

I. PROCEDURAL BACKGROUND

Of the original five Plaintiffs, four remain in the case: Alfonzo Faheem Madison, Brian Basil White, Muhammad Michael Collier, and Desmond Jahid McDougald.² The fifth, Jeremiah Talib Cottle, voluntarily dismissed the suit. All of the Plaintiffs were prisoners who were incarcerated in the State Correctional Institution ("SCI") at Frackville ("Frackville") at the time the suit was filed.³ Only Collier and McDougald remain at Frackville, the others having been transferred to other institutions.⁴ Four of the Defendants have been dismissed, including Adeb F. Rasheed, the outside religious leader who coordinates Muslim observance at Frackville. The remaining eight Defendants are Martin F. Horn, Commissioner of the Pennsylvania Department of Corrections ("DOC"), and seven DOC employees at Frackville: Joseph W. Chesney, Superintendent of Frackville; Robert D. Shannon, Deputy Superintendent; David J. Searfoss,

²While the submissions spell this Plaintiff's name "McDouglad," in his deposition, he stated that it was spelled "McDougald", and the Court will spell it as he spells it. (Defts.' Mot. Summ. J. Ex. ("Ex.") VII at 22.)

³Plaintiffs originally wanted to bring this suit on behalf of all Muslims at Frackville; however, despite their being notified that they would have to file a Motion for Class Certification, they failed to do so. The case therefore deals only with claims personal to these Plaintiffs.

⁴Former Plaintiff Cottle was transferred to SCI Graterford where he could receive kidney dialysis; Plaintiff Madison was transferred to SCI Huntingdon; Plaintiff White was transferred to SCI Coal Township, then to SCI Retreat, and then to SCI Pittsburgh. For them, the claims for injunctive relief with respect to the policies and practices at Frackville is moot.

Inmate Program Manager; Dennis P. Durant, Intelligence Captain; Lieutenant James J. Popson; Corrections Officer Dean S. Harner; and Lieutenant David J. Novitsky, who was added in Amended Complaints.

Plaintiffs are Orthodox Muslims who claim Defendants have violated their constitutional rights primarily by various policies and practices that impinge on their free exercise of religion, but they also allege infringement of other rights. They bring this action pursuant to 42 U.S.C.A. § 1983 (West Supp. 1998), alleging violations of the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. In addition, they allege violation of the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb-2000bb-4 (West 1994), and unspecified state laws. They seek declaratory and injunctive relief, compensatory and punitive damages.

Plaintiffs joined to file the original Complaint; thereafter Madison and White, who were transferred to other SCIs, filed separate Amended Complaints, and White filed a response to Defendants' Motion for Summary Judgment but Madison did not. Collier and McDougald, who remained at Frackville, filed a joint Amended Complaint and a joint Cross-Motion for Summary Judgment.⁵

⁵Both Collier and McDougald signed their Amended Complaint. Only Collier signed the Cross-Motion for Summary Judgment, but it states that both were filing the Motion.

II. ALLEGATIONS AND EVIDENTIARY SUPPORT

A. Factual Background

Frackville recognizes Orthodox Islam as a religion at the prison. Jumah⁶ services, which are mandatory for Orthodox Muslims, are held every Friday afternoon in the prison chapel, and as many as 120 inmates may attend them. Taleem classes are held on Fridays, immediately after Jumah, and other study classes are held on Mondays and Thursdays, when outside religious leaders are available to conduct them. There is a single chapel which is used by all religious groups at the prison. In it are some Christian symbols, the majority of which may be removed or turned or covered while other groups are using the chapel. During the month of Ramadam, Orthodox Muslims fast from sunrise to sunset. Inmates may fast during Ramadan if they have medical clearance to do so. They are also allowed to celebrate two feasts each year. Orthodox Muslims do not eat pork, and when pork is offered at Frackville, a substitute protein such as beans is also offered.

Three Imams now serve as outside religious advisors.⁷ Imam Adeeb F. Rasheed is an employee of the Department of Corrections. He works two days a week at Frackville, Mondays and Thursdays, and conducts Islamic study classes; the rest of the

⁶The Court uses the spelling of Islamic terms given in Imam Rasheed's declaration. (Ex. XIV.)

⁷This was as of the time Defendants' Motion for Summary Judgment was filed. As discussed below, a different policy was in effect at the time the suit was instituted.

time he is at SCI Camp Hill. The other two Imams are employees of a Masjid (mosque) in Harrisburg with which the DOC has a contract. They alternate in conducting Friday Jumah and Taleem, if they are available. All outside religious leaders are approved by prison authorities. In addition to their outside leaders, the Muslims at Frackville have inmate leaders, or Amirs, who also must be approved by prison authorities.⁸

In early May, 1997, Plaintiffs Madison and White were placed in administrative custody in the Restricted Housing Unit ("RHU") at Frackville and then were transferred to other prisons. Defendants claim they were placed there because they, along with certain other inmates, had planned to take over the religious leadership of the prison. Madison and White claimed they were being retaliated against for filing this suit.

The Court will next present Plaintiffs' allegations as they appear in the Complaint and Amended Complaints; where Defendants deny the allegations, it will note Plaintiffs' evidentiary support or its absence and Defendants' evidentiary support, where appropriate. In addition, the Court will note where there is evidence that prison authorities have responded and addressed a problem of which Plaintiffs complained.

⁸There are currently two such leaders at Frackville, inmates Lamont Campfield and Damian Jones. Plaintiffs have expressed dissatisfaction with Campfield as an Amir. White is the only one of the Plaintiffs who ever submitted his name for consideration as an inmate Amir. Imam Rasheed recommended him for the position, but the Frackville administration disapproved him.

B. Religious Services, Classes and Leaders

The Complaint alleges that Plaintiffs are not allowed to conduct Jumah without the presence of a religious coordinator from outside the prison. Defendants acknowledge the policy, which began January 1, 1996, and was in effect when the suit was filed. (Ex. XIII-A; Ex. XI at 26, 75.) Since then, however, Defendants have instituted a new policy to provide regular religious services when outside religious coordinators are absent. In those circumstances, inmate religious leaders may now lead the services, but only in the presence of an institutional chaplain. (Ex. XI at 29-32, 34-38, 72, 77; Ex. XII at ¶ 2; Ex. XIII at ¶ 7; Ex. XIII-A.) The policy of which Plaintiffs complain also prohibits inmates from conducting study classes in the absence of an outside religious leader, but there is no alternative arrangement for use of an institutional chaplain when their outside leader is unavailable. Imam Rasheed testified that the classes, unlike Jumah, are not required for Orthodox Muslims. (Ex. XIV at ¶ 4.)

Plaintiffs complain that they are not allowed to choose their outside religious coordinators or inmate leaders without the involvement or approval of the DOC or Frackville officials. Defendants acknowledge this policy. Plaintiffs allege that their outside religious leader, Imam Rasheed, does not adequately meet their needs. Since the Complaint was filed, two additional outside Imams have come to conduct Jumah at Frackville on

alternate Fridays. (Ex. XIV at ¶ 11; Ex. VI at 57-58; Ex. IX at 46.) Plaintiffs' claim was not that Imam Rasheed was unqualified or that he deviated from the faith, but rather that, because he was from the Middle East, he did not understand the plight of African American Muslims and therefore was not a good spokesman for them; they thought he was not active enough in explaining their religious needs to the prison administration. (Ex. VI at 28-30; Ex. IX at 98, 109.)

Plaintiffs allege that they are not afforded spiritual guidance while in solitary confinement. In his deposition, former Plaintiff Cottle acknowledged that Imam Rasheed had been to see him when he was in solitary confinement, but he claimed that the spiritual guidance was not adequate. He went on to say that Imam Rasheed had started coming more often since the Complaint had been filed and that one of the other Imams was also coming to see him, but that they were not allowed to bring Islamic literature to him in solitary confinement. (Ex. VIII at 97.) Plaintiff Madison complained that he was not afforded spiritual guidance when he was placed in the Restricted Housing Unit. Imam Rasheed testified that he was not allowed to see Madison at first for security reasons, that he went to see Madison once when he was allowed to do so, and that Madison did not request to see him again. (Ex. XIV at ¶ 10.)

Plaintiffs complain that, while they are allowed to attend Jumah without signing up in advance, they are not allowed to attend Taleem, which follows Jumah, or the Monday or Thursday

study classes without signing an institutional call sheet in advance. No inmate is allowed to be a teacher in the scheduled classes unless approved by Defendants, even when an outside religious coordinator is present. In addition, Plaintiffs state that they cannot hold unscheduled services or any prayer or study groups on their cellblocks or in the exercise yard or their places of work within the prison. Former Plaintiff Cottle testified that Christians were allowed to meet in study groups, but Muslims were not. (Ex. VII at 69, 71.) Defendants admit to all these policies except that of allowing Christians to hold study groups of a kind that are denied to Plaintiffs. Defendant Durant stated that the Christian Bible discussion group differed from Muslim study groups in that it had no organized leader. He also stated that no "organized, demonstrative prayer" was allowed in the yard. (Docs. and Affidavits in Supp. Pls.' Mot. Summ. J., Interrog. #5 to Durant & answer.)

Plaintiffs claim that civil groups are allowed to choose their own leaders, whereas they are not. Defendants admit that the policies for civil and religious groups are different.

Imam Rasheed, who holds a B.A. in Islamic studies, testified that there is no central or mandatory requirement of the Islamic faith which is not provided to the inmates at Frackville. (Ex. XIV at ¶¶ 1, 3.) Plaintiffs have presented no testimony to the contrary by any qualified religious leader.

C. The Chapel

Plaintiffs object that the chapel, which they share with other religious groups, is too small for their feasts and Plaintiff Madison stated that it was too small even for Jumah. (Ex. at 47-48.) Plaintiffs offer no objective evidence that the chapel is too small for services or feasts, only their subjective feeling that it is crowded.⁹

Plaintiffs would like to use the gym for their feasts. On one occasion, they were refused use of the gym when another group had already been scheduled to use it, but they were allowed to use it on another occasion for their post-Ramadan feast after this suit was filed. (Id.; Ex. VI at 76-77; Ex. VII at 71; Ex. XIII at ¶ 7.)

⁹Robert D. Shannon, Deputy Superintendent for Facilities Management at Frackville, testified that the chapel was 1536 square feet in size. (Ex. XIV at ¶ 6.) He stated that "[u]nder the law, 7 square feet is required to accommodate each person," and he calculated that the chapel therefore can accommodate up to 219 people at one time. (Id.) (Imam Rasheed estimates that the number of active Orthodox Muslims at Frackville is 110-120. (Ex. XIV at ¶ 11.)) Shannon derives his figures from a section of the Pennsylvania Code which gives a "square foot per person" figure for various types of spaces. All-purpose rooms require 10 square feet per person, dining areas require 15 square feet, and "dance halls, lodge halls and similar occupancies" require 7 square feet. No figure is given for a chapel. 34 Pa. Code § 50:23. The figures are not, in fact, absolute occupancy restrictions. Instead, the table lists "the maximum permissible square feet per person for the purpose of determining the minimum number of units of exit." Id. The figures are thus to be used in determining the number of fire exits one needs from a particular enclosed space, and that number varies depending not only on the use of the space, but also on the width of the exits and on whether there is an automatic sprinkling system. Id. The table is therefore not useful in determining whether the space in the chapel is large enough to accommodate reasonably those who attend services or feasts there.

Plaintiffs also object that there are idols and symbols of other religions on the walls of the chapel. Most of them are in the form of removable banners or can be covered; however Plaintiffs did not consider that adequate. (Ex. VII at 66-69; Ex. VIII at 55-57; Ex. IX at 49; Ex. X at 116.)

D. Dietary and Other Concerns

Plaintiffs allege that they are not allowed to observe and participate in Ramadan, the month-long holy period during which they fast between sunrise and sunset, unless approved by the medical department. Defendants acknowledge this policy. Plaintiffs complain about the food offered them throughout the year, and allege that they are not given adequate substitutes when pork is served. They also complain that the food they are given during Ramadan is insufficient. Plaintiffs have offered no objective evidence that the food is inadequate in nutrition or quantity. They acknowledge that beans are offered as a substitute when pork is served, but they wish to have other meats or cheese when pork is served. (Ex. VIII at 92-93; Ex. IX at 79.) Imam Rasheed stated that the food served at Frackville complies with the requirements of the Islamic faith 99% of the time. (Ex. XIV at ¶ 5.)

Plaintiffs further complain that their food is prepared by non-Muslims who handle pork and pork products, which Defendants do not contest. They also complain that some of the kitchen workers engage in homosexual activities and fail to

observe proper hygiene. Plaintiffs object to being required to eat in the dining room, where pork and pork products are served. They allege that they are not allowed to help prepare the special meals that they buy to be served at Islamic feasts. Defendants do not contest these allegations, except that they deny any knowledge of homosexuals in the kitchen or their unhygienic practices. Defendant Searfoss testified that only those inmates with appropriate medical and security clearance can prepare food. (Ex. XIII at ¶ 3.) He further testified that Frackville's Food Service Manager strives to use his Muslim food workers to prepare the food for the feasts and he allows Muslims who are not food workers to serve the food at the feasts. (Id.)

Plaintiffs allege that the commissary does not make available sufficient non-pork food and hygiene products for them to purchase. They further complain that they are allowed to purchase only two Kuffi (prayer caps) per year and are not permitted to purchase Jalibiyas (Islamic clothing) for prayer services. Nor are they allowed to purchase or have on their persons Muslim oils or incense. Defendants do not contest these allegations. In his deposition, Plaintiff McDougald complained that the small bar of soap they were issued each week was not sufficient for them to wash before prayer five times a day. Imam Rasheed testified that Muslims were require to make "ablutions"

before prayer, but Plaintiffs presented no evidence that soap must be used.¹⁰ (Interrog. #2 to Rasheed & Ans.)

Plaintiffs allege that they are no longer allowed to hold monthly fund raisers for the Muslim community. Defendants admit that a policy to this effect is now in place and state that it applies to all state correctional institutions and to all groups at Frackville. (Ex. VI at 37; Ex. IX at 55; Ex. XII at ¶ 2.)

Plaintiffs allege that the money they have raised from fundraisers for use of the Muslim community in the prison has been misused. They state that Defendants assured Plaintiffs that all the food for their Muslim feast would be purchased from outside vendors, but it was not. Defendant do to contest that the food was purchased from institutional vendors. Defendants have a new policy that all food for feasts must be bought from state vendors and prepared at the prison. (Ex. IX at 106-08.)

¹⁰The Encyclopaedia Britannica states the following under the entry "ablution":

in religion, a prescribed washing of part or all of the body or of possessions, such as clothing or ceremonial objects, with the intent of purification. Water, or water with salt or some other traditional ingredient is most commonly used, . . .

. . . Muslim piety requires that the devout wash their hands, feet, and face before each of the five daily prayers; the use of sand is permitted where water is unavailable.

I The New Encyclopaedia Britannica 34 (15th ed. 1994).

Plaintiffs complain that are not allowed to keep records of their proposals or submit their own proposals to the administration, which Defendants deny.

E. Conduct of Corrections Officers

Plaintiffs allege that corrections officers have been making too much noise outside the chapel during their services and study groups, especially during the holy month of Ramadan. Defendants testified that chapel doors are kept open during all services and study sessions so the corrections officer posted outside can observe what those inside are doing. They further acknowledged that corrections officers are required to keep their radios on and that the volume must be loud enough for them to hear the radios, which they wear at hip level. (Ex. XII at ¶ 4; Ex. XVII at ¶ 4; Ex. XVII-C.)

Plaintiffs Collier and McDougald allege that if they are engaged in prayer during the time scheduled for inmates to take showers, they sometimes have to miss their showers. Defendants do not contest this.

More generally, Plaintiffs claim that they are subjected to harassment in the form of frequent cell and body searches, discriminated against, and labeled as trouble makers because of their religious beliefs. They further allege that staff members make jokes about their beliefs. Defendants deny any harassment or excessive searches. They note that both Madison and McDougald were found with shanks (sharp weapons) and

Madison was seen "flying colors" (displaying handkerchiefs of gang colors), both which led to additional searches. (Ex. VIII at 38-9, 46-50, Ex. IX at 74-76, 86, Ex. XVI at ¶ 4.)

F. Retaliation and Access to Courts

In Amended Complaints, Plaintiffs Madison and White allege that they were subjected to retaliation for filing this law suit. Plaintiff Madison alleges that, in May, 1997, Defendants Durant, Novitsky, and Shannon allegedly caused him to be brought to the office for questioning about why he filed this law suit and Defendant Novitsky told him he was not going to get away with it. Thereafter Madison was placed in administrative custody until he was transferred to another prison. When Madison had a court appearance in Philadelphia in May, 1997, he asked for his legal materials to take with him, but alleges he was denied them and that, in addition, he was not allowed to make a "legal call." Madison further alleges he was denied the right to seek spiritual advice from Defendant Rasheed while he was in administrative custody in retaliation for his filing this suit. He claims he was falsely accused of being a major participant in an inmate attempt at a take-over simply in retaliation for trying to establish his religious rights.

Plaintiff White also alleges retaliation in his Amended Complaint. All but one of the Defendants he names are at institutions in the Middle District of Pennsylvania, and the case against them will be transferred to that district pursuant to 28

U.S.C.A. § 1404(a) (West 1993). White has made some allegations of retaliation concerning Defendant Novitsky at Frackville, and they will be considered here. He claims he was both put in the Restricted Housing Unit at Frackville by Novitsky and was transferred from Frackville in retaliation for filing this law suit.

Defendants deny all allegations of retaliation, stating that their concern about a plot to overthrow the existing Muslim leadership was genuine and based on information from confidential informants. They state that Madison and White were placed in administrative custody and transferred to other institutions for security reasons. In addition, Defendant Novitsky stated that he did not know about this law suit at the time Madison and White were transferred. (Ex. XVI at ¶ 2.)

III. LEGAL STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A factual dispute is "material" if it might affect the outcome of the case. Id.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, "the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). That is, summary judgment is appropriate if the nonmoving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. at 322, 106 S. Ct. at 2552. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S. Ct. at 2513 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

In a claim arising under 42 U.S.C.A. § 1983, a plaintiff must show (1) that the conduct of which he complains was committed by a person acting under color of state law and (2)

that the conduct deprived Plaintiff of "rights, privileges, or immunities secured by the Constitution or laws of the United States." 42 U.S.C.A. § 1983; Parratt v. Taylor, 451 U.S. 527, 535, 108 S. Ct. 1908, 1912 (1982)

Finally, pro se plaintiffs are allowed greater leeway and are held to less stringent standards in their submissions than are plaintiffs who are represented. See Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 596 (1972).

IV. DISCUSSION

A. First Amendment - Free Exercise of Religion

1. Legal Framework

As the Supreme Court stated in Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861 (1979), "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." Id. at 545, 99 S. Ct. at 1877. However, "simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. . . . The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights." Id. at 545-546, 99 S. Ct. at 1877-78.

"[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." O'Lone v. Estate of Shabazz, 482 U.S. 342, 349, 107 S. Ct. 2400, 2404

(1987) (quoting Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261 (1987)). The Supreme Court formulated a four-factor test for evaluating the validity of prison regulations in Turner v. Safley, 482 U.S. at 89-90, 107 S. Ct. at 2262. The United States Court of Appeals for the Third Circuit ("Third Circuit") recently summarized the Turner test in Johnson v. Horn, ___ F.3d ___, No. 97-3581, 97-3582, 1998 WL 420291 (3d Cir. July 28, 1998). In determining the reasonableness of the regulation, a court considers

(1) whether there is a rational connection between the regulation and the penological interest asserted; (2) whether inmates have an alternative means of exercising their rights; (3) what impact accommodation of the right will have on guards, other inmates and the allocation of [p]rison resources, and (4) whether alternative methods for accommodation exist at de minimis cost to the penological interest asserted.

Johnson v. Horn, 1998 WL 420291 at *4.

In considering a free exercise of religion claim, the Court need not perform this analysis with respect to every interference alleged, no matter how small or incidental to the practice of Plaintiffs' religion.

In order to establish a First Amendment free exercise [of religion] violation, a prisoner must show that a prison policy or practice burdens his practice of religion by preventing him from engaging in conduct or having a religious experience which his faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine. He must provide facts to show that the activities in which he wishes to engage are mandated by his religion.

Owen v. Horsely, No. C-95-4516 EFL, 1996 WL 478960 at *2 (N.D. Cal. Aug. 9, 1996) (citations omitted).

The first step in the analysis thus is to ask whether the policies and practices in question burden Plaintiffs' free exercise of religion.

2. Security Concerns

With respect to policies that Defendants justify on the grounds of security, Defendants do not challenge Plaintiffs' contention that the policies burden their free exercise of religion. The Court therefore will assume that they do. The question then becomes whether they are "reasonably related to legitimate penological interests." Turner, 482 U.S. at 89, 107 S. Ct. at 2261.

Under Turner, the first consideration is whether there is a rational connection between the regulations and a legitimate governmental interest. Defendants have set out security reasons for a number of local or state-wide prison policies that impinge on Plaintiffs' free exercise of religion.

Defendants state that many of the restrictions of which Plaintiffs complain are state-wide or local policies that grew out of the riots at SCI Camp Hill in 1989, which resulted in over 144 inmates and staff being injured and over \$17 million in property damages. (Ex. IX at 26-27.) Before those riots, inmates were running and leading the services in some facilities to the extent that some of the inmates were negotiating with the

administrators as to prison policies, which is contrary to good correctional practice. (Id.) Investigations following the riots showed that some of the inmate leaders of religious groups had been leaders of the riot. (Id. at 27.) The change in policy to prohibit inmates from leading services and study groups was meant to prevent inmates from gaining that kind of power again.¹¹

Plaintiffs and other inmates complained that this policy infringed on their right to the free exercise of religion because they were denied religious services if their outside coordinator failed to come to the prison. In response, Defendants have tried to strike a balance between prisoners' rights and their own security concerns by allowing inmates to lead services in the absence of their outside religious leaders, but only if an institutional chaplain is present.¹² (Ex. XIII-A.) Jumah, and not Taleem or study groups or classes, are treated this way because Jumah is mandatory for Orthodox Muslims; the others are not. (Ex. XIV at ¶ 4.) The prison reserves the

¹¹Defendants state that the policy of prohibiting inmates from leading religious services or study groups went into effect on January 1, 1996. There is no explanation as to why it took so long to implement a policy to correct conditions that led to riots in 1989.

¹²The Third Circuit has upheld the prohibition of unsupervised religious activity on the part of inmates for security reasons. Cooper v. Tard, 855 F.2d 125, 129 (3d Cir. 1988) (ban on unsupervised meetings of Muslim group upheld to prevent inmates' maintenance of a "leadership structure within the prison alternative to that provided by the lawful authorities").

right to approve all outside and inside religious leaders in order to avoid unnecessary security risks.¹³

Inmates need not sign up for regular Friday services because the attendance at Jumah is considered part of a "mass movement" and call sheets are impractical, if not impossible, at such times. Call sheets are used for Taleem and other religious study groups because it is feasible to keep track of the smaller groups of inmates and it is desirable for the prison to know where its inmates are at all times. (Ex. XII at ¶ 2.)

Security concerns are also behind the policy that Chapel doors are to be kept open during all services and study sessions, so the officer posted outside can observe the inmates inside; the officer must keep his radio on so he can hear transmissions at all times. (Ex. XII at ¶ 4; Ex. XVII t ¶ 4; Ex. XVIII-C.) The ban on unauthorized group meetings of inmates and on groups of more than 10 inmates in the exercise yard are also related to security. (Ex. XV at ¶ 9; Exs. XVII at ¶ 3 and XVII-B; Exs. XVII-A and XVII-B.)

¹³"[A] prisoner is not entitled to have the clergyman of his choice provided for him in prison." Reimers v. State of Oregon, 863 F.2d 630, 632 (9th cir. 1998) (citations omitted). See also Gittlemacker v. Prasse, 428 F.2d 1, 4 (3d Cir. 1970) ("The requirement that a state interpose no unreasonable barriers to the free exercise of an inmate's religion cannot be equated with the suggestion that the state has an affirmative duty to provide, furnish, or supply every inmate with a clergyman or services of his choice.") While they were not required to do so, Defendants have addressed Plaintiffs' dissatisfaction with Imam Rasheed by hiring two other Imams to lead Jumah on alternate Fridays.

A number of inmate groups at Frackville ran fundraisers in the past. In the past, Plaintiffs used some of the money to pay for the feasts for indigent inmates in the Muslim community. They complain that the new policy interferes with their ability to give charity to less fortunate Muslims, which they claim is a central tenet of their religion. (Ex. X at 88.) Defendants justify the new policies regarding fundraisers as follows: The DOC thought the fund raisers were getting out of control and revised the policy. Inmate organizations were holding fund raisers without specifying a specific purpose and several groups had accumulated a large amount of funds in their accounts, which they often used to pay for banquets. When such organizations regularly paid for their members' attendance at banquets, it allowed them to maintain a certain amount of control over their members. The DOC issued a new fund raising policy and a new banquet policy. Now, each fund raiser must have a distinct rationale and the money raised may no longer be used by organizations to pay for inmates' attendance at feasts. Each inmate must pay for his own attendance at a feast. The provision is meant to prevent a group from obtaining power over an inmate. In addition, groups are no longer permitted to sell the number and type of food products which they had sold. The purpose of this regulation is to decrease the amount of contraband coming into the prisons. (Ex. XXII-F.) These rules apply to all SCIs and to all groups at Frackville. (Ex. IX at 55, 110; Ex. XII at ¶ 2.)

All of the policies described above address the first consideration in Turner: that the prison regulations in question have a rational connection with the legitimate governmental interest of maintaining security at Frackville. Plaintiffs have presented no evidence that the regulations of which they complain do not have such a connection, and the Court finds as a matter of law that they serve a legitimate penological interest.

The second factor in Turner, whether there are alternative means available to the prisoner to exercise the right, is also satisfied. Imam Rasheed, who holds a B.A. in Islamic studies, testified that there is no central or mandatory requirement of the Islamic faith which is not provided to the inmates at Frackville.¹⁴ (Ex. XIV at ¶ 3.) Plaintiffs have presented no testimony to the contrary by any qualified religious leader and there is therefore no genuine issue of material fact on this point.¹⁵ Plaintiffs may not be able to exercise their right to the free exercise of religion in the manner they would prefer, but they have not demonstrated that they cannot satisfy

¹⁴The court takes the testimony to apply to the practice as of the time of Imam Rasheed's declaration. By then, inmates were allowed to observe Jumah even when their outside religious coordinator was not present.

¹⁵Plaintiffs contend that the new policy regarding fundraisers and the ban on the use of funds obtained through fundraising activities to pay for feast meals for indigent prisoners prevents them from performing one of the central tenets of their religion: giving charity to less fortunate Muslims. Plaintiffs have not adequately demonstrated that they cannot satisfy this requirement by other means: for example, by giving to outside mosques such as the ones with which their Imams are affiliated.

all the mandatory requirements of their religion within the framework of prison regulations.

No evidence was offered as to the third Turner consideration, the impact of the accommodation of the right on prison resources, guards, and other inmates of the practices discussed thus far. Nor was any evidence presented as to the fourth Turner factor, the existence of alternative methods for accommodation at de minimum cost to the security of the prison. Defendants' position is that the alternatives sought by Plaintiffs would compromise security at the prison.

3. Administrative Convenience and Other Factors

There are other practices that Plaintiffs complain interfere with their free exercise of religion that Defendants do not justify on grounds of security, such as the size of the chapel, the operation of the prison dining service, and the stocking of the commissary. Except for the stocking of the commissary, Defendants do not assert that the practices Plaintiffs allege, if true, would not burden their free exercise of religion. Therefore the Court will assume that they would.

Defendants justify the operation of the food service on the ground that it is a matter of administrative convenience, which is a legitimate penological interest under Turner and Shabazz. With the exception of the food prepared for Islamic feasts, the food prepared for Muslim inmates is part of the food prepared for the prison population at large. Plaintiffs have

presented no evidence that their diets are insufficient in quantity or nutrition. Nor have they presented any evidence that homosexuals who engage in unhygienic practices prepare their food; they named no individual prisoners with respect to this allegation. Plaintiffs complain that their food is prepared by pork handlers and that they must eat in the common dining room where pork is served. To accommodate Plaintiffs' wishes, the prison would have to use separate Muslim workers to prepare food for Muslim inmates and serve them in a separate dining room.

To apply the Turner analysis to the prison food service, the first Turner factor favors the prison: a prison "has a legitimate interest in keeping its food service system as simple as possible." Johnson, 1998 WL 420491 at *4. The second factor, the existence of alternative means of observance, also favors the prison. Prisoners are free to pray, meet with their outside Imams, and have weekly Jumah, and Imam Rasheed testified that inmates are not deprived of any mandatory requirement of their religion. See id. at *5. No evidence was offered on the third factor, the impact on guards, other inmates, and prison resources; however, it is obvious that special food handlers and a special dining room for Muslims would make additional demands on prison resources. Nor was any evidence offered on whether accommodating the inmates requests would have more than a de minimis cost to administrative efficiency, but again, it is obvious that it would.

Federal courts give great deference to prison officials' decisions with respect to the running of prisons. In a recent case, the Third Circuit deferred to the prison's decision to offer cold, rather than hot, kosher meals to Jewish inmates at prison expense, even though the cold meals cost more than the hot ones. In Johnson v. Horn, state prison officials conceded that they were required to provide Jewish inmates with some form of kosher diet at prison expense; however, they rejected the idea of buying frozen prepared kosher meals to reheat at the prison in favor of a more expensive cold diet consisting solely of milk, unpeeled fruit, uncut raw vegetables, a vanilla-flavored liquid nutritional supplement, granola, pretzels, cereal, and saltines. Id. at *2. The Third Circuit upheld the district court's grant of summary judgment in favor of the prison officials because "the First Amendment requires only that Prison officials provide the Inmates with a kosher diet sufficient to sustain the Inmates in good health." Id. Noting that the choice of the more expensive cold diet over less expensive hot kosher meals "might suggest a certain arbitrariness on the part of prison officials," the court stated that it could have given the cost factor some weight had it been free to apply the state regulation requiring "reasonable accommodations for dietary restrictions." Id. at *5. However, it concluded that it was not the court's function to do so. Instead, it deferred to the prison officials, thus avoiding "unnecessarily perpetuating the involvement of the federal courts in the affairs of prison

administration." Id. (quoting Turner, 482 U.S. at 89, 107 S. Ct. at 2262. The court quoted the Supreme Court on the federal courts' role in prison oversight:

[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Id. at *11 (quoting Turner, 482 U.S. at 84-85, 107 S. Ct. at 2259. Plaintiffs have presented no evidence challenging Defendants' justification of the operation of the food service on grounds of administrative convenience. Given Imam Rasheed's statement that the food at Frackville complies with the requirements of Islam 99% of the time, there is no evidence that the prison's food service unduly burdens Plaintiffs' free exercise of religion.

With respect to the complaint that the chapel is too small for feasts, the gym has been made available to Plaintiffs if they request it before it has been designated for another use. With respect to the complaint that it is too small for weekly services, Plaintiffs have presented no evidence that there are suitable alternatives other than the gym and no evidence as to whether the gym could be used for regular services. In addition,

Plaintiffs have offered no objective evidence that the chapel is, in fact, too small for the number of Muslims who wish to use it at one time.

The only one of Plaintiffs' complaints that Defendants may be able to satisfy with de minimis cost to penological interests is stocking the commissary with additional hygiene products that contain no pork or pork products. However, even here, Plaintiffs have presented insufficient evidence as to the ingredients in the range of products currently available, either in the prison or at the commissary. In addition, Defendants contend that their failure to provide additional products in the commissary does not burden the free exercise of Plaintiff's religion.¹⁶

Given Defendants' justification for their policies and Imam Rasheed's statement that all mandatory requirements of the Islamic faith can be satisfied at Frackville, the Court concludes that none of these or other practices mentioned by Plaintiffs unduly burden their free exercise of any central tenet of their religion. The impact on religious expression "must be more than an interference; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." Owen v. Horsely, 1996 WL 478960 at *2. Plaintiff's evidence does not show that any of the policies or practices of

¹⁶The Court has found no federal case holding that failure to provide additional or particular products for sale in the commissary constituted a constitutional deprivation.

which they complain place an undue burden on their free exercise of religion, and the Court will therefore grant Defendants' Motion for Summary Judgment as to this issue.

B. First Amendment - Access to Courts

Plaintiff Madison claims that he submitted request slips to Defendants Novitsky and Shannon from May 2, 1997 until May 13, 1997, in an attempt to retrieve his legal materials for a court appearance in the Court of Common Pleas of Philadelphia County, but his requests were denied.¹⁷ Prisoners have a constitutional right of access to the courts; however, to invoke that access, they must allege actual injury. Lewis v. Casey, 116 S. Ct. 2174, 2178-79, (citing Bounds v. Smith, 430 U.S. 817, 821, 97 S. Ct. 1491 (1977)). That is because a prisoner, like any other litigant, must have standing to bring a claim before the court; he must be "entitled to have the court decide the merits of the dispute or of particular issues." Allen v. Wright, 468 U.S. 737, 750-51, 104 S. Ct. 3315, 3324 (1984). The requirement of standing "has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Id. at 751, 104 S. Ct. at 3324 (citing Valley Forge Christian College v.

¹⁷Defendants dispute Madison's allegation; they claim he received one box of legal materials on May 8, 1997. (Ex. XII at ¶ 6; Ex. XVI, Ex. XXII at ¶ 6 and Ex. XXII-C; Ex. XXIII-C.)

Americans United for Separation of Church and State, Inc., 545 U.S. 464, 472, 102 S. Ct. 752, 758 (1982)). Defendants point out that Madison has not alleged or testified that the lack of his legal papers caused him any injury in connection with his court appearance in Philadelphia. He therefore has not shown that he has standing to bring a claim of interference with his constitutional right of access to the courts under the First Amendment. The Court will therefore grant summary judgment in favor of Defendants on this claim.

C. First Amendment - Free Speech - Retaliation

In their Amended Complaints, Plaintiffs Madison and White allege that they were transferred into administrative custody at Frackville and then from Frackville to other prisons in retaliation for exercising their free speech right to file this law suit. "Persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes access of prisoners to the courts for the purpose of presenting their complaints." Cruz v. Beto, 405 U.S. 319, 321, 92 S. Ct. 1079, 1081 (1972) (citations and internal quotations omitted). "Prisoners do not have a right to be placed in any particular prison, nor do prisoners have an absolute right not to be transferred to another prison, even if one prison is more or less desirable than another." Castle v Clymer, ___ F. Supp. ___, No. 95-2407, 1998 WL 400093, at *20 (E.D. Pa. June 30, 1998) (citing Meachum v. Fano, 427 U.S. 215,

224-25, 96 S. Ct. 2532, 2538 (1976)). However, "[i]t is well established that an act in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act when taken for different reasons would have been proper." Id. (citation and internal quotations removed).

Prisoners may not be transferred from one institution to another for engaging in constitutionally protected activity. Id. at *20. "A transfer in retaliation for an inmate's exercise of his First Amendment right to free speech states a cause of action under 42 U.S.C.A. § 1983." Id. at *21.

White alleges that, after the filing of this action, Defendant Durant ordered Defendant Novitsky to place White in the RHU, where he was told by Novitsky that he would be sorry for filing the law suit. (White's Am. Compl. at ¶¶ 3-4.) He alleges he was then transferred from Frackville to SCI Coalville for exercising his "Constitutional Right with the courts." (Id. at ¶ 5.) Madison alleged that Defendant Novitsky placed him in the RHU for investigation, and then brought him to the office for questioning. Defendant Durant asked him why he had filed a law suit and stated they would not have anyone filing law suits to change the way they run the Muslim community. After the investigation was over, Novitsky had Madison transferred to administrative custody, where he stayed until he was transferred to SCI Huntingdon. (Madison Am. Compl. at ¶¶ 6-12.)

Defendants assert that Madison and White were placed in administrative custody and transferred because they, along with

certain other inmates, planned to take over the religious leadership of the prison and replace the outside and inside Muslim leaders. Defendants state that "when Madison and White were placed in administrative custody, the original defendants had no knowledge of the pending lawsuit." (Defts.' Mot. Summ. J. at 25.) But even if they did know of the suit, Defendants argue, the reason for transferring Madison and White was that Defendant Novitsky had received information from corrections officers, other inmates, and inmate confidential sources which implicated Madison and White in a plot to overthrow the existing leadership of the Muslim community at Frackville. They contend that the transfers were therefore completely justified. Id. at 25.)

Defendant Novitsky stated that he works exclusively in internal security at Frackville, monitoring all inmates and staff and investigating them when he has reason to do so. (Ex. XVI at ¶ 2.) He set out in his declaration the concerns that he claims led him to recommend the transfer of Madison and White.

In the spring of 1997, I began to receive information from corrections officers that certain members of the Orthodox Muslim community at Frackville were having meetings out in the exercise yard and on the cellblocks. The rumor was that certain inmates were planning to overthrow the current staff and inmate leaders of the Islamic community at Frackville. With that information, I confined inmates Madison and White in administrative custody in the Restricted Housing Unit. I then interviewed and received additional information from two Confidential Sources of Information ("CSIs"). The first CSI named inmates Madison, White, Matthews and Cottle as being involved. I then confined inmate Matthews in administrative custody.

. . .
I recommended inmates White, Matthews, Madison and Cottle be transferred, but the final decision was not mine to make. . . .

Although one of the CSIs whom I interviewed did mention a lawsuit, he said only that inmate Matthews or Madison had an agenda, one item of which was to remove Imam Adeb Rasheed from Frackville. He then mentioned that some of the Muslim inmates were considering or had brought a lawsuit against him, Imam Rasheed.

(Ex. XVI at ¶¶ 1-2.)¹⁸

The following passage, taken from Madison's deposition, gives his version of some of events surrounding the filing of the law suit and his transfer. Defendants' attorney is questioning Madison.

Q. Now, what is it that makes you think that Novitsky put you in the RHU because of your religious beliefs?

A. Because when the talk was going down about switching [I]mams and re-electing people to different positions, automatically Rasheed went to security with this.

. . .
Then when [Imam] Shafik came in on a Friday, they summoned him over to security and asked him what he knew about this, was we trying to get him to take over Rasheed's position and that if this was going on and he was a part of it, he was going to have to be stopped from coming into the institution until all this is straightened out.

. . .
And then I had drew up the suit and give it to a brother, gave it to Plaintiff White, to give to Captain Frazier to take and return, and he gave the suit to Rasheed.

. . .
And Rasheed took the suit to the administration where my original suit was ripped up, where I had other claims on it. It was more plaintiffs and defendants.

¹⁸All four of the inmates named by CSIs as planning to overthrow the Muslim leadership were transferred to other prisons: Madison, White, Cottle and Matthews.

So I had to remove plaintiffs and defendants from the suit that was in the community that was working with the administration and I had to drop other defendants from the suit because I already had knowledge that they were going to be placing me in the RHU to stop me from changing the religious aspects of the way they running the institution. So when I sent my -- sent the -- when I drew up the next lawsuit and mailed it off on May the 1st, which was on a Thursday, the next day, that morning, is when I was placed in the RHU, May the 2nd.

Q. Now, how is Novitsky connected to all of that?

A. Because Novitsky was heading the investigation. He was the one asking questions by his informants.

. . .
Because he was the one that was constantly calling informants over and questioning them about the Muslim community. He clearly stated that he conducted the interviews to gather information.

Q. Yes, I'm not disputing that. What would he care about a lawsuit, though, for? I mean, the institution's involved in plenty of lawsuits.

A. There is a difference when they come -- when it involved the Muslims and so much as me alleging being the backing of it, the one that was pushing the movement.

Q. So why did Novitsky care? Why did he care?

A. Because some inmates, they -- they are just nervous about. Some they are not concerned about. It just so happened I was involved in it, so it was a major thing that we going to have to isolate this situation and get Madison out of the institution.

Q. Now, did Durant also have anything to do with putting you in the RHU?

A. Yes. He conducted the interrogation, too.

Q. Okay. And was that because of your religion or your lawsuit or both?

A. It was about the community in general and the lawsuit.

(Ex. IX at 112-115.)

Plaintiff White testified concerning his leadership role in the Muslim community at Frackville and how Defendants perceived that as a threat:

A. Now, when you have an individual, such as in particular a Muslim, and he is practicing his religion accordingly, how it's supposed to be, such as he is not participating in those things which is prohibited, such as gambling, fighting and the et cetera, and he is trying to teach and pull those other individuals, Muslims, who doesn't really know any better away from the prohibition of what they are indulged in, now when administration see a change or begin to see a change in them individuals, as far as them not fighting with one other, et cetera, then that individual, he is capable of something that they don't want him to be capable of. Meaning that he is capable of pulling the community together as a unity. Before the community was in disarray, but now you have an individual who is capable of actually changing that, so now he becomes a threat now.

Q. Okay. And all this hypothetical, you're talking about yourself, correct?

A. Yes, Ma'am.

(Ex. X at 42-44.)

Madison's and White's testimony supports Defendants' contention that they were primarily concerned about particular inmates assuming a position of religious leadership which they feared might be used to lead inmates in activities incompatible with prison security. Madison testified that there was talk in the prison about switching Imams, and that security officers were concerned that inmates were trying to get Imam Shafik to take over Imam Rasheed's place. He further testified that Defendants were "nervous" about certain inmates, including himself, and that Defendant Durant, who was the intelligence officer at Frackville

(Ex. XVI at ¶ 2.), questioned him because of concern about the Muslim community. He stated that he knew they were going to place him in the RHU "to stop me from changing the religious aspects of the way they running the institution." White testified that officials perceived him as a threat because he was capable of pulling the Muslim community together. Defendants stated that the Camp Hill riots had led to increased concern about the growth of such leadership, especially when it was used in opposition to prison authorities, and the evidence bears out their contention that that was their primary concern in transferring Madison and White. Four inmates who were considered to be leaders in the attempt to change the Muslim leadership were transferred, only three of whom were Plaintiffs, and two Plaintiffs who were not considered to be leaders were not transferred.

A recent opinion from this Court reviewed the standards for analyzing the constitutionality of prison transfers allegedly in retaliation for the inmate's exercise of his constitutional rights. Castle, 1998 WL 400093, at *21. It noted that there were four standards used by various courts of appeals, but the Third Circuit had not adopted any of them. They are: the "reasonable relationship" test; the "but for" test; the "significant factor" test; and the "narrowly tailored" test.¹⁹

¹⁹The Third Circuit has not adopted any of them, but in an unpublished opinion, it rejected the "but for" test and applied the "narrowly tailored" test. Id. (citing unpublished opinion Brooks-Bey v. Kross, No. 94-7650, slip op. at 7-8 (3d Cir. July

Id. The four tests have two things in common: each of them places the initial burden of proof on the plaintiff to show that he was transferred in retaliation for the exercise of a constitutionally protected right; and after the plaintiff's initial showing, each of the tests shifts the burden to the defendant to set forth one or more constitutional grounds for the transfer. Id. The court in Castle chose the "reasonable relationship" test, reasoning that it best balanced the protection of prisoners' constitutional rights and legitimate penological interests. That test places the final burden on the defendant, who must show that the transfer is reasonably related to legitimate penological interests. Id. This Court agrees, adopting the reasoning of the court in Castle.

The "reasonable relationship" test is the same one set out in Turner and used above in analyzing the practices Plaintiffs alleged violated their First Amendment right to the free exercise of their religion. The first prong of the test asks whether the legitimate government interest put forward to justify the transfer has a valid, rational connection to the transfer. Plaintiffs have presented no evidence disputing the evidence proffered by Defendants in support of that prong. Therefore, the court finds that the first prong of the Turner test is satisfied. The evidence shows that White and Madison were assuming positions of leadership in the Muslim community,

24, 1995)).

that they were dissatisfied with the current Muslim leadership and that prison security officers had reports that they were planning to overthrow the existing Muslim leadership. Transferring them to another prison was an obvious way of undermining their power base and preventing a breach of security.

The second prong of the reasonable relationship test asks whether plaintiff was able to exercise his First Amendment rights despite his transfer. In this case both Madison and White were able to do so, as shown by the fact that both of them continued to pursue this suit after the transfers. Both filed Amended Complaints and White filed a response to Defendants' Motion for Summary Judgment.

Under the third prong, the Court looks at the effect on inmates and prison staff of accommodating the inmate's exercise of his constitutional right. As discussed above, Defendants reasonably feared that the accommodation of allowing Madison and White to stay at Frackville might cause serious security problems.

The fourth prong asks whether there are alternatives to transferring Madison and White that would have de minimis cost to Defendants' security concerns. Plaintiffs have presented no evidence of any such alternatives and the Court can think of none. The Court therefore concludes that the transfer of Madison and White to other prisons satisfies the reasonable relationship test, and did not violate Plaintiffs' First Amendment rights to

free speech. Defendants' Motion for Summary Judgment will be granted as to this claim.

D. Fourth Amendment - Unreasonable Searches

Plaintiffs assert a violation of their Fourth Amendment rights to be free from unreasonable searches and seizures in Defendants' frequent searches of their cells. The Supreme Court has held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." Hudson v. Palmer, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200 (1984).

Plaintiffs also complain of frequent pat-searches or frisks of their persons on entering and leaving the chapel and when they came in from the exercise yard. Defendants quote a case from this Court, Jones/Seymour v. LeFebre, 781 F. Supp. 355 (E.D. Pa. 1991), stating that "[i]f there is no legitimate expectation of privacy in an inmate's cell, surely there is no legitimate expectation in a public corridor in a prison." (Defts. Mot. Summ. J. at 27 (quoting Jones/Seymour, 781 F. Supp. at 356.) In that case, the plaintiff claimed a violation of his Fourth Amendment rights when he was filmed by a television cameraman without his consent while walking down the main public corridor in the prison. The court disagreed, concluding he had no legitimate expectation of privacy in the prison corridor. The

Court does not find that case applicable here because Jones/Seymour did not involve a hands-on search of the prisoner's person. The more persuasive position is that of the United States Court of Appeals for the Tenth Circuit in Dunn v. White, 880 F.2d 1188 (10th Cir. 1989), which states:

Although the Supreme Court has . . . foreclosed any fourth amendment challenge to the search of a prison cell, this court has recognized a qualitative difference between property searches and searches of a prisoner's person. The prisoner's privacy interest in the integrity of his own person is still preserved under [Bell v.] Wolfish, 441 U.S. at 558, 99 S. Ct. at 1884, in which the Supreme Court applied traditional fourth amendment analysis to a constitutional challenge by prisoners to personal body searches.

In Wolfish, the Supreme Court assumed that prison inmates retain some measure of Fourth Amendment rights. We do not believe that the Supreme Court's decision in Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L. Ed. 393 (1984) . . . eviscerates the requirement set forth in Wolfish that personal body searches of inmates must be reasonable under the circumstances.

Dunn v. White, 880 F.2d at 1191 (quoting Leroy v. Mills, 788 F.2d 1437, 1439 n.** (10th Cir. 1986)).

The practices of which Plaintiffs complain in this case are well within the acceptable bounds for searches of prisoners. Courts have upheld conducting visual body-cavity searches of inmates following contact visits, Bell v. Wolfish, 441 U.S. at 558, 99 S. Ct. at 1884, and visual strip searches and body cavity searches of inmates in administrative custody when they left their cells. Rickman v. Avani, 854 F.2d 327 (9th Cir. 1988) One court of appeals has held that a male inmate was entitled to reasonable accommodation to prevent unnecessary observations of

his naked body by female guards during strip searches, Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994); however, the Court has encountered no case in which a pat-down search or frisk of a clothed prison inmate by a guard was held to be in violation of the Fourth Amendment. In this case, the searches were done by male guards on male prisoners, and there was no allegation that they were unusually invasive for clothed searches.²⁰ The Court has found no authority for Plaintiffs' claim that the frequent clothed searches to which they were subject violated their rights under the Eighth Amendment and will dismiss that claim. Plaintiffs also claim the frequent searches constituted harassment based on their religion, and that claim will be considered below.

²⁰The DOC's Administrative Directive on Searches of Inmates and Cells describes how frisk searches and strip searches must be conducted, and it lists the circumstances in which strip searches may be conducted, but it does not list the circumstances in which frisk searches may be conducted. Instead, it lumps frisk searches with non-contact searches and simply states, "Non-contact and frisk searches may be conducted in any area of the institution by authorized personnel of either sex. They will be conducted in a professional manner with tact and proper attitude displayed." (Ex. XIX at 203-3.) Evidently, these searches are considered so routine and non-invasive in the prison context that the DOC considered it unnecessary to give further directions or restrictions. That is not to say that such searches could never be unconstitutional. The United States Court of Appeals for the Ninth Circuit has held that a prison policy requiring male guards to conduct random, nonemergency, suspicionless clothed body searches of female prisoners was cruel and unusual punishment in violation of the Eighth Amendment. Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993).

E. Fifth Amendment

Plaintiffs state that they are bringing this action under the Fifth Amendment, among others. The Fifth Amendment is applicable to cases in which the plaintiffs claim the federal government violates a liberty or property interest. Bennett v. White, 865 F.2d 1395, 1406 (3d Cir. 1989). Plaintiffs make no such claims; therefore their Fifth Amendment claim will be dismissed.

F. Eighth Amendment

Plaintiffs evidently mean to allege that some of the practices at Frackville violate the Eighth Amendment's prohibition of cruel and unusual punishment, although it is not entirely clear which practices. In Rhodes v. Chapman, 452 U.S. 337, 101 S. Ct. 2392 (1981), the United States Supreme Court held that the Constitution did not mandate "comfortable prisons," and that prison conditions violated the Eighth Amendment when they denied prisoners "the minimal civilized measure of life's necessities." Id. at 349, 347, 101 S. Ct. at 2400, 2399. In Wilson v. Seiter, 501 U.S. 294, 111 S. Ct. 2321 (1991), the Court explored the subjective component of the standard and held that prison officials must act with "deliberate indifference" toward the plaintiff's needs. Id. at 303, 111 S. Ct. at 2326.

Plaintiffs alleged no physical injury as a result of Defendants' actions in their Complaint or Amended Complaints.²¹ In addition, they have failed to exhaust their administrative remedies. The Prison Litigation Reform Act of 1996 provides that "[n]o action shall be brought with respect to prison

²¹It should be noted that, although Plaintiffs allege no physical injury as a result of prison conditions in their Complaint or Amended Complaints, Plaintiffs Collier and McDougald belatedly alleged such injury in their Cross Motion for Summary Judgment, after Defendants' Motion for Summary Judgment had called to Plaintiffs' attention the physical injury requirement for damages under the Eighth Amendment. They also filed affidavits by themselves and other prisoners which detailed the physical injuries, although Collier and McDougald had testified in their depositions that they had not sustained physical injuries. Ex. VI at 80-81; Ex. VII at 86-87.)

The Court will disregard these affidavits. Collier's and McDougald's affidavits may be disregarded because they are contradicted by their earlier deposition testimony. Martin Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991) ("When, without a satisfactory explanation, a nonmovant's affidavit contradicts earlier deposition testimony, the district court may disregard the affidavit in determining whether a genuine issue of material facts exist.") With respect to the affidavits of prisoners other than Plaintiffs, they are not evidence of Plaintiffs' injuries, and Plaintiffs have standing in this case only with respect to their own injuries.

The physical injuries alleged by Collier in his affidavit include "Pains from the Flu because of the extremely cold climate and as a result of being ordered in the winter to take a shower just before meal lines [sic] by Defendant Horner;" "That on several occasions I had to choose between meals or shower to avoid the Possibility of becoming ill;" "Abdominal Pains from holding excrement because Defendants refuse to Provide [sufficient] Toilet Paper;" "Pain and skin abrasions from using Foreign Materials as a substitute for Toilet Paper;" "Facial rashes which can only be attributed to using the same wash Basin with Films of Bacteria, Grime and Grease for 7 Day intervals being Double Celled and Defendants Refuse to Provide cleaning materials [more often than once a week];" and "That Being indigent Plaintiff [could not buy commissary] Toothpaste and as a result suffered from Excessive Plaque, Swollen and Bleeding Gums." (Aff. of Collier at ¶¶ 10-15.)

conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C.A. § 1997e (West Supp. 1998). Plaintiffs have neither alleged nor demonstrated that they have exhausted their administrative remedies as to any of their claims.²² Therefore, none of Plaintiffs' complaints to the effect that prison conditions violate their Eighth Amendment rights are ready to come before this Court and that claim will therefore be dismissed.²³

G. Fourteenth Amendment - Equal Protection

Plaintiffs claim a violation of the equal protection clause of the Fourteenth Amendment because non-religious groups are allowed to choose their own leaders and to gather without

²²Plaintiffs complained that most of the products carried by the prison commissary contained pork or pork products and that there were not enough products that were suitable for them to use. When asked at his deposition whether he had filed a grievance to that effect, Madison responded he had not, and none of the other Plaintiffs testified that he had either as to these or any other prison conditions. (Ex. IX at 79-80.)

²³Even had Plaintiffs exhausted their administrative remedies, the practices of which Plaintiffs complain are not the kind or magnitude that typically are held to violate the Eighth Amendment. "The denial of medical care, prolonged isolation in dehumanizing conditions, exposure to pervasive risk of physical assault, severe overcrowding, and unsanitary conditions have all been found to be cruel and unusual under contemporary standards of decency." Tillery v. Owens, 907 F.2d 418, 426 (3d Cir. 1990) (citing Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285 (1976) (medical care); Hutto v. Finney 427 U.S. 678, 98 S. Ct. 2565 (1978) (prolonged isolation in unsanitary overcrowded cell); Riley v. Jeffes, 777 F.2d 143 (3d Cir. 1985).

outside coordinators being present. In addition, Plaintiffs allege that prison guards allowed small groups of Christians to congregate for religious study in the exercise yard, but do not allow them to do so.

In order to sustain a claim under 42 U.S.C.A. § 1983 based on the Equal Protection Claims of the Fourteenth Amendment, the plaintiff must show "the existence of purposeful discrimination" and demonstrate that he received "different treatment from that received by other individuals similarly situated." Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990). The burden is not on prison officials to demonstrate that allowing Plaintiffs to congregate would be dangerous; that would be "inconsistent with the deference federal courts should pay to the informed discretion of prison officials." Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 136, 97 S. Ct. 2532, 2543 (1977). "There is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence." Id. Instead, they need only establish that they had a rational basis relating to a legitimate penological interest for treating Plaintiffs differently. Turner, 482 U.S. at 89, 107 S. Ct. at 2261 Plaintiffs, for their part, must show that groups treated differently are so similar that there is no rational basis for the distinctions Defendants make and that the discretion of prison officials to treat groups differently has

been abused. North Carolina Prisoners, 433 U.S. at 136, 97 S. Ct. at 2543.

Defendants point out a number of differences between religious groups and non-religious groups that prevent them from being considered similarly situated. Prisoners have a constitutional right to meet in religious groups; therefore such groups cannot be banned from a prison as can non-religious groups, and, for the same reason, it is much harder to keep an inmate, for disciplinary reasons, from participating in a religious group than in a non-religious group. Religious groups and their leaders also carry a kind of authority that non-religious groups do not because they are based on more than simply common interests. Finally, Defendants presented evidence that religious leaders among the inmates led the Camp Hill riots. All of these factors provide sufficient reason for Defendants to treat religious groups differently from non-religious groups.

Plaintiffs alleged that they were treated differently from Christian groups, who were allowed to meet in small study groups. Defendants deny allowing Christians to hold study groups of a kind denied to Plaintiffs; however, Defendant Durant stated that the Christian group discussed the Bible and had no organized leader. (Docs. and Affidavits in Supp. Pls.' Mot. Summ. J.; Durant's Answers to Interrogs.) The key seems to be the fear of the emergence of religious leaders among the inmates. Former Plaintiff Cottle testified that, in Muslim study groups, one inmate was the teacher, that the leader teaches Islamic doctrine

and that an inmate would do so if allowed. (Ex. VIII at 63-66.) Accepting for purposes of this Motion Plaintiff's allegation that Defendants have a policy of treating Muslim and Christian study groups differently, the Court concludes that Defendants' concern about the security risk posed by inmate religious leaders and the fact that Muslim study groups have organized leaders, provides a reasonable basis for such a policy. See Cooper v. Tard, 855 F.2d at 129 (ban on unsupervised meetings of Muslim religious group upheld to prevent inmates' maintenance of a "leadership structure within the prison alternative to that provided by the lawful authorities"). The policy therefore does not violate the equal protection clause, and Defendants' Motion for Summary Judgment will be granted as to Plaintiffs' equal protection clause claims.

H. Fourteenth Amendment - Due Process

In their Motion for Summary Judgment, Collier and McDougald state that they were deprived of property without due process of law. They allege there are inconsistencies and discrepancies in the ledgers of the Religious Groups Treasury and state that the misuse of Muslim Community funds gives rise to claims under the Fourteenth Amendment and Pennsylvania Administrative Agency Law. While allegations of misuse of funds may state a claim under state law, they do not state a claim under the Constitution or federal laws.

Under two Supreme Court cases, Plaintiffs are precluded from seeking redress for the alleged misuse of Muslim community funds under section 1983. In Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908 (1984) (rev'd on other grounds), an inmate of a Nebraska prison lost packages containing mail order hobby materials when the normal procedure for receipt of mail packages was not followed. The Court held he had not alleged a violation of the Due Process Clause of the Fourteenth Amendment where there was "no contention that the procedures themselves were inadequate," and where "the State of Nebraska has provided means by which [the inmate] can receive redress for the deprivation." 451 U.S. at 543, 101 S. Ct. at 1917. Here, Plaintiffs have not alleged the normal accounting procedures for accounts of inmate groups are inadequate, merely that in this case there was misuse of funds. In addition, Pennsylvania has provided means for redress in that their claim falls within one of the few exceptions to Pennsylvania's assertion of sovereign immunity. There is no bar to a claim against the Commonwealth concerning

[t]he care, custody or control of personal property in the possession or control of Commonwealth parties, including Commonwealth-owned personal property and property of persons held by a Commonwealth agency, except that the sovereign immunity of the Commonwealth is retained as a bar to actions on claims arising out of Commonwealth agency activities involving the use of nuclear and other radioactive equipment, devices and materials.

42 Pa. Cons. Stat. Ann. 8542(b)(2) (West 1982 & Supp. 1997).

"Although the state remedies may not provide the [complainant] with all the relief which may have been available if he could

have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." Parratt, 451 U.S. at 544, 101 S. Ct. at 1917. Here, as in Parratt, the challenge is to misconduct on the part of a state official rather than to an established state procedure. Here, as there, it is difficult if not impossible to imagine what procedures the Commonwealth could have provided pre-deprivation; therefore, a post-deprivation remedy is an acceptable alternative. Id. at 540-42, 101 S. Ct. at 1915-16.

In Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194 (1984), the Court held that, even if the deprivation of property were intentional, the due process clause was not violated, "provided, of course, that adequate state post-deprivation remedies are available." 468 U.S. at 533, 104 S. Ct. at 3204. It is not clear whether Plaintiffs are alleging a negligent or intentional misuse of funds, but in either case, they have an adequate state remedy, and they do not state a claim under section 1983.

It is not clear whether Plaintiffs are claiming any other due process violation. A plaintiff claiming that his Fourteenth Amendment right to procedural due process has been violated must (1) demonstrate the existence of a protected interest in life, liberty or property that has been interfered with by the state, and (2) establish that the procedures attendant upon that deprivation were constitutionally insufficient. See Board of Regents v. Roth, 408 U.S. 564, 571,

92 S. Ct. 2701, 2705 (1972); see also Sample v. Diecks, 885 F.2d 1099, 1113 (3d Cir. 1989). The right to the free exercise of religion is a liberty interest for purposes of the due process clause.

Plaintiffs' claims regarding the free exercise of religion do not fit easily into a due process analysis, especially as that analysis is discussed in Sandin v. Connor, 515 U.S. 472, 482-83, 115 S. Ct. 2293, 2299-2300 (1995). In that case, the Supreme Court criticized the involvement of federal courts in the day-to-day management of prisons. The Court referred to several of its prior cases which expressed the view "that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." Id. at 482, 115 S. Ct. at 2299 (citing Wolff v. Belfish, 418 U.S. at 561-63, 99 S. Ct. at 1885-86 ; Hewitt v. Helms, 459 U.S. 460, 470-71, 103 S. Ct. 864, 870-71 (1983); North Carolina Prisoners, 433 U.S. at 125, 97 S. Ct. at 2537-38). It went on to say that "[s]uch flexibility is especially warranted in the fine-tuning of the ordinary incidents of prison life, a common subject of prisoner claims." Sandin, 515 U.S. at 483, 115 S. Ct. at 2299.

Defendants note that for prisoners, the deprivation of liberty does not give rise to a procedural due process claim "[a]s long as the conditions of confinement to which the prisoner is subjected is within the sentence imposed upon him." Vitek v. Jones, 445 U.S. 480, 493, 100 S. Ct. 1254, 1264 (1979) (citation

omitted). That standard seems to contemplate an individualized determination. The practices which Plaintiffs contend violate their right to the free exercise of their religion are almost all the result of prison-wide or state-wide policies, with no individualized determinations to be made. Having said that, the Court cannot conclude that any of the conditions of which Plaintiffs complain exceed the sentence imposed on them so as to implicate the due process clause of the Fourteenth Amendment. See, e.g., Vitek, 445 U.S. at 494-4096, 100 S. Ct. at 1264-65 (holding involuntary transfer of prisoner to mental hospital exceeded his sentence and required notice and adversary hearing).

I. Religious Freedom Restoration Act

Plaintiffs' claims based on the Religious Freedom Restoration Act will be dismissed because that Act was declared unconstitutional by City of Boerne v. Flores, ___ U.S. ___, 117 S. Ct. 2157 (1997).

J. Harassment and Verbal Abuse

Plaintiffs complain that Defendant corrections officers harass them by abusive language, frequent searches, and jokes about their religion. Defendants deny such actions but contend that, even if they had occurred, they would not be actionable under section 1983. Many courts have held that verbal abuse of prisoners, while inappropriate and unprofessional on the part of state actors, is not actionable under 42 U.S.C.A. § 1983. See,

e.g., Ellinburg v. Lucas, 518 F.2d 1196 (8th Cir. 1975) (state prisoner could not maintain 1983 action against prison employee who allegedly called him an obscene name); Collins v. Cundy, 603 F.2d 825 (10th Cir. 1979) (prisoner had no 1983 action against sheriff who laughed at him and threatened to hang him); Allah v. Vaughn, No. 90-6929, 1991 WL 269677 (E.D. Pa. Dec. 10, 1991) (verbal harassment and profanity do not constitute an invasion of any federally protected right); Young v. Newton, No. 82C 4327, 1985 WL 2405 (N.D. Ill. June 28, 1985) ("Allegations of verbal harassment do not rise to the level of a constitutional tort actionable under Section 1983. . . While [the prisoner's] status does not justify abuse from the mouths of those paid to watch over him, it is not the role of this court to protect him from the petty indignities that abound in the prison environment.")

Plaintiffs also complain that they were harassed by frequent searches of their cells and persons. The Court has already established that the searches did not violate the Fourth Amendment. Nor do they violate other federally protected rights. Routine physical contact of the kind necessary to maintain order in a prison does not amount to a constitutional deprivation and cannot form the basis of a claim under section 1983. See Rickets v. Derello, 574 F. Supp. 645 (E.D. Pa. 1983) (allegation that guard physically shoved prisoner into cellblock and threatened him with a knife does not state a claim under § 1983).

Plaintiffs have therefore failed to state a claim under 42 U.S.C.A. § 1983 as to harassment and verbal abuse.

K. State Law Claims

The Eleventh Amendment recognizes the sovereign immunity of the states and limits the power of the federal courts to hear suits against them unless the states consent to be sued. See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97-100, 104 S. Ct. 900, 906-08 (1984); see also Puerto Rico Aqueduct and Sewer Authority, 506 U.S. 139, 113 S. Ct. 684 (1993). “[A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.” Id. at 100 (quoting Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 297, 280, 93 S. Ct. 1614, 1616 (1973) (internal quotations omitted). While this immunity does not extend to claims made under the United States Constitution, it does apply to claims made under state laws unless the immunity is waived. Pennhurst, 463 U.S. at 102, 104 S. Ct. at 909. Pennsylvania asserts sovereign immunity, 42 Pa. Cons. Stat. Ann. § 8521 (West 1982), except for claims enumerated in 42 Pa. Cons. Stat. Ann. § 8522 (West 1982 & Supp. 1997).

Plaintiffs allege that Defendants, acting in their official capacities, have violated unspecified state laws. Plaintiffs have not sued the state itself; they have sued only individual state officials. “When the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself.” Id. at 101, 104 S. Ct. at 908. It is considered to be against the state when “the state is the real, substantial party in interest.” Id. (quoting Ford

Motor Co. v. Depart. of Treasury of Indiana, 323 U.S. 459, 464, 65 S. Ct. 347, 350 (1945). The general rule is that "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter," id. (quoting Hawaii v. Gordon, 373 U.S. 57, 58, 83 S. Ct. 1052, 1053 (1963), that is to say, if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." Pennhurst, 465 U.S. at 101 n.11, 104 S. Ct. at 909 n.11 (internal quotations omitted). In this case, the real, substantial party in interest is the Commonwealth of Pennsylvania. Plaintiffs seek to "interfere" with the current administration of Frackville. A federal court cannot issue an order against state officials for failing to carry out their duties under state law. Id. at 109, 104 S. Ct. at 913. This Court cannot entertain state law claims against state officials, even for those claims that comprise the exceptions to sovereign immunity, and Plaintiffs' state law claims must therefore be dismissed.

V. CONCLUSIONS

For reasons stated in the foregoing, none of Plaintiffs' claims survives, and the Court will therefore grant Defendants' Motion for summary Judgment and will deny Plaintiffs' Cross-Motion for Summary Judgment.

An appropriate Order follows.

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

ALFONSO FAHEEM MADISON, : CIVIL ACTION
et al. :
Plaintiffs :
v. :
MARTIN F. HORN, et al., :
Defendants : NO. 97-3143

O R D E R

AND NOW, this day of August, 1998, upon
consideration of Defendants' Motion for Summary Judgment (Doc.
No. 56), Plaintiff White's Response (Doc. No. 75), the Cross-
Motion for Summary Judgment of Plaintiffs Collier and McDougald
(Doc. No. 77), and Defendants' Response (Doc. No. 87) and all the
submissions thereto, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion for Summary Judgment is **GRANTED**;
2. Plaintiffs' Cross-Motion for Summary Judgment is **DENIED**; and
3. Plaintiff White's Amended Complaint (Doc. No. 36)
shall be transferred to the Middle District of
Pennsylvania with a copy of the Memorandum accompanying
this Order.

BY THE COURT:

JOHN R. PADOVA, J.