IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JOHN BAXLEY, JR., *et al.*,

Plaintiffs,

v. **Civil Action No. 3:18-cv-01526**
(Chambers, J.)

BETSY JIVIDEN, *et al.*,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO DANNY SPIKER

NOW COMES the Defendant Betsy Jividen, Commissioner of the West Virginia Division of Corrections and Rehabilitation, in her official capacity only, and the West Virginia Division of Corrections and Rehabilitation ("WVDCR"), by counsel, Webster J. Arceneaux, III, James C. Stebbins, and Valerie H. Raupp of Lewis Glasser PLLC and Briana J. Marino, Assistant Attorney General for the State of West Virginia, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and they moves this Honorable Court for summary judgment with regard to the claims of Danny Spiker as set forth herein as follows:

1. Plaintiff Danny Spiker is a named plaintiff in the above styled civil action. At the time the Second Amended Complaint was filed on December 19, 2019, Mr. Spiker was not incarcerated at any Regional Jail. In October and November, 2019, Mr. Spiker was a pretrial detainee at Tygart Valley Regional Jail, Second Amended Complaint, Doc. 67 ¶ 21.

2. Mr. Spiker, was transferred to Mildred Mitchell Bateman Hospital in November, 2020. Thereafter he was released and re-arrested and detained at Tygart Valley Regional Jail on or about April 4, 2020. *Id.*

3. Plaintiff Spiker clearly state in his Second Amended Complaint that this "is an action on behalf of inmates admitted to jail facilities throughout West Virginia . . . Plaintiffs seek to ensure that jails in West Virginia promptly provide appropriate and necessary medical and mental health treatment to inmates upon admission, . . ." *Id.* at ¶ 1.

4. This Court should dismiss the claims of Plaintiff Spiker for failure to exhaust his administrative grievance remedies under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a).

5. This Court should likewise dismiss the deliberate indifference claims in Count I under the Eighth and Fourteenth Amendments, United States Constitution, under 42 U.S.C. § 1983, finding that Plaintiff Spiker does not have sufficient evidence to support his Count I claims.

6. In addition, it is undisputed that all ten Regional Jails in West Virginia are certified by the National Commission on Correctional Health Care ("NCCHC"). This Court should conclude as a matter of law that NCCHC certification indicates that the ten Regional Jails in West Virginia meet the deliberate indifference standards under the Eighth and Fourteenth Amendments, United States Constitution, United States Constitution, and all claims by Plaintiff Spiker under Count I should be dismissed.

7. This Court should likewise dismiss the Count II claims under the Americans with Disability Act ("ADA"), 42 U.S.C § 12132, finding that neither Plaintiff Spiker or any other Plaintiffs have sufficient evidence to support their ADA claims under Count II.

8. Finally, this Court should at a minimum conclude that the claims in Count I under 42 U.S.C. § 1983 should be dismissed against WVDCR since it is not a person under that provision.

WHEREFORE, based upon the foregoing, as more fully discussed in the Memorandum of Law in Support, Defendants respectfully request that this Court enter an order dismissing Plaintiff

Danny Spiker's claims for declaratory and injunctive under Count I and II of the Second Amended Complaint in this case, that the claims under Count I and II of the Complaint should be dismissed for the additional grounds set forth herein, and that it order any other further relief that the Court deems just and proper.

Respectfully submitted on behalf of Defendants by:

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CERTIFICATE OF SERVICE

I, Webster J. Arceneaux, III, co-counsel for all Defendants, do hereby certify that on this 17th day of July 2020, I electronically served a copy of the foregoing "**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO DANNY SPIKER**" and the "**MEMORANDUM OF LAW IN SUPPORT**" via the CM/ECF system that will send notification to the following counsel of record:

Lydia C. Milnes, Esq.
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/s/ Webster J. Arceneaux, III
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Defendant.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO DANNY SPIKER

Defendants, by counsel, pursuant to Rule 56 of the Federal Rules of Civil Procedure, have moved this Honorable Court for summary judgment with regard to the claims of Danny Spiker as set forth in the accompanying Motion for Summary Judgment. As discussed herein, there can be no genuine or material dispute of fact that Plaintiff failed to exhaust his administrative remedies with regard to each of his claims and thus they must fail. In addition, Plaintiff Spiker's claims in Counts I and II of the Amended Complaint fail as a matter of law based on the undisputed facts. Accordingly, for these and other reasons set forth below, this Plaintiff's claims should be dismissed with prejudice.

STATEMENT OF FACTS

Mr. Spiker was admitted to Tygart Valley Regional Jail ("TVRJ") in Barbour County, West Virginia on October 31, 2019. *See* Second Amended Complaint (Doc. 67) at ¶ 46. He generally alleges that he has been diagnosed since childhood with bi-polar disorder and attention deficit hyperactivity disorder (ADHD), has been hospitalized in mental health facilities on a number of occasions, and that he has a history of suicidal ideation. *Id.* at ¶ 45.

Mr. Spiker alleges that when he first arrived at TVRJ, he was suicidal and told the intake

personnel that he was suicidal. *Id.* at ¶¶ 47-48. Plaintiff alleges that he got no medical intake at that time and was instead placed in a holding cell with a number of other inmates where he suffered a panic attack. *Id.* at ¶ 50. He was then transported to a local hospital for evaluation. *Id.* at ¶ 50. Mr. Spiker then claims that he intentionally hit his head on the corner of a desk at the hospital in an attempt to injure himself, was given liquid stitches, and then returned to TVRJ. *Id.* at ¶ 51.

Plaintiff alleges that upon his return, he was placed in a "pickle suit" (a green suit for suicidal inmates) and placed alone in a cell on suicide watch. *Id.* at ¶ 52. Plaintiff alleges that despite being put on "fifteen minute suicide watch," he was not appropriately monitored in the cell and rubbed his wound until it reopened and was bleeding. *Id.* at ¶ 55. Mr. Spiker then alleges that he "picked at his wounds for over three hours" and was finally discovered by jail staff on the floor in a pool of blood. *Id.* at ¶ 56. He alleges that he was then taken back to the local hospital where his wound was rebandaged and he returned to TVRJ and was placed in a restraint chair for eight hours. *Id.* at ¶ 57. He was then allegedly placed on suicide watch in a different single cell for several days without being seen or evaluated by a mental health worker. *Id.* at ¶ 59

Plaintiff alleges that when he was seen by a mental health worker several days later, the worker asked him if he was suicidal and released him from suicide watch with no other evaluation or treatment. *Id.* at ¶ 60. Mr. Spiker claims that he was then released into general population in a cell on the top tier of his cell block. *Id.* at ¶ 61. Mr. Spiker alleges that he then attempted (unsuccessfully) to hang himself from the balcony of his cell block using a rope made out of a sheet. *Id.* at ¶ 62.

Shortly thereafter, Mr. Spiker was committed to Mildred Mitchell Bateman Hospital (a state psychiatric hospital) in Huntington, West Virginia. *Id.* at ¶ 64. Plaintiff alleges that he started

taking medications at this hospital and that it quickly alleviated his suicidal ideations.[1]

STANDARD OF REVIEW

Under Rule 56(c), Federal Rules of Civil Procedure, "Summary judgment is proper where the pleadings, depositions, and affidavits in the record show that there is 'no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."' *Kitchen v. Summers Continuous Care Center, LLC*, 552 F.Supp.2d 589, 592 (S.D. W.Va. 2008) (quoting *Fed.R.Civ.P*. 56(c)). "The moving party bears the burden of showing that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 322-323 (1986). "When determining whether there is an issue for trial, the Court must view all evidence in the light most favorable to the non-moving party." *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123 (4th Cir. 1990). "The nonmoving party nonetheless must offer some 'concrete evidence from which a reasonable juror could return a verdict in his [or her] favor[.]'" *Piedmont Behavioral Health Ctr., LLC v. Stewart*, 413 F.Supp.2d 746, 751 (S.D. W.Va. 2006) (Goodwin, J.) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

District Courts in West Virginia have applied this standard in granting motions for summary judgment in appropriate inmate cases involving Eighth Amendment issues related to health care and other matters. *See Langley v Arresting Officers,*2020 U.S. Dist. LEXIS 56160 (S.D. W.Va. 2020); *Smith v PrimeCare Medical, et al.,* 2020 U.S. Dist. LEXIS 101065 (S.D. W.Va. 2020); and, *Salmons v. Western Regional Jail,* 2020 U.S. Dist. LEXIS 97540 (S.D. W.Va. 2020). Based upon this foregoing standard, Defendants respectfully represent that the instant

[1] Plaintiff Spiker has had issues arising after the filing of the Second Amended Complaint that Defendants contend are irrelevant to this proceeding. These involved apparent attempts to self-harm including an incident on April 6, 2020 where he wrapped a towel around his neck and threatened to kill himself, an incident on April 9, 2020 in which he threw himself to the ground, and an incident on April 17, 2020 where he intentionally ran into a cell door and was placed in a restraint chair.

Motion for Summary Judgment should be granted as a matter of law. As set forth below, even assuming Plaintiff's allegations are true, as a matter of law, Defendants cannot be held liable for the remaining allegations as set forth in Counts I and II of the Second Amended Complaint.[2]

ARGUMENT

I. PLAINTIFF DANNY SPIKER HAS NOT EXHAUSTED HIS ADMINISTRATIVE REMEDIES AS TO ANY CONDITION OF CONFINEMENT REFERENCED IN THE SECOND AMENDED COMPLAINT AND THEREFORE, IT SHOULD BE DISMISSED.

Plaintiff Danny Spiker failed to exhaust his administrative remedies under the Prison Litigation Reform Act of 1995, ("PLRA"), 42 U.S.C. § 1997 *et seq*. prior to seeking judicial redress. Defendants argue that all of Plaintiff's claims related to the alleged failure by Defendants to provide medical and mental health treatment to inmates upon admission to a Regional Jail should be dismissed because prisoners are required to exhaust their administrative remedies in making complaints regarding prison treatment prior to bringing an action in court and that requirement was not met for any of Plaintiff Spiker's claims. Likewise, any claim for a failure to accommodate a disability or claim under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12133 ("ADA") is subject to the PLRA. *See* discussion *infra*. Specifically, Defendants argue that Plaintiff Spiker failed to do the following: (1) provide evidence of exhaustion; (2) timely appeal the decisions; and (3) grieve or exhaust issues related to medical treatment prior to the filing of the Second Amended Complaint. Further, there are no genuine issues of material fact regarding whether the grievance process is "available" to Plaintiff Spiker.

The PLRA, 42 U.S.C. § 1997e(a) states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined

[2] This Court may note that only the allegations in Counts I and II of the Second Amended Complaint remain as the parties stipulated to the dismissal of the conditions of confinement allegations in Count III of the Second Amended Complaint. Doc. 223.

in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" as utilized by the PLRA is defined as "...conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings." 18 U.S.C. § 3626(g)(2). In *Porter v. Nussle*, 534 U.S. 516, 531 (2002), the United States Supreme Court held that "[t]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." The exhaustion requirement also applies regardless of the relief sought by the inmate through the administrative process. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

"Not only must a prisoner exhaust his administrative remedies, but he must also do so properly." *Wells v. Parkersburg Work Release Ctr*., 2016 U.S. Dist. LEXIS 21026, 2016 WL 696680, at *3 (S.D. W. Va. Jan. 19, 2016), adopted by 2016 U.S. Dist. LEXIS 20459, 2016 WL 707457 (S.D. W. Va. Feb. 19, 2016). "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id*. (citing *Woodford v. Ngo*, 548 U.S. 81, 90-91, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006)).

If a plaintiff fails to exhaust his or her administrative remedies under the PLRA, then the defendant is entitled to judgment as a matter of law. *Legg v. Adkins*, 2017 U.S. Dist. LEXIS 25432, 2017 WL 722604, at *2 (S.D. W. Va. 2017). Whether an administrative remedy has been exhausted for purposes of the PLRA "is a question of law to be determined by the judge." *Creel v. Hudson*, 2017 U.S. Dist. LEXIS 147329, 2017 WL 4004579, at *3 (S.D. W. Va. 2017) (citing *Drippe v. Tobelinski*, 604 F.3d 778, 782 (3d Cir. 2010)). Thus, disputed questions of fact regarding exhaustion of administrative remedies are resolved by the court. *See id*. The benefits of requiring

exhaustion "include allowing a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved, and improving litigation that does occur by leading to the preparation of a useful record." *Jones v. Bock*, 549 U.S. 199, 219 (2007) (citing *Woodford v. Ngo*, 548 U.S. 81, 88-91 (2006)).[3]

The West Virginia Division of Corrections and Rehabilitation, formerly the West Virginia Regional Jail and Correctional Facility Authority,[4] provides a grievance procedure in order to ensure direct access to an administrative remedy for inmates regarding all aspects of their confinement, including claims for medical care and conditions of confinement. The Inmate Handbook sets forth the formal process through which an inmate may seek "redress over any matter concerning prison life." **Exhibit 1**, Excerpts of Inmate Handbook for Regional Jail Inmates. Under Grievance Procedure outlined in the Inmate Handbook, an inmate may file a grievance to administrator/superintendent and, if unsatisfied by the response or if the response is not timely received in the manner prescribed by policy, the inmate may appeal to the Chief of Operations. *Id*. Again, if the inmate is not satisfied with the response received or does not receive a timely response, a third level of administrative oversight is included in the policy: an appeal to the Commissioner of the Division of Corrections and Rehabilitation (formerly referred to in the policy as the "Executive Director"). *Id*.

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[3] Like the PLRA, the WVPLRA "require[s] inmates to exhaust their administrative remedies before they bring a lawsuit." *Legg v. Adkins*, No. 2:16-cv-01371, 2017 U.S. Dist. LEXIS 25432, 2017 WL 722604, at *2 (S.D. W. Va. 2017) (citing 42 U.S.C. § 1997e(a); W. Va. Code § 25-1A-2a(i)). Under the WVPLRA, "[a]n inmate may not bring a civil action regarding an ordinary administrative remedy until the procedures promulgated by the agency have been exhausted." W. Va. Code § 25-1A-2(c). The WVPLRA defines an ordinary administrative remedy as "a formal administrative process by which an inmate submits a grievance seeking redress or presenting concerns regarding any general or particular aspect of prison life. . . .which includes health care" *Id.* § 25-1A-2(a). This Court should conclude that Plaintiff Spiker also failed to exhaust his grievances under the WVPLRA as well.

[4] Per House Bill 4338 (2018) the West Virginia Regional Jail and Correctional Facility Authority was consolidated with the West Virginia Division of Corrections and West Virginia Division of Juvenile Services to form the West Virginia Division of Corrections and Rehabilitation. This newly-formed entity assumed responsibility for the operations of West Virginia regional jails on July 1, 2018.

While the PLRA requires administrative exhaustion prior to an inmate seeking judicial resolution of a complaint, an inmate is only required to exhaust those administrative remedies which are actually available. 42 U.S.C. § 1997e(a) ("The PLRA, however, requires exhaustion of only 'such administrative remedies as are available.'"). "The availability of a remedy, according to the Supreme Court, is about more than just whether an administrative procedure is "on the books." *Ross v. Blake*, 136 S. Ct. 1850, 1859, 195 L. Ed. 2d 117 (2016)). Rather, a remedy is available only if it is "'capable of use' to obtain 'some relief for the action complained of.'" *Id*. at 1859 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)).

The Supreme Court noted three specific instances in which a remedy would not be "available" for purpose of PLRA exhaustion. *Id.* "First, . . . an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Ross* 136 S. Ct. at 1859, (citing *Booth*, 532 U.S. at 736, 738). Second, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use" because "no ordinary prisoner can discern or navigate it." *Id*. "[W]hen a remedy is . . . essentially 'unknowable'—so that no ordinary prisoner can make sense of what it demands—then it is also unavailable." *Id*. Finally, the third scenario in which the Supreme Court would find a remedy unavailable is "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id*. However, once the defendant has made a threshold showing of failure to exhaust, the burden of showing that administrative remedies were unavailable falls to the plaintiff. *Creel v. Hudson*, 2017 U.S. Dist. LEXIS 147329, *11, 2017 WL 4004579 (S. D. W. Va. 2017).

In the present civil action, Plaintiff Spiker alleges that he did not receive adequate medical or mental health care while incarcerated at TVRJ and this forms the basis for both Count I and Count II of the Amended Complaint. Therefore, Plaintiff's suit is subject to the requirement that all administrative remedies be exhausted prior to filing suit. Where an inmate has not done so, the Court must dismiss the action "so that the prison can either resolve the issue on own, or create a more complete record for the district court to examine when reviewing the prison official's decision." *Cline v. Fox*, 282 F.Supp.2d 490, 495 (N.D.W.Va. 2003). Here, Plaintiff Spiker filed one grievance that was unrelated to his medical treatment and one grievance regarding suicide watch. *See* Spiker grievances **Exhibit 2**. The first grievance was responded to within 24 hours and it was not appealed. *Id.* The second grievance dated May 5, 2020 was a request to change the terms of his suicide watch. Plaintiff does not appear to make any specific factual allegations identified as a failure to accommodate related to the ADA, and the general allegations made are addressed *infra*.

First, inmates are not allowed to change the terms of suicide watch via the grievance procedure. This is a serious medical decision that is reserved for the judgment of medical professionals. Second, this grievance was submitted after the Second Amended Complaint was filed. However, the PLRA requires prisoners to exhaust administrative remedies prior to filing a complaint in federal court. *See Christian v. Hale*, 2019 U.S. Dist. LEXIS 137368, *11 (S. D. W. Va. 2019). Therefore, clearly if Mr. Spiker had complaints about his medical care or any separate ADA accommodation issue, these complaints were not made via the proper grievance procedures and his administrative remedies were not exhausted as required by the PLRA and WVPLRA.

The grievance process is available to all inmates and certainly to Plaintiff Spiker. Plaintiff Spiker was incarcerated at TVRJ on October 31, 2019. *See* Second Amended Complaint (Doc. 67)

at ¶ 46. Plaintiff was moved to Davis Memorial Hospital on a Mental Hygiene Order on November 10, 2019. In that timeframe of approximately eleven days, Plaintiff has filed at least one grievance on the kiosk that was not related to this action. **Exhibit 2**. Plaintiff did not appeal this grievance but admits that he is aware of the appeal process. *See* relevant portions of Spiker deposition, **Exhibit 3** at p. 56.

Furthermore, Plaintiff Spiker admits that at his intake orientation he was shown the kiosk and the inmate handbook. *Id.* at p. 58. He had recorded access to and viewed the Inmate Handbook at least once. *See* Spiker Kiosk visitation log at **Exhibit 4.** The inmate rulebook and the grievance process is readily available via electronic means on the kiosk. **Exhibit 1**; *see, also,* kiosk screenshot, **Exhibit 5.** Clearly, Mr. Spiker is aware of and is able to use the grievance process. Further, his first grievance was addressed. **Exhibit 2**. After complaining about the charges he deemed unfair in a grievance, Superintendent Lanham responded within 24 hours to explain the charges he received. *Id*. For these reasons, the grievance process cannot be considered "unavailable" for Plaintiff Spiker.

Finally, upon his return on May 5, 2020 he was able to file a second grievance that he appealed all the way to the commissioner. *Id.*; *see, also,* deposition of Danny Spiker **Exhibit 3,** at p. 91. This grievance was filed after the commencement of this case. However, a plaintiff may not exhaust administrative remedies during the pendency of a federal suit. *King v. United States*, 2011 U.S. Dist. LEXIS 151880, *12, (S.D.W. Va. 2012); *see also Christian v. Hale*, 2019 U.S. Dist. LEXIS 137368, *15 (S.D.W. VA. 2019)(Thus, he is also required to exhaust his administrative remedies in accordance with the West Virginia Prisoner Litigation Reform Act, W. Va. Code § 25-1A-1, *et seq.*, prior to filing a federal lawsuit). The rationale behind pre-suit exhaustion is pragmatic, "if during the pendency of a suit, the administrative process was to produce results

benefitting plaintiff, the federal court would have wasted its resources adjudicating claims that could have been resolved within the prison grievance system at the outset. *King*, 2011 U.S. Dist. LEXIS at *12 citing *Neal v. Goord*, 267 F.3d 116, 121-22 (2d Cir. 2001).

Looking at this evidence as a whole, the Court must conclude that there are no genuine issues of material facts regarding whether the grievance process is available to Plaintiff Spiker and whether he properly exhausted the administrative remedies prior to bringing this issue before this Court. Plaintiff effectively utilized the grievance process during his short incarceration. He also acknowledged that he received an acceptable response to his second grievance. Armed with this knowledge, he still failed to request relief related to those complaints he asserts in the Amended Complaint. [Doc 67].

"[T]he PLRA[']s exhaustion requirement requires proper exhaustion" to include all steps that the agency has established and doing so consistent with the instructions provided. *Woodford v. Ngo*, 548 U.S. 81, 90 & 93 (2006). In this case, the requirements were set forth in the grievance procedure in the Inmate Handbook. Plaintiff failed to exhaust those administrative remedies available to him and, accordingly, Defendants are entitled to summary judgment on both Counts I and II as a result of his failure to exhaust his available administrative remedies under the PLRA.

II. THIS COURT SHOULD CONCLUDE AS A MATTER OF LAW THAT ALL OF THE DELIBERATE INDIFFERENCE CLAIMS FOR LACK OF MEDICAL AND MENTAL HEALTH TREATMENT UNDER COUNT I OF THE SECOND AMENDED COMPLAINT ARE WITHOUT MERIT.

Although an inmate is plainly entitled to receive adequate medical and mental health care while incarcerated, no inmate is entitled to receive nor may he or she insist that the State of West Virginia provide him with, the most sophisticated care that money can buy. *United States v. DeCologero*, 821 F.2d 39, 42 (1st Cir.1987). Rather the constitution only requires at Regional Jails, the facilities at issue under the Second Amended Complaint, that certain minimum standards of

medical and mental health treatment are met, "not that they cater to the individual preference of each inmate." *Chase v. Quick*, 596 F. Supp. 33, 35 (D.R.I. 1984). Deliberate indifference to a serious medical or mental health need of an inmate, including psychiatric care, can constitute unnecessary and wanton infliction of pain prohibited by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976).

To adequately plead and prove an Eighth Amendment claim of deliberate indifference to the medical or mental health needs of an inmate, Plaintiff Spiker must satisfy a two-part test comprised of both objective and subjective components. First, Plaintiff must prove that the alleged deprivation of mental health treatment was "objectively, 'sufficiently serious.'" *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (*quoting Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). In order to satisfy the objective prong in a conditions of confinement claim, the prisoner must "produce evidence of a serious or significant physical or emotional injury resulting from the challenged conditions," or "demonstrate a substantial risk of such serious harm resulting from the prisoner's unwilling exposure to the challenged conditions." Importantly, "only extreme deprivations are adequate to satisfy the objective component of an Eighth Amendment claim." *Shakka v. Smith*, 71 F.3d 162 (4th Circ. 1995) (*citing Hudson v. McMillian*, 503 U.S. 1, 8-9 (1993).

Second, Plaintiff Spiker must demonstrate by competent, reasonable, and admissible evidence that the prison official had "a sufficiently culpable state of mind." *Wilson*, 501 U.S. at 302-3. This subjective prong of the test requires Plaintiff to prove that Defendants had actual knowledge of and disregard for the "excessive risk to inmate health." *Farmer*, 511 U.S. at 837. Only when the official is "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [draws] the inference[]" does the requisite degree of culpability exist to satisfy the second element of the inquiry. *Id.* Neither negligence nor medical malpractice

in diagnosis or treatment of an inmate's medical/mental health condition may give rise to an Eighth Amendment deliberate indifference claim.

Importantly, the Fourth Circuit reviews Eighth Amendment claims based on the totality of the circumstances. *See, Clay v. Miller*, 626 F.2d 345, 347 (4th Cir. 1980); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976); *Sweet v. South Carolina Dept. of Corrections*, 529 F.2d 854, 865 (4th Cir. 1975). This Court followed this same deliberate indifference standard related to the COVID-19 conditions at West Virginia Regional Jails and Prisons in its Order in this case denying the preliminary injunction, Doc. 183 at pp. 13-14, as the Court found that the inmates could not meet that standard.

This Court's decision on COVID-19 is well-reasoned and it equally applies in this instance. Just as Defendants had a plan to deal with the coronavirus, they have a contract to deal with medical and mental health needs in this case. As set forth in paragraph 4 of the affidavit of Commissioner Betsy Jividen (**Exhibit 6):**

> DCR contracts with PrimeCare Medical, Inc. to provide health care to inmates at nine of the Regional Jails, all except for Northern Regional Jail. Health care is provided to inmates at Northern through Wexford Health Sources, Inc. Wexford also provides health care for all of the inmates at the Correctional Centers. Pursuant to the contracts, PrimeCare and Wexford are required to provide the proper staffing and adequate health care for inmates at their respective facilities.

Id. The Court has further been provided with copies of the contracts with PrimeCare and Wexford for its review.

A. Plaintiff Spiker Has Failed to Establish that Defendants were Deliberately Indifferent to a Substantial Risk of Serious Harm to Plaintiff.

Plaintiff Spiker cannot establish facts sufficient to proceed under § 1983 as to the objective prong of *Farmer v. Brennan*, *supra*. Under that prong, the Second Amended Complaint must allege that specific prison officials were deliberately indifferent to a risk of serious harm to the Plaintiff.

Even assuming, *arguendo*, that Plaintiff Spiker had properly pled the requisite "serious deprivation" for an Eighth Amendment claim, Plaintiff cannot establish sufficient facts to establish the requisite "deliberate indifference" specifically as to Defendants.[5] Commissioner Jividen has set forth in her affidavit that she is an attorney, not a licensed healthcare provider and that Defendants have no role in the delivery of healthcare in the Regional Jails. **Exhibit 6** ¶¶ 8-9.

Deliberate indifference requires a showing that the official was subjectively aware of a substantial risk of serious harm to an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (U.S. 1994). In order to possess this level of culpability, "the official must be aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw that inference." *Id.* To be liable, the prison officials must actually know of and disregard the risk. *Id.* at 837.

The Fourth Circuit has characterized the deliberate indifference standard as an "exacting one. *Lightsey*, 775 F.3d at 178." *Jones v. Chapman*, 2017 U.S. Dist. LEXIS 87907 at *87-91 (D. Md. June 7, 2017). Deliberate indifference "is a higher standard for culpability than mere negligence or even civil recklessness . . ." *Lightsey*, 775 F.3d at 178; *see also Scinto*, 841 F.3d at 225; *Russell v. Sheffer*, 528 F.2d 318, 319 (4th Cir. 1975); *Donlan v. Smith*, 662 F. Supp. 352, 361 (D. Md. 1986)." *Id*. "Deliberate indifference is a very high standard-a showing of mere negligence will not meet it .. . [T]he Constitution is designed to deal with deprivations of rights, not errors in judgments, even though such errors may have unfortunate consequences . . ." *Grayson v. Peed*, 195 F.3d 692, 695-96 (4th Cir. 1999).

Magistrate Tinsley, writing for this district, recently addressed a very similar situation

[5] The only parties with the requisite knowledge regarding the delivery of medical and mental health care that should have been sued here, but were not, are PrimeCare and Wexford. This Court may note that the Defendants tried to join them as third-party defendants earlier, but the Plaintiffs opposed this joinder, and this Court agreed. Doc. 110.

regarding medical care for an inmate in a proposed findings and recommendations for disposition in *Greene v. Ballard,* 2020 U.S. Dist. LEXIS 59180 (S.D. W.V. 2020), *aff'd.* 2020 U.S. Dist. LEXIS 53023 (S.D. W.V. 2020). In examining the second factor under the *Farmer* decision, Magistrate Tinsley at pp. 26-27, stated:

> Defendants Ballard, Frame, Clifford, Mitchell, and Snyder appear to be correctional or administrative staff, and not licensed healthcare providers. The Second Amended Complaint does not specifically allege that any of these defendants interfered with the treatment being provided to Greene for his medical needs. To the extent that the Second Amended Complaint alleges that Greene was denied the ability to attend follow-up outside doctor's appointments, he has failed to specifically identify which defendant or defendants made those decisions.
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> * * *
>
> Thus, the Second Amended Complaint falls woefully short of sufficiently pleading the subjective component necessary to state a plausible claim of deliberate indifference on this basis.

This Court should consider the decision in *Greene* and the deliberate indifference standard and reach a similar conclusion.

In the instant matter, Plaintiff has made allegations against Defendants that they were deliberately indifferent to his medical needs based on the care he received. It is undisputed in this case that none of those specific care allegations relate to any conduct by Defendants. Instead, they appear to be ground in policies. There is no indication; however, that Defendants were either 1) aware of the specific allegations of Plaintiff (nor could there be because he failed to properly follow the administrative procedure in place until after the instant action was filed) and 2) that they were aware or intended for the policies to be an excessive risk to any inmate. Plaintiff has not identified a specific policy or procedure that the allege Defendants knew was medically inappropriate under the deliberate intent standard and therefore Plaintiff cannot show "a sufficiently culpable state of mind." *Wilson*, 501 U.S. at 302-3 nor can he show that Defendants had an actual knowledge of

and disregard for the "excessive risk to inmate health." *Farmer*, 511 U.S. at 837. This Court should determine as a matter of law that Plaintiff has wholly failed to martial the necessary fact to establish deliberate indifference on the part of Defendants. As such, all claims under Count I of the Second Amended Complaint must be dismissed as a matter of law.

B. Defendants have required that PrimeCare and Wexford Maintain NCCHC Accreditation and this Court Should Rule as a Matter of Law that Meeting NCCHC's Standards are Substantial Evidence of Compliance with the Constitutional Standards of Deliberate Indifference.

As set forth in paragraph 5 of Commissioner Jividen's affidavit, **Exhibit 6**, as "a part of the contracts, each health care facility operated by PrimeCare and Wexford are required to be accredited by National Commission on Correctional Health Care ("NCCHC"), a nationally recognized organization with the mission of improving the quality of health care in prisons. *Id.* Every couple of years the NCCHC does a thorough audit of each facility and they review compliance with 39 essential standards and 20 important standards. The NCCHC requires 100% compliance with the essential standards for a facility to receive its accreditation. If you are not in full compliance with the essential standards, a contingent approval is provided and the facility is given a period of time to meet all of the essential standards." In ¶¶ 6-7 of her affidavit, she further attests that all nine of the PrimeCare Regional Jail health care facilities have met the NCCHC accreditation standards and Wexford has received contingent approval for its health care facility at Northern Regional Jail. *Id.*

The District Court in *Balla v. Idaho State Board of Corrections,* 2020 U.S. Dist. LEXIS 95915 (D. Idaho 2020) recently examined the NCCHC standards in an Eighth Amendment deliberate indifference case related to medical and mental health for inmates that has been ongoing for almost 40 years. In that case, the district court discussed at length the NCCHC standards and considered them as evidence of compliance with the Eighth Amendment deliberate indifference

standard. The district court made clear that the NCCHC standards, as "best practices" are not the "constitutional floor" but something to be considered along with the fact in the case. *Id.* at p. 29. Based upon the foregoing and the evidence in the case, the district court dismissed the case. Likewise, in this case, this Court should consider the NCCHC standards for accreditation and the evidence in the case, and conclude as a matter of law that all claims under Count I of the Second Amended Complaint must be dismissed against Defendants.

III. ALL CLAIMS UNDER COUNT II OF THE SECOND AMENDED COMPLAINT RELATED TO THE AMERICANS WITH DISABILITY ACT SHOULD BE DISMISSED AS A MATTER OF LAW.

Plaintiff's claims in Count II of the Second Amended Complaint fall under Title II of the Americans with Disabilities Act ("ADA") likewise fail. In order to present a claim under the ADA, Plaintiff must establish: "(1) they have a disability; (2) they are otherwise qualified to receive the benefits of a public service, program or activity; and (3) they were excluded from participation in or denied the benefits of such service, program, or activity, or otherwise discriminated against on the basis of their disability." *Gordon v. Tygart Valley Reg'l Jail*, 2013 U.S. Dist. LEXIS 28444 (N.D. W. Va. 2013) (citing *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 498 (4th Cir. 2005)).

First, out of an abundance of caution, because there is some vagueness as to the basis of the Plaintiff's ADA allegations based on the discovery to date, to the extent that Count II attempts to assert a claim against either Defendant under Title II of the ADA based on allegations that do not implicate constitutional rights, those claims are barred by sovereign immunity. *See Sims v. Marano,* 2020 U.S. Dist. LEXIS 20384 at 14-15 *(W.D. Va. 2020) (Mem. Op.) (*citing *United States v. Georgia,* 546 U.S. 151 (2006) and *Chase v. Baskerville,* 508 F.Supp.2d 492 (E.D. Va. 2007)). To the extent that Count II attempts to assert a Title II claim under the ADA against Defendant

Jividen in her official capacity, those claims are limited to prospective injunctive relief. *Id*. at 17.

Second, with regard to Title II clams under the ADA that are based on alleged constitutional violations, for the purposes of this Motion only, Defendants will assume Plaintiffs can meet the threshold to be considered disabled. However, even assuming, *arguendo*, that Plaintiff is disabled under this standard "courts routinely dismiss ADA suits by disabled inmates that allege inadequate medical treatment, but do not allege that the inmate was treated differently because of his/ her disability." *Gordon, supra,* at 10. The Court found "it is not enough, in asserting a Title II discrimination claim under the ADA, for the Plaintiff to show that he received inadequate care in light of his disability. He must demonstrate that he was excluded from participation in a program or activity, or otherwise discriminated against, on the basis of his disability." *Id*. at 12. In this case, Plaintiff Spiker cannot demonstrate such discrimination or that a request for accommodation that was denied and appealed through the required administrative process.

In the Second Amended Complaint, Plaintiff Spiker claims that all Plaintiffs did not receive necessary accommodations for disabilities to enable them to participate in jail life in the same manner as non-disabled inmates. Doc. 67 at ¶ 185. In addition, he has alleged that Plaintiffs were discriminated against by Defendants generally failing to provide reasonable accommodations. *Id*. at ¶ 186. The Amended Complaint further appears to allege that the policies related to medical treatment, including mental health services, "immediately upon entry to the State jails" Defendants have violated the ADA and discriminated against the Plaintiffs. *Id*. at ¶ ¶ 257 and 258.

To the extent that Plaintiff attempts to argue that his ADA claims are based on the same facts as the allegations related to the claim of deliberate indifference discussed *supra*, Plaintiff's argument fails. Plaintiff Spiker's Second Amended Complaint does not allege that he is receiving different medical care *because of* his disability. Accordingly, any claim related to medical care

appears to be that the medical care received was inadequate. At set forth above, the Second Amended Complaint allegations related to medical care fail to meet the deliberate indifference standard and must be dismissed. Regardless, it is well settled that a claim of inadequate medical care is insufficient to establish a claim under the ADA. *See Gordon, supra. See also Mondowney v. Balt. Cty. Det. Ctr.*, 2019 U.S. Dist. LEXIS 119566, p. 58-59 (D. Md. 2019) (discussing cases finding that a lack of medical treatment does not violate rights under the ADA); *Spencer v. Easter*, 109 F. Appx. 571, 773 (4th Cir. 2004) (failure to provide timely medication refills not an ADA violation); *Bryant v. Madigan,* 84 F. 3d. 246, 249 (7th Cir. 1996) (ADA not violated by a simple failure to attend to the medical needs of disabled prisoners).

Plaintiff Spiker has failed to articulate how he has been treated differently because of his alleged disabilities with regard to any jail program or service. Plaintiff has not identified any program or service that that he sought to participate in and was denied entry based on his disability. Instead, the allegations in the Second Amended Complaint are generally stated as a lack of accommodation and a general reference to policies. However, when asked in discovery to identify any evidence of an ADA violation, Plaintiff provided no specific information, he simply objected to the timing, calling the interrogatory an "improper block buster request, and calls for a legal conclusion that Plaintiff is not qualified to answer," and, notwithstanding that objection and without waiving the same, he identified his medical conditions but no specific policy, program, accommodation or other specific alleged ADA violation. *See* relevant portions of discovery responses of plaintiff, **Exhibit 7** at response to interrogatory number 21. To the extent that the allegations at issue are related to an accommodation for a disability, even general accommodations, they are subject to the exhaustion requirements of the PLRA. *See e.g. O'Guinn v. Lovelock Corr. Ctr*. 502 F.3d 1056, 1061-62 (9th Cir. 2007) (discussing plain language of PLRA requiring

exhaustion of administrative remedies before bringing ADA and Rehabilitation Act claims); *Corpening v. Hargrave*, 2015 U.S. Dist. 80447, 10-11 (W. D. N.C. 2015) (same). As discussed *supra*, Plaintiff failed to exhaust the available administrative remedies for any requested accommodation prior to filing suit and so his claims must be dismissed as a matter of law.

IV. COUNT I OF THE SECOND AMENDED COMPLAINT MUST BE DISMISSED AGAINST WVDCR SINCE IT IS NOT A PERSON.

WVDCR is entitled to dismissal under Count I of the Second Amended Complaint as a matter of law because it is not a "person" subject to suit in this court under 42 U.S.C. § 1983. That section provides a remedy to parties who are deprived of protected civil rights by "persons" acting under color of any state "law, statute, ordinance, regulation, custom, or usage." The Supreme Court in *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) held that neither a state nor its agencies are "persons" under § 1983. The Fourth Circuit has confirmed that it is "well settled" that a state or a state agency are not "persons" as required under 42 U.S.C. § 1983. *See e.g Kelly v. State*, 2007 U.S. Dist. LEXIS 95954 (D. Md. 2007) *aff'd* 267 F. App'x 209, 210, 2008 U.S. App. 1226 (4th Cir. 2008) (recognizing that it has been "well settled" that the state cannot be sued under 42 U.S.C. § 1983 and noting that "[a] cause of action under § 1983 requires the deprivation of a civil right by a "person" acting under color of state law.)

Court I against WVDCR clearly falls within the category of attempted § 1983 actions that cannot be brought under § 1983 because WVDCR is not a person. In similar cases, the State and its agencies have been found not to be "persons" under § 1983 and have been dismissed from suit. *See Cochran v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 2014 U.S. Dist. LEXIS 89893, at *8 (S.D. W.Va. 2014)(holding W.Va. Regional Jail and Correctional Facility Authority, the predecessor to WVDCR, is a state agency and that no § 1983 action could be brought against it) and *Black v. West Virginia*, 2019 U.S. Dist. LEXIS 172020, at *10-12 (S.D. W.Va. 2019)(holding the State was

entitled to dismissal because it is not a "person" subject to liability or suit under § 1983). This Court as a matter of law should dismiss WVDCR from Count I of the Second Amended Complaint.

Respectfully submitted on behalf of Defendants by:

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