IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DARNELL BONNER and
ANTHONY HALL,

Petitioners, ORDER

v. 01-C-487-C

SCOTT McCALLUM, Governor;
RICHARD VERHAGEN, Admin.;
UNNAMED OFFICIALS 1-100;
GERALD A. BERGE; GARY BOUGHTON;
BRAD HOMPE; TED HARIG; STEVE BECK;
MARYANN COOK; and CHAPLAIN OVERBO,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioners Darnell Bonner and Anthony Hall, who are presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, allege that respondents Scott McCallum, Richard Verhagan, Unnamed Officials 1-100, Gerald A. Berge, Gary Boughton, Brad Hompe, Ted Harig, Steve Beck, Maryann Cook and Chaplain Overbo violated petitioners' Eighth Amendment right to be free from cruel and unusual punishment, their Fourth Amendment right to be free from unreasonable searches, their

Eighth Amendment right to adequate medical care, their Fourteenth Amendment right to gain access to the courts and to equal protection and their rights under the Individuals with Disabilities Education Act.

Petitioners seek leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavits of indigency accompanying petitioners' proposed complaint, I conclude that petitioner Hall is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner Hall has submitted the initial partial payment required under § 1915(b)(1). From petitioner Bonner's trust fund account statement, it appears that he presently has no means with which to pay an initial partial payment of the $150 fee for filing his complaint. Therefore, although he has not made the initial partial payment required under § 1915(b)(1), petitioner Bonner is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if on three or more previous occasions the prisoner has had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief.

Although this court will not dismiss petitioners' case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioners have not exhausted the remedies available to them as required by § 1997e(a), they may allege their lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioners will be granted leave to proceed on their Eighth Amendment claim of unconstitutional conditions of confinement against respondent Berge, and petitioner Bonner will be granted leave to proceed on his Eighth Amendment claim that he was denied adequate medical care, his Fourth Amendment claim that he has been subjected to unreasonable searches, and his Eighth Amendment claim that he was treated with excessive force, all against respondent Berge. However, the proceedings as to the merits of these claims will be stayed because petitioners are members of the pending class in Jones 'El v. Berge, No. 00-C-421-C, in which these claims are being considered. Petitioners will not be granted leave to proceed on their claims of denial of access to the courts or to exercise their religion freely and that respondents' action violated their rights under the Individuals with Disabilities Education Act. In addition, petitioners will not be granted leave to proceed on their Fourteenth Amendment claim that they have been denied their right to equal protection or their First Amendment claim of denial of their right to freedom of expression

because these claims are legally frivolous.

In their complaint, petitioners make the following allegations of fact.

ALLEGATIONS OF FACT

Petitioners Darnell Bonner and Anthony Hall were inmates at Supermax Correctional Institution in Boscobel, Wisconsin, at all times relevant to this lawsuit. At present, petitioner Bonner is incarcerated at Mendota Mental Health Institute in Madison, Wisconsin. Respondent Scott McCallum is governor of Wisconsin. Respondent Richard Verhagan is administrator of the Division of Adult Institutions of the Wisconsin Department of Corrections. The remaining respondents are employed at Supermax: respondent Gerald A. Berge is the warden; respondent Gary Boughton is the security director, respondent Brad Hompe is a unit manager, respondent Ted Harig is the education director; respondent Steve Beck is the special education teacher; respondent Maryann Cook is an educational assistant; and respondent Chaplain Overbo is a chaplain.

A. Conditions of Confinement: Constant 24 Hour Illumination

Cells at Supermax are illuminated 24 hours a day. Both petitioners have problems sleeping under the constant lighting; they have been suffering emotionally, psychologically and physically. Since petitioner Bonner has been at Supermax, the constant lighting has

affected him badly. His vision has been deteriorating. If petitioners do not sleep under the lights, they are either harassed by the security guards or disciplined through the department rules and regulations.

B. Fourth Amendment: Unreasonable Searches

On approximately November 13, 2000, a sergeant and a unit officer performed a search of petitioner Bonner's cell. As a result of the search, they took a letter out his cell. The search was made to harass petitioner Bonner and was the result of unprofessional training of the officers. Supermax guards perform cell searches when they are bored or in retaliation against an inmate for the purpose of brutality. Petitioner Bonner has been the victim of this brutality on several occasions.

C. Eighth Amendment: Inadequate Medical Care

On December 10, 2000, correctional officers did a cell entry, during which they physically assaulted petitioner Bonner, spraining his back and badly injuring his ribs. Petitioner Bonner requested immediate medical attention. The nurse, Shirley Olson, refused to provide petitioner medical attention for his back and ribs.

D. Eighth Amendment: Excessive Force

On or about November 11, 2000, petitioner Bonner was physically assaulted by staff. Staff threw him onto the floor and kicked him in the mouth. Petitioner Bonner was injured. On December 10, 2000, correctional officers did a cell entry, during which they physically assaulted petitioner Bonner, spraining his back and badly injuring his ribs. On approximately December 13, 2000, staff assaulted petitioner Bonner during a cell entry. The officers ran his head into the floor and called him a punk and a sissy. Bonner received bumps and bruises on his head. Bonner had a severe headache for 7 days because of the incident. Security staff had no legitimate purpose for their act. Petitioner Bonner wrote to the "civil rights division" about the assaults against him. As a result, the district attorney wrote the sheriff, telling him to investigate the issue. Petitioner also wrote respondent Berge about the attacks against him.

E. Access to the Courts

1. Law library or recreation

Supermax has a policy that allows an inmate to spend his leisure time either at the law library or at the recreation cell. Inmates are allowed only four hours of recreation a week. While petitioner Bonner has been incarcerated at Supermax, he has been allowed out of his cell for recreation approximately 15 times in 17 months because he has been forced to sacrifice his recreation time for his law library time.

2. Legal route policy

Supermax has a legal route procedure that requires inmates to have other inmates assist them in their legal matters. The policy is inadequate and unreasonable because it requires that inmates write their legal matters by hand if they wish to pass it to other inmates offering help. Inmates are not allowed to send photocopies through the legal route, meaning that inmates are not allowed to send transcripts, briefs or other court documentation that is not handwritten. Inmates, such as petitioner Bonner, who have legal loans are unable to have other inmates trained in the law assist them because of the barriers of having to copy every document by hand.

F. First Amendment Freedom of Expression

1. Denial of publications

Both petitioners were denied publications while they were on Alpha unit. Respondents Hompe, Berge, McCallum and Verhagan refused to allow inmates on level one to possess their legal and personal publications on the ground that the publications are restricted at the lower levels as an incentive to encourage inmates to advance to higher levels. Petitioner Bonner has been on level one for 13 months. During that time, for 10 months he was refused publications. Petitioner Hall has been on level one for four months without publications. Both petitioners are currently on level one and are not receiving their

publications.

2. Censorship of mail

Supermax has a policy that all inmates must leave their mail open when sending it out of the institution other than letters to lawyers, the government and the legislature. Petitioners cannot send any mail to their families, friends and other loved ones without security staff reading the mail. Inmates cannot express themselves freely. Petitioners cannot criticize the institution or the guards because staff will confiscate and destroy such correspondence. This policy has been in effect since Supermax was opened. Security staff has disciplined informally inmates who use their Muslim names. Both petitioners have been affected emotionally by the mail room policy of censoring outgoing mail.

3. Writing supplies

Petitioner Bonner is an indigent inmate without any funds in his account. Indigent inmates are allowed only one piece of paper and one envelope. Because of this restriction, petitioner Bonner has not been able to write his family and friends as often as he would like. It is impossible to maintain communication with the outside with this restriction.

G. Eighth Amendment: Cruel and Unusual Punishment

Supermax officers fail to train guards in a professional, reasonable and mature manner. Supermax staff is abusive to inmates; they work in "diabolical" and disrespectful ways. Supermax employs approximately 175 guards and about 150 of them are unprofessional without any form of discipline. Supermax staff have poor social communication with inmates. The majority of the guards advocate violence. They fabricate conduct reports.

1. Mechanical restraints

Staff at Supermax refuses to remove wrist and leg restraints from inmates who are using the law library. Both petitioners have been abused by this policy. When inmates are in the law library, they have to write, walk and do legal research while wearing the restraints. This results in injury to inmates' wrists and ankles. Removing the restraint would not put staff or inmates in jeopardy. There is no difference between the security of the law library and the individual cells.

2. Penalties

a. Paper restriction

Supermax staff has taken both petitioners' property when they have covered their window or their camera or even when they placed paper on the walls. On or about May 17,

2000, petitioner Bonner was placed on paper restriction for covering his window. Staff took all of his property except for one piece of paper. When an inmate is placed on paper restriction, he remains on the restriction for 15 days or more. If an inmate receives mail from lawyers, courts or any outside person, staff will refuse to let the inmate read the mail because the paper restriction does not allow it. While petitioner Bonner was on paper restriction, he was not allowed to read all his mail. An inmate on paper restriction is allowed only one piece of paper in his cell and can exchange a piece of paper once during first shift and once during second shift. This means that if a letter is 15 pages long, if would take 8 days for the inmate to read the entire letter. If the inmates want to write a 5 page letter, it would take him 3 days to write it.

b. Segregation loaf restriction

Petitioners have been placed on segregation loaf restriction on numerous occasions for insignificant matters such as staff finding a jelly packet or the inmate's refusal to give up his milk carton. When an inmate is placed on seg loaf, he remains on the restriction for at least 10 days. The restriction is imposed before an inmate goes before the committee board to contest the restriction. When an inmate goes in front of the board, the restriction will already be finished.

Petitioner Bonner was recently placed on seg loaf for allegedly not going to the back

of the cell. He was placed on seg loaf restriction for 10 days, during which time he lost 5 pounds and vomited on several occasions because the seg loaf is inadequate. When petitioner Bonner was heard by the committee, Captain Blackburn dismissed the conduct report that the officers had fabricated. Petitioner Bonner spent 10 days on seg loaf for no reason. During that time, he lost weight, was "sick headed" and felt nauseated.

c. Refusal to feed petitioner Bonner

The Supermax unit handbook requires that when a meal is delivered, the inmate will be required to stand in the middle of the cell in full view of the officer with his light on. From August 27 to August 29, officials refused to feed petitioner Bonner for two full days because he was not standing at his door when the officers approached with the meals. Petitioner Bonner arrived at the door late. There was no reason that the staff could not have waited a couple more seconds for petitioner Bonner to reach the door. Staff did not wait for petitioner in order to harass him. Petitioner Bonner suffered emotionally from not eating.

d. Ink restriction

On or about September 12, petitioner Bonner was placed on ink restriction for 30 days for allegedly writing on the wall. Under the restriction, staff took his ink pen and gave him a crayon. At the time, petitioner Bonner was having psychotic problems, such as

emotional disturbances and auditory and visual hallucinations. Because of the restriction, petitioner Bonner was unable to write his family, friends or the court about his emotional problems. Petitioner Bonner still suffers from these emotional and psychological problems.

H. Free Exercise of Religion

1. Harassment by staff

On or about November 30, 2000, officer Jones and Sergeant Griffin mocked the Muslim inmates intentionally by chanting the Muslim prayer during the month of Ramadan. Petitioners were praying when they were disturbed by Jones and Griffin. This November 30 incident was not the first time that security officers have chanted Muslim prayers while inmates were praying. The security staff has a personal grudge against Muslim inmates; they seem to have no respect for the Islamic belief.

2. Lack of Muslim Chaplain

Petitioners are both Muslims who practice the Islamic faith. Petitioner Bonner has been a Muslim for approximately four years; petitioner Hall has been a Muslim for two years. Respondent Chaplain Overbo, the Supermax chaplain, is Christian and does not understand the fundamental principles of Islam. Supermax has failed to provide Muslim inmates with a Muslim chaplain. Respondent Chaplain Overbo visits inmates only when he

feels like it. Both petitioners have asked to see respondent Chaplain Overbo to discuss their spiritual beliefs, but Overbo disregarded their requests. When Overbo comes into the unit, he stays no more than 10 minutes.

I. Fourteenth Amendment: Equal Protection

Petitioners are African-American. Almost all security staff are white. Of the 340 inmates at Supermax, at least 280 are African-American or Hispanic. The majority of the staff advocate racial discrimination and cannot communicate with African-American inmates.

J. Disabilities Education Act: Denial of Educational Services

Petitioner Hall is 17 years old. He has been confined in the Wisconsin Department of Corrections for two years. He was 15 when he was transferred into the adult system from the Wisconsin juvenile system. Petitioner Bonner is 19 years old. He has been confined for approximately three years. He was 15 when he first entered the adult Department of Corrections from the juvenile system. Both petitioners have been identified as "emotionally disturbed" and as having exceptional educational needs. Petitioner Bonner has an 8.2 reading level, a 7.8 spelling level and a 3.9 math level. Petitioner Bonner has a mild speech problem. Petitioner Hall just learned to read and write one year ago. Both petitioners were

enrolled in special education programs before they were incarcerated. Petitioner Hall has been confined at Supermax for approximately 12 months; petitioner Bonner has been at Supermax for about 17 months.

Since petitioners arrived at Supermax, they have not been receiving adequate and satisfactory educational services from the education department. Respondent Beck, the special education teacher, has been denying petitioners the opportunity to receive adequate education; petitioners have not taken any tests or had any vocational training. Neither petitioner has completed his general equivalency diploma. Petitioners have informed respondent Harig, the educational director, that they are not being provided adequate educations. Petitioners have less than one and a half years of their sentences remaining to serve. Respondent Beck visits each petitioner once or twice a week at his cell door. At times, he does not see petitioners for weeks. When he does show up, he does not tutor petitioners or explain to them how to solve difficult problems. Petitioners have spent six months on adjustment segregation where they were refused education by respondents Harig, Beck, Cook and Berge.

A report from the client services specialist dated September 18, 2001 states that petitioner "Bonner received ed and special and language services." His teacher, Maryann Baugh, states that petitioner Bonner "needs a small classroom environment with a low teacher-student ratio."

DISCUSSION

Before addressing the merits of petitioners' complaint, there is an initial issue to be considered. Section 1983 creates a federal cause of action for "the deprivation under color of [state] law, of a citizen's rights, privileges, or immunities secured by the Constitution and laws of the United States." Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997) (citations omitted). To prevail on a § 1983 claim, a plaintiff must prove that (1) the defendant deprived him of a right secured by the Constitution and laws of the United States; and (2) the defendant acted under color of state law. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

To establish individual liability under § 1983, petitioners must allege that the individual respondents were involved personally in the alleged constitutional deprivation or discrimination. Under § 1983, individual defendants cannot be held liable under a theory of respondeat superior. Hearne v. Board of Education of City of Chicago, 185 F.3d 770, 776 (7th Cir. 1999). "'Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.'" Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir.1994)); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) ("A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary.").

It is not necessary that the respondent participate directly in the deprivation. The official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 76l F.2d 360, 369 (7th Cir. l985). See also Kelly v. Municipal Courts of Marion County, Indiana, 97 F.3d 902, 908 (7th Cir. 1996); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Although petitioners allege that respondent Berge knew of the deprivation of petitioners' constitution rights as to some claims, they do not allege that respondent Berge, Boughton or Hompe participated in, knew of or consented to the deprivation of petitioners' constitutional rights as to other claims. Nevertheless, their failure to do so is not necessarily a barrier to the initiation of a prisoner action at this stage of the proceedings. See Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (explaining that a prisoner may name a high-level prison official as a defendant to uncover through discovery the names of persons directly responsible).

In their complaint, petitioners refer to "security guards," a "sergeant," a "unit officer," "correctional officers" and "staff" as the individuals personally involved in depriving petitioners of their constitutional rights. Under Duncan v. Duckworth, petitioners will be allowed to proceed against respondent Berge on their conditions of confinement, unreasonable searches, inadequate medical care and excessive force claims so that they may

discover the identity of those directly responsible for the alleged constitutional violations. Before they will be able to recover any money damages on their claims, assuming they are entitled to such damages, petitioners will have to conduct discovery and amend their complaint to reflect the identities of the prison staff.

I. CLAIMS THAT OVERLAP WITH JONES 'EL

A. Eighth Amendment Conditions of Confinement: Constant 24 Hour Illumination

I understand petitioners to contend that respondents are violating their Eighth Amendment right to be free from cruel and unusual punishment by illuminating their cells 24 hours a day. Petitioners allege that they have problems sleeping under the constant lighting; they have been suffering emotionally, psychologically and physically. Petitioner Bonner's vision has been deteriorating since his arrival at Supermax. Petitioners' claim overlaps with the Eighth Amendment conditions of confinement claim in Jones 'El, which focuses on the following conditions:

> constant illumination; hourly bed checks throughout the night; extreme temperatures; confinement of prisoners in their cells for 24 hours a day; a lack of windows in cells; limited use of the phone; visits by video screen; constant monitoring; insufficient time in recreational facilities and inadequate recreational facilities.

Jones 'El, No. 00-C-421-C, slip op. at 37 (order entered Aug. 14, 2001). Petitioners allege facts sufficient to state a claim that respondents are violating their rights under the Eighth

Amendment. Because petitioners are already being represented on this claim in Jones 'El, their claims for declaratory and injunctive relief will be dismissed as duplicative. However, petitioners are also seeking monetary damages, which is not part of the class action. Therefore, although petitioners will be granted leave to proceed on their claim for money damages as to the Eighth Amendment conditions of confinement violation against respondent Berge, the claim will be stayed pending resolution of the same claim in Jones 'El.

B. Fourth Amendment: Unreasonable Searches

I understand petitioner Bonner to allege that respondents have violated his right to be free from unreasonable searches and seizures by performing harassing cell searches. Petitioner Bonner alleges that he has been the victim of this brutality on several occasions. This claim overlaps with the Fourth Amendment claim certified for class action in Jones 'El, alleging that "Supermax prisoners are subjected to cell searches, strip searches and body cavity searches without cause in violation of the Fourth Amendment." Jones 'El, No. 00-C-421-C, slip op. at 37 (order entered Aug. 14, 2001). Although petitioner Bonner has alleged facts sufficient to state a claim against respondent Berge that he was subjected to unreasonable searches in violation of the Fourth Amendment, his claim for money damages related to this claim will be stayed pending resolution of the claim in Jones 'El.

C. Eighth Amendment: Inadequate Medical Care

Petitioner Bonner contends that respondents violated his Eighth Amendment right to adequate medical care by refusing to treat his sprained back and his badly injured ribs. This claim overlaps with the inadequate medical, dental and mental health claim certified for class action in Jones 'El as follows: "the systemic inadequacies of the provision of medical, dental and mental health care at Supermax constitutes deliberate indifference to serious medical needs in violation of the Eighth Amendment to the United States Constitution." Jones 'El, No. 00-C-421-C, slip op. at 37 (order entered Aug. 14, 2001). Although petitioner Bonner will be granted leave to proceed on his claim against respondent Berge for money damages arising out of this claim, the claim will be stayed pending resolution of the same claim in Jones 'El.

D. Eighth Amendment: Excessive Force

Petitioner Bonner alleges that prison staff violated his right to be free from excessive force by physically assaulting him on three occasions. Although he does not allege that he is mentally ill, I take judicial notice of the fact that petitioner Bonner is currently incarcerated at Mendota Mental Health Institution. Accordingly, petitioner Bonner's claim overlaps with the excessive force claim certified for class action in Jones 'El as follows: "defendants are failing to prevent the use of excessive force against mentally ill inmates by

providing proper training." Jones 'El, No. 00-C-421-C, slip op. at 5-6 (order entered Sept. 13, 2001).

In Jones 'El, I noted that in deciding whether a petitioner has alleged facts sufficient to state a claim for the unconstitutional use of force by prison officials, it is necessary to determine whether the facts alleged in petitioner's complaint support an inference that the alleged force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). The court may consider factual allegations revealing the need for the application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the officers, and any efforts made to mitigate the severity of the officers' response. Id.; Whitley v. Albers, 475 U.S. 312, 321 (1986). Although petitioner Bonner will be granted leave to proceed on his claim against respondent Berge for money damages arising out of this claim, the claim will be stayed pending resolution of the same claim in Jones 'El.

After the constitutionality of the claims in Jones 'El has been determined, I will consider petitioners' claims again. If the claims for conditions of confinement, unreasonable searches, inadequate medical care and excessive force in Jones 'El are dismissed, I will also dismiss the claims in this case. If respondents' acts as to these claims are found to be unconstitutional, I will lift the stay in this case so that the case can be scheduled for further

proceedings on petitioners' claim for damages.

II. CLAIMS INDEPENDENT FROM JONES 'EL

A. Access to the Courts

I understand petitioners to allege that respondents have impeded petitioners' constitutional right of access to the courts by requiring inmates to write out any legal documents by hand in order to use the legal mail routing and by forcing inmates to choose between using the law library and having recreation. It is well established that prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. at 539, 578-80 (1974); Procunier v. Martinez , 416 U.S. 396, 419 (1974). The right of access is grounded in the due process and equal protection clauses of the Fourteenth Amendment. Murray v. Giarratano, 492 U.S. 1, 6 (1989). To insure meaningful access, states have the affirmative obligation to provide inmates with "adequate law libraries or adequate assistance from persons trained in the law." Bounds, 430 U.S. at 828.

To have standing to bring a claim of denial of access to the courts, a plaintiff must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). The plaintiff must have suffered injury "over and above the denial."

Walters v. Edgar, 163 F. 3d 430, 433-34 (7th Cir. 1998) (citing Lewis , 518 U.S. 343). At a minimum, the plaintiff must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." Id. at 434; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiff may sustain burden of establishing standing through factual allegations of complaint).

Petitioners assert that they must copy court documents by hand and that they must choose between going to the law library and the recreation cage. However, petitioners do not allege injury over and above the inconvenience caused by these policies. Specifically, they do not allege that because of these policies, a nonfrivolous legal action of theirs was dismissed or the time for filing such an action ran out. Thus, petitioners' request for leave to proceed on their claim that respondents McCallum, Verhagan and Berge violated petitioners' right of access to the courts will be dismissed for failure to state a claim upon which relief may be granted.

B. First Amendment: Free Expression

Petitioners allege that respondents violate petitioners' right to free speech by denying petitioners access to publications, censoring their non-legal outgoing mail and restricting indigent inmates to one piece of paper and one envelope a week. Prison actions that affect an inmate's receipt of non-legal mail must be "reasonably related to legitimate penological

interests." Thornburgh v. Abbott, 490 U.S. 401, 409 (1989); see also Turner v. Safley, 482 U.S. 78, 89-90 (1987) (setting forth four factor test); Bell, 441 U.S. 520. From other complaints filed by Supermax inmates, I take judicial notice of the fact that the restriction on periodicals at Supermax is part of the institution's level system, an incentive program. See, e.g., Tiggs v. Berge, No. 00-C-317-C, Opin. and Order entered Aug. 31, 2000, at 23. Therefore, petitioners' request for leave to proceed will be denied as to their claim that respondents are denying them access to publications at the more restrictive levels because restricting periodicals as part of an incentive program furthers a legitimate penological interest.

Petitioners allege that respondents require inmates to leave all their personal mail, but not their legal mail, open to permit staff to read it in violation of their rights under the First Amendment. Prisoners have a limited liberty interest in their mail under the First Amendment. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987). As a general rule, inmate mail can be opened and read outside the inmate's presence, Martin, 830 F.2d at 77, but legal mail may be subject to somewhat greater protection. Because petitioners' claim addresses only non-legal mail, petitioners' request for leave to proceed on their claim that respondents violate their First Amendment rights by requiring them to leave personal mail open will be denied.

Petitioner Bonner alleges that respondents are violating his rights under the First

Amendment by allowing him, as an indigent inmate, only one piece of paper and one envelope a week. The Supreme Court has held that "it [is] important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." Turner v. Safley, 482 U.S. 78, 90 (1987). Prison officials violate the First Amendment when for reasons unrelated to legitimate penological interests, they engage in "censorship of . . . expression of 'inflammatory political, racial, religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate.'" Procunier v. Martinez, 416 U.S. 396, 415 (1974).

The allegation that respondents restrict the amount of writing supplies given to indigent inmates does not implicate the First Amendment. Although petitioner Bonner may not be able to write as much as he would like, he has not alleged facts suggesting that this policy does not operate in a neutral fashion or that is not reasonably related to legitimate penological interests. Therefore, petitioners' request for leave to proceed on their First Amendment freedom of expression claim will be denied because the claim is legally frivolous.

C. First Amendment: Freedom of Religion

Petitioners allege that respondents are violating their right to the free exercise of religion by mocking Muslim inmates at prayer and by not hiring a Muslim chaplain to address their religious needs. "[T]he Free Exercise Clause does not require states to make

exceptions to neutral and generally applicable laws even when those laws significantly burden religious practices." Goshtasby v. Board of Trustees of Univ. of Ill., 141 F.3d 761, 769 (7th Cir. 1998) (citing Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990)); see also City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Scalia, J., concurring) ("Religious exercise shall be permitted so long as it does not violate general laws governing conduct."). When a prison regulation infringes on inmates' constitutional rights, the regulation must be reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78, 89 (1987). In other words, as long as respondents' acts promote a legitimate goal such as safety or administrative efficiency they do not run afoul of the Constitution.

Petitioners allege that prison staff mock Muslim inmates at prayer by chanting prayers to disturb them. Although prison staff may be crass and insensitive, petitioners fail to allege facts sufficient to state a claim for a constitutional violation. Petitioners do not allege that they were not able to practice their religion, but that respondents jeered them for practicing their religion. Similarly, petitioners' allegation that respondents are not providing a Muslim chaplain to Muslim inmates fails to state a claim upon which relief can be granted. Petitioners' allegations demonstrate that they are able to exercise their religion. The Constitution does not require prison officials to provide a chaplain for every religion represented at the prison. As long as inmates have other ways of exercising their religion and

the challenged policy furthers legitimate penological interests, a particular prison policy does not violate inmates' constitutional rights. See O'Lone v. Estate of Shabazz, 482 U.S. 342, 350-51 (1987) (prison regulations precluding Islamic prisoners from attending religious service held on Friday afternoons did not violate free exercise of religion clause: prison policies were related to legitimate security and rehabilitative concerns, alternative means of exercising religious faith with respect to other practices were available and placing Islamic prisoners into work groups so as to permit them to exercise religious rights would have adverse impact). The alleged facts do not suggest that the lack of a Muslim chaplain keeps petitioners from exercising their religion. Accordingly, petitioners' request for leave to proceed on their claim for the free exercise of religion will be denied for failure to state a claim.

D. Eighth Amendment: Cruel and Unusual Punishment

The Eighth Amendment imposes a duty on prison officials to provide adequate shelter and prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Although prisoners are entitled to "the minimal civilized measure of life's necessities," Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)),

conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F. 2d 105, 108, 109 (7th Cir. 1971).

Petitioners allege that respondents have violated their rights to be free from cruel and unusual punishment under the Eighth Amendment by refusing to remove wrist and leg restraints from inmates using the law library and by imposing certain paper, segregation loaf, food and ink restrictions on inmates who violate prison rules. Petitioners have failed to allege facts sufficient to support a finding that respondents subjected them to cruel and unusual punishment. The fact that respondents do not remove restraints from inmates while they are using the law library does not rise to the level of an Eighth Amendment violation. This omission does not "involve the wanton and unnecessary infliction of pain" or create a condition of confinement that is "grossly disproportionate to the severity of the crime warranting imprisonment" under Rhodes, 452 U.S. at 347. Similarly, the fact that respondents impose paper and ink restrictions on inmates who do not follow prison rules, withhold food for an inmate's failure to conform to the meal delivery rules or require inmates to eat seg loaf does not implicate the Eighth Amendment. Although the restrictions, and particularly the food restriction, may make confinement unpleasant, they are imposed as a consequence of not following prison rules and, therefore, do not involve the wanton and unnecessary infliction of pain under Rhodes. Id. Because their cruel and unusual

punishment claim fails to state a claim upon which relief may be granted, petitioners' request for leave to proceed on this claim will be denied for failure to state a claim.

E. Fourteenth Amendment: Equal Protection

The equal protection clause of the Fourteenth Amendment prohibits state actors from applying different legal standards to similarly situated individuals. If a petitioner demonstrates he has been treated differently from similarly situated persons because of his membership in a suspect class or the exercise of a fundamental right, the court applies heightened scrutiny to the constitutionality of the act or statute. See Nabozny v. Podlesny, 92 F.3d 446, 454 (7th Cir. 1996). Discriminatory intent may be established by showing an unequal application of a prison policy or system, but conclusory allegations of racism are insufficient. Minority Policy Officers Ass'n v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986).

In this case, petitioners offer no more than such bald assertions of racial discrimination, completely lacking in factual support. Petitioners do not allege facts from which an inference may be drawn that they were treated differently from similarly situated persons. If anything, the allegation that white security staff cannot communicate with African-American inmates indicates that the guards treat all inmates the same; guards fail to change their communication pattern when speaking with African-American inmates.

Similarly, petitioners' assertion that the majority of the staff at Supermax advocate racial discrimination is too conclusory to make out an equal protection claim. Because petitioners fail to allege facts to suggest that they were treated differently from similarly situated individuals, their request for leave to proceed on their equal protection claim will be denied as legally frivolous.

F. Individuals with Disabilities Education Act

Petitioners allege that respondents have failed to provide them with adequate educational services while they are on segregation status in violation of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487. The Individuals with Disabilities Education Act was passed in 1975 in response to Congress's perception that handicapped children in the United States were being excluded from educational opportunities. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 179 (discussing legislative history of act). The goal of the IDEA is to insure a free appropriate public education for all children with disabilities, normally ending when the child reaches 21 years of age. 20 U.S.C. §§ 1412(a)(1)(A) and 1412(2)(B). Prisoners who meet the requirements of the Act have a right to a free and appropriate public education while they are wards of the state. See, e.g., State of N.H. v. Adams, 159 F.3d 680 (1st Cir. 1998); Alexander S. v. Boyd, 113 F.3d 1373 (4th Cir. 1997); Doe By and Through Brockhuis v.

Arizona Dept. of Educ., 111 F.3d 678 (9th Cir. 1997). However, the IDEA requires that a litigant exhaust the statutorily prescribed administrative remedies before seeking relief from the court. 20 U.S.C. § 1415. Therefore, petitioners are required to have followed due process procedures, which involves requesting a due process hearing in front of an administrative law judge if they are not happy with their Individualized Education Plan, or the lack thereof. See generally Bonnie P. Tucker, Legal Rights of Persons with Disabilities: An analysis of Federal Law, 14:2-16 (July 2001). Although petitioners may have pursued their administrative remedies within the institution, this internal complaint system does not satisfy the requirements under the IDEA. Accordingly, petitioners' request to proceed in forma pauperis on their claim that respondents are violating their rights by denying them an adequate education while on segregation status will be denied.

ORDER

IT IS ORDERED that

1. Petitioners Darnell Bonner and Anthony Hall's request for leave to proceed in forma pauperis is GRANTED on their Eighth Amendment conditions of confinement claim, including constant 24 hour illumination, against respondent Gerald A. Berge; petitioner Bonner's request for leave to proceed in forma pauperis is GRANTED on his Fourth Amendment claim for unreasonable searches against respondent Berge, his inadequate

medical care claim against respondent Berge and his Eighth Amendment excessive force claim against respondent Berge; however, the proceedings relating to the merits of these claims are STAYED until this court has ruled on the constitutionality of the alleged conditions at Supermax in Jones 'El v. Berge, No. 00-C-421-C. The stay will take effect immediately with two exceptions: respondent may file an answer if he wishes to do so or he may exercise his right to file a motion permitted under Fed. R. Civ. P. 12 that does not go to the merits of the claims raised, in which case a briefing schedule will be set.

2. Petitioners' request for leave to proceed is DENIED on their claims for access to the courts, First Amendment free exercise of religion, Eighth Amendment excessive force, Eighth Amendment cruel and unusual punishment and Individuals with Disabilities Education Act for failure to state a claim.

3. Petitioners' request for leave to proceed is DENIED on their First Amendment claim for freedom of expression and their Fourteenth Amendment equal protection claim because the claims are legally frivolous.

4. Respondents Scott McCallum, Richard Verhagan, Unnamed Officials 1-100, Gary Boughton, Brad Hompe, Ted Harig, Steve Beck, Maryann Cook and Chaplain Overbo are dismissed from this case.

5. Petitioners should be aware of the requirement that they send respondent a copy of every paper or document that they file with the court. Once petitioners have learned the

identity of the lawyers who will be representing respondent, they should serve the lawyers directly rather than respondent. Petitioners should retain a copy of all documents for their own files. If petitioners do not have access to a photocopy machine, they may send out identical handwritten or typed copies of their documents. The court will disregard any papers or documents submitted by petitioners unless the court's copy shows that a copy has gone to respondent or to respondent's lawyers; and

6. The unpaid balance of petitioners' filing fee is $143.79; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 16th day of November, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge