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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF CALIFORNIA  
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9 JERRY DILLINGHAM,

10 Plaintiff,

11 v.

12 F. GARCIA, et al.,

13 Defendants.  
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Case No. 1:18-cv-00579-LJO-EPG (PC)

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS AND DENYING  
MOTIONS

(ECF NOS. 1, 16, 17, 18, & 19)

15 Jerry Dillingham (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma*  
16 *pauperis* with this civil rights action filed pursuant to 42 U.S.C. § 1983. The matter was  
17 referred to a United States magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local  
18 Rule 302.

19 On November 28, 2018, Magistrate Judge Erica P. Grosjean entered findings and  
20 recommendations, recommending that “[t]his case proceed on Plaintiff’s claims against  
21 Defendant Garcia for conspiracy, retaliation in violation of the First Amendment, and excessive  
22 force and failure to protect in violation of the Eighth Amendment,” and that “[a]ll other claims  
23 and defendants be dismissed.” (ECF No. 17, p. 14).

24 Plaintiff was provided an opportunity to file objections to the findings and  
25 recommendations. Plaintiff filed objections to Judge Grosjean’s screening order and findings  
26 and recommendations (ECF Nos. 16 & 20), as well as a motion for extension of time to file an  
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1 amended complaint (ECF No. 18),<sup>1</sup> motions for appointment of counsel and a guardian ad  
2 lidem (ECF No. 16 p. 8; ECF No. 19), and an amended complaint (ECF No. 20, pgs. 6-104).

3 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 304, this  
4 Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file,  
5 the Court finds the findings and recommendations to be supported by the record and proper  
6 analysis.

7 As to Plaintiff's motion for extension of time, motions for appointment of counsel, and  
8 motion for appointment of a guardian ad lidem, they will all be denied.

9 Plaintiff's motions for appointment of counsel will be denied because, while Plaintiff  
10 alleges that he cannot adequately articulate his claims or prosecute this case, his current  
11 complaint (which was allegedly drafted with the assistance of another inmate) appears to  
12 adequately describe the claims Plaintiff is attempting to assert. Moreover, the Court has  
13 reviewed the record in this case, and at this time the Court cannot make a determination that  
14 Plaintiff is likely to succeed on the merits of his claims. Plaintiff is advised that he is not  
15 precluded from renewing his motion for appointment of pro bono counsel at a later stage of the  
16 proceedings

17 Plaintiff's motion for appointment of a guardian ad litem will be denied without  
18 prejudice because appointment of a guardian ad lidem is not necessary to protect Plaintiff's  
19 interests in this action at this time. Under Federal Rule of Civil Procedure 17(c)(2), "[t]he court  
20 must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or  
21 incompetent person who is unrepresented in an action." "Although the court has broad  
22 discretion and need not appoint a guardian ad litem if it determines the person is or can be  
23 otherwise adequately protected, it is under a legal obligation to consider whether the person is  
24 adequately protected." United States v. 30.64 Acres of Land, More or Less, Situated in  
25 Klickitat Cty., State of Wash., 795 F.2d 796, 805 (9th Cir. 1986). If an "incompetent person is

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27 <sup>1</sup> In Plaintiff's motion for extension of time, Plaintiff asks the Court to send him a copy of the motion  
28 (because he was unable to make a copy). (ECF No. 18, p. 4). This request will be denied. The Court does not  
generally provide free copies of documents to parties. Moreover, it does not appear that Plaintiff needs a copy of  
the motion in order to prosecute this case.

1 unrepresented, the court should not enter a judgment which operates as a judgment on the  
2 merits without complying with Rule 17(c).” Krain v. Smallwood, 880 F.2d 1119, 1121 (9th  
3 Cir. 1989).

4 Here, Plaintiff has not submitted substantial evidence of incompetence. At most,  
5 Plaintiff’s evidence shows that he has a low TABE score, and that he is in the disability  
6 placement program. Additionally, Plaintiff appears to be able to adequately describe the claims  
7 he is attempting to assert, although Plaintiff allegedly received assistance. He has also filed  
8 objections to Judge Grosjean’s findings and recommendations (which include case cites), and  
9 timely filed a motion for an extension of time.

10 Moreover, at this time, Plaintiff’s interests are adequately protected. All claims and  
11 defendants being dismissed will be dismissed without prejudice. This protects Plaintiff’s  
12 interests while also allowing the case to proceed.<sup>2</sup>

13 The Court notes that Plaintiff may renew his motion for appointment of a guardian ad  
14 litem at a later stage in the proceedings. At that time the Court may hold a hearing to determine  
15 if a guardian ad lidem should be appointed. Krain, 880 F.2d at 1121 (“The preferred procedure  
16 when a substantial question exists regarding the mental competence of a party proceeding pro  
17 se is for the district court to conduct a hearing to determine whether or not the party is  
18 competent, so that a representative may be appointed if needed.”).

19 As to Plaintiff’s motion for extension of time to file a first amended complaint, it will  
20 be denied, and the Court will not consider Plaintiff’s First Amended Complaint (which Plaintiff  
21 filed without permission). To begin, Plaintiff did not file timely file his motion for extension of  
22 time. On September 7, 2018, the Court gave Plaintiff thirty days to file an amended complaint,  
23 if he so chose. (ECF No. 12). Even after being granted a thirty-day extension of time (ECF  
24 No. 15), Plaintiff’s second request for an extension of time was still over a month late, and  
25 Plaintiff did not adequately explain why he did not timely file his second request for an  
26 extension of time. Moreover, the Court has reviewed Plaintiff’s proposed first amended

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28 <sup>2</sup> Note that Judge Grosjean will consider appointing counsel for the limited purpose of assisting Plaintiff  
at a settlement conference at the appropriate time.

1 complaint, and it appears to suffer from most of the same defects as the original complaint.

2 While the Court is denying Plaintiff's motion for extension of time, the Court notes that  
3 Plaintiff is not precluded from filing a motion for leave to file an amended complaint at a later  
4 time.

5 Accordingly, based on the foregoing, THE COURT HEREBY ORDERS that:

- 6 1. The findings and recommendations issued by the magistrate judge on November  
7 28, 2018, are ADOPTED in full;
- 8 2. This action proceed on Plaintiff's original complaint (ECF No. 1), on Plaintiff's  
9 claims against Defendant Garcia for conspiracy, retaliation in violation of the  
10 First Amendment, and excessive force and failure to protect in violation of the  
11 Eighth Amendment;
- 12 3. All other claims and defendants are DISMISSED, without prejudice;
- 13 4. Plaintiff's motions for appointment of counsel are DENIED, without prejudice;
- 14 5. Plaintiff's motion for appointment of a guardian ad litem is DENIED, without  
15 prejudice;
- 16 6. Plaintiff's motion for an extension of time to file a first amended complaint is  
17 DENIED;
- 18 7. The Clerk of Court is DIRECTED to reflect the dismissal of all defendants,  
19 except defendant F. Garcia, on the Court's docket; and
- 20 8. This case is referred back to the magistrate judge for further proceedings.

21 IT IS SO ORDERED.  
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23 Dated: January 10, 2019

/s/ Lawrence J. O'Neill  
24 UNITED STATES CHIEF DISTRICT JUDGE  
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