UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARC R. PAGE,	:	
	:	
Plaintiff	:	PRISONER
v.	:	Case No. 3:05CV1271 (MRK)
	:	
THERESA LANTZ, et al.[1]	:	
	:	
Defendants.	:	

RULING AND ORDER

Plaintiff Marc R. Page, an inmate currently confined at the Osborn Correctional Institution in Somers, Connecticut, brings this civil rights action pro se and in forma pauperis pursuant to 28 U.S.C. §1915. Mr. Page alleges that the Defendants have deprived him of his constitutional right of access to the courts. For the reasons that follow, the complaint is dismissed without prejudice.

I. Standard of Review

Mr. Page has met the requirements of 28 U.S.C. § 1915(a) and has been granted leave to proceed in forma pauperis in this action. Pursuant to 28 U.S.C. § 1915(e)(2)(B), "the court shall dismiss the case at any time if the court determines that . . . the action . . . is frivolous or malicious; . . . fails to state a claim on which relief may be granted; or . . . seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915 (e)(2)(B)(i)-(iii). Thus, the dismissal of a complaint by a district court under any of the three enumerated sections in 28 U.S.C. §

[1] The named Defendants are Theresa Lantz; Sydney Schulman, Esq.; Inmate Legal Assistance Program; Connecticut Department of Correction; Brian K. Murphy; Remi Acosta; John J. Armstrong; Unit Manager Hannah; Daniel Martin; Major Hall; and Kenneth Speyer.

1915(e)(2)(B) is mandatory rather than discretionary. See Cruz v. Gomez, 202 F.3d 593, 596 (2d Cir. 2000).

"When an in forma pauperis plaintiff raises a cognizable claim, his complaint may not be dismissed sua sponte for frivolousness under § 1915 (e)(2)(B)(i) even if the complaint fails to 'flesh out all the required details.'" Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (quoting Benitez v. Wolff, 907 F.2d 1293, 1295 (2d Cir. 1990) (per curiam)).

> An action is "frivolous" when either: (1) the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy; or (2) the claim is based on an indisputably meritless legal theory. A claim is based on an indisputably meritless legal theory when either the claim lacks an arguable basis in law, or a dispositive defense clearly exists on the face of the complaint.

Livingston, 141 F.3d at 437 (citations and internal quotation marks omitted). The Court exercises caution in dismissing a case under § 1915(e) because a claim that the Court perceives as likely to be unsuccessful is not necessarily frivolous. See Neitzke v. Williams, 490 U.S. 319, 329 (1989).

A district court must also dismiss a complaint if it fails to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2) ("[T]he court shall dismiss the case at any time if the court determines that . . . (B) the action or appeal . . . (ii) fails to state a claim upon which relief may be granted . . . ."); Gomez, 202 F.3d at 596 ("[T]he Prison Litigation Reform Act . . . which redesignated § 1915(d) as § 1915(e) . . . provided that dismissal for failure to state a claim is mandatory."). In reviewing the complaint, the Court "accept[s] as true all factual allegations in the complaint" and draws inferences from these allegations in the light most favorable to the plaintiff. Gomez, 202 F.3d at 596 (citing King v. Simpson, 189 F.3d 284, 287 (2d. Cir. 1999)). Dismissal of the complaint under 28 U.S.C. 1915(e)(2)(B)(ii) is only appropriate if "'it appears beyond doubt that

the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 597 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Furthermore, "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim," the court should permit "a pro se plaintiff who is proceeding in forma pauperis" to file an amended complaint that states a claim upon which relief may be granted. Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999).

Finally, a district court is required to dismiss a complaint if the plaintiff seeks monetary damages from a defendant who is immune from suit. See 28 U.S.C. § 1915(e)(2)(B)(iii); Spencer v. Doe, 139 F.3d 107, 111 (2d Cir. 1998) (affirming dismissal pursuant to § 1915(e)(2)(B)(iii) of official-capacity claims in § 1983 action because "the Eleventh Amendment immunizes state officials sued for damages in their official capacity").

II. Allegations

The following facts are taken from Mr. Page's complaint. See Complaint [doc. #1]. The Inmates' Legal Assistance Program ("ILAP") provides legal assistance to inmates pursuant to a contract with the Connecticut Department of Correction. On September 21, 2002, Mr. Page filed a motion seeking to join as a plaintiff in a civil action filed against ILAP in state court. *Id.* at 1. After he joined the action against ILAP, program attorneys refused to provide legal assistance to Mr. Page. *Id.* ILAP's contract provided that if ILAP was unable to fulfill its contractual obligations to an inmate it would subcontract that service, but no substitute provider of legal assistance was named. *Id.* at 2.

On October 11, 2002, Mr. Page sent a letter to Defendant Counselor Hannah regarding

ILAP's failure to provide him with legal services. Mr. Page was told that he should write to Defendant Major Hall. *Id.* Mr. Page wrote to Defendant Hall on October 28, 2002. In the interim, on October 22, 2002, Mr. Page sent then-Commissioner Armstrong a document entitled "Request for Declaratory Ruling" in which he asked whether the Department of Correction was going to provide him legal representation. *Id.* Defendant Armstrong responded by letter dated December 16, 2002. He informed Mr. Page that the Department of Correction would not provide him with legal representation. Mr. Page has filed grievances about the lack of legal assistance. *Id.*

Mr. Page states that, as a result of the denial of legal assistance, he abandoned his participation in the case against ILAP, has other matters "languishing" in state court, and was unable to appeal the denial of a "medical habeas" case. *Id.* at 3.

III. Discussion

In order to state a claim for relief under 42 U.S.C. § 1983, Mr. Page must satisfy a two-part test. First, he must allege facts demonstrating that Defendants acted under color of state law. Second, he must allege facts demonstrating that he has been deprived of a constitutionally or federally protected right. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982); Washington v. James, 782 F.2d 1134, 1138 (2d Cir. 1986).

A. Claims Against Connecticut Department of Correction

Mr. Page names the Connecticut Department of Correction as a defendant in this case. It is well-settled that a state agency is not a "person" within the meaning of § 1983. See Santos v. Connecticut Department of Correction, No. 3:04cv1562 (JCH)(HBF), 2005 WL 2123543, at *3 (D. Conn. Aug. 29, 2005) (holding that Connecticut Department of Correction is not a person under

section 1983); see also Fisher v. Cahill, 474 F.2d 991, 992 (3d Cir. 1973) (state prison department cannot be sued under section 1983 because it does not fit the definition of "person" under section 1983); Santiago v. New York State Dep't of Correctional Servs., 725 F. Supp. 780, 783-84 (S.D.N.Y.1989) (holding that state and state agencies are not persons under § 1983), rev'd on other grounds, 945 F.2d 25 (2d Cir.1991). Thus, any claim asserted against the Department of Correction pursuant to § 1983 lacks an arguable legal basis and must be dismissed. See Neitzke, 480 U.S. at 325.

B. Claims Against Inmates' Legal Assistance Program, Schulman, and Speyer

As stated above, in order to state a claim for relief under § 1983, a plaintiff must demonstrate that he was deprived of a constitutionally or federally protected right by a person acting under color of state law. See 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988). Traditionally, acting under color of state law required "that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Id. at 49 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). In Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982), the Court held that the color-of-state-law requirement may also be established when a defendant's conduct satisfies the state action requirement of the Fourteenth Amendment. See id. at 935. Conduct constitutes state action when a deprivation of rights is "caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible," and "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." Id. at 937.

Generally, a public employee acts under color of state law when she acts in her official capacity or exercises her responsibilities pursuant to state law. See West, 487 U.S. at 50. The

Supreme Court has recognized one exception to the general rule. "[A] public defender does not act under color of state law when performing the traditional functions of counsel to a criminal defendant." Polk County v. Dodson, 454 U.S. 312, 317 (1981). See also Housand v. Heiman, 594 F.2d 923, 924-25 (2d Cir. 1979). The Court distinguished a public defender from the typical state employee or state actor: "While performing his duties, the public defender retains all of the essential attributes of a private attorney, including, most importantly, his 'professional independence,' which the State is constitutionally obliged to respect." West, 487 U.S. at 50 (quoting Polk County, 454 U.S. at 321-22). "[W]hen representing an indigent defendant in a state criminal proceeding, the public defender does not act under color of state law for the purposes of § 1983 because he 'is not acting on behalf of the State; he is the State's adversary.'" West, 487 U.S. at 50 (quoting Polk County, 454 U.S. at 323 n.13). Similarly, attorneys appointed to represent indigent litigants are not considered to be acting under color of state law. See, e.g., Rodriguez v. Weprin, 116 F.3d 62, 65-66 (2d Cir.1997) ("[I]t is well-established that court-appointed attorneys performing a lawyer's traditional functions as counsel to defendant do not act 'under color of state law' and therefore are not subject to suit under 42 U.S.C. § 1983."); Peavey v. Polytechnic Institute of New York, 775 F. Supp. 75 (E.D.N.Y. 1991) (private attorney), aff'd, 969 F.2d 1042 (1992); Neustein v. Orbach, 732 F. Supp. 333 (E.D.N.Y. 1990) (Legal Aid attorney does not act under color of state law).

Defendants Schulman and Speyer are private attorneys who provide legal assistance to Connecticut inmates pursuant to a contract with the Connecticut Department of Correction. That Defendants act pursuant to a state contract does not transform them into state actors for § 1983 purposes. See Szekeres v. Schaeffer, 304 F.Supp.2d 296, 307 (D. Conn. 2004) ("[G]overnment funding of a private entity, no matter how extensive, is insufficient in and of itself to establish state

action."). Nor does Mr. Page allege facts "that would show substantial control by the State over [its] management generally or in the performance of its duties." Id. at 308. This Court has previously held that attorneys working for ILAP under a contract with the State of Connecticut to provide legal assistance to inmates incarcerated in Connecticut in civil matters against the Department of Correction are not state actors under § 1983. See Ruling Granting Motion to Dismiss [doc. #47], McCarthy v. Armstrong, et al., No. 3:96cv517 (PCD) (HBF) (D. Conn. May 28, 1998) (granting Defendant Schulman's motion to dismiss civil rights complaint against her because she did not act under color of state law). See also McArthur v. Bell, 788 F. Supp. 706, 710 n.1 (E.D.N.Y. 1992) (holding that a private attorney generally is not considered a state actor for purposes of § 1983) (citations omitted). Because Attorneys Schulman and Speyer are acting as private attorneys in performing obligations under contract with the Department of Correction, the Court concludes they are not acting under color of state law.

ILAP acts only through its program attorneys. Mr. Page has alleged no facts suggesting any independent existence or actions. Since the Court has found that ILAP's attorneys are not subject to liability under § 1983, the Court also concludes that ILAP is itself free from § 1983 liability. See Neustein, 732 F. Supp. at 346 (finding the Legal Aid Society free from liability because its attorneys did not act under color of state law). Thus, the claims as to Attorneys Schulman, Speyer, and ILAP are dismissed.

C. Official Capacity Claims Against Defendants Lantz, Murphy, Acosta, Armstrong, Hannah, Martin, and Hall

Mr. Page does not specify the capacity in which he names Defendants Lantz, Murphy, Acosta, Armstrong, Hannah, Martin, and Hall. In his prayer for relief, however, Mr. Page seeks only

damages from the State of Connecticut to compensate him for the actions of these Defendants. Complaint [doc. #1] at 4. Because the Eleventh Amendment precludes a damage award against these Defendants in their official capacities, any claims against them in their official capacities are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii). See Kentucky v. Graham, 473 U.S. 159 (1985) (holding that Eleventh Amendment immunity protects state officials sued for damages in their official capacity).

D. Individual Capacity Claims Against Defendants Lantz, Murphy, Acosta, Armstrong, Hannah, Martin and Hall

Mr. Page alleges, generally, that these Defendants violated his right of access to the courts. "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828 (1977). In Lewis v. Casey, 518 U.S. 343 (1996), the Supreme Court clarified what is encompassed in an inmate's right of access to the courts and what constitutes standing to bring a claim for the violation of that right. The Court held that to show that the defendants violated his right of access to the courts, an inmate must allege facts demonstrating an actual injury stemming from the defendants' unconstitutional conduct. Id. at 349. As an illustration, the Court noted that if an inmate were able to show that, as a result of the defendant's action, he was unable to file an initial complaint or petition, or that the complaint he filed was so technically deficient that it was dismissed without a consideration of the merits of the claim, he could state a claim for denial of access to the courts. Id. at 351.

The Court restricted the types of cases for which correctional officials must ensure access to

the courts. A prisoner must be able to file petitions for writ of habeas corpus in state and federal court to challenge their sentences and civil rights actions under 42 U.S.C. § 1983 "to vindicate 'basic constitutional rights.'" See id. at 354 (citations omitted) (noting that all cases in the Bounds line were direct appeals of convictions or habeas petitions). Other frustrated legal claims do not satisfy the actual injury requirement:

> In other words, Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

Id. at 355. See Bourdon v. Loughren, 386 F.3d 88, 96 (2d Cir. 2004) ("The right of access to the courts requires that all prisoners defending against criminal charges or convictions (either directly or collaterally) or challenging the conditions of their confinement . . . not be impeded from presenting those defenses and claims for formal adjudication by a court." (citing Bounds, 430 U.S. at 823; and Lewis, 518 U.S. at 351)); Monsky v. Moraghan, 127 F.3d 243, 246 (2d Cir. 1997) (noting that prisoners must be afforded affirmative assistance in cases challenging their convictions or conditions of confinement). Moreover, the Supreme Court specifically disclaimed any requirement that prison officials ensure that inmates have sufficient resources to discover grievances or litigate effectively once their claims are brought before the court. See Lewis, 518 U.S. at 355.

Mr. Page alleges three potential injuries upon which to ground his claim that he has been denied access to the courts. Two of these claims – that his state cases are languishing and that he decided to abandon his participation in the state-court civil action against ILAP – do not implicate

his ability to challenge the conditions of his confinement. Accordingly, they cannot establish an actual injury as required by Lewis. His third claim is that his lack of counsel caused him not to appeal the denial of a state habeas petition related to medical issues. In Friedl v. City of New York, the Second Court declined to follow the Sixth Circuit's view that Lewis had limited "a prisoner's right to access the courts . . . to direct appeals, habeas corpus applications, and civil rights claims only." 210 F.3d 79, 86 (2d Cir. 2000) (quoting Thaddeus-X v. Blatter, 175 F.3d 378, 391 (6th Cir.1999) (en banc)). Instead, the Court found that a prisoner had stated a cognizable court-access claim under § 1983 where he had alleged that his work-release privileges were revoked in retaliation for his filing for public assistance benefits. Friedl, 210 F.3d at 86-87. Analogously, Mr. Page's alleged inability to pursue his "medical habeas" appeal may make out a valid court-access claim under Lantz.

However, in its current form his complaint lacks the facts necessary for this Court to ascertain the nature of his alleged injury. Mr. Page does not allege specific facts explaining how each defendant's actions contributed to his inability to file his appeal. His mere assertion that a lack of representation was at fault is insufficient. Id. at 85-86 ("To survive a motion to dismiss, [a prisoner's § 1983] claims must be supported by specific and detailed factual allegations, not stated in wholly conclusory terms." (internal quotation marks omitted)). Therefore, the Court dismisses without prejudice Mr. Page's claims against Defendants Lantz, Armstrong, Murphy, Acosta, Martin, Hannah and Hall pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). The Court gives Mr. Page 30 days to amend his complaint. If he chooses to do so, he must make clear (1) the nature of the "medical habeas" case he claims was adversely impacted by the state's actions, and (2) the involvement of each defendant in interfering with his rights. Mr. Page must state with specificity exactly how

Defendants Lantz, Armstrong, Murphy, Acosta, Martin, Hannah, and Hall interfered with his ability to file his "medical habeas" appeal.

V. Conclusion

The complaint is **DISMISSED,** pursuant to 28 U.S.C. §1915(e)(2)(B), with prejudice as to all claims against Defendants Department of Correction, Inmates' Legal Assistance Program, Schulman and Speyer, and Lantz, Armstrong, Murphy, Martin, Acosta, Hannah, and Hall in their official capacities; and dismissed without prejudice against Defendants Lantz, Armstrong, Murphy, Martin, Acosta, Hannah, and Hall in their individual capacities. In light of this dismissal, Mr. Page's motion for appointment of counsel [**doc. #3**] is **DENIED** without prejudice. Mr. Page may file an amended complaint against Defendants Lantz, Armstrong, Murphy, Martin, Acosta, Hannah, and Hall in their individual capacities if he can allege facts demonstrating an actual injury as described above and the personal involvement of any defendant included in the amended complaint. Any amended complaint shall be filed within **thirty (30)** days from the date of this ruling. The Court concludes that any appeal from this order would not be taken in good faith.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut, on September 26, 2005.