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

Richmond Division

NICOLAS REYES,

Plaintiff,

v. CASE NO. 3:18CV00611

HAROLD W. CLARKE, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS

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INTRODUCTION

In 2011, the Virginia Department of Corrections adopted and enacted the Segregation Reduction Step-Down Program. This nationally-acclaimed policy,[1] which is governed by VDOC Operating Procedure 830.A, creates a multi-step, incentive-based rehabilitation program designed to transition security level "S" inmates back into the general population, when their conduct over time demonstrates that it is safe to do so. Under the Step-Down Program, a level "S" inmate gains additional privileges as he successfully progresses through the program. As part of the Step-Down Program, prison officials regularly assess an inmate's progress to determine whether the assignment to security level "S" remains appropriate—specifically, to decide whether the inmate's conduct warrants advancement to the next step in the program, return to a previous step, or reassignment to another security level altogether.

Plaintiff Nicolas Reyes is a level "S" offender who contends that his "mental health has deteriorated greatly" during his confinement, in part because he "is a monolingual Spanish speaker" who is unable to read and write in English. Compl. ¶¶ 1-2. Reyes alleges that, because he "lack[s] the capacity" to participate in the Step-Down Program, he is "trapped in solitary confinement." Compl. ¶¶ 4, 7.

Reyes, however, fails to state a plausible federal claim to relief. In light of controlling Fourth Circuit precedent, Reyes has not sufficiently alleged that he was subjected to prison conditions posing a substantial risk of harm, nor has he plausibly alleged subjective indifference to a known risk of harm. Because Reyes has not alleged facts from which it could be determined that he has a vested liberty interest, he does not state a due process claim. Also, because he has not plausibly alleged that he was intentionally treated differently than other, similarly-situated

[1] *See* U.S. Dept. of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (2016), p. 77 (available at https://www.justice.gov/archives/dag/file/815551/download).

individuals, he has not stated an Equal Protection claim. His ADA, RA, and Title VI claims are barred by the applicable statutes of limitation, and they also fail because Reyes has not plausibly alleged intentional discrimination by the named Defendants. For these reasons, and as discussed in more detail below, Defendants request that the Court grant their motion to dismiss.

STATEMENT OF FACTS

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

A. The VDOC Step-Down Program

1. Within VDOC, security level "S" is a "non-scored security level reserved for offenders who must be managed in a segregation setting." OP 830.A(III).[2]

2. Offenders may be assigned to security level "S" based on a variety of factors, which are delineated by VDOC policy. OP 830.A(IV)(A)(2); *see also* OP 830.2(IV)(G)(2).[3]

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

4. In 2011, ROSP began implementing a "Segregation Reduction Step-Down Program" that "established procedures for incentive based offender management which will

[2] Reyes submitted VDOC Operating Procedure 830.A, *Segregation Reduction Step-Down Program*, as Attachment A to complaint (ECF 1-1), and its contents are therefore properly before the Court. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 322 (2007).

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

create a pathway for offenders to step-down from Security level S to lower security levels in a manner that maintains public, staff and offender safety." OP 830.A(I).

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

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

7. The IM pathway is for offenders "with the potential for extreme and/or deadly violence." OP 830.A(III). The SM pathway is for offenders with a history of fighting with staff or other offenders, but "without the intent to invoke serious harm or the intent to kill," or who repeatedly commit relatively minor disciplinary infractions with the apparent goal of remaining in restrictive housing. OP 830.A(III); Attachment B to Compl., ECF 1-2, p.27.)

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

9. Offenders who are designated at level "0" within their pathway (either IM0 or SM0) are those offenders who choose not to participate in the Step-Down Program. OP 830.A(IV)(D)(1)(a) & (E)(2). In terms of housing and privileges, offenders who have been designated as IM0 or SM0 receive the "basic requirements" set forth in VDOC Operating Procedure 861.3, *Special Housing*. OP 830.A(IV)(D)(1)(a) & (E)(2).[4]

10. For offenders who elect to participate in the Step-Down Program, those offenders earn progressively greater privileges as they advance through the internal pathway levels—*i.e.*,

[4] VDOC Operating Procedure 861.3, *Special Housing*, is Attachment C to the complaint (ECF No. 1-3), and, for the reasons discussed in n. 2, *supra*, it is properly before the Court.

from IM1 to IM2 to IM-SL6, or from SM1 to SM2 to SM-SL6. OP 830.A(IV)(D)(3)(b) & (E)(5)(b); *see also* ECF 1-2, pp. 50-52 (IM privilege chart) & pp. 58-59 (SM privilege chart).

11. Level "S" offenders must satisfy specific goals before advancing to the next privilege level. Among other things, offenders must avoid disciplinary charges and progress through the *Challenge Series*, a series of 7 workbooks and pro-social goals. Compl. ¶ 61.

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

13. "The purpose of Level 6 is to reintroduce offenders into a social environment with other offenders, and to serve as a proving ground and preparation for stepping down to Level 5." OP 830.A(IV)(F)(1)(b). Once the offender has made adequate progress at security level 6, the offender will be reclassified at security level 5, "stepped down" into the general population, and considered for eventual transfer to a lower security level institution. OP 830.2(IV)(G)(9)-(11). Thus, by demonstrating a pattern of "adequate progress," an inmate with a security level "S" classification may return to the general population.

14. Level "S" offenders undergo periodic reviews to ensure that they are assigned to the appropriate security level, pathway, and privilege level. Compl. ¶ 76.

15. First, level "S" offenders are "formally reviewed by the ICA at least once every 90 days" to "determine whether to recommend that the offender continue in Segregation for a subsequent period of up to 90 days or be assigned to the general population." OP

861.3(IX)(A)(5); OP 830.A(M)(h); OP 830.2(IV)(G)(7). The ICA's recommendation should be based on "consideration of the reason for the assignment, the offender's behavior, and the progress made toward case plan objectives," and should also consider "whether the offender is a threat to security or if the offender may be in danger due to enemies in the general population." OP 861.3(IX)(A)(5); *see also* Compl. ¶ 77. A formal ICA hearing triggers procedural requirements, including 48-hour advance notification and the opportunity to be present at the hearing, as well as the right to appeal any classification decision through the offender grievance procedure. OP 830.1(IV)(B).[5]

16. Second, twice a year, an external review team ("ERT") reviews each level "S" offender to determine: (1) whether the offender is appropriately assigned to level "S"; (2) whether the offender meets the criteria for the internal pathway to which they are currently assigned; (3) whether a pathway change would be appropriate; and (4) whether the Dual Treatment Team has made appropriate decisions to advance the offender through the step-down process. OP 830.A(IV)(L)(1); *see also* Compl. ¶ 80.

17. Third, the Dual Treatment Team ("DTT"), a facility-specific team, informally reviews level "S" offenders on an as-needed basis, but "at least quarterly," and specifically reviews any offender who is "being recommended to be considered for a status or pathway change." OP 830.A(IV)(M)(d)(iii); *see also* Compl. ¶ 80.

18. Fourth, ROSP, as a facility with a restrictive housing unit, also has a multi-disciplinary team ("MDT"), which evaluates each level "S" offender, through a formal ICA hearing, to develop an appropriate management path, including the establishment of mental health goals, disciplinary goals, responsible behavior goals, and programming assignments. OP

[5] Reyes submitted VDOC Operating Procedure 830.1, *Facility Classification Management*, as Attachment E to the complaint (ECF No. 1-5), and, for the reasons discussed in note 2, *supra*, it is properly before the Court.

841.4(V)(B)(3) & (C)(4).[6] The MDT formally reviews each level "S" offender at least once every 30 days, in order to recommend whether the offender should continue at his current security level or be assigned to a less restrictive level. OP 841.4(V)(C)(7).

19. Fifth, a Building Management Committee informally reviews all level "S" inmates. Compl. ¶ 78. The Committee is comprised of individuals "directly involved in the operations of a specific unit," and convenes "at least monthly to discuss offender statuses and unit incentives and sanctions." OP 830.A(IV)(M)(f). The Committee may recommend changes to an inmate's privilege level, as well as discussing and adjusting individual pod incentives and sanctions. OP 830.A(IV)(M)(g); OP 830.A(IV)(D)(4)(b).

20. Finally, Level "S" offenders are rated weekly on their progress by prison officials and counselors, who are encouraged to communicate with each offender routinely on their ratings as an opportunity to acknowledge positive performance as well as to motivate them to improve when needed. OP 830.A(IV)(E)(5)(d).

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

22. In the fall of 2017, VDOC started identifying level "S" inmates with a serious mental illness and diverting those inmates into a separate treatment program. Compl. ¶ 145; *see also* OP 861.3(V)(B)(4). Specifically, level "S" inmates who have been identified as seriously

[6] VDOC Operating Procedure 841.4, *Restrictive Housing Units*, is publicly-available at https://vadoc.virginia.gov/about/procedures/documents/800/841-4.pdf. For the convenience of the Court, a copy is also being submitted as Exhibit 2 to this pleading. And, for the reasons discussed in note 3, *supra*, this operating procedure may be considered by the Court in the context of resolving the Defendants' motion to dismiss.

mentally ill are reviewed by staff to determine whether they should be reclassified as security level "M." OP 830.2(IV)(H). Offenders who have been diagnosed with a serious mental illness and designated as security level "M" must be reviewed by the MDT to determine an appropriate housing placement, including referral to an acute care unit, referral to a mental health residential unit, referral to a secure diversionary treatment program, or referral to a secured allied management unit. OP 841.4(V)(C)(5); *see also* OP 730.3(V)(B)-(F).[7]

B. Incarceration History

23. Reyes entered VDOC custody in April 2001. Compl. ¶ 67. In June 2001, Reyes was transferred to ROSP. Compl. ¶ 67. About a year later, Reyes was transferred to WRSP, and he advanced into the general population by July 2003. Compl. ¶ 67.

24. In July 2006, Reyes was involved in an altercation with his cellmate. Compl. ¶ 68. Following the assault, Reyes was transferred back to ROSP, where he was reclassified as a level "S" offender. Compl. ¶ 72.

25. In May 2009, Reyes was moved into the progressive housing unit, "a setting aimed ostensibly at helping people transition out of" segregation. Compl. ¶ 92. When Reyes refused to be housed with a cellmate, however he was returned to segregation. Compl. ¶ 92.

26. Reyes was given another chance to return to the progressive housing unit in 2010, and he declined. Compl. ¶ 94. Reyes was given a third chance to return to the progressive housing unit in 2011, and he again declined. Compl. ¶ 95.

27. In December 2012, following the adoption of the Step-Down Program, Reyes was placed into the "SM" internal pathway. Compl. ¶ 73.

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

28. In contrast to "the vast majority of staff and prisoners at Red Onion," Reyes is a "monolingual Spanish speaker." Compl. ¶¶ 2, 16. Reyes alleges that, because he cannot read or write in English, he "was unable to participate in the journal series component of the Step-Down Program" and cannot progress out of segregation. Compl. ¶¶ 64; 87; 102.

29. However, Reyes was advanced from SM0 to SM1 in June 2018. Compl. ¶ 65.

30. As a SM1 level inmate, Reyes received additional privileges. Compl. ¶ 66.

31. Reyes also contends that he "does not receive Spanish-language notice of ICA hearings and recommendations before ICA segregation reviews occur, and so he has no meaningful opportunity to context the basis for his ongoing" classification. Compl. ¶ 82.

32. Reyes concludes that, although staff members at ROSP review the decision to hold Reyes in segregated confinement, those reviews are a "sham" and "serve no purpose other than to rubberstamp his continued isolation." Compl. ¶ 6.

C. Physical Conditions of Confinement

33. Reyes refers to his present conditions of incarceration as "solitary confinement," a nonspecific, general term that the VDOC does not recognize or use in the context of inmates incarcerated in Virginia. Compl. ¶¶ 34-67.

34. As a level "S" inmate, Reyes is housed in a single cell, without a cellmate. His cell has a bed, a table, a toilet, and a sink. The cell has lights that dim at night. Compl. ¶ 107. The cell has a solid door with an inset window, facing inside the prison. Compl. ¶¶ 57, 108. The cell also has a window with an exterior view, although Reyes contends that he cannot see out of the window in his cell. Compl. ¶ 119.

35. Inmates can verbally communicate with other offenders who are housed in the cells beside, above, or below their assigned cell. Comp. ¶¶ 57; 108. However, Reyes contends

that he is not able to meaningfully communicate with other offenders because there are no other Spanish-speaking inmates housed near him. Compl. ¶ 108.

36. Offenders in special housing receive laundry, barbering, and hair care services in the same manner as offenders in the general population, and they receive exchanges of clothing, bedding, and linen in the same manner as offenders in the general population. OP 861.3(V)(E)(12)(a). Offenders in special housing receive the same number and type of meals as the general population, OP 861.3(V)(E)(11), and they have the same mail regulations and privileges, including sending and receiving legal mail, as offenders in the general population. OP 861.3(V)(E)(13).

37. All offenders on the "SM" pathway, regardless of privilege level, are allowed to check out 2 library books per week, possess legal and religious materials, purchase up to $10 of commissary items from an approved list, have access to a television that is mounted on the pod wall, purchase a radio (after three months of maintaining a charge free status), have in-cell programming, out-of-cell recreation, one hour of non-contact visitation per week, make two 15-minutes phone calls per month, and have at least 3 showers per week. Attachment B to Compl., ECF 1-2, pp. 58-59.

38. Although Reyes is allowed to go to outside recreation two years a day, five days a week, he does not get taken outside as often as is mandated by policy. Compl. ¶ 115. Prior to being taken outside for recreation, Reyes must be strip-searched and shackled. Compl. ¶ 117.

39. By policy, Reyes is allowed to shower three times a week, although he alleges that he does not actually shower that frequently. Compl. ¶ 120. Offenders in special housing should be permitted to sponge bathe whenever they choose. OP 861.3(V)(E)(12)(b).

40. Reyes is allowed two fifteen-minute telephone calls per month. Compl. ¶ 123.

41. All offenders who have been assigned to a restrictive housing must be assessed by a qualified mental health professional ("QMHP") either before their placement, or within one day after their placement, so that any "at risk" offenders may be identified. OP 861.3(V)(C)(1).

42. Offenders who have been placed in a restrictive housing unit are provided with mental health and medical services. OP 861.3(V)(C).

43. Offenders in special housing should be checked by a corrections officer at least twice per hour. In addition to that supervision, the shift commander, or commensurate authority, should visit the special housing unit on a daily basis. OP 861.3(V)(E)(10).

44. Reyes alleges that, as a result of his conditions of confinement, his "mental health has declined precipitously." Compl. ¶ 132. Reyes also contends that the mental health staff "failed to take reasonable measures to address his decline." Compl. ¶ 139.

45. Although Defendant Trent designated Reyes as a MH-2S inmate, which indicated that he was substantially impaired, Defendant Lee denied Reyes the opportunity to be diverted into the program for level "S" inmates with a significant mental illness. Compl. ¶ 146.

46. Defendant McDuffie, the institutional psychiatrist, evaluated Reyes, diagnosed him with major depression, and prescribed anti-depressants. Compl. ¶ 150.

47. Following the psychiatric examination, Defendant Huff determined that Reyes no longer met the criteria for transfer into the diversionary program for mentally-ill, level "S" inmates. Compl. ¶ 151.

ARGUMENT AND AUTHORITIES

"[T]he purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint." *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is

plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and if there is "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556); *see also* Fed. R. Civ. P. (8)(a)(2). Also, although the Court must consider all of the factual allegations of the complaint as true, the Court is not bound to accept a legal conclusion couched as a factual assertion, *Iqbal*, 556 U.S. at 663-64, nor should the Court accept a plaintiff's "unwarranted deductions," "rootless conclusions of law" or "sweeping legal conclusions cast in the form of factual allegations." *Custer v. Sweeney*, 89 F.3d 1156, 1163 (4th Cir. 1996).

Generally, a Rule 12(b)(6) motion to dismiss "cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's claim is time-barred." *Goodman v. PraxAir, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). However, a court may determine the merits of an affirmative defense raised in a motion under Rule 12(b)(6) if "all facts necessary to the affirmative defense clearly appear[] on the face of the complaint." *Id.*

For the following reasons, Reyes' substantive claims fail to allege a plausible federal constitutional or statutory violation. Defendants therefore request that the complaint be dismissed for failure to state a claim upon which relief can be granted.

I. Eighth Amendment Claim

In Count I, Reyes alleges, broadly, that "all defendants" were deliberately indifferent to prison conditions that posed a serious and substantial risk of harm, in violation of the Eighth Amendment. Compl. ¶¶ 192-194. He includes what appears to be a subsumed medical indifference claim against Defendants Huff, Trent, and McDuffie. Compl. ¶ 196. Because

Reyes has not alleged sufficient facts to satisfy the objective component of an Eighth Amendment analysis, and because—at least with respect to some defendants—he has not alleged sufficient facts to satisfy the subjective element, Count I should be dismissed.

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

Under settled Fourth Circuit precedent, Reyes' Eighth Amendment claim fails under the objective prong of the Eighth Amendment analysis. Specifically, the Fourth Circuit has rejected a claim that the Eighth Amendment is violated by inmates who "are confined to their cells for twenty-three hours per day without radio or television, . . . receive[] only five hours of exercise per week, and . . . may not participate in prison work, school, or study programs." *Mickle v. Moore (In re Long Term Admin. Segregation of Inmates Designated as Five Percenters)*, 174

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

Reyes' conditions of confinement, which included access to library materials, legal and religious materials, commissary privileges, an in-pod television, the ability to purchase a radio, in-cell programing, out-of-cell recreation, the ability to have one hour of non-contact visitation per week, at least three showers per week, and the ability to use the phone twice a month, were not as restrictive as those upheld in *Mickle*. That Reyes did not always take advantage of these privileges cannot be used to undercut the fundamental constitutional nature of his conditions of confinement. Because Reyes has not alleged facts sufficient to distinguish his circumstances from those presented in *Mickle*, that precedent controls. *Accord Hubbert v. Washington*, No. 7:14cv00530, 2016 U.S. Dist. LEXIS 89031, at *19-20 (W.D. Va. July 7, 2016).

Because Reyes' conditions of confinement did not involve an illegitimate deprivation, such as "improper ventilation, inadequate lighting, no heat, unsanitary living environment, opportunity to wash, nutritional needs not being met, [or] no medical care," and because Reyes' ability to interact with other individuals—although limited—was not absent, his conditions of confinement did not rise to the level of an "extreme deprivation" amounting to cruel and unusual punishment. *Sweet*, 529 F.2d at 861-62.

From a subjective perspective, many of the claims against these defendants also fail. With respect to any official-capacity claims against the VDOC administrators, the segregation policies—in and of themselves—do not evidence deliberate indifference. To prevail in an official-capacity suit, a plaintiff must show that the challenged policies were "the functional equivalent of a decision by the [entity] itself to violate the Constitution." *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011). But even presupposing that Reyes' conditions of confinement subjected him to a risk of harm, VDOC policies are specifically tailored to address any potential danger. Segregation inmates are constantly checked by medical and mental-health personnel, and inmates are also provided with the option of requesting medical or mental-health assistance at any time. By policy, if an inmate were to exhibit mental health symptoms, he would be immediately assessed and appropriate treatment provided, up to and including transfer to Marion Correctional Center, the VDOC psychiatric facility. For these reasons, VDOC's policies are not the functional equivalent of a decision to impose cruel and unusual punishment upon offenders housed in segregation. Rather, these policies, in their totality, were devised to balance specific security needs against VDOC's corresponding obligation to safeguard inmates' physical and mental well-being. As in *Mickle*, the policies were specifically designed to protect inmates who might experience mental deterioration while in custody. *See Mickle*, 174 F.3d at 472 (holding that the Plaintiffs could not establish deliberate indifference where the prison's "procedures for administrative segregation provide for periodic visits by medical personnel and for the referral of inmates displaying mental health problems for treatment"). Accordingly, any official-capacity Eighth Amendment claims must fail. *See, e.g.*, *Hughes v. Blankenship*, 672 F.2d 403, 405-06 (4th Cir. 1982) (explaining that official-capacity liability arises from the application of an official policy, rather than the individualized acts of government employees).

With respect to individual-capacity claims, Defendants note that principles of *respondeat superior* are inapplicable in the context of claims under 42 U.S.C. § 1983. *See Iqbal*, 556 U.S. at 676 ("[B]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."). Because the allegations against the following individual fails to establish sufficient personal involvement in an alleged Eighth Amendment violation, any individual-capacity Eighth Amendment claims against these Defendants should be dismissed.

1. **Defendant Mathena**. As an initial matter, any individual or official-capacity claims arising out of Defendant Mathena's tenure as warden of ROSP are barred by the applicable two-year statute of limitations. *See* Va. Code § 8.01-243(A); *Shelton v. Angelone*, 148 F. Supp. 2d 670, 677 (W.D. Va. 2001). Defendant Mathena is alleged to have held the role of Warden from October 2011 until January 2015. This suit was not filed until 2018—over three years after Mr. Mathena left ROSP. Any claims involving Defendant Mathena's conduct as the Warden of ROSP should therefore be dismissed as time-barred.

The remaining allegations against Defendant Mathena focus on his role as the Security Operations Manager. Compl. ¶ 182. In that capacity, he is simply alleged to have performed biannual reviews of offenders assigned to security level "S." This allegation is insufficient to allege subjective indifference and, therefore, does not state an Eighth Amendment claim.

2. **Defendant Gallihar**. Defendant Gallihar is alleged to have not recommended that Reyes be moved out of segregation, and to not have "meaningfully assessed" Reyes' segregation status. Compl. ¶¶ 183-84. Again, this bare allegation does not establish subjective indifference to a known and substantial risk of harm and, therefore, does not state a claim.

3. **Defendants Justin Kiser, Gilbert, Adams, and Lambert**. These defendants are ICA members who allegedly failed to advance Reyes through the Step-Down Program. Compl. ¶ 187. The complaint does not allege sufficient facts to establish that any of these individuals actually and personally knew of a substantial risk of harm to Reyes, and yet failed to act.

4. **Defendant Lee**. Defendant Lee is alleged to have "refused" to transfer Reyes into a residential mental health unit, Compl. ¶ 188, suggesting instead that Reyes be re-examined to make sure that Reyes was not being misdiagnosed as a result of his purported inability to speak English. Compl. ¶ 146. Again, this allegation falls short of establishing that Defendant Lee knew that Reyes was being housed in unconstitutional conditions of confinement, and yet failed to act. To the contrary, the complaint affirmatively alleges that Defendant Lee was responsible for making sure that Reyes had an additional mental health evaluation—and that is the very antithesis of deliberate indifference.

5. **Defendants Huff, Trent, and McDuffie**. These three mental health professionals are alleged to have failed to remove Reyes from segregated confinement—an action they are not alleged to have had the authority to actually take. Compl. ¶ 189. The remaining allegations against these Defendants fault their diagnostic abilities and referrals. Certainly, within the context of alleged medical indifference, a prison official's deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976). But a claim concerning a disagreement between an inmate and medical personnel regarding diagnosis and course of treatment does not implicate the Eighth Amendment. *Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985). Questions of medical judgment are not subject to judicial review. *Russell v. Sheffer*, 528 F.2d 318 (4th Cir. 1975).

Moreover, medical malpractice does not state a federal claim, *Estelle*, 429 U.S. at 105-06, nor does negligence in diagnosis, *Sosebee v. Murphy*, 797 F.2d 179 (4th Cir. 1986).

Here, Defendant Trent is alleged to have met with Reyes, with an interpreter, and mentally assessed him on two initial occasions. Compl. ¶¶ 143, 145. Defendant Trent is alleged, on the latter occasion, to have classified Reyes as mentally ill. Compl. ¶ 145. Defendants Huff and Trent are alleged to have then performed two more evaluations, which resulted in Reyes being seen by Dr. McDuffie. Compl. ¶¶ 148-50. Dr. McDuffie is alleged to have examined Reyes, diagnosed him with major depression, and prescribed medication for him. Compl. ¶ 150. Following the prescription of anti-depressants, Defendant Huff is alleged to have removed Reyes from the list of inmates designated as seriously mentally ill. Comp. ¶ 151.

These allegations present, at most, a disagreement with the diagnostic actions and conclusions of these mental health professionals. Repeatedly assessing an inmate, using an interpreter on at least one occasion, and prescribing mental health medication for that inmate are not acts of deliberate indifference. To the extent Reyes disagrees with their professional conclusions, that does not state a federal constitutional claim. The Eighth Amendment allegations against these three mental health professionals therefore fail to state a claim.

6. **Defendant Herrick**. Defendant Herrick is alleged, simply, to be the Director of Health Services for VDOC. Any individual-capacity claims against Defendant Herrick fail, however, for failure to allege sufficient personal involvement with this particular plaintiff. Defendant Herrick is not alleged to have received any information specific to Reyes, or have any knowledge of his situation. Absent personal involvement, there is no basis for a finding of individual liability.

*** * ***

For the foregoing reasons, Reyes has not sufficiently alleged that his conditions of confinement deprived him of a discrete and identifiable human need. His general challenge to so-called "solitary confinement" is precluded by the Fourth Circuit decisions in *Mickle* and *Sweet*, and this Court should not discard that precedent.

Any official-capacity claims fail for the additional reason that Reyes has not identified any VDOC policy, the adoption and application of which goes beyond the circumstances addressed in *Mickle* and *Sweet*. The VDOC policies are before the Court, and none of them contain any indicia that VDOC, in adopting those policies, made the functional decision to violate the Eighth Amendment. Finally, for the reasons discussed with respect to many of the individual defendants, some individual-capacity claims fail to state a claim for the additional reason that they do not allege sufficient personal involvement or subjective indifference.

II. Due Process Claim

In Count II of the complaint, Reyes alleges that certain defendants violated his right to procedural due process by failing to provide him with "meaningful proceedings" to review his continued confinement in segregation. Compl. ¶ 203. Because Reyes does not have a vested liberty interest in avoiding confinement in segregated housing, this claim also fails.

To the extent Reyes is predicating his due process claim on any alleged failure to adhere to VDOC policies, he does not state a claim. *Riccio v. Cnty. of Fairfax, Va.*, 907 F.2d 1459, 1469 (4th Cir. 1990). Rather, "[t]o state a procedural due process violation, a plaintiff must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015). If, and only if, the inmate can establish a protected liberty interest, is it necessary to examine the sufficiency-of-process surrounding deprivation of that interest. *See id.*

To establish a protected liberty interest, an inmate must "[1] point to a Virginia law or policy providing him with an expectation of avoiding the conditions of confinement and [2] demonstrate that those conditions are harsh and atypical in relation to the ordinary incidents of prison life." *Prieto*, 780 F.3d at 252. With respect to the first prong of the analysis, Defendants will assume, without conceding, that Reyes has an expectation of avoiding confinement in administrative segregation. *See Incuuma v. Stirling*, 791 F.3d 517, 527 (2015).

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

Specifically, in *Wilkinson*, the Supreme Court identified three primary factors for consideration when determining whether prison conditions were "harsh and atypical" within the

meaning of the due process clause: (1) the magnitude of the restrictions imposed on the inmate; (2) whether the segregation was indefinite in nature; and (3) whether assignment to segregation had any collateral consequences on an inmate's sentence. 545 U.S. at 214. Considering the indefinite nature of the confinement, the extreme isolation imposed upon the inmates, and the fact that inmates assigned to that prison were disqualified from parole consideration, the United States Supreme Court concluded that inmates housed under those conditions possessed a protected liberty interest. *See id.* at 224.

Here, by contrast, Reyes has not been assigned to administrative segregation for an unlimited duration of time. He was previously given three opportunities to move out of segregated housing, which he declined. And he is presently in the process of utilized the step-down program to progress through and out of segregation. Because Virginia has a specified and particular pathway to allow offenders to progress out of segregation, assignment to security level "S" is not "indefinite." And offenders housed in segregation at Red Onion State Prison have fewer privileges than offenders in the general population, certainly. But the mere restriction of general inmate privileges does not necessarily translate a prison environment into one that is "harsh and atypical." For example, level "S" offenders have commissary privileges, visitation privileges, educational opportunities, recreation privileges, telephone privileges, access to religious guidance, access to legal services, the same mail and correspondence privileges as offenders in the general population, the same laundry, barbering, and hair care services as offenders in the general population, the opportunity to shower at least three times per week, the same number of meals and types of food as that offered to the general population, and access to medical and mental health services. And although Level "S" offenders are subjected to strip searches, so are offenders in the general population.

Moreover, the baseline conditions of segregation for security level "S" offenders are the same as those for any other offender confined to special housing, a factor that has been deemed particularly relevant by the United States Supreme Court. *See Sandin*, 515 U.S. at 486; *see also* O.P. 861.3(IX)(B)(1). And the physical living conditions for special housing offenders in Virginia "approximate those of the general population." O.P. 861.3(IX)(B). Finally, the Fourth Circuit has held that conditions of segregated housing, more onerous than those described by Reyes, do not necessarily pose an atypical and significant hardship within the meaning of the Due Process Clause. *See Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997).

Indeed, as court after court has unanimously concluded, the restrictions and limitations accompany segregated confinement at Red Onion State Prison are not so onerous as to trigger the protections of the Due Process Clause. *See, e.g.*, *Smith v. Collins*, No. 7:17cv00215, 2018 U.S. Dist. LEXIS 160614, at *15-17 (W.D. Va. Sept. 20, 2018) (Jones, J.) (concluding that the inmate was not "subjected to the sort of prolonged, extreme deprivation of sensory stimuli or social contact that gave rise to the concerns in *Wilkinson*," and therefore had not established that he had a protected liberty interest).[8]

Considering all of the circumstances, none of the conditions described by Reyes fall outside the scope of everyday experiences that an inmate could expect to encounter within the

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

confines of a prison. And because the conditions of confinement in segregated housing are not harsh and atypical as compared to the ordinary incidents of prison life, Reyes does not possess a protected liberty interest in avoiding confinement at security level "S". His due process claim, therefore, necessarily fails. *Prieto*, 780 F.3d at 252.

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

All offenders who are classified as security level "S" receive an initial, formal ICA hearing before being assigned to security level "S."[9] They receive advance notification and have the right to present during that hearing. The ICA recommendation must be approved by the Warden and the Regional Chief, and inmates have the opportunity to file a grievance relating to

[9]To the extent Reyes might be challenging the due process accompanying his initial assignment to security level "S" in 2006, that claim is barred by the applicable two-year statute of limitations.

his segregation assignment. Following their assignment to security level "S", inmates receive multiple internal and external, formal and informal, reviews.[10]

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

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

III. Americans with Disabilities Act and Rehabilitation Act

In Counts III and IV of the complaint, Reyes has brought official-capacity claims against Defendants Clarke and Kiser, alleging that he has a mental impairment that substantially limits his major life activities, and that they have not accommodated his impairment. Compl. ¶¶ 208-13; ¶¶217-219. Reyes concludes that these officials have therefore violated the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973 ("RA").

A. Statute of Limitations

As an initial matter, Reyes' claim that his alleged mental illness has not been appropriately accommodated during his segregated confinement, in violation of the ADA and the RA, is barred by the applicable statutes of limitations. Given the similarities between the ADA and the RA, courts apply the same limitations period to claims under both acts. *Semenova v. Md. Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017). And, as a general rule, "the one-year limitations period in the Virginia [Rights of Persons with] Disabilities Act applies to ADA

[10] *See* Statement of Facts, ¶¶ 14-21, *supra*.

claims brought in Virginia." *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 348 (4th Cir. 2011); *see also Wolsky v. Medical College of Hampton Rds.*, 1 F.3d 222, 224 (4th Cir. 1993); Va. Code § 51.5-46(B). The limitations period begins to run when the plaintiff knows or should have known of the alleged discriminatory decision. *A Soc'y Without a Name*, 655 F.3d at 347-48.

Here, Reyes has alleged that he was denied "an alternative means to progress out of segregation," and that he was entitled to this "benefit" because of his alleged mental illness. Compl. ¶ 213. Yet, Reyes alleges that he began exhibiting mental health symptoms in 2009, Compl. ¶ 140, and entered the Step-Down Program in December 2012, Compl. ¶ 73. At the time he entered the Step-Down program, then, Reyes was or should have been aware of the alleged lack of accommodations for his alleged mental illness. For this reason, the one-year statute of limitations began to run as of December 2012, and it had long since expired by the time Reyes filed this suit. Accordingly, his ADA and RA claims should be dismissed as time-barred.

B. The ADA and RA Claims Do Not Allege a Plausible Claim to Relief

Substantively, too, Reyes has not alleged a plausible claim to relief. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Similarly, under § 504 of the Rehabilitation Act, "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

To state a claim under either the ADA or RA, therefore, a plaintiff "must allege that (1) he has a disability; (2) he is otherwise qualified to receive the benefits of a public services,

program, or activity; and (3) he was excluded from participation in or denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of his disability." *Spencer v. Early*, 278 F. App'x 254, 261 (4th Cir. 2008) (quotation omitted); *see also Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005). The complaint fails to plausibly allege these elements.

With respect to the first element, Reyes has alleged that he is a qualified individual with a disability, presumptively by reason of his diagnosis of major depression. But even assuming that Reyes has appropriately alleged that he has a mental impairment that qualifies as a "disability," he must establish that he has been denied a "benefit" for which he is "otherwise qualified." The "benefit" that he is alleged to have been denied is release from segregation into the general population. Yet, Reyes does not have a vested right to a specific security classification, *Sandin*, 515 U.S. at 486-87, nor is an inmate's placement in general population guaranteed under VDOC policy or otherwise, *Meacham v. Dano*, 427 U.S. 217, 224 (1976). Also, Reyes has not plausibly alleged that he is "otherwise qualified" for release from segregation, particularly considering that he received a serious and significant disciplinary infraction in 2006. Because VDOC is vested with the broad discretion to classify and house inmates, *see Gatson v. Taylo*r, 946 F.2d 340, 343 (4th Cir. 1991), the fact that Reyes has remained in segregated confinement does not state a plausible claim that he was denied a "benefit" for which he was "otherwise qualified."

Also, Reyes has not plausibly alleged these named Defendants, in their official capacities, knowingly failed to release him from segregation, and that their actions "stemmed from any discriminatory intent due to any alleged disability." *Spencer v. Easter*, 109 F. App'x 571, 573 (4th Cir. 2014). Intentional discrimination requires more than simple negligence. Rather, it requires actual knowledge and a deliberate act or failure to act. Reyes has not plausibly alleged

intentional discrimination on the part of these Defendants, and, therefore, "fails to establish a prima facie claim under the ADA." *Id,* at 573. Nor has Reyes plausibly alleged that these official-capacity Defendants purposefully held him in segregated confinement "solely by reason of" his disability, as would be required to state a claim under RA.

For these reasons, Reyes has not plausibly alleged that his continued confinement in segregation constitutes a violation of the ADA or the RA. Moreover, for the reasons discussed below, he has not plausibly alleged an underlying constitutional violation—and that failure is also fatal to any claim under the ADA. *See United States v. Georgia*, 546 U.S. 151, 159 (2006).

C. Absent an Underlying Constitutional Violation, Defendants Are Immune.

As this Court has previously held, "in the context of state prisons, Title II [of the ADA] validly abrogates state sovereign immunity and 'creates a private cause of action for damages against the States' only 'for conduct that *actually* violates the Fourteenth Amendment.'" *Chase v. Baskerville*, 508 F. Supp. 2d 492, 506 (E.D. Va. 2007) (quoting *Georgia*, 126 S. Ct. at 882 (2006)), *aff'd*, 305 F. App'x 135 (4th Cir. 2008). In *Chase*, this Court acknowledged that, although "educational, rehabilitative, and vocational programs are a pervasive part of prison life," states have "no constitutional obligation to offer such programs." *Id.* at 505. Thus, failing to accommodate a prisoner in the context of those programs does not implicate the ADA unless the failure to accommodate also amounts to a constitutional violation.

For the reasons discussed elsewhere in this memorandum, Reyes has not sufficiently alleged that his constitutional rights were violated in the context of the administration of Virginia's Step-Down Program. It bears noting as well that Reyes admittedly was given three separate opportunities to transition out of segregation into progressive housing, and he declined to do so. Because any failure to accommodate Reyes' alleged mental disability in the context of the Step-Down Program did not rise to the level of a constitutional violation, it follows that

Defendants Clarke and Kiser retain their Eleventh Amendment immunity, and Reyes has not stated an actionable official-capacity claim under the ADA.[11]

IV. Equal Protection Clause

In Count V of the complaint, Reyes alleges that certain Defendants violated the Equal Protection Clause. Specifically, Reyes contends that these Defendants were aware that translation services for non-English-speaking Defendants were not being provided, and that they therefore intentionally discriminated against non-English speaking inmates. Compl. ¶¶ 226-28.

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

Here, Reyes has not plausibly alleged that he is treated differently from other, similarly-situated individuals. "Generally, in determining whether persons are similarly situated for equal

[11] The Fourth Circuit has noted that it is not clear "whether a dismissal on Eleventh Amendment immunity grounds is a dismissal for failure to state a claim under Rule 12(b)(6) or a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1)." *Andrews v. Daw*, 201 F.3d 521, 524 n.2 (4th Cir. 2000). It has been noted, however, that "[t]he recent trend . . . appears to treat Eleventh Amendment Immunity motions under Rule 12(b)(1)." *Haley v. Va. Dep't of Health*, No. 4:12cv00016, 2012 U.S. Dist. LEXIS 161728, at *5 n.2 (W.D. Va. Nov. 13, 2012). Regardless, because Reyes has not alleged a corresponding constitutional violation, Defendants are immune from his request for damages under the ADA.

protection purposes, a court must examine all relevant factors." *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996). The thrust of the inquiry is whether the plaintiff can "identify persons materially identical to him or her who ha[ve] received different treatment." *Kolbe v. Hogan*, 813 F.3d 160, 185 (4th Cir. 2016). To pass the similarly-situated threshold, "the evidence must show a high degree of similarity"—that is, "apples should be compared to apples." *Id.*

Reyes contends, in essence, that he has been discriminated against during his segregated confinement because he is not proficient at speaking English. To state an equal protection claim, then, he must establish that he has been treated differently than other inmates who are not proficient at speaking English. He has not done so. For example, Reyes has not alleged that the programs and services he believes should be provided in Spanish are provided in other foreign languages. According to the complaint, Reyes has been offered the program material in English—the same as every other level "S" inmate at ROSP. His complaint, then, is not that he has been treated differently from other inmates—it is that he has been treated exactly the same. This does not state an Equal Protection violation. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) ("Language, but itself, does not identify members of a suspect class.").

Moreover, Reyes has not alleged plausible, specific facts from which it could be determined that any of these named defendants intentionally discriminated against him because he does not speak English. In order to state an Equal Protection claim, Reyes must set forth "specific, non-conclusory factual allegations that establish improper motive." *Williams v. Hansen*, 326 F.3d 569, 584 (4th Cir. 2003). That is, "to establish intentional discrimination, a plaintiff must show that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Soberal-Perez*, 717 F.2d at 42 (concluding that official policies that "reflect[], at most, a

preference for English over all other languages" are insufficient evidence of discriminatory intent). Here, Reyes' generalized allegations that translation services have not been provided for Spanish-speaking inmates do not plausibly allege "improper motive" on the part of these named Defendants. Accordingly, Reyes has not stated a claim under the Equal Protection Clause.

V. Title VI of the Civil Rights Act of 1964

In Count VI of the complaint, Reyes contends that Defendants Clarke and Kiser, in their official capacities, failed to provide translation services for non-English speaking inmates, thereby violating Title VI of the Civil Rights Act. Compl. ¶¶ 236-38.

As an initial matter, this claim—like the claims under the ADA and the RA—are barred by the applicable statute of limitations. Because Title VI does not contain its own statute of limitations, courts typically borrow the state personal injury statute of limitations. *See Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 187 (4th Cir. 1999). In Virginia, the applicable personal injury statute of limitations is two years. Va. Code § 8.01-243(A).

Reyes contends that he was first brought into the Step-Down Program in December of 2012. Compl. ¶ 99. At that time, he knew, or should have known, that the program materials were not being offered in Spanish. Reyes therefore had until approximately December 2014 to file suit under Title VI. He did not initiate this litigation, however, until 2018. His claims under Title VI are therefore barred by the applicable two-year statute of limitations.

Substantively, too, Reyes has failed to state a claim under Title VI. 42 U.S.C. § 2000d prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin. Reyes has not plausibly alleged that he was discriminated against because of his "race, color, or national origin." Rather, the thrust of his complaint is that he was discriminated against because he does not speak English. "While Title VI prohibits

discrimination on the basis of national origin, language and national origin are not interchangeable." *Muhid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 795 (8th Cir. 2010). Accordingly, Reyes' allegation that he has been discriminated against as a Spanish-speaking inmate does not state a claim under Title VI.

Similarly, disparate-impact claims are not cognizable under Title VI, *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001), and Title VI prohibits only intentional discrimination, *Mumid.*, 619 F.3d at 794. Reyes has not plausibly alleged that any of these Defendants were actually aware of his "national origin" and intentionally discriminated against him on that basis. At best, Reyes has alleged that the Defendants were aware that he was not able to access certain program materials because they were not available in Spanish—and this does not state a claim under Title VI. *See Muhid*, 618 F.3d at 795 ("A policy that treats students with limited English proficiency differently . . . does not facially discriminate based on national origin."). Accordingly, Reyes has not stated a plausible claim under Title VI.

CONCLUSION

Through the Step-Down Program, VDOC sought to establish a definitive pathway to help level "S" offenders transition back into the general population. Every court to have considered the Step-Down Program has agreed that it is both constitutional and laudable. VDOC denies that it has discriminated against any inmate because they are a native-Spanish speaker. But even taking the complaint on its face, Reyes has not sufficiently alleged a plausible federal cause of action. For the foregoing reasons, Defendants respectfully request that this Court GRANT their motion to dismiss, and enter any other such relief as this Court may deem just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2018, I electronically filed the foregoing Memorandum in Support of Defendants' Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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