

**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 TO EXCLUDE THE REPORT AND TESTIMONY OF RICHARD WELLS**

TABLE OF CONTENTS

Table of Authorities	ii
Preliminary Statement.....	1
Legal Standard	1
Argument	2
I. Mr. Wells Is Qualified to Offer the Opinions in His Report.	2
A. Mr. Wells Has Extensive Experience Overseeing ADA Compliance Issues in Correctional Settings.	3
B. Defendants Mischaracterize Mr. Wells’s Opinions.	4
1. Mr. Wells Is Qualified to Opine on the Adequacy of Defendants’ Intake Procedures.	4
2. Mr. Wells Does Not Offer Opinions on Medical or Psychological Issues.	6
II. The Opinions That Mr. Wells Offers Are Relevant to Plaintiffs’ Claims.	7
A. Mr. Wells’s Opinions Are Relevant to Plaintiffs’ ADA and RA Claims.	8
B. Mr. Wells’s Opinions Are Relevant to the Relief That Plaintiffs Seek.....	10
C. Plaintiffs’ Failure to Bring Standalone Claims Related to Each of Mr. Wells’s Opinions Is Not a Basis for Excluding Mr. Wells’s Testimony.	11
D. The Admissibility of Mr. Wells’s Opinions Is Not Dependent on His Ability to Identify the Specific ADA Violations That Individual Plaintiffs Suffered.....	12
III. Mr. Wells Reliably Applies His Experience to the Facts of the Case.	13
IV. Mr. Wells’s Opinions Should Not Be Excluded as Impermissible Legal Conclusions.....	14
Conclusion	16

TABLE OF AUTHORITIES

Page(s)

Cases

<i>In re C.R. Bard, Inc.</i> , 948 F. Supp. 2d 589 (S.D.W. Va. 2013).....	5, 6
<i>Cooper v. Smith & Nephew, Inc.</i> , 259 F.3d 194 (4th Cir. 2001)	1, 2, 14
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993).....	1, 2
<i>Dunn v. Dunn</i> , 318 F.R.D. 652 (M.D. Ala. 2016).....	11, 12
<i>E.E.O.C. v. Freeman</i> 778 F.3d 463 (4th Cir. 2015)	14
<i>In re Ethicon Inc. Pelvic Repair Sys. Prod. Liab. Litig.</i> , 2017 WL 6346633 (S.D.W. Va. Dec. 12, 2017).....	13
<i>Focal Point Films, LLC. v. Sandhu</i> , 2020 WL 5760355 (N.D. Cal. Sept. 28, 2020).....	15, 16
<i>Gilley v. C.H. Robinson Worldwide, Inc.</i> , 2021 WL 4316811 (S.D.W. Va. Sept. 22, 2021)	6
<i>Hangerter v. Provident Life & Accident Ins. Co.</i> , 373 F.3d 998 (9th Cir. 2004)	15
<i>Knight v. Boehringer Ingelheim Pharms., Inc.</i> , 323 F. Supp. 3d 837 (S.D.W. Va. 2018).....	13
<i>Kopf v. Skyrms</i> , 993 F.2d 374 (4th Cir. 1993)	16
<i>McKiver v. Murphy-Brown, LLC</i> , 980 F.3d 937 (4th Cir. 2020)	6
<i>McReynolds v. Sodexo Marriott Servs., Inc.</i> , 349 F. Supp. 2d 30 (D.D.C. 2004)	6
<i>Md. Cas. Co. v. Therm-O-Disc, Inc.</i> , 137 F.3d 780 (4th Cir. 1998)	2
<i>Metamining, Inc. v. Barnette</i> , 2013 WL 3245355 (W.D. Va. June 26, 2013) (Jones, J.).....	2

<i>Pelican Int’l, Inc. v. Hobie Cat Co.</i> , --- F. Supp. 3d ----, 2023 WL 2130379 (S.D. Cal. Feb. 10, 2023)	15
<i>Roberts v. Sunbelt Rentals, Inc.</i> , 2016 WL 1259414 (W.D. Va. Mar. 30, 2016).....	6
<i>Robinson v. Lee-Moore Oil Co.</i> , 2002 WL 31769789 (M.D.N.C. Nov. 25, 2002).....	6
<i>Sanchez v. Bos. Sci. Corp.</i> , 2014 WL 4851989 (S.D.W. Va. Sept. 29, 2014).....	12
<i>SAS Inst., Inc. v. World Programming Ltd.</i> , 125 F. Supp. 3d 579 (E.D.N.C. 2015).....	13
<i>Specht v. Jensen</i> , 953 F.2d 805 (10th Cir. 1988)	15
<i>TFWS, Inc. v. Schaefer</i> , 325 F.3d 234 (4th Cir. 2003)	5
<i>Traxys N. Am., LLC v. Concept Mining, Inc.</i> , 808 F. Supp. 2d 851 (W.D. Va. 2011) (Jones, J.)	1
<i>United States v. Dazey</i> , 403 F.3d 1147 (10th Cir. 2005)	16
<i>United States v. Perkins</i> , 470 F.3d 150 (4th Cir. 2006)	16
<i>United States v. Wilson</i> , 484 F.3d 267 (4th Cir. 2007)	13
<i>Westberry v. Gislaved Gummi AB</i> , 178 F.3d 257 (4th Cir. 1999)	2
<i>Williams v. Ill. Dep’t of Corr.</i> , 2023 WL 1472246 (S.D. Ill. Feb. 2, 2023)	13, 14

Rules

Fed. R. Evid. 702	1, 2, 13
Fed. R. Evid. 704	16

PRELIMINARY STATEMENT

Richard Wells is a 39-year veteran of the corrections field who, for more than 15 years, oversaw ADA compliance issues for the second-largest prison system in the United States. Here, Mr. Wells's testimony will assist the jury in evaluating the types of policies, procedures, and practices that corrections institutions enact to satisfy their obligations under the ADA and RA, and how the policies, procedures, and practices that Defendants chose to enact (or not enact) differ from those enacted by other institutions. These opinions are indisputably relevant to Plaintiffs' ADA and RA claims as well as the relief that Plaintiffs seek pursuant to this lawsuit.

Despite all this, Defendants move to exclude Mr. Wells's testimony by attacking his credentials, arguing that his analysis is irrelevant to the issues in dispute, and painting his opinions as impermissible legal conclusions. This is simply not true. In advancing their arguments, Defendants blatantly mischaracterize Mr. Wells's opinions and lodge criticisms that go, at best, to the weight that Mr. Wells's testimony should receive, not its admissibility. None of Defendants' attacks justifies excluding Mr. Wells's testimony. Defendants' motion to exclude should be denied.

LEGAL STANDARD

Rule 702 governs the admissibility of expert testimony. *See* Fed. R. Evid. 702. In applying Rule 702, the district court acts as a gatekeeper "between expert evidence and the trier of fact," not as a factfinder. *Traxys N. Am., LLC v. Concept Mining, Inc.*, 808 F. Supp. 2d 851, 853 (W.D. Va. 2011) (Jones, J.) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)). Accordingly, a proponent of expert testimony need not prove that the expert's testimony is correct; instead, it need only establish by a preponderance of the evidence that the testimony is relevant and reliable. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th

Cir. 2001) (citing *Daubert*, 509 U.S. at 592 n.10); *Metamining, Inc. v. Barnette*, 2013 WL 3245355, at *9 (W.D. Va. June 26, 2013) (Jones, J.).

In evaluating reliability, “[t]he inquiry to be undertaken by the district court is ‘a flexible one’ focusing on the ‘principles and methodology’ employed by the expert, not on the conclusions reached.” *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (quoting *Daubert*, 509 U.S. at 594–95). The inquiry has a “liberal thrust” favoring admission. *Daubert*, 509 U.S. at 588; *Md. Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780, 783 (4th Cir. 1998); see Fed. R. Evid. 702 advisory committee’s note to 2000 amendment (noting that post-*Daubert* jurisprudence illustrates that “the rejection of expert testimony is the exception rather than the rule”). Indeed, even for “shaky but admissible evidence,” *Daubert* itself counsels that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof”—rather than outright exclusion—“are the traditional and appropriate means of attacking” such testimony. *Daubert*, 509 U.S. at 596; see also *Westberry*, 178 F.3d at 261.

ARGUMENT

Defendants argue that Mr. Wells should be precluded from offering expert opinion testimony because (1) he is not qualified to offer certain of his opinions; (2) certain of his opinions are irrelevant to Plaintiffs’ claims; (3) several of his opinions are the result of unreliable methods; and (4) several of his opinions constitute legal conclusions. None of these arguments has any merit.

I. Mr. Wells Is Qualified to Offer the Opinions in His Report.

Defendants contend that Mr. Wells—a corrections professional with decades of experience managing ADA compliance issues in prisons—is unqualified to offer certain opinions in his report. Mot. at 4. Specifically, Defendants contend that Mr. Wells is unqualified to opine

on the “incidence of VDOC inmates with mental illness” as well as certain “medical and psychological subjects.” *Id.* at 4–9. Defendants’ arguments are unavailing.

A. Mr. Wells Has Extensive Experience Overseeing ADA Compliance Issues in Correctional Settings.

There can be no serious dispute that Mr. Wells is qualified to offer opinions on how prison systems implement policies and procedures that are designed to comply with the ADA and RA as well as the ways in which Defendants’ policies and procedures deviate from what is typical. For over 30 years, Mr. Wells served as a member of the California Department of Corrections (“CDCR”), where he held positions at eight separate penological institutions, including positions in those institutions’ mental health and segregation units. Ex. 1, Wells Rep. ¶¶ 3, 5–6 & App’x A at 152; Ex. 2, Wells Reply Rep. App’x A at 57–58. From 2000 to 2010, Mr. Wells served as a Correctional Counselor and Facility Captain of CDCR’s Office of Audits and Court Compliance (“OACC”), “a unit specifically designed to monitor various litigation cases and to conduct various types of statewide monitoring [and] audits . . . primarily centered around cases pertaining to the ADA.” Ex. 1, Wells Rep. ¶ 5 & App’x A at 152–53; Ex. 2, Wells Reply Rep. App’x A at 62–63. While working for the OACC, Mr. Wells was responsible for, among other things, ensuring court-mandated compliance with the ADA for CDCR programs, conducting ADA compliance reviews and audits, and developing formal department-wide ADA training. Ex. 1, Wells Rep. App’x A at 153; Ex. 2, Wells Reply Rep. App’x A at 146–47. From 2010 to 2015, Mr. Wells served as the Deputy Director, Correctional Administrator (Associate Warden), and Chief of the OACC, where he served as the CDCR’s statewide subject matter expert for the ADA. Ex. 1, Wells Rep. ¶¶ 7–8 & App’x A at 153; Ex. 2, Wells Reply Rep. App’x A at 57–59, 61–62. Since 2012, Mr. Wells has provided ADA consulting services to numerous penological institutions, including the Monterey County Jail, and has served as a

neutral court-appointed monitor in connection with multiple ADA litigations, including in cases involving the Alameda County Jail, the Orange County Jail, and the Michigan Department of Corrections. Ex. 1, Wells Rep. ¶ 4 & App’x A at 151–52; Ex. 2, Wells Reply Rep. App’x A at 57–58, 60–61.

Based on his credentials, Mr. Wells has been repeatedly called upon to provide expert testimony in civil ADA cases. In the last five years, Mr. Wells has provided Rule 26 reports and testimony in six cases. Ex. 1, Wells Rep. ¶ 12 & App’x A at 151–52; Ex. 1, Wells Reply Rep. ¶ 6 & App’x A at 58. Mr. Wells has never been disqualified from providing expert testimony on *any* topic in *any* case.

B. Defendants Mischaracterize Mr. Wells’s Opinions.

Notwithstanding the depth and breadth of Mr. Wells’s experience, Defendants maintain that Mr. Wells is unqualified to offer certain opinions in his report. First, Defendants argue that Mr. Wells is unqualified to opine on whether “VDOC is . . . adequately or appropriately identifying incarcerated persons” with mental illnesses. Mot. at 4–7. Second, Defendants maintain that Mr. Wells is unqualified to testify about certain “medical and psychological subjects.” *Id.* at 7–9. Defendants distort the nature of Mr. Wells’s opinions.

1. Mr. Wells Is Qualified to Opine on the Adequacy of Defendants’ Intake Procedures.

Among other opinions he offers, Mr. Wells opines that Defendants’ intake procedures fail to adequately identify inmates with mental health disabilities, thereby contributing to the length of time such inmates remain in Step-Down Program. *See* Ex. 1, Wells Rep. ¶¶ 75–103, 165–68, 208, 212, 214, 220; Ex. 2, Wells Reply Rep. ¶¶ 60–62. In support of this opinion, Mr. Wells relies on his extensive experience implementing and evaluating ADA programs in prison

settings. Ex. 1, Wells Rep. ¶¶ 13–14, 81, 85, 168, 208; *see also generally id.* App’x A; Ex. 2, Wells Reply Rep. App’x A. Based on this experience, Mr. Wells opines that:

- Defendants’ intake procedures focus too narrowly on inmates’ current symptoms and fail adequately to explore inmates’ mental health histories, Ex. 1, Wells Rep. ¶¶ 80, 82, 84; Ex. 2, Wells Reply Rep. ¶ 53;
- The criteria used to assign mental health codes to inmates are opaque, inconsistent, and in several instances, disavowed by the very professionals charged with assigning mental health codes, Ex. 1, Wells Rep. ¶¶ 80–87, 96–97; Ex. 2, Wells Reply Rep. ¶ 53; and
- VDOC records that are meant to track mentally ill inmates are incomplete and error-ridden, Ex. 1, Wells Rep. ¶¶ 89, 91–95; Ex. 2, Wells Reply Rep. ¶¶ 60–62.

In addition to his review of Defendants’ policies and procedures, Mr. Wells observes that “the proportion of mentally ill persons within the prison population as identified by VDOC is substantially lower than the . . . percentages of mentally ill incarcerated persons in other state prison systems.” Ex. 1, Wells Rep. ¶ 78; *see also id.* ¶ 95. Specifically, Mr. Wells observes that while “most studies estimate that approximately 50 percent or more of incarcerated persons nationwide have mental illness[es],” VDOC identifies only 25% of its prison population as having “a mild mental impairment or [serious mental illness].” *Id.* ¶ 78. Mr. Wells views this discrepancy as further evidence of the failure of VDOC’s policies to adequately identify inmates with mental illnesses. *Id.* ¶¶ 78, 95.

Defendants take issue with Mr. Wells’s reliance on these statistics because Mr. Wells is not a statistician. *See* Mot. at 1, 5–7. This position is ludicrous. To be clear, Mr. Wells is not performing any statistical analyses for which he lacks the requisite expertise. Instead, he is relying on publicly-available statistical data that has been reported in the academic literature—and by VDOC itself—as one of several pieces of evidence that supports his conclusions. Experts are entitled to rely on information contained in academic literature, *see, e.g., TFWs, Inc. v. Schaefer*, 325 F.3d 234, 240 (4th Cir. 2003); *In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 626

(S.D.W. Va. 2013), as well as information furnished by defendants, *see, e.g., McReynolds v. Sodexo Marriott Servs., Inc.*, 349 F. Supp. 2d 30, 38 (D.D.C. 2004) (denying defendant's motion to exclude plaintiff's expert on the ground that the expert had failed to independently verify data produced by defendant itself).

To the extent Defendants claim that Mr. Wells lacks the qualifications necessary to *understand* the information he cites, Defendants' position is unavailing. *See McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 960 (4th Cir. 2020). Contrary to Defendants' suggestion, a Ph.D. in statistics is not necessary for someone to understand the mathematical concepts that Mr. Wells's applies—*i.e.*, that 25% is less than 50%. Mr. Wells's reliance on such statistics is not a basis for excluding his opinions.¹

2. *Mr. Wells Does Not Offer Opinions on Medical or Psychological Issues.*

Defendants next contend that Mr. Wells offers opinions about various “medical and psychological subjects.” Mot. at 7–9. This is not true either. Contrary to Defendants' assertion, Mr. Wells's opinions are focused solely on the policies and procedures that underlie the Step-Down Program. He does not purport to diagnose any inmate with a mental health condition, nor does he opine on whether the Step-Down Program exacerbates pre-existing mental illnesses. Put

¹ Defendants contend that Mr. Wells has misconstrued the academic articles he cites for the relevant statistics. Even if this were true—which it is not—this criticism goes to weight, not admissibility. *Roberts v. Sunbelt Rentals, Inc.*, 2016 WL 1259414, at *9 (W.D. Va. Mar. 30, 2016) (holding that even “legitimate criticisms” about the validity of an expert's testimony “go to the weight, not admissibility, of the testimony” and can be challenged “at trial through cross-examination”); *Gilley v. C.H. Robinson Worldwide, Inc.*, 2021 WL 4316811, at *4–5 (S.D.W. Va. Sept. 22, 2021) (declining to exclude expert testimony on reliability grounds where he “relied on information from a published paper,” which “even if . . . inaccurate” is an issue “that goes to weight, not admissibility”); *Robinson v. Lee-Moore Oil Co.*, 2002 WL 31769789, at *5 (M.D.N.C. Nov. 25, 2002) (explaining that “the fact that Defendant disagrees with [the expert's] facts and assumptions is not enough at this point for this court to hold [the expert's] testimony inadmissible as a matter of law” because “questions about [the expert's] assumptions and methodology may go more toward weight, not admissibility, and may best be left for cross-examination”).

simply, Mr. Wells does not offer the type of “clinical opinions” that Defendants try to ascribe to him. *See* Ex. 1, Wells Rep. ¶¶ 4 (“My work history and expertise also extend to the provision of health care (medical and mental health) *from a programmatic and non-clinical perspective.*”) (emphasis added), 168 (“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.*”) (emphasis added).

To be sure, Mr. Wells identifies the various ways in which VDOC procedures are out of sync with those of other penological institutions. For example, Mr. Wells opines that it is unusual for an institution, like VDOC, to have a policy specifying that suicide attempts are not reflective of mental illness because, as Mr. Wells explains, “suicidal thoughts and behavior” are commonly understood to be “symptoms of major depressive disorder, post-traumatic stress disorder,” and other mental illnesses. *See* Ex. 1, Wells Rep. ¶¶ 6, 36, 42, 84. In offering this testimony, however, Mr. Wells is not purporting to provide a medical opinion about the symptoms associated with mental illness. Instead, Mr. Wells is providing the perspective of a corrections professional who has extensive experience developing ADA compliance plans to explain the criteria used by corrections professionals to identify inmates with mental health disabilities. Mr. Wells is plainly qualified to offer *this* perspective, and thus Defendants’ argument should be rejected.

II. The Opinions That Mr. Wells Offers Are Relevant to Plaintiffs’ Claims.

Defendants contend that certain of Mr. Wells’s opinions—namely, opinions about Defendants’ inadequate training, notice, grievance, and tracking procedures—are irrelevant to Plaintiffs’ claims. Mot. at 12–15. Defendants’ arguments are meritless.

A. Mr. Wells's Opinions Are Relevant to Plaintiffs' ADA and RA Claims.

Defendants concede that Plaintiffs' ADA and RA claims relate to (1) Defendants' failure to provide proper services to inmates with mental health disabilities; (2) Defendants' selection of criteria that disproportionately inhibit inmates with mental health disabilities from progressing through the Step-Down Program; and (3) Defendants' failure to reasonably accommodate inmates with mental health disabilities. Mot. at 12. Each of Mr. Wells's opinions is relevant to Plaintiffs' theories of liability. For example:

Opinions About Defendants' Inadequate Training Procedure. Mr. Wells opines that Defendants' training program fails to adequately apprise employees of their obligations under the ADA and RA. Ex. 1, Wells Rep. ¶¶ 145–59. This opinion is relevant to Plaintiffs' allegations about Defendants' failure to provide appropriate services to disabled inmates. As Mr. Wells explains, “a quality ADA training program must be in place to ensure [that] staff are appropriately trained to perform their job duties and to help ensure [that] disabled incarcerated persons are provided equal access to programs, services and activities.” *Id.* ¶ 142. Indeed, Plaintiffs have adduced evidence that class members' ADA and RA rights are routinely violated because VDOC employees do not understand their obligations under the ADA and RA. For example, a former VDOC psychology associate testified that, because he did not have any training on what constitutes a reasonable accommodation, it was not his goal to provide accommodations to individuals with a mental health disability. Ex. 1, Wells Rep. ¶ 151 (citing Ex. 3, Trent Dep. at 302:8–22; Ex. 4, Va. Dep't of Corr. Operating Proc. 801.3, at 8 (“Managing Inmates and Probationers/Parolees with Disabilities”) (effective Nov. 1, 2022)).

Opinions About Defendants' Lack of Notice Procedures. Mr. Wells opines that Defendants fail to provide class members with notice of their rights under the ADA and RA and neglect to inform class members of the existence of an ADA coordinator. Ex. 1, Wells Rep. ¶¶

61–70, 73–74. These opinions are relevant to Plaintiffs’ claims because, as Plaintiffs allege, such policies contribute to class members’ inability to progress through the Step-Down Program. Without adequate notice of their ADA and RA rights, Plaintiffs allege that members of the Disabilities Classes do not know how to ask for reasonable accommodations or seek assistance from VDOC’s coordinator, thereby contributing to their “warehous[ing]” within Red Onion. ECF No. 1 ¶¶ 254–55.

Opinions About Defendants’ Inadequate Grievance Procedures. Mr. Wells opines that Defendants’ grievance procedures are insufficient for class members to raise—and for VDOC to address—ADA concerns. Ex. 1, Wells Rep. ¶¶ 132–40. This opinion is relevant to Plaintiffs’ claims. Defendants’ failure to implement an adequate grievance process contributes to the length of time that inmates with mental health disabilities remain in the Step-Down Program, including because VDOC’s procedures fail to provide class members with grievance forms in a timely fashion and to funnel ADA-related grievances to VDOC’s ADA coordinator. *Id.* ¶¶ 134, 140. Both of these deficiencies “depriv[e] [class members] of an effective mechanism to complain about ADA non-compliance,” resulting in Defendants’ failure to provide class members with proper services. *Id.* ¶ 134.

Opinions About Defendants’ Lack of Tracking Procedures. Finally, Mr. Wells’s opinions about Defendants’ failure to institute a comprehensive disability and accommodation tracking system are relevant to Plaintiffs’ ADA and RA claims. As Mr. Wells explains in his report, a comprehensive tracking system “allow[s] a facility or department to monitor its . . . compliance with the ADA’s requirement that public entities identify and accommodate persons with disabilities.” *Id.* ¶ 110. Without such a program, Mr. Wells opines that Defendants do not provide proper services to inmates with mental health disabilities and fail to provide reasonable

accommodations to disabled inmates. *Id.* ¶¶ 119–20. Indeed, Mr. Wells notes how unusual it is for VDOC to lack such a tracking system, as, in Mr. Wells’s experience, it is standard practice among corrections institutions to implement such programs. *Id.* ¶¶ 201, 207–08; Ex. 2, Wells Reply Rep. ¶¶ 63–64, 86.

B. Mr. Wells’s Opinions Are Relevant to the Relief That Plaintiffs Seek.

Separate and apart from the relevance of Mr. Wells’s opinions to the merits of Plaintiffs’ claims, his opinions are relevant to the relief that Plaintiffs seek. As set forth in their Complaint, Plaintiffs seek a variety of relief pursuant to their ADA and RA claims, including a permanent injunction that prohibits Defendants from engaging in “further violation[s] of . . . the Americans with Disabilities Act[] and the Rehabilitation Act.” ECF No. 1 ¶ 272. Mr. Wells’s opinions are directly relevant to the type of injunctive relief that Plaintiffs seek pursuant to this lawsuit.

Indeed, Defendants’ arguments about the purported irrelevance of Mr. Wells’s opinions are surprising, given that Defendants have served numerous discovery requests seeking information on the very issues on which Mr. Wells’s opines. For example, Defendants have served interrogatories seeking, among other things, the identification of “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 such inmates’ constitutional and statutory rights. Ex. 5 (Defs.’ First Set of Interrogatories), at 3 (Interrogatory No. 4). Plaintiffs have provided factual information in response to these interrogatories, *see, e.g.*, Ex. 6 (Class Pl. Wall’s Answers & Objs. to Defs.’ First Set of Interrogatories), and they have now provided expert testimony on the subject. Defendants do not explain why it is appropriate for them to demand fact discovery on the nature of Plaintiffs’ proposed relief, but Plaintiffs are not allowed to provide expert testimony on the same issue. Defendants’ position is meritless.

C. Plaintiffs’ Failure to Bring Standalone Claims Related to Each of Mr. Wells’s Opinions Is Not a Basis for Excluding Mr. Wells’s Testimony.

Defendants contend that Mr. Wells’s testimony is irrelevant because Plaintiffs cannot—and therefore have not—brought standalone ADA and RA claims based on Defendants’ failure to train, provide notice, or enact an adequate grievance system. Mot. at 12–13. Defendants misunderstand the relevant case law.

The decision in *Dunn v. Dunn*, 318 F.R.D. 652 (M.D. Ala. 2016), is instructive. There, inmates brought ADA discrimination claims against the Alabama Department of Corrections (“ADOC”) related to ADOC’s lack of “adequate systems for implementing its obligations under the ADA” and the resulting failure to accommodate prisoners with disabilities. *Id.* at 657. In support of their claims, plaintiffs adduced evidence that ADOC failed to comply with various ADA regulations, including regulations related to employee training and the implementation of an adequate grievance system. *Id.* at 663. At class certification, defendants sought to exclude such evidence because, according to ADOC, there is no private cause of action under the ADA for failure to train or implement a grievance system. *Id.* Defendants therefore argued that plaintiffs’ evidence was irrelevant to their claims. *Id.* at 663–64.

The court rejected defendants’ argument. As the court explained, even if a plaintiff cannot bring a cause of action to *enforce* certain regulations under the ADA and RA, a defendant’s failure to comply with those regulations is nonetheless *relevant* to a plaintiff’s claims. *Id.* at 664. The same is true here. Like the plaintiffs in *Dunn*, Plaintiffs contend that Defendants discriminated against them because they failed to craft a Step-Down Program that complied with the ADA’s requirements. Defendants’ compliance with ADA regulations is therefore relevant to Plaintiffs’ theory of discrimination and thus can be considered at summary judgment and at trial.

Defendants' citation to *Sanchez v. Boston Scientific Corp.*, 2014 WL 4851989 (S.D.W. Va. Sept. 29, 2014), is not to the contrary. In *Sanchez*, plaintiffs asserted state law tort claims related to complications resulting from the surgical implantation of products manufactured by the defendant. *Id.* at *1. In support of their allegations, plaintiffs proffered an expert who opined on the defendant's compliance with "the branding requirements of the Food, Drug, and Cosmetic Act." *Id.* at *34. The court excluded this evidence because the cited FDCA requirements did not "govern" the state law warning requirements, and thus the expert's opinions were irrelevant. *Id.* at *35. This, of course, is not the situation here. Unlike the expert report in *Sanchez*, the regulations that Mr. Wells cites in his report are "binding" on Defendants and "designed to facilitate . . . compliance with the ADA." *Dunn*, 318 F.R.D. at 663–64. They are therefore relevant to Plaintiffs' claims, for the reasons stated in *Dunn*.

D. The Admissibility of Mr. Wells's Opinions Is Not Dependent on His Ability to Identify the Specific ADA Violations That Individual Plaintiffs Suffered.

Finally, Defendants contend that Mr. Wells's opinions are irrelevant because he could not identify specific instances in which Plaintiffs were subject to the policies identified in his report. Mot. at 14. This argument fails for at least two reasons.

First, there is no suggestion—let alone evidence—that *different* sets of ADA and RA policies apply to *different* class members. On the contrary, at class certification, the Court held that class members were all subject to the *same* policies. ECF No. 299 at 25. Given this reality, the fact that Mr. Wells was unable to identify instances in which specific Plaintiffs were affected by, say, Defendants' inadequate grievance process is beside the point. As this Court has already recognized, the same grievance process applies to everyone.

Second, this is not a single-witness case. There is no requirement that Plaintiffs demonstrate *through Mr. Wells* that they were subject to the noncompliant policies identified in

his report. Defendants have offered no case law to support the proposition that a single expert must establish all of the elements of a party's claim. On the contrary, Plaintiffs can—and will—prove the application of these policies to them and their fellow class members through other witnesses and evidence. *See, e.g., Knight v. Boehringer Ingelheim Pharms., Inc.*, 323 F. Supp. 3d 837, 847–48 (S.D.W. Va. 2018) (“A single expert’s opinion cannot be analyzed in a vacuum, devoid of the meaningful context of issues presented and a party’s other evidence and experts.”); *In re Ethicon Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 2017 WL 6346633, at *3 (S.D.W. Va. Dec. 12, 2017). Defendants’ argument is not a basis for excluding Mr. Wells’s testimony.

III. Mr. Wells Reliably Applies His Experience to the Facts of the Case.

Defendants next argue that Mr. Wells’s opinions should be excluded because “he did not employ an identifiable or reliable methodology in formulating [h]is opinion[s].” Mot. at 10–11. This argument is meritless.

“Where an expert’s methodology is grounded in his experience, . . . a proper methodology analysis focuses on three areas: (1) how the expert’s experience leads to the conclusion reached; (2) why that experience is a sufficient basis for the opinion; and (3) how that experience is reliably applied to the facts of the case.” *SAS Inst., Inc. v. World Programming Ltd.*, 125 F. Supp. 3d 579, 589 (E.D.N.C. 2015) (quoting Fed. R. Evid. 702 advisory committee’s note to 2000 amendments); *United States v. Wilson*, 484 F.3d 267, 273 (4th Cir. 2007). Here, Defendants challenge only the third prong of this analysis. Specifically, Defendants argue that Mr. Wells has failed to establish that the policies and procedures on which he opines are relevant because he has not identified specific instances in which individual Plaintiffs were subject to those policies. This argument fails for the reasons discussed above. *See supra* at II.D.

The cases on which Defendants rely are readily distinguishable. In *Williams v. Illinois Department of Corrections*, 2023 WL 1472246 (S.D. Ill. Feb. 2, 2023), the court excluded

testimony from a corrections expert who opined that “systemic deficiencies affected the care [that plaintiff] received” in prison “and contributed to his death.” *Id.* at *14. The court excluded this testimony because the expert’s opinions focused only on “problems with the [Illinois Department of Corrections] generally”—not problems with respect to the specific facility that housed plaintiff. *Id.* at *14–15. Because the *Williams* expert did not tie the problems he identified to plaintiff’s facility, he did not adequately “connect” such problems to plaintiff’s “personal experience,” meriting the exclusion of his testimony. *Id.* at *15. The same is not true here. In contrast to the expert in *Williams*, Mr. Wells opines on the specific policies, procedures, and practices that underlie Defendants’ Step-Down Program, *in which all of the named Plaintiffs have participated*. Because all of the named Plaintiffs have been affected by the policies that Mr. Wells analyzes, the opinions he offers are indisputably relevant to the case.²

IV. Mr. Wells’s Opinions Should Not Be Excluded as Impermissible Legal Conclusions.

Finally, Defendants maintain that Mr. Wells’s opinions should be excluded as impermissible legal conclusions. This argument fails for at least two reasons.

First, contrary to Defendants’ assertion, Mr. Wells does not offer any legal conclusions in his report. On the contrary, Mr. Wells draws distinctions between the policies and practices that Defendants have implemented in connection with the ADA and RA and the policies and

² The other decisions Defendants cite are equally inapposite. In *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194 (4th Cir. 2001), for example, the Fourth Circuit affirmed a district court decision excluding expert testimony on the ground that the proffered expert failed to consider “other potential causes” of plaintiff’s injuries. *Id.* at 203. Here, there is no suggestion that Mr. Wells failed to consider relevant evidence. In *E.E.O.C. v. Freeman*, 778 F.3d 463 (4th Cir. 2015), Judge Agee issued a concurring opinion affirming a district court decision to exclude an expert report that “contained a ‘plethora’ of ‘analytical fallacies,’ reflected ‘cherry-picked’ data, produced ‘a meaningless skewed statistic,’ and included a ‘mind-boggling number of errors.’” *Id.* at 468 (Agee, J., concurring). The expert report in *Freeman* bears no resemblance to Mr. Wells’s opinions. Indeed, Defendants fail to identify a *single* “error[]” or “fallac[y]” in Mr. Wells’s report.

procedures that other correctional institutions have implemented. *See, e.g.*, Ex. 1, Wells Rep. ¶¶ 28–29, 35–37, 55–57, 59, 108, 150, 160; Ex. 2, Wells Reply Rep. ¶ 86; *see also* Ex. 1, Wells Rep. ¶ 14 (“I reviewed and assessed the evidence in this matter in a similar manner as I would have in conducting ADA audits and evaluations while employed at CDCR and as I do now as a consultant.”). Mr. Wells then explains why, in his opinion, Defendants’ policies and procedures are ill-suited to ensure ADA compliance. *See, e.g.*, Ex. 1, Wells Rep. ¶ 208 (“Based on my professional experience, and through review of documents for this case, it is my opinion that VDOC does not have established or effective disability-related policies/procedures in-place, does not have an effective formalized classroom training component in-place, does not have a comprehensive incarcerated person disability identification process in-place, and does not have an effective real time networked tracking system in-place. As such, it is my opinion that VDOC does not have an effective incarcerated person disability program.”). While Mr. Wells uses certain legal terminology in his report, that is not a basis for excluding his testimony. *See, e.g., Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) (“[A] witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms.” (quoting *Specht v. Jensen*, 953 F.2d 805, 809 (10th Cir. 1988))); *Pelican Int’l, Inc. v. Hobie Cat Co.*, --- F. Supp. 3d ----, 2023 WL 2130379, at *12 (S.D. Cal. Feb. 10, 2023) (“[E]xperts are permitted to use legal terminology from the applicable law in expressing their opinions.” (citation omitted)); *Focal Point Films, LLC v. Sandhu*, 2020 WL 5760355, at *6 (N.D. Cal. Sept. 28, 2020)

("[C]ourts have recognized that experts may express facts or opinions using 'legal terminology.'").³

Second, even if certain of Mr. Wells's opinions embrace the ultimate issue in the case—*i.e.*, whether Defendants have discriminated against Plaintiffs—that is not a basis, standing alone, for excluding his testimony. On the contrary, the Federal Rules of Evidence provide that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). Here, Mr. Wells opines on the types of programs that correctional institutions implement to facilitate ADA compliance and observes that Defendants' programs lack many of these features. In similar cases, courts have not hesitated to affirm the propriety of such testimony. *See, e.g., United States v. Perkins*, 470 F.3d 150, 160 (4th Cir. 2006) (affirming admission of expert testimony where the Court could not hold "that the [] testimony was necessarily unhelpful" or that the expert "merely told the jury what verdict to reach or 'supplanted the jury's independent exercise of common sense'" (alterations omitted) (quoting *Kopf v. Skyrn*, 993 F.2d 374, 377 (4th Cir. 1993))); *United States v. Dazey*, 403 F.3d 1147, 1171 (10th Cir. 2005) (affirming admission of expert testimony where expert "did not simply tell the jury to reach a particular verdict," but rather "explained the source of his extensive knowledge of prime bank frauds and explained what attributes these schemes, in his considerable experience, often share").

CONCLUSION

For the reasons above, Defendants' motion should be denied.

³ To the extent the Court is concerned about Mr. Wells's use of certain legal terms, Mr. Wells will gladly omit such terminology from his trial testimony.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on the 5th day of October, 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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