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

Richmond Division

WILLIAM THORPE, *et al.*,

Plaintiffs,

v. CASE NO. 3:19cv00332

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs have challenged the adequacy and constitutionality of various VDOC operating procedures governing the administration of segregated housing at two VDOC facilities. Puzzlingly, however, Plaintiffs argue that this Court cannot consider the actual text of those policies themselves, but is instead constrained to adopt Plaintiffs' misleading, spotty, and often fictitious version of what those policies actually say. It is true, as Plaintiffs argue, that their 97-page complaint contains numerous detailed factual allegations. But it is equally true that, where the allegations of a complaint conflict with the documents that the complaint is based upon, the undisputed provisions of those documents prevail. That Plaintiffs would prefer to ignore the substantive provisions of the applicable VDOC policies does not make those policies immaterial or otherwise irrelevant in context of a Rule 12 motion to dismiss.

Considering, as this Court may, the actual text of the applicable VDOC operating procedures, Plaintiff have not plausibly alleged that these Defendants violated their constitutional

rights. For the reasons previously argued, and as discussed in more detail below, this Court should grant Defendants' motion to dismiss.[1]

A. The text of the applicable VDOC operating procedures is appropriately before the Court.

As Defendant VDOC has previously argued, the four corners rule "was not developed to permit litigants to perpetrate a fraud upon the court." Def. VDOC's Reply, ECF No. 25, at 1. For this reason, courts may consider "matters of which a court may take judicial notice" in the context of resolving a Rule 12 motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, **and matters of which a court may take judicial notice**." (emphasis added)); *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record."); s*ee also Birmingham v. PNC Bank, N.A.*, 846 F.3d 88, 92 (4th Cir. 2017).

This Court has, on multiple occasions, observed that it may take judicial notice of VDOC operating procedures. *See, e.g., McCoy v. Hurst*, 2012 U.S. Dist. LEXIS 84283, at *5 n.4 (E.D. Va. June 15, 2012) (citing Fed. R. Evid. 201(b)(2) in support of this general proposition); *Perry v. Johnson*, 2011 U.S. Dist. LEXIS 854321, at *10 (E.D. Va. Aug. 2, 2011) ("[T]he Court takes judicial notice of the Operating Procedure as it appears on VDOC's website."); *see also Fauconier v. Clarke*, 652 F. App'x 217, 219 n.4 (4th Cir. 2016) ("Although [the plaintiff' did not file the VODC's operating procedures with his pro se complaint, we are entitled to consider them

[1] By selectively rebutting certain arguments raised in the Plaintiffs' Response in Opposition, Defendants are not abandoning any of the points raised in their initial supporting memorandum.

here."); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (taking judicial notice of information publicly-available on an official government website in the context of reviewing the district court's decision to grant a Rule 12 motion to dismiss). Because this Court may take judicial notice of VDOC operating procedures, they may be appropriately considered in this context.

The present case is not akin to the situation presented in *Goines v. Valley Community Services Board*, 822 F.3d 159 (4th Cir. 2016), which Plaintiffs cite for the general proposition that this Court cannot consider, for their truth, statements in documents not attached to a complaint. In *Goines*, the district court credited, as true, certain statements in a police incident report regarding a detainee's claim that he had been improperly held for a mental health evaluation, and then granted a Rule 12 motion to dismiss. Reversing, the Fourth Circuit explained that, simply by referencing the incident report, the Plaintiff had not necessarily adopted all the statements in the incident report as "true," reasoning that the Plaintiff's "purpose in quoting from the Incident Report was not to assert the truthfulness of the statements contained in the Report, but instead to illustrate the mistakes he believed were made by the Officers." *Id.* at 168. In other words, where a document contains disputed hearsay statements not necessarily adopted as true through the allegations of the complaint, those statements should not be credited in the context of resolving a Rule 12 motion.

The present circumstances are markedly different. VDOC operating procedures do not contain disputed hearsay statements, the credibility of which would need to be resolved by a factfinder at trial. This lawsuit directly challenges the very substance and adequacy of those operating procedures. It is entirely proper for these parties to defend themselves by placing the actual text of those procedures before the Court. In doing so, defense counsel is not attempting

to "testify," as she is repeatedly accused of doing throughout the Plaintiffs' response.[2] Rather, submission of the public documents was intended to ensure that this Court has ready access to the substantive provisions of all appropriate and applicable VDOC operating procedures. This Court should not be hamstrung in its resolution of an initial dispositive motion simply by Plaintiffs' apparent purposeful decision to avoid putting public documents before the Court that plainly defeat their claims to relief.

B. Plaintiffs have not stated a plausible procedural due process claim.

In their Response in Opposition, Plaintiffs do not make any arguments regarding their *initial* classification assignment (e.g., the decision to initially place the inmates at security level "S"), focusing instead upon whether their procedural due process rights were violated in the context of their *ongoing* classification reviews (*e.g.*, the decision to have the inmates remain at security level "S," within one of the internal management pathways). *See, e.g*, Plfs.' Resp. in Opp., ECF No. 26, at p. 11. When the procedural due process claim is examined as one challenging the sufficiency of ongoing reviews, as opposed to the initial classification decision itself, it is clear that Plaintiffs' procedural due process claim lacks merit.

First, with respect to whether the prison conditions experienced by inmates at ROSP and WRSP are "harsh and atypical," Defendants emphasize that neither of the "two added components" relied upon by the Supreme Court in *Wilkinson v. Austin*, 545 U.S. 209 (2005), are present here. In finding that assignment to the "Supermax" prison at issue in *Wilkinson* was "indefinite," the Supreme Court reasoned that the inmates only received a perfunctory annual review. *Id.* at 224. This stands in stark contrast to the multi-tiered reviews that are afforded level "S" inmates within VDOC. *See, e.g.*, Defs.' Mem. in Support, ECF No. 22, at 19-20.

[2] *See, e.g.*, Plfs.' Resp. in Opp. at 9, 19, 20.

Second, the Supreme Court noted that inmates held at the "Supermax" prison in *Wilkinson* were "disqualifie[d]" from "parole consideration." *Id.* For the reasons previously discussed, level "S" inmates at ROSP and WRSP are not "disqualified" from parole consideration. Removing, then, these "two added components" from the "harsh and atypical" analysis, all that remains are the general restrictions, that "likely would apply to most" restrictive housing units, and that the Supreme Court has said would not be enough, standing alone, to give rise to a protected liberty interest. *Id.* at 223-24; *accord Sandin v. Conner*, 515 U.S. 572 (1995) (holding that "disciplinary confinement of inmates" did not "itself implicate[] constitutional liberty interests," because "segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest," considering that "disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody," both of which were "totally discretionary" forms of "confinement"); *cf. McKune v. Lile*, 536 U.S. 24, 39-40 (2002) ("An essential tool of prison administration . . . is the authority to offer inmates various incentives to behave. The Constitution accords prison officials wide latitude to bestow or revoke these prerequisites as they see fit. . . [C]ases like *Meachum* and *Hewitt* . . . underscore the axiom that, by virtue of their convictions, inmates must expect significant restrictions, inherent in prison life, on rights and privileges free citizens take for granted.").

Second, even if these Plaintiffs possess a protected liberty interest in their initial assignment to security level "S" (meaning, they have an interest in avoiding those conditions of confinement in the first place), it does not necessarily follow that the Due Process Clause imposes a constitutional entitlement to continuing post-deprivation procedural reviews. Once the initial classification decision to level "S" is made, the "deprivation" of the "liberty interest" is

complete. The Supreme Court has never explicitly held that the Due Process Clause requires a state to continually re-visit that "deprivation" decision in the context of repeated due process hearings. Nor has the Supreme Court held that a continuing segregation review, if held, must satisfy the formal procedural due process dictates of *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Because, in this context, there is no procedural due process right to a due process hearing, the informal reviews voluntarily provided in the context of the Step-Down Program do not offend the Due Process Clause.

Of note, *Wilkinson* did not deal with the sufficiency of ongoing segregation reviews. Rather, *Wilkinson* concerned the procedural protections that must be afforded *before* an inmate could be assigned to the "Supermax" prison in the first instance. *See id.* at 220. Similarly, *Hewitt v. Helms*, 459 U.S. 460 (1983), did not hold that an inmate, once confined in administrative segregation, was entitled to ongoing due process hearings. *Hewitt* addressed, rather, whether and to what extent a due process hearing was required when an inmate was summarily moved into disciplinary segregation, a disciplinary hearing had not yet been convened, and the due process hearing did not occur until several days later. *See, e.g.*, *id.* at 477.

In *dicta*, the *Hewitt* court did observe, in a footnote, that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate," and that "[p]rison officials must engage in some sort of periodic review of the confinement of such inmates," which "will not necessarily require that prison officials permit the submission of any additional evidence or statements." *Id.* at 477 n.9. Yet, the *Hewitt* court did not specify that "some sort of periodic review" means that formal due process procedural protections must be implemented in the context of those periodic administrative decisions. Moreover, it is far from clear that this dicta in *Hewitt* survived the Supreme Court's decision in *Sandin v. Conner*, 515 U.S. 472 (1995), which

criticized the overall reasoning of that opinion, noting that "the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons," and "has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Id.* at 482.

Regardless, even if the dicta from the footnote in *Hewitt* has survived and imposes some sort of constitutional obligation on prison officials, it is undisputed that inmates who are participating in the Step-Down Program receive "some sort of periodic review." At best, this is all that would be required. Indeed, following their assignment to security level "S", VDOC inmates receive multiple formal and informal reviews, by a variety of individuals, both within the prison and external to it. Because the formal due process requirements of *Wolff, Mathews,* and *Wilkinson* are not required in this context, VDOC policies clearly supply the "some sort of periodic review" requirement courts have plucked from the footnote in *Helms*, which is the only "standard" that the Supreme Court has even suggested in the context of ongoing segregation (i.e., post-deprivation) reviews.

Also, considering the multiple reviews built into VDOC's Step-Down Program, *Incumaa v. Stirling*, 791 F.3d 571 (4th Cir. 2015), is readily distinguishable. In *Incumaa,* the plaintiff was assigned to a maximum security housing unit ("SMU") within the South Carolina Department of Corrections. *Id.* at 521. Although the plaintiff received a "review" every thirty days, that review was "single-layered," and was not administratively reviewed by the warden or anyone external to the prison itself. *Id.* at 523. The Fourth Circuit concluded, under the circumstances of that case, that "[t]he risk of erroneous deprivation" was "exceedingly high," in "contrast to the multi-layered procedural mechanism described by the *Wilkinson* court." *Id.* at 534. Here, by contrast, the procedural reviews established by VDOC, in the context of the Step-Down Program, far

eclipse the reviews offered in *Incumaa*, and instead mirror—if not exceed—those approved by the Supreme Court in *Wilkinson*.

For these reasons, and those discussed in Defendants' initial supporting memorandum, Plaintiffs have not plausibly alleged that their continuing Step-Down reviews deprive them of a protected liberty interest, nor have they plausibly alleged that they do not receive "some sort of periodic review," even assuming (without conceding) that the *dicta* in *Hewitt* imposes this as some sort of constitutional requirement. Accordingly, Plaintiffs' due process claim lacks substantive merit.[3]

C. Plaintiffs have not plausibly alleged an Eighth Amendment conditions-of-confinement claim.

Oddly, Plaintiffs contend that they have pled "two distinct Eighth Amendment claims," taking issue with Defendants' characterization of their complaint as "a generic conditions-of-confinement claim that Plaintiffs have not pleaded." Plfs.' Resp. in Opp., ECF No. 20, at pp. 17, 20-21. Defendants are a bit perplexed by this assertion, as the complaint contains a single count (Count V) regarding their Eighth Amendment claim. Either the conditions of confinement at ROSP and WRSP violate the Eighth Amendment, or they do not. Defendants fail to see how they should have addressed Count V differently, as some sort of bifurcated Eighth Amendment claim not actually alleged as separate counts to relief.

[3] Plaintiffs suggest that the cases from the Western District—many of which were affirmed on appeal to the Fourth Circuit—are somehow less compelling because they were developed in the context of *pro se* litigants, pointing out that some of those inmates might not have appropriately sought discovery. Whether the *pro se* litigants may have sought discovery does not undercut the reasoning of those opinions, which are appropriately based on the express language of the applicable VDOC operating procedures. Moreover, at least one of those district court judges allowed extensive discovery for the *pro se* litigant before addressing the merits of the case. *See, e.g.*, *Delk v. Younce*, 2017 U.S. Dist. LEXIS 36581, at *14-15 (W.D. Va. Mar. 14, 2017) (noting that, after the district court lifted an earlier protective order, the Defendants "provided [the inmate] with extensive discovery materials," and then submitted a renewed motion for summary judgment, which was ultimately granted).

Nevertheless, however construed, Count V—and its underlying factual allegations—do not plausibly allege an Eighth Amendment claim. For the reasons discussed in Defendants' initial supporting memorandum, the allegations of the complaint—even if true—do not plausibly allege that Plaintiffs have been exposed to objectively unconstitutional conditions of confinement. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991) ("*Some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, low cell temperature at night combined with a failure to issue blankets. . . . Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."). Similarly, also for the reasons discussed in Defendants' initial supporting memorandum, Defendants—in their official capacities—were not subjectively indifferent to any conditions of confinement that might conceivably pose a risk of harm, and they are entitled to qualified immunity as to any individual-capacity request for damages.

To the extent Plaintiffs claim that the Step-Down Program violates the Eighth Amendment because it "lacks a legitimate penological justification," this does not adequately plead a stand-alone claim to relief. The presence or absence of a penological justification may very well bear, as an evidentiary matter, on the deliberate indifference analysis, but it does not give rise to an entirely different cause of action. *See generally Porter v. Clarke*, 923 F.3d 348, 362-63 (4th Cir. 2019) (discussing the role of penological justifications in the context of an Eighth Amendment claim, and concluding that "legitimate penological justifications can support prolonged detention of an inmate in segregated or solitary confinement," even if "such

conditions create an objective risk of serious emotional and psychological harm"). Despite Plaintiffs' arguments to the contrary, then, the alleged absence of a penological justification does not mean that a prison official's conduct, *ipso facto*, violates the Eighth Amendment. It is simply another factor to consider in the overall deliberate indifference analysis. Ultimately, then, Plaintiffs' argument that Defendants "did not seek dismissal" of a separate (and unpled) "absence of penological purpose claim" is unavailing.

Plaintiffs' Eighth Amendment claim (or claims, however couched) should therefore be dismissed.

D. Plaintiffs have not plausibly alleged an Equal Protection violation.

Plaintiffs' argument regarding their Equal Protection claim fails to clarify how, precisely, they have pled the required elements of an Equal Protection violation. Plaintiffs argue, briefly, that the crux of this claim is that they were assigned "to solitary confinement and [held] there despite not posing an institutional risk." Plfs.' Resp. in Opp., ECF No. 26, at 23. But this does not state an Equal Protection claim. To adequately allege an Equal Protection claim, Plaintiffs must plausibly allege that they were treated differently from other, similarly-situated inmates, and that this unequal treatment was the result of intentional discrimination. *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001). They have not done so. As previously argued, "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 v. Heckler*, 717 F.2d 36, 42 (2d Cir. 1983). And even if the Step-Down Program "disproportionately affect[s] one group over another," this "does not make for unconstitutional discrimination." *Manning v. Caldwell*, 900 F.3d 139, 153 (4th Cir. 2018). Because Plaintiffs have failed to specify how they have been

intentionally discriminated against, or how they have intentionally been treated differently from similarly-situated individuals, they have not stated an Equal Protection claim.

For these reasons, and those discussed in Defendants' initial supporting memorandum, Plaintiffs have not pled the required elements of an Equal Protection claim, and this count should therefore be dismissed.

E. The official-capacity claims under the ADA and the RA should be dismissed as redundant.

Citing a lone case decided in the context of the Religious Land Use and Institutionalized Persons Act (RLUIPA), Plaintiffs contend that the official-capacity claims under the ADA and RA against these Defendants should not be dismissed as redundant. That one case, *Chase v. City of Portsmouth*, 428 F. Supp. 2d 487 (E.D. Va. 2006), was decided under different factual circumstances, and other courts have declined to adopt its reasoning. *See, e.g.*, D*emski v. Town of Enfield*, 2015 U.S. Dist. LEXIS 95116, at *8-9 (D. Conn. July 22, 2015); *see also Human Rights Def. Ctr. v. Bd. of Cty. Comm'rs*, 2018 U.S. Dist. LEXIS 140454, at *20 (D.N.M. Aug. 20 2018).

Because the ADA and RA claims focus on VDOC's Step-Down Program, if the Court decides that those claims should survive VDOC's motion to dismiss, it would serve no purpose to leave these individual defendants remain as parties to those claims. Rather, for the reasons set forth in *Latson v. Clarke*, 249 F. Supp. 3d 838, 855-56 (W.D. Va. 2017), the official-capacity claims against the individual defendants should be dismissed as redundant.

F. The claim alleging breach of the vacated "court-ordered" settlement agreement should be dismissed.

For the reasons that have been exhaustively briefed elsewhere—*see* Def. VDOC's Mem. in Support Mot. to Dismiss, ECF No. 19, pp. 10-20; Defs.' Mem. in Support Mot. to Dismiss, ECF No. 22, pp. 15-16; Def. VDOC's Reply in Support Mot. to Dismiss, ECF No. 25, pp. 3-

10—the count alleging breach of the Mecklenburg settlement agreement should be dismissed. The consent decree was vacated by this Court years ago. These individuals were not parties to that agreement. Any breach occurred—and the statute of limitations began to accrue—well outside the statutory limitations period. The state officials are entitled to Eleventh amendment immunity. There was no effective waiver of that Eleventh Amendment immunity, or, if there was, the waiver was rescinded when the parties sought—and obtained—a court order vacating the underlying consent decree. Finally, this Court lacks supplemental jurisdiction over what is, at best, a state-law breach-of-contract claim. Plaintiffs present no novel arguments or justification for retaining this stale claim. Rather, this Court should decline Plaintiffs' attempt to resurrect the 1980s Mecklenburg litigation in the present forum, and grant Defendants' motion to dismiss.

CONCLUSION

For these reasons, and those advanced in Defendants' initial memorandum in support of its Rule 12 motion to dismiss, Defendants respectfully requests that their motion be GRANTED, and that these Defendants be DISMISSED as parties to this litigation.

Respectfully submitted,

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By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2019, 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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