

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

WILLIAM THORPE, *et al.*,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

CASE NO. 2:20-cv-00007-JPJ-PMS

JOINT SUPPLEMENTAL RULE 26(f) REPORT

Whereas, on September 27, 2019, the parties met and conferred regarding discovery and scheduling for this matter, which was then before the Honorable Judge Robert E. Payne of the United States District Court for the Eastern District of Virginia (Case No. 3:19-cv-00332-REP);

Whereas, on October 11, 2019, the parties jointly submitted a Rule 26(f) report;

Whereas, on April 21, 2020, Judge Payne transferred this case to the United States District Court for the Western District of Virginia; and

Whereas, on April 24, 2020, this Court directed counsel for the parties to confer regarding discovery and file their Joint Rule 26(f) Report by or before April 30, 2020.

Therefore, pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, and this Court's April 24, 2020 order, a meeting was held telephonically on April 30, 2020, at 3:30 PM Eastern Standard Time and was attended by:

- **Kristen J. McAhren**, for Class Plaintiffs
- **Maxwell J. Kalmann**, for Class Plaintiffs
- **Timothy L. Wilson, Jr.**, for Class Plaintiffs
- **Eden Heilman**, for Class Plaintiffs
- **Vishal Agraharkar**, for Class Plaintiffs
- **Margaret O'Shea**, for Defendants
- **Maya Eckstein**, for Defendants

- **R. Dennis Fairbanks**, for Defendants

The parties hereby jointly submit this supplemental Rule 26(f) report and their proposals regarding discovery and scheduling.

I. NATURE OF CLAIMS AND DEFENSES

The parties certify that, in accordance with Fed. R. Civ. P. 26(f)(2), they considered the nature and basis of their respective claims and defenses when discussing the various topics encompassed by Rule 26(f).

A. Summary of Claims and Defenses

1. Plaintiffs' Brief Statement of the Case

Plaintiffs' Complaint presents detailed claims against twelve VDOC Defendants, supported by facts that date back to the late-1970s planning of the Phase Program at Mecklenburg Correctional Facility. The Complaint also lays bare Defendants' breach of their promise to refrain from using indefinite solitary confinement; Defendants' failure to provide meaningful review of whether a prisoner still requires solitary confinement; Defendants' use of solitary confinement and substandard care at ROSP and WRSP, causing prisoners serious physical and mental harms; and Defendants' use of solitary confinement for economic gain or without a legitimate penological purpose.

In all, the Complaint alleges that Defendants' conduct amounts to the following violations:

- Breach of the court-ordered Settlement Agreement relating to *Brown v. Landon* by instituting the Step-Down Program, which is a reincarnation of the Phase Program and SMU, despite VDOC's commitment not to reestablish these programs.
- Violating the Due Process Clause of the Fourteenth Amendment by failing to provide meaningful reviews of Class Plaintiffs' administrative segregation, by both maintaining facially inadequate review procedures and by failing to ensure that existing review procedures are actually followed.
- Violating the Equal Protection Clause by:

- (1) intentionally segregating prisoners whose behavior in prison does not warrant segregation, as if they are among the class of prisoners whose institutional history warrants segregation;
- (2) intentionally and arbitrarily placing prisoners on the IM Pathway based on behavioral criteria that is not meaningfully distinguishable from criteria for placement on the SM Pathway, leading to imposition of permanent solitary confinement on discriminatory grounds; and
- (3) intentionally failing to meaningfully consider prisoners' mental illness or disability, severely disadvantaging and effectively denying those prisoners any opportunity to progress out of long-term solitary confinement.

Furthermore, Defendants know that these features of the Step-Down Program are not related to the valid penological objectives of administrative segregation and merely further Defendants' economic scheme to fill prison beds at ROSP and WRSP.

- Violating the Eighth Amendment by:
 - (1) deliberately and wantonly subjecting prisoners to indefinite and long-term solitary confinement without legitimate penological purpose, resulting in serious mental and physical harms or substantial risk of such harms, and continuously increasing prisoners' time in solitary confinement due to behavior that is symptomatic of the harms caused by long-term solitary confinement; and
 - (2) subjecting prisoners to conditions of solitary confinement that exact serious deprivations of basic human needs, resulting in serious harms or a substantial risk of future harm, and demonstrating deliberate indifference by implementing or tacitly approving the use of such conditions despite knowing that they pose these harms, and by failing to adequately assess or care for such prisoners.
- Violating the Americans With Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973 by discriminating against people with mental health disabilities solely on the basis of their disabilities and by failing to grant access to, permit to participate in, and reap the benefits of programs, services, and activities.

2. Defendants' Brief Statement of the Case

Rule 26(f) neither mentions nor contemplates the need for a statement of the case in the written report outlining the discovery plan to be submitted to the court. To the extent that the Court wants Defendants' views of the case, Defendants incorporate by reference the statements and arguments contained in the pleadings they have filed with the Court to date, including

Defendants' pending motions to dismiss. Dkt. Nos. 18 and 21.

II. PROPOSED DISCOVERY SCHEDULE

The below section provides the parties' detailed positions on the scope and timing of discovery. For the convenience of the Court, the suggested deadlines are summarized in a table in Section V below.

A. Trial Date

1. Plaintiffs' Position

At this time, Plaintiffs anticipate that this action should be ready for trial, at the latest, by December 2021 and will take approximately twenty-one (21) days.

2. Defendants' Position

Until the Court rules on Defendants' pending motions to dismiss, it is premature to determine the length of trial for the remaining claims (if any). The question of whether this case is amenable for class certification also may bear on the length of trial. Defendants agree, however, that the case should be ready for trial by December 2021.

B. Mandatory Disclosures (Fed. R. Civ. P. 26(a)(1))

The parties agree to exchange the information required by Fed. R. Civ. P. 26(a)(1) within fourteen (14) days of the Court ruling on Defendants' pending motions to dismiss.

C. Completion of Discovery

1. Plaintiffs' Position

Non-expert fact discovery will close six months (or 180 days) before the scheduled trial date. With a proposed trial date of December 2021, non-expert fact discovery will close around May or June 2021. Plaintiffs note, however, that the proposed deadlines may need to be revisited and amended because Defendants have expressed intent to oppose any depositions, requests for interrogatories, and requests for admissions requiring responses from individuals until the Court

rules on the pending motions to dismiss. Moreover, social distancing guidelines arising from the current pandemic may result in additional delays to depositions and examinations.

Expert discovery, including any depositions of expert witnesses, will proceed on a parallel track separate from non-expert fact discovery and will be permitted until sixty (60) days after non-expert fact discovery closes.

2. Defendants' Position

The Court's rulings on the Defendants' pending motions to dismiss, the question of whether this case is amenable for class certification, and the extent to which class discovery is required are likely to bear on the length of discovery needed. Defendants currently propose that the discovery period should close approximately nine months from the date that this Court rules on their pending motions to dismiss. At this procedural juncture, discovery targeted to the individual Defendants is premature, considering the immunity defenses that have been raised in their pending motions to dismiss. Defendants previously have agreed to respond to requests for the production of documents pending the Court's ruling on those motions, as long as those requests remain proportionate to the needs of this litigation, the stage of the litigation, and are not otherwise objectionable. Defendants propose that, until the Court rules on Defendants' motions to dismiss, no significant additional discovery be permitted and that any discovery that is permitted be limited to the issue of class certification.

D. Dates of Disclosure of Experts and Experts' Written Reports and Supplementations

1. Plaintiffs' Position

Plaintiffs suggest that reports from retained experts under Rule 26(a)(2) be due from Plaintiffs within thirty (30) days after the close of non-expert fact discovery and from Defendants forty-five (45) days after the close of non-expert fact discovery.

2. Defendants' Position

Expert reports should be due prior to the close of all discovery, considering the potential need to depose retained expert witnesses. Defendants propose that Plaintiffs' expert reports be due 90 days prior to the close of discovery, that Defendants' expert reports be due 60 days prior to the close of discovery, and that Plaintiffs' rebuttal expert reports (if any) be due 45 days prior to the close of discovery.

E. Deadline for Dispositive Motions

The parties agree that all potentially dispositive motions should be filed thirty (30) days after the close of all discovery. Responses should be filed thirty (30) days following service of the dispositive motion. Reply briefs (if any) should be filed fifteen (15) days following service of the response in opposition.

F. Motions in Limine/Other Pretrial Motions

The parties agree that motions in limine and other pretrial motions should be filed thirty (30) days before the scheduled trial date and responses should be filed twenty (20) days before the scheduled trial date.

G. Pretrial Conference

The parties agree that a pretrial conference should be held fourteen (14) days before the scheduled trial date.

H. Pretrial Disclosures

The parties propose that final lists of witnesses and exhibits under Fed. R. Civ. P. 26(a)(3) be due sixty (60) days before the scheduled trial date. Objections should be submitted forty-five (45) days before the scheduled trial date.

I. Settlement

The parties agree that a meaningful settlement cannot be evaluated prior to decisions on

Defendants' pending motions to dismiss.

III. DISCOVERY

A. **Subjects of Discovery**

1. Plaintiffs' Position

Plaintiffs contend that discovery will be needed on the following subjects:

- i. Planning, design, and implementation of the Mecklenburg Phase Program;
- ii. Defendants' intent, knowledge of, and conduct surrounding the Settlement Agreement and termination of the *Brown* consent decree;
- iii. Planning, funding, and operation of ROSP and WRSP, including, but not limited to, designs, budgets, payroll, consulting agreements, operational costs, and transfers of prisoners previously segregated at Mecklenburg Correctional Center to ROSP and WRSP;
- iv. Purpose, nature, and economic aspects of Defendants' interstate compacts or similar agreements regarding the transfer of prisoners to and from Virginia and other states, including, but not limited to, decisions to transfer Named Plaintiff William Thorpe out of state;
- v. Defendants' justifications, purposes, and motivations for the use of indefinite and long-term solitary confinement, including, but not limited to, economic and penological motivations for various aspects of the Step-Down Program;
- vi. Creation and administration of the Step-Down Program and its predecessor programs at ROSP and WRSP, including, but not limited to, how the Step-Down Program and policies have been applied to each class member, decisions to place and retain prisoners in solitary confinement; decisions to alter the Pathway of prisoners in segregation, including the Named Plaintiffs and class members; reports; preparatory documents; meeting minutes; forms; documents relied upon, reviewed by, produced by, or relating to the Institutional Classification Authority, Building Management Committee, Dual Treatment Team, External Review Team, and similar entities; pod log books; status rating charts; grievances and decisions on external classification status or internal status within the Step-Down Program; disciplinary charges and related underlying evidence and decisions; post orders; Step-Down Program workbooks and journals; relevant policies; internal memoranda; and diagnostic tools;
- vii. Extent of Defendants' use of solitary confinement at ROSP and WRSP, including, but not limited to, the identities, number, and locations of prisoners incarcerated in ROSP and WRSP during the relevant period and the duration of their confinement and segregation;

- viii. Harms and risks of harm caused to Plaintiffs and class members by Defendants' use of solitary confinement, and Defendants' knowledge of or indifference to those risks and harms, including, but not limited to, the circumstances of prisoner transfers from ROSP and/or WRSP to Marion Correctional Center; grievances; and Defendants' presentations to correctional associations regarding the use of segregation;
- ix. Defendants' practices regarding detection, assessment, and treatment of medical and mental illnesses; supervision and assignment of staff involved in detection and treatment of medical and mental illnesses; and Defendants' awareness of scientific evidence linking solitary confinement to mental and physiological harms; and
- x. Communications and information relating to i through ix above, including, but not limited to, discussions with and work product produced by consultants and other external parties, and documentation exchanged by prison and medical staff, such as medical complaints, medical treatment, or medical evaluations.

2. Defendants' Position

Consistent with Defendants' position in II.C.2 above, the parties cannot meaningfully discuss the topics upon which discovery is needed until the parties know what topics (if any) will survive Defendants' pending motions to dismiss.

B. Phased Document Production

1. Plaintiffs' Position

In order to facilitate collaborative discovery, the parties agreed on a phased document production that reserves the most contentious documents requests (including those that require class-wide discovery and that may touch upon asserted Eleventh Amendment immunities) for later in the calendar. The phases are as follows:

- i. Complete institutional files, including medical documents for Named Plaintiffs, and statistical documentation on all prisoners at ROSP and WRSP, including, but not limited to, identities, number of prisoners, changes in housing assignments, privilege or internal status level changes, transfers from and to ROSP and WRSP, current location of prisoners previously detained at ROSP and WRSP;
- ii. Documentation created, relied upon, referenced, or in any way related to the creation, implementation, or administration of the Step-Down Program at ROSP and WRSP, including, but not limited to, communications, policies, hearing reports,

meeting minutes, deliberations, pod logs, training materials, financial documents, and documents regarding remuneration received for speeches, trainings, or other advice received from consultants;

- iii. Documentation regarding the planning, design, financing and funds appropriation, and construction of ROSP, WRSP, and Mecklenburg Correctional Center;
- iv. Medical records and related materials for all class members;
- v. Documents related to intrastate transfers of prisoners from and to ROSP and WRSP, including, but not limited to, quarterly progress reports, invoices, transfers, communications, and documents related to finances;
- vi. Documentation related to the creation, implementation, administration, or any other documents regarding the SMU, Phase Program, or Mecklenburg Correctional Center.

Plaintiffs previously had agreed that the first phase of document requests would not be specifically directed to any of the individual Defendants. Given the time that has elapsed since the filing and briefing of the initial dispositive motions in this case, and the need to move this matter forward, Plaintiffs do not agree to continue delaying discovery in this manner.

Interrogatories shall be served in accordance with Section III.C and may be served separately from the above phases.

2. Defendants' Position

Consistent with Defendants' position in II.C.2 above, no significant additional discovery should proceed until after this Court rules on Defendants' pending motions to dismiss. To the extent discovery does proceed ahead of that ruling, it should be limited to class certification. After that ruling, Defendants propose to revisit the question of whether merits discovery should proceed ahead of a decision on class certification.

C. Discovery Limits

1. Plaintiffs' Position

Plaintiffs propose that the parties adhere to the limitations of Fed. R. Civ. P. 33 regarding

the permissible number of interrogatories that may be served on an individual party. Plaintiffs anticipate taking approximately fifty (50) depositions of fact witnesses, the Defendants, and the Defendants' current employees, in addition to third-party witnesses and any expert witnesses for the Defendants. In any event, the number of depositions will remain reasonable and proportionate to the needs of this litigation. Defendants have indicated that they will depose each of the Plaintiffs' class representatives and at least some of their experts. Any deposition will be limited to a maximum of eight (8) hours unless extended by agreement of the parties.

Plaintiffs anticipate that requests for admission by each party to any other party will remain reasonable and proportionate to the needs of this litigation. Plaintiffs suggest that responses should be due thirty (30) days after service.

Given the breadth of discovery required in this case, Plaintiffs anticipate that the parties will serve many requests for production of documents, but these requests will be proportionate to the needs of this litigation.

2. Defendants' Position

Interrogatories. Defendants agree that the parties should adhere to the limitations of Fed. R. Civ. P. 33 regarding the permissible number of interrogatories that may be served on an individual party with the understanding that the limit applies to the interrogatories that may be served by a side—i.e., Plaintiffs, as a group, may serve the limit on each of Defendants; and Defendants, as a group, may serve the limit on each of Plaintiffs.

Depositions. Defendants agree that all named parties and named class representatives may be deposed, along with any expert witnesses. Defendants propose that the number of depositions for non-party, fact witnesses be capped at 20.

Requests for Admissions. Defendants propose that the Plaintiffs, collectively, be limited

to service of 100 requests for admissions upon Defendants, collectively, and that Defendants, collectively, be limited to service of 100 requests for admissions upon Plaintiffs, collectively.

Requests for the Production of Documents. Defendants agree that requests for documents should not be limited to a particular number, as to either side, but rather, that the parties attempt to ensure that their requests remain reasonable and proportionate to the needs of this litigation.

D. Expert Reports

1. Plaintiffs' Position

The Plaintiffs believe that written reports will be necessary.

Experts shall be granted site examinations, including access to prisoner cells, living areas, conference rooms, visitation rooms, and all other areas necessary to the experts' evaluation, as well as unabridged access to the class representatives, including, but not limited to, prisoner MRI scans and mental evaluations conducted in cell areas. The parties, however, may agree to amend this position depending on the needs of the case and after the Court rules on Defendants' pending motions to dismiss. Plaintiffs agree that expert examinations may be subject to some of the confidentiality measures referenced in IV.A.1 below.

2. Defendants' Position

Defendants agree to confer with Plaintiffs, in good faith, on the permissible scope of any requested examinations by expert witnesses, but propose that those examinations be conducted pursuant to a confidentiality agreement.

E. Preserving Discoverable Information

1. Plaintiffs' Position

Plaintiffs' counsel emphasizes the necessity and obligation to retain all documents that may be potentially relevant for this litigation. See *E.I. du Pont de Nemours v. Kolon Indus.*, 803 F. Supp. 3d 469, 496-97, 500 (E.D. Va. 2011).

2. Defendants' Position

Counsel for the Defendants certifies that a hold letter has been issued to Defendants, instructing them to retain all materials that may be relevant to the claims and defenses in this matter.

IV. OTHER MATTERS

A. **Protective Order and Confidentiality**

The parties are close to agreement on (i) a protective order concerning the production of documents or communications containing sensitive correctional information and other matters impacting security of prisons or prison staff and (ii) an order pursuant to Rule 502(d) regarding the assertion of privileges and other protections as to matters disclosed in discovery. The parties expect to submit both orders to the Court shortly.

B. **Electronically Stored Information**

Regarding electronically stored information, the parties have agreed to produce all such materials in their native format or hard copy. The parties will otherwise meet and confer regarding ESI production issues and raise any issues with the Court as necessary.

V. ANNEX

Topic	Plaintiffs' Position	Defendants' Position
Approximate Trial Date	December 2021	A trial date cannot be forecast until after the Rule 12 motions have been resolved, but agree the case will be ready for trial by December 2021.
Approximate Length of Trial	21 days	A trial length cannot be forecast until after the currently pending Rule 12 motions have been resolved.

Mandatory Disclosures	14 days of Court ruling on pending motions to dismiss	
Discovery Deadlines	Non-expert fact discovery shall close 180 days before trial. The period for expert discovery, including any expert depositions, shall close 60 days after the close of non-expert fact discovery.	9 months following this Court's ruling on the Rule 12 motions
Plaintiffs' Expert Reports Due	30 days following the close of non-expert fact discovery	90 days prior to the close of all discovery
Defendants' Expert Reports Due	45 days following the close of non-expert fact discovery	60 days prior to the close of all discovery
Plaintiffs' Rebuttal Expert Reports Due	60 days after the close of non-expert fact discovery	45 days prior to the close of all discovery
Dispositive Motions Due	30 days after the close of all discovery	
Response to Dispositive Motions Due	30 days after service of the dispositive motion	
Reply to Response to Dispositive Motions Due	15 days following service of the response in opposition	
Rule 26(a)(3) Pre-Trial Disclosures	60 days before trial	
Objections to Rule 26(a)(3) Trial Disclosures	45 days before trial	
Motions in Limine/Other Pretrial Motions	30 days before trial	
Response to Motions in Limine/Other Pretrial Motions	20 days before trial	
Pretrial Conference	14 days before trial	

Dated: April 30, 2020

Respectfully submitted,

By: /s/ Alyson Cox

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2020, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

Dated: April 30, 2020

Respectfully submitted,

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