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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

9 JAVIER CASTILLO,

10 Plaintiff,

11 v.

12 CBCC SUPERINTENDENT, et al.,

13 Defendants.

CASE NO. 3:17-CV-05701-RJB-JRC

ORDER ADOPTING REPORT AND
RECOMMENDATION

14 THIS ORDER is issued following review of the Report and Recommendation of
15 Magistrate Judge J. Richard Creatura (Dkt. 25), pleadings for an underlying motion, Defendants'
16 Motion for Summary Judgment (Dkt. 17, 20, 22), and the remainder of the file herein. Plaintiff
17 has filed a "Notice of Appeal and Memorandum of Support," Dkt. 26, which the Court has
18 construed as Objections to the Report and Recommendation because of the procedural posture of
19 the case, with Defendants' motion still pending.

20 The Report and Recommendation (R&R) recommends that Defendants' motion for
21 summary judgment be granted and that the case be dismissed with prejudice as to all defendants.
22 Dkt. 25. The R&R should be adopted, and the rationale is supplemented with the following
23 analysis.

1 Plaintiff, an inmate at Washington State Penitentiary in Walla Walla, Washington, seeks
2 damages under § 1983 for constitutional harms by several named defendants while incarcerated
3 at a prior facility, Clallam Bay Corrections Center. In summary, Plaintiff alleges constitutional
4 harm under the First and Fourteenth Amendments¹ from Defendants' request that Plaintiff
5 rewrite grievances in English, rather than Spanish. The R&R recommends granting summary
6 judgment of dismissal on qualified immunity grounds, as well as on the merits, because "plaintiff
7 has not shown that a requirement to file grievances in English unlawfully restricted his ability to
8 file grievances, and he has not otherwise shown that defendant had an unlawful motive for
9 declining to process his grievances written in Spanish." Dkt. 25 at 1, 2.

10 Plaintiff's briefing repeatedly references DOC Policy 450.500 as giving rise to the § 1983
11 claim. *See, e.g.*, Dkt. 20 at 1, 10, 13; Dkt. 26 at 1, 7, 9. The policy, which is publicly available, is
12 herein quoted because it does not appear elsewhere in the parties' briefing and the R&R. DOC
13 Policy 450.500, entitled, "Language Services for Limited English Proficient (LEP) Offenders," is
14 stated as follows:

15 The Department [DOC] will provide interpretation (i.e., oral) and translation (i.e.,
16 written) services through Department and/or contract services at all Department facilities
17 and field offices. The Department will also provide guidelines for interpretation and
translation for Limited English Proficiency (LEP) offenders under Department
jurisdiction.

18 DOC Policy 450.500 (revised 2013), available at <http://www.doc.wa.gov/information/policies/>
19 (last accessed 10/10/2018). The policy sets out a series of Directives, including:

20 §I. Access to Language Services for Offenders . . . (C) Employees will review the
21 Personal Characteristics-Languages section in the offender's electronic file to determine
22 if the offender requires interpreter services. Employees may request
interpretation/translation services when they become aware that a language barrier exists.

23 ¹ The Complaint (Dkt. 6) does not specify whether claims are brought under the First
24 Amendment or the Fourteenth Amendment, but Plaintiff's briefing elsewhere refers only to these
two constitutional provisions.

1 §II. Interpretation/Translation . . . (B) Offenders may request . . . a translator for written
2 communications, as appropriate as following[:]

3 6. Grievances

- 4 a. Grievances translated into English for Department review.
5 b. Department responses translated into the offender's language.
6 c. Notice of appeal rights, the appeal by the offender, and the decision
7 regarding the appeal.

8 §IV. Denial of Interpretation/Translation Services. (A) The Superintendent/Work Release
9 Program Administrator/Field Administrator can deny interpretation/translation services to
10 offenders who demonstrate a pattern of abuse of the materials, services, and/or programs.
11 Before an offender can be refused access to interpretation/translation services, the
12 following conditions must be met:

- 13 1. An employee must document the abuse and submit it to the
14 Superintendent/Work Release Program Administrator/Field Administrator.
15 2. The Superintendent/Work Release Program Administrator/Field
16 Administrator must authorize, in writing, denial of interpretation/translation
17 services. The denial must include parameters and specifications . . . to ensure
18 the abuse is addressed, but adequate legal access is maintained. A copy of the
19 denial will be scanned into the offender's electronic imaging file.
20 3. The Superintendent/Work Release Program Administrator/Field
21 Administrator will notify the appropriate LEP Coordinator.
22 4. The offender will be notified, in writing, that his/her access to translation
23 services has been denied.
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14 *Id.* at §§I(C), II(B), IV(A).

15 1. *Claim under the First Amendment.*

16 Although it is not entirely clear that Plaintiff has brought a claim under the First
17 Amendment, the record should be so construed in deference to Plaintiff, who is *pro se*.

18 In the context of prisoner First Amendment claims, as the R&R observes, quoting *Richey*
19 *v. Dahne*, 733 Fed.Appx. 881 at *2, 2018 WL 1940242 (9th Cir. 2018), “a prison official merely
20 requesting that a prisoner rewrite a grievance is not a First Amendment violation.” Dkt. 25 at 5.

21 In *Richey*, the court summarized the basic rule for First Amendment claims in the prisoner
22 context:

23 Under the [*Turner v. Safley*, 482 U.S. 78, 93 (1987)] framework, a prison may constrain
24 the expression of prisoners for a non-content-based legitimate penological reason, such as

1 avoiding hostilities . . . [b]ut absent such a legitimate penological reason, content-based
2 limitation of a prisoner’s expression is unconstitutional.

3 *Id.*

4 Applied here, if Plaintiff brings a claim under the First Amendment, the claim does not
5 withstand Defendants’ affirmative defense of qualified immunity. The record reflects an exercise
6 of discretion by Defendant Michael Holthe, who determined that Plaintiff was not a Language
7 English Proficiency (LEP) inmate, reflected by the OMNI database (Dkt. 18-1 at 36); the first
8 series of grievances written by Plaintiff, written in English in what Defendant Holthe believed to
9 be Plaintiff’s own handwriting (Dkt. 18 at 2); and an “investigation” of other documents (Dkt. 18
10 at 2, 3). On these facts, and under DOC Policy 450.500, the record reflects a legitimate
11 penological reason for denying grievance translation.

12 Plaintiff’s Objection argues that there are material facts as to whether Plaintiff is LEP,
13 given Plaintiff’s submission of a school transcript, which, Plaintiff represents, shows Plaintiff
14 only made it through grade school in a non-English speaking school. Dkt. 26 at 10. There is no
15 indication in the record that this evidence was in possession of DOC generally or Defendant
16 Holthe specifically, and the DOC policy only requires consideration of the electronic file, but if
17 it was, this would not be sufficient to overcome Defendants’ shield of qualified immunity given
18 the other materials in the file. Dkt. 18 at 2, 3; Dkt. 18-1 at 30-34.

19 *2. Claim under the Fourteenth Amendment.*

20 Under the Fourteenth Amendment, a prison can violate the due process right to equal
21 protection of its inmates by granting privileges to some and refusing them to other similarly
22 situated inmates. *See Baumann v. Ariz. Dep’t of Corrs.*, 754 F.2d 841, 845 (9th Cir.1985).
23 However, such a violation can only arise when the privilege is a constitutionally protected liberty
24 interest. Such a liberty interest can only arise where the policy confers a privilege that is not

1 subject to the discretion of prison officials. *Id.* at 844 (interpreting *Greenholtz v. Inmates of the*
2 *Neb. Penal and Corr. Complex*, 442 U.S. 1(1979)).

3 Applied here, much of DOC Policy 450.500 uses discretionary language and thus does
4 not give rise to a liberty interest. For example, under §I(C), “[e]mployees may request
5 interpretation/translation services when they become aware that a language barrier exists.” The
6 policy does mandate that employees “will review the Personal Characteristics-Languages section
7 in the offender’s electronic file[,]” but Defendant Holthe avows that he reviewed the electronic
8 file. A screen shot of the electronic file, part of the record, does not indicate that Plaintiff was
9 LEP. There is no evidence that Defendant Holthe departed from mandatory requirements of
10 DOC Policy 450.500, if it does give rise to an actionable liberty interest.

11 Even if violating DOC Policy 450.500 under these facts could give rise to a constitutional
12 claim, Plaintiff seeks damages only, not injunctive relief. (If Plaintiff did seek injunctive relief,
13 such a claim could not be sustained, because Plaintiff is held at different facility than where the
14 grievances issue arose.) The record does not establish an issue of material fact for an injury of
15 constitutional magnitude. All but two of seven grievances were written, eventually, in English,
16 and then processed administratively. Regarding the two remaining grievances, Nos. 17628722
17 (Dkt. 18-1 at 19) and 17629616 (Dkt. 18-1 at 23), Plaintiff received a response from Defendant
18 Holthe requesting that they be rewritten in English, but nothing in the record indicates that
19 Plaintiff suffered harm from this request, e.g., by the delay in DOC’s response.

20 In summary, no matter whether viewed as a claim under the First Amendment or
21 Fourteenth Amendment, Plaintiff has not met his burden to show a constitutional violation
22 sufficient to overcome the affirmative defense of qualified immunity. Plaintiff has also not
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24

1 shown facts supporting the request for damages under § 1983. Defendants' motion for summary
2 judgment should be granted.

3 3. *Supervisory liability and personal participation of Defendants Grubb and Haynes.*

4 Although not explicitly discussed in the R&R, Defendants' motion seeks dismissal for
5 the failure to establish liability personal to Defendants Grubb and Haynes (not Defendant
6 Holthe). Plaintiff has not established a constitutional deprivation personal to Defendants Grubb
7 and Haynes, because a general theory of supervisory liability is not enough. *Monell v. Dep't of*
8 *Social Services of City of New York*, 436 U.S. 658, 694 (1978); *Hansen v. Black*, 885 F.2d 642,
9 645-46 (9th Cir. 1989). Defendants' motion for summary judgment should also be granted on this
10 basis.

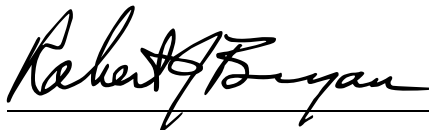
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12 THEREFORE,

- 13 (1) The Court HEREBY ADOPTS the Report and Recommendation (Dkt. 25).
14 (2) The Court HEREBY GRANTS Defendants' Motion for Summary Judgment (Dkt.
15 17).
16 (3) Plaintiff's action is DISMISSED as to all defendants.

17 It is so ordered.

18 **DATED** this 11th day of October, 2018.

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21 ROBERT J. BRYAN
22 United States District Judge
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