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

ASHOOR RASHO, FAYGIE FIELDS, BRIAN NELSON, and ROBERT BOYD, Individually and on behalf of the plaintiff class,	)	
Plaintiffs,	)	
vs.	)	**Civil No. 00-528-DRH**
DONALD SNYDER, JR., et al.,	)	
Defendants.	)	

REPORT AND RECOMMENDATION

PROUD, Magistrate Judge:

Pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (C), this Report and Recommendation is respectfully submitted to the District Court.

Before the Court is a motion to dismiss and memorandum in support thereof filed by defendants Powers and Chandra. **(Docs. 11 and 12).** A review of the record reveals that a motion to dismiss was previously filed on behalf of Powers and Chandra and the other seven defendants.[1] **(Doc. 9).**

It appears that there is some confusion as to who is representing Powers and Chandra, as opposed to Powers and Chandra attempting to take a "second bite at the apple." The present motion was prepared by retained counsel, attorney Patrick Londrigan of the law firm Heyl, Royster, Voelker & Allen, while the previous motion was prepared by Assistant Illinois Attorney General Katherine

[1] This Court recently submitted a Report and Recommendation regarding that previously filed motion. Therefore, insofar as the present motion adopts the defendants' arguments from that first motion, those issues have already been addressed on behalf of defendants Powers and Chandra.

41

Anthony. The Court record indicates that both Londrigan and Anthony have entered their appearances on behalf of Powers and Chandra. In any event, because Powers and Chandra are before the Court raising different issues, particular to them as individuals, this Court has elected to consider the merits of the second motion to dismiss, rather than striking it. Similarly, this Court construes "Plaintiffs' Response to Defendants' Motions to Dismiss Complaint" **(Doc. 24)** as being responsive to this second motion to dismiss, as well as to the first.

The Complaint

On July 6, 2000, the plaintiffs, Illinois Department of Corrections inmates housed at Tamms Correctional Center, who are allegedly mentally ill, filed the above-captioned civil rights suit, pursuant to 42 U.S.C. § 1983. **(Doc. 1).**

Plaintiffs set forth 27 pages of factual allegations, intermingling allegations regarding named plaintiffs with general assertions regarding the "class," upon which seven claims are premised. The seven enumerated claims are as follows:

Count I - The individual defendants were/are deliberately indifferent to plaintiffs' serious mental health needs in violation of the Eighth and Fourteenth Amendments.

Count II - Unconstitutional conditions of confinement for seriously mentally ill inmates imposed by the individual defendants constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Count III - The individual defendants have violated the plaintiffs' state-created liberty or property interest in being provided with adequate and humane care in the form of mental health treatment by mental health professionals who exercise their professional judgment in delivering treatment (created by the Illinois Mental Health and Developmental Disabilities Code, 405 ILCS 5/2-102), thereby denying them due process under the Fourteenth Amendment.

Count IV - The Illinois Department of Corrections discriminated against the plaintiffs on

account of their serious mental illness in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA).

Count V - The Department of Corrections discriminated against the plaintiffs on account of their serious mental illness in violation of the Rehabilitation Act, 29 U.S.C. § 794 (Rehab Act).

The plaintiffs seek declaratory relief (Count VI), as well as injunctive relief, and compensatory and punitive damages (Count VII).

The named defendants are all sued in their individual and official capacities.

These claims may be familiar to the District Court as plaintiffs voluntarily dismissed a virtually identical law suit in June 2000, *Boyd v. Snyder*, 99-280-DRH ("*Boyd* I"). Of note, defendant Chandra was not named in *Boyd* I.

Arguments for Dismissal

Defendants Powers and Chandra argue that dismissal is warranted pursuant to Fed.R.Civ.P. 12(b)(6) for the following reasons:

1. Plaintiffs failed to exhaust available administrative remedies prior to filing this action under 42 U.S.C. § 1983, as required by Section 803(d) of the Prison Litigation Reform Act of 1996 (PLRA) (Title VII of Pub.L. 104-134, 110 Stat. 1321 (effective April 26, 1996) codified as 42 U.S.C. § 1997e(a)).

2. Plaintiffs failed to allege sufficient personal involvement by Powers and Chandra to sustain liability under 42 U.S.C. § 1983.

3. Plaintiffs have failed to state a viable Eighth Amendment claim for "deliberate indifference to a serious medical need" (Count I).

4. Plaintiffs have not alleged injuries sufficient to satisfy the physical injury requirement under 42 U.S.C. § 1997e(e).

(*See* Doc. 12). This Court construes the defendants' arguments as pertaining only to claims asserted against them in their individual capacities (Counts I-III).

Fed.R.Civ.P. 12(b)(6) v. Fed.R.Civ.P. 56

Defendants' motion to dismiss is premised upon Federal Rule of Civil Procedure 12(b)(6), which dictates that if matters outside the pleadings are presented to and not excluded by the court, the 12(b)(6) motion shall be treated as a motion for summary judgment and disposed of in accordance with Federal Rule of Civil Procedure 56. Although defendants do not submit any additional matters for consideration, plaintiffs do, having attached an inch-thick stack of exhibits relative to the exhaustion issue. **(Doc. 24).**

Because the only copy of the amended complaint from *Boyd v. Snyder*, 99-280-DRH (which served as the grievance upon which this case is based) and the other grievances filed by the plaintiffs are contained in plaintiffs' response **(Doc. 24, Tabs 1-8)**, the Court has little choice but to consider these materials and apply the Rule 56 standard of review. However, insofar as no materials outside of the pleadings are considered with regard to the other arguments for dismissal, the Court considers the Rule 12(b)(6) standard of review still applicable. Consequently, in their responses to this Report and Recommendation regarding exhaustion, all parties may present any materials made pertinent by the switch to the Rule 56 standard. **Fed.R.Civ.P. 12(b).** No additional materials shall be presented by the parties in relation to the other arguments for dismissal, as the Rule 12(b)(6) standard is still being utilized.

The Rule 12 and Rule 56 standards will be set forth as necessary below.

1. Exhaustion of Administrative Remedies

The Court of Appeals for the Seventh Circuit held in *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir. 1999), that exhaustion of administrative remedies pursuant to 42 U.S.C. § 1997e(a), while not jurisdictional per se, is a "precondition" to suit, regardless of the apparent futility of pursuing an administrative remedy, regardless of whether money damages are

sought as a tangential remedy, and regardless of notions of judicial economy. Exhaustion of administrative remedies is required before a case may be brought, even if exhaustion is accomplished during pendency of the case. *See* 42 U.S.C. § 1997e(a); and *Perez*, 182 F.3d at 534-37. Recently, in *Booth v. Churner*, ___ U.S. ___, 121 S.Ct. 1819 (2001), the Supreme Court of the United States upheld the exhaustion requirement, even when only money damages are sought. The high court emphasized that procedural exhaustion is required "regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible." **(*Id.*, 121 S.Ct. at1824).**

The Illinois Department of Corrections (IDOC) has adopted a grievance procedure for inmates whereby an inmate first takes his complaint to a correctional counselor; if this does not resolve the problem, he is to file a written grievance on an institutional form within six months of the incident or occurrence complained of. Each institution has one or more designated grievance officers who review such grievances. The grievance officer reports his or her findings and recommendations to the chief administrative officer, i.e., the warden, within fifteen days, "whenever possible," and the warden is to advise the inmate of his or her decision within ten days after receipt of the grievance officer's report. In an emergency, an inmate may send his grievance directly to the warden. If the warden determines that there is a substantial risk of imminent personal injury to the inmate, the grievance is to be decided within three days.

The inmate may appeal the warden's disposition of the grievance in writing to the director of the Department of Corrections within 30 days of the warden's decision. The director reviews the grievance and the responses of the grievance officer and warden, and determines whether the grievance requires a hearing before the Administrative Review Board. If it is determined that the grievance is meritless or can be resolved without a hearing, the inmate is to be advised of this disposition within 30 working days of receipt of the grievance. Otherwise, the grievance is referred to the Administrative Review Board, which may hold hearings and examine witnesses. The Board

is supposed to submit a written report of its findings and recommendations to the director of the Department of Corrections within 30 working days of receipt of the grievance, "whenever possible"; presumably within 30 working days of the Board's receipt of the grievance, not the director's. The director then has ten days to make a final determination, again "whenever possible." **20 Ill.Adm.Code § 504.810-850 (1998).**

The complaint alleges that defendant Powers is the Medical Director of Tamms, and that "[h]e oversees the Health Care Unit at Tamms, which is responsible for providing medical and mental health services for prisoners." **(Doc. 1, p. 7, ¶ 24).** Defendant Chandra is described as the psychiatrist at Tamms, and it is alleged that "[h]e provides mental health services to prisoners at Tamms and administers psychotropic drugs to them." **(Doc. 1, pp. 7-8, ¶ 26).** As set forth above, Powers, Chandra and the other individual defendants are named in Counts I-III (the constitutional claims), in their individual and official capacities. In addition, Counts IV and V (the ADA and Rehab Act claims), brought against the Illinois Department of Corrections, are premised upon the actions of Powers, Chandra and the other named defendants, insofar as they acted on behalf of the Department. Counts VI and VII set forth the remedies sought-- declaratory and injunctive relief, as well as damages.

Combing through the myriad of allegations this Court finds that plaintiffs allege that there are systemic deficiencies in the staffing, facilities, and procedures of the mental health care system at Tamms, which fall under Powers' and Chandra's responsibility. **(Doc. 1. p. 14, ¶ 47(e)).** Of the individual plaintiffs, only Nelson and Boyd make specific allegations of individual wrongdoing-- both against Powers.

Nelson alleges that for symptoms of excruciating headaches, blurred vision, dangerously high blood pressure, a feeling of unsteadiness, and numbness on one side "Dr. Powers chose only to prescribe Inderal, an inexpensive antihypertensive agent that should not be given to Mr. Nelson

because it can trigger or exacerbate a serious depression." **(Doc. 1, p. 25, ¶ 73).** Boyd alleges that after he, Boyd, had cut his own neck and arm very badly, "Dr. Powers refused to stitch up the cuts until morning many hours later, when the wounds required approximately 26 stitches." **(Doc. 1, pp. 27-28, ¶ 81).** Both of these claims would fall under the ambit of Count I, the "serious medical need" claim.

A review of the *Boyd* I complaint/grievance reveals that Chandra is not mentioned at all, having not even started working at Tamms until April 1999. **(Doc. 24, Tab 3; and Doc. 1, p. 21, ¶59).** While this Court is only concerning itself with the claims against Powers and Chandra in their individual capacities, insofar as systemic allegations are contained in the *Boyd* I complaint/grievance, this Court does not perceive it crucial that the defendants be specifically named. Thus, all systemic allegations are considered exhausted by this Court, which may eventually prove to include conduct by Powers and Chandra in their official capacities. As to Nelson and Boyd's allegations against Powers in his individual capacity, both were contained in the *Boyd* I complaint/grievance and are therefore exhausted. **(Doc. 24, Tab 3, ¶¶ 52 and 80, and Doc 1, Tab C).**

It should be noted that plaintiff Boyd did exhaust a claim that Powers refused to believe Boyd had seizures, but no such claim appears in the present complaint. **(Compare Doc. 24, Tab 3, ¶ 57; and Doc. 1, pp. 26-30).** In addition, plaintiff Rasho exhausted a claim that defendant Chandra exacerbated his mental condition, but this claim against Chandra personally is not in the present complaint. **(Compare Doc. 24, Tab 7; and Doc. 1, pp. 18-24).**

In summary, no claims against defendant Chandra in his individual capacity my be pursued as no claims of individual wrongdoing have been exhausted. Consequently, all individual capacity claims against Chandra in Counts I-III should be dismissed. Only Boyd's Count I claim that defendant Powers, in his individual capacity, delayed stitching him up, and Nelson's Count I claim

that Powers, in his individual capacity, only prescribed Inderal have been exhausted. No other claims against Powers in his individual capacity appear in the complaint.

Personal Involvement

To state a civil rights claim under Section 1983, a plaintiff must allege that: (1) the defendant(s) deprived the plaintiff of a right secured by the Constitution and laws of the United States, and (2) the defendant(s) acted under color of state law. ***Stevens v. Umsted*, 131 F.3d 697, at 700 (7th Cir. 1997).** Generally, the doctrine of respondeat superior cannot be used to impose Section 1983 liability on a supervisor for the conduct of a subordinate violating a plaintiff's constitutional rights. ***Lanigan v. Village of East Hazel Crest, Illinois*, 110 F.3d 467, 477 (7th Cir. 1997).** Although pro se prisoners' pleadings warrant the Court considering whether a defendant's position justifies an inference of personal responsibility at this stage, plaintiffs are proceeding with counsel and are therefore not entitled to such leniency. ***Luck v. Rovenstine*, 168 F.3d 323, 327 (7th Cir. 1999); *cf Antonelli v. Sheahan*, 81 F.3d 1422, 1428 (7th Cir. 1996).**

Plaintiffs allege that defendant Powers, as Medical Director at Tamms, "oversees" the Health Care Unit, and that defendant Chandra, as the psychiatrist at Tamms, provides mental health services and administers psychotropic drugs. **(Doc. 1, pp. 7-8).**

The aforementioned description of defendant Powers clearly reflects his supervisory role, which is relevant only to claims against him in his official capacity. However, as set forth in the preceding analysis of exhaustion, plaintiffs do allege individual involvement by Powers–relative to stitching up Boyd's cut and prescribing only Inderal for Nelson. **(Doc. 1, p. 25, ¶ 73; and Doc. 1, pp. 27-28, ¶ 81).** Those are the only two claims where personal involvement by Powers in his individual capacity is sufficiently pled.

Plaintiffs have failed to allege <u>any</u> personal involvement by defendant Chandra in his

individual capacity. Therefore, no claims against Chandra in his personal capacity may proceed.

Count I
Deliberate Indifference to a Serious Medical Need

Defendants Powers and Chandra contend that plaintiffs have failed to state a viable Eighth Amendment claim in Count I regarding alleged deliberate indifference to plaintiffs' serious medical/mental health needs.

As explained above, at this point, the only viable claims which would fall under the ambit of Count I, are: (1) that Powers delayed in stitching up Boyd's neck and wrist cuts; and (2) that Powers prescribed only Inderal for Nelson. **(Doc. 1, p. 25, ¶ 73; and Doc. 1, pp. 27-28, ¶ 81).**

Generally, the Eighth Amendment obligates prison officials to "provide humane conditions of confinement; . . . [to] ensure that inmates receive adequate food, clothing, shelter and medical care, and [to] 'take reasonable measures to guarantee the safety of the inmates.'" ***Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 1976 (1994);** ***see also Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976).** The Eighth Amendment is violated when an official exhibits "deliberate indifference"--when an official "knows of and disregards an excessive risk to inmate health or safety[;] the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." ***Farmer*, 511 U.S. at 837, 114 S.Ct. at 1979.** This standard is subjective, and is the equivalent of recklessness in the criminal law sense. ***Id.*** Mere negligence will not create liability, nor will the provision of medical treatment other than that preferred by the inmate. ***Estelle*, 429 U.S. at 107; *Burns v. Head Jailor*, 576 F. Supp. 618 (N.D. Ill. 1984).**

For Eighth Amendment purposes in the medical care context, the seriousness of a medical problem is gauged by such factors as the severity of the problem, the potential for harm if care is denied or delayed, and whether harm actually resulted from the lack of medical attention. ***See***

Burns*, 576 F.Supp. at 620.** This is an objective determination. ***Davis v. Jones*, 936 F.2d 971, 972 (7th Cir. 1991).** Liability will not attach where the injury appeared slight, but later turned out to be serious; however, where an injury appeared serious and later turned out to be slight, liability will attach--anything else would be gambling with another's health or life. ***Id. The ultimate determination regarding the seriousness of an injury is best left to a physician, or the seriousness of the injury must be so obvious that even a lay person would easily recognize the necessity for a doctor's attention. ***Id.; see also Langston v. Peters*, 100 F.3d 1235, 1240 (7th Cir. 1996).**

Insofar as the defendants argue that plaintiffs have failed to allege a "serious medical need," this Court considers the plaintiffs' allegations sufficient at this stage in the proceedings. In order to have a claim dismissed under Fed.R.Civ.P. 12(b)(6) the moving party must meet a high standard. The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case. Under the "simplified notice pleading" of the Federal Rules of Civil Procedure, the complaint's allegations should be construed liberally, and "the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." ***Conley v. Gibson*, 355 U.S. 41, 46 (1957).** Stated another way, the plaintiff's claims must survive dismissal if "relief could be granted under any set of facts that could be proved consistent with the allegations." ***Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984).**

Relative to Powers' alleged delay in stitching up Boyd's neck and wrist cuts, unnecessary pain and suffering alone may be sufficiently serious for Eighth Amendment purposes. ***See Estelle*, 429 U.S. at 103.** Also, delay in providing medical care may be sufficient for liability. ***Kelley v. McGinnis*, 899 F.2d 612 (7th Cir. 1990).** With regard to Nelson's claim that Powers prescribed Inderal, this may ultimately pan out to be no more than a disagreement regarding the proper course of treatment, but at this stage in the proceedings this claim is sufficiently pled. This Court further

notes that the systemic aspects of Count I also are sufficiently pled, in that a broad "picture" of the plaintiffs' individual mental illness is set forth in the complaint. Therefore, Count I should proceed.

Prior Showing of Physical Injury

Suits by prisoners grounded solely on claims of psychological injury are recognized under the Eighth Amendment, as "[t]he Constitution 'does not countenance psychological torture merely because it fails to inflict physical injury.'" ***Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997) (quoting *Babcock v. White*, 102 F.3d 267, 273 (7th Cir. 1996)).** However, "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." **42 U.S.C. § 1997e(e).**

In *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997), the Court of Appeals found the Section 1997e(e) limitation on damages constitutional. The appellate court relied in part on *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 433 (1997), a FELA case analyzing a similar restriction on psychological damages, wherein the physical injury requirement was viewed by the Supreme Court as stemming the threat of unlimited and unpredictable liability for psychological injuries. ***Zehner*, 133 F.3d at 463.**

Relative to Count I, the "serious medical need claim," plaintiff Nelson describes suffering from depression, headaches, seizures, high blood pressure and blurred vision–all since arriving at Tamms, which implicitly persisted because Dr. Powers only prescribed Inderal. **(*See* Doc. 1, pp. 24-25).** Boyd describes Dr. Powers as leaving his cuts untreated for an extended period. **(*See* Doc. 1, p. 28).** Therefore, plaintiffs have alleged a physical injury in relation to the two individual claims perfected against Dr. Powers in Count I.. As detailed above, this Court has found no viable claims as to Dr. Chandra.

This Court previously recommended that plaintiff Boyd's claim that Dr. Powers failed to treat

his cuts for a prolonged period, and Nelson's claim that Powers prescribed Inderal, could not support an "excessive force" claim in relation to Count II, and that money damages were unavailable for Count II. This Court previously recommended that Court III be dismissed in its entirety. In any event, insofar as Count III alleges that plaintiffs were denied due process, this Court does not perceive that any physical damages have been alleged.

Accordingly, this Court recommends that the only claims upon which damages for mental or emotional injuries are available are plaintiff Boyd's Count I allegation that defendant Powers delayed in stitching up his injuries, and Nelson's Count I allegation that Powers misprescribed Inderal. As previously recommended, money damages for mental or emotional injuries alleged in Counts II and III should not be available.

Recommendation

For the aforestated reasons, it is the **RECOMMENDATION** of this Court that the defendants' motion to dismiss **(Doc. 11)** be **GRANTED IN PART AND DENIED IN PART** as indicated with respect to each issue addressed above.

If the District Court adopts this recommendation in full, the principal consequences would be that: (1) all individual capacity claims against defendant Chandra in Counts I-III would be dismissed, as no claims have been exhausted, and no personal involvement is alleged; (2) defendant Powers would remain as a defendant in his individual capacity in Count I only, and only insofar as Powers is alleged to have delayed in stitching up Boyd's cut, and Powers is alleged to have misprescribed only Inderal for Nelson **(Doc. 1, p. 25, ¶ 73; and Doc. 1, pp. 27-28, ¶ 81)**; and damages for mental and/or emotional injuries stemming from these two allegations are available; (3) all individual capacity claims against defendant Powers in Counts II and II would be dismissed, as

no such claims have been exhausted and no personal involvement by Powers has been pled.

SUBMITTED: August 2, 2001

CLIFFORD J. PROUD
U. S. MAGISTRATE JUDGE

NOTICE

PURSUANT to Title 28 U.S.C. §636(b) and Rule 73.1(b) of the Local Rules of Practice in the United States District Court for the Southern District of Illinois, any party may serve and file written OBJECTIONS to this Report and Recommendation/ Proposed Findings of Fact and Conclusions of Law within ten days of service.

Please note: You are not to file an appeal as to the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law. At this point, it is appropriate to file **OBJECTIONS**, if any, to the Report and Recommendation/ Proposed Findings of Fact and Conclusions of Law. An appeal is inappropriate until after the District Judge issues an Order either affirming or reversing the Report and Recommendation/ Proposed Findings of Fact and Conclusions of Law of the U.S. Magistrate Judge.

Failure to file such OBJECTIONS shall result in a waiver of the right to appeal all issues, both factual and legal, which are addressed in the the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law. *Video Views, Inc. v Studio 21, Ltd. and Joseph Sclafani, 797 F.2d 538 (7th Cir. 1986).*

You should mail your OBJECTIONS to the Clerk, U.S. District Court at the address indicated below:

☐ 301 West Main St.
Benton IL 62812

☒ 750 Missouri Ave.
P.O. Box 249
East St. Louis, IL 62202