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 EARL EDMONDSON

NOW COMES the Defendant Betsy Jividen, Commissioner of the West Virginia Division of Corrections and Rehabilitation, in her official capacity only, and West Virginia Division of Corrections and Rehabilitation, 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 move this Honorable Court for summary judgment with regard to the claims of Earl Edmondson as set forth herein as follows:

1. Plaintiff Edmonson is a named plaintiff in the above styled civil action. At the time the Second Amended Complaint was filed on December 19, 2019, Mr. Edmonson was convicted and he was an inmate at Northern Regional Jail. Doc. 67 at ¶ 16.

2. Plaintiff Edmondson was incarcerated for a short time at Martinsburg Correctional Center in Berkeley County, West Virginia (a prison) from January 17, 2020 to February 13, 2020. Plaintiff Earl Edmondson is currently serving a sentence of 1-5 years and he is incarcerated at the Pruntytown Correctional Center in Taylor County, West Virginia since February 13, 2020, for an unlawful assault. *See* Affidavit of Jonathan E. Huffman, **Exhibit 1** at ¶ 2(e)).

3. Plaintiff Edmondson clearly states 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, . . ." Doc. 67 at ¶ 1. It is also undisputed that "Plaintiffs bring this suit seeking solely declaratory and injunctive relief." Doc. 67 at ¶ 2. Plaintiff Edmondson's claims for declaratory and injunctive relief are moot, as Plaintiff is no longer housed in a West Virginia Regional Jail facility as set forth in the affidavit of Jonathan E. Huffman, **Exhibit 1** at ¶ 2(e).

4. This Court addressed a similar situation on a Motion to Dismiss filed by the West Virginia Regional Jail and Correctional Facilities Authority in *S.M.B. v. West Virginia Regional Jail and Correctional Facility Authority, et al.*, 2017 U.S. Dist. LEXIS 177668 (S.D. W.Va. 2017) at pp. 6-7, and it concluded that the Plaintiff's claim for injunctive relief was mooted by his release.

5. This Court should likewise examine the facts and circumstances in this case and conclude that it is undisputed that Plaintiff Edmondson has been transferred from a Regional Jail facility to a prison and that none of the exceptions to the mootness doctrine are present in this case that would preclude this Court from dismissing the claim of Plaintiff Edmonson at this time.

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

7. This Court should likewise dismiss the deliberate indifference claims in Count I of the Second Amended Complaint under the Eighth and Fourteenth Amendments, United States

Constitution, under 42 U.S.C. § 1983, finding that Plaintiff Edmondson does not have sufficient evidence to support his Count I claims.

8. 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 Edmondson under Count I should be dismissed.

9. 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 Edmonson nor any other Plaintiffs have sufficient evidence to support their ADA claims under Count II.

10. 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 as moot the Plaintiff Earl Edmonson's claims for declaratory and injunctive under the Second Amended 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:

LEWIS GLASSER PLLC

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III, State Bar #155
Richard L. Gottlieb, State Bar #1447
James C. Stebbins, State Bar #6674
Valerie H. Raupp, State Bar #10476
Post Office Box 1746
Charleston, WV 25326
(304) 345-2000
FAX: (304) 343-7999
wjarceneaux@lgcr.com

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ Briana J. Marino
Briana J. Marino (WVSB #11060)
Assistant Attorney General
1900 Kanawha Blvd., East
Building 1, Suite W-400
Charleston, WV 25305
Telephone: (304) 558-6593
Facsimile: (304) 558-4509
Email: Briana.J.Marino@wvago.gov

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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 EARL EDMONDSON.**" 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.
Jennifer S. Wagner, Esq.
Mountain State Justice
Counsel for Plaintiffs

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III, State Bar #155

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BETSY JIVIDEN, *et al.*,

Defendant.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO EARL EDMONDSON

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 Earl Edmondson as set forth in the accompanying Motion for Summary Judgment. For the reasons set forth below, this Plaintiff's claims should be dismissed with prejudice.

STATEMENT OF FACTS

Plaintiff Earl Edmondson is currently housed at the Pruntytown Correctional Center ("Pruntytown") in Taylor County, West Virginia. *See* Deposition of Mr. Edmondson attached as **Exhibit 2** at p. 7. Pruntytown is a prison and not a jail. Mr. Edmonson has been at Pruntytown since February 13, 2020. Mr. Edmondson is now serving a sentence for an unlawful assault that occurred in Ohio County. *Id.* at p. 8 and **Exhibit 1**.

Mr. Edmondson is 76 years old and claims to suffer from PTSD, chronic sinus issues, and a bulging disc in his back. *See* Second Amended Complaint (Doc. 67) at ¶ 106. He also claims that he has been diagnosed with bone cancer. *Id.* at ¶ 107. He further claims that he has lost his teeth and that he requires dentures which he does not have. *Id.* at ¶ 108. His primary medical complaints from his stay at NRJ are: 1) that he went for three months without Buspar for his PTSD

(*Id.* at ¶ 114); 2) that he went for three months without antibiotics for his chronic sinus condition (*Id.* at ¶ 115); 3) that the facility would not fetch his dentures from an outside dental facility (*Id.* at ¶ 108); and 4) that NRJ would never test or treat him for bone cancer (*Id.* at ¶ 107).

Regarding his PTSD and the alleged three-month delay before he was treated with Buspar, Mr. Edmondson's allegations in the Second Amended Complaint are false. As indicated in his medical records, it is clear that he started receiving Buspar on July 31, 2019, which was only about two weeks after his admission to NRJ. *See* medical records at Bates No. 118383.[1]

With respect to his chronic sinus complaints, Mr. Edmondson alleges that it took over three months for him to get antibiotics for a recurring sinus infection. *See* Doc. 67 at ¶ 115. In his deposition, the three-month period was suddenly reduced by Mr. Edmondson to only "a month." **Exhibit 2** at p. 53. This alleged time period is even further reduced when the actual medical records are considered. For example, the medical records demonstrate that plaintiff's first complaint about a flare up of his chronic sinus problems did not occur until September 30, 2019. *See* Bates No. 118291. The records clearly demonstrate that he was promptly started on a series of antibiotics (Amoxicillin) only ten days later on October 10, 2019. *See* Bates No. 118382.

Regarding the issue of dentures, Mr. Edmondson does not claim that he had dentures when he arrived at NRJ. **Exhibit 2** at p. 68. Plaintiff was planning to have someone from the outside (his friend "Gerry") fetch and bring him the dentures but Gerry was allegedly in Florida and therefore could not do this for him. *Id.* at p. 69. NRJ had no responsibility to obtain Mr. Edmondson's dentures for him. Dentures only become a medical necessity when an inmate loses weight from not eating properly. Mr. Edmondson admitted in his deposition that he weighed the same when he left NRJ that he did when he arrived. *Id.* at p. 70.

[1] Plaintiff's medical records are deemed confidential. At the Court's request, they will be produced under seal or in some other confidential manner.

Mr. Edmondson's last major complaint is that NRJ repeatedly refused to treat him for alleged bone cancer. *See* Second Amended Complaint (Doc. 67) at ¶ 107. DCR's response to that issue is simple. NRJ promptly obtained Mr. Edmondson's extensive medical records from the VA Hospital but there was no mention of a bone cancer diagnosis in those records. Mr. Edmondson could not explain why a bone cancer diagnosis was not mentioned in his VA medical records. **Exhibit 2** at p. 77. There is no competent evidence whatsoever that plaintiff ever had bone cancer.

Mr. Edmondson was very proficient at filing grievances and he filed at least 114 separate grievances on the electronic inmate kiosk in 6 months at NRJ. *See* grievances, **Exhibit 3.** These grievances dealt with every medical issue that Mr. Edmondson now raises in this lawsuit and they also dealt with legal issues and issues he had with other inmates. *Id.* Mr. Edmondson acknowledges that he was well aware of the "appeal" button on the kiosks. **Exhibit 2** at p. 102. He also admits that he knew exactly what it meant to "appeal." *Id.* However, Mr. Edmondson makes the disingenuous claim that whenever he pressed the appeal button it "erased" it. *Id.*

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). "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). "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.).

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 Reg. Jail,* 2020 U.S. Dist. LEXIS 97540 (S.D. W.Va. 2020).

ARGUMENT

I. PLAINTIFF EARL EDMONDSON'S CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF REGARDING INMATE MEDICAL CARE AT WEST VIRGINIA JAILS ARE MOOT SINCE HE HAS BEEN TRANSFERRED TO A PRISON.

This Court has recognized that in prison cases the "prisoner challenging a specified prison policy must have a 'present interest affected by that policy' in order to be heard." *S.M.B. v. West Virginia Regional Jail and Correctional Facility Authority, et al.*, 2017 U.S. Dist. LEXIS 177668 (S.D. W.Va. 2017) at p. 4 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975)). The Fourth Circuit has confirmed and implemented this principle through a general rule that "the transfer of an inmate from a unit or location where he is subject to the challenged policy, practice, or condition, to a different unit or location where he is no longer subject to the challenged policy, practice, or condition moots his claims for injunctive and declaratory relief…". *Incumma v. Ozmint*, 507 F.3d 281, 286-87 (4th Cir. 2007). *See also Rendelman v. Rouse,* 569 F.3d 182, 186-87 (4th Cir. 2009)(discussing this general rule of mootness and holding that the transfer out of Maryland Division of Corrections custody to federal prison after conviction mooted Plaintiff's claim for injunctive relief)(internal citations omitted); *Incumma, supra* (discussing cases supporting the general rule of mootness of declaratory and injunctive relief claims when an inmate is released and finding the inmate's claims for declaratory and injunctive relief under the First Amendment moot); *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991)(holding a prisoner

transfer mooted claims for declaratory and injunctive relief). This is because once removed from the location, the inmate "no longer has a legally cognizable interest in a judicial decision on the merits of his claim." *Incumma*, 507 F.3d at 287.

In *S.M.B. supra,* at pp. 6-7, this Court considered whether an inmate's claim for injunctive relief was mooted by his parole:

> In this case, Plaintiff was paroled on March 28, 2017. While he was purportedly housed in a West Virginia correctional facility at the time he filed his Complaint, this is no longer the case. As Plaintiff is no longer housed in a WVRJCFA facility, he is no longer subject to the prison policy he challenges and, accordingly, has no "present interest affected by that policy." As a result, the Court FINDS that Plaintiff's claim for equitable relief against WVRJCFA is moot.

In so holding, this Court relied upon the Court of Appeals decision in *Incumaa, supra,* and other similar decisions. This Court also concluded that none of the exceptions to the mootness doctrine were present in that case. Likewise, in *Whitmore v. Western Reg'l Jail*, 2019 U.S. Dist. LEXIS 133646 (S. D. W. Va. July 19, 2019), Magistrate Eifert reviewed a *pro se* inmate complaint regarding conditions at Western Regional Jail and found that the inmate's transfer to a different correctional facility effectively mooted his claim for injunctive relief, that no exception applied and dismissed his claim for injunctive relief. *Id*. at pp. 11-13. This Court accepted and incorporated Magistrate Eifert's findings and recommendation and dismissed the complaint with prejudice. *Whitmore v. W. Reg'l Jail,* 2019 U.S. Dist. LEXIS 132230 (S. D. W. Va. August 7, 2019).

This case, like *S.M.B.* and *Whitmore*, should be dismissed as moot because Plaintiff Edmondson is no longer an inmate of a Regional Jail governed by the policies challenged in the Second Amended Complaint. At the time the Second Amended Complaint was filed on December 19, 2019, Plaintiff was incarcerated at Northern Regional Jail. Doc. 67 at ¶ 16. Mr. Edmondson, was transferred from the Northern Regional Jail to the Pruntytown Correctional Center on or about February 13, 2020 to serve his one to five year sentence. *See* **Exhibit 1** at ¶ 2(e). Because Plaintiff

Edmondson is no longer incarcerated in a West Virginia Regional Jail facility as he has been transferred to Pruntytown, he does not have a present interest affected by any of the challenged policies, practices or conditions raised in the Second Amended Complaint. No exceptions to the mootness doctrine should apply.

II. PLAINTIFF EARL EDMONDSON 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 Earl Edmondson failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act of 1995, ("PLRA"), 42 U.S.C. § 1997 *et seq*. prior to seeking judicial redress. All of Plaintiff's claims related to an alleged failure 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. That requirement was not met for any of Plaintiff Edmondson'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's exhaustion requirements. Specifically, Defendants argue that Plaintiff 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 issues of fact regarding whether the grievance process is "available" to Plaintiff Edmondson.

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 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."

"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* [2]

[2] 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 Edmonson also failed to exhaust his grievances under the WVPLRA as well.

The West Virginia Division of Corrections and Rehabilitation (WVDCR) 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 4**, excerpts of Inmate Handbook for Regional Jail Inmates. Under Grievance Procedures 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*. If the inmate is still not satisfied a third level of administrative oversight is included in the policy: an appeal to the Commissioner of WVDCR. *Id*.

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).

Here, Plaintiff Edmondson alleges that he did not receive adequate medical or mental health care while incarcerated at Northern Regional Jail ("NRJ") and this appears to form the basis for both Count I and Count II of the Amended Complaint. Specifically, Mr. Edmondson alleges: 1) that he went for three months without Buspar medication for his PTSD (*Id.* at ¶ 114); 2) that he went for three months without any antibiotic treatment for his chronic sinus condition (*Id.* at ¶ 115); 3) that the facility would not fetch his dentures from an outside dental facility (*Id.* at ¶ 108); and 4) that NRJ would never test or treat him for bone cancer (*Id.* at ¶ 107). Plaintiff makes these allegations in the Second Amended Complaint filed on December 19, 2019. (Doc 67).

Plaintiff's suit is subject to the requirement that all administrative remedies be exhausted prior to filing suit, here December 19, 2019. 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 Edmondson filed approximately one hundred fifteen grievances on the kiosk and four handwritten grievances. **Exhibit 3**. Ten of these

were filed after suit was commenced. The grievances dealt with every medical issue that Mr. Edmondson now raises in this lawsuit. *Id*.

Clearly, Mr. Edmondson was very proficient at filing grievances and he acknowledges that he was well aware of the "appeal" button on the kiosks. **Exhibit 2** at p. 102. He also admits that he knew exactly what it meant to "appeal." *Id.* In fact, he appealed grievances on at least four occasions. Furthermore, Plaintiff Edmondson accessed and viewed the Inmate Handbook at least once, which is the same kiosk used to file grievances. *See* **Exhibit 5**, inmate kiosk view log. The inmate rulebook and the grievance process are also readily available via electronic means on the Kiosk. *See* **Exhibit 6**, kiosk screenshot. Mr. Edmondson simply did not exhaust his administrative remedies with regards to the claims relevant to this lawsuit.

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 Edmondson and whether he properly exhausted the administrative remedies prior to bringing this issue before this Court. Plaintiff routinely utilized the grievance process during his incarceration, he just did not utilize the grievance process to properly exhaust his remedies related to his medical claims in this case which are the basis of both Count I and Count II of the Complaint. Therefore, the grievance process cannot be considered "unavailable" because he successfully filed over one hundred grievances in total. Instead, Plaintiff simply failed to exhaust the administrative remedies available to him via the grievance procedure set forth in the Inmate Handbook. "[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). For these reasons, Defendants are entitled to summary judgment as a result of Plaintiff Edmondson's failure to exhaust his administrative remedies under the PLRA.

III. 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 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 Edmondson 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 Edmonson 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 April 8, 2020, 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, Defendants have a contract to deal with medical and mental health needs in this case. As set forth in Commissioner Jividen's affidavit (**Exhibit 7**):

> 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. at ¶ 4. The Court has further been provided with copies of the contracts with PrimeCare and Wexford for its review.

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

Plaintiff Edmondson 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 Edmonson 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.[3] As Commissioner Jividen has set forth in her affidavit, she is not a licensed healthcare provider and Defendants have no role in the delivery of healthcare in the Regional Jails. **Exhibit 7** ¶¶ 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

[3] 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.

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 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. …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 medical 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 grounded in policies. There is no indication 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) 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 Defendants knew was 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.

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 Commissioner Jividen's affidavit:

> [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. 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.

Exhibit 7 at ¶ 5. 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.

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.

C. 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 Edmondson cannot demonstrate such discrimination or that a request for accommodation that was denied and appealed through the required administrative process.

Plaintiff Edmondson generally claims that he did not receive necessary accommodations for his disabilities to enable him 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 failing to provide reasonable accommodations. *Id*. at ¶ 186. He further appears to allege that the Defendants' policies do not provide for appropriate medical treatment, including mental health services, "immediately upon entry to the State jails" and that this is a violation of the ADA and is discrimination against the Plaintiffs. *Id*. at ¶ ¶ 257 and 258. *See also Id*. at ¶ 255.

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 Edmonson'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 Edmonson 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. The issue picking up dentures was raised, however, he has not demonstrated that the same were medically necessary and so this fails to state a claim under the ADA. *See e.g. Hay v. Thaler*, 470 Fed. Appx. 411 (5th Cir. 2012)(unpublished).

The remaining 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. **Exhibit 8**, Plaintiff's Response to Defendants' Interrogatory No. 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 a lawsuit and so his claims must be dismissed as a matter of law.

Finally, even assuming, *arguendo* there were a failure to accommodate the Plaintiff or a violation of the ADA, which is denied, that past failure without continuing, present adverse effects for this Plaintiff and does not constitute a basis for "a present case or controversy regarding injunctive relief." *Sims, supra,* at 17-18 (W. D. Va. 2020)(Mem. Op.)(citing *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) in evaluating an inmate's *pro se* claims that his rights were violated under the ADA and noting that, *inter alia*, a claim related to the denial of a prosthetic leg under the ADA – which had been previously dismissed for failure to state a claim – could not be the basis for injunctive relief when he received a prosthetic leg after the lawsuit was filed because it was a prior harm). As such because Plaintiff Edmondson is no longer subject to any policy or lack of accommodation at a West Virginia Regional Jail, his claims cannot be the basis for the prospective injunctive relief sought and should be dismissed.

VI. 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 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.

CONCLUSION

WHEREFORE, based upon the foregoing, Defendants respectfully requests that this Court dismiss as moot Earl Edmonson's claims for declaratory and injunctive 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:

LEWIS GLASSER PLLC

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III, State Bar #155
Richard L. Gottlieb, State Bar #1447
James C. Stebbins, State Bar #6674
Valerie H. Raupp, State Bar #10476
Post Office Box 1746
Charleston, WV 25326
(304) 345-2000
FAX: (304) 343-7999
wjarceneaux@lgcr.com

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ Briana J. Marino
Briana J. Marino (WVSB #11060)
Assistant Attorney General
1900 Kanawha Blvd., East
Building 1, Suite W-400
Charleston, WV 25305
Telephone: (304) 558-6593
Facsimile: (304) 558-4509
Email: Briana.J.Marino@wvago.gov