UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

DWINEL MONROE, Plaintiff, v. KATHLEEN GERBING, et al. Defendants.	CASE NO. 16-CV-2818 (KMK)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiff Mr. Dwinel Monroe is a longtime Muslim, disabled individual, and formerly incarcerated person who was housed in New York State Department of Corrections and Community Supervision ("DOCCS") facilities from March 8, 2012 to April 6, 2017. At these facilities, Defendants substantially burdened his religious exercise and denied him reasonable accommodations for his disabilities. At Otisville Correctional Facility ("Otisville"), Defendant Kathleen Gerbing permitted the continuation of her staff's unconstitutional custom of forcing Muslim inmates like Plaintiff to choose between their health and observing fasting for Ramadan. At Greene Correctional Facility ("Greene"), Defendant Marie Hammond failed to provide Plaintiff with access to holy day services for Jummah. At Otisville, Greene, and Wallkill Correctional Facility ("Wallkill"), DOCCS fell far short of its duty to reasonably accommodate Plaintiff's disabilities and allow him access to programs at these facilities to which he was entitled.

In their Motion to Dismiss the Third Amended Complaint, Defendants raise a number of arguments. Each is without merit. First, Defendants attempt to argue that neither Defendants Gerbing nor Hammond were personally involved with the substantial burdens on Plaintiff's free exercise that resulted from the barriers to his observance of Ramadan at Otisville or participation in Jummah at Greene. These arguments are clearly contradicted by the allegations in Plaintiff's Third Amended Complaint ("TAC"). Defendants' invocation of qualified immunity as to Defendants Gerbing and Hammond is likewise unavailing in light of clear Second Circuit precedent. Second, Defendants' contentions that Plaintiff was not denied reasonable accommodations due to his disabilities in violation of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("Rehab Act") are both rebutted by the TAC, but are also improperly raised during this stage of the litigation. Finally, Defendants seek to transfer claims

related to Defendant Hammond and Greene Correctional Facility to a different venue. Not only are these arguments untimely, but Defendants have fallen woefully short of carrying their burden in establishing that transfer is appropriate here.

Accordingly, Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint should be denied in full.

II. FACTUAL & PROCEDURAL BACKGROUND

A. Mr. Monroe Is A Long-Time Practicing Muslim and Disabled Individual.

Plaintiff Mr. Dwinel Monroe has been a practicing Muslim for forty years. TAC ¶ 19. As part of his religious practice, Plaintiff sincerely believes that he must participate in Jummah, or Islamic congregational prayer services on Fridays, and fast during the holy month of Ramadan. TAC ¶¶ 24-25. For Muslims like Plaintiff, fasting during Ramadan requires refraining from eating or drinking from sunrise to sunset. TAC ¶ 23. Plaintiff believes that breaking his fast without need constitutes a grave sin for which serious atonement is required. TAC ¶ 24. Plaintiff also suffers from a number of medical conditions and disabilities, including Type II diabetes, chronic obstructive pulmonary disease ("COPD"), and severe lumbar pain caused by a spinal injury that impairs his ability to walk, stand, and bear weight. TAC ¶¶ 11, 20. Accordingly, he requires daily insulin to manage his diabetes and a cane to maintain basic mobility. TAC ¶ 11. Due to his disabilities, Plaintiff cannot walk more than short distances without pain. TAC ¶ 4. To continue observing Ramadan despite his diabetes, Plaintiff has long-scheduled his insulin outside of daylight hours with no ill effect to his health, including while incarcerated at DOCCS facilities. TAC ¶ 2.

B. Defendants Violated Plaintiff's Rights Under the First Amendment, the Americans with Disabilities Act, and the Rehabilitation Act.

From March 8, 2012 to April 6, 2017, Plaintiff was incarcerated in four New York State DOCCS facilities. TAC ¶ 1. While incarcerated, he experienced discriminatory and unjust conduct at Defendants' hands that prevented him from practicing his faith and barred him from accessing DOCCS programs due to his disabilities. TAC ¶ 1. First, at Otisville in June 2015, Defendants Dr. Goulding, Imam Hafiz Mahmood, Ms. Rhonda Murray, and Mr. Peter Wolff ("Ramadan Defendants") adopted a policy or custom of refusing to allow Mr. Monroe to modify his insulin delivery schedule so that he could observe Ramadan. TAC ¶ 3. Despite having oversight over Otisville's staff—including each of the Ramadan Defendants—Defendant Gerbing, the Superintendent of Otisville, failed to stop this policy after learning of it. TAC ¶ 41; TAC Ex. 1. Instead, she gave it her stamp of approval for continued use. TAC ¶ 41; TAC Ex. 1. Second, at Greene, Defendant Hammond, the Deputy Superintendent of Programs for Greene, although aware that Jummah was not accessible to Plaintiff because of his disabilities, failed to convene Jummah where Plaintiff could participate or otherwise provide him access to the program. TAC ¶¶ 51-52. Through these actions, Defendant Hammond denied Plaintiff the right to participate in a core religious exercise. TAC ¶ 52. As a result of Defendant Hammond's actions and DOCCS' failure to reasonably accommodate his disability, Plaintiff was forced to miss Jummah services for the duration of his time at Greene, a time span that covered approximately 75 Friday services. TAC ¶¶ 53, 80. Likewise, at Otisville and Wallkill, DOCCS denied Plaintiff access to specific programs available to other inmates at those facilities on the basis of his disability by depriving him of access to his cane or other reasonable accommodation. TAC ¶¶ 80-82.

C. Procedural Posture

Mr. Monroe filed his first complaint *pro se* on April 14, 2016. (ECF No. 2). He then filed two amended complaints *pro se*: first on September 30, 2016 (ECF No. 42) and then again on October 26, 2016 (ECF No. 48). On December 27, 2017, this Court granted in part and denied in part Defendants' Motion to Dismiss the Second Amended Complaint. (ECF No. 92). The Court rejected Defendants' motion as to Plaintiff's Free Exercise claims regarding the scheduling of his medication during Ramadan against the Ramadan Defendants; the Court also declined to dismiss those claims on qualified immunity grounds. TAC ¶ 65. The Court dismissed the remainder of Plaintiff's claims without prejudice. TAC ¶ 65.

On July 18, 2018, Plaintiff—represented for the first time by undersigned counsel—filed a Third Amended Complaint. (ECF No. 109). The TAC alleges claims under the First Amendment, Title II of the ADA, and Section 504 of the Rehab Act that stem from Plaintiff's treatment while incarcerated at DOCCS facilities. Defendants filed a premotion letter in advance of their motion to dismiss on September 18, 2018 (ECF No. 118) to which Plaintiffs replied on September 20, 2018 (ECF No. 119). A hearing on the premotion letter was held before this court on October 24, 2018 to establish the scope of the proposed motion. Defendants then filed their Motion to Dismiss the TAC on December 14, 2018. (ECF No. 127).

III. LEGAL STANDARD

In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a court must accept the factual allegations of the complaint as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). A court must construe all pleadings in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party. *Tukas Co. v. Continuum Co., LLC*, No. 00-2762, 2001 WL 114339, at *1 (S.D.N.Y. Feb. 9,

2001). A court can only dismiss a complaint when it appears "beyond doubt" that plaintiff can prove no facts supporting his claim that would entitle to him relief. *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-56 (1957)). Moreover, any ambiguities in the pleadings should be resolved in the Plaintiff's favor. *See Deangelis v. Corzine*, No. 11-7866, 2014 WL 216474, at *1 (S.D.N.Y. Jan. 17, 2014) (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)). In assessing a motion to dismiss, a court may also consider documents attached or incorporated in the complaint by reference. *See Leonard F. v. Isr. Disc. Bank of N.Y.,* 199 F.3d 99, 107 (2d Cir. 1999).

IV. ARGUMENT

A. Plaintiff Has Sufficiently Alleged That Defendant Gerbing Was Personally Involved with the Free Exercise Violation at Otisville.

The Court has already determined that Plaintiff has sufficiently alleged a First Amendment claim against Defendants Dr. Goulding, Wolff, Mahmood, and Murray. *Monroe v. Gerbing*, No. 16-2818, 2017 WL 6614625, at *11-*12 (S.D.N.Y. Dec. 27, 2017). The only remaining question for this claim is whether Plaintiff has also stated a claim as to Defendant Gerbing, who served as the superintendent of Otisville. Defendants' contention that "there are no allegations remotely indicating [her] personal involvement" Defs.' Mem. in Supp. of Mot. to Dismiss at 5 ("Defs.' Mem.") is premised on an inappropriately narrow and unnecessarily cramped reading of the TAC.

To establish a defendant's individual liability in a § 1983 suit, a plaintiff must show the defendant's personal involvement in the constitutional deprivation. *See Alvarado v. Westchester Cty.*, 22 F. Supp. 3d 208, 214 (S.D.N.Y. 2014). The Second Circuit has set forth five factors that can establish a supervisor's personal involvement with a constitutional violation, *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995);[1] the third factor—a defendant's involvement

[1] *Colon v. Coughlin* established five factors that can establish a supervisor's personal involvement in an unconstitutional act: (i) the defendant participated directly in the alleged constitutional violation; (ii) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong; (iii) the defendant created

in creating or allowing the continuance of a policy or custom under which unconstitutional practices occurred—clearly establishes that Defendant Gerbing was personally involved here.

Defendant Gerbing was aware that her staff had adopted an unconstitutional policy or custom of denying a Muslim inmate the right to participate in Ramadan. TAC ¶ 43; TAC Ex. 1. Despite being fully aware that Otisville staff had adopted a custom of repeatedly forcing Plaintiff to choose between his prescribed medication and religious fasting, Defendant Gerbing failed to take any actions to stop this custom or hold her staff accountable. *Id.* Instead, she justified the continuing use of this policy by Otisville's staff by citing "Islamic jurisprudence" in her written rejection of Plaintiff's grievance. *Id.*

Defendants contend that Defendant Gerbing's liability is based solely upon receipt of a grievance or her position in the prison hierarchy, Defs.' Mem. at 6, but that argument cannot be reconciled with the clear allegations set forth in the complaint. Plaintiff has alleged that Defendant Gerbing received his grievance, learned of the unconstitutional practices in Otisville undertaken by her staff, and provided a tailored response in her written rejection of Plaintiff's grievance and acceptance of the custom. TAC 43; TAC Ex. 1; *see also Freeman v. Goord*, No. 02-9033, 2004 WL 2002927, at *5 (S.D.N.Y. Sept. 8, 2004) ("While mere receipt of a letter from a prisoner is insufficient to establish personal liability, an official's actions and responses arising out of a grievance may form a basis for liability."). Accordingly, Plaintiff's TAC has adequately alleged Defendant Gerbing's personal involvement under the third *Colon* factor with the other Ramadan Defendants' violations of Plaintiff's free exercise rights.

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a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom; (iv) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts; or (v) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. 58 F.3d at 873.

In *McKenna v. Wright*, a case with a fact pattern analogous to the one here, the Second Circuit found a prison official personally involved in a constitutional violation. 386 F.3d 432, 437–38 (2d Cir. 2004). In *McKenna*, the defendant, a deputy superintendent responsible for a DOCCS prison's medical program, learned, through a grievance, that an incarcerated individual had been improperly denied medication. *Id.* The Second Circuit held that since the defendant was responsible for the medical program and had been adequately alleged to have allowed the challenged policies to continue under his supervision, the third *Colon* factor was satisfied. *Id*. Here, Defendant Gerbing, as superintendent of the facility, had clear authority over the Ramadan Defendants and the facility's medical program. TAC ¶ 43; TAC Ex. 1. Yet she took no action to correct the unconstitutional policies they had implemented and, instead, allowed these policies to persist under her supervision. *Id.*

B. Plaintiff Has Stated a Free Exercise Claim against Defendant Hammond for Denying Him the Ability to Participate in Jummah at Greene Correctional Facility.

In the TAC, Plaintiff sets forth that Defendant Marie Hammond, the Deputy Superintendent for Programs at Greene, denied Plaintiff the right to participate in Jummah congregational prayer services, in violation of the First Amendment. Defendants' primary argument in response—that Defendant Hammond was not personally involved in the violation—is without merit.

Under the first and second *Colon* factors, a defendant's personal involvement with a constitutional violation can be shown i) through allegations of direct participation in the act; or ii) through failure to remedy the wrong after being informed through reports or appeals. *Colon*, 58 F.3d at 873. Moreover, if a plaintiff alleges an ongoing constitutional violation that defendant fails to correct after being informed of it, the plaintiff's claim "should not [be] dismissed under Rule 12(b)(6)." *Zappulla v. Fischer*, No. 11-6733, 2013 WL 1387033, at *9 (S.D.N.Y. 2013); *see also*

Pugh v. Goord, 571 F. Supp. 2d 477, 515 (S.D.N.Y. 2008) (internal citations omitted) ("Personal involvement will be found, however, where a supervisory official receives and acts on a prisoner's grievance or otherwise reviews and responds to a prisoner's complaint.").

Not only did Defendant Hammond participate directly in denying Plaintiff access to Jummah at Greene, she, after being informed of the violations through grievances, failed to remedy the wrong. TAC ¶¶ 49-52. Mr. Monroe asked Defendant Hammond for access to Jummah, suggesting that he receive either a bus service or transfer to another facility. TAC ¶ 49. Two months later, in January, she responded, deciding that Jummah would be moved to the South Gym, which was accessible to Mr. Monroe in spite of his medical disabilities. TAC ¶¶ 49, 51. These allegations alone are sufficient to state Defendant Hammond's personal involvement.

Defendants' own briefing even concedes that Defendant Hammond was personally involved with the violation, admitting that she "took steps to provide Plaintiff with reasonable access religious to [sic] services by relocating Jummah prayers from the north side to an area closer to Plaintiff on the South Side of the facility…" Defs.' Mem. at 7. But as set forth in the TAC, even though Defendant Hammond had direct knowledge of the ongoing burden on Plaintiff's religious exercise and the ability to correct it, she failed to hold Jummah services at the South Gym. TAC ¶¶ 51-52. Instead, Defendant Hammond waited for several more months before moving services to the South Side at all. TAC ¶¶ 51-52. Even when, after months' delay, Defendant Hammond finally moved Jummah, it was not to the South Gym, an area of the facility determined to be accessible to Plaintiff, but to the visiting room on the South Side of Greene. TAC ¶ 52. Despite Defendant's baseless contentions to the contrary, Plaintiff clearly alleges that he could not participate in Jummah in the visiting room. TAC ¶ 52. These allegations are sufficient to establish Defendant Hammond's personal involvement with the violation of Plaintiff's free exercise rights.

Defendants make several other related arguments, all of which are equally unavailing. First, they assert that Defendnat Hammond's actions—denying Plaintiff access to Jummah services—did not substantially burden his religious exercise. Defs.' Mem. at 14. The Second Circuit has "long held that prisoners should be afforded every reasonable opportunity to attend religious services." *Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir. 1989). It is well-established that denial of the ability to participate in Jummah constitutes a substantial burden on an individual's right to free exercise. *See, e.g., Phillip v. Schriro*, No. 12-8349, 2014 WL 4184816, at *3 (S.D.N.Y. Aug. 22, 2014) ("Plaintiff's assertion that he was denied the right to attend Jumu'ah services on ten occasions adequately alleges that his practice of Islam was substantially burdened"); *Covington v. Mountries*, No. 13-343, 2014 WL 2095159, at *4–5 (S.D.N.Y. May 20, 2014) (finding Muslim prisoner who claimed that he was prevented from attending Jummah services twice had adequately alleged a substantial burden on his religious exercise under the First Amendment). Plaintiff has alleged that Jummah is a core part of his Islamic practice, that it is his sincerely held religious belief that he must participate in Jummah, and that being deprived of the ability to participate in Jummah substantially burdened his religious exercise. TAC ¶¶ 50, 52. He has also alleged that he could not access and participate in this core religious practice at the locations where Defendant Hammond held Jummah at Greene during his tenure—on the North Side and in the South Side visiting room. TAC ¶¶ 47, 52. Despite requesting access to Jummah at Greene from Defendant Hammond, he was unable to participate and missed approximately 75 services, a figure far exceeding the two or ten Jummah services missed by the plaintiffs in *Philip* and *Covington*. TAC ¶ 52; *see also Phillip*, 2014 WL 4184816, at *3; *Covington*, 2014 WL 2095159, at *4–5. Plaintiff has thus more than adequately established that the denial of access to Jummah at Greene substantially burdened his religious exercise rights under the First Amendment.

Second, Defendants assert that Plaintiff never "informed anyone that the relocation of Jummah services was unsuitable." Defs.' Mem. at 10. That is clearly rebutted by the grievances and adjudications attached as Exhibit 2 to the TAC. *See Leonard F.*, 199 F.3d at 107 (2d Cir. 1999) (holding that documents attached to a complaint may also be considered in a motion to dismiss). In any event, Defendant's assertions present a factual dispute and to the extent factual questions remain about the extent of Defendant Hammond's personal involvement, any ambiguities in the pleadings at this stage are resolved in the Plaintiff's favor and questions of fact are appropriately addressed at summary judgment or trial after the development of a fuller record. *Deangelis*, 2014 WL 216474, at *1 (citing *Chambers,* 282 F.3d at 152).

Finally, Defendants' contention that Defendant Hammond's denial of Jummah services was supported by a legitimate penological purpose, is not properly before the Court at this time. *See Covington*, 2014 WL 2095159, at *4 ("[The reasonableness of penological interests] assessment 'is a factual and context specific inquiry' that is often inappropriate to determine on a motion to dismiss." (quoting *Washington v. Gonyea,* 538 F. App'x 23, 27 (2d Cir. 2013) (summary order)).

C. <u>Defendants Gerbing and Hammond Are Not Entitled to Qualified Immunity.</u>

Defendants assert that both Superintendent Gerbing and Deputy Superintendent Hammond are entitled to qualified immunity. Defs.' Mem. at 11-13. These arguments are also without merit.

i. Legal Standard for Qualified Immunity

Qualified immunity shields government officials sued in their individual capacities whose "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" from liability for civil damages. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A right is clearly established in the Second Circuit if: (i) the law is defined

with reasonable clarity, (ii) the Supreme Court or the Second Circuit has recognized the right, and (iii) a reasonable defendant would have understood from the existing law that his conduct was unlawful. *See Monroe*, 2017 WL 6614625, at *12 (quoting *Schubert v. City of Rye*, 775 F. Supp. 2d 689, 702 (S.D.N.Y. 2011)). It is not necessary for courts to have ruled in favor of a plaintiff under the exact same factual circumstances for the right to be clearly established as long as the precedent has been articulated with sufficient clarity to have "placed the constitutional question 'beyond debate.'" *Id.* (quoting *Ganek v. Leibowitz*, 874 F.3d 73, 81 (2d Cir. 2017)).

A defendant presenting a qualified immunity defense at the motion to dismiss stage must satisfy a "stringent standard." *See McKenna*, 386 F.3d at 436. The facts supporting the qualified immunity defense must appear on the face of the complaint and the motion can only be granted when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id.* (quoting *Citibank, N.A. v. K–H Corp.*, 968 F.2d 1489, 1494 (2d Cir. 1992)). A plaintiff is entitled to all reasonable inferences from the facts alleged, including those that defeat the qualified immunity defense. *Id*. If a defendant fails to establish that conduct was "objectively reasonable" in light of clear Second Circuit precedents, qualified immunity cannot be invoked. *Monroe*, 2017 WL 6614625, at *12.

ii. Defendant Gerbing Is Not Entitled to Qualified Immunity.

Defendant Gerbing cannot invoke qualified immunity because, as this Court has already found, the right of an incarcerated person like Mr. Monroe to participate in Ramadan was clearly established in the Second Circuit at the time of the violation. *Monroe*, 2017 WL 6614625, at *12. Defendants previously advanced—and the Court rejected—the same qualified immunity argument on behalf of the Ramadan Defendants. *Id.* As the Court previously explained: "A Muslim inmate's right to participate in Ramadan fasting was clearly established at the time of the incident." *Id.*

Further, the Second Circuit has long held that a Muslim inmate has a right to a diet consistent with his religious scruples. *See Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003). At least as early as 1975, the Second Circuit established that prison officials must provide a prisoner a diet consistent with his religious scruples. *See Bass v. Coughlin*, 976 F.2d 98, 99 (2d Cir. 1992). Plaintiff has alleged that Defendant Gerbing, after learning of her staff's policy of denying Plaintiff the right to participate in Ramadan by refusing to alter his insulin schedule, nonetheless failed to change the policy or otherwise hold her staff accountable. TAC ¶ 43. Given the clarity with which the Second Circuit has established that an inmate has a right to fast during Ramadan, it was not reasonable for Defendant Gerbing to believe that her conduct was lawful.

Moreover, Defendants' argument that it was "objectively reasonable for [Gerbing] to believe that denying a grievance after Ramadan had ended did not violate Plaintiff's constitutional rights" is unavailing. Defs.' Mem. at 13. Per the adjudication itself, Defendant Gerbing's determination was not based on a belief that Ramadan was over. *See* TAC Ex. 1. She makes no reference to the timing of Ramadan but instead cites to "Islamic jurisprudence" to support her denial. *See* TAC Ex. 1; TAC ¶ 43. As this Court has held, an official cannot render an act objectively reasonable by grounding it in some kind of religious opinion—like the general citation to Islamic jurisprudence that Defendant Gerbing relied on in denying Mr. Monroe's grievance. *See Monroe*, 2017 WL 6614625, at *12 ("Moreover, Defendants cannot simply rely upon the opinion of Mahmood that Plaintiff may break his fast if his physicians determine there is a medical necessity."). Accordingly, Defendant Gerbing's qualified immunity defense must fail.

iii. Defendant Hammond Is Not Entitled to Qualified Immunity.

Defendants' qualified immunity defense for Defendant Hammond also fails. Defendant Hammond cannot invoke qualified immunity because the right of an incarcerated person like Mr.

Monroe to participate in congregational prayer was well-established in the Second Circuit at the time of the violation. In the Second Circuit, it is clearly established that "prisoners have a constitutional right to participate in congregate religious services." *Salahuddin v. Coughlin*, 993 F.2d 306, 308 (2d Cir. 1993); *see also Ford*, 352 F.3d at 597 (finding that a prisoner's right to participate in religious services is well-established). The Supreme Court has also recognized that Jummah "is commanded by the Koran and must be held every Friday after the sun reaches its zenith and before the Asr, or afternoon prayer." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987). Moreover, Defendants have already acknowledged that Plaintiff had "clearly established rights" to access Jummah. Defs.' Mem. at 13.

The allegations in the TAC establish that Defendant Hammond's actions were not "objectively reasonable" and that she is not entitled to qualified immunity. After becoming aware that Plaintiff did not have access to Jummah and recommending that Jummah be moved to an area of Greene accessible to Plaintiff, Defendant Hammond unreasonably failed to provide Plaintiff with any kind of access to Jummah for several months. TAC ¶ 52. During that time period, while Jummah remained on the North Side, Plaintiff was entirely unable to participate in Jummah. TAC ¶¶ 47, 50, 52. When Defendant Hammond belatedly moved Jummah, it was to an area on the South Side not accessible to Mr. Monroe. TAC ¶ 52. Despite Defendant Hammond's role in receiving and addressing Plaintiff's grievances related to Jummah, when he grieved that Jummah had never been convened in the South Gym, she failed to correct the issue. TAC ¶¶ 49, 52, TAC Ex. 2. Accordingly, Defendant Hammond's qualified immunity defense must fail.

D. Plaintiff Has Adequately Alleged that DOCCS Violated His Rights under the ADA and Rehab Act at Otisville, Wallkill, and Greene.

Title II of the ADA mandates 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 subjected to discrimination by any such entity." 42 U.S.C. § 12132. A plaintiff has stated a violation of the ADA if he has alleged that (i) he is a qualified individual with a disability; and (ii) he is being excluded from participation in, or being denied the benefits of some service, program, or activity by reasons of his or her disability. *See Burgess v. Goord,* No. 98-2077, 1999 WL 33458, at *6 (S.D.N.Y. Jan. 26, 1999). A private suit for money damages under Title II of the ADA that implicates a constitutional right does not need to allege that discriminatory animus underlay the mistreatment to overcome state sovereign immunity. *See Degrafinreid v. Ricks*, 417 F. Supp. 2d 403, 409 (S.D.N.Y. 2006). Where a constitutional right is not implicated, a plaintiff must establish that the Title II violation "was motivated by either discriminatory animus or ill will due to disability." *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98, 111 (2d Cir. 2001). Since Section 504 of the Rehab Act and the ADA impose near-identical requirements, courts regularly consider these claims together and apply the same analysis. *See Meekins v. City of New York, N.Y.*, 524 F. Supp. 2d 402, 407 (S.D.N.Y. 2007).

The ADA requires that covered entities like DOCCS make "reasonable accommodations" that enable disabled individuals "meaningful access" to provided services. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 282 (2d Cir. 2003). To determine whether an accommodation is reasonable under the ADA, the relevant inquiry is whether "those with disabilities are as a practical matter able to access benefits to which they are legally entitled." *Id.* at 271. Thus, government entities bear an affirmative burden to provide disabled persons with access to government services. *See Meekins*, 524 F. Supp. 2d at 407.

Defendants' one-sentence argument notwithstanding, Defs.' Mem. at 9, Plaintiff's TAC clearly states that DOCCS violated his rights under the ADA and Rehab Act at Otisville, Wallkill,

and Greene. As set forth in the TAC, Plaintiff has stated that he was a qualified individual with a disability, suffering from lumbar pain, difficulty walking, and COPD, whom DOCCS excluded from participating in specific programs at Otisville, Wallkill, and Greene because of his disability. TAC ¶¶ 20, 53, 57, 59. At Otisville, Plaintiff has alleged that DOCCS staff denied him access to his cane on the basis of a policy without any individualized consideration of his circumstances. TAC ¶ 55. The Second Circuit has held that a blanket facility policy barring a certain disability accommodation—like a uniform bar on canes—violates the ADA and Rehab Act because "it precludes DOCCS from having to make an individualized assessment of a disabled inmate's particular needs." *Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 76–77 (2d Cir. 2016). Moreover, the accommodation DOCCS afforded Plaintiff was unreasonable since the bus regularly failed to transport him to his desired destinations and deprived him of the opportunity to participate in the specific programs alleged. TAC ¶ 57. Likewise, at Wallkill, Plaintiff has stated that he was unable to use a cane on the basis of an overarching policy, thereby depriving him of meaningful access to specific Wallkill programs. TAC ¶¶ 58-59. With regard to Plaintiff's disability-related claims arising from Greene, Plaintiff's allegations that although he repeatedly filed grievances and requests for accommodation, he still missed Jummah due to his disability for the entirety of his incarceration at Greene show that DOCCS fell far short of its affirmative obligation to provide him meaningful access to its programs. TAC ¶¶ 49, 59; TAC Ex. 2. These allegations more than sufficiently establish that DOCCS violated the ADA and Rehab Act. *See Burgess,* 1999 WL 33458, at *6.

i. DOCCS' Actions Are Not Shielded by State Sovereign Immunity.

DOCCS' actions are not protected by state sovereign immunity.[2]

First, DOCCS' failure to provide Plaintiff with reasonable accommodation while incarcerated at Greene prevented him from attending Jummah congregational prayer services. Because DOCCS' actions violated Plaintiff's First Amendment free exercise rights, *see* TAC ¶¶ 73-76, state sovereign immunity does not apply. *See United States v. Georgia*, 546 U.S. 151 (2006) (holding that Title II of the ADA abrogated state sovereign immunity to create a private right of action for money damages against the state for conduct that violates the Fourteenth Amendment).

Second, state sovereign immunity does not apply even where constitutional rights are not implicated, because the allegations in the TAC that DOCCS treated Plaintiff differently from non-disabled inmates by denying him access to various programs at its facilities available to non-disabled inmates on the basis of his disability are sufficient to support a finding of discrimination under the ADA that overcomes DOCCS' immunity. *See, e.g., Allah v. Goord*, 405 F. Supp. 2d 265, 279-280 (S.D.N.Y. 2005); *Duttweiller v. Eagle Janitorial, Inc.*, No. 05-0886, 2009 WL 1606351, at *14 (N.D.N.Y. June 4, 2009), *aff'd sub nom. Duttweiller v. Upstate Bldg. Maint. Companies, Inc.*, 407 F. App'x 552 (2d Cir. 2011).

In the TAC, Plaintiff alleges that Defendant DOCCS denied Plaintiff access to his cane and failed to provide Plaintiff reasonable accommodations that allowed him access to specific programs at Otisville and Wallkill that were available to other non-disabled inmates. TAC ¶¶ 57, 58. In not providing him access to programs, DOCCS treated him differently on the basis of his

[2] New York's continued acceptance of federal funds under § 504 of the Rehab Act is a knowing waiver of sovereign immunity under that provision. *See Marsh-Godreau v. Suny Coll. at Potsdam*, No. 815-0437, 2016 WL 1049004, at *4 (N.D.N.Y. Mar. 11, 2016).

disability. TAC ¶¶ 57, 58. Such differential treatment shows animus that would support a claim for monetary damages under Title II of the ADA. *See Allah*, 405 F. Supp. 2d at 280.[3]

These allegations more than sufficiently establish that DOCCS treated Plaintiff discriminatorily in violation of the ADA. In *Allah*, the court denied DOCCS' motion to dismiss because it found that plaintiff had alleged a violation of the ADA by DOCCS, where plaintiff had stated animus against wheelchair-bound inmates because handicapped and non-handicapped inmates were treated differently. 405 F. Supp. 2d at 280. As evidence for animus, plaintiff pointed to the fact that incarcerated individuals who did not require a wheelchair for mobility were transported safely by DOCCS. *Id.* Here, as there, DOCCS treated Plaintiff differently from similarly situated, non-disabled inmates by not affording him access to its programs solely because Plaintiff was disabled. This differential treatment shows discrimination that overcomes DOCCS' claims to state immunity.

ii. Defendants' Arguments Concerning Plaintiff's ADA Claims Present Factual Disputes.

The only remaining arguments mounted by Defendants pertaining to Plaintiff's ADA and Rehab Act claims amount to nothing more than factual disputes that are not ripe for resolution at the motion to dismiss stage. Defendants' characterization of Plaintiff and DOCCS' actions at Greene are in opposition to the allegations of the complaint and present a factual dispute. Defendants contend that Plaintiff never attempted to inform DOCCS officials at Greene of his inability to access Jummah and engage in the ADA's envisioned "interactive process." Defs.' Mem. 10-11. However, as the grievances attached as Exhibit 2 of the TAC demonstrate, not only

[3] Should this Court determine that the Jummah-related violations at Greene did not implicate a constitutional right, Plaintiff alleged that he was denied access to Jummah, which was available to other, non-disabled inmates, solely because of his disability sufficient to defeat DOCCS' state sovereign immunity. TAC ¶¶ 47-53.

did Plaintiff attempt to inform DOCCS officials that his Jummah accommodation was deficient, but DOCCS officials rejected or ignored him. *See* TAC Ex. 2.

The case law that Defendants cite alongside their proposition that a supposed failure to engage in an "interactive process" requires dismissal of a properly pled ADA claim in the prison context is inapposite. Defs.' Mem. at 10-11. In fact, the authority referenced weighs against Defendants. Defendants cite to *Wright*, which held on appeal from summary judgment that when inmate or his representative submitted communication to DOCCS and DOCCS still refused to resolve the issue, the breakdown of the interactive process rested with DOCCS. *See Wright*, 831 F.3d 6 at 80. To the extent this court accepts that an interactive process is needed, a factual dispute exists as to whether Plaintiff adequately engaged in this interactive process and which party was in fact responsible for any breakdown and is better addressed at a later stage. *Wright* supports this conclusion, since it was decided by the Second Circuit after the district court had entered a ruling at the summary judgment stage. *See id.*

Along these same lines, Defendants argue that the bus pass provided at Otisville and the relocated Jummah services at Greene constituted "reasonable accommodations." Defs.' Mem. at 11. The TAC makes clear that Plaintiff firmly and unequivocally disputes that these so-called accommodations were reasonable because they were ineffectual (or untimely) and did not afford him access to the relevant programs. TAC ¶¶ 47-53; 54-59. Accordingly, Defendants have only presented factual disagreements that are properly suited for consideration at the summary judgment stage.

E. <u>The Southern District of New York Is the Proper Venue for the Jummah-Related Claims at Greene.</u>

The Southern District of New York is the proper venue for all claims in this action, including the Jummah-related claims that occurred at Greene. First, Defendant Hammond's

objection to venue is untimely under Fed. R. Civ. P. 12(h)(1)(B)(i) because she failed to raise the defense of improper venue in her first responsive pleading in this action—the Motion to Dismiss the Second Amended Complaint. (ECF No. 54). Second, the Jummah claims are properly heard in this district because all Defendants are New York state residents and the facts of the claim are closely related to other claims in the litigation. Finally, the § 1404(a) transfer factors do not favor overturning the Plaintiff's choice of forum for these claims in the Southern District.

i. Defendant Hammond's Objection to Venue Is Untimely.

Pursuant to Fed. R. Civ. P. 12(h)(1)(B)(i), a defendant waives any challenge to venue under Fed. R. Civ. P. 12(b)(3) if they fail to raise that objection in a pre-answer motion or in their first responsive pleading. *See Johnson v. Bryson*, 851 F. Supp. 2d 688, 704 (S.D.N.Y. 2012) (citing *Tri–State Emp't Servs., Inc. v. Mountbatten Sur. Co.*, 295 F.3d 256, 261 n. 2 (2d Cir. 2002)). Filing an amended complaint does not resurrect the availability of the defense of improper venue. *See id.* ("[T]he filing of an amended complaint will not revive the right to present by motion defenses that were available but were not asserted in timely fashion prior to the amendment of the pleading.") (quoting 5C Charles Alan Wright, *Federal Practice & Procedure* § 1388, at 491 (4th ed. 2009)).

Defendant Hammond already had and missed the opportunity to argue that venue in the Southern District was improper when Defendants moved to dismiss Plaintiff's Second Amended Complaint. (ECF No. 54). Defendant Hammond failed to argue in her initial motion to dismiss that venue was improper under Rule 12(h)—even as Defendants argued that it was improper for other (since removed) defendants who worked at Greene. Simply put, Defendant Hammond seeks a second bite at the apple for the venue argument even though it is well-established that an amended complaint does not revive the right to present a defense that was previously available but not timely

asserted. Any argument under Rule 12(h) that venue in the Southern District is improper for Defendant Hammond should be deemed waived.

ii. This Action Is Properly Venued in the Southern District of New York.

Even assuming Defendant Hammond has not waived the right to assert the defense of improper venue by failing to argue it in her first responsive pleading, Plaintiff has sufficiently pled that his claims arising from his incarceration at Greene are properly venued in this district. Plaintiff has alleged that venue is proper for this action pursuant to 28 U.S.C. § 1391(b)(1)(2). TAC ¶ 9. Under 28 U.S.C. § 1391(b), venue is proper, in relevant part, in any district where "any defendant resides, if all defendants are residents of the State in which the district is located" or where "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(1)(2). Importantly, "[§] 1391(b)(2) does not restrict venue to the district in which the 'most substantial' events or omissions giving rise to a claim occurred." *Marshall v. Annucci*, No. 16-8622, 2018 WL 1449522, at *10 (S.D.N.Y. Mar. 22, 2018) (quoting *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 432 (2d Cir. 2005)). For purposes of venue, defendants who are state employees are considered to reside in the district of the state facility at which they work. *See Smolen v. Brauer*, 177 F. Supp. 3d 797, 801 (W.D.N.Y. 2016).

Here, all defendants are New York state residents, since Defendants are either employees of New York state facilities or are a New York state agency. TAC ¶¶ 12-18. Otisville, where Defendants Gerbing, Goulding, Murray, and Mahmood worked, and Wallkill are located in this district. TAC ¶¶ 12-18. Accordingly, a substantial part of the events giving rise to this action occurred in the Southern District. TAC ¶ 9. While Greene is admittedly not located in this district, the crux of the claims at Greene and Otisville are nearly identical: namely, whether Defendants

were unjustified in using Plaintiff's medical conditions to deprive him of the opportunity to observe Muslim holy days, thereby substantially burdening his free exercise.

Defendants' contention that the ADA and Rehab Act claims at Greene against DOCCS are unrelated to the ADA and Rehab Act claims against DOCCS at Wallkill and Greene are likewise unpersuasive and unsupported by the TAC's allegations. The ADA and Rehab Act claims related to each facility rest on DOCCS' refusal to reasonably accommodate Mr. Monroe's physical disability that left him unable to access programs offered by DOCCS. The court's analysis in *Perez v. Hawk*, 302 F. Supp. 2d 9, 17 (E.D.N.Y. 2004) (dismissed on other grounds) is instructive here. In *Perez*, the court denied a motion to sever and transfer claims that arose in facilities in two different states (Pennsylvania and New York). *Id.* The plaintiff had alleged that he had received inadequate medical treatment for a variety of symptoms that he believed to be from the water treatment at the different facilities. *Id.* The court held that although the claims arose from two different facilities in two different states and plaintiff experienced different medical issues at each facility, the claims were so similar that the court saw "no reason to waste judicial resources" by splitting the claims. *Id.* at 17-18. Here, the core issues of the basic harm and its cause are likewise similar. And unlike the facilities in *Perez*, Greene, Otisville, and Wallkill are located in the same state and run by the same state agency. TAC ¶ 21. Based on the close relationship between the claims and Defendants implicated in all three sets of claims, venue is proper for all claims in the Southern District.

iii. The § 1404(a) Transfer Factors Strongly Support Maintaining the Claims Related to Greene in this District.

As a final argument, Defendants assert that "in the interest of justice and for the convenience of the parties and witnesses" the Court should transfer the Greene-related claims to the Northern District. Defs.' Mem. at 17. However, Defendants have utterly failed to carry their

burden, as the party seeking transfer, of establishing by clear and convincing evidence that transfer is appropriate for the claims related to Greene. *See New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 114 (2d Cir. 2010).

To the contrary, the balance of factors establishes that convenience and the interests of justice are served by maintaining the action entirely in this district. A district court must engage in a two-step inquiry to assess whether a motion to transfer should be granted. *See Sec. & Exch. Comm'n v. Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 225 (S.D.N.Y. 2015). First, the court must determine whether the action might have been brought in the transferee court. *Id.* Second, the court must evaluate several factors relating to convenience and the interests of justice: (i) the plaintiff's choice of forum; (ii) the convenience of witnesses; (iii) the location of relevant documents and relative ease of access to sources of proof; (iv) the convenience of the parties; (v) the locus of operative facts; (vi) the availability of process to compel the attendance of unwilling witnesses; and (vii) the relative means of the parties. *See Flood v. Carlson Restaurants Inc.*, 94 F. Supp. 3d 572, 576 (S.D.N.Y. 2015) (citing *New York Marine*, 599 F.3d at 112). The balancing of these factors is an equitable task at the court's discretion. *Id.* No single factor is determinative and there is no "rigid formula" for balancing the factors. *Id.* In performing this analysis, the court must "give due deference to the plaintiff's choice of forum." *Citigroup Inc. v. City Holding Co.*, 97 F.Supp.2d 549, 561 (S.D.N.Y. 2000).

Convenience and interests of justice are best-served by allowing this action to continue wholly in this district. Nothing in the TAC or the Defendants' cursory treatment of these factors in their brief is sufficient to overcome this fact. First, the plaintiff's choice of forum in this district is "entitled to significant consideration and will not be disturbed unless other factors weigh **strongly** in favor of transfer." *See Flood*, 94 F. Supp. 3d at 576 (emphasis added). Plaintiff does

not dispute that the claims relating to Greene could have been brought in the Northern District of New York ("Northern District"). But as discussed in Section E.ii, *supra*, Plaintiff selected this district as the forum for his action because the operative facts and law are tightly tethered together, with the allegations pertaining to Greene presenting similar issues of law and fact as those allegations relating to Otisville and Wallkill. This factor does not support transfer.

To transfer on the basis of the convenience of witnesses, the moving party must provide a list of probable witnesses who would be inconvenienced by litigation continuing in the current district. *See About.com, Inc. v. Aptimus, Inc.*, No. 01-2106, 2001 WL 503251, at *2 (S.D.N.Y. May 11, 2001); *see also Marshall*, 2018 WL 1449522, at *12 (failure to identify even one witness who would be inconvenienced by testifying in the Southern District was "insufficient to tip this factor."). Defendants, however, broadly reference "principal witnesses" and, like the defendants in *Marshall*, do not name a single specific witness who would be inconvenienced by continuing this case in this district. Defs.' Mem. at 16-17. Likewise, Defendants have not argued that there may be nonparty witnesses who would refuse to testify that are outside of this court's subpoena power or are not DOCCS employees.[4] *Id.* Nor is it clear from the pleadings (and Defendants have not provided) estimates of the cost to "transport, maintain, and compensate" witnesses in this district. *About.com, Inc.*, 2001 WL 503251, at *2. On the other hand, Plaintiff will likely call, among others, his current physician, who is located in this district and can speak to Plaintiff's medical conditions and history. Defendants have not established that these factors support transfer.

Nor have Defendants shown that the convenience of the parties favors transfer. It is well-established that this factor does not support transfer when transfer would simply shift

[4] If any potential non-party witnesses are DOCCS employees, they are available in any venue, including the Southern District, in which their employer is available. *Distefano v. Carozzi N. Am., Inc.*, No. 98-7137 (SJ), 2002 WL 31640476, at *3 (E.D.N.Y. Nov. 16, 2002) (quoting *Merkur v. Wyndham Int'l, Inc.*, No. 00-5843 (ILG), 2001 WL 477268 at *4 (E.D.N.Y. Mar. 30, 2001)).

inconvenience from defendant to plaintiff. *See Toy Biz, Inc. v. Centuri Corp.*, 990 F. Supp. 328, 331 (S.D.N.Y. 1998). Defendants state that (unspecified) parties "would have to travel over 100 miles to access the Southern District forum." Defs.' Mem. at 17. However, when assessing convenience for DOCCS employees, courts in this district have found that it is not overly burdensome for New York state officials to travel to New York City. *See Cancel v. Mazzuca*, No. 01-3129, 2002 WL 1891395, at *3 (S.D.N.Y. Aug. 15, 2002). This same principle applies to nearby cities like White Plains. On the other hand, transferring a part of this litigation to Northern District would greatly burden Mr. Monroe, who resides in New York City and is thus a train ride away from the courthouse in White Plains. TAC ¶ 11. In light of Plaintiff's physical disability, the long journey to the Northern District would be physically difficult, expensive, and above all, inconvenient. TAC ¶ 20. Defendants have not established that this factor supports transfer.

The relative means of the parties supports retaining the action in this district. Plaintiff is a formerly incarcerated person of limited means, whereas DOCCS is a state agency, which could compensate its employees like Defendant Hammond for any necessary travel. TAC ¶¶ 12, 21. Plaintiff would be financially burdened by paying for transportation to Northern District and accommodation for the estimated three-day duration of the trial. (ECF No. 122). Defendants have not argued to the contrary and have not established that this factor supports transfer.

Defendants' broad statement that "the relevant documents and evidence would be located in their respective facility-specific locations" is insufficient support that the location of relevant documents favors transfer. Defs.' Mem. at 17. Defendants' assertion that documents are located in "the transferee forum is entitled to little weight in the absence of a detailed showing as to the burden defendant would incur in the absence of a transfer." *NBA Properties, Inc. v. Salvino, Inc.*, No. 99-11799, 2000 WL 323257, at *8 (S.D.N.Y. Mar. 27, 2000). Moreover, modern technology

such as photocopying and faxing has largely rendered this factor neutral. *See, e.g., Bossom v. Buena Cepa Wines, LCC*, No. 11-6890, 2011 WL 6182368, at *3 (S.D.N.Y. Dec. 12, 2011). Thus, documents prepared at Greene like grievances, correspondence, or program schedules are easily portable to this district. Defendants have not established that this factor supports transfer.

Therefore, Defendants have failed to carry their burden of showing that the § 1404(a) factors strongly weigh in favor of disturbing Plaintiff's choice of forum and transferring the Greene-related claims. [5]

V. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint should be denied.

Dated: Washington, D.C.
January 14, 2019

Respectfully submitted,

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[5] To the extent this Court is inclined to agree with Defendants regarding transfer, Plaintiff respectfully requests that the Court set a separate briefing schedule to address this issue. Given the current procedural posture, the only information properly before the Court are the TAC's allegations and its supporting documentation. Plaintiff requests the opportunity to more fully address the § 1404(a) factors (and to provide evidentiary support for his arguments). He also asks that Defendants be required to provide support for the assertions in their opening brief.