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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 KELVIN HOUSTON,

11 Plaintiff,

No. 2:11-cv-2897 KJM JFM P

12 vs.

13 A. TORRES,

14 Defendant.

ORDER

15 _____/
16 Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action
17 seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate
18 Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

19 On November 2, 2012, the magistrate judge filed findings and recommendations,
20 which were served on all parties and which contained notice to all parties that any objections to
21 the findings and recommendations were to be filed within fourteen days. Plaintiff has filed
22 objections to the findings and recommendations.

23 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule
24 304, this court has conducted a *de novo* review of this case. Having carefully reviewed the file,
25 the court finds the findings and recommendations to be supported by the record and by the
26 proper analysis as to plaintiff's claims based on the due process clause and on state law.

1 In the findings and recommendations, the magistrate judge rejects plaintiff's equal
2 protection claim by noting that plaintiff failed to allege any form of discrimination. ECF No. 23
3 at 11. In his objections, plaintiff argues that the court should read his complaint, with its
4 citation to state regulations concerning disciplinary proceedings, as alleging that he was denied
5 the protection of the regulations afforded to all other prisoners. ECF No. 24 at 1. Plaintiff does
6 not allege, however, he was intentionally singled out for different treatment than other similarly
7 situated inmates. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Nevertheless,
8 the magistrate judge erred in dismissing this claim without giving plaintiff leave to amend the
9 complaint. *See Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987) ("A pro se litigant must
10 be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of
11 the complaint could not be cured by amendment.") (internal quotations omitted). This court
12 expresses no view on the viability of any amended complaint.

13 Accordingly, IT IS HEREBY ORDERED that:

- 14 1. The findings and recommendations filed November 2, 2012, are adopted in
15 part;
16 2. Defendant's August 23, 2012 motion to dismiss be granted as to plaintiff's due
17 process and state law claims without leave to amend;
18 3. Plaintiff's equal protection claim is dismissed with leave to file an amended
19 complaint; and
20 4. The case is referred back to the magistrate judge for further proceedings.

21 DATED: February 11, 2013.

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24 UNITED STATES DISTRICT JUDGE
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