IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SAMUEL UPTHEGROVE,

Plaintiff,

v.

CATHY JESS, JON LITSCHER, KEVIN KALLAS, SCOTT ECKSTEIN, STEVE SCHEULER, JOHN KIND, RYAN BAUMANN, JAN VAN LANEN,

Defendants.

OPINION and ORDER

Case No. 18-cv-847-wmc

Pro se plaintiff Samuel Upthegrove claims that staff at the Green Bay Correctional Institution ("GBCI") and the Wisconsin Department of Corrections have failed and are failing to treat his mental health needs and increased the risk that he will attempt suicide, in violation of his rights under the Eighth Amendment, the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 ("ADA"), and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* Following a January 14, 2019, telephonic conference, defendants filed copies of Upthegrove's medical and psychological records from January 2018 to present; his psychological service unit records and psychiatric notes from 2014 to present; his diagnoses at the Wisconsin Resource Center in January 2018; his May 2018 transition plan; and the June 25, 2018, November 9, 2018, and November 11, 2018, incidents outlined in the complaint. The court further converted Upthegrove's emergency motion into a motion for a preliminary injunction and directed defendants to file their response by February 8, 2019.

For the reasons explained below, this opinion and order grants Upthegrove leave to proceed against defendants on his Eighth Amendment claims under 28 U.S.C. § 1915A,

but denies his motion for preliminary injunction seeking an order directing GBCI officials to prohibit prisoners from possessing razors and over-the-counter medication, to put up netting on the upper tiers to prevent prisoners from jumping, and for a transfer to the Mendota Mental Health Institution ("Mendota"). (Dkt. #6.) Upthegrove also has filed a motion for assistance in recruiting counsel (dkt. #16), which the court will deny without prejudice. Finally, the court is inclined to appoint a neutral expert psychologist at defendants' expense, but will give defendants 45 days to oppose such an order.

ALLEGATIONS OF FACT[1]

A. The Parties

Upthegrove is currently incarcerated at GBCI, where six of the defendants work. Scott Eckstein is the warden; Steve Schueler is the deputy warden; John Kind is the security director; Jay Van Lanen is the restrictive housing supervisor; and Ryan Baumann is the administrative captain. Upthegrove's complaint also names former DOC Secretaries Cathy Jess and Jon Litscher, and the DOC's mental health director Kevin Kallas.

B. GBCI's Mental Health Care Inadequacies

Generally speaking, Upthegrove claims that all of the defendants have acted with deliberate indifference to his serious medical needs and his risk of self-harm or attempted

[1] In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the facts above based on the allegations in Upthegrove's complaint and addendum, as well as reasonable inferences from those allegations. Additional, initial findings related to plaintiff's motion for preliminary injunction are addressed below.

suicide by failing to provide adequate mental health care at GBCI as a result of inmate overcrowding, inadequate correctional officer and psychological services staffing, improper placement in segregation or general population, and inappropriate discipline for mentally ill inmates. More specifically, Upthegrove identifies the following eight *failures* at GBCI that have worsened his own mental illness and contributed to defendants' failure to protect him from self harm, as well as deprived him of mental health treatment. The failure to provide:

1. Adequate, sufficiently qualified PSU staff. For example, Upthegrove claims that despite the Division of Adult Institution ("DAI") policy requiring GBCI to have an onsite psychological services unit ("PSU") supervisor, GBCI has not had one since 2016, after the PSU supervisor was assaulted by an inmate. Additionally, since September 1, 2016, GBCI has been operating with six PSU vacancies, leaving only three PSU staff members to triage mental health-based requests. There is a similar shortage with respect to correctional officers, which prompted GBCI administration to put GBCI in lockdown on Sundays between October of 2017 and July of 2018.
2. Adequate security staff to avoid security related interruptions to, or inference with, mental health care. In particular, understaffing has made it impossible for staff to monitor mentally ill inmates, leaving decompensating inmates unnoticed.

3. Adequate psychotherapeutic care, counseling and other individual treatment, pointing in particular to the fact that when GBCI is in lockdown status for weeks or months at a time, inmates receive *no* counseling for mental health needs.
4. Monitoring or treatment of suicidal inmates, including not adequately identifying suicidal inmates, and when identified, not placing them on observation status or poorly monitoring them.
5. Proper treatment and instead disciplining mentally ill inmates for harming themselves.
6. Alternatives to segregation for mentally ill inmates.
7. Proper housing for mentally ill inmates in general population, which, in reality, is much like being housed in segregation but allows easy access to items that may be used for self-harm.
8. Proper training to staff in suicide prevention, mental health issues, and effective de-escalation techniques.

Upthegrove further alleges that in late 2017 two GBCI psychologists alerted Former DOC Secretary Litscher to these problems, specifically complaining that Warden Eckstein, Deputy Warden Schueler, Security Director Kind, Captain Baumann and Restrictive Housing Supervisor Van Lanen were interfering with staff's ability to provide mental health treatment. Apparently Litscher initiated a formal investigation with respect to these complaints, which Upthegrove states may be ongoing.

C. Upthegrove's actual mental health care in the DOC and at GBCI

Upthegrove has been incarcerated at GBCI since August of 2013, but he has been incarcerated at various DOC facilities since 2005. He has severe mental health issues that DOC officials have been attempting to respond to throughout his incarceration. As a result, on multiple occasions, he has been transferred to two different state-run mental health facilities, the Mendota Mental Health Institute ("Mendota") and the Wisconsin Resource Center ("WRC"). Most recently, Upthegrove was transferred to the WRC in January of 2018 and returned to GBCI in May 2018.

In his most recent filing, Upthegrove describes three instances since May of 2018 in which he has severely harmed himself during periods that GBCI has been operating under lockdown procedures. (Dkt. #7.) First, on June 25, 2018, Upthegrove swallowed several razor blades and ingested 24 acetaminophen tablets, all of which he was allowed to purchase from the commissary and keep in his cell. In response, Upthegrove was taken to a hospital, where he underwent an endoscopy to remove the razors from his stomach. On June 26, 2018, Upthegrove was returned to GBCI and placed in clinical observation status, during which he met with defendant Van Lanen and GBCI's psychologist, Dr. Hamilton. During their ensuing conversation, Security Director Kind and Captain Baumann also apparently joined because Upthegrove had previously written to the Wisconsin Attorney General about the conditions at GBCI. Upthegrove apparently remained in clinical observation status for about two weeks, during which time he cut himself repeatedly and attempted to hang himself. When attempting the latter, a sergeant resorted to spraying

him with pepper spray. Nevertheless, Upthegrove was subsequently returned to general population, and he successfully got a job working as a clerk in the law library.

Second, on November 9, 2018, GBCI was again placed on lockdown status following the assault of a staff member. This allegedly caused Upthegrove to become despondent, and he cut himself with a razor and swallowed five razor blades. Upthegrove does not allege that he alerted any staff member that he might harm himself, but attaches an incident report to his addendum to the complaint, which shows that GBCI staff found him in his cell covered in blood and lying on the floor. (Dkt. #6-2.) At that point, Upthegrove told staff that he had cut himself with a razor blade and swallowed five additional blades, and he was transported in an ambulance to the hospital for further treatment.

Third, Upthegrove again returned to GBCI on November 11, 2018, where he was placed on clinical observation status. On November 13, 2018, Upthegrove once again felt that he wanted to die, removed his sutures and cut himself, this time with his toenail. Upthegrove claims he was able to accomplish this as a result of lack of supervision. On November 26, 2018, Upthegrove was released from observation status, but remained in restrictive housing pending the outcome of a conduct report, in which he was charged with smuggling razors into the restrictive housing unit. Upthegrove was found guilty of that charge and punished with 30 days of cell confinement. He was also fired from his job in the library.

In his request for a preliminary injunction, Upthegrove explains that he continues to be held in GBCI's general population. While he may now be personally restricted from

possessing items that he might readily use for self-harm, such as razor blades and medication, he claims to have immediate access to those items through other inmates. Furthermore, Upthegrove points out that GBCI's cells have a very simple light fixture that he can easily remove and use to cut himself, as well as that GBCI is four stories high and does not have fencing or netting to prevent inmates from jumping.

Plaintiff Upthegrove seeks to proceed on Eighth Amendment and ADA/Rehabilitation Act claims related to GBCI's flawed policies and practices. He also seeks a preliminary injunction to require defendants to make structural and procedural changes at GBCI to address his mental health needs and prevent further acts of self-harm.

OPINION

I. Eighth Amendment

The Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement" and to insure that "reasonable measures" are taken to guarantee inmate safety and prevent harm. *Farmer v. Brennan*, 511 U.S. 825, 834-35 (1994). An inmate may prevail on a claim under the Eighth Amendment by showing that the defendant acted with "deliberate indifference" to a "substantial risk of serious harm" to his health or safety. *Id.* at 836. Significant self-harm constitutes "serious harm." *See Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010). Deliberate indifference to a risk of self-harm is present when an official is subjectively "aware of the significant likelihood that an inmate may imminently" harm himself, yet "fail[s] to take reasonable steps to prevent the inmate from performing the act." *Pittman ex rel. Hamilton v. County of Madison, Ill.*, 746 F.3d 766, 775-76 (7th Cir. 2014) (citations omitted). *See also Rice ex rel. Rice v. Correctional*

Medical Services, 675 F.3d 650, 665 (7th Cir. 2012) ("[P]rison officials have an obligation to intervene when they know a prisoner suffers from self-destructive tendencies.").

The Eighth Amendment also gives prisoners the right to receive adequate medical care, *Estelle v. Gamble*, 429 U.S. 97 (1976), which includes a right to appropriate mental health treatment. *See Rice ex. Rel. Rice v. Correctional Medical Servs.*, 675 F.3d 650, 665 (7th Cir. 2012). To establish deliberate indifference under the Eighth Amendment on a denial of medical care claim, the plaintiff must demonstrate that: (1) he had a serious medical need; (2) defendants knew that plaintiff needed medical treatment; and (3) defendants consciously failed to take reasonable measures to provide the necessary treatment. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997).

Upthegrove claims that all of the defendants have been aware of the understaffing problems and complaints about inadequate psychological services at GBCI. While Upthegrove adds that Litscher initiated an investigation into GBCI's approach to addressing mental health care issues, it is reasonable to infer at this stage that none of the defendants have taken meaningful corrective action to address the problems, which led to Upthegrove's incidents of self-harm and ongoing risk that he will engage in additional acts of self-harm, which should have been anticipated and prevented. Accordingly, the court will grant him leave to proceed on his deliberate indifference claims under the Eighth Amendment against defendants in their official capacities as supervisors based on their alleged failure to take adequate corrective actions addressing GBCI's inadequate staffing and policies to respond to mental health requests, including how mentally ill inmates are

handled when the institution is in lockdown status. The court will substitute Kevin Carr, the current DOC Secretary, for Jess and Litcher.

Of course, whether Upthegrove may proceed against any defendant with respect to his specific instances of self-harm in June and November of 2018 remains to be seen. At this point, for example, since Upthegrove has not alleged facts permitting an inference that he warned any of the individual defendants that he might harm himself, it would appear that these defendants were not sufficiently, personally involved for liability to attach under § 1983. *Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010) ("[I]ndividual liability under § 1983 requires personal involvement in the alleged constitutional violations."). However, if Upthegrove can allege facts sufficient to support an inference that any of the named defendants were in a position to prevent him from committing self-harm and failed to do so, he may seek leave to proceed on those facts as well. Similarly, if Upthegrove alerted other GBCI staff members that he felt that he might commit staff harm and they failed to respond in a reasonable manner to those threats, he may seek leave to amend his complaint to name those staff members as defendants. For now, however, the court will grant Upthegrove leave to proceed against defendants in their official capacities related to GBCI's inadequate policies and staffing.

II. ADA/Rehabilitation Act

Upthegrove further claims that defendants violated his rights under the ADA and Rehabilitation Act. The ADA prohibits discrimination against qualified persons with disabilities. To establish a violation of Title II of the ADA, a plaintiff "must prove that he

is a 'qualified individual with a disability,' that he was denied 'the benefits of the services, programs, or activities of a public entity' or otherwise subjected to discrimination by such an entity, and that the denial or discrimination was 'by reason of' his disability." *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) (*citing Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (citing 42 U.S.C. § 12132)). While Congress has denied sovereign immunity to states under the Eleventh Amendment for ADA violations that also constitute federal constitutional violations, the Seventh Circuit has yet to decide whether ADA violations that do not implicate constitutional rights may be brought in federal court. *Norfleet v. Walker,* 684 F.3d 688, 690 (7th Cir. 2012). Moreover, in circumstances where an ADA claim is questionable and a pro se plaintiff has failed to invoke the roughly parallel provisions of the Rehabilitation Act, the Seventh Circuit has suggested reading in a Rehabilitation Act claim so as to avoid this tricky abrogation question. *Id.* Accordingly, so shall this court.

Plaintiff's Rehabilitation Act claims are substantially identical to the claims under the ADA, providing that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A claim under § 504 of the Act has four elements: (1) an individual with a disability; (2) who was otherwise qualified to participate; (3) but who was denied access solely by reason of disability; (4) in a program or activity receiving federal financial assistance. *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 671 (7th Cir. 2012).

While one might infer at the pleading stage that Upthegrove's mental illnesses render him disabled as defined by the ADA and Rehabilitation Act, his current allegations do not satisfy either the second or third elements of the prima facie case. Although GBCI is considered a "public entity," Upthegrove does not claim to be excluded from any service, program, or activity offered to other prisoners. 42 U.S.C.A. § 12132. On the contrary, his claims seem to arise almost exclusively out of systemic defect in GBCI's operation and that his treatment is typical.

Regardless, the Seventh Circuit has already held that refusing to accommodate a prisoner's severe leg spasm condition by installing guardrails on his bed did not implicate the ADA or the Rehabilitation Act, because "incarceration, which requires the provision of a place to sleep, is not a 'program' or 'activity.'" in *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996). To the extent Upthegrove is alleging that he has been denied appropriate mental health services, *Bryant* also clarifies that while denying a special cell accommodation may constitute medical malpractice, because the plaintiff in that case was "not complaining of being excluded from some prison service, program, or activity -- for example, "an exercise program that his paraplegia would prevent him from taking part in without some modification of the program" -- the ADA does not provide any remedy for this lack of services. *Id*. Accordingly, since Upthegrove has provided no allegations suggesting that he is being denied proper mental health treatment *because* he is mentally ill, he may not proceed on a claim under the ADA or the Rehabilitation Act.

III. Motion for Preliminary Injunction (dkt. #6)

Upthegrove also seeks a preliminary injunction that would: (1) prohibit GBCI staff from allowing prisoners access to razors and over-the-counter medication, (2) require GBCI to install netting below the upper tiers of its buildings or to prevent prisoners from jumping; and (3) transfer him from GBCI to Mendota. While this order does not foreclose the possibility of *some* type of injunctive relief to ensure Upthegrove's safety during this proceeding, the court will deny his specific requests on this record for the reasons set forth below.[2]

A. Record of Self-Harm and Treatment

As directed by the court, to provide context for Upthegrove's psychological profile and particular needs, defendants provided his PSU and HSU records. Accordingly, the court starts there. Of relevance to Upthegrove's request for injunctive relief, those records show that Upthegrove's psychological diagnoses include antisocial personality disorder and borderline personality disorder. (PSU Record (dkt. #13-1, at 3).)

Upthegrove received treatment at the Wisconsin Resource Center from October of 2013 until July of 2015, as well as in 2018. During each stay at WRC during this time frame, he continued to engage in self-harm, resulting in his placement in clinical observation requiring restraints. For example, in February 2014, WRC staff referred him to the Dialectical Behavior Therapy ("DBT") program, which is designed to teach stills to prisoners with a history of emotional stability and self-harm. However, Upthegrove started

[2] The facts set forth here are largely derived from Upthegrove's medical and mental health records produced by DOC.

missing group sessions and stated in March of 2014 that he no longer wanted to participate in DBT. Then, on March 12, 2014, because he asked for a DBT coach, but the coach did not get to him soon enough, Upthegrove broke his radio and swallowed a piece of metal. Afterward, Upthegrove was sent to the hospital and placed on clinical observation. Upon his return from the hospital, WRC staff placed Upthegrove in the high management unit and determined that he should continue in DBT pre-treatment.

On March 14, however, Upthegrove refused to attend an appointment with his psychiatrist, Dr. Andrade. When Dr. Andrade instead visited Upthegrove, he further refused to speak with her. As a result, WRC staff became concerned that Upthegrove was again failing to participate in his DBT therapy. Later on March 14, Upthegrove demanded to see Dr. Andrade immediately, which Andrade construed under the circumstances to be a highly manipulative act and the type of behavior the DBT treatment intends to curb.

On March 20, 2014, Upthegrove was released from the high management unit and resumed individual DBT therapy sessions. He began therapeutic services and apparently for a short period of time was somewhat cooperative with staff. However, in May, Upthegrove broke an alarm clock and cut himself with a piece of it, which required several stitches. Resuming his therapeutic services a few days later, there were multiple incidents of self-harm in June that required hospital visits and stays in clinical observation, including one instance at Mendota, where Upthegrove swallowed two bolts.

Then in July of 2014, Upthegrove got upset with his psychiatrist at WRC for reporting that he had misused resources and skills coaching, as well as abused people. Upthegrove then started kicking and jumping on his sink, prompting his placement in the

security unit in ambulatory restraints and safety mitts. However, he eventually freed himself of the restraints and started swinging them over his head, striking cell windows and the door in the process, at which point WRC staff used pepper spray to subdue him and then placed him in bed restraints. After this incident, Upthegrove was nevertheless permitted to continue his individual DBT sessions.

In September of 2014, Upthegrove met with the Program Review Committee and asked to be placed at GBCI permanently. Still, also in September and October, he had more incidents of self-harm. On October 21, 2014, Upthegrove met with his therapist, who questioned him about his threats to do something disruptive on the unit. Upthegrove explained that he believed other patients were receiving more attention than he, adding that even if transferred to GBCI, he would just continue to act out and refuse programming so that he could be sent back to WRC. And indeed after his transfer to GBCI, Upthegrove's pattern of behavior continued until he was transferred back to GBCI in July of 2015. However, he was returned again to WRC briefly in September of 2015, after he bit his shoulders while in restraints at GBCI.

Upthegrove's most recent stay at the WRC started in January 2018. Staff felt it was appropriate to place him in the DBT aftercare program, based on his previous treatment at WRC. He was also placed in the Men's Trauma Recovery Empowerment Model group. In April of 2018, however, Upthegrove once again reported to his WRC psychologist that he wanted to return to GBCI because he was irritated by his housing unit's rules. Consistent with past behavior, Upthegrove apparently changed his mind a few times during this meeting itself, ultimately deciding that he actually wanted to

continue with his therapy groups at WRC. On April 25, however, Upthegrove once again sent a psychological service request to his therapist, reporting that he was receiving another conduct report and stating, "so fuck WRC. I'm ready to snap. I don't know why people are fucking with me, but this is the last straw." (Dkt. #13-1, at 275.)

That same day, April 25, Upthegrove used his glasses to reopen an old wound on his neck, then he swallowed pieces of his glasses. Sent to the hospital and placed on clinical observation status in response, Upthegrove was then he returned to WRC. On April 30, Upthegrove also missed his third trauma group session, resulting in his being dropped from that program for failing to meet attendance expectations. On May 2, 2018, Upthegrove then met with the treatment team and requested that he be returned to GBCI because he was not ready for treatment. The team agreed, and he was transferred back to GBCI once again. (Dkt. #10-2 at 3.)

After Upthegrove returned to GBCI, he was seen by a psychological services clinician on May 21, June 13 and June 21. On June 25, 2018, he swallowed razor blades and a bottle of Tylenol. Taken to the hospital, three razor blades were removed from his stomach and duodenum. When he returned to GBCI, he met with Dr. Hamilton, Security Director Kind, Captain Van Lanen and Administrative Captain Baumann. During this meeting Upthegrove told them he was desperate to get out of his cell and could not be locked up for 24 hours a day. Upthegrove also told them that he had been able to buy objects from the canteen that he could use for self-harm, and even if prevented from buying these objects, he would find a way to harm himself. Dr. Hamilton noted that Upthegrove had admitted that he did not intend to kill himself when he committed acts of self-harm,

but Hamilton decided to keep Upthegrove on observation status because it did not appear that he appreciated the severity of his actions. (Dkt. #10-3 at 2.) After Upthegrove was removed from clinical observation status, he was seen by GBCI psychologists again on July 12 and 19.

On July 24, 2018, Upthegrove wrote the following in a psychological services request: "Because of the futility of my requests for adequate mental health care, I will no longer be submitting PSR's asking for help. When GBCI gets its staffing shortage and overcrowding issues under control and can provide me appropriate therapy with a therapist I'm compatible with, let me know. Thank you." (*Id*. at 102.) On August 10, 2018, Upthegrove received a conduct report for passing Tylenol to another inmate, who used it for self-harm.

Upthegrove attended a psychology clinical appointment on October 12, 2018. At some point after this appointment, he wrote to his social worker "If I kill myself it's because you keep denying the visitor questionnaire for Danika." (*Id.* at 7, 101.) On November 7, a psychologist met with him about this note, but it is unclear what was discussed. On November 9, Upthegrove wrapped razors in toilet paper and swallowed them; he also cut his arm with a razor blade. After being sent to the hospital once again, five razor blades were removed. Upthegrove returned to GBCI on November 11, at which point Psychologist Dr. Hamilton placed Upthegrove on clinical observation status.

On November 13, 2018, Upthegrove was to be released from observation, but a captain told him that he would be placed instead on temporary lockup status pending investigation into a conduct report. Upthegrove responded that he wanted to stay in

observation, and about an hour later, Upthegrove bit through his stitches and opened the cut on his arm, at which point he was returned to the hospital, where a doctor applied steri-strips. This time when Upthegrove returned to GBCI, he was placed in restraints for his protection. The restraints were removed the next day, November 14, and Upthegrove was placed on clinical observation status. Upthegrove was later released from observation status on November 26.

As of February of 2019, Upthegrove was continuing to be seen by GBCI psychological service clinicians. Defendants represent that Upthegrove will continue to be seen periodically for clinical monitoring or sooner upon his request. In May of 2019, Upthegrove notified the court that the conditions at GBCI continued to increase the risk of suicide, but he has not apprised the court of any additional attempts of self-harm.

B. Analysis

"A preliminary injunction is an extraordinary equitable remedy that is available only when the movant shows clear need." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 661 (7th Cir. 2015) (internal citation omitted). Under the Seventh Circuit approach, a district court engages in a two-step analysis where "[i]n the first phase, the party seeking a preliminary injunction must make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits." *Id.* at 661-62. If the movant makes these showings, then the court considers: "(4) the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is

wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties." *Id.* at 662. Finally, "[t]he court weighs the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." *Id.*

As formidable as these factors are for a typical party to prove, the Prison Litigation Reform Act ("PLRA"), which governs this lawsuit, narrows the available relief to an even greater extent in cases involving prison conditions. As the PLRA explains, any injunctive relief to remedy prison conditions must be "narrowly drawn extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2); *see also Westefer v. Neal*, 682 F.3d 679, 681 (7th Cir. 2012) (vacating overbroad injunction related to the procedures for transferring prisoners to a supermax prison). The PLRA also requires this court to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief." 18 U.S.C. § 3626.

To start, the record of Upthegrove's treatment does not suggest a reasonable likelihood of success on the merits.[3] Assuming that Upthegrove's mental state places him at an ongoing risk of serious harm, the record of his treatment does not give rise to a reasonable inference of deliberate indifference. Upthegrove does not deny that currently he has access to psychological service providers at GBCI, nor that he received extensive

[3] Since Upthegrove does not dispute defendants' recitation of his treatment history the court sees no basis to conduct a hearing to resolve the requests for injunctive relief.

treatment at WRC. By all accounts, GBCI (and WRC and Mendota) staff have been attempting to respond to Upthegrove's habit of committing self-harm whenever given the opportunity. For an almost two-year period of time, the solution to Upthegrove's problems has been to admit him to the WRC for treatment and programming. However, Upthegrove's repeated placements at WRC has not stopped him from committing self-harm *both* at WRC *and* upon his return to GBCI.

Accordingly, Upthegrove's only viable argument in support of a request for injunctive relief is a sweeping one that he repeats over and over again in the allegations from his complaint: due to overcrowding and understaffing of psychological services staff, he faces imminent danger of serious bodily harm and deliberate indifference from defendants. (Dkt. #19.) However, Upthegrove has still not come forward with any proposed findings of fact or evidence suggesting that GBCI staff are not responding to his requests for treatment. While Upthegrove's complaints about understaffing ultimately may help him prove his claims related to the incidents of self-harm in 2018, the record of his current conditions of confinement do not suggest that GBCI staff are not taking adequate measures to prevent him from committing self-harm. Far from it, the current record suggests that defendants have behaved reasonably under difficult and challenging circumstances.

Even assuming that Upthegrove's record suggests a likelihood of success on the merits, he has not shown that he will suffer irreparable harm absent injunctive relief. *First*, Upthegrove's request for a transfer (or referral) to Mendota would not appear to prevent him from attempting self-harm. To start, in handling previous requests for transfer to

Mendota, the court recognizes that prison officials at GBCI lack the authority to simply transfer him there. Rather, Mendota staff have to determine whether Upthegrove's placement is appropriate, based on whether it has capacity to take him on, his willingness to participate in programming intended to address his psychological problems, and his past record at WRC. In any event, the record of Upthegrove's treatment at WRC, Mendota, and GBCI does not suggest that a referral to Mendota would actually address Upthegrove's concerns. Indeed, during his most recent referral at WRC, Upthegrove requested to be sent *to GBCI* because he did not feel ready for programming even at WRC.

Second, Upthegrove's requests for netting and an institution-wide prohibition on prisoner access to razors and medication are similarly unlikely to prevent him from committing self-harm. As for the netting, while Upthegrove engages in self-harm on an alarmingly frequent basis, his regular pattern is to either cut himself or swallow razors. Accordingly, installing nets would not prevent the risks Upthegrove's proclivities pose. Furthermore, while Upthegrove insists that he can easily obtain razors from other prisoners or the canteen, he has provided no evidence that he currently is able to purchase or obtain these items.

For both reasons, the court will deny Upthegrove's motion for injunctive relief. To the extent Upthegrove has a factual basis to pursue a preliminary injunction related to his current need for mental health care, he may renew his motion. In doing so, he should be sure to follow this court's procedures in filing a motion for injunctive relief, a copy of which will be sent to him along with this order.

IV. Motion for Assistance in Recruiting Counsel (dkt. #16) and Recruitment of Neutral Psychiatric Expert

Finally, Upthegrove requests the court's assistance in recruiting counsel, which will be denied without prejudice. A pro se litigant does not have a right to counsel in a civil case, *Olson v. Morgan*, 750 F.3d 708, 711 (7th Cir. 2014), but a district court has discretion to assist pro se litigants in finding a lawyer to represent them. *Pruitt v. Mote*, 503 F.3d 647, 649 (7th Cir. 2007). A party who wants assistance from the court in recruiting counsel must meet certain requirements. *Santiago v. Walls*, 599 F.3d 749, 760–61 (7th Cir. 2010). First, he must show that he is unable to afford counsel and that he made reasonable efforts on his own to find a lawyer to represent him. Upthegrove has already satisfied these requirements.

However, Upthegrove has not shown that this is one of the relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds the litigant's demonstrated ability to prosecute it. *Pruitt*, 503 F.3d at 654–55. "The question is not whether a lawyer would present the case more effectively than the pro se plaintiff" but instead whether the pro se litigant can "coherently present [his case] to the judge or jury himself." *Id.* at 655. Almost all of this court's pro se litigants would benefit from the assistance of counsel, but there are not enough lawyers willing to take these types of cases to give each plaintiff one. Accordingly, the court must decide for each case "whether this particular prisoner-plaintiff, among many deserving and not-so-deserving others, should be the beneficiary of the limited resources of lawyers willing to respond to courts' requests." *McCaa v. Hamilton*, 893 F.3d 1027, 1036 (7th Cir. 2018) (Hamilton, J., concurring).

Upthegrove seeks the court's assistance in recruiting counsel because he believes that his mental health challenges prevent him from litigating the complex claims he brings in this lawsuit. While the court does not underestimate the challenges posed by his mental illness, Upthegrove's filings in this case, as well as the fact that he has brought other lawsuits in this and other courts, suggest that his mental illness is not a barrier to him litigating this case, at least at this stage. Indeed, Upthegrove's complaint and filings suggest that he is familiar with the relevant legal standards and can write clearly. Furthermore, Upthegrove's demeanor and engagement during the January 2019 telephonic conference was respectful and cogent, all of which indicates that he can go forward in this lawsuit without an attorney. That said, if any of his claims survive summary judgment and Upthegrove were to proceed to trial, Upthegrove may renew his motion at that time, but he should be sure to provide a detailed and specific explanation of how the claims proceeding to trial are too complex for him to litigate on his own.

Although the court is unconvinced recruitment of counsel is necessary at this time, Upthegrove's repeated acts of profound self-harm and the real risks that (1) Upthegrove may cause *substantial and permanent* injury to his body and mind, and (2) the DOC and GBCI may repeat the same treatment on and off with no discernable effect, does prompt the court to question whether something like deliberate indifference may be approaching the defendants despite their best intentions. Accordingly, the court is inclined to recruit a psychiatrist familiar with Upthegrove's mental health challenges and the constraints on DOC's budget and resources, with defendants absorbing all or the majority of the cost. *See Goodvine v. Ankarlo*, No. 12-cv-134-wmc, dkt. ##59, 70 (W.D. Wis. 2013). The court will

give defendants 45 days to show cause why an expert should not be appointed with costs apportioned to them in light of plaintiff's indigent status, and if they wish, defendants may submit nominations. Any opposition should include an affidavit from Upthegrove's mental health provider(s) as to his current state and treatment.

ORDER

IT IS ORDERED that:

(1) DOC Secretary Kevin Carr is substituted for defendants Jess and Litscher, who are DISMISSED.

(2) Plaintiff Samuel Upthegrove is GRANTED leave to proceed on Eighth Amendment claims against defendants Carr, Kevin Kallas, Scott Eckstein, Steve Schueler, John Kind, Ryan Baumann, and Jay Van Lanen, in their official capacities, as set forth above.

(3) Plaintiff is DENIED leave to proceed on all other claims.

(4) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendants.

(5) For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendants or to defendants' attorney.

(6) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

(7) If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for failure to prosecute.

(8) Plaintiff's motions for preliminary injunction (dkts. ##2, 6) are DENIED. The clerk of court is directed to send plaintiff a copy of this court's procedures for filing a motion for injunctive relief along with this order.

(9) Plaintiff's motion for assistance in recruiting counsel (dkt. #16) is DENIED without prejudice.

(10) Defendants have 45 days to oppose the court appointing a neutral expert to assist the court in evaluating plaintiff's psychological state at their expense, as set forth above.

Entered this 16th day of October, 2019.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge