

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

WILLIAM THORPE, *et al.*,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

Civil Case No. 2:20-cv-00007-JPJ-PMS

**PLAINTIFFS' STATEMENT OF GENUINE DISPUTES OF MATERIAL FACTS IN
OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs hereby submit their Statement of Genuine Disputes of Material Facts in Opposition to Defendants' Motion for Summary Judgment, ECF No. 379, pursuant to Federal Rule of Civil Procedure 56(c). Plaintiffs retained the section titles, text, and footnotes included in Defendants' Statement of Undisputed Material Facts ("SUMF"). *See* ECF No. 381, Defs.' Br. at 18–52.

As a threshold matter, Plaintiffs dispute Defendants' discussion of non-material facts throughout their Statement. *See, e.g.*, SUMF ¶¶ 2, 3, 5, 88, 90, 92–95. Non-material facts are not appropriate in a statement in support of summary judgment and should be disregarded or stricken. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Factual disputes that are irrelevant or unnecessary will not be counted."); *accord HP Tuners, LLC v. Cannata*, 2022 WL 562625, at *1, *5 (D. Nev. Feb. 24, 2022) (granting motion to strike non-material facts); *Knidel v. T.N.Z., Inc., et al.*, 189 F. Supp. 3d 283, 284–85 (D. Mass. 2016) ("giv[ing] little to no consideration to extraneous factual and legal assertions propounded").

* * *

1. According to the analysis of Plaintiffs' expert, Russell Molter, there were 415 "class members" designated Security Level S ("SL-S") as of August 31, 2012 with no "class members" designated SL-6 ("SL-6") as of that date.³ Untitled document dated June 23, 2023 at Updated Exhibit 2, relevant portions attached as Exhibit 1. According to Molter, the number of "class members" designated SL-S as of December 2022 was 57 and the number of "Class members" designated SL-6 was 70. *Id.*

Plaintiffs' Response to SUMF ¶ 1: Disputed in part. Plaintiffs do not dispute Mr. Molter's analysis, but Plaintiffs do dispute Defendants' incomplete excerpt and characterization of that analysis. Mr. Molter's supplemental report identifies VDOC's inaccurate record-keeping and its struggle to provide accurate, comprehensive data from which to work, including the failure of their data to identify who was in Level S on August 31, 2012. Ex. 1, Molter Rep. ¶ 28.* As a preliminary matter, VDOC data indicates that the Level 6 classification did not exist in 2012, even though Level 6 units did. *Compare* Ex. 8, Molter Supp. Rep. at Ex. 2 (showing 0 people in SL-6 in December 2012) *with id.* at Ex. 1 (showing dozens of people supposedly in Level S classified in internal statuses corresponding with Level 6 units such as SAM, SIP, or Step-Down Phases 1 and 2). In other words, VDOC data shows that many people who were designated Level S at the end of 2012 were in fact in Level 6 units. However, because VDOC did not provide internal status data as of August 31, 2012 but instead provided only the first *change of status* after August 31, 2012, Mr. Molter could not capture the true number of incarcerated persons in Level S at the start of the class period to the same extent VDOC could. Of the 415 people classified as Level S in August 2012, the data VDOC provided includes no internal status code for 372 of them, making it impossible to know from this data whether they were in fact in Level 6 units already. Yet, data shows that by the end of 2012, many of the 411 prisoners still designated Level S were in fact in

³ Defendants dispute that Molter's analysis is accurate, but accept it for purposes of summary judgment only.

* All exhibits cited in Plaintiffs' Responses refer to those attached to the Declaration of Vincent E. Glynn, Jr., unless otherwise noted.

internal statuses associated with Security Level 6 such as Step-Down Phase 1 (44 people), Step-Down Phase 2 (42 people), SAM (18 people), or SIP (19 people), making it highly unlikely that none of those persons were in Security Level 6 at the end of August 2012. ECF No. 383-54, Pacholke Rebuttal Rep. ¶ 29 & n.53 (citing ECF No. 383-69, VADOC-00150626); Ex. 8, Molter Supp. Rep. at 5. This is consistent with evidence in the record indicating that in July 2012, then-Warden Randall Mathena expected there to be fewer than 300 people in Level S by August 2012 (before full implementation of the Step-Down Program) because of the number of people he had moved out of Level S in the first six months of 2012, in addition to the number of people he planned to move or reclassify out of Level S by August, at which point he and CCO Robinson planned to “freeze” the movement of people out of Level S in preparation for the start of the “new” Step-Down Program. Ex. 2, Pacholke Rep. ¶ 92; Ex. 3, VADOC-00142806; Ex. 4, Mathena Dep. at 518:20–524:12. Thus, to the extent Defendants seek to attribute the decrease in prisoners designated Level S from 415 to 57 to the Step-Down Program, Plaintiffs dispute this: the data indicates the largest decrease of persons from Level S in fact occurred prior to the full implementation of the Step-Down Program and around the time Level S-designated persons in Level 6 units were reclassified as Level 6, after which the rate of decrease of people in Level S appears to have slowed considerably. Ex. 2, Pacholke Rep. ¶ 92; Ex. 8, Molter Supp. Rep. at 5–6. (showing that the number of people in Level S between 2013 and 2017 stayed relatively stable). Beyond the fundamental issues with Defendants’ data, the factual record indicates that a significant portion of the referenced decrease in the Level S population was not because of the Step-Down Program pathways but rather because: 1) prisoners were moved out of Level S prior to implementation of the Step-Down Program; and 2) reclassification of persons in Level S when Level 6 was created, when the Secure Diversionary Treatment Program (“SDTP”) was

implemented for people classified as MH-2S and when, after the filing of this litigation, SM-2 was reclassified as a Level 6 unit. Ex. 2, Pacholke Rep. ¶¶ 91–93; ECF No. 383-54, Pacholke Rebuttal Rep. ¶ 29; Ex. 8, Molter Supp. Rep. at 5–6; Ex. 5, Robinson Dep. at 238:6–16; Ex. 4, Mathena Dep. at 520:6–521:14, 522:10–14, 526:20–527:9. The evidence further raises questions as to whether some of the decisions made after the filing of this action reflect the ordinary operation of the Step-Down Program or if they were instead made because of this litigation. For example, in the four months after Plaintiffs filed this action, the ERT met twice and moved 6 of the named Plaintiffs out of IM and into SM after they had spent 27 years in the IM pathway, collectively, and without listing any rationale for doing so. See ECF No. 383-79, VADOC-00174671 at 3156–75, 7675–86, 12305–11, 19907–13, 20264–87, 24852–62 (Internal Status Spreadsheet). And the lead named Plaintiff, William Thorpe, was suddenly transferred to Texas in the weeks after the filing of the complaint in this case after spending 24 years in solitary confinement in VDOC, including 7 years on the IM pathway. ECF No. 174-27, Thorpe Aff. ¶¶ 3, 10. Finally, Plaintiffs dispute any suggestion that a drop in the number of people classified by VDOC as Level S is material to Plaintiffs’ claims, including for the reasons indicated above.

2. As early as July 2013, the Southern Legislative Conference recognized VDOC’s “diligent work in reducing administrative segregation and for developing a program model replicable in other states” with the STAR (State Transformation in Action Recognition). Senate Joint Resolution No. 184, attached as Exhibit 2. In March 2014, the Virginia General Assembly passed Senate Joint Resolution No. 184, commending VDOC for reducing the number of inmates in administrative segregation through implementation of the Step-Down Program. *Id.* In 2016, the U.S. Department of Justice, in its *Report and Recommendations Concerning the Use of Restrictive Housing*, identified Virginia as one of “five jurisdictions that have undertaken particularly significant reforms in recent years.” Exhibit 3 at 74.

Plaintiffs’ Response to SUMF ¶ 2: Disputed in part. Plaintiffs do not dispute that these publications include the language quoted above. Plaintiffs dispute that Defendants’ invocation of these publications is material to the adjudication of any of Plaintiffs’ claims or Defendants’ affirmative defenses. Neither Defendants’ Exhibit 2 nor 3 supports VDOC’s compliance with

constitutional due process, Eighth Amendment, Americans with Disabilities Act (“ADA”), or Rehabilitation Act (“RA”) protections owed to prisoners. Furthermore, Defendants’ selective citation to this *Report* overlooks that VDOC violated and continues to violate many of the reforms in the *Report* and the recommendations made that were relevant to Plaintiffs’ claims. ECF No. 381-3, DOJ, *Report and Recommendations Concerning the Use of Restrictive Housing* (2016) at 99–101. For example, the *Report* recommends: not to place inmates with Serious Mental Illness (“SMI”) in restrictive housing and, if such placement occurs, that a mental health consultation should occur at time of placement and enhanced in-cell and out-of-cell programming be provided, to name just a few. *Id.*; *see, e.g.*, ECF No. 383-108, VADOC-00040782 (2016 O.P. 801.3) (VDOC did not require a mental health screening during ROSP intake until 2019); Ex. 59, Lee Dep. at 20:8–15, 49:12–20 (mental health screening omitted factors necessary to identify mental health conditions); Ex. 11, Mathena 30(b)(6) Dep. at 199:22–200:7 (incarcerated persons at the lowest privilege levels lack access to any programming besides the Challenge Series).

3. In December 2016, the Vera Institute of Justice selected Virginia as one of five new states to join the Safe Alternatives to Segregation Initiative. ECF No. 195-5 at 5. In its findings and recommendations for VDOC, issued in December 2018 (the “Vera Report”), Vera described VDOC as “one of the agencies at the forefront of addressing restrictive housing” and VDOC’s Restrictive Housing Reduction Step-Down Program as having made “considerable strides in reducing the use of restrictive housing in its facilities.” *Id.* It further describes the Step-Down Program as “a pioneering and significant program for reducing the number of people in long-term restrictive housing.” *Id.*

Plaintiffs’ Response to SUMF ¶ 3: Disputed in part. Plaintiffs do not dispute that these publications include the language quoted above. Plaintiffs dispute that Defendants’ Vera Report quotations are material to the adjudication of any of Plaintiffs’ claims or Defendants’ affirmative defenses and that the Vera Report provides any support for VDOC’s compliance with constitutional due process, Eighth Amendment, ADA, or RA protections owed to prisoners. *See generally* ECF No. 195-5, VADOC-00003443 (Byron Kline et al., *The Safe Alternatives to*

Segregation Initiative: Finding and Recommendations for the Virginia Department of Corrections (2018)). Moreover, unlike the other four correctional facilities Vera evaluated around the same period, VDOC did not provide Vera with raw data for an independent analysis. Vera did not independently analyze VDOC's raw data but instead relied upon conclusions provided by VDOC, with little mechanism for quality control or challenge to the underlying data. *See* ECF No. 383-54, Pacholke Rebuttal Rep. ¶ 40; ECF No. 195-5, VADOC-00003442 at -450.

4. VDOC internal reports indicate that 461 inmates had graduated from the Step-Down Program as of July 31, 2021. Red Onion State Prison: Administrative Step Down Progress, attached as Exhibit 4.

Plaintiffs' Response to SUMF ¶ 4: Disputed in part. Plaintiffs do not dispute the statements contained in the VDOC report at Defendants' Exhibit 4. Plaintiffs dispute the figures cited, that the cited data is evidence of "graduation" from the Step-Down Program, and that the cited figures are material. A VDOC internal spreadsheet analyzed by Plaintiffs' expert Russell Molter indicates that 410 inmates that once had an IM or SM pathway status code were moved to Security Level 5 or lower, more than ten percent fewer than VDOC represents in its internal reports. *See* Ex. 8, Molter Supp. Rep. Updated Ex. 14; *see also* ECF No. 381-12, VADOC-00053668 at -700 (noting that prisoners become eligible for Level 5 after they [REDACTED]). Further disputed because email correspondence indicates that the IM pathway was designed to house people in restrictive housing permanently, because VDOC officials understood these individuals to be [REDACTED]. *See* Ex. 9, VADOC-00087397.

I. *Origin and Purpose of the Step-Down Program*⁴

Plaintiffs’ Response to Heading I: Defendants’ heading is not an undisputed material fact that requires a response. To the extent a response is required to footnote number 4, Plaintiffs dispute Defendants’ assertion, which is unsupported by any citation to the record. Fed. R. Civ. P. 56(c)(2).

5. Harold Clarke became Director of VDOC in November 2010. Remote Video Deposition of Harold Clarke dated September 10, 2020, relevant portions attached in Exhibit 5 at 49:3–9. Clarke first visited Red Onion in December 2010. *Id.* at 55:22–56:8. Clarke testified that his review of operations at Red Onion caused him three concerns: (1) the ability of multiple individuals to place inmates in administrative segregation,⁵ (2) the lack of a defined pathway out of administrative segregation, and (3) release of inmates from administrative segregation directly into the community. Transcript of Harold Clarke dated April 12, 2023, relevant portions attached in Exhibit 5 at 150:1–151:10; 154:20–155:5. Clarke’s concerns were the impetus for the Step-Down Program. *Id.*

Plaintiffs’ Response to SUMF ¶ 5: Disputed in part. Plaintiffs do not dispute Defendant Clarke’s recollection of his personal opinions and motivations a decade prior. Plaintiffs dispute that such testimony is material to the adjudication of any of Plaintiffs’ claims or Defendants’ affirmative defenses; that Mr. Clarke’s testimony supports his or any other Defendant’s compliance with constitutional due process, Eighth Amendment, ADA, or RA protections VDOC owed to prisoners; that Mr. Clarke’s testimony regarding the “impetus for the Step-Down Program” affected the structure or day-to-day management of the Program; and that such information should be considered “fact.” Plaintiffs also dispute the characterization of “administrative segregation”

⁴ In recent years, VDOC has expanded its Step-Down Program concept (and name) to short-term restorative housing as used for inmates at security levels other than SL-S and SL-6. As used in this brief, “Step-Down Program” refers to the program only as used with inmates designated SL-S and SL-6.

⁵ Administrative segregation is used here to denote a status reserved for inmates who cannot be safely managed at lower security levels due to serious risks they pose to other inmates, staff, or the public. See generally Evidence Based Practices Plan for Administrative Segregation at Red Onion and Wallens Ridge State Prisons, attached as Exhibit 6 (VADOC-00165115). After VDOC initiated the Step-Down Program, the American Correctional Association (“ACA”) adopted the defined term “restrictive housing,” which VDOC also adopted. This brief uses the ACA term, restrictive housing, unless a specific document that uses the term segregation is referenced.

as “reserved for inmates who cannot be safely managed at lower security levels due to serious risks they pose” in footnote 5. Defendants conceded that there is no prisoner in the Step-Down Program at Red Onion who qualified as an inmate whose [REDACTED] [REDACTED] Ex. 11, Mathena 30(b)(6) Dep. at 227:14–228:7; Ex. 10, Richeson Dep. at 213:4–15 (identifying prisoners at Red Onion who “were a management issue, but it wasn’t violent, and it wasn’t threatening” but “needed a higher level of management”). The Step-Down Manual, from the Program’s inception in 2012 through its most recent revision in 2020, assigns prisoners to Intensive Management based solely on [REDACTED] [REDACTED] who expressly [REDACTED] [REDACTED] and are not considered to [REDACTED] ECF No. 383-1, VADOC-00052689 at -711 (2012 Step-Down Manual); ECF No. 381-12, VADOC-00053668 at -694 (2020 Step-Down Manual). Plaintiffs likewise dispute any characterization of the Step-Down Program as applying or incorporating “Evidence-Based Practices.” Neither Defendants’ Exhibit 6 nor the factual record supports Defendants’ claim that the Step-Down Program is based on scientific studies or support of any kind and Defendants conceded that the Program was developed without [REDACTED] [REDACTED] Ex. 11, Mathena 30(b)(6) Dep. at 164:15–165:4; 168:4–8; Ex. 36, Clarke Dep. at 206:17–207:7; Ex. 10, Richeson Dep. at 60:1–4, 63:12–19.

6. The Operations Strategy for the Segregation Reduction Step-Down Plan dated August 28, 2012 (the “2012 Operations Strategy”) depicts the timeline for development of the Step-Down Program. Exhibit 7 at VADOC-00038041. The first step on that timeline was the targeting of Red Onion as an Evidence-Based Practices (“EBPs”) prison at a statewide executive meeting in April 2011. *Id.*

Plaintiffs’ Response to SUMF ¶ 6: Undisputed as to the identification of the page in question as a timeline in the 2012 Step-Down Manual. Plaintiffs dispute, however, that this timeline depicts events as they actually occurred. *See* ECF No. 383-54, Pacholke Rebuttal Rep. ¶ 29 (discussing

flux of inmate population caused by administrative decisions and not progression through Step-Down pathways); *see also* Ex. 5, Robinson Dep. at 238:6–16; Ex. 4, Mathena Dep. at 520:6–521:14, 522:10–14, 526:20–527:9. Plaintiffs note also that the timeline appears to be color coded, ECF. No. 381-7, VADOC-00037971 at -043, yet Defendants refer the Court and Plaintiffs to a pixelated, grayscale version, rendering it impossible to distinguish between completed and in-progress tasks. Plaintiffs also dispute that, even if Red Onion were “targeted as an ‘Evidence-Based Practices’ prison,” that commitment was ever realized. Defendants adduced no evidence supporting the claim that the Step-Down Program is based on scientific studies or support of any kind and in fact conceded that the Program was developed without [REDACTED]

[REDACTED] Ex. 11, Mathena 30(b)(6) Dep. at 164:15–165:4; 168:4–8; Ex. 36, Clarke Dep. at 206:17–207:7; Ex. 10, Richeson Dep. at 60:1–4, 63:12–19.

A. *Evidence Based Practices*

Plaintiffs’ Response to Heading I.A: Defendants’ heading is not an undisputed material fact that requires a response. To the extent a response is required, Defendants adduced no evidence supporting the claim that the Step-Down Program is based on scientific evidence or support of any kind and in fact conceded that the Program was developed without [REDACTED]

[REDACTED] Ex. 11, Mathena 30(b)(6) Dep. at 164:15–165:4; 168:4–8; Ex. 36, Clarke Dep. at 206:17–207:7; Ex. 10, Richeson Dep. at 60:1–4, 63:12–19.

7. VDOC has modified the Step-Down Program multiple times during its existence, issuing six versions of the operations strategy: (1) the 2012 Operations Strategy; (2) the Operations Strategy for the Restrictive Housing Reduction Step-Down Program dated March 4, 2014 (the “2014 Operations Strategy”), Exhibit 8; (3) the Operations Strategy for the Restrictive Housing Reduction Step-Down Program dated August 2015 (the “2015 Operations Strategy”), Exhibit 9; (4) the Operations Strategy for the Restrictive Housing Reduction Step-Down Program dated September 2016 (the “2016 Operations Strategy”), Exhibit 10; (5) the Operations Strategy for the

Restrictive Housing Reduction Step-Down Program dated September 2017 (the “2017 Operations Strategy”), Exhibit 11; and (6) the Operations Strategy for the Restrictive Housing Reduction Step-Down Program dated February 2020 (the “2020 Operations Strategy”), Exhibit 12 (collectively, the “Operations Strategies”). While key characteristics of the Step-Down Program have changed, key principles have remained constant.

Plaintiffs’ Response to SUMF ¶ 7: Disputed in part; Plaintiffs dispute that VDOC issued six official, operative versions of the Step-Down Manual because Defendants have never identified which of the six versions of the “operations strategy” were operative or official. Indeed, only three versions include the signatures that verify that Step-Down Manual in question was [REDACTED] [REDACTED] ECF No. 381-7, VADOC-00037971 at -972; ECF No. 381-11, VADOC-00053104 at -105; ECF No. 381-12, VADOC-00053668 at -669. The 2014, 2015, and 2016 Operations Strategies were never signed or approved. ECF No. 381-8, VADOC-00002632 at -633; ECF No. 381-9, VADOC-00002697 at -698; ECF No. 381-10, VADOC-00056788 at -789. Further, VDOC testimony indicates that manuals go into effect only when they are approved and signed. Ex. 11, Mathena 30(b)(6) Dep. at 35:9–35:13. Undisputed as to VDOC’s understanding and practice that materials lacking formal, institutional approval could be enforced as if they were policy; however, Plaintiffs further note VDOC’s practice of disregarding formal, institutionally approved policies and procedure in favor of implementing unwritten rules and dispute any characterization of the Step-Down Manuals as accurately describing the Step-Down Program.

8. Appendix B to each of the Operations Strategies contains “a[n] outline[of] the [EBP] principles that [were] used to guide the thinking and planning for” the Step-Down Program. *See, e.g.*, Ex. 12 at VADOC-00053707. According to Scott Richeson, VDOC’s Deputy Director of Re-entry and Programs, EBPs within VDOC are things that have been proven to “most likely reduce recidivism” and are based on research conducted around 2000. Transcript of Helen Scott Richeson dated February 9, 2023, relevant portions attached in Exhibit 13 at 59:13–60:4; 60:22–62:6.

Plaintiffs’ Response to SUMF ¶ 8: Disputed in part. Undisputed as to the text of Appendix B in Defendants’ Exhibit 12, VADOC-00053668 at -707, with the exception of the bracketed

material, and the words of the quotation from Ms. Richeson's deposition. Plaintiffs incorporate their response to SUMF ¶ 7 above and dispute the characterization of the Operations Strategies as approved or official institutional policies due to the absence of any signature or indicia of such approval or enactment. ECF No. 381-8, VADOC-00002632 at -633; ECF No. 381-9, VADOC-00002697 at -698; ECF No. 381-10, VADOC-00056788 at -789. Plaintiffs further dispute the characterization that any "evidence-based" principles guided, or currently guide, the Step-Down Program in any way. Neither the factual record nor Ms. Richeson's testimony supports Defendants' claim that the Step-Down Program is based on scientific studies or support of any kind, and VDOC conceded that the Program was developed without [REDACTED] [REDACTED] Ex. 11, Mathena 30(b)(6) Dep. at 164:15–165:4; 168:4–8; *see also* Ex. 36, Clarke Dep. at 206:17–207:7; Ex. 10, Richeson Dep. at 60:1–4, 63:12–19. Ms. Richeson was not referring to VDOC when discussing EBPs as "those things that have been proven most likely to reduce recidivism, or most likely to reduce recidivism" but rather was explaining that the corrections "discipline," much like the medical field, implements its own EBPs. Ex. 10, Richeson Dep. at 59:15–60:4. Although Ms. Richeson stated "Yeah" when asked if the EBPs referred to a written set of practices, she could not identify the body of research, its authors, its date of publication, or any of the component studies in that research. *Id.* at 59:15–19, 61:4–9, 63:12–15. Ms. Richeson could confirm only that these EBPs had not changed in twenty years since the unnamed, uncited study. *Id.* at 63:20–64:6. Ms. Richeson could not point to the study. *Id.* at 63:12–13.

9. The Operations Strategies identify the following EBP Principles:

- Risk Management and Risk Reduction - to be successful, Red Onion must not only manage risk but incorporate risk reduction strategies, i.e., "deliver treatment to offenders to reduce their criminogenic risk factors."

- Social Learning - changing the fundamental culture at Red Onion by addressing the “three primary components that make up that culture:”
- (1) staff beliefs, attitudes, skills, and practices, (2) facility resources and operating procedures, and (3) inmate beliefs, values, goals, attitudes, and behavior.
- Responsivity - identifying the sub-groups that make up the SL-S population “so that strategies can be applied that respond to the specific risks, needs, and characteristics of the target groups.” For example, an inmate who displays non-violent nuisance behavior to stay in restrictive housing should not be managed with the same methods as an inmate who poses a serious risk of extreme violence towards others just as the latter inmate “cannot be treated as low risk because they have not misbehaved even for an extensive period of time while in high security.”
- Motivational - using privileges to motivate and introduce desirable behavior, balancing privileges and sanctions, getting the right timing between the behavior and the privilege or sanction, identifying privileges from the inmate’s point of view, and establishing privileges as earned rather than entitled.

See, e.g., Ex. 12 at VADOC-00053707–08. According to Randall Mathena, Director of Security and Correctional Enforcement, VDOC implements the responsivity principle by separating the inmates into groups and programming based on the needs of each group.” Transcript of Randall Mathena Designated Representative – Day 1 dated April 4, 2023 (“Mathena Tr. Day 1”), relevant portions attached in Exhibit 14 at 175:14–176:1.

Plaintiffs’ Response to SUMF ¶ 9: Disputed in part. Undisputed as to the paraphrase of the purported EBPs being similar to the language included in the various Step-Down Manuals. Disputed as to Mr. Mathena’s testimony as VDOC’s designated representative, Defendants’ failure to include proper context in Defendants’ Exhibit 14, and that this is consistent with the responsivity principle or any other evidence-based principle as used in a technical sense. While Mr. Mathena agreed that the [REDACTED] behind the responsivity principle is to develop strategies that are tailored to specific groupings of people, and the Manuals suggest that a study of the Level S population identified 5 subgroupings of people, he was in fact *not* aware of any such study separating the population into subgroups, Ex. 11, Mathena 30(b)(6) Dep. at 176:2–177:13, and acknowledged that the only manner in which people *are* sorted while in Level S is by placing them into either IM or SM, *id.* at 178:4–180:7—where programming and requirements are identical—*see infra*

Plaintiffs' Response to SUMF ¶ 22. Further, prior to offering the response Defendants quote, Mr. Mathena admitted under oath that he couldn't testify to the [REDACTED] for any of the Step-Down Program principles. Ex. 11, Mathena 30(b)(6) Dep. at 169:21–170:7. Nor could Mr. Mathena testify that [REDACTED] *id.* at 169:4–8, because he took no steps to [REDACTED] [REDACTED] *id.* at 170:12–15. Any testimony Mr. Mathena could have offered beyond confirmation that the Step-Down Manuals spoke for themselves is not material because Mr. Mathena, VDOC's designated representative and a cornerstone of the implementation of the Program, admitted that he has [REDACTED] [REDACTED] of the Step-Down Program let alone deeper knowledge. *Id.* at 168:18–169:2.

10. This motivational principal warrants a separate appendix in the Operations Strategies. *Id.* at VADOC-00053710–11. As described in Appendix C, the concept is to define the rehabilitative behavior to be promoted, then balance incentives and sanctions to motivate good behavior while deterring unwanted behavior. *Id.* Positive behaviors include accepting the rules and taking responsibility for oneself as measured by disciplinary charges, carrying oneself with pride as measured by personal hygiene and cell cleanliness, setting goals and using days to move toward those goals as measured by program participation, being polite and cordial to others as measured by general attitude. *Id.*

Plaintiffs' Response to SUMF ¶ 10: Disputed in part. Undisputed as to Defendants' paraphrase summarizing Appendix C of the 2020 Step-Down Manual. Disputed as to any characterization of the behavior management techniques described in Appendix C as being based on, derived from, or in any way related to Evidence-Based Principles for the same reasons cited in Plaintiffs' Responses to SUMF ¶¶ 5–6, 8–9, *supra*. Plaintiffs also dispute that the structure of the Step-Down Program as described in the Manuals indicates how the Program was implemented in reality. *See, e.g.,* Ex. 12, Trent Dep. at 30:15–30:20, 45:10–47:6; 294:1–297:11 (Red Onion psychology associate with sole responsibility over monitoring the mental health of Level S prisoners voiced concerns that went unheeded about how the program did not adequately reinforce positive

behaviors and instead they “were always taking stuff away for negative behavior”); *see also infra* Plaintiffs’ Response to SUMF ¶ 23.

B. Project Goals

Plaintiffs’ Response to Heading I.B: Defendants’ heading is not an undisputed material fact that requires a response.

11. The Operations Strategies also identify the Step-Down Program’s project goals, including to “develop a prison management system that will create a pathway for offenders to step-down from Level S to lower security levels in a way that maintains public, staff, and offender safety by applying the principles of” EBPs to Red Onion and Wallens Ridge Operations” and “infuse evaluation into the operational design by setting observable and measurable standards as a means to ensure fidelity.” *See, e.g.*, Ex. 12 at VADOC-00053674.

Plaintiffs’ Response to SUMF ¶ 11: Disputed. Plaintiffs dispute any definition of “Operations Strategies” that includes the three unsigned versions of the Step-Down Manual. *See supra* Plaintiffs’ Response to SUMF ¶ 7. Plaintiffs likewise dispute that Defendants ever applied any Evidence-Based Principles to the Step-Down Program in either location. *See supra* Plaintiffs’ Response to SUMF ¶¶ 5–6, 8–9. Plaintiffs also dispute that “observable and measurable standards” were applied to the Step-Down Program or are probative of behaviors that might threaten “public, staff, and offender safety” as Defendants assert. VDOC did not formally train employees to evaluate prisoners’ compliance with behavioral goals, for example. Ex. 11, Mathena 30(b)(6) Dep. at 298:6–18; Ex. 21, King Dep. at 56:21–58:12. As a result, the “observable and measurable standards” ultimately applied were at employees’ discretion and subjective. *See, e.g.*, Ex. 5, Robinson Dep. at 303:12–17; ECF No. 383-20, Gallihar Dep. at 72:12–22, 73:1–3. Likewise, VDOC admits that it provided no standards for evaluating the Challenge Series materials, the main mechanism by which prisoners in the Step-Down Program could move through the pathway. ECF No. 383-36, VDOC Objs. & Ans. to Pls.’ Reqs. For Admis. at No. 24; ECF No. 383-33, Turner Dep. at 229:12–17, 249:18–250:22.

12. Up to and including the 2016 Operations Strategy, another goal was to link, through the Step-Down Program, Red Onion with Wallens Ridge to take advantage of already successfully established EBPs at Wallens Ridge. *See, e.g.*, Ex. 10 at VADOC-00056794. VDOC accomplished this linkage by transferring certain SL-S inmates to Wallens Ridge, while transferring some Security Level 5 (SL-5) inmates from Wallens Ridge to Red Onion. *Id.*

Plaintiffs’ Response to SUMF ¶ 12: Disputed. Plaintiffs dispute any definition of the Operations Strategies that includes the three unsigned versions of the Step-Down Manual, including such characterization of the 2014, 2015, and 2016 Manuals, which were never signed. *See supra* Plaintiffs’ Response to SUMF ¶ 7. To the extent Defendants’ statement refers to the only signed Step-Down Manual prior to 2016, the 2012 Step-Down Manual, Plaintiffs dispute that VDOC had “successfully established EBPs at Wallens Ridge” and “accomplished linkage” from Red Onion to Wallens Ridge through prisoner transfers. VDOC offers no citation to the factual record to support establishment or accomplishment of either. Fed. R. Civ. P. 56(c). The factual record indicates that Defendants never established Evidence-Based Principles in the Step-Down Program, so no linkage to Red Onion would have resulted in the application of Principles to that facility. *See supra* Plaintiffs’ Response to SUMF ¶¶ 5–6, 8–9.

13. As EBPs became more ingrained at Red Onion and VDOC reduced the number of inmates in Restrictive Housing such that there was sufficient space at Red Onion to house all of the inmates in the Step-Down Program as well as inmates at SL-5, VDOC removed this goal with the 2017 Operations Strategy. Ex. 11 at VADOC-00053110. Mathena testified that SL-6 inmates never were housed at Wallens Ridge and estimated the remaining SL-S inmates housed there were moved to Red Onion around 2016. Mathena Tr. Day 1 at 142:12–143:6.

Plaintiffs’ Response to SUMF ¶ 13: Disputed in part. Plaintiffs dispute Defendants’ characterization of the Step-Down Program as incorporating Evidence-Based Principles or having them “ingrained.” *See supra* Plaintiffs’ Response to SUMF ¶¶ 5–6, 8–9. Plaintiffs further dispute that Defendants have described what it means for the “EBPs [to] bec[ome] more ingrained” or when that process allegedly occurred.

II. *Step-Down Program Operation: Addressing Clarke's Concerns By Implementing the EBP Principles*

Plaintiffs' Response to SUMF Section II Heading: Defendants' heading is not an undisputed material fact that requires a response. To the extent a response is needed, Plaintiffs dispute any characterization of the Step-Down Program as having Evidence-Based Principles or that those Principles related in any way to Mr. Clarke's concerns. *See supra* Plaintiffs' Response to SUMF ¶¶ 5–6, 8–9; *see also* Ex. 36, Clarke Dep. at 207:4–7 (admitting he did not “look into or learn about the evidence underlying” the Step-Down Program).

14. When VDOC executives approved the 2012 Operations Strategy on August 30, 2012, it provided that SL-S inmates be managed per Special Housing Guidelines policy 861.3 (“O.P. 861.3”). Ex. 7 at VADOC-00037972, 00037979. Future Operations Strategies continued to include this provision through the 2017 Operations Strategy. *See, e.g.*, Ex. 11 at VADOC-00053113. O.P. 861.3, in turn, referenced more than a dozen other operating procedures. O.P. 861.3, Special Housing, attached as Exhibit 15, at VADOC-00003220.

Plaintiffs' Response to SUMF ¶ 14: Disputed in part. Plaintiffs do not dispute that some versions of the Operations Strategy documents contain the language indicated, or that O.P. 861.3 referenced other operating procedures. Plaintiffs dispute any suggestion that the cited language is an accurate statement of policy or that it provides clarity as to which provisions of O.P. 861.3 apply to SL-S inmates. On the contrary, it is clear that some of the guidelines for Special Housing in O.P. 861.3 do not apply to SL-S inmates. For example, O.P. 861.3 provides that inmates in special housing are to be provided reviews of their housing status every seven days during their first two months in special housing and every 30 days thereafter, whereas SL-S inmates are provided less frequent reviews of their housing status, including prior to 2017. *See* ECF No. 383-44, Duncan (*DePaola*) Dep. at 190:2–4; Ex. 11, Mathena 30(b)(6) Dep. at 301:11–18 (testifying that the ICA hearing, which only occurs every 90 days, serves as a [REDACTED] while the responsibility of the Building Management Committee, the authority that meets every 30 days, is to evaluate privilege status, not a housing status).

15. In addition to the VDOC-wide operating procedures, Red Onion and Wallens Ridge approved Local Operating Procedure 830.A, titled “Segregation Reduction Step-Down Program” (“O.P. 830.A”), with an effective date of February 18, 2013 that, as updated and amended, continues to govern the Step-Down Program. Exhibit 16. That first issue of O.P. 830.A referenced the following operating procedures: 425.4, Management of Bed and Cell Assignments (“O.P. 425.4”); 830.1, Institution Classification Management (“O.P. 830.1”); 830.2, Security Level Classification (“O.P. 830.2”); O.P. 841.7, Structured Living Unit, and O.P. 861.3, Special Housing (“O.P. 861.3”). *Id.* at VADOC-00003156. The current version of O.P. 830.A, with an effective date of October 1, 2021, replaces the last two of those operating procedures with O.P. 841.4, Restrictive Housing Units (“O.P. 841.4”). Exhibit 17 at VADOC-00134604.

Plaintiffs’ Response to SUMF ¶ 15: Disputed in part. Plaintiffs do not dispute that Local Operating Procedure 830.A applies to the Step-Down Program, or that it references the other operating procedures as stated. Plaintiffs dispute that either O.P. 830.A or the other referenced operating procedures provide clarity as to which provisions of the other referenced operating procedures apply to the Step-Down Program or which provisions take precedence over 830.A (or vice versa) in the event of a conflict. Plaintiffs further dispute any suggestion that O.P. 830.A is strictly followed in the implementation of the Step-Down Program. *See, e.g.*, ECF No. 383-15, Wall Decl. ¶ 5; ECF No. 383-16, Cornelison Decl. ¶ 5; ECF No. 383-17, Arrington Decl. ¶¶ 3, 5 (noting that plaintiffs and class members were given no notice of security level increase); ECF No. 383-45, VADOC-00021251 (reflecting that VDOC personnel sometimes fail to record participants’ ratings on their status rating charts); Ex. 11, Mathena 30(b)(6) Dep. at 85:12–17 (testifying that VDOC records reflected that [REDACTED] [REDACTED]).

A. *Concern 1: Assignment to SL-S*

Plaintiffs’ Response to SUMF Section II.A Heading: Defendants’ heading is not an undisputed material fact that requires a response.

16. In anticipation of the implementation of the Step-Down Program, O.P. 830.2 was amended in June 2012 such that Central Classification Services (“CCS”) no longer had final authority to approve assignment to SL-S. Ex. 18 at VADOC-00003121. Instead, after CCS approval, the Warden of Red Onion and the Regional Operations Chief (“ROC”) or designee had

to review the assignment. *Id.* Only after the Warden and ROC or designee approved the assignment could the inmate be assigned to SL-S and transferred to Red Onion. *Id.*; O.P. 830.2, with an effective date of October 1, 2021, attached as Exhibit 19, at 11.

Plaintiffs' Response to SUMF ¶ 16: Plaintiffs do not dispute that O.P. 830.2 was amended such that CCS no longer had final authority to approve assignment to SL-S, or that the Warden and ROC were required to approve a referral to SL-S. However, Plaintiffs dispute the suggestion that that such approval necessarily precedes transfer to Red Onion generally, or to Level S conditions specifically. Instead of serving as a check to prevent unnecessary placement in Level S, the factual record indicates the additional levels of review serve to extend the period of time during which a person may remain in segregation without having access to the Step-Down Program and before the clock begins to run for their mandatory-minimum time periods in Level S. *See* Ex. 11, Mathena 30(b)(6) Dep. at 263:5–9 (testifying that between a person's referral to Level S and a person's final approval by the Warden and ROC, a person remains in conditions akin to IM-0). For example, after allegedly being involved in an incident at Sussex II State Prison in October 2022, class member Sidney Bowman was transferred immediately to Red Onion State Prison and placed in segregation conditions, and remained in such conditions until February 2023 before learning that he had been assigned to Level S in January—three months after his transfer to segregation at Red Onion—and to the IM Pathway in February (when his 6-month mandatory minimum period would finally have begun to run). Ex. 13, Bowman Decl. ¶¶ 3–9, 12–16. Plaintiffs further dispute the underlying motivation or reason for the creation of O.P. 830.2 because there is no supporting evidence for Defendants' proposition in the record. Fed. R. Civ. P. 56(c).

B. *Concern 2: Defined Pathway Out*

Plaintiffs' Response to SUMF Section II.B Heading: Defendants' heading is not an undisputed material fact that requires a response.

17. O.P. 830.A details how the pathway out of SL-S begins with intake/orientation at Red Onion. Ex. 16 at VADOC-00003148; Ex. 17 at VADOC-00134593. It provides that inmates be provided an orientation to the case plan including goals, expectations, privilege earning process, and step-down process and be given an initial battery of assessments to establish a baseline for the inmate. *Id.*

Plaintiffs’ Response to SUMF ¶ 17: Plaintiffs dispute that the cited portion of 830.A accurately describes policy and practice at Red Onion. Plaintiffs dispute that persons in the Step-Down Program are provided any orientation to the Step-Down Program, or any “battery of assessments” at intake/orientation for the purpose establishing a “baseline” or otherwise. ECF No. 383-17, Arrington Decl. ¶ 7; ECF No. 383-16, Cornelison Decl. ¶¶ 6–7; Ex. 13, Bowman Decl. ¶ 12; Ex. 14, Mukuria Decl. ¶ 6; Ex. 15, McClintock Decl. ¶ 18.

18. At the completion of intake orientation, inmates are referred to the Dual Treatment Team (“DTT”) for assignment to a path (Intensive Management (“IM”) or Special Management (“SM”) “based on their identified risk level.” *Id.*

Plaintiffs’ Response to SUMF ¶ 18: Plaintiffs dispute that prisoners are referred to the DTT “at the completion of intake orientation,” because they dispute that any such orientation occurs. *See supra* Plaintiffs’ Response to SUMF ¶ 17. Prisoners can remain in the “orientation” pod, in conditions akin to the lowest levels of the Step-Down Program, for weeks if not months before they are assigned to a pathway by the DTT. *See* Ex. 11, Mathena 30(b)(6) Dep. at 243:11–15, 320:15–18; ECF No. 383-5, VADOC-00134589 at -589, -593 (2021 O.P. 830.A) (the Intake/Orientation Unit [REDACTED]

[REDACTED]); ECF No. 383-17, Arrington Decl. ¶ 8; Ex. 14, Mukuria Decl. ¶¶ 6–7. Plaintiffs further dispute that prisoners are assigned to a path “based on their identified risk level,” because they dispute that their risk level is assessed through any “battery of assessments” in orientation or otherwise, *see supra* Plaintiffs’ Response to SUMF ¶ 17, and because “identified risk level” is vague and until 2021 the policy provided that persons in IM can include “offenders

incarcerated for a notorious crime that puts them *at risk from other offenders*,” and not just those who pose a risk *to* others, ECF No. 381-16, VADOC-00003146.

19. O.P. 830.A identifies IM inmates, in part, as those “with the potential for extreme and/or deadly violence” who “may have an institutional adjustment history indicating the capability for extreme deadly violence against staff or other inmates.” Ex. 17 at VADOC-00134591. Further, “[t]his group most often would have an extensive criminal history and lifestyle that has escalated so that extreme/deadly violence has become a behavior characteristic. . . . Alternatively, the offender may present a routinely disruptive and threatening pattern of behavior and attitude.” *Id.*

Plaintiffs’ Response to SUMF ¶ 19: Undisputed that the quoted language is in the 2021 version of Operating Procedure 830.A. Disputed as to the materiality of the language in the policy, as divorced from VDOC’s practice and as to the omission of other IM placement categories as described in the Step-Down Program Manuals. *See* ECF No. 381-7, VADOC-00037971 at -992–93; ECF No. 381-11, VADOC-00053104 at -129–31; ECF No. 381-12, VADOC-00053668 at -693–95.

20. It identifies SM inmates as those “who may display an institutional adjustment history indicating repeated disruptive behavior at lower level facilities, a history of fighting with staff or offenders, and/or violent resistance towards a staff intervention resulting in harm to staff, other offenders without the intent to invoke serious harm or the intent to kill, or serious damage to the facility, and where reasonable interventions at the lower security level have not been successful in eliminating disruptive behaviors.” *Id.*

Plaintiffs’ Response to SUMF ¶ 20: Undisputed that the quoted language is in the 2021 version of Operating Procedure 830.A. Disputed as to the materiality of the language in the policy, as divorced from VDOC’s practice and as to the omission of other SM placement categories as described in the Step-Down Program Manuals. *See* ECF No. 381-7, VADOC-00037971 at -994–95; ECF No. 381-11, VADOC-00053104 at -132–33; ECF No. 381-12, VADOC-00053668 at -695–96.

21. As detailed in O.P. 830.A, inmates on both pathways are “challenged to meet goals in three areas” that track with the positive behaviors identified in the motivational EBP principles in Appendix C to the Operations Strategies: (1) eliminating disciplinary violations (accepting rules and taking responsibility); (2) responsible behavior goals that include personal hygiene and cell

compliance (carrying oneself with pride), standing for count (accepting rules and taking responsibility), and respect (being polite and cordial to others); and participating in programming (setting goals and moving toward those goals). Ex. 17 at VADOC-00134594, 596. According to the Operations Strategies:

The disciplinary violation goals are designed to improve respect for authority, improved decision making, and replace impulsivity with forward thinking. The responsible behavior goals are designed to develop a routine pattern of responsible and mature behavior. The program participation goals are to involve offenders in evidence-based programs that are proven to have a positive impact on offender thinking, beliefs, and attitudes which, in turn, support and reinforce responsible and mature behavior.

See, e.g., Ex. 12 at VADOC-00053687.

Plaintiffs’ Response to SUMF ¶ 21: Plaintiffs dispute this as a mischaracterization of both the policy and practice. Specifically, they dispute the characterization that prisoners are “challenged to meet [the referenced] goals,” which obscures that (i) the goals are in fact *requirements* for advancement for which no exceptions are made, *see infra* Defs.’ SUMF ¶ 22; (ii) prisoners generally are not provided any meaningful orientation about the requirements, *see supra* Plaintiffs’ Response to SUMF ¶ 17; or (iii) prisoners are evaluated on these requirements by a body (the BMC) that they do not appear before and which does not document—let alone share with prisoners—the reason(s) for preventing a prisoner from progressing within the Step-Down Program. Ex. 25, Collins Dep. at 197:21–198:1; Ex. 23, Duncan Dep. at 272:4–6; Ex. 16, VDOC Ans. to Written Dep. Questions at 2–4 (noting that there were no formal records documenting BMC decisions prior to some point in 2016 and that after that point, BMC meeting notes were input into a prisoner’s electronic record that would record only “the date of the review and whether a status change was recommended,” and claiming further that “notes of determinations made by the BMC . . . were surplus to need after the determinations were conveyed verbally and the inmate facesheets were updated”); ECF No. 383-54, Pacholke Rebuttal Rep. ¶ 16; Ex. 17, VADOC-00136301 at -313 (Gary Wall Officer’s Log Sheet); Ex. 14, Mukuria Decl. ¶ 19 (noting he was

unaware of the existence of the BMC or the Unit Manager Team, let alone their criteria for advancement or how he was doing on them); Ex. 13, Bowman Decl. ¶ 24 (same). Plaintiffs also dispute that the Step-Down Program requirements are consistent with evidence-based principles, including the principles stated in Appendix C in the Operations Strategy, which emphasize reinforcement of positive behavior with rewards and incentives, and warns that [REDACTED]

[REDACTED] ECF No. 381-17, VADOC-00134589 at -710–11; *see also* Ex. 2, Pacholke Rep. ¶¶ 70–87, 215 (describing ways in which the program misapplies and misrepresents evidence-based principles).

22. To progress from each privilege level to the next, inmates must, regardless of path, have less than the same defined number of specific charges, meet the same specific responsible behavior goals, and complete the same specified *Challenge Series* journals. *See, e.g.*, Ex. 12 at VADOC-00053717–18, 53722. The one difference is that, consistent with the responsivity EBP principle, IM inmates must demonstrate improved decision making and modified behavior for a longer period of time (6 months) than SM inmates (3 months) at each privilege level. *Id.*

Plaintiffs’ Response to SUMF ¶ 22: Plaintiffs do not dispute that to progress from one privilege level to the next, the Step-Down Manual provides that prisoners in both the IM and SM pathways have to meet similar requirements relating to number of disciplinary charges, grades received on responsible behavior categories, and completion of Challenge Series journals. Nor do Plaintiffs dispute that prisoners must spend a minimum period of time at each privilege level, or that the minimum time period differs depending on their pathway. Plaintiffs dispute that VDOC’s responsible behavior goals are consistent with the responsivity EBP principle or any other evidence-based principle. *See* Ex. 2, Pacholke Rep. ¶¶ 70–87, 215; ECF No. 383-54, Pacholke Rebuttal Rep. ¶¶ 15–20; *see also* Ex. 12, Trent Dep. at 294:1–297:11 (Red Onion psychology associate with responsibility over Level S voiced concerns that went unheeded about how the program did not adequately reinforce positive behaviors and instead they “were always taking stuff

away for negative behavior”). Plaintiffs also dispute that these “requirements” are applied in an objective manner. Ex. 11, Mathena 30(b)(6) Dep. at 301:5–8 (behavior goals rely on [REDACTED] of staff).

23. As set forth in those same appendices, as inmates meet goal levels they advance in status from privilege level 0 to 1 to 2 to SL-6,⁶ earning additional privileges (outlined on separate IM and SM Privilege Levels charts) consistent with the EBP motivational principle of using privileges to motivate and introduce desirable behavior. *See, e.g.*, Ex. 12 at VADOC-00053719, 53723. Also consistent with that principle, sanctions for deterring unwanted behavior can include being demoted to a lower privilege level. *Id.*

Plaintiffs’ Response to SUMF ¶ 23: Plaintiffs dispute that the structure of the Step-Down Program, including the manner in which people advance through privilege levels, is consistent with evidence-based principles. *See* Ex. 2, Pacholke Rep. ¶¶ 70–87, 215; ECF No. 383-54, Pacholke Rebuttal Rep. ¶¶ 15–20. Plaintiffs do not dispute that prisoners receive some additional privileges as they advance through the program but dispute the characterization of behaviors as “desirable,” “unwanted,” or in any way probative of a prisoners’ risk. With respect to the footnote, Plaintiffs do not dispute that SM-2 was reclassified from Level S to Level 6, although Plaintiffs dispute that the cited materials indicate the reason for this change. Further, Plaintiffs dispute that the cited portions of the Operations Strategy document in the footnote indicate when SM-2 was reclassified to Level 6 in practice, and they further dispute that all (or even any) security level 6 statuses have the opportunity for congregate meals. In fact, the Operations Strategy document provides that for SIP and SAM units, after 30 days, prisoners *may* participate in group meals [REDACTED]

[REDACTED] *See* ECF No. 381-12, VADOC-00053668 at -699; ECF No. 381-11, VADOC-00053104 at -136–37. Plaintiffs note

⁶ With approval of the 2020 Operations Strategy SM2 became a SL-6 privilege level in light of the increase in privileges for that level, in particular the opportunity for congregate meals and recreation. *Compare* Ex. 11 at VADOC-00053165 with Ex. 12 at VADOC-00053721; ECF No. 201–2 ¶¶ 15–16.

further that a policy permitting some prisoners to walk to the dining hall to obtain a food tray which they are then required to eat in their cell is not the same as a congregate or group meal. The factual record does not indicate that people in SL-6 Step-Down pods were permitted to eat meals in a congregate setting. Ex. 14, Mukuria Decl. ¶ 33 (noting that during his time in security level 6 in 2019, he was permitted to walk to the chow hall to pick up a tray to bring back to his cell but was *not* permitted congregate meals).

24. SL-6 was created in June 2012 as, and continues to be, “SL-S Step-down.” O.P. 830.2, with an effective date of January 1, 2012, attached as Exhibit 18 at VADOC-00003115; O.P. 830.2, with an effective date of October 1, 2021, attached as Exhibit 19 at 4. The Operating Strategies explain that “[f]ollowing a successful period in IM or SM, offenders will be eligible for advancement and to step-down from Level S to their first introduction into General Population at Level 6. The purpose of Level 6 is to reintroduce offenders into a social environment with other offenders and as a proving ground and preparation for stepping down to level 5.” *See, e.g.*, Ex. 12 at VADOC-00053697. Consistent with the responsivity EBP principle, SL-6 always has included several different housing options designed for inmates with certain characteristics, *e.g.*, the Secure Allied Management (“SAM”) unit “for offenders that tend to be easily bullied, manipulated, or taken advantage of by other offenders.” *Id.* The pathway out of SL-6 differs for IM and SM inmates.

Plaintiffs’ Response to SUMF ¶ 24: Undisputed as to the contents of O.P. 830.2 or the Operating Strategy cited. Disputed that the different Level 6 units constitute “options,” since prisoners are unable to select between them, and in many cases even correctional officials do not have discretion to select between Level 6 units. For instance, IM prisoners are eligible only for IM Closed Pod, *see infra* Defs.’ SUMF ¶ 25, and SM prisoners may not have access to certain units due to unavailable bed space. *see, e.g.*, Ex. 18, VADOC-00098836 (Mar. 26, 2018 Email from UM Swiney) (noting that prisoner had been held in Level S between Nov. 2017 and Mar. 2018 pending bed space in SIP/SAM pod). Plaintiffs dispute further that the manner in which VDOC has structured the program, including any purported sorting of people into different housing options, comports with evidence-based principles. *See* Plaintiffs’ Response to SUMF ¶ 9; Ex. 2, Pacholke Rep. ¶¶ 62, 70–80, 215.

1. *IM Path*

Plaintiffs' Response to SUMF Section II.B.1 Heading: Defendants' heading is not an undisputed material fact that requires a response.

25. Although inmates on the IM pathway always have stepped down to the SL-6 IM Closed Pod when eligible, beginning with the 2015 Operations Strategy this step further was subdivided into a Phase 1 and Phase 2. *Compare* Ex. 8 at VADOC-00002680 with Ex. 9 at VADOC-00002748.

Plaintiffs' Response to SUMF ¶ 25: Plaintiffs do not dispute the suggestion that prisoners on the IM pathway are ineligible for Level 6 units other than IM Closed Pod. Plaintiffs do not dispute that the cited documents contain the distinction specified between IM Closed Pod Phase 1 and Phase 2, but Plaintiffs dispute that the documents are evidence of either policy or practice, including because, unlike some analogous documents from other years, neither of these documents are signed by VDOC officials (the signature pages are blank), *see* ECF No. 381-8, VADOC-00002632 at -633; ECF No. 381-9, VADOC-00002697 at -698, and VDOC testimony indicates that Step-Down Manuals go into effect only when they are approved and signed, Ex. 11, Mathena 30(b)(6) Dep. at 35:9–35:13.

26. With the sub-division of the SL-6 IM Closed Pod, inmates advance to Phase 1 upon stepping down from SL-S and then to Phase 2 after twelve successful and charge-free months in Phase 1, as described in the 2020 Step-Down Program Guide. Ex. 12 at VADOC-00053697. As depicted in Appendix F to the Operations Strategies beginning in 2015, “success” continues to be measured using the same goals used for progressing through SL-S. Ex. 9 at VADOC-00002752.

Plaintiffs' Response to SUMF ¶ 26: Disputed. The page cited by Defendants in the 2020 Step-Down Manual in fact describes advancement from IM Closed Pod Phase I to Phase II as discretionary rather than automatic, noting that [REDACTED]

[REDACTED]

[REDACTED] at which point prisoners [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ECF No. 381-12, VADOC-00053668 at -697 (emphases added). Plaintiffs further dispute that the word [REDACTED] as used in this context is defined in either the pages cited or at any point in the Step-Down Program manual. Contrary to what Defendants claim, Appendix F to the Step-Down Manual does not indicate that [REDACTED] in IM Closed Pod is measured using the same goals for progressing through SL-S: first, Appendix F does not split IM Closed Pod into two phases, so it is not clear whether the behavioral goal requirements listed are required for advancement to Phase II (which is not contemplated at all in the Appendix F), or alternatively are required to avoid being sent back to Level S, or something else entirely, ECF No. 381-9, VADOC-00002697 at -752; second, the column in Appendix F listing the disciplinary goals for advancement from each privilege level to the next is notably blank in the row corresponding to IM Closed Pod (leaving little clarity as to what, if any, disciplinary requirements exist for remaining in or advancing within IM Closed Pod), *id*; third, the programming participation goals listed in the far right column of Appendix F are not the same as those in Level S (which, in practice, is the Challenge Series), *see supra* Defs.’ SUMF ¶ 22, and Appendix F does not make clear what if any programming is required at Level 6 (or, again, whether such programming is required to advance to Phase II or to avoid being sent back to Level S), *see* ECF No. 381-9, VADOC-00002697 at -752; fourth, even with respect to the behavioral goals listed for IM-Closed Pod (“No more than 2 Poor/Incomplete within 90-day review period / Minimum of 6 Good / Positive Effort within 90 day review period”), the testimony of VDOC officials has made clear that performance on behavioral goals are not tracked at all after prisoners move from Level S to Level 6 Closed Pod, *see* Ex. 19, Gallihar (*DePaola*) Dep. at 20:7–21:12 (status rating charts

that document prisoners' grades on behavior goals are not kept for prisoners in Closed Pod), further calling into question whether Appendix F has any relevance to either policy or practice for IM Closed Pod. Plaintiffs finally dispute any suggestion that the Step-Down Manual provides clarity to prisoners about how one might advance in Level 6 because, even if the Manual *did* provide any comprehensible guidance about how successful adjustment is measured in either Level 6, generally, or IM Closed Pod, specifically, the manual itself is not available to prisoners, Ex. 11, Mathena 30(b)(6) Dep. at 31:21–32:1, and has not been made publicly available to this day, as evidenced by Defendants' designation of the manual as confidential under the protective order in this case. Plaintiffs dispute that the 2020 Step-Down Manual has any relevance to VDOC policy or practice prior to the manual's effective date.

27. The pathway out of SL-6 for inmates on the IM path goes through the SM path. As explained by Mathena, IM inmates who show satisfactory progress in the Step-Down Program are eligible to transition to the SM path. ECF No. 201-2 ¶ 14. In fact, several of Named Plaintiffs transitioned from the IM path to the SM path on their pathway out of SL-6. *See, e.g.*, External Review Team Recommend Change Forms dated October 23, 2019, attached as Exhibit 20. Further, as demonstrated by the External Review Team Recommend Change Form, inmates can be transitioned at the same privilege level without starting the SM path at SM-0. *See, e.g.*, External Review Team Recommend Change Form dated October 17, 2018, attached as Exhibit 21.

Plaintiffs' Response to SUMF ¶ 27: Plaintiffs do not dispute that the ERT has the authority to move persons from the IM Pathway to the SM Pathway, or that it has done so on some occasions. However, they dispute that it has been either the policy or the practice of the Step-Down Program that persons in IM Pathway “who show satisfactory progress in the Step-Down Program” are eligible to transition to the SM Pathway, and they further dispute any suggestion that there is a standard or criteria based on “satisfactory progress” for determining when to progress an IM prisoner to the SM Pathway. Plaintiffs do not dispute that Mathena stated this in his declaration in opposition to class certification during the pendency of this litigation, but none of the versions of either O.P. 830.A or the Step-Down Manual have ever stated that “satisfactory progress”—or

anything akin to that—can make an IM prisoner eligible for SM, let alone defined the term. *See generally* ECF No. 383-5, VADOC-00134589 at -601 (2021 O.P. 830.A); ECF No. 381-12, VADOC-00053668 at -676; ECF No. 381-11, VADOC-00053104 at -113 (2017 Step-Down Manual); ECF No. 381-7, VADOC-00037971 at -979 (2012 Step-Down Manual). In fact, until the language was omitted from the 2020 version, the Step-Down Program manual explicitly stated in relation to people in IM that [REDACTED] [REDACTED] *see* ECF No. 381-11, VADOC-00053104 at -131 (2017 Step-Down Manual); ECF No. 381-7, VADOC-00037971 at -993 (2012 Step-Down Manual). And the current version of O.P. 830.A still contains this language. *See* ECF No. 383-5, VADOC-00134589 at -594 [REDACTED] [REDACTED] (2021 O.P. 830.A). Further, the proposition that incarcerated persons in the IM pathway can transition to SM by showing “satisfactory progress” in the Step-Down Program contradicts the substance of Mathena’s testimony at deposition, which was that, in determining whether a person is appropriate for Level S, the ERT primarily looks to the *initial* decision to classify the person as Level S and whether there are any problems with that decision or the rationale underlying that decision, such as when charges leading to someone’s placement in Level S are subsequently dropped. Ex. 4, Mathena Dep. at 480:1–482:17. Because the ERT often does not provide *any* rationale for moving someone from IM to SM it is often impossible to derive the reason for any such move, including whether the decision was made for reasons unrelated to someone’s “satisfactory progress” in the Step-Down Program. *See, e.g.*, ECF No. 381-20, VADOC-00020350 (including no comments or rationale for decisions) (2019 External Review Signature Pages). For example, in the four months after Plaintiffs filed this action, the ERT met twice and moved six of the named Plaintiffs out of IM and into SM after they had spent a collective 27 years in Level S, and without listing any

rationale for doing so, *see* ECF No. 383-79, VADOC-00174671 at lines 3156–75, 7675–86, 12305–11, 19907–13, 20264–87, and 24852–62 (Internal Status Spreadsheet), raising a question whether the moves were made in the ordinary course of the Step-Down Program as part of any “satisfactory progress” review, or instead because of the litigation. Multiple plaintiffs in IM status have been told that they would never make it out of IM, including by Mathena himself. Ex. 14, Mukuria Decl. ¶¶ 4, 7, 32; ECF No. 383-16, Cornelison Decl. ¶ 23.

2. *SM Path*

Plaintiffs’ Response to SUMF Section II.B.2 Heading: Defendants’ heading is not an undisputed material fact that requires a response.

28. As noted above, SM-2 became an SL-6 privilege level with approval of the 2020 Operations Strategy. But the SL-6 path after SM-2 has remained similar since the first Operations Strategy: inmates progress to one of two specialty housing units (SAM or Secure Integrated Pod (“SIP”)) or the Step-Down unit. *See, e.g.*, Ex. 12 at VADOC-00053698.

Plaintiffs’ Response to SUMF ¶ 28: Regarding the first sentence, Defendants do not cite admissible evidence, *see* Fed. R. Civ. P. 56(c)(2); Plaintiffs refer to their responses to the referenced evidence. *See* Plaintiffs’ Response to SUMF ¶ 23. Plaintiffs do not dispute the contents of the Step-Down Manual referred to in the second sentence. Plaintiffs dispute that the 2020 Step-Down Manual has any relevance to VDOC policy or practice prior to the manual’s effective date.

29. Each of these SM SL-6 programs has a Phase 1 and Phase 2 as described in the Operating Strategies. *See, e.g.*, Ex. 12 at VADOC-00053700. Following successful completion of Phase 2, inmates are eligible to be reclassified to SL-5. *Id.*

Plaintiffs’ Response to SUMF ¶ 29: As to the first sentence, undisputed as to the contents of the Step-Down Manual. Disputed as to the second sentence, because the manual provides that prisoners who “successfully adjust through Level 6” become eligible for Level 5, and does not speak in terms of “successful completion of Phase 2.” Plaintiffs dispute that “successful adjustment through Level 6” (or “successful completion of Phase 2”) is defined in either the pages

cited or at any point in the Step-Down Program manual or any other policy document. Plaintiffs further dispute any suggestion that the Step-Down Manual provides clarity to SM SL-6 prisoners about how one might advance to Level 5 because, even if the Manual *did* provide any comprehensible guidance about how successful adjustment is measured in either Level 6, generally, or IM Closed Pod, specifically, the manual itself is not available to prisoners, Ex. 11, Mathena 30(b)(6) Dep. at 31:21–32:1, and has not been made publicly available to this day, as evidenced by Defendants’ designation of the manual as confidential under the protective order in this case. Plaintiffs dispute that the 2020 Step-Down Manual has any relevance to VDOC policy or practice prior to the manual’s effective date.

C. *Concern 3: Re-Entry Program*

Plaintiffs’ Response to SUMF Section II.C Heading: Defendants’ heading is not an undisputed material fact that requires a response.

30. As explained in the Operations Strategies, VDOC considers it

unconscionable that a Level S offender might be considered too dangerous for unrestrained contact with others in prison, yet they would be released directly from segregation onto an unsuspecting citizenry in the community. Therefore, given that this population may pose a risk, the department’s position is that the facility is in the best position to bear that risk. The department has a professional responsibility to work to effectively reduce the offender’s danger to the community and the risk of reoffending, and improve the likelihood of reentry success.

See, e.g., Ex. 12 at VADOC-00053690. Although the Operations Strategies indicate that VDOC has modified the re-entry program over time, they indicate at least one characteristic has remained unchanged: inmates are diverted to the re-entry program from whatever point they may be in the Step-Down Program (SL-S or SL-6) at two years before their release. *Id.*

Plaintiffs’ Response to SUMF ¶ 30: Undisputed as to the content of the current Step-Down Manual. Plaintiffs note, however, that VDOC has and does release prisoners from the Step-Down Program directly into the community, calling into question their own claims asserted in the Step-

Down Manual and in SUMF ¶ 30 that prisoners are first diverted to a re-entry program. *See, e.g.*, Ex. 20, *VDOC Adoption of Restorative Housing Rep.*, Fiscal Year 2022 at 9 (identifying two Step-Down Program prisoners released directly to community). Plaintiffs dispute that the 2020 Step-Down Manual has any relevance to VDOC policy or practice prior to the manual's effective date.

31. The initial version of O.P. 830.A provided that, for the final six months of re-entry, SL-S inmates would be stepped down to SL-6 to continue re-entry programming, with those demonstrating appropriate behavior stepped down to SL-5 and transferred to the re-entry program at a facility determined by the region of the state to which their plan called for release. Exhibit 16 at VADOC-00003153. The next version of O.P. 830.A, effective February 15, 2018, divided the re-entry program along the IM and SM paths with SM inmates at SL-6 eligible to be stepped down to SL-5 and transferred to the re-entry program at a facility determined by the region of the state to which their plan called for release. O.P. 830.A, with an effective date of February 15, 2018, attached as Exhibit 22 at VADOC-00108213.

Plaintiffs' Response to SUMF ¶ 31: As to the first sentence, undisputed as to the contents of the 2013 version of 830.A. As to the second sentence, disputed in part as to the contents of the Step-Down Manual. The 2018 version of 830.A did not make all "SM inmates at SL-6 eligible to be stepped down to SL-5 and transferred" from Red Onion. Rather, it provides that only [REDACTED] [REDACTED] prisoners in SM Re-entry *may* be reduced to Level 5. ECF No. 381-22, VADOC-00108205 at -213.

32. With the 2020 Operations Strategy and the next version of O.P. 830.A, effective October 1, 2020, the re-entry program was in its current version. According to the 2020 Operations Strategy, "[a]t two-years prior to release[, SL-S] and [SL-6] offenders will be diverted into the Level 6 Reentry Program from whatever point they may be in the Level S step-down program." Ex. 12 at VADOC-00053690. According to the 2020 version of O.P. 830.A, "[f]or the final ten (10) months of reentry, Level 6 Re-Entry offenders may be reduced to [SL-5] and transferred to a [SL-5] intensive re-entry site." O.P. 830.A, with effective date of October 1, 2020, attached as Exhibit 23 at VADOC-00069659.

Plaintiffs' Response to SUMF ¶ 32: Undisputed as to the contents of the 2020 Step-Down Program manual and the 2020 version of O.P. 830.A.

III. *Step-Down Program Review Process*

Plaintiffs' Response to SUMF Section III Heading: Defendants' heading is not an undisputed material fact that requires a response.

33. The Vera Report identifies the requirement that inmates be assessed regularly by multidisciplinary teams of staff as an "integral part of the Step-Down Program model." ECF No. 195-5 at 10. As detailed in the Operating Strategies and VDOC's operating procedures, the Step-Down Program involves multiple levels of review.

Plaintiffs' Response to SUMF ¶ 33: Regarding the first sentence, undisputed as to the contents of the Vera Report. Regarding the second sentence, disputed as to any implication that the referenced "reviews" are meaningful. For example, Dual Treatment Team (DTT) pathway assignment meetings are a cursory five minutes, ECF No. 383-21, Gibson Dep. at 139:2-9; inmates were not permitted to participate prior to 2017, *id.* at 152:2-6; and there is no guidance or training provided as to how to review the required factors, Ex. 11, Mathena 30(b)(6) Dep. at 277:12-278:5. After an inmate is assigned a pathway, the Building Management Committee (BMC), when evaluating prisoners for privilege level advancement, relies on subjective behavioral evaluations, ECF No. 381-12, VADOC-00053668 at -717, -722; Ex. 25, Collins Dep. at 171:20-172:6, for which it provides no training, Ex. 11, Mathena 30(b)(6) Dep. at 298:6-299:10. The BMC provides no formal notice, Ex. 25, Collins Dep. at 199:7-13, and no opportunity to be heard, *id.* at 197:21-198:1. The outcome of these sham BMC "reviews" dictate prisoners' advancement through the Step-Down Program, as the Institutional Classification Authority (ICA) does not change a prisoner's housing status if he has not met the BMC-adjudicated Step-Down Program requirements, ECF No. 383-44, Duncan (*DePaola*) Dep. at 190:2-191:19, the DTT does not consider a prisoner for advancement through the Step-Down Program, ECF No. 383-29, Gallihar (*Reyes*) Dep. at 91:16-92:14, and the External Review Team (ERT) has never adjusted a prisoner's privilege level, ECF No. 383-33, Turner Dep. at 172:2-11, 177:17-22.

A. ICA

Plaintiffs' Response to SUMF Section III.A: Defendants' heading is not an undisputed material fact that requires a response.

34. According to Operating Procedure 830.1, the ICA is an experienced senior staff member appointed by the Facility Unit Head who has contact with the inmate but who is impartial to the inmate being presented for review. O.P. 830.1, with effective date of February 1, 2021, attached as Exhibit 24 at 7. A formal due process hearing—requiring formal notification to the inmate indicating the reason for, purpose of, and possible results of the classification hearing 48 hours in advance of the scheduled hearing, the inmate's right to be present at the hearing, and notice of the results of the hearing and the reason for the decision—is required before assignment to SL-S. *Id.* at 3, 8. Inmates may appeal any classification decision through the offender grievance procedure. *Id.* at 13.

Plaintiffs' Response to SUMF ¶ 34: Undisputed as to the contents of Operating Procedure 830.1. Disputed as to the impartiality in practice of the ICA when conducting 90-day segregation reviews, because members of the ICA are also members of the BMC. *See* Ex. 21, King Dep. at 180:16–181:2. Disputed as to whether prisoners in practice receive effective notice of the ICA hearing, are permitted to be present at the ICA hearing, or receive the results of the hearing prior to assignment to SL-S, all of which precludes submission of a grievance to challenge an SL-S assignment. *See* ECF No. 383-15, Wall Decl. ¶ 5; ECF No. 383-16, Cornelison Decl. ¶ 5; ECF No. 383-17, Arrington Decl. ¶¶ 3, 5; Ex. 13, Bowman Decl. ¶ 10.

35. The ICA conducts several types of hearings, *see generally id.* at 4–6, including, as previously discussed, a hearing necessary to assign an inmate to SL-S. But the ICA reviews specific to progression in the Step-Down Program have changed over time. The 2012 Operations Strategy provided that each SL-S and SL-6 inmate would be reviewed at a minimum of every 90 days by the ICA, or more frequently as necessary, to ensure the reclassification of SL-S and SL-6 inmates was consistent with policy. Ex. 25 at VADOC-00037981. This requirement was changed in 2016 such that each SL-S would be reviewed at a minimum of every 90 days by the ICA, or more frequently as necessary, to ensure the reclassification of SL-S inmates was consistent with policy. Ex. 26 at VADOC-00056800.

Plaintiffs' Response to SUMF ¶ 35: Regarding the first sentence, Defendants do not cite admissible evidence, *see* Fed. R. Civ. P. 56(c)(2); Plaintiffs refer to their responses *supra* to the

referenced evidence. Regarding the remaining sentences, undisputed as to the contents of the 2012 and 2016 Step-Down Manual, and as to the change between the two documents.

B. CCS

Plaintiffs' Response to SUMF Section III.B: Defendants' heading is not an undisputed material fact that requires a response.

36. CCS consists of staff members from the Offender Management Services Unit. Ex. 27 at 3. As discussed in a previous section, CCS reviews each inmate reclassification assignment to SL-S but does not have final approval. The 2020 Operations Strategy contains the following descriptor of the approval process: "Referring facility -> Central Classification Services-> Warden of the primary Maximum Security Prison (currently ROSP)-> Regional Operations Chief (ROC) or designee Regional Administrator (RA)." Ex. 12 at VADOC-00053677.

Plaintiffs' Response to SUMF ¶ 35: Regarding the first sentence, the information is immaterial, and Defendants' proffered evidence does not support the stated fact. Regarding the second sentence, Defendants do not refer to admissible evidence, *see* Fed. R. Civ. P. 56(c)(2); Plaintiffs refer to their responses *supra* to any implicitly referenced evidence. Regarding the third sentence, undisputed as to the contents of the 2020 Step-Down Manual.

C. Unit Management Team ("UMT") / Building Management Committee ("BMC")

Plaintiffs' Response to SUMF Section III.C: Defendants' heading is not an undisputed material fact that requires a response.

37. The 2013 O.P. 830.A defined the UMT as a "multi-disciplinary team comprised of staff assigned to work in a housing unit that tracks, measures, and advances or lowers offenders to appropriate privilege levels within SL-S based on established criteria. Ex. 16 at VADOC-00003147. Membership could consist of the unit manager, security supervisor, counselor, mental health, investigator, and other members as needed. *Id.* The UMT was responsible for assigning inmates on both the IM and SM pathways to privilege levels as they met program goals. *Id.* at VADOC-00003149, 3150.

Plaintiffs' Response to SUMF ¶ 37: Undisputed as to the contents of the 2013 Operating Procedure 830.A. Disputed as to any implication that the UMT provided meaningful review,

because it kept no records, Ex. 16, VDOC Answers to Written Deposition Questions at 1-3, and VDOC has proffered no evidence regarding the UMT review in practice.

38. With issuance of the 2015 Operations Strategy, the UMT's role was taken over by the BMC, "a grouping of individuals directly involved in the operations of a specific unit at Red Onion and Wallens Ridge." Exhibit 19 at VADOC-00002708. The BMC was described as being made up of, but not limited to, the Chief of Housing and Programs ("CHAP"), Unit Manager, Counselor, Unit Security Supervisor, Security Line Staff, and Treatment Officers. *Id.* The 2017 Operations Strategy specifically added the Qualified Mental Health Professional ("QMHP") to the list of BMC members. Ex. 11 at VADOC-00053116. The BMC continues to include all of these members in the 2020 Operations Strategy.⁷ Ex. 12 at VADOC-00053679.

Plaintiffs' Response to SUMF ¶ 38: Regarding the first two sentences, undisputed as to the contents of the 2015 Step-Down Manual (Defendants' Exhibit 9). Plaintiffs dispute that the contents of the 2015 Step-Down Manual are evidence of or reflect actual policy or practice, including because it was never signed and approved. *See supra* Plaintiffs' Response to SUMF ¶ 7. Regarding the final two sentences, undisputed as to the contents of the 2017 and 2020 Step-Down Manuals.

39. The 2015 and later Operations Strategies require the BMC to convene at least monthly to discuss inmate statuses and unit incentives and sanctions. *Id.* In addition to assigning inmates to privilege levels in SL-S, the 2015 and later Operations Strategies identify the BMC as being responsible for the following reviews and recommendations: discussing and preparing recommendations to the DTT discussing and adjusting individual pod incentives and sanctions; and reviewing inmates upon being removed from security protocols before they are returned to normal status. *Id.* According to Mathena, the BMC also determines which SL-6 program inmates should be placed in once they are approved to move from SL-S to SL-6. Mathena Tr. Day 1 at 260:10–262:6.

Plaintiffs' Response to SUMF ¶ 39: Regarding the first two sentences, undisputed as to the contents of the 2015, 2017, and 2020 Step-Down Manuals. Plaintiffs dispute that the contents of the 2015 Step-Down Manual are evidence of or reflect actual policy or practice, including because

⁷ The QMHP is referred to as the Mental Health Associate in the 2020 Operations Strategy. These individuals also have been referred to as Psychology Associates.

it was never signed and approved. *See supra* Plaintiffs' Response to SUMF ¶ 7. Regarding the third sentence, undisputed as to Mathena's testimony.

D. DTT

Plaintiffs' Response to SUMF Section III.D: Defendants' heading is not an undisputed material fact that requires a response.

40. The DTT always has been a component of the Step-Down Program with the Operations Strategies reflecting its membership, meeting frequency, and responsibilities evolving over time. *Compare* Exs. 7 at VADOC-00037980–81, 8 at VADOC-00002641–42, 9 at VADOC-00002706–07, 10 at VADOC-00056798–99, 11 at VADOC-00053114–15, 12 at VADOC-00053677–78. But the DTT always has been responsible for assigning inmates to a path and recommending when an inmate should transition from SL-S to SL-6. *Id.* The DTT meets as deemed necessary. Ex. 12 at VADOC-00053678. As of the 2017 Operations Strategy, the DTT is required to meet with and interview inmates as part of assigning them to a path. Ex. 11 at VADOC-00053115. The DTT is made up of the Chief of Housing and Programs, IPM/Cognitive Counselor, Unit Manager, Investigator/Intelligence Officer, Mental Health Associate, Counselor(s), and a Corrections Officer. Ex. 12 at VADOC-00053677.

Plaintiffs' Response to SUMF ¶ 40: Regarding the first, second, and fourth sentences, undisputed as to the contents of Step-Down Manuals over time. Plaintiffs dispute that the contents of the 2014, 2015, and 2016 Step-Down Manuals are evidence of or reflect actual policy or practice, including because they were never signed and approved. *See supra* Plaintiffs' Response to SUMF ¶ 7. Regarding the third and fifth sentences, undisputed as to the contents of the 2020 Step-Down Manual.

E. Wardens / ROC

Plaintiffs' Response to SUMF Section III.E: Defendants' heading is not an undisputed material fact that requires a response.

41. The Operations Strategies identify the following decision as the responsibility of the Wardens with an external review by the ROC: reassignment from SL-S to SL-6, reassignment from SL-6 to SL-5, and SL-5 transfers from Red Onion to Wallens Ridge with the decision referred to the ROC if the Wardens cannot reach consensus. *See, e.g., id.*

Plaintiffs’ Response to SUMF ¶ 41: Disputed insofar as the Step-Down Manuals do not reflect external review by the ROC of reassignment from SL-S to SL-6 or, where there is consensus among the Wardens, SL-5 transfers from Red Onion to Wallens Ridge. *See* ECF No. 381-7, VADOC-00037971 at -980; ECF No. 381-8, VADOC-00002632 at VADOC-00002641; ECF No. 381-9 at VADOC-00002706; ECF No. 381-10 at VADOC-00056798; ECF No. 381-11, VADOC-00053104 at -114; ECF No. 381-12, VADOC-00053668 at -677. Plaintiffs dispute that the contents of the 2015 and 2016 Step-Down Manual are evidence of or reflect actual policy or practice, including because they were never signed and approved. *See supra* Plaintiffs’ Response to SUMF ¶ 7. Otherwise, undisputed as to the contents of the Step-Down Manuals.

F. *External Review Team (“ERT”)*

Plaintiffs’ Response to SUMF Section III.F: Defendants’ heading is not an undisputed material fact that requires a response.

42. The Operations Strategies reflect that the ERT’s mandate has remained relatively constant: review the case of each inmate assigned to the Step-Down Program, including, but not limited to the following areas: whether the inmate is appropriately assigned to SL-S; whether the inmate meets the criteria for the IM or SM path to which they are assigned; and whether the DTT has made appropriate decisions to advance the inmate through the step-down process. *See, e.g.*, Ex. 7 at VADOC-00037979. In addition, the 2020 Operations Strategy specifies an additional area: review IM inmates for SL-6 Re-Entry if they will fall within their 24-month time frame before release before the next review. Ex. 12 at VADOC-00053676.

Plaintiffs’ Response to SUMF ¶ 42: Regarding the first sentence, disputed as to “each inmate assigned to the Step-Down Program,” as the Step-Down Manuals pre-dating 2017 indicate that the ERT reviewed only prisoners in Level S; further disputed as to “not limited to the following areas,” as the Step-Down Manuals pre-dating 2017 limit the scope of the ERT’s review to the enumerated review areas; but otherwise undisputed as to the contents of Step-Down Manuals over time, although Plaintiffs dispute that the contents of certain pre-2017 Step-Down Manuals are evidence of or reflect actual policy or practice. *See supra* Plaintiffs’ Response to SUMF ¶ 7. Further

disputed as to any suggestion that ERT reviews consider anything other than (1) whether the original decision to place a prisoner in Level S accords with VDOC policy, and (2) whether the prisoner should remain in the pathway to which the DTT assigned him. Ex. 4, Mathena Dep. at 478:20–479:9. Regarding the second sentence, undisputed as to the contents of the 2020 Step-Down Manual.

43. Although the 2012 Operations Strategy indicates that the ERT reviews were annual and the Operations Strategies before 2017 indicate that the ERT reviewed only SL-S inmates, the ERT review documents show that the ERT has conducted biannual reviews from the beginning and always has reviewed the cases of SL-S and SL-6 inmates. *See, e.g.*, Red Onion State Prison Segregation Reduction Step Down Plan, attached as Exhibit 28 (indicating a date of 6/3/2013 at VADOC-00001776 and SL-6 review starting at VADOC-00001806); Red Onion State Prison Segregation Reduction Step Down Plan, attached as Exhibit 29 (indicating a date of 12/3/13 at VADOC-00001830 and SL-6 review starting at VADOC-00001857).

Plaintiffs’ Response to SUMF ¶ 43: Defendants have not produced evidence sufficient to establish that the ERT “conducted biannual reviews from the beginning,” because records of two reviews from 2013 do not establish VDOC’s practice in 2012 or in 2014 prior to the amendment of the Step-Down Manual. *Compare* ECF No. 381-7, VADOC-00037971 at -979 *with* ECF No. 381-8, VADOC-00002632 at -640. Defendants have not produced evidence sufficient to establish that the ERT “always has reviewed the cases of SL-S and SL-6 inmates,” as two reviews conducted in 2013 do not establish VDOC’s practice in 2012 or in 2014–2017 prior to the amendment of the Step-Down Manual. *Compare* ECF No. 381-7, VADOC-00037971 at -979; ECF No. 381-8, VADOC-00002632 at -640; ECF No. 381-9, VADOC-00002697 at -705; ECF No. 381-10, , VADOC 00056788 at -797 *with* ECF No. 381-11, VADOC-00053104 at -113. Undisputed as to the contents of Step-Down Manuals over time and as to the two referenced 2013 ERT review documents, but Plaintiffs dispute that the contents of the 2014, 2015, and 2016 Step-Down Manual are evidence of or reflect actual policy or practice, including because they were never signed and approved. *See supra* Plaintiffs’ Response to SUMF ¶ 7.

44. The Operations Strategies reflect that the membership of the ERT always has included a mix of operations, mental health, and medical professionals. For example, the Chief of Mental Health Services always has been an identified member, and the Chief Physician was replaced in the membership by the Chief Nurse with the 2016 Operations Strategy. *See, e.g.*, Ex. 7 at VADOC-00037979; Ex. 10 at VADOC-00056797.

Plaintiffs’ Response to SUMF ¶ 44: Undisputed as to the contents of the Step-Down Manuals.

Plaintiffs dispute that the contents of the 2016 Step-Down Manual is evidence of or reflects actual policy or practice, including because it was never signed and approved. *See supra* Plaintiffs’ Response to SUMF ¶ 7.

45. Mathena testified that the ERT began consistently interviewing inmates as part of its review process in 2017. Transcript of Randall Mathena – Day 2 dated April 5, 2023 (“Mathena Tr. Day 2”), relevant portions attached in Exhibit 14 at 462:4–15. Multiple Plaintiffs testified that they were interviewed by the ERT. *See, e.g.*, Transcript of Vernon Brooks, Jr., dated March 21, 2023 (“Brooks Tr.”), relevant portions attached in Exhibit 30 at 223:3–18; Transcript of Brian Cavitt, dated March 20, 2023 (“Cavitt Tr.”), relevant portions attached in Exhibit 31 at 262:3–15; Transcript of Derek Cornelison dated April 11, 2023 (“Cornelison Tr.”), relevant portions attached in Exhibit 32 at 291:17–21; Transcript of Gerald McNabb dated April 4, 2023 (“McNabb Tr.”), relevant portions attached in Exhibit 33 at 180:14–181:10.

Plaintiffs’ Response to SUMF ¶ 45: Disputed as to the word “consistently,” because only five ERT interviews of prisoners occurred prior to May 14, 2019. *See* Ex. 4, Mathena Dep. at 471:9–472:4 (noting that all ERT interviews have been recorded and all recordings are preserved); Ex. 22, May 9, 2023 Email from M. Podolny and attachment (indicating only six interview recordings from 2018). Further disputed as to any implication that all inmates in the Step-Down Program are interviewed by the ERT. *See* Ex. 4, Mathena Dep. at 456:13–18, 456:19–21. Otherwise, undisputed as to the referenced deposition testimony.

IV. *Step-Down Program Conditions of Confinement*

Plaintiffs’ Response to SUMF Section IV: Defendants’ heading is not an undisputed material fact that requires a response.

46. During the entire period that the Step-Down Program has been operational, Red Onion has been an ACA accredited facility. Commission on Accreditation for Corrections Standards Compliance Reaccreditation Unit Audit [VDOC Red Onion] dated October 1–3, 2012,

attached as Ex. 34; dated October 19–21, 2015, attached as Exhibit 35; dated October 24–26, 2018, attached as Exhibit 36; American Correctional Association Accreditation Report, attached as Exhibit 37. As part of the accreditation process, ACA experts examine hundreds of aspects of VDOC’s policies and practices, including with respect to restrictive housing. *See, e.g., id.* VDOC’s Step-Down Program has always been in compliance with ACA standards relevant to restrictive housing. *Id.*

Plaintiffs’ Response to SUMF ¶ 46: Disputed. Red Onion has not always been in compliance with ACA standards relevant to restrictive housing. Red Onion received waivers or exceptions so that they were not required to comply with certain ACA standards. *See e.g.,* ECF No. 381-34, VADOC-00132213 at -235–54; ECF No. 381-35, VADOC-00132106 at -140–56; ECF No. 381-36, VADOC-00132162 at -191–207; ECF No. 381-37, VADOC-00174801 at -850–73. Plaintiffs further dispute that the ACA has found that the “Step-Down Program” complies with its standards, or that it evaluated the Step-Down Program at all. There is no evidence in the cited materials that the ACA evaluated the Step-Down Program’s review procedures as opposed to certain aspects of the conditions of confinement at Red Onion units, generally. *See generally* ECF No. 381-37, VADOC-00174801 at -832–45. Plaintiffs further dispute any suggestion that the ACA accreditation means that policies and procedures are being adhered to by staff or applied appropriately. *See* Ex. 2, Pacholke Rep. ¶ 46; ECF No. 383-54, Pacholke Rebuttal Rep. ¶¶ 8–11.

47. The conditions of confinement have evolved over time as VDOC has expanded privileges to inmates in SL-S and 6. But certain conditions, are, and always have been, consistent with the conditions in general population at Red Onion and Wallens Ridge. Each of the Operations Strategies specifies that inmates in the Step-Down Program “are provided with their basic requirements that meet constitutional standards such as, but not limited to, medical care, access to a law library, hygiene items, access to phone, in-cell education and religious programs, recreation, showers, and meals.” *See, e.g.,* Ex. 12 at VADOC-00053687.

Plaintiffs’ Response to SUMF ¶ 47: Regarding the first and second sentences, the information is immaterial, and Defendants do not cite admissible evidence. *See* Fed. R. Civ. P. 56(c)(2). Regarding the second sentence, certain conditions of confinement are not consistent with conditions in the general population at Red Onion and Wallens Ridge. *See e.g.,* ECF No. 381-12,

VADOC-00053668 at -716, -721 (2020 Step-Down Manual). Regarding the third sentence, disputed as to the implication that the enumerated conditions are the same in the Step-Down Program as in the general population. For example, Step-Down Program prisoners must conduct programming in-cell or in restraints while general population prisoners do not. *See* Ex. 23, Duncan Dep. at 106:16–19; ECF No. 383-33, Turner Dep. at 188:15–17, 211:3–5. Step-Down Program prisoners have recreation alone in cages or with small groups while general population prisoners have recreation with large groups. *See* ECF No. 383-33, Turner Dep. at 189:6–10, 191:12–13, 211:7–8. Step-Down Program prisoners eat in their cell while general population prisoners typically eat communally. *See* ECF No. 1 (Compl.) ¶ 98; ECF No. 126 (Answer & Aff. Defenses of Va. Dep’t of Corr.) ¶ 98. Step-Down Program meals often do not contain adequate portions and were sometimes denied to prisoners by officers. *See* Ex. 80, Wall Dep. at 224:2–227:18. Otherwise undisputed as to the contents of the Step-Down Manuals.

A. *Consistent Conditions*

Plaintiffs’ Response to SUMF Section IV.A: Defendants’ heading is not an undisputed material fact that requires a response.

Cells

48. VDOC houses inmates in the Step-Down Program in cells of the same size and configuration in which it houses inmates in general population. Transcript of Frederick Hammer dated March 21, 2023 (“Hammer Tr.”), relevant portions attached in Exhibit 38 at 187:21–188:8; Cornelison Tr. at 218:19–220:6, Ex. 32. The vast majority of inmates in general population share their cell with a cellmate, whereas inmates in the Step-Down Program have a cellmate only in the last phase of the program, if at all.⁸ *See, e.g.*, Ex. 12 at VADOC-00053699–700, 53716, 53721.

⁸ The 2012 Operations Strategy provided that inmates on the SM path at SL-6 Phase 2 are double celled. Ex. 7 at VADOC-00037998. Starting with the 2014 Operations Strategy, this aspect no longer applies to inmates in the SAM and SIP programs. Ex. 8 at VADOC-00002660–61.

Plaintiffs' Response to SUMF ¶ 48: Regarding the first sentence, undisputed as to the comparison between Step-Down Program and general population cells at Red Onion and Wallens Ridge; Defendants do not cite admissible evidence regarding the cell size and configuration at other general population facilities, *see* Fed. R. Civ. P. 56(c)(2). Regarding the second sentence, undisputed.

49. The lighting in the cells used for SL-S and SL-6, like the lighting in general population, remains on at all times. Brooks Tr. at 212:1–9; Transcript of Kevin Snodgrass dated April 12, 2023 (“Snodgrass Tr.”), relevant portions attached in Exhibit 39 at 258:5–18; Transcript of Peter Mukuria, dated March 28, 2023 (“Mukuria Tr.”), relevant portions attached in Exhibit 40 at 65:8–11. Jessica King testified that the lighting remains on in all cells so the corrections officers can check on inmates. Transcript of Jessica King dated June 1, 2022, relevant portions attached in Exhibit 41 at 229:17–230:16. The lighting is dimmed at night. Hammer Tr. at 103:11–14; Snodgrass Tr. at 258:5–18.

Plaintiffs' Response to SUMF ¶ 49: Regarding the first sentence, disputed insofar as Defendants imply that lighting conditions are the same, because in the general population, prisoners have ways of covering up the lights. *See* Ex. 101, Snodgrass Dep. at 258:12–16. Further, the lights in the Step-Down Program housing units are brighter than in population housing units. *See* Ex. 80, Wall Dep. at 232:11–13 ([REDACTED]); Ex. 14, Mukuria Decl. ¶ 20 (noting that the night light was brighter than at other VDOC facilities). Otherwise regarding the first and third sentences, undisputed as to the comparison between Step-Down Program and general population cells at Red Onion and Wallens Ridge; Defendants do not cite admissible evidence regarding the lighting at other general population facilities, *see* Fed. R. Civ. P. 56(c)(2). Regarding the second sentence, Defendants do not cite admissible evidence regarding the purpose of the lighting. *See* Fed. R. Civ. P. 56(c)(2).

50. Further Plaintiff testimony establishes that inmates were able to converse with each other while in their cells, in group settings, and at recreation. Brooks Tr. at 12:7–13:5, 244:20–245:17; Cavitt Tr. at 222:5–224:4; Cornelison Tr. at 37:11–38:5, 42:6–20, 64:20–67:14, 221:11–222:9; Hammer Tr. at 14:1–18:1; Mukuria Tr. at 17:10–18:17, 33:10–34:22, 237:19–239:9.

Plaintiffs' Response to SUMF ¶ 50: Disputed insofar as Defendants claim conditions of conversation are the same in the Step-Down Program as in the general population, and otherwise immaterial but undisputed. In the Step-Down Program, prisoners in cell can only speak with their cell neighbors and need to stand on their sink and speak through the piping or yell to be heard. Ex. 96, Brooks Dep. at 245:1–5; Ex. 56, Cavitt Dep. at 222:18–22; Ex. 94, Cornelison Dep. at 37:18–22, 221:11–20; Ex. 37, Hammer Dep. at 14:13–22; Ex. 95, Mukuria Dep. at 17:15–18:2. Prisoners are only eligible to program group settings after completing the first two books of the Challenge Series, *see* Ex. 23, Duncan Dep. at 106:14–19, these group settings include only seven or so inmates, *see* Ex. 37, Hammer Dep. at 16:16–17:1, inmates are restrained in “therapeutic modules” or secure chairs during programming, *see* ECF No. 383-33, Turner Dep. at 188:15–17, and there has been no group programming at all in Level S over the past two years, *see* Ex. 13, Bowman Decl. ¶ 23; Ex. 15, McClintock Decl. ¶ 19. At recreation, prisoners need to yell to be heard, particularly because they are in cages by themselves, the cages are covered in plexiglass, and there are only six to twelve recreation cages. *See* Ex. 94, Cornelison Dep. at 42:14–18, 64:14–15, 65:1–4; Ex. 37, Hammer Dep. at 15:14–16:7; Ex. 13, Bowman Decl. ¶ 20. In general population, prisoners congregate in larger groups at meals, recreation, and other instances, and can communicate with one another without yelling. *See* ECF No. 383-33, Turner Dep. 211:5–8.

Food

51. O.P. 861.3 provided from the beginning of the Step-Down Program that inmates in the Step-Down Program should receive the same number and type of meals served the general population. Ex. 42 at VADOC-0003213. That requirement has not changed. O.P. 841.4, attached as Ex. 43 at 14. During operation of the Step-Down Program, VDOC procedures never have allowed for the provision of food to be used as disciplinary measure. Ex. 44 at VADOC-0000313. For example, punitive diets (*i.e.*, bread and water) for inmates is prohibited. *Id.*

Plaintiffs' Response to SUMF ¶ 51: With respect to the first two sentences, undisputed that this is what the policy provides. Plaintiffs dispute, however, that the Policy is applied as written. Meals

for prisoners in the Step-Down Program often did not contain adequate portions and were sometimes denied to prisoners by officers. *See* Ex. 80, Wall Dep. at 224:2–227:18; Ex. 49, Haney Rep. ¶ 257 (describing dramatic weight loss of prisoners in Step-Down Program). Plaintiffs dispute that the word “should” indicates that VDOC interprets the cited language as a “requirement.” Plaintiffs further dispute the suggestion that meals eaten in cell—either via a tray that is delivered to one’s cell or after a walk to the chow hall to obtain a meal tray—is of the same “type” as a congregate meal. *See* Plaintiffs’ Responses to SUMF ¶¶ 23, 47.

Personal Hygiene

52. O.P. 861.3 provided from the beginning of the Step-Down Program that inmates in the Step-Down Program should receive laundry, barbering, and hair care services and be issued exchange clothing, bedding, and linen on the same basis as inmates in the general population. *Id.*

Plaintiffs’ Response to SUMF ¶ 52: Disputed insofar as Defendant’s statement is not supported by an Exhibit with a relevant page number and disputed in that the time frame of the Operating Policy cited does not extend to the beginning of the Step-Down Program.

53. It further provided that inmates in the Step-Down Program should be permitted to shower and shave not less than three times per week and have the opportunity to sponge bathe whenever they choose. *Id.* That requirement has not changed. Ex. 43 at 16.

Plaintiffs’ Response to SUMF ¶ 53: The first sentence is disputed insofar as Defendant’s statement is not supported by an Exhibit with a relevant page number and disputed in that the time frame of the Operating Policy cited does not extend to the beginning of the Step-Down Program. Undisputed as to the third sentence. Plaintiffs dispute, however, that the Policy is applied as written. Ex. 49, Haney Rep. ¶ 135 (describing denial of shower time); *Rivera v. Mathena*, 795 F. App’x 169, 176 (4th Cir. 2019) (plaintiff filed numerous grievances challenging denial of showers, among other things); Ex. 24, Khavkin Dep. at 112:1–15 (“You take a shower three times a week per policy. And a lot of times I wasn’t getting no shower. The officers, every time I wanted rec or shower, they would be like you didn’t put down for it.”).

Others

54. O.P. 861.3 provided that inmates in the Step-Down Program have the same mail regulations and privileges, including sending and receiving legal mail, as inmates in the general population. Ex. 42 at VADOC-00003214. Further, it provided that they have the ability to continue to conduct litigation on their own behalf and be afforded access to facility legal services, including the Facility Attorney and the use of Law Library materials. *Id.* Those requirements have not changed. Ex. 43 at 15.

Plaintiffs' Response to SUMF ¶ 54: With regard to the first sentence, not all mail privileges are the same in the Step-Down Program and in general population. “Inmates in the Restorative Housing Unit will not receive the contents of their packages unless approved by the Facility Unit Head. Disapproved items may be stored if approved for general population, returned to the sender at the expense of the inmate or the sender, or disposed of in accordance with Operating Procedure 802.1.” ECF No. 381-43, 2021 O.P. 841.4 at 15. Plaintiffs dispute the second and third sentences because O.P. 861.3 in fact states that prisoners “will not be prohibited” from conducting litigation on their own behalf (not that they have the ability to do so), and further states that they “*should* be afforded to access to facility legal services including the Facility Attorney and the use of Law Library materials *in accordance with Operating Procedure 866.3, Offender Legal Access.*” Defendants do not cite any evidence to clarify whether VDOC policy and practice ensures that law library materials are in fact accessible to prisoners in the Step-Down Program, let alone to the same extent as prisoners in general population.

55. O.P. 861.3 further provided that inmates in the Step-Down Program will have access to religious guidance and library books for personal use. Ex. 42 at VADOC-00003215. Those requirements have not changed. Ex. 43 at 17.

Plaintiffs' Response to SUMF ¶ 55: Undisputed as to the contents of the cited operating procedures. Plaintiffs dispute any suggestion that access to books is not restricted or otherwise equal to that provided to prisoners in general population. *See* ECF No. 383-17, Arrington Decl. ¶ 10.

56. The Operations Strategies consistently have indicated that inmates, regardless of path, have access to library books, religious materials, and legal materials. *See, e.g.*, Ex. 12 at VADOC-00053716, 721. They further consistently have provided that all inmate in the Step-Down Program have access to visitation, at a minimum, once per week for one hour with access to increased visitation at higher privilege levels. *Id.* at VADOC-00053725.

Plaintiffs' Response to SUMF ¶ 56: Regarding the first sentence, disputed insofar as Defendants claim privileges are the same in the Step-Down Program as in the general population. *See* ECF No. 383-50, Cavitt Decl. ¶ 26 (general population prisoners get five books every two weeks); ECF No. 381-12, VADOC-00053668 at -716, -721 (Level S inmates receive fewer than five books per two weeks). Further disputed insofar as Step-Down Program prisoners in practice are not able to access library books as often as is required by policy. *See* ECF No. 383-17, Arrington Decl. ¶ 10. Otherwise, immaterial but undisputed as to the contents of the Step-Down Manuals. Regarding the second sentence, disputed insofar as Defendants claim that visitation privileges are the same in the Step-Down Program as in the general population, because Step-Down Program prisoners are not permitted contact visits, but general population prisoners are. *See* ECF No. 381-12, VADOC-00053668 at -716, -721; ECF No. 383-33, Turner Dep. at 210:10-22. Otherwise, immaterial but undisputed as to the contents of the Step-Down Manual. Plaintiffs further dispute that contact visits for prisoners in Level 6 of the Step-Down Program are equivalent to contact visits in general population. *See* Ex. 14, Mukuria Decl. ¶ 25 (noting that when he was finally able to have a “contact visit” in 2019, he was handcuffed, shackled, and required to change into used and dingy clothing specially approved for visitation).

B. *Variable Conditions*

Plaintiffs' Response to SUMF Section IV.B: Defendants' heading is not an undisputed material fact that requires a response.

57. As discussed above, key aspects of the motivational EBP principle involve establishing privileges as earned rather than entitled and using privileges to motivate and introduce desirable behaviors. Hence, as shown in the tables titled “SM Privilege Levels” and “IM Privilege

Levels” in the appendices of the Operations Strategies, certain privileges, like the amount of commissary allowed per week and the number of phone calls allowed per month, increase as inmates advance in privilege levels within a path. *See, e.g.*, Ex. 12 at VADOC-00053716, 721.

Plaintiffs’ Response to SUMF ¶ 57: The first sentence is disputed as it lacks a citation to relevant evidence as required by Rule 56(c). In addition, Plaintiffs dispute that any EBP principle, including the motivational principle, as described by the Step-Down Manuals is consistent with true evidence-based principles. *See* Ex. 2, Pacholke Rep. ¶¶ 70–87, 215; ECF No. 383-54, Pacholke Rebuttal Rep. ¶¶ 15–20. The second sentence is undisputed as to the contents of the Step-Down Manual.

58. Further, a comparison of those same tables between Operations Strategies indicates that privileges have increase over time at a given privilege level within each path. For example, in the 2012 Operations Strategy, inmates at SL-S on either path were not eligible to have access to an MP3 player (a device for playing audio files). Ex. 7 at VADOC-00038017, 8022. With the 2017 Operations Strategy, inmates at all privilege levels were eligible to have access to JP5 players (a tablet device that provides access to audio files, email, photo files, etc.). Ex. 11 at VADOC-00053158, 166. In the 2012 Operations Strategy, inmates on the IM path were not eligible for a job until they reached SL-6. Ex. 7 at VADOC-00038021. In the 2014 Operations Strategy, they became eligible for a job at the IM-2 privilege level. Ex. 8 at VADOC-00002680. For example, Brian Cavitt testified that he had a job while he was at SL-6 on the IM path and that other inmates had jobs at privilege level IM-2. Cavitt Tr. at 248:7–249:13; Kevin Snodgrass also testified that he had a job at SL-6 on the IM path. Snodgrass Tr. at 260:13–18.

Plaintiffs’ Response to SUMF ¶ 58: Regarding the first sentence, immaterial, and Defendants do not cite admissible evidence. *See* Fed. R. Civ. P. 56(c)(2). Regarding the second sentence, disputed in part—the 2012 Step-Down Manual states that SL-S inmates at the IM-2 privilege level were eligible to purchase an MP3 player from commissary—and otherwise undisputed as to the contents of the 2012 Step-Down Manual. *See* ECF No. 381-7, VADOC-00037971 at -022. Regarding the third sentence, undisputed as to the contents of the 2017 Step-Down Manual. Regarding the fourth sentence, undisputed as to the contents of the 2012 Step-Down Manual. Regarding the fifth sentence, disputed that the 2014 Step-Down Manual provides that all IM-2 prisoners are eligible for jobs; the document cited provides only one possible job for people IM-2

(listed as “showers”) but provides certain “eligibility criteria,” including “[h]istory of safe job performance;” “[p]ositive trend in COMPAS, CTS, and URICA scores;” “[p]ositive Responsibility Behavior & Program Scores” (without defining how many “good,” “acceptable,” or “poor,” scores would qualify); and, most notably, requiring “[o]ne year charge [free]” behavior. *See* ECF No. 381-8, VADOC-00002632 at -680 (2014 Step-Down Manual). Many prisoners who satisfy each of these goals would no longer be in IM-2, which requires six months of charge-free behavior (along with other requirements), rendering any “eligibility” for the shower job illusory. *See id.* at -683. Regarding the sixth sentence as to Mr. Cavitt’s testimony, Plaintiffs dispute this characterization, because Mr. Cavitt merely testified that the Unit Manager gave a job to a [REDACTED]—meaning a favored prisoner in IM-2—but refused to provide one to him. *See* Ex. 56, Cavitt Dep. at 248:7–249:13. As to Mr. Snodgrass’s testimony, disputed. Mr. Snodgrass was never on the IM pathway, *see* ECF No. 174-26, Snodgrass Aff. ¶¶ 8, 17-18, and the cited testimony indicates he had a job cleaning showers while in the “phase pod,” which is not in the IM pathway, *see* Ex. 101, Snodgrass Dep. at 260:13–18. Generally, disputed insofar as Defendants claim that job privileges are the same in the Step-Down Program as in the general population. *See* ECF No. 381-12, VADOC-00053668 at -716, -721 (Step-Down Program prisoners eligible for no job, or few jobs); ECF No. 383-33, Turner Dep. at 211:9-11 (general population prisoners eligible for more jobs).

59. A summary of the privileges at the various privilege levels can be found in the Operations Strategies. Conditions related to time out of cell specifically are addressed here.

Plaintiffs’ Response to SUMF ¶ 59: Paragraph 59 does not present facts supported by evidence in violation of Rule 56(c).

Recreation

60. The Operations Strategies indicate that VDOC always has followed the ACA standards, at a minimum, for recreation. For example, the 2012 Operations Strategy indicates

VDOC permitted one hour per day of recreation outside in recreation cages, per the ACA standards, at all privilege levels in the Step-Down Program. Ex. 7 at VADOC-00038021, 8028. The 2017 Operations Strategy indicates that VDOC increase that time to two hours per day of recreation outside in recreation cages, per the ACA standards, at all privilege levels in the Step-Down Program. Ex. 11 at VADOC-00053157, 165.

Plaintiffs' Response to SUMF ¶ 60: Disputed that the cited material indicates that VDOC has always followed ACA standards (they merely state the words, “ACA standards” but do not indicate what they are or evaluate whether they are in compliance with such standards). Plaintiffs further dispute that the cited material reflects actual practices. As one VDOC employee testified, [REDACTED]

[REDACTED] Ex. 11, Mathena 30(b)(6) Dep. at 85:12–17; *see, e.g.*, ECF No. 174-19, Brooks Aff. ¶ 4 (“opportunities to leave my cell were routinely revoked by corrections officers with no reason given, or were inconsistently provided”); Ex. 14, Mukuria Decl. ¶¶ 23, 27, 32 (describing being provided significantly less recreation than described in the materials cited); Ex. 49, Haney Rep. ¶¶ 26–27, 136–137, 209, 215, 220, 247 (describing reports by many prisoners that out-of-cell time was often in practice far less than four hours). In addition, ACA audits conducted in 2012, 2015, 2018, and 2021 found that VDOC violated the minimum standards for recreation space in restrictive housing units, which marks a decade of violations since the inception of the Step-Down Program. ECF No. 381-34, VADOC-00132213 at -235 (2012 ACA Audit Committee Report); ECF No. 381-35, VADOC-00132106 at -140 (2015 ACA Audit Committee Report); ECF No. 381-36, VADOC-00132162 at -191 (2018 ACA Audit Committee Report); ECF No. 381-37, VADOC-00174801 at -850 (2021 ACA Audit Committee Report). An ACA audit conducted as late as October 2021 found that people in Level S were allowed [REDACTED]

[REDACTED] presumably referring to the outdoor cage. ECF No. 381-37, VADOC-00174801 at -841; *see also* ECF No. 381-36,

VADOC-00132162 at -180 (noting in 2018 that [REDACTED]
[REDACTED]).

61. Further, the 2012 Operations Strategy indicates VDOC permitted inmates on the SM path, after a seven-day assessment period, in-pod recreation one tier at a time for one hour on days there was no outside recreation, as well as outside recreation one tier at a time for one hour twice a week at SL-6 Phase 1. Ex. 7 at VADOC-00037997. It further indicates VDOC permitted in-pod recreation with both tiers at the same time for one hour on days there was no outside recreation and outside recreation with both tiers at the same time for one hour twice a week at SL-6 Phase 2. *Id.* at VADOC-00037998.

Plaintiffs' Response to SUMF ¶ 61: Plaintiffs dispute the suggestion in the first sentence that the cited material applies to all prisoners on the SM pathway, as opposed to prisoners in SL-6 Phase 1 (first sentence) and SL-6 Phase 2 (second sentence). Plaintiffs further dispute that the cited material is evidence of, or accurately reflects, actual practices in Level 6. *See* Ex. 14, Mukuria Decl. ¶¶ 27, 32 (describing being provided significantly less recreation than described in the materials cited in Level 6). As one VDOC employee testified, [REDACTED]
[REDACTED] ECF No. 383-33, Turner Dep. at 274:21–22.

62. The 2014 Operations Strategy indicates that SM path SL-6 further was divided by program. It indicates that inmates in the SAM and SIP units had the option as approved by staff to participate in in-pod group recreation. Ex. 8 at VADOC-00002660. It indicates inmates in the Step-Down Program had the same privileges as the 2012 Operations Strategy. *Id.* at VADOC-00002661.

Plaintiffs' Response to SUMF ¶ 62: Disputed insofar as VADOC-00002661 refers to “Level 6” of the Step-Down Program, not all inmates in the Step-Down Program. ECF No. 381-8, VADOC-00002632 at -661. Plaintiffs further dispute that the contents of the 2014 Step-Down Manual are evidence of or reflect actual policy or practice, including because it was never signed and approved. *See supra* Plaintiffs' Response to SUMF ¶ 7.

63. The 2015 Operations Strategy indicates that the outside congregate recreation for Step-Down Program Phase 2 inmates increased to three days per week. Ex. 9 at VADOC-00002730. The 2017 Operations Strategy indicates that the outside congregate recreation for Phase 1 also increased to three days per week. Ex. 11 at VADOC-00053138. It also indicates that inmates in the SAM and SIP units had the option, at a minimum of 30 days and with BMC

approval, for in-pod and outside group recreation up to one tier at a time. *Id.* at VADOC-00053137.

Plaintiffs’ Response to SUMF ¶ 63: Disputed insofar as it is not clear the outside recreation referred to in the Operations Policy is congregate recreation. In fact, the policy does not specify that such recreation is “group” recreation as it does in relation to SIP/SAM prisoners, as described below. Rather the Policy states, [REDACTED] *See* ECF No. 381-11, VADOC-00053104 at -138. Plaintiffs further dispute that the contents of the 2015 Step-Down Manual are evidence of or reflect actual policy or practice, including because it was never signed and approved. *See supra* Plaintiffs’ Response to SUMF ¶ 7. As to the third sentence, Plaintiffs dispute that prisoners “had the option” to participate in such recreation (as opposed to the option belonging to the building management committee as to whether or not to provide this privilege). Otherwise, Plaintiffs do not dispute that the cited page states that prisoners in SIP and SAM *may* participate in in-pod and outside group recreation, but only after 30 days and only [REDACTED] [REDACTED] ECF No. 381-11, VADOC-00053104 at -137.

64. The 2020 Operations Strategy indicates that outside recreation for the Step-Down Program Phase 1 and Phase 2 increased to four days per week, with in-pod recreation three days per week. Ex. 12 at VADOC-00053700. It further indicates that inmates at the SM-2 privilege level will have recreation in unrestrained small groups (maximum of 5). *Id.* For example, Plaintiff Gary Wall testified that, when he reached SM-2, he had daily, unrestrained, “congregate” recreation with other inmates in a recreation yard with a basketball court. Transcript of Gary Wall dated March 20, 2023 (Wall Tr.), relevant portions attached in Exhibit 46 at 61:5–62:8.

Plaintiffs’ Response to SUMF ¶ 64: Plaintiffs dispute that the Operations Strategy was applied as written. Randall Mathena testified that in February 2021, [REDACTED] [REDACTED] Ex. 11, Mathena 30(b)(6) Dep. at 85:12–17; *see also* Ex. 25, Collins Dep. at 110:8–9, 111:7–11 (during

regular shakedowns, incarcerated persons in the Step-Down Program may be entirely confined to their cells for 7–10 days at a time).

Meals

65. The 2012 Operations Strategy indicates VDOC permitted inmates on the SM path to walk to meals unrestrained, one tier at a time, with both tiers collected in the dining hall at SL-6 Phase 2. Ex. 7 at VADOC-00037998.

Plaintiffs’ Response to SUMF ¶ 65: Disputed in that the cited material applies only to prisoners at SL-6, not everyone in the SM Pathway. *See* ECF No. 381-7, VADOC-00037971 at -998. Plaintiffs note further that a policy permitting prisoners to walk to the dining hall to obtain a food tray which they are then required to eat in their cell is not the same as a congregate or group meal, and that the factual record does not indicate that people in SL-6 Step-Down pods were permitted to eat meals in a congregate setting. Ex. 14, Mukuria Decl. ¶ 33 (noting that during his time in security level 6 in 2019, he was permitted to walk to the chow hall to pick up a tray to bring back to his cell but was *not* permitted congregate meals).

66. The 2014 Operations Strategy indicates that SM path SL-6 was further divided by program. Inmates in the SAM and SIP units had the option as approved by staff to have group meals in the pod. Ex. 8 at VADOC-00002660. It indicates that inmates in the Step-Down Program could walk to the dining hall one tier at a time with no more than one tier in the dining hall at a time beginning at Phase 1. *Id.* at VADOC-00002661–62.

Plaintiffs’ Response to SUMF ¶ 66: The third sentence is disputed in that it applies specifically to Level 6 of the Step-Down Program, not prisoners in the Step-Down Program, generally. Plaintiffs note further that a policy permitting prisoners to walk to the dining hall to obtain a food tray which they are then required to eat in their cell is not the same as a congregate or group meal, and that the factual record does not indicate that people in SL-6 Step-Down pods were permitted to eat meals in a congregate setting. Ex. 14, Mukuria Decl. ¶ 33 (noting that during his time in security level 6 in 2019, he was permitted to walk to the chow hall to pick up a tray to bring back to his cell but was *not* permitted congregate meals). Plaintiffs further dispute that the contents of

the 2014 Step-Down Manual are evidence of or reflect actual policy or practice, including because it was never signed and approved. *See supra* Plaintiffs’ Response to SUMF ¶ 7.

67. The 2020 Operations Strategy indicates that, at a minimum of 30 days, the SAM and SIP unit inmates can have group meals in pod up to one tier at a time with review and approval by the BMC. Ex. 12 at VADOC-00053700.

Plaintiffs’ Response to SUMF ¶ 67: Disputed to the extent the Operations Strategy accurately describes actual practice because VDOC has cited to no evidence regarding actual practice.

Programming

68. The 2012 Operations Strategies noted that programming is part of engaging and promoting “pro-social behaviors in offenders as a cultural group including their social influences and lifestyle.” Ex. 7 at VADOC-00037977. As noted in the Operations Strategies, programming begins in cell for all SL-S inmates, but they recognize that “more effective programming is possible with increased counselor and offender direct contact and in groups of peers facilitated by counselors or other treatment staff.” *See, e.g.*, Ex. 12 at VADOC-00053687.

Plaintiffs’ Response to SUMF ¶ 68: Disputed to the extent the Operations Strategy accurately describes actual practice because VDOC has cited to no evidence regarding actual practice. Also disputed that the Operations Strategy “recogniz[ing]” a programming goal corresponds with actual practice related to programming.

69. The Operations Strategies provide that the basic program used with SL-S inmates will be the *Challenge Series*, a seven-journal series developed by the Federal Bureau of Prisons in conjunction with the Change Companies specifically for inmates in restrictive housing. *Id.* at VADOC-00053688. The 2020 Operations Strategy adds an alternative curriculum consisting of four Life Skills journals and a stand-alone DVD and self-assessment journal as an alternative curriculum to encourage inmates to participate in the Step-Down Program. *Id.*

Plaintiffs’ Response to SUMF ¶ 69: Undisputed as to the contents of the Step-Down Manuals. Plaintiffs dispute any suggestion that any such “alternative” curriculum has meant that prisoners are no longer required to complete the Challenge Series. *See, e.g.*, Ex. 25, Collins Dep. at 160:3–11.

70. They identify the primary curriculum for SL-6 as *Thinking for a Change* (“T4C”). *Id.* at VADOC-00053700. They also indicate that Reentry programs increased from the five identified in the 2012 Operations Strategy to the list found in the 2020 Operations Strategy, which

includes, but is not limited to, the following: Aggression Alternative Skills, Resources for Successful Living, P.R.E.P.S., *Challenge Series*, T4C, T4C Aftercare, ServSafe, Ready to Work, Cognitive Self Change, Re-Entry Planning, Re-Entry – Money Smart, and Decision Points. *Id.* at VADOC-00053690–91.

Plaintiffs’ Response to SUMF ¶ 70: As to the first sentence, undisputed as to the contents of the Step-Down Manual. As to the second sentence, Plaintiffs dispute that the cited materials indicate that the various programs provided in the list are in fact offered. The Step-Down Program in fact provides that [REDACTED] the programs mentioned, leaving open whether such programs *are* in fact offered to anyone. Otherwise, undisputed as to the contents of the Step-Down Program manual.

71. In addition, the Operations Strategies indicate that inmates on the IM path have been eligible for a structured art program and structured creative writing program at SL-6 since the 2012 Operations Strategy. Ex. 7 at VADOC-00038022.

Plaintiffs’ Response to SUMF ¶ 71: Plaintiffs dispute the availability of the “structured art program” and “structured creative writing program,” as neither program is among the available treatment programs listed in the Offender Orientation Handbook. Ex. 26, VADOC-00041077 at -084 (Offender Orientation Handbook 2017); Ex. 27, VADOC-00041095 at -108 (Offender Orientation Handbook 2020); Ex. 48, VADOC-00040809 at -822 (Offender Orientation Handbook 2021).

72. The 2012 Operations Strategy identifies program delivery as follows:

For IM offenders, in-cell programming will continue until the offender’s pattern of programming and motivation are better understood, and counselor to offender rapport has had time to be established. Dialogue is continuing to determine at what point IM Level 6, Level 1 and Level 2 might be implemented and when these program tools are appropriate. These factors can be used to help determine a safe time to begin moving the offender from their cell to Therapeutic Modules for programming. Therapeutic Modules and Program Chairs will be used with offenders during Level 1 in the SL6 Closed Pod. At Level 2 in the SL6 Closed pod, programming can be expanded to include small groups. Each offender should be assessed to determine their individual readiness and level of safety

as they progress to increasing levels of freedom in greater contact with others during programming.

For SM offenders, programming is recommended to be limited to in-cell for SMO. At SM1, programming can expand to include Therapeutic Modules. Program Chairs can be added at SM2. When SM offenders advance to Level 6 for the SIP, SAM, and Step-Down pods, programming can be expanded to include unrestrained small groups. Each offender should be assessed to determine their individual readiness and level of safety as they progress to increasing levels of freedom in greater contact with others during programming.

Id. at VADOC-00037989–90.

Plaintiffs’ Response to SUMF ¶ 72: Undisputed as to the content of the Operations Strategy.

However, Plaintiffs dispute that this is an accurate reflection of actual policy and practices. *See, e.g.*, Ex. 15, McClintock Decl. ¶¶ 19, 37 (noting that he completed all Challenge Series books in his cell and that “Step Down Phase 1 was the first time where I was able to participate in group meetings”); Ex. 13, Bowman Decl. ¶ 23 (“I have never had group meetings or other group programming related to the Challenge Series, even as I progressed to IM-1 and IM-2. In fact, I have not been pulled out of my cell for any group programming of any kind, despite requesting mental health programming and group programming for the Challenge Series.”).

73. The 2020 Operations Strategy changes the paragraph for SM inmates as follows:

For SM offenders, programming will be in approved program areas. When SM offenders advance to Level 6 for the SIP, SAM, and Step-Down pods, programming can be expanded to include unrestrained small groups. Each offender should be assessed to determine their individual readiness and level of safety as they progress to increasing levels of freedom in greater contact with others during programming.

Ex. 12 at VADOC-00053689.

Plaintiffs’ Response to SUMF ¶ 73: Undisputed as to the content of the Operations Strategy.

74. The 2012 and 2014 Operations Strategies limit small groups to no more than five inmates for both the SM and IM paths. *See, e.g.*, Ex. 8 at VADOC-00002681, 2689. With the

2015 Operations Strategy, small groups were increased to a maximum of 15 inmates at SL-6 on the SM path. Ex. 9 at VADOC-00002757.

Plaintiffs' Response to SUMF ¶ 74: Disputed insofar as the first sentence does not apply to SM/IM0, SM/IM1, or IM2. ECF No. 381-8, VADOC-00002632 at -681, -689. Plaintiffs further dispute that the contents of the 2015 Step-Down Manual are evidence of or reflect actual policy or practice, including because it was never signed and approved. *See supra* Plaintiffs' Response to SUMF ¶ 7.

C. *VDOC Eliminates Restrictive Housing*

Plaintiffs' Response to SUMF Section IV.C: Defendants' heading is not an undisputed material fact that requires a response. Plaintiffs dispute, however, any characterization that the Step-Down Program or VDOC's other policies related to Level S or Level 6 constitute the elimination of "restrictive housing" or segregation and that VDOC's replacement of the phrase "restrictive housing" with another term constitutes any change to Level S or Level 6 prisoners' experience other than a semantic one.

75. The ACA defines "restrictive housing" as "a placement that requires an inmate to be confined to a cell at least 22 hours per day for the safe and secure operation of the facility." Performance Based Standards and Expected Practices for Adult Correctional Institutions, Fifth Edition, selected portions attached as Exhibit 47 at PACHOLKE001095.

Plaintiffs' Response to SUMF ¶ 75: Undisputed.

76. In the Vera Report, Vera recommended that VDOC expand strategies to further increase out-of-cell time for inmates in restrictive housing. ECF No. 195-5 at 15. In October 2018, VDOC issued new guidance for out-of-cell recreation, mandating a minimum of 12 hours per week in outside recreation for inmates in IM-0 and SM-0, increasing to 18 hours per week for inmates at IM-2 and 20 hours per week for inmates at SM-2. ECF No. 195-13.

Plaintiffs' Response to SUMF ¶ 76: Regarding the first sentence, undisputed as to the contents of the Vera Report. Regarding the second sentence, undisputed as to the guidance issued, but disputed insofar as Defendants claim that prisoners actually received the stated amount of time out-of-cell. *See* ECF No. 383-33, Turner Dep. at 272:9-276:11 (snow and ice and quarterly

shakedowns prevent prisoners from getting four hours out-of-cell per day); Ex. 25, Collins Dep. at 110:8–9, 111:7–11 (quarterly shakedowns last seven to ten days); ECF No. 383-47, Younce Dep. at 236:17–237:2 (prisoners who need to use the bathroom have their rec cut short); Ex. 49, Haney Rep. ¶¶ 26–27, 136–137, 209, 215, 220, 247 (describing reports by many prisoners that out-of-cell time was often in practice far less than four hours); ECF No. 383-16, Cornelison Decl. ¶¶ 26, 32 (recreation denied for retaliation and only 1 hour per day out-of-cell for IM Closed Phase 1 and Phase 2 in 2019); Ex. 15, McClintock Decl. ¶ 21 (denying recreation arbitrarily and because cages were full); Ex. 13, Bowman Decl. ¶¶ 19-20 (recreation denied frequently with false reports of denial, and terminated when prisoner needs to use the bathroom). Further disputed as to the date. *See* ECF No. 195-13, VADOC-00037968 (dated September 2018). Plaintiffs further note that an ACA audit conducted in October 2021 found that people in Level S were allowed [REDACTED] [REDACTED] presumably referring to the outdoor cage. ECF No. 381-37, VADOC-00174801 at -841; *see also* ECF No. 381-36, VADOC-00132162 at -180 (noting in 2018 that [REDACTED] [REDACTED]).

77. On September 17, 2019, David Robinson, Chief of Corrections Operations, issued Chief of Corrections Operations Memorandum #040-2019, directing that, for male inmates in SL-S and SL-6, among others, “[e]ffective no later than January 6, 2020, each offender in the restrictive housing unit will be provided the opportunity to participate in a minimum of four hours out of cell activity, seven days a week.” ECF No. 195-14 at 1. Clarke reported to the Virginia General Assembly in VDOC’s Fiscal Year 2021 Report that, “in practice, the end of restrictive housing took place in January 2020.” Adoption of Restorative Housing in the Virginia Department of Corrections FY 2021 Report, attached as Exhibit 48 at VADOC-00134473.

Plaintiffs’ Response to SUMF ¶ 77: Regarding the first sentence, undisputed as to the contents of the memo, but disputed insofar as Defendants claim that prisoners actually receive four hours out-of-cell per day. *See* ECF No. 383-33, Turner Dep. at 272:9-276:11 (snow and ice and quarterly shakedowns prevent prisoners from getting four hours out-of-cell per day); Ex. 25, Collins Dep.

at 110:8–9, 111:7–11 (quarterly shakedowns last seven to ten days); ECF No. 383-47, Younce Dep. at 236:17–237:2 (prisoners who need to use the bathroom have their rec cut short); Ex. 49, Haney Rep. ¶¶ 26–27, 136–137, 209, 215, 220, 247 (describing reports by many prisoners that out-of-cell time was often in practice far less than four hours); ECF No. 383-16, Cornelison Decl. ¶¶ 26, 32 (rec denied for retaliation and only 1 hour per day out-of-cell for IM Closed Phase 1 and Phase 2 in 2019); Ex. 15, McClintock Decl. ¶ 21 (denying rec arbitrarily and because cages were full); Ex. 13, Bowman Decl. ¶¶ 19-20 (recreation denied frequently with false reports of denial, and terminated when prisoner needs to use the bathroom); *see also supra* Plaintiffs’ Resp. to SUMF ¶¶ 60, 76. Regarding the second sentence, immaterial but undisputed as to Director Clarke’s statements about VDOC’s terminology used to describe the Step-Down Program.

V. *Step-Down Program Mental Health Care*

Plaintiffs’ Response to SUMF Section V: Defendants’ heading is not a material fact that requires response.

78. Operating Procedure 730.2, Mental Health Services: Screening, Assessment, and Classification (“O.P. 730.2”) has required that all inmates receive an initial mental health screening at the time of admission to a VDOC facility to identify mental health services needs since before implementation of the Step-Down Program. Exhibit 49 at VADOC-00002893.

Plaintiffs’ Response to SUMF ¶ 78: Disputed in part. Undisputed as to the language included in O.P. 730.2. Disputed as to the mental health screening requirement pre-dating the implementation of the Step-Down Program. The Step-Down Program was implemented no earlier than the end of August 2012. ECF No. 381-7, VADOC-00037971 at -972 (dated August 28, 2012 with signatures completed by August 30, 2012) (2012 Step-Down Manual). O.P. 730.2 took effect on November 1, 2012, two months later. ECF No. 381-49, VADOC-00002892 at -892. Plaintiffs also dispute that the Operating Procedure was implemented as written or that mental health services needs were appropriately identified by staff tasked with the screening. Defendants

adduced no evidence supporting appropriate implementation of O.P. 730.2, and the factual record regarding mental health screenings at Red Onion’s intake, for example, indicate that mental health screenings regularly omitted mental health records and factors necessary to properly identify mental health conditions. Ex. 60, McDuffie Dep. at 254:6–9, 256:16–257:13; Ex. 59, Lee Dep. at 20:8–15, 49:12–20; Ex. 54, Hendricks Rep. ¶ 123 ([REDACTED] [REDACTED] and the screening that does occur [REDACTED] the person might be affected by conditions in the Step-Down Program.). Moreover, O.P. 730.2 does not govern Prisoners with Mental Disabilities, and Defendants fail to acknowledge that the governing procedure for incarcerated persons with disabilities did not require mental health screening until 2019. *Compare* ECF No. 383-108, VADOC-00040782 at -782 (2016 O.P. 801.3) *with* ECF No. 383-109, VADOC-00040788 at -792 (2019 O.P. 801.3). The requirement was added nearly a decade after the Step-Down Program began, on August 1, 2019, and after this lawsuit was filed. ECF No. 383-109, VADOC-00040788 at -788 (2019 O.P. 801.3).

A. Mental Health Classification Codes

Plaintiffs’ Response to SUMF Section V.A: Defendants’ heading is not a material fact that requires response.

79. O.P. 730.2 describes the VDOC Mental Health Classification Code System (“MH Code”) as providing “a standard approach through which the mental health status and service needs of individual inmates may be examined.” *Id.* at VADOC-00002897. Before issuance of O.P. 730.2 with an effective date of January 1, 2019, it identified the MH Codes as MH-X, MH-0, MH-1, MH-2, MH-3, and MH-4. *See, e.g., id.*

Plaintiffs’ Response to SUMF ¶ 79: Undisputed as to the content of O.P. 730.2 dated November 1, 2012. Disputed to the extent that Defendants contend the policy was implemented as written or reflects any kind of standard approach to mental health services. Plaintiffs further dispute that the MH Codes “provide[] a standard approach” to the mental health treatment VDOC may provide, or

not provide, any given incarcerated person. ECF No. 381-49, VADOC-00002892 at -897–98 (2012 O.P. 730.2). Plaintiffs dispute that the mental health codes were applied in any meaningful way because the factual record indicates that VDOC officials, including program directors and mental health professionals, were aware of incarcerated persons with the MH-0 classification who exhibited clear signs of mental illness and should have been classified as a higher MH code. Ex. 28, Lee (*Reyes*) Dep. at 165:22–167:8, 168:6–169:5, 174:1–175:6. Defendants omit from SUMF ¶ 79 the codes themselves. MH-X is the absence of any code and includes both offenders housed in facilities “with no QMHP to assign a Mental Health Classification Code” and “also offenders awaiting assessment by a QMHP.” ECF No. 381-49, VADOC-00002892 at -898. MH-0 is defined as “No Mental Health Services Needs,” for offenders without a “*documented* history of mental health treatment within the *past two* years” and excuses QMHPs from any “monitoring or treatment.” *Id.* (emphasis added). MH-1 is defined as “Minimal Impairment” but includes offenders with “a history of self-injurious behavior, suicidal gestures or attempts, or mental health treatment within the past two years.” *Id.* There is no provision for monitoring or treatment, and these offenders are regarded as MH-0 offenders are: not currently requiring treatment. *Id.* Moreover, VDOC’s mental health screening omits basic requests related to medical history, rendering suspect any claim that prisoners have no history of mental health treatment. *See* Ex. 60, McDuffie Dep. at 256:16–257:13 (identifying omission of medical history from mental health screening); *see also* Ex. 54, Hendricks Rep. ¶ 123. MH-2, the step above MH-1, is defined as “Mild to Moderate Impairment.” The key phrase for such prisoners is having a documented diagnosis with “symptoms that are usually mild to moderate but stable;” there is no example provided beyond the ability to “typically function satisfactorily in a general population setting for extended periods.” ECF No. 381-49, VADOC-00002892 at -898 (2012 O.P. 730.2). VDOC does

not require monitoring for mental health treatment even though MH-2 prisoners must be assigned to facilities with full time mental health services staff. *Id.* MH-3 prisoners are those with ongoing mental disorders who “may be chronically unstable” and require “ongoing mental health monitoring or mental health monitoring and treatment.” *Id.* at -897. MH-4 prisoners are “seriously mentally ill” and a danger to themselves or others or “may be substantially unable to care for self.” *Id.* There is no requirement for any MH code that the prisoner be prescribed psychotropic medication. *Id.* at -897–98.

80. O.P. 730.2 issued with an effective date of January 1, 2019, identifies a sixth MH Code:

- MH-2S (Substantial Impairment) – must have a documented significant DSM diagnosis that meets SMI criteria that requires monitoring by a QMHP and may require medication intervention—admission to an acute care treatment unit or other designated VDOC mental health unit is a probable periodic occurrence.

Ex. 50 at VADOC-00002934.

Plaintiffs’ Response to SUMF ¶ 80: Disputed in part. Undisputed as to the definition of MH-2S in Defendants’ Exhibit 50. Disputed as to Defendants’ omission of part of the definition of MH-2S, which requires that prisoners coded as MH-2S be assigned to institutions with full time mental health services staff. ECF No. 381-50, VADOC-00002925 at -934. Defendants likewise omit the limitation of MH-2S to certain enumerated disorders and to unnamed “serious impairment[s]” despite a distinct internal requirement for more severe impairments. *See infra* Defs.’ SUMF ¶ 81. Plaintiffs further dispute the implication that VDOC internally considers MH-2S to be merely “substantial impairment” where the required SMI designation is to present with “severe functional impairment.” *See, e.g.*, ECF No. 381-32 at 16 (VADOC-00004317) (Mental Health SMI Determination Form). Plaintiffs dispute that MH-2S, or any mental health classification, appropriately captured the incarcerated population at Red Onion or Wallens Ridge

with mental impairments. *See, e.g.*, Ex. 28, Lee (*Reyes*) Dep. at 174:1–175:6, 176:14–179:15. (recognizing prisoners classified as MH-0 who exhibited signs of mental illness and underclassification). Moreover, the SMI classification was limited to certain specific diagnoses, even where an incarcerated person had another, “severe functional impairment” and did not capture all incarcerated persons in Level S who could be designated as disabled. Ex. 62, Wells Rep. ¶ 178 (citing sworn testimony from Dr. Malone, Mr. Collins, and Dr. Lee).

81. It also defined “Offender with Serious Mental Illness (SMI)” as one “diagnosed with a Psychotic Disorder, Bipolar Disorder, Major Depressive Disorder, Posttraumatic Stress Disorder (PTSD) or Anxiety Disorder, or any diagnosed mental disorder (excluding substance abuse disorders) currently associated with serious impairment in psychological, cognitive, or behavioral functioning that substantially interferes with the person’s ability to meet the ordinary demands of living.” *Id.* at VADOC-00002926.

Plaintiffs’ Response to SUMF ¶ 81: Undisputed as to the quotation of O.P. 730.2 dated January 1, 2019. Plaintiffs dispute that this is an accurate or appropriate definition of “Serious Mental Illness.” *See, e.g.*, Ex. 54, Hendricks Rep. ¶ 49 n.21 (definition [REDACTED])

[REDACTED]). Plaintiffs further dispute the implication that VDOC internally considers MH-2S to be merely “serious impairment” where the required SMI designation is to present with “severe functional impairment.” *See, e.g.*, ECF No. 381-32 at 16 (VADOC-00004317) (Mental Health SMI Determination Form). Defendants, in fact, acknowledge that SMI is an under-inclusive designation because VDOC limited its application to certain specific diagnoses, even where an incarcerated person had another, “severe functional impairment” and did not capture all incarcerated person in Level S who could be designated as disabled. Ex. 62, Wells Rep. ¶ 178 (citing sworn testimony from Dr. Malone, Mr. Collins, and Dr. Lee).

82. The current version of O.P. 730.2 issued with an effective date of June 1, 2021 defines SMI as “Psychotic Disorders, Bipolar Disorders, and Major Depressive Disorder; any diagnosed mental disorder (excluding substance use disorders) currently associated with serious impairment in psychological, cognitive, or behavioral functioning that substantially interferes with

the person's ability to meet the ordinary demands of living and requires an individualized treatment plan by a qualified mental health clinician." Exhibit 51 at 3-4.

Plaintiffs' Response to SUMF ¶ 82: Disputed in part. Undisputed as to the quotation of O.P. 730.2 dated June 1, 2021. Disputed as to the omission of the definitions for psychological disorders, which "relat[e] to the mental and emotional state of an individual" and cognitive disorders, which "relat[e] to cognitive or intellectual abilities." Plaintiffs dispute that this is an accurate or appropriate definition of "Serious Mental Illness." *See, e.g.*, Ex. 54, Hendricks Rep. ¶ 49 n.21 (definition "likely results in under-identification of people with serious mental illness who require additional monitoring and treatment generally). Plaintiffs further dispute the implication that VDOC internally considers MH-2S to include a disorder that "substantially interferes" with ordinary living where the required SMI designation is to present with a "severe functional impairment." *See, e.g.*, ECF No. 381-32 at 16 (VADOC-00004317) (Mental Health SMI Determination Form). VDOC in fact limited SMI designation to certain specific diagnoses, even where an incarcerated person had another, "severe functional impairment" and did not capture all incarcerated persons in Level S who could be designated as disabled. Ex. 62, Wells Rep. ¶ 178 (citing sworn testimony from Dr. Malone in her capacity as a designated representative). Plaintiffs also dispute the materiality of any operating procedure with an effective date of June 1, 2021, to a lawsuit filed May 6, 2019; Defendants adduce no evidence supporting application of this specific timeframe policy prior to that date. Fed. R. Civ. P. 56(c).

B. *Inmate Screening*

Plaintiffs' Response to SUMF Section V.B: Defendants' heading is not a material fact that requires response.

83. Since the beginning of the Step-Down Program, VDOC policy has required that inmates placed in the Step-Down Program be screened by a QMHP before their placement or within one day of their placement in the Step-Down Program. *See, e.g.*, Ex. 42 at VADOC-00003210. O.P. 730.2 requires that an SMI determination be completed upon assignment to the

Step-Down Program if the inmate was last screened for an SMI more than one year ago. Ex. 51 at 14. Further, O.P. 730.2 requires, upon transfer from one VDOC facility to another, that a Psychology Associate (formerly QMHP) review an inmate's health records within three days of admission into the Step-Down Program and conduct an interview as indicated by the inmate's MH Code. *Id.* at 7.

Plaintiffs' Response to SUMF ¶ 83: Disputed in part. Undisputed as to the language of O.P. 861.3 in Defendants' Exhibit 42, and the language of O.P. 730.2 in Defendants' Exhibit 51. Plaintiffs dispute that the policy requirement for mental health screening upon placement into the Step-Down Program has been implemented as written or implemented effectively. The factual record also indicates that O.P. 730.2 had no such requirement regarding an SMI determination until the version effective June 1, 2021, two years after this lawsuit was filed. *Compare* ECF No. 381-51 at 14 (2021 O.P. 730.2) *with* ECF No. 381-50, VADOC-00002925 (2019 O.P. 730.2). Nor does the 2021 O.P. 730.2 require review of health records within three days of admission to the Step-Down Program as Defendants assert, *supra*; it requires only an interview "within five working days" of admission of a prisoner classified at MH-2 or higher to a facility, not to the Step-Down Program. ECF No. 381-51 at 7. No version of O.P. 730.2 prior to 2021 includes this requirement. *See*, ECF No. 381-49, VADOC-00002892 (2012 O.P. 730.2); ECF No. 381-50, VADOC-00002925 (2019 O.P. 730.2). Defendants adduced no evidence in support of how either of these written requirements for screening or interview is implemented or applied. The factual record indicates that, as implemented, these policies do not adequately screen prisoners for mental health conditions. *See, e.g.*, Ex. 59, Lee Dep. at 20:8–15, 49:12–20 (mental health screening omitted factors necessary to identify mental health conditions); Ex. 54, Hendricks Rep. ¶ 123 (

[REDACTED]

[REDACTED] and the screening that does occur [REDACTED]

[REDACTED] the person might be affected by conditions in the Step-Down Program.); Ex. 15,

McClintock Decl. ¶ 11 (“The last psychiatric evaluation I had was from when I was received by VDOC. To my memory, I never received a mental health evaluation at Red Onion.”).

C. Participation in Step-Down Program Reviews

Plaintiffs’ Response to SUMF Section V.C: Defendants’ heading is not a material fact that requires response.

84. As discussed above, the Operations Strategies detail mental-health staff participating in multiple review bodies that meet with and assess inmates’ progress in the Step-Down Program, including the BMC, DTT, and ERT. Dr. Denise Malone, VDOC’s Director of Mental Health, testified that participating in these reviews and assessments helps ensure that mental health staff are aware of an inmate’s mental health status and needs throughout their time in the Step-Down Program. Transcript of Denise Malone, Designated Representative & Individually dated April 12, 2023 (“Malone Tr.”), relevant portions attached in Exhibit 52 at 124:9–18.

Plaintiffs’ Response to SUMF ¶ 84: Disputed as to the actual implementation of the policies, procedures, and Step-Down Manuals as they are written. Plaintiffs likewise dispute any characterization that the mental health staff that participate in such reviews do so on behalf of prisoners as to explain the potential impact of their mental health impairments on the progress and behavior evaluated by these review bodies but rather, according to SUMF ¶ 84, for their own benefit to be “ensure [they] . . . are aware” of an inmate who, according to policy, should already be in their care. Dr. Malone testified that the mental health staff did not participate in reviews so much as attend in order to “decide what further interventions, screenings, referrals might be necessary.” ECF No. 381-52, Malone Dep. at 124:11–12. Plaintiffs dispute that the passive seeking of guidance by mental health staff on how to better treat prisoners’ impairments from non-medical professionals on the review board, may be characterized in any way as “participating in multiple review bodies.” The factual record indicates that, even when mental health staff attended DTT reviews, they “typically [did] not speak during a dual treatment team meeting unless called upon,” and “in many of the dual treatment team meetings [they] weren’t called upon.” Ex. 12,

Trent Dep. at 277:2–13. Mr. Trent, a psychology associate, acknowledged that “[m]ental health didn’t really have a say in what form of the step-down program [prisoners] were in” and their input “didn’t affect the ultimate outcome one way or another typically.” *Id.* at 278:22–279:17. Plaintiffs likewise dispute that Dr. Malone’s testimony, as cited in SUMF ¶ 84, refers to any review body besides the DTT. ECF No. 381-52, Malone Dep. at 124:9–18.

D. *Implementation of the Secure Diversionary Treatment Program*

Plaintiffs’ Response to SUMF Section V.D: Defendants’ heading is not a material fact that requires response.

85. VDOC implemented The Secure Diversionary Treatment Program (“SDTP”) in January 2018. ECF No. 201–7 at 1. The August 2018 Preliminary Analysis of VDOC SDTP states that the SDTP “provides a pathway for stabilizing [inmates] identified as SMI by providing appropriate mental health treatment services and programs based on individual evaluations and assessments.” *Id.* The SDTP Manual states that VDOC’s goal in implementing the SDTP is to minimize and/or eliminate the use of restrictive housing for SMI inmates. ECF No. 201–6 at 14. Dr. Malone testified that another goal is to create “structured and supportive environments” that helps SMI inmates function better both within a prison environment and upon their re-entry into the community. Malone Tr. at 260:4–9.

Plaintiffs’ Response to SUMF ¶ 85: Undisputed as to the timeframe VDOC began SDTP and to the language used in the August 2018 Preliminary Analysis and VDOC’s claimed “goal.” Disputed as to the characterization of SDTP as an alternative pathway “for stabilizing prisoners identified as SMI” and appropriate provision of mental health care. Plaintiffs further dispute the claim that SDTP will minimize or eliminate the use of restrictive housing for SMI inmates as SDTP is simply another form of solitary confinement. Prisoners in SDTP are likewise confined to their cell for more than twenty hours per day, restricted to outdoor recreation in a cage, denied access to congregate programming, including religious activities, may only participate in out-of-cell programming while shackled to a chair, have restricted phone call access, are subject to strip searches in order to leave their cells, and are restrained and leashed in order to leave their cells. Brief for Appellant at 4, *Cartagena v. Lovell*, No. 22-7279 (4th Cir. May 11, 2023). These

characteristics are some of the defining features of the Step-Down Program, and referring to the program by another name cannot erase the shared structure and treatment of incarcerated persons. The Fourth Circuit understands “solitary confinement” to include incarceration under conditions such as these, whether the prison names them “Special Management Units;” “administrative segregation,” or “supermax facilities.” *Incumaa v. Stirling*, 791 F.3d 517, 519, 521 (4th Cir. 2015), *as amended* July 7, 2015; *Smith v. Collins*, 964 F.3d 266, 268, 269 (4th Cir. 2020); *Thorpe v. Clarke*, 37 F.4th 926, 930 (4th Cir. 2022). Plaintiffs dispute Dr. Malone’s testimony as incorrectly quoted as well as not material to the adjudication of claims or affirmative defenses. VDOC’s “goal” in creating the SDTP program is irrelevant to the actual implementation of that program, which did not distinguish it from the Step-Down Program or from solitary confinement more generally.

86. O.P. 841.4 bars the assignment of an inmate to restrictive for more than 28 days without an exemption request. Ex. 43 at 7. Dr. Malone testified that, within ten days of being assigned to restorative housing, VDOC needs to have a plan for the inmate and, within 28 days, must move the inmate out of restorative housing. Malone Tr. at 257:3–6.

Plaintiffs’ Response to SUMF ¶ 86: Disputed as to the characterization of O.P. 841.4 barring assignment of any prisoner to restrictive housing for more than 28 days without an exemption request; O.P. 841.1 applies only to prisoners categorized as “SMI.” Moreover, O.P. 841.4, as cited by Defendants, became effective on August 1, 2021; Defendants adduce no evidence supporting application of this specific timeframe policy prior to that date. Fed. R. Civ. P. 56(c). Plaintiffs further dispute the incomplete citation to Dr. Malone’s testimony, in which she claimed SDTP was created to be “the least restrictive alternative possible” to “restorative housing.” ECF No. 381-52, Malone Dep. at 257:3–9; *see supra* Plaintiffs’ Resp. to SUMF ¶ 85 (identifying restrictive, solitary nature of SDTP). Plaintiffs further dispute that VDOC employees implemented the timeframe required in O.P. 841.4. Defendants cited no evidence in support that the timeframe was enforced,

and the factual record indicates that prisoners were routinely left in limbo, far beyond the 28–30 days VDOC estimates. *See, e.g.*, Ex. 11, Mathena 30(b)(6) Dep. at 320:15–18 (claiming 30 days spent in Step-Down orientation); ECF No. 174-24, Mukuria Aff. ¶¶ 2, 9 (spending more than 80 days without assignment). Plaintiffs also observe that VDOC’s SMI designation was underinclusive, almost certainly leaving prisoners in restrictive housing without exemption requests for longer than thirty days. Ex. 62, Wells Rep. ¶ 178 (citing sworn testimony from Dr. Malone, Mr. Collins, and Dr. Lee); Ex. 28, Lee (*Reyes*) Dep. at 174:1–175:6, 176:14–179:15. (recognizing prisoners classified as MH-0 who exhibited signs of mental illness and underclassification); Ex. 54, Hendricks Rep. ¶ 49 n.21 (definition [REDACTED]).

87. According to the Vera Report, VDOC transferred all SMI inmates out of Red Onion and into SDTP facilities, and no additional SMI inmates were transferred to Red Onion after implementation of the SDTP. ECF No. 195-5 at 37.

Plaintiffs’ Response to SUMF ¶ 87: Plaintiffs dispute that any data related to VDOC contained within the Vera report constitutes “fact,” and the Vera Report is not admissible evidence to prove the facts alleged in this paragraph. VDOC did not provide Vera with raw data for an independent analysis or to verify any of its claims. Vera did not independently analyze VDOC’s raw data but instead relied upon conclusions provided by VDOC, with little mechanism for quality control or challenge to the underlying data. *See* ECF No. 383-54, Pacholke Rep. ¶ 40; ECF No. 195-5, VADOC-00003442 at -450. Plaintiffs further dispute that VDOC employs an accurate or appropriate definition of “Serious Mental Illness.” *See, e.g.*, Ex. 54, Hendricks Rep. ¶ 49 n.21 (definition [REDACTED]). Defendants’ definition of SMI does not comport with generally accepted definitions of the term, which are far broader. For example, the Substance Abuse and Mental Health Administration, a federal agency, defines “serious mental illness” as “a

diagnosable mental, behavior, or emotional disorder that causes serious functional impairment that substantially interferes with or limits one or more major life activities.” SAMHSA.gov, “Mental Health and Substance Use Disorders,” (available at <https://www.samhsa.gov/find-help/disorders>); *compare id. with* ECF No. 383-76, VADOC-00002882 at -882 (restricting SMI classification to diagnosed disorders “associated with serious impairment . . . that substantially interfere[] with the person’s ability to meet the ordinary demands of living”) (2018 O.P. 730.2). Plaintiffs dispute, therefore, that “all SMI inmates” were transferred out of Red Onion in light of VDOC’s systematic under-identification of people with serious mental illness. Mr. Molter’s analysis demonstrates that prisoners classified as MH-2S, MH-3, or MH-4 who were in the Step-Down Program as of May 6, 2018 collectively spent 56,384 days at Level S and Level 6. Ex. 8, Molter Supp. Rep. Updated Ex. 16a. In light of VDOC’s claim that “no additional SMI inmates were transferred to Red Onion” after SDTP began in January 2018, the factual record supports the significant under-identification Dr. Hendricks observes.

VI. *Outside Interest in the Step-Down Program*

Plaintiffs’ Response to SUMF Section VI Heading: Defendants’ heading is not an undisputed material fact that requires a response.

88. In a 2019 presentation, VDOC identified individuals and entities seeking to learn more about the Step-Down Program for which it had hosted tours, including Departments of Corrections from 12 other states: Georgia, Iowa, Kentucky, Maine, New York, Ohio, Pennsylvania, North Carolina, South Carolina, South Dakota, Tennessee, and Wyoming. Red Onion State Prison “Partnering Science with Corrections,” attached as Exhibit 53, at VADOC-00043386. Robinson testified that the ACA had asked VDOC to provide training on restrictive housing and that most states that attend when VDOC has done such training want to visit to implement VDOC’s approach. Transcript of A. David Robinson dated February 16, 2023 (“Robinson Tr.”), relevant portion attached in Exhibit 54 at 384:12–385:2.

Plaintiffs’ Response to SUMF ¶ 88: Disputed in part. Plaintiffs do not dispute that Defendants’ Exhibit 53 identified twelve Departments of Corrections that took tours of Red Onion between 2013 and 2019 to learn more about [REDACTED] ECF No. 381-53, VADOC-

00043364 at -386 (“Partnering Science with Corrections” Pres.). Plaintiffs dispute that such tours are material to the adjudication of any of Plaintiffs’ claims or Defendants’ affirmative defenses. Plaintiff also dispute Defendants’ characterization of Mr. Robinson’s testimony paraphrased here. Mr. Robinson’s testimony does not support any connection between these tours and the supposed ACA request, and the state mentioned in Mr. Robinson’s testimony is not listed in the presentation. *Compare id. with* Ex. 5, Robinson Dep. at 384:12–385:2 (identifying New Jersey and no other state). Mr. Robinson’s testimony likewise does not support any personal knowledge as to what motivates attendance at such lectures. Ex. 5, Robinson Dep. at 384:21–385:2; Fed. R. Evid. 602. Regardless, the fact of providing trainings at ACA’s request or individual attendees’ motivations are not material to the adjudication of any of Plaintiffs’ claims or Defendants’ affirmative defenses.

VII. *Legislation*

Plaintiffs’ Response to SUMF Section VII Heading: Defendants’ heading is not an undisputed material fact that requires a response.

A. 2019

Plaintiffs’ Response to SUMF Section VII.A Heading: Defendants’ heading is not an undisputed material fact that requires a response.

89. The Virginia General Assembly directed, effective July 1, 2019 that, among other things, VDOC’s “restrictive housing shall, at a minimum, adhere to the standards adopted by the American Correctional Association, the accrediting body for the corrections industry.” Va. Code § 53.1-39.1(A).

Plaintiffs’ Response to SUMF ¶ 89: Undisputed that the quoted language is in Virginia Code § 53.1-39.1(A), although it is contained in the definition of “restrictive housing,” and Plaintiffs do not know whether it is interpreted as an affirmative obligation on VDOC or whether it applies to all housing, including the housing at issue in this action, or only housing that VDOC deems “restrictive housing.” To the extent this is a material fact, which Plaintiffs dispute, Plaintiffs

further dispute the characterization of the ACA as a valid accreditor of state institutions or arbiter of those institutions' compliance with the Constitution or with federal law; the ACA is a for-profit organization which charges for access to the standards it issues. The factual record identifies that ACA accreditation does not reflect ADA compliance, for example. *See, e.g.*, ECF No. 383-111, WELLS001826 at -826–27 (DOJ letter to ACA-accredited Department of Corrections, identifying multiple ADA violations); ECF No. 383-82, Vare Dep. at 222:8–11 (admitting ACA accreditation does not determine ADA compliance); ECF No. 381-37, VADOC-00174801 at -850 (2021 ACA Audit Committee Report) (accrediting ROSP despite failure to [REDACTED] [REDACTED]).

90. The same statute requires VDOC to report certain information to the General Assembly and the Governor on or before October 1 of each year for the previous fiscal year. Va. Code § 53.1-39.1(B). The required information includes the number of inmates placed in and released from restrictive housing;⁹ the number of days spent in restrictive housing; the number of inmates released from restrictive housing directly into the community; and changes to VDOC procedures relating to the use and conditions of restrictive housing and SAM units. *Id.*

Plaintiffs' Response to SUMF ¶ 90: Undisputed, to the extent that Defendants accurately paraphrase part of their reporting requirement pursuant to Virginia Code § 53.1-39.1(B). Disputed because this statute is not a material fact for the purposes of adjudication of any of Plaintiffs' claims or Defendants' affirmative defenses. Plaintiffs observe that these reports contain information which contradicts Defendants' assertions of undisputed material facts in support of their Motion for Summary Judgment; for example, the Fiscal Year 2022 report indicates that two inmates were released directly into the community from the Step-Down Program. *Compare* SUMF ¶ 30 (claiming policy that inmates diverted into re-entry program "at least" two years before release "unchanged" since beginning of Step-Down Program) *with* Ex. 20, VDOC *Adoption of*

⁹ Restrictive housing in this context includes inmates in short-term restrictive housing who are not in the Step-Down Program at issue in this case.

Restorative Housing Report, Fiscal Year 2022 at 9; *see also infra* Plaintiffs' Response to SUMF ¶ 91.

91. VDOC reported that there were 37 SL-S inmates as of June 30, 2019 in the FY2019 Report. *The Reduction of Restrictive Housing in the Virginia Department of Corrections: FY2019 Report*, attached as Ex. 55 at VADOC-00003291. It reported that there were 36 SL-S inmates as of June 30, 2020 in the FY2020 Report. *The Reduction of Restrictive Housing in the Virginia Department of Corrections: FY2020 Report*, attached as Ex. 56 at VADOC-00133191. It reported that there were 63 SL-S inmates as of June 30, 2021 in the FY2021 Report. *Adoption of Restorative Housing in the Virginia Department of Corrections: FY2021 Report*, attached as Ex. 57 at VADOC-00134476. It reported that there were 55 SL-S inmates as of June 30, 2022 in the FY2022 Report.¹⁰

Plaintiffs' Response to SUMF ¶ 91: Undisputed as to the accurate paraphrasing of VDOC's reports. Disputed as to the characterization of these numbers as accurately reflecting the number of inmates in Level S as of those dates. Mr. Molter's supplemental report identifies VDOC's inaccurate record-keeping and struggle to provide accurate, comprehensive data from which to work. *See supra* Plaintiffs' Response to SUMF ¶ 1. Plaintiffs further dispute the relevance of these statistics to the factual record, to Plaintiffs' claims, and to Defendants' affirmative defenses because they exclude Level 6 prisoners, who form part of the class in this litigation. Though Mr. Molter's analysis examines the number of class members classified as Level 6 as of December 31 instead of June 30, including these class members would more than double the number of prisoners VDOC reports to the Legislature. *See* Ex. 8, Molter Supp. Rep. Updated Ex. 2. Plaintiffs further dispute the veracity of any material VDOC cites in these reports, which contain information contradicting Defendants' assertions of undisputed material facts in support of their Motion for Summary Judgment. *See supra* Plaintiffs' Response to SUMF ¶ 90.

¹⁰ Publicly available at <https://rga.lis.virginia.gov/Published/2022/RD472/PDF>.

B. 2023

Plaintiffs’ Response to SUMF Section VII.B Heading: Defendants’ heading is not an undisputed material fact that requires a response.

92. The Virginia General Assembly codified certain aspects of the current Step-Down Program, effective July 1, 2023, in Va. Code § 53.1-39.2. That statute states in relevant part that “[n]o incarcerated person in a state correctional facility shall be placed in restorative housing unless (i) such incarcerated person requests placement in restorative housing with informed voluntary consent, (ii) such incarcerated person needs such confinement for his own protection, (iii) there is a need to prevent an imminent threat of physical harm to the incarcerated person or another person; or (iv) such person’s behavior threatens the orderly operation of the facility” Va. Code § 53.1-39.2(B). It further states that “[a]n incarcerated person who has been placed in restorative housing shall be offered a minimum of four hours of out-of-cell programmatic interventions or other congregate activities per day aimed at promoting personal development or addressing underlying causes of problematic behavior, which may include recreation in a congregate setting, unless exceptional circumstances mean that doing so would create significant and unreasonable risk to the safety and security of other incarcerated persons, the staff, or the facility” and that less than four hours per day may be provided “only in the circumstance that the facility administrator determines a lockdown is required to ensure the safety of the incarcerated persons in the facility.” Va. Code § 53.1-39.2(B)(5), (D).

Plaintiffs’ Response to SUMF ¶ 92: Undisputed, to the extent that Defendants accurately quote subsections of Virginia Code § 53.1-39.2. Disputed because this statute is not a material fact for the purposes of adjudication of Plaintiffs’ claims or Defendants’ affirmative defenses. Plaintiffs dispute that all requirements of § 53.1-39.2 are currently or ever have been aspects of the Step-Down Program. For example, Plaintiffs dispute that persons currently in Level S are getting any “hours of out-of-cell programmatic interventions or other congregate activities per day,” let alone four. *See, e.g.*, Ex. 15, McClintock Decl. ¶ 37 (“Step Down Phase 1 was the first time where I was able to participate in group meetings.”); Ex. 13, Bowman Decl. ¶¶ 20, 23. Plaintiffs also dispute paragraph 92 to the extent that Defendants contend they comply with the law, the law provides protections in compliance with the ADA or constitutional Due Process and Eighth Amendment protections, and these standards have applied since the Step-Down Program’s inception. *See, e.g.*, ECF No. 383-1, VADOC-00052689 at -740, -746 (providing only one hour of outside recreation)

(2012 Step-Down Manual); ECF No. 383-15, Wall Decl. ¶¶ 10, 19; ECF No. 383-26, VADOC-00053104 at -157, -165 (providing only two hours of outside recreation) (2017 Step-Down Manual). Moreover, VDOC admits that it did not enforce its policy mandates for time spent out of cell, and prisoners in the Step-Down Program did not receive [REDACTED] [REDACTED] Ex. 11, Mathena 30(b)(6) Dep. at 85:12–86:2; ECF No. 383-17, Arrington Decl. ¶ 17; Ex. 25, Collins Dep. at 92:22–93:9; 93:17–94:4 (identifying change in recording method to make out-of-cell time appear longer than it was); ECF No. 383-71, VADOC-00158348 (instructing VDOC employees to claim more than four hours of time offered to inmates regardless of true amount). VDOC employees are responsible for these failures, and the factual record shows they deny out-of-cell time for more than just lockdowns as § 53.1-39.2(D) permits. *See, e.g.*, ECF No. 383-33, Turner Dep. at 272:9–276:11 (denying out of cell time for prison-wide quarterly shake-downs, holidays, and inclement weather); Ex. 25, Collins Dep. at 110:8–9, 111:7–11 (confining prisoners in the Step-Down Program to their cells for 7–10 days at a time); ECF No. 383-47, Younce Dep. at 236:17–237:2 (cutting short out-of-cell recreation if a prisoner needs to use the restroom). Further, out-of-cell time offered to people in the Step-Down Program consists of all time spent out-of-cell, including non-programming or congregate activities such as showers, time spent at a kiosk to download music, or individual recreation. *See, e.g.*, Ex. 25, Collins Dep. at 68:19–21, 78:9–16; ECF No. 383-34, Mefford Dep. at 73:18–74:1; Ex. 49, Haney Rep. ¶ 138. VDOC operating procedures and practices related to the Step-Down Program—which remain unchanged since the effective date of Virginia Code § 53.1-39.2—do not comply with other aspects of that code section, including: the requirement that the placement of people in *restorative housing* “shall be reviewed once a week and the reason why a less restrictive setting could not be utilized shall be recorded in writing by the facility administrator and placed in the incarcerated

person's institutional file" (Virginia Code § 53.1-39.2(C)); the requirement that out-of-cell time may only be restricted "in the circumstance that the facility administrator determines a lockdown is required to ensure the safety of the incarcerated persons in the facility" (Virginia Code § 53.1-39.2(D)); the requirement that any person placed in restorative housing be given a "medical evaluation and a mental health evaluation within one workday of such placement, unless such evaluation was completed within the previous week" (Virginia Code § 53.1-39.2(E)); and the requirement that there be a "defined and publicly available policy and procedure for the process of transitioning an incarcerated person placed in restorative housing out of such restorative housing and back to the general population of the facility, subject to the approval of the Director" (Virginia Code § 53.1-39.2(F)).

VIII. *Legal Challenges to the Step-Down Program*

Plaintiffs' Response to SUMF Section VIII Heading: Defendants' heading is not an undisputed material fact that requires response.

93. Numerous inmates have brought suit challenging the constitutionality of the Step-Down Program, on a variety of grounds. These suits have not been successful. For instance, In April 2015, Plaintiff Peter Mukuria filed a civil rights action under 42 U.S.C. § 1983 alleging, among other things, that the Step-Down Program unfairly prolonged his confinement under segregation conditions in violation of his Due Process rights and that his living conditions as an IM-0 inmate violated his Eighth Amendment rights. *Mukuria v. Clarke*, No. 7:15CV00172, 2016 WL 5396712 (W.D. Va. Sep. 27, 2016) (Jones, J.), *aff'd*, 706 F. App'x 139 (4th Cir. 2017). After careful review of O.P. 830.A, this Court concluded that Mukuria had no constitutionally protected liberty interest in avoiding any particular security classification or reclassification under VDOC policy. *Id.* at *18–19. This Court also granted the defendants summary judgment on the Eighth Amendment claim because Mukuria failed to allege that the restrictions caused him any serious or significant harm. *Id.* at *11.

Plaintiffs' Response to SUMF ¶ 93: Other lawsuits brought by members of the class or even by named Plaintiffs are not facts material to the adjudication of any claims or defenses in this action. Plaintiffs do not dispute that Mr. Mukuria, proceeding *pro se*, filed a civil rights action pursuant to 42 U.S.C. § 1983. *Mukuria*, 2016 WL 5396712, at *1. Plaintiffs dispute Defendants'

description of the case and its citations to pages 18 and 19, which are not included in the eleven-page opinion. *See generally id.* This Court granted summary judgment on that action in part because Mr. Mukuria’s factual allegations did not support the claims brought. *Id.* at *9–11. This class action lawsuit is differently situated and makes arguments distinct from Mr. Mukuria’s. Moreover, reference to unpublished district court opinions on Step-Down Program procedures have no precedential value, as the Fourth Circuit has explained repeatedly, including in this case. *Thorpe*, 37 F.4th at 943 n.6 (“[P]ublished district court opinions, like unpublished opinions from our Court, have no precedential value, and we do not consider them when surveying clearly established law.”) (internal quotation marks omitted).

94. In a similar lawsuit, this Court granted the defendants summary judgment where the plaintiff alleged that his conditions of confinement at IM status “caused him to suffer anxiety, headaches, loss of sleep, physical deterioration, weight loss, and ““(to [his] belief) akathisia.”” *Obataiye-Allah v. Va. Dep’t of Corr.*, No. 7:15CV00230, 2016 WL 5415906, at *6 (W.D. Va. Sept. 28, 2016), *aff’d sub nom. Obataiye-Allah v. Clarke*, 688 F. App’x 211 (4th Cir. 2017). The Court concluded that the inmate failed to state facts “showing that any of these health concerns qualifies as a serious or significant harm.” *Id.*

Plaintiffs’ Response to SUMF ¶ 94: Other lawsuits brought by members of the class or even by named Plaintiffs are not facts material to the adjudication of any claims or defenses in this action. Plaintiffs do not dispute that Mr. Obataiye-Allah, proceeding *pro se*, filed a civil rights action pursuant to 42 U.S.C. § 1983 and to the Religious Land Use and Institutionalized Persons Act. This Court granted summary judgment on Mr. Obataiye-Allah’s § 1983 claim in part because Mr. Obataiye-Allah’s factual allegations did not support the claims he brought. *Id.* at *10–13. This class action lawsuit is differently situated and makes arguments distinct from Mr. Obataiye-Allah’s. Moreover, reference to unpublished district court opinions on Step-Down Program procedures have no precedential value, as the Fourth Circuit has explained repeatedly, including in this case. *Thorpe*, 37 F.4th at 943 n.6 (“[P]ublished district court opinions, like unpublished

opinions from our Court, have no precedential value, and we do not consider them when surveying clearly established law.”) (internal quotation marks omitted).

95. Between the filing of Mukuria’s first lawsuit challenging the Step-Down Program and this lawsuit, multiple VDOC inmates, including other named Plaintiffs in this lawsuit, filed more than a dozen separate lawsuits challenging the Step-Down Program on Due Process grounds, Eighth Amendment grounds, or both.¹¹ Every sitting federal district court judge in the Western District of Virginia at the time of the filing of this lawsuit had rejected those claims. *Id.*

Plaintiffs’ Response to SUMF ¶ 95: Other lawsuits brought by named Plaintiffs, by members of the class, and even by other prisoners incarcerated by VDOC are not facts material to the adjudication of any claims or defenses in this action. Plaintiffs dispute the characterization of these cases, included at footnote 11 in SUMF ¶ 95 because of their distinct posture. The majority of these cases were filed *pro se* and dismissed for failure to allege facts in support of the legal claims brought as opposed to a rejection of the legal merits of the claims asserted. And, as the Fourth Circuit has held repeatedly, because “‘published district court opinions, like unpublished opinions from our Court, have no precedential value, it follows that we should not consider them’” when evaluating qualified immunity. *Collins*, 964 F.3d at 282 n.11 (quoting *Booker v. S.C. Dep’t of Corr.*, 855 F.3d 533, 545 (4th Cir. 2017)). This Court has held the same. *See, e.g., Thorpe*, 37 F.4th at 943 n.6 (“[P]ublished district court opinions, like unpublished opinions from our Court,

¹¹ *See, e.g., Edwards v. Kanode*, No. 7:19CV00324, 2020 WL 1158253 (W.D. Va. Mar. 10, 2020) (Conrad, J.); *Riddick v. Dep’t of Corr.*, No. 7:17CV00268, 2017 WL 6599007 (W.D. Va. Dec. 26, 2017) (Conrad, J.); *Jordan v. Va. Dep’t of Corr.*, No. 7:16cv00228, 2017 WL 4127905 (W.D. Va. Sept. 18, 2017) (Dillon, J.); *Muhammad v. Smith*, No. 7:16cv00223, 2017 WL 3402971 (W.D. Va. Aug. 8, 2017) (Conrad, J.); *Barksdale v. Clarke*, No. 7:16cv00355, 2017 WL 3381370 (W.D. Va. Aug. 4, 2017) (Kiser, J.); *Snodgrass v. Gilbert*, No. 7:16cv00091, 2017 WL 1049582 (W.D. Va. Mar. 17, 2017) (Conrad, C.J.), *vacated in part*, 2018 WL 1972721 (Apr. 26, 2018); *Delk v. Younce*, No. 7:14cv00643, 2017 WL 1011512 (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 WL 1091943 (W.D. Va. Mar. 22, 2017) (Urbanski, J.); *Muhammad v. Mathena*, No. 7:14cv00529, 2017 WL 395225 (W.D. Va. Jan. 27, 2017) (Conrad, J.); *DePaola v. Va. Dep’t of Corr.*, No. 7:14cv00692, 2016 WL 5415903 (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 WL 5415906 (W.D. Va. Sept. 28, 2016) (Jones, J.), *aff’d sub nom. Obataiye-Allah v. Clarke*, 688 F. App’x 211 (4th Cir. 2017).

have no precedential value, and we do not consider them when surveying clearly established law.”)
(internal quotation marks omitted).

IX. *The Current Litigation*

Plaintiffs’ Response to SUMF Section IX: Defendants’ heading is not a material fact that requires response.

A. *Plaintiffs*

Plaintiffs’ Response to SUMF Section IX.A: Defendants’ heading is not a material fact that requires response.

Vernon Brooks

96. Vernon Lee Brooks¹² is a 38-year-old male serving a 35-year sentence for two counts of malicious wounding, two counts of use of a firearm in a felony, and possession of a firearm as a felon.¹³ *See* VADOC-00007480, VADOC-00007458; *see also* Brooks Tr. at 93:10–95:13 (describing how Brooks shot two individuals following an altercation in Chesapeake, Virginia). Brooks is scheduled to be released on April 12, 2038.¹⁴

Plaintiffs’ Response to SUMF ¶ 96: Undisputed.

97. In August 2015, Brooks’s security level was changed from Level 5 to Level S due to a high number of institutional charges, which culminated in an April 2015 incident in which Brooks stabbed two other inmates behind the ear with a knife, causing puncture wounds. *See* VADOC-00007814. As a result, Brooks was transferred to Red Onion and placed in the Step- Down Program on the IM pathway. *Id.* Brooks progressed through the IM pathway and advanced from Level S to Level 6 on July 30, 2017, when he was assigned to the IM Closed Pod, Phase 1. *See* VADOC-00007832. In February 2018, Brooks was reclassified to SL-S and IM-0 status after he was found attempting to make a weapon in his cell. *See* VADOC-00007836 In August 2019, Brooks was moved to IM Closed Pod, and, in November 2019, his pathway was changed from IM to SM, where he was moved to Step Down Phase 1. VADOC-00007763; VADOC-00135481. In May 2020, Brooks was transferred to the general population in Red Onion, ending his time in the Step- Down Program. ECF No. 174-19 ¶ 40 (Brooks Aff.).

¹² Brooks changed his name to “Asiatic Royal Prince Allah” in 2008. *See* Brooks Tr. at 5:18–21. Produced records variously refer to him as either Brooks or Allah. Because the Complaint and other case materials still refer to him as Vernon Brooks, this Motion also uses that name.

¹³ All documents cited in this section regarding Vernon Brooks are attached as Exhibit 30.

¹⁴ Information publicly available at [https://vadoc.virginia.gov/general-public/offender- locator/](https://vadoc.virginia.gov/general-public/offender-locator/).

Plaintiffs' Response to SUMF ¶ 97: Disputed in part. Plaintiffs dispute the facts recited in this paragraph as follows: (1) Ex. 29, VADOC-00175822 at lines 27465–66 indicates that Mr. Brooks' security level was changed from Level S to Level 6 on August 1, 2017, and he was assigned to the IM Closed Pod on August 4, 2017; (2) Plaintiffs dispute the characterization of the reason for Brooks's security level change from Level 5 to Level S, which is stated in Ex. 30, VADOC-00007184, as "We feel at this time offender Allah could best be benefited from the security and program in a segregation setting"; and (3) Plaintiffs dispute that Brooks was attempting to make a weapon in his cell in February 2018, *see* Ex. 31, VADOC-00007761 (Disciplinary Offense Report dated Feb. 6, 2018, which describes how, during a shakedown, an officer observed that on the cell table, "a shape resembling a knife blade had been drawn and cut/scored into the metal in three separate locations," and that this observation was the basis for the charge of "Conspiracy or Making Plans to Commit/Possession or Use of a Weapon")). All other facts are undisputed.

98. Brooks has received approximately 30 institutional charges during his time in prison. In addition to his stabbing of two other inmates, Brooks received several charges related to fighting or assaults on other inmates. In May 2013, Brooks was charged with attempting to kill another offender, although the charge was later dismissed on a procedural error. *See* VADOC-00007777.

Plaintiffs' Response to SUMF ¶ 98: Disputed in part. Plaintiffs dispute the vague characterization that Brooks received "several charges related to fighting or assaults on other inmates." According to Ex. 32, VADOC-00135480, five of Mr. Brooks' charges involved fighting or assaults on other inmates: 8/10/2004 Fighting with Any Person; 5/29/2006 Fighting With Any Person; 9/26/2006 Simple Assault Upon An Inmate; 2/6/2007 Aggravated Assault Upon An Inmate; 4/3/15 Aggravated Assault upon an Offender. Plaintiffs likewise dispute the internal records' characterization of events, which reflect the view of corrections officials only, and reserve the right to dispute these facts in the future.

99. When Brooks was first placed in VDOC custody, he was assigned a mental health code of MH-1. VADOC-00007434. Over the first several years of his incarceration, Brooks's mental health codes alternated between MH-1 and MH-0. *See, e.g.*, VADOC-00007432 (downgrading to MH-0 in April 2005); VADOC-00007421 (upgrading to MH-1 in October 2006). During this time, Brooks engaged in a repeated pattern of self-harm, including a hanging attempt that was disguised as a "suicidal gesture" (although he later stated that he made the attempt to avoid interacting with officers and was not actually suicidal). *See* VADOC-00007403, VADOC-00007411, VADOC-00007420. He has been consistently classified as MH-0 since 2008 (VADOC-00007384), but though was placed on "at risk" watch in both May 2015 and December 2015. *See* VADOC-00007329, VADOC-00007326.

Plaintiffs' Response to SUMF ¶ 99: Disputed in part. Plaintiffs dispute that Mr. Brooks has "been consistently classified as MH-0 since 2008." According to data produced by VDOC, Mr. Brooks was classified as MH-2 on November 11, 2021 and has maintained that code to the present. Ex. 33, VADOC-00165197 at lines 1134–1136.

Brian Cavitt

100. Brian Cavitt is a 40-year-old male serving a life sentence for two counts of first degree murder, arson, robbery, and assault and battery.¹⁵ *See* VADOC-00004070. Cavitt originally was incarcerated in Massachusetts where, while housed in the Hampden County jail in November 2016, he assaulted an officer and beat him over the head with a telephone receiver until he was physically pulled away. *See* VADOC-00003704. In May 2008, Cavitt broke through a recreation cage to attack another inmate with a weapon. VADOC-00003815. In December 2015, Cavitt again attempted to break through a recreation cage to fight with another inmate until guards deployed a "chemical agent" to force him away from the fence. VADOC-00003679. Cavitt also formulated several involved escape plots, including plans that involved murdering corrections officers to facilitate an escape during a court visit. VADOC-00003840.

Plaintiffs' Response to SUMF ¶ 100: Plaintiffs do not dispute that records from the Massachusetts Department of Corrections contain this information but note that these records reflect the view of corrections officials only and reserve the right to dispute these facts in the future.

101. Cavitt was transferred into the custody of VDOC in November 2016 due to the high potential of gang-related violence if he stayed in a Massachusetts facility.¹⁶ *Id.* Upon his transfer to VDOC, Cavitt was classified at Level S and placed in the Step Down Program at ROSP on the IM pathway. *Id.* In February 2017, the ICA first recommended that Cavitt remain in segregation because he had not met all the requirements of the Step-Down Program. VDOC-00004043. The

¹⁵ All documents cited in this section regarding Brian Cavitt are attached as Exhibit 31.

¹⁶ Cavitt is/was affiliated with the Gun Square Bloods gang. *See* VADOC-00003866.

ICA made the same recommendation in May 2017, and again in July 2017. VADOC-00004072; VADOC-00004073; CP-20-cv-7_00003341. Between December 2017 and January 2018, the ICA again failed to advance Cavitt through the Step-Down Program, and advised that he needed to continue to work to meet the Program's requirements, including completing the Challenge Series and maintaining infraction-free behavior. VADOC-00004075. In August 2018, Cavitt was moved to the IM-Closed Pod and reclassified to SL-6. VADOC-00004078. In November 2020, Cavitt was moved from the IM pathway to the SM pathway. VADOC-00174786 On April 9, 2021, Cavitt was moved to general population. ECF No. 174-20 ¶ 21.

Plaintiffs' Response to SUMF ¶ 101: Disputed in part. VADOC-00004075, which Defendants cite, does not reflect an ICA review of Mr. Cavitt's placement in Level S, his progression through the Step-Down Program, or his performance while in the program, but is a review of his good time level for the purpose of the earned sentence credit program. Plaintiffs also dispute that the ICA advances or fails to advance anyone through the Step-Down Program. *See supra* Plaintiffs' Responses to SUMF ¶¶ 34–35; ECF No. 383-44, Duncan (*DePaola*) Dep. at 190:2–6, 191:11–16, 193:20–22 (BMC, not ICA, determines pathway progression); Ex. 23, Duncan Dep. at 272:15–274:1 (ICA presents BMC's determination).

102. During his time within VDOC's custody, Cavitt has been consistently classified as MH-0. *See, e.g.*, VADOC-0016088, VADOC-0010704, VADOC-0016087. During a December 2019 "Serious Mental Illness" Determination, Cavitt was found not to meet any of the criteria for an SMI. VADOC-00160712.

Plaintiffs' Response to SUMF ¶ 102: Plaintiffs do not dispute that the cited records reflect this information. Plaintiffs dispute that Mr. Cavitt does not suffer from mental illness. Plaintiffs' expert Dr. Michael Hendricks diagnosed Mr. Cavitt with Major Depressive Disorder and PTSD. Ex. 54, Hendricks Rep. ¶ 45.

Derek Cornelison

103. Derek Cornelison is a 38-year-old male serving a thirty-year sentence for armed robbery, grand larceny, and related offenses.¹⁷ VADOC-0000068. He has been incarcerated since 2004 and is scheduled to be released on December 26, 2045.¹⁸

Plaintiffs' Response to SUMF ¶ 103: Undisputed.

104. Cornelison was placed in the Step-Down Program in May 2016 following a December 2015 incident in which he attempted to kill another offender at Sussex I Prison, connecting approximately 20 times with a weapon. *See* VADOC-00004553. He was assigned to the IM pathway. ECF No. 174-21 ¶ 7. Cornelison progressed to IM-1 on January 20, 2017 and then to IM-2 on August 15, 2017. *See* VADOC-00135648. In February 2018 he was moved to the IM-Closed Pod and reclassified to Level 6. *Id.* Cornelison was transferred to the SM pathway in May 2019 and moved to Step-Down Phase 1. *Id.* Cornelison was released to general population a few months later, in August 2019. ECF No. 174-21 ¶ 23.

Plaintiffs' Response to SUMF ¶ 104: Disputed in part. According to data produced by VDOC, Mr. Cornelison was classified as IM-2 on August 17, 2017, and was placed in the IM-Closed pod on March 27, 2018. Ex. 29, VADOC-00175822 at lines 19911–12. Plaintiffs likewise dispute the internal records' characterization of events, which reflect the view of corrections officials only, and reserve the right to dispute these facts in the future. All other facts are undisputed.

105. Outside of the above-stated charge that resulted in his being placed in the Step Down Program, Cornelison has also received several other charges for fighting and for making gang-related threats. *See* VADOC-00135637. Cornelison has been consistently classified as MH-0 throughout his time in VDOC. *See e.g.*, VADOC-00004305, 00004610, 00004801.

Plaintiffs' Response to SUMF ¶ 105: Disputed in part. Mr. Cornelison did not receive any charges while in the Step-Down Program. ECF No. 383-16, Cornelison Decl. ¶ 34. While Plaintiffs do not dispute that Mr. Cornelison has been classified as MH-0 while in VDOC custody, Plaintiffs dispute that Mr. Cornelison does not suffer from a mental illness. Plaintiffs' expert Dr.

¹⁷ All documents cited in this section regarding Derek Cornelison are attached as Exhibit 32.

¹⁸ Information publicly available at <https://vadoc.virginia.gov/general-public/offender-locator/>.

Michael Hendricks diagnosed Mr. Cornelison with Generalized Anxiety Disorder. Ex. 54, Hendricks Rep. ¶ 254.

Frederick Hammer

106. Frederick Hammer is a sixty-three-year-old male serving multiple life sentences for capital murder, burglary, and robbery.¹⁹ See VADOC-00006159. Hammer was convicted of killing three men during a botched robbery at a Grayson County, Virginia Christmas tree farm in January 2008. VADOC-00006042.²⁰

Plaintiffs' Response to SUMF ¶ 106: Undisputed.

107. Hammer was transferred from Wallens Ridge to the Step-Down Program at Red Onion in April 2012 because of the notorious nature of his crime and was assigned to IM-2. VADOC-00001721. He reached the IM-Closed Pod in August 2013, before being placed back to IM-0 in October 2014. ECF No. 174-22 ¶ 14. He returned to SL-6 and the IM-Closed Pod in February 2016. *Id.* ¶ 17. Hammer stayed in the IM-Closed Pod until October 2019, when he was transferred to the SM pathway and Step Down Phase 2. *Id.* ¶ 22. In March 2020, Hammer completed the Step-Down Program and was released into the general population at Red Onion. *Id.* ¶ 23.

Plaintiffs' Response to SUMF ¶ 107: Disputed in part. Data produced by VDOC reflects that Mr. Hammer was classified as Level S on April 4, 2012, and classified as “ROSP Intensive Management” on October 19, 2012. Ex. 29, VADOC-00175822 at lines 24852–53. This data also indicates that Mr. Hammer was returned to IM-0 from the IM Closed Pod on August 1, 2014. *Id.* at line 24859. This data also indicates that Mr. Hammer was transferred from the IM Closed Pod to Step Down Phase 1 of the SM pathway on November 21, 2019. *Id.* at line 24864.

108. When he was first placed in the custody of VDOC in 2009, Hammer was classified with the mental health code of MH-2. See VADOC-00005971, VADOC-00005952. Hammer had been diagnosed with Depressive Disorder, Impulse Control Disorder, and Antisocial Personality Disorder, for which he was being treated with Celexa, Vistaril and Trazadone. VADOC-00005952. Hammer had progressed off medication around December 2012. VADOC-00005894. From July 2013 until early 2015, Hammer was classified MH-1. See VADOC-00005951. In January 2015, his status was changed to MH-0, where it has remained since. VADOC-00005951.

¹⁹ All documents cited in this section regarding Frederick Hammer are attached as Exhibit 38.

²⁰ Hammer also has confessed to committing at least three additional murders, including that of a Philadelphia police officer in 1978. See Hammer Tr. at 152:18–22, 169:7–181:18.

Plaintiffs' Response to SUMF ¶ 108: Disputed in part. Mr. Hammer has suffered from the following mental health symptoms: anxiety, depression, anger, mood swings, bouts of disorientation, inability to concentrate, thoughts of suicide and self-harm, restlessness, and insomnia. ECF No. 174-22, Hammer Aff. ¶ 28. Plaintiffs' expert, Dr. Michael Hendricks, confirmed his prior diagnosis of Major Depressive Disorder. Ex. 54, Hendricks Rep. ¶ 63. Plaintiffs dispute the materiality of Mr. Hammer progressing off medication to the extent Defendants seek to characterize that change as affecting Mr. Hammer's diagnoses, mental health status, or appropriate mental health code.

Dmitry Khavkin

109. Dmitry Khavkin is a 39-year-old male serving a 45-year sentence for crimes that include first-degree murder and unlawful wounding.²¹ See VADOC-00000555. Khavkin has a release date of May 28, 2052.²²

Plaintiffs' Response to SUMF ¶ 109: Disputed in part. Mr. Khavkin has convictions for robbery, misdemeanor assault, abduction, use of a firearm in commission of a felony, and second-degree murder. Ex. 34, VADOC-00000555 at -555–56. He does not have convictions for first-degree murder or unlawful wounding.

110. Between February and March 2013, the ICA recommended a security level change for Khavkin to segregation because he was under investigation for the killing of his cellmate at Lawrenceville Correctional Facility. VADOC-00000176. Khavkin was assigned to the SM pathway. ECF No. 174-23 ¶ 5. In January 2014, Khavkin was transferred to the IM pathway. *Id.* ¶ 7. Khavkin continued to make forward progress through the Step-Down Program, either advancing or remaining at the same status level, VADOC-00000168, VADOC-00000171–172, until around December 2016, when ICA recommended that he be moved to SL-S and advised that he could not stay in the IM Closed Pod due to poor adjustment, VADOC-00000166–167. Throughout 2018, he continued to progress through the Step-Down Program, culminating in his transfer from SL-S to SL-6 on the SM path in or around October 2018. *Id.* ¶ 10; CP-20-cv-7_00003343; VADOC-00000163. By April 2019, Khavkin was transferred to general population.

²¹ All documents cited in this section regarding Dmitry Khavkin are attached as Exhibit 58.

²² Information publicly available at <https://vadoc.virginia.gov/general-public/offender-locator/>.

Khavkin Tr. at 235:4–238:16; VADOC-00000161. Khavkin consistently has been classified as MH-0. VADOC-00006868, VADOC-00006869.

Plaintiffs’ Response to SUMF ¶ 110: Disputed in part. Plaintiffs dispute the internal records’ characterization of events, which reflect the view of corrections officials only, and reserve the right to dispute these facts in the future. Plaintiffs further dispute the characterization of the ICA as having made any recommendation as to Mr. Khavkin’s housing status. *See supra* Plaintiffs’ Response to SUMF ¶ 33. Plaintiffs also dispute Mr. Khavkin’s mental health classification because such classifications were under-inclusive and omitted incarcerated persons with mental impairments. *See supra* Plaintiffs’ Responses to SUMF ¶¶ 79–82.

Gerald McNabb

111. Gerald McNabb is a 66-year-old male serving a single life sentence, plus additional time, for crimes including homicide, kidnapping, robbery, burglary, and unlawful wounding.²³ *See* VADOC-00135777.

Plaintiffs’ Response to SUMF ¶ 111: Undisputed.

112. McNabb has an extensive history of violence within VDOC institutions, both against fellow inmates and officers. McNabb Tr. at 132:8–160:13 (describing history of violence within prisons, including stabbings of at least two officers and three inmates, plus multiple additional charges for fighting and possessing weapons). McNabb was placed in the Step-Down Program following an incident in August 2012 in which he assaulted a female officer at Sussex I State Prison, stabbing her with a weapon. McNabb Tr. at 160:1–21; 161:6–9. By January 2016 he had completed the *Challenge Series* programming and the Step-Down Program and was back in general population at Red Onion. VADOC-00135762. One month later, however, in February 2016, McNabb was reclassified as SL-S following an incident in which a knife was found inside his television. *Id.* In November 2020, McNabb requested to be transferred out of state, asserting that he would be “better adjusted if he was in another state” due to his history of poor performance within VDOC facilities. VADOC-00164819. In May 2021, McNabb was transferred to the Wyoming State Penitentiary. McNabb Tr. at 28:1–3.

²³ All documents cited in this section regarding Gerald McNabb are attached as Exhibit 33.

Plaintiffs' Response to SUMF ¶ 112: Disputed in part. Plaintiffs dispute the internal records' characterization of events, which reflect the view of corrections officials only, and reserve the right to dispute these facts in the future.

113. McNabb is classified as mental health code MH-0 and does not have a history of mental health diagnoses. VADOC-00164819.

Plaintiffs' Response to SUMF ¶ 113: Disputed in part. Plaintiffs' expert, Dr. Michael Hendricks, diagnosed Mr. McNabb with PTSD, which likely pre-dated his time in the Step-Down Program. Ex. 54, Hendricks Rep. ¶ 110. Plaintiffs dispute the accuracy of Mr. McNabb's mental health classification because such classifications were under-inclusive and omitted incarcerated persons with mental impairments. *See supra* Plaintiffs' Responses to SUMF ¶¶ 79–82.

Peter Mukuria

114. Peter Mukuria is a 36-year-old male serving a 44-year sentence for crimes that include murder, assault, grand larceny, and malicious wounding.²⁴ *See* VADOC-00000687. He is scheduled for release on February 21, 2051.²⁵

Plaintiffs' Response to SUMF ¶ 114: Undisputed.

115. In November 2012, Mukuria stabbed a guard at Suffolk II State Prison who was attempting to break up an "incident" occurring between Mukuria and another inmate. *See* VADOC-00010385. The attack was described as so severe that the officer required immediate emergency surgery. *Id.* Following this incident, Mukuria was reclassified to Level S and placed in the Step-Down Program at ROSP on the IM pathway.²⁶ *See* VADOC-00010320. Mukuria moved to IM-1 in June 2014 (VADOC-00010329) and then to IM-2 in July 2015. VADOC-00010337. In August 2016, Mukuria moved to the IM Closed Pod Phase I, and then in September 2017 to Phase II. *See* VADOC-00010344, VADOC-00013051. In May 2019, Mukuria was moved from the IM pathway to the SM pathway and placed in the SL-6 Phase 1 Pod. VADOC-00010355. In August 2019, Mukuria's ICA review noted that he had received multiple disciplinary infractions, including attempting to incite a riot among other offenders. VADOC-00010359. He was subsequently downgraded to SM0 status. *Id.* In March 2022, Mukuria was transferred to a

²⁴ All documents cited in this section regarding Peter Mukuria are attached as Exhibit 40.

²⁵ <https://vadoc.virginia.gov/general-public/offender-locator/>

²⁶ In the spring of 2014, Mukuria was temporarily transferred back to Sussex II for court appearances related to the stabbing. During this time he was incorrectly classified at Security Level 5. The May 29, 2014 ICA hearing makes clear that this was an error and he was meant to remain classified at SL-6. VADOC-000010328.

correctional facility in Maryland under the terms of the Interstate Corrections Compact. VADOC-00146043.

Plaintiffs' Response to SUMF ¶ 115: Disputed in part. According to data produced by VDOC, Mr. Mukuria was not placed in the IM pathway until November 15, 2013. Ex. 29, VADOC-00175822 at line 20267. He advanced to IM-1 on January 24, 2014. *Id.* at line 20268. His privilege level alternated between IM-1 and IM-2 multiple times between May 13, 2015 and August 30, 2016, when he was placed in the IM Closed Pod. *Id.* at lines 20273–85. Plaintiffs do not dispute that Mr. Mukuria was incorrectly classified as Level 5, but dispute any suggestion that, during that time, he was ever afforded the privileges or conditions of Level 5 general population. In fact, he was treated as a Level S prisoner throughout his time at Sussex, but without access to the Step-Down Program or knowledge of whether he remained in the program or not. Ex. 14, Mukuria Decl. ¶¶ 13–14. All other facts are undisputed, although Mr. Mukuria's charge for attempting to incite a riot was changed on appeal to charge for encouraging others to participate in a group demonstration (both of which he disputed). *Id.* ¶¶ 34–35.

116. When he was first incarcerated in 2007, Mukuria received a mental health code of MH-1 for "minimal impairment." See VADOC-00009855. By January 2010, Mukuria's mental health code was reclassified to MH-0, where he has consistently remained since. See VADOC-00010130; VADOC-00146183; VADOC-00009845.

Plaintiffs' Response to SUMF ¶ 116: Disputed in part. Mr. Mukuria's mental health code was changed to MH-2 on May 11, 2021, and has remained at MH-2 since. Ex. 33, VADOC-00165197 at lines 7054–58. He was prescribed medication for anxiety. Ex. 95, Mukuria Dep. at 173:15–17.

Steven Riddick

117. Steven Riddick is a 49-year-old male serving a 50-year sentence for crimes that include first-degree murder, unlawful wounding, and shooting from a vehicle.²⁷ See VADOC-000011178. He is currently scheduled for release on December 20, 2058.²⁸

Plaintiffs' Response to SUMF ¶ 117: Disputed in part. Mr. Riddick is serving a period of incarceration on a conviction of murder and various probation violations. Virginia Courts Case Information, "Circuit Court Case Information" for City of Hampton Circuit Court, (available at <https://eapps.courts.state.va.us/CJISWeb/circuit.jsp>).

118. In 2011, Riddick was housed in segregation at Wallens Ridge "by choice" because he did not want a cellmate or to interact with other inmates. See Riddick Tr. at 65:21–66:6. In August 2011, he was transferred from Wallens Ridge to Red Onion and, after a period of segregation, was placed in the SIP/SAM Pod. *Id.* at 66:7–14; VADOC-00000731. After being notified in August 2014, Riddick was reclassified in September to SL-S and SM0 due to poor behavior and adjustment to population. VADOC-00011206. Over the previous few months, Riddick had racked up a number of institutional charges, including refusing to participate in programming and threatening to kill an officer. *Id.*

Plaintiffs' Response to SUMF ¶ 118: Disputed in part. Plaintiffs dispute that Mr. Riddick was provided notice prior to being reclassified as SL-S in August 2014 and dispute that Mr. Riddick's conduct warranted that reclassification. ECF No. 383-43, Riddick Decl. ¶¶ 18–20.

119. In the years since, Riddick showed a consistent pattern of refusing to participate in the Step-Down Program, which has resulted in him repeatedly moving up and down the SM pathway. See, e.g., Riddick Tr. at 259:14–260:10, 282:5–9; VADOC-00011234 (ICA Hearing from September 2017 stating that Riddick "refuses to participate" in the Step Down Program, and "would not have a cell partner"); VADOC-00135931 (January 2020 ICA Hearing notes Riddick's "continued refusal to participate in the *Challenge Series* Program"); VADC-00135934 (August 2020 ICA hearing notes Riddick "has displayed pathetic behavior for this review period" and refuses to participate in the programs that have been offered to him"); see also VADOC-00136052; VADOC-00011105; VADOC-00175521; VADOC-00175543; VADOC-00175551; VADOC-00175552; VADOC-00175522; VADOC-00011205; VADOC_00011234; VADOC-00011233, VADOC-00011235; VADOC-00011236; VADOC-00011237; VADOC-00011238-1240; VADOC-00011242-1243; CP-20-cv-7_00002100; VADOC-00011246; CP-20-cv-7_00002080; VADOC-00011247; CP-20-cv-7_00002175; CP-20-cv-7_00002364; CP-20-cv-7_00004364; VADOC-00011249; VADOC-00135931–5933; VADOC-00135935-5936; CP-20-cv-

²⁷ All documents cited in this section regarding Steven Riddick are attached as Exhibit 59.

²⁸ <https://vadoc.virginia.gov/general-public/offender-locator/>

7_00002118; CP-20-cv-7_00002150; CP-20-cv-7_00002622; VADOC-00135937. Riddick has received over 40 institutional charges, mostly relating to refusing to obey orders or making threats. *See* VADOC-00135929. Riddick exited the Step-Down Program in March 2023. Riddick Tr. at 285:4–286:19; VADOC-00175548; VADOC-00175549.

Plaintiffs’ Response to SUMF ¶ 119: Disputed in part, to the extent that the cited documents refer to Mr. Riddick’s “refusal” to participate in the Step-Down Program or characterize his conduct as voluntary as opposed to a manifestation of mental illness. *See, e.g.*, ECF No. 383-43, Riddick Decl. ¶¶ 27–38.

120. Riddick’s mental health status was changed from MH-0 to MH-2 in July 2018 when he was diagnosed with major depressive disorder and recurrent mood disorder. *See* CP-20-cv-7_00003350. As of February 2023, Riddick remains MH-2. CP-20-cv-7_00002121.

Plaintiffs’ Response to SUMF ¶ 120: Undisputed.

Kevin Snodgrass

121. Kevin Snodgrass is a 41-year-old male serving a 47-year sentence for crimes that include first-degree murder and possession of drugs and firearms.²⁹ VADOC-00019976, -19990. He is scheduled to be released on May 10, 2055.³⁰

Plaintiffs’ Response to SUMF ¶ 121: Undisputed.

122. Snodgrass was transferred into the Step-Down program on the SM pathway as a result of a December 2013 incident in which he was charged with possessing a weapon while in general population. VADOC-00012428. Snodgrass was downgraded to SL-6 in October 2014 when he was moved to the Step-Down Pod Phase 1. VADOC-00089724. Snodgrass was placed back in Level S in November 2015. *Id.* Snodgrass worked his way to general population in September of that year. ECF No. 174-26.

Plaintiffs’ Response to SUMF ¶ 122: Disputed in part. Mr. Snodgrass was placed in the SM pathway for the second time on November 2, 2015, and returned to general population on September 5, 2017. Ex. 29, VADOC-00175822 at lines 21843–50.

123. Snodgrass’s mental health status has consistently remained at MH-0 during his time in VDOC custody. *See, e.g.*, VADOC-00012436.

²⁹ All documents cited in this section regarding Kevin Snodgrass are attached as Exhibit 39.

³⁰ <https://vadoc.virginia.gov/general-public/offender-locator/>.

Plaintiffs' Response to SUMF ¶ 123: Undisputed.

William Thorpe

124. William Thorpe is a 66-year-old male serving an 81-year sentence for crimes including robbery, malicious wounding, assault, kidnapping, and escape.³¹ VADOC-00014576, 00051096. He is currently scheduled to be released on June 10, 2041. Thorpe participated in the August 1984 riot at Mecklenburg Correctional Center, in which he and other inmates took control of a cell block and held multiple corrections officers hostage. Thorpe Tr. at 27:4–13.

Plaintiffs' Response to SUMF ¶ 124: Undisputed.

125. Thorpe's time in restrictive housing predates the Step-Down Program. Thorpe was assigned to the IM Pathway when the Step-Down Program was initiated in 2012. ECF No. 174-27 ¶ 8. In the fall of 2013, Thorpe was moved from SL-S to SL-6. VADOC-00015212. In September 2015, Thorpe publicly masturbated during an IM-Closed contact visitation. VADOC-00014576. As a result, Thorpe was moved back to IM-0. *Id.* From this point onward, Thorpe refused to participate in any Step Down programming and remained at IM-0. *See, e.g.*, VADOC-00014617 (March 2016: Thorpe "refuses programs and has poor status ratings."); VADOC-00014624 (May 2017: "Thorpe has not completed all the requirements of the Step Down Program."); VADOC-00014634 (May 2018: "Offender is to remain IM[-]0 until offender decides to program."). In May 2019, Thorpe was transferred to a facility in Texas for being a security risk. VADOC-00013801; VADOC-00113055.

Plaintiffs' Response to SUMF ¶ 125: Disputed in part, to the extent that conflicting rationales have been given for Mr. Thorpe's transfer to Texas soon after the filing of this lawsuit, including that his wife is a former VDOC employee, *see* ECF No. 195 at 22 (noting in opposition to class certification that, "[i]n actuality, Thorpe was transferred because he was married to a former corrections officer at Red Onion"), and that he refused to participate in the Step-Down Program, *see* ECF No. 195-32, VADOC-00113055. As to the fourth and fifth sentences, plaintiffs dispute the admissibility of the cited record—dated October 2019—as to the truth of either the alleged incident that occurred four years earlier, or as to whether the incident was the basis for Mr. Thorpe's move back to IM-0.

³¹ All documents cited in this section regarding William Thorpe are attached as Exhibit 60.

126. Thorpe's mental health status has consistently been MH-0. *See, e.g.*, VADOC-00015460, 00015447, 00015446.

Plaintiffs' Response to SUMF ¶ 126: Undisputed; however, Plaintiffs dispute that this accurately reflects Mr. Thorpe's mental health status. He was diagnosed with PTSD and Major Depressive Disorder by Plaintiffs' expert, Dr. Michael Hendricks. Ex. 54, Hendricks Rep. ¶ 116.

Gary Wall

127. Gary Wall is a 47-year-old male serving an approximately 45-year sentence for crimes that include unlawful wounding, robbery, and injury to a corrections employee.³² VADOC-00020177-00020192, 00001717. He is scheduled to be released on November 24, 2027.³³

Plaintiffs' Response to SUMF ¶ 127: Undisputed.

128. When the Step-Down Program was implemented at Wallens Ridge in 2012, Wall was assigned to SL-S and placed in the Step-Down Program. ECF No. 174-28 ¶ 3. By September 2013, Wall had completed Step-Down Phase 1, but was downgraded to SM-0 for receiving a charge for "gathering around or approaching a person in a threatening manner." VADOC-00001678. Wall reached Level 6 again in September 2014 and then returned to general population at Red Onion in May 2015. *Id.* In or about September 2015 Wall was placed back at SL-S at IM-0 due to assaultive behavior. Wall worked his way back to IM-2 but was again returned to IM-0 in February 2018 for receiving disciplinary infractions. *Id.* ICA hearing forms indicate that Wall refused to program in April 2016, March 2018, and mid-2018. VADOC-00001678; CP-20-cv-7_00003260; VADOC-00175655; VADOC-00175656 After two more years, Wall was reclassified to SM-2 in March 2019 and then to Level 6 in May 2019. *Id.* Wall was returned to the general population in June 2020. Step-Down Phase II Graduates, excerpted from VADOC-00131924.

Plaintiffs' Response to SUMF ¶ 128: Disputed in part, in that Plaintiffs dispute the factual basis for several of the disciplinary charges Mr. Wall received, and that Mr. Wall's apparent refusal to participate in the Step-Down Program was unrelated to his mental illness. *See* ECF No. 383-15, Wall Decl. ¶¶ 14, 24, 44. Plaintiffs note, for example, that Mr. Wall was sent all the way back to the beginning of the IM pathway for a 100-level charge of intentionally destroying, altering, damaging, or defacing state or any person's property charges, which was based on his ripping up

³² All documents cited in this section regarding Gary Wall are attached as Exhibit 46.

³³ <https://vadoc.virginia.gov/general-public/offender-locator/>.

his own state-issued pants. *Id.* ¶ 44; Ex. 35 at 1–2 (Feb. 2, 2018 Disciplinary Offense Report); ECF No. 383-100, VADOC-00136273 (Gary Wall Disciplinary Action Report); ECF No. 383-101, VADOC-00013601 at -611 (Gary Wall Officer’s Log Sheet).

129. Wall was consistently classified as MH-0 until 2014, but was reclassified to MH-2 in April of that year after showing signs of mental illness. VADOC-00001598. After a period of stability, his mental health code was reduced to MH-1 in June 2017, *see id.*, but he was returned to MH-2 in July 2017 and has remained there since. VADOC-00148900.

Plaintiffs’ Response to SUMF ¶ 129: Undisputed.

B. *Defendants*

Plaintiffs’ Response to SUMF Section IX.B: Defendants’ heading is not an undisputed material fact that requires a response.

130. Harold Clarke. Clarke is the Director of VDOC, responsible for supervising and managing VDOC and its system of correctional institutions. In response to Plaintiffs’ interrogatories, Clarke stated that “[n]either the activities that I have identified nor my experience as a correctional professional has led me to believe that placement in VDOC’s Restrictive or Restorative housing poses an unreasonable risk of a deleterious effect or impact on the physical or mental health of inmates, particularly as it relates to their long-term functioning.” Def. Harold Clarke’s Objs. & Answers to Pls.’ First Set of Interrogs. to Harold Clarke at 3, located in Exhibit 5.

Plaintiffs’ Response to SUMF ¶ 130: Plaintiffs dispute that Harold Clarke was unaware of the harmful effects that the Step-Down Program has on inmates’ health, particularly as it relates to inmates’ mental health. Clarke testified that restrictive housing “could have an impact on one’s mental health,” and that “mental health is something that should be taken into consideration when deciding whether or not to place someone in restrictive housing.” Ex. 36, Clarke Dep. at 58:3–13. Clarke also testified that “[he has] been told that if you have a preexisting mental illness and you are isolated, it may exacerbate it.” *Id.* at 340:3–9. In addition, Clarke is aware that severe restrictions on social interaction may harm any inmate, as he testified, “[I] tend to agree” that “social interaction, meaningful interaction, is a basic human need.” *Id.* at 252:8–12.

131. Randall Mathena. Mathena is VDOC's Director of Security and Correctional Enforcement. Mathena served as the Warden of Red Onion between 2011 and 2015. In his current position, he visits Red Onion 3-4 times a year and participates in the bi-annual ERT meetings, as well as reviewing other security measures. Mathena Tr. at 365:22–366:10. In response to Plaintiffs' interrogatories, Mathena stated that "[n]one of my training or experience led me to believe that placement in VDOC's Restrictive or Restorative housing posed an unreasonable risk of a negative effect or impact on the physical or mental health of inmates, particularly as it relates to their long-term functioning." Def. Randall Mathena's Objs. & Answers to Pls.' First Set of Interrogs. to Randall Mathena at 3, located in Exhibit 14.

Plaintiffs' Response to SUMF ¶ 131: Plaintiffs dispute that Randall Mathena was unaware of the harmful effects that the Step-Down Program has on inmates' health. VDOC admitted that "as of 2016, some employees of VDOC were aware of competing academic studies, some of which, using different methodologies, examined various conditions of confinement (some of which are more similar to the conditions of confinement defined by Plaintiffs as segregation than others), and concluded that living in segregation generally increases the risk of negative impacts on inmates' mental health; and others concluding that living in segregation has outcomes that range from an increased risk of such negative impacts for some inmates to benefits for others." ECF No. 383-36, VDOC Objs. & Ans. to Pls.' Reqs. For Admis. at No. 26. In his role as VDOC's Director of Security and Correctional Enforcement, Mathena should have had exposure to such information.

132. H. Scott Richeson. Richeson is the VDOC Deputy Director of Reentry and Programs. Richeson Tr. at 34:22–35:6. In her current position, she is responsible for ensuring that COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) is being monitored and updated. These assessments extend beyond the Step-Down Program. *Id.* at 48:14–21, 53:19–54:5. Prior to holding her current position, she was the Director of Re-Entry. Richeson Tr. at 75:6–76:2. In 2011, the Correctional Education program was added to her division, and in 2018, Mental Health program services was added. *Id.* at 77:14–18; 81:8–17. In response to Plaintiffs' interrogatories, Richeson stated that "[n]either the articles I have reviewed nor my work in VDOC, including my work with Dr. Malone, has [led] me to believe that placement in VDOC's Restrictive or Restorative Housing poses an unreasonable risk of harmful effect or impact on the physical or mental health of inmates, particularly as it relates to their long-term functioning." Def. H. Scott Richeson's Objs. & Answers to Pls.' First Set of Interrogs. to H. Scott Richeson at 3, located in Exhibit 13.

Plaintiffs' Response to SUMF ¶ 132: Plaintiffs dispute that H. Scott Richeson was unaware of the harmful effects that the Step-Down Program has on inmates' health. Richeson received an

email on March 23, 2012, which stated, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. 38, VADOC-00163939 at -939 (Mar. 23, 2012 Email from White to Richeson). In addition, Richeson testified that “any security level people are in that’s higher than another limits their ability to get into programs, for example, and to interact,” which she recognized “definitely [] interferes with their ability to develop themselves.” Ex. 10, Richeson Dep. at 225:2–226:5.

133. David Robinson. Robinson is the VDOC Chief of Corrections Operations. He assumed this role on August 16, 2011. Robinson Tr. at 79:9–10. Mathena is one of his direct reports. *Id.* at 80:14–16. He has been responsible for shepherding the process of moving from restrictive housing to restorative housing. *Id.* at 88:8–11. In response to Plaintiffs’ interrogatories, Robinson stated that “[n]either my activities related to the assessment and development of a program to address long-term segregation nor my experience as a correctional professional has led me to believe that placement in VDOC’s Restrictive or Restorative housing poses an unreasonable risk of a negative effect or impact on the physical or mental health of inmates, particularly as it relates to their long-term functioning.” Def. David Robinson’s Objs. & Answers to Pls.’ First Set of Interrogs. to David Robinson at 4, located in Exhibit 54.

Plaintiffs’ Response to SUMF ¶ 133: Plaintiffs dispute that David Robinson was unaware of the harmful effects that the Step-Down Program has on inmates’ health. Robinson testified that he is aware that [REDACTED]

[REDACTED] Ex. 5, Robinson Dep. at 179:5–9.

134. Henry Ponton. Ponton is the Regional Operations Chief for the Central Region of VDOC. He previously served as Regional Operations Chief for the Western Division, which includes Red Onion and Wallens Ridge, and as the Regional Operations Administrator. Ponton testified that he believed the goal of the Step-Down Program was to ultimately reduce the number of inmates in long-term restrictive housing and get them back into a general population setting. Ponton Tr. at 143:22–146:11. In response to Plaintiffs’ interrogatories, Ponton stated that “[n]one of those articles or that training led me to believe that placement in VDOC’s Restrictive or Restorative Housing has posed an unreasonable risk of a negative effect or impact on the physical or mental health of inmates, particularly as it relates to their long-term functioning.” Def. Henry

Ponton's Objs. & Answers to Pls.' First Set of Interrogs. to Henry Ponton at 2–3, located in Exhibit 61.

Plaintiffs' Response to SUMF ¶ 134: Plaintiffs dispute that Henry Ponton was unaware of the harmful effects that the Step-Down Program has on inmates' health. Ponton testified that he is familiar with and was involved in the December 4, 2017 report from the Vera Institute of Justice. Ex. 39, Ponton Dep. at 238:21–22, 239:1–2. Regarding restrictive housing, the 2017 Vera Report states, "it is important to further expand the program's efforts to make restrictive housing less isolating in order to mitigate the negative impacts of living in segregation, particularly on mental health." Ex. 40, VADOC-00045021 at -028 (Dec. 4, 2017 Vera Institute of Justice Report).

135. Marcus Elam. Elam is the Regional Administrator for the Central Region of Virginia. He previously served as Regional Administrator for the Western and Eastern Regions. While serving as Regional Administrator for the Western Region, he was the direct supervisor of Jeffrey Kiser, Warden at Red Onion, and Carl Manis, Warden at Wallens Ridge. Elam Tr. at 19:11–14 and 20:2–4. He reported to Henry Ponton. *Id.* at 19:8–10 and 36:8–12. When he became Regional Administrator, he had more responsibilities related to inmate care, grievances, medical and mental health issues, education and other areas related to inmate care. *Id.* at 32:1–16. As part of his role he would talk to inmates when he visited the facilities on a monthly basis. *Id.* at 34:8–35:17. In response to Plaintiffs' interrogatories, Elam stated that "[n]one of the articles I have read or my training leads me to believe that placement in VDOC's Restrictive or Restorative housing has posed an unreasonable risk of a negative effect or impact on the physical or mental health of inmates, particularly as it relates to their long-term functioning." Def. Marcus Elam's Objs. & Answers to Pls.' First Set of Interrogs. to Marcus Elam at 3, located in Exhibit 62.

Plaintiffs' Response to SUMF ¶ 135: Plaintiffs dispute that Marcus Elam was unaware of the harmful effects that the Step-Down Program has on inmates' health. In his role as Regional Administrator for the Western and Eastern Regions, Elam should have been among the VDOC personnel exposed to research on the negative effects of restrictive housing. As VDOC admitted, "some employees of VDOC were aware of competing academic studies, some of which, using different methodologies, examined various conditions of confinement (some of which are more similar to the conditions of confinement defined by Plaintiffs as segregation than others), and concluded that living in segregation generally increases the risk of negative impacts on inmates'

mental health; and others concluding that living in segregation has outcomes that range from an increased risk of such negative impacts for some inmates to benefits for others.” ECF No. 383-36, VDOC Objs. & Ans. to Pls.’ Reqs. For Admis. at No. 26.

136. Denise Malone. Dr. Malone is the Chief of Mental Health Services for VDOC. Malone Tr. at 9:6–10. She has held this role since 2012. *Id.* at 73:19–20. Prior to this, she was the mental health clinical supervisor for the Eastern Region for two years. *Id.* at 71:8–12. She reports to Scott Richeson. *Id.* at 49:7–10. She also works directly with Clarke. She sits on his executive team, which meets every Monday. *Id.* at 49:14–20. She is the co-facilitator on the External Review Team with Mathena. *Id.* at 50:6–9. She testified that she works with Robinson facilitating a multi-disciplinary approach to mental health. *Id.* at 51:7–14. She has also worked with Ponton on issues where security and mental health overlap. *Id.* at 52:6–18. Dr. Malone works with Tori Raiford, who was designated to set up and manage SDTP, SAM, and restorative housing units. *Id.* at 54:17–21. In her roles as unit head for mental health and wellness, she provides an overview of the procedures, practices and standards for mental health services. *Id.* at 62:2–6. She testified that she meets with the inmates during her site visits, and she is part of the External Review Team that does interviews. *Id.* at 88:9–13. In response to Plaintiffs’ interrogatories, Dr. Malone stated that “[n]one of the activities I have identified has led me to believe that placement in VDOC’s Restrictive or Restorative housing has posed an unreasonable risk of a negative effect or impact on the physical or mental health of inmates, particularly as it relates to their long-term functioning.” Def. Denise Malone’s Objs. & Answers to Pls.’ First Set of Interrogs. to Denise Malone at 5, located in Exhibit 52.

Plaintiffs’ Response to SUMF ¶ 136: Plaintiffs dispute that Denise Malone was unaware of the harmful effects that the Step-Down Program has on inmates’ health. Malone testified that [REDACTED]

[REDACTED]

[REDACTED]

Ex. 41, Malone 30(b)(6) Dep. at 135:22–136:7.

137. Steve Herrick. Dr. Herrick is VDOC’s Health Services Director. He started his position at VDOC in 2016. Herrick Tr. at 78:5–7. When he started at VDOC, Mental Health Services reported to him. *Id.* at 79:4–7. Mental Health Services transferred out in 2018. *Id.* at 91:406. He meets with Dr. Malone when there is a medical need associated with any offender move based on mental health. *Id.* at 32:18–33:6; 104:8–15. His staff makes determinations about accommodations for prisoners with physical disabilities. *Id.* at 55:19–22. Until 2018 or 2019, he signed off on medical grievance responses in an administrative, not clinical, role, *i.e.*, to verify that VDOC’s procedure had been followed. *Id.* at 107:16–112:9. In response to Plaintiffs’ interrogatories, Dr. Herrick stated that “[n]one of the activities I have identified has led me to believe that placement in VDOC’s Restrictive or Restorative housing has posed an unreasonable risk of a negative effect or impact on the physical or mental health of inmates, particularly as it

relates to their long-term functioning.” Def. Steve Herrick’s Objs. & Answers to Pls.’ First Set of Interrogs. to Steve Herrick at 3, located in Exhibit 63.

Plaintiffs’ Response to SUMF ¶ 137: Plaintiffs dispute that Steve Herrick was unaware of the harmful effects that the Step-Down Program has on inmates’ health. Herrick testified that “my understanding is that there are cases where individual’s mental health condition deteriorates when in restorative housing”; their “symptoms could increase.” Ex. 42, Herrick Dep. at 217:7–10, 217:19–20. He further testified, “we are definitely being presented, the individuals in my role, that there are certain populations that need to be . . . more frequently assessed for mental decline when they go into restorative housing. And it’s been presented to me that there’s research to show that you need to have those increased mental health assessments in order to catch it and accommodate that change.” *Id.* at 220:21–221:8. He also testified that the SMI “population is particularly vulnerable when entering long-term restorative housing.” *Id.* at 222:14–16.

138. Tori Raiford. Raiford is the Central Classification Supervisor for VDOC. Raiford Tr. at 32:14–19. She previously served as a Unit Manager at Red Onion, as Statewide Restrictive Housing Coordinator, and as the Chief of Restrictive Housing and Serious Mental Illness. She served as Chief of Restrictive Housing and Serious Mental Illness from November 2017 to February 2020, and moved into her current role in May 2022 after a time as Superintendent of Caroline Correctional Unit 2. *Id.* at 31:18–32:16. As Unit Manager, she would have contact with inmates when she made rounds. *Id.* at 24:16–25:3. During her time at Red Onion, Raiford served on committees that revised the Step Down Program. *Id.* at 35:16–21. Her duties included reviewing the existing manual and making recommendations for revisions and changes. *Id.* at 36:19–37:4. Before 2020, she was involved in the biannual External Review Team. Her role varied as she progressed from each position. Early in her career, her role was primarily information gathering. Later she attended the ERT interviews. *Id.* at 60:3–21. In response to Plaintiffs’ interrogatories, Raiford stated that “[d]uring my time working with Restrictive Housing I do not recall reviewing any information or participating in any training that led me to believe that placement in VDOC’s Restrictive or Restorative housing posed an unreasonable risk of a negative effect or impact on the physical or mental health of the inmate, particularly as it relates to their long-term functioning.” Def. Tori Raiford’s Objs. & Answers to Pls.’ First Set of Interrogs. to Tori Raiford at 4, located in Exhibit 64.

Plaintiffs’ Response to SUMF ¶ 138: Plaintiffs dispute that Tori Raiford was unaware of the harmful effects that the Step-Down Program has on inmates’ health. Raiford testified that she read the November 2018 Report from the Vera Institute for Justice. Ex. 43, Raiford Dep. at 283:18–

22, 284:1–20. The Report notes [REDACTED]

[REDACTED] and [REDACTED]

[REDACTED] Ex. 44,

VADOC-00049867 at -867 (Nov. 2018 Vera Report). In addition, Raiford admitted in deposition testimony that Vera made “a recommendation about VDOC’s program and the negative impacts of living in segregation on mental health as to VDOC’s program.” Ex. 43, Raiford Dep. at 297:4–11.

139. Jeffrey Kiser. Kiser was warden at Red Onion, holding this position from 2017 to 2021. Kiser Tr. at 45:12–19. He started as a Corrections Sergeant in 1997 and worked his way up, spending some of the time at other facilities. *Id.* at 38:1–45:15. He became Assistant Warden at Red Onion in 2011. *Id.* at 44:3–5. He retired in February 2021, spending his last day at Red Onion on December 19, 2020. *Id.* at 45:17–19. He had some level of interaction with most of the named plaintiffs while making rounds at Red Onion. *Id.* at 18:14–27:11; 49:2–9. In response to Plaintiffs’ interrogatories, Kiser stated that “[n]one of those things or my experience as warden of ROSP led me to believe that placement in VDOC’s Restrictive or Restorative housing posed an unreasonable risk of a negative effect or impact on the physical or mental health of inmates, particularly as it relates to their long-term functioning.” Def. Jeffrey Kiser’s Objs. & Answers to Pls.’ First Set of Interrogs. to Jeffrey Kiser at 3, located in Exhibit 65.

Plaintiffs’ Response to SUMF ¶ 139: Plaintiffs dispute that Jeffrey Kiser was unaware of the harmful effects that the Step-Down Program has on inmates’ health. Kiser testified that he read a January 9, 2012 email from Larry Traylor which includes a Washington Post article that details the harms of solitary confinement. Ex. 45, Kiser Dep. at 361:2; Ex. 46, VADOC-00142276.

140. Carl Manis. Carl Manis is VDOC’s Regional Administrator for Probation and Parole in the Central Region. He started at that position in January 2023. Manis Tr. at 27:3–4. He previously served as Warden of Wallens Ridge from 2017 to 2019, and as Regional Administrator for Facilities in the Western Region 2020 to 2022. *Id.* at 17:9–10; 26:21–27:2. His involvement with the Step Down Program was limited to interacting with inmates while making rounds. He had no responsibility for inmate movement. *Id.* at 103:5–14. In response to Plaintiffs’ interrogatories, Manis stated that “[n]one of those articles or that training has led me to believe that placement in VDOC’s Restrictive or Restorative housing has posed an unreasonable risk of a negative effect or impact on the physical or mental health of inmates, particularly as it relates to their long-term functioning.” Def. Carl Manis’s Objs. & Answers to Pls.’ First Set of Interrogs. to Carl Manis at 3, located in Exhibit 66.

Plaintiffs' Response to SUMF ¶ 140: Plaintiffs dispute that Carl Manis was unaware of the harmful effects that the Step-Down Program has on inmates' health. In his role as VDOC's Regional Administrator for Probation and Parole in the Central Region, Manis should have been among the VDOC personnel exposed to research on the negative effects of restrictive housing. As VDOC admitted, "some employees of VDOC were aware of competing academic studies, some of which, using different methodologies, examined various conditions of confinement (some of which are more similar to the conditions of confinement defined by Plaintiffs as segregation than others), and concluded that living in segregation generally increases the risk of negative impacts on inmates' mental health; and others concluding that living in segregation has outcomes that range from an increased risk of such negative impacts for some inmates to benefits for others." ECF No. 383-36, VDOC Objs. & Ans. to Pls.' Reqs. For Admis. at No. 26. In addition, Plaintiffs dispute that the third sentence applies only to Manis's role as Regional Administrator. Ex. 47, Manis Dep. at 103:5–14.

* * *

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants.

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