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United States District Court, N.D. Alabama, Northeastern Division.

Brent JACOBY, AIS # 291560, Plaintiff,
v.
PREA COORDINATOR, et al., Defendants.

Case No. 5:17-cv-00053-MHH-TMP
|
Signed 04/04/2017

Attorneys and Law Firms

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MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

T. MICHAEL PUTNAM, UNITED STATES MAGISTRATE JUDGE

***1** The plaintiff has filed an amended *pro se* complaint pursuant to 42 U.S.C. § 1983 alleging violations of his rights under the Constitution or laws of the United States while he was detained at St. Clair Correctional Facility, in Springville, Alabama.[1] (Doc. 11). The plaintiff names as defendants PREA Coordinator John Doe, Investigation and Intelligence ("I&I") Supervisor Terry Loggins, I&I Director Arnaldo Mercado, I&I Investigator Mary Surrett, and Lieutenant Angela Gordy. (*Id.* at 1, 8-12). The plaintiff seeks nominal, compensatory, and punitive damages. (*Id.* at 5). In accordance with the usual practices of this court and 28 U.S.C. § 636(b)(1), the complaint was referred to the undersigned magistrate judge for a preliminary report and recommendation. *See McCarthy v. Bronson*, 500 U.S. 136 (1991).

I. Standard of Review

The Prison Litigation Reform Act, as partially codified at 28 U.S.C. § 1915A, requires this court to screen complaints filed by prisoners against government officers or employees. The court must dismiss the complaint or any portion thereof that it finds frivolous, malicious, seeks monetary damages from a defendant immune from monetary relief, or which does not state a claim upon which relief can be granted. *Id.* Moreover, the court may *sua sponte* dismiss a prisoner's complaint prior to service. *See* 28 U.S.C. § 1915A(a).

Under § 1915A(b)(1) and § 1915(e)(2)(B)(i), a claim may be dismissed as "frivolous where it lacks an arguable basis in law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A claim is frivolous as a matter of law where, *inter alia*, the defendants are immune from suit or the claim seeks to enforce a legal right that clearly does not exist. *Id.*, at 327.

Moreover, a complaint may be dismissed pursuant to 28 U.S.C. § 1915A (b)(1) for failure to state a claim upon which relief may be granted. A review on this ground is governed by the same standards as dismissals for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Jones v. Bock*, 549 U.S. 199, 215 (2007). In order to state a claim upon which relief may be granted, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and must be a " 'plain statement' possess[ing] enough heft to 'sho[w] that the pleader is entitled to relief.' " *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555, 557 (2007) (alteration incorporated). But "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Similarly, when a successful affirmative defense, such as a statute of limitations, appears on the face of a complaint, dismissal for failure to state a claim is also warranted. *Jones*, 549 U.S. at 215.

***2** *Pro se* pleadings "are held to a less stringent standard than pleadings drafted by attorneys" and are liberally construed. *Boxer X v. Harris*, 437 F.3d 1107, 1110 (11th Cir. 2006). However, they still must allege factual allegations that "raise a right

to relief above the speculative level." *Saunders v. Duke*, 766 F.3d 1262, 1266 (11th Cir. 2014) (internal quotation marks omitted).

II. Factual Allegations

The facts of this case arise out of the plaintiff's allegations of being held hostage, beaten, and raped by other inmates in March 2016, while in the custody of the Alabama Department of Corrections at St. Clair Correctional Facility ("SCCF").[2] In this case, the plaintiff addresses solely the defendants' actions in the aftermath of his report of the rapes and beatings.[3]

Upon the plaintiff's arrival at SCCF in December 2015, he was sent to M-Block. (Doc. 11 at 15). When he found his assigned cell, he learned someone else was already living there. (*Id.*). Inmate Derik Burt told the plaintiff the inmates slept where they wanted and the plaintiff could move in with Burt and be his "girl," or he could fend for himself. (*Id.*). The plaintiff asked Classification Specialist Mr. Cox and Mental Health counselor Mr. Payne to have him transferred to the Therapeutic Community ("T.C.") dorm, or the Honor dorm, both of which are less violent. (*Id.*, at 16). Cox and Payne told the plaintiff they would get him moved, but the move never occurred. (*Id.*). The plaintiff remained in general population where he was extorted, bought and sold by inmates, and forced to perform sexual acts. (*Id.*).

In mid-February 2016, the plaintiff told Mr. Payne and Mental Health counselor Ms. Coogan that inmate Burt had sold him to another inmate named Octavious Bufford, but then Bufford was stabbed in the neck. (Doc. 11 at 17). Although Bufford was in the infirmary, he was trying to sell the plaintiff to another gang member. (*Id.*). The plaintiff told Coogan and Payne he was tired of being bought and sold into unwanted relationships. (*Id.*). Coogan and Payne took the plaintiff's concerns to defendant Angela Gordy, the Prison Rape Elimination Act ("PREA") Compliance Manager for SCCF.[4] (*Id.*). Defendant Gordy notified Captain Graham of the plaintiff's complaints, and the plaintiff asked them to place him in protective custody, but both Gordy and Graham told the plaintiff no beds were available. (*Id.*). They also told the plaintiff that, because he was not sexually assaulted on that particular day, February 12, 2016, he did not have grounds for a PREA claim, or for protective custody. (*Id.*). Gordy and Graham assured the plaintiff they would have him moved to the T.C. program or an Honor dorm. (*Id.*, at 17-18). However, they also instructed him to write a statement that he was not sexually assaulted on February 12, 2016, and that he did not need protective custody.[5] (*Id.*, at 18). Once again, the plaintiff was not moved from his dorm. (*Id.*).

***3** Inmate Bufford sold the plaintiff to inmates Willie Jenkins and Ellis Diggs. (Doc. 11 at 18). Jenkins had a bad drug problem and would make the plaintiff get high with him and have sex with him. (*Id.*, at 19). On March 8, 2016, Jenkins found out the plaintiff smoked a joint and became so angry, he locked the plaintiff in his cell and beat and raped him. (*Id.*). The next day, a code was called due to an inmate fight involving Jenkins and Diggs. (*Id.*). The plaintiff escaped from Jenkins' cell and ran to the shift office for help and medical attention. (*Id.*).

With that background, the undersigned turns to the facts relevant to this action. Defendant Gordy and I&I Investigators defendant Terry Loggins and defendant Mary Surrett were notified of the plaintiff's allegations of rape. (Doc. 11 at 19). The plaintiff was taken for a rape examination, but the officers would not remove his handcuffs so a proper examination could be conducted. (*Id.*, at 20). When the plaintiff returned to SCCF, defendants Gordy, Loggins, and Surrett did not attempt to have the plaintiff undergo a proper rape examination. (*Id.*). They did not collect any evidence to confirm the rape occurred, such as sheets from the cell or the plaintiff's clothing. (*Id.*). They did not interview the plaintiff in a timely manner or ask about witnesses. (*Id.*, at 20-21).

The plaintiff was placed in lock-up for his own safety. (Doc. 11 at 20). Defendant Surrett interviewed him on March 29, 2016. (*Id.*, at 21). Surrett told the plaintiff he had a right to an attorney, and the plaintiff asked for an attorney. (*Id.*). Surrett ended the interview to allow the plaintiff to obtain counsel, but counsel was never provided to him.[6] (Id., at 22).

The plaintiff complains that defendant Gordy failed to have the plaintiff transferred to general population in another prison in a timely manner. (Doc. 11 at 22). The plaintiff was kept in lock-up at SCCF until October 21, 2016, when he was transferred to Limestone Correctional Facility, where he remains in protective custody. (*Id.*).

The plaintiff asserts that the PREA Coordinator for the Alabama Department of Corrections (currently designated as "John Doe"), has failed to comply with PREA regulations and policies. (Doc. 11 at 22). He further asserts that defendant Mercado failed to adequately train PREA officers on how to secure a crime scene or collect evidence, and failed to comply with PREA regulations. (*Id.*, at 23). The plaintiff also alleges that defendants Gordy, Loggins, and Surrett failed to adequately investigate his claims, violated his due process rights by not writing disciplinary reports of inmates Diggs and Jenkins, by not performing any type of meaningful investigation of the plaintiff's claims, and by denial of an appeal process. (*Id.*).

The plaintiff further asserts that defendants Loggins and Surrett violated his Fourteenth Amendment right to due process by failing to adequately investigate his rape claims, his Sixth Amendment right to counsel by not providing him an attorney, and his right of access to the courts. (Doc. 11 at 24-25). Defendant Loggins, as a supervisor, failed to adequately train and supervise defendant Surrett. (*Id.*, at 25). Moreover, the plaintiff claims defendants Loggins and Surrett demonstrated deliberate indifference to his rape allegations by failing to investigate his claims. (*Id.*). Their deliberate indifference to his plight also constituted cruel and unusual punishment, in violation of the Eighth Amendment. (*Id.*).

***4** The plaintiff asserts defendant Gordy failed to protect him by denying him protective custody in February 2016, which violated his Eighth Amendment right against cruel and unusual punishment. (Doc. 11 at 26). Additionally, the plaintiff states that defendant Gordy's failure to investigate his rape claims was a violation of his Eighth Amendment rights, his Fourteenth Amendment right to due process and his Sixth Amendment right to access the court and to legal counsel. (*Id.*). Defendant PREA Coordinator John Doe's failure to ensure that the PREA policies were followed allowed the plaintiff's rights to be violated and amounted to a failure to protect him from rape, extortion and beatings. (*Id.*, at 26-27).

The plaintiff claims defendant Mercado's failure to adequately investigate his claims violated the PREA procedures and his due process rights, as well as his right to counsel and access to the courts. (Doc. 11 at 27).

III. Analysis

A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief. *Jones v. Bock*, 549 U.S. 199, 215 (2007). The standards governing Federal Rule of Civil Procedure 12(b)(6) dismissals apply to dismissals under § 1915(e)(2). *Alba v. Montford*, 517 F.3d 1249, 1252 (11th Cir. 2008) (citing *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997)). As previously stated, under § 1915A(b)(1) and § 1915(e)(2)(B)(i), a claim also may be dismissed as "frivolous where it lacks an arguable basis in law or fact." *Neitzke*, 490 U.S. at 325. *See also Bilal v. Driver*, 251 F.3d 1346, 1349 (11th Cir. 2001). Additionally, "the court shall dismiss the case at any time if the court determines that the action or appeal fails to state a claim on which relief may be granted." *Salazar v. U.S. Atty. Gen.*, 476 Fed.Appx. 383, 385 (11th Cir. 2012) (*quoting* 28 U.S.C. § 1915(e)(2)(B)(ii)).

To state a claim for relief under § 1983, a plaintiff must allege an act which deprived him of a right, privilege, or immunity protected by the Constitution or laws of the United States, committed by a person acting under color of state law. *Hale v. Tallapoosa County*, 50 F.3d 1579, 1582 (11th Cir. 1995). If, taking the allegations of the complaint as true and construing them in the light most favorable to the plaintiff, *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003), no claim rises above the speculative level, then the complaint is subject to dismissal, *Twombly*, 550 U.S. at 555. *See also* 28 U.S.C. § 1915A(b).

A. Failure to Investigate:

The plaintiff asserts that each of the defendants failed to undertake an adequate investigation, failed to comply with PREA investigation policies, and failed to properly collect evidence. (Doc. 11 at 25-27). Although he couches his failure to investigate allegations as both due process and deliberate indifference claims, any such distinction is inconsequential.

Taking the facts alleged as true, the plaintiff fails to state facts which could rise to the level of a violation of the plaintiff's federal constitutional rights. The failure to investigate the plaintiff's claims in a manner satisfactory to the plaintiff is not a constitutional violation. *See Vinyard v. Wilson*, 311 F.3d 1340, 1356 (11th Cir. 2002) (holding that there was no constitutional right to an investigation following a violent incident based upon which the plaintiff raised a claim of excessive force); *see also Stinger v. Doe*, 503 Fed.Appx. 888, 8891 (11th Cir. 2013 (same)); *Mallory v. Hetzel*, 2016 WL 5030469, *14 (M.D. Ala. 2016) (inmates simply do not enjoy a constitutional right to an investigation of any kind by government officials); *Beers v. Hassan*, 2015 WL 9948259, *4 (D.N.H. Dec. 14, 2015) ("Beers does not have a protected interest or right to have alleged wrongdoers investigated or prosecuted."); *Moore v. Honeycutt*, 2009 WL 1033760, *2 (D. Kan Apr. 17, 2009) (dissatisfaction with the defendant's investigation of reported rape by a fellow inmate does not state an Eighth Amendment violation); *Rennick v. City of Cincinnati*, 2007 WL 2248818 (S.D. Ohio 2007) ("In general, a public officer does not owe a duty to one individual to investigate or prosecute a specific crime."). Whether an inadequate investigation, or the failure to investigate at all, no § 1983 liability is created.

***5** To the extent the plaintiff alleges that the defendants failed to follow the State of Alabama Department of Corrections' PREA procedures in conducting an investigation, the failure of state prison officials to follow their own procedures does not, of itself, violate the Constitution. Prison regulations are "primarily designed to guide correctional officials in the administration of a prison. [They are] not designed to confer rights on inmates." *Sandin v. Conner*, 515 U.S. 472, 481-82 (1995). *See also Maust v. Headley*, 959 F.2d 644, 648 (7th Cir. 1992) (no federally protected interest in mere procedures

because process is not an end in itself). The failure or refusal to investigate a prisoner's complaints creates no liability under § 1983. *Geiger v. Jowers*, 404 F.3d 371, 373-374 (5th Cir. 2005) (inmate's claim that prison officials failed to investigate his grievances was meritless because inmate had no federally protected interest in having grievance resolved to his satisfaction). Because "inmates do not have a due process right to have their claims investigated at all," any claim that the investigation done was inadequate or improper does not state a constitutional violation. *Wilkins v. Illinois Dep't of Corr.*, 2009 WL 1904414, at *9 (S.D. Ill. 2009).

The Constitution does not require officials to investigate or otherwise correct wrongdoing after it has happened. *Stough v. Silva*, 2013 WL 5406741, *5 (M.D. Ala. 2013); *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002) (unless defendant knew of possibility of serious injury to plaintiff in advance, no constitutional claim is stated); *Garness v. Wisconsin Dep't of Corr.*, 2016 WL 426611, at *2 (W.D. Wis. 2016) (same). Instead, the plaintiff must assert facts which demonstrate that the defendants knew of and disregarded an excessive risk to his health or safety, prior to the harm complained of occurring. *See Farmer*, 511 U.S. at 837-38. A negligent investigation after the fact is not enough to state a claim. *Id.*, at 835; *Wilson v. Seiter*, 501 U.S. 294, 305 (1991) (negligence in inadequate to support an Eighth Amendment claim). Moreover, a prison "official's failure to alleviate a significant risk of harm to an inmate that the official should have perceived but did not" does not violate the Eighth Amendment. *Farmer*, 511 U.S. at 838. Thus, the issue is not whether defendants failed to investigate the plaintiff's allegations pursuant to PREA regulations, but whether defendants "responded reasonably to the risk" alleged by the plaintiff in order to ensure the plaintiff's safety. *Id.*, at 844.

Although prison officials have a duty under the Constitution to protect prisoners from violence by other prisoners, including sexual assault, *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), the alleged failure to follow PREA investigation regulations did not contribute to the sexual assault of the plaintiff. Viewed as an Eighth Amendment violation for deliberate indifference and/or failure to protect, the claim for failure to adequately investigate is still insufficient. While the plaintiff asserts the actions and inactions of the defendants were deficient *after* his allegations of rape and other abuses were made, the plaintiff has not been subjected to any further sexual assault as a result. Thus, the defendants' failures to investigate after March 9, 2016, whether intentional or otherwise, have not caused the plaintiff any harm. *See Salvato v. Miley*, 790 F.3d 1286, 1297 (11th Cir. 2015) (the failure to investigate an incident cannot have caused that incident). The plaintiff's claim that defendants Loggins and Surrett's failure to investigate demonstrated deliberate indifference to the plaintiff's rights must be dismissed for failure to state a claim.

The plaintiff acknowledges that each of the defendants, except for Gordy, became involved in the facts underlying this action on or after March 9, 2016. In other words, the plaintiff complains solely about each of these defendants' actions post-dating the alleged rape, in failing to investigate his complaints. No constitutional action lies for such conduct.

B. Supervisory Liability

***6** The plaintiff asserts defendant Loggins failed to adequately supervise and train defendant Surrett. (Doc. 11 at 25). Under § 1983, supervisors cannot be held liable solely on the basis of their employees' acts. *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1985) (comparing the position of a supervisor to a municipality which may have liability imposed through its customs or policies, but not through employees' actions); *see generally Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978) (discussing municipality liability); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) (same).

Rather, to establish supervisory liability under § 1983, a plaintiff must show either that the supervisor personally participated in the alleged unconstitutional conduct or that a causal connection exists between the actions of the supervising official and the alleged constitutional deprivation. *Harrison v. Culliver*, 746 F.3d 1288, 1298 (11th Cir. 2014) (citing *Cottone*, 326 F.3d at 1360). A causal connection may be established when: 1) a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he or she fails to do so; 2) a supervisor's custom or policy results in deliberate indifference to constitutional rights; or 3) facts support an inference that the supervisor directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them from doing so. *Id.* (quotation omitted). Deliberate indifference exists if an official "(1) [has] subjective knowledge of a risk of serious harm; [and] (2) disregard [s] ... that risk; (3) by conduct that is more than gross negligence." *Townsend v. Jefferson County*, 601 F.3d 1152, 1158 (11th Cir. 2010) (alteration adopted) (quotation omitted).

Applying the foregoing, "under § 1983, a supervisor can be held liable for failing to train his or her employees only where the failure to train amounts to deliberate indifference to the rights of persons with whom the officers come into contact." *Keith v. DeKalb Cty., Ga.*, 749 F.3d 1034, 1052 (11th Cir. 2014) (alteration, citation, and internal quotation marks omitted). To sufficiently allege a supervisor violated a plaintiff's constitutional rights for failing to train subordinates, a plaintiff "must demonstrate that the supervisor had 'actual or constructive notice that a particular omission in their training program causes

[his or her] employees to violate citizens' constitutional rights,' and that armed with that knowledge the supervisor chose to retain that training program." *Id.* (*quoting Connick v. Thompson*, 563 U.S. 51, 61 (2011)). A plaintiff establishes a supervisor's notice sufficiently to state a claim when the need for more or different training is obvious—such as when there has been a history of widespread abuse by subordinates that has put the supervisor on notice of the need for corrective measures, or when the failure to train is likely to result in a constitutional violation. *See Williams v. Limestone Count, Ala.*, 198 Fed. Appx. 893, 896 (11th Cir. 2006); *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1985).

However, liability cannot be imposed based on a prison official's participation in an after-the-fact review of an incident or failure to take disciplinary action against the officer at fault. *Johnson v. Hinsley*, 2010 WL 966651, *5 (N.D. Ga. 2010) (the failure to investigate an incident, without more, does not violate any constitutional rights) (citing *Wright v. City of Ozark*, 715 F.2d 1513, 1516 (11th Cir. 1983)). *See also Pride v. Danberg*, 2009 WL 151535, *3 (D. Del. 2009) ("any participation by Defendants in the after-the-fact review of [plaintiff's] complaints is not enough to establish personal involvement."). Because no liability can attach to defendant Surrett for an insufficient investigation, defendant Loggins, as her supervisor, cannot be liable for Surrett's insufficient investigation. Therefore, the claim against defendant Loggins for defendant Surrett's allegedly incompetent investigation, even if true, is due to be dismissed.

C. PREA Claims

***7** The plaintiff claims that PREA Coordinator "John Doe" created an unsafe environment by failing to ensure that policies promulgated under the PREA were followed. (Doc. 11 at 26-27). He alleges that defendant Mercado violated his due process rights by failing to investigate his allegations in accordance with the PREA. (Doc. 11 at 27). However, the PREA does not confer a private right of action on individuals. *Gibson v. Kent*, 2016 WL 7384646, at *2 (N.D. Fla., 2016) ("Nowhere in the PREA is there language to suggest that part of its purpose was to create a private cause of action or a federal right which could be enforced in a Section 1983 action."). Rather, the PREA was enacted to "address the problem of rape in prison, authorize[ ] grant money, and create[ ] a commission to study the issue." *Chinnici v. Edwards*, 2008 WL 3851294, at *3 (D. Vt. Aug. 12, 2008). It "does not grant prisoners any specific rights." *Id. See also J.K.J. v. Polk County*, 2017 WL 28093, *12 (W.D. Wis. Jan. 3, 2017) ("[T]here is no private right of action under the PREA."); *Garness v. Wisconsin Dep't of Corr.*, 2016 WL 426611, at *2 (W.D. Wis. 2016) (no personal right to sue for failure to comply with the Act's requirements exists); *Alexander v. Steele City Jail*, 2014 WL 4384452, *7 (D. Minn. 2014).

Prisoners have no constitutionally-protected liberty interest in accessing a prison's grievance procedure. *Bingham v. Thomas*, 654 F.3d 1171, 1177 (11th Cir. 2011); *Thomas v. Warner*, 237 Fed.Appx. 435, 438 (11th Cir. 2007) ("Plaintiff's allegations that prison officials failed to comply with the prison's voluntary grievance procedures does not state a due process claim."). The fact that the plaintiff's allegations arise under facts implicating the PREA does not change this inquiry.

To the extent the plaintiff complains that inmates Jenkins and Diggs were not punished, the plaintiff has no protected interest or right to have alleged wrongdoers investigated or prosecuted. *Nieves–Ramos v. Gonzalez–De–Rodriguez*, 737 F.Supp. 727, 728 (D.P.R. 1990) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another")). Accordingly, the plaintiff's claims based on the PREA and failure to investigate, report, and prosecute claims should all be dismissed.

D. Failure to Protect

The plaintiff asserts defendant Gordy failed to protect him by not placing him in protective custody. (Doc. 11 at 26). Under the Eighth Amendment, prison officials have a duty to "take reasonable measures to guarantee the safety of the inmates." *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1099 (11th Cir. 2014) (*quoting Farmer*, 511 U.S. at 832). More to the point, they "have a duty to protect prisoners from violence at the hands of other prisoners." *Id.* (*quoting Farmer*, 511 U.S. at 833) (internal quotation marks omitted). As with other Eighth Amendment claims, a plaintiff must show a "substantial risk of serious harm" and that the defendants were "deliberately indifferent" to that risk. *Carter v. Galloway*, 352 F.3d 1346, 1349 (11th Cir. 2003).

The court must apply an objective standard in examining the first element, a substantial risk of serious harm. *Caldwell*, 748 F.3d at 1099 (citing *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1028-29 (11th Cir. 2001) (en banc), *abrogated on other grounds by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). The second element—the defendant's deliberate indifference to that risk—has two components, one subjective and one objective. To meet the subjective prong, a plaintiff must produce evidence that the defendant "actually (subjectively) knew that an inmate faced a substantial risk of serious harm." *Caldwell*, 748 F.3d at 1099 (citing *Rodriguez v. Sec'y for Dep't of Corr.*, 508 F.3d 611, 617 (11th Cir. 2007)) (alterations omitted). To satisfy the objective component of the second element, a plaintiff must produce evidence that the

defendant "disregarded that known risk by failing to respond to it in an (objectively) reasonable manner." *Id.*

***8** "[D]eliberate indifference describes a state of mind more blameworthy than negligence," and an "ordinary lack of due care for a prisoner's interest or safety" will not support an Eighth Amendment claim. *Farmer*, 511 U.S. at 835. Rather, a plaintiff must show "conduct that is more than gross negligence." *Goodman v. Kimbrough* 718 F.3d 1325, 1332 (11th Cir. 2013). The allegations must rise to the level of "a conscious or callous indifference to a prisoner's rights." *Williams v. Bennett*, 689 F.2d 1370, 1380 (11th Cir. 1982) (citations omitted). A constitutional violation occurs only when a plaintiff establishes "a substantial risk of serious harm, of which the official is subjectively aware, exists and the official does not 'respond[ ] reasonably to the risk....' " *Marsh v. Butler County*, 268 F.3d 1014, 1028 (11th Cir. 2001) (quoting *Farmer*, 511 U.S. at 844).

The plaintiff alleges that on February 12, 2016, he told defendant Gordy he was tired of being bought and sold by other inmates. (Doc. 11 at 17). Although the plaintiff asked for protective custody, defendant Gordy and non-party Graham told the plaintiff no beds were available, and since he had not been sexually assaulted on that particular day, he had no basis for a PREA claim. (*Id.*). Although defendant Gordy told the plaintiff she would have him moved, nothing was done. (*Id.*, at 18). Given the plaintiff's allegation that he told Gordy he was being bought and sold by other inmates and needed protection from them, the facts presented are sufficient to require defendant Gordy to respond to the plaintiff's amended complaint.

The plaintiff's failure-to-protect claims against the other defendants do not fare as well. He alleged that defendants PREA Coordinator "John Doe," Loggins, and Surrett, in failing to follow PREA procedures, failed to protect him from being raped. (Doc. 11 at 25, 27). However, the plaintiff does not allege that the PREA Coordinator, Loggins, or Surrett had any knowledge that the plaintiff was in any danger prior to the time that the plaintiff reported the rape and other abuses that occurred on March 9. The failure to investigate the plaintiff's claims after the fact could not contribute to a failure to protect him from those very abuses prior to when they occurred. *See Salvato*, 790 F.3d at 1297. Without subjective knowledge of a substantial danger to the plaintiff, these defendants could not be deliberately indifferent to that danger. *See e.g., Caldwell*, 748 F.3d at 1099 (requiring plaintiff to produce evidence that defendant actually knew of a substantial risk to an inmate and failed to respond to that risk). Thus, any failure-to-protect claim the plaintiff attempts to bring against any of the defendants other than Gordy is due be dismissed, as the plaintiff does not allege they knew of the risk to the plaintiff prior to the time he was raped.

E. Due Process Claims

The due process clause provides two types of protections: procedural due process and substantive due process. A violation of either may form the basis for a suit under § 1983. *McKinney v. Pate*, 20 F.3d 1550, 1555 (11th Cir. 1994). Substantive due process protects against "government interference with certain fundamental rights and liberty interests." *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1235 (11th Cir. 2004) (citation omitted). Because "conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense," *Waddell v. Hendry County Sheriff's Office*, 329 F.3d 1300, 1305 (11th Cir. 2003), and "[o]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense," *id.*, the court interprets the plaintiff's claims as alleging procedural due process violations, as the conduct by the defendants named here is not "conscience shocking in a constitutional sense."

***9** The plaintiff makes multiple claims based on the Fourteenth Amendment Due Process Clause. He asserts Gordy, Loggins, and Surrett violated his due process rights by not writing disciplinary reports on inmates Diggs and Jenkins, by not performing any type of meaningful investigation of the plaintiff's claims, and by denial of an appeal process. (Doc. 11 at 24-26). He alleges defendant Mercado's failure to adequately investigate his claims violated PREA procedures and his due process rights, as well as his right to counsel and access to the courts. (Doc. 11 at 27).

As previously stated, the plaintiff has no constitutional right to have other inmates disciplined. *Nieves–Ramos*, 737 F.Supp. at 727 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). Because the plaintiff has no constitutional right to an investigation of his claims, the thoroughness or conclusion of that investigation cannot create a right under the Fourteenth Amendment. Similarly, although the plaintiff asserts he was denied an appeal process, presumably as to the outcome of the investigation, such a claim fails to allege a violation of a constitutional right. As the plaintiff had no constitutional right to have his claims investigated, the failure to provide him an appeal process does not infringe his due process rights in any manner.[7]

To the extent the plaintiff is attempting to assert that his placement in segregation or protective custody after the events of March 9, 2016, violated his rights (doc. 11 at 20), that too fails to state a due process claim. The Due Process Clause "does not directly protect an inmate from changes in the conditions of his confinement" or create a constitutionally-protected interest " 'in being confined to a general population cell, rather than the more austere and restrictive administrative

segregation quarters.' " *Chandler v. Baird*, 926 F.2d 1057, 1060 (11th Cir. 1991) (*quoting Hewitt v. Helms*, 459 U.S. 460, 466 (1983)). Thus, to state a due process claim, a prisoner must allege more than that he has been confined in segregation without due process. *See Sandin*, 515 U.S. at 484-486.

Even disciplinary segregation does not present the type of atypical, significant deprivation, necessary for procedural due process to attach. *Sandin*, 515 U.S. at 486. Because none of the plaintiff's allegations implicate the Due Process Clause, the plaintiff's claims for violations of his Fourteenth Amendment due process rights are due to be dismissed.

F. Right to Counsel and Access to Courts

The plaintiff claims defendants Gordy, Loggins, Surrett, and Mercado failed to provide the plaintiff access to the courts and legal counsel by not adequately investigating his rape claim, and not providing him counsel when he asked for a lawyer. (Doc. 11 at 25-27).

1. *Access to Courts*[8]
Interference with an inmate's access to the courts is a violation of the First Amendment, actionable under § 1983. *Lewis v. Casey*, 518 U.S. 343 (1996); *Bounds v. Smith*, 430 U.S. 817 (1977). However, this is not an "abstract, freestanding right." *Bass v. Singletary*, 143 F.3d 1442, 1445 (11th Cir. 1998). To successfully allege a constitutional violation based upon a denial of access to courts, a plaintiff must specifically show how he was actually harmed or prejudiced with respect to the litigation in which he was involved. *Lewis*, 518 U.S. at 350-51. The type of prejudice that is deficient in the constitutional sense is that which hinders the inmate's ability to actually proceed with his claim; there is no constitutional mandate "to suggest that the State must enable the prisoner to discover grievances, and to litigate effectively once in court." *Id.*, at 354 (emphasis omitted). Importantly, "the injury requirement is not satisfied by just any type of frustrated legal claim." *Id.* The plaintiff must show that he was prejudiced in a criminal appeal or post-conviction matter, or in a civil rights action seeking "to vindicate 'basic constitutional rights.' " *Id.* at 354-55 (*quoting Wolff v. McDonnell*, 418 U.S. 539, 579 (1974)). Furthermore, he must allege actual injury "such as a denial or dismissal of a direct appeal, habeas petition or a civil rights case that resulted from the actions of prison officials." *Wilson v. Blankenship*, 163 F.3d 1284, 1290-91 (11th Cir. 1998) (citing *Bass v. Singletary*, 143 F.3d 1442, 1445-46 (11th Cir. 1998)). Moreover, the plaintiff cannot show an injury unless he shows that the case he was unable to pursue had arguable legal merit. *Lewis*, 581 U.S. at 353 n. 3; *Bass*, 43 F.3d at 1445.

***10** Here, the plaintiff has not identified any litigation in which he was involved that was impeded by any of the defendants he named in this action. His claim that the named defendants failed to adequately investigate his allegations of rape and other abuses in no way creates a wholly separate First Amendment claim based on access to the courts. The plaintiff fails to point to any legal action which has been thwarted by any of the defendants' actions. Thus, any claim the plaintiff brings under the First Amendment based on interference with his access to the courts is due to be dismissed. *See e.g., Jackson v. State Bd. of Pardons & Paroles*, 331 F.3d 790, 797 (11th Cir. 2003) (citing *Lewis*, 518 U.S. at 353) (alterations and omission in original) ("To have standing to seek relief under this right, however, a plaintiff must show actual injury by 'demonstrat[ing] that a nonfrivolous legal claim ha[s] been frustrated or ... impeded.' ").

2. Right to Counsel
The plaintiff complains that after being informed he had a right to have counsel present during his PREA interview, he was not provided with counsel. The right to counsel arises under the Sixth Amendment in criminal cases; no similar guarantee exists for parties in a civil proceeding. *Daniel v. U.S. Marshall Svc.*, 188 Fed.Appx. 954, 958 (11th Cir. 2006) (citing *Mekdeci v. Merrell Nat'l Labs*, 711 F.2d 1510, 1523 (11th Cir. 1983)). *See also Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999). Thus, while the plaintiff was informed he had the right to have counsel present during his PREA interview, he had no right to have the State of Alabama provide that counsel for him. The plaintiff does not allege that he was prevented from retaining counsel. Because he could have been assisted by counsel of his choosing, should he have retained counsel, the plaintiff's due process right to have counsel present was not infringed.

IV. Recommendation

Accordingly, for the reasons stated above, the magistrate judge **RECOMMENDS** as follows:

1. All claims against defendants Loggins, Surrett, Mercado and PREA Coordinator John Doe be **DISMISSED** pursuant to 28 U.S.C. § 1915A(b)(2).

2. All claims against defendant Gordy except the failure-to-protect claim be **DISMISSED** pursuant to 28 U.S.C. § 1915A(b)(2).

3. The plaintiff's failure to protect claim against defendant Gordy be referred to the undersigned magistrate judge for further proceedings.

V. Notice of Right to Object

The plaintiff may file specific written objections to this report and recommendation. Any objections must be filed with the Clerk of Court within fourteen (14) calendar days from the date the report and recommendation is entered. Objections should specifically identify all findings of fact and recommendations to which objection is made and the specific basis for objection. Failure to object to factual findings will bar later review of those findings, except for plain error. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986); *Dupree v. Warden*, 715 F.3d 1295, 1300 (11th Cir. 2013). Objections also should specifically identify all claims contained in the complaint which the report and recommendation fails to address. Objections should not contain new allegations, present additional evidence, or repeat legal arguments.

Upon receipt of objections, a United States District Judge will make a *de novo* determination of those portions of the report and recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings of fact and recommendations made by the magistrate judge. The district judge also may refer this action back to the magistrate judge with instructions for further proceedings.

The plaintiff may not appeal the magistrate judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. The plaintiff may only appeal from a final judgment entered by a district judge.

***11** The Clerk is DIRECTED to mail a copy of the foregoing to the plaintiff.

DONE this 4th day of April, 2017.

[1] The plaintiff since has been moved to Limestone Correctional Facility in Harvest, Alabama. (Doc. 11 at 22).

[2] The events leading up to and surrounding these allegations are the subject of a prior filed lawsuit, *Brent Jacoby v. Warden Carter, et al.*, 4:16-cv-00728-MHH-TMP (N.D.Al.). As originally filed, the complaint in this case made claims duplicative of those in the plaintiff's earlier, still pending, action. The plaintiff was instructed to file an amended complaint, removing the redundant claims and parties. (Doc. 9). The plaintiff complied with the order by filing the amended complaint now before the court. (Doc. 11).

[3] For purposes of this opinion, and the review mandated by § 1915A and § 1915(e)(2), the court assumes that the factual background, as set forth by the plaintiff, is true. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). However, no factual findings in this opinion are binding on the court in the plaintiff's prior action, which is currently pending on summary judgment motions.

[4] The Incident Report completed based on the February 12, 2016, events reflects that "Captain Graham spoke with Mr. Payne and Mr. Payne stated that inmate Jacoby stated that he was tired of being bought and sold out to different inmates." *Jacoby v. Carter*, 4:16-cv-00728-MHH-TMP (doc. 61-1 at 2). However, that same Incident Report reflects that the plaintiff stated he did not report any sexual abuse and did not need PREA involved. (*Id.*).

[5] This statement was submitted by the defendants in *Jacoby v. Carter*, 4:16-cv-00728-MHH-TMP (doc. 61-1 at 4).

[6] The I&I report was submitted in *Jacoby v. Warden.* (Doc. 61-1 at 9-10). Defendant Surrett concluded that the plaintiff's claims of rape and sexual abuse were "unfounded." (*Id.*, at 10).

[7] In essence, the failure to protect the plaintiff from harm states a constitutional claim, but the consequences of that failure do not. Thus, while officials' actions may be cognizable under the Eighth Amendment deliberate indifference standard for not protecting the plaintiff before March 8, 2016, the failure to investigate the events of March 8 and 9, 2016, does not, in and of itself, state an additional basis for claims under the Eighth or Fourteenth Amendments.

[8] Although the plaintiff repeatedly refers to a Sixth Amendment right to access to courts, such a right arises under the First Amendment. *See e.g., Harris v. Ostrout*, 65 F.3d 912, 916 (11th Cir. 1995) (the First Amendment grants prisoners a limited right of access to the courts).