

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

LILLIAN SMITH,

Plaintiff,

VS.

C. BURGDORFF, et al.,

## Defendants.

1:17-cv-00634-DAD-GSA-PC

## **FIRST SCREENING ORDER**

**ORDER DISMISSING COMPLAINT  
FOR FAILURE TO STATE A  
CLAIM, WITH LEAVE TO AMEND  
(ECF No. 1.)**

**THIRTY DAY DEADLINE TO FILE  
AMENDED COMPLAINT**

## I. BACKGROUND

This is a civil action filed by Lillian Smith (“Plaintiff”), a state prisoner proceeding *pro se*. This action was initiated by civil complaint filed by Plaintiff in the Madera County Superior Court on November 18, 2016 (Case #MCV073193). On May 17, 2017, defendants C. Burgdorff, J. Harry, E. Olesky, and B. Wilkins (“Defendants”) removed the case to federal court by filing a Notice of Removal of Action pursuant to 28 U.S.C. § 1441(a). (ECF No. 1.)

Plaintiff's Complaint is now before the court for screening. 28 U.S.C. § 1915A.

## II. SCREENING REQUIREMENT

The court is required to screen complaints in civil actions in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised

1 claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may  
2 be granted, or that seek monetary relief from a defendant who is immune from such relief. 28  
3 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may  
4 have been paid, the court shall dismiss the case at any time if the court determines that the  
5 action or appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. §  
6 1915(e)(2)(B)(ii).

7 A complaint is required to contain “a short and plain statement of the claim showing  
8 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are  
9 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
10 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937,  
11 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955  
12 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required to indulge  
13 unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)  
14 (internal quotation marks and citation omitted). Plaintiff must set forth “sufficient factual  
15 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal 556 U.S.  
16 at 678. While factual allegations are accepted as true, legal conclusions are not. Id. at 678-79;  
17 Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of  
18 misconduct falls short of meeting this plausibility standard. Id.

19 **III. SUMMARY OF COMPLAINT**

20 Plaintiff is presently incarcerated at the California Institution for Women in Corona,  
21 California. The events at issue in the Complaint allegedly occurred when Plaintiff was  
22 incarcerated at the Central California Women’s Facility in Chowchilla, California, in the  
23 custody of the California Department of Corrections and Rehabilitation. Plaintiff names as  
24 defendants Dr. C. Burgdorff, Dr. Jonathan Harry, Pho Edward Olesky, and Dr. B. Wilkins<sup>1</sup>  
25 (collectively “Defendants”). A summary of Plaintiff’s factual allegations follow.

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28 <sup>1</sup> Plaintiff mistakenly sues defendant Wilkins as Wilkerson. (Notice of Removal, ECF No. 1 at 1  
n.1.)

The gravamen of Plaintiff's Complaint is that she was wrongly labeled as a mental health patient, housed in the Mental Health Crisis Unit, and administered medication without her consent. On July 23, 2014, defendants Dr. Wilkins and Dr. Harry came to Plaintiff's cell and told her she was moving to a mental health crisis bed. Plaintiff asked why, but was not given an answer. Plaintiff was not hostile or argumentative, and never stated she had suicidal thoughts or concerns.

On July 24, 2014, Plaintiff was issued a 115 Rules Violation Report stating that she had caused an “Indian Burn” to CNA Solis. (ECF No. 1 at 11 ¶7).<sup>2</sup> She was found not guilty of the charges in September 2014. Plaintiff’s coworker stated that Plaintiff did not do it. Even after she was found not guilty, Plaintiff continued to be held in a mental health crisis bed until November 14, 2014.

Plaintiff was harassed for filing grievances about lack of medical care. Plaintiff reported the medical staff to the Division of Adult Institutions for not changing her diaper in a timely manner. It is standard in nursing facilities to change and check each patient every two hours. Defendants Dr. Harry and Dr. Wilkins tried to build a “paper trail” against Plaintiff based on false allegations, attempting to establish that Plaintiff was hostile and suffering from a mental health disorder from medical neglect. Plaintiff never said anything or displayed any behavior to warrant services from mental health staff.

Plaintiff alleges that she was subject to “cruel and unusual punishment, human rights violations, no equal rights, couldn’t get access to materials for legal purpose,” (ECF No. 1 at 8 ¶10), and “discrimination against my ethnicity and sexual orientation,” (ECF No. 1 at 14).

Defendants Wilkins, Harry, Bergdorff, and Oleksy generated false mental health diagnoses and illegally had Plaintiff committed because of an allegation by inmate Marks stating that “something was thrown at her.” (ECF No. 1 at 9 ¶1.) To be committed to a mental health crisis bed an inmate needs to claim to be suicidal. It is not true that Plaintiff was argumentative during the interview by Sgt. Johnson [not a defendant] regarding the allegation

<sup>2</sup> All page numbers cited herein are those assigned by the court's CM/ECF system and not based on the parties' pagination of their briefing materials

1 against Plaintiff, and the issue was resolved by Sgt. Johnson. Plaintiff was not disruptive on  
2 July 11, 2014. If the doctors had properly evaluated Plaintiff's symptoms they would have  
3 concluded that Plaintiff was suffering from hypokalemic periodic paralysis. Plaintiff claims  
4 that because of Defendants' actions she suffered physical pain and emotional distress.

5 Plaintiff requests compensatory and punitive damages.

6 **IV. PLAINTIFF'S CLAIMS**

7 The Civil Rights Act under which this action was filed provides:

8 Every person who, under color of any statute, ordinance, regulation, custom, or  
9 usage, of any State or Territory or the District of Columbia, subjects, or causes  
10 to be subjected, any citizen of the United States or other person within the  
jurisdiction thereof to the deprivation of any rights, privileges, or immunities  
11 secured by the Constitution and laws, shall be liable to the party injured in an  
action at law, suit in equity, or other proper proceeding for redress . . . .

12 42 U.S.C. § 1983. “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely  
13 provides ‘a method for vindicating federal rights elsewhere conferred.’” Graham v. Connor,  
14 490 U.S. 386, 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see also Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los  
15 Angeles, 697 F.3d 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir.  
16 2012); Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).

17 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted  
18 under color of state law and (2) the defendant deprived him or her of rights secured by the  
19 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.  
20 2006); see also Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing  
21 “under color of state law”). A person deprives another of a constitutional right, “within the  
22 meaning of § 1983, ‘if he does an affirmative act, participates in another’s affirmative act, or  
23 omits to perform an act which he is legally required to do that causes the deprivation of which  
24 complaint is made.’” Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th  
25 Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite  
26 causal connection may be established when an official sets in motion a ‘series of acts by others  
27 which the actor knows or reasonably should know would cause others to inflict’ constitutional  
28

1 harms.” Preschooler II, 479 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of  
2 causation “closely resembles the standard ‘foreseeability’ formulation of proximate cause.”  
3 Arnold v. Int’l Bus. Mach. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City  
4 of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008).

5 **A. Personal Participation**

6 Under section 1983, Plaintiff must demonstrate that each defendant *personally*  
7 participated in the deprivation of her rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir.  
8 2002) (emphasis added). Plaintiff must demonstrate that each defendant, through his or her  
9 own individual actions, violated Plaintiff’s constitutional rights. Iqbal, 556 U.S. at 676-77.

10 In the Complaint, Plaintiff fails to allege facts showing that individual defendants  
11 personally acted against her. Plaintiff fails to attribute any personal act to any individual  
12 defendant. Plaintiff cannot state a claim against these defendants unless she demonstrates in  
13 her allegations that each of them, identified by name, personally acted or failed to act, violating  
14 Plaintiff’s rights. Plaintiff may not attribute liability to a group of defendants, but must “set  
15 forth specific facts as to each individual defendant’s” deprivation of her rights. Leer v.  
16 Murphy, 844 F.2d 628, 634 (9th Cir. 1988); see also Taylor v. List, 880 F.2d 1040, 1045 (9th  
17 Cir. 1989). Liability may not be imposed under a theory of *respondeat superior*, and there  
18 must exist some causal connection between the conduct of each named defendant and the  
19 violation at issue. Iqbal, 556 U.S. at 676-77; Lemire v. California Dep’t of Corr. and Rehab.,  
20 726 F.3d 1062, 1074-75 (9th Cir. 2013); Lacey v. Maricopa County, 693 F.3d 896, 915-16 (9th  
21 Cir. 2012) (*en banc*); Starr v. Baca, 652 F.3d 1202, 1205-08 (9th Cir. 2011), cert. denied, 132  
22 S.Ct. 2101 (2012). Therefore, Plaintiff fails to state any claims against any of the Defendants.  
23 Plaintiff shall be granted an opportunity to amend the complaint, to cure this deficiency.

24 **B. Eighth Amendment Medical Claim**

25 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an  
26 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d  
27 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two-part  
28 test for deliberate indifference requires the plaintiff to show (1) “‘a serious medical need’ by

1 demonstrating that ‘failure to treat a prisoner’s condition could result in further significant  
2 injury or the unnecessary and wanton infliction of pain,’” and (2) ““the defendant’s response to  
3 the need was deliberately indifferent.”” Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith,  
4 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX Techs., Inc. v.  
5 Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (*en banc*) (internal quotations omitted). Deliberate  
6 indifference is shown by “a purposeful act or failure to respond to a prisoner’s pain or possible  
7 medical need, and harm caused by the indifference.” Id. (citing McGuckin, 974 F.2d at 1060).  
8 Deliberate indifference may be manifested “when prison officials deny, delay or intentionally  
9 interfere with medical treatment, or it may be shown by the way in which prison physicians  
10 provide medical care.” Id. Where a prisoner is alleging a delay in receiving medical treatment,  
11 the delay must have led to further harm in order for the prisoner to make a claim of deliberate  
12 indifference to serious medical needs. McGuckin at 1060 (citing Shapely v. Nevada Bd. of  
13 State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985)).

14 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,  
15 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be aware of the  
16 facts from which the inference could be drawn that a substantial risk of serious harm exists,’  
17 but that person ‘must also draw the inference.’” Id. at 1057 (quoting Farmer v. Brennan, 511  
18 U.S. 825, 837 (1994)). “If a prison official should have been aware of the risk, but was not,  
19 then the official has not violated the Eighth Amendment, no matter how severe the risk.”” Id.  
20 (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)). “A  
21 showing of medical malpractice or negligence is insufficient to establish a constitutional  
22 deprivation under the Eighth Amendment.” Id. at 1060. “[E]ven gross negligence is  
23 insufficient to establish a constitutional violation.” Id. (citing Wood v. Housewright, 900 F.2d  
24 1332, 1334 (9th Cir. 1990)).

25 “A difference of opinion between a prisoner-patient and prison medical authorities  
26 regarding treatment does not give rise to a § 1983 claim.” Franklin v. Oregon, 662 F.2d 1337,  
27 1344 (9th Cir. 1981) (internal citation omitted). To prevail, a plaintiff “must show that the  
28 course of treatment the doctors chose was medically unacceptable under the circumstances . . .

1 and . . . that they chose this course in conscious disregard of an excessive risk to plaintiff's  
2 health." Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (internal citations omitted). In  
3 applying this standard, the Ninth Circuit has held that before it can be said that a prisoner's  
4 civil rights have been abridged, "the indifference to his medical needs must be substantial.  
5 Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of  
6 action." Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980), citing Estelle,  
7 429 U.S. 97. "[A] complaint that a physician has been negligent in diagnosing or treating a  
8 medical condition does not state a valid claim of medical mistreatment under the Eighth  
9 Amendment. Medical malpractice does not become a constitutional violation merely because  
10 the victim is a prisoner." Estelle, 429 U.S. at 106; see also Anderson v. County of Kern, 45  
11 F.3d 1310, 1316 (9th Cir. 1995); McGuckin, 974 F.2d 1050 (internal quotations omitted). In  
12 order to state a claim for violation of the Eighth Amendment, Plaintiff must allege sufficient  
13 facts to support a claim that the named defendants "[knew] of and disregard[ed] an excessive  
14 risk to [Plaintiff's] health . . . ." Farmer, 511 U.S. at 837.

15 To the extent that Plaintiff's claim is based on her disagreement with the doctors'  
16 assessment that she required mental health treatment, Plaintiff fails to state an Eighth  
17 Amendment claim. Plaintiff has not shown that the course of treatment the doctors chose was  
18 medically unacceptable under the circumstances, and that they chose this course in conscious  
19 disregard of an excessive risk to Plaintiff's health. To state a medical claim, Plaintiff must  
20 make factual allegations demonstrating that an individual Defendant knew that Plaintiff faced  
21 an excessive risk to her health and yet consciously disregarded the risk, causing Plaintiff harm.

22 Therefore, Plaintiff fails to state a cognizable Eighth Amendment medical claim against  
23 any of the Defendants. Plaintiff shall be granted leave to file an amended complaint curing the  
24 deficiencies in this claim.

25 **C. State Law Claims**

26 Plaintiff also brings claims for fraud, negligence, and intentional infliction of emotional  
27 distress. These are state law claims, and violation of state law is not sufficient to state a claim  
28 for relief under § 1983. To state a claim under § 1983, there must be a deprivation of federal

1 constitutional or statutory rights. See Paul v. Davis, 424 U.S. 693 (1976). Although the court  
2 may exercise supplemental jurisdiction over state law claims, Plaintiff must first have a  
3 cognizable claim for relief under federal law.<sup>3</sup> See 28 U.S.C. § 1367. In this instance, the court  
4 fails to find any cognizable federal claims in the Complaint. Therefore, Plaintiff's state law  
5 claims fail.

6 **D. Due Process – Fourteenth Amendment**

7 Plaintiff alleges that the Defendants used false information, claiming that Plaintiff  
8 violated rules and was argumentative and hostile, to commit her to the mental health unit.

9 The Due Process Clause protects prisoners from being deprived of liberty or property  
10 without due process of law. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In order to state a  
11 cause of action for deprivation of procedural due process, a plaintiff must first establish the  
12 existence of a liberty interest for which the protection is sought.

13 Liberty interests may arise from the Due Process Clause itself or from state law. Id.  
14 The Due Process Clause itself does not confer on inmates a liberty interest in avoiding “more  
15 adverse conditions of confinement.” Wilkinson v. Austin, 545 U.S. 209, 221 (2005). The Due  
16 Process Clause itself does not confer on inmates a liberty interest in being confined in the  
17 general prison population instead of administrative segregation. See Hewitt v. Helms, 459 U.S.  
18 460, 466-68 (1983); see also May v. Baldwin, 109 F.3d 557, 565 (9th Cir. 1997) (convicted  
19 inmate's due process claim fails because he has no liberty interest in freedom from state action  
20 taken within sentence imposed and administrative segregation falls within the terms of  
21 confinement ordinarily contemplated by a sentence) (quotations omitted)).

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24 <sup>3</sup> Plaintiff must also plead the claim presentation requirement contained in California Government Code §  
25 900 *et seq.* California's Government Claims Act establishes certain conditions precedent to the filing of a lawsuit  
26 against a public entity. State v. Superior Court (Bodde), 32 Cal. 4th 1234, 1237, 90 P.3d 116, 118 (2004). “[A]  
27 plaintiff must timely file a claim for money or damages with the public entity, (§ 911.2.), and the failure to do so  
28 bars the plaintiff from bringing suit against that entity, (§ 945.4.)” Id. Compliance with the claim presentation  
requirement is an element of the cause of action, Bodde, 32 Cal.4th at 1240, 13 Cal.Rptr.3d 534, 90 P.3d 116, is  
required, Mangold v. California Public Utilities Com'n, 67 F.3d 1470, 1477 (9th Cir. 1995), and “failure to file a  
claim is fatal to a cause of action,” Hacienda La Puente Unified School Dist. Of Los Angeles v. Honig, 976 F.2d  
487, 495 (9th Cir. 1992); City of Stockton v. Superior Court, 42 Cal.4th 730, 738 (Cal. 2007) at 738; Shirk v.  
Vista Unified Sch. Dist., 42 Cal.4th 201, 208-09 (Cal. 2007).

1       Under state law, the existence of a liberty interest created by prison regulations is  
2 determined by focusing on the nature of the deprivation. Sandin v. Conner, 515 U.S. 472, 481-  
3 84, 115 S.Ct. 2293 (1995). Liberty interests created by state law are “generally limited to  
4 freedom from restraint which . . . imposes atypical and significant hardship on the inmate in  
5 relation to the ordinary incidents of prison life.” Id. at 484; Myron v. Terhune, 476 F.3d 716,  
6 718 (9th Cir. 2007).

7       There is no due process right to be free from false disciplinary charges. The falsification  
8 of a disciplinary report does not state a standalone constitutional claim. Canovas v. California  
9 Dept. of Corrections, 2:14-cv-2004 KJN P, 2014 WL 5699750, n.2 (E.D. Cal. 2014); see e.g.,  
10 Lee v. Whitten, 2:12-cv-2104 GEB KJN P, 2012 WL 4468420, \*4 (E.D. Cal. 2012). There is  
11 no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct  
12 which may result in the deprivation of a protected liberty interest. Sprouse v. Babcock, 870  
13 F.2d 450, 452 (8th Cir. 1989); Freeman v. Rideout, 808 F.2d 949, 951 (2d Cir. 1986)).  
14 “Specifically, the fact that a prisoner may have been innocent of disciplinary charges brought  
15 against him and incorrectly held in administrative segregation does not raise a due process  
16 issue. The Constitution demands due process, not error-free decision-making.” Jones v.  
17 Woodward, 2015 WL 1014257, \*2 (E.D. Cal. 2015) (citing Ricker v. Leapley, 25 F.3d 1406,  
18 1410 (8th Cir. 1994); McCrae v. Hankins, 720 F.2d 863, 868 (5th Cir. 1983)). Therefore,  
19 Plaintiff has no protected liberty interest against being defamed or having false information in  
20 her file.

21       The Supreme Court has concluded that the Due Process Clause itself does not grant  
22 prisoners a liberty interest in remaining in the general population, see Sandin, 515 U.S. at 485-  
23 86 and Hewitt, 459 U.S. at 468 or in not losing privileges, Baxter v. Palmigiano, 425 U.S. 308,  
24 322, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). However, in Vitek v. Jones, 445 U.S. 480, 493-94,  
25 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552 (1980), the Supreme Court found that a prisoner had a  
26 liberty interest in freedom from involuntary commitment to a mental hospital and that “[a]  
27 criminal conviction and sentence of imprisonment extinguish an individual’s right to freedom  
28 from confinement for the term of his sentence, but they do not authorize the State to classify

1 him as mentally ill and to subject him to involuntary psychiatric treatment without affording  
2 him additional due process protections.” In Washington v. Harper, 494 U.S. 210, 221–222, 110  
3 S.Ct. 1028, 1036–1037, 108 L.Ed.2d 178 (1990), the Court held that an inmate had a liberty  
4 interest in freedom from the involuntary administration of psychotropic drugs. Such  
5 deprivations implicate the Due Process Clause because they go beyond the “normal limits or  
6 range of custody which the conviction has authorized the State to impose.” Meachum v. Fano,  
7 427 U.S. 215, 225, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976). The Court in Vitek held that  
8 the “medical nature of the inquiry . . . does not justify dispensing with due process  
9 requirements. It is precisely “[t]he subtleties and nuances of psychiatric diagnoses” that justify  
10 the requirement of adversary hearings. Vitek, 445 U.S. at 495 (quoting Addington v. Texas,  
11 441 U.S. 418, 429, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979)).

12 “When protected interests are implicated, the right to some kind of prior hearing is  
13 paramount . . . [A] weighing process has long been a part of any determination of the *form* of  
14 hearing required in particular situations by procedural due process.” Neal v. Shimoda, 131  
15 F.3d 818, 830 (9th Cir. 1997) (quoting Board of Regents of State Colleges v. Roth, 408 U.S.  
16 564, 569–70, 92 S.Ct. 2701, 2704–05 (1972) (footnotes omitted)). In Neal, where state  
17 prisoners claimed that the State was improperly labelling them as sex offenders, the court found  
18 that the plaintiff was constitutionally entitled to all of the process due under the standards set  
19 forth in Wolff, 418 U.S. 539. Neal 131 F.3d at 830 (citing see Sandin, 515 U.S. at 482, 115  
20 S.Ct. at 2300 (“The time has come to return to the due process principles we believe were  
21 correctly established and applied in Wolff and Meachum.”); see also Keenan v. Hall, 83 F.3d  
22 1083 (9th Cir. 1996) (embracing this proposition in the context of a prisoner’s suit to  
23 participate in a hearing to determine his re-classification)).

24 “In Wolff, the Supreme Court determined that inmates were entitled to procedural due  
25 process protections in disciplinary hearings that could result in the forfeiture of an inmate’s  
26 good-time credits.” Neal, 131 F.3d at 830. “After holding that such a result implicated a  
27 protected liberty interest, the Court turned to the question of what process the inmate was due.”  
28 (Id.) “At the outset, the Court held that two elements were essential ‘if the minimum

1 requirements of procedural due process are to be satisfied. These are advance written notice of  
2 the claimed violation and a written statement of the factfinders as to the evidence relied upon  
3 and the reasons for the disciplinary action taken.”” Id. (citing Wolff, 418 U.S. at 563, 94 S.Ct.  
4 at 2978).

5 In the event that an inmate such as Plaintiff, who was labeled as mentally ill and moved  
6 within the prison to a Mental Health Unit bed, is entitled to the same due process protections as  
7 an inmate transferred to an outside mental hospital. Plaintiff is entitled, at the least, to written  
8 notice, a hearing, an independent decision maker, and a written statement by the factfinder as to  
9 the evidence relied on and the reasons for re-housing the inmate. Vitek, 445 U.S. at 494.

10 Plaintiff alleges that on July 23, 2014, defendants Dr. Wilkins and Dr. Harry came to  
11 her cell and told her she was moving to a mental health crisis bed, and when Plaintiff asked  
12 why, she was not given an answer. (ECF No. 1 at 11 ¶6.) This is not sufficient to state a due  
13 process claim. Plaintiff must provide more information. Plaintiff has not indicated whether she  
14 received any due process protections, such as notice or a hearing, before or after Defendants  
15 came to her cell. Before the court can determine whether Plaintiff has a cognizable due process  
16 claim, Plaintiff must inform the court of the entire process used to label her as a mental patient,  
17 confine her in a mental health crisis bed, and administer medications to her without her  
18 consent.

19 Therefore, Plaintiff fails to state a cognizable due process claim against any of the  
20 Defendants. Plaintiff shall be granted leave to amend the complaint to cure the deficiencies in  
21 this claim.

22 **E. Retaliation**

23 Allegations of retaliation against a prisoner’s First Amendment rights to speech or to  
24 petition the government may support a 1983 claim. Rizzo v. Dawson, 778 F.2d 5527, 532 (9th  
25 Cir. 1985); see also Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir. 1989); Pratt v.  
26 Rowland, 65 F.3d 802, 807 (9th Cir. 1995). “Within the prison context, a viable claim of First  
27 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some  
28 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that

1 such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action  
2 did not reasonably advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559,  
3 567-68 (9th Cir. 2005); accord Watson v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012);  
4 Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009).

5 An allegation of retaliation against a prisoner’s First Amendment right to file a prison  
6 grievance is sufficient to support a claim under section 1983. Bruce v. Ylst, 351 F.3d 1283,  
7 1288 (9th Cir. 2003). The court must “afford appropriate deference and flexibility” to prison  
8 officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be  
9 retaliatory.” Pratt, 65 F.3d at 807 (9th Cir. 1995) (quoting Sandin, 515 U.S. at 482). The  
10 burden is on Plaintiff to demonstrate “that there were no legitimate correctional purposes  
11 motivating the actions he complains of.” Id. at 808.

12 Plaintiff satisfies the first element of a retaliation claim because she alleges that she was  
13 wrongfully placed in the mental health unit, which is an adverse action against Plaintiff.  
14 Plaintiff also satisfies the third element, because she exercised her protected right to file prison  
15 grievances against medical staff for failing to change her diaper every two hours. However,  
16 Plaintiff fails to satisfy the second element of a retaliation claim because she has not alleged  
17 facts showing that Defendants wrongfully placed her in the mental health unit *because* she filed  
18 grievances about her medical care. There are no factual allegations showing a causal  
19 connection between the filing of grievances and Plaintiff’s housing placement, such as timing  
20 or behavior by a Defendant showing the Defendant was upset about the grievances. Moreover,  
21 Plaintiff has not alleged that Defendants’ actions did not reasonably advance a legitimate  
22 correctional goal.

23 Therefore, Plaintiff fails to state a claim for retaliation. She shall be granted leave to  
24 amend the complaint to address the deficiencies in this claim discussed by the court.

25 **F. Discrimination – Fourteenth Amendment Equal Protection Claim**

26 “The Equal Protection Clause requires the State to treat all similarly situated people  
27 equally.” Hartmann v. California Dep’t of Corr. & Rehab., 707 F.3d 1114, 1123 (9th Cir.  
28 2013) (citing see City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249,

1 87 L.Ed.2d 313 (1985)). “This does not mean, however, that all prisoners must receive  
2 identical treatment and resources.” Hartmann at 1123 (citing see Cruz v. Beto, 405 U.S. 319,  
3 322 n. 2 (1972); Ward v. Walsh, 1 F.3d 873, 880 (9th Cir. 1993); Allen v. Toombs, 827 F.2d  
4 563, 568–69 (9th Cir. 1987)).

5 “To prevail on an Equal Protection claim brought under § 1983, Plaintiff must allege  
6 facts plausibly showing that “the defendants acted with an intent or purpose to discriminate  
7 against [them] based upon membership in a protected class,”” Id. (citing see Thornton v. City of  
8 St. Helens, 425 F.3d 1158, 1166 (9th Cir. 2005) (quoting Lee v. City of Los Angeles, 250 F.3d  
9 668, 686 (9th Cir. 2001)), or that similarly situated individuals were intentionally treated  
10 differently without a rational relationship to a legitimate state purpose, Engquist v. Oregon  
11 Department of Agr., 553 U.S. 591, 601-02, 128 S.Ct. 2146 (2008); Village of Willowbrook v.  
12 Olech, 528 U.S. 562, 564, 120 S.Ct. 1073 (2000); Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580,  
13 592 (9th Cir. 2008); North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008)).

14 Plaintiff claims human rights violations against her and discrimination because of  
15 ethnicity and sexual orientation. However, Plaintiff has not alleged facts demonstrating that  
16 she was intentionally discriminated against on the basis of her membership in a protected class,  
17 or that she was intentionally treated differently than other similarly situated inmates without a  
18 rational relationship to a legitimate state purpose. Therefore, Plaintiff fails to state a claim for  
19 relief for violation of her right to equal protection.

20 **G. Access to Courts Claim**

21 Plaintiff alleges that she “couldn’t get access to materials for [a] legal purpose.” (ECF  
22 No. 1 at 8 ¶10.) These allegations suggest a claim for denial of access to the courts.

23 Inmates have a fundamental constitutional right of access to the courts and prison  
24 officials may not actively interfere with a plaintiff’s right to litigate. Lewis v. Casey, 518 U.S.  
25 343, 346 (1996); Phillips v. Hust, 588 F.3d 652, 655 (9th Cir. 2009). Courts have traditionally  
26 differentiated between two types of access claims, those involving the right to affirmative  
27 assistance, and those involving inmate’s right to litigate without *active interference*. Silva v. De  
28 Vittorio, 658 F.3d 1090, 1102 (emphasis added). The right to *assistance* is limited to direct

1 criminal appeals, habeas petitions, and civil rights actions. Lewis, 518 U.S. at 354 (emphasis  
2 added).

3 Prisoners have the right to pursue claims that have a reasonable basis in law or fact,  
4 without active interference. Silva, 658 F.3d at 1103–04 ((finding that repeatedly transferring  
5 the plaintiff to different prisons and seizing and withholding all of his legal files constituted  
6 active interference). Mere inconvenience to Plaintiff resulting from lost, misplaced, or  
7 confiscated legal documents will not suffice to support a constitutional claim. Id. at 1103–04.  
8 Inmates do not have the right to a law library or legal assistance. Lewis, 518 U.S. at 351. Law  
9 libraries and legal assistance programs are only the means of ensuring access to the courts. Id.  
10 Because inmates do not have “an abstract, freestanding right to a law library or legal assistance,  
11 an inmate cannot establish relevant actual injury by establishing that his prison’s law library or  
12 legal assistance program is sub-par in some theoretical sense.” Id.

13 Defendants’ actions must have been the proximate cause of actual prejudice to Plaintiff.  
14 Silva, 658 F.3d at 1103–04. To state a viable claim for relief, Plaintiff must show that she  
15 suffered an actual injury, which requires “actual prejudice to contemplated or existing  
16 litigation” by being shut out of court. Nevada Dep’t of Corr. v. Greene, 648 F.3d 1014, 1018  
17 (9th Cir. 2011) (citing Lewis, 518 U.S. at 348, 351); Christopher v. Harbury, 536 U.S. 403, 415  
18 (2002); Phillips, 588 F.3d at 655. The complaint should state the underlying claim in  
19 accordance with Federal Rule of Civil Procedure 8(a), just as if it were being independently  
20 pursued, and a like plain statement should describe any remedy available under the access  
21 claim and presently unique to it. Christopher, 536 U.S. 403.

22 Here, Plaintiff has not shown that she suffered an actual injury as described above.  
23 Therefore, Plaintiff fails to state a claim for denial of access to the courts.

24 **H. Fifth and Eleventh Amendment Claims**

25 Generally, the Fifth Amendment concerns the grand jury, double jeopardy, self-  
26 incrimination, due process, and takings. U.S. CONST. amend. V. The Eleventh Amendment  
27 prohibits federal courts from hearing suits brought against an unconsenting state. Brooks v.  
28 Sulphur Springs Valley Elec. Co., 951 F.2d 1050, 1053 (9th Cir. 1991) (internal citations

1 omitted); see also Tennessee v. Lane, 541 U.S. 509, 517 (2004); Idaho v. Coeur d'Alene Tribe  
2 of Idaho, 521 U.S. 261, 267-68 (1997); Clark v. California, 123 F.3d 1267, 1269 (9th Cir.  
3 1997).

4 Plaintiff indicates on the front of the Complaint that she brings claims under the Fifth  
5 and Eleventh Amendments. (ECF No. 1 at 6.) However, the court finds no allegations in  
6 Plaintiff's Complaint suggesting a claim for violation of either of these amendments. Plaintiff  
7 shall be granted leave to amend the Complaint to clarify these claims.

8 **V. CONCLUSION AND ORDER**

9 For the reasons set forth above, the court finds that Plaintiff fails to state any cognizable  
10 claims in the Complaint. Therefore, the court shall dismiss the Complaint, with leave to file an  
11 amended complaint curing the deficiencies in her claims found by the court.<sup>4</sup>

12 Under Rule 15(a) of the Federal Rules of Civil Procedure, “[t]he court should freely  
13 give leave to amend when justice so requires.” The court will provide Plaintiff with time to file  
14 an amended complaint curing the deficiencies identified above. Plaintiff is granted leave to file  
15 an amended complaint within thirty days. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir.  
16 1987).

17 The amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state what each  
18 named defendant did that led to the deprivation of Plaintiff's constitutional or other federal  
19 rights, Iqbal, 556 U.S. at 678; Jones, 297 F.3d at 934. Plaintiff must set forth “sufficient factual  
20 matter . . . to ‘state a claim that is plausible on its face.’” Id. at 678 (quoting Twombly, 550  
21 U.S. at 555). As noted above, there is no *respondeat superior* liability, and each defendant is  
22 only liable for his or her own misconduct. Iqbal, 556 U.S. at 677. Plaintiff must demonstrate  
23 that each defendant *personally* participated in the deprivation of her rights. Jones, 297 F.3d at  
24 934 (emphasis added). Plaintiff should note that although she has been given the opportunity to  
25 amend, it is not for the purpose of adding new defendants for unrelated issues. Plaintiff should

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27 <sup>4</sup> For any claims dismissed with prejudice and without leave to amend, Plaintiff is not required to include  
28 them in a subsequent amended complaint to preserve them for appeal. See Lacey, 693 F.3d at 928. However, for  
any claims voluntarily dismissed, the court will consider those claims to be waived if not replied. Id.

1 also note that she has not been granted leave to add allegations of events occurring after the  
2 initiation of this suit on May 4, 2017.

3 Plaintiff is advised that an amended complaint supercedes the original complaint,  
4 Lacey, 693 F. 3d at 907 n.1 (*en banc*), and it must be complete in itself without reference to the  
5 prior or superceded pleading. Local Rule 220. Once an amended complaint is filed, the  
6 original complaint no longer serves any function in the case. Therefore, in an amended  
7 complaint, as in an original complaint, each claim and the involvement of each defendant must  
8 be sufficiently alleged. The amended complaint should be clearly and boldly titled “First  
9 Amended Complaint,” refer to the appropriate case number, and be an original signed under  
10 penalty of perjury.

11 Based on the foregoing, **IT IS HEREBY ORDERED** that:

- 12 1. Plaintiff’s Complaint is dismissed for failure to state a claim, with leave to  
13 amend;
- 14 2. The Clerk’s Office shall send Plaintiff a civil rights complaint form;
- 15 3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file  
16 a First Amended Complaint curing the deficiencies identified in this order;
- 17 4. Plaintiff shall caption the amended complaint “First Amended Complaint” and  
18 refer to the case number 1:17-cv-00634-DAD-GSA-PC; and
- 19 5. Plaintiff’s failure to comply with this order shall result in a recommendation that  
20 this case be dismissed for failure to state a claim.

21 IT IS SO ORDERED.  
22

23 Dated: April 16, 2018

24 /s/ Gary S. Austin  
25 UNITED STATES MAGISTRATE JUDGE  
26  
27  
28