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.

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

Plaintiff contends that he has been held in "solitary confinement." Citing studies and other outside sources, he argues, basically, that "solitary confinement" is *per se* unconstitutional. Adding the first and the second, Plaintiff concludes that his constitutional rights must have been violated.

This approach is overly simplistic. Constitutional liability under 42 U.S.C. § 1983 is personal—personal to the individual named defendants, and personal to the specific plaintiff before the Court. It is not enough to allege that theoretical policies regarding theoretical offenders in theoretical situations transgress constitutional boundaries. Under the *Federal Rules of Civil Procedure*, a plaintiff is required to allege specific facts, about his specific situation, involving specific defendants, who engaged in specific actionable misconduct. He cannot simply bootstrap an entire federal lawsuit onto a body of studies or publications that may not even apply to his given situation.

Stripping away the rhetoric about so-called "solitary confinement," it is evident that the Plaintiff has not alleged sufficient facts to elevate his claims above controlling Fourth Circuit precedent. For this reason, and as discussed in more detail below, Defendants' Rule 12(b)(6) motion to dismiss should be granted.[1]

A. <u>The continuing violation rule does not save the time-barred claims.</u>

Defendant Mathena maintains that any official or personal-capacity Eighth Amendment claims against him, arising out of his former position as warden of ROSP, are barred by the applicable two-year statute of limitations. It is true, certainly, that the Fourth Circuit has endorsed application of the continuing violation rule in the context of deliberate indifference claims under 42 U.S.C. § 1983. But "to assert a Section 1983 claim for deliberate indifference under the 'continuing violation' doctrine, a plaintiff must (1) identify a series of acts or omissions that demonstrate deliberate indifference to his serious medical need(s); and (2) *place one or more of these acts or omissions within the applicable statute of limitations for personal injury*." *Depaola v. Clarke*, 884 F.3d 481, 487 (4th Cir. 2018) (emphasis added). That is, "this principle does not apply to claims that are based on 'discrete acts of unconstitutional conduct,' or those that fail to identify acts or omissions within the statutory limitation period that are a component of the deliberate indifference claim." *Id.* In turn, this requirement "screens out Eighth Amendment claims that challenge discrete acts of unconstitutional conduct or that fail to allege acts within the relevant statutory period that are traceable to a policy of deliberate indifference." *Shomo v. City of New York*, 579 F.3d 176, 182 (2d Cir. 2009).

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[1] Defendants are selectively rebutting certain arguments raised in the Plaintiff's response in opposition. By omitting any previously-raised arguments, Defendants do not intend to abandon their position on those points.

Defendant Mathena is alleged to have held the role of Warden between October 2011 and January 2015. This suit was not filed until 2018. Defendant Mathena cannot have engaged in any acts—in his capacity as a warden—during the statutory limitations period because he was not the warden of ROSP during the statutory limitations period. And the Plaintiff cannot use actions Defendant Mathena allegedly took, in another context and in a different official position, to "save" any Eighth Amendment claims arising out of his position as warden of ROSP. The continuing violation doctrine is inapplicable to those claims, and they are time-barred.

Nor does the continuing violation rule save the Plaintiff's statutory claims under the Americans with Disabilities Act ("ADA"), the Rehabilitation Act ("RA"), or Title VI of the Civil Rights Act. For claims under these statutes, 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 v. Virginia*, 655 F.3d 342, 347-48 (4th Cir. 2011). As the Fourth Circuit has recognized, "if a plaintiff can show that the illegal act did not occur just once, but rather in a series of separate acts, and if the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation." *Id.* at 348 (internal quotations and alterations omitted). However, "continual unlawful acts are distinguishable from the continuing ill effects of an original violation," for "the latter do not constitute a continuing violation." *Id.*; *see also Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991) ("[L]imitations periods begin to run in response to discriminatory *acts* themselves, not in response to continuing *effects* of past discriminatory acts." (emphasis in original)).

With respect to these statutory claims, the Plaintiff has alleged that Director Clarke and Warden Kiser discriminated against him by not accommodating his "mental illness," and by not offering adequate translating services or providing written program materials in Spanish. Their

alleged liability stems, apparently, from the fact that other unnamed actors did not "account for his mental illness" when reviewing his classification and housing status, and for the initial decision (to the extent there was one) to not offer translators or program materials in foreign languages.

The plaintiff does not plausibly allege the Director Clarke and Warden Kiser, themselves, were aware of his alleged mental illness. Nor does he plausibly allege that they were aware that he did not speak English. Their liability, then, must stem from an unnamed policy that "led to these actions and omissions." Compl. ¶¶ 214, 238. But neither Director Clarke, Warden Kiser, nor anyone else at ROSP or VDOC is alleged to have changed or altered those applicable policies during the statutory limitations period. The Plaintiff's complaint does not allege discrete discriminatory acts on the part of these official-capacity defendants, but rather, the continuing ill effects of the original policy decision—*i.e.*, to allegedly not accommodate his mental illness or the fact that he allegedly does not speak English.

For this reason, the Plaintiff's ADA, RA, and Title VI claims accrued as of the time that the challenged Step-Down policies were first applied to him, in December 2012—years before he initiated this litigation. The statutes of limitations on these claims therefore expired well before he filed suit, and he cannot rely on his continuing inaction to toll the statute of limitations against these official-capacity defendants. After all, "the continuing violation doctrine should not provide a means for relieving plaintiffs from their duty to exercise reasonable diligence in pursuing their claims." *Cowell v. Palmer Twp.*, 263 F.2d 286, 292 (3d Cir. 2001) (requiring courts weighing the applicability of the continuing violation doctrine to consider "the degree of permanence" associated with the challenged action, specifically, "whether the act had a degree of permanence such that it should have triggered the plaintiff's awareness of and duty to assert his

rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate").

Finally, Defendants disagree that the Plaintiff is entitled to claim the four-year statute of limitations made applicable to claims brought under the ADA Amendments Act of 2008. It is true, as Plaintiffs argue, that the 2008 amendments "expressly included episodic impairments in the definition of disability and provided that mitigating measures such as medication should not be considered in determining whether an impairment substantially limits a major life activity and thus qualifies as a disability." *Latson v. Clarke*, No. 1:16cv00039, 2018 U.S. Dist. LEXIS 189386, at *50 (W.D. Va. Nov. 6, 2018). But the Plaintiff has not plausibly alleged that his "mental disability" is "episodic." He alleges, rather, that he has a "serious mental illness," which has become exacerbated over time. Regardless, even if the Plaintiff has plausibly alleged that his disability is only "episodic," such as to claim the benefit of the four-year statute of limitations, his claim is still time-barred. By 2014, the Plaintiff had clearly been placed on notice that his "mental illness" was allegedly not being accommodated by the challenged VDOC policies. That is, the Plaintiff 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, the Plaintiff was or should have been aware of the alleged lack of accommodations for his alleged mental illness. For this reason, the statute of limitations began to run as of December 2012, and, under either applicable statute of limitations, it had long since expired by the time this suit was filed.

B. The Plaintiff has not plausibly alleged an Eighth Amendment deliberate indifference claim.

When analyzing the Plaintiff's Eighth Amendment deliberate indifference claim, it is necessary to examine the actual allegations in the complaint, along with the corresponding provisions of VDOC policy. Those sources establish the following:

- The Plaintiff 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.
- The cell has a solid door with an inset window, facing the prison interior.
- The call has a window with an exterior view.
- Inmates can verbally communicate with other offenders who are housed near them.
- But the Plaintiff contends he cannot meaningfully communicate because there are no other Spanish-speaking inmates.
- The plaintiff has the same laundry, barbering, and hair care services as the general population.
- The plaintiff receives exchanges of clothing, bedding, and linen in the same manner as the general population.
- The plaintiff receives the same number and type of meals as the general population.
- The plaintiff has the same mail regulations and privileges as the general population.
- The plaintiff is allowed to check out 2 library books per week.
- He may possess legal and religious materials.
- He may purchase up to $10 of commissary items from an approved list.
- He has access to a television that is mounted on the pod wall.
- As long as he remains charge-free, he may purchase a radio.
- In-cell programming is available.
- The plaintiff is allowed at least ten hours of outdoor recreation per week.

- Before going outside for recreation, the Plaintiff is strip-searched and shackled.
- The plaintiff is allowed one hour of non-contact visitation per week.
- The plaintiff is allowed to make two 15-minute (personal) phone calls per month.
- The plaintiff is allowed at least 3 showers per week.
- He is allowed to sponge bathe whenever he would like.
- He is provided with mental health and medical services.
- The plaintiff is checked by a corrections officer at least twice per hour.
- In addition, the shift commander, or commensurate authority, should visit the special housing unit on a daily basis.

The Plaintiff contends, however, that these objective conditions of confinement are sufficiently serious, for purposes of stating an Eighth Amendment claim, because of his general solitude or inability to communicate. But the Fourth Circuit has expressly held that that "the restrictive nature of high-security incarceration does not alone constitute cruel and unusual punishment." *Mickle v. Moore (In re Long Term Admin. Segregation of Inmates Designated as Five Percenters)*, 174 F.3d 464, 472 (4th Cir. 1999). Specifically, where an inmate alleges simply that he is "confined to [his] cell[] for twenty-three hours per day without radio or television, . . . receive[s] only five hours of exercise per week, and . . . may not participate in prison work, school, or study programs," those allegations do not implicate the Eighth Amendment proscription against cruel and unusual punishment. *Id.* at 471. Specifically, "***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.* at 472 (emphasis added) (citing *Sweet v. S.C. Dep't of Corr.*, 529 F.2d 854, 861 (4th Cir. 1975)); *accord Hubbert v. Washington*, No. 7:14cv00530, 2016 U.S. Dist. LEXIS 89031, at *19-20 (W.D. Va. July 7, 2016).

That the Plaintiff does not care for settled Fourth Circuit precedent does not mean that he is at liberty to disregard it. Setting aside the nonspecific and rather inflammatory commentary about "solitary confinement," this Court should examine the actual alleged conditions of the Plaintiff's confinement. And those conditions survive objective constitutional scrutiny. *Cf. Latson*, 2018 U.S. Dist. 189386, at *11 ("The plaintiff refers to all of these special housing statuses as solitary confinement, but because that term is imprecise and somewhat misleading, I will refer to them collectively as restrictive housing."). Because the Plaintiff's 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 his 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.

For the reasons set forth in the Defendants' initial memorandum in support, the Eighth Amendment claims also fail against many Defendants because the Plaintiff has not plausibly alleged specific, individualized and subjective indifference. It is not enough to allege that a Defendant holds a particular position, note what the Defendant did in that position, and then conclude that the Defendant was subjectively indifferent to some latent risk of harm. Liability in a civil rights case is "personal, based upon each defendant's own constitutional violations." *Trulock v. Freeh*, 275 F.3d 391, 402 (4th Cir. 2001). And "[a] claim of deliberate indifference, unlike one of negligence, implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice." *White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997).

The Plaintiff alleges, generally, that all of the Defendants were aware of the "dangers" of so-called "solitary confinement." But that is not enough. The Plaintiff must allege facts from which it could be determined that each individual Defendant was aware that *his* conditions of confinement and subjected *him* to a substantial and unreasonable risk of harm. He has not plausibly alleged that Defendants Mathena, Gallihar, Justin Kiser, Gilbert, Adams, Lambert, or Herrick had any personalized knowledge of his alleged situation. And Defendants cannot be deliberately indifferent to a risk they did not know about.

With respect to Defendants Lee, Huff, and Trent, the Plaintiff presents a complaint as to their professional assessments of his need for different types of mental health treatment. But as Defendants previously argued, 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 v. Gamble*, 429 U.S. 97, 105-06 (1976), nor does negligence in diagnosis, *Sosebee v. Murphy*, 797 F.2d 179 (4th Cir. 1986).

The classification and assessment issues that underlie the Plaintiff's claims against these three defendants do not evidence deliberate indifference. Not one of these three Defendants turned a blind eye to a need for a mental health assessment, instead actively evaluating the Plaintiff and making recommendations commensurate with their professional opinions. To the extent Reyes disagrees with their professional conclusions, that does not state a federal constitutional claim. The Eighth Amendment allegations against these mental health professionals therefore fail to state a claim.

C. <u>The Plaintiff has not stated a plausible procedural due process claim.</u>

The right to procedural due process is only implicated where a litigant is deprived of a protected liberty interest. Fourth Circuit precedent is clear that, 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 v. Clarke*, 780 F.3d 245, 252 (4th Cir. 2015).

The "liberty interest" analysis does not end, then, with the first part of the inquiry. Rather, the question presented here is whether the Plaintiff has plausibly alleged that his conditions of confinement "are harsh and atypical in relation to the ordinary incidents of prison life." He has not. *See id.*; *see also Sandin v. Conner*, 515 U.S. 472, 484 (1995); *Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974).

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.

First, 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, and the physical living conditions for special housing offenders in Virginia approximate those of the general population. Also of note, 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); *see also Smith v. Collins*, No. 7:17cv00215, 2018 U.S. Dist. LEXIS 160614, at *15-17 (W.D. Va. Sept. 20, 2018) (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).

Second, as the allegations of the complaint make clear, the Plaintiff 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 utilizing the step-down program to progress through and out of segregation. The fact that he has had a prolonged stay in restrictive housing does not mean that his assignment to that status is "indefinite" in its duration.

Third, being assigned to restrictive housing does not have significant collateral effects on the duration of an inmate's sentence. Although the Plaintiff alleges that his placement at level

"S" impacts somewhat his ability to earn future "good time," or sentence-reducing credits, he does not allege that his eligibility for sentence-reducing credits has been completely eliminated. Moreover, he does not allege that his placement in level "S" resulted in the loss of any vested sentence-reducing credit. Regardless, a change in class earning level is not of the same magnitude as the interest at issue in *Wilkinson*, where inmates who were transferred to the prison at issue became ineligible for release on parole. *See Wilkinson*, 545 U.S. at 214; *see Gaskins v. Johnson*, 443 F. Supp. 2d 800, 804 (E.D. Va. 2006) (noting the difference between a loss of vested sentence-reducing credits and a simple change in class level, pointing out, as to the latter, that the "mere possibility that he might have earned more credits qualifying him for an earlier release does not equate to a guarantee that he would have obtained a speedier release"); *cf. Moss v. Clark*, 886 F.2d 686 (4th Cir. 1989) (statute eliminating an inmate's ability to earn good time credits in certain prison facilities did not violate the Constitution).

Considering all of the circumstances, the conditions described by the Plaintiff do not fall outside the scope of everyday experiences that an inmate could expect to encounter within the confines of a prison. And because the conditions of confinement in segregated housing are not harsh and atypical as compared to the ordinary incidents of prison life, the Plaintiff 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 the Plaintiff has a protected liberty interest, his procedural due process claim still fails. Weighing: (1) the private interest at issue; (2) the risk of an erroneous deprivation; (3) the probable value of additional safeguards; and (4) the government's interest, including any burdens additional procedures would require, the applicable VDOC policies satisfy constitutional due process requirements. *Wilkinson*, 545 U.S. at 224-25.

As Defendants noted in their initial memorandum, all offenders who are classified as security level "S" receive an initial, formal ICA hearing before being assigned to security level "S." They receive advance notification and have the right to present during that hearing. The ICA recommendation must be approved by the Warden and the Regional Chief, and inmates have the opportunity to file a grievance relating to his segregation assignment. Following their assignment to security level "S", inmates receive multiple internal and external, formal and informal, reviews. Specifically, a level "S" inmate receives: (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.

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 there are few, if any, additional procedural safeguards that could be implemented. Although the Plaintiff alleges that he does not necessarily understand what is happening during his ICA hearings, it does not follow that those hearings are "meaningless" or a "sham." Contrary to the Plaintiff's arguments, there is no general due process right to receive formal notifications in a certain language. *See, e.g.*, *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994) ("A requirement that the government ascertain, and provide notice in, the 'preferred' language of prison inmates or detainees would impose a patently unreasonable burden upon the government and establish a paradoxically favored status in this respect for persons who have engaged in conduct warranting imprisonment or detention."). Indeed, considering that ROSP

employees tried, three times, to move the Plaintiff into a progressive housing unit, it appears that his "sham" hearings are anything but.

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

D. <u>The Plaintiff has not stated a plausible equal protection claim.</u>

On brief, the Plaintiff contends that he has plausibly alleged an equal protection claim because he was discriminated against on the grounds of his "national origin." Yet, this is not what he alleges in his complaint. The Plaintiff contends, repeatedly, that he cannot participate in the Step-Down program because he is a "monolingual Spanish speaker." But not providing translation services to an individual who does not speak English is not the same thing as discriminating against that individual on the basis of "national origin." *See Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) ("Language, by itself, does not identify members of a suspect class.").

As the Second Circuit has reasoned, failing to provide "forms and services in the Spanish language, does not on its face make any classification with respect to Hispanics as an ethnic group." *Id.* Although "[a] classification is implicitly made," that classification "is on the basis of language, i.e., English-speaking versus non-English-speaking individuals," and therefore is "not on the basis of race, religion or national origin." *Id.*; *accord Trower v. Mount Sinai Hosp.*, 2018 U.S. Dist. LEXIS 152341, at *14 (S.D.N.Y. Sept. 6, 2018) ("A claim that a plaintiff suffered discrimination solely on the basis of language abilities does not establish membership in a protected class."); *Santiago-Lebron v. Fla. Parole Comm'n*, 767 F. Supp. 2d 1340, 1349 (S.D. Fla. 2011) ("Immutable characteristics determined solely b the accident of birth such as race,

national origin and gender are typically the basis for finding a suspect class. . . . Language is not an immutable characteristic and, by itself, does not identify members of a suspect class.").

Similarly, although "facially neutral conduct can constitute discrimination in violation of the Equal Protection Clause," this type of claim requires a plaintiff to demonstrate "an intent to discriminate against the suspect class." *Soberal-Perez*, 717 F.2d at 42. But a general "failure to provide Spanish language services . . . reflects, at most, a preference for English over all other language," not an intent to discriminate against a protected class. *Id.* Considering that discriminatory purpose requires a plaintiff to 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," mere awareness of a foreseeable adverse impact "is insufficient to establish discriminatory intent." *Id.*

The present case is on all fours with the facts of *Soberal-Perez.* The Plaintiff has alleged that he is not being provided programming or materials in his native language. From that fact, he jumps to the conclusion that he has been intentionally discriminated against on the basis of a suspect classification, in violation of the Equal Protection Clause. But his inferential leap goes too far.

Because the Plaintiff has not established purposeful discrimination against a suspect class, the policies at issue in this case will be upheld as long as they bear a rational relationship to a legitimate governmental purpose. And "[w]e need only glance at the role of English in our national affairs to conclude that the [policy is] not irrational." *Id.* "Congress conducts its affairs in English, the executive and judicial branches of government do likewise," and "those who wish to become naturalized United States citizens must learn to read English." *Id.* "Given these

factors, it is not irrational for [VDOC] to choose English as the one language in which to conduct [its] affairs." *Id.* at 42-43.

Because the Plaintiff has not plausibly alleged that he was treated differently than similarly-situated individuals, nor has he sufficiently alleged purposeful discrimination, the challenged VDOC policies need only satisfy rational-basis review. And because a decision to provide programming materials in English—the language presumably spoken by the majority of VDOC inmates—is not irrational, the Plaintiff's equal protection claim fails. *See, e.g.*, *Santiago-Lebron*, 767 F. Supp. 2d at 1350 ("A legitimate purpose for providing [inmate] programs in English is to conserve BOP's limited financial resources and provide effective . . . services to the greatest number of eligible inmates. A rational basis exists to believe that providing class in English, and eliminating duplicative classes in other languages, would further a budgetary purposes.").

E. <u>The plaintiff has not alleged a plausible claim under the ADA or the RA.</u>

The Plaintiff contends that he has been "denied" a "benefit" to which he was "otherwise entitled," because, "as a non-death-row prisoner who has not had a disciplinary infraction in three years, Mr. Reyes is eligible to leave solitary confinement and to access the services and programs afforded prisoners in the general population." Mem. in Opp., pp. 31-32. But even the most cursory review of applicable VDOC policies demonstrates that this statement is not accurate. As Defendants previously argued, the Plaintiff does not have a vested right to a specific security classification, nor is an inmate's placement in general population guaranteed under VDOC policy or otherwise, *Meacham v. Dano*, 427 U.S. 217, 224 (1976). That the Plaintiff now asserts that he would like to be in the general population (despite the three

opportunities he declined that might have gotten him there), that is insufficient as a matter of law to plausibly allege he is "otherwise qualified" for release from restricted housing.

For these reasons, and those discussed in more detail in Defendants' original memorandum in support, the Plaintiff has not plausibly alleged that his continued confinement in segregation constitutes a violation of the ADA or the RA.

F. The Plaintiff has not alleged a plausible Title VI claim.

As with the Equal Protection claim, the Plaintiff's failure to adequately differentiate between "racial origin" and "native language" is fatal to his Title VI claim. Courts within this Circuit have explicitly rejected his argument that "discrimination" involving individuals "with limited English proficiency" serves as a "proxy" for discrimination on the basis of national origin. *See, e.g.*, *Krpan v. Bd. of Educ.*, 2013 U.S. Dist. LEXIS 115251, at *19 (D. Md. Aug. 15, 2013). Perhaps, under certain circumstances, Plaintiff could be correct. For example, if there is a language or dialect that is spoken only by individuals of a certain national origin, and the Plaintiff alleges intentional discrimination against persons who speak that language, the inference could be drawn that the discriminatory act was aimed at individuals with that specific national origin. *See, e.g.*, *Hernandez v. New York*, 500 U.S. 352, 353-54 (1991) (noting that "it may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race," but rejecting a claim that juror exclusion on the basis of ability to speak Spanish was equivalent to striking on the basis of ethnicity).

But the Spanish language (like the English language) is not so limited in its distribution. Over 400 million people are native Spanish speakers, making it the second most widely-spoken language in the world. And Spanish is the official language of at least twenty countries, found

on four separate continents. The simple fact that someone speaks Spanish therefore fails to provide a clear indicator as to their "national origin." It follows that language "discrimination" against a Spanish-speaking individual cannot and should not serve as a substitute for the type of invidious racial discrimination that motived Congress to enact Title VI. *Cf. Reyes v. Pharma Chemie, Inc.*, 890 F. Supp. 2d 1147, 1158-59 (D. Neb. 2012) (holding that, although "language is closely tied to national origin," "language itself is not a protected class," and "language and national origin [are not] interchangeable").

It bears noting, too, that Plaintiff's argument has no limiting principle. If the failure to provide materials or programming in an inmate's native language constitutes "intentional" discrimination "on the basis of national origin," then VDOC would presumably be required to reproduce all of its programming and other materials in any language that any inmate claims is his native tongue. This Court should reject the Plaintiff's attempt to broaden the scope of Title VI in this manner.

CONCLUSION

For the foregoing reasons, and those set forth in their initial Memorandum in Support of Motion to Dismiss (ECF No. 16), Defendants respectfully request that this Court GRANT their Rule 12(b)(6) 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 8th day of November, 2018, I electronically filed the foregoing Reply in Further 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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