IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

WILLIAM THORPE, *et al.*,

Plaintiffs,

v. CASE NO. 3:19cv00332

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In 2011, the Virginia Department of Corrections adopted and enacted the Segregation Reduction Step-Down Program. This nationally-acclaimed policy,[1] which is governed by VDOC Operating Procedure 830.A, creates a multi-step, incentive-based program designed to transition security level "S" inmates back into the general population, when their conduct over time demonstrates that it is safe to do so. Under the Step-Down Program, a level "S" inmate gains additional privileges as he progresses through the program. As part of the Step-Down Program, officials regularly assess an inmate's progress to determine whether the assignment to security level "S" remains appropriate—specifically, to decide whether the inmate's conduct warrants advancement to the next step in the program, return to a previous step, or reassignment to another security level altogether. Following the adoption of the Step-Down Program, "a significant number of individuals have progressed through the phases and successfully transitioned to general population settings; between its launch in 2011 and October 2018, the number of people in Security Level S . . . decreased from 511 to 72."[2]

In this putative class action, twelve inmates have filed suit against various VDOC officials, claiming that their continued confinement in segregated housing has violated their constitutional rights. They also allege that the implementation of VDOC's Step-Down Program somehow violated a settlement agreement from the 1980s that involved a different prison (and different parties), and that they have been discriminated against on the basis of their disabilities, in violation of the Americans with Disabilities Act (ADA) and Rehabilitation Act (RA).

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[1] *See* U.S. Dept. of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (2016), p. 77 (available at https://www.justice.gov/archives/dag/file/815551/download); *see also* Vera Institute of Justice, Center on Sentencing and Corrections, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Virginia Department of Corrections*, at p. 17 (Dec. 2018) ("The Step-Down Program is a pioneering and significant program for reducing the number of people in long-term restrictive housing.").

[2] Vera Institute of Justice, *Safe Alternatives to Segregation Initiative*, *supra* n. 1, at p. 11.

For the reasons set forth in Defendant VDOC's Memorandum in Support of Motion to Dismiss (ECF No. 19), the claim alleging breach of the settlement agreement does not state a plausible claim to relief, and the ADA and the RA claims do not adequately allege discrimination on the basis of disability. In the spirit of streamlining the pleadings before the Court, these defendants incorporate those arguments by reference rather than reiterating them verbatim. Focusing, then, on the constitutional claims, Plaintiffs have failed to state a plausible claim to relief. As to the due process claims, Plaintiffs cannot establish deprivation of a protected liberty interest, nor have they plausibly alleged that the multiple procedural protections delineated in OP 830.A are constitutionally inadequate. Because Plaintiffs have not plausibly alleged intentional discrimination on the part of these named defendants, their Equal Protection claim also fails. And because Plaintiffs' objective conditions of confinement do not transgress constitutional boundaries, their Eighth Amendment claim lacks merit. Finally, even if this Court were to determine that some of the constitutional claims should survive this initial motion to dismiss, Defendants, in their individual capacities, are entitled to qualified immunity.

STATEMENT OF FACTS

"[W]hen ruling on a defendant's motion to dismiss, a [trial] judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations omitted). So viewed, the essential allegations of the complaint are as follows:

The Plaintiffs

1. **Plaintiff William Thorpe,** #1033929, has been incarcerated in some form of restrictive housing for "approximately twenty-four years." Compl. ¶ 24. He is presently assigned to the IM pathway. Compl. ¶ 24. Thorpe is one of the inmates who was involved in the hostage takeover and officer stabbings at Mecklenburg Correctional Center in August 1984, and several of his underlying felony convictions resulted from his participation in that incident.

2. **Plaintiff Frederick Hammer**, #1411791, has been in restrictive housing for approximately "eight years," and he is assigned to the IM pathway. Compl. ¶ 25. Hammer is serving multiple life sentences on five convictions for capital murder, as well as other associated felonies. *Commonwealth v. Hammer*, No. CR09800159, -190 to -204 (Grayson Cnty. Cir. Ct.).[3]

3. **Plaintiff Gerald McNabb,** #1082047, has been in restrictive housing for approximately three years, and he is assigned to the IM pathway. Compl. ¶ 27. He is serving a life sentence, and he became eligible for release on discretionary parole as of October 11, 1995. *McNabb v. Kiser*, No. 7:17cv00449 (W.D. Va. May 21, 2018).

4. **Plaintiff Vernon Brooks,** #1030654, has been in restrictive housing for approximately four years, and he is assigned to the IM pathway. Compl. ¶ 29. His anticipated release date is August 5, 2037. Compl. ¶ 29.

5. **Plaintiff Derek Cornelison,** #1194371, has been in restrictive housing for approximately two and a half years, and he is assigned to the IM internal pathway. Compl. ¶ 31. He is serving a term-of-years sentence on underlying felony convictions, and his anticipated release date is December 26, 2045. Compl. ¶ 31.

6. **Plaintiff Christopher Cottrell** has been in restrictive housing for approximately seven years, and he is presently assigned to the SM pathway. Compl. ¶ 32. His anticipated release date is July 14, 2021. Compl. ¶ 32. His term-of-years sentence includes two felony convictions for assault and battery of a correctional officer, based on separate incidents where he threw a cup of feces on a correctional officer, and then threw a cup of feces on the warden. *See Cottrell v. Clarke*, No. 3:16cv200, 2016 U.S. Dist. LEXIS 135131 (E.D. Va. Sept. 29, 2016).

[3] In 2009, following his Virginia convictions, Hammper requested to be transferred to WRSP in exchange for disclosing the location of his nephew's body, who he confessed to having previously murdered in North Carolina. *See Hammer paid $15K for Location of Body*, WATAUGA DEMOCRAT (Aug. 7, 2009). He received an eighth life-without-parole sentence as a result of his ensuing murder conviction in North Carolina. *See* L. Chambers, *Hammer Pleads Guilty to Murder*, THE DECLARATION (Dec. 14, 2010).

7. **Plaintiff Peter Mukuria**, #1197165, has been in restrictive housing for approximately seven years, and he is presently assigned to the IM pathway. His anticipated release date is September 20, 2049. Compl. ¶ 34. His term-of-years sentence includes an underlying conviction for murder, *Commonwealth v. Mukuria*, No. CR06F02616 (Richmond City Cir. Ct.), as well as a conviction for aggravated malicious wounding, based on an incident where he stabbed a correctional officer in the chest. *See Mukuria v. Mullins*, No. 7:15cv00451, 2015 U.S. Dist. LEXIS 152009 (W.D. Va. Nov. 10, 2015).

8. **Plaintiff Kevin Snodgrass,** #1203403, has been incarcerated at ROSP for four years, and he is presently assigned to the SM pathway. His anticipated release date is October 16, 2053. Compl. ¶ 35. He is serving a term-of-years sentence on convictions that include first-degree murder. *Commonwealth v. Snodgrass*, CR05066405 (Prince William Cnty. Cir. Ct.).

9. **Plaintiff Gary Wall** has been incarcerated at ROSP for at least "three years," and his anticipated release date is April 19, 2032. Compl. ¶ 28. He is serving a term-of-years sentence based on underlying convictions that include felony injury to a correctional officer and unlawful wounding. *See Wall v. Barksdale*, No. 7:17cv00066 (W.D. Va.) (ECF No. 24-03); *see also Wall v. Ruffin*, 2012 U.S. Dist. LEXIS 119832, at *14 (E.D. Va. Aug. 22, 2012). Wall has progressed through various phases of the Step-Down Program at ROSP. However, he has an extensive history of disciplinary violations at that facility. *See, e.g., Wall v. Artrip*, 2018 U.S. Dist. LEXIS 119415, at *39 (W.D. Va. July 28, 2018).

10. **Plaintiff Brian Cavitt** has been incarcerated at ROSP for "two years." Compl. ¶ 30. Cavitt is serving two consecutive life sentences and an additional term of years based on underlying convictions that include first degree murder. *See generally Cavitt v. Saba*, 57 F.

Supp. 81, 86 (D. Mass. 2014); *Commonwealth v. Cavitt*, 460 Mass. 617 (2011). He is assigned to the IM internal pathway. Compl. ¶ 30.

11. **Plaintiff Steven Riddick** has been incarcerated at ROSP for "four years." Compl. ¶ 34. He is serving a fifty-year sentence on an underlying conviction for the first-degree murder of his pregnant live-in girlfriend. *See, e.g.*, *Riddick v. Commonwealth*, 2008 Va. App. LEXIS 237 (Ct. App. May 13, 2008). He is presently assigned to the SM pathway. Compl. ¶ 34.

12. **Plaintiff Dmitry Khavkin** has been incarcerated at ROSP for "six years." Compl. ¶ 26. He is serving a term-of-years sentence on underlying convictions that include second degree murder. *See Khavkin v. Clarke*, 2018 U.S. Dist. LEXIS 124077 (E.D. Va. July 23, 2018). He was originally assigned to the IM internal pathway, but was reassigned to the SM pathway in October 2018, before ultimately transitioning to general population. Compl. ¶ 26.

The Defendants

13. **Defendant Harold Clarke** is the Director of VDOC, and he "is responsible for implementing and overseeing policies and procedures to determine long- and short-range goals for the correctional facilities in Virginia." Compl. ¶ 38.

14. **Defendant Randall Mathena** is the VDOC Security Operations Manager. Defendant Mathena was "involved in the development and implementation of the Step-Down Program," and is presently "chairperson of the External Review Team." Compl. ¶ 40.

15. **Defendant H. Scott Richeson** is the Deputy Director of Reentry and Programs, and she is "responsible for supervising the mental health services within VDOC." Compl. ¶ 41.

16. **Defendant A. David Robinson** is the VDOC Chief of Corrections Operations. He is "responsible for the daily operations and overall safety of Virginia's correctional facilities, including supervising VDOC's 'restrictive housing' program and compliance with federal laws."

Compl. ¶ 42. He is also a "member of the ERT," and has been responsible for "reviewing and approving updates to the Step-Down Program." Compl. ¶ 42.

17. **Defendant Henry Ponton** is the VDOC Regional Operations Chief for the Western Region, and he is "responsible for approving the reassignment or transfer of any inmate to Red Onion and Wallens Ridge for placement in Level S." Compl. ¶ 43. He is also alleged to have "ultimate authority over decisions made by the Dual Treatment Team ("DTT") regarding whether a prisoner should advance through the Step-Down Program." Compl. ¶ 43.

18. **Defendant Marcus Elam** is the VDOC Regional Administrator for the Western Region, and he is "responsible for approving any inmate at Red Onion and Wallens Ridge for placement in Level S." Compl. ¶ 44.

19. **Defendant Denise Malone** is the Chief of Mental Health Services for VDOC, the department that is "responsible for stabilization of the mentally ill and minimization of psychiatric deterioration in the correctional setting." Compl. ¶ 45.

20. **Defendant Steve Herrick** is the VDOC Health Services Director. In that role, he is "responsible for the supervision of all health care personnel within VDOC, including at Red Onion and Wallens Ridge." Compl. ¶ 46.

21. **Defendant Tori Raiford** is the VDOC Restrictive Housing Coordinator, and is responsible for implementing the Step-Down Program. Compl. ¶ 47.

22. **Defendant Jeffrey Kiser** is the Warden of ROSP, and he is responsible for ensuring staff compliance with the Step-Down Program. Compl. ¶ 48.

23. **Defendant Carl Manis** is the Warden of WRSP, and he is responsible for ensuring staff compliance with the Step-Down Program. Compl. ¶ 49.

***The 1981 Class Action: Brown v. Procunier* et al.**

24. In August 1981, seven inmates confined at Mecklenberg Correctional Center (MCC) filed a putative class action, challenging the conditions of confinement at that facility. *See* Compl., *Brown et al. v. Landon et al.* (ECF 19-02).

25. In April 1983, the parties entered into a settlement agreement, which was incorporated into a consent decree issued by this Court. *See* 4/8/83 Settlement Agreement (ECF 19-04); 4/22/83 Court Order (ECF 19-05); 8/2/83 Court Order (ECF 19-06); 8/2/83 Memorandum Opinion (ECF 19-07).

26. After the plaintiffs initiated contempt proceedings based on an alleged violation of the 1983 consent decree, the parties executed a second, modified settlement agreement, which was also incorporated into a consent decree issued by this Court. *See* 4/5/85 Settlement Agreement; 4/5/85 Court Order (ECF 19-08).

27. By order dated April 7, 1997, the prior court orders memorializing the settlement agreements were expressly vacated, "pursuant to 18 U.S.C. § 3626(b)(2)," and the case was administratively closed. *See* 4/7/97 Order (ECF 19-01).

28. Red Onion State Prison opened in 1998. Compl. ¶ 14.

29. Wallens Ridge State Prison opened in 1999. Compl. ¶ 14.

The Step-Down Program

30. Within VDOC, security level "S" is a "non-scored security level reserved for offenders who must be managed in a segregation setting." OP 830.A(III).[4]

31. Offenders may be assigned to security level "S" based on a variety of factors, which are delineated by VDOC policy. OP 830.A(IV)(A)(2); *see also* OP 830.2(IV)(G)(2).[5]

[4] Plaintiffs submitted VDOC Operating Procedure 830.A, *Segregation Reduction Step-Down Program*, as Exhibit 9 to the complaint (ECF No. 1-12), and its contents are therefore properly before the Court. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 322 (2007).

32. The reclassification of an inmate to security level "S" requires a formal hearing by the Institutional Classification Authority ("ICA"), review by Central Classification Services ("CCS"), and approval by both the Warden of ROSP and the appropriate regional administrator. OP 830.A(IV)(A)(3); OP 830.A(IV)(M)(c); OP 830.2(IV)(G)(3).

33. In 2011, ROSP began implementing a "Segregation Reduction Step-Down Program" that "established procedures for incentive based offender management which will create a pathway for offenders to step-down from Security level S to lower security levels in a manner that maintains public, staff and offender safety." OP 830.A(I); *see also* Compl. ¶ 130.

34. As described in its governing document, OP 830.A, the program uses "observable standards" to evaluate inmates and reward those who engage in positive behavior with incremental privileges. OP 830.A(I); *see also* OP 830.A(IV)(J)(1).

35. OP 830.A provides for two pathways for level "S" offenders in the Step-Down Program: Intensive Management ("IM") and Special Management ("SM"). OP 830.A(III).

36. The IM pathway is for offenders "with the potential for extreme and/or deadly violence." OP 830.A(III). The SM pathway is for offenders with a history of fighting with staff or other offenders, but "without the intent to invoke serious harm or the intent to kill," or who repeatedly commit relatively minor disciplinary infractions with the apparent goal of remaining in restrictive housing. OP 830.A(III); *see also* Compl. ¶¶ 140-41.

37. Each pathway has its own internal tiers. IM privilege levels are IM0, IM1, IM2 and IM-SL6. SM offenders have corresponding privilege levels—SM0, SM1, SM2, and SM-SL6. OP 830.A(IV)(D)(2) & (E)(1).

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[5] OP 830.2, *Security Level Classification*, is available at https://vadoc.virginia.gov/about/procedures/documents/800/830-2.pdf. For the convenience of the Court, a copy is also being submitted as Exhibit 1 to this pleading. As a publicly-available official document, VDOC Operating Procedures are subject to judicial notice and may properly be considered in the context of a motion to dismiss. *See, e.g.*, *Perry v. Johnson*, No. 3:10cv630, 2012 U.S. Dist. LEXIS 24840, at *5 n.5 (E.D. Va. Feb. 27, 2012).

38. Offenders who are designated at level "0" within their pathway (either IM0 or SM0) are those offenders who choose not to participate in the Step-Down Program. OP 830.A(IV)(D)(1)(a) & (E)(2). In terms of housing and privileges, offenders who have been designated as IM0 or SM0 receive the "basic requirements" set forth in VDOC Operating Procedure 841.4, *Restrictive Housing Units*. OP 830.A(IV)(D)(1)(a) & (E)(2).[6]

39. For offenders who elect to participate in the Step-Down Program, those offenders earn progressively greater privileges as they advance through the internal pathway levels—*i.e.*, from IM1 to IM2 to IM-SL6, or from SM1 to SM2 to SM-SL6. OP 830.A(IV)(D)(3)(b) & (E)(5)(b); *see also* Compl. Ex. 8, Restrictive Housing Reduction Step Down Program (ECF No. 1-11), at pp. 54-56 (IM privilege chart) & pp. 62-63 (SM privilege chart).

40. Level "S" offenders must satisfy specific goals before advancing to the next privilege level. Among other things, offenders must avoid disciplinary charges and progress through the *Challenge Series*, a series of 7 workbooks and pro-social goals. Compl. ¶ 151.

41. "Following a successful period in IM or SM, offenders are eligible for advancement and to step down from Level 'S' to their first introduction into general population at Security Level 6." OP 830.A(IV)(F)(1); *see also* OP 830.2(IV)(G)(8). The security level reduction is recommended by the ICA, and the ICA's recommendation is reviewed by the warden of ROSP as well as the warden of Wallens Ridge State Prison ("WRSP"), which also houses security level 6 inmates. OP 830.2(IV)(G)(8).

42. "The purpose of Level 6 is to reintroduce offenders into a social environment with other offenders, and to serve as a proving ground and preparation for stepping down to Level 5."

[6] Although OP 830.A references OP 861.3, *Special Housing Units*, OP 861.3 has been administratively superseded by new Operating Procedure 841.4, which is available at https://vadoc.virginia.gov/about/procedures/documents/800/841-4.pdf. For the convenience of the Court, OP 841.4 is attached as Exhibit 2 to this pleading. And for the reasons discussed in note 5, *supra*, it may be considered by the Court in the context of resolving the instant motion.

OP 830.A(IV)(F)(1)(b). Once the offender has made adequate progress at security level 6, the offender will be reclassified at security level 5, "stepped down" into the general population, and considered for eventual transfer to a lower security level institution. OP 830.2(IV)(G)(9)-(11).

43. Although the IM pathway ends at security level 6, an inmate who has progressed to IM-SL-6 may be reclassified as a "SM" offender and thereby transition into the general population. *See, e.g.*, OP 830.A(IV)(L)(1)(a)(iii) (noting that the ERT may change the internal pathway to which an offender is assigned); *see also* Compl. ¶ 26 (noting that Plaintiff Khavkin transitioned to the general population by being reassigned from the IM to the SM pathway, and then progressing out of security level 6).[7]

44. Level "S" offenders undergo periodic reviews to ensure that they are assigned to the appropriate security level, pathway, and privilege level.

45. First, level "S" offenders are formally reviewed by the ICA at least once every 90 days to "determine whether to recommend that the offender continue in Segregation for a subsequent period of up to 90 days or be assigned to the general population." OP 830.A(M)(h); OP 830.2(IV)(G)(7). A formal ICA hearing triggers procedural requirements, including 48-hour advance notification and the opportunity to be present at the hearing, as well as the right to appeal any classification decision through the offender grievance procedure. OP 830.1(IV)(B).[8]

46. Second, twice a year, an external review team ("ERT") reviews each level "S" offender to determine: (1) whether the offender is appropriately assigned to level "S"; (2)

[7] Although the Plaintiffs allege elsewhere that, if a prisoner is classified in the IM pathway, "VDOC policy does not allow him to be reassigned to the SM Pathway," Compl. ¶ 147, this allegation is refuted by the language of the operating procedure itself. And "in the event of conflict between the bare allegations of the complaint and any exhibit attached . . . , the exhibit prevails." *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991).

[8] VDOC Operating Procedure 830.1, *Facility Classification Management*, is publicly-available at https://vadoc.virginia.gov/about/procedures/documents/800/830-1.pdf. For the convenience of the Court, it is attached as Exhibit 3 to this pleading. And for the reasons discussed in note 5, *supra*, it may be considered by the Court in the context of resolving the instant motion.

whether the offender meets the criteria for the internal pathway to which they are currently assigned; (3) whether a pathway change would be appropriate; and (4) whether the Dual Treatment Team has made appropriate decisions to advance the offender. OP 830.A(IV)(L)(1).

47. Third, the Dual Treatment Team ("DTT"), a facility-specific team, informally reviews level "S" offenders on an as-needed basis, but "at least quarterly," and specifically reviews any offender who is "being recommended to be considered for a status or pathway change." OP 830.A(IV)(M)(d)(iii); *see also* Compl. ¶ 136.

48. Fourth, ROSP, as a facility with a restrictive housing unit, also has a multi-disciplinary team ("MDT"), which evaluates each level "S" offender, through a formal ICA hearing, to develop an appropriate management path, including the establishment of mental health goals, disciplinary goals, responsible behavior goals, and programming assignments. OP 841.4(V)(H)(2). The MDT formally reviews each level "S" offender at least once every 30 days, in order to recommend whether the offender should continue at his current security level or be assigned to a less restrictive level. OP 841.4(V)(H)(2).

49. Fifth, a Building Management Committee informally reviews all level "S" inmates. The Committee is comprised of individuals "directly involved in the operations of a specific unit," and convenes "at least monthly to discuss offender statuses and unit incentives and sanctions." OP 830.A(IV)(M)(f). The Committee may recommend changes to an inmate's privilege level, as well as discussing and adjusting individual pod incentives and sanctions. OP 830.A(IV)(M)(g); OP 830.A(IV)(D)(4)(b).

50. Finally, Level "S" offenders are rated weekly on their progress by prison officials and counselors, who are encouraged to communicate with each offender routinely on their

ratings as an opportunity to acknowledge positive performance as well as to motivate them to improve when needed. OP 830.A(IV)(E)(5)(d).

51. In sum, then, a level "S" inmate receives the following program compliance and security level reviews: (1) formal ICA hearings every 90 days; (2) bi-annual reviews by the External Review Team; (3) informal reviews by the Dual Treatment Team, at least four times a year; (4) 30-day formal reviews by the Multi-Disciplinary Team; and (5) informal reviews by the Building Management Committee on an as-needed basis, but at least monthly.

52. Beginning in 2017, level "S" inmates with mental illness were reviewed by staff to determine whether they should be reclassified as security level "M." OP 830.2(IV)(H). Offenders who have been diagnosed with a serious mental illness and designated as security level "M" must be reviewed by the MDT to determine an appropriate housing placement, including referral to an acute care unit, referral to a mental health residential unit, referral to a secure diversionary treatment program, or referral to a secured allied management unit. OP 841.4(IV)(E)(4); *see also* OP 730.3(V)(B)-(F).[9]

Conditions of Confinement

53. Offenders in special housing receive laundry, barbering, and hair care services in the same manner as offenders in the general population, and they receive exchanges of clothing, bedding, and linen in the same manner as offenders in the general population. OP 841.4(IV)(K)(2). They also receive the same number and type of meals as the general population, OP 841.4(IV)(K)(3)(c), and they have the same mail regulations and privileges as the general population. OP 841.4(IV)(K)(b)(i).

[9] VDOC Operating Procedure 730.3, *Mental Health Services: Levels of Service*, is publicly-available at https://vadoc.virginia.gov/about/procedures/documents/700/730-3.pdf. For the convenience of the Court, a copy is also being submitted as Exhibit 4 to this pleading. And, for the reasons discussed in note 5, *supra*, this operating procedure may be considered by the Court in the context of resolving the Defendants' motion to dismiss.

54. All offenders on the "SM" pathway, regardless of privilege level, are allowed to check out 2 library books per week, possess legal and religious materials, purchase up to $10 of commissary items from an approved list, have access to a television that is mounted on the pod wall, purchase a radio (after three months charge-free), have in-cell programming, out-of-cell recreation, one hour of non-contact visitation per week, make two 15-minutes phone calls per month, and have at least 3 showers per week. Compl. Ex. 8 (ECF No. 1-11), at pp. 62-63.

55. All offenders on the "IM" pathway, regardless of privilege level, are allowed to check out 2 library books per week, possess legal and religious materials, purchase up to $10 of commissary items from an approved list, have in-cell programming, out-of-cell recreation at least 2 hours per day, have one hour of non-contact visitation per week, make two 20-minute phone calls per month, and have at least 3 showers per week. Compl. Ex. 8 (ECF No. 1-11), at p. 54.

56. All offenders who have been assigned to a restrictive housing must be assessed by a qualified mental health professional ("QMHP") either before their placement, or within one day after their placement, so that any "at risk" offenders may be identified. OP 841.4(IV)(D)(1).

57. Offenders in special housing should be checked by a corrections officer at least twice per hour. In addition to that supervision, the shift commander, or commensurate authority, should visit the special housing unit on a daily basis. OP 841.4(IV)(I)(1).

58. Although the Plaintiffs have alleged that "VDOC effectively permanently denies [] prisoner[s] any opportunity for parole" while at ROSP and WRSP, Compl. ¶ 117, this is incorrect. Under Virginia law, the Virginia Parole Board—a separate state agency—has the authority to determine whether an inmate should be released on discretionary parole. Va. Code § 53.1-136. VDOC has no decision-making authority relative to this process.

ARGUMENT AND AUTHORITIES

I. Applicable Legal Standards

Federal district courts are courts of limited jurisdiction. "Thus, when a district court lacks subject matter jurisdiction over an action, the action must be dismissed." *U.S. v. Jadhay*, 555 F.3d 337, 347 (4th Cir. 2009). A challenge to a court's subject matter jurisdiction can be raised at any time and is properly considered on a motion under Rule 12(b)(1) of the *Federal Rules of Civil Procedure*. The burden of proving subject matter jurisdiction in response to a Rule 12(b)(1) motion rests with the plaintiff, the party asserting jurisdiction. *See Williams v. U.S.*, 50 F.3d 299, 304 (4th Cir. 1995); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

"[T]he purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint." *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and if there is "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556); *see also* Fed. R. Civ. P. (8)(a)(2); *Francis v. Giacomelli*, 588 F.3d 186 (4th Cir. 2009). Also, although the Court must consider all of the factual allegations of the complaint as true, the Court is not bound to accept a legal conclusion couched as a factual assertion, *Iqbal*, 556 U.S. at 663-64, nor should the Court accept a plaintiff's "unwarranted deductions," "rootless conclusions of law" or "sweeping legal conclusions cast in the form of factual allegations." *Custer v. Sweeney*, 89 F.3d 1156, 1163 (4th Cir. 1996).

The Fourth Circuit has noted that it is not clear "whether a dismissal on Eleventh Amendment immunity grounds is a dismissal for failure to state a claim under Rule 12(b)(6) or a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1)." *Andrews v. Daw*, 201 F.3d 521, 524 n.2 (4th Cir. 2000). It has been noted, however, that "[t]he recent trend . . . appears to treat Eleventh Amendment Immunity motions under Rule 12(b)(1)." *Haley v. Va. Dep't of Health*, No. 4:12cv00016, 2012 U.S. Dist. LEXIS 161728, at *5 n.2 (W.D. Va. Nov. 13, 2012). The underlying rationale is that, "although the Eleventh Amendment immunity is not a 'true limit' of [the] Court's subject matter jurisdiction, . . . it is more appropriate to consider [this] argument under Fed. R. Civ. P. 12(b)(1) because it ultimately challenges this Court's ability to exercise its Article III power." *Beckham v. AMTRAK*, 569 F. Supp. 2d 542, 547 (D. Md. 2008).

II. Count I: Breach of Settlement Agreement

For the reasons discussed in the Memorandum in Support of Motion to Dismiss submitted by Defendant VDOC (ECF No. 19), after the Mecklenburg consent decrees were vacated in 1997, the underlying settlement agreements ceased to have any ongoing force or effect. *See Benjamin v. Jacobson*, 172 F.3d 144, 157 (2d Cir. 1999) (en banc); *see also* Mem. in Support VDOC's Mot. to Dismiss (ECF No. 19), at pp. 10-16. Accordingly, Count I of the complaint—which seeks to hold the defendants collectively liable for allegedly breaching those settlement agreements—fails to state a claim.

Moreover, even if some aspect of the settlement agreements survived the 1997 order vacating the consent decrees, Defendants—in their official capacities—are immune, under the Eleventh Amendment, from a breach-of-contract suit in federal court. *See In re Sec'y of the Dep't of Crime Control & Pub. Safety*, 7 F.3d 1140, 1144-45 (4th Cir. 1993); *see also* Mem. in Support VDOC's Mot. to Dismiss (ECF No. 19), at pp. 16-19. To the extent Count I seeks to

hold Defendants liable in their individual capacities, that claim would fail for the simple reason that no individually-named defendant was a party to the settlement agreements that were allegedly breached. And "[i]t goes without saying that a contract cannot bind a nonparty." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *see also Guttenberg v. Emery*, 41 F. Supp. 3d 61, 68-69 (D.D.C. 2014) (dismissing a claim alleging breach of settlement agreement, where the named defendant was not a party to that agreement, reasoning that she "had no duties under a contract to which she was not a party, so she cannot be liable for any breach").

Finally, as discussed in Defendant VDOC's Motion to Dismiss, Count I is additionally barred by the applicable five-year statute of limitations. *See* Va. Code § 8.01-230; *see also* Mem. in Support VDOC's Mot. to Dismiss (ECF No. 19), at pp. 19-20.

III. Count II: Due Process

Plaintiffs allege that their procedural due process rights have been violated because they do not receive "meaningful periodic review" of their placement in security level S. "To state a procedural due process violation, a plaintiff must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015). If, and only if, the inmate can establish a protected liberty interest, is it necessary to examine the sufficiency-of-process surrounding deprivation of that interest. *See id.*

To establish a protected liberty interest, an inmate must "[1] point to a Virginia law or policy providing him with an expectation of avoiding the conditions of confinement and [2] demonstrate that those conditions are harsh and atypical in relation to the ordinary incidents of prison life." *Prieto*, 780 F.3d at 252. With respect to the first prong of the analysis, Defendants

will assume, without conceding, that Plaintiffs have an expectation of avoiding confinement in administrative segregation. *See Incuuma v. Stirling*, 791 F.3d 517, 527 (2015).

But even conceding that Virginia policy gives Plaintiffs an expectation of avoiding confinement in segregated housing, their allegations do not establish denial of a protected liberty interest. Specifically, an inmate's liberty interest is only implicated by a deprivation that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *see also Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974). Here, Plaintiffs have not alleged facts tending to show that their continuing confinement in administrative segregation imposed an "atypical and significant hardship" upon them "in relation to the ordinary incidents of prison life." Plaintiffs allege that they have more limited commissary privileges than offenders in the general population, are disallowed certain personal property, do not earn good conduct credit at the same rate, have more difficulty communicating with other offenders and staff, have limited recreation and shower time, eat meals in their cells, have more cell and strip searches, have to wear restraints while being escorted around the prison, are denied contact visitation, and cannot not participate in group activities. But because these conditions of confinement are not "harsh and atypical," in a constitutional sense, it follows that Plaintiffs do not possess a constitutionally-protected liberty interest in their avoidance.

Specifically, in *Wilkinson*, the Supreme Court identified three primary factors for consideration when determining whether prison conditions were "harsh and atypical" within the meaning of the due process clause: (1) the magnitude of the restrictions imposed on the inmate; (2) whether the segregation was indefinite in nature; and (3) whether assignment to segregation had any collateral consequences on an inmate's sentence. 545 U.S. at 214. Considering the

indefinite nature of the confinement, the extreme isolation imposed upon the inmates, and the fact that inmates assigned to that prison were disqualified from parole consideration, the United States Supreme Court concluded that inmates housed under those conditions possessed a protected liberty interest. *See id.* at 224.

Here, by contrast, Plaintiffs have not been assigned to administrative segregation for an unlimited duration of time. Indeed, one of the named Plaintiffs has successfully transitioned to the general population in recent months. Because VDOC has a specified pathway to allow offenders to progress out of segregation, assignment to security level "S" is not "indefinite"—particularly in light of the large number of offenders (including at least 2 of these plaintiffs) who have successfully transitioned from level "S" into the general population.

Also, offenders housed in segregation at ROSP and WRSP have fewer privileges than offenders in the general population, certainly. But the mere restriction of general inmate privileges does not necessarily translate a prison environment into one that is "harsh and atypical." For example, level "S" offenders have commissary privileges, visitation privileges, educational opportunities, recreation privileges, telephone privileges, access to religious guidance, access to legal services, the same mail and correspondence privileges as offenders in the general population, the same laundry, barbering, and hair care services as offenders in the general population, the opportunity to shower at least three times per week, the same number of meals and types of food as that offered to the general population, and access to medical and mental health services. And although Level "S" offenders are subjected to strip searches, so are offenders in the general population.

Moreover, the baseline conditions of segregation for security level "S" offenders are the same as those for any other offender confined to special housing, a factor that has been deemed

particularly relevant by the United States Supreme Court. *See Sandin*, 515 U.S. at 486; *see also* O.P. 841.4. And the physical living conditions for special housing offenders in Virginia "approximate those of the general population." O.P. 841.4. Finally, the Fourth Circuit has held that conditions of segregated housing, more onerous than those described by Plainitffs, do not necessarily pose an atypical and significant hardship within the meaning of the Due Process Clause. *See Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997).

Indeed, as court after court has unanimously concluded, the restrictions and limitations that accompany segregated confinement within VDOC are not so onerous as to trigger the protections of the Due Process Clause. *See, e.g.*, *Smith v. Collins*, No. 7:17cv00215, 2018 U.S. Dist. LEXIS 160614, at *15-17 (W.D. Va. Sept. 20, 2018).[10] Considering all of the circumstances, none of the conditions described by Plaintiffs fall outside the scope of everyday experiences that an inmate could expect to encounter within the confines of a prison. And because the conditions of confinement in segregated housing are not harsh and atypical as compared to the ordinary incidents of prison life, Plaintiffs do not possess a protected liberty interest in avoiding confinement at security level "S". Their due process claim therefore fails.

Even if this Court were to hold that Plaintiffs possess a protected liberty interest in avoiding continued confinement as a security level "S" offender, VDOC policies establish

[10] Every sitting federal district court judge in the Western District of Virginia has rejected a due process claim that the conditions of confinement for level "S" inmates at ROSP are so harsh and atypical that they give rise to a protected liberty interest. *See. e.g., Cooper v. Gilbert*, No. 7:17cv00509, 2018 U.S. Dist. LEXIS 65096, at *8-9 (W.D. Va. Apr. 17. 2018) (Conrad, J.); *Jordan v. Va. Dep't of Corr.*, No. 7:16cv00228, 2017 U.S. Dist. LEXIS 150501, at *23-26 (W.D. Va. Sept. 18, 2017) (Dillon, J.); *Muhammad v. Smith*, No. 7:16cv00223, 2017 U.S. Dist. LEXIS 125335, at *32-33 (W.D. Va. Aug. 8, 2017) (Conrad, J.); *Barksdale v. Clarke*, No. 7:16cv00355, 2017 U.S. Dist. LEXIS 123518, at *13-20 (W.D. Va. Aug. 4, 2017) (Kiser, J.); *Snodgrass v. Gilbert*, No. 7:16cv00091, 2017 U.S. Dist. LEXIS 39122, at *34-38 (W.D. Va. Mar. 17, 2017) (Conrad, C.J.); *Delk v. Youce*, No. 7:14cv00643 2017 U.S. Dist. LEXIS 36581, at *21-25 (W.D. Va. Mar. 14, 2017) (Moon, J.), *aff'd*, 709 F. App'x 184 (4th Cir. 2018); *Hubbert v. Washington*, No. 7:14cv00530, 2017 U.S. Dist. LEXIS 41695, at *12-18 (W.D. Va. Mar. 22, 2017) (Urbanski, J.); *Muhammad v. Mathena*, No. 7:14cv00529, 2017 U.S. Dist. LEXIS 11734, at *4-5 (WD. Va. Jan. 27, 2017) (Conrad, J.); *DePaola v. Va. Dep't of Corr.*, No. 7:14cv00692, 2016 U.S. Dist. LEXIS 132980, at *22-31 (W.D. Va. Sept. 28, 2016) (Jones, J.), *aff'd*, 703 F. App'x 205 (4th Cir. 2017); *Obataiye-Allah v. Va. Dep't of Corr.*, No. 7:15cv00230, 2016 U.S. Dist. LEXIS 133316, at *25-31 (W.D. Va. Sept. 28, 2016) (Jones, J.), *aff'd sub nom. Obataiye-Allah v. Clarke*, 688 F. App'x 211 (4th Cir. 2017).

constitutionally-sufficient process. "Because the requirements of due process are 'flexible and cal[l] for such procedural protections as the particular situation demands,'" the Supreme Court has set forth three basic factors to consider when evaluating the sufficiency of process that has been afforded a litigant. *Wilkinson*, 545 U.S. at 224 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (alteration in original)). Specifically, courts consider "'[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" *Id.* at 224-25 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

All offenders who are classified as security level "S" receive an initial, formal ICA hearing before being assigned to security level "S."[11] They receive advance notification and have the right to present during that hearing. The ICA recommendation must be approved by the Warden and the Regional Chief, and inmates have the opportunity to file a grievance relating to his segregation assignment. Following their assignment to security level "S", inmates receive multiple internal and external, formal and informal, reviews.[12]

The procedural protections that Virginia has implemented with respect to inmates assigned to security level "S" minimize the risk that an inmate will be erroneously placed in segregation, and they minimize the risk that an inmate will languish in either internal pathway, indefinitely. These safeguards largely mirror the procedural protections that the Supreme Court has previously upheld. *See Wilkinson*, 545 U.S. at 225-29. Accordingly, considering all of these

[11]To the extent Plaintiffs might be challenging the due process accompanying their initial assignment to security level "S," considering that each has allegedly been confined at ROSP for more than two years, that challenge would be barred by the applicable statute of limitations.

[12] *See* Statement of Facts, ¶¶ 44-51, *supra*.

circumstances, Plaintiffs' continued placement at security level "S" does not offend procedural due process, and Defendants are entitled to judgment on this claim.

Moreover, to the extent that Plaintiffs seek compensatory damages for the alleged denial of their due process rights, Defendants are entitled to qualified immunity on that claim.[13] As the Supreme Court recently stated, "[t]he doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

For a right to be clearly established, it must be "'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Id.* (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). "This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). Accordingly, to recover monetary damages against these Defendants, Plaintiffs must show that a reasonable prison official would have known that the multi-layered procedural protections embodied in the Step-Down Program were insufficient as a matter of law.

Plaintiffs cannot meet that standard. No federal court has ever suggested that the multiple tiers of review in the Step-Down Program are insufficient. To the contrary, every

[13] Defendants further note that, to the extent Plaintiffs might be requesting an award of monetary damages from Defendants, in their official capacities, they are immune. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Thus, any official-capacity claims for compensatory damages under 42 U.S.C. § 1983 should be summarily dismissed.

federal court—including the Fourth Circuit—to have considered the constitutional adequacy of the Step-Down Program has concluded that it complies with the dictates of due process. *See* note 10, *supra*. Moreover, as Defendants have noted, in *Beverati v. Smith*, 120 F.3d 500 (4th Cir. 1997), the Fourth Circuit held that conditions more onerous than those experienced by Plaintiffs were not "harsh and atypical" when compared to the ordinary incidents of prison life. Also, Virginia's level "S" inmates are not subjected to two of the crucial factors identified in *Wilkinson v. Austin*, 545 U.S. 209 (2005), that led that court to find a protected liberty interest—specifically, receiving only one security review per year and being automatically disqualified from parole consideration. *See id.* at 224. For this reason, even if this Court were to conclude that the procedural due process claims should go forward, Defendants—in their individual capacities—are entitled to qualified immunity.

IV. Count III: Equal Protection

The Equal Protection clause requires that persons similarly situated be treated alike. *Plyer v. Doe*, 457 U.S. 202 (1982). However, this mandate "does not take from the States all power of classification," *Personnel Adm'r v. Feeney*, 442 U.S. 256, 271 (1979), but "keeps governmental decision-makers from treating differently persons who are in all relevant respects alike," *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). For this reason, in order to state a claim for an equal protection violation, a plaintiff must demonstrate that he has been treated differently from others who are similarly situated, and that the unequal treatment was the result of intentional discrimination. *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001). If the plaintiff does not make this threshold showing, the Court need not determine whether the alleged disparate treatment was justified under the appropriate level of scrutiny. *Ephraim v. Angelone*, 313 F. Supp. 2d 569, 573-74 (E.D. Va. 2003).

Here, Plaintiffs have not plausibly alleged that they are treated differently from other, similarly-situated individuals. "Generally, in determining whether persons are similarly situated for equal protection purposes, a court must examine all relevant factors." *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996). The thrust of the inquiry is whether the plaintiff can "identify persons materially identical to him or her who ha[ve] received different treatment." *Kolbe v. Hogan*, 813 F.3d 160, 185 (4th Cir. 2016).

Plaintiffs contend, in essence, that they have been discriminated against because, in the exercise of the Defendants' professional judgment, some inmates are assigned to the IM pathway, and others are assigned to the SM pathway. But Plaintiffs have not alleged plausible, specific facts from which it could be determined that any of these named defendants intentionally discriminated against the Plaintiffs for any reason, much less on the basis of any identifiable trait. In order to state an Equal Protection claim, Plaintiffs must set forth "specific, non-conclusory factual allegations that establish improper motive." *Williams v. Hansen*, 326 F.3d 569, 584 (4th Cir. 2003). That is, "to establish intentional discrimination, a plaintiff must show that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Soberal-Perez*, 717 F.2d at 42.

Here, Plaintiffs' conclusory allegations do not contain "specific" factual allegations "that establish improper motive." At best, Plaintiffs allege that some inmates are accidentally assigned to the IM pathway rather than the SM pathway, and vice versa. That Defendants have allegedly, on occasion, erred in the exercise of their professional judgment, in the application of a VDOC operating procedure, does not support any reasonable inference that they are deliberately discriminating against the Plaintiffs. Accordingly, Plaintiffs have not stated a claim

under the Equal Protection Clause. *See, e.g.*, *Mukuria v. Clarke*, No. 7:15cv00172, 2016 U.S. Dist. LEXIS 131966, at *31-33 (W.D. Va. Sept. 27, 2016) (holding that the different treatment afforded inmates in the SM and IM internal pathways did not violate the Equal Protection Clause), *aff'd*, 706 F. App'x 139 (4th Cir. Dec. 19, 2017).

Second, to the extent Plaintiffs are contending that their Equal Protection rights have been violated because the Step-Down Program discriminates against individuals with mental disabilities, they have not plausibly alleged that the program was intentionally designed to discriminate against them. Specifically, the Step-Down Program does not "single out" or penalize individuals with mental disabilities. *Manning v. Caldwell*, 900 F.3d 139, 152 (4th Cir. 2018). "That it may disproportionately affect one group over another . . . does not make for unconstitutional discrimination." *Id.* at 153. Because "[d]isparate impact alone cannot sustain an equal protection violation," *Majeed v. Columbus County Bd. of Educ.*, No. 99-1341, 2000 U.S. App. LEXIS 8621, at *11 (4th Cir. May 2, 2000), Plaintiffs have not plausibly alleged that their failure to progress through the Step-Down Program, even if attributable to any mental disabilities, violated their Equal Protection Rights.

Finally, even if this Court were to conclude that the Equal Protection challenge should survive these considerations, Defendants are entitled to qualified immunity. As with the Due Process challenge, no court has ever suggested that the Step-Down Program might transgress the Equal Protection Clause. To the contrary, every court to have considered the issue—including the Fourth Circuit—has concluded that the different pathways are constitutional. *See, e.g.*, *Mukuria*, 2016 U.S. Dist. LEXIS 131966, at *31-33, *aff'd*, 706 F. App'x 139 (4th Cir. Dec. 19, 2017); *DePaola*, 2016 U.S. Dist. LEXIS 132980, at *32-34 (W.D. Va. Sept. 27, 2016), *aff'd*, 703 F. App'x 205 (4th Cir. Nov. 22, 2017). For this reason, even if this Court were to conclude that

the Equal Protection claim should go forward, Defendants—in their individual capacities—are entitled to qualified immunity.

V. Count V: Eighth Amendment Conditions-of-Confinement[14]

To state an Eighth Amendment conditions-of-confinement claim, a plaintiff must plausibly allege facts that will establish two elements: (1) that objectively, the deprivation suffered or harm inflicted was "sufficiently serious," and (2) that subjectively, the prison officials acted with a "sufficiently culpable state of mind." *Johnson v. Quinones*, 145 F.3d 164, 167 (4th Cir. 1998). With respect to the objective component, a plaintiff must establish "a serious or significant physical or emotional injury resulting from the challenged conditions or a substantial risk thereof." *De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013) (quotations omitted). And to satisfy the subjective component, the inmate must show that prison officials were deliberately indifferent—specifically, that the defendant "actually kn[e]w of and disregard[ed] an objectively serious condition, medical need, or risk of harm." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure reasonable safety." *Id.* at 844.

1. Objective Prong

Under settled Fourth Circuit precedent, Plaintiffs' Eighth Amendment claim fails under the objective prong of the analysis. Specifically, the Fourth Circuit has rejected a claim that the Eighth Amendment is violated by inmates who "are confined to their cells for twenty-three hours per day without radio or television, . . . receive[] only five hours of exercise per week, and . . .

[14] The complaint appears to skip from Count III to Count V, with no Count IV. To avoid potential confusion, Defendants use the same numbering as the subheadings in the complaint.

may not participate in prison work, school, or study programs." *Mickle v. Moore*, 174 F.3d 464, 471 (4th Cir. 1999). Noting that "the restrictive nature of high-security incarceration does not alone constitute cruel and unusual punishment," The Fourth Circuit concluded that the Plaintiffs failed to show "that the conditions in administrative segregation or maximum custody work a serious deprivation of a basic human need." *Id.* at 472, reasoning that "the isolation inherent in administrative segregation or maximum custody is not itself constitutionally objectionable," even when those inmates are housed in segregation for an "indefinite duration." *Id.* (citing *Sweet v. S.C. Dep't of Corr.*, 529 F.2d 854, 861 (4th Cir. 1975)).

Plaintiffs' conditions of confinement, which included access to library materials, legal and religious materials, commissary privileges, an in-pod television, the ability to purchase a radio, in-cell programing, out-of-cell recreation, the ability to have one hour of non-contact visitation per week, at least three showers per week, and the ability to use the phone twice a month, were not as restrictive as those upheld in *Mickle*. Because Plaintiffs have not alleged facts sufficient to distinguish his circumstances from *Mickle*, that precedent controls. *Accord Hubbert v. Washington*, 2016 U.S. Dist. LEXIS 89031, at *19-20 (W.D. Va. July 7, 2016).

Nor does the Fourth Circuit's recent decision in *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019)[15] meaningfully alter this analysis. Specifically, in *Porter*, a three-judge panel held that Virginia's death row inmates had been subjected to objectively harsh conditions of confinement, exposing them to a substantial risk of serious harm. However, in the context of evaluating the objective prong of the Eighth Amendment analysis, the Fourth Circuit distinguished *Mickle*, noting that, in *Mickle*, the plaintiffs had been "placed in segregation based on their *in-prison conduct*," and had an avenue for release from those conditions of confinement. *Id.* at 359. By

[15] Of note, the mandate in *Porter v. Clarke* has been stayed because the appellees filed a petition for rehearing *en banc*, which, as of the date of this filing, is still pending.

contrast, the *Porter* plaintiffs were placed in restrictive housing "based on their sentence alone," and had no "avenue for removing themselves from segregation." *Id.*

Because these Plaintiffs acknowledge that their in-prison conduct formed the basis of their assignment to security level "S," and because VDOC has provided them with a pathway out of restrictive housing, *Mickle*—rather than *Porter*—controls the Eighth Amendment analysis. And because Plaintiffs' conditions of confinement did not involve an illegitimate deprivation, such as "improper ventilation, inadequate lighting, no heat, unsanitary living environment, opportunity to wash, nutritional needs not being met, [or] no medical care," and because Plaintiffs' ability to interact with other individuals—although limited—was not absent, their conditions of confinement do constitute an "extreme deprivation" amounting to cruel and unusual punishment. *Sweet*, 529 F.2d at 861-62. The Eighth Amendment is only implicated by conditions of confinement that involve the "wanton and unnecessary infliction of pain," or are "grossly disproportionate to the severity of the crime warranting imprisonment," *Rhodes*, 452 U.S. at 347, meaning they are "so shocking or barbarous as to violate the Constitution," *Chapman v. Plageman*, 417 F. Supp. 906, 907 (E.D. Va. 1976). Those extreme conditions do not exist here.

2. Subjective Prong

From a subjective perspective, the claims against these defendants also fail. With respect to any official-capacity claims against the VDOC administrators, the segregation policies—in and of themselves—do not evidence deliberate indifference. To prevail in an official-capacity suit, a plaintiff must show that the challenged policies were "the functional equivalent of a decision by the [entity] itself to violate the Constitution." *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011). But even presupposing that Plaintiffs' conditions of confinement subjected

them to a risk of harm, VDOC policies are specifically tailored to address potential danger. Segregation inmates are constantly checked by medical and mental-health personnel, and inmates are also provided with the option of requesting medical or mental-health assistance at any time. By policy, if an inmate were to exhibit mental health symptoms, he would be immediately assessed and appropriate treatment provided, up to and including transfer to Marion Correctional Center, the VDOC psychiatric facility. For these reasons, VDOC's policies are not the functional equivalent of a decision to impose cruel and unusual punishment upon offenders housed in segregation. Rather, these policies, in their totality, were devised to balance specific security needs against VDOC's corresponding obligation to safeguard inmates' physical and mental well-being. As in *Mickle*, the policies were specifically designed to protect inmates who might experience mental deterioration while in custody. *See Mickle*, 174 F.3d at 472. Accordingly, any official-capacity Eighth Amendment claims must fail. *See, e.g.*, *Hughes v. Blankenship*, 672 F.2d 403, 405-06 (4th Cir. 1982).

With respect to individual-capacity claims, Defendants are entitled to qualified immunity. Until the 2019 *Porter* decision, the controlling Fourth Circuit precedent in *Sweet* and *Mickle* made clear that the conditions of confinement in VDOC's restrictive housing units fell within acceptable constitutional parameters. Indeed, district court decisions upholding ROSP's conditions-of-confinement were affirmed by the Fourth Circuit as recently as December 2017. *See, e.g.*, *Mukuria*, 2016 U.S. Dist. LEXIS 131966, at *33-35, *aff'd*, 706 F. App'x 139 (4th Cir. Dec. 19, 2017); *DePaola*, 2016 U.S. Dist. LEXIS 132980, at *35-36 ("DePaola's allegations do not show that he has suffered any Eighth Amendment violation while subject to the living conditions under OP 830.A at Red Onion."), *aff'd*, 703 F. App'x 205 (4th Cir. Nov. 22, 2017). For this reason, no reasonable corrections official, charged with knowledge of established law,

would have believed that holding Plaintiffs in segregated confinement at Red Onion State Prison violated their Eighth Amendment rights. With respect to any individual-capacity claims, Defendants are, therefore, entitled to qualified immunity.

VI. Counts VI and VII: ADA and RA

For the reasons discussed in detail in the Memorandum in Support of Defendant VDOC's Motion to Dismiss (ECF No. 19), the complaint fails to allege a plausible claim of disability discrimination. *See* Mem. in Support VDOC's Mot. to Dismiss (ECF No. 19), pp. 22-29.

Moreover, because the ADA and the RA only prohibit disability discrimination by "public entities" that receive federal funding, the Defendants—in their individual capacities—are not subject to suit under either statute. *See Baird v. Rose*, 192 F.3d 462, 471 (4th Cir. 1999); *see also Bracey v. Buchanan*, 55 F. Supp. 2d 416, 420 (E.D. Va. 1999) ("Because the Plaintiff cannot, as a matter of law, state a claim against the Defendant in his individual capacity under either the ADA or the Rehabilitation Act, the Court DISMISSES those claims.").

Similarly, to the extent that Counts VI and VII are brought against these Defendants in their official capacities, those claims should be dismissed as redundant. Because the entity that is allegedly discriminating against the Plaintiffs—the Virginia Department of Corrections—is a named party to the suit, it is duplicative to also assert official-capacity claims against these Defendants. *See Latson v. Clarke*, 249 F. Supp. 3d 838, 855-56 (W.D. Va. 2017) ("[T]he ADA and RA claims against the defendants other than VDOC are redundant").

Accordingly, in addition to the reasons explained in Defendant VDOC's Memorandum in Support of Motion to Dismiss (ECF No. 19), any individual-capacity claims under the ADA and the RA should be dismissed for failure to state a claim, and, considering that VDOC is also a party to this litigation, any official-capacity claims should be dismissed as redundant.

CONCLUSION

As the Supreme Court has cautioned, allegations that merely "reflect an aspiration toward an ideal environment for long-term confinement" are insufficient to establish a constitutional claim, because "these considerations properly are weighed by the legislature and prison administration rather than a court."[16] As this Court has recognized, prisons

> cannot be described as cheerful – hardly. . . . However, it is not by the standards of the ACA, nor by the opinion of the experts, nor even by the personal opinion of the Court, that the conditions of confinement are to be judged; rather, it is by the Constitution.[17]

For the reasons discussed above, Plaintiffs have not stated a plausible claim that the enactment and administration of the Step-Down Program has violated their constitutional rights. Accordingly, Defendants request that their Motion to Dismiss be GRANTED.

Respectfully submitted,

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[16] *Rhodes*, 452 U.S. at 349.

[17] *Shrader v. White*, 1983 U.S. Dist. LEXIS 15888, at *37, *58-59 (E.D. Va. June 29, 1983).

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2019, I electronically filed the foregoing Memorandum in Support of Defendants' Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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