IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEVEN BROWN WILBERT DELANO GREGORY HAMMOND SEDRIC HOLLEY RUSSELL HOPKINS JOHNNIE JAMES TYRELL POLLEY MAYNARD SNEAD ROBERT WILSON, *Plaintiffs*,	*	Civil Action No. RDB-16-945
v.	*	
DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES STEPHEN MOYER DAYENA M. CORCORAN RICHARD MILLER, *Defendants*.	*	

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DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

This Court should deny plaintiffs' motion for partial summary judgment. In their motion, which they bring solely on their claims under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("Rehab Act"), plaintiffs seek a finding both that defendants have violated the rights of all nine plaintiffs under the disability rights statutes, and that defendants continue to do so.

With regard to plaintiffs' allegations of ongoing ADA and Rehab Act violations, defendants agree that there are no genuine disputes of material fact, but it is defendants, not plaintiffs, who are entitled to judgment as a matter of law. As demonstrated in defendants' motion for summary judgment (ECF No. 178), the five plaintiffs who have been released from custody lack standing to assert a claim of ongoing illegal conduct, and the four who remain incarcerated cannot generate any genuine dispute of fact regarding the Department's current ADA and Rehab Act compliance in their cases.[1] Nor can the four remaining prisoner-plaintiffs establish that they are entitled to any injunctive relief that would comply with the strict requirements of the Prison Litigation Reform Act ("PLRA"). That statute limits the Court to "correct[ing] the violation of the Federal right of [the] particular plaintiff or plaintiffs," and providing relief that "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A).

[1] In their motion for summary judgment, ECF No. 178, which is incorporated herein by reference, defendants have moved for summary judgment on plaintiffs' request for injunctive relief. *See id.* at 46-50.

The Court should also deny plaintiffs' motion for summary judgment on their claims that at some point commencing in March 2013, certain plaintiffs experienced violations of the Rehab Act.[2] As demonstrated herein, a review of the record evidence demonstrates that there are genuine disputes of material fact regarding plaintiffs' claims of past Rehab Act violations. Accordingly, plaintiffs' motion for summary judgment should be denied.

ARGUMENT

I. LEGAL PRINCIPLES APPLICABLE TO PRISONER COMPLAINTS BROUGHT UNDER THE DISABILITY RIGHTS STATUTES.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity." 42 U.S.C. § 12132. The Rehab Act contains a similar prohibition, providing that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a). "State prisoners . . . may qualify as 'qualified individual[s] with . . . disabilit[ies]' . . . so as to come within the protection of Title II of the ADA" and the Rehab Act. *See Jarboe v. Maryland Dep't of Pub. Safety & Corr. Servs*.,

[2] As demonstrated in defendants' motion for summary judgment, *see* ECF No. 178 at 45, because plaintiffs cannot establish any violations of rights protected by the Fourteenth Amendment, the State's sovereign immunity from suit under the ADA has not been abrogated. Nor has the State waived that immunity. While that immunity does not apply to claims for injunctive relief under the ADA, *see Fauconier v. Clarke*, 652 Fed. Appx. 217, 220 (2016) (per curiam), it fully bars plaintiffs' ADA claims for damages. Thus, plaintiffs may pursue their claims for damages against the State only under the Rehab Act.

No. CIV.A. ELH-12-572, 2013 WL 1010357, at *2, 3 (D. Md. Mar. 13, 2013) (quoting 42 U.S.C. § 12131(2)) and citing *Rogers v. Dept. of Health & Environmental Control*, 174 F.3d 431, 433–34 (4th Cir.1999)).

Although "the majority of circuits that have resolved the question have held that damages may be awarded if a public entity 'intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons,'" *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 373 (D. Md. 2011) (quoting *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir.2008)), as applied to prisoners, "'[m]eaningful access and the question of whether reasonable accommodations are made to an inmate must be assessed through the prism of the prison setting.'" *Jardina v. Dep't of Pub. Safety & Corr. Servs.*, No. CV JKB-16-1255, 2018 WL 6621518, at *4 (D. Md. Dec. 18, 2018) (quoting *Havens v. Colorado Dep't of Corr*., 897 F.3d 1250, 1270 (10th Cir. 2018) (citing *Turner v. Safley*, 482 U.S. 78, 81 (1987) (noting that "the problems of prisons in America are complex and intractable" and that "[r]unning a prison is an inordinately difficult undertaking"))).

Ordinarily, to meet the deliberate indifference standard, a plaintiff must show "'(1) [that the defendant had] "knowledge that a harm to a federally protected right [was] substantially likely," and (2) "a failure to act upon that . . . likelihood."'" *Havens*, 897 F.3d at 1264 (quoting *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1229 (10th Cir. 2009)) (internal quotations omitted). *See also Paulone*, 787 F. Supp. 2d 360, 374 (D. Md. 2011) (noting that this Court has "endorsed the proposition that 'the level of proof necessary for finding intentional discrimination under [the] Rehabilitation Act means

a deliberate indifference to a strong likelihood that a violation of federal rights would result") (*citing Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 820, 829 n. 6 (D. Md. 1998)). But because "[p]rison officials have the obligation to consider security and other factors unique to the prison environment in their decision-making, and courts have accorded them considerable discretion to do so," *Jardina*, 2018 WL 6621518, at *4; *Havens*, 897 F.3d at 1270 (citing *Onishea v. Hopper*, 171 F.3d 1289, 1300 (11th Cir. 1999) (en banc) and *Torcasio v. Murray*, 57 F.3d 1340, 1355 (4th Cir. 1995)), these unique considerations must be taken into account in assessing whether a prisoner "has . . . carried his burden of showing that a correctional agency" had "knowledge that a harm to a federally protected right [was] substantially likely." *Havens*, 897 F.3d at 1271. *See also Bane v. Virginia Dep't of Corr.*, No. CIV.A. 705CV00024, 2005 WL 1388924, at *4 (W.D. Va. June 9, 2005) ("[P]rison officials may determine the reasonableness of the accommodation request in consideration of other penological needs in the prison setting, such as security, safety and administrative exigencies.").

Thus, as the Fourth Circuit explained in *Torcasio*, "any rights prisoners enjoy—including the right of disabled inmates to some degree of accommodation—must be assessed in light of the requirements of prison administration . . . ." *Torcasio*, 57 F.3d at 1356. *See also Jardina*, 2018 WL 6621518, at *4) ("[A]ccommodations [under the ADA] are viewed in light of requirements of prison administration[.]") (citing *Torcasio*, 57 F.3d 1340 at 1355).

These concerns apply with greater force to prisoner requests for permanent injunctive relief against state prison systems. First, "the need for a proper balance between

state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate." *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983). More specifically to this case, the PLRA, as noted, "imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, '[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief.'" *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (quoting 18 U.S.C. § 3626(a)(1)). In light of these considerations, and as set forth more fully below, this Court should deny plaintiffs' request for summary judgment.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE GENUINE DISPUTES OF MATERIAL FACT EXIST AS TO WHETHER PLAINTIFFS HAVE ESTABLISHED ANY VIOLATIONS OF THE REHAB ACT OR THE ADA.

In assessing plaintiffs' motion for summary judgment, this Court must "'view the evidence in the light most favorable to the [defendants]' and refrain from 'weigh[ing] the evidence or mak[ing] credibility determinations.'" *Lee v. Town of Seaboard*, 863 F.3d 323, 327 (4th Cir. 2017) (quoting *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015)). "The pertinent inquiry is whether 'there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Reyazuddin v. Montgomery Cty., Md.*, 789 F.3d 407, 413 (4th Cir. 2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Because there are genuine issues of material fact regarding plaintiffs' claims that they have

been subjected to intentional discrimination under the Rehab Act and ADA, this Court should deny plaintiffs' motion.

In their Rehab Act and ADA claims, plaintiffs assert that the vocational, educational, and work release programs provided to sighted inmates are not "equally available to Plaintiffs." Am. Compl. ¶¶ 53, 59. In particular, plaintiffs state that "[i]nmates within [the Department] may earn diminution credits and wages through work assignments," *id.* ¶ 48, and allege that "Defendants have denied Plaintiffs placement in or removed them from certain jobs," which plaintiffs do not identify, "based on unfounded safety concerns and stereotypes about the capabilities of blind individuals." Am. Compl. ¶ 49. Further, plaintiffs allege that they have been denied private, independent, and effective access to the Inmate Handbook, "orientation materials," mail service, the grievance process and courts, and the opportunity to navigate the prison without escort, despite being provided assistance with all of these services from other inmates. Am. Compl. ¶¶ 3, 33-40, 68-70, 48-50, 60-62. And they allege that they have been denied single-cell housing and the housing status of their choosing. Am. Compl. ¶¶ 74-76.

Plaintiffs have failed to demonstrate that they are being denied, or were denied, the benefit of any the programs and services about which they complain on the basis of their visual impairments. As noted, under the Rehab Act and the ADA, states may be required to make reasonable modifications to rules, policies, or practices, or to provide auxiliary aids and services to ensure that disabled persons can benefit from certain services, programs, or activities. *Jarboe*, 2013 WL 1010357, at *4 (citing *A Helping Hand, LLC v. Baltimore County, Md.*, 515 F.3d 356, 362 (4th Cir. 2008)). With respect to blindness,

auxiliary aids may include "qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments." 42 U.S.C. § 12103. In general, whether a modification is reasonable depends upon the "totality of the circumstances" and "whether the service, program, or activity . . . 'when viewed in its entirety,' is readily accessible," *Dee v. Maryland Nat'l Capitol Park & Planning Comm'n*, Civ. CBD-09-491, 2010 WL 3245332, at *5 (D. Md. Aug. 16, 2010) (citation omitted). Of course, in prisoner cases, the court must also "consider security and other factors unique to the prison environment." *Jardina*, 2018 WL 6621518, at *4.

Regardless of whether a claim is brought by a prisoner or by another individual, "a reasonable modification does not require the public entity to employ any and all means to make services available to persons with disabilities. Rather, the public entity is obligated to make those modifications that do not 'fundamentally alter the nature of the service or activity of the public entity or impose an undue burden.'" *Miller v. Hinton*, 288 Fed. App'x 901, 902 (4th Cir. 2008) (citation omitted). Here, none of the plaintiffs can demonstrate that defendants have denied them access to any required services or benefits.

A. Denied "Private, Independent, and Effective Access" to Inmate Handbook and Orientation Materials.

Plaintiffs first claim that they were discriminated against by not being "afforded private, independent, and effective access" to the Inmate Handbook and "orientation materials." Am. Compl. ¶ 3. Significantly, plaintiffs do not allege that they have no means of obtaining the information in these documents. Indeed, their awareness of the substance

of these documents is readily apparent even from the allegations of the complaint.[3] Rather, they base their claim on their purported inability to access these documents "private[ly] and independent[ly]." *Id.* This claim is baseless. "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct," and "share[] none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Hudson v. Palmer*, 468 U.S. 517, 526-7 (1984) (citation omitted). Thus plaintiffs, like every other inmate, have no right to conduct an "independent" and "private" review of the Inmate Handbook and "orientation materials." *See id*. at 526 (holding that prisoner has no "subjective expectation of privacy . . . in his prison cell.").

Moreover, absent from the record is any evidence that plaintiffs are, or were, denied access to these materials. When inmates arrive at RCI, they are given an orientation by a case manager and provided with the inmate handbook setting forth rules and procedures of the facility. *See* EXHIBIT 1, Transcript of the Deposition of Richard Miller ("Miller Dep.") 58:6 – 59:1; EXHIBIT 2, Transcript of the Deposition of Maureen Reid ("Reid Dep.) 120:7-13; EXHIBIT 3, Transcript of the Deposition of Johnny James ("James Dep.") 51:21 – 52:22. Inmates are informed at their orientation that they should contact their case managers if they have any particular needs in the facility, including any accommodations

[3] Plaintiffs know, for instance, that inmates are given orientation materials "with information specific to the institution in which they are incarcerated," Am. Compl. ¶ 28, and they have a detailed understanding of the inmate grievance process and associated forms that inmates must complete. Am. Compl. ¶ 32. Plaintiffs could not have this working knowledge without access to these materials.

for their disabilities. Miller Dep. 143:20 – 145:4; Reid Dep. 120:7-13. Additionally, an audio version of the inmate handbook was provided to all blind and visually impaired inmates who were housed at RCI in 2017, and another audio copy is available upon request. Defs' Mem. Supp. Sum. Jud. Ex. 16, Campbell Declaration ("Campbell Decl.") at ¶15; Reid Dep. 221:13 – 222:4. All institutional bulletins and directives are available in large print and video CD in the RCI library and are read on the inmate television service throughout the facility. Campbell Decl. at ¶14.

Several of the plaintiffs acknowledged their familiarity with the provisions of the Inmate Handbook and orientation materials. Indeed, Plaintiff Wilson testified, "when I first got [to RCI] they gave me a regular handbook" and "I read it." See EXHIBIT 4, Transcript of Deposition of Robert Wilson ("Wilson Dep.") 105. Mr. Wilson confirmed that he was "sure" that he received handbooks at the other institutions to which he was assigned, in particular, at ECI, where he was confined at the time of his deposition, and that all the handbooks contain the "same rules and regulations." *Id*. He also stated that when he went to RCI in 2013, he received an orientation in a "book" that described the rules and regulations, which he was able to read, and that when he arrived at ECI in 2017, a case manager also gave him a verbal orientation. *Id.* at 102-103.

Mr. Delano also acknowledged that he received written orientation materials at each facility at which he was housed, but claimed that he could not read them. *See* EXHIBIT 5, Transcript of the Deposition of Wilbert Delano ("Delano Dep.") 17-18. He admitted, however, that certain orientation materials were presented by video, and that he could listen to the audio portion of the presentation. *Id.* Additionally, Mr. Delano's claim that the

written orientation materials were never provided to him in an accessible format is contradicted by Mr. Brown, who testified that he received a copy of the Inmate Handbook on CD *from* Mr. Delano when Mr. Delano was released. *See* EXHIBIT 6, Transcript of the Deposition of Steven Brown ("Brown Dep.") 97. Maynard Snead could not remember if he was provided a copy of the inmate handbook, any type of orientation, or verbal instruction regarding inmate rules and rights. See EXHIBIT 7, Transcript of the Deposition of Maynard Snead ("Snead Dep.") 173. These disputes of fact regarding the inmates' access to orientation materials cannot be resolved by the court on summary judgment.

Plaintiffs' failure to identify any injury arising from their purported ineffective access to the Inmate Handbook and other orientation materials is a separate basis for denying their summary judgment motion. "The mere violation of the ADA does not alone establish injury. A plaintiff is obligated to show, by competent evidence, that a defendant's violation of the ADA caused him actual injury before such plaintiff can recover." *Levy v. Mote*, 104 F. Supp. 2d 538, 544 (D. Md. 2000). The only "injury" plaintiffs plead is "the risk of discipline or confrontations with correctional officers or other inmates." Am. Compl. ¶ 30. Nor have plaintiffs identified any concrete and non-speculative injures in their motion for summary judgment arising from their purported lack of access to these materials. This Court should deny plaintiffs' request for summary judgment on this claim.

B. Denied Ability to Read and Draft Grievances and Lawsuits "Privately and Independently."

This Court should also deny plaintiffs' request for summary judgment on their claim that they were discriminated against by being denied access to the inmate grievance process

and the courts. Plaintiffs claim that because they are blind, they cannot read and draft grievances and other legal documents "privately and independently," and cannot access the law library, without assistance from sighted inmates. Am. Compl. ¶¶ 33-40. The ADA itself does not contemplate that private and independent access to printed material is necessary; rather, it provides that a "qualified reader" is an acceptable auxiliary aid or service for the blind. 42 U.S.C. 12103(1)(B).

The complaint offers no specific examples of why the offered accommodation of an inmate reader is not reasonable for any particular plaintiff. Moreover, plaintiffs have failed to produce evidence demonstrating that their access is not meaningful and effective. Courts have routinely found that where inmates are given assistance with the grievance process and court proceedings from other inmates, the ADA is satisfied. *See Havens,* 897 F.3d at 1268-70 (finding no ADA violation where the inmate "had some degree of law library access, enough that he was able to pursue multiple lawsuits."); *Wells v. Thaler*, 460 F. App'x 303, 312-13 (5th Cir. 2012) (holding "the existing accommodations were more than sufficient to give [plaintiff] effective and meaningful access to the law library" where another inmate read to him and assisted with court and other filings); *Mason v. Correctional Med. Servs., Inc.*, 559 F.3d 880, 887 (8th Cir. 2009) (holding inmate assistant who helped plaintiff with daily tasks, including grievances, was sufficient under the ADA).

Department personnel testified that staff members were available to assist blind inmates in reading and writing. Indeed, Maureen Reid, who has been a case management supervisor at RCI since 2014 and was one of the Department's Rule 30(b)(6) designees, Reid Dep. 6, 23, testified that the handbook informed all inmates that they could request

assistance from their case managers, and that it was understood that "case managers [who] are assigned to Housing Unit 1, where the blind inmates are housed," could be "asked to do duties" for blind inmates that "they aren't necessarily used to doing for the general population." Reid Dep. 70. She also testified that the Administrative Remedy Procedure ("ARP") policy provided that "case managers can assist in filling [the ARP form] out for [inmates] that are illiterate or can't speak English, or [are] otherwise unable to fill out an ARP form." Reid Dep. 202.[4] *See* EXHIBIT 8, ARP Directive.

Contrary to plaintiffs' argument, there is no requirement in the Rehab Act or ADA that a prison "assign" a particular staff member, or another inmate, to "read and write personal mail for blind inmates" or "act as a reader or scribe." Pls' Mem. at 13. Indeed, plaintiffs cite no authority whatsoever for this proposition, which is contrary to established case law holding that there is no ADA or Rehab Act violation so long as assistance is "reasonably available" to the prisoner. *Mason*, 559 F.3d at 887. But in any event, there is clear record evidence that blind inmate escorts *were* instructed that they could, on request, assist the inmate with reading and writing. Indeed, as noted, Case Manager Reid testified to this, Reid Dep. 70, 202, and the written instructions provided to the escorts explicitly state so. *See* EXHIBIT 10 "Job Duties for Inmates Assigned as Escorts for the Blind"

[4] Although one RCI case manager, Kimberly Baker, testified that she declined to write an ARP for an inmate because she had been instructed to do so by a supervisor, *see* EXHIBIT 9, Transcript of the Deposition of Kimberly Baker ("Baker Dep.") 64, she did not identify the inmate as any of the plaintiffs. In any event, she also testified that the supervisor instructed her to refer the inmate to other staff for assistance, in particular, the institution's librarian or ARP coordinator, or to the inmate's escort or "walker." Ms. Baker also testified that she had read printed documents to blind inmates on request. Baker Dep. 63, 64.

stating that ("[t]he escort may assist the visually impaired inmate with any written correspondence ([i.e.,] sick call requests, ARP's, departmental requests to staff, etc[.]")). Moreover, Department sick call policy allows inmates to verbally request unscheduled sick call at any time, even without a sick call slip.[5] Single instances where Department policies were not followed do not establish that assistance was not "reasonably available."

Nor is there any support in the law, or the record, for plaintiffs' claim that defendants violated the ADA by failing to ensure that the inmates who assisted them with reading and writing were properly qualified. Contrary to plaintiffs' belief, the ADA and Rehab Act do not require prison officials only to designate readers who "have a GED or high school diploma." Pls' Mem. at 34. Rather, a "[q]ualified reader [is] a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary." 28 C.F.R. § 35.104. Plaintiffs do not even allege, let alone supply any evidence, that any of the inmates assigned to them were unable to read accurately or effectively.

The fact that the Department's Rule 30(b)(6) deponent testified that it "sounded a little off base" that the Department did not require blind escorts to have a GED or high school diploma does not establish that the escorts were not "qualified readers." *See* Pls' Mem. at 34. The issue is whether they were able to read "effectively, accurately, and impartially," 28 C.F.R. § 35.104, not whether they had any particular educational background. There is no evidence that the blind escorts were incapable of performing these

[5] *See* Section II.E, n. 15, EXHIBIT 37, Transcript of Deposition of Sharon Baucom M.D., ("Baucom Dep.") 25:18-26:12; 28:4-15.

duties. On the contrary, they are screened to ensure that they "can read and write" and that they are "the more capable inmate[s]." Reid Dep. 219-221.

That plaintiffs currently have meaningful access is evident from the existence of the instant consolidated lawsuits and the fact the record evidence, that they have each filed grievances – some with assistance of other inmates, and some without needing any assistance at all. *See* Am. Compl. ¶¶ 33, 36-38, 40-41; *Bridges v. Gilbert*, 557 F.3d 541, 555 (7th Cir. 2009) ("Because he is currently exercising his right to petition the government for redress of grievances through this lawsuit, he has not been harmed."). Mr. Wilson testified that while confined at RCI, he wrote and filed an ARP, Wilson Dep. at 39, regarding his need for a magnifier to assist him in reading, *id.* at 28-29, which was his "only complaint [he] had at the time," *id.* at 29, and that he received the magnifier. Mr. Wilson also acknowledged that he filed "numerous" ARPs while confined at the Eastern Correctional Institution, *id.* at 107-108, that he never had to pay any inmate to help him file an ARP, *id.* at 67, and that when he was at RCI, he even helped another inmate prepare and file an ARP. *Id.*[6] Additionally, he acknowledged that he filed a grievance with the Inmate Grievance Office. *Id*. at. 57-58.

Mr. Brown acknowledged that in 2013, he submitted an ARP to see the ophthalmologist, Brown Dep. 27, and testified that "Yeah, we got – I got people to file ARPs, and I think I filed some too." *Id.* at 93. Indeed, he acknowledged receiving

[6] Mr. Wilson claims that a correctional officer retaliated against him for assisting the other inmate with the ARP by planting a weapon in his cell. Wilson Dep. 66-70. However, that claim was investigated by the Department's Intelligence and Investigative Division and found to be meritless. *See* Defs' Mem. Supp. Sum. Jud. Ex. 30.

favorable outcomes regarding some of his ARPs. *Id.* at 98. He also had other inmates file grievances with the IGO for him; one regarded charges against an officer, and another was for "legal stuff" in the library. Mr. Delano also acknowledged that he filed written complaints and ARPs. Delano Dep. 46, 65-66. Mr. Holley filed numerous ARPs, and in addition a grievance with the IGO resulting in a favorable decision from the Office of Administrative Hearings on the issue of auxiliary aides in the RCI Library. *See* EXHIBIT 11, Holley ARP/IGO.). In addition, ARPs were filed by Snead (EXHIBIT 12, Snead ARP), Hammond (EXHIBIT 13, Hammond ARP), and Hopkins (EXHIBIT 14, Hopkins ARP).

C. Denied Ability to "Read and Write Mail Privately and Independently."

Plaintiffs have also failed to demonstrate that they are entitled to summary judgment on their claim that they must "rely on sighted inmates to use the mail services" and cannot "read and write mail privately and independently." Am. Compl. ¶ 68. As noted above in § II.C and D, the ADA authorizes the use of "qualified readers" and "other effective methods of making visually delivered materials available to individuals with visual impairments." 42 U.S.C. 12103(1)(B). Based upon this express language, courts have rejected claims that inmates are entitled to read and write mail "privately and independently" without the assistance of other individuals. *See, e.g., Wells v. Thaler*, 460 F. App'x 303, 310, 313 (5th Cir. 2012). Because plaintiffs' preferred accommodation is not the benchmark of what is required under the disability laws, "[t]he failure to provide [plaintiffs] with the specific accommodations of [their] choosing does not violate the ADA or the Rehabilitation Act." *Lopez v. Kirkpatrick*, 505 F. App'x 58, 59 (2d Cir.

2012). Rather, plaintiffs must show that their existing access is inadequate, *Wells*, 460 F. App'x at 313, and they have failed to do so because they have not produced undisputed facts demonstrating a denial of adequate access to the mail system.

On the contrary, the record is replete with evidence of plaintiffs both sending and receiving mail. *See* Delano Dep. 51 (testifying that he received and could read letters sent from his parents without requiring any assistance); Brown Dep. 41 (testifying that, with regard to requests for assistance, "[O]ne of my biggest things from walkers is reading, and I felt that that was pretty much a good thing"); James Dep. 84-85 (testifying that he took correspondence courses through the mail); Snead Dep. 26-27, 32 (in the past other inmates would help him with reading his mail and now he uses a device that reads his mail to him). Additionally, while plaintiff Wilson vaguely claimed that he had difficulty sending mail, Wilson Dep. 109-110, he acknowledged that this was not a problem unique to blind inmates, and in any event, he admitted that he was able to send complaints and letters to government officials, including a Congressman. Wilson Dep. 57-58.

Contrary to plaintiffs' claim, the fact that other inmates allegedly gained access to certain plaintiffs' personal information does not, as a matter of law, render all inmates who provided assistance to plaintiffs "unqualified" for the purposes of the ADA. First, plaintiffs have not identified any other inmates who were assigned by staff to assist them and who allegedly procured their personal information. Rather, plaintiffs offer only vague and non-specific statements to support their claim. For example, Steven Brown testified that another inmate sent an explicit letter to Brown's "baby mother," but acknowledged that the inmate, whom he could only identify as "James or something," Brown Dep. 58, "wasn't

assigned to [him]" but was "just somebody on the tier" whom he sometimes asked to assist him.[7] Moreover, plaintiffs have again failed to demonstrate *any* actual injury resulting from their purported inadequate access to the mail system. Accordingly, plaintiffs' motion based upon a purported denial of access to the mail system should be denied.

D. Denied Access to Work and Educational Programs and Appropriate Security Classifications.

This Court should also reject plaintiffs' request for summary judgment on their claim that, because of their visual impairments, they have been denied access to work and educational programs that offer higher pay, training, and more diminution credits, and that they were placed in "inappropriate security classifications." Am. Compl. ¶¶ 48-50, 54-56; Pls' Mem. at 39-40. In particular, plaintiffs claim they have been denied placement in, or were removed from, programs based upon "unfounded safety concerns and stereotypes," and have been "relegated to jobs that pay less and offer fewer diminution credits and opportunities for vocational training." Am. Compl. ¶ 49.

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[7] Similarly lacking in evidentiary support is plaintiffs' claim that other inmates "submit[ted] fake sick call slips for [Brown] for embarrassing ailments." Pls. Mem. at 14. The sole support offered by plaintiffs for this proposition are the sick call slips themselves, *see id*. Ex. 26, which provide no indication whatsoever that they were written by inmates assigned to assist him; the slips only contain statements by Brown that he "didn't write" them. Ex. 26, BROWN 643. Indeed, absent from Brown's deposition or answers to interrogatories is any testimony, or even a claim, that the "fake" sick call slips were prepared by other inmates assigned to assist him, or, for that matter, by any other inmate who allegedly accessed his personal information. The "evidence" offered by plaintiffs on this claim is plainly insufficient to warrant the entry of summary judgment. Moreover, plaintiffs' assertion that Mr. [redacted] HIV status was at risk of disclosure, Pls. Mem. at 13-14, would require unsupported inferences. Mr. [redacted] never suggested in any of his testimony that his HIV status was disclosed; plaintiffs' assertions that an inmate could infer he was HIV positive from his medication requests are based only on speculation.

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. Univ. of Md. Med. Sys. Corp.,* 50 F.3d 1261, 1265 (4th Cir.1995). An individual is not qualified if he or she "poses a significant risk to the health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodation. *Id*. "Legitimate physical qualifications may in fact be essential to participation in particular programs." *Knapp v. Northwestern Univ.*, 101 F.3d 473, 482 (7th Cir. 1996); *see also* 34 C.F.R. § Pt. 104, App. A, subpt. A(5) (noting that a blind person who possesses all of the qualifications for driving a bus except sight is not qualified to be a bus driver).

The evidence offered by plaintiffs on this issue is far from undisputed, and falls woefully short of meeting their burden of showing entitlement to judgment as a matter of law. First, contrary to plaintiffs' apparent belief, the disability rights statutes and accompanying regulations do not require that Department offer the same "specialized programming" at every institution. Pls. Mem. at 39; *see id.* at 16 ("Other facilities offer programs not available at RCI or ECI."). Indeed, in so claiming, plaintiffs omit from their memorandum key language from the regulations on which they rely. Under 28 CFR 35.152, which is applicable to correctional facilities, public entities "shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals" and "*[u]nless it is appropriate to make an exception*," a public entity shall not: place inmates in (i) inappropriate security classifications due to unavailable cells or beds, (ii) designated medical areas unless they are receiving medical

care, (iii) facilities that do not offer the same programs as would otherwise be available, or (iv) deprive them of visitation with family members by placing them in distant facilities. 28 C.F.R. § 35.152 (b)(1-3) (emphasis added). *See* Pls. Mem at 37-38 (quoting 35.152(b)(2)(i),(iii), (iv) but failing to include the "[u]nless it is appropriate to make an exception" language). Thus, consistent with the principle that the reasonableness of accommodations "must be assessed through the prism of the prison setting,'" *Jardina*, 2018 WL 6621518, at *4 (D. Md. Dec. 18, 2018), the regulations sensibly allow correctional authorities to make decisions regarding housing and programming on a case-by-case basis, in a manner "appropriate to the needs" of the particular prisoner, 28 C.F.R. § 35.152, while at the same time taking into account "security and other factors unique to the prison environment." *Jardina*, 2018 WL 6621518, at *4

The record contains ample evidence that this is exactly what defendants have done. First, contrary to plaintiffs' allegations, plaintiffs have been classified to security levels below medium security. *See* Baker Dep. 259, 243. *See also* EXHIBIT 15, Hopkins Security Reclassification Instrument; EXHIBIT 16, James Security Reclassification Instrument; EXHIBIT 17, OCMS Confidential Case Notes.[8] In certain cases, however, correctional staff determined that the prisoners should remain at RCI so that they could continue to receive the benefit of services available at the facility for blind inmates. Baker

[8] Additionally, Mr. Holley's 2010 Security Reclassification Instrument, Pl.'s Mem. Supp. Sum. J. Ex. 36, classified Mr. Holley as medium security because inmates are not eligible for minimum security classification until 5 years from release, and Mr. Holley still had over 15 years remaining on his sentence at that time. Reid Dep. 45:3-19.

Dep. 102-04, 235-38; Reid Dep. 33, 35-39.[9] In other cases, plaintiffs were transferred, or given the opportunity for transfer, to minimum security facilities. For example, in particular, in September 2016, Warden Miller notified Mr. Wilson that "Dorsey Run Correctional Facility ["DRCF"], which is ADA compliant, would be the best housing assignment based upon your minimum security status," and that he was "on the transfer list for DRCF." *See* EXHIBIT 18, Letter from Richard Miller to Robert Wilson (Wilson 3212). However, after his transfer to that facility, where he had minimum security status, Wilson Dep. 77, Mr. Wilson had an argument with another inmate "over a fan," *id*., and, after the inmate allegedly threatened him, he was transferred for his safety. *Id*.; Reid Dep. 39. Mr. Hopkins and Mr. Snead were offered to transfer to DRCF, but they declined. Reid Dep. 38-39; *see also*, EXHIBIT 19, Transcript of Deposition of Russell Hopkins ("Hopkins Dep.") at 148-49 (acknowledging that he had requested to be transferred to a minimum security facility but subsequently "decided [he] wanted to stay at RCI").

Although plaintiffs' claim that "minimum security and pre-release facilities offer benefits to inmates not otherwise available at medium security facilities," Pls. Mem. 39, in the cases of the plaintiffs, there is ample evidence to the contrary. First, Ms. Reid, the RCI case management manager and one of the Rule 30(b)(6) deponents, testified that the job opportunities at minimum security facilities and medium security facilities "are pretty

[9] Ms. Reid explained that a minimum security inmate could be confined at a medium security facility such as RCI because "[a]ny inmate can be [at] lower security and be housed at a higher-security level facility." Reid Dep. 33. Thus, for example, in the case of Mr. Hopkins, cited by plaintiffs, the security classification review document specifies that Mr. Hopkins should "remain to minimum security" *and* indicates that he is "vision impaired should remain @ RCI for housing." *See* Pls' Ex. K-35 (Hopkins00000127).

much going to be the same." Reid Dep. 28-29. She stated that "the differences will be for those that might be eligible for outside detail,"[10] *id.*, which permits inmates to participate in assignments outside the facility, but that "[e]verything else would be the same." *Id.* However, Ms. Reid noted that outside detail is also offered at some medium security facilities, including RCI, *id.* at 29-30, that "not every minimum-security institution has an outside detail," and that "even if they have one, it may only be one or two persons that are. . . employed." *Id.* at 30. Ms. Reid testified that while inmates at minimum security facilities have a "little bit more freedom" inasmuch as they housed in dormitories, *id.* at 27-28, those facilities do not offer any programming that is unavailable to inmates at medium security institutions. Reid Dep. 32. Finally, Ms. Reid noted that inmates who progress below minimum security status, to pre-release status, could be placed into work release, and that RCI houses inmates who are in pre-release status.[11] Plaintiffs are thus wrong to argue that they could not obtain vocational opportunities or training without being transferred to a lower security facility.

Plaintiffs are also wrong to argue that they were denied the benefit of job opportunities at RCI. Plaintiffs' complaint that they were not afforded the opportunity to work in the kitchen or dining hall is without evidentiary support. Institutional food services

[10] An inmate may not be eligible for outside detail or work release because of the nature of the inmate's offenses, Reid Dep. 44:6-9, a restriction that applied to Mr. Hopkins, Hopkins Dep. 145:12-14, and Mr. Delano.

[11] Work release is governed by § 3-801 of the Correctional Services Article, which permits the DOC to establish a work release program, under which "an inmate . . . may be granted the privilege of leaving actual confinement" to "work at gainful public or private employment, "attend school," or "under appropriate conditions . . . seek employment". Corr. Servs § 3-801 and 3-802.

inside a correctional setting faces unique challenges and constrained resources. For example, the dietary manager at RCI testified at his deposition that he had just received authority to purchase new equipment—replacing two grills from 1986 that could no longer be serviced and a 100-gallon pot that had a hole in it and could not be repaired consistent with the health code. *See* EXHIBIT 22, Transcript of Deposition of Lieutenant Jon Schenck ("Schenck Dep.") 24:7-19. The pot had "been out of service, and for three years [he had] been asking for a replacement pot, and they finally came up with the money." *Id.* at 24:17-19. There is never any training or printed materials that are offered to kitchen workers. *Id.* at 26:3-10. Inmate kitchen workers are assigned a specific job based on "ability," *id.* at 80:14, and they are expected to learn on the job by shadowing other inmates. *Id.* at 85:17-86:14. If they are not able to pick up needed skills from observation and peer learning, they are returned to a job category they can perform. *Id.* 86:18-87:5.

The food services staff consists only of 12 line officers and 3 supervisors, whereas there are around 275 inmates on the kitchen payroll. *Compare* Schenck Dep. 27:16-29:6 *with* 87:15-18. At each shift, there are 55 inmate workers, at minimum. *Id.* 67:15-70:14. They are supervised by five officers. *Id.* at 89:20-90:1. Inmates are therefore left unsupervised for minutes at a time while officers circulate to other parts of the active kitchen. *Id.* As Lieutenant Schenck explained, "our kitchen is so big that, you know, if you're in the front of the kitchen watching the inmates pull chicken and stuff out of the oven, you can't watch the inmates in the back who are doing your bread and stuff." *Id.* at 91:9-13. Inmate behavior is a concern; inmates try to steal high-value food items for re-sale to other inmates in the general population and try to tear apart kitchen equipment to

make weapons. *Id.* at 92:8-14. When asked how inmates are prevented from using kitchen equipment as weapons in the kitchen, Lt. Schenck replied, "You can't." *Id.* at 92:18. While the kitchen knives are tethered, inmates do not have to be directly supervised when using knives and an inmate could drag another inmate within the four-foot range of the tether to stab him. *Id.* at 93:16-94:2. Inmates on occasion fight in the kitchen; if they do, they are excluded from further assignments in dietary. *Id.* at 101:8-20.

It is in this context that prison officials expressed concern over placing totally blind inmates, like Mr. Hopkins, in an environment where it is difficult to ensure inmate safety. When Mr. Hopkins, who plaintiffs admit has had no light perception for the entire time he was at RCI, Pls' Mem. at 3, was sent by case management to food service, the open position was on "the serving line," which required Mr. Hopkins to be in "such close quarters with" approximately 60 inmates in the serving line and had a high risk of error in putting hot food on someone's hand or upending a tray. Schenck Dep. at 129:17-130:2. While Lt. Schenck testified that he did not have specific knowledge of Mr. Hopkins's visual acuity, he knew he would be impaired in many kitchen tasks because Mr. Hopkins was "pretty blind." *Id.* at 131:10. These conditions caused Lt. Schenck to request that Mr. Hopkins wait for a greeter job to become available "for his safety," *id.* at 130:1-2, but he would not have made that request for any inmate. *Id.* at 131:6-10. Although Mr. Hopkins was told that he was let go from this original job for "safety reasons" he did not at the time inquire further about what the reasons were. Hopkins Dep. 65:5-12. There is no evidence that he requested or suggested any accommodation that could be made in order for the job to be made safe. *Id.*

By contrast, when Mr. Delano, who has low vision, and Mr. Timothy Sherman, a visually impaired non-plaintiff, were assigned to food service, Lt. Schenck allowed them to work to their comfort level, performing dishwashing and dining room sanitation duties, respectively. Mr. Delano was originally re-assigned out of the kitchen when the RCI safety officer was concerned that Mr. Delano's medically documented need for a single cell and other accommodations conflicted with the safety requirements of the institutional food services jobs. *See* EXHIBIT 21 Landin E-mail (Schenck Dep. Ex. 149). Mr. Delano re-gained his dishwashing job during his second period of incarceration at RCI. Schenck Dep. 121-124. Mr. Sherman continued to perform his food services job until he left RCI. *Id.*

Although Mr. Holley testified he made verbal requests for kitchen work assignments from 2013 to 2017, See EXHIBIT 22, Transcript of Deposition of Sedric Holley ("Holley Dep.") 49:7-51:21, there is no record of any verbal request to case management since 2010. *See* EXHIBIT 23, OCMS Confidential Case Notes Sedric Holley. It is therefore in dispute whether Mr. Holley renewed his request to be assigned to food services at any time after the 2012 administrative decision. Similarly, although Mr. Polley testified that he requested to be placed on the food service wait list, his case notes indicate that he was placed on sanitation while awaiting assignment to mandatory education in December 2015 as his initial assignment. Four months later, he was placed in mandatory education as a student earning 10 diminution credits per month.[12] *See* EXHIBIT 24, OCMS Confidential Case

[12] Under §§ 3-701 – 3-711 of the Correctional Services article, an inmate serving term of confinement in the DOC may earn credits to reduce the length of the inmate's incarceration. There are four types of diminution of confinement credits that inmates may earn: good conduct credits, industrial credits, educational credits, and special project credits. Good

Notes Tyrell Polley. He remained in school other than a period of disciplinary segregation. *Id.* Mr. Wilson also testified that he worked in the kitchen at RCI for several months, earning pay and diminution credits, but that he left that assignment to attend school, which was "more important because they outlined the things that I needed." Wilson Dep. 63-64.[13] Mr. Brown currently works in the kitchen as a greeter and also washes dishes there, earning 10 diminution credits per month.[14]

There is no dispute of material fact that blind inmates are currently reasonably accommodated in work assignments to food services. After the blind greeter position was created in 2016, Lt. Schenck described how when a visually impaired inmate is assigned to food services, food service staff "do not know what their limitations are. So we give them that job first, and then if they decide they want to try and do something different,"

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conduct credits are deducted "in advance from the inmate's term of confinement," subject to the inmate's future good behavior. Corr. Servs. § 3-704(a). The other types of credit are awarded monthly, as they are earned. Corr. Servs. §§ 3-705 – 3-707. Once an inmate "serving a term of confinement of more than 18 months" has "served the term or terms, less diminution credit awarded," the inmate is released on mandatory supervision, Corr. Servs. § 7-501(a), and "is subject to . . . all laws, rules, regulations, and conditions that apply to parolees." Corr. Servs. § 7–502(b)(1) and (2).

[13] As of February 2019, while confined at ECI, Mr. Wilson was earning 10 credits per month, and pay, for attending school to earn his GED. Wilson Dep. 101. He stated that he desired to work in a "shop," such as the Electronics shop, but acknowledged that he is not qualified because he does not yet have his GED. Wilson Dep. 65.

[14] Mr. [redacted] stated that he made a request to work in the kitchen when he was confined at ECI, but that it was shortly thereafter that he "came down with my disease [multiple sclerosis] and got sick and went blind and got moved" to another part of the institution, and thereafter to RCI. *See* EXHIBIT 25, Transcript of Deposition of [redacted] ("[redacted] Dep.") 14, 59. Mr. [redacted] did not allege that he ever requested to work in the kitchen at RCI. Additionally, he acknowledged that he worked a sanitation job at RCI, [redacted] Dep. 51-52, that he was enrolled in classes for his GED, and that the institution provided a tutor to assist him with reading in his classes. [redacted]. 71.

like some of the other job responsibilities in the kitchen, they can attempt to do so. When asked if a blind inmate could ask to be a cook, Lt. Schenck said "if we have an opening and he thinks that he can handle it, we would give him a try." 134:18-20. The current position of the Department is that a blind inmate will be assigned duties in food service commensurate with inmate preference and ability. *See* EXHIBIT 26, Transcript of the Deposition of Casey Campbell ("Campbell Dep.") 362:2-6; Reid Dep. 272:1-12. There is no current visually impaired inmate who has requested to work in dietary who did not have that request fulfilled at some point during his incarceration. Reid Dep. 275:8-19; Schenck Dep. 132:10-133:1 (there is no current waitlist for blind greeter job).[15] Given the vast evidence in the record documenting the educational and vocational opportunities provided to the plaintiffs, this Court should deny their motion for summary judgment. *See Middleton v. Chavis*, No. 5:15-CT-03180-D, 2016 WL 7322515, at *2 (E.D.N.C. Apr. 12, 2016), (recommending dismissal of visually impaired prisoner's complaint where "the face of [the] complaint clearly indicates that [plaintiff] participates in numerous [prison] recreational activities . . . [and] work assignments"), *report and recommendation adopted*, No. 5:15-CT-3180-D, 2016 WL 7324079 (E.D.N.C. Dec. 15, 2016)).

[15] Mr. Snead testified that he also "signed up for the greeter job," Snead Dep. 119, but was unable to participate in the assignment because his physical examination revealed that he had a nail fungus. *Id*. However, Mr. Snead testified that he participated in other jobs for which he earned pay and diminution credits, including a position that was "like the head of sanitation," where he earned the most of any inmate working the sanitations assignment, and that he was also transferred to the "honor tier." Snead Dep. 115-116.

E. Denied Access to Treatment Programs at Patuxent Institution

The record also contains abundant record evidence to contradict Mr. Delano's claim that he was denied the opportunity to participate in the Parole Violators Program ("PVP") at Patuxent Institution because of his blindness, and Mr. Snead's claim that he was unlawfully denied the opportunity to participate in Patuxent's Eligible Person program. Mr. Delano was released from incarceration on mandatory supervision release on December 21, 2017. *See* EXHIBIT 27, OCMS Traffic History Wilbert Delano.) Within less than two months, he had violated the conditions of his release and was returned to Department custody. *Id.* Among Delano's numerous infractions was his continued use of controlled dangerous substances. *See* EXHIBIT 28, Transcript of revocation hearing in case of Wilbert Delano dated February 22, 2018. Delano was incarcerated at Patuxent Institution pending his revocation hearing before a Commissioner of the Maryland Parole Commission. Exhibit 27. On February 15, 2018, while awaiting his revocation hearing, Mr. Delano approached Sergeant Michael McClean and informed him that he "fear[ed] for his safety" and that "there [was] an inmate somewhere in the facility which [sic] knows []Delano from RCI, and this inmate was communicating with other inmates." *See* EXHIBIT 29, Email from Sergeant Michael McClean to Janae Allen, Case Management Specialist II dated February 15, 2018. Mr. Delano further reported that "due to his impairment he would not be able to defend himself if attacked, and that he most likely would not be able to identify his attacker(s)". *Id.* Sergeant McClean advised the case management staff about this disclosure and inquired about placing Mr. Delano is medical segregation to address his safety concerns. *Id.*

A hearing was convened before Maryland Parole Commissioner John Cluster on February 22, 2018. EXHIBIT 28. Mr. Delano admitted that he had violated the terms of his release and his mandatory supervision release was revoked. *Id.* pp. 1,8.; *see also,* EXHIBIT 30, Decision Resulting from Parole/Mandatory Supervision Release Violation Hearing dated February 22, 2018. During the hearing, Commissioner Cluster deemed Mr. Delano, to be a "threat to society." EXHIBIT 28, p. 6. Commissioner Cluster revoked Mr. Delano's release, rescinded all of his diminution credits and referred him to the Parole Violators Program ("PVP"), which he described to Delano as "a drug program." *Id.* Commissioner Cluster told Mr. Delano "[i]f you successfully complete that, which is about a six month program, … if you complete that you write me and I'll amend your decision and let you out. If you do not complete you're going to be in jail for quite a few years." *Id.* pp. 6-7.

On February 26, 2018, Delano was evaluated by Hettie T. Wilson, Physician Assistant at Patuxent, who reported that Delano was having problems navigating stairs and is concerned about falling. *See* EXHIBIT 31, Note from Wilbert Delano medical records memorializing appointment of February 26, 2018. The Physician Assistant opined that Delano "would be best served at a facility that can accommodate his specific needs" and recommended that "he be transferred to the most appropriate facility immediately." *Id.* Mr. Delano was transferred from Patuxent to RCI on March 14, 2018. EXHIBIT 27.

Because the PVP is only offered at Patuxent, Delano was not able to attend that program. RCI case management staff contacted Commissioner Cluster on Delano's behalf to advise that his lack of participation in PVP was due to no fault of his own. *See* EXHIBIT

32, Email from Dwight Barnhart Case Management Specialist II to Commissioner John Cluster dated March 19, 2018. In light of this information, Commissioner Cluster reconvened a hearing on May 16, 2018, to address his prior referral to PVP and to ensure that Mr. Delano suffered no adverse implication on his length of incarceration due to the inability to attend the PVP. *See* EXHIBIT 33, Testimony Transcription in the Case of Wilbert Delano DOC #346138 May 16, 2018. After the hearing, Commissioner Cluster issued a subsequent decision in which he allowed for Mr. Delano to write requesting an amended decision within the approximate time it would have taken him to complete the Parole Violators Program. See EXHIBIT 34, Decision Resulting from Parole/Mandatory Supervision Release Violation Hearing dated May 16, 2018. Mr. Delano was released from custody on October 25, 2018.

As noted, a party claiming discrimination under Title II of the ADA must prove "that he is otherwise qualified for the benefit in question" and that he "was excluded from the benefit due to discrimination solely on the basis of the disability." *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d at 1265. Delano is unable to prove that he was "otherwise qualified" for to participate in the PVP. Inmates referred to the PVP by the Parole Commission are subject to eligibility review by Patuxent's Associate Director of Behavioral Sciences, Dr. Erin Shaffer, before they are officially enrolled in the program. In order to qualify for participation in PVP the inmate must meet the following criteria: 1) no Category 100 level infraction within the past six months; 2) enough time on sentence to complete the program; 3) have no enemies at Patuxent; and 4) must be able to be safely

housed in the general population at Patuxent. See EXHIBIT 35, Transcript of Deposition of Dr. Erin Shaffer ("Shaffer Dep.") 54, 56-57.

There is substantial record evidence showing that Delano was not "otherwise qualified" to participate in the PVP. First, he was not an inmate that could be safely housed in the general population at Patuxent. In fact, it was Delano who brought that fact to the attention of correctional staff at Patuxent expressing "fear for his safety." EXHIBIT 29. Moreover, the medical staff at Patuxent expressed further reservations about the appropriateness of housing Delano at Patuxent due to the stairs, and recommended that he be transferred to another facility that could better accommodate his needs. EXHIBIT 31. Finally, Delano expressed fear about "another inmate he knew from RCI" and raised the prospect of an assault. EXHIBIT 29. These facts render him ineligible under two of the eligibility criteria. Specifically, Delano was not an inmate who could safely be housed in general population at Patuxent, nor was he an inmate who had no enemies at Patuxent.

Nor can Mr. Delano establish that he was "excluded from the benefit" of the programming offered by the PVP because he was offered comparable programming at RCI. The evidence shows that while housed at RCI, Mr. Delano refused to participate in substance abuse treatment, which was the specific reason that Commissioner Cluster referred Mr. Delano him to the PVP in the first place. EXHIBIT 28, p. 6. Department records confirm Mr. Delano's approval for and refusal to participate in substance abuse programing while at RCI. In a memorandum Michael E. Rines, Addiction Counselor, reported the following:

> A tap [treatment assignment protocol] assessment was performed on Mr. Delano 346138 on 8-23-18. He was approved by headquarters to be placed in ATP [Addictions Treatment Protocol] 038 at RCI. He was issued an individual pass on Tuesday September 4 in an effort to have him sign consent for treatment. He did not show. Group passes were issued to him on both September 5 and September 10. These were both efforts to have him sign consent for treatment. He did not sign consent. I did not discuss the consequences of not signing with him.

EXHIBIT 36, Memorandum from Michael E. Rines dated November 28, 2018 regarding Wilbert Delano.

Likewise, there are numerous disputes of material fact surrounding the question of any of the individual plaintiffs' participation in the Eligible Persons Program at Patuxent. Plaintiffs rely upon the fact that Maynard Snead was referred by his Case Manager for participation in the program in 2009 and 2012. Plaintiff's Exhibits Z-63, 64. Yet, plaintiffs provide no evidence – indeed there is none – that Mr. Snead was not selected to participate in that program because of his visual impairment. In fact, there is no evidence he was ever declined for participation in the program at all; rather, he simply remained on the referral list. The deposition testimony revealed that the referral list for the Eligible Persons Program had over 2000 names on it for 164 available slots. Shaffer Dep. 43-45. Dr. Erin Shaffer, who oversees the program, testified that inmates have remained on the referral list for years. *Id.* at 151. Moreover, the testimony of Dr. Shaffer confirmed that inmates are not selected from the referral list in the order in which they were received. *Id.* at 43. Rather, selection from the referral list is dependent upon numerous factors including: whether the inmate was referred by the court, the length of sentence, presence of enemies at Patuxent, and infraction history. *Id.* at 162-169.

The same is true for Wilbert Delano and Steven Brown, both of whom, plaintiffs claim, were referred to the Eligible Persons Program at some point during their incarceration. There is no evidence, or even an allegation, that Delano or Brown were affirmatively rejected from participation in the Eligible Persons Program, let alone denied from participating because of their visual impairment. They simply were referred, like hundreds of other inmates for a program that has a limited number of available slots. Furthermore, there are disputes of fact surrounding their eligibility for the program. These disputed factual questions about 1) whether the identified plaintiffs were denied participation, 2) if so, was it because of their visual impairment, and 3) whether they met eligibility criteria, preclude summary judgment.[16]

F. Single vs. Double Celling

Plaintiffs' claim that the Department violated the Rehab Act and ADA by housing them with a cellmate fails as a matter of fact and law. It is well-established that inmates are not entitled to be housed in any particular facility or cell, just as they are not entitled to any particular security classification. *Spivey v. Department of Pub. Safety & Corr. Servs.*,

[16] Also without merit is plaintiffs' argument that they were denied access to complete "sick call" slips to seek medical treatment. As noted above, Department sick call policy allows inmates to verbally request unscheduled sick call at any time even if they do not fill out a sick call slip. *See* EXHIBIT 37, Transcript of Deposition of Sharon Baucom M.D., ("Baucom Dep.") 25:18-26:12; 28:4-15 (describing that inmates may request to be seen verbally and that correctional officers are responsible for documenting and fulfilling those requests). And, as Mr. Hopkins stated, a walker may write a sick call slip for a visually impaired inmate as part of his job duties. Hopkins Dep. 44:5-9. Although Mr. Hopkins testified that he might need assistance from another inmate in filling out sick call slips, he did not testify that he was unable to attend sick call if no slip was completed, or that he tried to attend sick call without using the slips and was denied. *Id.*

No. Civ. JFM-09-440, 2009 WL 5177285, at *3 (D. Md. Dec. 18, 2009); *Ford v. Harvey*, 106 F. App'x 397, 399 (6th Cir. 2004); *Montanye v. Haymes*, 427 U.S. 236, 242 (1976); *Sheehan v. Beyer*, 51 F.3d 1170, 1174 (3d Cir. 1995) ("An inmate does not have a right to be placed in the cell of his choice."); *Hewitt v. Helms*, 459 U.S. 460, 468 (1983) ("[T]he transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.").

Tellingly, Plaintiffs cite no authority—not the disability rights statutes themselves, nor the regulations, nor any case law—to support their apparent argument that they had a right protected by the ADA and the Rehab Act to be in a single cell. Thus, to maintain the instant claim, plaintiffs must demonstrate that their cell assignments somehow denied them access to services and programs. Plaintiffs do not even attempt to do this; instead, they simply insist that the Department was required to single cell them because the "medical contractor" had "ordered" it. Pls' Mem. at 42. Plaintiffs allege that, under the Department's "standards," the "medical contractor was authorized to decide who should be single celled as a disability modification and that this decision should not be overridden by non-medical staff." Pls' Mem. at 43. In fact, as demonstrated in defendants' motion for summary judgment, ECF 178 at 3-5, numerous plaintiffs have been single celled over significant portions of their incarcerations. Moreover, the witnesses, including the 30(b)(6) deponents also testified that the determination whether to single-cell was "a clinical decision *for the most part*," See EXHIBIT 38, Transcript of Deposition of Denise Gelsinger ("Gelsinger Dep.") 183 (emphasis added), and that an inmate should be single celled "if

single cells *are available* and a single cell has been deemed by medical." Reid Dep. 124 (emphasis added).

As she explained in her deposition, then-Commissioner Corcoran, who, "[s]ubject to the authority vested in the Secretary by law, . . . [was] in charge of the [DOC] and its units," Corr. Servs. 3-203(a), determined that the policy of single-celling blind inmates should be examined in light of the limited availability of cells and her belief that "sometimes it can be helpful to have another person in the cell" and that, with regard to blind inmates, it could be "more safe for them to be double celled." *See* EXHIBIT 39, Transcript of Deposition of Dayena Corcoran ("Corcoran Dep.") 217. *See also* EXHIBIT 40, Transcript of the Deposition of Stephen Moyer ("Moyer Dep.") 70 – 71 (noting that it can be safer for inmates to be double-celled since cellmates can obtain assistance for each other in the event of an emergency); Reid Dep. 127 ("There is [a] large amount[] of information out there that says being single celled is not necessarily a good thing as far as for your mental health"). *See also* 28 C.F.R. § 35.152(b)(2) (requiring that "inmates or detainees with disabilities [be] housed in the most integrated setting appropriate to the [their] needs"). The Department was free to modify its housing policy and plaintiffs have utterly failed to demonstrate that, by doing so, it violated the Rehab Act or ADA. Nor have the plaintiffs even established that the Department violated its standards for celling inmates. And even if they had done so, plaintiffs would still not be entitled to summary judgment, because "the relevant inquiry is whether [the public entity] violated the ADA or Section 504 of the Rehabilitation Act, not whether [it] followed its internal policies."

Shaikh v. Lincoln Mem'l Univ., 608 F. App'x 349, 355 (6th Cir. 2015). Accordingly, this Court should deny plaintiffs' motion for summary judgment.

G. Denied Accommodations to Independently Navigate the Prison Facility

Plaintiffs are not entitled to summary judgment on their claim that they were discriminated against by not being allowed to navigate the prison facilities independently. Their primary complaint is with the "walker program," through which they were assigned a paid inmate to serve as a guide and escort throughout the facility, which they argue deprived them of the independence enjoyed by sighted inmates, Am. Compl. ¶¶ 60-62, and "forced" them to rely upon "untrained, unvetted, and at times abusive sighted inmates," and thus violated the ADA and Department policy. Pl. Memo., p. 41. This is plainly false.

First, plaintiffs erroneously base this claim on the belief that they are entitled to "an equal opportunity to navigate their facilities safely." Pl. Memo. p. 42. However, "navigation" around a facility is not a program, service, or benefit protected by the ADA or Rehab Act, *see* 29 U.S.C.A. § 794 (b), but rather a means to enable inmates to engage in and benefit from a facility's programs and services. Thus, contrary to their argument, they have no right to accommodations to enable *independent* navigation, so long as they are able to get to the programs and services they are entitled to access. Nonetheless, plaintiffs were in fact provided with canes to assist their ambulation, as well as training on use of a cane. *See, e.g.*, James Dep. 81-82 (James started using a cane in 2011 and presently uses it); Snead Dep. 17-19 (Snead uses a cane to walk within the facility); Hopkins 24-24 (during his incarceration, Hopkins was able to move within the institution using a cane);

See EXHIBIT 41, Transcript of the Deposition of Tyrell Polley ("Polley Dep.") 78 (Polley was provided a cane while confined at RCI). *See also* Delano Dep. 25, 37-38 (he was provided a cane, but returned it because he did not need it); Wilson Dep. (Wilson uses a cane to walk not as a result of vision issues but due to a foot injury); Hammond Dep. 81 (Hammond did not have a cane while he was at RCI, and did not ask for one); Reid Dep. 187 (when visually impaired inmates are provided a cane, the medical department "will teach them how to use the cane").

Second, the walker program is a reasonable accommodation as a matter of law. In fact, it is well-settled that providing another individual, including an inmate, to serve as a walker or escort *is* reasonable and appropriate under the ADA and Rehab Act. *See Allen v. Carrington*, No. C/A 4:07-797 DCN, 2009 WL 2877557, at *6 (D.S.C. Aug. 28, 2009) (holding that where prison assigned another inmate "to assist Plaintiff with getting to and from the cafeteria and carrying his tray and whatever other needs he may have as a result of his eyesight," the prison "provide[d] Plaintiff with reasonable accommodations to participate in the day-to-day operations of the prison" in compliance with the ADA and Rehab Act), *aff'd*, 372 F. App'x 390 (4th Cir. 2010); *Mason*, 559 F.3d at 887 (dismissing ADA claim where plaintiff had another inmate serve as a facility escort, despite the escort's sporadic unavailability); *Colon v. New York State Dep't of Corr. & Cmty. Supervision*, No. 15-CV-7432 (NSR), 2017 WL 4157372, at *7 (S.D.N.Y. Sept. 15, 2017) at *7 (holding it reasonable for inmates and staff to escort blind inmates even where plaintiff was attacked and injured during one such escort); *Havens*, 897 F.3d at 1269 (holding plaintiff's access to prison facility meaningful where he was able to travel around the facility with the

assistance of staff); *Cf. Williams v. Illinois Dep't of Corr.*, No. 97 C 3475, 1999 WL 1068669, at *8 (N.D. Ill. Nov. 17, 1999) (holding that a prison facility must provide "navigational assistance," including "the use of other prisoners" to a blind inmate to comply with the ADA and Rehab Act). Plaintiffs' motion must therefore be denied because the defendants' walker program was a reasonable accommodation as a matter of law.

Third, plaintiffs' reliance upon *American Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D.C. Cir. 2008), and *Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 74 (2d Cir. 2016), is misplaced. They claim these cases hold that an accommodation that involves reliance "upon the cooperation of other inmates is ineffective." Pl. Memo. p. 41. Plaintiffs are wrong. First, the court in *American Council* was not considering the reasonableness of accommodations within a prison setting, but within the greater general public, as that case dealt with the accessibility of the U.S. paper currency system. *American Council,* 525 F.3d 1256. Moreover, the court took issue with the currency system because it required visually impaired individuals to rely upon "the kindness of strangers" in order to perform basic functions such as grocery shopping. *Id.* at 1269. By contrast, the walker program does not force plaintiffs to rely upon the "kindness of strangers," but upon the paid actions of hired and screened individuals, for whom there is a consequence for non-performance or mistreatment. *See* Miller Dep. 304:1-6 ("If an inmate walker is extorting them, there are a number of avenues that they can -- to complain about that."); Gelsinger Dep. 200:2-5 (identifying avenues for inmate to report a problem with walker).

Similarly, although *Wright* was a prison case, the court based its decision that the "mobility assistance program" was ineffective on the fact that a disabled inmate had to

request assistance far in advance and thus had no means to obtain assistance for any spontaneous need, such as using the restroom. *Wright*, 831 F.3d at 74. By contrast, plaintiffs here do not request use of their walkers far in advance, but have access to their walkers at their request. *See* Defs.' Mem. Supp. Sum. Jud. (ECF 178) at 48-49 (citing deposition testimony of the plaintiffs regarding walkers). Thus, contrary to plaintiffs' argument, the evidence does not demonstrate that they were prevented from participating in any programs or services as a result of the Department's use of a blind escort program.

Fourth, not only is the walker program permissible under the law, it does not violate Department policy, as plaintiffs erroneously claim. Plaintiffs base this claim on the Department policy stating that inmates, for their own safety, should not accept gifts or favors from other inmates because it can make them vulnerable to abuse. Pl. Memo. p. 41. However, Warden Miller unequivocally distinguished the use of inmate walkers from situations where inmates accept gifts and favors from each other, because walkers are screened for the position, paid, and monitored by staff, so they do not result in the same vulnerabilities. Miller Dep. 301:9 – 302:2, 303:9 – 304:6 ("[T]he inmates who have walkers, they're not indebted to [other inmates]. The inmate walker is being paid. The inmate walker is being monitored. If an inmate walker is extorting them, there are a number of avenues that they can -- to complain about that." Miller Dep. 304:1-6).

Additionally, plaintiffs' unsupported claim that walkers are not "vetted" is contradicted by record evidence that they must in fact pass a minimum of two levels of screening. First, inmate walkers are screened by security staff to ensure they are capable of walking around the facility, and to exclude any inmates that may be inclined to take

advantage of a blind or visually impaired inmate. Reid Dep. 217:1-8. Inmates are then screened by case management, who focus on excluding inmates who have committed sex offenses or other crimes involving vulnerable victims,[17] or who have gang or other threat group associations. Reid Dep. 219:7 – 220:10. Moreover, case management seeks to identify inmates who are empathetic and avoid conflicts with other inmates to serve as walkers. Reid Dep. 217:6-18, 219:7 – 220:10.

Although plaintiffs claim their walkers were "at times abusive," the record evidence establishes that where there were alleged instances of abuse, they were isolated to particular walkers, and thus do not pose a challenge to the walker program as a whole. For instance, plaintiff Hammond is the only inmate who claims to have suffered an injury – bruising – as a result of an assault by a walker, who was also his cellmate at the time. Hammond Dep. 17-18, 21. However, Mr. Hammond did not report the abuse to any Department staff until sometime later, and when he did, the cellmate was transferred out of Mr. Hammond's cell. Hammond Dep. 19-20. Mr. Hammond was assigned another escort and he had no issues with this escort. Hammond Dep. 68-69.

The remaining plaintiffs were not assaulted by their walkers, and generally testified that their walkers were effective at assisting their navigation around the facility. *See* Brown

[17] Maureen Reid, one of the Department's Rule 30(b)(6) witnesses, testified that although the requirement that an inmate not have a sex offense conviction was added in 2018, prior to this, inmates were still screened to exclude those who committed crimes involving vulnerable victims. Reid Dep. 219:11-220:10. Plaintiffs offer no authority whatsoever that the absence of this requirement is a *per se* violation of the law, or even that any plaintiff was harmed by an inmate with a sex offense conviction.

Dep. 40-41, 42-43, 43-47, 48-49 (noting one walker helped him get to the dining hall and would read to him, one drank alcohol but did not harm him, another sold drugs but did not harm him, and another was effective at escorting but did not read to him); Delano Dep. 2-25 (stating that his walkers did jobs for him, and that at worst, he had a few disagreements with them); Holley Dep. 69, 95-97, 98 (stating that he had a close bond with, and trusted, one walker, and that another he had verbal disagreements with on occasion, which never got physical); James Dep. 56-57, 59-60, 62 (stating that one walker was helpful for navigating the facility, and after another walker rubbed up against him, he was replaced); Polley Dep. 66 (noting that his walker was helpful and did not assault him or charge him money for services); Snead Dep. 140-1 (stating that his only complaint against his walkers were they were sometimes slow to respond); Wilson Dep. 38 (stating that he never had any issues with his walkers). On this claim, as on all their other claims, plaintiffs cannot meet the deliberate indifference standard, because there is no record evidence, let alone record evidence beyond genuine dispute, of "knowledge that a harm to a federally protected right [was] substantially likely,' and (2) 'a failure to act upon that . . . likelihood." *Havens*, 897 F.3d at 1264 (quotation omitted). Accordingly, this Court should deny plaintiffs' motion for summary judgment.

CONCLUSION

Plaintiffs' partial motion for summary judgment should be dismissed in its entirety.

Respectfully submitted,

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