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

THE NATIONAL FEDERATION OF THE BLIND OF VIRGINIA, *et al.*,

Plaintiffs,

v.

Case No. 3:23-cv-127-HEH

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs are a few of the many blind[1] people in VDOC's custody who are systematically precluded from equal access to its programs and services due to their blindness. Plaintiffs moved for partial summary judgment because one of the barriers they face—VDOC's failure to provide effective communication and accessible technology—is unquestionable and easily remedied.

Defendants' arguments fail on two fronts. First, Defendants do not dispute over half of Plaintiffs' stated facts and fall short of alleging *genuine* disputes to those they contest. One of Defendants' chief quarrels is that technologies exist within VDOC that they contend make their electronic devices accessible to blind prisoners—a point refuted by Plaintiffs, expert witnesses, and VDOC's own staff. Defendants also insist that blind prisoners who need accommodations should simply ask VDOC staff. But Plaintiffs have established that they are not informed about the types of accommodations they can request, that the paper-based request and grievance systems are inaccessible to them, and that staff are consistently unwilling or unable to help.

[1] We use the terms "blind" and "blindness" in their broad sense, to include people with low-vision and other vision impairments that substantially limit their ability to see, consistent with the definition laid out in the Amended Complaint. See Am. Compl. ¶ 1 n.1.

Second, Defendants' legal arguments[2] are unavailing. Plaintiffs have exhausted the remedies that are "available" to them as blind prisoners. And Defendants have failed to prove that Plaintiffs have access to library services, JPay communications, and paper-based programs at VDOC equal to that of sighted prisoners. VDOC cannot evade or explain away its failures to provide effective communication. As such, Plaintiffs are entitled to partial summary judgment.

STATEMENT OF DISPUTES AS TO DEFENDANTS' ADDITIONAL FACTS[3]

35. Disputed that inmate aides and the law librarians help locate and print cases or documents and do so in large print. Clerks are not responsible for performing legal research for blind prisoners. ECF No. 235-6, Ex. 6, Marano 30(b)(6) Dep. 92:2–93:4. They do not have resources to create alternative formats like large print. ECF No. 235-30, Ex. 30, Delbridge Dep. 25:14–26:5. The librarian (who is not stationed in the library), not clerks, receives written requests for documents, prints them, and provides them to the requesting prisoner. *Id.* 38:3–15, 39:7–40:7; ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶¶ 2–4.

36. Defendants' assertion that certain documents "can be printed" for a person to read either on the Merlin or SARA machines is a third-person hypothetical with no basis in the record. The process outlined in ¶ 36 requires that prisoners know what documents or cases to ask for, which they cannot do if they cannot access to the computers for research, and that they know they can ask for a document to be printed out, which no record evidence suggests is true. It also requires them to know how to use the SARA and/or Merlin machines, which neither they, nor staff or clerks, receive training on. ECF No. 235-30, Ex. 30, Delbridge Dep. 116:22–117:3. It also requires the law librarians and/or inmate aides to understand how to create a large print copy of a document,

[2] Because Plaintiff Nacarlo Courtney and Plaintiff William Stravitz have moved to voluntarily dismiss their claims for injunctive relief, ECF No. 223, Plaintiffs do not address those arguments from Defendants, ECF No. 219 § III, in this memorandum.

[3] Defendants' headings are not disputed material facts that require a response, and therefore Plaintiffs have omitted them from this brief.

which they do not. ECF No. 235-27, Ex. 27, Geist Dep. 48:8–49:12; ECF No. 235-28, Ex. 28, Phillips Dep. 15:6–16:6, 33:3–21, 41:5–44:14, 83:19–84:11, 109:19–111:10.

37. Disputed. Deerfield only started addressing the issue with watermarks six months ago—after the initiation of this lawsuit—and only with respect to Mr. Shabazz. ECF No. 235-30, Ex. 30, Delbridge Dep. 170:22–171:10, 176:5–178:14. Mr. Shabazz has not asked Ms. Delbridge to print out any cases from Lexis Nexis; he does not know what cases to request without being able to perform legal research. ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶ 4.

38. Disputed. VDOC offers a few ways to communicate with friends, families, and attorneys, but offers fewer ways to connect to blind individuals because not all of those communication methods are accessible. *See* Pls.' Resp. to Defs.' Add'l Facts ¶¶ 39–42, *infra.*

39. Disputed. Plaintiffs are not guaranteed access to the wall phones any day of the week. For example, Mr. McCann lives in a pod with 99 other people who all share four phones. ECF No. 235-11, Ex. 11, McCann Supp. Decl. ¶ 14. Phone calls are cut off after 20 minutes. *Id.* And each call costs between 84 cents and a dollar for 20 minutes on the phone. *Id.*

41. Disputed that videophones are available for daily use at Deerfield and Greensville. As stated in the cited evidence, videophones are not located in all housing units, and prisoners have to request the use of the videophones. ECF No. 219-3, Talbott Supp. Decl. ¶ 7; ECF No. 219-2, L. Shaw Supp. Decl. ¶ 7; *see also* ECF No. 235-19, Ex. 19, Hajacos Supp. Decl. ¶ 3.

44. Disputed. OP 866.1 provides that the first step in the grievance procedure is to discuss the issue with a staff member "for a quick resolution." *See* ECF No. 235-41, VDOC OP 866.1 § I(D)(1). And before filing an ADA-related complaint, the prisoner "must" attempt to address the issue by filling out a reasonable accommodation request form, which then "must" be appended to the complaint. *Id*. § III.B.6. VDOC rejects complaints and grievances where a prisoner fails to attach an ADA Reasonable Accommodation form. ECF No. 235-43, Ex. 43, NFBV 009645; ECF No. 235-44, Ex. 44, NFBV 010172–76; ECF No. 235-45, Ex. 45, NFBV 018480–81; ECF No. 235-46, Ex. 46, NFBV 010201; ECF No. 235-47, Ex. 47, NFBV 010180; ECF No. 235-48, Ex. 48, NFBV 009631; ECF No. 235-49, Ex. 49, NFBV 010184. ADA coordinators

offered conflicting testimony as to whether prisoners must first file an accommodation request form before proceeding with the grievance process. ECF No. 235-5, Ex. 5, Talbott Dep. 173:14–174:16; ECF No. 235-8, Ex. 8, L. Shaw Dep. 132:18–134:7.

45. Disputed to the extent that—if not by VDOC's policy, then by VDOC's practice—both informal complaints *and* regular grievances regarding ADA accommodations may be rejected if they do not attach the corresponding reasonable accommodation request form. As such, Plaintiffs incorporate their response to ¶ 44 fully herein.

46. Disputed in part. VDOC's rejections of prisoners' grievances often leave prisoners with no effective way to remedy the purported problem, such as when a grievance inappropriately is rejected as beyond the control of VDOC, ECF No. 235-50, Ex. 50, NFBV 010451–52; ECF No. 235-51, Ex. 51, NFBV 010479–81, or when prisoners are instructed to consult medical personnel or file a "Request for Services," not a grievance, *e.g.*, ECF No. 235-42, NFBV 010045–46.

48. Plaintiffs dispute that VDOC Grievance Reports "reflect" all complaints and accepted grievances. *See* Pls.' Opp'n to Defs.' Mot. Summ. J. ("Pls.' Opp'n") Section I.A at 33–35, ECF No. 232. For example, Mr. McCann's Grievance Report does not include a complaint he submitted, which was denied because he attached a separate sheet of paper with the full description of his complaint. ECF No. 235-52, Ex. 52, MCCANN 000005; ECF No. 235-53, Ex. 53, MCCANN 000142; ECF No. 235-54, Ex. 54, NFBV 019511. Additionally, Grievance Reports do not reflect the verbatim language in complaints, grievances, and appeals, or responses. *Compare, e.g.*, ECF No. 235-55, Ex. 55, NFBV 010611 (grieving that "[p]rison life is dangerous enough without the loss of sight"), *with* ECF No. 235-56, Ex. 56, NFBV 019561 (summarizing this complaint as: "You state that since you were diagnosed with cataracts in October 2021 you have been waiting for surgery."). Grievance Reports also omit the date a document was submitted, any attachments, and to whom the document was directed. *Id*. Additionally, as Plaintiffs have testified, not all documents are "filed by [the] inmate" whose name is on the document. ECF No. 235-22, Ex. 22, P. Shaw Dep. 87:18–22. Blind prisoners frequently rely on other people to submit documents on their behalf. ECF No. 235-21, Ex. 21, Shabazz Dep. 13:2–18. Grievance Reports

fail to capture hand-written markings, such Mr. Shaw's caretaker who initialed grievance documents written on his behalf. *See, e.g.,* ECF No. 235-57, Ex. 57, NFBV 010600; ECF No. 235-14, Ex. 14, P. Shaw Supp. Decl. ¶ 2. Plaintiffs also object to the assertions in ¶ 48 as failing to cite to admissible evidence. Fed. R. Civ. P. 56(c)(2). Ms. Phillips' and Ms. DeBerry's testimony about what the Grievance Reports say is not sufficient to satisfy the best evidence rule. Fed. R. Evid. 1002. Nor does their testimony satisfy the exception thereto for testimony about an original document, Fed. R. Evid. 1007, because they do not testify to the content of the original grievance documents—they testify about a VDOC-created list of abbreviated summaries. The Grievance Reports themselves are not sufficient to satisfy the best evidence rule because VDOC is required to cite to the original grievance documents. *Id.* Additionally, neither Ms. Phillips' nor Ms. DeBerry's testimony establish any foundation to admit the Grievance Reports as business records or another hearsay exception. Finally, Grievance Reports omit information about rejected grievances, facility requests, or other commonly-used forms and the reasons for their rejection. These inconsistencies demonstrate VDOC's strawman grievance process. *See* Pls.' Opp'n Sect. I.A at 33–35.

49. Plaintiffs dispute ¶ 49 for the same reasons they dispute ¶ 48, and they incorporate their response to ¶ 48 fully herein.

50. Plaintiffs dispute ¶ 50 for the reasons set forth in ¶ 48 and fully incorporate their response herein. Plaintiffs also dispute that Plaintiffs were required to exhaust administrative remedies. *See* Pls.' Opp'n Sects. I.A–D at 33–45.

51. Plaintiffs dispute that Mr. Courtney's "Grievance File" and "Grievance Report" are complete. For instance, Mr. Courtney testified that he filed a grievance regarding his cell lighting and "appeal[ed] that all the way up," ECF No. 235-17, Ex. 17, Courtney Dep. 159:3–161:16, yet that appeal is not noted in VDOC's Grievance File and Grievance Report. *See also* Pls.' Opp'n Sect. I.A at 33–35 (explaining why VDOC records are not reliable). Plaintiffs dispute ¶ 50 for the same reasons they dispute ¶ 48 and incorporate their response fully herein. Plaintiffs also dispute that the PLRA's exhaustion requirement applies to Mr. Courtney. *Id.* at 46.

52. Plaintiffs dispute that Mr. Shaw's "Grievance File" and "Grievance Report" are complete. *Id.* at 33–35 (explaining why VDOC records are not reliable). Plaintiffs dispute ¶ 52 for the reasons set forth in ¶ 48 and fully incorporate their response herein, and that they were required to exhaust administrative remedies. *Id.* Sects. I.A–D at 33–45.

53. Disputed. Mr. Shaw filed a written request asking for access to the SARA machine, one of which is located in the Law Library. *See* ECF No. 235-72, Ex. 72, NFBV 014175. Plaintiffs dispute ¶ 53 for the same reasons they dispute ¶ 52, and incorporate their response fully herein.

54. Disputed. First, the evidence shows that VDOC's records are unreliable. *See* Pls.' Opp'n Sect. I.A at 33–35. Defendants' statement also ignores how Mr. Hajacos could not exhaust his remedies at Greensville prior to VDOC acknowledging his blindness. ECF No. 235-64, Ex. 64, NFBV 009176–77; ECF No. 235-65; Ex. 65, NFBV 009186–9201. This precluded him from receiving accommodations, which he grieved in April 2022. *Id.* His grievances were rejected for inappropriate reasons that stymied his ability to use the grievance process. *Id.* Plaintiffs dispute ¶ 54 for the same reasons they dispute ¶ 48, and they incorporate their response fully herein.

55. Plaintiffs dispute ¶ 55 for the same reasons they dispute ¶ 54, and they incorporate their response to ¶ 54 fully herein.

56. Plaintiffs dispute ¶ 55 for the same reasons they dispute ¶ 48, and they incorporate their response fully herein. Additionally, at least one of Mr. McCann's informal complaints, ECF No. 235-52, Ex. 52, MCCANN 000005; ECF No. 235-53, Ex. 53, MCCANN 000142, is not included in the rejected grievance documents in Enclosure E to Ms. DeBerry's Declaration, nor is it included in his Grievance Report. Additionally, Mr. McCann testified that sometimes he asks his caregiver or someone else to write up an event on his behalf and is not sure if it is filed as a grievance or other form—or filed at all. ECF No. 235-20, Ex. 20, McCann Dep. 62:20–63:14.

57. Disputed. In November 2023, Mr. McCann filed a complaint and grievance concerning JPay kiosks. VDOC rejected his grievance as "nongrievable" because the kiosks are provided by JPay, an outside contractor; Mr. McCann appealed, but the ombudsman affirmed. ECF No. 235-96, Ex. 96, NFBV 018644; ECF No. 235-97, Ex. 97, NFBV 018642; ECF No. 235-

98, Ex. 98, NFBV 018643; ECF No. 235-99, Ex. 99, NFBV 018667–68. Plaintiffs also dispute ¶ 57 for the same reasons they dispute ¶ 56, and they incorporate their response to ¶ 56 fully herein.

58. Disputed. First, Defendants' records are unreliable, *see* Pls.' Opp'n Sect. I.A at 33–35, including with respect to Mr. Shabazz. For instance, Defendants assert that Mr. Shabazz filed one complaint (from November 2022) concerning JPay tablets. ECF No. 210-24, DeBerry Aff. ¶ 22. Mr. Shabazz submitted a second complaint in December 2022, explaining his tablet did not "provide equal access" with respect to "navigating [the tablet's] system independently like sighted inmates." ECF No. 235-68, Ex. 68, NFBV 010396. Similarly, Defendants assert Mr. Shabazz filed four complaints regarding the SARA machine (January 2019, April 2020, and two in November 2022). ECF No. 210-24, DeBerry Aff. ¶ 24. That is incorrect; he filed another in March 2023. ECF No. 235-32, Ex. 32, NFBV 010459. Plaintiffs also dispute ¶ 58 for the same reasons they dispute ¶ 48, and they incorporate their response to ¶ 48 fully herein.

59. Plaintiffs dispute ¶ 59 for the same reasons they dispute ¶ 58, and they incorporate their response to ¶ 58 fully herein.

ARGUMENT

I. Defendants' exhaustion defense fails because VDOC's grievance process is inaccessible and Plaintiffs exhausted available remedies.

Defendants' argument that Plaintiffs' Motion fails because Plaintiffs did not exhaust administrative remedies is incorrect for three reasons. First, because VDOC's grievance process is inaccessible to the blind, it is not "available" for PLRA purposes. Second, Plaintiffs exhausted their grievance that VDOC does not provide blind prisoners with means to read and write privately and independently. To the extent Plaintiffs attempted to grieve the inaccessible tablets in particular, VDOC barred such grievances. Third, if this Court concludes genuine disputes of fact exist on Defendants' exhaustion defense, the Court should still grant summary judgment to NFB-VA, an organizational plaintiff that is not bound by the PLRA's exhaustion requirements.

A. VDOC's grievance process is not available to blind prisoners because it is inaccessible to them.

Under the PLRA, prisoners are only required to exhaust "available" remedies. 42 U.S.C. § 1997e(a). "[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it." *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008). Here, blind Plaintiffs cannot avail themselves of the grievance process because no part of the grievance process is accessible to them. *See Brown v. Dep't of Pub. Safety & Corr. Servs.*, 383 F. Supp. 3d 519, 543–44 (D. Md. 2019) (blind prisoners have no obligation to exhaust if they are "unable to read the print-only grievance materials"). The forms prisoners must use to file complaints, grievances, and appeals are all offered in standard print only. ECF No. 235-26, Ex. 26, Cosby 30(b)(6) Dep. 22:11–23:11; ECF No. 235-5, Ex. 5, Talbott Dep. 173:22–174:2. VDOC responses to those filings also are on standard print forms, ECF No. 235-26, Ex. 26, Cosby 30(b)(6) Dep. 22:11–23:11, and the responses are handwritten, meaning they cannot be "read aloud" by the SARA machine available at Deerfield (but not Greensville). ECF No. 191-22, Ex. 23, Chong Expert Report at 8; *see* ECF No. 235-30, Ex. 30, Delbridge Dep. 175:17–176:1. Plaintiffs depend on other (sighted) individuals to file complaints, grievances, and appeals, and to read all responses. In addition, VDOC does not provide accessible information regarding grievance procedures to blind prisoners. Pls.' Mem. In Supp. of Mot. for Summ. J. ("Pls.' Mot.") at 39–42, ECF No. 189-1. Because the grievance process is not available to them, Plaintiffs need not exhaust these remedies. *See Lanaghan v. Koch*, 902 F.3d 683, 688 (7th Cir. 2018).

Defendants argue the grievance process is "accessible" because blind prisoners can ask sighted third parties for assistance. But courts routinely reject such arguments in the context of the ADA and Section 504, which are intended to promote the independence of blind people. *See Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D.C. Cir. 2008) (noting that, under the ADA and Section 504, the "enjoyment of a public benefit is not contingent upon the cooperation of third persons" for individual with disabilities); *Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 200 (2d Cir. 2014) (ADA rights "should not be contingent on the happenstance that

others are available to help"). ADA Title II regulations specifically require that auxiliary aids and services provide privacy and independence, which reliance on third parties does not accomplish. 28 C.F.R. § 35.160(b)(2) Further, in order to be "qualified," a reader must be impartial. Defendants' staff are not impartial to complaints filed about staff actions and inactions. *See* Section II(c), *infra.* Because the grievance process is not accessible to blind inmates, it is necessarily unavailable under the PLRA.

B. Mr. Shabazz and Mr. McCann exhausted grievances regarding VDOC's failure to allow them to read and write privately and independently.

Because Defendants do not make assistive technology such as screen readers, accessible tablets, and SARA machines sufficiently available to the blind, Plaintiffs and other blind prisoners cannot read and write privately and independently like their sighted peers. At every turn, blind prisoners are forced to rely on sighted third parties for assistance. In the law libraries, Plaintiffs cannot read cases on LexisNexis because Defendants have not installed a screen reader on the computers. Plaintiffs' ability to read print materials is also severely limited; the Deerfield law library has one SARA machine, which prisoners must request to use, that reads aloud typed, print documents, while Greensville has none. Plaintiffs cannot read and write emails privately and independently, because VDOC's tablets and kiosks are not accessible. Pls.' Mot. at 26–31. Defendants concede that blind prisoners should not have to depend on others for reading and writing, and that such dependence raises security concerns. *See* Ex. 1, Phillips Dep. 96:10-97:13; Ex. 2, Delbridge Dep. 110:11–111:13.

With respect to exhaustion, Defendants concede that Mr. Shabazz exhausted the issue that, because Deerfield does not accommodate blind prisoners, he is forced to have "other inmates read [his] correspondence and other documents for him at Deerfield" and forced to have "other inmates write [his] correspondence and other documents for him at Deerfield." ECF No. 210-24, DeBerry Aff. ¶¶ 19–20. Defendants further concede that Mr. McCann exhausted these same two issues. *Id.* ¶¶ 34–35. Defendants also concede that Mr. Shabazz exhausted his claim regarding access to the SARA machine, *Id.* ¶ 25.

Nonetheless, Defendants suggest that Mr. Shabazz and Mr. McCann did not specifically exhaust the lack of screen readers, the inaccessibility of the tablet, or access to a SARA machine. Plaintiffs are "not required to grieve every fact" relevant to their effective-communication claims, and, likewise, courts do not "allow Defendants to comb through the Amended Complaint, cherry picking which facts they believe can now be asserted." *See Wilson v. Frame*, No. 2:19-cv-00103, 2020 WL 1482145, at *6 (S.D.W. Va. Mar. 23, 2020); *Scott v. Clarke*, 64 F. Supp. 3d 813, 834 (W.D. Va. 2014) (exhaustion requirement is satisfied if defendants have "fair notice of the alleged systemic problem[]"). Rather, a grievance "need only be sufficient to alert the prison to the nature of the wrong for which redress is sought." *Wilcox v. Brown*, 877 F.3d 161, 167 n.4 (4th Cir. 2017). Once Defendants had "fair notice of the alleged systemic problem," *Scott*, 64 F. Supp. 3d at 834, that blind prisoners could not read and write privately and independently, Mr. Shabazz and Mr. McCann were not required to "file multiple, successive grievances raising the same issue." *See Wilcox*, 877 F.3d at 167 n.4. Accordingly, Mr. McCann and Mr. Shabazz exhausted their remedies regarding Defendants' failure to enable blind prisoners to read and write independently.

Under the vicarious exhaustion doctrine, a single plaintiff's exhaustion suffices for other plaintiffs alleging they were similarly affected by Defendants' actions or inactions. *See, e.g.*, *Jarboe v. Md. Dep't of Pub. Safety & Corr. Servs.*, No. ELH-12-572, 2013 WL 1010357, at *15 (D. Md. Mar. 13, 2013) (the vicarious exhaustion doctrine applies if plaintiffs' disabilities are similar and they "complain about substantially similar alleged failures to accommodate their disability in common aspects of prison life," even if their "requested accommodations may vary"). Accordingly, this Court should conclude that all Plaintiffs, not just Mr. Shabazz and Mr. McCann, exhausted grievances regarding Defendants' failure to permit them to read and write privately and independently, as sighted prisoners can.

C. Defendants thwarted Plaintiffs' ability to grieve inaccessible tablets and kiosks.

This Court also should deem all claims concerning inaccessible JPay tablets and kiosks to be exhausted because VDOC repeatedly and falsely informed Plaintiffs they could not grieve

effective-communication issues concerning the actions of contractors such as JPay. Defendants are incorrect. Because the ADA bars public entities from discriminating "through contractual, licensing, or other arrangements," 28 C.F.R. § 35.130(b)(1), VDOC must ensure that its contractors, including JPay, comply. By misleading Plaintiffs, VDOC ensured they could not exhaust administrative remedies as to the tablets, rendering the grievance procedure "unavailable." *See Ross v. Blake*, 578 U.S. 632, 644 n.3 (2016) ("Grievance procedures are unavailable . . . if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process.").

For instance, in November 2023, Mr. McCann filed a complaint and grievance concerning JPay kiosks. VDOC rejected his grievance because the issue is "nongrievable," as the kiosks are provided by JPay, an outside contractor; Mr. McCann appealed, but the ombudsman affirmed. ECF No. 235-96, Ex. 96, NFBV 018644; ECF No. 235-97; Ex. 97, NFBV 018642; ECF No. 235-98, Ex. 98, NFBV 018643; ECF No. 235-99, Ex. 99 NFBV 018667–68. Similarly, in December 2022, VDOC rejected Mr. Shabazz's grievance that JPay tablets are inaccessible, stating (incorrectly) that his grievance was "Beyond the control of the Department of Corrections"; Mr. Shabazz appealed, and the ombudsman affirmed. ECF No. 235-50, Ex. 50, NFBV 010451–52; ECF No. 235-51, Ex. 51, NFBV 010479–81. In comparable cases, courts have found that the grievance process is "unavailable." *See, e.g.*, *Ebmeyer v. Brock*, 11 F.4th 537, 542–43 (7th Cir. 2021) (remedies are "unavailable" when an officer tells the prisoner he cannot file a grievance when, in fact, he can); *Wright v. Ferguson*, No. 7:22-CV-00395, 2023 WL 6304687, at *3 (W.D. Va. Sept. 26, 2023) (administrative remedies were unavailable where defendants told inmate his issues were "not grievable"); *Hartsell v. Dietz*, No. 3:20-CV-588-MGG, 2023 WL 6382578, at *4 (N.D. Ind. Sept. 30, 2023) (same).

II. Summary judgment is appropriate on NFB-VA's claims irrespective of whether Individual Plaintiffs exhausted available remedies.

Even if this Court concludes genuine disputes of fact exist with respect to Defendants' exhaustion defense, it should grant partial summary judgment with respect to the NFB-VA' s claims regarding Defendants' failure to provide appropriate assistive technology.

The NFB-VA, as an organizational plaintiff seeking injunctive relief on behalf of its members, is not bound by the PLRA's exhaustion requirement. The PLRA only requires exhaustion by a "prisoner," 42 U.S.C. § 1997e, meaning "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law," *id.* § 1997e(h). NFB-VA is not a "prisoner" under the statute because it is not a "person" and has not been incarcerated. *Dunn v. Dunn*, 219 F. Supp. 3d 1163, 1176 (M.D. Ala. 2016) (concluding that PLRA exhaustion did not apply to the Alabama Disabilities Advocacy Program, which had associational standing to sue on behalf of Alabama prisoners).

By arguing otherwise, Defendants appear to confuse standing and exhaustion. As an entity with associational standing, NFB-VA may sue for injunctive and declaratory relief so long as it has standing to sue on behalf of one member. The NFB-VA's associational standing, in turn, is unaffected by whether or not any blind prisoner exhausted PLRA remedies, "because standing is jurisdictional, while the PLRA's exhaustion requirement . . . is not." *Id.* at 1169 n.9 (citing *Woodford v. Ngo*, 548 U.S. 81, 101 (2006)). Thus, even if the Individual Plaintiffs in this case all failed to exhaust, such failure "would have no effect on these plaintiffs' standing, and would therefore be irrelevant to their ability to support [NFB-VA's] associational standing." *Id. Green Haven Prison Preparative Meeting of Religious Soc'y of Friends v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67 (2d Cir. 2021), cited by Defendants, is not to the contrary. There, the organization had eight members, all of whom were prisoners at the same correctional institution. The Second Circuit reasoned that the incarcerated plaintiffs "may not avoid the exhaustion requirement simply by forming an organization and then suing in the name of that organization." *Id.* at 82. Here, by contrast, NFB-VA is a longstanding organization whose

members include Plaintiffs and many other blind Virginians, their families, and friends. ECF No. 191-15, Ex. 16, Soforenko Dep. 8:19–9:8; 27:14–19; 113:22–114:3. The NFB-VA has a rich history of providing support to blind Virginians, promoting full participation and integration of blind people in all areas of life, and advocating for change when equal access and treatment of the blind is denied. *Id.* 113:22–114:3. This case bears no resemblance to *Green Haven Prison.*

III. Plaintiffs are entitled to partial summary judgment because VDOC has denied Plaintiffs effective communication.

A. VDOC's recent modifications to their tablets and kiosks do not make them accessible to blind prisoners.

No genuine dispute exists that VDOC's tablets are inaccessible. Pls.' Mot. ¶ 54; ECF No. 191-13, Ex. 14, Stravitz Dep. 172:3–173:3; ECF No. 191-12, Ex. 13, Stravitz Decl. ¶ 14. Tablet and kiosk access is critical for blind prisoners to have access to messaging their friends, families, and attorneys, as well as participating in recreational activities, like music and games, and receiving announcements from VDOC. ECF No. 235-11, Ex. 11, McCann Supp. Decl. ¶¶ 13–14; ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶ 13; ECF No. 235-19, Ex. 19, Hajacos Supp. Decl. ¶ 10; ECF No. 191-12, Ex. 13, Stravitz Decl. ¶ 15. The ADA's implementing regulations dictate that "a public entity shall give primary consideration to the requests of individuals with disabilities," 28 C.F.R. § 35.160(b)(2), and Plaintiffs have made clear that they want this access.

VDOC makes a point of stating that prisoner tablets are "currently" equipped with certain accessibility functions. Defs' Opp'n ¶ 23. Defendants' caveat is essential because such features have only become available on Plaintiffs' tablets in the last few weeks. ECF No. 235-11, Ex. 11, McCann Supp. Decl. ¶¶ 6–7; ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶ 8; ECF No. 235-14, Ex. 14, P. Shaw Supp. Decl. ¶¶ 4–5; ECF No. 235-19, Ex. 19, Hajacos Supp. Decl. ¶ 8. Mr. Stravitz was unaware of these features. ECF No. 235-13, Ex. 13, Stravitz Supp. Decl. ¶ 4.

And even when Plaintiffs have found a way to enable the magnification or text-to-speech function, they are not effective aids due to flaws in the technology. ECF No. 235-19, Ex. 19, Hajacos Supp. Decl. ¶¶ 7–8 (screen is too small to see; cannot scroll on a page while TalkBack is

enabled); ECF No. 235-14, Ex. 14, P. Shaw Supp. Decl. ¶ 5 (requires activation; touch screen makes it difficult to use); ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶¶ 8–9 (touch screen makes typing difficult); ECF No. 235-11, Ex. 11, McCann Supp. Decl. ¶¶ 5–10 (TalkBack and the zoom function cannot run concurrently; consistent error messages; requirement to re-activate the software each time the tablet turns on or wakes from sleep).

The auxiliary aids Defendants cite in support of their argument that prisoner tablets are accessible are surprising, to say the least. None of the Plaintiffs housed at Deerfield have witnessed another person using an external keyboard for a JPay tablet, let alone a Braille one, and have not been informed by VDOC that they exist. ECF No. 235-11, Ex. 11, McCann Supp. Decl. ¶ 12; ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶ 10; ECF No. 235-13, Ex. 13, Stravitz Supp. Decl. ¶ 5; ECF No. 235-14, Ex. 14, P. Shaw Supp. Decl. ¶ 6. Even if they did know about these keyboards, they would be required to pay for them, Ex. 3, NFBV 019746–48, while sighted prisoners can use their tablets free of charge. Furthermore, the evidence shows that there is only one Braille kiosk at Deerfield, ECF No. 191-27, Ex. 28, Shabazz Decl. ¶ 20; ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶ 12; ECF No. 235-13, Ex. 13, Stravitz Supp. Decl. ¶ 2; ECF No. 235-37, Ex. 37, Basche Decl. ¶ 5, none at Greensville, ECF No. 235-19, Ex. 19, Hajacos Supp. Decl. ¶ 9. The lone declaration Defendants submit in support of their assertion that "numerous" Braille kiosks exist throughout VDOC facilities is not based on personal knowledge and thus cannot create a genuine dispute. *See* , Pls' Opp'n ¶ 69. Indeed, Defendants provide no evidence—even in Ms. Welch's declaration—that the kiosks have any accessibility features.

Perhaps most egregiously, Defendants argue that even if the tablets and kiosks are inaccessible, blind prisoners have alternative means for effective communication through telephone, videophone, and in-person visitation. But these means of communication are not effective alternatives due to their limited availability and expense—and they do not provide Plaintiffs access to important announcements from the Department, or recreational activities that sighted prisoners can access on their tablets. Rather than provide "alternatives" to tablets and

kiosks and "honor the choice" of the blind prisoner, *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 397 (D. Md. 2011) (citing 28 C.F.R. part 35, App. A), they have taken the choice away.

The only ways that a prisoner can initiate communication with a party outside the prison are by mail, JPay message, or wall phone. Because Plaintiffs are blind, they cannot send or receive mail privately or independently. Ex. 4, P. Shaw Dep. 132:17–133:12; ECF No. 235-1, Ex. 1, NFBV 017182; ECF No. 235-4, Ex. 4, Miller Dep. 126:17–127:2. Wall phones are not always available because of the number of people who need to use them. Mr. McCann, is one of 100 people in his pod who share four wall phones. ECF No. 235-11, Ex. 11, McCann Supp. Decl. ¶ 14. And it may cost up to a dollar per 20-minute call. *Id.* As for videophones and TTY phones, prisoners have to request to use those, and share them with swaths of fellow prisoners. ECF No. 235-19, Ex. 19, Hajacos Supp. Decl. ¶ 3; ECF No. 235-11, Ex. 11, McCann Supp. Decl. ¶ 14. At Deerfield, one 20-minute videophone call costs fifteen dollars. ECF No. 235-11, McCann Supp. Decl. ¶ 14. And an in-person visit with the cost of transportation, food, lodging, and more, could cost hundreds of dollars. *Id.* ¶ 14. Having simple, instantaneous communications, at the rate of 40¢ per message, is sometimes the only option.

Well-established case law dictates that an alternative means of effective communication must be "adequate to ensure that Plaintiffs are able to communicate as effectively as their fellow inmates," *Brown*, 383 F. Supp. 3d at 558, and must be selected in consultation with the disabled prisoner, *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 271–72 (D.D.C. 2015) (Public entities must consult with individual regarding his needs, not merely hope that "the auxiliary aids that the [public entity] randomly provided" were sufficient.). Defendants' proposed alternatives simply do not measure up.

B. Plaintiffs have been denied meaningful access to VDOC's library services.

Defendants' next argument also misses the mark. As an initial matter, although Defendants argue that only Mr. Shabazz has objected to his lack of access to library services, and that Mr. Shabazz's objections concern only the SARA Machine, Defs.' Opp'n at 22, ECF No. 219, that is

not accurate. For years, Mr. Shabazz also has objected that screen readers such as JAWS are not available for prisoners to use in the library. ECF No. 235-110, Ex. 110, NFBV 011457; ECF No. 235-104, Ex. 104, NFBV 014108; ECF No. 235-105, Ex. 105, NFBV 014116. Despite those requests, there are still no screen readers on Deerfield law library computers. ECF No. 235-30, Ex. 30, Delbridge Dep. 118:10–120:19.

Similarly, there is no real dispute that Mr. Shabazz repeatedly has asked VDOC to give him increased time with the SARA machine, because the limited time he had was insufficient. Citing no relevant case law, Defendants argue that Ms. Shabazz's current ability to use the SARA Machine "for up to 32 hours per week" is "more than sufficient." Defs.' Opp'n at 22–23. That ignores, however, that Mr. Shabazz only recently was granted such increased access; as recently as November 2022, Mr. Shabazz was allowed only 2 hours on weekdays and 1 hour per day on weekends. ECF No. 191-27, Ex. 28, Shabazz Decl. ¶¶ 8–9. Mr. Shabazz has also repeatedly objected that he should be able to use the SARA machine in his bed area, so he can read at his leisure, just as sighted prisoners can. ECF No. 235-107, Ex. 107, NFBV 010527–28.

With respect to other Plaintiffs, Defendants argue they never requested specific technologies such as use of a screen reader in the libraries, and that prisons are not required to "guess" at which accommodations blind prisoners need. *See* Defs' Opp'n at 22. That argument ignores both VDOC's obligation to consult with prisoners it knows are blind concerning their needs, and the fact that, as VDOC acknowledges, blind prisoners do not know what technologies are available, especially prisoners like Mr. Shaw and Mr. Hajacos who went blind in prison. Ex. 5, Butcher Dep. 109:8–110:20. But with respect to blind prisoners, VDOC is not proactively reaching out to see what their needs are—even though VDOC knows they are blind. *See Pierce v. D.C.*, 128 F. Supp. 3d 250, 254 (D.D.C. 2015) (concluding the District of Columbia violated the ADA because it "did *nothing* to evaluate [the plaintiff's] need for accommodation, despite their knowledge that he was disabled"); *see, e.g.*, Ex. 1, Phillips Dep. 90:10–14. Instead, VDOC "figuratively shrugged and effectively sat on [its] hands," failing to inform blind prisoners about

technologies that could help them (like screen readers) and failing to inquire which library services blind Plaintiffs wished to access and how. *See Pierce*, 128 F. Supp. 3d at 254. That does not suffice. *See also Updike v. Multnomah Cnty.*, 870 F.3d 939, 954 n.6 (9th Cir. 2017) ("a public entity's duty to look into and provide a reasonable accommodation may be triggered when the need for accommodation is obvious."); *Bax v. Drs. Med. Ctr. of Modesto, Inc.*, 52 F.4th 858, 869 (9th Cir. 2022) ("[W]here a disability is obvious and indisputably known to the provider of services," a request for accommodation "would be redundant and unnecessary.").

Finally, this Court should reject Defendants' attempts to minimize the services VDOC libraries provide or construe existing auxiliary aids and services as sufficient. For example, Defendants state that screen readers on recreational libraries are not essential because such computers contain only a "library catalog" and a "set collection of documents." Defs.' Opp'n at 6. This statement omits that the library catalog is the mechanism through which prisoners research their interests and ignores that prisoners also use these computers to perform research on an offline version of Wikipedia. Pls.' Mot. ¶ 37. With respect to the law libraries, Defendants elide the fact that Deerfield has no screen readers whatsoever, meaning prisoners cannot do their own research and explore which cases might be helpful to them. Defs.' Opp'n at 11–14. Defendants suggest that blind prisoners have access to LexisNexis because they can, without using the database or having a clerk do so for them, figure out which specific case they need, put in a request for the librarian to print the case without a watermark, receive the (inaccessible) document via institutional mail later in the week, and request time to use the SARA machine to read the printed case. ECF No. 235-30, Ex. 30, Delbridge Dep. 26:2–5; ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶¶ 2–4. The notion that this process provides communication that is "as effective" as that of sighted prisoners is a non-starter. Finally, Defendants argue the Greensville law library ensures effective communication with the blind because it has a Narrator program which, according to VDOC's own training materials, is not ready to "go big time yet" and which provides a vastly inferior reading experience for the blind. Pls' Opp'n at 11.

C. VDOC's paper-based processes are inaccessible, and making verbal requests in lieu of following VDOC's procedures has proved futile for Plaintiffs.

Defendants begin their argument with the idea that the grievance, accommodations request, commissary, and other written processes "do not rely strictly upon written documents." Defs.' Opp'n at 28. This statement is patently false.

First, with regard to the grievance process, Defendants spend the bulk of their Motion and Opposition arguing that, because there is not *written documentation* of Plaintiffs' complaints, grievances, and appeals, summary judgment should be granted in Defendants' favor. *See generally* Defs.' Opp'n; Defs.' Mem. In Supp. Mot. Summ. J., ECF No. 210. Defendants cannot, on the one hand, maintain that Plaintiffs must have adhered to a written process as a threshold to bringing this lawsuit, then, on the other hand, argue that Plaintiffs can raise their issues verbally.

Second, with regard to accommodations requests, Defendants' contend, citing only the testimony of Lane Talbot, Greensville's former ADA Coordinator, that blind prisoners may request accommodations "from facility ADA Coordinators verbally or . . . through third parties." Defs.' Opp'n at 28 (citing Talbott Dep. 171:7–174:13). Not only does Ms. Talbott's testimony not support this assertion—it pertains to how all *written* requests that mention "disability" or "accommodations" should be routed to her—but several of the Plaintiffs attested that whenever they make a verbal request for an accommodation, facility staff tell them to put it in writing. ECF No. 235-11, Ex. 11, McCann Supp. Decl. ¶ 16; ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶ 16; ECF No. 235-14, Ex. 14, P. Shaw Supp. Decl. ¶ 12. Plaintiffs have had the exact same experience with medical requests. ECF No. 235-11, Ex. 11, McCann Supp. Decl. ¶ 15; ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶ 15; ECF No. 235-14, Ex. 14, P. Shaw Supp. Decl. ¶ 11.

Third, with regard to the disciplinary process, Defendants contend that the charges are read aloud when they are served, inmate advisors and staff are "available" to provide assistance, and that at the hearing on the charge, the disposition is announced verbally. Defs. Opp'n at 28. Again, Plaintiffs' own experiences belie these contentions. ECF No. 235-12, Ex. 12, Shabazz Supp. Decl. ¶ 14; ECF No. 235-19, Ex. 19, Hajacos Supp. Decl. ¶ 11.

Even if facility staff were available to assist blind inmates with the grievance and disciplinary processes, they are not "qualified readers." A qualified reader is "a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary." 28 CFR § 35.104. Facility staff are *not* impartial. In the law enforcement context, the U.S. Department of Justice has made clear that when communicating with the deaf or hard of hearing, it is inappropriate to ask a family member or companion to interpret in situations that implicate due process rights because emotional ties may interfere with the ability to interpret impartially.[4] Similarly, here, facility staff's relationships with one another—especially if the grievance is against a friend or acquaintance—renders that staff member partial.

Finally, that Plaintiffs have used VDOC's paper-based process themselves is of no moment. *See* Defs.' Opp'n at 28–29. Most of the Individual Plaintiffs had to rely on other inmates to complete these documents for them and read any responses. ECF No. 235-22, Ex. 22, P. Shaw Dep. 87:18–22; ECF No. 235-57, Ex. 57, NFBV 010600 (exhibiting the initials "AS" next to Mr. Shaw's name on the written complaint, which stands for "Anthony Sheppard," Mr. Shaw's former caregiver); ECF No. 235-21, Ex. 21, Shabazz Dep. 13:2–18; ECF No. 235-14, Ex. 14, P. Shaw Supp. Decl. ¶ 2; ECF No. 235-11, Ex. 11, McCann Supp. Decl. ¶ 17; ECF No. 191-3, Ex. 4, Hajacos Decl. ¶¶ 6 –7; ECF No. 191-12, Ex. 13, Stravitz Decl. ¶¶ 4, 11.[5]

CONCLUSION

Because the undisputed record supports Plaintiffs' Motion, Plaintiffs are entitled to partial summary judgment.

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[4] U.S. Dep't of J., *Communicating with People Who Are Deaf or Hard of Hearing - ADA Guide for Law Enforcement Officers* (Feb. 25, 2020), https://www.ada.gov/resources/law-enforcement-guide/#requirements-for-effective-communication

[5] Because Plaintiffs have moved to voluntarily dismiss Mr. Stravitz's and Mr. Courtney's claims for injunctive relief, ECF No. 223, Plaintiffs do not address Defendants' argument that they are moot.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March 2024, I filed the foregoing electronically 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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