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:

Before the Court is a motion to dismiss filed by defendants Snyder, Elyea, Hopkins, DeTella, Welborn, Powers, Rhodes, Chandra and the Illinois Department of Corrections, a supporting memorandum, plaintiffs' response thereto, and defendants' reply. **(Docs. 9, 17, 24, and 26).** Pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (C), this Report and Recommendation is respectfully submitted to the District Court.

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' prefatory "Nature of the Action" is deceiving, indicating that plaintiffs are alleging merely cruel and unusual punishment and seeking treatment and the end to discrimination against them. **(*See* Doc. 1, p. 2).** In fact, plaintiffs set forth 27 pages of factual allegations, upon which they then premise seven claims. Obviously, the plaintiffs have not heeded the directive in Federal Rule of Civil Procedure 8(e) that pleadings be "simple, concise, and direct," nor have plaintiffs taken

advantage of the liberal federal notice pleading standard. The plethora of "evidence" pled, with allegations regarding named plaintiffs intermingled with general assertions regarding the "class" further complicates matters. Drawing exclusively from the seven enumerated claims, the complaint alleges the following on behalf of the named plaintiffs and a proposed class of all similarly situated inmates at Tamms:

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).

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.

Arguments for Dismissal

The defendants responded to plaintiffs' Amended Complaint by filing a motion to dismiss and supporting memorandum, presenting seven arguments for dismissal, one of which is that 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)). **(Doc. 17).** More specifically, defendants contend that plaintiffs have not exhausted administrative remedies in regard to the allegations in paragraphs 34, 35, 47a-f, 47h, 47j, 63, 64 and 91b of the complaint. Because exhaustion is a precondition for bringing suit, this issue will be addressed first. ***See Perez v. Wisconsin Department of Corrections*, 182 F.3d 532, 534-535 (7th Cir. 1999).**

The other arguments for dismissal raised by the defendants are:

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

3. Plaintiffs have failed to allege sufficient personal involvement on the part of defendants Snyder, DeTella, Elyea, Hopkins and Welborn to sustain liability under 42 U.S.C. § 1983.

4. The complaint fails to state a cause of action under the ADA or Rehab Act.

5. The complaint fails to state a due process claim under the Illinois Mental Health and Developmental Disabilities Act.

6. The defendants are all entitled to qualified immunity, as no clearly established rights were violated, and the conditions at Tamms do not violate the Eighth Amendment; and the individual defendants sued in their official capacities and the IDOC are immune from damages under the Eleventh Amendment.

7. Plaintiffs' requests for injunctive relief are inadequately pled.

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

Defendants utilize the caption "Motion to Dismiss," but they do not base their motion on a specific procedural rule. Federal Rule of Civil Procedure 12(b)(6) pertains to responsive pleadings seeking dismissal for failure to state a claim upon which relief can be granted–the type of pleading the subject motion appears to be. However, Rule 12(b) 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[1]) is contained in plaintiff's response **(Doc. 24, Tab 3)**, the Court has little choice but to consider this material 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.

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[1]From a practical standpoint, the plaintiffs' many prior grievances **(Doc. 24, Tabs 4-8)** became irrelevant once the amended complaint/grievance was submitted. Defendants have taken issue only with those enumerated paragraphs which are not verbatim from the amended complaint/grievance.

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).**

Defendants contend that plaintiffs have not exhausted administrative remedies with regard to the allegations in paragraphs 34, 35, 47a-f, 47h, 47j, 63, 64 and 91b of the complaint. Plaintiffs counter that the defendants have forfeited their right to require exhaustion by impeding plaintiffs' efforts to exhaust at every turn by refusing to grant or deny grievances based on procedural rules which defendants subsequently acknowledged did not even exist. Plaintiffs further argue that the objectionable paragraphs are not legal or factual issues, but rather are merely "details" of the claims pled.

Insofar as plaintiffs contend that the defendants have forfeited their right to require exhaustion, with waiver of the exhaustion requirement being the appropriate remedy or sanction for obstructionist tactics utilized by prison authorities to stymy a perspective prisoner-plaintiff. *Perez* and *Booth* make it clear that the Court has no discretion in this area. ***See Perez*, 182 F.3d at 535; and *Booth*, 121 S.Ct. at 1824.** Furthermore, if a plaintiff has not attempted to grieve an issue, difficulties in pursuing the grievance through the administrative process are irrelevant.

The plaintiffs in this case were eventually able to pursue their grievance through the entire administrative process. The grievance included a copy of the amended complaint from *Boyd v. Snyder*, 99-280-DRH. However, plaintiffs admittedly added a few new "details" to the complaint. Therefore, the Court must determine whether these "details" are distinct problems or claims, materially different from the problems or claims presented through the grievance process.

Because of the federal notice pleading standard, a prisoner's complaint is often less detailed than his or her grievance. In any event, there is no requirement under 42 U.S.C. § 1997e(a) that the complaint mirror the grievance word for word; nor is there a specificity requirement under the Illinois grievance procedures. The purpose of the exhaustion requirement is to give prison authorities an opportunity to resolve or narrow issues before a suit is filed. ***See Perez*, 182 F.3d at 535.** *Booth* emphasizes that bringing the problem to the attention of prison authorities is the goal of Section 1997e(a), as opposed to arriving at the solution desired by the plaintiff. Most recently, *Smith v. Zachary*, 2001 WL 723010 (7th Cir. June 28, 2001), elaborated that grievances provide "prompt notice of problems," and the administrative review process, at a minimum, gives some initial consideration to "the basics of who-did-what-to-whom").

Of course, since this case has not been certified as a class action, the Court is concerned only with whether the four named plaintiffs have exhausted all issues. Insofar as the amended complaint/grievance refers to various systemic problems affecting all plaintiffs or all the mentally ill inmates, the allegations will be considered exhausted as to the four named plaintiffs, as prison officials reviewing the amended complaint/grievance recognized that the individual plaintiffs were and are a part of the collective.[2] **(*See* Doc. 1, Tab C).**

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[2]While the defendants may initially be inclined to balk at this, it is important to keep in mind that this in no way alters the factual and legal standards for proving the requisite personal involvement of the defendants, or damages.

Paragraph 34 (Doc. 1, p. 10)

Paragraph 34 appears under the subsection "ALLEGATIONS OF FACT." It alleges "Mentally ill prisoners also are punished by the use of excessive force by prison guards"– followed by general assertions that officials unofficially condone such behavior through "an atmosphere of terror and brutality, " where prisoner complaints aren't investigated and guards go unpunished.

None of the seven counts of the complaint specifically assert an "excessive force" claim. Count II does allege that the "unconstitutional conditions" violated the plaintiffs' Eighth Amendment rights to be free from cruel and unusual punishment, based upon paragraphs 1-88 of the complaint. "Excessive force" does fall under the ambit of the Eighth Amendment and is considered a "condition of confinement." ***Smith v. Zachary*, 2001 WL 723010 (7th Cir. June 28, 2001).** However, a different legal standard applies to such claims. ***See Hudson v. McMillian*, 503 U.S. 1, 7-11 (1992); and *Rhodes v. Chapman*, 452 U.S. 337, 345-347 (1981).** In any event, neither the complaint in this case, nor the amended complaint/grievance allege that a named defendant exerted excessive force against a named plaintiff. Thus, the four plaintiffs have failed both to state a viable claim, and to administratively exhaust this issue. Regardless of the type of relief sought, how are prison officials to attempt to investigate or remedy such a problem– plaintiffs' grievance omits the "who" and the "to whom" of the problem, and only vaguely alludes to the "what."

Plaintiffs Rasho and Boyd's individual grievances do raise allegations of particular incidents of excessive force, but not by named defendants; they also do not allege the systemic problems mentioned in paragraph 34. **(*See* Doc. 24, Tab. 4).**

Therefore, this Court recommends that it be clarified that paragraph 34 cannot form the basis of a claim for relief, by itself or in relation to Count II, the "conditions of confinement" claim. In short, there is no excessive force claim.

Paragraph 35 (Doc. 1, pp. 10-11)

The allegations in paragraph 35 of the complaint fairly mirror those in paragraph 43(c) of the amended complaint/grievance. Therefore, paragraph 35 can serve as a basis for liability, as the plaintiffs pursued the amended complaint/grievance until it was denied by the Administrative Review Board in all respects. **(Doc. 1, Tab C).**

Paragraph 47(a) (Doc. 1, p. 15)

Paragraph 47(a) mirrors paragraphs 28 and 43(a) of the amended complaint/grievance. Therefore, paragraph 47(a) can serve as a basis for liability, as the plaintiffs pursued the amended complaint/grievance until it was denied by the Administrative Review Board in all respects. **(Doc. 1, Tab C).**

Paragraph 47(b) (Doc. 1, p. 15)

Paragraph 47(b) fairly mirrors paragraph 43(b) of the amended complaint/grievance. Therefore, paragraph 47(b) can serve as a basis for liability, as the plaintiffs pursued the amended complaint/grievance until it was denied by the Administrative Review Board in all respects. **(Doc. 1, Tab C).**

Paragraph 47(c) (Doc. 1, p. 15)

Paragraph 47(c) alleges that punishment is masquerading as treatment at Tamms– four examples are set forth as subparagraphs (i)-(iv).

Subparagraph (i) mirrors paragraphs 28, 43(j) and 43(k) of the amended complaint/grievance. Therefore, 47(c)(i) can serve as a basis for liability, as the plaintiffs pursued the amended complaint/grievance until it was denied by the Administrative Review Board in all respects. **(Doc. 1, Tab C).**

Subparagraph 47(c)(ii) pertains to guards handling inmates more roughly than is necessary

when [mentally ill] inmates are being brought to the Health Care Unit, or while they are in the Unit. As discussed above in regard to paragraph 34, the nature of an excessive force claim (even for purposes of declaratory or injunctive relief) make it virtually impossible for prison authorities to attempt to investigate or remedy such a problem– plaintiffs' grievance omits the "who" and the "to whom" of the problem, and only vaguely alludes to the "what." Therefore, 47(c)(i) cannot serve as the basis for liability on its own, or as the basis of any other constitutional claim, as it cannot be said to be fairly exhausted.

Subparagraph 47(c)(iii) pertains to withholding "talking therapy." This allegation was presented in the amended complaint/grievance as paragraph 43(c)(iv). Therefore, 47(c)(iii) can serve as a basis for liability, as the plaintiffs pursued the amended complaint/grievance until it was denied by the Administrative Review Board in all respects. **(Doc. 1, Tab C).**

Subparagraph 47(c)(iv) of the complaint generally alleges that prisoners are being denied their right to send and receive mail (including legal mail), and their right to toiletries. These problems are not raised in the amended complaint/grievance. Plaintiff Rasho individually filed a grievance regarding defendant Rhodes keeping him from receiving legal mail in the Health Care Unit. **(Doc. 24, Tab 5).** Therefore, only Rasho may utilize a denial of legal mail as a basis for liability. None of the other aspects of 47(c)(iv) may serve as the basis for liability for Rasho or any of the other plaintiffs.

Paragraph 47(d) (Doc. 1, p. 16)

Paragraph 47(d) of the complaint reflects the allegations set forth in paragraphs 43(d) and 67 of the amended complaint/grievance. Therefore, paragraph 47(d)can serve as a basis for liability, as the plaintiffs pursued the amended complaint/grievance until it was denied by the Administrative Review Board in all respects. **(Doc. 1, Tab C).**

Paragraph 47(e) (Doc. 1, p. 16)

Paragraph 47(e) alleges that defendants Rhodes and Chandra allow security concerns to compromise their prisoner-plaintiffs, e.g. breaching confidentiality by sending reports to non-medical personnel, and keeping inmates uncomfortably shackled during treatment sessions, with guards present in the room. Plaintiff Boyd's individual concerns regarding confidentiality of mental health sessions and records is reflected in paragraph 56 of the amended complaint/grievance. Plaintiff Nelson's personal concerns about being uncomfortable situated during treatment sessions, and his confidentiality concerns were pursued via the grievance system. **(*See* Doc. 24, Tab 6).** Therefore, Boyd and Rasho may pursue their respective issues, but that is the extent that paragraph 47(e) has been exhausted.

Paragraph 47(f) (Doc. 1, p. 16)

Paragraph 47(f) of the complaint mirrors paragraph 43(e) of the amended complaint/grievance regarding elevated security wing F-1, except that paragraph 47(f) encompasses the recent addition of a second elevated the complaint, referring to "elevated security wings." This Court does not perceive a material difference between the grievance and the complaint. Therefore, Paragraph 47(f) is deemed exhausted.

Paragraph 47(h) (Doc. 1, p. 17)

In paragraph 47(h) of the complaint the plaintiffs complain of delayed assessment and treatment of the mentally ill or decompensating inmates. Three reasons for delay are specified: (i) sketchy records; (ii) deliberate delay in responding by correctional officers; and (iii) a systemic refusal to treat. These allegations are a reasonably fair reflection of those presented in paragraphs 43(g) and 43(m) of the amended complaint/grievance. Therefore, paragraph 47(h)can serve as a basis for liability, as the plaintiffs pursued the amended complaint/grievance until it was denied by the Administrative Review Board in all respects. **(Doc. 1, Tab C).**

Paragraph 47(j) (Doc. 1, p. 17)

The allegations in paragraph 47(j) of the complaint are representative of those presented in paragraphs 43(i) and 65 of the amended complaint/grievance and are therefore deemed exhausted.

Paragraph 63 (Doc. 1, p. 22)

Paragraph 63 pertains specifically to plaintiff Rasho, alleging that he has been placed in a Specialized Treatment Unit where he and four others receive therapy designed to modify their behavior but not treat their illness. Plaintiff asserts that plaintiff Rasho's individual grievances regarding the Specialized Treatment Unit serve to exhaust the issue raised in paragraph 63. However, a comparison reveals that Rasho was not grieving behavior modification or any other sort of treatment. (***See* Doc. 24, Tab 7).** Rasho was grieving the conditions of the Unit, not treatment or behavior modification. Therefore, paragraph 63 cannot serve as a basis for liability.

Paragraph 64 (Doc. 1, p. 22)

Paragraph 64 states: "The combination of insensitive, hostile treatment, and haphazard administration of potent mind-altering drugs has been devastating for Mr. Rasho, who wishes every day to be released from Tamms." This paragraph cannot be said to be a problem or claim per se, as it is entirely too vague to be said to allege a constitutional violation. Therefore, paragraph 64 cannot form the basis of liability.

Paragraph 91(b) (Doc. 1, p. 32-33)

Paragraph 91(b) is a part of Count IV, the ADA claim. It alleges that the IDOC discriminated against plaintiffs on account of their disabilities by failing to reasonably accommodate class members' disabilities and thereby increasing the severity of their illnesses by such methods as adjudicating disciplinary charges without reference to their mental health records, and failing to assist them with the grievance process, and thwarting their efforts to exhaust their grievances. Plaintiffs Rasho and Nelson did pursue grievances asserting that their efforts to exhaust were being

obstructed. **(*See* Doc. 24, Tab 8).** None of Rasho or Nelson's grievances pertained to disciplinary charges. Therefore, only plaintiffs Rasho and Nelson may use paragraph 91(b) as a basis for liability, and only regarding alleged obstruction of their efforts to pursue grievances.

2. 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.** Defendants contend that the only physical injuries alleged by the plaintiffs were self-inflicted, and thus insufficient to satisfy the "physical injury" requirement.

A review of the complaint reveals multiple general assertions that the overall conditions at Tamms have caused mentally ill inmates "tormenting pain," and have driven those inmates to attempt suicide and physically mutilate themselves. **(*See* Doc. 1, pp. 3, 9-10, and 14).** It is also alleged that unidentified inmates have been sprayed in the face with caustic, burning chemicals. **(*See***

Doc. 1, pp. 10 and 17). Plaintiff Rasho's individual injuries consist of attempted suicide, self-mutilation, and vomiting blood (cause unspecified). **(*See* Doc. 1, pp. 18, 20-22).** Plaintiff Fields, who has also attempted suicide at Tamms, complains of emotional pain, migraine headaches and stomach pains. **(*See* Doc. 1, p. 23).** Plaintiff Nelson describes suffering from depression, headaches, seizures, high blood pressure and blurred vision–all since arriving at Tamms, and implicitly as a result of Dr. Powers not prescribing the proper medication(s). **(*See* Doc. 1, pp. 24-25).** Plaintiff Boyd has allegedly suffered the effects of attempted suicide and self-mutilation. **(*See* Doc. 1, pp. 26-8).** In addition, Boyd describes Dr. Powers, a named defendant, as leaving his cuts untreated for an extended period, and unidentified guards macing him, bruising him, and slamming his head into a wall, cutting open his forehead. **(*See* Doc. 1, p. 28).**

Defendants correctly perceive that permitting self-inflicted injuries to satisfy Section 1997e(e) would turn the requirement on its ear and destroy Congress's attempt to distinguish valid from invalid claims. In *Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997), a claim for money damages premised upon "the terror, psychological harm and deterioration, and suicide attempts" was found not to constitute a "physical injury" for purposes of Section 1997e(e). Therefore, the plaintiffs' self-inflicted physical injuries, which allegedly resulted from the conditions of confinement at Tamms, cannot support their claims for money damages, and those claims must be dismissed insofar as money damages are sought. Nevertheless, in *Doe*, the Court of Appeals noted that, although money damages were not available for such a claim, injunctive and declaratory relief remain available without a prior physical injury. ***Doe*, 110 F.3d at 524, FN 4.**

With regard to exhaustion of administrative remedies, and paragraph 34 in particular, this

Court has concluded that plaintiffs have failed to exhaust their administrative remedies as to any individualized excessive force claims which could arguably fall under Count II. Consequently, with regard to Count II alone, plaintiff Boyd's claim that Dr. Powers failed to treat his cuts for a prolonged period, and that guards physically injured him, fail despite his properly pleading a physical injury. Insofar as Boyd alleges that Dr. Powers' delay in stitching up his injuries caused him harm, a Count I "deliberate indifference to a serious medical need claim" remains viable. The other general allegations about being maced and suffering "pain" are too amorphous to be construed as pleading a physical injury for purposes of Count II and Section 1997e(e).

This Court does not perceive any physical injuries to have been pled in regard to Count III, the due process claim. In any event, for reasons set forth below, this Court is recommending that Count II be dismissed.

Accordingly, this Court recommends that the claims for monetary damages set forth in Count I against all defendants except Powers[3] , and all claims for money damages in Counts II and III be dismissed (just insofar as monetary damages are sought for mental or emotional injuries); these claims should proceed insofar as other remedies are sought.

3. Personal Involvement

Defendants Snyder, DeTella, Elyea, Hopkins and Welborn argue that they cannot be held liable via a theory of respondeat superior in Counts I-III , which are brought pursuant to 42 U.S.C. § 1983. 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

[3]Powers' liability will be addressed by separate Report and Recommendation.

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).** This is not a heightened pleading requirement as plaintiffs suggest. 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 defendants Snyder, as IDOC Director, Eleyea, as IDOC Medical Director, Hopkins, as IDOC Chief of Medical Services, DeTella, as IDOC Associate Director, and Welborn, as Warden of Tamms, all have "overall responsibility," or in Welborn's case, "ultimate responsibility," for the complained of conditions of confinement. **(Doc. 1, p. 7).** In addition, it is alleged that Snyder has "personal, first-hand knowledge of the operations at Tamms;" and that DeTella has "personal knowledge of most transfer decisions, including the decision to transfer many of the seriously ill prisoners who have been sent to Tamms." **(Doc. 1, p. 7).**

None of the aforementioned allegations of personal involvement are sufficient to sustain individual liability under Section 1983– they all describe supervisory authority, not actual personal involvement. Plaintiffs appear to confuse establishing the requisite mens rea by showing a pattern of conduct or systemic and gross deficiencies with pleading personal involvement– such logic puts the cart before the horse. Plaintiffs have not pled that any of the aforementioned supervisory

defendants personally formulated or implemented any of the complained of policies and practices; therefore, they cannot face personal liability. ***See Armstrong v. Squadrito*,152 F.3d 564, 581 (7th Cir. 1998).** Therefore, defendants Snyder, DeTella, Elyea, Hopkins and Welborn cannot be held personally liable, in their individual capacities, in Counts I-III. However, insofar as Counts I-III are brought against them in their official capacities, these claims may proceed, as personal involvement is not required.

4. The Adequacy of Plaintiffs' ADA and Rehab Act Claims

The ADA Claim

Plaintiffs' ADA claim, Count IV, is brought pursuant to Title II of the Act, 42 U.S.C. § 12131. Plaintiffs concede that controlling precedent in the Seventh Circuit dictates that Title II ADA claims can only proceed in state court, but they explain that Count IV was formulated in expectation that that precedent would soon be upset when the Supreme Court ruled on *Board of Trustees of the University of Alabama v. Garrett.* **(Doc. 24, pp. 14-15).**

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) has been decided. The Supreme Court ruled that Title I claims against a state are barred by the Eleventh Amendment, which is what the Seventh Circuit concluded in *Ericson v. Board of Governors for Northeastern Illinois University*, 207 F.3d 945 (7th Cir. 2000). *Garrett* (and *Ericson)* involved Title I, not Title II. Nevertheless, the high court can be said to have affirmed the underlying rationale upon which the Seventh Circuit based its decision regarding Title II, *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000). In any event, *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), still controls, holding that Title II ADA claims cannot proceed in federal court, but rather should be brought in state court. Therefore, Count IV, the ADA claim, should be dismissed.

The Rehab Act Claim

Count V alleges that the IDOC violated Section 504 of the Rehab Act, 29 U.S.C. § 794. To

state a prima facie case, plaintiffs must allege: (1) that they are "handicapped individuals" under the Act; (2) that they are "otherwise qualified" for the benefit(s) sought; (3) that they were discriminated against solely by reason their handicap(s); and (4) that the program or activity in question receives federal financial assistance. ***Grzan v. Charter Hospital of Northwest Indiana*, 104 F.3d 116, 119 (7th Cir. 1997).** Defendants argue that: (1) the plaintiffs have not properly pled that they are "disabled" for purposes of the Act; (2) plaintiffs are not "otherwise qualified" for the benefit(s) sought; and (3) plaintiffs have not been denied access to programs or services that non-disabled inmates enjoy, nor have they been denied reasonable accommodation.

"Disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities." **29 U.S.C. § 705.** The Rehab Act regulations provide a representative list, defining the term to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." **45 C.F.R. § 84.3(j)(2)(ii).** ***Conley v. Gibson*, 355 U.S. 41, 46 (1957).** All well-pled facts and allegations in the plaintiff's complaint must be taken as true. ***Ed Miniat, Inc. v. Globe Life Ins. Group Inc.*, 805 F.2d 732, 733 (7th Cir. 1986).** The plaintiff is entitled to all reasonable inferences that can be drawn from the complaint. ***Ellsworth v. Racine*, 774 F.2d 182, 184 (7th Cir. 1985).** Under those parameters, this Court has no trouble in concluding that, if the descriptions of the plaintiffs' individual situations set forth in the complaint are true, they would each qualify as "disabled" under the Act. **(*See* Doc. 1, pp. 18-30; *see also Bragdon v. Abbott*, 524 U.S. 624, 638-639 (1998)).** The descriptions of the plaintiffs in the complaint evoke a vernacularism of the day, "they just aren't right."

With regard to the assertion that plaintiffs are not "otherwise qualified", their Rehab Act claim is premised upon the following: (1) their being unjustifiably isolated by being sent to Tamms; (2) failure to accommodate their mental conditions by adjudicating their disciplinary charges

without reference to their mental health records and by not assisting them in navigating the grievance process; (3) denying them access to programs, activities and services such as: contact with other prisoners, access to jobs, rehabilitation and educational programs, group therapy, outdoor exercise, communal religious programs, an adequate law library, art supplies and personal property, telephone privileges, and contact visits; (4) segregating some of them on an elevated security wing where it is chaotic, noisy and isolated, and where less mental health treatment is offered than elsewhere in Tamms.

"'Otherwise qualified' means that were [they] not handicapped, [plaintiffs] would have qualified for the program or treatment [they were] denied because of [their] handicap. 'An otherwise qualified person is one who is able to meet all of the program's requirements *in spite* of [their] handicap.'" ***Grzan*, 104 F.3d at 120 (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)).** The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case. Consequently, whether plaintiffs are truly "otherwise qualified" constitutes a mixed question of law and fact which must remain for trial.

For the aforestated reasons, the Rehab Act claim, Count V should proceed.

5. The Viability of Plaintiffs' Due Process Claim

Count III alleges that 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. Defendants contend that plaintiffs have no liberty or property interest stemming from the Illinois Mental Health and Developmental Disabilities Code (MHDDC). More specifically, it is argued that plaintiffs are not "recipients of services" under the MHDDC and the MHDDC is inapplicable to the IDOC.

In pertinent part, the MHDDC provides that "[a] recipient of services shall be provided with adequate and humane care and services in the least restrictive environment, pursuant to an individual services plan . . . ." **405 ILCS 5/2-102(a).** "Services" are defined as "treatment or habilitation." **405 ILCS 5/1-115.** "Treatment" is limited that which is provided by "mental health facilities." **405 ILCS 5/1-128.** A "mental health facility" is defined as "any licensed private hospital, institution, or facility or section thereof, and any facility, or section thereof, operated by the State or a political subdivision thereof for the treatment of persons with mental illness and includes all hospitals, institutions, clinics, evaluation facilities, and mental health centers which provide treatment for such persons." **405 ILCS 5/1-114.** However, a "State-operated mental health facility" is narrowly defined as "a mental health facility operated by the Department [of Human Services]." **405 ILCS 5/1-114.1; and 5/1-105.** Plaintiffs completely ignore Section 1-114.1, focusing only on Section 1-114. There is nothing in the record to suggest that Tamms is anything but a Department of Corrections facility, and that the mental health professionals at Tamms fall under the ambit of the IDOC.[4]

Insofar as the plaintiffs could be said to be receiving "habilitation," such services must be provided by "developmental disabilities facilities. **405 ILCS 5/1-111.** A "developmental disability facility" is defined as being "licensed or operated by or under contract with the State or a political subdivision thereof which admits persons with a developmental disability for residential and habilitation services." **405 ILCS 5/1-107.** This Court does not perceive Tamms to fall under that definition. Furthermore, application of the MHDDC to the IDOC would conflict with 730 ILCS 5/3-7-7, which leaves the mental health care of committed persons to the IDOC. ***See generally C.J. v.***

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[4]The plaintiffs' situation is distinguishable from that of the plaintiffs in *Barichello v. McDonald*, 98 F.3d 948 (7th Cir. 1996), in that the *Barichello* plaintiffs were involuntarily committed as unfit to stand trial, and they were treated at the Elgin Mental Health Center, which was run by the Department of Mental Health and Developmental Disabilities.

***Department of Mental Health and Developmental Disabilities*, 693 N.E. 2d 1209, 1213 (Ill.App. 1st Dist. 1998) (recognizing that, with regard to those acquitted by reason of insanity who have been involuntarily committed for mental health treatment, in the event of a conflict with the MHDDC, the Code of Corrections, 730 ILCS 5/5-2-4(k), controls).**

For the aforestated reasons, this Court does not find that the MHDDC is applicable to the plaintiffs and the IDOC; thus the MHDDC cannot provide the basis of the plaintiffs' due process claim. Consequently, Count III should be dismissed.

6. The Eleventh Amendment and Qualified Immunity

The Eleventh Amendment

Defendants Snyder, Elyea, Hopkins, DeTella, Welborn, Powers, Rhodes and Chandra are all sued in both their individual capacities and their official capacities. **(Doc. 1, pp. 7-8).** Counts I-III pertain only to the individual defendants. The IDOC is also sued, obviously as an agency of the State of Illinois. **(Doc. 1, p. 6).** Counts IV and V pertain only to the IDOC. Counts VI and VII, which only set forth the remedies plaintiff seek in relation to Counts I-V, relate to all of the individual defendants, as well as the IDOC.

Insofar as Counts I-III are premised upon 42 U.S.C. § 1983, the money damages sought via Count VII may only be sought from the defendants individually; official capacity suits are actually suits against the State and the Eleventh Amendment bars such damages actions. ***Kentucky v. Graham*, 473 U.S. 159, 166-167 and 169 (1985).** Therefore, all Section 1983 claims against the individually named defendants in their official capacities for money damages (Counts I-III and VII) should be dismissed in that limited respect. Insofar as injunctive and declaratory relief is sought against these individuals in their official capacities, those claims, Counts I-III by way of Counts VI and VII, remain viable. ***Canedy v. Boardman*, 91 F.3d 30, 33 (7th Cir. 1996); *see also Will v.***

***Michigan Department of State Police*, 491 U.S. 58, 71 FN 10 (1989).**

Similarly, the Eleventh Amendment bars claims for money damages from the IDOC. ***Will v. Michigan*, 491 U.S. 58 (1989).** Therefore, insofar as Counts IV and V, by way of Count VII, seek money damages, theses claims must be dismissed in that limited respect.

Qualified Immunity

Defendants further argue that the individual defendants are entitled to qualified immunity in relation to all damages claims. Qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. ***Anderson v. Creighton*, 483 U.S. 635, 640 (1987).**

Defendants acknowledge that prison inmates have an Eighth Amendment right to be confined under conditions that provide "adequate food, clothing, shelter, and medical care." ***Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).** However, defendants stress that it is established that prison conditions may be harsh and uncomfortable without violating the Eighth Amendment's prohibition against cruel and unusual punishment. ***See Farmer*, 511 U.S. at 833-34;and *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997).** Citing *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988), finding no fault with the harsh conditions of confinement at the maximum security U.S.P. Marion, Illinois, defendants assert that the conditions of confinement at Tamms have essentially passed constitutional muster.

The glaring flaw in the defendants' logic is that *Bruscino* pertains to U.S.P. Marion, not Tamms. Even if Tamms were run along the lines of Marion, the plaintiffs' general claim is that the conditions at Tamms have crossed the line, so to speak– that Tamms is worse than U.S.P. Marion. Such mixed questions of law and fact cannot be decided in a motion to dismiss. The Court could sift through the myriad of individual examples of allegedly unconstitutional conditions set forth in

the complaint and strike some of the examples, but that would ignore that the plaintiffs are essentially challenging the totality of the conditions of confinement at Tamms. Although some conditions, when considered alone, do not constitute an Eighth Amendment violation, the cumulative effect may. ***Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997).** Therefore, this Court considers it premature to rule on the defendants' qualified immunity argument.

7. Injunctive Relief

Defendants consider plaintiffs' claim for injunctive relief, Count VII, to be inadequately pled. More specifically, defendants assert that plaintiffs have failed to demonstrate that they have no adequate remedy at law, and that irreparable harm will result.

Defendants correctly cite *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th Cir. 1997) for the proposition that in order to obtain a preliminary injunction the aforementioned elements must be demonstrated. However, the plaintiffs have not sought a preliminary injunction. The format of plaintiffs' complaint is not helpful, in that the prayer for injunctive relief is set forth as a separate claim, tied to the substantive claims (which are themselves a mishmash of individual capacity and official capacity claims). Under the liberal federal notice pleading standard, at this stage in the proceedings, on a motion to dismiss, dismissal would be inappropriate.

Of course, the scope of any injunction that could issue would be limited in accordance with 18 U.S.C. § 3626.

Recommendation

For the aforestated reasons, it is the **RECOMMENDATION** of this Court that the defendants' motion to dismiss **(Doc. 9)** 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) the claims for monetary damages set forth in Count I against all defendants except

Powers , and all claims for money damages in Counts II and III be dismissed (just insofar as monetary damages are sought for mental or emotional injuries); these claims should proceed insofar as other remedies are sought. pursuant to 42 U.S.C. § 1997e(e); (2) all claims against defendants Snyder, DeTella, Elyea, Hopkins and Welborn in their individual capacities (Counts I-III) would be dismissed; (3) Count IV, the ADA claim, would be dismissed for lack of jurisdiction; and (4) Count III, the due process claim, would be dismissed for failure to state a claim. Only Counts III and IV would be dismissed in their entirety; Counts I, II, V, VI and VII would survive in some manner; and no defendants would be dismissed out of the entire case.

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