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 **CLASS ACTION**

PLAINTIFFS' REVISED STATEMENT REGARDING NEW PROPOSED CLASS REPRESENTATIVES AND AMENDED NOTICE

1. In its April 12, 2023 Opinion and Order (the "Order"), this Court granted Plaintiffs' Motion for Class Certification and certified four Sub-Classes: (1) a Constitutional Violation Injunction Class; (2) a Constitutional Violation Damages Class; (3) a Disabilities Injunction Class; and (4) a Disabilities Damages Class. ECF No. 299, at 41–42. The Court further directed Plaintiffs to: (1) designate "one class representative for each subclass" and "advise the court . . . of such selections and the qualifications for class representative of each such person selected, for approval and designation by the court"; and (2) "submit a proposed notice and process for notice to class members." *Id.* at 42.

2. On May 3, 2023, Plaintiffs submitted their proposed class representatives and plan of notice. ECF No. 310. On August 8, 2023, the Court directed Plaintiffs to make certain changes to the proposed class representatives and plan of notice. ECF No. 358, at 14–15 (the "Revised Order"). Specifically, the Court directed Plaintiffs to identify new proposed representatives for the Constitutional Violation Injunction Class, the Disabilities Injunction Class, and the Disabilities Damages Class and to amend the plan of notice to ensure sufficient time "to receive any returned notices, [perform] skip-tracing, and . . . remail[] . . . any returned notices." *Id.*

3. On August 22, 2023, Plaintiffs filed a motion to reconsider aspects of the Court's Revised Order. ECF No. 359. The Court denied that motion on March 29, 2024, and additionally directed Plaintiffs to identify a new proposed representative for the Constitutional Violation Injunction Class and to submit proposed class notices and a class notice plan within 21 days of its order. ECF No. 467 at 8.

4. To comply with the Court's Revised Order and the Court's Order denying Plaintiffs' Motion to Reconsider, Plaintiffs respectfully submit for Court approval their new proposed class representative, their revised proposed notice, and their revised plan of notice.

5. Data recently provided by Defendants suggests that (i) there currently are no persons who meet the Disabilities Injunction Class definition of being confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program and who are classified at Mental Health Classification Code MH-2S or higher, and (ii) under the current Disabilities Damages Class definition, the number of persons with effective claims is considerably more limited than under the original class definition, and likely less than 10 individuals in total. The parties have met and conferred concerning this development and have agreed to stipulate to the decertification of the Disabilities Classes and bifurcation of the named Plaintiffs' ADA and RA claims such that they may pursue those claims individually, subject to the Court's approval.[1] The parties intend to meet and confer on how to proceed accordingly and will prepare a joint stipulation, which they plan to submit to the Court in a timely fashion.

PROPOSED CLASS REPRESENTATIVES

6. Although the Court found that the current Class Representative for the Constitutional Violation Damages Class, Peter Mukuria, is a satisfactory representative for

[1] Plaintiffs respectfully preserve their objections to the revised definitions of the Disabilities Classes.

that Class, the Court requested that Plaintiffs identify a new Class Representative for the Constitutional Violation Injunction Class. ECF No. 358 at 9; ECF No. 467 at 7–8. In light of the Court's prior rulings, Plaintiffs respectfully believe that it would be most efficient to move forward with a single class representative for the Constitution Classes.[2]

7. Therefore, Plaintiffs make the following proposal for a single class representative for the Constitutional Classes.

8. Plaintiffs respectfully submit for approval Mr. Derek Cornelison as the proposed Class Representative for the Constitutional Violation Injunction Class and for the Constitutional Damages Class.

9. Mr. Cornelison is qualified to serve as the class representative for the Constitutional Violation Injunction Class and for the Constitutional Damages Class. Mr. Cornelison meets all of the criteria of the Sub-Classes' definitions. Mr. Cornelison was incarcerated at Red Onion State Prison ("Red Onion") from June 2016 until August 2019, classified as Level S or Level 6, and subject to the Step-Down Program. ECF No. 174-21 ¶¶ 2, 3, 7, 23; *see also* Cornelison Dep. Tr. at 211:14–213:1; 218:11–12; 262:17–263:22. Mr. Cornelison has been a named Plaintiff since the inception of the litigation and contends that the policies and practices associated with the Step-Down Program violate his constitutional rights, including by forcing prisoners like him to remain in solitary confinement for extended periods of time, by employing vague and subjective criteria to determine whether prisoners should progress through the Step-Down Program, by denying prisoners' meaningful review

[2] For the first time at the hearing on Plaintiffs' Motion for Reconsideration, Defendants raised a concern regarding res judicata resulting from Mr. Mukuria's prior lawsuits against VDOC. ECF No. 467 at 7–8. Plaintiffs respectfully submit that Defendants' argument was not timely raised and that Defendants have not shown that the conditions for res judicata have been met. Although the Court held Mr. Mukuria satisfies the requirements of a class representative, *see* ECF No. 358 at 9, and Plaintiffs disagree that Mr. Mukuria is precluded from any of the class claims, Plaintiffs submit a new Constitutional Violation Damages Class representative in order to minimize the issues that may need to be addressed at trial.

of, or notice and opportunity to rebut, decisions about their progression through the Program, and by subjecting prisoners to cruel and unusual punishment. Class Counsel spoke with Mr. Cornelison on April 10, 2024, and he confirmed his willingness to serve as a class representative and represent the interests of the class.

10. That Mr. Cornelison, like the other named Plaintiffs, is no longer subject to the Step-Down Program does not affect his qualifications to serve as the representative of the Constitutional Violation Injunction Class. While no longer subject to the Step-Down Program, Mr. Cornelison remains confined at a VDOC facility in Virginia. As Defendants argued in prior briefing, a named Plaintiff confined in a VDOC facility may very well be subjected to the Step-Down Program in the future, *see* ECF No. 365 at 7,[3] and thus Mr. Cornelison plainly qualifies as someone who may "in the future[] be confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program," ECF No. 299 at 41. Moreover, even if Mr. Cornelison is not presently a member of the Constitutional Violation Injunction Class, as the Court recognized in its Order, there are exceptions to the general rule that a litigant must be a member of the class that he seeks to represent at the time of class certification, including for class representatives who assert claims based on deprivations that are "capable of repetition, yet evading review" and/or claims that are "inherently transitory" and involve class members who "continue to be subject to the challenged conduct." ECF No. 467 at 6–7 (citing *Jonathan R. ex rel. Dixon v. Justice*, 41 F.4th 316, 325 (4th Cir. 2022)). These exceptions enable Mr. Cornelison to represent the Constitutional Violation Injunction Class, even were he no longer a member of that class. *Id.*

[3] Based on meet and confers between the parties, Plaintiffs' understanding is that Defendants expressly reserve their right to appeal all aspects of the Court's adverse rulings on class certification and appointment of class representatives but acknowledge that, under the Court's current rulings, Mr. Cornelison may represent the Constitutional Classes.

11. Plaintiffs, of course, are cognizant of the Court's guidance that "[g]enerally, a litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." ECF No. 358 at 10. As Plaintiffs raised with respect to their Motion to Reconsider the Court's August 8, 2023 Order, *see, e.g.,* ECF No. 359-1 at 4, none of the named Plaintiffs currently participate in the Step-Down Program. To the extent the Court is disinclined to select a class representative who is not currently participating in the Step-Down Program, Plaintiffs respectfully submit for approval, in the alternative, Sidney Bowman as the proposed Class Representative for the Constitutional Violation Injunction Class and for the Constitutional Damages Class.

12. Mr. Bowman is qualified to serve as the class representative for the Constitutional Violation Injunction Class and for the Constitutional Damages Class. Mr. Bowman meets all of the criteria of the Classes' definitions. Mr. Bowman is currently incarcerated at Red Onion State Prison ("Red Onion"), classified as Level S or Level 6, and subject to the Step-Down Program. ECF No. 400-14 ¶¶ 2, 12, 14. Like the named Plaintiffs, Mr. Bowman contends that the policies and practices associated with the Step-Down Program violate his constitutional rights, including by forcing inmates like him to remain in solitary confinement for extended periods of time, by employing vague and subjective criteria to determine whether inmates should progress through the Step-Down Program, by denying inmates any meaningful review of decisions about their progression through the Program, and by subjecting inmates to cruel and unusual punishment. Class Counsel spoke with Mr. Bowman on April 5, 2024, and he confirmed his willingness to serve as a class representative and to represent the interests of the class.

13. Mr. Bowman is not a named Plaintiff, and Plaintiffs thus respectfully request leave to amend their complaint to add Mr. Bowman as a named Plaintiff should the Court find Mr. Bowman to be the more appropriate class representative as compared to Mr.

Cornelison. Motions to amend should be granted liberally unless the desired amendment "would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509–10 (4th Cir. 1986). Courts in the Fourth Circuit routinely grant leave to plaintiffs to amend their complaints if no named plaintiff meets the class definition, and no named Plaintiff currently participates in the Step-Down Program. *See, e.g.*, *Chisolm v. TranSouth Financial Group*, 194 FRD 538, 559 (E.D. Va. 2002); *Booth v. Prince George's County*, 66 FRD 466, 473 (D. Md. 1975); *see also Cox v. Babcock & Wilcox*, 471 F.2d 13, 16 (4th Cir. 1972).

14. Plaintiffs disclosed Mr. Bowman as a possible witness in their amended Rule 26(a) disclosures served more than a year ago, and Mr. Bowman previously submitted a declaration in this case. *See* ECF No. 400-14. Thus, Defendants have long had notice that Mr. Bowman is both a putative class member and potential witness at trial. Amending the complaint to include Mr. Bowman is therefore appropriate under the Federal Rules and Fourth Circuit precedent.

PROPOSED NOTICE AND PROCESS FOR NOTICE

15. Plaintiffs respectfully submit for approval the revised Notice of Class Action (the "Revised Notice"), attached hereto as Exhibit A, for the Constitutional Violation Damages Class only.

16. In accordance with the Court's orders at ECF Nos. 358 and 467, Plaintiffs propose the following revised process for providing notice.

17. For class members who are currently in the custody and control of VDOC and who are currently housed in VDOC facilities, individualized notice to class members will be effectuated by having VDOC distribute the Court-approved Notice to class members. *See*

Riker v. Gibbons, 2009 WL 910971, at *7 (D. Nev. 2009) ("distributing a court-approved form of notice to inmates is [a] common method of serving notice on inmate classes.").

18. For class members who are currently in the custody and control of VDOC but who are currently housed in non-VDOC facilities (*e.g.*, inmates housed in non-VDOC facilities pursuant to an interstate compact), notice to class members will be effectuated by mail, with VDOC supplying information about the facility in which each such class member is housed.

19. For class members who are no longer in VDOC's custody and control, individualized notice to class members will be effectuated by mail, with VDOC supplying class members' last known addresses. If VDOC does not have address information for a class member, Plaintiffs will make reasonable efforts to locate class members' last known addresses via skip-tracing or a similar service. ECF No. 358 at 13.

20. Because VDOC is best positioned to know whether a class member is presently in its custody and control, VDOC will identify the class members in VDOC's custody and control, so that Plaintiffs can prepare the requisite Notices.

21. For class members not in VDOC's custody and control, the Court has ordered Defendants to identify their last known addresses. If VDOC does not have address information for a class member, Plaintiffs will make reasonable efforts to locate that class member's last known addresses via skip-tracing or another service. ECF No. 358 at 13.

22. Plaintiffs propose the following schedule for the Class Notice plan:[4],[5]

[4] To the extent any deadline falls on a weekend or federal holiday, Plaintiffs propose that the relevant deadline be extended to the next business day.

[5] Based on meet and confers with Defendants, Plaintiffs' understanding is that the parties agree to this proposed schedule.

Within 35 days of the Court's approval of the proposed Revised Notice	Deadline for VDOC to (i) identify the class members currently in VDOC facilities, and (ii) for class members housed in non-VDOC facilities pursuant to an interstate compact, the facilities in which those class members reside, and (iii) for class members no longer in VDOC custody, those class members' last known addresses
Within 70 days of the Court's approval of the proposed Revised Notice	Deadline for (i) VDOC to distribute Notices to class members in VDOC facilities; and (ii) Plaintiffs to issue Notices to class members not in VDOC facilities
Within 60 days of deadline to distribute and issue Notice to class members	Deadline for class members to mail a written request to opt out of the class

23. To address the Court's concern over the potential of returned Notices and the remailing process, *see* ECF No. 358 at 13–14, Plaintiffs have added to the previously submitted schedule an additional two weeks to distribute Notices to class members and an additional fifteen days for class members to opt out. Plaintiffs will mail notices to the class members on a rolling basis. If a notice is returned as undeliverable, Plaintiffs will refer the intended recipient's information to a skip-tracing service. Within five business days of receiving alternative addresses from the skip-tracing service, Plaintiffs will mail a second notice to the recipient at the identified next most-likely address, if any.

24. During the opt-out period, Class Counsel will be available by telephone to respond to any inquiries from class members. Class Counsel will also be available to respond to any written inquiries received from class members.

25. Plaintiffs will bear what they anticipate will be the modest cost of printing the Notice for all class members and for mailing the Notice to class members who are housed in non-VDOC facilities and/or who are not in VDOC's custody and control. Should other methods of notification be necessary, Plaintiffs reserve the right to seek cost-shifting.

PROPOSED, STIPULATED DECERTIFICATION OF DISABILITIES INJUNCTION AND DISABILITIES DAMAGES CLASSES

26. The Court's Revised Order re-defined the Disabilities Class to include only those Step-Down Program participants who have been assigned a mental health code of MH-2S or higher. ECF No. 358 at 8. The Court re-affirmed that definition in its Order Denying Plaintiffs' Motion to Reconsider. ECF No. 467.

27. Plaintiffs reviewed updated documentation identifying the incarcerated persons who are members of the Disabilities Classes pursuant to the new class definitions. Plaintiffs' understanding is that there currently are no persons who meet the Disabilities Injunction Class definition of being confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program and who are classified at Mental Health Classification Code MH-2S or higher, and likely less than 10 persons who have effective claims pursuant to the current Disabilities Damages Class definition compared to the original class definition. The parties have met and conferred concerning this development and have agreed to stipulate to the decertification of the Disabilities Classes and bifurcation of the named Plaintiffs' ADA and RA claims such that they may pursue those claims individually, subject to the Court's approval. The parties intend to meet and confer on how to proceed accordingly and will prepare a joint stipulation, which they plan to submit to the Court in a timely fashion.

28. The parties' stipulation to decertify the Disabilities Classes is not and should not be construed as a waiver of Plaintiffs' right to challenge the class definitions in any appeal of the final judgment entered in this case.

Dated: April 19, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2024, 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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