UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1443

KING GRANT-DAVIS,

Plaintiff - Appellant,

v.

SOUTH CAROLINA OFFICE OF THE GOVERNOR; SOUTH CAROLINA VOCATIONAL REHABILITATION DEPARTMENT,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Patrick Michael Duffy, Senior District Judge. (2:15-cv-02521-PMD)

Submitted: September 20, 2018 Decided: October 2, 2018

Before WILKINSON and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

King Grant-Davis, Appellant Pro Se. Carmen Vaughn Ganjehsani, RICHARDSON PLOWDEN & ROBINSON, PA, Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

King Grant-Davis appeals the district court's order denying leave to amend his amended complaint and adopting the magistrate judge's recommendation and granting summary judgment to Defendants in Grant-Davis' civil action. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Grant-Davis v. S.C. Office of the Governor*, No. 2:15-cv-02521-PMD (D.S.C. Mar. 21, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

King Grant-Davis
Plaintiff
v.
South Carolina Office of the Governor, South Carolina Vocational Rehabilitation Department
Defendant

Civil Action No. 2:15-cv-02521-PMD

SUMMARY JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($__), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

other: It is ordered that the Plaintiff's objections are overruled, and that Defendants' motion for summary judgment is granted. It is further ordered that Plaintiff's motion to amend his complaint is denied.

This action was *(check one)*:
☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

decided by the Honorable Patrick Michael Duffy, Senior United States District Judge, presiding, adopting Magistrate Mary Gordon Baker's Report and Recommendation.

Date: March 21, 2018

CLERK OF COURT

s/Elena Graham
Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

King Grant-Davis, Plaintiff, v. South Carolina Office of Governor, South Carolina Vocational Rehabilitation Department, Defendants.	)	C.A. No.: 2:15-cv-2521-PMD-MGB **ORDER**

This matter is before the Court on Plaintiff King Grant-Davis' objections to United States Magistrate Judge Mary Gordon Baker's report and recommendation ("R & R") (ECF Nos. 92 & 89), and Plaintiff's motion for leave to amend his complaint (ECF No. 93). The Magistrate Judge recommends granting Defendants' motion for summary judgment. For the reasons stated herein, the Court overrules Plaintiff's objections, adopts the R & R, and grants Defendants' motion for summary judgment. The Court denies Plaintiff's motion to amend as futile.

PROCEDURAL HISTORY

The Magistrate Judge issued her R & R on January 26, 2018. Plaintiff filed his objections to the R & R on February 9, and Defendants did not reply. Plaintiff also filed his motion for leave to amend on February 9. Accordingly, this matter is now ripe for review.

STANDARD OF REVIEW

The Magistrate Judge makes only a recommendation to this Court. The R & R has no presumptive weight, and the responsibility for making a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). Parties may make written objections to the Magistrate Judge's recommendations and proposed findings within fourteen days after being

served with a copy of the R & R. 28 U.S.C. § 636(b)(1). This Court must conduct a de novo review of any portion of the R & R to which a specific objection is made, and the Court may accept, reject, or modify the Magistrate Judge's findings and recommendations in whole or in part. *Id.* Additionally, the Court may recommit the matter to the Magistrate Judge with instructions. *Id.* A party's failure to object is taken as the party's agreement with the Magistrate Judge's conclusions. *See Thomas v. Arn*, 474 U.S. 140, 151–52 (1985). Absent a timely, specific objection—or as to those portions of the R & R to which no specific objection is made—this Court "must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

DISCUSSION

Plaintiff's claims arise out of Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and 42 U.S.C. § 1983. He makes a number of objections that are irrelevant as they fail to address the critical points of the Magistrate Judge's analysis. As a result, the Court need not discuss them. The Magistrate Judge analyzed Plaintiff's claims in the order set forth above, so the Court organizes its opinion the same way.

As stated by the Magistrate Judge, claims under Title II and Section 504 are analyzed together because they are substantially similar. *See Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999). The Magistrate Judge recommends granting Defendants' motion for summary judgment as to these claims because a one-year statute of limitations applies, and Plaintiff failed to file this action within a year of the actions in question. Plaintiff objects, arguing that his individualized plan for employment under the Rehabilitation Act is in the nature of a contract and therefore South Carolina's three-year breach of contract statute of limitations applies. However,

Plaintiff does not point to any law that contradicts this Court's well-settled jurisprudence that a one-year statute of limitations applies to Title II and Section 504 causes of action. *See, e.g.*, *Cockrell v. Lexington Cty. Sch. Dist. One*, No. 3:11-cv-2042-CMC, 2011 WL 5554811 (D.S.C. Nov. 15, 2011). Plaintiff misapprehends the application of the statute of limitations, as the breach of contract statute of limitations only applies when a plaintiff brings a breach of contract cause of action. Here, the Title II and Section 504 statute of limitations applies because Plaintiff has brought those causes of action. Accordingly, the Court overrules that objection. Plaintiff also generically argues that equitable tolling should apply because Defendants never made him aware of his rights and privileges. However, Plaintiff does not point to any specific error in the Magistrate Judge's thorough analysis of the circumstances under which South Carolina law permits equitable tolling of the statute of limitations. Having independently reviewed that analysis, the Court agrees with the Magistrate Judge that Plaintiff is not entitled to equitable tolling of the statute of limitations under these circumstances.

The Court now turns to Plaintiff's claim under 42 U.S.C. § 1983. The Magistrate Judge recommends granting Defendants' motion for summary judgment as to this claim as well. Specifically, she concluded that there was "[n]o genuine issue of material fact that Plaintiff's completion of driver's education classes was not a government entitlement protected by the due process clause." (R & R, ECF No. 89, at 10.) The Magistrate Judge based her conclusion on the fact that the driving lessons were subject to the discretion of vocational rehabilitation officials, and were "therefore not 'a protected entitlement.'" (*Id.* at 12 (quoting *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.")).) She further concluded that even if the lessons were a protected entitlement, Defendants provided Plaintiff with

"a full hearing before a disinterested party." (*Id.*) Here, Plaintiff argues that he has a protected interest in his driving lessons, but he has failed to show that the vocational rehabilitation officials lack discretion as to whether Plaintiff can continue those lessons. Because the Supreme Court has clearly determined that a discretionary benefit is not a protected entitlement, the Court concludes that the Magistrate Judge correctly analyzed Plaintiff's § 1983 claim. Accordingly, the Court overrules his objection to her analysis.

Finally, the Court turns to Plaintiff's motion to amend his complaint. Plaintiff's motion is intended to address Defendants' argument that he named the improper parties for purposes of § 1983 when he named the Office of the Governor and the Vocational Rehabilitation Department as defendants. Because Plaintiff's proposed change of parties would not impact the disposition of his claims as set forth above, the Court concludes that his proposed amendments would be futile. Consequently, the Court denies his motion.

CONCLUSION

For the reasons stated herein, it is **ORDERED** that Plaintiff's objections are **OVERRULED**, that the R & R is **ADOPTED**, and that Defendants' motion for summary judgment is **GRANTED**. It is further **ORDERED** that Plaintiff's motion to amend his complaint is **DENIED**.

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

March 21, 2018
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

King Grant-Davis, PLAINTIFF, vs. South Carolina Office of Governor, South Carolina Vocational Rehabilitation Department, DEFENDANTS.	C/A No. 2:15-cv-02521-PMD-MGB **REPORT & RECOMMENDATION**

The Plaintiff, appearing *pro se*, brought this action under 42 U.S.C. § 1983 and other federal statutes on June 23, 2015. (Dkt. No. 1.) Before the court is the Defendants' Renewed Motion for Summary Judgment. (Dkt. No. 68.) All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(d), DSC. This court recommends that the Defendants' Renewed Motion for Summary Judgment (Dkt. No. 68) be granted.

Procedural History

On June 23, 2015, Plaintiff King Grant-Davis filed his original Complaint against the South Carolina Office of Governor and the South Carolina Vocational Rehabilitation Department ("VR") (Dkt. No.1) After the Defendants answered, the court issued a Scheduling Order dated November 19, 2015, outlining the deadlines for amended pleadings, discovery and dispositive motions. (Dkt. No. 19.)

With leave of the court, the Plaintiff filed an Amended Complaint on March 14, 2016. (Dkt. No. 41.) The Amended Complaint seeks one million dollars and an order from this court

allowing the Plaintiff to complete his driver's education course. (*Id.*) On May 16, 2016, Defendants moved for summary judgment on the claims asserted in Plaintiff's Amended Complaint and argued that under 29 U.S.C. § 722(c)(5)(J), the decision of VR to terminate driver training to Plaintiff was lawful and was supported by the evidence. (Dkt. No. 52.) On June 13, 2016, Plaintiff responded to Defendants' Motion for Summary Judgment arguing that he was not appealing the decision of Defendants under § 722(c)(5)(J), but rather bringing a lawsuit for violation of his alleged rights under 42 U.S.C. § 1983, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. (Dkt. No. 55.)

On January 31, 2017, the undersigned filed her Report and Recommendation recommending the denial of Defendants' motion for summary judgment without prejudice on the basis that Plaintiff's Amended Complaint could be construed to raise claims under 42 U.S.C. § 1983, the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The undersigned recommended that the motion for summary judgment should be denied without prejudice. The District Court adopted the undersigned's Report and Recommendation on February 17, 2017. (Dkt. No. 63.) The District Court's Order gave the parties sixty days to file any additional dispositive motions. (*Id.*)

The Defendants filed their Renewed Motion for Summary Judgment on April 18, 2017. (Dkt. No. 68.) The following day, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the Plaintiff was advised of the dismissal procedure and the possible consequences if he failed to adequately respond to the motion. (Dkt. No. 69.) The Plaintiff filed his Response to Renewed Motion for Summary Judgment on May 22, 2017. (Dkt. No. 72.) The Defendants filed a Reply on June 9, 2017. (Dkt. No. 83.) The Plaintiff filed a "Follow-Up Affidavit" on July, 21, 2017. (Dkt. No. 85.) The Defendants made a supplemental filing on December 1, 2017. (Dkt.

No. 86.) The Plaintiff responded to the supplemental filing on December 11, 2017. (Dkt. No. 87.)

Factual Background

The Plaintiff's claims arise from the services the Plaintiff received from VR. (Dkt. No. 41.) The Plaintiff's allegations are recited in great detail in the Amended Complaint. For the sake of brevity and because of the nature of this court's recommendation, the following is a brief synopsis of the Plaintiff's allegations. The Plaintiff alleges that he is disabled because he has "blindness and glaucoma of the left eye and myopia of the right eye, lumbar spine (back) problems, and has major mental health conditions of posttraumatic stress disorder, major depression, and anti-social disorder symptoms (none of which are violent tendencies)." (*Id.* at 3.) The Plaintiff began driver training with VR on May 10, 2011. (*Id.* at 6.) At the end of ten lessons, the Plaintiff alleges that it was recommended that the Plaintiff be allowed to take further lessons to be able to pass a driving exam. (*Id.* at 6-7.) The Plaintiff alleges that VR improperly terminated his driver training services. Notes from his counselor provide that the Plaintiff was discontinued because of safety issues with his driving, the unsuccessful results of his prior driving lessons, and his admission he was not taking his mental health medications as prescribed. (Dkt No. 43-9.) The Plaintiff alleges that he repeatedly requested VR to resume the services but they refused. (Dkt. No. 41 at 7-8.)

The Plaintiff under took an appeals process and was offered the opportunity to take six additional driving lessons. (Dkt. Nos. 44-16; 44-18.) The Plaintiff alleges that VR placed additional requirements on him to participate in the program after he was initially stopped from participating. (Dkt. No. 43 at 18-19.) On April 9, 2013, Plaintiff informed Counselor Reed that he had been arrested for shoplifting, which was in violation of the agreement the Plaintiff signed

to resume driving lessons. (Dkt. No. 44-19.) The Plaintiff pleaded no contest to the charge on April 8, 2013. (Dkt. No. 1-1.) Per the conditions agreed to by the Plaintiff, VR terminated the Plaintiff's driving lessons. (Dkt. No. 44-19.)

The Plaintiff again appealed the termination of his driving lessons. The Plaintiff was given a hearing before an impartial arbiter, who upheld VR's decision to terminate his lessons. (Dkt. No. 44-20.) The Plaintiff appealed the arbiter's decision to the Governor's office. (Dkt. No. 44-21.) The Governor's office upheld the arbiter's decision. (*Id.*)

The Plaintiff alleges that VR failed to provide the Plaintiff with a mirror prescribed by the Department of Motor Vehicles to accommodate his vision related disabilities. (*Id.* at 19.) The Plaintiff alleges that VR did not allow him to restart his driver's education specifically because of his disabilities. (*Id.*)

Standard of Review

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "Facts are 'material' when they might affect the outcome of the case, and a 'genuine issue' exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *The News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In ruling on a motion for summary judgment, "'the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor.'" *Id.* (quoting *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999)); *see also Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990).

The court "must construe *pro se* complaints liberally and liberal construction of the pleadings is particularly appropriate where, as here, there is a *pro se* complaint raising civil rights issues." *Jehovah v. Clarke*, 798 F.3d 169, 176 (4th Cir. 2015), *cert. denied,* 136 S. Ct. 1829, 194 L. Ed. 2d 834 (2016), *reh'g denied,* 136 S. Ct. 2503, 195 L. Ed. 2d 836 (2016) (internal quotation marks and citations omitted).

Analysis

This court has already broadly construed the Plaintiff's claims as being brought under 42 U.S.C § 1983, under Title II[1] of the Americans with Disabilities Act ("ADA"), and under Section 504 of the Rehabilitation Act (" Section 504").[2] (Dkt. No. 59; 63.) The Plaintiff has confirmed that these are his claims in his Response to the motion now before the court. (Dkt. No. 72.)

1. **ADA and Section 504 Claims**

Title II of the ADA and Section 504 are analogous of one another. *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999) (quoting *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264 n. 9 (4th Cir.1995)) ("Because the language of the two statutes [Title II of the ADA and Section 504 of the Rehabilitation Act] is substantially the same, we apply the same analysis to both."). A plaintiff asserting a claim under the ADA or Section 504 must prove that he (1) is a

[1] To the extent Plaintiff makes a claim under Title I of the ADA for employment discrimination, the Plaintiff did not exhaust his administrative remedies before the EEOC. *Sydnor v. Fairfax Cty., Va.*, 681 F.3d 591, 593 (4th Cir. 2012) (Title I of the ADA requires "that a plaintiff must exhaust his administrative remedies by filing a charge with the EEOC before pursuing a suit in federal court."). The Plaintiff never filed a charge with the EEOC.

[2] The Defendants have again moved for summary judgment "out of an abundance of caution" on an appeal brought under Title I of the Rehabilitation Act, 29 U.S.C. § 722(c)(5)(j), "which allows an aggrieved party to seek judicial review in a matter involving eligibility for vocational rehabilitation and the development of an individualized plan for employment." *Starkey v. Missouri Dep't of Elementary & Secondary Educ.*, No. 4:16-cv- 93-DDN, 2017 WL 118224, at *1 (E.D. Mo. Jan. 12, 2017). (Dkt. No. 68.) The Plaintiff again confirms in his Response that he is not bringing any such action. (Dkt. No. 72 at 1-2.) Therefore, the undersigned does not address the Defendant's argument because it is moot.

qualified individual with a disability, (2) is otherwise qualified for the benefit of programs, services or activities in question, and (3) was excluded from the same due to discrimination on account of that disability. *McIntyre v. Robinson*, 126 F.Supp.2d 394, 407–08 (D. Md.2000) (citing *Doe*, 50 F.3d at 1265).

Neither the ADA nor Section 504 contains a statute of limitations, and courts in this district have long held that a one year statute of limitations applies to both statutes.[3] *Cockrell v. Lexington Cty. Sch. Dist. One*, No. 3:11-cv-2042-CMC, 2011 WL 5554811 (D.S.C. Nov. 15, 2011); *Finch v. McCormick Corr. Inst.*, No. 4:11-cv-0858-JMC-TER, 2012 WL 2871665, at *2 (D.S.C. June 15, 2012), *report and recommendation adopted,* No. 4:11-cv-858-JMC, 2012 WL 2871746 (D.S.C. July 12, 2012); *Milford v. Middleton et al.*, No. 2:16-cv-2441-RMG, 2018 WL 348059, at *4 (D.S.C. Jan. 10, 2018). The Plaintiff concedes that a one year statute of limitations applies to his ADA and Section 504 claims. (Dkt. No. 17 at 12.) The Plaintiff argues that S.C. Code § 15-3-60 extends the statute of limitations for a person with two or more disabilities that coexist at the time a right of action accrues. (*Id.* at 12-13.)

South Carolina Code § 15-3-60 states, "When two or more disabilities shall coexist at the time the right of action accrues the limitation shall not attach until they all be removed." South Carolina Code Section 15-3-40 identifies the disabilities that may toll the statute limitations as being (1) under the age of 18 or (2) "insane." *See Davis v. Citimortgage, Inc.*, No. 0:15-cv-04643-MGL, 2016 WL 4040084, at *3 (D.S.C. July 28, 2016), *appeal dismissed* 16-1939 (4th Cir. Oct. 17, 2016).

The Plaintiff was born on February 13, 1952. (Dkt. No. 52-1.) Therefore, the Plaintiff was not under the age of eighteen at any time relevant to this action. The Plaintiff alleges that he

[3] When a federal statute contains no limitations period, Congress has directed courts to borrow the most appropriate state statute of limitations to apply to the federal claim. 42 U.S.C. § 1988.

suffers from "blindness and glaucoma of the left eye and myopia of the right eye, lumbar spine (back) problems, and had mental health conditions of posttraumatic stress disorder, major depression, and anti-social disorder sym[p]toms (none of which are violent tendencies)." (Dkt. No. 1 at 3.) Physical disabilities do not toll the statute of limitations under South Carolina law. *Wiggins*, 314 S.C. at 129, 442 S.E.2d at 171. The Supreme Court of South Carolina has held that:

> Insanity or mental incompetency that tolls the statute of limitations consists of a mental condition which precludes understanding the nature or effects of one's acts, an incapacity to manage one's affairs, an inability to understand or protect one's rights, because of an over-all inability to function in society, or the mental condition is such as to require care in a hospital.

Wiggins, 314 S.C. at 129, 442 S.E.2d at 170 (quoting 54 C.J.S. *Limitations of Actions* § 117 at 159–169). The Plaintiff has failed to provide any evidence that his PTSD, depression, and anti-social symptoms resulted in "an over-all inability to function in society" or required hospitalization.

Indeed, the record shows that the Plaintiff was actively engaging in society at the time this action accrued. The record shows that on December 31, 2013, following the Plaintiff's termination from driving classes, the Plaintiff wrote a lengthy and cogent letter to Barbara Hollis, the Commissioner of VR, requesting she reconsider terminating the Plaintiff from the program. (Dkt. No. 72-2 at 8-12.) Commissioner Hollis denied the Plaintiff's request on January 16, 2014. (Dkt. No. 72-2 at 13.) The denial of reconsideration prompted the Plaintiff to file a discrimination complaint with the Department of Education Office of Civil Rights on March 6, 2014. (Dkt. No. 72-2 at 14-25.) The discrimination complaint is thorough and contains multiple pages of coherent and articulate narrative concerning the Plaintiff's interactions with VR. (*Id.*)

In a letter dated March 14, 2014, the Department of Education informed the Plaintiff that they would not investigate the allegations in his discrimination complaint because it was not timely filed. (Dkt. No. 72-2 at 26-27.) The Plaintiff wrote a letter to the director of the enforcement office for the Department of Education on April 8, 2014 requesting reconsideration of the conclusion stated in the March 14, 2014 letter. (Dkt. No. 72-2 at 28-29.) The two page letter is logically organized and clearly puts forth the Plaintiff's reasons for reconsideration. (*Id.*) In a letter dated May 27, 2014, the director of the Washington DC Regional Office of the Office for Civil Rights of the Department of Education wrote the Plaintiff a letter stating the Department was not going to change its determination and that the Plaintiff had exhausted his administrative remedies. The Plaintiff filed this suit over a year later on June 23, 2015. (Dkt. No.1 .)

There is no record that the Plaintiff was ever hospitalized for his mental conditions during the events that led up to this lawsuit. At the time the Plaintiff's right to action accrued, the Plaintiff was reasonably and cogently pursuing his administrative remedies within VR and the Department of Education. There is no evidence that the Plaintiff was under the age of 18 or legally insane during this time to toll the statute of limitations. Therefore, this court concludes that the Plaintiff's ADA and Section 504 claims are barred by the statute of limitation, and this court recommends that Defendants' Motion be granted.[4]

[4] Assuming *arguendo* that the Plaintiff's ADA and Section 504 claims are not barred by the statute of limitations, the Plaintiff has failed to show the third required element of his claims, that he "was excluded from the same due to discrimination on account of that disability." *McIntyre v. Robinson*, 126 F.Supp.2d 394, 407–08 (D.Md.2000). The record is uncontroverted that the Plaintiff was allowed to participate in the driver education program, but was discontinued because of his failure to progress in his training and his criminal activity. (Dkt. Nos. 43-7, 43-23, 43-24, 44.) Indeed the record reflects the Plaintiff was even given a second chance in the driver education program after being discontinued once because of his lack of progress in the program. (Dkt. Nos. 43, 44.)

2. 42 U.S.C § 1983 Claims

In order to state a claim pursuant to 42 U.S.C. § 1983, a plaintiff must allege (1) that he or she "has been deprived of a right, privilege or immunity secured by the Constitution or laws of the United States," and (2) "that the conduct complained of was committed by a person acting under color of state law." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 658 (4th Cir. 1998) (citing 42 U.S.C. § 1983); *see also Gomez v. Toledo*, 446 U.S. 635, 540 (1983); *Hall v. Quillen*, 631 F.2d 1154, 1155-56 (4th Cir. 1980). In a § 1983 action, "liability is personal, based upon each defendant's own constitutional violations." *Trulock v. Freeh*, 275 F.3d 391, 402 (4th Cir. 2001).

State agencies are not "persons" amenable to suit under § 1983 for monetary damages. *Manning v. S.C. Dep't of Highway & Pub. Transp.*, 914 F.2d 44, 48 (4th Cir. 1990) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989)); *Brown v. Doe*, No. 4:12-cv-00927-TLW, 2015 WL 1297917, at *9 (D.S.C. Mar. 23, 2015) ("[S]tates and state agencies are not 'persons' as defined by 42 U.S.C. § 1983."). Similarly, state officials and their offices sued in their official capacity for monetary damages are not "persons" under § 1983. *DeJesus-Brito v. Spartanburg Cty. Det. Facility*, No. 5:17-cv-01472-RBH-KDW, 2017 WL 4011133, at *2 (D.S.C. Aug. 7, 2017), *report and recommendation adopted*, No. 5:17-cv-01472-RBH-KDW, 2017 WL 3980712 (D.S.C. Sept. 11, 2017) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)). Neither of the Defendants are "persons" under § 1983 for claims seeking monetary damages.

The only non-monetary relief sought by the Plaintiff is to "compel South Carolina Vocational Rehabilitation Department to provide the Plaintiff with completed drivers education

and certificate without delay."[5] (Dkt. No. 41. at 21.) The Plaintiff argues that his "substantive due process rights" were violated because an agreement he signed with VR created a "protected liberty and property interest" in the driving classes. (Dkt. No. 72 at 15-17.)

The Fourteenth Amendment's Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "For a due process challenge ... to succeed, the general rule is that the action must have been 'intended to injure in some way unjustifiable by any government interest.'" *Waybright v. Frederick County*, 528 F.3d 199, 205 (2008) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)). Every government "benefit" is not protected by the Due Process Clause. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005). "'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" *Id.* (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 1972)). The Supreme Court has held that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Id.* (citation omitted).

No genuine issue of material fact exists that the Plaintiff's completion of driver's education classes was not a government entitlement protected by the due process clause. After receiving a driver's permit, the Plaintiff took ten two-hour driving lessons through VR between May 10, 2011 and November 22, 2011. (Dkt. Nos. 44-5, 43-5.) The Plaintiff's total driving instruction, 20 hours, doubled the total amount normally allowed by VR. (Dkt. No. 43-6.) Following the lessons, the driving school produced a report that the Plaintiff was having difficulty carrying over knowledge from one session to the next, was having difficulty with

[5] The Plaintiff does not seek any non-monetary damages against the South Carolina Office of Governor. (Dkt. No. 41 at 21 of 21.)

perception, focusing, and staying calm, and overall was not progressing in the lessons. (Dkt. No.43-7.) The driving instructor, who had been teaching a fulltime driving instructor for over twenty years, noted an array of difficulties Plaintiff faced during his driving lessons, including (1) his failure to stay in the center of the lane – moving too close to the right then too close to the left; (2) speed control – driving too fast and then too slow; and (3) failure to completely stop at stop signs. (*Id.*) Despite these concerns, the Plaintiff was given another two hour driving assessment. (Dkt. No. 43-8.)

On March 23, 2012, the Plaintiff's counselor spoke with him about additional driving lessons. (Dkt No. 43-9.) The Plaintiff's counselor did not allow the Plaintiff to take more driving lessons based on the safety issues, unsuccessful results of his prior driving lessons, and his admission that he was not taking his mental health medications as prescribed. (*Id.*) The Plaintiff became angered by this result. (*Id.*)

VR's Client Assistance Program ("CAP") opened a file to review the Plaintiff's request for additional driving lessons. (Dkt. No. 44-10.) On April 2, 2012, CAP director Marjorie Butler and Rachel Richardson, VR client relations specialist, spoke with the driving school, which indicated that Plaintiff did not progress in the driving lessons and still had not advanced to interstate driving. (Dkt. Nos. 43-10, 44-11.) The driving school also advised Butler and Richardson that most employers require a clean five (5) year driving record prior to employment.[6] (*Id.*) The Plaintiff was denied the opportunity to take more driving lessons. (Dkt. No. 43-12.)

The Plaintiff then requested an administrative hearing to address the denial of driving lessons. (Dkt. No. 43-13.) On July 9, 2012, Freda King, VR Director of Community and Client Relations, wrote a letter to Plaintiff outlining the requirements Plaintiff would need to fulfill in

[6] The Plaintiff appears to have acquired his driving permit in early 2011. (Dkt. No. 43-4.)

order to receive additional driving training. (Dkt. No. 43-14.) One of the requirements that was the Plaintiff refrain from criminal activities. (*Id.*) The Plaintiff agreed to the conditions and was told he would receive six more driving lessons. (Dkt. Nos. 44-16; 44-18.) On April 9, 2013, Plaintiff informed Counselor Reed that he had been arrested for shoplifting since the execution of the July 9 agreement to resume driving lessons. (Dkt. No. 44-19.) The Plaintiff pleaded no contest to the charge on April 8, 2013. (Dkt. No. 1-1.) Per the conditions agreed to by the Plaintiff, VR terminated the Plaintiff's driving lessons. (Dkt. No. 44-19.)

At Plaintiff's request, a hearing took place on July 17, 2013, at VR's offices in North Charleston, South Carolina before Dr. David Staten, Program Director and Professor of Rehabilitation Counseling at South Carolina State University, who served as the "Impartial Hearing Officer." (Dkt. No. 44-20.) The Plaintiff was present at the hearing and testified. (*Id.*) Dr. David Staten concluded that VR had "done all that [was] reasonably possible" and that "no amount" of driving lessons would serve the Plaintiff's benefit. (*Id.*) The Plaintiff appealed Dr. Staten's decision to Michelle Dhunjishah, a reviewing official in the Governor's office. (Dkt. No. 44-21.) Ms. Dhunjishah reviewed the entire record and upheld Dr. Staten's decision. (*Id.*)

While the Plaintiff may not agree with the decision to discontinue his driving lessons, he has failed put forth any evidence that he had any liberty interest or property interest in the lessons. The lessons were a benefit provided at the discretion of VR officials and therefore not a" protected entitlement." *Town of Castle Rock, Colo.*, 545 U.S. at 756. To the extent he had any protected interest in the lessons, the Defendants afforded the Plaintiff a full hearing before a disinterested party. There is no evidence that that the Defendants violated the Plaintiff's right to substantive due process. Therefore, this court recommends that the Defendants' Motion be granted.

Conclusion

Based on the forgoing, this court RECOMMENDS that Defendants' Renewed Motion for Summary Judgment (Dkt. No. 68) be GRANTED.

IT IS SO RECOMMENDED.

January 26, 2018

Charleston, South Carolina

MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).