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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

RICKY RIVERA,  
Plaintiff,  
v.  
DAVE DAVEY, et al.,  
Defendants.

Case No.: 1:16-cv-01817-AWI-BAM (PC)

FINDINGS AND RECOMMENDATION TO  
DISMISS ACTION, WITHOUT PREJUDICE,  
FOR FAILURE TO EXHAUST  
ADMINISTRATIVE REMEDIES

(ECF No. 52)

**FOURTEEN (14) DAY DEADLINE**

Plaintiff Ricky Rivera is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil action pursuant to 42 U.S.C. § 1983. On August 7, 2020, Defendants Crain, Davey, Robicheaux filed a motion to dismiss on the ground that Plaintiff failed to exhaust all available administrative remedies before filing suit. (ECF No. 52.) Plaintiff filed an opposition to the motion on September 20, 2020. (ECF No. 56.) Defendants filed a reply brief on September 17, 2020. (ECF No. 57.) The motion is deemed submitted. Local Rule 230(l).

**I. Summary of Second Amended Complaint**

Plaintiff names the following defendants: (1) CSP-COR Warden Dave Davey; (2) Community Resource Manager M. Robicheaux; (3) Christian Chaplain Ed Crain;<sup>1</sup> and (4) S.M.V. Chapoleun,<sup>2</sup> Catholic Priest.

<sup>1</sup> Plaintiff refers to this Defendant both a “Cain” and “Crain” in the second amended complaint. The exhibits attached to the complaint identify this Defendant as “Crain,” and therefore, the Court will adopt this spelling.

<sup>2</sup> Defendant Chapoleun was dismissed on August 20, 2020 from this action, without prejudice, for failure to serve process under Federal Rule of Civil Procedure 4(m). (Doc. 53.)

1 Plaintiff alleges as follows: Plaintiff is Jewish since birth, by a Jewish mother. Plaintiff  
2 asserts that he is a member of the Aleph Institute, which was founded in 1981 by Rabbi Sholom  
3 D. Lipskar at the express direct of the Lubaritcher Rebbe. Further, Plaintiff alleges that all  
4 Defendants are, and have been aware, that Plaintiff has been a Jew since birth. Plaintiff's faith  
5 requires him to follow the religious prayers and rituals under the Jewish faith. Plaintiff's  
6 sincerely held religious belief is that Jewish religious practices be conducted in a room that does  
7 not contain a toilet or similar receptacle and the Mezuzah cannot be placed or hung on an  
8 entrance door to a restroom.

9 On June 23, 2014, Plaintiff arrived at CSP-COR, after being transferred from Wasco State  
10 Prison. However, from May 2014 through April 2016, Plaintiff's requests to practice his Jewish  
11 prayers and Jewish holy day events were repeatedly denied by Defendants Robicheaux, Crain,  
12 Chapoleun, and Davey. From July 2014 through November or December 2015, Defendant  
13 Chapoleun was employed as the CSP-COR chaplain. From November or December 2015 and  
14 then on, Defendant Crain replaced Defendant Chapoleun as the CSP-COR chaplain. Defendant  
15 Robicheaux was/is Defendants Chapoleun's and Crain's supervisor.

16 On May 18, 2014, June 1, 2014, July 10, 2014, September 23, 2014, September 30, 2014,  
17 October 4, 2014, October 6, 2014, October 11, 2014, October 12, 2014, December 12, 2014,  
18 December 26, 2014, January 31, 2015, February 28, 2015, March 1, 2015, March 29, 2015,  
19 March 31, 2015, May 2, 2015, May 19, 2015, July 1, 2015, July 21, 2015, August 31, 2015,  
20 September 11, 2015, September 18, 2015, September 23, 2015, October 2, 2015, December 2,  
21 2015, December 17, 2015, January 20, 2016, March 18, 2016, March 19, 2016, and on April 17,  
22 2016, Plaintiff submitted separate Form 22 Inmate Request for Interview, Item or Service ("Form  
23 22") requests to Defendant Robicheaux and either Defendants Chapoleun or Crain via the  
24 institutional mail, asking the Defendants to observe specific Jewish holy day ritual on July 17,  
25 2014, August 5, 2014, September 25-26, 2014, September 23, 2014, September 28, 2014,  
26 September 30, 2014, October 4, 2014, October 9-17, 2014, December 12, 17-24, 2014, December  
27 26, 2014, January 1, 2015, January 31, 2015, February 4, 2015, February 28, 2015, March 4-5,  
28 2015, March 29, 2015, April 3-10, 2015, May 7, 2015, May 24-25, 2015, July 1, 2015, July 5,

1 2015, July 21, 2015, July 26, 2015, September 11, 2015, September 14-16, 2015, September 23,  
2 2015, September 28-October 6, 2015, December 7-22, 2015, January 25, 2016, March 18, 23-24,  
3 2016, and April 22, 2016. Each Form 22 request asked for space and time in the chapel and  
4 notified Defendants Robicheaux and Chapoleun or Crain to the fact that Plaintiff could not  
5 perform any holy day rituals in his prison cell because the holy day rituals cannot be performed in  
6 a room that contains a toilet or any other receptacle where a person is intended to urinate or  
7 defecate. Plaintiff suggested if the Chapel were not available, space in the gym or education  
8 room would suffice. Plaintiff's request to use the yard for his religious service was denied  
9 because Plaintiff and all STG-Surenos were subject to modified program during this period.  
10 However, Plaintiff never received a response to any of the Form 22s that he submitted between  
11 May 18, 2014 and April 17, 2016, in violation of Title 15. Further, on all the dates Plaintiff  
12 requested use of the Facility Chapel between July 15, 2014 and April 22, 2016, Plaintiff was  
13 denied access to the Facility Chapel or any other room without a toilet where he could perform a  
14 Jewish holy day ritual. Plaintiff alleges that Defendants Robicheaux and Chapoleun or Crain  
15 each individually denied him access to the Facility Chapel or any other room without a toilet  
16 where he could perform a Jewish holy day ritual. The denials were not reasonably related to  
17 legitimate penological interests because for two years he was substantially burdened in his  
18 practice.

19 On August 17, 2015, August 24, 2015, and November 21, 2015, Plaintiff sent Form 22  
20 requests to Defendant Robicheaux, asking the Defendant to immediately assist him and rectify the  
21 continued denial and deprivation of his requested religious obligatory prayers and holy day events  
22 being conducted in the Chapel facility. However, Defendant Robicheaux failed to respond to  
23 Plaintiff's Form 22 requests and failed to assist Plaintiff in establishing a time and place to  
24 perform his obligatory Jewish prayers and holy day events in 2015 at the Facility Chapel.

25 In 2014 and/or 2015, Plaintiff made personal requests to Defendant Crain and Chapoleun  
26 at the Chapel for time and space and/or a room without a toilet to allow him to conduct his Jewish  
27 Prayers/Rituals consistent with his religious beliefs. Both Defendant did not make any appropriate  
28 accommodations for Plaintiff. This was not reasonably related to legitimate penological interests.

1 On September 30, 2014, December 31, 2014, March 31, 2015, June 30, 2015, September  
2 30, 2015, December 31, 2015, and March 31, 2016, Plaintiff submitted separate Form 22 requests  
3 to Defendant Davey, asking Defendant Davey to adopt a policy and procedure to rectify the  
4 denial of access to the Facility Chapel or other room without a toilet where Jewish holy day  
5 rituals could be performed. Plaintiff asserts that he never received any response to the Form 22s.  
6 No accommodations were made for Plaintiff's sincerely held religious beliefs and Defendant  
7 Davey's nonresponse was not reasonably related to a legitimate penological interest because a  
8 non response burdened Plaintiff's religious practice for a year.

9 However, on April 1, 2016, an unidentified man in plain clothes called Plaintiff for an  
10 interview regarding all of the Form 22s that Plaintiff had sent to Defendant Davey. The  
11 unidentified man, who Plaintiff identifies as DOE#1,<sup>3</sup> refused to give Plaintiff his name, had all of  
12 the Form 22s in his physical possession, and informed Plaintiff that he would only answer the  
13 Form 22s verbally so that no evidence that the conversation had occurred would exist. The  
14 unidentified man told Plaintiff that he was addressing Plaintiff's Form 22s on behalf of Defendant  
15 Davey, that Defendant Davey had actually read the Form 22s, and that Defendant Davey  
16 knowingly neglected to put a policy and procedure in place to prevent the deprivation of the  
17 rights of Jewish inmates to perform holy day rituals in a room without a toilet. DOE #1 also said  
18 that Defendant Davey admitted his failure to have a policy for Jewish inmates to exercise their  
19 beliefs was the reason Defendant Robicheaux, Chapoleun and Crain were not granting Plaintiff's  
20 requests. Plaintiff alleges that DOE #1 conceded that Defendant Davey "'admitted' he had a  
21 'causal connection' of creating a custom of the absence of any policies or procedure to the point  
22 defendant Davey conceding that the doctrine of 'respondeat superior' does not immune Davey  
23 from civil liability were Plaintiff top ever file suit." (EDF 32 para 13)(unedited text).

24 On November 10, 2015, Plaintiff submitted a Form 602 administrative appeal, Log No.  
25 COR-15-06806, to Defendant Davey and "supervisor liability" for failure to train and supervise  
26 Defendants Robicheaux, Chapoleun, and Crain and for their continued intentional failure to

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27 \_\_\_\_\_  
28 <sup>3</sup> Plaintiff is informed that he has not named any DOE defendants in the caption of the second amended  
complaint or identified any DOE defendants in the list of defendants.

1 comply with their agency's policies and give Plaintiff the same opportunity to perform his  
2 religious prayer services and holy day events that all other religious inmates were afforded. He  
3 challenged the lack of equal access to Chapel like other religions. Defendant Crain told Plaintiff  
4 that staff has been trained and has provided Plaintiff with the necessary items for his Jewish  
5 observation and that the Protestant Chaplain has been assigned to ensure Plaintiff was provided  
6 the same privileges and other religious groups. Plaintiff's appeal was granted as to food sales, but  
7 Plaintiff's appeal had nothing to do with food and providing religious artifacts. Plaintiff  
8 appealed. Non-Defendant Chief Deputy Warden Sexton granted Plaintiff's appeal of access to  
9 the Facility Chapel or a room without a toilet where Plaintiff could conduct his religious practice  
10 on or about March-April 2016. A policy was implemented in which Plaintiff and other Jewish  
11 inmates could conduct Jewish Rituals in a space which did not contain a toilet.

12 Plaintiff alleges that Defendant Davey, Ribocheaux, Chapoleun and Crain, intentionally  
13 discriminated against Plaintiff on the basis of his Jewish religion by failing to provide a  
14 reasonable opportunity to pursue his Jewish faith "compared to other similarly situated religious  
15 groups of Christians, Islamic, Buddhist, Catholic, and Kemectic, inmates faiths." Plaintiff alleges  
16 that these defendants treatment of Plaintiff and their treatment of all other similarly situated  
17 inmates of Christina, Islamic, Buddhist, Catholic, and Kemectic faiths is not reasonably related to  
18 legitimate penological interest or goals.

19 At an unknown date, Defendant Davey developed an institutional policy and procedure to  
20 allow Jewish inmates to use the Facility Chapel and, after April 22, 2016, Plaintiff was authorized  
21 to utilize the Facility Chapel in order to perform all of his Jewish holy day rituals.

22 Following screening the second amended complaint, Plaintiff was allowed to proceed on  
23 Plaintiff's second amended complaint, filed on September 20, 2019, (ECF No. 32), against  
24 Defendants Robicheaux, Chapoleun, and Crain for violations of the Free Exercise Clause of the  
25 First Amendment and against Defendant Davey for a deficient policy that violates the Free  
26 Exercise Clause of the First Amendment.

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1 **II. Legal Standard**

2 **A. Motion to Dismiss**

3 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss on  
4 the grounds that a complaint “fail[s] to state a claim upon which relief can be granted.” A motion  
5 to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. *Navarro v. Block*,  
6 250 F.3d 729, 732 (9th Cir. 2001). In deciding a motion to dismiss, “[a]ll allegations of material  
7 fact are taken as true and construed in the light most favorable to the nonmoving party.” *Cahill v.*  
8 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The pleading standard under Rule 8  
9 of the Federal Rules of Civil Procedure does not require “ ‘detailed factual allegations,’ but it  
10 demands more than an unadorned, the-defendant-unlawfully harmed-me accusation.” *Ashcroft v.*  
11 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555  
12 (2007)). In assessing the sufficiency of a complaint, all well-pleaded factual allegations must be  
13 accepted as true. *Iqbal*, 556 U.S. at 678–79. However, “[t]hreadbare recitals of the elements of a  
14 cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678. To avoid a  
15 dismissal under Rule 12(b)(6), a complaint must plead “enough facts to state a claim to relief that  
16 is plausible on its face.” *Twombly*, 550 U.S. at 570.

17 **B. Exhaustion Requirement**

18 **1. Statutory Exhaustion Requirement**

19 Under the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with  
20 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner  
21 confined in any jail, prison, or other correctional facility until such administrative remedies as are  
22 available are exhausted.” 42 U.S.C. § 1997e(a). This statutory exhaustion requirement “applies to  
23 all inmate suits about prison life,” *Porter v. Nussle*, 534 U.S. 516, 532, 122 S.Ct. 983, 152  
24 L.Ed.2d 12 (2002), regardless of the relief sought by the prisoner or the relief offered by the  
25 process, *Booth v. Churner*, 532 U.S. 731, 741, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001).  
26 Unexhausted claims must be dismissed. See *Jones v. Bock*, 549 U.S. 199, 211, 127 S.Ct. 910, 166  
27 L.Ed.2d 798 (2007). A prison's own grievance process, not the PLRA, determines how detailed a  
28 grievance must be to satisfy the PLRA exhaustion requirement. *Id.* at 218, 127 S.Ct. 910. The

1 administrative remedy process of the California Department of Corrections and Rehabilitation  
2 (“CDCR”) is applicable here. See Cal. Code of Regs. tit. 15, § 3084. To exhaust available  
3 remedies during the relevant time period, an inmate must proceed through three formal levels of  
4 review unless otherwise excused under the regulations. *Id.* § 3084.1(b). Cancellation or rejection  
5 of a grievance does not exhaust administrative remedies. *Id.*

6 A defendant may raise the issue of administrative exhaustion in cases where failure to  
7 exhaust is obvious from the face of the complaint. *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir.  
8 2014) (en banc). Motions to dismiss under Rule 12(b)(6) are only appropriate “in those rare cases  
9 where a failure to exhaust is clear from the face of the complaint.” *Albino*, 747 F.3d. at 1169. If  
10 the Court concludes that Plaintiff has failed to exhaust available remedies, the proper remedy is  
11 dismissal without prejudice of the portions of the complaint barred by § 1997e(a). See *Jones*, 549  
12 U.S. at 223-24; *Lira v. Herrera*, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

13 Here, Defendants contend that it is clear from the face of the operative second amended  
14 complaint that Plaintiff Ricky Rivera failed to exhaust all available administrative remedies  
15 before filing suit.

16 **2. California Department of Corrections and Rehabilitation (“CDCR”)**  
17 **Administrative Remedy Process**

18 At the relevant time of the allegations in the Second Amended Complaint, the State of  
19 California provides its prisoners and parolees the right to appeal administratively “any policy,  
20 decision, action, condition, or omission by the department or its staff that the inmate or parolee  
21 can demonstrate as having a material adverse effect upon his or her health, safety, or welfare.”  
22 Cal. Code Regs. tit. 15 § 3084.1(a). The process is initiated by submitting a CDCR Form 602  
23 (“602 form”). *Id.* at § 3084.2(a). Three levels of appeal are involved, including the first level,  
24 second level, and third level. *Id.* at § 3084.7. The third level of review exhausts administrative  
25 remedies. *Id.* at § 3084.7(d)(3).

26 In 2015-16, when Plaintiff was submitting the appeal at issue, the regulations required the  
27 prisoner to, among other things, “list all staff member(s) involved and...describe their  
28 involvement in the issue”; “include the staff member’s last name, first initial, title or position, if

1 known, and the dates of the staff member’s involvement in the issue”; and “state all facts known  
2 and available to him/her regarding the issue being appealed at the time of submitting the” 602  
3 form. Cal. Code Regs., tit. 15 § 3084.2(a)(1)-(4). In order to satisfy § 1997e(a), California state  
4 prisoners are required to use this process to exhaust their claims prior to filing suit. *Woodford v.*  
5 *Ngô*, 548 U.S. 81, 85, 126 S.Ct. 2378 (2006); *McKinney v. Carey*, 311 F.3d. 1198, 1199–1201 (9<sup>th</sup>  
6 Cir. 2002).

### 7 **3. Grievance Filed by Plaintiff**

8 In his second amended complaint filed on September 20, 2019, Plaintiff asserted that he  
9 filed an appeal or 602 grievance concerning all of the facts contained in his complaint and that the  
10 process was complete. (ECF No. 32, p. 2.) Plaintiff attached a copy of the underlying  
11 administrative appeal documents to his second amended complaint. (See ECF No. 32, p. 38.)  
12 The grievance, with log number CSP-Corcoran-15-6806, asserted Warden Davey’s “failure to  
13 train, supervise, and instruct his subordinate” Robicheaux and Crain, and requested that he was  
14 not timely provided the requested Jewish religious services since arriving at Corcoran. (ECF No.  
15 32, p. 38, 40.) The 602 grievance was signed by Plaintiff and dated November 10, 2015.

16 Grievance CSP-Corcoran-15-6806 was initially screened out on November 19, 2015  
17 because Plaintiff had failed to attach a form (CDCR Form 22) which Plaintiff had referred to in  
18 the grievance description. (ECF No. 32, p.40.) Plaintiff was directed to submit the Form 22 to  
19 the community resource manager. (*id.*) Plaintiff re-submitted the grievance for review, noting  
20 that he had followed the instructions, submitted a CDCR 22 to CRM Robicheaux, received a  
21 response on December 22, 2015, and attached the form. (ECF No. 32, pp. 42, 43 (The submitted  
22 Form 22 states: “since I came to Corcoran, I have not received nothing I requested about my  
23 Jewish services.”).) A response was provided by Defendant Crain on December 15, 2015, that  
24 Plaintiff would be receiving ducats for certain dates and that a rabbi would be coming to talk to  
25 Plaintiff. (ECF No. 32, p. 43.) Plaintiff responded that he was dissatisfied with Defendant  
26 Crain’s response (ECF No. 32, p. 43 (“dissatisfied with the above staff response”)), and on  
27 December 22, 2015, Defendant Robicheaux responded to Plaintiff that she would talk with the  
28 Chaplain to see if they could accommodate his request. (ECF No. 32, p. 43.)



1 Plaintiff resubmitted his grievance and it was accepted at the first level on December 31,  
2 2015. (ECF No. 32, p. 38.) Defendant Crain interviewed Plaintiff and both Crain and Robicheaux  
3 issued a first level response. (ECF No. 32, pp. 38, 47.) On January 15, 2016, the formal response  
4 at the first level noted that Plaintiff able to conduct his services in a smaller room at the Chapel,  
5 was provided candles for worship, met with the Catholic Caplin, and that the Protestant Chaplin  
6 was assigned to sponsor the Jewish population and to assist with religious needs. Plaintiff's  
7 appeal was granted at the first level. (ECF No. 32, p. 47.)

8 Plaintiff was dissatisfied with the first level response and appealed to the second level. In  
9 his second amended complaint, Plaintiff acknowledges that he was dissatisfied with the response.  
10 (ECF No. 32, ¶¶15-16.) In fact, Plaintiff appealed the first level response to the second level.  
11 (ECF No. 32, ¶16 and p. 39 (“Petitioner objects to the above First Level Reviewer’s Response”))  
12 The appeal was initially screened out and rejected at the second level because Plaintiff had failed  
13 to sign “Section D.” (ECF No. 32, p. 45 (“Your appeal was received without signature in section  
14 D. You must correct this issue prior to resubmission”)). Plaintiff resubmitted and the appeal was  
15 accepted for review at the second level on February 4, 2016. (ECF No. 32, p. 39.) Chief Deputy  
16 Warden Sexton responded at the second level on March 7, 2016, indicating that Plaintiff had been  
17 interviewed by Defendant Crain, and that services had been provided in response to the first level.  
18 *Id.* The response at the second level also stated that on December 6, 7, 8, and 9 candles and  
19 lighter for religious services were provided, but no services were provided on December 10 and  
20 11 because a weapon had been discovered in the facility, and the facility was placed on modified  
21 program. (ECF No. 32, p. 48.) The second level response also stated that “in regards to training,  
22 the Warden has not failed to train, supervise, and instruct the Community Resource Manager, [or]  
23 Protestant and Catholic Chaplain, [because] training is required and provided on a continual  
24 basis.” *Id.* The second level of review “partially granted” Plaintiff’s grievance and noted that  
25 “[i]f you are dissatisfied with the decision, you may appeal to the Third Level.” *Id.*

26 On March 29, 2016, Plaintiff filed an appeal to the Third Level. (ECF No. 32, p. 39.).  
27 Plaintiff stated: “Petitioner objects to the above second level response alleging that the requested  
28 religious obligatory services were not provided timely as required by Jewish faith guidelines.” *Id.*

1 The Office of Appeal screened out Plaintiff’s appeal on July 6, 2016 because it was missing  
2 supporting documentation. (ECF No. 32, p. 49.) Plaintiff did not resubmit the appeal for the third  
3 level review. (See ECF No. 32, p. 39 that Section G is not completed with only the submission  
4 date of July 6, 2016 in Section G.)

### 5 **III. Discussion**

#### 6 **A. Parties’ Arguments**

##### 7 **1. Defendants’ Arguments**

8 Defendants argue that action is barred because Rivera failed to exhaust his grievance by  
9 obtaining a decision on the merits at the third and final level of administrative review. Rivera’s  
10 appeal to the third level of review is insufficient to exhaust because the appeal was screened out  
11 and never was accepted for review. Plaintiff’s failure to obtain a decision on the merits at the  
12 third level of review renders his claims unexhausted.

##### 13 **2. Plaintiff’s Arguments**

14 Plaintiff argues that the prison’s purported grant of his grievance at the first level of  
15 review exhausts his claims and he does not have to exhaust his appeal further. (Opposition p. 5-  
16 6.) He also argues that because he got what he wanted, after the second level and when the  
17 facility returned to normal after the modified program, he has exhausted his claims. Plaintiff  
18 argues he was “not dissatisfied with the decision” at the second level, because he received all he  
19 had requested once he was returned to normal programming.

#### 20 **B. Analysis**

##### 21 **1. The First Level did not Exhaust Remedies**

22 Plaintiff argues that the first level of review satisfied his concerns and that no further  
23 exhaustion was required. The Court disagrees because the documents attached to the second  
24 amended complaint demonstrate that Plaintiff was not satisfied by the response to the first level of  
25 review. In Plaintiff’s appeal of the first level response to the second level, Plaintiff stated:

26 “Petitioner objects to the above first level reviewer’s response as being untrue and  
27 incorrect. Petitioner has not received any of the requested religious artifacts nor  
28 services mentioned in section A.”

1 (ECF No. 32, p. 30.) Thus, while Plaintiff argues that he was satisfied and has exhausted his  
2 remedies at the first level, he was in fact objecting to the first level response and was dissatisfied  
3 with the response. Thereafter, Plaintiff appealed to the second level of review on January 26,  
4 2016. Therefore, the grant at the first level of review did not exhaust Plaintiff's administrative  
5 remedies because Plaintiff was dissatisfied with the first level response.<sup>4</sup>

## 6 **2. The Second Level did not Exhaust Remedies**

7 Plaintiff also argues that the partial grant of relief at the second level of review and his  
8 return to normal programming gave him what he wanted, thus exhausting remedies. The Court  
9 again disagrees because the documents attached to the second amended complaint demonstrate  
10 that Plaintiff was not satisfied by the response to the second level of review. In Plaintiff's appeal  
11 of the second level response to the third level, Plaintiff stated:

12 "Petitioner objects to the above second level response alleging that the requested  
13 religious obligatory services were not provided timely as required by Jewish faith  
14 guidelines."

15 (ECF No. 32, p. 39.) While Plaintiff argues that he was satisfied and thus exhausted his remedies  
16 at the second level, he was in fact objecting to the second level response and was dissatisfied with  
17 the response. The partial grant at the second level of review did not exhaust Plaintiff's  
18 administrative remedies because Plaintiff was dissatisfied with the second level response.  
19 Thereafter, Plaintiff submitted an appeal to the third level of review on March 29, 2016.

## 20 **3. The Third Level did not Exhaust Remedies**

21 Plaintiff argues that because he got what he wanted after the second level and when the  
22 facility returned to normal after the modified program, he therefore has exhausted his claims.  
23 (Opposition p. 7-8.) The documents attached to the second amended complaint show that Plaintiff  
24 attempted to appeal to the third level of review. The appeal at the third level was screened out

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25 <sup>4</sup> The Court address Plaintiff's argument that Plaintiff was "satisfied" even though it is not legally relevant.  
26 California's regulations require a third-level decision to exhaust. Cal. Code Regs. tit. 15, § 3084.1(b) ("all appeals are  
27 subject to a third level of review . . . before administrative remedies are deemed exhausted.") Regardless of the relief  
28 sought, a prisoner must pursue an appeal through all levels of a prison's grievance process as long as some remedy  
remains available. "The obligation to exhaust 'available' remedies persists as long as some remedy remains  
'available.' Once that is no longer the case, then there are no 'remedies...available,' and the prisoner need not further  
pursue the grievance." *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005) (emphasis and alteration in original) (citing  
*Booth v. Churner*, 532 U.S. 731, 736 (2001)).

1 and not resubmitted by Plaintiff for further review.

2 Plaintiff's documents demonstrate that Plaintiff did not get "what he wanted at the second  
3 level." In the second amended complaint, Plaintiff alleges wrongful conduct, in March and April  
4 2016, which is after the second level response. Plaintiff could not have been "satisfied" with the  
5 second level response, because he alleges wrongful conduct which occurred after the second level  
6 response. (See Doc. 32, ¶¶ 6-7.) Thus, there were remedies available after the second level  
7 appeal response in March 2016 because Plaintiff alleges ongoing wrongful conduct. Thereafter,  
8 when he filed his appeal at the third level, his appeal was screened out at the third level and was  
9 not resubmitted to the third level. Indeed, the entirety of Plaintiff's second amended complaint  
10 complains of failure to accommodate his religious services and beliefs on numerous dates  
11 throughout 2015-2016, which indicates he was not satisfied with the decision at the first level or  
12 the second level or that he "got all that he wanted." Further, because the second level of review  
13 denied his appeal that the Warden failed to properly train subordinates, Plaintiff did not get all  
14 that he wanted. (ECF No. 32, p. 48.) Therefore, Plaintiff did not fully exhaust through the third  
15 level, and there were remedies available at the third level which Plaintiff did not pursue.  
16 Accordingly, Plaintiff has failed to fully exhaust his administrative remedies through the third  
17 level of review.

### 18 **C. Grievance Against Warden Davey**

19 Defendant Warden Davey argues he is entitled to dismissal because Plaintiff's grievance  
20 is not factually sufficient to exhaust claims against the Warden.

21 In light of the Court finding that Plaintiff failed to exhaust his administrative remedies  
22 through the third level when remedies remained available, the Court need not and does reach this  
23 argument.

## 24 **IV. Conclusion and Recommendation**

25 Based on the foregoing, IT IS HEREBY RECOMMENDED that Defendants' motion to  
26 dismiss for failure to exhaust administrative remedies, filed on August 7, 2020, be GRANTED.

27 These Findings and Recommendations will be submitted to the United States District  
28 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within

1 **fourteen (14) days** after being served with these Findings and Recommendations, the parties may  
2 file written objections with the Court. The document should be captioned “Objections to  
3 Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file  
4 objections within the specified time may result in the waiver of the “right to challenge the  
5 magistrate’s factual findings” on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014)  
6 (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

7  
8 IT IS SO ORDERED.

9 Dated: February 25, 2021

/s/ Barbara A. McAuliffe  
10 UNITED STATES MAGISTRATE JUDGE