IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KARL ROGERS, *et al.*,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 1:19-cv-03090-ELH
DEPARTMENT OF PUBLIC SAFETY & CORRECTIONAL SERVICES, *et al.*,	*	
Defendants.	*	

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

Plaintiffs, who identify themselves as current and former inmates of the Maryland Division of Correction ("DOC") who are disabled, have filed a six-count complaint ("complaint") (ECF No. 2) in which, among other claims, they seek to hold senior officials of the Department of Public Safety and Correctional Services ("the Department") personally liable for purportedly denying plaintiffs' constitutional rights. The named individual defendants in the complaint are Secretary of Public Safety and Correctional Services Robert L. Green; Commissioner of Correction Wayne Hill; Warden of the Maryland Correctional Pre-Release System Jama Acuff; former Warden of the Western Correctional Institution Richard J. Graham, Jr.; former Warden of the Maryland, Reception Diagnostic, and Classification Center Carolyn J. Scruggs; former Warden of the Dorsey Run Correctional Facility Casey Campbell; former Secretary of Public Safety and Correctional Services Stephen T. Moyer; and former Commissioner of Correction Dayena Corcoran.

Plaintiffs bring suit under 42 U.S.C § 1983 against the individual defendants in their individual and official capacities for alleged violations of the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiffs have also sued the Department and the individual defendants under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12165, 12201-12213; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Rehab Act"); and the Maryland Declaration of Rights. Defendants now move to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure

because plaintiffs have failed to state viable claims for relief under § 1983, the ADA, the Rehab Act, or Maryland law.[1]

SUMMARY OF THE COMPLAINT

Plaintiffs Karl Rogers, James Jardina, Larry Coleman, and Vincent Berry allege that they are "wheelchair-bound prisoners currently or formerly residing at the Dorsey Run Correctional Facility . . . , a [Department] prison facility[.]" Compl., ¶ 3. Mr. Rogers alleges that he is "a single-leg amputee and requires a prosthetic or other assistive devices to ambulate." Compl., ¶ 34. He states that he "was released from [Department] custody in May 2019," and that "[d]uring his incarceration with [the Department], [he] was housed at the Maryland Reception, Diagnostic and Classification Center ("MRDCC") in Baltimore, and at [Dorsey Run]." Compl., ¶ 10.

Mr. Jardina alleges that, "[a]s a result of medical complications," which he does not describe, he "is confined to a wheelchair" and "relies on an ileostomy bag to relieve himself and requires ongoing medical care." Compl., ¶ 57. He alleges that he was "mysteriously released" from the custody of the Department in June 2019, after the Department allegedly "conceded that it could not accommodate [his] ongoing and serious medical needs," Compl., ¶ 11, and that "[d]uring his incarceration with [Department]. . . [he] was housed at several [Department] facilities, including the Western Correctional Institution ("WCI") and [Dorsey Run]." *Id.*

[1] The complaint was filed on August 30, 2019 in the Circuit Court for Baltimore City. On October 23, 2019, defendants removed the case to this Court pursuant to 28 U.S.C. § 1446(a). *See* ECF No. 1.

Mr. Coleman alleges that he "requires a wheelchair to ambulate after a spinal cord injury in 1990," Compl., ¶ 72, and that he has been incarcerated at Dorsey Run since December 2018. ¶ 72. Mr. Berry alleges that he is "a paraplegic prisoner who is confined to a wheelchair," and that he "has been incarcerated at [Dorsey Run] since approximately 2016." Compl., ¶ 80.

Plaintiffs John Fishback and Eric Andre Young allege that they "are prisoners with disabilities or perceived disabilities who are currently housed at [Dorsey Run]." Compl., ¶ 4. Mr. Fishback, who alleges that he "suffers from bipolar disorder and chronic pain," Compl., ¶ 14, states that he "is currently incarcerated at [Dorsey Run], but has spent significant time in [Department] institutions since 2002." Compl., ¶ 86. Mr. Young alleges that he "is an asthmatic and was diagnosed with that condition as a child," Compl., ¶ 15, and that he is currently incarcerated at Dorsey Run, having "arriv[ed] at [Dorsey Run] in 2019." Compl., ¶ 103.

In their complaint, plaintiffs allege that Dorsey Run is not a "Wheelchair Accessible Facilit[y]" because it does not maintain "ADA-compliant housing accommodations, shower and toilet facilities, accessible common areas, recreational activities and opportunities, dining accommodations, and visiting room accommodations." Compl., ¶ 44. Mr. Jardina, who was previously confined at WCI, also complains that WCI is "almost entirely inaccessible to a wheelchair-bound individual." Compl., ¶ 58. Mr. Jardina and Mr. Coleman also complain that the wheelchairs provided for them at Dorsey Run are inadequate. Plaintiffs Rogers, Jardina, Berry, and Coleman, also allege that they have been "also routinely denied appropriate and timely medical care, follow up treatment, and

medical supplies," such as catheters, gloves, underpads and ileostomy bags. Compl., ¶ 28, 83, 113. Mr. Fishback and Mr. Young allege that they have been denied the opportunity to participate in pre-release programming, including home detention, work release and "outside detail," because of their disabilities, Compl. ¶¶ 88-102, and that they "cannot access the same opportunities, services, and programs as [their] non-disabled peers." Compl., ¶ 104.

The complaint contains the following counts: Count I ("Discrimination Against Plaintiffs Because of Actual or Perceived Disabilities in Violation of the [ADA]") (against all defendants); Count II ("Discrimination Against Plaintiffs Because of Disability [i]n Violation of Section 504 of the Rehabilitation Act") (against all defendants); Count III ("42 U.S.C. § 1983 – Subjecting Plaintiffs to Serious Harm and a Substantial Risk of Serious Harm in Violation of the Eighth Amendment"); (against the individual defendants); Count IV ("42 U.S.C. § 1983 – Constitutional Denial of Due Process in Failing to Train and/or Supervise"); (against the individual defendants); Count V ("Violations of Articles 16 and 25 of the Maryland Declaration of Rights") (against all defendants); Count VI ("Negligence") (against defendants Department and Carolyn Scruggs).

LEGAL STANDARD

A motion made under Rule 12(b)(6) allows a complaint to be dismissed for failure to state a claim upon which relief can be granted. Indeed, a complaint must be dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under the plausibility standard, a complaint must contain "more than labels and conclusions" or a "formulaic recitation of

the elements of a cause of action." *Twombly*, 550 U.S. at 555. Rather, the complaint must be supported by factual allegations that "raise a right to relief above the speculative level." *Id*. Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin*., 780 F.3d 582, 587 (4th Cir. 2015) ("[T]he Supreme Court has, with *Iqbal* and *Twombly*, rejected the sufficiency of complaints that merely allege the possibility of entitlement to relief, requiring plausibility for obtaining such relief and thus rejecting a complaint in which the plaintiff relies on speculation."). For the reasons set forth below, plaintiffs' complaint fails to plead with sufficiency any of their claims, and therefore should be dismissed in its entirety.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO STATE ANY PLAUSIBLE CLAIMS FOR RELIEF UNDER § 1983 AGAINST THE INDIVIDUAL DEFENDANTS.

A. Plaintiffs Have Failed to Allege That Defendants Were Personally Involved in Any Deprivations of Plaintiffs' Constitutional Rights.

Plaintiffs' complaint contains no plausible claims against the individual defendants for violating plaintiffs' rights to due process of law or to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments. First, plaintiffs have alleged no facts showing the defendants' personal involvement in unconstitutional conduct. It is well-settled that liability under 42 U.S.C. § 1983 must be premised on the defendant's personal conduct and cannot rest on any theory of vicarious liability. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691–695 (1978). *See also Vinnedge v. Gibbs*, 550 F.2d 926,

928 (4th Cir. 1977) (liability under § 1983 requires a state official to have acted personally to cause a deprivation of constitutional rights).

Absent an allegation of direct involvement by a supervisor in causing an injury, a supervisor may be held liable only if the plaintiff demonstrates that: (1) the supervisor had "knowledge that his subordinate was engaged in conduct that posed a 'pervasive and unreasonable risk' of constitutional injury" to plaintiff; (2) the supervisor's response "was so inadequate as to show 'deliberate indifference to or tacit authorization of'" the alleged conduct; and (3) "'an affirmative causal link' between the supervisor's inaction" and the plaintiff's injury. *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994) (citations omitted).

Plaintiffs have failed to meet this rigorous standard. "[T]he Supreme Court explained in *Iqbal* that 'a supervisor's mere knowledge' that his subordinates are engaged in unconstitutional conduct is insufficient to give rise to liability; instead a supervisor can only be held liable for 'his or her own misconduct.'" *Evans v. Chalmers*, 703 F.3d 636, 660-61 (4th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 677). Thus, "'a plaintiff must plead that *each* [supervisory] defendant, through the official's *own individual actions*, has violated the Constitution.'" *Chalmers*, 703 F.3d at 661 (quoting *Iqbal*, 556 U.S. at 676). Plaintiffs have not done so. For the most part, references to the individual parties are contained in the "Parties" section of the complaint, which merely identifies the defendants as supervisors and alleges, in conclusory fashion, that they were "aware of [the Department's] policies and practices regarding disabled prisoners" and "knowledgeable of the requirements of federal law, including the Eighth and Fourteenth Amendments to the United States Constitution, the ADA, and Section 504 [of the Rehab Act]." Compl., ¶¶ 18-25. Elsewhere,

the complaint simply provides "formulaic recitation[s] of the elements" of constitutional claims against the individual defendants, *Iqbal*, 556 U.S. at 681, without identifying any unconstitutional conduct or violation allegedly perpetrated by any particular defendant. *See*, *e.g.*, Compl. at 44 and ¶ 177 (alleging that "Defendants were personally involved in the alleged constitutional and statutory violations in that each of them directly participated in the infraction" but failing to identify any conduct engaged in by any defendant). Such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a constitutional violation against a government official sued in his or her individual capacity. *See Iqbal*, 556 U.S. at 681 (allegations that the U.S. Attorney General was the "principal architect" of "unconstitutional policy that subjected [plaintiff] to harsh conditions of confinement on account of his race, religion, or national origin" and that he "knew of, condoned, and willfully and maliciously agreed to subject" plaintiff to harsh conditions of confinement "as a matter of policy . . . for no legitimate penological interest" were "conclusory [allegations] and not entitled to be assumed true").

On the two occasions where defendants are mentioned with any degree of specificity in the complaint, the plaintiffs' factual allegations fail to identify how their alleged conduct personally violated any plaintiff's constitutional rights. First, plaintiffs allege that, in response to a grievance filed by Mr. Rogers, "Warden Acuff confirmed that many facilities at [Dorsey Run] are not ADA compliant," Compl., ¶ 71, but they do not explain how this alleged statement demonstrates personal involvement in a violation of plaintiffs' constitutional rights to due process or to be free from harm under the Eighth Amendment. Plaintiffs also allege that Warden Campbell responded to a grievance filed by Mr. Jardina

by asserting that Dorsey Run is "well within [ADA] compliance" with regard to inmate beds, "the ratio of prisoners to handicap bathrooms," and the configuration of the institution's showers, and by stating that "Mr. Jardina's claims concerning disabled prisoners being denied jobs was unsubstantiated." Compl., ¶ 61. While plaintiffs dispute the accuracy of Warden Campbell's response, they provide no facts plausibly suggesting that Warden Campbell was personally involved in an alleged violation of Mr. Jardina's or any other plaintiff's constitutional rights.

Plaintiffs have failed to allege any facts demonstrating that Secretary Green and Secretary Moyer, Commissioners Hill and Corcoran, or Wardens Acuff, Graham, Campbell, and Scruggs had even "mere knowledge" that any subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to plaintiffs, let alone that they were indifferent to or tacitly approved it. To allow plaintiffs to proceed with their personal capacity claims based on the threadbare assertion that defendants were "aware" of "policies and practices" and the requirements of the law, Compl., ¶¶ 17-24, would inappropriately burden defendants with having to defend against claims bereft of any specific alleged conduct relating to any individual party. *See Iqbal*, 556 U.S. at 685 ("If a Government official is to devote time to his or her duties . . . it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."); *Chalmers*, 703 F.3d at 665 (dismissing insufficient pleadings because allowing them "to proceed would let litigation loose in such a

fashion as to impair the ability of the criminal justice system to do its job. . . . That is to say, individuals would be pulled into the coercive proceedings of courts when they have no business being there."). Accordingly, plaintiffs' claims against the individual defendants should be dismissed.

B. Plaintiffs Have Failed to Allege a Plausible Claim of Deliberate Indifference Under the Eighth or Fourteenth Amendments.

The complaint contains no plausible claims that defendants were deliberately indifferent to alleged "serious and unreasonable risks of harm" to any plaintiff in violation of the Eighth or Fourteenth Amendments. *See* Compl., ¶ 93. Plaintiffs allege that the defendants violated their rights to be free from serious harm by "fail[ing] to make reasonable accommodations to their policies and procedures or to provide Plaintiffs auxiliary aids or services to allow Plaintiffs to safely navigate DPSCS facilities." Compl., ¶ 174. They also allege that defendants violated the Eighth Amendment by "refus[ing] to consider Plaintiffs' disabilities in housing, work, recreation, programming, and other areas all of which severely limit, if not bar entirely, Plaintiffs from participating in activities of daily living that are available to their non-disabled peers." Compl., ¶ 175. These allegations fail to state actionable claims under the well-established Eighth Amendment test, which requires a prisoner to demonstrate that a prison official "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

1. Elements of an Eighth Amendment Claim.

To succeed on an Eighth Amendment claim regarding the conditions of a prisoner's confinement, an inmate must establish both elements of a two-prong standard. First, to

satisfy the "objective" prong, a plaintiff inmate must "demonstrate that 'the deprivation alleged [was], objectively, sufficiently serious.'" *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016) (quoting *Farmer*, 511 U.S. at 834). A deprivation is sufficiently serious only if it is "'extreme'— meaning that it poses a 'serious or significant physical or emotional injury" or "'a substantial risk of such serious harm resulting from . . . exposure to the challenged conditions.'" *Scinto*, 841 at 225 (quoting *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003)).

The subjective component requires a showing "that the prison official had a 'sufficiently culpable state of mind,' which . . . consists of 'deliberate indifference to inmate health or safety.'" *Raynor v. Pugh*, 817 F.3d 123, 127 (4th Cir. 2016) (quoting *Farmer*, 511 U.S. at 834). Under the subjective test, "actual knowledge of facts from which a reasonable person might have inferred the existence of the substantial and unique risk to [the prisoner] . . . is not enough to establish a violation of the Eighth Amendment," because "the defendant official . . . must actually have drawn the inference." *Rich v. Bruce*, 129 F.3d 336, 340 (4th Cir. 1997). Thus, negligence alone does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *See Ruefly v. Landon*, 825 F.2d 792, 793 (4th Cir. 1987); *Whitley v. Albers*, 475 U.S. 312, 319 (1986) ("It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the prohibited conduct.").

2. Plaintiffs Have Failed to Meet the Objective Component of an Eighth Amendment Claim Because They Have Failed to Allege Facts Constituting a "Substantial" or "Excessive" Risk of Serious Harm.

Plaintiffs' complaint does not satisfy the objective element of an Eighth Amendment claim because plaintiffs have failed to allege that they were subjected to conditions which

caused them serious harm or exposed them to a substantial risk of serious harm. As the Fourth Circuit has explained, "[t]he Eighth Amendment does not prohibit cruel and unusual prison conditions; it prohibits cruel and unusual punishments." *Strickler v. Waters*, 989 F.2d 1375, 1381 (4th Cir. 1993). Thus, as noted, "[o]nly extreme deprivations are adequate to satisfy the objective component of an Eighth Amendment claim regarding conditions of confinement." *De'Lonta*, 330 F.3d at 633–34 (4th Cir. 2003). *See also Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995) ("'[O]nly those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation.'") (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

None of the plaintiffs' allegations of harm meet the objective standard for establishing an Eighth Amendment violation. Mr. Rogers alleges that, when transferred to MRDCC for a brief confinement, he was "denied the ability to enter that institution with a wheelchair and instead offered . . . forearm crutches." Compl., ¶ 35. He does not dispute that he was able to ambulate with the crutches, but claims that on January 3, 2019, he fell on a wet floor in the shower facilities at MRDCC because he was not permitted to use his crutches and the shower lacked "handrails, anti-slip guards, or shower chairs," resulting in "serious[] injur[y] [to] his right shoulder." Compl., ¶ 35. This is insufficient, because "courts have found that wet or slippery floors or a prison's failure to equip showers with non-slip mats are not the types of conditions warranting relief under the Eighth Amendment." *Shariff v. Coombe*, 655 F. Supp. 2d 274, 300–01 (S.D.N.Y. 2009) (citing *Adams v. Perez*, No. 08 Civ. 4834(BSJ)(MHD), 2009 WL 513036, at *3 (S.D.N.Y. Feb. 27, 2009) ("[A] failure on the part of prison officials to provide shower mats does not rise to

the level of a constitutional violation"); *Sylla v. City of New York*, No. 04–cv–5692 (ILG), 2005 WL 3336460, at *3 (E.D.N.Y. Dec. 8, 2005) ("Courts have regularly held that a wet or slippery floor does not pose an objectively excessive risk to prisoners"); and *Williams v. Dillon*, No. 93–3127–DES, 1993 WL 455442, at *1 (D.Kan. Oct. 28, 1993) ("Even if the absence of a shower mat contributed to plaintiff's fall, it would still fail to evidence the kind of condition proscribed under the eighth amendment"). *See also Alsaifullah v. Furco*, No. 12–CV–2907, 2013 WL 3972514, at *14 (S.D.N.Y.2013) (prisoner's claim that he injured shoulder in slip-and-fall resulting from failure to install handrails was not cognizable under the Eighth Amendment). *See also Reynolds v. Powell*, 370 F.3d 1028, 1031 (10th Cir.2004) (slippery condition arising from standing water in prison shower did not constitute cruel and unusual punishment, even where inmate was on crutches and had warned prison employees that he was at heightened risk of falling).

Mr. Rogers's claims arising from his confinement at Dorsey Run also fail to meet the objective prong of the Eighth Amendment test. Mr. Rogers complains that "[s]hortly after his arrival at [Dorsey Run]," his "forearm crutches broke," and, for a one week period, he "had to borrow another prisoner's wheelchair to access food, medical services, and the lavatory." Compl., ¶¶ 38, 39. He does not dispute that he was able to access those services during the one-week period, but complains that after his wheelchair arrived, it "routinely broke and needed maintenance," that "the hardware that secured the brakes to the wheelchair came loose and made slowing or stopping the wheelchair very difficult," and that he "had to rely on friendly maintenance workers—when he could find them—to repair his wheelchair." Compl., ¶ 40. Mr. Rogers alleges no facts demonstrating that the alleged

defects in his wheelchair prevented him from obtaining food, medical services, or hygiene, let alone that they "pose[d] an unreasonable risk of serious damage to his future health." *Helling v. McKinney*, 509 U.S. 25, 35 (1993). Accordingly, these allegations fail to state an Eighth Amendment violation.

Mr. Jardina's and Mr. Coleman's complaints regarding their wheelchairs also fail to state plausible Eighth Amendment claims. Mr. Coleman acknowledges that, while confined at WCI, he "had a wheelchair that his family provided to him" that was "fitted to him to accommodate his specific needs," Compl., ¶ 73, but that, upon his transfer to Dorsey Run, he "ha[d] to use a wheelchair provided to him by [the facility]," which was "too small . . ., not fitted to Mr. Coleman, . . . in poor condition," and "not designed for outside use." Compl., ¶ 73. Similarly, Mr. Jardina acknowledges that a wheelchair was provided to him, but complains that WCI staff "failed to personalize a wheelchair for him," and that "[c]onsequently, the wheelchair provided to [him] was too small, uncomfortable, and . . . in need of several modifications to properly roll." Compl., ¶ 66. Like Mr. Rogers's claims, these claims regarding the perceived inadequacies of the plaintiffs' wheelchairs fail because they do not constitute "extreme deprivations," *De'Lonta*, 330 F.3d at 633–34, that "den[ied] [plaintiffs] the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 832. Similarly, Mr. Jardina's allegation that, while working in the Dorsey Run library, he had to "push himself outside for hundreds of yards back to his housing unit" to use the bathroom, Compl., ¶ 65, fails to state a viable Eighth Amendment claim, because "[c]ourts have generally found . . . . that a temporary deprivation of bathroom facilities does not rise to the level of an Eighth Amendment violation." *McGee v. Pallito*, No. 1:10-CV-11, 2011

WL 6291954, at *6 (D. Vt. Aug. 3, 2011) (citing cases), *report and recommendation adopted*, No. 1:10-CV-11-JGM-JMC, 2011 WL 6294202 (D. Vt. Dec. 15, 2011). *Cf. Shariff*, 655 F.Supp.2d at 298–300 (wheelchair-bound inmates who alleged that they had urinated and defecated on themselves several times per week as a result of lack of access to bathroom facilities stated viable Eighth Amendment claim).

Also lacking in merit are plaintiffs' claims that defendants violated the Eighth Amendment by failing to repair "cracks and uneven pavement" on the walkway at WCI, which allegedly caused Mr. Jardina to fall from his wheelchair, Compl., ¶ 67, or by failing to ensure that the "walking track" and "weight pit" at Dorsey Run were fully accessible to inmates in wheelchairs. Compl., ¶ 64. "[T]he existence of potholes, broken concrete, guardhouses or other conditions that create accessibility issues . . . does not constitute a violation of the Eighth Amendment." *Shariff*, 655 F.Supp. at 300. Again, plaintiffs have failed to plausibly allege that these conditions "deprived [them] of minimal civilized necessities," *Williams v. Branker*, 462 F. App'x 348, 353 (4th Cir. 2012), or rose to the level of a "condition posing a substantial risk of serious harm to [their] health or safety." *Farmer*, 511 U.S. at 834. Moreover, plaintiffs' do not have an Eighth Amendment right to a "pusher" to "assist [them] in navigating around" the prison facilities, Compl., ¶ 74, and thus plaintiffs' complaints that they were not provided pushers or that the pushers that were provided were improperly trained, Compl.,¶ 67, fail to state plausible claims that they have been exposed to "objectively intolerable risk[s]" as required to state an Eighth Amendment claim. *Farmer,* 511 U.S. at 846.

3. Plaintiffs Have Failed to Plausibly Allege That Any Defendant Was Deliberately Indifferent to any Risk of Serious Harm to Any Plaintiff.

Plaintiffs' allegations also fail to meet the subjective component of the Eighth Amendment test, which requires not only "[a]ctual knowledge or awareness on the part of" the defendant to the substantial and excessive risk of harm to the prisoner, *Brice v. Virginia Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995), but also a showing that the official acted with "deliberate indifference." *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014). Plaintiffs allege no facts plausibly demonstrating that defendants had "actual knowledge" of *any* risk of harm to plaintiffs. As noted previously, the individual defendants are barely mentioned in the complaint, and the complaint is thus devoid of any facts demonstrating that a defendant was aware of a serious risk of harm to any plaintiff. Plaintiffs' Eighth Amendment claims thus contain no more than the very type of "un-adorned, the-defendant[s]-unlawfully-harmed-me accusation[s]," without any "factual enhancement," that the Court cautioned against in *Twombly and Iqbal*. *See Iqbal*, 556 U.S. at 677. Because plaintiffs have failed to provide "factual content that allows the court to draw the reasonable inference that the defendant[s] [are] liable" under the Eighth Amendment, *id*. at 678, the Court should dismiss Count III of the complaint.[2]

[2] To the extent plaintiffs' § 1983 claims for damages are brought against the defendants in their official capacities, they fail for the additional reason that "neither a State nor its officials acting in their official capacities are 'persons' who are subject to suit for money damages under Section 1983." *Brown v. Dep't of Pub. Safety & Corr. Servs*., 383 F. Supp. 3d 519, 538 (D. Md. 2019) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989)). *See also Graham v. Cox*, ELH-18-221, 2019 WL 1427860, at *10 (D. Md. March 29, 2019) ("[Section] 1983 claims are not cognizable against states, state agencies, or state agents acting in their official capacities."). Plaintiffs' official capacity claims are also barred by the Eleventh Amendment to the United States Constitution. *See Pennhurst State*

C. Plaintiffs Have Failed to Allege a Plausible Claim of a Denial of Due Process Under the Fourteenth Amendment.

Plaintiffs have failed to state a claim against the defendants in Count IV of the complaint of a "[c]constitutional [d]enial of Due Process in [f]ailing to [t]rain and/or [s]upervise." In that count, plaintiffs allege that defendants "failed to properly train and supervise [Department] staff with respect to reasonable accommodations for disabled prisoners, the legal requirements for physical and auxiliary accommodations for such disabled prisoners, and properly responding to disabled prisoners' complaints about the inadequacy, or like here, the complete absence of such accommodations." Compl., ¶ 183. Plaintiffs also allege that defendants were deliberately indifferent in failing to provide the "requisite training and supervision to [Department] staff, or the requisite protection and assistance to the Plaintiffs." Compl., ¶ 184.

Plaintiffs' due process claim fails because they have failed to plausibly allege that Department "staff," none of whom are identified, committed any constitutional violation that could be the basis for a failure to train claim. In the Fourth Circuit, "[t]he law is quite clear . . . that a section 1983 failure-to-train claim cannot be maintained against a governmental employer in a case where there is no underlying constitutional violation by

Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984). Section 1983 does not abrogate state immunity, *see Quern v. Jordan*, 440 U.S. 332, 345 (1979) and the State of Maryland has not waived its immunity from private suits in federal court. *See* Md. Code Ann., State Gov't § 12-103(2). Nor does the defendants' removal of this case constitute a waiver of sovereign immunity from suit under § 1983. *See Stewart v. North Carolina,* 393 F.3d 484, 490 (4th Cir. 2005) (removal does not waive immunity where state has not consented to suit in its own courts for claim).

the employee." *Young v. City of Mount Ranier*, 238 F.3d 567 (4th Cir. 2001). Such a claim against a supervisor is "actionable under section 1983 only where . . . the failure to train [the subordinates] in a relevant respect evidences . . . deliberate indifference" to constitutionally protected rights. *Jordan v. Jackson*, 15 F.3d 333, 341 (4th Cir. 1994) (citations omitted). And, in the context of a failure to train claim, a supervisor can be said to be "deliberately indifferent" only if, "in light of the duties assigned to specific officers or employees, the need for more or different training is . . . obvious," and "likely to result in the violation of constitutional rights." *Id.*

The requirement that a plaintiff demonstrate indifference on a supervisor's part rests on the principle that the liability of supervisory officials "is not based on ordinary principles of respondeat superior, but rather is premised on 'a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care.'" *Baynard v. Malone*, 268 F.3d 228, 235 (4th Cir. 2001) (quoting *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir. 1984)). It follows that "[m]ere negligence is insufficient to impose section 1983 liability" on a supervisor for an alleged failure to train. *Jordan*, 15 F.3d at 341.

Plaintiffs have not met any of these requirements. As demonstrated above, plaintiffs have failed to plausibly allege the commission of any constitutional violation by any defendant or any subordinate of any defendant. Nor have plaintiffs plausibly alleged that any defendant was aware of such alleged violations and exhibited deliberate indifference to any plaintiffs' constitutional rights. Accordingly, this Court should dismiss Count IV of the complaint.

D. Plaintiffs Have Failed to Allege a Plausible Claim of a Denial of Access to the Courts.

Plaintiffs have also failed to allege facts demonstrating that they have been denied their constitutional right of access to the courts. Plaintiffs allege that defendants "have failed to establish minimum mandatory standards for administrative complaints and grievances as required by Md. Code, Corr. Servs. § 8-103, and Md. Code Regs. 12.14. 04.05, violating Plaintiffs' Fourteenth Amendment rights to access the courts." Compl., ¶ 8. These allegations fail to state plausible claims for relief. In *Bounds v. Smith*, 430 U.S. 817, 825 (1977), the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." The Constitution "does not guarantee inmates the wherewithal to transform themselves into litigating engines," but rather gives them the "tools . . . to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996).

For Maryland prisoners, access to courts is established by "the array of services provided by the Office of the Public Defender and the Prisoner Assistance Program of the Legal Aid Bureau," *see Savko v. Rollins*, 749 F. Supp. 1403, 1408 (D. Md. 1990), which has been succeeded by the Prisoner Rights Information System of Maryland ("PRISM"), and by the law libraries and the Library Assistance to State Inmates ("LASI") program. *See Pevia v. Commissioner of Corr*., No. CV ELH-17-0273, 2018 WL 4052244, at *12 n.10 (D. Md. Aug. 24, 2018) ("This [C]ourt has found that the combination of services provided to [DOC] prisoners through private contract with outside agencies such as . . . .

PRISM, the Office of the Public Defender, and LASI, is sufficient to ensure their right of access to the courts."). Nowhere in the complaint do plaintiffs even allege that they are unable to access the assistance provided by the Office of the Public Defender, Legal Aid Bureau, PRISM, or LASI, or that such assistance is in any way inadequate.

Similarly, there is no "fundamental" right to an institutional inmate complaint resolution process, *see Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988); *Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994), and alleged defects in an inmate grievance system do not violate the Constitution. *Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1995) (prisoner's allegation that jail grievance procedures were inadequate to redress his grievances did not state claim for violation of due process). *See also Booker v. South Carolina Dep't of Corr*., 855 F.3d 533, 541 (4th Cir. 2017) ("[I]inmates have no constitutional entitlement or due process interest in access to a grievance procedure."). In any event, the allegations of the complaint demonstrate that the plaintiffs have access to, and availed themselves of, the administrative remedy process. Plaintiffs Jardina (Compl., ¶¶ 60-61, 68), Coleman (Compl., ¶¶ 77, 78) Berry (Compl. ¶ 82) and Fishback (Compl. ¶ 94) all acknowledge that they filed grievances with prison officials to which they received responses. The fact that they were not satisfied with those responses does not mean that the administrative remedy process was unavailable to them. Thus, when viewed under the proper legal standard for assessing a prisoner's access to courts claim, plaintiffs' allegations of denial of access to courts do not pass the plausibility test.

Just as importantly, plaintiffs have failed to plausibly allege facts satisfying the second component of a denial of access to courts claim: "actual injury." *See Lewis*, 518

U.S. at 352-54. To prevail under this component, a prisoner must demonstrate that the actions of prison officials "hindered his efforts to pursue" a constitutionally protected legal claim. *Id.* at 351. Absent a showing of such actual injury caused by the conduct of prison officials, such as the dismissal of an action filed by the prisoner, there is no constitutional violation. *Id.*; *see also Strickler*, 989 F.2d at 1385 ("'A demonstration of inability to present a legal claim is an essential ingredient . . . because the prisoner must be able to show that the rules interfered with his entitlement (access to the courts) rather than with a mere instrument for vindicating an entitlement (access to books)." (quoting *DeMallory v. Cullen*, 855 F.2d 442, 452 (7th Cir.1988) (Easterbrook, J., dissenting))).

Plaintiffs have failed to allege any constitutional injury arising from their purported lack of access to courts. Accordingly, this Court should dismiss plaintiffs' access to courts claim.

E. Defendants Are Entitled to Qualified Immunity from Plaintiffs' Federal Constitutional Claims.

Defendants are entitled to qualified immunity from plaintiffs' claims under the First, Eighth, and Fourteenth, amendments. Qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)).

Typically, "[d]etermining whether qualified immunity is appropriate is a two-step inquiry." *Jones v. Chandrasuwan,* 820 F.3d 685, 691 (4th Cir. 2016) (citing *Pearson,* 555 U.S. at 232)). "First, a court must decide whether the facts that a plaintiff has shown make

out a violation of a constitutional right." *Id.* "Second, the court must consider whether the right at issue was 'clearly established' at the time of the alleged misconduct." *Id.* Judges are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236.

Ultimately, the lodestar for whether a right was clearly established is whether the law "gave the officials 'fair warning' that their conduct was unconstitutional." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 313 (4th Cir. 2006) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). The contours of the constitutional right "must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Hope*, 536 U.S. at 753 (quotation omitted). Although "'[c]learly established' does not mean that 'the very action in question has previously been held unlawful' . . . it does require that, 'in the light of pre-existing law the unlawfulness [of the official's conduct] must be apparent.'" *Owens v. Lott*, 372 F.3d 267, 278 (4th Cir. 2004) (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)) (brackets in original); s*ee also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (finding that "clearly established" does not "require a case directly on point . . . but existing precedent must have placed the statutory or constitutional question beyond debate.").

"[W]hether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded," because "the sufficiency of [plaintiff's] pleadings is both inextricably intertwined with and directly implicated by the qualified immunity defense." *Iqbal*, 556 U.S. at 671. And, in assessing the merits of the

qualified immunity defense, the threshold inquiry—whether the plaintiff has alleged a constitutional violation—is especially appropriate where "discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all." *Pearson*, 555 U.S. at 236. *See also Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011) (dismissal of a complaint based on qualified immunity is appropriate when "the face of the complaint clearly reveals" that the defense is "meritorious") (citations omitted).

Defendants are entitled to qualified immunity under both prongs of the qualified immunity standard. First, as demonstrated above, plaintiffs have failed to allege facts plausibly demonstrating that any right of plaintiffs protected by the Eighth or Fourteenth Amendment is implicated in this case. Plaintiffs have also failed to allege personal conduct by any defendant in alleged constitutional violations. Thus, the facts pleaded by plaintiffs "do not make out a constitutional violation at all" against the defendants. *Pearson*, 555 U.S. at 236.

Even if plaintiffs had stated a plausible claim that the defendants violated a constitutional right, defendants would still be entitled to qualified immunity because "the right's contours were [not] sufficiently definite that any reasonable official in [the defendants'] shoes would have understood that [they were] violating it." *City & County of San Francisco, Cal. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). As demonstrated above, plaintiffs' Eighth, and Fourteenth Amendment claims are devoid of any "controlling authority," *al-Kidd*, 563 U.S. at 742, that adopts plaintiffs' expansive theories of a prisoner's constitutional right to due process, access to the courts, or to be free from

unreasonable risk of harm. Nor do plaintiffs cite a "consensus of cases of persuasive authority" that has "placed the . . . constitutional question[s] beyond debate." *Id.* at 741-2. Accordingly, defendants are entitled to qualified immunity.

II. PLAINTIFFS' ADA CLAIM IS BARRED BY SOVEREIGN IMMUNITY.

Plaintiffs' claims brought under Title II of the ADA should be dismissed because the sovereign immunity bars those claims against the Department. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989).[3] In *United States v. Georgia*, 546 U.S. 151, 159 (2006), the Supreme Court held that the ADA abrogates state sovereign immunity for conduct that also violates the Fourteenth Amendment to the United States Constitution. The Supreme Court has not, however, held that state sovereign immunity is abrogated for conduct that does *not* rise to the constitutional level. *See id*.; *see also Spencer v. Earley*, 278 F. App'x 254, 257-58 (4th Cir. 2008). Indeed, the Fourth Circuit has upheld the dismissal of an ADA claim on the basis of state sovereign immunity where the conduct did not violate the Fourteenth Amendment. *Barnes v. Young*, 565 F. App'x 272, 273 (4th Cir. 2014). Because plaintiffs have not stated a Fourteenth Amendment claim, as argued above

[3] Sovereign immunity also bars plaintiffs' ADA claims against the individual defendants in their official capacities because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will*, 491 U.S. at 71 (internal citations omitted). To the extent that plaintiffs attempt to sue the defendants in their individual capacities their attempt fails because Title II of the ADA does not permit individual capacity suits against a state official. *Barnes v. Young*, 565 F. App'x 272, 273 (4th Cir. 2014). Thus, although plaintiffs assert their ADA claims against the individual defendants in addition to the Department, they should be construed as asserted only against the Department.

in § I, the State is immune from suit for the purported ADA violations alleged in the complaint. Accordingly, plaintiffs' ADA claims should be dismissed.[4]

III. PLAINTIFFS HAVE FAILED TO STATE ANY PLAUSIBLE CLAIMS FOR RELIEF UNDER § 504 OF THE REHABILITATION ACT.

To state a claim under § 504 of the Rehab Act, plaintiffs must sufficiently plead that they (1) are qualified individuals with a disability; (2) were denied the benefits of a program or service of a public entity that receives federal funds; and (3) were denied such benefits "due to discrimination solely on account of the disability."[5] *Koenig v. Maryland*, No. Civ.A. CCB-09-3488, 2010 WL 148706, at *1 (D. Md. Jan. 13, 2010), *aff'd*, 382 F. App'x 273 (4th Cir. 2010); 29 U.S.C. § 794(a). By contrast, under the ADA, a plaintiff may state a claim for relief by showing that he or she was subjected to discrimination or "excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity . . . by reason of [a] disability." 42 U.S.C. § 12132. By adding the word "solely" to the ADA's requirement for a plaintiff to show discrimination by reason of the

[4] Defendants did not waive their immunity from plaintiffs' ADA claim by removing this case to federal court. As noted earlier, removal does not waive those defenses that would be available to a party in state court. *See Stewart*, 393 F.3d at 489-90. Because the State of Maryland has not consented to suits under the ADA in its own courts, removal did not effect a waiver of immunity from suit under the ADA. *See Ramos v. Berkeley County*, C.A. No. 2:11-3379-SB-BM, 2012 WL 5292899, at *3 (D.S.C. Aug. 7, 2012) (removal of case did not waive State's Eleventh Amendment immunity from suit on ADA claim); *Means v. S.C. Dep't of Soc. Servs.*, No. CV 6:15-4104-HMH-KFM, 2017 WL 2189699, at *5 (D.S.C. Apr. 27, 2017) (same), *report and recommendation adopted*, No. CV 6:15-4104-HMH-KFM, 2017 WL 2155431 (D.S.C. May 17, 2017).

[5] Defendants acknowledge that the Department is a public entity that receives federal funds and thus do not contest the applicability of the Rehab Act to the Department for the purposes of the instant motion. *See Huber v. Howard County, Md.*, 849 F. Supp. 407, 415 (D. Md. 1994), *aff'd*, 56 F.3d 61 (4th Cir. 1995).

disability, the Rehab Act imposes a stronger causation standard between the disability and the purported discrimination than the ADA. *Jarboe v. Maryland Dep't of Pub. Safety & Corr. Servs*., No. Civ.A. ELH-12-572, 2013 WL 1010357, at *3 (D. Md. Mar. 13, 2013).

Plaintiffs' Rehab Act claims fail because plaintiffs fail to plead with sufficiency that they were denied benefits of a service, program, or activity solely by reason of a disability. Plaintiffs allege that the defendants violated the Rehab Act by "fail[ing] to equally extend [the Department's] vocational training and work release programs to Plaintiffs, causing Plaintiffs to los[e] the opportunity to work and earn money while incarcerated." Compl., ¶ 162. Plaintiffs also allege that defendants "discriminate against Plaintiffs because of their disabilities or perceived disabilities when they relegate them to jobs that provide lower pay and fewer diminution credits based on stereotypes about their abilities as disabled individuals," by "failing to provide them with the necessary medical care and devices that they require, and by refusing to properly house Plaintiffs in accommodations that are specifically designed and equipped for disabled individuals." Compl. ¶ 163.

There are three distinct grounds upon which relief may be pursued under § 504 of the Rehab Act: "(1) intentional discrimination or disparate treatment; (2) disparate impact; and (3) failure to make reasonable accommodations." *A Helping Hand, LLC v. Baltimore County, Md.*, 515 F.3d 356, 362 (4th Cir. 2008). Plaintiffs do not specify which theory they base their claims upon, but rather conflate allegations of intentional discrimination with a purported failure to make reasonable accommodations. Under either theory, punitive damages may not be awarded, and plaintiffs must show intentional discrimination or

disparate treatment *by the defendants* to be awarded compensatory damages. *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 373 (D. Md. 2011).

The allegations in the complaint demonstrate that plaintiffs cannot make either showing. First, many of the plaintiffs' claims concern the alleged denial of medical care. An allegation of a denial of medical care, however, does not state a claim under the disability rights statutes. *See Davidson v. Wexford's Health Sources Inc*., No. CIV.A. WDQ-13-2583, 2014 WL 2768586, at *13 (D. Md. June 16, 2014) (noting that, "[a]lthough the Fourth Circuit has not addressed this issue in a published opinion, unpublished cases from this circuit and opinions from other circuits indicate that a prisoner may not state a claim under the ADA for a lack of medical treatment.") (citing *Miller v. Hinton*, 288 Fed. App'x 901, 902 (4th Cir. 2008) (alleged denial of access to colostomy bags and catheters to paraplegic inmate did not constitute disability discrimination where plaintiff failed to show that he was treated differently because of his disability): *Spencer v. Easter,* 109 Fed. App'x 571, 573 (4th Cir. 2004) (alleged failure to obtain prisoner's prescription medication in a timely manner was not an ADA violation because there was no showing of discriminatory intent based on prisoner's disability); *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996) (holding that the ADA is not "violated by a prison's simply failing to attend to the medical needs of its disabled prisoners").

Plaintiffs devote a significant amount of attention to the allegation that the Department "failed to reinstate [Mr. Rogers's] health insurance upon release." Compl., ¶ 48-56. Specifically, Plaintiffs complain that the Department "cancelled Mr. Rogers's Medicare medical coverage upon his commitment because [it] has a policy of enrolling

prisoners in the state Medicaid program." Compl., ¶ 48. Plaintiffs' further complain that "[u]pon Mr. Rogers' release, however, [the Department] failed to ensure that his Medicare medical coverage was reinstated." *Id.* These allegations pertaining to Mr. Rogers' Medicare eligibility, even if true, do not support a Rehab Act claim because there is no factual allegation that the actions complained of were taken because of Mr. Rogers's disability, or were related to his disability in any way.[6]

Nor have plaintiffs stated plausible claims under the Rehab Act by alleging that they have been denied access to work and educational programs that offer higher pay or more diminution credits. In order to maintain such a claim, plaintiffs must sufficiently plead that they are qualified for the benefit in question, i.e., a specific program, and that they were excluded "due to discrimination solely on the basis of the disability." *Doe v. University of Md. Med. Sys. Corp*., 50 F.3d at 1265. Plaintiffs have not met their pleading burden. They have failed to identify what programs they applied for, how they are qualified for such programs, or at minimum, how they would be qualified with reasonable accommodations. They have failed to identify the specific bases for each of their denials or exclusions from programs. They have also failed to plead any facts to show that they were excluded from such programs "solely on the basis" of their disabilities, *Doe*, 50 F.3d at 1265. For example, Mr. Coleman acknowledges that he was provided a job at Dorsey Run in April 2019. Compl., ¶ 78. Although he complains that he was medically cleared for work in January

[6] Nor would these allegations support Mr. Rogers's constitutional claims. Failing to aid a released inmate in enrolling in Medicare does not constitute cruel and unusual punishment under the Eighth Amendment. Likewise, there is no reasonable connection between Mr. Rogers's Medicare enrollment and the denial of due process claim.

2019, he alleges no facts indicating that the reason for the brief delay in placing him in the job was due to a disability. Mr. Jardina acknowledges that he was provided a job in the Dorsey Run library. Compl., ¶ 65. Mr. Young, who is asthmatic, alleges that he was "classified as being eligible for outside work detail and work release programs," and that the "[Department] and its agents *performed* the requisite medical clearance evaluation to authorize Mr. Young's inclusion in these programs and confirmed, inter alia, that Mr. Young could lift more than fifty pounds," Compl. 103, 104, but he does not allege that he *received* the medical clearance necessary to participate in these programs. Thus, he has failed to plausibly allege that he was qualified for the position. Similarly, Mr. Rogers and Mr. Berry baldly allege they have been denied prison jobs, Compl., ¶¶ 46, 85, but allege no facts plausibly indicating that they were denied the opportunity to work in prison because of their disabilities. Accordingly, these plaintiffs have failed to plead a plausible claim that they were denied access to a program for which they were qualified on the basis of their disabilities.

Mr. Fishback has also failed to allege a plausible Rehab Act claim. He alleges that, in addition to suffering from bipolar disorder, he has a "chronic pain condition in his left shoulder" for which he has been prescribed Tramadol, a pain medication. Compl., ¶ 86. He states that, in May 2019, "DPSCS granted [him] parole in December 2019, provided that he met certain conditions," which he does not describe, *id*. at ¶ 88, and reduced his security level to pre-release, *id.* at ¶ 90, but "denied [him] any opportunity to engage in [home detention housing] or work release programming" because of his "Tramadol prescription." Compl., ¶ 94. He alleges that thereafter, he discontinued using Tramadol,

resulting in painful withdrawal symptoms "as he tapered off of his Tramadol." Thereafter, "[u]pon learning that work release would never be made available to him even though he is eligible for same, Mr. Fishback resumed his Tramadol prescription." *Id.* at ¶ 94. He alleges that because he is unable to work, he "cannot earn the money he needs to pay for his transitional housing [upon release] and risks being unable to satisfy the terms of his release." Compl., ¶ 102.

Mr. Fishback's Rehab Act claim fails because he has not plausibly pled that his purported inaccess to work release was based solely upon his disability. Indeed, the complaint makes clear that he had to meet numerous conditions to become eligible, but fails to set forth what those conditions were and whether he met them. *See* Compl. ¶ 90. Moreover, the allegations of the complaint make clear that Mr. Fishback's disability was, in fact, not the basis for his ineligibility for work release; rather, it was his dependence upon, and use of, certain medication. Compl. ¶ 92. This fails to allege a viable claim of discrimination against an individual with Mr. Fishback's condition. His claim that he ceased use of the medication for a limited period of time does not show that he became eligible for work release, or that the purported denial of work release amounted to discrimination. Additionally, although he alleges that he cannot earn money and satisfy the terms of his release without working, Compl. ¶ 90, he does not set forth sufficient facts to show that he was denied all work assignments or that this was even one of the terms of his release. As a result, the allegations of Mr. Fishback's Rehab Act claim fail to meet his pleading burden.

IV. PLAINTIFFS HAVE FAILED TO STATE ANY PLAUSIBLE CLAIMS FOR RELIEF UNDER ARTICLES 16 OR 25 OF THE MARYLAND DECLARATION OF RIGHTS BECAUSE THEY HAVE FAILED TO STATE CLAIMS UNDER THE EIGHTH AMENDMENT.

"Articles 16 and 25 of the Maryland Declaration of Rights are construed in pari materia with the Eighth Amendment." *Banks v. Broadwater*, No. CIV.A. DKC 09-0589, 2011 WL 3164367, at *3 (D. Md. July 26, 2011) (citing *Brooks v. State*, 104 Md.App. 203, 213 n. 2 (1995)). Hence, plaintiffs' "state constitutional claims are duplicative of [their] federal constitutional claims," *Drury v. Dziwanowski*, No. CV MJG-15-3845, 2017 WL 1153890, at *6 (D. Md. Mar. 28, 2017), and "need not be considered separately from [their] federal constitutional challenge[s]." *Banks*, 2011 WL 3164367, at *3.

For the reasons stated in § I of this memorandum, which is incorporated by reference, plaintiffs have failed to plead plausible federal constitutional claims of denial of due process or cruel and unusual punishment. Accordingly, this Court should dismiss plaintiffs' claims under Count V of the complaint.

V. PLAINTIFF ROGERS'S CLAIM OF A NEGLIGENT BREACH OF THE ADA IS BARRED BY SOVEREIGN IMMUNITY AND OTHERWISE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Count VI of the complaint, which is brought solely by Plaintiff Rogers against the Department and Warden Scruggs, arises from Mr. Rogers's claim that on January 3, 2019, he slipped and fell in the shower at MRDCC. He alleges that the defendants "owed a duty to Mr. Rogers arising out of their special relationship with him to protect him against unreasonable risk of physical harm." Compl., ¶ 192. He further alleges that the Department and Warden Scruggs "knew that MRDCC was not ADA-compliant because it did not have handicapped showers, handrails, anti-slip guards, or shower chairs for disabled prisoners,

like Mr. Rogers," Compl., ¶ 193, and breached their duty to protect Mr. Rogers from harm by "ignoring MRDCC's ADA noncompliance," which "caused Mr. Rogers to sustain several tears in his right shoulder, and other physical injuries." Compl., ¶ 194.

The legal basis of the claim asserted by Mr. Rogers in Count VI of the complaint is not clear. Although the count is captioned as a claim of "negligence," the allegations of the count suggest Mr. Rogers seeks to hold defendants liable for a purported breach of the ADA. To the extent he attempts to do so, as demonstrated in § II of this memorandum, incorporated herein by reference, sovereign immunity bars his ADA claim against the defendants. Accordingly, this Court should dismiss count VI of the complaint.

To the extent that Mr. Rogers attempts to assert a state law claim under Count VI, the claim is still subject to dismissal. As noted, plaintiff suggests that defendants breached a duty created by a "special relationship" that obligated defendants to "protect [him] against unreasonable risk of physical harm." Compl., ¶ 192. He has failed to identify the legal basis for any such relationship that would give rise to a claim for "negligence" as alleged in Count VI of the complaint. Maryland courts have recognized that, under certain circumstances, the State owes a duty of reasonable care to protect prisoners from being harmed *by other prisoners* where the harm is reasonably foreseeable, *see Lamb v. Hopkins*, 303 Md. 236, 241 (1985) (adopting Restatement (Second) of Torts (1965) §§ 319 and 320); *Rodriguez v. State*, 218 Md.App. 573 (2014). Maryland courts have also recognized "the State's general duty to furnish reasonable medical treatment" to inmates, *State v. Johnson*, 108 Md. App. 54, 69 (1996), while cautioning that the State does not owe a prisoner "an independent duty to create an individualized treatment plan for [a prisoner's] health care,

separate and distinct" from the State's "duty to provide reasonable health care." *Id.* at 65, 69. Maryland courts have not, however, recognized a "special relationship" between the State and prisoners that gives rise to a duty in tort to refrain from allegedly violating the provisions of the ADA.

Mr. Rogers's claim fails for the additional reason that, contrary to Maryland law, he seeks to plead it as negligence *per se*. In contradistinction with a regular negligence claim, Mr. Rogers purports to base this claim upon a statutory duty, *i.e.* the duty to comply with the provisions of the ADA. However, although many states treat the violation of a statutory duty as "negligence *per se*," "Maryland is among the minority of states that treat the violation simply as evidence of negligence." *Rivers v. Hagner Mgmt. Corp.*, 182 Md. App. 632, 654 (2008) (citation omitted). Indeed, "[t]here is no cause of action of negligence per se under Maryland law." *Bray v. Marriott Int'l*, 158 F. Supp. 3d 441, 445 (D. Md. 2016). Thus, a plaintiff must still plead, and ultimately prove, not only that there was a statutory violation, but that the violation proximately caused the plaintiff's injury. *Rivers*, 182 Md. App. at 654. Rogers has failed to plead sufficient facts to make that showing here. His allegations that Defendants "knew" and "ignor[ed]" or "fail[ed] to intervene" in "MRDCC's ADA noncompliance," "which caused Mr. Rogers to sustain" his injuries, does nothing more than state boilerplate elements of the claim. Compl. ¶¶ 193-94. This does not suffice. Accordingly, this Court should dismiss Count VI of the complaint.

VI. DEFENDANTS ARE ENTITLED TO IMMUNITY FROM PLAINTIFFS' STATE LAW CLAIMS.

This Court should dismiss the state law claims brought against the individual defendants in Counts V and VI for the additional reason that defendants are immune from

suit for the tortious conduct alleged in those counts. As "State personnel" sued in the performance of his public duties, the individual defendants are entitled to immunity under the Maryland Tort Claims Act ("MTCA"). *See* Md. Code Ann., State Gov't § 12-101 – 110. Section 12-105 of the MTCA provides that State personnel have "immunity from liability" as provided under § 5-522(b) of the Courts and Judicial Proceedings Article. That section, in turn, provides that State personnel "are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence, and for which the State or its units have waived immunity[.]" Cts. and Jud. Proc. § 5-522(b). This statutory immunity afforded to State personnel extends not only to simple negligence claims, but also to "non-malicious intentional torts and constitutional torts." *Lee v. Cline*, 384 Md. 245, 255 (2004).

Plaintiffs have failed to allege any facts indicating that the individually named Defendants acted with malice or gross negligence. The malice necessary to defeat the immunity of State personnel is "actual malice" – that is, conduct "motivated by ill will, by an improper motive, or by an affirmative intent to injure." *Shoemaker v. Smith*, 353 Md. 143, 157 (1999). To establish actual malice, a plaintiff must demonstrate that individual state personnel "intentionally performed an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff." *Thacker v. City of Hyattsville*, 135 Md. 268, 300 (2000). A plaintiff may not rely on mere general allegations of malice; on the contrary, "[t]o overcome a motion raising governmental immunity, the plaintiff must allege with some clarity and

precision those facts which make the act malicious." *Manders v. Brown*, 101 Md. App. 191, 216 (1994).

A plaintiff faces a similarly high burden in establishing a gross negligence claim, as gross negligence is "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them." *Barbre v. Pope*, 402 Md. 157, 188 (2007) (citing *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 635 (1985)). Put another way, "a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist." *Id.*

There are no allegations in the complaint that the individually named defendants acted with malice, and a review of Maryland law makes clear that plaintiffs have failed to allege plausibly that the individually named Defendants acted with gross negligence. *See, e.g., Boyer v. State*, 323 Md. 558, 579 (1991) (allegations failed to state a claim of gross negligence against state trooper for pursuing suspected drunk driver "at an excessively high rate of speed through a heavy traffic area" and failing to "activate immediately all of the emergency equipment on his police car" while attempting to apprehend the drunk driver, who crashed into the back of another vehicle and killed two passengers); *Wells v. State*, 100 Md. App. 693, 706 (1994) (holding, in case arising from alleged failure of state social services officials to prevent "repeated infliction of abuse" of child by child's mother and her boyfriend, that allegations "suggest[ed] individual negligence and bureaucratic mismanagement and incompetence," and a "critically important governmental unit not

properly doing its job because of underfunding, understaffing, lack of effective leadership and supervision, lack of training, and lack of clear procedures and protocols," but that Plaintiff failed to state a claim for gross negligence). Accordingly, the defendants are entitled to immunity from plaintiffs' state law claims.

CONCLUSION

The motion to dismiss should be granted, and plaintiffs' complaint should be dismissed.

Respectfully submitted,

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