

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

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

Plaintiffs,

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

v.

**VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,**

Defendants.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE
DEFENDANT'S PROPOSED EXPERT DR. JEFFREY BEARD**

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INTRODUCTION

Plaintiffs—four blind prisoners in the custody of Defendant Virginia Department of Corrections (“VDOC”), two former prisoners, and a non-profit organization that advocates for the rights of the blind—seek systemic change within VDOC due to its ongoing failure to provide blind prisoners with equal access to programs and services and equally effective communication. As part of their case in chief, Plaintiffs will provide expert testimony through five expert witnesses, including: (1) Richard Wells, an expert on accommodating prisoners with disabilities in the corrections context in areas such as written guidelines and policies, staff training, and program monitoring, *see generally* Ex. 1, Expert Rep. of Rick Wells; and (2) Richard Subia, an expert on the security implications of disability accommodations in prison, including processes and procedures for determining whether specific auxiliary aids and assistive technology pose threats to security in the correctional setting, *see generally* Ex. 2, Expert Rep. of Rich Subia (“Subia Rep.”).

VDOC offers Dr. Jeffrey Beard as its sole expert witness in this case. Dr. Beard has nearly 40 years of experience in corrections, the bulk of it with the Pennsylvania Department of Corrections. *See* Ex. 3, Expert Rep. of Dr. Jeffrey Beard (“Beard Rep.”) at 1. Dr. Beard has a Ph.D. in counseling, and was a licensed psychologist in Pennsylvania, but he let his license lapse.¹ *Id.* at 2. Dr. Beard is not an expert in accommodating prisoners with disabilities, in general or in a correctional setting, in training correctional staff, in general or specifically on how to comply with

¹ Absent from Dr. Beard’s report is a statement regarding the fields or areas in which he is offering an expert opinion. *See* Ex. 1, Beard Rep. app. A. Therefore, neither Plaintiffs nor the Court can determine Dr. Beard’s purported areas of expertise. Based on Dr. Beard’s testimony at his deposition, Plaintiffs’ assume that he is being offered as an expert in prison administration. Ex. 4, Beard Dep. 278:16–18. (“I don’t consider myself an ADA expert. I consider myself an administrator who has administrated facilities . . .”).

the ADA, or on assessing items prisoners may possess for security risks, in general or specifically with regard to auxiliary aids for blind prisoners. Ex. 4, Beard Dep. 189:12–20, Feb 22, 2024 (“I’m not really an ADA expert”); *id.* at 278:16–18 (“I don’t consider myself an ADA expert. I consider myself an administrator who has administrated facilities”); *id.* at 196:2–13 (testifying that he would not “be an expert to opine on the content” of the training)²; *id.* at 213:2–215:9 (testifying that he had his staff conduct security assessments when he was the Executive Deputy of Security for the Pennsylvania Department of Corrections); *id.* at 215:10–13 (testifying that he never participated in an evaluation of an item requested by a blind prisoner as an accommodation). Yet, VDOC retained Dr. Beard “to assess security considerations surrounding Americans with Disabilities Act (“ADA”) accommodation requests, the use of inmate caregivers (helpers), and the necessity of ADA training for general correctional staff.”³ Ex. 3, Beard Rep. at 1.

At the outset, Defendants have not met their burden to establish Dr. Beard is qualified to offer these opinions. There is no evidence that Dr. Beard has expertise in managing and accommodating prisoners with disabilities, how to assess security concerns with blind prisoners’ requested auxiliary aids, blind prisoners’ use of caregivers, or training for correctional staff in general, let alone ADA compliance training in particular. Thus, Defendants have failed to meet their threshold burden that Dr. Beard is qualified to offer opinions in areas relevant to this case.

Even if Dr. Beard were qualified, his report consists of impermissible conclusions on factual and legal issues and lacks the requisite factual basis for rendering an opinion. The content of Dr. Beard’s report and his proffered testimony violates the evidentiary standards for expert

² Dr. Beard also has never provided training to prison officials on ADA compliance, developed an ADA training curriculum, or attended a conference about the ADA. Ex. 4, Beard Dep. 75:20–77:4.

³ Also absent from Dr. Beard’s report is a statement that he holds his opinions to a reasonable degree of certainty in his areas of expertise. *See generally* Ex. 3, Beard Rep.

testimony because Dr Beard’s proffered testimony is: (1) not based upon sufficient facts or data; (2) is not the product of reliable principles and methods; and (c) does not stem from reliably applied principles and methods. Accordingly, this Court should exclude Dr. Beard’s report in its entirety and preclude him from testifying at trial. If the Court is not inclined to exclude Dr. Beard’s report and testimony, Plaintiffs alternatively move to exclude the majority of his opinions.

LEGAL STANDARD

Federal Rule of Evidence 702 and the *Daubert* standard govern the admissibility of expert testimony and opinions. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588–95 (1993). An expert may be qualified to offer expert testimony by “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. An expert opinion can be challenged for reliability “based on the credentials of the testifying witness.” *Davis v. Cap. One, N.A.*, No. 1:22-CV-00903 (AJT/IDD), 2023 WL 6964051, at *6 (E.D. Va. Oct. 20, 2023) (citing *Copeland v. Bieber*, No. 2:13cv246, 2016 WL 7079569, at *5 (E.D. Va. Sept. 8, 2016)). When determining whether an expert is qualified, the court should consider whether the proffered expert’s professional qualifications are sufficient to support his testimony. *Belk, Inc. v. Meyer Corp. U.S.*, 679 F.3d 146, 162 (4th Cir. 2012) (first citing *United States v. Pansier*, 576 F.3d 726, 737 (7th Cir. 2009); and then citing *Richmond Med. Ctr. for Women v. Herring*, 527 F.3d 128, 134 n.1 (4th Cir. 2008)).

If the expert is qualified, the court must then decide whether the expert testimony is both relevant and reliable. *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 249–50 (4th Cir. 1999) (quoting *Daubert*, 509 U.S. at 589). Indeed, Rule 702 “‘imposes a special gatekeeping obligation on the trial judge’ to ‘ensur[e] that an expert’s testimony both rests on a *reliable* foundation and is *relevant* to the task at hand.’” *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) (alteration in original) (quoting *Nease v. Ford Motor Co.*, 848 F.3d 219, 229–30 (4th Cir. 2017)). For an expert’s opinion to be relevant, the expert must have “sufficient specialized knowledge to

assist the jurors in deciding the particular issues in the case.” *Belk*, 679 F.3d at 162 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999)), *as amended* (May 9, 2012); *see also* Fed. R. Evid. 702(a) (“[T]he expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact at issue.”). To be relevant under *Daubert*, proposed expert testimony “must have ‘a valid scientific connection to the pertinent inquiry as a precondition to admissibility.’” *Nease*, 848 F.3d at 229 (quoting *Daubert*, 509 U.S. at 592).

For an expert’s opinion to be deemed reliable, it must be “based on sufficient facts or data,” Fed. R. Evid. 702(b), and it must be “the product of reliable principles and methods,” *id.* 702(c). That is, the expert’s opinion “must be based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods.” *Copeland*, 2016 WL 7079569, at *3 (emphasis in original) (quoting *Oglesby*, 190 F.3d at 250). For “experiential expert testimony,” which “does not rely on anything like a scientific method,” “an expert may be qualified on the basis of experience,” or on the basis of “experience in conjunction with other knowledge, skill, training or education.” *Id.* at *3 (quoting *United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007)). When examining the testimony of an experiential expert, the court must require the expert witness to “explain how [his] experience leads to the conclusion reached, why [his] experience is a sufficient basis for the opinion, and how [his] experience is reliably applied to the facts.” *Id.* (quoting *Wilson*, 484 F.3d at 274). “Expert opinions that are ‘bare conclusion[s] without reliable support’ must be excluded.” *Metro Towers, LLC v. Duff*, No. 1:20CV206, 2022 WL 1693717, at *3 (N.D.W. Va. May 26, 2022) (alteration in original) (first quoting *Stolting v. Jolly Roger Amusement Park, Inc.*, 37 F. App’x 80, 83 (4th Cir. 2002); and then citing *McEwen v. Baltimore Washington Med. Ctr. Inc.*, 404 F. App’x 789, 791–92 (4th

Cir. 2010)). As the Fourth Circuit has explained, “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.” *Id.*; (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, (1997))

Under FRE 702(d), an expert’s opinions must also “reflect[] a reliable application of the principles and methods to the facts of the case.” Fed. R. Evid. 702(d). Expert opinions “wholly conclusory and unsupported in nature,” by definition, fail to satisfy FRE 702(d) because the court is unable to determine whether the expert “reliably applied [any] principles and methods.” *Riddick v. Norfolk S. Ry. Co.*, No. 2:21CV297, 2022 WL 1180018, at *4 (E.D. Va. Apr. 20, 2022), *objections overruled*, No. 2:21CV297 (RCY), 2022 WL 2614877 (E.D. Va. May 6, 2022).

VDOC bears the burden of establishing that Dr. Beard’s proffered testimony is admissible under Rule 702. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001); *Md. Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780, 782–83 (4th Cir. 1998) (holding that party seeking to admit evidence must establish that it is appropriate by a preponderance of the evidence).

ARGUMENT

I. Dr. Beard Is Not Qualified to Testify as an Expert on Accommodations for Prisoners with Disabilities or Training.

Expert opinion testimony offered by a witness who does not qualify as an expert, or which is outside his area of expertise, is inadmissible. Fed. R. Evid. 702. The opinions Dr. Beard offers about the adequacy of accommodations for blind prisoners in VDOC custody, the use of caregivers as auxiliary aids for blind prisoners, and the adequacy of VDOC’s ADA training, are well outside any area of expertise he may have and should therefore be excluded. Plaintiffs do not dispute that

Dr. Beard has experience in corrections.⁴ Ex. 4, Beard Dep. 286:22–287:5. However, he has no experience with the ADA or with regard to disability-related issues in the correctional setting, including auxiliary aids for the blind. As Dr. Beard repeatedly testified at his deposition, he’s “not really an ADA expert.” *Id.* at 189:12–20; *see e.g., id.* 279:19–21; *id.* at 286:19–21 (Q: “Are you holding yourself out as an expert [] regarding the requirements of the ADA?” A: “No.”); *id.* at 278:16–17 (“As I told you, I don’t consider myself an ADA expert.”). Dr. Beard also testified that he is not an expert in issues relating to blindness or vision impairments. *Id.* at 286:15–18 (“Q: Just to be clear, are you holding yourself out as an expert regarding blindness or vision impairments?” A: No.”). He also admitted that he was never involved with how the prisons he worked for managed and accommodated blind prisoners, *id.* at 157:13–18; 158:2–5, and that he had no exposure to auxiliary aids for the blind before this case, *id.* at 109:8–17. Yet, here, Dr. Beard opines that VDOC has sufficiently accommodated blind prisoners, including the Individual Plaintiffs. *See generally* Ex. 3, Beard Rep. Because Dr. Beard has no knowledge of the ADA and its requirements and in his many years working in corrections he had no involvement in the management of prisoners with disabilities, he is not qualified to offer an opinion as to whether VDOC has sufficiently accommodated blind prisoners.

Dr. Beard also offers an “opinion” that VDOC’s ADA training is sufficient. *Id.* But Dr. Beard testified that he has never provided training to prison officials on ADA compliance, developed an ADA training curriculum, or attended a conference about the ADA. Ex. 4, Beard

⁴ The last five cases in which Dr. Beard has had his deposition taken as an expert witness involved prison management during the COVID-19 pandemic. Ex. 4, Beard Dep. 8:13–13:15. Dr. Beard has also testified as an expert in prison overcrowding. *Id.* at 16:10–16. Earlier in his career, from 2010 to 2012, Dr. Beard consulted in cases involving prison lockdowns, gang issues, and the provision of mental health care to inmates with serious mental health issues. *Id.* at 55:20–56:5. Since 2016, Dr. Beard has done consulting work for Axon, Keefe, Shawntech, and STVS, which are all third-party companies that sell their products and services to state prisons. *Id.* at 60:6–62:20.

Dep. 75:20–77:4. He further testified, “I’m not going to rewrite the training. I’m not the expert. I’m not a training expert, nor am I an ADA expert.” *Id.* at 279:11–13. In fact, Dr. Beard does not even remember if he participated in ADA trainings when he worked for the Pennsylvania Department of Corrections and the California Department of Corrections and Rehabilitation. *Id.* at 74:19–75:15. Nor does he recall what ADA staff training those systems provided. *Id.* at 189:21–190:22. Because Dr. Beard admitted that he is not an expert on the ADA or on training, he is not qualified to offer an opinion on the adequacy of VDOC’s ADA training.

Dr. Beard also provides purported expert opinions regarding the use of caregivers to assist blind inmates. Ex. 3, Beard Rep. at 7–9. Dr. Beard has *some* experience with the use of caregivers in a correctional setting, but it is confined to when they are medically necessary, not as an accommodation under the ADA. Ex. 4, Beard Dep. 159:14–160:3. In his report, Dr. Beard speaks of his experience observing prisoners who are “wheelchair pushers” and his knowledge of a housing unit in Pennsylvania for prisoners with dementia, in which some of the prisoners have caregivers, as well as a hospice facility in California. Ex. 3, Beard Rep. at 7. But Dr. Beard testified at his deposition that he “didn’t get deeply involved in what other prison systems, even the ones that [he] worked [with], were doing with blind inmates,” Ex. 4, Beard Dep. 157:9–158:1, and that he “[doesn’t] know one way or the other” how other prison systems handle requests for caregivers.” *Id.* at 158:2–5. Dr. Beard simply “assume[d] that other systems” seek medical approval of caregiver requests. *Id.* at 158:2–5. Dr. Beard, therefore, has only personally witnessed caregivers being used as wheelchair pushers, and has no actual knowledge or experience of how or when it is appropriate for a blind prisoner to have an assigned caregiver. Accordingly, Dr. Beard lacks the necessary experience to offer an opinion regarding the use of caregivers to assist blind prisoners.

Dr. Beard also offers an opinion that “It is appropriate for VDOC to review items or devices on an individual basis for security concerns to protect inmates, staff, and the security of the facility.” Ex. 3, Beard Rep. at 2. But, as Dr. Beard testified during his deposition, he has not performed security assessments of items prisoners wish to possess since he was a warden, Ex. 4, Beard Dep. 44:13–46:12, which, according to his resume, was in May 1994, *see* Ex. 3, Beard Rep. app. A, and that he has no experience evaluating auxiliary aids requested by blind prisoners for security concerns, Ex. 4, Beard Dep. at 215:10–13 (testifying that he never participated in a security evaluation of an item requested by a blind prisoner as an accommodation). Therefore, at best, Dr. Beard is an expert in security policies and procedures generally, but not in the evaluation of items generally, or auxiliary aids specifically for security risks.

Because Dr. Beard admittedly has *no experience* with the ADA, *no experience* with training correctional staff, let alone training correctional staff on the ADA, *no experience* with evaluating auxiliary aids used by blind prisoners for security issues, and only has experience with the use of caregivers as a medical necessity, not as an accommodation under the ADA, he is not qualified to offer the opinions he provided in his report. Dr. Beard’s opinions are outside the scope of his knowledge, skill, experience, training, or education, and therefore do not satisfy the threshold qualification inquiry of FRE 702. *See In re MIL-Related Prods. Liab. Litig. II*, 341 F. Supp. 3d 213, 240–41 (S.D.N.Y. 2018) (“[I]f the witness does not possess superior knowledge, education, experience, or skill *in the relevant area*, the Court *must exclude* his or her testimony.” (emphases added)). Because Dr. Beard lacks the requisite experience to provide the opinions he has offered, he should be precluded from testifying in this case.

II. Even if the Court Concludes that Dr. Beard Is Qualified, All of His Proffered Opinions Are Inadmissible Under FRE 702 and *Daubert*.

Dr. Beard offers his opinions in—the “Summary of Opinions” section of his report. Ex. 3, Beard Rep. at 2–3. There, he states the following:

- It is appropriate for VDOC to review items or devices on an individual basis for security concerns to protect inmates, staff, and the security of the facility.
- There is no evidence in Plaintiffs’ expert reports or inmate grievances and accommodation requests that the VDOC does not have adequate devices for accommodating blind and visually impaired inmates.
- It is appropriate for inmate caregivers (helpers) to be assigned generally based upon medical recommendations.
- It is appropriate that inmate caregivers (helpers) are provided instructions on what they can and cannot do, including that they are not to get involved in other inmates’ confidential matters.
- It is appropriate that inmates who are assigned caregivers (helpers) be told that staff are available to assist with confidential inmate matters.
- There is no evidence that blind and visually impaired inmates are not receiving staff assistance if required.
- There is no evidence that the VDOC does not provide adequate ADA training for all correctional staff and ADA specific employees.

These “opinions” fail to pass muster under Rule 702 and *Daubert*, or are an impermissible conclusion on a factual or legal issue that invades the role of the jury. Accordingly, the Court should exercise its gatekeeping function and exclude them.

A. Dr. Beard’s opinions are not based on sufficient data, a reliable methodology, or reliably applied principles and methods.

If Dr. Beard survives Plaintiffs’ threshold challenge as to his expert qualifications, he must still have a sufficient factual basis to offer his opinions, he must employ a reliable methodology in forming his opinions, and he must apply that reliable methodology to the facts of the case. Fed. R.

Evid. 702(b)–(d). Dr. Beard’s proffered opinions fail each of these prongs of the FRE 702 and *Daubert* analysis.

1. Dr. Beard’s “opinions” regarding security are based on an insufficient review of the evidence and speculation, and are unreliable.

Dr. Beard offers two “opinions” related to security: (1) “It is appropriate for VDOC to review items or devices on an individual basis for security concerns to protect inmates, staff, and the security of the facility”;⁵ and (2) “There is no evidence in Plaintiffs’ expert reports or inmate grievances and accommodation requests that the VDOC does not have adequate devices for accommodating blind and visually impaired inmates.” Ex. 3, Beard Rep. at 2.

With regard to the first “opinion,” in his report, Dr. Beard provides a scant factual basis, and the basis he does provide undercuts his opinion—that VDOC should review items for security concerns on an individual basis. Dr. Beard cites five VDOC Security Bulletins to support his concerns with items prisoners may possess being used as weapons, *id.* at 3, each of which are blanket warnings regarding “wheelchairs broken and refashioned into a weapon; a rolling walker used to hide contraband; a watch destroyed to remove fence ties; and a knee brace used to make a weapon,” *id.* at 3, and do not demonstrate that VDOC is conducting an individualized assessment of these items, Ex. 5, NFBV 018948–018956. And none of the security bulletins he reviewed implicate auxiliary aids provided to inmates with disabilities. Similarly, Dr. Beard invokes fears of items with Wifi capabilities connecting to the internet and items with Bluetooth capabilities syncing with other devices, but the only basis he cites for concerns with such device is an article from the *Edinburgh Evening News* regarding the seizure rates of weapons and cell phones at two

⁵ Plaintiffs’ expert on security concerns regarding auxiliary aids for blind prisoners does not disagree with this statement. Ex. 2, Subia Rep. at 7. During his deposition, Dr. Beard clarified that “appropriate” does not mean required by law or the ADA. Ex. 4, Beard Dep. 97:19–98:2.

Scottish prisons. Ex. 3, Beard Rep. at 5 n.5 (citing <https://www.edinburghnews.scotsman.com/news/crime/bluetooth-trainer-amongst-items-seized-from-prisoners-at-saughton-and-addiewell-last-year-1394137>). With regard to auxiliary aids for prisoners with disabilities, Dr. Beard is not familiar with any of the auxiliary aids (*i.e.*, devices) blind individuals commonly use, Ex. 4, Beard Dep. 109:8–110:16. Indeed, Dr. Beard did not even know what auxiliary aids and services the institutions at which he previously worked provided to blind prisoners. *Id.* at 215:10–13. As to specific auxiliary aids blind inmates use, Dr. Beard was not familiar with the SARA reader, Merlin, or JAWS prior to his involvement in this case. *Id.* at 109:18–110:16. Dr. Beard further testified that he knows nothing about a SARA reader or how it functions, *id.* at 141:22–143:15. He did not even know what it was until he did an internet search for it after he read about the device in Plaintiffs’ expert’s report, *id.* at 245:4–9. Even with his Google-based knowledge, Dr. Beard testified that a SARA reader—which scans in and reads print documents—could be a substitute for a screen reader—which is software that reads text and describes electronic documents, such as web pages and PDFs. *Id.* at 137:14–138:14. Five VDOC security bulletins and a news article about prisons in another country—and a complete absence of knowledge and even confusion about specific auxiliary aids used by blind prisoners—do not provide Dr. Beard with a sufficient factual basis for his opinion.

Even if he had a sufficient factual basis, Dr. Beard did not use any methodology in forming this opinion, let alone one that was reliably applied to the “facts.” Dr. Beard testified that he does not have any recent experience reviewing items or devices for security concerns. *Id.* at 213:2–215:9. Dr. Beard has not personally performed a security assessment of the items that are the subject of VDOC’s security bulletins, *id.* at 213:2–215:9, nor was he involved in security evaluations when he was an Executive Deputy with the Pennsylvania Department of Corrections

(“PA DOC”)—his staff handled them. *Id.* Dr. Beard became the Executive Deputy Secretary of the PA DOC in 1997—over 25 years ago and before the rise of cell phones, Bluetooth, and the internet. Thus, any method Dr. Beard may have for evaluating items for security risks is completely outdated.

With regard to auxiliary aids for prisoners with disabilities, Dr. Beard testified that he has never participated in the evaluation of an auxiliary aid requested by a blind prisoner as an accommodation. *Id.* at 215:10–13. He has never participated in a security assessment of a SARA reader, nor has he ever seen one in person, *id.* at 245:4–9. Because Dr. Beard has not participated in a security evaluation of an item in more than 25 years and has never evaluated an auxiliary aid for security risks, he lacks any sort of methodology in forming his opinion on performing individualized assessments of items, let alone a reliable methodology that was reliably applied to the facts. Accordingly, the Court should preclude Dr. Beard from offering testimony regarding the review of items prisoners may possess, including auxiliary aids, for security concerns.

As to his second “opinion” related to security, Dr. Beard’s report and deposition testimony are riddled with speculative statements based upon his review of the minimal evidence in the record. Dr. Beard testified that the factual basis for his opinion that there is no evidence that Deerfield’s blind prisoners are not being adequately accommodated was his review of their accommodation requests and grievances, *id.* at 259:10–261:6, but then testified, “I could have missed something. There were a lot of those accommodation requests and stuff, but as I remember, there was some medical ones that were disapproved . . . generally most other devices were approved.” *Id.* at 223:16–224:5. Dr. Beard also testified that he does not know if Greenville has a SARA reader, how many blind prisoners are there, or the severity of their visual impairments. *Id.* at 258:5–20. Given Dr. Beard’s lack of bare minimum facts regarding Greenville’s blind

prisoner population and the auxiliary aids it may—or may not—offer them, it is unclear how Dr. Beard could offer an “opinion” that VDOC is adequately accommodating them. Dr. Beard testified that he also reviewed the deposition transcripts of Barry Marano, the VDOC-wide ADA Coordinator; Rashida Butcher,⁶ the VDOC-wide Educational Coordinator; Lakeisha Shaw, Deerfield’s ADA Coordinator; and Lane Talbott, Greensville’s former ADA Coordinator. *Id.* at 99:19–101:12; 102:11–16. Dr. Beard did not speak with the Individual Plaintiffs, Beard Dep. 305:5–10, or even read the transcripts of their depositions, *id.* at 137:10–13; *see also* Ex. 3, Beard Rep., app. B. Basically, Dr. Beard performed a one-sided review of minimal evidence that renders his opinion unreliable, unless he can provide a basis for doing so. *See Marria v. Broaddus*, 200 F. Supp. 2d 280, 290 (S.D.N.Y. 2002) (striking as unreliable opinion of expert who selectively chose the evidence he would review and include in his analysis without providing a basis for doing so). He cannot.

Again, Dr. Beard offers no methodology for his review of the materials he examined, let alone a reliable one. In his report, Dr. Beard states, “**I suspect based on Mr. Marano’s comments that if the requested item was the only thing that could accommodate, further review of the item by VDOC would occur**” and “from reading the depositions of Mr. Marano, Ms. Butcher, Ms. Shaw, and Ms. Talbott, and based upon the fact that most accommodation requests are approved if there is a medical need, **I would think that most if not all these items would be approved if requested** and medically indicated.” Ex. 3, Beard Rep. at 7 (emphasis added). But Dr. Beard did not review any evidence that this is actually the case—and there is evidence to the contrary. *See, e.g.,* Pls.’Opp’n to Defs.’ Mot. Summ. J. (“Pls.’ Opp’n”) Ex. 33, NFBV 019933

⁶ According to Appendix B of Dr. Beard’s report, he reviewed the transcript from the deposition of Ms. Butcher from November 17, 2023. This was her 30(b)(6) deposition as a corporate designee for VDOC. Ex. 6, Butcher VDOC 30(b)(6) Dep., Nov. 17, 2023. Dr. Beard did not review the transcript of Ms. Butcher’s fact-witness deposition, which took place on November 29, 2023. Ex. 7, Butcher Dep., Nov. 29, 2023.

(Shabazz denial of access to SARA scanner), ECF No. 232-33; *id.* Ex. 34, Pl. Kevin Shabazz Resp. to VDOC’s First Set of Interrogs. ¶ 4 (same), ECF No. 232-34; *id.* Ex. 61, NFBV 009206 (Mr. Hajacos’s grievance regarding denial of access to large print documents), ECF No. 232-61; *id.* Ex. 62, NFBV 009216–21 (same), ECF No. 232-62; Ex. 92, NFBV 009013 (Mr. Hajacos objecting that he is being “arbitrarily denied” accommodations), ECF No. 232-92; *id.* Ex. 108, NFBV 019732 (denial of Mr. Hajacos’s request for an accessible JPay tablet), ECF No. 232-108. Dr. Beard also relied on Ms. Butcher’s deposition testimony to conclude that VDOC is sufficiently accommodating blind prisoners, Ex. 4, Beard Dep. 118:8–119:6, even though she testified that she has no control over what accommodations are provided outside the classroom, Ex. 7, Butcher Dep. 53:9–13, Nov. 29, 2023, which is where blind prisoners spend the majority of their time. Dr. Beard simply “assum[ed] that [Education Department] makes [computers screen readers] available to somebody that needs them or they wouldn’t have them.” Ex. 4, Beard Dep. 118:5–12. Although Dr. Beard reviewed the Individual Plaintiffs’ accommodation requests and grievances, he applied no methodology to his review. Instead, he offers conclusory testimony that he saw “some” accommodation requests that were “disapproved,” but that “most other devices were approved.” Indeed, during his deposition, Dr. Beard testified that he “assumed” that a blind prisoner whose request for Bluetooth headphones was denied received other headphones, but he does not know whether he actually received them. *Id.* at 206:11–207:19. Testimony such as this is not reliable because Dr. Beard cannot explain how he reached his conclusion. *Andrews v. Woody*, No. 3:17CV167, 2018 WL 2452177, at *5 (E.D. Va. May 31, 2018) (expert “must still identify *how* his . . . review of materials led to his . . . stated opinions”). Instead, Dr. Beard “simply state[s] in a conclusory manner that his . . . opinions are based on a review of relevant materials.” *Id.* Therefore, Dr. Beard’s testimony is unreliable and must be excluded. *Id.* (excluding testimony of proffered

expert because his report “contains no explanation of how his review of such material resulted in his opinions, or any methods on which he relied in conducting that review”).

Because Dr. Beard’s “opinions” regarding evaluating items for security concerns on an individual basis and VDOC’s “accommodating” blind prisoners is pure speculation based on a one-sided review of the evidence and an unreliable methodology, the Court should preclude Dr. Beard from offering these opinion at trial. *See Marria*, 200 F. Supp. 2d at 290.

2. Dr. Beard’s proffered opinions regarding Caregivers lack a sufficient factual basis and are unreliable.

Dr. Beard offers three purported opinions regarding caregivers: (1) “It is appropriate for inmate caregivers (helpers) to be assigned generally based upon medical recommendations”; (2) “It is appropriate that inmate caregivers (helpers) are provided instructions on what they can and cannot do, including that they are not to get involved in other inmates’ confidential matters”; and (3) “It is appropriate that inmates who are assigned caregivers (helpers) be told that staff are available to assist with confidential inmate matters.” Ex. 3, Beard Rep. at 3. But Dr. Beard’s report and his deposition testimony reveal that he lacks a factual basis for his opinions, and that they are not reliable.

In his section on the use of inmate caregivers, Dr. Beard sets forth the policies and procedures that *should* be in place for the selection and assignment of caregivers, as well as the training caregivers *should* receive:

It is standard practice that inmate caregivers or assistants are screened for appropriateness and compatibility. Inmates apply for the job and staff review their history with a particular emphasis on behavior. Those with frequent or serious misconducts, or violent history should be screened out. Those with recent gang activity, mental health issues or manipulative tendencies should likewise also be rejected. Staff should seek someone who is compatible with the inmate to be helped and may consider the disabled inmate in the decision process. Once assigned, the inmate helper should be oriented to the job. They should be provided direction as to what they can do and what they cannot do. They should then be monitored by staff to ensure that they were acting appropriately.

Id. at 8.⁷ Dr. Beard then concludes—with scant citations to evidence in the record and no citations to specific pages and line numbers of depositions—that “[t]his is the process that VDOC follows in selecting and assigning inmate helpers to blind or vision impaired inmates.” *Id.* at 9. But Dr. Beard did not read VDOC’s caregiver job descriptions and he is not familiar with the VDOC caregiver qualifications, Ex. 4, Beard Dep. 163:7–164:8, even though VDOC produced this information in discovery, Ex. 8, NFBV016346. Dr. Beard acknowledged during his deposition that the basis for his opinion that VDOC Caregivers are instructed on what they can and cannot do are the depositions he reviewed. Ex. 4, Beard Dep. 166:16–167:20. There is also no evidence in the record that Caregivers receive training in their job responsibilities or that staff monitor them. In addition, Greenville does not even have Caregivers, Ex. 9, Talbott Dep. 189:21–190:2, but Dr. Beard testified that Greenville does have them (even though he reviewed Ms. Talbott’s deposition), Ex. 4, Beard Dep. 150:10–20. In short, Dr. Beard offers an opinion about what VDOC should *hypothetically* do with regard to the selection and training of caregivers, but his “opinion” is not based on any actual evidence in the record. Dr. Beard’s opinion regarding Caregiver training is pure speculation and should be excluded. *See Copeland*, 2016 WL 7079569, at *3 (quoting *Oglesby*, 190 F.3d at 250).

Dr. Beard also offers an opinion that it is “appropriate” for prisoners with caregivers to be informed that staff are available to assist with confidential matters. In his report, he states that the

⁷ Dr. Beard also devotes a significant amount of time to discussing accreditation by the American Correctional Association, and lists the ACA’s nine standards related to disabled inmates. Ex. 3, Beard Rep. at 7–8. Only one of these standards, however, appears to implicate the issue of inmate caregivers—“5-ACI-6b-12 (Offender Assistants).” What Dr. Beard omits from his report—and is part of the evidence in the record and his deposition testimony—is that compliance with ACA standards does not mean that a prison is compliant with the ADA. Ex. 4, Beard Dep. 264:7–11 (Q: “And if a prison facility is accredited by the American Correctional Association, does that mean that the facility fully complies with the ADA?” A: “Not necessarily, no.”).

Individual Plaintiffs do not have any problems with keeping their personal information confidential. Ex. 3, Beard Rep. at 9. But Dr. Beard reviewed only the grievances and accommodation requests of the Individual Plaintiffs to make this determination. The review of grievances and accommodation requests alone does not provide Dr. Beard with a sufficient factual basis for his opinion, especially where the Individual Plaintiffs testified during their depositions that their caregivers and other prisoners routinely assist them with reading and completing written documents, such as grievances and requests for accommodations, Pls.' Opp'n Ex. 21, Shabazz Dep. 13:2–18, ECF No. 253-21, that Dr. Beard agrees should be confidential, Ex. 4, Beard Dep. 294:14–296:4 (commissary forms); *id.* at 296:5–297:18 (accommodation request forms and grievances). The Individual Plaintiffs also testified that the staff who VDOC claim are “available” to assist with reading and writing documents refuse to do so because it is not their job or they do not have time to assist. Pls.' Opp'n to Defs.' Mot. Summ. J. Ex. 17, Courtney Dep. 155:9–16, ECF No. 253-17; Ex. 18, Hajacos Dep. 10:8–17, ECF No. 253-18; Ex. 20, McCann Dep. 23:25–24:20, ECF No. 253-20; Ex. 21, Shabazz Dep. 14:8–12, ECF No. 253-21; Ex. 22, P. Shaw Dep. 26:11–27:1, 68:21–71:12, ECF No. 253-22.

Dr. Beard also failed to apply any methodology when developing this opinion. When asked to provide the basis for his opinion, Dr. Beard responded, “I don't really know how to answer that question.” Ex. 4, Beard Dep. 176:15–22. He added that he “believes” VDOC is informing prisoners with caregivers that staff are able to assist with confidential matters at Deerfield and Greenville based on the depositions he read. *Id.* at 177:11–19. But this is based only on his review of Ms. Shaw's deposition—Dr. Beard did not speak with VDOC staff, review their job descriptions, or review the training they receive. *Id.* at 182:22–183:18. Thus, whether it is appropriate or not to inform blind prisoners with caregivers that staff are available to assist with confidential matters is

of no moment when Dr. Beard does not cite to any evidence in the record this is actually occurring at Deerfield or Greenville and Plaintiffs can find none. This is not the product of a reliable method being applied reliably. Permitting Dr. Beard to offer such an opinion would mislead the jurors into believing that prisoners with caregivers are being informed of this information and that staff are actually providing such assistance. Accordingly, this Court should preclude Dr. Beard from testifying about staff assisting blind prisoners with caregivers with confidential matters.

3. Dr. Beard lacks a sufficient factual basis or a reliable methodology to form his opinion regarding VDOC staff training.

Dr. Beard lacks any factual basis for his proffered testimony on ADA training.

Dr. Beard testified during his deposition, “I’m not really an ADA expert, and I don’t know whether I would really say, ‘Yes, this training is appropriate,’ or, ‘It’s inappropriate,” but I haven’t seen anything to show me that it’s inappropriate, either from any of the experts that you had or anybody else, because I don’t know that they saw the training other than the outline that I saw.” Ex. 4, Beard Dep. 189:12–20; *see also id.* 196:2–13 (“I don’t know that I would be an expert to opine on the content.”). Dr. Beard further testified that he did not review VDOC’s ADA training materials, *id.* at 193:4–194:17, and admitted that he does not even know what VDOC’s annual online training covers, *id.* at 268:3–10; 268:18–269:1. So, not only did Dr. Beard testify that he does not have the necessary expertise to opine on whether the substance of VDOC’s ADA training is appropriate, he only reviewed *the outline* of the training, not the substance. *Id.* at 189:6–20. In fact, in his deposition he acknowledged that he had no knowledge of whether the training actually happened, just his belief that VDOC’s training policy was adequate and his assumption that VDOC’s ADA Coordinator would check that it was carried out. *Id.* at 187:9–188:12. Nevertheless, Dr. Beard “opines” that “[t]here is no evidence that the VDOC does not provide adequate ADA training for all correctional staff and ADA specific employees.” Ex. 3, Beard Rep. at 2–3. During

his deposition, Dr. Beard walked back his opinion and clarified that he is not opining that VDOC's ADA training is adequate—he is opining that he did not see any evidence that it is inadequate. Ex. 4, Beard Dep. 195:1–8. Of course, Dr. Beard would conclude that there is no evidence that VDOC's ADA training is inadequate because *he did not even review the evidence that he would need to review to make this determination*—VDOC's ADA training materials.

As for his methodology, Dr. Beard testified that the basis for his opinion that VDOC's ADA training is not inadequate is that he did not see any grievances in which the Individual Plaintiffs complained that staff were not complying with the ADA. *Id.* at 199:10–18. But Dr. Beard did not explain why this is a reliable method for reaching his opinion, and the Individual Plaintiffs' grievances actually support an opinion to the contrary—that VDOC's ADA training is inadequate. *See* Ex. 10, NFBV 009641 (Unit Manager for Mr. McCann's housing unit denying his grievance about the lack of clear walkways in his pod, stating that his mobility cane is to be used to “clear a safe path and locate objects along the way in indoor and outdoor environments”) Pls.' Opp'n Ex. 61, NFBV 009206 (Hajacos denial of access to large print documents), ECF No. 232-61; *id.* Ex. 62, NFBV 009216–21 (same), ECF No. 232-62. Dr. Beard cannot selectively exclude relevant evidence regarding ADA training from his review, and then offer an opinion that VDOC's ADA training is adequate. *See Marria*, 200 F. Supp. 2d at 290.

Dr. Beard's “opinion” regarding VDOC's ADA training is unreliable for another reason—it is pure speculation. Dr. Beard testified that the basis for his opinion that VDOC's ADA training is not inadequate is the fact that VDOC is complying with its own policy that it provide “basic in-service training” or “basic training” to all the correctional staff that comes in, “and part of that basic training covers the ADA” and “to the best of my knowledge, people are getting the training that they're supposed to be getting under policy.” Ex. 4, Beard Dep. 187:5–188:12. But, again, Dr.

Beard did not even review the training materials. Whether VDOC is complying with its own policy to provide annual in-service training is of no moment if those trainings do not address—or do not adequately address—ADA compliance. Dr. Beard’s “opinion” regarding VDOC’s ADA training is pure *ipse dixit* and should be stricken. See *Cooper*, 259 F.3d at 203 (“[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” (quoting *Kumho Tire*, 526 U.S. at 157)); *McEwen*, 404 F. App’x at 791–92 (quoting *Joiner*, 522 U.S. at 146) (same).

Because Dr. Beard lacks an adequate factual basis and offers no reliable methodology for forming his opinion, this Court should preclude Dr. Beard from offering testimony regarding VDOC’s ADA training.

III. Dr. Beard’s Opinions Invade the Province of the Jury

Dr. Beard offers three “opinions” in which he states: “there is no evidence” of a particular phenomenon—that “VDOC does not have adequate devices for accommodating blind and visually impaired inmates,” that “VDOC does not provide adequate ADA training for all correctional staff and ADA specific employees,” and that “blind and visually impaired inmates are not receiving staff assistance if required.” Ex. 3, Beard Rep. at 2–3. Each of these statements is an impermissible conclusion on a factual or legal issue that invades the role of the jury. *S.E.C. v. Tourre*, 950 F. Supp. 2d 666, 681 (S.D.N.Y. 2013) (noting that an expert witness “cannot be a conduit for a factual narrative” and that “[h]e also may not invade the province of the jury by ‘finding facts’ that are in contention in this case”). This is especially true of the first “opinion” in which Dr. Beard concludes that VDOC is “accommodating” blind prisoners. *United States v. Perkins*, 470 F.3d 150, 158 (4th Cir. 2006) (holding that “conclusory testimony” that . . . involves the use of terms with considerable legal baggage . . . nearly always invades the province of the jury”). It is for the jury to consider the evidence presented by all parties and resolve disputed facts. Accordingly, the Court

should exclude these three “opinions” and preclude Dr. Beard from offering conclusory testimony regarding the absence of evidence.

IV. Dr. Beard’s Opinions Are Inadmissible Under Federal Rule of Evidence 403

Under Federal Rule of Evidence 403 “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. Here, even if Dr. Beard’s opinions regarding prison administration generally are relevant, their probative value is outweighed by their potential to mislead the jury. Dr. Beard has no experience with prisoners with disabilities, including managing and accommodating them, as well as training correctional staff in how to do so, his testimony would mislead the jury into thinking that VDOC properly manages and accommodates individuals with disabilities. Accordingly, FRE 403 provides an independent basis for excluding Dr. Beard’s proffered expert testimony.

CONCLUSION

Not only are Dr. Beard’s opinions outside the scope of his knowledge, training, and experience, but they are not, as required under FRE 702 and *Daubert*, based on sufficient facts or data, are not the product of reliable principles and methods, and are not the result of Dr. Beard applying any reliable principles and methods to the facts of the case. Rather, Dr. Beard’s opinions represent unfounded speculation that is not sufficiently reliable to pass muster under FRE 702. Accordingly, Plaintiffs respectfully request that the Court grant their Motion to Exclude the Testimony of Defendant’s Expert Witness, Jeffrey Beard.

Dated: April 19, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2024, I electronically filed the foregoing 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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