

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DANIEL BISPING,

Plaintiff,

v.

UW HEALTH, RUSSELL L. LEMMON, DO,
BENJAMINE SCHNAPP, MD, SARAH L. LIEGL, PA,
AMY J. FARGO-YOUNG, PA, SUSAN E.
MONTGOMERY, MD, ANNE SCHMITZ, NP,
KATHERINE GONZAGA, MD, JENNIFER
EDGOOSE, MD, MARK BIAGTAN, MD, PAIGE
STONE, NATASHA PEDONE-KAHLE, MOLLY
HAJENGA, AFFILIATED COUNSELING CENTER,
LLC, and JOHN WHELAN,

Defendants.

OPINION and ORDER

23-cv-256-wmc¹

Pro se plaintiff Daniel Bisping contends that the health care professionals who treated him between 2018 and 2022 violated his constitutional and state-law rights. Because Bisping proceeds in forma pauperis, I must screen the complaint under 28 U.S.C. § 1915 and dismiss any portion that is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks money damages from an immune defendant. I must accept the complaint's allegations as true and construe them generously, holding the complaint to a less stringent standard than one a lawyer drafts. *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011). Applying this standard, I will dismiss this case because Bisping fails to state a federal claim for relief, and this court does not have subject matter jurisdiction over his state-law claims.

¹ I am exercising jurisdiction over this case for purposes of screening only.

ANALYSIS

Bisping is suing the University of Wisconsin Hospital (UW Health) and the medical professionals who treated him there. Bisping says that these defendants committed crimes against him, committed medical malpractice, and withheld destroyed his medical records. Bisping is also suing Affiliated Counseling Center and a psychiatrist at that clinic, defendant John Whelan. He contends that Whelan committed medical malpractice and crimes against him, and that he has been unable to obtain his complete records from Affiliated.

Bisping has not stated a federal claim against any of the defendants. He contends that the defendants and their attorneys violated his Fourteenth Amendment rights by withholding or destroying his medical records. I understand Bisping to be suing defendants under 42 U.S.C. § 1983, but to succeed on constitutional claims under that statute, the defendants must have acted “under color of state law.” *See Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 822 (7th Cir. 2009). Neither Affiliated nor Whelan are state actors, so Bisping’s Fourteenth Amendment claims against those two defendants fail at the outset because they are not subject to suit under § 1983.

Depending on the nature of their employment, the UW Health defendants could qualify as state actors. *See Kreger-Mueller v. Shiner*, No. 18-cv-708-jdp, 2020 WL 429448, at *2 (W.D. Wis. Jan. 28, 2020) (assuming for screening purposes that UW Health providers were either state employees or acting under color of state law). But claims against the individual UW Health defendants have another problem: Bisping does not allege that any of the individual defendants at UW Health was responsible for either refusing to comply with his requests for medical records or destroying his records. Bisping’s conclusory assertion that records were withheld, destroyed or incomplete does not show that any of the individual

defendants violated his constitutional rights. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (under Federal Rule of Civil Procedure 8(a)(2), “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face”).

There is yet a further problem with any claims based on the failure to provide medical records. The Due Process Clause of the Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law[.]” U.S. Const. Amend. XIV, § 1. To state a procedural due process claim, a plaintiff must allege the deprivation of a legally protected liberty or property interest. *See Cheli v. Taylorville Comm. Sch. Dist.*, 986 F.3d 1035, 1038–39 (7th Cir. 2021). State law may create liberty and property interests, but state procedural protections do not alone give rise to federal due process interests. *Lavite v. Dunstan*, 932 F.3d 1020, 1033 (7th Cir. 2019). Usually, “failure to follow state statutes or state-mandated procedures does not amount to a federal due process claim of constitutional magnitude.” *Dietchweiler by Dietchweiler v. Lucas*, 827 F.3d 622, 629 (7th Cir. 2016). Purely procedural rules of state law “give rise to constitutionally protected interests only when the mandated procedure contains within it a *substantive* liberty or property interest.” *Manley v. Law*, 889 F.3d 885, 893 (7th Cir. 2018) (emphasis in original).

In Wisconsin, patients may request copies of their medical records under a set of procedures set forth in Wis. Stat. § 146.83, but that statute describes the procedures for requesting records and paying fees for copies of the records; it does not create a substantive property interest in medical records or access to them. Likewise, although the Health Insurance Portability and Accountability Act (HIPAA) provides that patients should receive a copy of their medical records upon request, individuals cannot sue to enforce their rights under HIPAA, nor does HIPAA create an enforceable constitutional right. *See Carpenter v. Phillips*, 419 F. App’x

658, 659 (7th Cir. 2011); *Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010); *Seaton v. Mayberg*, 610 F.3d 530, 533 (9th Cir. 2010). So, even assuming that the UW Health defendants are state actors subject to suit under § 1983, Bisping does not state a federal claim against them for mishandling his records requests.

Bisping contends that defendants also committed crimes. Bisping has no private cause of action to sue in federal court for violation of criminal statutes, and this court cannot initiate federal criminal proceedings. *See Gartner v. Harvard Univ.*, No. 21-cv-503-wmc, 2023 WL 2163083, at *5 (W.D. Wis. Feb. 22, 2023) (“Gardner does not have a private right of action to sue in federal court for violations of federal criminal statutes, and I cannot initiate federal criminal proceedings.”) (citations omitted).

Bisping also contends that all defendants violated his state-law rights. District courts have subject matter jurisdiction over civil actions where the matter in controversy exceeds \$75,000 and is between citizens of different states. 28 U.S.C. § 1332(a)(1). This statute requires “complete diversity of citizenship.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). “That is, diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff.” *Id.* (emphasis in original). This court does not have diversity jurisdiction over this case because both Bisping and defendants are Wisconsin citizens. Without a viable federal claim in this case, I cannot exercise jurisdiction over any state-law claims.

The court of appeals has cautioned against dismissing a pro se plaintiff’s case without giving the plaintiff a chance to amend. *Felton v. City of Chicago*, 827 F.3d 632, 636 (7th Cir. 2016). But I cannot conceive of a scenario in which he would be able to state a federal claim against any of the defendants, or in which he could amend his complaint to proceed with his

state-law claims in federal court. Amendment would be futile. So, I will dismiss Bisping's federal claims with prejudice for failure to state a claim, and I will dismiss his state-law claims without prejudice for lack of subject matter jurisdiction.

ORDER

IT IS ORDERED that:

1. Plaintiff Daniel Bisping is DENIED leave to proceed in this case.
2. Plaintiff's federal claims are DISMISSED with prejudice for failure to state a claim upon which relief can be granted.
3. Plaintiff's state-law claims are dismissed without prejudice for lack of subject matter jurisdiction.
4. The clerk of court is directed to enter judgment accordingly and send plaintiff a copy of this order.

Entered June 1, 2023.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge