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August 11, 2014

Mr. Scott W. Kroll, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Kroll:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Andino, Luis v. Frederick Lomy, Frances Sallivan, John Rodriguez, Chief Love, Captain Beanko, and Lieutenant Leary, et al.*
Document Received:	Decision and Order
Name of Claimant:	Luis Andino #60944, #05-B-1233 Erie County Correctional Facility 11581 Walden Avenue
Claimant's attorney:	Claimant is proceeding *pro se*.

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle M. Parker
First Assistant County Attorney

MMP:dld
Enc.

-PS-O-

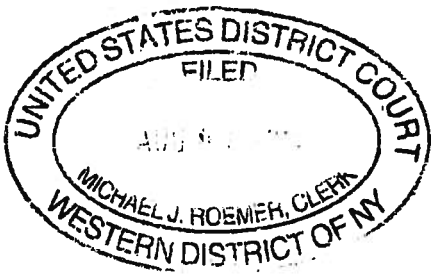
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LUIS ANDINO,
Plaintiff,

-v-

FREDERICK LOMY, Commission of Corrections;
FRANCES SALLIVAN, Commission of Corrections,
JOHN RODRIGUEZ, Superintendent,
CHIEF LOVE,
CAPTAIN BEANKO, LIEUTENANT LEARY,
SGT. SPILLMAN, O.C. E.C.C.F.
SGT. WHALEN, O.C. E.C.C.F.
SGT. GREEN, O.C. E.C.C.F.
SGT. JOHN DOE, O.C. E.C.C.F.
C.O. UTZ, O.C. E.C.C.F.
C.O. PENCZELSKI, O.C. E.C.C.F.
C.O. JANE DOE, O.C. E.C.C.F.
SGT. MCMAHN, *O.C. E.C.C.F.*
C.O. SCOTT PRESTER, O.C. E.C.C.F.
C.O. RUTSKI, O.C. E.C.C.F.
C.O. JAY BALL, O.C. E.C.C.F.
C.O. CHAPPEL, O.C. E.C.C.F.
C.O. GROOVES, O.C. E.C.C.F.
C.O. BROCK, O.C. E.C.C.F.
C.O. JANE DOE 2, O.C. E.C.C.F.
C.O. JOHN DOE 2, O.C. E.C.C.F.
DIRECTOR OF MEDICAL CORRINE,
C.O. KING, O.C. E.C.C.F.,
MENTAL HEALTH COUNCILER JANE DOE,
Defendants.

DECISION and ORDER
13-CV-1225A



INTRODUCTION

Plaintiff Luis Andino, an inmate of the Erie County Holding Center ("ECHC") who, at the time of the events alleged in the complaint, was incarcerated at the Erie County Correctional Facility ("ECCF"), has filed this *pro se* action seeking relief under 42 U.S.C. § 1983, Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 *et seq.*, and Section 504 of the Rehabilitation Act of 1974, 29 U.S.C. § 794 ("Rehab. Act") (Docket No. 1), and has both requested permission to proceed *in forma pauperis* and filed a signed Authorization (Docket Nos. 2,5). Plaintiff claims that the defendants, supervisory and correctional employees at ECCF, and two members of New York's Commission of Corrections, violated his rights in myriad ways. He claims, *inter alia*, that he was denied a number of reasonable accommodations for his visual impairment, denied fair and impartial disciplinary hearings, and was subjected to the use of excessive force during an altercation between himself and another inmate on September 20, 2012. For the reasons discussed below, plaintiff's request to proceed as a poor person is granted, several of his claims are dismissed with prejudice, pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A, several of his claims are dismissed without prejudice and with leave to file an amended complaint as to those claims, and the remaining claims may proceed to service at this time.

DISCUSSION

Because plaintiff has met the statutory requirements of 28 U.S.C. § 1915(a) and filed an Authorization with respect to this action, he is granted permission to proceed *in*

forma pauperis. Sections 1915(e)(2)(B) and 1915A(a) of 28 U.S.C. require the Court to conduct an initial screening of this complaint. In evaluating the complaint, the Court must accept as true all of the factual allegations and must draw all inferences in plaintiff's favor. *See Larkin v. Savage*, 318 F.3d 138, 139 (2d Cir. 2003) (per curiam); *King v. Simpson*, 189 F.3d 284, 287 (2d Cir. 1999). While "a court is obliged to construe [*pro se*] pleadings liberally, particularly when they allege civil rights violations," *McEachin v. McGuinnis,* 357 F.3d 197, 200 (2d Cir. 2004), even pleadings submitted *pro se* must meet the notice requirements of Rule 8 of the Federal Rules of Civil Procedure. *Wynder v. McMahon*, 360 F.3d 73 (2d Cir. 2004). "Specific facts are not necessary," and the plaintiff "need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1959, 167 L.Ed.2d 929 (2007) (internal quotation marks and citation omitted).

Plaintiff brings this action pursuant to 42 U.S.C. § 1983. "To state a valid claim under 42 U.S.C. § 1983, the plaintiff must allege that the challenged conduct (1) was attributable to a person acting under color of state law, and (2) deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States." *Whalen v. County of Fulton*, 126 F.3d 400, 405 (2d. Cir. 1997) (citing *Eagleston v. Guido*, 41 F.3d 865, 875-76 (2d Cir.1994)). Based on its evaluation of the complaint, the Court finds that several of plaintiff's claims must be dismissed with prejudice, pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b), because they fail to state a

claim upon which relief may be granted. In addition, the Court finds that several of plaintiff's remaining claims must be dismissed without prejudice and with leave to file an amended complaint as to those claims and that the other remaining claims may proceed to service.

PLAINTIFF'S CLAIMS

Plaintiff alleges that he is blind and that, while incarcerated at ECCF, his rights under the Constitution of the United States, Title II of the ADA, and the Rehab. Act were violated, including the right to be provided with reasonable accommodations in relation to legal research and materials--*e.g.*, a computer in the law library with "talking software" and a legal research program with "talking software"--in order to prepare for and defend himself in prison disciplinary proceedings and to prepare grievances and lawsuits. His primary allegations appear to be centered around three issues: (1) the failure to afford him reasonable accommodations; (2) the failure to provide him fair and impartial disciplinary hearings; and (3) the use of excessive force on October 20, 2012 in response to an altercation between himself and another inmate. The first two are related in that he alleges, in part, that the failure to provide him with certain accommodations as a blind person hindered his ability to prepare for and defend himself during the disciplinary hearings. He also raises several other claims--*e.g.*, interference with or refusal to file his grievances, retaliation and removal of books and legal documents from his cell, and the disclosure of confidential medical information.[1]

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[1]Plaintiff's complaint which was prepared using, in part, the Court's form pro se prison civil right complaint and an additional number of handwritten pages, contains a handwritten document entitled "Grievance," dated December 12, 2013, which appears to include instances of failures to accommodate his

The handwritten portion of the complaint begins with a "Preliminary Statement" which is, in effect, a summary of the claims alleged, and continues with a "Statement of Facts," which are numbered and allege various and separate instances of misconduct and violations of plaintiff's rights. The complaint ends with a statement of the relief sought.[2]

1. ADA/Reasonable Accommodations.

As noted, the complaint alleges a number of instances where the defendants purportedly denied plaintiff a reasonable accommodation for his disability. For instance, plaintiff alleges that on August 29, 2012, he filed a grievance against ECCF's Superintendent Rodriguez after being denied access to an inmate rule book on audio tape, a scanner book reader, a talking computer with "jaws," adequate legal assistance

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disability upon his transfer to ECHC from ECCF on or about November 9, 2013. The complaint itself, however, includes claims relating only to his incarceration at ECCF, not ECHC. Plaintiff also has filed a second complaint, *Andino v. Lomy*, 14-CV-0054A, which addresses instances of misconduct at ECHC and a denial of accommodations upon his transfer there. To the extent the handwritten document entitled "Grievance" is included within the complaint in the instant matter and includes a summary of events that had occurred at ECHC since his transfer there, it will not be considered as part of the complaint in the instant matter.

[2]This is not the first action plaintiff has filed alleging violations of Title II of the ADA and the Rehab. Act during the period of time he was at ECCF--on of after August 2012. On September 6, 2012, plaintiff filed *Andino v. Cummins, et al.*, 12-CV-0852A(Sc), and alleged, *inter alia*, that he was transferred to ECCF in August 2012, and that on August 28, 2012, he filed a grievance alleging that he was blind and that ECCF lacked reasonable accommodations, including a talking computer, software for blind inmates and mobility aids. (*Id.*, Docket No. 8, Report and Recommendation, at 9, filed June 19, 2013). He also alleged that he was denied access to the courts, the right to file or have his grievances heard and a denial of his request to have written materials for a disciplinary hearing be in audio format.

While the allegations in *Andino v. Cummins*, *supra*, are similar to the ones in the instant action, it was filed in September 2012, and thus pre-dates the vast majority of the specific allegations raised in the instant action. Additionally, in *Andino v. Cummins*, *supra*, plaintiff was directed to file an amended complaint on or before April 7, 2014 (Docket No. 19, Order Adopting Report and Recommendation, and No. 20, Order), but to date plaintiff has not filed an amended complaint as directed. The Court will therefore not address consolidation at this time. If and when issue is joined in both cases, the parties and the Court may wish to address consolidation.

with respect to filing legal documents, brail dots on computer, mobility training and assistance, and a sighted assistant that he requested and trusted. (Complaint, ¶ ¶ 1, 5-7, 10-16, 20.)[3]

Plaintiff has sued a number of correctional officials and other employees at ECCF alleging that some of them violated his rights under the ADA and Rehab. Act. Neither Title II of the ADA nor the Rehab. Act, however, provides for individual liability. *Dorsey v. Sullivan*, 2013 WL 4776344, at * 6 (W.D.N.Y., Sept. 3, 2013) (Foschio, M.J.) (citing *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98, 107 (2d Cir.2001) ("neither Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials."); *see also Fox v. State University of New York*, 497 F.Supp.2d 446, 449–50 (E.D.N.Y.2007) ("The plaintiff's claims against the individual defendants in their individual capacity must be dismissed because there is no individual liability under Title I or Title II of the ADA . . . .").[4] Accordingly, plaintiff's claims under the ADA and Rehab. Act must be dismissed, but the dismissal is without prejudice to the filing of an amended complaint against a proper defendant.[5]

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[3]Paragraph 1 alleges in a summary fashion that plaintiff filed a grievance against Rodriguez alleging that he was denied these accommodations; the other paragraphs cited allege specific instances where plaintiff was denied one or more of these accommodations by specifically named defendants.

[4]To the extent plaintiff may be asserting claims for prospective injunctive relief against the individual defendants in their official capacity, *see Mabry v. Neighborhood Defender Serv.*, 769 F.Supp.2d 381, 391 (S.D.N.Y.2011) ("[T]he ADA does not provide for personal liability on the part of non-employer individuals, except in the case of claims under Title II of the ADA asserted against individuals in their official capacity for prospective injunctive relief." (citations omitted)), such claims are moot and must be dismissed because plaintiff was transferred from ECCF in November 2013. *See Andino v. Cummins, et al.*, 12-CV-0852A(Sc), Docket No. 8, Report and Recommendation, at 19, filed June 19, 2013 (Report and Recommendation adopted, Docket No. 19, Decision and Order, filed March 5, 2014).

[5] Title II of the ADA provides "that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a *public entity*, or be subjected to discrimination by any such *entity*." 42 U.S.C. § 12132 (emphasis added).

2. Fair and Impartial Disciplinary Hearings.

Plaintiff alleges that based on a number of misbehavior reports, some of which were falsely or fraudulently written, he was subjected to a number of disciplinary hearings during which certain defendants denied him a fair and impartial hearing. Specifically, he alleges that at hearings conducted on September 17 and 19, October 22, and November 5, 2012, by defendants Sgt. Whalen, C.O. Utz and C.O. Penczelski (September 17 Hearing); Sgt. Spillman, C.O. Jane Doe, C.O. John Doe 2 (September 19 Hearing); Sgt. Whalen, C.O. Utz and C.O. John Doe (October 22 Hearing); and Lt. Leary (November 5 Hearing), he was denied his requests to have the Hearing audio recorded, to call witnesses, to present documentary evidence and the ability to conduct legal research to prepare his defense. (Complaint, ¶ ¶ 8, 10, 20, 21 and 23-24.)

Plaintiff also alleges that following the Hearing on September 17, 2012, which was adjourned to September 19, he was found guilty of the disciplinary charges and received a disposition of ten days keeplock (Complaint, ¶ 10.) Similarly, he was adjudicated guilty following the October 20 and 22 Hearings and received dispositions of 14 days administrative segregation for both. (*Id.*, ¶ ¶ 20, 21, 23-24.) He provides no information about the disposition of the November 5 Hearing.

Because plaintiff has not alleged that he suffered an " 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life[,]' " *Palmer v. Richards*,

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"Public entity," defined as "any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority ...." 42 U.S.C. § 12131(1)(A)-(C). Section 504 of the Rehab. Act provides that no qualified individual with a disability "shall, solely by reason of [such] 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) (emphasis added).

364 F.3d 60, 64 (2d Cir.2004) (quoting *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995)), he has not stated an actionable claim of a violation of procedural due process. Thus, his claims alleging a denial of due process and fair and impartial hearings must be dismissed with prejudice. *See, e.g.*, Brown v. Graham, 2010 WL 6428251, at *9 (N.D.N.Y., March 30, 2010) (Report & Recommendation adopted by District Judge, 2011 WL 1213482 (March 31, 2011) ("The federal district courts in New York, applying Sandin, have been consistent in holding that terms of SHU or 'keeplock' of approximately 30 days or less . . . do not implicate a liberty interest protected by the Due Process clause, even in the absence of detailed factual development regarding the conditions of confinement.") (citations omitted)), *aff'd* 470 Fed.Appx. 11 (2d Cir. 2012).[6]

3. Use of Excessive Force on October 20, 2012.

Plaintiff alleges that in response to an altercation between himself and another inmate on October 20, 2012, defendants Sgt. John Doe, C.O. Prester, C.O. Rutski, C.O. Ball, C.O. Grooves and C.O. Brock used excessive physical force which caused him to suffer injuries that needed to be treated at a hospital. (Docket No. 17-19.) These claims will be allowed to proceed to service at this time against defendants Prester, Rutski, Ball, Grooves and Brock, and the Erie County Attorney's Office will be asked, pursuant to *Valentin v. Dinkins*, 121 F.3d 72 (2d Cir. 1997), to attempt to ascertain the identity of Sgt. John Doe who was allegedly involved in the incident of

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[6]To the extent plaintiff alleges that he was subjected to discipline and disciplinary hearings based on the filing of false misbehavior reports by certain defendants–C.O. Jane Doe 2, C.O. King (Complaint, ¶ ¶ 7,22), those claims too must be dismissed because the filing of a false misbehavior does not state a claim of a violation of a constitutional right. *See Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir. 1986) ("The prison inmate has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest"), *cert. denied*, 485 U.S. 982, 108 S. Ct. 1273, 99 L.Ed.2d 484 (1988).

October 20, 2012. The County Attorney's Office need not undertake to defend or indemnify this individual at this juncture. This order merely provides a means by which plaintiff may name and properly serve the defendant as instructed by the Second Circui in *Valentin.*

4. Plaintiff's Additional Claims.

(a.) Denied access to Law Library.

Plaintiff alleges that on September 1, 2012, defendant Chief Love denied him access to the library and stated to him that he would need to wait until he was called. (Complaint, ¶ 2.) To the extent this claim can be construed as a denial of access to the courts, as opposed to a denial of a reasonable accommodation in violation of the ADA and Rehab. Act, a claim which has been dismissed above, it too must be dismissed because it fails to state a claim upon which relief can be granted.

While it is true that under the Constitution a correctional facility must provide an inmate with meaningful access to the courts, *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), the mere limitation of access to legal materials, without more, does not state a constitutional claim, as " 'the Constitution requires no more than reasonable access to the courts.' " *Jermosen v. Coughlin*, 877 F. Supp. 864, 871 (S.D.N.Y. 1995) (quoting *Pickett v. Schaefer*, 503 F. Supp. 27, 28 (S.D.N.Y. 1980)). Moreover, in order to state a constitutional claim, a plaintiff must make a showing that he has suffered, or will imminently suffer, actual harm; that is, that he was "hindered [in] his efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed.2d 606 (1996). *Accord Morello v. James*, 810 F.2d 344, 347 (2d

Cir. 1987).

Thus, plaintiff must show that he has suffered an actual injury traceable to the challenged conduct of prison officials. A plaintiff has not shown actual injury unless he shows that a "nonfrivolous legal claim had been frustrated or was being impeded" due to the actions of prison officials. *Lewis*, 518 U.S. at 351-52, 116 S. Ct. at 2179, 2181. Taking plaintiff's claim as true, he alleges he was denied access to the law library on one occasion only and he "offers no facts to explain how the denial of access to the library [on this one occasion, September 1,] prejudiced [his] ability to seek redress from the judicial system." *Smith v. O'Connor*, 901 F. Supp. 644, 649 (S.D.N.Y. 1995). Accordingly, plaintiff's claim that he was denied access to the law library by Lt. Leary on September 1, 2012, is hereby dismissed with prejudice.

(b.) Confiscation of law books from plaintiff's cell.

Plaintiff alleges that on September 19, 2012, Chief Love directed C.O. Utz to confiscate the legal books from his cell because they were being used improperly to file grievances and lawsuits. Plaintiff alleges this was done in retaliation for his filing of grievances and lawsuits. (Complaint, ¶ 11.) At this stage in the litigation, this claim alleging retaliation may proceed to service against Chief Love and C.O. Lutz. *See Graham v. Henderson*, 89 F.3d 75, 79-80 (2d Cir. 1996) (The Second Circuit has held that "retaliation against a prisoner for pursuing a grievance violates the right to petition government for the redress of grievances guaranteed by the First and Fourteenth

Amendments and is actionable under § 1983.") (citation omitted)).[7]

(c.) Cell search and confiscation of legal papers.

Plaintiff alleges that on September 18, 2012, when he was out at a court appearance, C.O. Penczelski searched his cell and confiscated his lawsuit against ECCF and refused to proved plaintiff with a "contraband slip." (Complaint, ¶ 9.) To the extent this claim was intended to allege a Fourth Amendment violation (cell search) it must be dismissed with prejudice because an inmate has no right to privacy in his cell. *See, e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 527-528, 104 S. Ct. 3194, 3201, 82 L. Ed.2d 393 (1984). To the extent this claim can be construed either as a retaliation claim or a denial of access to the courts claim, it must be dismissed but without prejudice.

To make out a § 1983 retaliation claim, an inmate must show: (1) that he was engaged in constitutionally protected conduct; and (2) that the prison official's conduct was taken in retaliation for the inmate's protected conduct. *Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996). However, "because we recognize both the near inevitability of decisions and actions by prison officials to which prisoners will take exception and the ease with which claims of retaliation may be fabricated, we examine prisoner's

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[7] *See, e.g.*, *McEachin v. McGuiniss*, 357 F.3d 197, 200 (2d Cir. 2004) ("We have frequently reiterated that '[s]ua *sponte* dismissals of *pro se* prisoner petitions which contain non-frivolous claims without requiring service upon respondents or granting leave to amend is disfavored by this Court.' ") (quoting *Moorish Sci. Temple of Am. Inc. v. Smith*, 693 F.2d 987, 990 (2d Cir. 1982)); *Benitez v. Wolff*, 907 F.2d 1293, 1295 (2d Cir. 1990) (*per curiam*) ("*Sua sponte* dismissal of a *pro se* complaint prior to service of process is a draconian device, which is warranted only when the complaint lacks an arguable basis in law or fact. Where a colorable claim is made out, dismissal is improper prior to service of process and the defendants' answer.") (citations and internal quotations omitted)).

In allowing these claims to proceed and directing a response to them, the Court expresses no opinion as to whether plaintiff's claims can withstand a properly filed motion to dismiss or for summary judgment.

claims of retaliation with skepticism and particular care." *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995) (citing *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983)).

Plaintiff's complaint sets forth no factual allegations that the confiscation of his legal papers on September 18, 2012, was in retaliation for the filing of a grievance or lawsuit. He does not allege what lawsuit against ECCF was confiscated, *see* n. 2, *supra*, nor does he allege any facts to support a claim that the "lawsuit" was confiscated in retaliation for protected activity. As such, this claim fails to set forth an actionable claim of retaliation. Plaintiff, however, may file an amended complaint and attempt to re-allege an actionable claim of retaliation.

To the extent this claim can be construed as a denial of access to the courts, it too fails to state an actionable claim under § 1983 and must be dismissed without prejudice and with leave to file an amended complaint. As noted above, in order to state an actionable claim under the First Amendment, an inmate must allege more than the mere limitation of access to legal materials, *Pickett*, 503 F. Supp. at 28; a plaintiff must make a showing that he has suffered, or will imminently suffer, actual harm; that is, that he was "hindered [in] his efforts to pursue a legal claim." *Lewis*, 518 U.S. at 351, 116 S. Ct. 2174, 2180, 135 L. Ed.2d 606. Plaintiff has not alleged any such harm or prejudice. He has filed at least two actions against ECCF, *see* n. 2, *supra*, and one against ECHC, *Andino v. Lomy*, 13-CV-0054A, and does not allege how the "confiscation" of his lawsuit harmed or prejudice his claims against ECCF in any way. This claim, therefore, fails to state an actionable constitutional claim and is dismissed without prejudice but with leave to the filing of an amended complaint.

(d.) Refusal to file grievances.

Plaintiff alleges that on a couple of occasions certain defendants refused to allow him to file a grievance (C.O. Chappel) or interfered with his attempt to file a grievance (C.O. John Doe 2). He alleges that C.O. John Doe 2 tried to prevent him from dictating a grievance to another inmate through a vent. (Complaint, ¶ ¶ 6, 26.) To the extent plaintiff is alleging that these defendants denied or interfered with his ability to file a grievance, this claim fails to state a claim upon which relief can be granted under § 1983 because "[t]here is no constitutional right of access to [an] established inmate grievance program." *White v. Clark*, 2012 WL 5877160, at *8 (N.D.N.Y., Nov. 20, 2012) (citing *Davis v. Buffardi*, 2005 WL 1174088, at *3 (N.D.N.Y. May 4, 2005) ("[p]articipation in an inmate grievance process is not a constitutionally protected right"); *Shell v. Brzezniak*, 365 F.Supp.2d 362, 369–70 (W.D.N.Y.2005) ("[i]nmate grievance programs created by state law are not required by the Constitution and consequently allegations that prison officials violated those procedures does not give rise to a cognizable § 1983 claim"); *Cancel v. Goord*, 2001 WL 303713, at *3 (S.D.N .Y. Mar. 29, 2001) ("inmate grievance procedures are not required by the Constitution and therefore a violation of such procedures does not give rise to a claim under § 1983")). Thus, to the extent that plaintiff alleges that defendants impeded or interfered with his grievances, he fails to state a claim pursuant to § 1983.

(e.) Right To privacy.

Plaintiff alleges that defendant "Director of Medical Corrine" disclosed his HIV

status to another inmate because plaintiff was unable to read certain test results himself. (Complaint, ¶ 4.) The constitutional right to privacy has been found to include the "right to protection regarding information about the state of one's health." *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994). The right to privacy, however is not absolute and "the interest in the privacy of medical information will vary with the condition." *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999). Courts in the Second Circuit have recognized a constitutional right to privacy with respect to a limited number of medical conditions, including HIV. *See Doe*, 15 F.3d at 267. Accordingly, this claim may proceed to service once this defendant--"Director of Medical, Corrine"--is identified sufficiently for service to be effected upon her. *See Nolley v. County of Erie*, 776 F.Supp. 715 (W.D.N.Y.1991) (holding that prison inmates are protected by a constitutional right to privacy from unwarranted disclosure of their HIV status); *Rodriguez v. Coughlin*, 1989 WL 59607 (W.D.N.Y., June 5, 1989) (holding that inmates have a constitutional right to privacy precluding corrections officers from disclosing to others that the inmate suffered from AIDS).

Pursuant to *Valentin*, 121 F.3d at 75, the Erie County Attorney's Office is requested to ascertain the full name of this defendant--"Corrine"--who is identified in the complaint as "Director of Medical" and an address at which she can be served.

(f.) Interference with mail.

Plaintiff alleges that either C.O. John or Jane Doe removed his mail from a mail box on a housing unit and it was thus not received by the Division of Parole. (Complaint, ¶ 3.) "Interference with legal mail implicates a prison inmate's rights to

access to the courts and free speech as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution." *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir.2003). In order to state a claim for lack of access to the courts by interference with one's legal mail, "an inmate must allege that a defendant's deliberate and malicious interference actually impeded his access to the court or prejudiced an existing action." *Cancel*, 2001 WL 303713, at *4 (citing *Lewis*, 518 U.S at 349, 116 S. Ct. 2174, 2180, 135 L. Ed.2d 606). However, "[a] delay in being able to work on one's legal action or communicate with the courts does not rise to the level of a constitutional violation." *Cancel*, 2001 WL 303713, at *5 (citing *Jermosen v. Coughlin*, 877 F.Supp. 864, 871 (S.D.N.Y.1995); *Jones v. Smith*, 784 F.2d 149, 151-52 (2d Cir.1986)). "[I]f an adverse judgment to an 'otherwise meritorious' motion resulted from defendants' delay, then a § 1983 claim is stated. *Midalgo v. Bass*, 2006 WL 2795332, at 12-15 (N.D.N.Y. Sept. 26, 2006) (adopting Report and Recommendantion) (quoting *Cancel*, 2001 WL 303713 at *5).

Plaintiff claims only that the library at ECCF did not have a mailbox for outgoing mail and that the prisoners had to place all legal mail in mailboxes on the housing units which is then collected by corrections officers. On August 30, 2012, he placed a "parole appeal" in the mailbox on the medical housing unit and claims that C.O. John or Jane Doe took the mail out of the mailbox and it was never received by the parole commissioners. Plaintiff, however, does not allege that his parole appeal was denied, prejudiced or hindered in any way. In the absence of such an allegation, the claim fails to state a claim upon which relief can be granted. Moreover, plaintiff does not allege any facts that would assist to identify the corrections officer who allegedly collected the

mail from the box, or to support an inference that the collection process involved some intentional interference with legal mail. Accordingly, this claim must be dismissed without prejudice to the filing of an amended complaint which alleges sufficient facts to support this claim and provides at least some facts which would assist in identifying the defendant who allegedly took the mail.

(h.) Defendants Lomy and Sallivan, Commission of Corrections.

Plaintiff names two Commissioners of the New York Commission of Corrections as defendants, Fredrick Lomy and Frances Sallivan, but sets forth no allegations of any type against them. In order for a plaintiff to establish a claim against a defendant in a § 1983 action, the plaintiff must allege that the defendant had some personal involvement in the allegedly unlawful conduct. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). Since plaintiff has made no specific allegations whatsoever against Lomy and Sallivan they must be dismissed from this action with prejudice.

CONCLUSION

Because plaintiff has met the statutory requirements of 28 U.S.C. § 1915(a) and filed an Authorization with respect to the filing fee, his request to proceed *in forma pauperis* is hereby granted. For the reasons discussed above, the following claims are dismissed with prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A: (1) the claims alleging violations of Title II of the ADA and the Rehab. Act against the individual defendants; (2) the claims alleging violations of plaintiff's procedural due process rights in relation to his disciplinary hearings (fair and impartial hearing claims) and the filing of false or fraudulent misbehavior reports; (3) the claims alleging a refusal to file or

interference with plaintiff's grievances; (4) the claims against Fredrick Lomy and Frances Sallivan, Commission of Corrections; and (5) the claim alleging a denial of access to the Law Library by Lt. Leary on September 1, 2012. The following claims are dismissed without prejudice and with leave to file an amended complaint as to these claims only: (1) the claims under Title II of the ADA and the Rehab. Act against a proper defendant; (2) the retaliation claim against C.O. Penczelski based on the confiscation of plaintiff's "lawsuit" against ECCF during a cell search on September 18, 2012; and (3) the claim alleging interference with plaintiff's mail by C.O. John or Jane Doe on August 30, 2012. Further, the U.S. Marshal is directed to serve the summons and complaint on defendants: (1) Chief Love and C.O. Utz regarding the alleged retaliatory confiscation of law books from plaintiff's cell on September 19, 2012; (2) C.O. Prester, C.O. Rutski, C.O. Ball, C.O. Grooves, C.O Brock and Sgt. John Doe (when and if identified) regarding the claim of the use of excessive force on October 20, 2012; and (3) Corrine, Director of Medical, regarding a violation of plaintiff's right to privacy (when and if identified).

ORDER

IT HEREBY IS ORDERED, that plaintiff's request to proceed *in forma pauperis* is granted;

FURTHER, that the following claims are dismissed with prejudice, pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A: (1) the claims alleging violations of Title II of the ADA and the Rehab. Act against the defendants; (2) the claims alleging violations of procedural due process rights in relation to plaintiff's disciplinary hearings (fair and impartial hearing claims) and the filing of false or fraudulent misbehavior reports; (3) the

claims alleging a refusal to file or interference with plaintiff's grievances; (4) the claims against Fredrick Lomy and Frances Sallivan, Commission of Corrections; and (5) the claim alleging a denial of access to the Law Library by Lt. Leary on September 1, 2012;

FURTHER, that the following claims are dismissed without prejudice and with leave to file an amended complaint as to these claims only: (1) the claims under Title II of the ADA and the Rehab. Act against the proper defendant; (2) the retaliation claim against C.O. Penczelski based on the confiscation of plaintiff's "lawsuit" against ECCF during a cell search on September 18, 2012; and (3) the claim alleging interference with plaintiff's mail by C.O. John or Jane Doe on August 30, 2012.[8]

FURTHER, that the Clerk of the Court is directed to terminate defendants C.O. Chappel, C.O. John Doe 2, C.O. Jane Doe 2, C.O. King, Sgt. Greene, Fredrick Lomy, Frances Sallivan, Lt. Leary, Supt. John Rodriguez, Captain Beanko, Sgt. Spillman, Sgt. Whalen, C.O. Penczelski, Sgt. McMahn, and Mental Health Counselor Jane Doe as parties to this action;

FURTHER, that the Clerk of the Court is directed to file plaintiff's papers, and to cause the United States Marshal to serve copies of the Summons, Complaint, and this Order upon (1) Chief Love and C.O. Utz regarding the alleged retaliatiatory confiscation of law books from plaintiff's cell on September 19, 2012; (2) C.O. Prester, C.O. Rutski,

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[8]Should plaintiff seek to pursue one or more of the claims dismissed without prejudice by the Court herein he must file an amended complaint. Any amended complaint, which shall supersede and replace the original complaint in its entirety, must allege claims of misconduct or wrongdoing against each named defendant which plaintiff has a legal right to pursue, and over which the Court may properly exercise jurisdiction. Any amended complaint filed by plaintiff must also comply with the pleading requirements of Rules 8 and 10 of the Federal Rules of Civil Procedure, and will be subject to review by the Court pursuant to 28 U.S.C. § § 1915(e)(2)(B) and 1915A in the same manner as the complaint was reviewed herein.

C.O. Ball, C.O. Grooves, C.O Brock and Sgt. John Doe (when and if identified) regarding the claim of the use of excessive force on October 20, 2012; and (3) Corrine, Director of Medical, regarding a violation of plaintiff's right to privacy (when and if identified), without plaintiff's payment therefor, unpaid fees to be recoverable if this action terminates by monetary award in plaintiff's favor;

FURTHER, that, as directed above, the County Attorney's Office is requested to attempt to ascertain the identities of Sgt. John Doe and Corrine, Director of Medical and advise the Court's Pro Se Office, in writing, of such information within 30 days of entry of this Decision and Order;

FURTHER, the Clerk of the Court is directed to forward a copy of this Order by first class mail to Michael A. Siragusa, County Attorney, County of Erie, Erie County ;

FURTHER, that pursuant to 42 U.S.C. § 1997e(g)(2), the defendants are directed to respond to the complaint.

SO ORDERED

Dated: August 01, 2014
Buffalo, New York

WILLIAM M. SKRETNY
Chief Judge
United States District Court