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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

J.J., a minor, by and through his Guardian *Ad Litem*, Robert M. Vantress,

Plaintiff,

vs.

OAK GROVE SCHOOL DISTRICT, a public entity school district, et al.,

Defendants.

Case No. C-08-05376 RMW

**ORDER GRANTING DEFENDANTS'
SUMMARY JUDGMENT MOTIONS**

[Re Docket Nos. 218, 219]

J.J.¹ brings claims under 28 U.S.C. § 1983 against school officials at Bernal Intermediate School ("Bernal") and trustees of the Oak Grove School District ("the District"), in which Bernal is located (collectively "Oak Grove Defendants"), arising out of an incident occurring at Bernal. J.J. also alleges that Deanna Mouser and her law firm ("Mouser Defendants") violated his rights by the advice they gave to the District with respect to action taken against J.J. following the incident. J.J. alleges, among other things, that the defendants deprived him of his civil rights under the Due Process Clause and Equal Protection Clause of the United States Constitution by

¹ The court uses initials to refer to plaintiff and other students as they were minors at the time this lawsuit began.

1 failing to provide him with proper notice and a hearing before he was transferred to a different
2 school within the District and by unlawfully targeting him based on his race. The defendants
3 deny plaintiff's claims and now bring motions for summary judgment.

4 I. BACKGROUND

5 A. The Incident

6 Shortly after school on November 29, 2007, an incident occurred between J.J. and a
7 female student, L., on the school campus. Vantress Decl. Ex. 5 (San Jose Police Department
8 Report). The defendants claim that J.J. "humped" L.'s buttocks while refusing her pleas to stop.
9 Oak Grove Defs.' Br. 3, Dkt. No. 219. J.J. insists he was never behind L. and only gave her a
10 hug. Vantress Decl. Ex. 5 at 6 (J.J.'s statement). The incident ended when a teacher, Richard
11 Holtermann, came to the scene after hearing L. yell "no," several times. *Id.* at 4, 5, 7, 8
12 (witnesses and victim's statements).

13 B. Initial Investigation

14 Bernal administrators, district officials, the San Jose Police Department, and a school
15 official selected by J.J. all investigated the incident. Vantress Decl. Ex. 6 (Expulsion Hearing
16 Report and Recommendation). On November 30, 2007, the day after the incident, Tamara Unck,
17 Assistant Principal at Bernal, spoke with Holtermann, and interviewed L., the alleged victim, and
18 R., a male student who witnessed the incident. Vantress Decl. Ex. 6 at 17-19. On the same day,
19 Katherine Baker, the Principal at Bernal, interviewed L., J.J., and Holtermann. *Id.* 3-4. She also
20 met with J.J.'s mother and J.J. *Id.* at 4-5. On December 3, 2007, Principal Baker met with J.J.'s
21 father and continued her investigation. *Id.* at 5-8.

22 On December 4, 2007, Principal Baker, based upon her investigation and after having
23 discussions with other school officials, formally suspended J.J. and completed an Oak Grove
24 District Suspension Form recommending that J.J. be expelled. *See* Vantress Decl. Ex. 1, 48:6-10,
25 37:24-25; Vantress Decl. Ex. 8. J.J. was suspended for five days, consisting of: (1) two days of
26 in-house suspension, which Principal Baker concluded J.J. had already completed sitting at an
27 administrator's office on December 3 and 4 during the investigation, and (2) an additional three
28 days of off-campus suspension, which would begin on December 5. Vantress Decl. Ex. 6 at 8.

1 Principal Baker also met with J.J.'s mother on December 4 to explain the suspension, the
2 suspension form, and her conclusions based on her investigation. *Id.* at 8-9. J.J.'s mother denied
3 that J.J. had done anything wrong and objected to the procedures that the District followed. *Id.*

4 The San Jose Police Department conducted its own investigation and interviewed the
5 witnesses on November 29, 2007. Vantress Decl. Ex 5 (Police Report). The police cited J.J. for
6 misdemeanor sexual battery on December 4, 2007. Vantress Decl. Ex 5 (Police Citation). The
7 police ultimately decided not to bring formal charges. Vantress Decl. Ex. 18.

8 **C. Lead-Up to the Expulsion Hearing**

9 On December 5, 2007, there was another meeting about the incident among J.J.'s mother,
10 Principal Baker, a NAACP representative, Superintendent Emmanuel Barbara, and a community
11 liaison. Vantress Decl. Ex. 6 at 9. On December 7, J.J.'s mother, J.J., the NAACP representative,
12 and district representatives met again to discuss the incident and J.J.'s suspension was extended to
13 the date of the expulsion hearing. *Id.* at 10. On December 14, 2007, the District sent J.J.'s parents
14 a letter setting the expulsion hearing for January 10, 2008. Vantress Decl. Ex. 47. On December
15 19, 2007, J.J.'s parents and the NAACP representative came to the school to view the location of
16 the incident. Vantress Decl. Ex. 6 at 13. Also, on that date, J.J.'s mother requested that the
17 District have Joyce Millner, a District employee whom she trusted, conduct an independent
18 investigation. Millner began her investigation on December 20, 2007. In the Matter re: J.J.,
19 Statement of Findings and Decision, Dkt. No. 121-2, Ex. H at 23. On December 21, 2007,
20 Superintendent Barbara had a follow-up meeting with J.J.'s family regarding the incident. *Id.*
21 Shortly thereafter Principal Baker and Assistant Principal Unck prepared administrative
22 declarations summarizing their respective investigations and recommending expulsion. *Id.*; *see*
23 *also* Vantress Decl. Ex. 6.

24 Millner conducted initial interviews of all of the witnesses, but was unable to conduct
25 follow-up interviews because of the start of winter vacation. Vantress Decl. Ex 7 (Millner
26 Report). Millner's interview notes on the witnesses' statements are largely consistent with their
27 other statements and findings by other district personnel. *Id.*

1 **D. Cancellation of Expulsion Proceedings and Administrative Transfer**

2 On December 21, 2007, Superintendent Barbara met with J.J.'s family during which he
3 explained that his own conclusion was consistent with the results of the other investigations.
4 Barbara Decl. ISO Motion to Strike, Dkt. No. 121 ¶ 13. He described the evidence against J.J. as
5 "overwhelming." *Id.* At the meeting, J.J.'s parents agreed to accept the District's offer to drop the
6 expulsion proceeding if J.J. transferred to Herman Intermediate School at the end of winter break.
7 *Id.*

8 On January 2, 2008, however, J.J.'s mother notified the superintendent that they were not
9 accepting the offer to transfer. *Id.* at ¶ 14. On January 7, 2007, the District confirmed by phone
10 that it was continuing the expulsion hearing from January 10, 2008, to either January 31 or
11 February 1 at J.J.'s request. Vantress Decl. Ex. 6 at 42 (letter confirming continuance). The
12 District then officially reset the hearing to February 1, 2008. *Id.*

13 On January 21, 2008, J.J.'s mother, father, and NAACP representatives met with
14 Superintendent Barbara. Vantress Decl. Ex. 24 at 4 (Letter from J.J.'s mother). The parties
15 tentatively agreed once again to drop the expulsion hearing and that J.J. would be transferred to
16 another school. *Id.* Shortly thereafter, J.J. and his parents again decided not to accept the
17 District's offer. *Id.* On January 29, 2008, Superintendent Barbara, after further investigation,
18 cancelled the expulsion hearing. Barbara Decl. Ex. H at 26, Dkt. No. 121-2. On February 20,
19 2008, Superintendent Barbara completed an amended suspension form that only called for
20 suspension and not expulsion. *Id.* at 27. Superintendent Barbara also officially notified J.J. that
21 he was being transferred to another school in the district. *Id.*

22 Between December 3, 2007, and March 28, 2008, J.J. was enrolled in independent studies.
23 Vantress Decl. Ex. 24 at 4. J.J. finally returned to regular instruction on April 1, 2008, at Herman
24 Intermediate School. Barbara Decl. Ex. H at 27, Dkt. No. 121-2.

25 **E. Due Process Hearing**

26 J.J. objected to the transfer and accused the District of falsifying records pertaining to the
27 incident and a 2006 suspension. *See* Barbara Decl. ¶ 22; Vantress Decl. Ex. 32. J.J. requested a
28 hearing to challenge his records. Barbara Decl. Ex. B. As a result, the District scheduled a

1 hearing on the records request *and* a due process hearing on the appropriateness of J.J.'s transfer.
2 Barbara Decl. Exs. D, H, Dkt. Nos. 121-1, 121-2. J.J. objected to the appropriateness of the due
3 process hearing. *See* Vantress Decl. Exs. 30, 31, 34, 36.

4 School Board Trustees Dennis Hawkins, Jeremy Nishihara, Yvonne Cook, Dianne Lemke,
5 and Jacquelyn Adams conducted the hearing over three nights in April and May 2008. Attorney
6 Adam Fiss of the Littler Mendelson law firm acted as an impartial hearing officer. The Board
7 concluded that: (1) the decision to transfer J.J. was appropriate in light of the sexual battery and
8 that the procedure Bernal had taken satisfied due process; (2) no racial discrimination had
9 occurred; and (3) the District's records relating to both the 2006 and 2007 incidents were accurate.
10 Barbara Decl. Ex. H at 37, Dkt. No. 121-2.

11 The plaintiffs then filed the instant action.

12 **F. Procedural History**

13 J.J., with his parents acting as both his guardian *ad litem* and his representative, initially
14 brought their complaint on November 26, 2008. Comp., Dkt. No. 1. After multiple motions to
15 dismiss, the court found that the Oak Grove Defendants in their official capacities were entitled to
16 sovereign immunity under the Eleventh Amendment to the extent that J.J. sought retrospective
17 monetary or injunctive relief against them. Order 26, Dkt. No. 183. The Court dismissed J.J.'s
18 claims for violations of sections 1981, 1985, and 1986 as well as for the Unruh Civil Rights Act.
19 *Id.* at 18-24. Ultimately, the court allowed J.J.'s section 1983 claim against the Oak Grove
20 Defendants and the Mouser Defendants to proceed. Order, Dkt. No. 201.

21 Presently before the Court are: (1) Oak Grove Defendants' Motion for Summary
22 Judgment, Dkt. No. 219; and (2) Mouser Defendants' Motion for Summary Judgment, Dkt. No.
23 218. The Mouser Defendants raise evidentiary and procedural objections to J.J.'s papers and also
24 join in the substantive arguments made by the Oak Grove Defendants. Mouser Defs.' Br., Dkt.
25 No. 218; Objections, Dkt. No. 241.

26 **II. ANALYSIS**

27 The issues raised by the summary judgment motions are whether any reasonable jury
28 could find that the actions of the Oak Grove Defendants and their counsel, the Mouser

1 Defendants, after the incident (1) deprived J.J. of his due process right, or (2) violated J.J.'s equal
2 protection right by basing its decision on race. Although the court must make all reasonable
3 inferences in J.J.'s favor, if there is no genuine issue of material fact the defendants are entitled to
4 judgment as a matter of law. Fed. R. Civ. P. 56(a).

5 **A. Section 1983 Claims Against Oak Grove Defendants**

6 To establish a claim under section 1983, the plaintiff must show "(1) that a right secured
7 by the Constitution or laws of the United States was violated, and (2) that the alleged violation
8 was committed by a person acting under the color of State law." *Long v. County of Los Angeles*,
9 442 F.3d 1178, 1185 (9th Cir. 2006). As the operators of public schools, which state law required
10 J.J. to attend, the Oak Grove Defendants were acting under the color of state law. *See W. Virginia*
11 *State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The Fourteenth Amendment, as now
12 applied to the States, protects the citizen against the State itself and all of its creatures—Boards of
13 Education not excepted."). Thus, the issue as to the Oak Grove Defendants is whether J.J. has
14 raised a triable issue of fact that said defendants violated his constitutional rights.

15 The Supreme Court has recognized that state education codes can impart rights to
16 students—in particular the right to a free public education—such that deprivation of those rights
17 may violate due process. *See Goss v. Lopez*, 419 U.S. 565, 573-74 (1975). In *Goss*, the Court
18 found that the authority of the state to "prescribe and enforce standards of conduct in its schools"
19 is very broad, but "must be exercised consistently with constitutional safeguards." *Id.* The Court
20 acknowledged that "maintaining security and order in the schools requires a certain degree of
21 flexibility in school disciplinary procedures." *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985).

22 The court will first consider whether the Oak Grove Defendants violated any of the
23 California Education Code sections on which J.J. relies, and if so, whether any such violation was
24 arbitrary or wrongful and thus constituted a due process violation. *See Zinermon v. Burch*, 494
25 U.S. 113, 125 (1990). The court will also consider whether the District followed a fair procedure
26 complying with due process and if there is any evidence that the District violated J.J.'s equal
27 protection rights. *See id.* Finally, the court will consider qualified immunity.

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1. **J.J.'s Statutory Violation Allegations**

J.J. identifies ten alleged rights based on sections of the California Code of Education,² which he claims the Oak Grove Defendants violated. *See* Opp'n 1-3. He does not challenge the constitutionality of any of the Education Code provisions. The court addresses these alleged rights below.

- a. Rights 1, 7, & 8: To Attend Home School, to Not Be Transferred from Home School, and to Return Promptly to Home School after Suspension

J.J. claims he had a right to attend his home school, Bernal Middle School; the right not to be transferred unless his parents agreed to a transfer or he was found guilty of misconduct warranting expulsion; and the right to be returned to his home school once the expulsion proceeding was dropped. Opp'n 1-3, Dkt. No. 237. J.J. relies on eight provisions of the Education Code for the existence of these rights, Opp'n 1-3, but they are not as extensive as he claims.³ Section 46600 only relates to transfers between districts, not within districts, and J.J. was transferred within the Oak Grove School District. Section 48200 gives students the right to attend a school in their home district, but not necessarily a "home" school.⁴ Section 48900 lists the offenses that are grounds for suspension or expulsion. The section does not specifically discuss transfers, but gives a superintendent of the school district or principal the authority to "use his or her discretion to provide alternatives to suspension or expulsion." § 48900(v). This logically includes the authority to transfer a student within the district. Section 48925(b) defines expulsion and section 48900.6 provides that the principal or superintended *may* require community service as an alternative to other disciplinary action. Section 48911(e) requires

² All references to sections are to the California Code of Education unless otherwise indicated.
³ He relies on sections 46600, 48200, 48900, and 48925(b) to support the right to attend his home school; sections 46600, 48200, 48900, 48900.6, and 48918(e) to support the right to no administrative transfer without grounds for expulsion; and sections 48911(e), 48918(a) and (e) to support the right to be returned after expulsion proceedings are dropped. Opp'n 1-3.
⁴ "Each person subject to compulsory full-time education . . . shall attend the public full-time day school . . . of the school *district* in which the residency of either the parent or legal guardian is located." Cal. Educ. Code § 48200 (emphasis added).

1 schools to report the suspension of a pupil to the governing board of the district. Section
2 48918(a) only relates to the timing for an expulsion hearing and the subsequent decision, which
3 J.J. has not challenged.⁵ The District did not violate any of these provisions.

4 Finally, section 48918(e) defines what should happen to a student whom the District elects
5 not to expel after a hearing. This provision does not apply to J.J. because he never had an
6 expulsion hearing. Even if it did apply, the District did not violate it. The law requires that a
7 student who is not expelled after an expulsion hearing be immediately reinstated in "a classroom
8 instructional program," "other instructional program," or a rehabilitation program. § 48918(e)
9 (emphasis added). The section does *not* require that a student be placed back in the same
10 educational program or school in which he was enrolled prior to suspension. *Id.*

11 At the time the expulsion hearing was taken off calendar, J.J. was already enrolled in an
12 independent instructional program. *See* Vantress Decl. Ex 13 at 68 (Letter from District to J.J.'s
13 mother); Vantress Decl. Ex. 24 at 4 (Letter from J.J.'s mother to State Board of Education).
14 While he was enrolled in the independent study program, Bernal provided him with packets of
15 schoolwork, homework, and gave him access to teachers by phone. Vantress Decl. Ex 1, 30:2-6
16 (Baker Depo.). The independent study would likely qualify as an "other instructional program."⁶
17 Furthermore, as best the court can discern, the transfer option, including immediate enrollment at
18 a different school within the district, had been available to J.J. since winter break. *See* Vantress
19 Decl. Ex. 13 at 69. Because J.J. was in an "instructional program" and had options to return to a
20 classroom instructional program, the District did not violate section 48918(e).

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25 ⁵ J.J. has not alleged or argued that the defendants violated section 48918(a) by failing to hold the
26 expulsion hearing within thirty-school days and thus the court does not consider that issue. J.J.'s
27 parents also requested one extension of the expulsion hearing. Vantress Decl. Ex 13 at 69.

28 ⁶ The adequacy of the program is not before this court.

1 b. Right 2: No Discipline without Substantial Evidence of Misconduct

2 J.J. claims he had a right not to be accused or disciplined without "substantial evidence" of
3 each element or qualifying offense of misconduct. Opp'n 2. J.J. bases this claim on three
4 sections: 48900, 48918(b)(5), 48918(f), and 48922(a). Opp'n 2.

5 Section 48918(f) requires that the governing board base expulsion recommendations on
6 substantial evidence. However, the District did not expel J.J. and thus the section does not apply.
7 Even if it did, a reasonable fact-finder could have found substantial evidence because all of the
8 witnesses generally agreed about what happened except for J.J. *See, e.g.*, Vantress Decl. Ex 6
9 (containing the summaries of Principal Barker, Assistant Principal Unck, and witness statements);
10 Ex. 7 (Millner Report). Therefore, the court finds that the Oak Grove Defendants had substantial
11 evidenced justifying the actions they took.

12 The other cited sections do not help J.J. Section 48900 states that a pupil shall only be
13 suspended or recommended for expulsion if the principal or superintendent determines that the
14 pupil committed one of an enumerated list of offenses. The District determined that J.J.
15 committed some of these offenses based upon extensive investigations. *See* Barbara Decl. ¶ 18;
16 Vantress Decl. Ex 16.

17 The remaining sections relate to the procedure for expulsion and appeal. *See* §§
18 48918(b)(5), (f) and 48922(a). J.J. was not expelled from the district, and therefore they are
19 inapplicable. Even if they did apply during the period in which the District was considering
20 expulsion or are deemed to apply to suspension hearings, the Oak Grove Defendants did not
21 violate them. Section 48918(b)(5) requires an opportunity for the pupil or the pupil's parents to
22 appear, review, and challenge witnesses and testimony at an expulsion hearing. Although the
23 District never held an expulsion hearing,⁷ J.J.'s parents had numerous opportunities to meet with
24 the District to discuss the issues and evidence, as described above. The District informed J.J.'s

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26 ⁷ J.J.'s parents also specifically declined to have the expulsion hearing reinstated after the District
27 canceled it. Vantress Decl. Ex. 13 at 69.

1 parents of these rights and the procedure for exercising them in a letter prior to the scheduled date
2 of the expulsion hearing. *See* Vantress Decl. Ex 6 at 40-47.

3 c. Rights 3 & 10: Unbiased Determination and Equal Treatment

4 J.J. claims he had the right to have his guilt or innocence determined by neutral and
5 unbiased parties based upon sections 48900, 48918, and 48919. These sections do not directly
6 support the alleged right nor did the District violate them. Section 48900, which provides the
7 grounds for suspension and expulsion, is discussed above, and the Oak Grove Defendants did not
8 violate it. Similarly, section 48918, also discussed above, defines the procedures for an expulsion
9 hearing. J.J. has not stated what particular provision the District violated and the court found that
10 the District followed the procedure for an expulsion hearing prior to canceling the hearing.
11 Finally, section 48919 defines the procedure for appealing an expulsion to the country board of
12 education, which is inapplicable.

13 d. Right 4: Suspension as a Last Resort

14 J.J. claims he had the right not to be suspended unless there were no alternative means of
15 correction or he posed a danger to others at the school. Opp'n 2 (citing sections 48900, 48900(v),
16 48900.5, 48900.6, 48915(b) and (e)). This overstates California law, which only provides that the
17 District *may* use discretion to provide alternatives to suspension or expulsion. § 48900(v).

18 As explained before, some of these sections are inapplicable because J.J. was not expelled.
19 Even if they all do apply, the District did not violate J.J.'s right because a reasonable official
20 could have concluded that other means of correction would fail and that J.J.'s presence caused a
21 continuing danger to the physical safety of others. *See* § 48900.5. J.J. was suspended the year
22 before for making obscene sexual gestures in class, suggesting less serious means of correction
23 would fail. *See* Vantress Decl. Ex. 6. Principal Baker concluded that there was a threat of
24 physical danger if J.J. returned to Bernal because other students might retaliate against him and
25 because J.J.'s "extremely poor judgment and decision making reflected in this incident" made
26 another incident more likely. Vantress Decl. Ex. 6 at 15. Assistant Principal Unck agreed that
27 J.J. presented a danger. *Id.* at 20. Superintendent Barbara also met repeatedly with L.'s family,
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1 and L. feared having J.J. return to campus, suggesting a danger to physical safety. Barbara Decl.
2 ¶ 19.

3 Therefore, to the extent such a right exists, the District did not violate it.

4 e. Rights 5 & 6: Five Day Limit on Suspension and Limits on Extensions

5 J.J. claims he had a right not to be suspended for more than five days, unless the
6 suspension was extended pending an expulsion hearing in a meeting with him and his parents
7 within five days of the incident and there was substantial evidence that he posed a danger to
8 others or to the instructional process. Opp'n 2. J.J. raises three issues: (1) whether the
9 suspension-extension meeting was held in time; (2) whether there was evidence that he posed a
10 danger or threat of disrupting the instructional process; and (3) whether he was suspended for too
11 long.

12 First, J.J. argues that the District was required to hold the suspension-extension meeting
13 within five days of suspending him. § 48911(a), (g). This would have required a meeting on or
14 before December 4, 2007. Opp'n 5 n.5. J.J.'s suspension-extension meeting was held on
15 December 7, 2007.⁸ The District formally suspended J.J. on December 3, 2007, which means the
16 December 7 meeting was held within five days of the suspension. Vantress Decl. Ex. 8.

17 J.J. argues, however, that the District actually suspended him on November 30, 2007,
18 which would mean the suspension-extension meeting was held a day late.⁹ The Education Code
19 defines suspension as "removal of a pupil from ongoing instruction for adjustment purposes." §

21 ⁸ J.J. also argues that "The hearing was not held until December 7, 2007. [citation.] And there
22 was no hearing. Just a meeting in which the parents were not told of this purpose, followed by a
23 letter making false allegations on December 14, 2007." Opp'n 5 n.5. To the extent that J.J.
24 argues that the December 7th meeting was not a valid suspension-extension meeting pursuant to
25 section 48911(g), he provides no evidence to support his contention. In contrast, Principal
26 Baker's expulsion hearing declaration, signed under penalty of perjury, states that she had an over
27 3-hour meeting with J.J., his mother, and other supporters regarding J.J.'s "suspension, extension
28 of suspension, and recommended expulsion." Vantress Decl. Ex. 6 at 10. *See also*, Vantress
Decl. Ex. 43 (December 14, 2007 follow-up letter describing the suspension-extension meeting).
Thus the uncontroverted facts are that a suspension-extension meeting was held on December 7,
2007.

⁹ December 1 and 2, 2007, were weekend days.

1 48925(d). Based on the evidence before this court, it is unclear whether J.J.'s removal from class
2 on November 30 was a suspension because he was not removed from class until partway through
3 the last period of the day. *See* Vantress Decl. Ex. 6 at 17-18 (Unck Decl.). At that point,
4 administrators were still investigating the incident and thus he was most likely removed for
5 investigative purposes not "adjustment purposes." However, these facts are in dispute and thus
6 the court cannot conclude as a matter of law that the District did not violate the five-day
7 requirement for holding a suspension-extension meeting. Nevertheless, as explained below,
8 holding the meeting one day late was not a constitutional violation.

9 Second, J.J. argues that there was no evidence that he posed a danger or threat of
10 disrupting the instructional process. A district may extend a suspension while an expulsion is
11 being processed if the principal, after meeting with the parents, determines that the presence of
12 the pupil at the school "would cause a danger to persons or property or a threat of disrupting the
13 instructional process." § 48911(g). As explained above, a reasonable official could have
14 concluded that J.J. presented a threat of physical danger. Principal Baker also concluded that J.J.
15 should not be allowed to return because the female victim was fearful of seeing him and his
16 presence might disrupt the educational process. The law only requires that the superintendent or
17 his designee make a reasonable determination. *See* § 48911(g). Although J.J. and his parents
18 may have disagreed with the District's decision, the evidence supports the conclusion that the
19 District made a reasonable determination.

20 Third, J.J. argues that his suspension of 122 days exceeded the maximum allowed under
21 the law. *See* Opp'n 4. A principal may suspend a student for up to a maximum of five
22 consecutive schooldays. § 48911(a). Although J.J. may have been out of school for 122 days, the
23 undisputed facts are that the District did not suspend him for this amount of time. As explained
24 above, the district legally extended J.J.'s suspension through winter break pending the expulsion
25 hearing and after winter break, J.J. was in independent study and had the option to transfer to
26 another school within the district. Therefore, the court finds that the District did not violate the
27 Education Code by suspending J.J. for too many days.

1 f. Right 9: Clear Record

2 J.J. claims the right to have all traces of alleged misconduct excluded from his official file
3 unless he is found guilty of an offense justifying discipline. Opp'n 3. However, section 48900.8
4 cited by J.J. does not contain any provision about corrections or limitations on what may be
5 placed in a student's records. All the section requires is that the appropriate student records note
6 what offenses were committed for notifying parents and reporting to the Department of Education
7 on expulsions and suspensions. The District did not violate section 48900.8 in J.J.'s case.

8 2. **Constitutional Violations**

9 a. Due Process

10 In *Goss*, the Supreme Court held that a state law providing for public education for all
11 children created a property interest that the government could not revoke without due process.
12 419 U.S. at 573. The Court held that a suspension, even a relatively short one of ten days was an
13 "interference with a protected property interest" such that a student "must be given some kind of
14 notice and afforded some kind of hearing." *Id.* at 579. The Court noted that a suspension "is a
15 serious event in the life of the suspended child" and that the charges of misconduct underlying the
16 suspension "[i]f sustained and recorded . . . could seriously damage the students' standing with
17 their fellow pupils and their teachers as well as interfere with later opportunities for higher
18 education and employment." *Id.* at 575. The Court held that due process for a ten-day suspension
19 required that "the student be given oral or written notice of the charges against him and, if he
20 denies them, an explanation of the evidence the authorities have and an opportunity to present his
21 side of the story." *Id.* at 581. The court concluded by noting that "[l]onger suspensions or
22 expulsions for the remainder of the school term, or permanently, may require more formal
23 procedures." *Id.* at 584.

24 As explained above, California law only permits a district to suspend a student for more
25 than five consecutive school days if the suspension is extended after a meeting with the parents
26 on the basis that the student presents a danger to others or a threat of disrupting the instructional
27 process if returned to his school or an alternate school. The District's suspension policy required:
28 (1) an informal conference with the student informing the student of the reason for the discipline,

1 the evidence, and allowing the student an opportunity to present his version; (2) an attempt to
2 notify the parent via phone or in person; (3) written notice to the parent; (4) a meeting with the
3 parents; and (5) that a suspension not be for more than five consecutive school days except when
4 a student was being considered for expulsion. Vantress Decl. Ex. 6 at 87 (Oak Grove School
5 District 2006-2007 Student Behavior and Parent Information Handbook). Based on all of the
6 available evidence, the District followed these requirements. The extensive investigations and
7 numerous meetings related to the incident described above provided more than adequate due
8 process to J.J.

9 Additionally, J.J.'s forced transfer to another school in the district did not violate due
10 process. *See Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 27 (5th Cir. 1997)
11 (holding that a transfer alone did not deprive a student of any property interest and thus did not
12 even raise a constitutional issue); *Doe v. Bagan*, 41 F.3d 571, 576 (10th Cir. 1994) (no due
13 process violation for failing to transfer a student because no authority supporting "the right to a
14 public education encompasses a right to choose one's particular school."); *Zamora v. Pomeroy*,
15 639 F.2d 662, 669 (10th Cir. 1981) (no deprivation of education and thus no due process violation
16 for transferring student for disciplinary reasons, even to an inferior school); *Helena F. v. W.*
17 *Contra Costa Unified Sch. Dist.*, 49 Cal. App. 4th 1793, 1800 (1996) (finding no due process
18 violation for assigning students to schools within the district that were not the student's first
19 choice and were not geographically convenient and finding parents' rejection of alternative
20 schools offered to them was irrelevant as far as due process concerned). J.J.'s transfer, standing
21 alone, and all of the school he missed because of his or his parent's decision not to enroll him in
22 one of the offered schools does not implicate a due process issue.

23 Finally, as explained above, the only possible violation of the California Education Code
24 was that the suspension-extension meeting with J.J and his parents may have been held one day
25 late. However, the court has found no case suggesting that a one-day delay in holding a
26 suspension-extension meeting constitutes a due process violation, particularly where the district
27 spent the time leading up to the meeting investigating J.J.'s actions. *See, e.g., Vantress Decl. Ex.*
28 *6 at 3-10.* The evidence shows the district provided J.J. extensive due process, meeting with his

1 parents and their representatives multiple times as well as interviewing the witnesses multiple
2 times.

3 b. Equal Protection

4 "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of
5 the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or
6 purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren*
7 *v. Harrington*, 152 F.3d 1193, 1194-95 (9th Cir. 1998) (citing *Washington v. Davis*, 426 U.S.
8 229, 239-40 (1976)). Here, J.J., as an African-American student, has shown he is a member of a
9 protected class, but he fails to raise an issue of material fact suggesting that the defendants
10 intentionally discriminated against him based upon his race.

11 J.J. claims the District disciplined him under its zero tolerance policy and that such
12 policies have disproportionate effects on African-American students, which makes the action
13 against him discriminatory. *See* Opp'n 4; Vantress Decl. Exs. 45 (California Dept. of Ed.
14 statement on zero tolerance policies), Ex. 46 (Harvard report on discriminatory consequences of
15 zero tolerance policies). He argues that the Oak Grove Defendants' "enforcement of its Zero
16 Tolerance Policy ignored the intent of the perpetrator" and that he was not given a second chance.
17 Opp'n 16-17.

18 However, there is no evidence that J.J. was subject to a zero tolerance policy, that the
19 District's implementation of its zero tolerance policy had a discriminatory impact on African
20 Americans, or that the District discriminated against him. Although the District had a zero
21 tolerance policy, the district had discretion in applying it, as demonstrated by this case—J.J. was
22 not expelled and was given a second chance at another school. *See also* Vantress Decl. Ex. 4
23 (Barbara Depo.) at 62:9-63:3; Ex. 3 (Quon Depo.) 69:18-70:3.

24 In his complaint, J.J. alleged that Principal Baker made an announcement to all students
25 and others publicly over the PA system at Bernal that "a student was molested and the perpetrator
26 was returning because the District caved in." FAC ¶ 58. There is no evidence that Principal
27 Baker made such a comment and the District repeatedly denied it was made. Even if the remark
28 was made, although it may have shown bad judgment, it does not reflect racial animus.

1 Finally, multiple authorities investigated the alleged discrimination and all reached the
2 same conclusion: that there was no discrimination. The California Department of Education
3 reviewed an appeal by J.J.'s mother in which she alleged that J.J. was denied an equal education
4 opportunity because of his race. Mouser Decl. ISO Motion to Strike and Dismiss Ex. 1, Dkt. No.
5 109-2, Ex. 1. The Department determined that the documentation did not provide support for the
6 allegation and that the District acted reasonably and appropriately. *Id.* J.J. appealed this decision
7 to the State Superintendent of Public Instruction who denied the appeal. *Id.* at Ex. 3. J.J. also
8 sought relief from the U.S. Department of Education, which determined that "the appropriate
9 legal standard was applied" and that the process used by the District and the State of California in
10 reviewing the District's actions meets the U.S. Department of Education Office for Civil Rights
11 standards. *Id.* at Ex 2.

12 Therefore, the court finds no merit to plaintiff's claim of racial bias suggesting an equal
13 protection violation.

14 3. Qualified Immunity

15 The Oak Grove Defendants claim that if they violated any constitutional right of J.J. by
16 the disciplinary action they took, they are nevertheless entitled to the defense of qualified
17 immunity. Qualified immunity limits the reach of a section 1983 claim. In the court's order of
18 July 14, 2011, dismissing in part J.J.'s first amended complaint, the court explained the standard
19 for the defense:

20 Qualified immunity is a defense against liability available to
21 government officials who perform executive and administrative
22 functions and who are sued for monetary relief in their personal
23 capacities. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The
24 doctrine shields public officers from "undue interference with their
25 duties and potentially disabling threats of liability." *Harlow v.*
26 *Fitzgerald*, 457 U.S. 800, 806 (1982); *see also Brosseau v. Haugen*,
27 543 U.S. 194 (2004). To determine whether a public official is
28 entitled to qualified immunity from § 1983 liability, a court must
consider: (1) whether the plaintiff has identified a specific federal
law or constitutional right that allegedly has been violated; (2)
whether that right was so clearly established as to alert a reasonable
official to its parameters; and (3) whether a reasonable officer could
have believed his or her conduct was lawful. *See Sweaney v. Ada*
County, 119 F.3d 1385, 1388 (9th Cir. 1997) (citing *Newell v.*
Sausser, 79 F.3d 115, 117 (9th Cir. 1996)). Where a plaintiff has
established the existence of a "clearly established" right, the

1 defendant has the burden of proving that, even if he violated the
2 plaintiff's constitutional rights, his actions were reasonable. *Doe v.*
3 *Petaluma City Sch. Dist.*, 54 F.3d 1447, 1450 (9th Cir. 1995). "[I]n
4 the specific context of school discipline, . . . a school board member
5 is not immune from liability for damages under § 1983 if he knew
6 or reasonably should have known that the action he took within his
7 sphere of official responsibility would violate the constitutional
8 rights of the student affected, or if he took the action with the
9 malicious intention to cause a deprivation of constitutional rights or
10 other injury to the student." *Wood v. Strickland*, 420 U.S. 308, 322
11 (1975).

12 Order at 21. Students have a legitimate entitlement to a public education as a property interest
13 which is protected by the Due Process Clause and which may not be taken away for misconduct
14 without adherence to the minimum procedures required by that clause. *Goss*, 419 U.S. at 574.
15 The school's right to enforce standards, however, is very broad. *Id.* School officials cannot
16 impose discipline for malicious or racial reasons but otherwise the officials have broad discretion.
17 *Id.*

18 There is no evidence that any of the Oak Grove Defendants acted with malice or racial
19 animus in their handling of J.J.'s case. Even if there had been a constitutional violation, the
20 contours of the right of school officials to impose standards for conduct and discipline are broad
21 and not so clear that a reasonable school official would have understood that the action he or she
22 took in J.J.'s case violated his constitutional rights. *See Saucier v. Katz*, 533 U.S. 194, 200
23 (2001). The official's mistake, if any, as to what the law required was reasonable. Thus, the Oak
24 Grove Defendants are entitled to the immunity defense. *Id.* at 205.

25 **B. Other Defenses**

26 The court has found no constitutional violation and that even if there were some evidence
27 of a constitutional violation, the Oak Grove Defendants are entitled to qualified immunity.
28 Because these are sufficient grounds for granting summary judgment for defendants, the court
does not reach the other defenses raised by defendants.

29 **C. Mouser Defendant's Motion**

30 The Mouser Defendants joined in the Oak Grove Defendants' summary judgment motion.
31 They worked for the District as legal advisors. Because J.J.'s claims against the Mouser
32 Defendants are based on what they advised the District to do and because the court has found no

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underlying constitutional violation, the court also finds that the Mouser Defendants did not violate J.J.'s constitutional rights.

The Mouser Defendants are also entitled to summary judgment because plaintiff admitted they had no evidence against the Mouser Defendants. Plaintiffs failed to respond to requests for admission served by the Mouser Defendants on May 15, 2012. By failing to respond, the requests are deemed admitted. Fed. R. Civ. P. 36(a)(3).

III. ORDER

For the foregoing reasons, the court GRANTS defendants' motions for summary judgment.

Dated: June 20, 2013


Ronald M. Whyte
United States District Court Judge