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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
10 **FRESNO DIVISION**  
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13 JAMES E. BRYANT,  
14 CDCR #C-48302,

15 Plaintiff,

16 vs.

17 M. BAIREs, Correctional Lieutenant,

18 Defendant.  
19

Civil No. 08-1165 MJL (PCL)

**ORDER SUA SPONTE DISMISSING  
COMPLAINT FOR FAILING TO STATE  
A CLAIM PURSUANT TO  
28 U.S.C. §§ 1915(e)(2) and 1915A(b)**

20  
21 **I.**

22 **PROCEDURAL HISTORY**

23 On August 8, 2008, Plaintiff, a state inmate currently incarcerated at the California  
24 Substance Abuse Treatment Facility located in Corcoran, California and proceeding pro se, filed  
25 a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff did not prepay the \$350 filing  
26 fee mandated by 28 U.S.C. § 1914(a) to commence a civil action; instead, he filed a Motion to  
27 Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 5]. The Court  
28 granted Plaintiff's Motion to Proceed *IFP* on September 2, 2008 [Doc. No. 6].

1 On November 25, 2008, this matter was reassigned to District Judge M. James Lorenz  
2 for all further proceedings [Doc. No. 9].

## 3 II.

### 4 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

5 The Prison Litigation Reform Act (“PLRA”) obligates the Court to review complaints  
6 filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained  
7 in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of  
8 criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary  
9 program,” “as soon as practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b).  
10 Under these provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any  
11 portion thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from  
12 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203  
13 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,  
14 446 (9th Cir. 2000) (§ 1915A).

15 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
16 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is  
17 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,  
18 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing  
19 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of  
20 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(3). *Id.* at 1127 (“[S]ection  
21 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint  
22 that fails to state a claim.”); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)  
23 (discussing 28 U.S.C. § 1915A).

24 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
25 allegations of material fact and must construe those facts in the light most favorable to the  
26 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
27 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s  
28 duty to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,

1 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*  
2 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

3 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person  
4 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived  
5 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the  
6 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*  
7 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d  
8 1350, 1354 (9th Cir. 1985) (en banc).

9 Plaintiff alleges that his due process rights under the Fourteenth Amendment were  
10 violated during a disciplinary hearing related to a rules violation report.<sup>1</sup> “The requirements of  
11 procedural due process apply only to the deprivation of interests encompassed by the Fourteenth  
12 Amendment’s protection of liberty and property.” *Board of Regents v. Roth*, 408 U.S. 564, 569  
13 (1972). State statutes and prison regulations may grant prisoners liberty interests sufficient to  
14 invoke due process protections. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). However,  
15 the Supreme Court has significantly limited the instances in which due process can be invoked.  
16 Pursuant to *Sandin v. Conner*, 515 U.S. 472, 483 (1995), a prisoner can show a liberty interest  
17 under the Due Process Clause of the Fourteenth Amendment only if he alleges a change in  
18 confinement that imposes an “atypical and significant hardship . . . in relation to the ordinary  
19 incidents of prison life.” *Id.* at 484 (citations omitted); *Neal v. Shimoda*, 131 F.3d 818, 827-28  
20 (9th Cir. 1997).

21 In this case, Plaintiff has failed to establish a liberty interest protected by the Constitution  
22 because he has not alleged, as he must under *Sandin*, facts related to the conditions or

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23  
24 <sup>1</sup> It is not clear whether Plaintiff is seeking the return of good time credits that were  
25 revoked at his disciplinary hearing. If Plaintiff is seeking the return of good time credits in this  
26 action, he may not do so until his disciplinary conviction has been invalidated by a direct appeal  
27 or other habeas corpus proceedings. *See Heck v. Humphrey*, 512 U.S. 475, 486-87 (1994).  
28 Under *Heck*, before Plaintiff may seek damages related to an allegedly unconstitutional parole  
revocation determination, he must allege facts to show that the parole decision has already been:  
(1) reversed on direct appeal; (2) expunged by executive order; (3) declared invalid by a state  
tribunal authorized to make such a determination; or (4) called into question by the issuance of  
a writ of habeas corpus. *Id.* at 487; *see also Edwards v. Balisok*, 520 U.S. 641, 643 (1997)  
(*Heck*’s “favorable termination” requirement applies to prison disciplinary proceedings which  
result in lost good-time credit.)

1 consequences of his disciplinary hearings which show “the type of atypical, significant  
2 deprivation [that] might conceivably create a liberty interest.” *Id.* at 486. For example, in  
3 *Sandin*, the Supreme Court considered three factors in determining whether the plaintiff  
4 possessed a liberty interest in avoiding disciplinary segregation: (1) the disciplinary versus  
5 discretionary nature of the segregation; (2) the restricted conditions of the prisoner’s  
6 confinement and whether they amounted to a “major disruption in his environment” when  
7 compared to those shared by prisoners in the general population; and (3) the possibility of  
8 whether the prisoner’s sentence was lengthened by his restricted custody. *Id.* at 486-87.

9 Therefore, to establish a due process violation, Plaintiff must first show the deprivation  
10 imposed an atypical and significant hardship on him in relation to the ordinary incidents of  
11 prison life. *Sandin*, 515 U.S. at 483-84. Plaintiff has failed to allege any facts from which the  
12 Court could find there were atypical and significant hardships imposed upon him as a result of  
13 the Defendants’ actions. Plaintiff must allege “a dramatic departure from the basic conditions”  
14 of his confinement that would give rise to a liberty interest before he can claim a violation of due  
15 process. *Id.* at 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended*  
16 *by* 135 F.3d 1318 (9th Cir. 1998). He has not; therefore the Court finds that Plaintiff has failed  
17 to allege a liberty interest, and thus, has failed to state a due process claim. *See May*, 109 F.3d  
18 at 565; *Hewitt*, 459 U.S. at 466; *Sandin*, 515 U.S. at 486.

19 Accordingly, the Court finds that Plaintiff’s Complaint fails to state a section 1983 claim  
20 upon which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C.  
21 §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an opportunity to amend  
22 his pleading to cure the defects set forth above.

### 23 III.

#### 24 CONCLUSION AND ORDER


25 Good cause appearing, **IT IS HEREBY ORDERED** that:

26 Plaintiff’s Complaint [Doc. No. 1] is **DISMISSED** without prejudice for failing to state  
27 a claim upon which relief may be granted. *See* 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b).  
28 However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is “Filed”

1 in which to file a First Amended Complaint which cures all the deficiencies of pleading noted  
2 above. Defendants not named and all claims not re-alleged in the Amended Complaint will be  
3 deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

4 Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief  
5 may be granted, it may be dismissed without further leave to amend and may hereafter be  
6 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79  
7 (9th Cir. 1996).

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9 DATED: January 28, 2009

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11 M. James Lorenz  
12 United States District Court Judge  
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