conflicts with the weight of the evidence, which provides yet another basis for excluding his opinions. *See, e.g., Perkins v. United States*, 626 F. Supp. 2d 587, 594 (E.D. Va. 2009) (excluding testimony from purported expert who “‘categorically dismissed’ or ignored evidence that contradicted his opinions and did not explain how he ruled out such ‘obvious alternative explanation[s]’ for plaintiff’s injuries (quoting *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202 (4th Cir. 2001)); *Sanchez v. Bos. Sci. Corp.*, 2014 WL 4851989, at *31 (S.D.W. Va. Sept. 29, 2014) (excluding expert opinion that was untethered to record evidence). Plaintiffs address Mr. Vare’s specific opinions below.

A. Mr. Vare’s Opinions about VDOC’s Compliance with the ADA Based on Its Purported Compliance with ACA Standards Are Unreliable.

Mr. Vare opines that VDOC’s policies, procedures, and practices comply with the ADA because two audits conducted by the ACA—an industry trade association representing the interests of “corrections practitioners”—found that ROSP was “an ADA-compliant facility.” Ex. 1 (Vare Rep.) at 51, 76–77, 90–92; *see supra* note 1. This opinion should be excluded for several reasons.

First, as Mr. Vare admitted at his deposition, ACA accreditation is not a proxy for ADA compliance. Ex. 2 (Vare Tr.) at 216:10–217:19, 228:17–230:5. This is because ACA accreditation is not based on—and ACA audits are not focused on—ADA compliance, but rather compliance with the ACA’s “performance-based standards.” *See* Ex. 1 (Vare Rep.) at 34 (“The Commission on Accreditation for Corrections was established in 1974 with the purpose of continuous review and evaluation about compliance with the ACA standards. ACA standards are the foundation of the accreditation process.”); Ex. 17 (Amer. Corr. Ass’n, *Performance-Based Standards and Expected Practices for Adult Correctional Institutions* (5th ed. Mar. 2021)

[hereinafter “*ACA Performance-Based Standards*”]) at xvii (explaining that “the performance-based model of accreditation will help facilities to operate more effective programs **while adhering to ACA performance-based standards and expected practices**” (emphasis added)); *see also* [REDACTED]

[REDACTED] The vast majority of these standards do not concern the ADA or inmates with disabilities. *See generally* Ex. 17 (*ACA Performance-Based Standards*); Ex. 2 (Vare Tr.) at 144:8–145:8, 149:9–150:2, 150:9–17, 151:8–16, 152:6–19, 153:6–20, 154:16–155:2, 156:15–157:11 (admitting that the standards he cites are not specifically related to inmates with disabilities or the ADA).

Indeed, Mr. Vare repeatedly cites ACA standards in his report that have nothing to do with the ADA or disabled inmates as evidence of VDOC’s purported compliance with the ADA. Ex. 1 (Vare Rep.) at 37–46, 91–92 (citing Ex. 17 (*ACA Performance-Based Standards*) at 105 (5-ACI-3D-08 requiring that “[w]ritten policy, procedure, and practice protect inmates from personal abuse, corporal punishment, personal injury, disease, property damages, and harassment”), 109 (5-ACI-3D-19, requiring that “[t]here is a written inmate grievance procedure that is made available to all inmates and that includes at least one level of appeal”), 121 (5-ACI-4B-01, requiring that “[w]ritten policy, procedure and practice provide that the placement of an inmate in Restrictive Housing shall be limited to those circumstances that pose a direct threat to the safety of persons or a clear threat to the safe and secure operations of the facility”), 129 (5-ACI-4B-24, requiring “[w]ritten policy, procedure, and practice” for out-of-cell time for inmates in restrictive housing), 139 (5-ACI-5B-01, 5-ACI-5B-02, requiring that there be a classification system, and accompanying written policy, procedure, and practice, for specifying the level of custody required for an inmate), 140 (5-ACI-5B-06, requiring that inmate’s custody level

classification is reviewed at least every 12 months), 144 (5-ACI-5B-19, requiring that “[w]ritten policy, procedure, and practice provide for a system that identifies and monitors the movements and activities of inmates who pose a significant concern to the safety, security, and orderly management of correctional institutions”)).

Of the few ACA standards that do invoke the ADA, none effectively measures whether a facility’s management of inmates with disabilities complies with the ADA. For example, ACA Standard No. 5-ACI-2C-11 asks whether a facility has a “written policy and procedure” in place for “housing used by inmates with disabilities,” without ever evaluating whether that “policy and procedure” actually complies with the ADA or is even enforced. *See* Ex. 17 (*ACA Performance-Based Standards*) at 59; *see also, e.g., id.* at 60 (5-ACI-2C-13); 104 (5-ACI-3D-04), 141 (5-ACI-5B-11), 157 (5-ACI-5E-02). ACA standards are also silent on the need to provide accommodations to inmates with disabilities, focusing instead on the need to provide accommodations to persons *other than inmates*, such as a facility’s employees. *See, e.g., id.* at 22 (5-ACI-1C-07, requiring reasonable accommodation for “either an applicant or an employee”), 70 (5-ACI-2F-03, requiring reasonable accommodations for “staff and visitors with disabilities”).

Second, Mr. Vare is unaware of any source that suggests that ACA accreditation is tantamount to ADA compliance. It is well established that an expert’s opinion must be “the product of reliable principles and methods.” Fed. R. Evid. 702; *see Mod. Remodeling, Inc. v. Tripod Holdings, LLC*, 2021 WL 5234698, at *6 (D. Md. Nov. 9, 2021). Here, however, Mr. Vare cites no literature or other experts in the field in support of his opinions. In fact, the documentary record reflects that ACA accreditation has no bearing on ADA compliance. For example, the DOJ has investigated at least two state prison systems, both ACA-accredited, and

found each of them to have committed multiple violations of the ADA. *See* Ex. 18 (WELLS001826, Letter from Rebecca B. Bond, Chief, Disability Rts. Section, U.S. Dep’t of Just., Civ. Rts. Div., to Ryan Thornell, Dir., and Ashley Oddo, Gen. Couns., Ariz. Dep’t of Corr., Rehab., & Reentry (July 19, 2023)) at -1833 (“ADCRR has violated and continues to violate Title II of the ADA through its discriminatory treatment of individuals with [] disabilities.”); Ex. 19, (WELLS001835, Letter from Anne S. Raish, Acting Chief, Disability Rts. Section, U.S. Dep’t of Just., Civ. Rts. Div., to Paul Schnell, Comm’r, Minn. Dep’t of Corr. (Sept. 30, 2022)) at -1842 (same); Ex. 20 (Expert Reply Report of Richard Wells) at apps. C, D. Faced with such evidence, Mr. Vare conceded at his deposition that an ACA-accredited institution can be noncompliant with the ADA. Ex. 2 (Vare Tr.) at 216:10–217:19, 228:17–230:5.

Third, the report that an institution receives after an ACA audit provides no information explaining *how* an auditor arrived at his or her conclusion that a facility is ACA-compliant. *Id.* at 175:3–7, 175:13–176:1. The absence of such information means that Mr. Vare does not know what information ACA auditors reviewed in connection with an audit or how they evaluated the information received to conclude that the facility does or does not comply with ACA standards. The audit process is a black box to Mr. Vare, meaning that he cannot vouch for its quality or efficacy in evaluating a facility.

Fourth, Mr. Vare opines that VDOC complies with the ADA based on his review of four ACA audits of ROSP. Ex. 1 (Vare Rep.) at 76–77. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Mr. Vare admits that he does not know whether the 2012 and 2015 audits evaluated ROSP's disability policies, and thus he has no basis for opining on ROSP's compliance during those years. Ex. 2 (Vare Tr.) at 195:7–12. Indeed, the available evidence suggests that ROSP was *not* compliant with the ADA in 2012 and 2015, as VDOC did not even have an ADA policy in place before 2016. *See* Ex. 6 (Va. Dep't of Corr.'s Objections and Answers to Plaintiffs' Requests for Admissions) at No. 29.

In sum, Mr. Vare's opinions are exactly the type of testimony that Rule 702 is intended to exclude. His opinions based on ACA standards rely on a methodology that is fundamentally flawed, and the conclusions he draws from that methodology conflict with the factual record. Mr. Vare's opinions based on ACA standards should be excluded.

B. Mr. Vare's Opinions Regarding Whether Plaintiffs Have Qualifying Disabilities Are Unreliable.

Mr. Vare next purports to opine that none of the named Plaintiffs in this case have a qualified mental health disability. Ex. 1 (Vare Rep.) at 81. But as explained above, Mr. Vare does not have any medical or mental health training, and thus lacks the expertise necessary to opine on whether Plaintiffs' mental health conditions rise to the level of a qualified disability. *Id.* at 77 (“Neither do I” have “medical or mental health background that would qualify [me] to” “estimat[e] the medical and mental health limitations of the named plaintiffs in this case.”); Ex. 2 (Vare Tr.) at 106:6–16, 116:15–118:21 (admitting that he is not qualified to assess whether a person has a particular medical or mental health diagnosis, whether a licensed professional's

diagnosis is correct, or whether an individual has treatment needs), 94:12–16 (“Q. Do you know what a significant DSM diagnosis is? A. **Not --not being a medical or mental health expert, I only know what a layperson’s knowledge would be related to that.**” (emphasis added)), 102:1–3 (“A. **I do not know. I do not know. That may be something that a medical expert needs to answer. I don’t know.**” (emphasis added)).

Because Mr. Vare lacks any medical or mental health training, whatever methodology he used to arrive at his opinions about Plaintiffs’ disabilities—and, to be clear, Mr. Vare identified no such methodology in his report or at his deposition—is inherently unreliable. *See, e.g., Moore v. BPS Direct, LLC*, 2019 WL 2913307, at *8 (D.S.C. July 8, 2019) (allowing mechanical engineer to testify as expert on manufacturing and design but not on suspension trauma and other medical injuries because he had “no medical training”); *Lee v. City of Richmond*, 2014 WL 5092715, at *4–5 (E.D. Va. Sept. 30, 2014) (finding that a use of force expert was not qualified to testify about the effect of tear gas on plaintiff because he had “no medical training or experience that would permit him to testify” on the effects of tear gas on a particular person and failed to “explain[] how his experience leads to the proffered opinion or why that experience is a sufficient basis for the proffered opinion, or how his experience is reliably tethered to the facts”); *United States v. Huber*, 603 F.2d 387, 399 (2d Cir. 1979) (upholding district court finding that economics professor with no medical training was unqualified to testify as an expert concerning appellant’s mental state).

C. Mr. Vare's Opinions on the Purported Safety and Security Threat Posed by Plaintiffs Are Unreliable.²

Mr. Vare opines that none of the named Plaintiffs has ever been entitled to an accommodation based on his mental health disability because “each one of the named plaintiffs posed a considerable direct safety and security threat based upon their history of violent behavior and the severity of dangerous and aggressive actions while incarcerated which justified their placements into high-security housing.” Ex. 1 (Vare Rep.) at 82. Mr. Vare further opines that any such accommodations should be denied in the future because “extensive modifications to current safety and security protocols would be required . . . to allow the additional access” that Plaintiffs request. *Id.* Mr. Vare's opinions related to the “safety and security threat[s]” allegedly posed by Plaintiffs are unreliable in several respects.

First, Mr. Vare does not identify the “additional access to programs” that he claims to be evaluating. Nor does he explain why Plaintiffs' proposed modifications to these programs would pose a safety concern. Mr. Vare's failure to specify the modifications he is analyzing is notable, given that many of the changes that Plaintiffs request—such as [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]—do not require any obvious changes to security practices.

² Plaintiffs have objected to Defendants' assertion of a “direct threat” defense as untimely pleaded. *See* ECF No. 351. As of the date of this motion, Plaintiffs' objection remains pending. Should the Court sustain Plaintiffs' objection, Mr. Vare's opinions about the purported “direct safety and security threat[s]” posed by Plaintiffs should be excluded as irrelevant. *See* Fed. R. Evid. 702(a) (noting an expert's testimony must “help the trier of fact to understand . . . a fact in issue”); *Atanassova v. Gen. Motors LLC*, 2021 WL 683246, at *6 (D.S.C. Feb. 22, 2021) (excluding expert testimony on a subject that was “no longer relevant to a fact at issue in this case”).

Second, Mr. Vare has not engaged in any meaningful analysis of Plaintiffs’ purported security risks, let alone the *additional* risks that Plaintiffs might pose were they to receive certain accommodations. On the contrary, Mr. Vare does nothing more than summarize Plaintiffs’ criminal and disciplinary histories, without providing so much as an explanation as to *why* such criminal and disciplinary histories make modifications to the Step-Down Program untenable. Ex. 1 (Vare Rep.) at 20–34. Such opinions should be excluded, as it is well established that the mere recitation of facts—without any analysis—is not admissible as expert testimony. *See, e.g., In re Trasylol Prods. Liab. Litig.*, 709 F. Supp. 2d 1323, 1346 (S.D. Fla. 2010) (excluding expert witness that did “not analyze the facts,” but rather “regurgitate[d] them and reache[d] conclusory opinions that are purportedly based on these facts”).

Even if Mr. Vare’s recitation of facts were admissible as expert testimony—which it is not—Mr. Vare’s recitation is incomplete. For example, in determining that “each one of the named plaintiffs pose[s] a considerable direct safety and security threat,” Mr. Vare focuses exclusively on “whether [Plaintiffs] were appropriately placed into the [Step-Down Program]” in the first place. Ex. 1 (Vare Rep.) at 20, 82. As Mr. Vare acknowledges, however, each of the named Plaintiffs was placed in the Step-Down Program years—and sometimes *many years*—ago, meaning that Mr. Vare relies on incidents that are outdated and not reflective of Plaintiffs’ *current* and/or *recent* security risks. *See id.* at 21–33. Indeed, seven Plaintiffs have returned to general population since the filing of the Complaint, *see id.*, meaning that VDOC does not consider them to pose any special security risk at this time. That Mr. Vare fails to consider that an individual’s security risk can change over time—a fact VDOC tacitly admits by moving certain Plaintiffs to general population—is fatal to the reliability of this testimony. *In re Bextra & Celebrex Mktg. Sales Pracs. & Prod. Liab. Litig.*, 524 F. Supp. 2d 1166, 1176 (N.D. Cal.

2007) (excluding opinion formed by “cherry-picking” supportive facts “and rejecting or ignoring the great weight of the evidence that contradicts [the] conclusion”).

D. Mr. Vare’s Opinions about the Costs Associated with Reforming the Step-Down Program Are Unreliable.³

Mr. Vare claims that Defendants are not required to make any changes to the Step-Down Program because of the “potentially tremendous additional cost” of implementing any such changes. Ex. 1 (Vare Rep.) at 82. This opinion should be excluded for three reasons.

First, Mr. Vare does not identify the specific modifications to the Step-Down Program that he believes would result in a “tremendous additional cost.” *See id.* at 82–86. Without identifying the specific modifications that form the basis of his opinion, Mr. Vare’s statements about their supposedly “tremendous . . . cost” are entirely hypothetical. *Robinette*, 2016 WL 8737153, at *5 (excluding proffered expert testimony where the expert’s opinions were “speculative because they are not based on sufficient facts in the record”).

Second, Mr. Vare does not quantify the “cost” associated with any modification to the Step-Down Program. *See* Ex. 1 (Vare Rep.) at 82–86. Nor does he provide a benchmark against which any such cost can be adjudged to be “tremendous.” *Id.* It is black-letter law that testimony “must be based on more than subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 590; *Donalds*, 2023 WL 2446703, at *3; *Sardis*, 10 F.4th at 281. Without providing any facts about the costs associated with any modification, information about how those costs

³ Plaintiffs have objected to Defendants’ assertion of an “undue burden” defense as untimely pleaded. *See* ECF No. 351. As of the date of this motion, Plaintiffs’ objection remains pending. Should the Court sustain Plaintiffs’ objection, Mr. Vare’s opinions about the purported “extensive modifications” and “potentially tremendous additional cost” posed by Plaintiffs’ proposed modifications should be excluded as irrelevant. *See* Fed. R. Evid. 702(a); *Atanassova*, 2021 WL 683246, at *6.

compare to the costs of prison programs generally, or any standard by which to judge whether or not a cost is “tremendous,” Mr. Vare’s opinions are based on sheer conjecture.

Finally, even if it were appropriate to provide the type of vague and standard-less testimony that Mr. Vare offers in his report, it is clear that Mr. Vare’s opinions are not based on any defensible methodology. For example, while Mr. Vare opines upon the “tremendous . . . cost” of various (unspecified) modifications, he admits that he did not so much as look at a budget for ROSP or VDOC. *See* Ex. 2 (Vare Tr.) at 47:19–48:2. Nor did he compare a ROSP or VDOC budget to the budget of any other prison or prison system. *See id.* at 46:7–48:2. Without looking at the data necessary to provide an educated opinion about the costliness of certain changes to the Step-Down Program or VDOC’s ability to sustain such costs, Mr. Vare cannot testify on the feasibility of implementing changes to the Step-Down Program from a cost perspective.

E. Mr. Vare’s Opinions Should Be Excluded to the Extent They Are Based on Purported Conversations with VDOC Staff.

A number of Mr. Vare’s opinions—including his opinions about the adequacy of VDOC’s ADA training program and its grievance procedures—are based on conversations he allegedly had with VDOC staff during his June 2023 visit to ROSP. *See, e.g.,* Ex. 1 (Vare Rep.) at 54–69 (describing June 20 site visit to ROSP); Ex. 2 (Vare Tr.) at 253:22–254:11, 256:3–19, 258:4–10, 263:15–264:1, 275:5–9, 278:11–21, 287:6–288:10 (explaining his reliance on conversations with VDOC staff from June 2023 site visit). As explained above, however, Mr. Vare destroyed his notes from these conversations on his way home from the prison. Ex. 2 (Vare Tr.) at 240:20–241:8. Without his notes, Mr. Vare could not answer basic questions about his conversations with VDOC staff. For example, Mr. Vare could not identify:

- The individual(s) who “informed” him “that there are some individuals in Level S that have no desire to be placed into lower levels and willingly wish to remain in their

current classification for safety reasons.” Ex. 1 (Vare Rep.) at 56; Ex. 2 (Vare Tr.) at 251:9–252:11; *see also id.* at 252:18–253:4 (admitting that he did not do anything to independently verify this assertion beyond speak with VDOC staff).

- The individual(s) who “informed” him that “there were no individuals identified as seriously mentally ill (SMI) in Level S.” Ex. 1 (Vare Rep.) at 58; Ex. 2 (Vare Tr.) at 254:12–255:5; *see also id.* at 256:3–12 (admitting that he did not do anything to independently verify this assertion beyond speak with VDOC staff).
- The individual(s) who told him that “[a]ll corrections personnel at ROSP were trained in Motivational Interviewing (MI).” Ex. 1 (Vare Rep.) at 58; Ex. 2 (Vare Tr.) at 256:13–257:6; *see also id.* at 257:7–258:10 (admitting that he did not review any motivational interviewing training materials, or consider any other information beyond speak with VDOC staff).

Mr. Vare’s inability to remember the factual bases for his opinions is fatal to their admissibility. The Federal Rules of Civil Procedure require an expert to disclose “the basis and reasons for” his opinions as well as “the facts and data considered by the witness in forming them.” Fed. R. Civ. P. 26(a)(2)(B). Moreover, *Daubert* requires the Court to “judge [the expert] testimony’s basis in facts, reliable principles, and reliable application of those principles to assess its reliability.” *Mod. Remodeling*, 2021 WL 5234698, at *6. Absent information about who said what to Mr. Vare, neither Plaintiffs nor the Court can perform this gatekeeping analysis.

Separate and apart from Mr. Vare’s inability to provide the factual basis for his opinions, the facts that he *can* identify are contrary to weight of the record evidence. For example, Mr. Vare opines that “Mr. Wells’ assertion that VADOC’s staff is not adequately trained in the requirements of the ADA or VADOC’s own ADA-related policies is incorrect.” Ex. 1 (Vare Rep.) at 90. This opinion contradicts the record evidence, which establishes that:

- VDOC did not have an ADA training program until 2016, *see, e.g.*, Ex. 6 (Va. Dep’t of Corr.’s Objections and Answers to Plaintiffs’ Request for Admissions) at No. 32; Ex. 7 (King 30(b)(6) Tr.) at 125:18–21;

- Certain VDOC employees do not remember ever attending an ADA training program, before or after 2016, *see, e.g.*, Ex. 8 (Kiser Tr.) at 248:20–249:12; Ex. 9 (Elam Tr.) at 10:17–20, 44:7–10, 44:22–45:4;
- Other VDOC employees have not attended an ADA training program in several years, *see, e.g.*, Ex. 10 (McDuffie Tr.) at 82:4–83:4, 378:2–379:3; and
- VDOC employees have come away from the training program without an understanding of their obligations under the ADA, *see, e.g.*, Ex. 11 (Mefford Tr.) at 23:11–16, 28:7–29:6, 31:11–15 (ROSP recreation supervisor testifying that her employment training did not discuss the provision of recreation services for inmates who have disabilities because it is “not really [her] role” to provide accommodations for recreational services).

Mr. Vare’s failure to grapple with these facts is grounds for exclusion. *See, e.g., Bextra*, 524 F. Supp. 2d at 1176.

CONCLUSION

For the foregoing reasons, the Court should grant this Motion and exclude Mr. Vare’s opinions in their entirety.

Dated: September 8, 2023

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 8th day of September, 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.

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