IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DEON HAMPTON, Plaintiff, v. JOHN BALDWIN, KEVIN KINK, KAREN JAIMET, OFFICER BURLEY, LT. GIVENS, OFFICER CLARK, OFFICER LANPLEY, JOHN DOE 1-4, JOHN VARGA, OFFICER GEE, OFFICER MANZANO, OFFICER BLACKBURN, LT. DOERING, and SGT. KUNDE, Defendants.	)	Case No. 18-cv-550-NJR-RJD

REPORT AND RECOMMENDATION

DALY, Magistrate Judge:

The matter has been referred to United States Magistrate Judge Reona J. Daly by United States District Judge Nancy J. Rosenstengel pursuant to 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72(b), and SDIL-LR 72.1(a) for a Report and Recommendation on the question of whether Plaintiff exhausted her administrative remedies prior to filing this lawsuit, as required by the Prison Litigation Reform Act, 28 U.S.C. § 1997(e)(a). It is **RECOMMENDED** that the District Court **ADOPT** the following findings of fact and conclusions of law, and **GRANT IN PART AND DENY IN PART** the Motion for Summary Judgment on the Issue of Exhaustion of Administrative Remedies filed by Defendants John Baldwin, Karen Jaimet, Kevin Kink, Nicholas Lanpley, Michael Clark, Jeremy Givens, Jacob Blackburn, Christopher Doering, Taylor Gee, Susan Kunde, Arthur Manzano, and John Varga (Docs. 36, 37 and 86).

FINDINGS OF FACT

Plaintiff Deon Hampton, an inmate in the custody of the Illinois Department of Corrections ("IDOC"), filed this lawsuit pursuant to 42 U.S.C. § 1983 alleging violations of her constitutional rights. Plaintiff is a transgender woman currently housed in Logan Correctional Center ("Logan"). At the time of filing, Plaintiff was housed in Lawrence Correctional Center ("Lawrence"). This case is proceeding on Plaintiff's First Amended Complaint filed on August 14, 2018 (Doc. 64). In her Amended Complaint, Plaintiff alleges violations of the Eighth and Fourteenth Amendments, the Americans with Disabilities Act, and the Illinois Hate Crimes Act related to her incarceration at various IDOC facilities. Plaintiff is proceeding in this action on the following claims:

Count One: Fourteenth Amendment Equal Protection claim against John Baldwin, the Director of the IDOC, in his official capacity for refusing to place Plaintiff in a women's prison.

Count Two: Fourteenth Amendment Equal Protection claim against Director Baldwin and Dixon Warden John Varga in their official capacities related to Plaintiff's subjection to continued verbal sexual harassment due to her gender identity.

Count Three: Eighth Amendment failure to protect claim against Defendants John Does 1-4, Officer Burley, Lt. Givens, Officer Clark, Officer Lanpley, Officer Gee, IA Officer Manzano, and IA Officer Blackburn in their individual capacities and Director Baldwin and Warden Varga in their official capacities for failing to ensure Plaintiff's safety at Dixon and Lawrence despite their knowledge that she is vulnerable to abuse and sexual assault.

Count Four: Eighth Amendment cruel and unusual punishment claim against Defendants Warden Varga, Warden Kink, and Warden Jaimet in their individual capacities, and Director Baldwin and Warden Varga in their official capacities for placing Plaintiff in segregation, thereby exacerbating her serious mental health problems.

Count Five: Eighth Amendment excessive force claim against Officer Burley, Lt.

Doering, and Sgt. Kunde.

Count Six: Claim under the Americans with Disabilities Act against Director Baldwin and Warden Varga in their official capacities for failing to provide Plaintiff with reasonable accommodations for her Gender Dysphoria disability.

Count Seven: *Monell* claim under 42 U.S.C. § 1983 against Director Baldwin and Warden Varga in their official capacities for ratifying and implementing unconstitutional policies related to transgender prisoners.

Count Eight: Claim under the Illinois Hate Crimes Act against Officer Burley in his individual capacity for allegedly physically assaulting Plaintiff due to her gender and sexual orientation, and against Director Baldwin and Warden Varga in their official capacities to prevent the continued violation of Plaintiff's rights under the Illinois Hate Crimes Act.

Count Nine: Intentional infliction of emotional distress claim against all individual defendants.

On April 20, 2018, all Defendants (except for Officer Burley) filed a motion for summary judgment arguing Plaintiff failed to exhaust her administrative remedies prior to filing this lawsuit (Doc. 36). Plaintiff filed her response on May 24, 2018 (Doc. 41). Following the filing of Plaintiff's First Amended Complaint, the Court allowed supplemental briefing on the motion to address the newly added claims (Docs. 86 and 101). Pursuant to *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008), the Court held a hearing on the issue of exhaustion on November 19, 2018. The arguments and evidence mentioned in the parties' briefing and proffered at the hearing is set forth in the Court's discussion of the relevant grievances in the record.

A. Grievances Submitted while Plaintiff was at Lawrence

1. February 7, 2018 Emergency Grievance (Doc. 37-1; Doc. 41-1)

Plaintiff filed this grievance with the assistance of counsel[1] asserting she is in danger as a

[1] Defendants generally argue that the PLRA requires offenders, rather than attorneys or other outside persons, to exhaust their administrative remedies. While the Court recognizes that the Illinois Administrative Code only

woman placed in a man's prison and explaining that she has not received the mental health treatment she requires under Department Rules, the *Rasho* settlement agreement[2], the ADA, the Rehabilitation Act, and the Eighth Amendment. This grievance was received by the Lawrence Grievance Office on February 14, 2018. Plaintiff asserts she never received any response to this grievance. District Judge Rosenstengel considered this grievance in her Order on Plaintiff's Motion for Preliminary Injunction and found that it was exhausted due to the delay in receiving any response, and sufficiently addressed Plaintiff's requests for preliminary injunctive relief. No argument was heard concerning this grievance at the undersigned's hearing on the issue of exhaustion.

2. February 8, February 13, and February 14, 2018 Emergency Grievances (*see* Doc. 41-2)

Plaintiff asserts that the Lawrence Grievance Log demonstrates that the Grievance Office received emergency grievances on February 8, February 13, and February 14, 2018. The Log indicates that the Warden returned the February 8, 2018 grievance on February 13, 2018. There is no indication that the Warden returned Plaintiff's February 13 or February 14 grievances. Plaintiff asserts she never received any responses to these grievances and does not have a copy of the same. There is no record of the content of these grievances.

3. February 19, 2018 Emergency Grievance (Doc. 37-2 and Doc. 41-3)

In this grievance, Plaintiff complains that she was assaulted by Defendant Burley on

contemplates offenders engaging in the administrative review process, there is nothing in the Code expressly prohibiting outside persons from assisting. Further, the grievances that were submitted with the assistance of counsel were considered at the facility level despite having been drafted by counsel. For these reasons, the Court will consider the grievances Plaintiff submitted with the assistance of counsel over Defendants' objection. Additional discussion concerning this argument is set forth as it relates to Plaintiff's grievance dated June 29, 2018.

[2] *See Rasho v. Walker*, 1:07-cv-1298-MMM (C.D. Ill.).

February 18, 2018. Plaintiff explains that Officer Burley grabbed Plaintiff by the back of her neck and slammed her face into the fence. Plaintiff writes that Officers Givens and Clark (both defendants) witnessed the assault, but did not take any action or intervene. Plaintiff asked Givens for medical attention, but he ignored her request. Plaintiff sent a copy of this grievance directly to Defendant Kink, Defendant Baldwin, and the Administrative Review Board ("ARB") simultaneously. The ARB received this grievance on February 22, 2018 and returned it on February 28, 2018 without a decision on the merits. Plaintiff was directed to provide her original grievance with her counselor's response, as well as a copy of the Grievance Officer's and CAO's responses. Director Baldwin acted to forward the grievance to Plaintiff's facility and she was advised that grievances should begin at the facility level (*see* Doc. 41-3 at 12). Warden Kink received a copy of this grievance on February 23, 2018 and responded on the same date finding that an emergency was not substantiated. Plaintiff was directed to submit her grievance in the normal manner. Warden Kink also received two other grievances dated February 19, 2018 on February 23, 2018 that had been designated as emergencies by Plaintiff. In the first of these other grievances, Plaintiff again complains about the assault by Officer Burley and the issuance of a disciplinary ticket in retaliation for the incident. In the second of these grievances, Plaintiff explains that another inmate told her the adjustment committee dropped his ticket, but they would not drop hers because they do not like her. Warden Kink found these grievances were not of an emergency nature and directed Plaintiff to submit them in the normal manner. There is no indication in the record that Plaintiff pursued her February 19, 2018 grievances any further.

Defendants contend that this grievance was not exhausted and fails to exhaust any claims in this lawsuit as Plaintiff did not follow the proper procedure for exhaustion. Plaintiff asserts

that denial of this grievance as an emergency by the Warden was a final decision and no further action was necessary. Plaintiff also testified at the hearing that she submitted a letter to the ARB after the warden's denial. Plaintiff testified that the ARB responded, noting it concurred with the institution. There is no record of Plaintiff's letter directed to the ARB or its response to the same.

4. February 20, 2018 Emergency Grievance (Doc. 41-4)

In this grievance, Plaintiff complains that she has not been able to attend group therapy to treat her mental illness or gender dysphoria. Plaintiff complains that the mental health counselors have harassed and threatened her. This grievance was received by Warden Kink on February 23, 2018, and he determined that an emergency was not substantiated. Plaintiff was directed to submit her grievance in the normal manner. There is no other documentation in the record concerning this grievance.

Plaintiff contends that this grievance was exhausted after the warden determined an emergency was not substantiated, as it has been found that Plaintiff was experiencing irreparable harm. Plaintiff points to District Judge Rosenstengel's Order on Plaintiff's Motion for Preliminary Injunction to support her position concerning irreparable harm (*see* Doc. 105). *See Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010) ("If a prisoner has been placed in imminent danger of serious physical injury by an act that violates his constitutional rights, administrative remedies that offer no possible relief in time to prevent the imminent danger from becoming actual harm can't be thought available."). Defendants assert that this grievance was not fully exhausted as Plaintiff took no further action after receiving the warden's decision on the emergency nature of the same. Defendants also argue that this grievance includes issues beyond what was considered in Judge Rosenstengel's Order.

5. February 22, 2018 Emergency Grievance (Doc. 37-3 and Doc. 41-5)

This grievance, prepared with the assistance of Plaintiff's counsel, complains that officials have failed to protect Plaintiff from a serious risk of harm by placing Plaintiff in a male prison. Plaintiff explains that since arriving at Lawrence she has been subjected to assaults, harassment, and threats from prisoners and correctional officers. Plaintiff also recounts an assault by an unknown officer that occurred on February 19, 2018. More generally, Plaintiff asserts she is being improperly held in segregation and denied access to mental health services. Counsel for Plaintiff sent this grievance to Defendant Warden Kink and Defendant Director Baldwin via email and postal mail, and a copy was also sent to the ARB via postal mail. The CAO at Lawrence received this grievance on February 23, 2018 and indicated on the grievance form: "Emergency. Please expedite." The Lawrence Grievance Office received this grievance on February 27, 2018 and the Grievance Officer responded on March 5, 2018. The Grievance Officer recommended that the grievance be partially upheld, noting that the PREA allegations and staff conduct have been or are being investigated by internal affairs and all mental health issues are currently being addressed. The CAO concurred with the Grievance Officer's response on March 7, 2018. On March 12, 2018, Leslie McCarty with the ARB responded to Attorney Bedi's submission of the grievance sent directly to the ARB and advised her of the dictates of § 504.850 of the Illinois Administrative Code. In particular, McCarty indicated that pursuant to § 504.850, an appeal must be received by the *offender*. Director Baldwin also responded to the submission of the grievance, explaining that it was forwarded to the CAO at Lawrence (who was already addressing the same).

At the hearing, Plaintiff asserted that because this grievance was treated as an emergency by the facility and was partially upheld, she was not required to appeal the decision to the ARB.

Defendants contend that Plaintiff did not receive all the relief she was seeking and, as such, she was required to appeal the CAO's decision to the ARB.

6. February 23, 2018 Emergency Grievances (Doc. 41-6)

In these grievances, Plaintiff complains generally about staff misconduct and retaliation. In particular, Plaintiff explains that she was wrongfully issued a disciplinary ticket by Officer Rue on February 21, 2018. These grievances were received by the CAO on February 28, 2018 and the CAO determined an emergency was not substantiated on the same date. Plaintiff was directed to submit these grievances in the normal manner. There is no other documentation concerning these grievances.

At the hearing, Plaintiff reiterated her argument set forth in regards to her February 20, 2018 grievance concerning the emergency nature of the grievance and Judge Rosenstengel's Order finding irreparable harm. Defendants maintained that despite Judge Rosenstengel's Order, Plaintiff should have continued with the administrative review process and submitted her grievance in the normal manner.

7. February 25, 2018 Emergency Grievance (Doc. 41-7)

In this grievance, Plaintiff asserts she is being retaliated against for submitting PREA reports about various officials, including Defendants Clark and Burley. Plaintiff asserts she is being denied segregation yard and transgender group therapy. The CAO determined an emergency was not substantiated on February 28, 2018 and directed Plaintiff to submit this grievance in the normal manner. There is no other documentation concerning this grievance.

Defendants contend that this grievance was not exhausted because Plaintiff failed to submit it in the normal manner as directed by the CAO. Plaintiff again asserts that Judge Rosenstengel's

finding of irreparable harm made the administrative review process unavailable and, as such, it was fully exhausted.

B. Grievances Submitted while Plaintiff was at Dixon

1. June 6, 2018 Emergency Grievance (Doc. 86-1)

In this grievance, Plaintiff complains about the adjustment committee's handling of the incident that allegedly occurred at Lawrence involving Officer Burley. Plaintiff requests a new hearing and that the charges be dismissed or expunged. This grievance was reviewed by the CAO on June 13, 2018 and the CAO determined an emergency was not substantiated. Plaintiff was directed to submit this grievance in the normal manner. The Grievance Officer responded to this grievance on August 3, 2018 and recommended that the disciplinary report be remanded back to the adjustment committee for additional documentation, correction or clarification on offender witness statements. The CAO concurred on August 3, 2018 and Plaintiff appealed the decision to the ARB on August 7, 2018. There is no documentation from the ARB concerning this grievance.

Defendants contend that this grievance was not yet exhausted at the time Plaintiff filed her amended complaint and, in any event, assert that the content of this grievance has nothing to do with the allegations against Defendants who are employed by Dixon. Plaintiff asserts that she is not relying on this grievance to demonstrate exhaustion of her claims.

2. June 17, 2018 Emergency Grievance (Doc. 101-1)

In this grievance, Plaintiff asserts she has been verbally abused and threatened by Officer Blackburn and other male officers since May 25, 2018. Plaintiff requests that Blackburn be trained in how to deal with transgender prisoners and disciplined with a suspension without pay.

The counselor received this grievance on June 20, 2018 and responded on August 24, 2018, indicating that the staff denies all allegations of misconduct. There is no other documentation concerning this grievance.

At the hearing, Plaintiff asserted that she is not relying on this grievance to demonstrate exhaustion of her claims.

3. June 23, 2018 Emergency Grievance, No. 18-7-53 (Doc. 86-2 and Doc. 101-2)

In this grievance, Plaintiff complains that she is experiencing ongoing harassment and discrimination from staff at Dixon. Plaintiff asserts she is being targeted because of the expression of her gender and referred to as "Mr. Hampton" or "sir." She explains that employees have told her they do not care if she is raped and correctional officers stare at her to the point it has become harassment. Plaintiff's counselor responded to this grievance on July 2, 2018, finding that the claims were not substantiated. The Grievance Officer responded on August 21, 2018, finding that the claims had no merit, and the CAO concurred on August 22, 2018. There is no other documentation in the record concerning this grievance.

At the hearing, Plaintiff asserted that she is not relying on this grievance to demonstrate exhaustion of her claims.

4. June 23, 2018 Grievance, No. 18-7-54 (Doc. 86-3 and Doc. 101-3)

In this grievance, Plaintiff asserts that since arriving at Dixon she has been sexually assaulted by two difference inmates. Plaintiff complains that she has made many PREA calls, but no one has interviewed her. She states that she does not feel the IDOC can protect her in a male prison and she is not allowed to express herself as a woman and shop the women's commissary. Plaintiff's counselor responded to this grievance on July 2, 2018, finding the grievance moot as

the incidents complained of were under investigation by IA and noting Plaintiff was being seen by medical and mental health staff. The Grievance Officer responded to this grievance on August 21, 2018 (*after* Plaintiff's amended complaint was filed), and the CAO concurred on August 22, 2018. There is no other documentation in the record concerning this grievance.

At the hearing, Plaintiff asserted that she is not relying on this grievance to demonstrate exhaustion of her claims.

5. June 23, 2018 Grievances, No. 18-7-55/56 (Doc. 86-4)

In these grievances, Plaintiff complains that she has been denied access to school and job assignments since entering IDOC custody. Plaintiff contends she has been denied the same because of her transgender status. Plaintiff's counselor responded to these grievances on July 2, 2018 and June 29, 2018. The Grievance Officer responded on August 21, 2018 (*after* the amended complaint was filed), and the CAO concurred on August 24, 2018. There is no other documentation in the record concerning this grievance.

At the hearing, Plaintiff asserted that she is not relying on this grievance to demonstrate exhaustion of her claims.

6. June 23/24, 2018 Grievance, No. 18-7-52 (Doc. 86-5 and Doc. 101-4)

In this grievance, Plaintiff complains about unknown staff calling her derogatory terms and referring to her by male pronouns. Plaintiff asks to be transferred to a woman's prison to ensure she will not be discriminated against and will be allowed to wear tight fitting clothes so she can identify as a woman. Plaintiff's counselor denied this grievance on July 2, 2018, noting that transfers are not an administrative decision. The Grievance Officer responded on August 21, 2018, and the CAO concurred with the Grievance Officer's response on August 24, 2018.

At the hearing, Plaintiff asserted that she is not relying on this grievance to demonstrate exhaustion of her claims.

7. June 29, 2018 Emergency Grievance (Doc. 101-5)

This grievance was prepared and submitted on behalf of Plaintiff by her counsel. Plaintiff grieves the fact that she is in danger as a woman placed in a man's prison and indicates that she is being sexually harassed by Dixon staff based on her status as a transgender woman. Plaintiff also asserts that Dixon staff members are failing to protect her and that she has been placed in segregation due to retaliatory disciplinary tickets. Plaintiff specifically grieves an incident that occurred with Defendant Officer Manzano, wherein he allegedly maced her in the face, threatened her for making complaints, and wrote her a retaliatory disciplinary ticket.

Plaintiff's counsel sent this grievance to Defendant Warden Varga and Defendant Director Baldwin via email and postal mail, and to the ARB via postal mail. On July 9, 2018, the ARB sent a letter to Plaintiff's counsel confirming receipt of the grievance and noting that the ARB would forward the grievance to the CAO at Dixon for handling, per proper procedure. Dixon Warden Varga responded on July 16, 2018 via letter. In Varga's letter, he explains the grievance and transfer request procedures, references the Department's policies for sexual abuse and sexual harassment, and describes the provision of mental health services. Varga also asserts that Plaintiff has been meeting with mental health therapists and attending transgender group meetings.

Defendants assert that this grievance was not exhausted as it was not submitted personally by Plaintiff, as required, and Plaintiff did not follow proper grievance procedures. Plaintiff contends that this grievance was exhausted as it was submitted as an emergency, but was not treated as an emergency, causing her administrative remedies to be "unavailable."

8. July 4, 2018 Emergency Grievance (Doc. 86-6)

In this grievance, Plaintiff complains about staff conduct that occurred at Lawrence. This grievance sets forth obscene incidents that allegedly occurred at Lawrence, but it is not clear if the incidents complained of were committed by staff or other inmates. This grievance was received by the ARB on July 10, 2018 and the ARB indicated it was being forwarded to Lawrence for an investigation. The ARB letter was dated July 16, 2018. There is no other documentation concerning this grievance.

9. August 1, 2018 Emergency Grievance (Doc. 101-6)

In this grievance, Plaintiff complains about staff conduct and retaliation. Plaintiff details how she was assaulted by another inmate on June 25, 2018. Plaintiff notified Officer Gee, IA Officer Manzano, and IA Officer Blackburn, but they told her she would be going to segregation. The CAO determined an emergency was not substantiated on August 3, 2018, and directed Plaintiff to submit the grievance in the normal manner. The grievance, however, was forwarded to the Grievance Officer to address the PREA concerns. The Grievance Officer found that Plaintiff's claims were being addressed by Internal Affairs. The Grievance Officer issued his response on August 6, 2018, and the CAO concurred on August 10, 2018. There is no other documentation in the record concerning this grievance.

Plaintiff argues this grievance was exhausted after the CAO determined an emergency was not substantiated pursuant to Judge Rosenstengel's Preliminary Injunction Order. Defendants conceded that although this grievance was ultimately exhausted, it was only exhausted after Plaintiff filed her Amended Complaint.

LEGAL STANDARDS

Summary Judgment Standard

Summary judgment is appropriate only if the moving party can demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322(1986); *see also Ruffin-Thompkins v. Experian Information Solutions, Inc.*, 422 F.3d 603, 607 (7th Cir. 2005). The moving party bears the initial burden of demonstrating the lack of any genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Estate of Simpson v. Gorbett*, 863 F.3d 740, 745 (7th Cir. 2017) (quoting *Anderson*, 477 U.S. at 248). In considering a summary judgment motion, the district court views the facts in the light most favorable to, and draws all reasonable inferences in favor of, the nonmoving party. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 735 F.3d 962, 965 (7th Cir. 2013) (citation omitted).

Exhaustion Requirements

Pursuant to 42 U.S.C. § 1997e(a), prisoners are required to exhaust available administrative remedies prior to filing lawsuits in federal court. "[A] prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies." *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002). "[A] suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment." *Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 535 (7th Cir. 1999). "[A]ll dismissals under § 1997e(a)

should be without prejudice." *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004).

An inmate in the custody of the Illinois Department of Corrections must first submit a written grievance within 60 days after the discovery of the incident, occurrence or problem, to his or her institutional counselor, unless certain discrete issues are being grieved. 20 ILL. ADMIN. CODE § 504.810(a). If the complaint is not resolved through a counselor, the grievance is considered by a Grievance Officer who must render a written recommendation to the Chief Administrative Officer — usually the Warden — within 2 months of receipt, "when reasonably feasible under the circumstances." *Id.* §504.830(e). The CAO then advises the inmate of a decision on the grievance. *Id.*

An inmate may appeal the decision of the Chief Administrative Officer in writing within 30 days to the Administrative Review Board for a final decision. *Id.* § 504.850(a); *see also Dole v. Chandler*, 438 F.3d 804, 806–07 (7th Cir. 2006). The ARB will submit a written report of its findings and recommendations to the Director who shall review the same and make a final determination within 6 months of receipt of the appeal. 20 ILL. ADMIN. CODE § 504.850(d) and (e).

An inmate may request that a grievance be handled as an emergency by forwarding it directly to the Chief Administrative Officer. *Id.* § 504.840. If it is determined that there exists a substantial risk of imminent personal injury or other serious or irreparable harm, the grievance is handled on an emergency basis, which allows for expedited processing of the grievance by responding directly to the offender. *Id.* Inmates may further submit certain types of grievances directly to the Administrative Review Board, including grievances related to protective custody, psychotropic medication, and certain issues relating to facilities other than the inmate's currently

assigned facility. *Id.* at § 504.870.

CONCLUSIONS OF LAW

The Court has considered each of the grievances detailed above and finds as follows.

A. Grievances Submitted while Plaintiff was at Lawrence

1. February 7, 2018 Emergency Grievance (Doc. 37-1; Doc. 41-1)

The Court agrees with Judge Rosenstengel's finding that this grievance was exhausted due to the institution's failure to provide a timely response. However, the content of this grievance does not exhaust each of the claims in this lawsuit. Generally, Plaintiff grieves her placement in a man's prison and complains about inadequate mental health treatment. Plaintiff seeks a transfer to a women's prison, release from segregation, an updated treatment plan, and the provision of group and other required therapy. No particular individual is named in this grievance. Based on the issues set forth in this grievance, the Court finds it adequately grieved the allegations set forth in Count One and Count Four as against Defendant Baldwin (in his official capacity).

2. February 8, February 13, and February 14, 2018 Emergency Grievances (*see* Doc. 41-2)

Based on a review of Lawrence's Grievance Log, it appears the Grievance Office received emergency grievances dated February 8, February 13, and February 14, 2018. However, there is no other documentation concerning these grievances. As Defendants have not met their burden in demonstrating that Plaintiff failed to exhaust her administrative remedies with respect to these grievances, the Court finds they were exhausted. However, as conceded by Plaintiff, she has no recollection of the content of these grievances and is not intending to rely on the content of the same to establish exhaustion of her claims. As such, these grievances are insufficient to exhaust

the claims in this lawsuit.

3. February 19, 2018 Emergency Grievance (Doc. 37-2 and Doc. 41-3)

The Court finds that Plaintiff failed to exhaust the available administrative remedy process for her February 19, 2018 grievance. First, the Court considers Plaintiff's argument that following the warden's denial of her emergency grievance she was not required to take any further action. In support of this argument, Plaintiff cites *Thornton v. Snyder*, 428 F.3d 690, 694 (7th Cir. 2005), in which the Seventh Circuit remarked that "[t]here is nothing in the current regulatory text … that requires an inmate to file a new grievance after learning only that it will not be considered on an emergency basis." Notably, the Seventh Circuit left open the possibility that the inmate was required to appeal the non-emergency determination. *Id.* ("even if the non-emergency determination was a decision that should have been appealed …"). Moreover, since *Thornton*, the regulatory text of the Illinois Administrative Code has changed. The operative text is 20 ILCS § 504.840, which (in its current form) reads:

An offender may request a grievance be handled on an emergency basis by forwarding the grievance directly to the Chief Administrative Officer.

> a) If there is a substantial risk of imminent personal injury or other serious or irreparable harm to the offender, the grievance shall be handled on an emergency basis.
>
> […]
>
> c) If the Chief Administrative Officer determines that the grievance should not be handled on an emergency basis, the offender shall be notified in writing that he or she may resubmit the grievance as non-emergent, in accordance with the standard grievance process.

Subsection (c) was included as an amendment to the regulation in April 2017. Because the facts

of this case postdate the amendment, subsection (c) must be applied in the Court's analysis. Subsection (c) and its implications for an inmate's exhaustion requirements was recently examined in detail by District Judge J. Phil Gilbert in *Smith v. Asselmeier*, Case No. 3:17-cv-1237-JPG-DGW, 2018 WL 3533346 (July 23, 2018 S.D. Ill.), *aff'd*, No. 18-2832, 2019 WL 1568111, -- F. App'x – (7th Cir. 2019). In *Asselmeier*, Judge Gilbert considered the language of the text, finding that the use of the word "may" is a mandate that requires a prisoner to resubmit his grievance through the non-emergency procedures. *Id.* at *2. In support of his conclusion, Judge Gilbert considered other provisions in the Illinois Administrative Code in which the Seventh Circuit has interpreted the word "may" as a mandatory requirement, such as 20 ILCS § 504.850(a). *Id.* at *3. Judge Gilbert also considered the context of the amendment, finding that if resubmission of the grievance were merely an option, it would render the inclusion of the same meaningless. *Id.* The Court is not only persuaded by Judge Gilbert's consideration of the text and its context, but also of Judge Gilbert's consideration of the logistical concerns if a prisoner could exhaust his administrative remedies solely by filing an emergency grievance instead of going through the standard protocols (if said grievance were deemed to not be of an emergency nature). Indeed, Judge Gilbert noted that if exhaustion could be satisfied solely by submitting an emergency grievance, "then the entire regulatory structure would collapse. Every prisoner would be able to fully exhaust his remedies by filing a frivolous emergency grievance, bypassing the standard procedures that are meant to address these issues on the merits." *Id.* The Court agrees with Judge Gilbert's analysis concerning 20 ILCS § 504.840 and finds that Plaintiff's attempt to exhaust her February 19, 2018 grievance by submitting it to the warden, without any further action, was insufficient to exhaust her administrative remedies.

Insofar as Plaintiff asserts that the warden's denial of the grievance as an emergency was sufficient to exhaust based on Judge Rosenstengel's Order finding Plaintiff was suffering from irreparable harm, the Court disagrees. The incident complained of in this grievance was not addressed by Judge Rosenstengel in her Order and it is not at all clear that her Order was founded upon a finding that the February 18, 2018 incident was causing or threatening irreparable, imminent harm.

The Court further finds that Plaintiff's submission of this grievance directly to the ARB was insufficient to exhaust her remedies. The complaints set forth in this grievance do not meet the criteria for submission of a grievance for direct review by the ARB under § 504.870 of the Illinois Administrative Code. Finally, Plaintiff's reliance on 730 ILCS § 5/3-8-8(c) is misplaced. Her submission of this grievance to Director Baldwin, although allowed under § 5/3-8-8(c), does not equate to satisfaction of her exhaustion requirements.

Based on the foregoing, the Court finds that Plaintiff failed to exhaust her February 19, 2018 grievance.

4. February 20, 2018 Emergency Grievance (Doc. 41-4)

In this grievance, Plaintiff complains that she has been unable to attend her group therapies in retaliation for filing lawsuits against the State. Plaintiff also complains about her placement in a male facility. These issues were addressed in Judge Rosenstengel's Order on Plaintiff's motion for preliminary injunction (*see* Doc. 105). In that Order, Judge Rosenstengel found that Plaintiff's physical safety was at risk and that she faced irreparable harm absent injunctive relief. In light of this finding, Plaintiff argues the administrative remedy process was exhausted once the warden denied the grievance as an emergency. Insofar as Plaintiff relies on *Thornton v. Snyder* to support

this contention, for the reasons set forth above, the Court disagrees. Submission of an emergency grievance to the warden, without any further action once the warden denies the emergency nature of the grievance, is insufficient to exhaust an inmate's administrative remedies.

Insofar as Plaintiff relies on *Fletcher v. Menard Correctional Ctr.*, 623 F.3d 1171 (7th Cir. 2010), her reliance is misplaced. First, the holding in *Fletcher* does not excuse a prisoner from exhausting remedies tailored to imminent dangers. Indeed, the Seventh Circuit found that the inmate-plaintiff in *Fletcher*, who availed himself of the emergency grievance procedure, was too hasty in filing his suit after waiting only two days for a response to his emergency grievance. *Id.* at 1175. The Court specifically found that the inmate-plaintiff had an available remedy and he had to wait more than two days to test its availability. *Id.* Here, there is no dispute that the warden responded to this grievance just three days after Plaintiff filed it. The warden denied the emergency nature of the grievance and directed Plaintiff to submit it in the normal manner. As set forth above, submission in the normal manner was not merely a suggestion, but a requirement for exhaustion. *Fletcher* does not change the procedure Plaintiff was obligated to follow. Notwithstanding Judge Rosenstengel's subsequent finding of irreparable harm, Plaintiff was required to exhaust her remedies as directed by the institution, which, in this instance, was to submit her grievance in the normal manner. Plaintiff has not provided, and the Court is unaware, of any authority for the Court to determine, after-the-fact, whether the CAO correctly determined whether an emergency was substantiated and alter the grievance requirements after a lawsuit is filed. This outcome would clearly be in contravention of the purpose and letter of the PLRA.

5. February 22, 2018 Emergency Grievance (Doc. 37-3 and Doc. 41-5)

Plaintiff invokes the reasoning set forth in *Thornton v. Snyder*, 428 F.3d 690 (7th Cir. 2005)

to support her exhaustion argument for her February 22, 2018 grievance. The Court agrees. In this grievance, Plaintiff (through her attorneys), set forth a litany of issues concerning her placement at Lawrence, including enduring harassment, assaults, and threats from prisoners and correctional officers, her improper placement in segregation and denial of access to mental health services. Plaintiff requested that she be: (1) transferred to a woman's prison; (2) released from segregation; and (3) issued an updated treatment plan and receive the group and other therapy required to treat her serious mental illnesses. The Grievance Officer partially upheld the complaints set forth by Plaintiff, noting all PREA allegations/staff conduct were being investigated by internal affairs and that all mental health issues were currently being addressed (the Court also notes that it is not clear what complaints were not being upheld). The CAO concurred. Although Defendants contend that Plaintiff was required to appeal the CAO's decision because Plaintiff did not receive all of the relief she was seeking, the Court disagrees. The Grievance Officer's recommendation appears to indicate all issues were being addressed aside from the allegations that occurred at other facilities, but it is not clear how this impacted the relief Plaintiff was requesting. Although Plaintiff may not have been released from segregation or transferred to a women's prison in response to her filing this grievance, the response she received appeared to indicate such matters were being considered. As noted by the Seventh Circuit in *Thornton*, not only is it counter-intuitive to require Plaintiff to appeal to higher channels after receiving the relief requested, but it is not required by the PLRA. 428 F.3d at 697. Because the Grievance Officer's response (and CAO's subsequent concurrence), appeared to address the issues set forth in the grievance, the Court finds it was exhausted prior to the filing of this lawsuit.

Next, the Court must consider which claims were sufficiently exhausted. Based on the

content of the grievance, the Court finds it exhausts the claims set forth in Count One, Count Two against Director Baldwin, Count Three against John Does 1-4 and Director Baldwin, Count Four against Warden Kink and Director Baldwin, Count Six against Director Baldwin, Count Seven against Director Baldwin, and Count Eight against Director Baldwin.

6. February 23, 2018 Emergency Grievances (Doc. 41-6)

In this grievance, Plaintiff sets forth complaints concerning her interaction with Officer Rue on February 21, 2018. Plaintiff also includes general concerns about staff misconduct and retaliation. Plaintiff argues that this grievance, like her February 20, 2018 grievance, was exhausted once the CAO determined an emergency was not substantiated based on Judge Rosenstengel's finding that she faced imminent, irreparable harm. As discussed *supra*, the Court disagrees. The CAO responded to this grievance five days after submission. The warden denied the emergency nature of the grievance and directed Plaintiff to submit it in the normal manner. Notwithstanding Judge Rosenstengel's subsequent finding of irreparable harm, Plaintiff remained bound to exhaust her remedies tailored to imminent dangers, which she did not do. Thus, the Court finds this grievance was not exhausted.

7. February 25, 2018 Emergency Grievance (Doc. 41-7)

Plaintiff again grieves issues concerning staff harassment and retaliation at Lawrence. The CAO determined an emergency was not substantiated three days after filing. The Court applies its discussion above and finds this grievance was not exhausted.

B. <u>Grievances Submitted while Plaintiff was at Dixon</u>

1. June 6, 2018 Emergency Grievance (Doc. 86-1); June 17, 2018 Emergency Grievance (Doc. 101-1); June 23, 2018 Emergency Grievance, No. 18-7-53 (Doc. 86-2 and Doc. 101-2); June 23, 2018 Grievance, No. 18-7-54 (Doc. 86-3 and Doc. 101-3); June 23,

2018 Grievances, No. 18-7-55/56 (Doc. 86-4); June 23/24, 2018 Grievance, No. 18-7-52 (Doc. 86-5 and Doc. 101-4)

Plaintiff conceded at the hearing that these grievances were either not exhausted prior to filing her Amended Complaint or that she was not relying on them to demonstrate exhaustion of her administrative remedies. Based on Plaintiff's concessions, the Court need not discuss these grievances further, but finds they are insufficient to exhaust any of the claims in this lawsuit.

2. June 29, 2018 Emergency Grievance (Doc. 101-5)

The Court finds that Plaintiff's June 29, 2018 Emergency Grievance, drafted and submitted on Plaintiff's behalf by counsel, was sufficiently exhausted because the administrative review process was unavailable to Plaintiff. The crux of the issue here is whether it was procedurally proper for counsel to submit this emergency grievance on Plaintiff's behalf and whether the institution provided a valid response. First, while the Court recognizes that the Illinois Administrative Code seems to contemplate that offenders themselves shall engage in the administrative review process, there is nothing in the Code that expressly prohibits outside persons from assisting. Moreover, the June 29, 2018 emergency grievance was accepted and considered at the facility level despite having been drafted by counsel and counsel made clear it was being submitted as an emergency grievance ("Pursuant to the procedures set forth in Illinois Administrative Code Title 20 Section 504.840, I am filing this grievance on an emergency basis …"). The Court finds that the question of whether Warden Varga provided a valid response must tip in favor of Plaintiff as it is Defendants' burden to prove Plaintiff did not exhaust and Warden Varga's response letter is ambiguous. Varga did not specifically indicate whether or how he was disposing of the grievance, he merely commented on the complaints set forth in the grievance.

He gave no direction concerning whether an emergency was substantiated or whether Plaintiff's grievance was being denied or upheld. In light of the ambiguous nature of Varga's response, the Court must find that Varga failed to adequately respond to the same. Because the Illinois Administrative Code does not provide direction on how to exhaust administrative remedies in this instance, the Court finds that Plaintiff's administrative remedies were exhausted.

The Court next considers the contents of this grievance and which claims were sufficiently addressed to achieve exhaustion. The Court finds this grievance exhausted the claims set forth in Count One, Count Two, Count Three against Officer Manzano, Officer Gee, Officer Blackburn, and Warden Varga, Count Four against Warden Varga in his official and individual capacity, Count Five against Lt. Doering and Sgt. Kunde, Count Six, Count Seven, and Count Eight against Warden Varga and Director Baldwin.

3. July 4, 2018 Emergency Grievance (Doc. 86-6)

The Court finds that this grievance, complaining about staff conduct at Lawrence, was addressed on the merits by the ARB on July 16, 2018. Although Defendants contend that the ARB's response was not a decision on the merits, that is not clear based on a plain reading of the same. Thus, Plaintiff exhausted her administrative remedies for this grievance before filing suit. However, the contents of this grievance do not exhaust the claims set forth in Plaintiff's Amended Complaint.

4. August 1, 2018 Emergency Grievance (Doc. 101-6)

The Court finds this grievance was not exhausted prior to the filing of Plaintiff's Amended Complaint. The CAO initially determined an emergency was not substantiated and directed Plaintiff to submit it in the normal manner. Based on the reasoning discussed *supra,* Plaintiff was

obligated to engage the administrative review process following this decision, but failed to do so. Further, notwithstanding the CAO's decision as to the emergency nature of the grievance, it was referred to the Grievance Officer to address the PREA concerns cited by Plaintiff. The Grievance Officer found that the PREA claims were addressed by Internal Affairs and recommended no further action. The CAO concurred with this determination on August 10, 2018. Although the Grievance Officer and CAO addressed the merits of Plaintiff's PREA allegations, her grievance was not upheld and she did not receive the relief she requested. Thus, *Thornton v. Snyder*, 428 F.3d 690 (7th Cir. 2005), is not applicable and the Court cannot find exhaustion on this basis.

C. Remaining Issues

Based on the above discussion, the Court finds Plaintiff sufficiently exhausted her administrative remedies for Count Nine against the following defendants named in their individual capacities: John Baldwin, John Varga, Warden Kink, Lt. Doering, and Sgt. Kunde.

Finally, the Court notes that because Officer Burley did not move for summary judgment on the issue of exhaustion, any claims against him shall proceed and it was not necessary for the Court to discuss how any of the grievances in the record pertain to Defendant Burley.

RECOMMENDATIONS

Based on the foregoing, it is **RECOMMENDED** that the Motion for Summary Judgment on the Issue of Exhaustion of Administrative Remedies filed by Defendants John Baldwin, Karen Jaimet, Kevin Kink, Nicholas Lanpley, Michael Clark, Jeremy Givens, Jacob Blackburn, Christopher Doering, Taylor Gee, Susan Kunde, Arthur Manzano, and John Varga (Docs. 36, 37 and 86) be **GRANTED IN PART AND DENIED IN PART**; that the Court **FIND** Plaintiff failed to exhaust her administrative remedies as to Count Three against Lt. Givens, Officer Clark, and

Officer Lanpley, and Count Four against Warden Jaimet; that Defendants Givens, Clark, Lanpley, and Jaimet be **DISMISSED WITHOUT PREJUDICE**, and that the Court adopt the foregoing findings of fact and conclusions of law.

If this Report and Recommendation is adopted in its entirety, Plaintiff will be proceeding in this action on the following claims:

Count One: Fourteenth Amendment Equal Protection claim against John Baldwin, the Director of the IDOC, in his official capacity for refusing to place Plaintiff in a women's prison.

Count Two: Fourteenth Amendment Equal Protection claim against Director Baldwin and Dixon Warden John Varga in their official capacities related to Plaintiff's subjection to continued verbal sexual harassment due to her gender identity.

Count Three: Eighth Amendment failure to protect claim against Defendants John Does 1-4, Officer Burley, Officer Gee, IA Officer Manzano, and IA Officer Blackburn in their individual capacities and Director Baldwin and Warden Varga in their official capacities for failing to ensure Plaintiff's safety at Dixon and Lawrence despite their knowledge that she is vulnerable to abuse and sexual assault.

Count Four: Eighth Amendment cruel and unusual punishment claim against Defendants Warden Varga and Warden Kink, in their individual capacities, and Director Baldwin and Warden Varga in their official capacities for placing Plaintiff in segregation, thereby exacerbating her serious mental health problems.

Count Five: Eighth Amendment excessive force claim against Officer Burley, Lt. Doering, and Sgt. Kunde.

Count Six: Claim under the Americans with Disabilities Act against Director Baldwin and Warden Varga in their official capacities for failing to provide Plaintiff with reasonable accommodations for her Gender Dysphoria disability.

Count Seven: *Monell* claim under 42 U.S.C. § 1983 against Director Baldwin and Warden Varga in their official capacities for ratifying and implementing unconstitutional policies related to transgender prisoners.

Count Eight: Claim under the Illinois Hate Crimes Act against Officer Burley in his

individual capacity for allegedly physically assaulting Plaintiff due to her gender and sexual orientation, and against Director Baldwin and Warden Varga in their official capacities to prevent the continued violation of Plaintiff's rights under the Illinois Hate Crimes Act.

Count Nine: Intentional infliction of emotional distress claim against all individual defendants.

Pursuant to 28 U.S.C. § 636(b)(1) and SDIL-LR 73.1(b), the parties shall have fourteen (14) days after service of this Report and Recommendation to file written objection thereto. The failure to file a timely objection may result in the waiver of the right to challenge this Report and Recommendation before either the District Court or the Court of Appeals. *See, e.g., Snyder v. Nolen*, 380 F.3d 279, 284 (7th Cir. 2004).

DATED: April 29, 2019

s/ Reona J. Daly

Hon. Reona J. Daly
United States Magistrate Judge