

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 ARTHUR KINLAW,

No. C 07-00430 SBA (PR)

4 Plaintiff,

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

5 v.

(Docket no. 44)

6 NANCY KOZAK, et al.,

7 Defendants.

8 _____/

9 **INTRODUCTION**

10 Plaintiff Arthur Kinlaw, who is currently incarcerated at the Attica Correctional Facility in
11 New York, filed this pro se civil rights complaint under 42 U.S.C. § 1983. He originally asserted
12 claims on behalf of himself and his minor daughter, Atheia R., against Defendants Mendocino
13 County Social Workers Nancy Kozak and Melissa Phillips, as well as the Mendocino County
14 Department of Social Services. Plaintiff alleged that Defendants violated his constitutional right to
15 familial association under the First and Fourteenth Amendments by writing a report and causing the
16 state juvenile court to deny him mail communication with Atheia without due process of law.
17 Plaintiff, who is African-America, also claimed an equal protection violation because the
18 deprivation was allegedly based on a racial motive. Lastly, Plaintiff claimed his First Amendment
19 rights were violated because Defendants wrote the report in retaliation for previous grievances he
20 filed against Chuck Dunbar, another Mendocino County social worker.

21 In an Order dated September 22, 2009, the Court found that Plaintiff alleged cognizable First
22 and Fourteenth Amendment claims against Defendant Kozak. (Sept. 22, 2009 Order at 5-6.) The
23 Court also found that Plaintiff alleged a cognizable retaliation claim against Defendants Kozak and
24 Phillips. (Id. at 6.) The Court, however, dismissed the claim against Defendant Mendocino County
25 Department of Social Services upon concluding that Plaintiff had not alleged sufficient grounds for
26 municipal liability. (Id. at 6-7.) The Court further dismissed Atheia as a named party to the action
27 because Plaintiff, as a pro se litigant, had no authority to represent another other than himself. (Id. at
28

1 3-4.) On September 28, 2009, the complaint was served on Defendants Kozak and Phillips.
2 Defendants filed an answer, and Plaintiff filed a reply.¹

3 On January 20, 2010, Defendants filed a motion for summary judgment on the grounds that
4 there is no triable issue of material fact, and that they are entitled to judgment as a matter of law.
5 (Defs.' Motion for Summary Judgment (MSJ) at 1.) On February 3, 2010, Plaintiff filed an
6 opposition with attached exhibits. On February 16, 2010, Defendants filed a reply. On February 16,
7 2010, Defendants filed an objection to Plaintiff's opposition and exhibits offered in support of the
8 opposition.

9 For the reasons discussed below, Defendants' motion for summary judgment is GRANTED.

10 **BACKGROUND**

11 The following factual background is based on the allegations in Plaintiff's complaint, on
12 Defendants' motion for summary judgment and the attached exhibits, Plaintiff's opposition and
13 Defendants' reply. The facts are undisputed, unless otherwise noted.

14 Plaintiff is currently serving "three (20) to life sentence's [sic]." (Compl. at 11.) On
15 September 13, 2005, the juvenile court of Mendocino County denied Plaintiff all visitation rights,
16 including mail communication, with Atheia, his biological child. (Phillips Decl. ¶ 5.) The juvenile
17 court based its decision on a report written for a dependency proceeding by Defendant Kozak.
18 While Plaintiff does not claim Defendant Kozak fabricated evidence or included false statements in
19 her report, he alleges that she "discriminated against Plaintiff when submitting . . . , a[n] eight-page
20 report in the matter of Plaintiff's biological children: Jakeima [R.] . . . and Atheia [R.]"²
21 (Compl. at 12.) Both children were "in [a] licensed foster home" during this time. (Id. at 13.)

22 On October 22, 1997, Jakeima and Atheia were taken into protective custody by the
23 Mendocino County Department of Social Services. (Defs.' MSJ, Ex. A.) A detention hearing was
24

25 ¹ On October 16, 2009, Plaintiff filed a motion called "Affirmation of Opposition to Motion
26 for Summary Judgment." The Court construes this to be a response to Defendants' answer because
27 Defendants had not yet filed their motion for summary judgment at that time.

28 ² The Court notes that Plaintiff has other children who were also mentioned in his
complaint, but they are irrelevant to the claims against the named Defendants.

1 held on October 27, 1997, and a jurisdiction hearing was held on August 19, 1998. (Id.) On
2 November 18, 1998, at a disposition hearing, the juvenile court declared both children dependents of
3 the court. (Id.) Additionally, the juvenile court ordered reunification services for Ms. Kinlaw, the
4 mother of the children,³ but denied reunification services for Plaintiff based on a report by Mr.
5 Dunbar. (Id.) Because Plaintiff believed that Mr. Dunbar committed perjury and included false
6 information in his report to the court during the November 18, 1998 disposition hearing, Plaintiff
7 alleges he filed "a number of civil complaints" and grievances in 2003 against Mr. Dunbar, which he
8 sent to various agencies, including the Department of Justice, the United States Attorney General
9 and the Department of Health and Human Services.⁴ (Compl. at 21-23.) On September 22, 1999,
10 long term foster care was established as the permanent plan for both Jakeima and Atheia. (Defs.'
11 MSJ, Ex. A.)

12 On August 9, 2005, the twelfth semi-annual review hearing of the permanent plan was held.
13 (Id.) Prior to the hearing, notices were sent to Ms. Kinlaw and to Plaintiff, who were each
14 represented by counsel at the hearing. (Id. at 2-3.) At that time, Defendants Kozak and Phillips
15 were assigned to the case regarding Plaintiff's children. (Phillips Decl. ¶ 3.) As part of the
16 proceeding, Defendant Kozak submitted a report in which she recommended that visitation with
17 Jakeima and Atheia be restricted to only "letters designed to aid in the healing of the children" and
18 that such letters be "approved by the social worker before distribution" for both parents. (Defs.'
19 MSJ, Ex. A. at 17.) The court ordered the parents to have "[n]o face-to-face visits and no phone
20 contact" for Jakeima, but permitted mail communication under direct supervision of social workers.
21 (Id. at 19-20.) For Atheia, the court ordered no visitation for both Ms. Kinlaw and Plaintiff. (Id. at
22

23 ³ Reunification services were subsequently terminated for Ms. Kinlaw on April 22, 1999.
24 (Defs' MSJ, Ex.A.)

25 ⁴ Defendants dispute Plaintiff's claims by stating that no civil complaint has ever been filed
26 by Plaintiff against Mr. Dunbar. (Chapman Decl. ¶¶ 4-6; Meek Decl. ¶ 3; Dunbar Decl. ¶¶ 3-4.)
27 The Court notes that Mr. Dunbar is not a named Defendant in the instant action. In Plaintiff's
28 opposition, he alleges that he filed letter grievances and that his "letter of complaint" sent to Mr.
Dunbar "was taken as a threat, therefore, co-workers Defendants Kozak and Phillips, retaliated using
Plaintiff[s] children as devises [sic] to do so" (Opp'n at 11-12.) Defendants do not dispute that
Plaintiff filed these grievances.

1 22.) At this hearing, Atheia "requested permission from the Superior Court for the State of
2 California, County of Mendocino . . . to have letter contact with her father" (Defs.' MSJ, Ex. B
3 at 4-5.)

4 On September 13, 2005, a special hearing was held to address visitation issues. (Defs.' MSJ,
5 Ex. B.) Prior to the hearing, notices were sent to Ms. Kinlaw and Plaintiff, and, again, each were
6 represented by counsel at the hearing. (Id. at 2-3.) Defendants Kozak and Phillips were still
7 assigned to the case regarding Plaintiff's children at that time. (Phillips Decl. ¶ 3.) As part of this
8 hearing, Defendant Kozak issued a report entitled, "Report and Recommendation of the Department
9 of Social Services Regarding Visitation and Contact with the Biological Parents." (Defs.' MSJ, Ex.
10 B. at 1-5.) Defendant Kozak stated that Jakeima "has consistently requested permission from this
11 social worker to contact his biological mother" and that Jakeima "would very much like to continue
12 to have contact with his mother." (Id. at 3-4.) Defendant Kozak stated that "Jakeima is almost
13 sixteen years of age and developing a sense of himself and who he is in the world" and that "Ms.
14 Kinlaw may be able to provide [him] with family knowledge he so desperately seeks." (Id. at 4.)
15 Accordingly, Defendant Kozak recommended that "Jakeima be allowed to have one telephone
16 contact per week with Ms. Kinlaw." (Id.)

17 For Atheia, the report stated,

18 This social worker does not recommend letter contact for Atheia with Arthur
19 Kinlaw at this time. Mr. Kinlaw is incarcerated for three 20 year to life sentences
20 running concurrently. Atheia is fourteen years of age and has worked very hard to
make significant changes in her young life. The undersigned does not believe it is
in the best interest of this young lady to receive communication from Mr. Kinlaw.

21 (Id. at 4-5.) The juvenile court adopted Defendant Kozak's recommendation and ordered one
22 monitored telephone contact per week between Jakeima and Ms. Kinlaw, and granted Atheia
23 monitored mail communication with Ms. Kinlaw. (Phillips Decl. ¶ 5.) The court, however, denied
24 Atheia's request for mail communication with Plaintiff. (Id.)

25 On January 23, 2007, Plaintiff filed the instant civil rights action.

26 DISCUSSION

27 I. Legal Standard For Summary Judgment

28 Summary judgment is properly granted when no genuine and disputed issues of material fact

1 remain and when, viewing the evidence most favorably to the non-moving party, the movant is
2 clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S.
3 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

4 The moving party bears the burden of showing that there is no material factual dispute.
5 Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or
6 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The Court must
7 draw all reasonable inferences in favor of the party against whom summary judgment is sought.
8 Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v.
9 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). A verified complaint may be
10 used as an opposing affidavit under Rule 56, as long as it is based on personal knowledge and sets
11 forth specific facts admissible in evidence. Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11
12 (9th Cir. 1995).

13 Material facts which would preclude entry of summary judgment are those which, under
14 applicable substantive law, may affect the outcome of the case. The substantive law will identify
15 which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

16 Where the moving party does not bear the burden of proof on an issue at trial, the moving
17 party may discharge its burden of production by either of two methods:

18 The moving party may produce evidence negating an essential element of the
19 nonmoving party's case, or, after suitable discovery, the moving party may show that
20 the nonmoving party does not have enough evidence of an essential element of its
21 claim or defense to carry its ultimate burden of persuasion at trial.

22 Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1106 (9th Cir. 2000).

23 If the moving party discharges its burden by showing an absence of evidence to support an
24 essential element of a claim or defense, it is not required to produce evidence showing the absence
25 of a material fact on such issues, or to support its motion with evidence negating the non-moving
26 party's claim. Id.; see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v. NME
27 Hospitals, Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the moving party shows an absence of
28 evidence to support the non-moving party's case, the burden then shifts to the non-moving party to
produce "specific evidence, through affidavits or admissible discovery material, to show that the

1 dispute exists." Bhan, 929 F.2d at 1409.

2 If the moving party discharges its burden by negating an essential element of the non-moving
3 party's claim or defense, it must produce affirmative evidence of such negation. Nissan, 210 F.3d at
4 1105. If the moving party produces such evidence, the burden then shifts to the non-moving party to
5 produce specific evidence to show that a dispute of material fact exists. Id.

6 If the moving party does not meet its initial burden of production by either method, the non-
7 moving party is under no obligation to offer any evidence in support of its opposition. Id. This is
8 true even though the non-moving party bears the ultimate burden of persuasion at trial. Id. at 1107.

9 **II. Evidence Considered**

10 A district court may only consider admissible evidence in ruling on a motion for summary
11 judgment. See Fed. R. Civ. P. 56(e); Orr v. Bank of Am., 285 F.3d 764, 773 (9th Cir. 2002).

12 Unauthenticated documents and hearsay evidence are not admissible, and consequently, may not be
13 considered on summary judgment. See id. at 773-74, 778.

14 Defendants have submitted declarations by Defendant Phillips, Mr. Dunbar and Pat Meek,
15 who is the custodian of records as to personnel/grievance matters at Mendicino County Health and
16 Human Services Agency. They have also submitted an affidavit of concurrence by Defendants'
17 attorney Douglas Losak and a declaration by his secretary, Julie Chapman. Defendants have
18 submitted a request for judicial notice in support of their motion for summary judgment. Attached to
19 this request, Mr. Losak has submitted a status review report prepared by Defendant Kozak on July
20 28, 2005 for the August 9, 2005 dependency proceeding, which includes case plan updates,
21 individualized education program and school records, as well as other medical and health documents
22 for Jakeima and Atheia. Additionally, Mr. Losak has submitted a status report prepared by
23 Defendant Kozak on September 8, 2005 for the September 13, 2005 hearing. Mr. Losak states that
24 the aforementioned submitted exhibits are "true and correct copies" of what they purport to be.
25 (Req. for Judicial Notice at 1.) The Court will consider the aforementioned exhibits as properly
26 authenticated; therefore, Defendants' request for judicial notice in support of their motion is
27 GRANTED. The Court notes that Mr. Losak has also submitted the juvenile court's orders for both
28 hearings. Defendants have submitted unsigned orders for the August 9, 2005 and September 13,

1 2005 hearings. However, the evidence in the record sufficiently demonstrates that these unsigned
2 orders were issued by the juvenile court at both hearings. (Compl. at 12-13; Phillips Decl. ¶¶ 4, 5.)
3 Therefore, both orders will also be considered by the Court in connection with Defendants' motion.

4 Plaintiff filed a complaint, which he signed under penalty of perjury. Also in the record is
5 Plaintiff's opposition, which he also signed under penalty of perjury. Attached to the opposition,
6 Plaintiff submitted the following exhibits: letters dated February 19, 2003 and August 1, 2003, from
7 Steve Jackson of the Mendocino County Public Defender's Office; greetings cards written by
8 Plaintiff to his children entitled, "A Rose" and "A Blessed Morning"; letters reportedly from
9 "Margaret Law" to Defendant Kozak dated May 23, 2004 and May 30, 2004; a letter from
10 Mendocino County Superior Court to Plaintiff dated January 27, 2006; a four-page document
11 entitled "Affidavit of Service"; a six-page document entitled "Affidavit of Service" dated April 22,
12 2007; a letter from Plaintiff to Heather Hunter dated February 6, 2006; a March 25, 2003 letter to the
13 United States Department of Health and Human Services; and a letter to David Shapiro, acting
14 United States Attorney, dated March 25, 2003.

15 Defendants filed an objection to the evidence offered in support of Plaintiff's opposition and
16 his attached exhibits. Defendants request that the Court strike the entire opposition on grounds that
17 the pleading violates this Court's September 22, 2009 Order to comply with Rules 3-4(c)(2)-(3), and
18 7-4(a)(2)-(5), (b), of the Northern District of California Civil Local Rules. The Court overrules this
19 objection and denies Defendants' request to strike Plaintiff's opposition. Defendants also object to
20 the exhibits attached to Plaintiff's opposition. However, none of these exhibits is necessary to
21 adjudicate the instant motion. For these reasons, Defendants' objections are overruled as moot.

22 **III. Legal Claims**

23 **A. Absolute Immunity**

24 Defendants argue that summary judgment is warranted because social workers are entitled to
25 absolute immunity for their acts of writing reports and making recommendations to the juvenile
26 court in a child dependency hearing. Defendants argue that recommendations issued under court
27 order are "discretionary function[s], done within the context of a judicial proceeding" and therefore
28 absolute immunity applies. (Defs.' MSJ at 8.)

1 **1. Applicable Legal Standard**

2 The United States Supreme Court has recognized that some officials perform special
3 functions which, because of their similarity to functions that would have been immune when
4 Congress enacted § 1983, deserve absolute protection from damages liability. Buckley v.
5 Fitzsimmons, 509 U.S. 259, 268-69 (1993). This immunity extends to individuals performing
6 functions that are "critical to the judicial process itself." Miller v. Gammie, 335 F.3d 889, 896
7 (citing Imbler v. Pachtman, 424 U.S. 409, 430 (1976)). Prosecutors are absolutely immune in
8 "initiating a prosecution and in presenting the State's case." Id. at 895-96 (quoting Imbler, 424 U.S.
9 at 431). Accordingly, "social workers are entitled to absolute immunity in performing
10 quasi-prosecutorial functions connected with the initiation and pursuit of child dependency
11 proceedings." Meyers v. Contra Costa County Dep't of Social Servs., 812 F.2d 1154, 1157 (9th Cir.
12 1987). In making this determination, the Supreme Court evaluates the "nature of the function
13 performed, not the identity of the actor who performed it." Buckley, 509 U.S. at 269; see also
14 Miller, 335 F.3d at 898.

15 Absolute immunity could extend to the initiation of dependency proceedings to make a child
16 a dependent of the state. See Miller, 335 F.3d at 897-98; Meyers, 812 F.2d at 1156-57. There also
17 may be other submissions to the court which are functionally similar to the conduct recognized at
18 common law to be protected by absolute prosecutorial immunity. See Miller, 335 F.3d at 897;
19 Meyers, 812 F.2d at 1156-57. However, to the extent social workers make discretionary decisions
20 and recommendations that are not functionally similar to prosecutorial or judicial decisions, only
21 qualified, not absolute immunity, is available. Miller, 335 F.3d at 898. Thus, social workers are not
22 entitled to absolute immunity from claims that they fabricated evidence during an investigation or
23 made false statements in a dependency petition affidavit they signed under penalty of perjury
24 because such actions are not similar to discretionary decisions about whether to prosecute. See
25 Greene v. Camreta, 588 F.3d 1011, 1035-36 (9th Cir. 2009) (reversing district court's finding of
26 immunity for social worker where plaintiff submitted evidence that social worker included false
27 statements in his affidavit requesting a protective custody order); Beltran v. Santa Clara County, 514
28 F.3d 906, 908 (9th Cir. 2008) (en banc) (reversing district court's finding of absolute immunity for

1 social worker's investigatory conduct and overruling Circuit precedent in Doe v. Lebbos, 348 F.3d
2 820 (9th Cir. 2003)). "Even actions taken with court approval or under a court's direction are not in
3 and of themselves entitled to quasi-judicial, absolute immunity." Miller, 335 F.3d at 897.

4 "[B]eyond those functions historically recognized as absolutely immune at common law,
5 qualified and only qualified immunity exists." Id. at 897. The burden ultimately rests on the official
6 claiming absolute immunity to identify the common-law counterpart to the function that the official
7 asserts is shielded by absolute immunity. Id.

8 **2. Analysis**

9 Defendants argue that "Plaintiff is not alleging Defendants made false statements or
10 fabricated evidence" but rather, that "he is complaining of Defendants' recommendation in a court-
11 ordered review of his children's dependency hearings." (Def.' MSJ at 7.) However, Defendants
12 have failed to identify the common-law counterpart to the functions that Defendants assert are
13 shielded by absolute immunity. In fact, neither party has presented evidence as to Defendants'
14 precise functions that may or may not give rise to liability. See, e.g., Miller, 335 F.3d at 898 (stating
15 that the nature of the functions the defendants allegedly performed needs to be sufficiently outlined
16 before determining whether absolute immunity applies). Because the application of absolute
17 immunity is highly factual, further development of the record would ordinarily be required in this
18 case. The Court, however, concludes that no further development of the record is necessary at this
19 time because as set forth in the following sections, Defendants are entitled to qualified immunity as
20 to Plaintiff's First and Fourteenth Amendment Claims, see Miller, 335 F.3d at 898, and to summary
21 judgment on the remaining claims.

22 **B. First and Fourteenth Amendment Claims**

23 Plaintiff alleges that Defendant Kozak violated his constitutional rights by writing a report
24 and causing the juvenile court to deny him mail communication with Atheia, thus depriving him of
25 his First and Fourteenth Amendment rights to familial association.

26 "It is well established that a parent has a fundamental liberty interest in the companionship
27 and society of his or her child and that the state's interference with that liberty interest without due
28 process of law is remediable under 42 U.S.C. § 1983." Lee v. City of Los Angeles, 250 F.3d 668,

1 685 (9th Cir. 2001) (internal citation omitted). Subsumed in this liberty interest is the right for
2 parents and children to live together without undue governmental interference. See Santosky v.
3 Kramer, 455 U.S. 745, 753 (1982); Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 2000).
4 Furthermore, parents have a constitutionally protected liberty interest in making decisions about the
5 care, custody, and control of their children. Miller v. Cal., 355 F.3d 1172, 1175 (9th Cir. 2004).
6 When the state has a legitimate interest in interfering with a parent-child relationship, the state may
7 legitimately interfere so long as it provides "fundamentally fair procedures." Kramer, 455 U.S. at
8 754.

9 Defendant Kozak argues that summary judgment is warranted because, as a social worker,
10 she is entitled to qualified immunity as to the familial association claim.

11 **1. Applicable Legal Standard**

12 The defense of qualified immunity protects "government officials . . . from liability for civil
13 damages insofar as their conduct does not violate clearly established statutory or constitutional rights
14 of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
15 The threshold question in qualified immunity analysis is: "Taken in the light most favorable to the
16 party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional
17 right?" Saucier v. Katz, 533 U.S. 194, 201 (2001). A court considering a claim of qualified
18 immunity must determine whether the plaintiff has alleged the deprivation of an actual constitutional
19 right and whether such right was "clearly established." Pearson v. Callahan, __ U.S. __, 129 S. Ct.
20 808, 818 (2009) (overruling the sequence of the two-part test that required determination of a
21 deprivation first and then whether such right was clearly established, as required by Saucier and
22 holding that court may exercise its discretion in deciding which prong to address first, in light of the
23 particular circumstances of each case). Where there is no clearly established law that certain
24 conduct constitutes a constitutional violation, the defendant cannot be on notice that such conduct is
25 unlawful. Rodis v. City and County of S.F., 558 F.3d 964, 970 (9th Cir. 2009) (applying Pearson to
26 find no clearly established right before evaluating whether there was a deprivation). The relevant,
27 dispositive inquiry in determining whether a right is clearly established is whether it would be clear
28 to a reasonable officer that his conduct was unlawful in the situation he confronted. Saucier, 533

1 U.S. at 202. "The qualified immunity standard 'gives ample room for mistaken judgments' by
2 protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Hunter v.
3 Bryant, 502 U.S. 224, 229 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 343 (1986)).

4 **2. Analysis**

5 Under the first prong of the qualified immunity analysis, Plaintiff must have suffered a
6 constitutional violation. Defendants argue that "Plaintiff does not have a constitutional right to
7 familial association" because he is "incarcerated in prison, is a non-custodial parent, and had been
8 denied reunification services by the juvenile court." (Defs.' MSJ at 8.) More specifically,
9 Defendants argue that "Plaintiff does not have a constitutional right to have mail visitation with his
10 children." (Id. at 9.) Defendants have not cited any authority directly on point to support this
11 assertion. Indeed, the Supreme Court has recognized that the Constitution protects "certain kinds of
12 highly personal relationships." Roberts v. United States Jaycees, 468 U.S. 609, 618, 619-620
13 (1984). Outside the prison context, there is some discussion in Supreme Court cases of a right to
14 maintain certain familial relationships, including association among members of an immediate
15 family. See generally Moore v. East Cleveland, 431 U.S. 494 (1977) (plurality opinion); Meyer v.
16 Neb., 262 U.S. 390 (1923). However, the Supreme Court has not held that any right to intimate
17 association is altogether terminated by incarceration or is always irrelevant to claims made by
18 prisoners. Overton v. Bazzetta, 539 U.S. 126, 131 (2003). In any event, the Court need not decide
19 whether a denial of mail communication violated Plaintiff's constitutional right because at the time
20 Defendants issued their recommendations, the alleged violation was not clearly established. See
21 Pearson, __ U.S. __, 129 S. Ct. at 818.

22 The record does not show that Defendant Kozak fabricated evidence or made false
23 statements in her report to deny mail communication between Plaintiff and Atheia. Instead, the
24 record shows that Defendant Kozak supported her recommendation by submitting status reports for
25 the August 9, 2005 and September 13, 2005 hearings. Defendant Kozak argues she acted reasonably
26 and made appropriate recommendations regarding parental communication. For example, Defendant
27 Kozak reassessed, consulted and maintained contact with all the children and their caretakers
28 throughout the dependency proceedings. (Defs.' MSJ, Ex. A. at 5.) Defendant Kozak met with the

1 children, including Atheia, on a monthly basis. (Id.) For Atheia specifically, Defendant Kozak had
2 face-to-face meetings with her on January 12, 2005, February 15, 2005, April 21, 2005, May 20,
3 2005, June 10, 2005, and July 1, 2005. (Id. at 6.)

4 Furthermore, in Defendant Kozak's status report for the August 9, 2005 hearing, she stated
5 that Atheia "made a great deal of progress during her placement at Lincoln Child Center" and upon
6 graduation, moved in with her former foster parents with whom Atheia maintained contact and had
7 always sought reunification. (Id. at 12-13.) The report states:

8 This social worker remains cautiously optimistic about Atheia and her future.
9 Lincoln Child Center provided Atheia with structure, support, and a healthy,
10 emotional environment. Atheia worked very hard while at Lincoln and made
11 significant progress in her behaviors and level of maturity.

12 (Id. at 13.)

13 The record shows that Defendant Kozak did not recommend mail communication between
14 Plaintiff and Atheia at the September 13, 2005 hearing because of Atheia's circumstances at the time
15 and the fear that contact with Plaintiff would jeopardize Atheia's progress. (Defs.' MSJ at 9.)
16 Defendant Kozak stated that "Atheia is fourteen years old and has worked very hard to make
17 significant changes in her young life." (Defs.' MSJ, Ex. B. at 5.) Defendant Kozak claimed that
18 Atheia had more potential for growth. For example, Atheia's teacher at Lincoln Child Center had
19 reported that Atheia would likely catch up in education if "she is provided with a consistent school
20 placement and academic support." (Defs.' MSJ, Ex. A. at 13.) Additionally, Atheia was receiving
21 help from her therapist, Rhonda M. Lawrence, in dealing with the "deep emotional pain of [her]
22 childhood." (Id.) While Plaintiff understandably may disagree with the social workers'
23 recommendations, he has not presented any evidence that such recommendations were based on
24 fabricated evidence or false statements. Absent such evidence, Plaintiff has not raised a triable issue
25 of fact regarding his constitutional claims.

26 Even assuming Defendant Kozak's recommendation to deny mail communication was
27 unreasonable, Plaintiff has not provided any clearly established law indicating that it is
28 unconstitutional to make such a recommendation, especially in light of the discretionary functions of
social workers. It would not have been clear to a reasonable social worker that the conduct was
unlawful in this situation. Therefore, Defendant Kozak would not have been on notice that her

1 conduct was unlawful. See Rodis, 558 F.3d at 970. Accordingly, Defendant Kozak is entitled to
2 qualified immunity with respect to Plaintiff's familial association claim and is entitled to summary
3 judgment as a matter of law.

4 **C. Due Process Claim**

5 Plaintiff argues that he was denied due process of law because Defendants Kozak and
6 Phillips "never allowed Plaintiff, to talk to them neither [sic] by phone or by mail." (Opp'n at
7 4.) He further claims that the recommendation to deny mail communication was written based on
8 their "own biased opinions because they did and have not taken the opportunity to get to know the
9 man they wrote about and denied services to." (Id. at 4-5.)

10 **1. Applicable Legal Standard**

11 The Court must determine what process is due before a protected interest may be taken away.
12 See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Hewitt v. Grabicki, 794 F.2d 1373, 1380
13 (9th Cir. 1986). An essential principle of due process is that a deprivation of life, liberty or property
14 "be preceded by notice and opportunity for hearing appropriate to the nature of the case."
15 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (citation omitted). To determine
16 what process is due, the Court must balance the risk of an erroneous deprivation, the government's
17 interest in providing specific procedures, and the strength of the individual's interest. Erickson v.
18 United States, 67 F.3d 858, 863 (9th Cir. 1995); see also Mathews, 424 U.S. at 334-35; Hewitt, 794
19 F.2d at 1380. This determination is a matter of federal law; it is not restricted by any specific
20 procedures mandated by state statute or regulation. Mathews, 424 U.S. at 334-35; Quick v. Jones,
21 754 F.2d 1521, 1523 (9th Cir. 1985).

22 **2. Analysis**

23 Here, Plaintiff cites no legal authority supporting his proposition that due process requires
24 social workers to remain in contact "by phone or by mail" before issuing a report in a child
25 dependency proceeding. Due process only requires that certain procedures are provided to ensure
26 that a parent's liberty interests are adequately protected. See Lee, 250 F.3d at 685. The record
27 reflects that Plaintiff was given ample notice of the hearing and an opportunity to be heard. (Defs.'
28 MSJ, Ex. A at 2-3; Defs.' MSJ, Ex. B. at 2-3.) Importantly, Plaintiff was represented by counsel at

1 the August 9, 2005 hearing as well as the September 13, 2005 hearing when Atheia's request for
2 mail communication was denied. (Id.; Reply at 2.) Because Plaintiff received proper notice and was
3 represented by counsel, the Court finds that Plaintiff received the requisite process that he was due.
4 Accordingly, Defendants are entitled to summary judgment as to Plaintiff's due process claim.

5 **D. Equal Protection Claim**

6 Plaintiff claims an equal protection violation because the alleged deprivation stemming from
7 Defendants' actions was based on a racial motive. Plaintiff argues that Ms. Kinlaw, who is white
8 and on parole, was allowed phone contact with his children, while Defendants chose not to
9 recommend similar communication for Plaintiff "due to being incarcerated and because he is black"
10 and also because he has a "psychiatric condition." (Compl. at 19, 29.)

11 **1. Applicable Legal Standard**

12 "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall
13 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a
14 direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne
15 Living Center, 473 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)). To state
16 a claim for relief under the Equal Protection Clause, a plaintiff must allege that the defendant acted
17 at least in part because of the plaintiff's membership in a protected class. See Serrano v. Francis,
18 345 F.3d 1071, 1081-82 (9th Cir. 2003). Proof of a discriminatory intent or purpose is also required.
19 City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 194 (2003). A
20 conclusory statement of bias is insufficient to carry a non-moving party's burden. See Taylor v. List,
21 880 F.2d 1040, 1045 (9th Cir. 1989); Thornton v. City of St. Helens, 425 F.3d 1158, 1167 n. 4 (9th
22 Cir. 2005).

23 **2. Analysis**

24 Plaintiff claims that Defendants' recommendation to deny mail communication was based on
25 their own "bias[ed] opinion . . . that due to Plaintiffs ethnicity . . . [he was] a danger, and would be
26 detrimental to [Atheia]." (Opp'n at 5.) Plaintiff further claims that Defendant Kozak's September
27 13, 2005 report stated, "Jakeima reported that he felt the court was trying to keep him away from his
28

1 family when he was younger." (Compl. at 19.) Plaintiff adds:

2 Jakeima was allowed phone contact with his mother . . . who is on parole in the
3 state of New York, for accessory to murder, and who happens to be caucastion
4 [sic]. Whereas the Plaintiff is black and continually [sic] denied phone contact with
any of his children while in the care of Mendocino County Department of Social
Services.

5 (Id.)

6 However, Jakeima's statement was made in the context of a conversation regarding
7 Jakeima's attempts to contact his mother and siblings, not Plaintiff. (Defs.' MSJ, Ex. B.) In fact,
8 Jakeima did not request contact with Plaintiff. (Id.) Furthermore, the evidence in the record
9 demonstrates that both parents were denied contact of some sort with the two children. Defendants
10 state,

11 Mother did not request mail contact with A.R., and Plaintiff did not request phone
12 contact with J.R. and J.R. did not request phone contact with Plaintiff. Therefore to
13 claim that one was given greater visitation than the other based on race is baseless,
especially when equal visitation was never requested.

14 (Defs.' MSJ at 5.)

15 While Plaintiff presented a cognizable claim for a violation of equal protection based on an
16 allegation that Defendants' recommendations were racially motivated, that allegation alone will not
17 survive a motion for summary judgment. Plaintiff's claim is entirely conclusory and he has come
18 forward with nothing to even suggest that his denial was racially motivated even in part. His
19 conclusory allegations and mere assertions of racial prejudice are insufficient to overcome a motion
20 for summary judgment. Fed. R. Civ. P. 56; see Taylor, 880 F.2d at 1045; see also Preston v.
21 Heckler, 734 F.2d 1359, 1373 (9th Cir. 1984); Keniston v. Roberts, 717 F.2d 1295, 1300 (9th Cir.
22 1983). Plaintiff has not produced any evidence indicating that Defendants harbored a
23 discriminatory intent or racially charged motive in issuing their recommendations. Accordingly,
24 the Court finds that Defendants have shown that no genuine issue of material fact exists by
25 demonstrating that "there is an absence of evidence" to support Plaintiff's claim of an equal
26 protection violation based on race. Celotex, 477 U.S. at 325. Further, when the facts are viewed in
27 the light most favorable to Plaintiff, he has not produced "specific evidence, through affidavits or
28 admissible discovery material" to show that a dispute exists regarding Defendants' motives in

1 issuing the recommendations. See Bhan, 929 F.2d at 409. Accordingly, Defendants are entitled to
2 summary judgment as to Plaintiff's equal protection claim.

3 **E. Retaliation Claim**

4 Plaintiff alleges that Defendants "retaliated against [him] through his children" because they
5 were aware of the grievances he filed against Mr. Dunbar. (Compl. at 20.) Plaintiff claims that he
6 filed grievances alleging that Mr. Dunbar made false statements in a report submitted to the
7 Mendocino County juvenile court in 1998 at the disposition hearing, that led the court to deny
8 Plaintiff the ability to correspond with his children. (Id. at 20-25.)

9 **1. Applicable Legal Standard**

10 A claim may be stated under § 1983 where a plaintiff alleges retaliation by state actors for
11 the exercise of his First Amendment rights. See Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S.
12 274, 283-84 (1977). The plaintiff must show that the type of activity he was engaged in was
13 protected by the First Amendment and that the protected conduct was a substantial or motivating
14 factor for the alleged retaliatory acts. See id. at 287. Retaliation is not established simply by
15 showing adverse activity by defendant after protected speech; rather, plaintiff must show a nexus
16 between the two. See Huskey v. City of San Jose, 204 F.3d 893, 899 (9th Cir. 2000). In order to
17 create a genuine issue of material fact on retaliatory motive in the First Amendment context, a
18 plaintiff must establish "in addition to evidence that the defendant knew of the protected speech, at
19 least (1) evidence of proximity in time between the protected speech and the allegedly retaliatory
20 decision, (2) evidence that the defendant expressed opposition to the speech or (3) evidence that the
21 defendant's proffered reason for the adverse action was pretextual." Corales v. Bennett, 567 F.3d
22 554, 568 (9th Cir. 2009) (internal citation and emphasis omitted). A plaintiff must show a causal
23 connection between a defendant's retaliatory animus and subsequent injury in any sort of retaliation
24 action. Hartman v. Moore, 547 U.S. 250, 259 (2006). The requisite causation must be but-for
25 causation, without which the adverse action would not have been taken. Upon a prima facie case of
26 retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the
27 impetus to retaliate he would have taken the action complained of. Id. at 260; Wilkie v. Robbins,
28 551 U.S. 537, 560 & n.10 (2007) (rejecting argument that an ill motive alone supports a retaliation

1 claim; "proof that the action was independently justified on grounds other than the improper one
2 defeats the claim."). If there is a finding that retaliation was not the but-for cause of the action
3 complained of, the claim fails for lack of causal connection between unconstitutional motive and
4 resulting harm, despite proof of some retaliatory animus in the official's mind. Harman, 547 U.S. at
5 259.

6 **2. Analysis**

7 As a threshold matter, Plaintiff has established as a matter of law that his conduct -- the
8 filing of grievances against Mr. Dunbar -- is constitutionally protected under the First Amendment.⁵
9 See O'Keefe v. Van Boenly, 82 F.3d 322, 325 (9th Cir. 1996) (stating that the right to petition the
10 government for redress of grievances extends to administrative arms and units of the government).
11 However, for the reasons stated below, the Court concludes that Plaintiff fails to show that
12 Defendants harbored a retaliatory motive or that any retaliatory motive was the cause of the denial
13 of communication between him and his children.

14 Plaintiff does not demonstrate that "in addition to evidence that the defendant knew of the
15 protected speech, at least (1) evidence of proximity in time between the protected speech and the
16 allegedly retaliatory decision, (2) evidence that the defendant expressed opposition to the speech or
17 (3) evidence that the defendant's proffered reason for the adverse action was pretextual." Corales,
18 567 F.3d at 568. Plaintiff claims that he sent grievances against Mr. Dunbar to various agencies,
19 and that Defendants retaliated against him because of these grievances. (Opp'n at 11-12.) First,
20 there is no evidence that Defendants retaliated against Plaintiff -- or even knew of these grievances
21 -- beyond Plaintiff's mere assertions. Even assuming that Defendants knew of these grievances,
22 there is a lack of proximity in time between Plaintiff's protected speech in 2003 and the alleged
23 retaliatory decision to deny communication in 2005. Finally, Plaintiff does not show that

24
25 ⁵ As stated above, Defendants presented affidavits attesting that to their knowledge, Plaintiff
26 has not filed complaints against Mr. Dunbar. (Chapman Decl. ¶¶ 4-6; Dunbar Decl. ¶¶ 3-4; Meek
27 Decl. ¶ 3.) Therefore, they argue that "[s]ince Plaintiff did not file a lawsuit or complaint against
28 Mr. Dunbar, there can be no retaliation." (Defs.' MSJ at 9.) However, Plaintiff has alleged in his
opposition that he filed grievances against Mr. Dunbar, and Defendants do not dispute this.
Therefore, the Court rejects Defendants' argument because Plaintiff has met the core requirement of
the retaliation analysis, that is, by establishing that the filing of grievances is constitutional protected
under the First Amendment.

1 Defendants "expressed opposition" to the grievances, or that any of the reasons for their
2 recommendations were pretextual. Accordingly, Plaintiff cannot demonstrate that Defendants
3 harbored a retaliatory motive.

4 Even assuming that Defendants were motivated by some retaliatory intent, in light of the
5 evidence presented, the undisputed facts, and taking the remaining facts presented by the Plaintiff
6 as true, the Court concludes that any retaliatory animus was not the but-for cause of the creation of
7 their recommendations. See Hartman, 547 U.S. at 259. Defendants' individual assessment of each
8 child's needs and progress are reasons independent of any potential retaliatory motive in
9 recommending limited or no communication between Plaintiff and his children. Plaintiff has failed
10 to dispute those reasons or proffer any explanation as to why those reasons are not sufficient to
11 defeat summary judgment as to this claim.

12 The Court finds that Defendants have shown that no genuine issue of material fact exists by
13 demonstrating that "there is an absence of evidence" to support Plaintiff's claim of retaliation.
14 Celotex, 477 U.S. at 325. Further, when the facts are viewed in the light most favorable to Plaintiff,
15 he has not produced "specific evidence, through affidavits or admissible discovery material" to
16 show that a dispute regarding Defendants' motives exists. See Bhan, 929 F.2d at 1409.
17 Accordingly, Defendants are entitled to summary judgment as to Plaintiff's retaliation claim.

18 CONCLUSION

19 Defendants' motion for summary judgment (docket no. 44) is GRANTED as to all claims.
20 The Clerk of the Court shall enter judgment, terminate all pending motions, and close the file.

21 This Order terminates Docket no. 44.

22 IT IS SO ORDERED.

23 DATED: 3/16/10


SAUNDRA BROWN ARMSTRONG
United States District Judge

24
25 UNITED STATES DISTRICT COURT
26 FOR THE
27 NORTHERN DISTRICT OF CALIFORNIA

28 ARTHUR KIRLAW et al,

Plaintiff,

Case Number: CV07-00430 SBA

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v.

CERTIFICATE OF SERVICE

NANCY KOZAK et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 17, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Arthur Kinlaw Den:00A3863
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

Dated: March 17, 2010

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk