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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 MICHAEL HOPKINS,

12 Plaintiff,

13 v.

14 R. BUSTOS, et al.,

15 Defendants.
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Case No.: 15-CV-788 JLS (PCL)

**ORDER (1) OVERRULING
OBJECTIONS; (2) ADOPTING
REPORT AND
RECOMMENDATION; AND (3)
GRANTING MOTION FOR
SUMMARY JUDGMENT**

(ECF No. 81)

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19 Presently before the Court are: (1) Defendants Jeffrey Beard¹ and Daniel Paramo's
20 Motion for Summary Judgment ("MSJ," ECF No. 63); (2) Magistrate Judge Peter C.
21 Lewis's Report and Recommendation ("R&R") advising that the Court should grant
22 Defendants' MSJ, (ECF No. 81); and Plaintiff's Objections to the R&R, ("R&R Objs.,"
23 ECF No. 85). Defendants did not file a reply in opposition to Plaintiff's Objections. After
24 considering the parties' arguments and the law, the Court (1) **OVERRULES** Plaintiff's
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27 ¹ The Court hereby substitutes the current Secretary of the California Department of Corrections and
28 Rehabilitation ("CDCR"), Scott Kernan, for former Secretary Beard on Plaintiff's official capacity claim.
See Fed. R. Civ. P. 25(d). However, for ease of reference and to preserve continuity in assessing the
matters before the Court, the Court considers Plaintiff's factual allegations against Defendant Beard.

1 Objections, (2) **ADOPTS** the R&R in its entirety, and (3) **GRANTS** Defendants’ Motion
2 for Summary Judgment.

3 **BACKGROUND**

4 Judge Lewis’s R&R contains a thorough and accurate recitation of the factual and
5 procedural histories underlying the instant Motion for Summary Judgment. (*See* R&R 1–
6 9².) This Order incorporates by reference the background as set forth therein.

7 **LEGAL STANDARD**

8 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district
9 court’s duties regarding a magistrate judge’s report and recommendation. The district court
10 “shall make a de novo determination of those portions of the report . . . to which objection
11 is made,” and “may accept, reject, or modify, in whole or in part, the findings or
12 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(c); *see also United*
13 *States v. Raddatz*, 447 U.S. 667, 673–76 (1980). In the absence of a timely objection,
14 however, “the Court need only satisfy itself that there is no clear error on the face of the
15 record in order to accept the recommendation.” Fed. R. Civ. P. 72 advisory committee’s
16 note (citing *Campbell v. U.S. Dist. Court*, 510 F.2d 196, 206 (9th Cir. 1974)).

17 **ANALYSIS**

18 **I. Summary of the R&R Conclusion**

19 On May 4, 2015 Plaintiff filed a Complaint against various defendants for alleged
20 violations of his civil rights. (Compl., ECF No. 1.) Plaintiff accuses the moving Defendants
21 of violating his due process rights under the Fourteenth Amendment by denying him
22 admittance into the Developmentally Disabled Program (“DDP”) which would have
23 allegedly enabled him to file grievances against correctional staff while he was incarcerated
24 at Richard J. Donovan Correctional Facility (“RJD”). (Compl. 5–7.) On September 14,
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27 ² Pin citations to docketed material refer to the CM/ECF numbers electronically stamped at the top of each
28 page.

1 2016 Defendants filed a Motion for Summary Judgment arguing that (1) neither Beard nor
2 Paramo violated Plaintiff’s due process rights, and (2) Plaintiff’s claim is moot. (*See*
3 *generally* MSJ.)

4 Judge Lewis concluded that Defendants did not violate Plaintiff’s due process rights
5 and thus recommends that the Court grant Defendants’ MSJ. While Plaintiff argues that
6 Defendants denied him access into the DDP, Judge Lewis notes that the evidence shows
7 the opposite—that Plaintiff initially failed to test into the program, was still able to file
8 grievances, and was eventually placed into the DDP. (R&R 12–13.) Thus, Judge Lewis
9 found that there was no liberty interest at stake wherein process was constitutionally due.
10 (*Id.* at 13.)

11 **II. Summary of Plaintiff’s Objections**

12 Plaintiff’s objections appear to be buried at page 196 of his 213-page filing.³ (R&R
13 Objs. 196.) Liberally construing Plaintiff’s filing, it appears that he objects to Judge
14 Lewis’s apparent failure to consider certain evidence in issuing his R&R. (*See, e.g., id.* at
15 197 (listing the bases for Plaintiff’s Objections).)

16 **III. Court’s Analysis**

17 The Court will review, *de novo*, each part of Judge Lewis’s R&R to which Plaintiff
18 objects.

19 First, Plaintiff objects to the fact that “Defendants have violated his Due Process
20 Rights in multiple violations as alleged in his complaint in which [the R&R] seems not to
21 encompass[s] and recognize.” (*Id.* at 197.) However, Plaintiff does not identify which facts
22 in his Complaint were allegedly ignored by Judge Lewis. More fundamentally, however,
23 “a party opposing a properly supported motion for summary judgment may not rest upon
24 mere allegation or denials of his pleading, but must set forth specific facts showing that

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27 ³ The first several pages of his filing appear to be his account of the events that have thus far transpired
28 without any reference to his actual objections, followed by over one hundred pages of exhibits. (*See*
generally R&R Objs.)

1 there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256
2 (1986). Accordingly, the Court **OVERRULES** Plaintiff’s first Objection.

3 Second, Plaintiff similarly objects to Judge Lewis’s alleged failure to discuss these
4 violations as set forth in Plaintiff’s response in opposition to Defendants’ Motion for
5 Summary Judgment. (R&R Objs. 197.) As above, Plaintiff fails to identify what facts in
6 particular Judge Lewis allegedly failed to consider. Instead, Plaintiff appears to discuss
7 general legal principles, (*id.* at 197–200), asserts in a conclusory fashion that he “clearly
8 demonstrates that” his rights were violated, (*id.* at 200), and then appears to attach a
9 verbatim copy of his response in opposition to Defendants’ Motion for Summary
10 Judgment, (*compare id.* at 201–08, with ECF No. 76, at 5–12). This is insufficient to
11 demonstrate that Judge Lewis failed to consider any particular evidence. *See, e.g., Celotex*
12 *Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (“Rule 56(e) therefore requires the nonmoving
13 party to . . . designate ‘specific facts showing that there is a genuine issue for trial.”
14 (emphases added)); *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003)
15 (“A party opposing summary judgment must direct our attention to specific, triable facts.
16 General references without page or line numbers are not sufficiently specific.” (citations
17 omitted)); Fed. R. Civ. P. 56(c)(1)(A) (requiring parties to cite to “particular parts of
18 materials in the record”).

19 Moreover, contrary to Plaintiff’s objection, the record reflects that Judge Lewis
20 considered Plaintiff’s allegations in relation to the record evidence. According to Judge
21 Lewis:

22 Here, Plaintiff alleges that Defendants Warden Paramo and Secretary Beard
23 ignored his developmental disability and did not provide him with adequate
24 assistance to file grievances with the prison. Plaintiff argues that because he
25 was deemed mentally incompetent to stand trial for a short period of time
26 before successfully being tried and convicted he should have been considered
27 developmentally disabled for purposes of receiving prison assistance with
28 reading and writing. Defendants have put forth evidence that Plaintiff was
tested for placement in DDP at the start of his current sentence in 2012 and
that he did not get a low enough score to be placed in the program. (Doc. 63-
8, at 2, Decl. Pope at ¶ 3.) Starting in March 2014, Plaintiff filed numerous

1 administrative appeals regarding his desire to be classified as a DDP inmate
2 and eventually received a favorable response from the prison, the record
3 shows. (Decl. of Robinson at ¶ 9.) Defendants have shown that Plaintiff was
4 retested for DDP assistance and given a *Clark Adaptive Support Evaluation*
5 (*CASE*) at the California Institution for Men on January 27, 2015. (Doc. 63-
6 5, at 11, Exhibit 4 to Decl. Custodian of Records.) Following this evaluation,
7 Defendants have provided evidence that he was placed in the DDP program
8 at the DD2 level, meaning he may need occasional prompts to initiate or
9 complete self-care and daily life activities; he may need adaptive supports and
10 additional supervision for appropriate interaction with others, following rules,
11 and avoiding social isolation; and he may need help in reading, writing, and
12 preparing documentation. (*Id.*; Doc. 63-8, at 12, Exhibit 3.) After Plaintiff was
13 designated as a DDP inmate, he has been incarcerated at Donovan from
14 February 5, 2015 to February 26, 2015, and then from March 6, 2015 to April
15 21, 2015, and then from March 7, 2016 to March 26, 2016. (Doc. 63-8, at 4-
16 5, Decl. Pope at ¶ 10.) While being held at Donovan during these times,
17 Plaintiff has received accommodations in accordance with the *Clark Remedial*
18 Plan including assistance in reading and completing forms and documents,
19 such as inmate appeals, Form 22 Requests for Interview, and other documents.
20 (*Id.*) Furthermore, Defendants have put forth evidence that they did not
21 interfere with Plaintiff's access to the inmate appeals process. Since the
22 beginning of his incarceration with CDCR on July 15, 2012, Plaintiff has filed
23 more than thirty health care appeals. (Doc. 63-9, at 3-4, Decl. Robinson at ¶ 8
24 and Exhibit 1.) About half of his health care appeals have been either granted
25 or partially granted at different levels of review. (*Id.*) And Plaintiff has taken
26 thirteen of those appeals to the third level of review. (*Id.*)

19 (R&R 12–13.)

20 Based on this evidence, Judge Lewis concluded that Defendants did not violate
21 Plaintiff's due process rights. Specifically, Judge Lewis found that

22 [f]rom the evidence presented by Defendants, the Court does not detect facts
23 that implicate a liberty interest at stake, which is the heart of Plaintiff's sole
24 claim under consideration against Defendants in this motion for summary
25 judgment. Plaintiff alleges that he was prevented from filing inmate appeals
26 because of his disability in violation of Due Process, but the record shows that
27 Plaintiff was able to file administrative appeals sans DDP status through the
28 help of other inmates according to Plaintiff's own admission. (Doc. 80, at 28.)
With or without help, Plaintiff filed over thirty inmate appeals and took
thirteen of those appeals to the third level of review. (Doc. 63-9, at 3-4, Decl.
Robinson at ¶ 8 and Exhibit 1.) Although Plaintiff has also put forth evidence

1 where he is quoted saying, “Custody retaliated on me for writing 602s,” this
2 merely colorable evidence does not flesh out any specific details of an
3 “atypical and significant hardship on the inmate in relation to the ordinary
4 incidents of prison life”[footnote] that has been caused by the prison’s long
5 delay in classifying Plaintiff as an DDP inmate. As Plaintiff has been free to
6 file inmate appeals and has been granted what he has requested – DDP status
7 – before the filing of this lawsuit, this Court fails to detect a liberty interest at
8 stake in where process is constitutionally due. (Doc. 63-8, at 4, Decl. Pope at
9 ¶ 9; Doc. 63-8, at 30, Exhibit 6.)

10 (*Id.* at 13–14.) Based on the record evidence, the Court agrees with Judge Lewis that “the
11 evidence shows that there isn’t a genuine issue of material fact in Plaintiff’s Due Process
12 claim, [and thus] Defendants Warden Paramo’s and Secretary of CDCR’s summary
13 judgment motion on this sole operative claim in Plaintiff’s complaint should be granted.”
14 Accordingly, the Court **OVERRULES** Plaintiff’s second Objection.

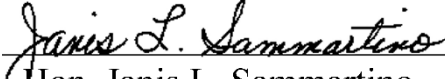
15 Furthermore, after review of the moving papers and Judge Lewis’s R&R the Court
16 finds “that there is no clear error on the face of the record” and thus the Court may “accept
17 the recommendation.” Fed. R. Civ. P. 72 advisory committee’s note (citing *Campbell*, 510
18 F.2d at 206). Accordingly, the Court **ADOPTS** Judge Lewis’s R&R in its entirety and
19 **GRANTS** Defendants’ Motion for Summary Judgment (ECF No. 63).

20 CONCLUSION

21 For the reasons stated above, the Court (1) **OVERRULES** Plaintiff’s Objections,
22 (2) **ADOPTS** Judge Lewis’s R&R in its entirety, and (3) **GRANTS** Defendants’ Motion
23 for Summary Judgment (ECF No. 63).

24 IT IS SO ORDERED.

25 Dated: June 20, 2017

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Hon. Janis L. Sammartino
United States District Judge