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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WESLEY MITCHELL,
Plaintiff,
v.
MATTHEW L. CATE, et al.,
Defendants.

No. 2:11-cv-1240 JAM AC P

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this action filed pursuant to 42 U.S.C. § 1983. The court currently has before it defendants’ motion for summary judgment, which argues that they did not violate plaintiff’s constitutional rights under the First, Eighth, or Fourteenth Amendments and, alternatively, that they are entitled to qualified immunity. ECF No. 65. Plaintiff has filed a response (ECF No. 84) and defendants have replied (ECF No. 87).

I. Plaintiff’s Allegations

On May 4, 2011, plaintiff submitted his ten count complaint. ECF No. 1. The complaint made various allegations against defendants Matthew Cate, Scott Kernan, Steven Chapman, Mike McDonald, R.L. Gower, D. Davey, D. Clark, D. Van Leer, A. Sanders, Harkness, R. Miranda,

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1 unknown Clark (hereinafter J. Clark),¹ and Dangler² arising out of plaintiff's placement in
2 administrative segregation between October 6, 2009, and May 26, 2010. Id. at 6, 13, ¶¶ 24, 92.³
3 According to the complaint, plaintiff was placed in administrative segregation as a result of his
4 alleged membership or association with the "2-5" disruptive group. Id. at 6, ¶ 26.

5 In Count I, plaintiff alleged that defendants McDonald, D. Clark,⁴ Chapman, Kernan, and
6 Dangler violated his First Amendment rights by deliberately interfering with his administrative
7 grievances, thereby denying him access to the courts. Id. at 19, ¶ 149.

8 Count II alleged that defendants McDonald, Davey, Cate, Sanders, Van Leer, Chapman,
9 and Kernan violated his First Amendment rights by burdening his practice of his sincere Christian
10 faith without a legitimate penological reason. Id. at 20, ¶ 150. Plaintiff alleged that he was not
11 allowed to participate in religious activities or services or to speak with a religious advisor. Id. at
12 15-16, 18, ¶¶ 119, 126, 141.

13 Count III alleged that defendants McDonald, Davey, Cate, Van Leer, and Sanders violated
14 his Eighth Amendment rights by depriving him of any outdoor exercise from October 6, 2009,
15 through May 31, 2010. Id. at 20, ¶ 151.

16 Count IV alleged that defendants McDonald, Davey, Van Leer, and Sanders violated his
17 Eighth Amendment rights by subjecting him to extreme cold for a prolonged period of time. Id.,
18 ¶ 152. Plaintiff alleged that between October 6, 2009, and November 20, 2009, he was not
19 provided with sheets or blankets or any clothing other than boxer shorts despite the extremely
20 cold temperatures in his cell. Id. at 10-11, ¶¶ 58, 64-67, 73, 74.

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23 ¹ "Unknown" Clark was ultimately identified as J. Clark. ECF No. 21.

24 ² Defendant Dangler was not identified in plaintiff's list of defendants (ECF No. 1 at 3-4), but
was identified as a defendant later in the complaint (id. at 19, ¶ 149).

25 ³ References to page numbers in filed documents reflect the court's electronic pagination, not the
page numbers designated by the parties on the original documents.

26 ⁴ Plaintiff did not specify which defendant Clark he was referring to in Count I (ECF No. 1 at 19,
27 ¶ 149), but D. Clark was identified as a correctional counselor who was responsible for
classification and was also an appeals coordinator (id. at 3, ¶ 12) while J. Clark was identified as
28 a nurse (id. at 4, ¶ 17). Given the allegations it is clear the intended defendant was D. Clark.

1 Count V alleged that defendants McDonald, Davey, Van Leer, and Sanders violated
2 plaintiff's Eighth Amendment rights by depriving him of essential hygiene items. Id. at 20, ¶
3 153. Specifically, he claims that he was denied soap, toilet paper, toothpaste, and a toothbrush
4 between October 6, 2009, and October 10, 2009. Id. at 10-11, ¶¶ 58, 62, 68. He also alleged that
5 defendants J. Clark and Miranda violated his Eighth Amendment rights by denying him timely
6 medical care despite being aware of the pain he was suffering. Id. at 20, ¶ 153.

7 Count VI alleges that defendants McDonald, Davey, Cate, Sanders, Van Leer, and Gower
8 violated plaintiff's Fourteenth Amendment rights when they placed him in administrative
9 segregation without providing him with the required due process. Id. at 20, ¶ 154. Defendants
10 allegedly placed him in administrative segregation without providing him with a hearing,
11 information about the charges or reason for segregation, or an opportunity to present a response.
12 Id. at 6, 10, ¶¶ 25, 59. He was also denied periodic reviews of his placement in segregation. Id.
13 at 6, ¶ 25.

14 Count VII alleges that defendants McDonald, Gower, Davey and Sanders violated his
15 Fourteenth Amendment due process rights by failing to provide him with meaningful notice that
16 he was under consideration for gang member validation. Id. at 6-7, 21, ¶¶ 27, 155. Plaintiff
17 alleges that the defendants failed to provide notice that he had been designated as being an active
18 gang member or associate, notice of the evidence relied on to make that determination, a hearing
19 before the classification committee, advance notice of the hearing, and an opportunity to express
20 his views regarding his proposed validation. Id.

21 Count VIII alleges that defendants McDonald, Gower, Davey, Van Leer, D. Clark,⁵
22 Chapman, and Sanders violated plaintiff's Fourteenth Amendment right to equal protection when
23 they treated him differently than other similarly classified inmates, other inmates in
24 administrative segregation for investigation, and other inmates placed in disciplinary segregation
25 for misconduct. Id. at 21-22, ¶ 156.

26 ⁵ Plaintiff did not specify which defendant Clark he was referring to in Count VIII (ECF No. 1 at
27 21-22, ¶ 156), but given the allegations relating to classification, it is clear the intended defendant
28 was D. Clark.

1 Count IX alleges that defendants McDonald, Gower, Clark,⁶ Kernan, Sanders, Van Leer,
2 and Davey conspired to deprive him of his constitutional rights in violation of 42 U.S.C. § 1985.
3 Id. at 22, ¶ 157.

4 Count X alleges that all named defendants violated plaintiff's state law rights, including
5 his rights to due process; free exercise of religion; and to be free from cruel and unusual
6 punishment, retaliation, and indifference to serious medical conditions. Id., ¶ 158.

7 II. Procedural History

8 On September 14, 2011, the complaint was screened by the previously assigned
9 magistrate judge who found that it stated "a colorable claim for relief against defendants
10 McDonald, Gower, Davey, Van Leer, Sanders, Miranda and Clark." ECF No. 9 at 3. The order
11 did not specify which defendant Clark the complaint stated a claim against. The court found that
12 plaintiff had stated claims for (1) inadequate medical care; (2) violations of due process to the
13 extent that plaintiff's alleged conditions of confinement during the modified program were
14 imposed without any procedural safeguards and "imposed a 'freedom from restraint' that
15 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of
16 prison life;" (3) deprivation of outdoor exercise for a period of eight months; and (4) denial of
17 participation in religious activities for an eight-month period. Id. at 4. The court also
18 acknowledged an Eighth Amendment conditions of confinement claim related to plaintiff being
19 subject to extremely cold temperatures his first two nights in segregation and having only boxer
20 shorts and shower shoes from October 6 to November 20, 2009. Id.

21 The claims against defendants Cate, Kernan, Chapman, Harkness, and Dangler were
22 dismissed (id. at 7) and the court later confirmed that plaintiff's cognizable due process claims
23 did not include "claims associated with plaintiff's allegations related to gang validation" (ECF
24 No. 96 at 14, n.8 (citing ECF No. 9 at 4)). The screening order made no mention of plaintiff's
25 claims for violation of his First Amendment right to access the courts (Count I [ECF No. 1 at 19,
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27 ⁶ It is not clear which defendant Clark plaintiff intended to bring this claim against, but given the
28 other defendants named in this count plaintiff likely intended to name D. Clark.

1 ¶ 149]), violation of his Fourteenth Amendment equal protection rights (Count VIII [ECF No. 1
2 at 21-22, ¶ 156]), conspiracy to deprive him of his constitutional rights in violation of 42 U.S.C. §
3 1985 (Count IX [ECF No. 1 at 22, ¶ 157]), and violation of his state law rights (Count X [ECF
4 No. 1 at 22, ¶ 158]). ECF No. 9.

5 Plaintiff was given the option of amending the complaint or proceeding against defendants
6 McDonald, Gower, Davey, Van Leer, Sanders, Miranda, and Clark without amending the
7 complaint. *Id.* at 6-7. Plaintiff opted to proceed with the complaint rather than file an amended
8 complaint. ECF No. 12. Service was ordered on defendants McDonald, Gower, Davey, Van
9 Leer, Sanders, Miranda, and Clark (ECF No. 13) and defendants Cate, Kernan, Chapman,
10 Harkness, and Dangler were dismissed (ECF No. 17).

11 After service of the complaint, defendant J. Clark moved for clarification of the screening
12 order (ECF No. 9) and the order and findings and recommendations that ordered service on some
13 defendants while recommending dismissal of others (ECF No. 13). ECF No. 21. Defendant J.
14 Clark sought to clarify which defendant Clark the court found the complaint stated cognizable
15 claims against. *Id.* The court granted the motion and clarified that the complaint proceeded
16 against defendant J. Clark and recommended that defendant D. Clark be dismissed. ECF No. 24.
17 No objections were filed and D. Clark was dismissed. ECF No. 31.

18 Defendant Miranda filed a motion to dismiss for failure to state a claim (ECF No. 29) and
19 defendants J. Clark, Davey, Gower, McDonald, Sanders, and Van Leer filed a motion to dismiss
20 for failure to exhaust administrative remedies (ECF No. 30).⁷ Defendant Miranda joined in the

21 ⁷ This matter was resolved prior to the Ninth Circuit's decision in Albino v. Baca, which requires
22 that questions of administrative exhaustion be decided pursuant to motions for summary
23 judgment. 747 F.3d 1162, 1166 (9th Cir. 2014). Although the exhaustion issue was decided on a
24 motion to dismiss, which was appropriate at the time of disposition, defendants submitted their
25 supporting evidence, and plaintiff was advised of the importance of responding to the motion and
26 presenting his own supporting evidence (ECF No. 39), just as would have occurred on a motion
27 for summary judgment. The court found that the exhausted appeal put forth by plaintiff did not
28 raise issues of unsafe confinement and he did not make any showing of filing grievances
regarding the exhaustion of grievances related to temperature or clothing. ECF No. 48 at 17.
Plaintiff did not object to the findings and recommendations, which were adopted by the District
Judge. ECF No. 49. No facts were in dispute so there is no need for further factual development
on the exhaustion issue. Accordingly, Albino does not affect the decision in this case. See
(continued)

1 other defendants' motion to dismiss. ECF No. 36. The case was reassigned to the undersigned
2 (ECF No. 47), who recommended that defendant Miranda's motion to dismiss be granted (ECF
3 No. 48). The motion to dismiss defendant Miranda was granted without prejudice to amendment
4 and plaintiff was granted twenty-eight days to file an amended complaint. ECF No. 49. Plaintiff
5 did not amend the complaint and defendant Miranda was dismissed from this action. ECF No.
6 52. Defendants J. Clark, Davey, Gower, McDonald, Sanders, and Van Leer's motion to dismiss
7 was granted only as to plaintiff's claim that his "Eighth Amendment rights were violated by
8 exposure to extreme cold without adequate clothing and/or linens" (Count IV [ECF No. 1 at 20, ¶
9 152]). ECF No. 49. In analyzing the motion to dismiss, the court noted that plaintiff had
10 exhausted an appeal regarding his loss of canteen privileges, which "could be relevant to the
11 claim that defendants deprived plaintiff of toiletries necessary to basic hygiene, which is an aspect
12 of the alleged Eighth Amendment violation" (ECF No. 48 at 11, n.3), though this claim had not
13 previously been acknowledged (ECF No. 9 at 3-4).

14 Upon disposition of the motions to dismiss, the following claims remained: (1) Count II
15 against defendants McDonald, Davey, Sanders, and Van Leer for violating plaintiff's First
16 Amendment rights by preventing him from practicing his religion; (2) Count III against
17 defendants McDonald, Davey, Van Leer, and Sanders for depriving plaintiff of outdoor exercise
18 for a period of nearly eight months; (3) Count V against defendant J. Clark for being deliberately
19 indifferent to plaintiff's serious medical need; and (4) Count VI against defendants McDonald,
20 Davey, Sanders, Van Leer, and Gower for placing plaintiff in administrative segregation without
21 the required due process.

22 Plaintiff and defendants J. Clark, Davey, Gower, McDonald, Sanders, and Van Leer filed
23 motions for summary judgment. ECF Nos. 64, 65. Plaintiff's motion was denied (ECF No. 102),
24 and defendants' motion is currently pending.

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27 McBride v. Lopez, 791 F.3d 1115, 1118 (9th Cir. 2015) (Albino does not affect decision where
28 there is no need for further factual development).

1 III. Failure to State a Claim

2 Plaintiff's First Amendment access to the courts, Eighth Amendment conditions of
3 confinement (sanitation), Fourteenth Amendment equal protection, conspiracy, and state law
4 claims were not acknowledged in the screening order, nor were they explicitly dismissed. See
5 ECF No. 9. Therefore, before discussing defendants' motion for summary judgment, the court
6 will explain why each of these counts should be dismissed for failure to state a claim.

7 A. Count I: First Amendment (Access to the Courts)

8 In the complaint, plaintiff alleges that defendant McDonald⁸ violated his First Amendment
9 right to access the courts by "deliberately and/or constructively interfering with his administrative
10 grievances thus denying him adequate and effective court access." ECF No. 1 at 19, ¶ 149. In
11 recommending dismissal of defendant D. Clark, the court addressed why Count I failed to state a
12 claim against D. Clark. ECF No. 24 at 3-6. For the same reasons Count I failed to state a claim
13 against D. Clark, it fails to state a claim against defendant McDonald, and Count I against
14 defendant McDonald should be dismissed.

15 B. Count V: Eighth Amendment (Sanitation)

16 Though not mentioned in the screening order, the court later indicated that plaintiff's
17 conditions of confinement claim also encompassed the alleged deprivation of toiletries necessary
18 to basic hygiene (ECF No. 1 at 20, ¶ 153). ECF No. 48 at 11, n.3. However, plaintiff's
19 conditions of confinement claim against defendants McDonald, Davey, Van Leer, and Sanders
20 fails to state a claim.

21 "The Constitution does not mandate comfortable prisons, but neither does it permit
22 inhumane ones." Farmer v. Brennan, 511 U.S. 825, 832 (1994) (internal quotation marks and
23 citation omitted). A prison official violates the Eighth Amendment only when two requirements
24 are met. Id. at 834. "First, the deprivation alleged must be, objectively, sufficiently serious, a
25 prison official's act or omission must result in the denial of the minimal civilized measure of
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27 ⁸ As noted above in Section II, defendants D. Clark, Chapman, Kernan, and Dangler have already
28 been dismissed from the case.

1 life's necessities." Id. (internal quotation marks and citations omitted). Second, the prison
2 official must subjectively have a sufficiently culpable state of mind, one of deliberate indifference
3 to inmate health or safety. Id. The official is not liable under the Eighth Amendment unless he
4 knows of and "disregards an excessive risk to inmate health or safety; the official must both be
5 aware of facts from which the inference could be drawn that a substantial risk of serious harm
6 exists, and he must also draw the inference." Id. at 837. Then he must fail to take reasonable
7 measures to abate the substantial risk of serious harm. Id. at 847. Mere negligent failure to
8 protect an inmate from harm is not actionable under § 1983. Id. at 835-36.

9 Although prison conditions may be restrictive and harsh, Rhodes v. Chapman, 452 U.S.
10 337, 347, (1981), prison officials must provide prisoners with food, clothing, shelter, sanitation,
11 medical care, and personal safety, Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir. 1981)
12 (citing Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978)). "What is necessary to show sufficient
13 harm for purposes of the Cruel and Unusual Punishment Clause depends upon the claim at issue."
14 Hudson v. McMillian, 503 U.S. 1, 8 (1992). "The objective component of an Eighth Amendment
15 claim is therefore contextual and responsive to 'contemporary standards of decency.'" Id.
16 (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). "[E]xtreme deprivations are required to
17 make out a[n] [Eighth Amendment] conditions-of-confinement claim." Id. at 9. With respect to
18 this type of claim, "[b]ecause routine discomfort is part of the penalty that criminal offenders pay
19 for their offenses against society, only those deprivations denying the minimal civilized measure
20 of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation."
21 Id. (internal quotation marks and citations omitted).

22 While the Eighth Amendment guarantees sanitation, Wright, 642 F.2d at 1132-33,
23 including personal hygiene supplies such as soap and toothpaste, Keenan v. Hall, 83 F.3d 1083,
24 1091 (9th Cir. 1996), temporarily substandard conditions of confinement do not rise to the level
25 of constitutional violations, see Anderson v. County of Kern, 45 F.3d 1310, 1314 (9th Cir. 1995);
26 Hoptowit v. Ray, 682 F.2d 1237, 1258 (9th Cir. 1982) (court may consider time prisoners go
27 without benefits, the longer the deprivation, the more likely there will be an "unwarranted
28 infliction of pain"), abrogated on other grounds by Sandin v. Conner, 515 U.S. 472, (1995).

1 Some conditions of confinement may establish an Eighth
2 Amendment violation “in combination” when each would not do so
3 alone, but only when they have a mutually enforcing effect that
4 produces the deprivation of a single, identifiable human need such
5 as food, warmth, or exercise—for example, a low cell temperature
6 at night combined with a failure to issue blankets. . . . To say that
7 some prison conditions may interact in this fashion is a far cry from
8 saying that all prison conditions are a seamless web for Eighth
9 Amendment purposes. Nothing so amorphous as “overall
10 conditions” can rise to the level of cruel and unusual punishment
11 when no specific deprivation of a single human need exists.

12 Wilson v. Seiter, 501 U.S. 294, 304 (1991) (emphasis in original).

13 First, plaintiff’s allegations related to the deprivation of hygiene items fail to state a claim
14 because plaintiff has failed to allege any facts that would demonstrated that McDonald, Davey,
15 Van Leer, or Sanders were aware of the deprivation. There is no indication that any of these
16 individuals were responsible for or prevented the distribution of hygiene items. Nor are there any
17 facts that would demonstrate that any of these individuals was advised of the deprivation either
18 through the appeals process or some other form of communication. The complaint alleges that
19 hygiene items were requested from “building staff,” but does not identify any of the defendants as
20 the “building staff” to whom requests were made. If defendants were not aware of the
21 deprivation, they would be unable to form the requisite intent to be liable under the Eighth
22 Amendment. However, even if plaintiff could amend the complaint to allege sufficient facts to
23 show defendants were aware of the deprivation of hygiene items, the claim still fails because the
24 deprivation was not “objectively, sufficiently serious.”

25 In this case, plaintiff alleges that he was denied soap, toilet paper, toothpaste, and a
26 toothbrush between October 6, 2009, and October 10, 2009. ECF No. 1 at 10-11, ¶¶ 58, 62, 68.
27 Plaintiff’s deprivation of soap, toilet paper, toothpaste, and a toothbrush for four days does not
28 rise to the level of an Eighth Amendment violation. See Murillo v. Bueno, No. 1:12-cv-00095-
LJO-DLB PC, 2013 WL 1731393, at *1-2, 2013 U.S. Dist. LEXIS 57710, at *3-7 (E.D. Cal. Apr.
20, 2013, adopted in full May 17, 2013) (prisoner not provided with toothbrush, toothpaste, soap,
toilet paper, or deodorant for approximately five days while housed in holding cell failed to state
a claim); Lopez v. Cate, No. 1:10-cv-01773-AWI-SKO PC, 2013 WL 239097, at *8, 2013 U.S.

1 Dist. LEXIS 8630, at *22-23 (E.D. Cal. Jan. 22, 2013, adopted in full Mar. 19, 2013⁹)
2 (deprivation of toilet paper, toothbrush, and toothpowder for approximately seven days does not
3 rise to level of Eighth Amendment violation); Harris v. Fleming, 839 F.2d 1232, 1234-35 (7th
4 Cir. 1988) (depriving prisoner of toilet paper for five days and soap, toothpaste and toothbrush for
5 ten days while housing him in filthy, roach-infested cell was not a constitutional violation);
6 Williams v. Delo, 49 F.3d 442, 444-45 (8th Cir. 1995) (placement in strip cell without water,
7 mattress, a toothbrush, toothpaste, deodorant, soap, sheets, blankets, pillow cases, pillows, his
8 legal mail and/or clothing, for four days did not violate Eighth Amendment).

9 Though some cases have found an Eighth Amendment claim where the deprivations
10 included the failure to provide soap, toilet paper, toothpaste, and a toothbrush, those cases are
11 distinguishable from the instant case because the deprivations alleged included additional
12 deprivations, such as inadequate heat¹⁰ or no access to water. Holloway v. Cohen, 61 F. App'x.
13 435, 436-37 (9th Cir. 2003) (four day deprivation of clothing, mattress, additional blankets, toilet
14 paper, and ability to shower while vents blew cold air into cell night and day sufficient to state a
15 claim (citing Wilson, 501 U.S. at 304, for principle that low cell temperature combined with
16 failure to issue blankets may establish Eighth Amendment violation));¹¹ Johnson v. Runnels, No.
17 2:04-cv-776-LKK-EFB P, 2013 WL 3940884, at *10-11, 2013 U.S. Dist. LEXIS 106783, at *33-
18 34 (E.D. Cal. July 30, 2013, adopted in full Dec. 13, 2013¹²) (approximately nine day deprivation
19 of sufficiently warm cell, sufficient clothing, sanitary bedding, hygiene items, showers, and
20 medical slips states a claim, but noting that “deprivation of hygiene items and showers may not
21 alone have been serious enough to violate the Eighth Amendment due to the short time period

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23 ⁹ 2013 WL 1151980; 2013 U.S. Dist. LEXIS 38115.

24 ¹⁰ Plaintiff's allegations regarding inadequate heat were previously dismissed as unexhausted.
25 ECF No. 49.

26 ¹¹ Because deprivations of warmth and sanitation do not “have a mutually enforcing effect that
27 produces the deprivation of a single, identifiable human need,” they cannot be combined to
28 constitute “overall conditions” that are unconstitutional. Wilson, 501 U.S. at 304-305. Therefore,
the court's citation to Wilson indicates that the conditions that stated a claim were those related to
the denial of adequate heat, especially in consideration of the cases finding no claim where only
allegations related to sanitation existed.

¹² 2013 WL 6576044; 2013 U.S. Dist. LEXIS 175360.

1 involved”); Conley v. Mahoney,¹³ No. CV 08-19-H-DWM-RKS, 2008 WL 5435336, at *4 (D.
2 Mont. May 1, 2008) (deprivation of clothing, bedding, toilet paper, running water, and ability to
3 shower for eight days in cold unsanitary conditions states a claim).

4 There are no allegations that plaintiff was deprived of running water, that his living
5 conditions were otherwise unsanitary, or that he suffered any harm from the deprivations he did
6 allege. The short-term deprivation suffered by plaintiff is therefore insufficient to state a claim.
7 Additionally, plaintiff states that he was able to obtain “a small amount of toilet paper” on
8 October 7, 2009 (id. at 10, ¶ 63), and so was not without toilet paper for the entire four day period
9 at issue. For these reasons, plaintiff’s Eighth Amendment conditions of confinement claim
10 related to the deprivation of hygiene items should be dismissed.

11 C. Count VIII: Fourteenth Amendment (Equal Protection)

12 The Equal Protection Clause requires the State to treat all similarly situated people
13 equally. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). “To state a claim
14 for violation of the Equal Protection Clause, a plaintiff must show that the defendant acted with
15 an intent or purpose to discriminate against him based upon his membership in a protected class.”
16 Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003). Prison classifications that burden
17 fundamental rights but are not based on race generally pass constitutional muster if they are
18 “reasonably related” to “legitimate penological interests.” See Johnson v. California, 543 U.S.
19 499, 509-510 (2005) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)). “Gang membership is not
20 a suspect class.” Allen v. Hubbard, No. CV 11-4056-SJO (PJW), 2011 WL 6202910, at *4, 2011
21 U.S. Dist. LEXIS 143164, at *12 (C.D. Cal. Oct. 12, 2011 adopted Dec. 8, 2011); Watt v.
22 Runnels, No. 2:03-cv-01928-JKS-GGH-P, 2007 WL 2898563, at *1 n.1, 2007 U.S. Dist. LEXI
23 72628, at *3 (E.D. Cal. Sept. 28, 2007) (classification by gang membership or affiliation is not

24
25 ¹³ In Conley, the District Court for the District of Montana also collected cases where the alleged
26 conditions of confinement were determined to have stated a claim. 2008 WL 5435336, at *4.
27 Though the majority of the cases cited were cases where the plaintiff stated a claim related to
28 sanitation, all of the cases are distinguishable from the instant case because in addition to the
deprivations alleged here, they also included allegations that the inmates were housed in cells
with pit toilets or no toilets, no access to water or a sink, or both. Id.

1 suspect); Medina v. Gomez, No. C 93-1774 TEH, 1997 WL 488588, at *6, 1997 U.S. Dist.
2 LEXIS 12208, at *19 (N.D. Cal. Aug. 14, 1997) (“[G]ang membership bears none of the
3 ‘traditional indicia of suspectness.’”) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411
4 U.S. 1, 28 (1973)).

5 Plaintiff alleges that defendants McDonald, Gower, Davey, Van Leer, and Sanders
6 violated his rights by providing “disparate treatment between plaintiff and other prisoners
7 classified as ‘A1-A’; other CDCR inmates placed into ASU for investigation into disruptive
8 group/gang investigation; and other prisoners placed in disciplinary segregation for alleged
9 misconduct.” ECF No. 1 at 21, ¶ 156. He claims that these classifications burdened his
10 fundamental right to court access by preventing adequate access to the administrative appeals
11 process. Id. at 22, ¶ 156. The imposed segregation was based on his alleged membership or
12 association with the “2-5” gang or disruptive group, which had recently been involved in assaults
13 on other inmates and staff. Id. at 6, ¶ 26.

14 Plaintiff does not allege any racial or other discriminatory bias for his placement in
15 administrative segregation. Nor does he allege that any other inmates that were held in
16 administrative segregation as suspected 2-5 members or affiliates, the most essential defining
17 characteristic of the group, were treated any differently than he was. Though he argues that he
18 was treated differently than other inmates with his A1-A classification score and other inmates in
19 segregation, there is no indication that those other inmates were suspected to be members or
20 affiliates of the 2-5 disruptive group or otherwise suspected of being involved in the kind of
21 large-scale, violent disruption that was the focus of the 2-5 investigation. “Similarly situated”
22 persons are those “who are in all relevant respects alike.” Nordlinger v. Hahn, 505 U.S. 1, 10
23 (1992). There is nothing to show that these other groups of inmates were similarly situated to
24 plaintiff beyond a single over-lapping factor of classification score or segregation status.

25 Plaintiff’s allegations of equal protection violations are no more than due process claims
26 of “atypical and significant hardship.” In fact, plaintiff highlights the differences between the
27 conditions he was subject to and those of other inmates in various classification groups under the
28 heading “Atypical and Significant Hardship/Major Disruption in Environment.” ECF No. 1 at 14.

1 The undersigned finds nothing in plaintiff's complaint that would, if true, support a cause of
2 action for violation of plaintiff's right to equal protection against any defendant.

3 D. Count IX: Conspiracy

4 To state a cause of action under § 1985(3), a complaint must allege
5 (1) a conspiracy, (2) to deprive any person or a class of persons of
6 the equal protection of the laws, or of equal privileges and
7 immunities under the laws, (3) an act by one of the conspirators in
8 furtherance of the conspiracy, and (4) a personal injury, property
9 damage or a deprivation of any right or privilege of a citizen of the
10 United States.

11 Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980) (citing Griffin v. Breckenridge, 403 U.S.
12 88, 102-103 (1971)). “[T]here must be some racial, or perhaps otherwise class-based, invidiously
13 discriminatory animus behind the conspirators’ action.” Griffin, 403 U.S. at 102. To state a
14 claim under § 1985(3) for a non-race-based class, the Ninth Circuit requires “either that the
15 courts have designated the class in question a suspect or quasi-suspect classification requiring
16 more exacting scrutiny or that Congress has indicated through legislation that the class required
17 special protection.” Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (quoting
18 Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985)). “[T]he absence of a section 1983
19 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same
20 allegations.” Caldeira v. County of Kauai, 866 F.2d 1175, 1182 (9th Cir. 1989) (citing Cassettari
21 v. Nevada County, 824 F.2d 735, 739 (9th Cir. 1987)).

22 Here, plaintiff's allegations of a conspiracy fail to state a claim upon which relief may be
23 granted. There are no facts to support that there was a race-based, discriminatory motive behind
24 defendants' actions, that plaintiff is a member of a suspect or quasi-suspect class, or that he is part
25 of a class that Congress has indicated requires special protection. While prisoners can be
26 members of a protected class by virtue of their race, religion, or other recognized protected status,
27 the fact that plaintiff is a prisoner does not itself qualify him as a member of a protected class.
28 Webber v. Crabtree, 158 F.3d 460, 461 (9th Cir. 1998); see also Pryor v. Brennan, 914 F.2d 921,
923 (7th Cir. 1990) (“Prisoners do not constitute a suspect class.”); Moss v. Clark, 886 F.2d 686,
690 (4th Cir. 1989) (“The status of incarceration is neither an immutable characteristic, nor an

1 invidious basis of classification.”). Nor is there authority to find that inmates classified as “A1-
2 A,” inmates in administrative segregation for investigation, or inmates placed in disciplinary
3 segregation for misconduct (ECF No. 1 at 21, ¶ 156) are part of a suspect or quasi-suspect class.

4 Additionally, there is absolutely no indication of any agreement between any of the
5 defendants. Mere joint employment by the California Department of Corrections and
6 Rehabilitation is insufficient to establish the common objective required for a conspiracy.
7 Finally, as set forth below in Section VIII, the undersigned recommends that defendants’ motion
8 for summary judgment be granted, thereby dismissing plaintiff’s remaining claims under § 1983.
9 Plaintiff’s claim for conspiracy under § 1985 cannot survive without a cognizable claim under §
10 1983. For these reasons, plaintiff’s § 1985 conspiracy claim should be dismissed.

11 E. Count X: State Law Claims

12 Subject to the conditions set forth in 28 U.S.C. § 1367(c), district courts may decline to
13 exercise supplemental jurisdiction over state law claims. Acri v. Varian Associates, Inc., 114
14 F.3d 999, 1000 (9th Cir. 1997) (en banc). The court’s decision whether to exercise supplemental
15 jurisdiction should be informed by values of “economy, convenience, fairness, and comity.” Id.
16 at 1001 (citations omitted). Further, primary responsibility for developing and applying state law
17 rests with the state courts. Therefore, when federal claims are eliminated before trial, district
18 courts should usually decline to exercise supplemental jurisdiction. Carnegie-Mellon Univ. v.
19 Cohill, 484 U.S. 343, 350 (1988); Gini v. Las Vegas Metro. Police Dept., 40 F.3d 1041, 1046 (9th
20 Cir. 1994) (“[I]n the usual case in which federal-law claims are eliminated before trial, the
21 balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state
22 law claims.”) (quoting Schneider v. TRW Inc., 938 F.2d 986, 993 (9th Cir. 1991)). As outlined
23 below in Section VIII, it is recommended that defendants’ motion for summary judgment be
24 granted and the remaining federal-law claims be dismissed. The undersigned therefore
25 recommends that the court decline to exercise supplemental jurisdiction over plaintiff’s state law
26 claims.

27 //////

28 //////

1 IV. Defendants' Summary Judgment Motion

2 Defendants J. Clark, Davey, Gower, McDonald, Sanders, and Van Leer move for
3 summary judgment on the grounds that defendants Davey, Gower, Sanders, and Van Leer did not
4 have authority to begin, end, or adjust the modified program¹⁴ (ECF No. 65-1 at 10, 29-30) and
5 that plaintiff was not entitled to procedural protections when he was placed on modified program
6 (id. at 10, 30-32). Defendants Davey, Gower, McDonald, Sanders, and Van Leer also argue that
7 they did not violate plaintiff's First or Eighth Amendment rights because the restrictions in place
8 during the modified program were reasonable and related to a legitimate penological interest. Id.
9 at 10, 32-39. Defendant J. Clark argues that he was not deliberately indifferent to plaintiff's
10 medical needs because plaintiff did not have a serious medical need and defendant Clark provided
11 plaintiff with appropriate treatment. Id. at 10, 39-42. Finally, all defendants argue that they are
12 entitled to qualified immunity. Id. at 10, 42-44.

13 V. Plaintiff's Opposition

14 It is well-established that the pleadings of pro se litigants are held to "less stringent
15 standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972)
16 (per curiam). Nevertheless, "[p]ro se litigants must follow the same rules of procedure that
17 govern other litigants." King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987), overruled on other
18 grounds, Lacey v. Maricopa County, 693 F.3d 896 (9th Cir. 2012) (en banc). However, the
19 unrepresented prisoners' choice to proceed without counsel "is less than voluntary" and they are
20 subject to the "handicaps . . . detention necessarily imposes upon a litigant," such as "limited
21 access to legal materials" as well as "sources of proof." Jacobsen v. Filler, 790 F.2d 1362,
22 1364-65 & n.4 (9th Cir. 1986). Inmate litigants, therefore, should not be held to a standard of

23 ¹⁴ Though defendants introduce the argument regarding authority to control the modified
24 program as covering defendants Davey, Gower, Sanders, and Van Leer, the argument itself
25 addresses only defendants Sanders and Van Leer. ECF No. 65-1 at 10, 29-30. With respect to
26 defendants Davey, Gower, and Van Leer, absent a claim that they made recommendations that
27 were not followed (e.g. allowing 2-5 members outdoor exercise or religious group activities), this
28 argument is without merit in light of their duties to keep McDonald apprised of the status of the
investigation and recommend subsequent action and McDonald's reliance on their reports and
recommendations (DSUF ¶¶ 6-7, 11-12, 19, 23-24). No such claim has been made here.

1 “strict literalness” with respect to the requirements of the summary judgment rule. Id.

2 The court is mindful of the Ninth Circuit’s more overarching caution in this context, as
3 noted above, that district courts are to “construe liberally motion papers and pleadings filed by
4 pro se inmates and . . . avoid applying summary judgment rules strictly.” Thomas v. Ponder, 611
5 F.3d 1144, 1150 (9th Cir. 2010). Accordingly, though plaintiff has largely complied with the
6 rules of procedure, the court will consider the record before it in its entirety. However, only those
7 assertions in the opposition which have evidentiary support will be considered.

8 Plaintiff’s opposition argues that the defendants’ motion for summary judgment should be
9 denied because there was no credible evidence that he was a 2-5 member, the restrictions placed
10 on him during the modified program were unnecessary, he did have a serious medical need that
11 defendant Clark was deliberately indifferent to, and defendants are not entitled to qualified
12 immunity.

13 VI. Undisputed Material Facts¹⁵

14 A. Plaintiff’s Objections

15 Plaintiff objects to Defendants’ Statement of Undisputed Facts (DSUF) [ECF No. 93] ¶¶
16 31-40, 56, 70-71, 87-94, 101-02, 121, 126-28, 135, 139-40, 154-56, 163, 170, and 172 on the
17 grounds that they are irrelevant or immaterial to disposition of the motion for summary judgment,
18 but does not dispute the facts asserted. Response to DSUF [ECF No. 98].¹⁶ To the extent these

19 ¹⁵ As a result of the court’s denial of their first motion to file documents under seal, defendants
20 moved to file an amended statement of facts to reflect the reorganization and renumbering of their
21 exhibits. ECF No. 74. The motion was granted (ECF No. 75) and defendants filed a first
22 amended statement of facts (ECF No. 76). When the court partially granted defendants second
23 motion to file documents under seal, they were given the option of providing the exhibits not
24 approved for filing under seal or filing a second amended statement of facts that omitted reference
25 to those exhibits. ECF No. 81. Defendants filed a second amended statement of facts. ECF No.
26 82. However, due to deficiencies in the second amended statement of facts, defendants were
27 ordered to file a third amended statement of facts and plaintiff was afforded an opportunity to file
28 a response to the amended statement of facts. ECF No. 91. Defendants’ third amended statement
of facts (ECF No. 93) is the operative statement of facts and is supported by a set of amended
exhibits (ECF No. 77).

¹⁶ Based on the page numbers provided by plaintiff, his response to defendants’ third amended
statement of facts is missing pages twenty-five and thirty-one. ECF No. 98. Upon inspection,
page twenty-six continues on from page twenty-four and so it appears plaintiff simply mis-
(continued)

1 facts are relied on below, the court overrules plaintiff's objections and deems the facts
2 undisputed. The facts objected to are both relevant and material for the context they provide or
3 because they show what defendants knew or believed at the time.

4 Plaintiff also objects to, without disputing the contents of, DSUF ¶¶ 75, 86, 100, 103-04,
5 116, 122-28, 157, 160, and 171 because they are inadmissible hearsay and the evidence does not
6 support the fact asserted. Response to DSUF. The court has reviewed the evidence relied on and
7 finds that the facts are sufficiently supported and that the supporting evidence falls under
8 exceptions to the hearsay rule, see Fed. R. Evid. 803(6), (8), or is a declaration where the
9 declarant is an individual able to testify to the facts based upon his personal knowledge or
10 experience. Additionally, to the extent the evidence is presented to show what defendants knew
11 or believed at the relevant time, it is not hearsay because it is not offered for the proof of the
12 matter asserted. These objections are therefore overruled and the facts are deemed undisputed.

13 Finally, plaintiff's objections to DSUF ¶¶ 99 and 117 on the grounds that he should have
14 been provided with the supporting evidence are overruled. The court has already determined the
15 documents were properly submitted under seal. Since plaintiff does not dispute the accuracy of
16 the facts, they are deemed undisputed.

17 The following material facts are undisputed except as noted.

18 B. Summary of the 2-5 Modified Program

19 On September 17, 2009, three inmates associated with the 2-5 group (commonly referred
20 to as "the 2-5") assaulted three other inmates in two violent assaults that were coordinated to take
21 place at the same time at opposite ends of the B-Facility main exercise yard at High Desert State
22 Prison (HDSP). DSUF ¶¶ 99-100. The assaults followed a string of violent incidents on B-

23 numbered his pages in this instance. However, page thirty-two does not continue from page
24 thirty, and it appears that plaintiff did in fact leave out page thirty-one. As a result, plaintiff's
25 responses to facts 97-100 were not included in the response. Id. at 29-30. Because facts 97-99
26 are identical and fact 100 is substantively identical, to the extent the court considers any of these
27 facts material, it has relied on the objections plaintiff made to those facts in his response to
28 defendants' second amended statement of facts (ECF No. 86 at 29-30) in determining whether a
dispute exists. Where the evidentiary basis for the fact has changed, the court has considered
whether the fact is appropriately supported by the evidence cited.

1 Facility that were determined to be part of a coordinated effort by the 2-5 to murder or remove
2 sex offenders from B-Facility. DSUF ¶¶ 85-95. Though not officially recognized as a prison
3 gang or disruptive group at the time of the incidents, the violence on B-Facility during 2009 led to
4 efforts to officially designate the 2-5 a gang or disruptive group and the 2-5 are currently
5 identified as a Security Threat Group II. DSUF ¶¶ 96-98.¹⁷

6 The assaults on September 17, 2009, resulted in all inmates on B-Facility being placed on
7 modified programming on September 18, 2009. DSUF ¶ 105. On October 6, 2009, all inmates
8 believed to be associates or members of the 2-5 were isolated from the rest of the inmates on B-
9 Facility and placed on a more restrictive modified program. DSUF ¶¶ 110, 115, 119-20. Plaintiff
10 was one of the inmates identified as being a possible member or associate of the 2-5 and was
11 subject to the more restrictive modified program until he was returned to normal programming on
12 May 25, 2010. DSUF ¶¶ 118, 190. The specifics of the events leading to the implementation of
13 the modified program, the conditions of the modified program, and the efforts to return to normal
14 programming are outlined in further detail below.

15 C. The Parties (DSUF ¶¶ 1-30)

16 At all times relevant to the complaint, plaintiff was an inmate in the custody of the
17 California Department of Corrections and Rehabilitation (CDCR) and housed at High Desert
18 State Prison HDSP, B-Facility. DSUF ¶¶ 1-2, 118.¹⁸

19 At all times relevant to the complaint, defendant McDonald was either the acting warden
20 or warden of HDSP. DSUF ¶ 3. McDonald had the sole authority to begin, end, and adjust the
21 terms of the modified program that was implemented on September 18, 2009 (2-5 modified
22 program). DSUF ¶ 5. McDonald was not personally involved in conducting the investigation
23 into the incidents that triggered the 2-5 modified program and instead relied upon the
24

25 ¹⁷ Plaintiff's objections to DSUF ¶¶ 96-98 are overruled. The facts are supported by defendant
26 McDonald's declaration and are within the realm of his personal knowledge as warden at the
time.

27 ¹⁸ A citation to only defendants' undisputed facts means that plaintiff has explicitly identified a
28 fact as undisputed or the court has already deemed the fact undisputed as noted in this order.

1 investigations, analysis, and opinions of his staff. DSUF ¶¶ 6-7.¹⁹ The information relied on by
2 McDonald in making his decisions included, but was not limited to, the status of any ongoing
3 investigations, the evidence collected, the effectiveness of the restrictions imposed as part of the
4 modified program, the likelihood that violence would occur without the restrictions in place, the
5 appropriateness of the scope of the restrictions, and the prospects and timetable for a phased
6 unlock to return to normal programming. DSUF ¶ 7. McDonald also attended numerous weekly
7 threat assessment meetings where prison officials discussed and offered opinions and
8 recommendations on the modified program, the status of the investigation, and the threats to
9 safety and security in B-Facility and the institution generally. DSUF ¶¶ 8-9.

10 At all times relevant to the complaint, defendant Gower was the chief deputy warden at
11 HDSP. DSUF ¶ 10. As chief deputy warden, Gower was responsible for reviewing the
12 programming recommendations and evidence provided by subordinate staff and evaluating the
13 ongoing need for the 2-5 modified program. DSUF ¶ 11. He also attended weekly meetings as
14 part of the Warden's Executive Committee. DSUF ¶ 12. Although Gower could have served as
15 McDonald's designee, in which capacity he would have been authorized to begin, end or adjust
16 the terms of a modified program, he was never authorized to act as McDonald's designee for
17 those purposes and all authority remained with McDonald for the duration of the 2-5 modified
18 program. DSUF ¶¶ 13-16.

19 From September 18, 2009, through December 22, 2009, defendant Davey was the
20 correctional captain for B-Facility at HDSP. DSUF ¶ 17. He was promoted on December 22,
21 2009, at which point he transferred to Complex II at HDSP and no longer had any involvement
22 with the 2-5 modified program. DSUF ¶¶ 18, 20-21. While Davey was the B-Facility captain, he
23 was a member of the warden's executive committee, consulted with McDonald and other
24 members of the committee regarding the 2-5 modified program, and provided McDonald daily
25 briefings regarding the status of the modified program and updates on the investigation as new
26

27 ¹⁹ Plaintiff states he does not have evidence that would allow him to either admit or deny the
28 facts in DSUF ¶¶ 6-9, 12, 15, 19, and 23 and they are therefore deemed undisputed.

1 intelligence was discovered. DSUF ¶ 19.

2 At all times relevant to the complaint, defendant Van Leer was the second watch
3 lieutenant for B-Facility at HDSP. DSUF ¶¶ 22-23. He was responsible for implementing the
4 warden's policies concerning the 2-5 modified program, attended numerous threat assessment
5 meetings, provided briefing to the B-Facility captain, and drafted memoranda advising McDonald
6 of the status of the investigation and the efforts to return to normal programming. DSUF ¶¶ 23-
7 25.

8 Defendant Sanders was, at all times relevant to the complaint, a correctional counselor and
9 was assigned as the counselor for the inmates identified as being members or associates of the 2-5
10 disruptive group. DSUF ¶¶ 26-27. Sanders did not have any decision-making authority with
11 respect to the 2-5 modified program and did not have authority to alter the status of plaintiff's
12 confinement under the modified program. DSUF ¶ 28.²⁰

13 At all times relevant to the complaint, defendant J. Clark was a registered nurse at HDSP.
14 DSUF ¶ 29. As a registered nurse, Clark could not prescribe or renew medications. DSUF ¶ 204.

15 D. High Desert State Prison and B-Facility (DSUF ¶¶ 31-40)

16 High Desert State Prison is a Level IV, maximum security prison and the majority of
17 inmates housed there are Level IV inmates who pose the greatest threat to institutional safety and
18 security. DSUF ¶ 31. Level IV prisons house the most violent and dangerous felons and have a
19 secure perimeter with internal and external armed coverage and housing units with cells that are
20 not adjacent to exterior walls. DSUF ¶ 32. B-Facility is self-contained and built around a yard
21 where inmates are allowed to exercise daily unless unusual circumstances require otherwise.
22 DSUF ¶ 34. B-Facility is a designated sensitive needs yard. DSUF ¶ 36. Sensitive needs yards

23 ²⁰ Plaintiff purports to dispute DSUF ¶ 28, but his dispute is argumentative and offers no
24 evidence to support his position on what Sanders knew and what she could have done with that
25 information. Response to DSUF ¶ 28. Moreover, he does not dispute that Sanders did not have
26 decision-making authority or authority to alter plaintiff's status. Id. Instead he argues that she
27 could have assisted him by passing on information to her superiors. Id. Therefore, the fact that
28 Sanders did not have decision-making authority or authority to alter plaintiff's status will be
deemed undisputed and plaintiff's argument that she could have assisted him will be addressed
below in Section VIII.D.

1 were established to provide protective housing for inmates that could not safely program on a
2 general population yard. Id. Inmates were typically placed on one of these yards for reasons that
3 would make him a target for violence at the hands of other inmates, such as commitment offense,
4 medical needs, age, or being a gang dropout. Id. During 2009, B-Facility housed approximately
5 1,100 sensitive needs inmates. DSUF ¶ 35.

6 Despite the intent to provide more protective housing, the sensitive needs yard at HDSP
7 often presented equal or greater problems, including violence, than the general population yards.
8 DSUF ¶ 37. Though most inmates on the sensitive needs yard attempted to program non-
9 violently, when tensions arose it was often difficult for staff to manage those tensions. DSUF ¶
10 40. This was because of the diverse mix of inmates housed on the special needs yard, many of
11 whom were members of rival street and prison gangs and were convicted killers who had
12 previously sworn to kill members of rival gangs or known sex offenders on sight. DSUF ¶ 38.
13 Managing tensions on a general population yard was less difficult in many respects because rival
14 gangs on those yards would self-segregate and each gang typically had its own “turf.” DSUF ¶
15 39.

16 E. Modified Programming

17 1. Background (DSUF ¶¶ 41-56)

18 Normal programming within the prison is optimal. DSUF ¶ 41. Normal programming
19 means that the inmates attend work and education programs; have regular visiting, canteen, and
20 telephone privileges; are allowed to attend the law library and religious services; and they are
21 released to the yard for recreation in large groups according to their yard schedules. Id. Under
22 CDCR policy, whenever there is a serious incident, the priorities are to (1) isolate, contain, and
23 control the situation to the smallest possible area; (2) provide medical attention to all injured
24 persons; (3) preserve all available evidence; (4) identify all involved persons; and (5) complete
25 and submit appropriate written documentation and reports within the designated time frames.
26 DSUF ¶ 44.

27 A modified program typically involves the suspension of various programs or services for
28 a specified group of inmates and/or in a specific portion of a facility. DSUF ¶ 42. For example,

1 work and education programs might be suspended; telephone, canteen, or visiting privileges
2 might be restricted; and meals may be delivered to the cells instead of being served in the dining
3 hall. Id. Programs and privileges are restored incrementally as the administration deems
4 appropriate, based on concerns of safety and institutional security. Id.

5 In contrast to a modified program, a lockdown typically involves the restriction of all
6 inmates to their cells or dormitory beds, the suspension of all programs, and the suspension of all
7 but essential functions. DSUF ¶ 43. Lockdowns can be imposed on the entire prison or on a
8 specific facility within the prison and inmate movement is strictly controlled, under close
9 supervision, and generally under escort with mechanical restraints. Id. The administration
10 determines whether critical inmate workers in the affected housing units should be permitted to
11 attend their work assignments and inmates are only released on a case-by-case basis. Id.

12 During a modified program, the warden communicates with staff and the affected inmate
13 population through periodic reports called program status reports (PSRs). DSUF ¶ 45. Part B of
14 each PSR updates all interested parties about the status of the modified program and
15 communicate the warden's plan for returning to normal programming as soon as it is safe to do
16 so. Id. Program status reports reflect the warden's instructions for how the modified program is
17 to be implemented, and subordinate staff are not free to deviate from these instructions. Id.

18 When there is a threat to institutional safety and security, after the situation stabilizes, the
19 incident is assessed to determine whether it is necessary to modify or restrict programming
20 activities for some or all inmates. DSUF ¶ 46. The lockdown committee meets to assess the
21 overall safety and security risk and determines what areas of the prison are affected, which
22 investigations must be conducted, whether to interview staff and inmates, and how to collect
23 relevant evidence. Id. If the incident is serious, program activities may be modified or restricted
24 for some or all inmates by (1) declaring a state of emergency; (2) locking down an entire facility
25 or portions of a facility; or (3) placing some or all of the facility on a modified program. DSUF ¶
26 47. The lockdown committee submits a recommendation, which could include a request to
27 institute any of the three security measures, to the warden who approves or rejects the
28 recommendation. DSUF ¶ 48.

1 At any given time, a facility or housing unit can be operating under more than one
2 modified program, each designed to address a specific security risk. DSUF ¶ 49. In the case of
3 the 2-5 modified program, there were two modified programs in place: one affecting suspected 2-
4 5 members and one affecting the remaining population. Id.

5 Lockdowns and modified programs are implemented when necessary to maintain safety
6 and security in the prisons and to protect the lives of inmates and staff. DSUF ¶ 50. The decision
7 to implement a lockdown or modified program is usually based on numerous situation-specific
8 facts. Id. The decisions regarding when to implement a lockdown or modified program, what
9 activities to suspend, and when to return to normal programming are made by evaluating incidents
10 on a case-by-case basis. DSUF ¶ 51. Identifying the group of inmates to be subject to modified
11 programming is situation specific and groups are identified with the intention of facilitating
12 investigational tasks without being under or over-inclusive so as to ensure the safety and security
13 of the staff, inmates, and institution as a whole without interrupting the programming of inmates
14 who were not involved. DSUF ¶ 52.

15 Policy is to return to normal programming as soon as it is safe to do so and information is
16 gathered regarding the cause of the violence, any significant security breaches, and plans for
17 committing acts of violence so that it can be determined how and when to resume normal
18 programming and avoid further incidents. DSUF ¶ 53. Once the inmates that cause the incident
19 have been identified and removed from the general population and the warden determines it is
20 safe to return to normal programming, a phased unlock may begin. DSUF ¶ 54. The warden and
21 his staff develop an unlock plan in which inmates are released and privileges are restored in
22 stages. DSUF ¶ 55.

23 Typically, during normal programming, inmates assist staff as part of their work
24 assignments, and they are allowed to report to the showers and some medical appointments
25 without an escort. DSUF ¶ 56. During a modified program, correctional staff must deliver all
26 meals to each inmate's cell, most work assignments are suspended, inmates must be escorted to
27 showers and medical appointments, and correctional staff are diverted from their regular
28 responsibilities to assist in the investigation of the underlying incident, all resulting in

1 correctional staff having to work overtime hours. Id. For these reasons, it is more difficult, labor
2 intensive, and expensive to operate a prison during a modified program. Id.

3 2. Procedures for Investigating an Incident (DSUF ¶¶ 57-62)

4 The implementation of a modified program begins the process of investigating and
5 gathering intelligence, which can be slow, time consuming, and labor intensive. DSUF ¶ 57. The
6 prisons, including inmate cells, are searched thoroughly for evidence, weapons and contraband;
7 mail is screened for information regarding planned violence; and evidence and information
8 obtained through searches and interviews is examined and often leads to additional searches and
9 interviews. DSUF ¶ 58. The discovery of weapons delays the investigation process because it
10 creates additional issues that must be investigated, such as where the weapons came from, how
11 they were made, when they were gathered, and who their intended target is. DSUF ¶ 59. When
12 additional incidents occur during the unlock process, previously restored programs may be
13 rescinded to facilitate investigation of the new incident and the modified program may be
14 continued if a return to normal programming would pose too great of a risk. DSUF ¶ 60. The
15 completion of necessary interviews, searches, and investigations can take several weeks or even
16 months and may be extended or delayed if critical information is discovered or leads are
17 developed that require additional investigation or if other incidents occur. DSUF ¶ 61. Every
18 inmate within the determined scope of the modified program is subject to investigation even if he
19 was not housed in the housing unit where the incident occurred. DSUF ¶ 62.

20 3. Phased Return to Normal Programming (DSUF ¶¶ 63-69)

21 In order to return to normal programming as soon as it is safe to do so, the warden
22 requests that staff develop an unlock plan for releasing affected inmates back to normal
23 programming. DSUF ¶¶ 63-64. Unlock plans are developed on a case-by-case basis based on the
24 underlying incident and the phases for returning to full program activities depend upon the
25 magnitude and dynamics of the incident. DSUF ¶ 64. The resumption of normal program
26 activities is planned and implemented during normal business hours when the majority of
27 regularly scheduled staff are present and have been briefed on the plan of operation. Id.

28 Critical workers are often the first inmates to be released and inmates are initially released

1 in small numbers which increase over time when it is deemed safe to do so. DSUF ¶ 65. Once
2 the inmates with priority work assignments have been released, their privileges are restored
3 incrementally. Id. The remaining inmates are included in incremental releases and return to full
4 programming. DSUF ¶ 66. Typically non-involved groups are released first, followed by those
5 involved in the incident based on their gang and disruptive group affiliations. Id. Inmates are
6 released in small groups to the day room and the recreation yard where staff have the opportunity
7 to observe their conduct in a controlled environment and evaluate whether the unlock can proceed
8 safely. DSUF ¶ 67. Program activities such as telephone calls, canteen, and quarterly packages
9 are also restored incrementally, but if another incident occurs during the unlock process, inmates
10 that were previously released may be placed back on lockdown so the new incident can be
11 investigated. DSUF ¶¶ 68-69.

12 4. Restrictions on Exercise (DSUF ¶¶ 70-74)

13 Of all the programming activities that are suspended during a modified program, it is most
14 difficult to determine when exercise programs can be safely resumed. DSUF ¶ 70. Inmates have
15 the greatest access to each other on exercise yards, which is where most assaults occur, and in
16 defendant McDonald's experience, the exercise yard is where violence is most likely to occur
17 following a phased unlock. Id. The number of inmates on a yard greatly outnumbers the
18 correctional staff members assigned to monitor the area. Id.

19 In 2009-2010, McDonald considered numerous factors when deciding how and when to
20 safely resume outdoor exercise after the 2-5 modified program and he believed that every
21 modified program should end as quickly as is safely possible. DSUF ¶ 72. Striking the right
22 balance between security and safety and returning to normal programming as soon as possible is
23 difficult (DSUF ¶¶ 71) and the consequences of failing to impose a modified program or ending
24 one prematurely can be dire (DSUF ¶ 72). The risk of lifting modified programming prematurely
25 is that further incidents of violence can occur. DSUF ¶ 73.²¹ This was the recent experience on

26 _____
27 ²¹ Plaintiff objects to DSUF ¶ 73 on the grounds that evidence has not been presented regarding a
28 separate attempted murder and that there is no mention of 2-5 ties. Response to DSUF ¶ 73.
Though defendants do not cite to it, the record contains evidence of the facts in DSUF ¶ 73
(continued)

1 B-Facility, as the September 17 attacks occurred approximately one week after B-Facility
2 returned to normal programming following another attempted murder, making McDonald
3 particularly cautious about lifting the 2-5 modified program prematurely. Id.

4 It was not feasible to utilize the small concrete yards on B-Facility for exercise during the
5 2-5 modified program for several reasons. DSUF ¶ 74.²² The concrete yards could safely
6 accommodate approximately ten to twenty prisoners at a time and devoting custodial staff to
7 evaluating, selecting, escorting, and supervising such small groups would significantly impede
8 and delay investigations and lengthen the time that all inmates would be deprived of exercise on
9 the main yard and other programming activities. DSUF ¶ 74(b).²³ Placing up to twenty Level IV
10 inmates in an enclosed space the size of a basketball court could have been disastrous because if
11 an inmate were assaulted in one of the enclosed concrete yards, he would have been trapped with

12
13
14 beyond defendant McDonald's declaration. Exhibit D to the statement of facts shows modified
15 program HOP-B-09-21, for the attempted murder of an inmate, beginning on July 31, 2009, and
16 ending on September 9, 2009. ECF No. 77-1 at 4. Exhibit E includes an incident report from
17 July 30, 2009, for the attempted murder of an inmate. Id. at 10. Additionally, plaintiff has
18 admitted that prior to the 2-5 modified program, there were a number of violent incidents on B-
19 Facility, including multiple attempted murders (Response to DSUF ¶ 85) and the sealed,
20 confidential memorandum from October 2, 2009, indicates that there had been previous incidents
21 involving suspected 2-5 members, though it does not specify which incidents (ECF No. 92 at 3).
22 There is sufficient evidence to support DSUF ¶ 73 and plaintiff's objection is overruled.

23 ²² Plaintiff objects to DSUF ¶ 74 and provides arguments why each subsection of DSUF ¶ 74 is
24 incorrect. Response to DSUF ¶ 74. Plaintiff's objections to each subsection will be addressed
25 separately, with the exception of subsection (a) because the court finds it to be irrelevant to the
26 motion. The historic and intended use of the concrete yards by administrative segregation
27 overflow and security housing unit inmates, without more, is irrelevant to whether the yards could
28 have been used for inmates subject to the modified program.

²³ Plaintiff argues that federal law requires segregated inmates a minimum of ten hours per week
of yard exercise (Response to DSUF ¶ 74(b)), however, this argument relates to whether or not
his constitutional rights were violated and does nothing to dispute the facts presented. He also
argues that "[e]scorting plaintiff to this yard 2-3 times a week would not have impeded on the
investigation at all times and it would not deprive non-segregated inmates any main yard
programming activities." Id. Again, this is argument and relates to the analysis of whether
plaintiff's rights were violated and whether the conditions imposed were reasonable. It does not
actually dispute the facts presented. Moreover, plaintiff fails to support his opinion with any
competent evidence. DSUF ¶ 74(b) will be deemed undisputed and plaintiff's arguments will be
considered below in Section VIII.B.

1 no means of escape. DSUF ¶ 74(c).²⁴ Putting ten to twenty inmates in such a situation exposed
2 them to an unreasonable risk of harm. Id. The 2-5 gang was engaged in a concerted and
3 coordinated effort to murder all sex offenders on B-Facility and providing 2-5 members an
4 opportunity to meet and make further plans would have undermined one of the mains reasons for
5 placing them on modified program in the first place, which was to prevent them from planning
6 and carrying out further violence. DSUF ¶ 74(d).²⁵

7 5. Restrictions on Religious Practice (DSUF ¶¶ 75-77)

8 Allowing inmates to participate in group worship while on modified program presented
9 staffing and security issues similar to those faced by permitting outdoor exercise because the
10 areas reserved for group worship were small and enclosed. DSUF ¶ 75. Specifically, allowing
11 group worship posed the same issues in regard to diverting staffing resources, the potential for
12 violence in an enclosed space, and the opportunity to communicate and conspire with other
13 inmates. Id. Alternative means of religious practice remained available to inmates during a
14 modified program. DSUF ¶ 76.²⁶ Upon an inmate’s request, custody staff would arrange a cell

15 ²⁴ Plaintiff argues that it would have not been necessary to escort all twenty inmates at once
16 because that is not done on the administrative segregation yards and inmates are classified before
17 they can have yard privileges. Response to DSUF ¶ 74(c). These arguments go toward the
18 analysis of whether plaintiff’s rights were violated and the reasonableness of the conditions
19 imposed, and do not actually dispute the facts in DSUF ¶ 74(c), which is deemed admitted.
20 Plaintiff’s arguments will be considered below in Section VIII.B.

21 ²⁵ Plaintiff argues that 2-5 members would not have been able to carry out further attacks because
22 they were segregated and inmates on the concrete yards had no desire to plan further attacks.
23 Response to DSUF ¶ 74(d). Plaintiff’s argument does not actually dispute the facts in DSUF ¶
24 74(d), but instead argues that the reasoning makes no sense. Plaintiff’s argument regarding the
25 intent of other inmates is also unsupported by any evidence. The facts in DSUF ¶ 74(d) will
26 therefore be deemed undisputed and plaintiff’s arguments will be considered below in Section
27 VIII.B.

28 ²⁶ Plaintiff objects to DSUF ¶ 76 by summarily stating that it is not true and arguing that
defendants have not presented evidence that a religious leader ever visited plaintiff or any other
inmate upon request. This objection is insufficient to create an issue of fact. See e.g., Taylor v.
List, 880 F.2d 1040, 1045 (9th Cir. 1989) (conclusory allegations, unsupported by evidence are
insufficient to defeat a motion for summary judgment); see also Villarimo v. Aloha Island Air,
Inc., 281 F.3d 1054, 1061 (9th Cir. 2002) (no “genuine issue” of fact if only evidence presented is
the “uncorroborated and self-serving” testimony of the opposing party). The contents of DSUF ¶
76 are supported by defendant McDonald’s declaration and as warden he is competent to testify
to the policies and practices in place at that time and DSUF ¶ 76 is deemed admitted to the extent
(continued)

1 visit with religious and spiritual leaders. Id. Additionally, once an inmate's cell and property
2 were searched, the inmate would be provided access to his religious property, allowing for in-cell
3 religious study. DSUF ¶ 77.²⁷

4 F. 2-5 Modified Program

5 1. Time and Scope (DSUF ¶¶ 78-84)

6 While portions of the modified program at issue applied only to specific groups of
7 inmates, the restrictions were not arbitrary. DSUF ¶ 78. Based on the information defendant
8 McDonald was provided, he believed that: (1) there were unknown numbers of unidentified
9 inmates involved; (2) the investigators had properly identified the target groups of inmates (i.e. 2-
10 5 members or associates housed on B-Facility); (3) the only way to ensure the safety of staff and
11 inmates and the security of the institution was to remove or isolate this target group; and (4) the
12 consequences for failing to act would have been dire. Id. All restrictions imposed on inmate
13 access to the main exercise yards during modified programming were imposed with the belief that
14 the restrictions would be effective in preventing further acts of violence and would help to restore
15 order. DSUF ¶ 79. McDonald repeatedly instructed staff that his objective was to return to
16 normal programming as soon as it was safe to do so and he believed that his staff worked
17 diligently to achieve that objective. DSUF ¶ 80.

18 McDonald's intent was always to return the affected inmates to regular programming as
19 soon as was safely possible, but knowing when and how to return to regular programming after an
20 incident is a difficult and delicate decision and the restrictions placed on outdoor exercise during
21 the modified program at issue were based on considerations of the safety and security of the
22 institution, staff, inmates, and the public. DSUF ¶ 81. As each investigation progressed,
23 McDonald developed a plan to release all affected inmates from the restriction of the modified
24 program as soon as he determined it was safe to do so, and when he believed that it was safe to

25 it outlines what custody staff were supposed to do. Plaintiff's allegations from his motion for
26 summary judgment that his requests were ignored will be addressed below in Section VIII.A.

27 ²⁷ Plaintiff's response to DSUF ¶ 77 is pure argument related to the adequacy of this alternative
28 and will be considered below in Section VIII.A. Response to DSUF ¶ 77. Since there is no
actual dispute, DSUF ¶ 77 is deemed admitted.

1 restart normal programming activities, based on all the information provided by prison staff, he
2 implemented a gradual, calculated release based on those restrictions. DSUF ¶ 82. Based upon
3 the reports received, McDonald and his staff believed that the modified program at issue was (1)
4 necessary to protect the lives of correctional staff and inmates because of significant and credible
5 threats of continued violence; (2) a response to severe and unusually high levels of violence on B-
6 Facility; (3) designed solely to protect the lives and safety of inmates and correctional staff
7 members, who they believed were in imminent danger of violent assaults; (4) did not last any
8 longer than was necessary to protect the lives and safety of inmates and correctional staff; (5) was
9 not intended to prejudice or harass anyone; and (6) did not violate any statutory or constitutional
10 rights. DSUF ¶ 83.²⁸ Defendants' belief is supported by the marked decrease in violence on B-
11 Facility as the 2-5 modified program progressed and inmates identified as 2-5 members were
12 removed from the sensitive needs population. DSUF ¶ 84.

13 2. Events Preceding 2-5 Modified Program (DSUF ¶¶ 85-98)

14 Prior to the 2-5 modified program, there were a number of violent incidents on B-Facility,
15 including multiple attempted murders, and much of the violence involved the use of inmate
16 manufactured weapons. DSUF ¶ 85, 87-94. A majority of the violence was directly attributable
17 to the 2-5 disruptive group. DSUF ¶ 86. As a result of the incidents, B-Facility experienced
18 several modified programs between February 18, 2009, and September 9, 2009. DSUF ¶¶ 87-94.
19 The modified program that ended on September 9, 2009, was the result of an attempted murder.
20 DSUF ¶¶ 93-94. On September 17, 2009, approximately a week after B-Facility returned to
21 normal programming, there was a third attempted murder, which led to the implementation of the
22 2-5 modified program. DSUF ¶ 95.

23 3. September 17, 2009 Incident (DSUF ¶¶ 99-104)

24 One of the most serious incidents that occurred on B-Facility took place on September 17,
25 2009, when three members of the 2-5 disruptive group assaulted inmates on the sensitive needs

26 _____
27 ²⁸ Plaintiff disputes only subsection (6) of DSUF ¶ 83. Response to DSUF ¶ 83. Plaintiff's
28 dispute does not cause an issue of fact because he disputes whether defendants' actions violated
his rights, not whether they believed their actions violated his rights.

1 yard. DSUF ¶ 99. The incident consisted of two violent, coordinated stabbings on the main
2 exercise yard that were planned to occur at exactly the same time on opposite ends of the yard.
3 DSUF ¶ 100. Three inmates who were associated with the 2-5 disruptive group stabbed three
4 other inmates with inmate manufactured weapons causing serious injuries to all the victims.
5 DSUF ¶ 101. All three victims were transported to outside hospitals, one by ambulance and two
6 by air. DSUF ¶ 102. Subsequent investigation uncovered multiple sources that stated the attacks
7 were part of a coordinated effort by the 2-5 gang to systematically murder or remove sex
8 offenders from B-Facility. DSUF ¶ 103. Information discovered during the investigation
9 indicated that the 2-5 would continue to attack sex offenders every time B-Facility returned to
10 normal programming until they were transferred to another institution. DSUF ¶ 104.

11 4. Initiation of Modified Program and Investigation (DSUF ¶¶ 105-15)

12 As a result of the September 17, 2009 incident, all inmates on B-Facility were placed on
13 modified programming on September 18, 2009, thus beginning the 2-5 modified program. DSUF
14 ¶ 105. During the 2-5 modified program all inmates' central files were reviewed to determine
15 gang or disruptive group affiliation. DSUF ¶ 106.²⁹ During the investigation, which included
16 interviews with each inmate, custody staff specifically attempted to identify which inmates were
17 affiliated with the 2-5 disruptive group. DSUF ¶¶ 107-08.

18 Given the severity of the September 17 attack, custody staff believed it was imperative
19 that inmates identified as being affiliated with the 2-5 were isolated from the remainder of the
20 inmate population on B-Facility and on October 6, 2009, all such inmates were removed from
21 their cells and escorted to the B-Facility dining hall. DSUF ¶¶ 109-10. Once in the dining hall,
22 gang investigators photographed the inmates to document any gang-related tattoos and conducted
23 interviews to determine any gang affiliation while correctional officers searched the inmates'
24 cells and removed all property. DSUF ¶¶ 111-12. The inmates' property was searched for

25 _____
26 ²⁹ Plaintiff's objection to DSUF ¶ 106 because his file did not contain any gang or disruptive
27 group affiliation is overruled. There is a 2007 memo indicating plaintiff was a 2-5 member or
28 associate (ECF No. 92 at 14-16, under seal) and whether it was located in his central file or
elsewhere is immaterial.

1 anything that would indicate gang affiliation. DSUF ¶ 113. Inmates identified as being affiliated
2 with the 2-5 were separated from other B-Facility inmates and housed in Building Two, Section
3 C, where they remained on modified program status while inmates not affiliated with the 2-5
4 were removed and re-housed in another unit. DSUF ¶¶ 114-15.

5 5. Plaintiff's Identification as a 2-5 Member (DSUF ¶¶ 116-18)

6 In a confidential memo dated December 11, 2007, plaintiff was identified as a member of
7 the 2-5 disruptive group by an inmate who claimed that he was assaulted by 2-5 members and
8 then used as a witness against them. DSUF ¶ 116. The information provided by this inmate was
9 deemed reliable because it was corroborated by other confidential sources, through investigation,
10 or by information provided by a non-confidential source. DSUF ¶ 117. Based on this
11 information, plaintiff was housed in B-Facility, Building Two, Section C with the other suspected
12 members of the 2-5 gang. DSUF ¶ 118.

13 6. October 2009: Attempt to Return Non-2-5 Inmate to Normal Programming
14 (DSUF ¶¶ 119-29)

15 On October 20, 2009, defendant Van Leer drafted a memorandum to defendant McDonald
16 in which he indicated that B-Facility supervisors believed that all inmates identified as 2-5
17 members had been removed from the remainder of the inmate population and placed in Building
18 2, C Section. DSUF ¶ 119. Based on this belief, the B-Facility supervisors thought that the root
19 of the recent violence had been removed and the remainder of the B-Facility population could
20 return to normal programming. DSUF ¶ 120.

21 However, on October 23, 2009, first watch staff intercepted a letter that stated, "I hear
22 some more shit is going to go down on Monday. So we will probably be on lockdown again."
23 DSUF ¶ 121. The inmate who authored the letter was interviewed the following day and said that
24 the 2-5 were going to continue "removing 'Sex Criminals' from the yard" and that the inmate was
25 to be assaulted with a weapon made of metal. DSUF ¶¶ 122, 124. The inmate also told prison
26 officials that white inmates not affiliated with the 2-5 were planning a larger-scale attack on 2-5
27 members because the 2-5 attacks were affecting their programming. DSUF ¶ 125.

28 ////

1 On October 24, 2009, an inmate was interviewed concerning a statement he had made to
2 his mother on the telephone during second watch where he stated that the 2-5 were going to stab a
3 child molester in Building One. DSUF ¶ 126. The inmate's cellmate was also interviewed and
4 stated that he had also heard that the 2-5 were going to stab a child molester. DSUF ¶ 127. The
5 same day, an officer overheard another inmate tell his mother that the facility would be back on
6 lockdown on Monday and that he would not be able to call. DSUF ¶ 128.

7 Based on this information, defendant McDonald placed B-Facility on lockdown on
8 Monday, October 26, 2009. DSUF ¶ 129.

9 7. November 2009: Resumption of Modified Program (DSUF ¶¶ 130-40)

10 Beginning on November 2, 2009, prison officials once again began to review inmate
11 central files and conduct interviews with inmates in an effort to identify additional inmates
12 affiliated with the 2-5. DSUF ¶ 130. Inmates with identifying tattoos or other substantiated
13 evidence of 2-5 affiliation were re-housed in Building Two, Section C of B-Facility. DSUF ¶
14 131. If no evidence of 2-5 affiliation was found, the inmate was required to sign an unlock
15 chrono that indicated he would not participate in gang activities and would program non-
16 violently. DSUF ¶ 132. The goal was to move all inmates with suspected 2-5 affiliation into
17 Building Two, Section C, while inmates with no affiliation would be housed in Buildings One,
18 Three, Four, and Five and the B-Facility gym. DSUF ¶ 133. The purpose was to ensure that
19 Buildings One, Three, Four, and Five and the gym were housed with inmates that wanted a
20 positive, non-violent program. DSUF ¶ 134.

21 The renewed investigation began with inmates housed in the gym where most of B-
22 Facility's critical workers were housed, so that these inmates could return to work at the earliest
23 possible time in order to alleviate some of the strain on correctional staff. DSUF ¶ 135. Once all
24 central files were reviewed and all inmates were interviewed, McDonald's plan was that those
25 housed in the gym would begin Phase One of a phased return to normal programming with the
26 investigation continuing building by building until each housing unit was cleared of suspected 2-5
27 affiliates. DSUF ¶¶ 136-37. Once this was accomplished, each housing unit would receive

28 /////

1 evening dayroom on a rotational basis, canteen, quarterly packages, and contact visits. DSUF ¶
2 138.

3 On November 12, 2009, a member of the 2-5 informed correctional staff that he had been
4 directed to use an inmate manufactured key to escape his handcuffs during his escort to the
5 showers and to assault staff once he was free. DSUF ¶¶ 139-40. Based on this information, B-
6 Facility was placed on modified program. DSUF ¶ 140.

7 8. December 2009: Phased Return to Normal Programming (DSUF ¶¶ 141-
8 53)

9 On December 1, 2009, B-Facility initiated Phase One of a modified program. DSUF ¶
10 141. During Phase One, all inmates were fed in their cells and those not suspected of
11 participation in gang activities were provided yard access on a rotating basis, with one tier from a
12 building being released at a time. DSUF ¶¶ 142-43. During this period there were no incidents
13 involving the inmates released for yard. DSUF ¶ 144.

14 On December 14, 2009, B-Facility initiated Phase Two of the modified program. DSUF ¶
15 145. During Phase Two, both tiers from a building were released for yard at the same time with
16 one building released for morning yard and a different building for afternoon, so that Buildings
17 One through Five and the gym would receive yard time every third day. DSUF ¶ 146. Inmates
18 not suspected of participation in gang activities had access to the telephone and canteen, were
19 escorted unrestrained to medical appointments, and received their morning meal in the dining hall
20 with evening meals received in cell. DSUF ¶ 147. All inmates were escorted in handcuffs for
21 non-contact visits, could arrange for law library access, and were limited to in-cell religious
22 study. DSUF ¶ 148. During Phase Two, no incidents occurred that would preclude the
23 implementation of Phase Three. DSUF ¶ 149.

24 On December 28, 2009, B-Facility initiated Phase Three of the modified program. DSUF
25 ¶ 150. All privileges that were restored during Phases One and Two continued and inmates not
26 suspected of participation in gang activities received all meals in the dining hall while those
27 suspected of gang activity continued to receive meals in their cells. DSUF ¶¶ 151-52.

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1 9. January 2010: Interruption of Phased Unlock (DSUF ¶¶ 154-66)

2 On January 4, 2010, written information was intercepted indicating that an inmate
3 affiliated with the 2-5 disruptive group was conspiring with other inmates to assault unidentified
4 correctional staff and inmates on B-Facility. DSUF ¶ 154. Secondary information was also
5 received from other confidential sources indicating that inmates affiliated with the 2-5 were
6 attempting to recruit other inmates not currently on modified program to carry out assaults on B-
7 Facility staff. DSUF ¶ 155.

8 On January 5, 2010, an inmate was interviewed regarding a note he authored in which he
9 indicated that his cellmate intended to assault three correctional officers and that his cellmate had
10 been discussing with another inmate whether to assault staff or sex offenders. DSUF ¶¶ 156-57.
11 The second inmate was interviewed and stated that he had no intention of assaulting staff, only
12 sex offenders. DSUF ¶ 158. He indicated that members and associates of the 2-5 were still
13 planning on carrying out assaults on sex offenders, that there were an ample amount of metal
14 weapon stock and weapons on the yard, that the targets were selected, and that the 2-5 members
15 that were to carry out the stabbing assaults had also been selected. DSUF ¶¶ 159-60.

16 Based on this information, all of B-Facility was placed on lockdown³⁰ on January 7, 2010,
17 so that further investigation could occur. DSUF ¶ 161. The investigation included extensive
18 searching and interviewing of inmates and their housing areas and resulted in the identification of
19 several additional members of the 2-5 disruptive group who were re-housed in Building 2, Unit C
20 with the other 2-5 inmates. DSUF ¶¶ 162-64. The searches and interviews did not lead to the
21 discovery of any weapons or any information that would corroborate the information regarding
22 the conspiracy to assault staff and sex offenders on B-Facility and correctional staff therefore
23 recommended that B-Facility resume the modified program at Phase Two. DSUF ¶¶ 165-66.

24 10. February 2010: Continued Attempts to Unlock (DSUF ¶¶ 167-74)

25 McDonald implemented the recommendation to resume Phase Two on February 9, 2010.

26 _____
27 ³⁰ Although DSUF ¶ 161 states the facility went on modified program, the documentation cited
28 (ECF No. 92 at 6-7, under seal) and other documentation provided (ECF No. 77-2 at 53) indicate
the facility went on lockdown.

1 DSUF ¶ 166. On February 22, 2010, B-Facility returned to Phase Three of the modified program
2 as there had been no incidents that would preclude its implementation. DSUF ¶ 167. All inmates
3 that had not been identified as participating in gang activity received their meals in the dining
4 hall, had access to canteen and the telephone, and received yard on a rotating basis. DSUF ¶¶
5 168-69.

6 On February 28, 2010, prison officials received additional information about potential
7 future assaults from an inmate that had recently been transferred to HDSP. DSUF ¶ 170. This
8 inmate indicated that he had connections with the Mexican Mafia, could communicate with
9 inmates housed in any facility within the institution, and had knowledge of staff assaults that were
10 to take place on B-Facility, D-Facility, and Unit Z. DSUF ¶¶ 171-72. B-Facility was placed on
11 modified program, but an investigation determined the threat was not credible and B-Facility was
12 returned to Phase Three of the modified program within two days. DSUF ¶ 173-74.

13 11. March 2010: Continuation of Phased Unlock (DSUF ¶¶ 175-181)

14 On March 2, 2010, B-Facility returned to amended Phase Three of the modified program
15 and moved into Phase Four on March 9, 2010. DSUF ¶¶ 175-76. As of March 9, 2010, the
16 inmate population on B-Facility, excluding those associated with the 2-5, had successfully
17 completed Phase Three of the modified program without any further incidents of violence and
18 staff had identified and removed all inmates suspected of being associated with the 2-5 disruptive
19 group from the general inmate population on B-Facility. DSUF ¶¶ 177-78. During Phase Four,
20 inmates on modified program had yard time every third day and dayroom access two times during
21 a three day period. DSUF ¶ 179. Investigations continued into the actions, activities, and
22 membership of inmates in the 2-5 disruptive group with the goal of gathering information that
23 would allow for the validation of inmates identified as members of the 2-5 disruptive group.
24 DSUF ¶¶ 180-81.

25 12. May 2010: Return to Normal Programming (DSUF ¶¶ 182-90)

26 Since the inmates identified as 2-5 members had been placed on modified program,
27 inmate violence on B-Facility was significantly reduced. DSUF ¶ 183. On May 17, 2010, the
28 investigation regarding threats to inmates and staff on B-Facility by the 2-5 gang was concluded.

1 DSUF ¶ 182. Staff identified sixteen inmates perpetuating the unrest and disruption, twenty-nine
2 inmates with ties or association with these inmates, and a preliminary list of eleven inmates with
3 no association. DSUF ¶ 184. The inmates in question continued to be monitored to determine
4 any gang, violent, or disruptive activity, and on May 18, 2010, all sixteen inmates identified as
5 perpetuating the unrest were placed in administrative segregation. DSUF ¶ 185-86.

6 On May 19, 2010, B-Facility staff began to return inmates identified as having little or no
7 apparent association with the 2-5 to normal programming. DSUF ¶ 187. On May 24 and May
8 25, 2010, correctional counseling staff interviewed nineteen inmates who were identified as
9 having some ties to the 2-5. DSUF ¶ 188. Each of these inmates stated their willingness to
10 positively program and to not participate in any gang, violent, or illegal activities and signed the
11 CDCR-128-B Unlock Chrono, documenting this willingness. DSUF ¶ 189. Plaintiff signed an
12 unlock Chrono on May 24, 2010, and was returned to normal programming the following day.
13 DSUF ¶ 190.

14 G. Plaintiff's Medical Care (DSUF ¶¶ 191-213)

15 Defendant J. Clark saw plaintiff once during the relevant time period on April 28, 2010,
16 regarding his medical concerns. DSUF ¶ 191. Prior to that, Clark reviewed three health care
17 requests in which plaintiff complained of stomach cramps and diarrhea, the first of which was
18 dated February 22, 2010. DSUF ¶¶ 192-93. In his first health care request, Mitchell stated "I
19 need medication for stomach flu/diar[rh]ea symptoms. Maybe something I ate." DSUF ¶ 194;
20 ECF No. 77-2 at 37. The request was initially reviewed by another registered nurse on February
21 23, 2010. DSUF ¶ 195.³¹ The request form shows that it was reviewed by Clark on March 18,
22 2010. ECF No. 77-2 at 37.³² At that time, plaintiff had an appointment with his primary care
23 physician on March 26, 2010, and had not submitted any additional health care requests related to
24 his stomach. DSUF ¶¶ 197, 199. Due to the nature of the complaint, which indicated the issues

25 ³¹ Plaintiff objects to DSUF ¶ 195 on the grounds that he was not seen in a reasonable time, but
26 does not dispute that another nurse conducted the first review. Response to DSUF ¶ 195. DSUF
27 ¶ 195 is therefore deemed undisputed.

28 ³² Plaintiff's dispute with when Clark actually reviewed the request will be addressed below in
Section VIII.C.

1 may have been caused by something plaintiff ate, defendant Clark believed that his health
2 concerns were likely resolved at the time he reviewed the request. DSUF ¶ 199. Clark therefore
3 believed it was unnecessary to schedule an appointment any earlier than March 26, 2010. DSUF
4 ¶ 200.³³

5 On March 26, 2010, Clark reviewed a second health care request dated March 23, 2010, in
6 which plaintiff stated “I have been experiencing reoccurring bouts of stomach pains, irregularity,
7 dia[rrhea]. Need my I.B.S. medication (d[i]cycloimine) to be re-issued and possibly see a
8 gastrologist [sic]. Pains have been on and off over the last month.” DSUF ¶ 201; ECF No. 77-2
9 at 38. Since plaintiff was scheduled to see his primary care physician that same day and Clark
10 believed plaintiff’s doctor was better suited to address his health concerns, Clark did not believe it
11 was necessary to schedule plaintiff for an appointment with him as well. DSUF ¶ 203.³⁴

12 As a registered nurse, defendant Clark could not prescribe or renew medications and it
13 was appropriate for Clark to keep plaintiff’s appointment with his primary care physician, who
14 could prescribe medication. DSUF ¶ 204. Nothing in plaintiff’s medical records indicate that
15 Clark took any action to prevent the March 26, 2010 appointment from occurring. DSUF ¶ 205.

16 On April 22, 2010, Clark reviewed a third health care request, dated April 20, 2010, where
17 plaintiff stated the following:

18 On 2-2-10, I requested services for stomach flu/dia[rrh]ea/possible
19 food poisoning but not called to see a Dr. On 3-23-10, I requested
20 medical attention for reoccurring stomach pains, dia[rrh]ea
21 (possibly related to my I.B.S.) and I have still not seen a Dr. I am
22 continuing to experience crippling bouts of stomach pain (cramps),
23 dia[rrh]ea which limit my ability to function properly. (I request to
24 see a stomach specialist.)”

25 DSUF ¶ 206; ECF No. 77-2 at 39.

26 On April 28, 2010, Clark saw plaintiff regarding his complaints of cramping, occasional

27 ³³ Plaintiff’s “dispute” does not create an issue of fact regarding Clark’s belief, but instead
28 implies the belief was unreasonable or unfounded. Response to DSUF ¶ 200. DSUF ¶ 200 is
therefore deemed undisputed and plaintiff’s argument will be addressed in Section VIII.C. below.

³⁴ Plaintiff argues that he did not actually see a physician that day, but does not otherwise
dispute DSUF ¶ 203.

1 diarrhea, and nausea. DSUF ¶ 208. During the exam there was no indication that plaintiff was
2 seriously ill or crippled and Clark noted that plaintiff had a history of irritable bowel syndrome
3 treated in the past with dicyclomine. DSUF ¶ 209. The notes also indicate that plaintiff had
4 normal bowel sounds, normal bowel movement, normal vital signs, and that the exam was
5 otherwise unremarkable. Id. The records show that after recording plaintiff’s medical concerns
6 and taking his vital signs, Clark conferred with plaintiff’s primary care provider³⁵ who prescribed
7 fiber tablets. DSUF ¶ 210. Because Clark’s license did not permit him to prescribe medications,
8 he was not responsible for the fiber tablet prescription or any side effects that may have occurred.
9 DSUF ¶ 211. Plaintiff saw his primary care provider on May 14, 2010,³⁶ at which time he was
10 prescribed dicyclomine to treat his symptoms, which apparently quickly subsided. DSUF ¶ 212;
11 ECF No. 77-2 at 27.

12 VII. Legal Standard for Summary Judgment

13 Summary judgment is appropriate when the moving party “shows that there is no genuine
14 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
15 Civ. P. 56(a).

16 Under summary judgment practice, the moving party “initially bears the burden of
17 proving the absence of a genuine issue of material fact.” In re Oracle Corp. Securities Litigation,
18 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).
19 The moving party may accomplish this by “citing to particular parts of materials in the record,
20 including depositions, documents, electronically stored information, affidavits or declarations,
21 stipulations (including those made for purposes of the motion only), admission, interrogatory
22 answers, or other materials” or by showing that such materials “do not establish the absence or

23 ³⁵ The records show that defendant Clark conferred with “PCP Miranda” (ECF No. 77-2 at 26)
24 who is a physician’s assistant (id. at 12, ¶ 19). Therefore it is likely that “PCP” actually stands
25 for primary care provider, rather than physician as stated in the statement of undisputed facts.
26 However, this discrepancy is not material as there does not appear to be any dispute that Miranda
27 was plaintiff’s primary care provider and capable of prescribing medication to plaintiff.
28 Response to DSUF ¶ 212; ECF No. 77-2 at 27.

³⁶ Although DSUF ¶ 212 states the appointment was on May 17, 2010, plaintiff’s medical record
shows the date of his exam was May 14, 2010.

1 presence of a genuine dispute, or that the adverse party cannot produce admissible evidence to
2 support the fact.” Fed. R. Civ. P. 56(c)(1)(A), (B). When the non-moving party bears the burden
3 of proof at trial, “the moving party need only prove that there is an absence of evidence to support
4 the nonmoving party’s case.” Oracle Corp., 627 F.3d at 387 (citing Celotex, 477 U.S. at 325); see
5 also Fed. R. Civ. P. 56(c)(1)(B). Indeed, summary judgment should be entered, after adequate
6 time for discovery and upon motion, against a party who fails to make a showing sufficient to
7 establish the existence of an element essential to that party’s case, and on which that party will
8 bear the burden of proof at trial. See Celotex, 477 U.S. at 322. “[A] complete failure of proof
9 concerning an essential element of the nonmoving party’s case necessarily renders all other facts
10 immaterial.” Id. In such a circumstance, summary judgment should be granted, “so long as
11 whatever is before the district court demonstrates that the standard for entry of summary
12 judgment, . . . , is satisfied.” Id. at 323.

13 If the moving party meets its initial responsibility, the burden then shifts to the opposing
14 party to establish that a genuine issue as to any material fact actually does exist. See Matsushita
15 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the
16 existence of this factual dispute, the opposing party may not rely upon the allegations or denials
17 of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or
18 admissible discovery material, in support of its contention that the dispute exists. See Fed. R.
19 Civ. P. 56(c)(1); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the
20 fact in contention is material, i.e., a fact that might affect the outcome of the suit under the
21 governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv.,
22 Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is
23 genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving
24 party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

25 In the endeavor to establish the existence of a factual dispute, the opposing party need not
26 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
27 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
28 trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce

1 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.”
2 Matsushita, 475 U.S. at 587 (citations omitted).

3 “In evaluating the evidence to determine whether there is a genuine issue of fact,” the
4 court draws “all reasonable inferences supported by the evidence in favor of the non-moving
5 party.” Walls v. Central Costa County Transit Authority, 653 F.3d 963, 966 (9th Cir. 2011). It is
6 the opposing party’s obligation to produce a factual predicate from which the inference may be
7 drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
8 aff’d, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing
9 party “must do more than simply show that there is some metaphysical doubt as to the material
10 facts Where the record taken as a whole could not lead a rational trier of fact to find for the
11 nonmoving party, there is no ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation
12 omitted).

13 On February 3, 2014, the defendant served plaintiff with notice of the requirements for
14 opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. ECF. No. 65-3.
15 See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (movant may provide notice) (en banc),
16 cert. denied, 527 U.S. 1035 (1999), and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

17 VIII. Analysis

18 A. Count II: First Amendment (Free Exercise of Religion)

19 A religious claim must satisfy two criteria to merit protection under the free exercise
20 clause of the First Amendment: (1) the claimant’s belief must be “sincerely held” and (2) “the
21 claim must be rooted in religious belief, not in purely secular philosophical concerns.” Malik v.
22 Brown, 16 F.3d 330, 333 (9th Cir. 1994) (citations and internal quotation marks omitted). The
23 free exercise right, however, is necessarily limited by the fact of incarceration, and may be
24 curtailed in order to achieve legitimate correctional goals or to maintain prison security. O’Lone
25 v. Shabazz, 482 U.S. 342, 348-49 (1987). To state a free exercise claim, a prisoner must show
26 that a defendant burdened the practice of the prisoner’s religion by preventing him from engaging
27 in a sincerely held religious belief and that the defendant did so without any justification
28 reasonably related to legitimate penological interests. Shakur v. Schriro, 514 F.3d 878, 884 (9th

1 Cir. 2008). To substantially burden the practice of an individual’s religion, the interference must
2 be more than an inconvenience. Freeman v. Arpaio, 125 F.3d 732, 737 (9th Cir. 1997), overruled
3 in part by Shakur, 514 F.3d at 884-85.

4 In order to determine whether a policy is reasonable, analysis under Turner v. Safley, 482
5 U.S. 78 (1987), must be conducted. “As formulated by the court in Turner – and subsequently
6 applied by [the Ninth Circuit] in Ashelman [v. Wawrzaszek], 111 F.3d 674 [(9th Cir. 1997)], and
7 Ward v. Walsh, 1 F.3d 873 (9th Cir. 1993) – the test weighs four factors in determining the
8 reasonableness of a prison regulation affecting constitutional rights.” Resnick v. Adams, 348
9 F.3d 763, 768-69 (9th Cir. 2003). “First, there must be a ‘valid, rational connection’ between the
10 prison regulation and the legitimate governmental interest put forward to justify it” and “the
11 governmental objective must be a legitimate and neutral one.” Turner, 482 U.S. at 89-90. “A
12 second factor relevant in determining the reasonableness of a prison restriction . . . is whether
13 there are alternative means of exercising the right that remain open to prison inmates.” Id. at 90.
14 “A third consideration is the impact accommodation of the asserted constitutional right will have
15 on guards and other inmates, and on the allocation of prison resources generally.” Id. “Finally,
16 the absence of ready alternatives is evidence of the reasonableness of a prison regulation. Id.

17 Plaintiff alleges that defendants McDonald, Davey, Sanders, and Van Leer violated his
18 First Amendment rights by preventing him from practicing his religion. ECF No. 1 at 20, ¶ 150.
19 Specifically, he alleged that during the 2-5 program he “was not allowed to participate in
20 religious activities, services, or speak with a religious advisor.” Id. at 15-16, 18, ¶¶ 119, 126,
21 141.

22 Defendants do not challenge whether plaintiff’s beliefs are sincerely held or rooted in
23 religion or whether the restrictions constituted a substantial burden, so the issue before the court
24 is whether the restrictions on plaintiff’s religious practice during the 2-5 modified program were
25 reasonably related to a valid penological purpose.

26 1. Rational Relationship Between Policy and Penological Interests

27 Prison officials have a legitimate interest in maintaining the safety and security of the
28 prisons and in protecting the lives and safety of the inmates and officers within the prison. Cutter

1 v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) (“prison security is a compelling state interest”);
2 Farmer, 511 U.S. at 833 (“prison officials have a duty . . . to protect prisoners from violence at the
3 hands of other prisoners” (internal quotation marks and citation omitted)). The undisputed
4 evidence shows that the governmental objective used to justify the modified program was
5 legitimate and neutral and was rationally related to the implementation of the modified program.
6 DSUF ¶¶ 83, 100-05.

7 The modified program was implemented in response to a violent, coordinated set of
8 assaults that were part of an organized effort by the 2-5 to murder and remove sex offenders from
9 B-Facility. DSUF ¶¶ 100-05. All inmates in B-Facility were affected by the modified program,
10 and plaintiff’s inclusion in the more restrictive portion of the modified program was based on
11 prison officials’ belief, based on existing documentation, that plaintiff was associated with the 2-5
12 disruptive group. DSUF ¶¶ 105, 115-18. It is undisputed that allowing group worship during the
13 modified program presented staffing and security issues because it would require diverting staff
14 to escort and supervise small groups of inmates, which would delay the investigation, and would
15 put groups of inmates together in a small enclosed space, which posed the risk for both potential
16 violence and an ability to make plans for additional violent incidents. DSUF ¶ 75. Furthermore,
17 the restriction on group religious services did not single out any one religious group and all out-
18 of-cell activities were restricted, especially for those inmates believed to be associated with the 2-
19 5.³⁷ ECF No. 77-2 at 42-65. Finally, it is undisputed that defendant McDonald and his staff
20 believed the modified program lasted only as long as necessary, was not intended to prejudice or
21 harass anyone, and was necessary to protect the lives of inmates and staff as a result of the severe
22 and unusually high levels of violence on B-Facility. Response to DSUF ¶ 83.

23 The first prong of the Turner test weighs in defendants’ favor.

24 2. Alternatives Means of Religious Exercise

25 The second prong of the Turner analysis requires that the court determine “whether there
26

27 ³⁷ Group religious activities and a number of other out-of-cell activities were also restricted for
28 the non-2-5 inmates at B-Facility. ECF No. 77-5 at 42-65.

1 are alternative means of exercising the right that remain open to prison inmates.” Resnick, 348
2 F.3d at 769. “The relevant inquiry under this factor is not whether the inmate has an alternative
3 means of engaging in a particular religious practice that he or she claims is being affected; rather
4 [the court is] to determine whether the inmates have been denied all means of religious
5 expression.” Ward, 1 F.3d at 877 (citing O’Lone, 482 U.S. at 351-52).

6 It is undisputed that once an inmate’s property was searched it was returned and the
7 inmates could conduct in-cell religious study (DSUF ¶ 77) and that plaintiff had access to a Bible
8 (ECF No. 64-2 at 105). Plaintiff argues that in-cell religious study is not comparable to “[b]eing
9 taught and worshipping with his religious leader” (Response to DSUF ¶ 77), but the alternative
10 means of religious expression are not required to be comparable, merely available. Additionally,
11 defendants have stated that religious advisors and spiritual leaders were available to inmates on
12 modified program or lockdown. DSUF ¶ 76. Plaintiff argues in conclusory fashion that this was
13 not true and that defendants failed to provide evidence that indicated a religious leader ever
14 visited plaintiff or other inmates on request. Response to DSUF ¶ 76. Defendants are not
15 required to prove that plaintiff, or any other inmates for that matter, took advantage of the
16 opportunity to have a religious leader visit their cell. They must show only that such an
17 opportunity existed, which they did through the declaration of defendant McDonald. While
18 documentation of inmates being visited by religious leaders would certainly also be evidence that
19 this opportunity existed, no particular type of evidence is required. Plaintiff’s conclusory claim,
20 devoid of any supporting evidence, is insufficient to create a dispute of fact. See e.g., Taylor, 880
21 F.2d at 1045 (conclusory allegations, unsupported by evidence are insufficient to defeat a motion
22 for summary judgment); see also Villarimo, 281 F.3d at 1061 (no “genuine issue” of fact if only
23 evidence presented is the “uncorroborated and self-serving” testimony of the opposing party).

24 However, plaintiff also argues in his opposition to the motion that defendants “outright
25 refus[ed] to allow [him] the opportunity to worship with a religious leader.” ECF No. 84 at 17.
26 This statement is unsupported by either a sworn statement or other documentary evidence and the
27 response to the motion for summary judgment is not signed under penalty of perjury. Moreover,
28 the excerpt from plaintiff’s deposition that he attached to his statement of facts in support of his

1 own motion for summary judgment shows that he stated that his requests to be visited were
2 “never responded to.” ECF No. 64-2 at 105. He also stated that he did not know if any spiritual
3 advisors were available at the time. Id. This does not support a claim of “outright denial.” Even
4 if plaintiff did request to see a spiritual advisor and his requests were ignored, he has neither
5 alleged nor provided evidence that he made his requests to any of the defendants, that any of the
6 defendants were aware of the requests, that defendants are the individuals that ignored him, or
7 that any of the defendants knew he was being ignored. Plaintiff also fails to provide any evidence
8 that would support a claim that the policy during the modified program was to disallow cell-front
9 visits by spiritual advisors.

10 The second prong of the Turner analysis weighs in defendants’ favor.

11 3. Impact of Accommodation

12 The third factor requires consideration of “the impact accommodation of the asserted
13 constitutional right will have on guards and other inmates, and on the allocation of prison
14 resources generally.” Turner, 482 U.S. at 90. Defendants have provided evidence that allowing
15 group worship during the modified program would have presented the same staffing and security
16 problems as allowing outdoor exercise. DSUF ¶ 75. Specifically, group worship would have
17 required diverting staff to escort and supervise small groups of inmates, which would have
18 delayed the investigation, and would have put groups of inmates together in a small enclosed
19 space, which posed the risk for both potential violence and an ability to make plans for additional
20 violent incidents. DSUF ¶¶ 74, 75. Delaying the investigation would have meant extending the
21 modified program and extending the time before the facility could return to normal programming.
22 DSUF ¶ 74. This would have impacted inmates, the staff at B-Facility, and the institution as a
23 whole because modified programs make it more difficult, labor intensive, and expensive to run
24 the prison. DSUF ¶ 56. It would also have defeated one of the main purposes of the modified
25 program, which was to prevent additional violence by keeping the inmates thought to be
26 associated with the responsible group from gathering where they could plan or engage in further
27 violence. DSUF ¶ 74. Allowing plaintiff and other suspected 2-5 associates to congregate would
28 have given them an opportunity to communicate with each other and either engage in violence or

1 devise plans for additional violence. Id. To the extent any of plaintiff's arguments regarding
2 these concerns as they relate to outdoor exercise apply to group religious worship, the arguments
3 are unsupported by competent evidence. Response to DSUF ¶ 74. Plaintiff has not established
4 that he has sufficient knowledge regarding the operational resources of the prison or the strain a
5 modified program puts on those resources.

6 The third factor also weighs in defendants' favor.

7 4. Ready Alternative to Regulation

8 The final factor requires the court to consider whether there is an absence of ready
9 alternatives to the policy. The burden is on the prisoner challenging the regulation, not on the
10 prison officials, to show that there are obvious, easy alternatives to the regulation. See O'Lone,
11 482 U.S. at 350; Casey v. Lewis, 4 F.3d 1516, 1523 (9th Cir. 1993) ("It is incumbent upon the
12 prisoners to point to an alternative that accommodates their rights at de minimis cost to security
13 interests."). Plaintiff offers no alternative to the modified program other than to allow him to
14 participate in religious activities in the same manner he would if the modified program was not
15 running. Were plaintiff the only inmate at issue, this would no doubt be reasonable. However,
16 plaintiff was neither the only inmate on B-Facility nor the only inmate thought to be associated
17 with the 2-5. All of B-Facility was subject to the modified program, and in 2009 that meant
18 approximately 1,100 inmates. DSUF ¶¶ 35, 105. Even if the court does not consider the rest of
19 B-Facility, there were approximately fifty inmates suspected of having ties to the 2-5. ECF No. 1
20 at 13, ¶ 95; ECF No. 92 at 12, under seal; ECF No. 64-2 at 38. In light of the number of other
21 inmates affected, plaintiff's suggestion does not present a ready alternative.

22 5. Conclusion

23 For these reasons, the court finds that the implementation of the 2-5 modified program,
24 which restricted group religious activities, was reasonably related to legitimate penological
25 interests. Plaintiff does not establish a triable issue of fact as to whether defendants McDonald,
26 Davey, Sanders, or Van Leer improperly infringed on his religious exercise and defendants are
27 therefore entitled to summary judgment.

1 B. Count III: Eighth Amendment (Outdoor Exercise)

2 A prison official violates the Eighth Amendment when the alleged deprivation is
3 objectively, sufficiently serious, resulting in the “denial of the minimal civilized measure of life’s
4 necessities” and the defendant acted with a sufficiently culpable state of mind, one of deliberate
5 indifference to inmate health or safety. The official must know of and disregard “an excessive
6 risk to inmate health or safety” and then fail to take reasonable measures to abate the substantial
7 risk of serious harm. Id. at 837, 847.

8 Plaintiff alleges that defendants McDonald, Davey, Van Leer, and Sanders violated his
9 Eighth Amendment rights when he was denied outdoor exercise for a period of approximately
10 eight months as a result of the 2-5 modified program. ECF No. 1 at 20, ¶ 151. Appropriately,
11 defendants do not argue that plaintiff did not suffer an objectively serious deprivation. See
12 Thomas, 611 F.3d at 1151 (“‘lack of outside exercise for extended periods is a sufficiently serious
13 deprivation’ for Eighth Amendment purposes” (quoting LeMarie v. Maass, 12 F.3d 1444, 1457
14 (9th Cir. 1993)); Lopez v. Smith, 203 F.3d 1122, 1132-33 (9th Cir. 2000) (deprivation of outdoor
15 exercise for a period of six and one-half weeks is sufficiently serious deprivation for Eighth
16 Amendment purposes). Nor do they argue that defendants were unaware of a substantial risk of
17 serious harm to plaintiff. See Farmer, 511 U.S. at 842 (“[A] factfinder may conclude that a prison
18 official knew of a substantial risk from the very fact that the risk was obvious.”); Thomas, 611
19 F.3d at 1152 (concluding that extended denials of outdoor exercise pose an obvious risk to inmate
20 health). Defendants do, however, argue that there was a reasonable justification for allowing
21 plaintiff to face the risk.

22 Based on the undisputed facts outlined above in Section VI, plaintiff does not appear to
23 argue that the 2-5 modified program was inherently unreasonable or excessive in duration, and in
24 fact appears to agree that it was necessary and ended as soon as was safely possible. Even if
25 plaintiff is attempting to argue that the 2-5 modified program was unreasonably implemented or
26 excessive in duration, defendants have met their burden of showing the modified program was
27 reasonably justified by the violence being perpetuated by the 2-5 and, in light of the undisputed
28 facts, plaintiff is unable to raise a genuine issue of material fact on this issue. However, plaintiff

1 argues instead (1) that he was inappropriately identified as a possible 2-5 member and this
2 misidentification should have been corrected sooner, and (2) that the small concrete yards could
3 have been used to provide outdoor exercise to himself and the other inmates identified as possible
4 2-5 members. ECF No. 84 at 13; Response to DSUF ¶¶ 28, 74.106, 116, 131. These arguments
5 will be addressed in turn.

6 1. Misidentification

7 There is no allegation that plaintiff was involved in the attacks that took place on
8 September 17, 2009. However, it is undisputed that there was a memorandum from December
9 2007, in which an inmate identified plaintiff as a member of the 2-5 and that this memorandum is
10 what led to plaintiff's inclusion in the group of suspected 2-5 members. DSUF ¶¶ 116, 118.
11 Though plaintiff argues that because this memorandum was the only evidence that he was
12 associated with the 2-5 and was insufficient without more to warrant his inclusion in the group of
13 2-5 suspects, he offers no evidence that it was unreasonable for prison officials to rely on the
14 memorandum. Moreover, even if it was unreasonable to rely on the memorandum, there is no
15 evidence that defendants McDonald, Davey, Van Leer, or Sanders either (1) reviewed the
16 documentation and made the determination to include plaintiff in the group of suspected 2-5
17 members or (2) had reason to question the decision of the individual(s) that made the
18 determination.

19 Though plaintiff argues that Sanders could have alerted her supervisors to the fact that the
20 memorandum was the only evidence of his 2-5 affiliation (Response to DSUF ¶ 28), he does not
21 dispute that she had no authority to alter his designation and was not responsible for investigating
22 or determining an inmate's gang association (Declaration of A. Sanders at 2, ¶¶ 11-13 [ECF No.
23 77-2 at 3]). Moreover, since Sanders was not involved in investigating inmate gang associations,
24 which was being handled in part by the gang investigation unit and included more than simply
25 reviewing an inmate's file (DSUF ¶¶ 57, 111, 113), it is unclear why she would have any reason
26 to believe that the memorandum was the only piece of evidence establishing plaintiff's gang
27 association or that it had not already been discovered.

28 It is undisputed that prison officials had a genuine safety concern regarding the 2-5

1 disruptive group and plaintiff cannot show that his identification as a 2-5 suspect was either
2 unreasonable or the result of the actions of defendants McDonald, Davey, Van Leer, or Sanders.

3 2. Reasonable Alternatives

4 Plaintiff also argues that he should have been permitted to use the small concrete yards for
5 exercise during the 2-5 program. Response to DSUF ¶ 74. He argues that they were designated
6 for administrative segregation overflow and security housing unit inmates and would have
7 therefore offered a reasonable alternative. Id. However, defendants provide evidence that the
8 yards were approximately the size of a basketball court and could accommodate, at most, twenty
9 inmates. DSUF ¶ 74. Taking staff away from the ongoing investigation would have been
10 necessary in order to evaluate, select, escort, and supervise such small groups of inmates, leading
11 to the modified program continuing for a longer period of time. Id. Plaintiff argues, without any
12 evidence to support the claim, that because the law requires a minimum of ten hours of exercise
13 per week, escorting him to the yard two to three times a week would not have caused any
14 additional delays. Response to DSUF ¶ 74. While the burden of escorting plaintiff by himself
15 may have been minimal, there were approximately fifty other inmates that had been identified as
16 potential 2-5 members and were not allowed outdoor exercise, and the reasonableness of the
17 alternative must be considered in this context. ECF No. 1 at 13, ¶ 95; DSUF ¶ 184. Moreover,
18 while this may have been reasonably accomplished while the prison was running a normal
19 program, there are additional demands on prison resources, including available staff, during a
20 modified program. DSUF ¶ 56.

21 In response to defendants' claim that allowing twenty inmates to use the yard at a time
22 presented an increased danger for any inmate because the close confines meant no means of
23 escape in the event of an assault, plaintiff argues that it would not be necessary to escort that
24 many inmates at one time and that inmates are classified first to avoid such incidents. Response
25 to DSUF ¶ 74. Plaintiff's first argument is unconvincing because even if escorting smaller groups
26 would have been effective, it would have placed an even greater strain on staff resources because
27 it would have required escorting even more groups of inmates. Plaintiff's second argument
28 carries more weight. Presumably, inmates using the concrete yards would be those already

1 identified as potential 2-5 members, in which case they would not have been the targets of the
2 assaultive behavior that was the concern of the modified program, though they would have still
3 been Level IV inmates. However, even if there was not a danger of further violence among the 2-
4 5 suspects, allowing them to meet in a group would have undermined one of the main purposes of
5 the modified program, which was to prevent the 2-5 from planning and carrying out further
6 violence. DSUF ¶ 74. While plaintiff argues this makes no sense because they were already
7 segregated from other inmates, it ignores the possibility of the 2-5 members making plans to
8 initiate violence as the restrictions of the modified program were lessened or attempting to devise
9 ways to circumvent the restrictions.

10 In this situation, the court cannot find that allowing inmates to use the concrete yards was
11 a reasonable alternative.

12 3. Conclusion

13 Based on the undisputed facts, the implementation of the 2-5 modified program was
14 reasonably justified by the circumstances and was not excessive in length. The court also finds
15 that plaintiff's identification as a suspected 2-5 member was not unreasonable, nor is there
16 evidence that it was a result of the action of any of the defendants. Finally, plaintiff has not
17 created a material issue of fact regarding the use of the concrete yards by the suspected 2-5
18 members as a reasonable alternative. Defendants' motion for summary judgment on plaintiff's
19 Eighth Amendment claim regarding the deprivation of outdoor exercise against McDonald,
20 Davey, Van Leer, and Sanders should therefore be granted.

21 C. Count V: Eighth Amendment (Inadequate Medical Care)

22 In order to state a §1983 claim for violation of the Eighth Amendment based on
23 inadequate medical care, plaintiff must allege "acts or omissions sufficiently harmful to evidence
24 deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976).
25 To prevail, plaintiff must show both that his medical needs were objectively serious, and that
26 defendants possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 298-
27 99 (1991); McKinney v. Anderson, 959 F.2d 853, 854 (9th Cir. 1992) (on remand). The requisite
28

1 state of mind for a medical claim is “deliberate indifference.” Hudson v. McMillian, 503 U.S. 1,
2 5 (1992).

3 “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in
4 further significant injury or the ‘unnecessary and wanton infliction of pain.’” McGuckin v.
5 Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds WMX Technologies v.
6 Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc). Examples of a serious medical need include
7 “[t]he existence of an injury that a reasonable doctor or patient would find important and worthy
8 of comment or treatment; the presence of a medical condition that significantly affects an
9 individual’s daily activities; or the existence of chronic and substantial pain.” Id. at 1059-60
10 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir. 1990) (citing cases); Hunt v.
11 Dental Dept., 865 F.2d 198, 200-01 (9th Cir. 1989)).

12 In Farmer v. Brennan, 511 U.S. 825 (1994), the Supreme Court established a very
13 demanding standard for “deliberate indifference.” Negligence is insufficient. Farmer, 511 U.S.
14 at 835. Even civil recklessness (failure to act in the face of an unjustifiably high risk of harm
15 which is so obvious that it should be known) is insufficient to establish an Eighth Amendment
16 violation. Id. at 836-37. It is not enough that a reasonable person would have known of the risk
17 or that a defendant should have known of the risk. Toguchi v. Chung, 391 F.3d 1051, 1057 (9th
18 Cir. 2004). Rather, deliberate indifference is established only where the defendant *subjectively*
19 “knows of and disregards an *excessive risk* to inmate health and safety.” Id. (citation and internal
20 quotation marks omitted) (emphasis added). Deliberate indifference can be established “by
21 showing (a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need
22 and (b) harm caused by the indifference. Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)
23 (citations omitted).

24 In the complaint, plaintiff alleges that defendant J. Clark deprived him of timely medical
25 care despite being aware of his suffering and having the ability to intervene. ECF No. 1 at 20, ¶
26 153. Specifically, he alleges that between February 22, 2010, and April 20, 2010, he submitted
27 three health care requests regarding his abdominal pain and diarrhea, but was not seen by
28 defendant Clark until April 28, 2010. Id. at 18-19, ¶¶ 142-46.

1 Defendant Clark makes only a brief, conclusory argument that plaintiff did not have a
2 serious medical need. ECF No. 65-1 at 41. Plaintiff's verified complaint alleges that he suffered
3 "excruciating abdominal pain" and diarrhea that progressed in severity from February 22, 2010,
4 and that after he received fiber tablets on April 30, 2010, his symptoms "began to surface more
5 frequently than before and worsened to such degree of impairing plaintiff's daily activities and
6 causing him significant and daily crippling pain without warning." ECF No. 1 at 18-19, ¶¶ 142-
7 43, 146. His second and third health care requests also describe "reoccurring bouts of stomach
8 pains, irregularity, [and] dia[rrhea]" and "crippling bouts of stomach pain." ECF No. 77-2 at 38-
9 39. Plaintiff also previously provided a sworn declaration from his cellmate that described him as
10 suffering from stomach pains that "kept him from performing activities such as in-cell cleaning,
11 changing and washing his clothes/sheets." ECF No. 64-2 at 143, ¶ 6. The declaration also stated
12 that plaintiff "would lay in bed on a regular basis until his symptoms subsided" and that once
13 plaintiff received treatment he "was no longer bed-ridden for extended periods and was back to
14 performing daily activities with regularity." *Id.* at 143-44, ¶¶ 6, 9. Additionally, the report from
15 defendant Clark's examination of plaintiff on April 26, 2010, shows that he had lost ten pounds in
16 the past six months. ECF No. 77-2 at 39. On these facts, plaintiff suffered from a serious
17 medical need. See T.W. Elec. Serv., Inc., 809 F.2d at 630 ("at summary judgment, the judge
18 must view the evidence in the light most favorable to the nonmoving party"). Having found that
19 plaintiff suffered from a serious medical need, the court turns to the question of whether
20 defendant Clark was deliberately indifferent to that need.

21 The undisputed evidence shows that plaintiff submitted health care requests dated
22 February 22, 2010; March 23, 2010; and April 20, 2010, related to his abdominal pain and
23 diarrhea. DSUF ¶¶ 193, 201, 206; ECF No. 77-2 at 37-39. The first request was reviewed by
24 another nurse on February 23, 2010. DSUF ¶ 195; ECF No. 77-2 at 37. In a sworn declaration,
25 defendant Clark states that he did not see the February 22, 2010 request until March 18, 2010
26 (Declaration of J. Clark at 2, ¶ 6 [ECF No. 77-2 at 7]), and this statement is supported by the
27 request itself, which was signed by Clark on March 18, 2010 (ECF No. 77-2 at 37). In response,
28 plaintiff argues that "[t]here is no credible evidence presented as to when defendant Clark

1 actually reviewed plaintiff's request. Even though it was supposed to [be] reviewed within 24
2 hours." Response to DSUF ¶ 196 [ECF No. 98 at 51]. To dispute Clark's statement, plaintiff
3 offers nothing but the speculative implication that Clark reviewed his request prior to March 18,
4 2010, and this is insufficient to create an issue of fact. See, e.g., Taylor v. List, 880 F.2d 1040,
5 1045 (9th Cir. 1989) (conclusory allegations, unsupported by evidence are insufficient to defeat a
6 motion for summary judgment); see also Villarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061
7 (9th Cir. 2002) (no "genuine issue" of fact if only evidence presented is the "uncorroborated and
8 self-serving" testimony of the opposing party). Plaintiff's argument that his request was to be
9 reviewed within twenty-four hours of submission is also insufficient to create an issue of fact
10 because the form shows that it was reviewed by another nurse within twenty-four hours of
11 submission (ECF No. 77-2 at 37) and plaintiff does not allege, nor does the evidence show, that
12 the initial review of health care requests had to be performed by defendant Clark specifically.

13 By the time defendant Clark reviewed plaintiff's request on March 18, 2010, plaintiff was
14 already scheduled to be seen by his primary care provider eight days later on March 26, 2010.
15 Id.; DSUF ¶ 197. Clark states that, given that plaintiff stated his symptoms may have been
16 caused by something he ate and that plaintiff had not submitted a second health care request as of
17 March 18, 2010, he believed that plaintiff's health concern had likely resolved by that time.
18 Declaration of J. Clark at 2, ¶ 9 [DSUF ¶ 199]. Plaintiff does not dispute this fact, but argues that
19 Clark did not schedule him for another doctor's appointment. Response to DSUF ¶ 199.
20 Presumably plaintiff believes that Clark should have scheduled him for an earlier appointment.
21 Plaintiff also argues, in response to Clark's statements that plaintiff's condition was not an
22 emergency and that he did not believe an earlier appointment was necessary, that Clark had no
23 basis for those beliefs without having first seen plaintiff. Response to DSUF ¶¶ 198, 200.

24 Even if plaintiff was still suffering from his symptoms on March 18, 2010, he does not
25 dispute that defendant Clark believed his symptoms had resolved by that point. Response to
26 DSUF ¶ 199. Moreover, though plaintiff argues Clark had no basis for his belief that plaintiff did
27 not need to be seen sooner than March 26, 2010, Clark states that his belief was based upon
28 plaintiff's description of his condition and the lack of any additional health care requests during

1 the approximately three-and-a-half weeks between the date the request was submitted and when it
2 was seen by Clark. Because it is undisputed that Clark believed plaintiff's symptoms had likely
3 resolved, plaintiff cannot show that on March 18, 2010, defendant Clark knew he had a serious
4 medical need. The evidence also shows that even though Clark believed plaintiff's issues had
5 likely resolved, he did not ignore plaintiff's complaints because he noted on the request that
6 plaintiff was to keep his appointment with his primary care provider on March 26, 2010. ECF
7 No. 77-2 at 37. There is no evidence that Clark had any indication that the March 26, 2010
8 appointment would not take place.

9 Plaintiff's next health care request was dated March 23, 2010, and was reviewed by
10 defendant Clark on March 26, 2010. DSUF ¶ 197; ECF No. 77-2 at 38. Because plaintiff was
11 already scheduled to see his primary care provider that same day, Clark did not believe it was
12 necessary to schedule an additional appointment for plaintiff. DSUF ¶ 203. Plaintiff argues that
13 the appointment never took place, but does not dispute that an appointment was scheduled for that
14 day or that there is no evidence that Clark interfered with the appointment. Response to DSUF ¶¶
15 197, 203, 205. Instead, plaintiff argues that there is nothing to show that Clark took affirmative
16 steps to ensure the appointment took place, but he offers no evidence that would establish Clark
17 was responsible for ensuring the appointment took place or that Clark had any reason to believe a
18 scheduled appointment would not take place as scheduled. DSUF ¶ 205. Because plaintiff was
19 already scheduled to see a primary care provider who, unlike Clark, would be able to prescribe
20 medication and there is no evidence that Clark prevented that appointment, was responsible for
21 ensuring the appointment took place, or knew the appointment would not actually take place,
22 plaintiff cannot show that Clark ignored his serious medical need.

23 Plaintiff's final request for health care was dated April 20, 2010, and reviewed by Clark
24 on April 22, 2010. DSUF ¶ 206; ECF No. 77-2 at 39. Plaintiff was then seen by Clark six days
25 later on April 28, 2010. DSUF ¶ 208; ECF No. 77-2 at 39. During the exam plaintiff did not
26 appear to be suffering from symptoms and Clark noted plaintiff's history of IBS and previous
27 prescription for dicylomine. DSOF ¶ 209; ECF No. 77-2 at 39. Upon consultation with the
28 primary care provider, the primary care provider prescribed plaintiff with fiber tablets. DSUF ¶

1 210. Though plaintiff alleges that his symptoms worsened after he received the fiber tablets (ECF
2 No. 1 at 19, ¶ 146), he admits that defendant Clark was not responsible for that prescription or the
3 side effects he experienced (Response to DSUF ¶ 211). The records do not show, nor does
4 plaintiff allege, any further involvement in his treatment by defendant Clark. Plaintiff later had
5 an appointment with his primary care provider in May 2010, at which time dicyclomine was
6 prescribed and plaintiff's symptoms subsided. DSUF ¶ 212.

7 Defendant Clark has provided a declaration from B. Barnett, M.D., who is board-certified
8 in family medicine and has been practicing medicine since the mid-1970s. Declaration of B.
9 Barnett, M.D. at 1, ¶ 1 [ECF No. 77-2 at 10]; ECF No. 77-2 at 15. Doctor Barnett states that
10 given that plaintiff's "complaints were consistent with his prior chronic condition which had been
11 intermittent and resolved on its own," scheduling plaintiff to be seen on April 28, 2010, in
12 response to the April 20, 2010 request was "entirely appropriate." Declaration of B. Barnett at 3,
13 ¶¶ 15-17. Plaintiff offers no evidence, and does not argue, that the time between the submission
14 of the April 20, 2010 request and his exam on April 28, 2010, was inappropriate. Instead,
15 plaintiff's argument is that the cumulative delay between his first request, submitted February 22,
16 2010, and his exam on April 28, 2010, reflects deliberate indifference. But, as set forth above,
17 defendant Clark did not know about plaintiff's health issues until March 18, 2010, and at the time
18 Clark reviewed the first two requests, plaintiff was already scheduled to see a primary care
19 provider. There is no evidence that Clark was aware plaintiff did not actually see his provider
20 until Clark reviewed the April 20, 2010 request, at which point he scheduled plaintiff for an
21 exam. Moreover, plaintiff's first health care request indicated an isolated issue, while his second
22 and third requests indicated a chronic condition, rather than an emergency condition, that was
23 intermittent, not continuous. ECF No. 77-2 at 37-39. In light of the circumstances leading up to
24 plaintiff's appointment with defendant Clark, plaintiff cannot show that Clark had the requisite
25 state of mind to be deliberately indifferent to his serious medical need because he did not examine
26 plaintiff until April 28, 2010.

27 For these reasons, the motion for summary judgment on plaintiff's Eighth Amendment
28 deliberate indifference claim against defendant Clark should be granted.

1 D. Count VI: Fourteenth Amendment (Due Process)

2 The Due Process Clause of the Fourteenth Amendment protects prisoners from the
3 deprivation of life, liberty or property without due process of law. Wolff v. McDonnell, 418 U.S.
4 539, 556 (1974). However, “that prisoners retain rights under the Due Process Clause in no way
5 implies that these rights are not subject to restrictions imposed by the nature of the regime to
6 which they have been lawfully committed.” Id. (citations omitted). Liberty interests may arise
7 from the Due Process Clause or from state law, but the Due Process Clause itself does not confer
8 on inmates a liberty interest in avoiding more adverse conditions of confinement. Wilkinson v.
9 Austin, 545 U.S. 209, 221-22 (2005). While states may in some circumstances create liberty
10 interests entitled to protection under the Due Process Clause, such

11 interests will be generally limited to freedom from restraint which,
12 while not exceeding the sentence in such an unexpected manner as
13 to give rise to protection by the Due Process Clause of its own force
14 nonetheless imposes atypical and significant hardship on the inmate
15 in relation to the ordinary incidents of prison life.

16 Sandin v. Conner, 515 U.S. 472, 484 (1995) (internal citations omitted); see also, Mitchell v.
17 Dupnik, 75 F.3d 517, 522 (noting Sandin’s re-focus of the test for existence of a liberty interest
18 “away from the wording of prison regulations and toward an examination of the hardship caused
19 by the prison’s challenged action relative to ‘the basic conditions’ of life as a prisoner”). To
20 prevail on a claim of a due process violation plaintiff must first prove that he suffered “a
21 deprivation of a constitutionally protected liberty or property interest.” Brewster v. Bd. of Educ.
22 of Lynwood Unified Sch. Dist., 149 F.3d 971, 982 (9th Cir. 1998). Second, he must show he was
23 denied adequate procedural protections. Id.

24 Plaintiff alleges that defendants McDonald, Davey, Sanders, Van Leer, and Gower
25 violated his due process rights when they placed him in administrative segregation without the
26 appropriate due process safeguards. ECF No. 1 at 21, ¶ 154. Specifically, he alleges that he was
27 placed in administrative segregation without providing him with a hearing, information about the
28 charges or reason for segregation, or an opportunity to present a response. Id. at 6, 10, ¶¶ 25, 59.
He was also denied periodic reviews of his placement in segregation. Id. at 6, ¶ 25. As the

1 undisputed facts have shown, plaintiff was not in administrative segregation, but was instead
2 under a modified program that was in place due to a set of violent, coordinated assaults by the 2-5
3 disruptive group, which plaintiff admits was implemented for the purpose of ensuring the safety
4 of the staff and inmates and was ended as soon as safely possible.

5 In Hayward v. Proconier, the Ninth Circuit held that inmates had no protected liberty
6 interest in avoiding a prison-wide lockdown. 629 F.2d 599, 601-02 (9th Cir. 1980), cert. denied,
7 451 U.S. 937 (1981). The plaintiffs in Hayward were seeking procedural safeguards in response
8 to a prison-wide lockdown that lasted over five months. Id. at 601. Although the lockdown in
9 Hayward was institution-wide, the analysis applies equally to the collective lock-down of inmates
10 in a particular unit of a prison. The Ninth Circuit held that the increased security of a five-month
11 lockdown for prisoners therein was a foreseeable consequence of a criminal conviction, and, as
12 such, it was not an atypical and significant hardship:

13 We do not find here the equivalent of a statute conferring a
14 particular benefit, such as good behavior time or parole, with a
15 specification of conditions under which that benefit can be lost. See
16 Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed.2d 935
17 (1974); Greenholtz v. Inmates of Nebraska Penal and Correctional
18 Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed.2d 668 (1979). The
19 regulations here do not purport to enumerate specific reasons for
20 which a prisoner can be placed in solitary confinement and to
21 require documentation of those reasons. See Wright v. Enomoto,
22 462 F. Supp. 397 (N.D. Cal.1976), aff'd mem., 434 U.S. 1052, 98
23 S. Ct. 1223, 55 L. Ed.2d 756 (1978). Nor are prisoners being
24 subjected to treatment wholly outside the foreseeable consequences
25 of criminal conviction, such as commitment to a mental institution
26 in the absence of a mental disease or defect. See Vitek v. Jones,
27 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980).

22 Hayward, 629 F.2d at 601-02. The court found that the lockdown in Hayward was
23 distinguishable from other situations where inmates were found to have a right to a due process
24 hearing because it was not the conduct or fate of individual prisoners that was at issue. Id. at 602.

25 In the case of a lockdown,

26 the facts in dispute are not those which would differentiate the
27 plaintiffs from the general prison population and cause them to be
28 subjected to distinctive treatment. The conduct of the plaintiffs is
not in issue. Instead, the question to be decided is whether the
degree of emergency justifies a continuation of the lockdown—a

1 determination involving a high degree of policy and prediction.

2 Id.

3 Here, plaintiff and other suspected members or associates of the 2-5 disruptive group were
4 isolated from other inmates in B-Facility and placed under a separate, more restrictive program
5 within the facility-wide modified program. The undisputed evidence shows that plaintiff's
6 inclusion in the modified program was not due to any conduct by him, but due to his
7 identification as a possible member of the 2-5 disruptive group, the same as for all other inmates
8 included in the more restrictive portion of the modified program. DSUF ¶¶ 115-16, 118. It is
9 also undisputed that the modified program was implemented solely for the purpose of preventing
10 further violence by the 2-5 group and restoring order to the prison and that prison officials
11 believed it was necessary to isolate inmates affiliated with the 2-5 in order to stop the violence.
12 DSUF ¶¶ 79, 83, 109. It is also undisputed that the modified program lasted only as long as was
13 necessary for the safety of the inmates and staff. DSUF ¶ 80, 82-84. There is no evidence that
14 the implementation of the modified program was intended to be punitive or disciplinary in any
15 way.

16 Plaintiff was subject to a modified program, not administrative segregation as he alleged
17 in the complaint. As such, he had no protected liberty interest in remaining free of what was an
18 admittedly legitimate modified program and he was not entitled to due process. Hayward, 629
19 F.2d at 601-02; Hurd v. Garcia, 471 F. App'x. 798, 800 (9th Cir. 2012) (affirming summary
20 judgment in favor of the defendant prison officials on a due process claim arising from a
21 lockdown); Snow v. Lamarque, 74 F. App'x 815, 816 (9th Cir. 2003) (affirming summary
22 judgment because "a prisoner is not entitled to a hearing before being placed on lockdown during
23 a prison emergency" and plaintiff failed to raise genuine issue as to whether emergency existed);
24 Furnace v. Evans, 459 F. App'x. 630, 632 (9th Cir. 2011) (affirming summary judgment finding
25 no due process required for twenty-month lockdown when genuine emergency existed); Corona
26 v. Harrington, No. CV F 08-0237 LJO DLB, 2010 WL 318555, at *8-9, 2010 U.S. Dist. LEXIS
27 4013, at *23-25 (E.D. Cal. Jan. 20, 2010) (granting motion to dismiss due process claim arising
28 from a five month lockdown of a "sub-group" of inmates).

1 For these reasons, summary judgment should be granted on plaintiff’s claim that
2 defendants McDonald, Davey, Sanders, Van Leer, and Gower violated his due process rights.

3 XI. Qualified Immunity

4 Government officials are immune from civil damages “unless their conduct violates
5 ‘clearly established statutory or constitutional rights of which a reasonable person would have
6 known.’” Jeffers v. Gomez, 267 F.3d 895, 910 (9th Cir. 2001) (quoting Harlow v. Fitzgerald, 457
7 U.S. 800, 818 (1982)). In analyzing a qualified immunity defense, the court must consider the
8 following: (1) whether the alleged facts, taken in the light most favorable to the plaintiff,
9 demonstrate that defendant’s conduct violated a statutory or constitutional right; and (2) whether
10 the right at issue was clearly established at the time of the incident. Saucier v. Katz, 533 U.S.
11 194, 201 (2001) overruled in part by Pearson v. Callahan, 555 U.S. 223, 236 (2009) (overruling
12 Saucier’s requirement that the two prongs be decided sequentially).

13 These questions may be addressed in the order most appropriate to “the circumstances in
14 the particular case at hand.” Pearson, 555 U.S. at 236. Thus, if a court decides that plaintiff’s
15 allegations do not support a statutory or constitutional violation, “there is no necessity for further
16 inquiries concerning qualified immunity.” Saucier, 533 U.S. at 201. On the other hand, if a court
17 determines that the right at issue was not clearly established at the time of the defendant’s alleged
18 misconduct, the court need not determine whether plaintiff’s allegations support a statutory or
19 constitutional violation. Pearson, 555 U.S. at 236-242. Assuming that plaintiff has established
20 violations of his rights with respect to his claims that he was denied group religious activities,
21 outdoor exercise, and due process, defendants would be entitled to qualified immunity.

22 A. Group Religious Activities and Outdoor Exercise

23 Assuming the deprivation of group religious activities and outdoor exercise constituted a
24 violation of plaintiff’s constitutional rights, the court must determine whether this conduct
25 violated clearly established law.

26 It is not clearly established exactly how or when prison officials must lift a lockdown or
27 modified program implemented in response to threats to the safety and security of the institution
28 arising from violent inmate assaults or information that inmates plan to carry out further assaults

1 of other inmates or staff. Noble v. Adams, 646 F.3d 1138, 1143 (9th Cir. 2011) (“[I]t was not
2 clearly established in 2002 – nor is it established yet – precisely how, according to the
3 Constitution, or when a prison facility housing problem inmates must return to normal operations,
4 including outside exercise, during and after a state of emergency called in response to a major
5 riot.”); Norwood v. Vance, 591 F.3d 1062, 1070 (9th Cir. 2009); see also Ford v. Martel, 262 F.
6 App’x. 777, 777 (9th Cir. 2007) (affirming summary judgment on First Amendment claim
7 because there was no triable issue as to whether lockdown was legitimate action to maintain
8 security or whether it prevented plaintiff from engaging in religiously mandated conduct). As
9 Norwood states, “[w]hen violence rises to unusually high levels, prison officials can reasonably
10 believe it is lawful to temporarily restrict outdoor exercise to help bring the violence under
11 control.” 591 F.3d at 1069.

12 In light of the undisputed evidence regarding the reasons for the modified program, the
13 investigatory steps undertaken in responding to the events, and that prison officials lifted the
14 modified program in stages depending upon the results of the investigations, it would not have
15 been clear to a reasonable officer that restricting an inmate’s outdoor exercise in conjunction with
16 the modified program during the investigations at issue here was unlawful. Moreover, while
17 Noble and Norwood both deal with the deprivation of outdoor exercise, their reasoning applies
18 equally to the suspension of group religious activities, and the court has been unable to identify
19 any case law that would have alerted a reasonable officer that the restrictions on group religious
20 activities during the modified program violated plaintiff’s First Amendment rights.

21 Defendants are therefore entitled to qualified immunity for the 2-5 modified program.
22 Accordingly, the court finds defendants should also be entitled to qualified immunity on the
23 Eighth Amendment claim for denial of outdoor exercise and First Amendment claim for denial of
24 group religious activities.

25 B. Due Process

26 Even if plaintiff’s allegations could be construed to state a due process claim, plaintiff has
27 not cited, nor has the court found, authority for the proposition that a reasonable official would
28 have known that placing plaintiff on modified program following inmate attacks on other inmates

1 created an “atypical and significant hardship” triggering procedural due process protections. The
2 existing authority both in 2009 and currently indicates that an inmate does not have a protected
3 liberty interest triggering the requirement of notice and a hearing when prison officials impose
4 and maintain a lockdown or modified program in response to an emergency. See Hayward, 629
5 F.2d at 601-03 (finding no due process right to a hearing when officials impose a lockdown);
6 Snow, 74 F. App’x at 816 (no entitlement to a hearing before being placed on lockdown during a
7 prison emergency); Hurd, 471 F. App’x. at 800 (no due process claim arising from a lockdown);
8 Furnace, 459 F. App’x. at 632 (no due process required for twenty-month lockdown when
9 genuine emergency existed); Corona, 2010 WL 318555, at *8-9, 2010 U.S. Dist. LEXIS 4013, at
10 *23-25 (no due process claim arising from five month lockdown in 2006 of a “sub-group” of
11 inmates).

12 Therefore, dismissal of this claim is also warranted on qualified immunity grounds.

13 C. Conclusion

14 Defendants are therefore entitled to qualified immunity on the claims for denial of group
15 religious activities and outdoor exercise and denial of due process.

16 X. Conclusion

17 For the reasons set forth above, defendants’ motion for summary judgment (ECF No. 65)
18 should be granted.

19 Accordingly, IT IS HEREBY RECOMMENDED that:

20 1. The following claims be dismissed without leave to amend for failure to state a claim:

21 a. Count I: First Amendment claim for denial of access to the courts;

22 b. Count V: Eighth Amendment claim for conditions of confinement based on
23 deprivation of hygiene items;

24 c. Count VIII: Fourteenth Amendment equal protection claim; and

25 d. Count IX: Conspiracy.

26 2. The court decline to exercise supplemental jurisdiction over plaintiff’s state law claims
27 and dismiss Count X.


28 /////

1 3. Defendants' motion for summary judgment (ECF No. 65) be granted for the reasons set
2 forth above.

3 4. Judgment be entered for the defendants.

4 These findings and recommendations are submitted to the United States District Judge
5 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
6 after being served with these findings and recommendations, any party may file written
7 objections with the court, which shall be captioned "Objections to Magistrate Judge's Findings
8 and Recommendations." **Due to exigencies in the court's calendar, no extensions of time will**
9 **be granted.**³⁸ A copy of any objections filed with the court shall also be served on all parties.
10 The parties are advised that failure to file objections within the specified time may waive the right
11 to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 DATED: September 8, 2015

13 
14 ALLISON CLAIRE
15 UNITED STATES MAGISTRATE JUDGE
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26 _____
27 ³⁸ Plaintiff is informed that in order to obtain the district judge's independent review and
28 preserve issues for appeal, he need only identify the findings and recommendations to which he
objects. There is no need to reproduce briefing on the issues.