F.M., et al., v. Los Olivos School District, et al. 24CV04444
Hearing Date: April 28, 2026
Summary Judgment/Adjudication

PROPOSED TENTATIVE

Plaintiff minor F.M., by a through his Guardian Ad Litem Laurie Mateyko (his mother), filed a second amended complaint on March 10, 2025, against defendants Olivos School District (aka Los Olivos Elementary School District) (District), and Ray Vazquez (Vazquez), alleging three causes of action involving two separate incidents: 1) the first, pursuant to title 42 U.S.C. sections 1983 and 1988, based on violations of the Fourth and Fourteenth Amendments to the federal Constitution (against Mr. Vazquez individually, based on the September 28, 2023 incident); 2) negligence pursuant to Government Code sections 815.2 and 815.6 (against all defendants involving both incidents); and negligent hiring, retention and supervision of employees and agents (against District only based on both incidents). On March 27, 2025, defendants filed an answer on standard Judicial Council forms. Plaintiff F.M. was a seventh-grade student at Los Olivos Elementary School at all relevant times.

This lawsuit is based on two separate incidents.

The first occurred on September 28, 2023, when plaintiff F.M. was suspended from school on the basis of a photograph "taken during a pizza party at a private residence off campus on a weekend. That photo depicted Plaintiff playing with his friends and holding a plastic toy gun with an orange tip. . . ." An unknown individual showed the photo to "Los Olivos School District Administrator Ray Vasquez[,] who decided to punish Plaintiff (for legal activities taking place on a weekend and off school property) by suspending him for one day from school and searching his backpack and locker for two weeks." These events are alleged as the basis for Mr. Vazquez's personal liability with regard to first cause of action, based on violations of the Fourth and Fourteenth Amendments to the federal Constitution.

The second occurred on March 6, 2024. Death threats against plaintiff were found on the mirror of the boy's restroom mirror in Los Olivos Elementary School. "The death threats were from a student by the name of H.R. against Plaintiff. H.R. was threatening Plaintiff F.M. by writing on the boy's restroom that 'F. will be shot.' Plaintiff F.M. was scared, feared for his life, and hid in another building." According to the operative pleading, "H.R. was full of hate toward Plaintiff for being in all sports and being liked by his peers and teachers. [H.R.] bullied and threatened Plaintiff because he wanted Plaintiff to feel scared and threatened." Mr. Vazquez, "the Principal and Superintendent of the School," did not notify the authorities or take necessary actions to protect Plaintiff when he was notified of the death threats against Plaintiff, a minor. H.R. was only suspended for a few days and returned to the same classroom as Plaintiff. Mr. Vazquez did not warn Plaintiff's teachers regarding the death threat incident involving Plaintiff

and H.R. When Plaintiff and H.R. returned to school, not only where they placed in the same classroom but in the same study group. H.R. continuously stared down at Plaintiff and made Plaintiff fearful of his life. Plaintiff did not want to return to school. That was brough[t] to Mr. Vazquez's attention through numerous email communications, a doctor's note was provided to Mr. Vazquez and even the doctor's information for Mr. Vazquez to contact the doctor. Knowing Plaintiff's mental condition and fear of returning to school, Mr. Vazquez did not warn Plaintiff's teachers regarding the death threat incident, and he was placed in the same study group with his assailant until the teachers were made aware by Plaintiff's parents. H.R. was finally removed from the same study group but not the classroom."

The matter on calendar is defendants' motion for summary judgment/adjudication as to all three causes of action. All briefing has been reviewed.

The court will address some preliminary concerns about the Separate Statements; examine the merits of defendants' evidentiary objections; and then explore the merits of defendants' challenges as to each cause of action. The court will conclude with a summary of its conclusions.

A) Preliminary Observations about Separate Statements

Defendants filed a "Separate Statement," advancing three issues (as to each cause of action), with a total of 40 issues of undisputed fact (10 as to the first issue, 29 issues to the second issue, and one as to the third issue, No. 40, which incorporates all other issues therein. Plaintiff filed an opposition "Separate Statement" as to all 40 Issues. Plaintiff additionally has provided an additional "Separate Statement" based on additional material facts that plaintiff considers pertinent, as authorized by California Rules of Court, rule 3.1350(f)(3), consisting of 41 Issues of claimed undisputed fact.

Defendants on April 16, 2026, filed a document entitled "Defendant's Response to Plaintiff's Additional Proposed Material Facts," addressing plaintiff's 41 issues of pertinent material facts. This is in essence a reply separate statement. There is no provision in the statute or Rules of Court for this. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252 ['there is no provision in the statute for a "reply separate statement"]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2025) ¶ 10:220.6, p. 5-65) In fact, Code of Civil Procedure section 437c, subdivision (b)(4), amended and effective January 1, 2025, goes farther, as follows: ". . . The reply shall not include any new evidentiary matter, additional material facts, ***or separate statement submitted with the reply and not presented in the moving papers or opposing papers***." (Emphasis added.) The court as a result of this recent legislative action will not examine defendant's reply separate statement.

B) Evidentiary Objections

Defendants have filed eleven (11) evidentiary objections to plaintiff's evidentiary proffer (filed with plaintiff's "Separate Statement). Specifically, defendant makes two (2) evidentiary objections to statements in the declaration of expert Daniel Saborio; six (6) evidentiary objections to statements made in Guardian Ad Litem Lauri Mateyko's declaration; and three (3) evidentiary objections to the declaration of F.M.

Mr. Saborio is as an expert witness, with over "forty-two years of experience in education," part of which was spent as Assistant Principal for Los Angeles Unified School District Elementary Schools. He claims he has reviewed the entire "MSJ package,"[1] as well as the declarations of Laurie Mateyko and plaintiff F.M. Starting in paragraph 12 of his declaration, Mr. Saborio sets out the facts he gleaned from a review of the records concerning the March 6, 2024 incident involving the death threats. In paragraph 14, he declares as follows: "Mr. Vazquez did not timely warn Plaintiff's teachers regarding the death threat incident involving Plaintiff and the student," and in Paragraph 15, reiterates that "Mr. Vazquez did not timely warn Plaintiff's teachers regarding the death threat incident. . . ." As to the second objection, Mr. Saborio declares in paragraph 21 that "it was inappropriate that Mr. Vazquez did not inform Plaintiff's teachers regarding the threat incident in a timely manner, and because of this, Plaintiff was placed not only in the same classroom but in the same study group. . . ." Defendants object, claiming that because of Mr. Vazquez's declaration and Exhibit G, Mr. Saborio's opinions are not justified by the facts.

The court overrules defendants' first two evidentiary objections. The issue at play is not whether Mr. Vazquez informed the teachers of the threat – he did clearly on April 7, 2024 – but the full nature of the threat and the timing of the limited warning that was made. The threats occurred on March 6, 2024; the teachers were not informed until April 7, 2024, and the warning did not go into detail. Mr. Saborio's opinion is not fully countered by defendants' evidentiary showing, and thus the issue is not admissibility, but weight.

Defendant also objects to six (6) statements in Laurie Mateyko's declaration (Objection Nos 3 to 8). The court will sustain objection No. 3 as an impermissible legal conclusion, but

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[1] It is true that Mr. Saborio does not define what he means by this term. But there is no reason to assume at this stage that Mr. Saborio, in rendering his opinion, had not reviewed Exhibits A to H to defendant's evidentiary proffer (entitled Defendants' "Exhibit Package,"), including Mr. Vazquez's declaration, which was signed on January 13, 2026, was served on plaintiffs on January 15, 2026, and was filed with the court on January 30, 2025. Mr. Saborio signed his declaration on April 5, 2026. This court of course is required to review the nonmoving parties' less rigorously than the moving parties' evidence. (*Degala v. John Stewart Co.* (2023) 88 Cal.app.5th 158, 167 [courts view the evidence in the light most favorable to plaintiff, as the nonmoving party, "liberally construing [his] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor"].)

overall Objection Nos. 4, 5, 6, 7 and 8, based on defendants' contentions that there is no evidence to support her claim that Mr. Vazquez's untimely informed F.M.'s teachers about the March 7, 2024 threat. She was a percipient witness, and could testify to her child F.M.s emotional turmoil following the death threat on March 6, 2024. The facts she recounts support a claim that Mr. Vazquez acted untimely (at least to the extent F.M. was required to be in both the same classroom and the same study group with the student who made the death threat, the fact H.R. was only suspended one day, and the fact Mr. Vazquez was provided medical alerts before April 7 about F.M.'s mental outlook following the threats). There is no reason to exclude her declaration statements based on claims that they rest on improper "assumptions of fact without evidentiary support." While it is true that Mr. Vazquez declares that he frequently "checked in" with F.M. when he returned to school "to make sure he felt safe," there are competing inferences from the evidence, not evidentiary speculation. There is no reason to exclude the declarative statements per Evidentiary Objection Nos. 4,5,6,7, and 8. They are thus overruled.

Defendant also objects to three (3) statements in F.M.'s declaration. The court sustains the objection to F.M.'s statement at issue in Evidentiary Objection No. 9, to the effect F.M.s declares that Mr. Vazquez suspended him in violation of Education Code section 48900, subdivision (m) – this is an improper legal conclusion. The court also sustains Evidentiary Objection No. 10 to F.M.'s statement that "Mr. Vazquez did not do an investigation," as he has no personal knowledge of what Mr. Vazquez did or did not do outside his presence. The court overrules defendants' Evidentiary Objection No. 11, as he can testify about how H.R. felt towards him ("H.R. was full of hate toward me for being in all sports and being liked by my peers and teachers)" and is certainly privy to the fact "H.R. bullied and threatened me because he wanted me to feel scared and threatened."

The court sustains evidentiary objection Nos. 3, 9, and 10, and overrules evidentiary objections Nos 1, 2, 4, 5, 6, 7, 8, and 11.

C) *First Cause of Action: Title 42 U.S.C. section 1983 and 1988 (predicated on violations of the Fourth and Fourteenth Amendments of the federal Constitution)(Vazquez in his personal capacity only*)

It is clear from the face of the first cause of action, stemming from the September 28, 2023 incident, that plaintiff is advancing a cause of action under Title 42 U.S.C. section 1983 and 1988, based on violations of the Fourth and Fourteenth Amendments[2] of the federal Constitution. It appears each cause of action has a separate primary right (separate harm), as the Fourteenth Amendment violation is based on the F.M/'s suspension from school, while the Fourth Amendment violation is based on the defendants search of F.M's backpack after suspension. Although not discussed by parties, the court will apply the rules in *Lilienthal & Fowler v.*

[2] It appears defendant is relying on the substantive **and** procedural Due Process clause of the Fourteenth Amendment, and not Equal Protection. The court will assume this is true.

Superior Court (1993) 12 Cal.App.4th 1848, and treat each primary theory separately for purposes of summary adjudication pursuant to Code of Civil Procedure section 437c, subdivision (f). The court will assume that the Fourth Amendment and Fourteenth Amendment violations are based on different primary rights and proceed accordingly.

As for the alleged Fourteenth Amendment violation, the court agrees with defendant that a school suspension does not implicate substantive but only procedural due process concerns. (*Granowitz v. Redlands Unified School Dist*. (2003) 105 Cal.App.4th 349, 358 [a school suspension is an executive decision that does not implicate the rights of substantive due process if proper procedural protections are afforded.].) There must therefore be disputed issues of material fact to show a procedural due process violation to proceed.

To adequately state a procedural due process for a student facing a temporary short-term suspension, a student has minimal procedural due process rights, including the right to a hearing. As described by the United States Supreme Court in *Goss v. Lopez* (1975) 419 U.S. 565, 581, 'We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.' " (*Granowitz, supra,* 105 Cal.App.4th at pp. 354-355.) An informal meeting between the school official and student or between the official and a student and his parents comports with due process, where the students is informed of what he is accused of doing, what the basis of the accusation is, and an opportunity to explain his version of events. (*Id*. at pp. 355-356.) "Briefly stated, once school administrators tell a student what they heard or saw, ask why they heard or saw it and allow a brief response, a student has received all the process that the Fourteenth Amendment demands." (*C.B. by and Through Breeding v. Driscoll* (11th Cir. 1996) 82 F.3d 383, 386 (*Driscoll*).)

There are two issues between the parties in this regard. The first involves notice – plaintiffs claiming in Issue No. 6 of the Opposition Separate Statement that while Mr. Vazquez wrote a suspension letter to F.M.'s mother (Laurie Mateyko), the letter was not presented until "the first or second week of October 2023" – long after the one-day suspension occurred. meaning it could not meaningfully be challenged. According to Mr. Vazquez in his declaration, by contrast, on September 28, 2023, he received information and saw a photograph of F.M. "holding a firearm pointing it towards the camera and posing with it." The student who showed the picture expressed concern about F.M. posing with a gun because he "was not getting along with him at the time"; Mr. Vazquez then talked to F.M., who explained it was a "fake gun and the pictures were taken at a party." Mr. Vazquez explains further that on September 28, 2023, he wrote "a suspension letter to F.M.'s mother, Laurie Mateyko, advising her or her child's right to

request a meeting with the Superintendent," a copy of which is attached to his declaration as Exhibit A. Ms. Mateyko declares that she was not presented with the letter until "early October," despite the fact that the letter indicated she had a right to appear at the conference at September 28, 2023,at 8:00 a.m., and that date had passed by the time she received the latter. If what Ms. Mateyko says is true, there would be disputed issues of material fact that notice was not properly given, amounting to a possible procedural due process violation.[3]

The second issue seems even more problematic for defendant. Education Code section 48900, subdivision (m) indicates that a pupil shall not be suspended from school unless the appropriate school official determines the pupil has committed an act as defined pursuant to any of subdivisions (a) to (r), inclusive. Subdivision (m), part of this rubric, provides as follows: "(m) Possessed an imitation firearm. As used in this section, 'imitation firearm' means a replica of a firearm that is so substantially similar in physical properties to an existing firearm as to lead a reasonable person to conclude that the replica is a firearm." This is the provision Mr. Vazquez relied upon as the basis to suspend F.M. But subdivision (s) of the very same provision makes the following important qualification:" (s) A pupil shall not be suspended or expelled for any of the acts enumerated in this section ***unless the act is related to a school activity or school attendance occurring within a school under the jurisdiction of the superintendent of the school district or principal or occurring within any other school district.*** A pupil may be suspended or expelled for acts that are enumerated in this section and related to a school activity or school attendance that occur at any time, including, but not limited to, any of the following: (1) While on school grounds. (2) While going to or coming from school. (3) During the lunch period whether on or off the campus.(4) During, or while going to or coming from, a school-sponsored activity." (Emphasis added.)

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[3] In reply, defendant argues that while "Ms. Mateyko claims [] she did not receive the letter notifying her of the suspension and the right to a hearing until weeks later, she still had a telephonic conference with Mr. Vazquez in which she was able to contest the suspension. Plaintiff has failed to show that more formal hearing would have changed the outcome." (P. 3 of Reply.) It is true that a student must show substantial prejudice from the inadequate procedure in order to establish a due process violation. (*Watson ex rel. Watson v. Beckel* (10th Cir. 2001) 242 F.3d 1237, 1242.) But we are at the summary adjudication stage, and because defendants are the moving party, they must present prima facie evidence to show that plaintiff does not have ***and*** cannot present evidence to show substantial prejudice under this standard (See, e.g., *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1165 ["Having failed to address . . . allegations pertaining to [a] theory of liability, [defendant] failed to carry his 'initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.' "].) Defendants' Separate Statement is silent about this issue, and defendants have otherwise made no showing that plaintiff possesses no evidence (and cannot find any) to show that the telephonic conference referenced above is alone sufficient to satisfy due process (indeed, defendants did send the letter, and there is no indication that the deadline was even discussed on the telephone). Defendants claim cursorily in reply that plaintiff "has failed to show" that a more formal hearing would have changed the outcome. While merely arguing the absence of evidence may be sufficient to obtain summary adjudication in federal practice, no California case has concluded that a party moving for summary judgment/adjudication can simply argue there is an "absence" of facts to support the opposing party's case. (*Scheiding v. Dinwiddie Const. Co*. (1999) 69 Cal.App.4th 64, 81.) Defendants have failed to satisfy their burden in this regard. This defect is a recurring one in defendants' motion, as discussed and developed later in this order.

It appears undisputed that the acts captured by the picture Mr. Vazquez saw – F.M. point an imitation gun – ***occurred off campus***, in an unrelated school activity occurring outside the jurisdiction of the superintendent of the school district or principal or occurring within any other school district. Indeed, Mr. Vazquez in his declaration expressly concedes the pictured event depicting F.M. "did not occur at school;" he nevertheless declares he was obligated to suspend plaintiff because the student who brought the picture expressed "concern enough to bring it to my attention." Where is the statutory authority for a school principal to suspend a student, despite the clear language of subdivision (s) that the events at issue in subdivision (a) to (r) ,including subdivision (m), have to involve a school-related activity? While plaintiff's expert, Mary Schillinger, declares that Mr. Vazquez acted well within his authority to suspend F.M. for possession of an imitation gun, there is no discussion – or mention – of the limitation contained in subdivision (s), which clearly is part of the procedural due process calculus. (See Witkin, Summary of California Law (11th ed. 2025), Constitutional Law, § 760 [in light of *Goss*, the Education Code was enacted to meet due process requirements of that decision, which includes section 48900, subdivision (s).)

In *Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Education* (1991) 235 Cal.App.3d 1182, a case not cited by any party, the court interpreted the highlighted language above – "related to school activity or school attendance" as "appropriately limiting" the school's jurisdiction to suspend students. (*Id.* at p. 1187.) As the appellate court in *Fremont Unition High School* observed, "even [the high school] concedes that if [a pupil] 'had walked into a restaurant on a weekend ***where no school activities were in progress*** and shot someone unrelated to the school district,' ***then [Education Code] section 48900 would not apply***." (*Id.* at p. 1187, emphasis added.) The logic of this dicta in *Fremont* applies here – that is, if F.M. was using an imitation gun "where no school related activity" was in progress, then as (as was true in Fremont) Education Code section 48900 (including subdivision (m), the express provision relied upon by Mr. Vazquez, would not apply. As defendants fail to address the issue in their motion or their "Separate Statement," they have not met their burden to show the absence of a disputed issue of fact about whether plaintiff can establish a procedural due process violation. Accordingly, defendants' summary adjudication challenge as to the procedural due process claim is inappropriate.

As for the Fourth Amendment claim, a public school's power over its students is "custodial and tutelary, permitting a degree of supervision and control' " that cannot be exercised " 'over free adults.' " (*In re Randy G.* (2001) 26 Cal.4th 556, 562.) Public school officials do not need "articulable facts supporting reasonable suspicion" that a student has violated a law or school policy in order to detain the student on school grounds. (*Id.* at p. 566.) Instead, the test for whether public school officials' "infringement on the residuum of liberty retained by the student" constitutes an unlawful seizure or detention under the Fourth Amendment, is "whether the school officials' conduct was arbitrary, capricious, or undertaken for purposes of harassment." (*Randy G.*, at pp. 565, 567.) "An action is arbitrary when it is based on no more than the will or desire of

the decision-maker and not supported by a fair or substantial reason." (*Clack v. State* (1969) 275 Cal.App.2d 743, 747.)

This does not end the inquiry. Even if an initial detention is lawful, the question remains whether the search of F.M.'s backpack was unreasonable. The legality of a search of the student by school official will be justified at its inception depending on whether there are reasonable grounds to suspect that a search will turn up evidence that the student has violated or is violating either the law or the rules of the school. (*N.J. v. T.L.O. (*1985) 469 U.S. 325, 3410342.) In other words, "searches of students by public school officials must be based on [an objectively] reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute). There must be articulable facts supporting that reasonable suspicion." (*In re William G.* (1985) 40 Cal.3d 550, 564.)

One can see the potential problems with defendant's arguments under these standards. If in fact it is true that Mr. Vazquez had ***no*** authority to suspend F.M., because the imitation gun was used at an unrelated school event, ability of Mr. Vazquez to detain F.M. while at school for Fourth Amendment purposes because for more tenuous. It follows as logical corollary that the search of F.M.'s backpack may be objectively unreasonable from the inception of the search. Mr. Vazquez declares that he searched F.M.'s backpack every day in his office before school started "to make sure he was not in possession of any weapons" – based on the belief that he may have been in possession of an imitation gun (or a real one). Indeed, the reasonableness of the suspension is the very predicate upon which defendants justify F.M.'s detention and the subsequent two-week backpack search. (See, e.g., Motion, p. 16 ["Searching a student's backpack and ensure there are no weapons on his person ***following a suspension related to guns*** is reasonable and does not constitute a violation of the Fourth Amendment."].) But if the suspension was unreasonable because there was no authority to act (i.e., for off-campus conduct), the reasonableness of any subsequent search and seizure because far more suspect. There are therefore disputed issues of material fact as to the Fourth Amendment issues as well, which cannot be resolved at this juncture.

This leaves us with defendant's last argument – the court should grant summary adjudication as to the first cause of action under qualified immunity principles as implemented by the United States Supreme Court. Today, qualified immunity shields a public officer (such as Mr. Vazquez) from an action for damages under 42 United States Code section 1983 unless the officer has violated a "clearly established" constitutional right. By "clearly established" the court means "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted" (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1241-1242.) In resolving questions of qualified immunity at summary judgment, therefore engage in a two-pronged inquiry. First, '[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right.' [Citation.] 'If no constitutional right would have been violated were the allegations established,' then the qualified

immunity inquiry ends. [Citation.] However, 'if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, ***must be undertaken in light of the specific context of the case, not as a broad, general proposition***.' " (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 711, emphasis added; *Tolan v. Cotton* (2014) 572 U.S. 650, 134 S.Ct. at pp.1865-1866.) The "first step analyzes whether a constitutional right was violated, which is a question of fact. The second examines whether the right was clearly established, which is a question of law. Step two serves the aim of refining the legal standard and is solely a question of law for the judge." (*Tortu v. Las Vegas Metropolitan Police Dept.* (9th Cir. 2009) 556 F.3d 1075, 1085; *Dunn v. Castro* (9th Cir. 2010) 621 F.3d 1196, 1199; see *Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 385.)

"A right is clearly established only if its contours are sufficiently clear that 'a reasonable official would understand that what he is doing violates that right.' [Citation.] In other words, 'existing precedent must have placed the statutory or constitutional question beyond debate.' [Citation.] This doctrine 'gives government officials breathing room to make reasonable but mistaken judgments.' " (*Carroll v. Carman* (2014) ––– U.S. ––––, 135 S.Ct. 348, 350; see *Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1108, 190 Cal.Rptr.3d 97.) "When properly applied, [qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law.' " (*Ashcroft v. al-Kidd* (2011) 563 U.S. 731, 743, 131 S.Ct. 2074 ; *Carroll*, ––– U.S. ––––, 135 S.Ct. at p. 350; see *Marshall*, at p. 1108.)

Although the United States Supreme Court has left "open the issue of the burden of persuasion . . . with respect to a defense of qualified immunity" (*Gomez v. Toledo* (1980) 446 U.S. 635, 642), the appellate courts generally agree that, on a defendant's motion for summary judgment, the plaintiff "bears the burden of showing that the right at issue was clearly established." (*Alston v. Read* (9th Cir. 2011) 663 F.3d 1094, 1098; see, e.g., *Keith v. Koerner* (10th Cir. 2016) 843 F.3d 833, 837; *Mendez v. Poitevent* (5th Cir. 2016) 823 F.3d 326, 331; *Rivera-Corraliza v. Morales* (1st Cir. 2015) 794 F.3d 208, 214; *Hess v. Ables* (8th Cir. 2013) 714 F.3d 1048, 1051; *Morton v. Kirkwood* (11th Cir. 2013) 707 F.3d 1276, 1280-1281; *Donahue v. Gavin* (3d Cir. 2002) 280 F.3d 371, 378; *Sledd v. Lindsay* (7th Cir. 1996) 102 F.3d 282, 287; *Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 386.)

The court is aware that because qualified immunity supplies immunity from suit instead of a mere defense to liability, its protections are partially lost if a case goes to trial, and therefore the issue should be resolved at the earliest possible stage. (*Mendoza, supra,* 206 Cal.App.4th at p. 711.) But the court cannot say at this juncture, based on this record, that qualified immunity applies. This is true even if the court puts the burden on plaintiff to show the law at issue was "clearly established." The lynchpin of defendants' argument (as to both procedural due process and the Fourth Amendment violations, as discussed above) rests on their claim that Mr. Vazquez appropriately suspended F.M., later detaining him and searching his backpack, following Mr. Vazquez's determination that plaintiff violated Education Code section 48900, subdivision (m),

by using an imitation gun off-campus, when it alarmed a fellow student. But any facial reading of Education Code section 48900, subdivision (s), as discussed above, reveals an important conditional limitation to such authority – that the conduct at issue must be associated with a related school activity, as reinforced in *Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Education,* a case overlooked by the parties, which unmistakably places limits on defendants' authority to suspend. Whether a right is "clearly established" turns on whether the case law at the time of the alleged constitutional violation made it sufficiently clear that every reasonable official would have known his conduct violates that right, and the court must consider all decisional law that is available, including decisions of state courts, other circuits, and event unpublished district court decisions. (*Mendoza, supra,* 206 Cal.App.4th at p. 712.) While the authority may not be voluminous, it seems clear, pointing in one direction. "Section 48900 is set out in 'terms that the ordinary person exercising common sense can sufficiently understand and comply with, without sacrifice to the public interest." (*Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Education, supra,* 235 Cal.App.3d at p. 1188.) It was sufficiently established to put defendants on notice.

The court's hesitation is reinforced by federal authority that clearly places constitutional constraints over a school's ability to regulate or punish off-campus conduct (authority again ignored by the parties). In *Mahoney Area School District v, B.L. by and through Levy* (2021) 594 U.S, 180, the court observed that schools' "regulatory interest remain significant in some-off-campus circumstances," such as "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers or participation in other online school activities; and breaches of school security devices, including material maintained within school computers." There is no evidence of any of these events occurring here; nor is there evidence that F.M. threatened the student who brought the picture to Mr. Vazquez's attention, establishing any reasonable nexus between the fake gun and student's fear while on campus.[4] As observed in *C.R. Eugene School District* (2016 9th Cir.) 835 F.3d 1142, 1148, schools must achieve a

[4] Mr. Vazquez, in his declaration, declares that the basis for the suspension was the student's report "that he had been friends with F.M., but was not getting along with him at the time, and expressed concern about coming to school given the photographs depicting F.M. with a gun." Mr. Vazquez goes on: ". . . [S]ince a student was concerned enough to bring it to my attention, I felt it was necessary to suspend F.M . . . . ." Nothing else is mentioned, and nothing in defendants' Separate Statement references any other evidence. As the United States Supreme Court in *Mahoney Area School District* has made clear, the mere fact that a student's off-campus communication finds its way to the school is alone insufficient to warrant regulation by school officials. (*Chen Through Chen v. Albany Unified School District*,(9th Cir. 2022) 56 F.4th 708, 721.) There is no evidence, for example, that F.M. expressly targeted this student with the display of a fake gun (or any members of the school community for that matter), an omission that seemingly lessens the school's ability to punish F.M. (594 U.S. at p. 191.) The evidence here thus stands in contrast to those cases in which a significant nexus was established between off-campus conduct/speech and the school to warrant disciplinary action. (*Id.* at p. 721 [there was evidence to show that the offending communications would have a significant impact on individual students and to the school other than the mere risk the communication would make it to the school, all determined on a reasonably objective test].) Without full explication in the briefing, the court cannot find qualified immunity applicable at this time.

balance between the protecting the safety and well-being of their students and respecting the same students' constitutional rights. While no doubt student safety is important, it is not clear to the court whether the appropriate balance was achieved based on the limited record and less than complete briefing. At a minimum the court cannot say resolve the issue at this time as a matter of law.

Defendants fail to address any of this comprehensively or meaningfully(or even tangentially) in their briefing. (See, e.g., *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1165 ["Having failed to address ... allegations pertaining to [a] theory of liability, [defendant] failed to carry his 'initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.' "].) For example, defendant contends in reply for the first time that the "suspension did not clearly violate Education Code [section] 48900 . . . ." Defendants explain (also for the first time) that "because the student expressed a concern about coming to school after seeing the photograph, it affected school activities and attendance, and gave Defendant to right to suspend plaintiff pursuant to Education Code section 48900, [subdivision (s)]." (Reply at p. 5.) Defendant goes on – "there is no clear case law that says otherwise," and then looks to the declaration of expert Mary Schillinger, who declares in paragraph 20 of her declaration that "it was not only appropriate for Principal Vazquez to suspend F.M after another student brought the photographs to his attention, but he was obligated to do so. The fact that another student brought the photographs to his attention required him to take action and suspend him. It was furthermore appropriate for Principal Vazquez to check F.M.'s backpack for two weeks and ensure there were no weapons on his person when he returned to ensure the safety of all others."

Problems exist with this analysis. Defendant cites no authority for these propositions, even though *Fremont Union High Sch. Dist.* ***clearly*** places limits on the defendants' authority to suspend a student for ***unrelated*** school activity; and despite the fact that the United States Supreme Court in *Mahoney Area* has treated off-campus conduct/speech differently (imbuing it with greater constitutional protection). (See fn. 5, *ante.*) Indeed, in *Fremont*, the appellate court found the school district had jurisdiction to suspend the pupil when he used a stun gun on a different campus from the one involving the student, activity that was sufficiently "related to school activity or school attendance" to satisfy the statute. (*Fremont, supra,* 235 Cal.App.3d at p. 1186 [the activity at issue must be related to school activity or school attendance].)[5] Failure to follow Education Code section 48900 (and its limits) would constitute a violation of the statute.

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[5] Defendants contend essentially that Education Code section 48900, subdivision (s) allows school authorities to suspend a student for conduct unrelated to school activity when the fear generated by such off-campus conduct impacts other students. Defendants provide no authority for that proposition, a questionable proposition in any event following *Fremont*'s interpretation of Education Code section 48900 and the constitutional implications articulated in *Mahoney Area*. It seems evident from the evidence before the court that the student's fear was generated not because of F.M's actions at school or travelling to or from school, but at private party, in a private home. Whether intentional or not, defendants seem to treat the following situations as essentially coterminous – suspension would be reasonable if F.M. displayed a toy gun on school property, travelling to and from school, or as displaying a toy gun in an unrelated school event. Nothing in the case law supports such similar treatment, for recent case law notes that school authorities have diminished authority to regulate off-campus activities. (*Chen Through Chen v. Albany Unified School District*, supra, 56 F.4th at p. 719.)

(80 Ops. Cal.Atty,Gen 91 (1997); see also *T.H. v. San Diego Unified School Dist.* (2004) 122 Cal.App.4th 1267m 1276 [Education Code, § 48900, along with three other statutes (§§ 48900.2, 48900.3, 48900.4 establish the exclusive grounds for which a student may be suspended or expelled]; *M.N. v. Morgan Hill Unified School Dist*. (2018) 20 Cal.App.5th 607, 617 [same].) As one appellate court has noted, possession of a "toy" firearm is permitted as a basis for suspension *as long as the school authorities suspend for this offense that otherwise meets the requirements of the state statute pursuant to Education Code section 48900, subdivision (m)* (and thus by logic also subdivision (s).) (*T.H., supra,* at p. 1286 [as there is no showing that the school authorities reference to a "toy" firearm is considered "to be any different from the statutory definition (an 'imitation firearm'), there is no violation].) The court is simply not prepared to grant summary adjudication on the basis of qualified immunity without a more robust factual showing, coupled with more thorough briefing.

The court therefore denies summary judgment/adjudication as to the first cause of action.

D) Second Cause of Action: All Defendants for Negligence Pursuant to Government Code sections 815.2 and 816.6, and Education Code section 32261, subdivision (c)

Plaintiffs contend that all defendants are negligent for both the September 28, 2023 suspension of F.M., and the subsequent detention and search of F.M; as well as the failure to act appropriately following the March 6, 2024 death threats on the bathroom mirror. Plaintiffs contend liability is established: 1) pursuant to Government Code section 815.2, which provides generally that public entities are liable for injuries caused by the negligence of their employees when acting in the scope of their employment; 2) pursuant to Government Code section 815.6, which provides in relevant part that where a public entity is under a mandatory duty to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by the failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty; 3) pursuant to Education Code section 201, subdivision (a), which provides that "all pupils have the right to participate fully in the education process, free from discrimination and harassment"; and 4) pursuant to Education Code section 32261, subdivision (a), which provides that "all pupils enrolled in the state public school system have the inalienable right to attend classes that are safe, secure, and peaceful" ; and Education Code section 32261, subdivision (c), which provides that California public schools must develop and implement comprehensive safety plans that are the result of systematic planning process, in order to prevent crime and violence on school campuses and that address school crime and violence. The cause of action is predicated on Mr. Vazquez's actions based on both incidents

As this court has previously indicated in earlier orders, plaintiffs can state a negligence cause of action against defendants to the extent they properly advance a claim based on procedural due process violations. And because the court finds that summary adjudication is inappropriate as to the procedural due process claim, it follows that summary adjudication is inappropriate to the second cause of action for negligence.

Defendants nevertheless claim that both defendants are immune from negligence claims for any alleged procedural due process violation pursuant to Government Code section 820.2, which provides that except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, which or not such discretion is abused. As Mr. Vazquez is immune, the argument goes, the institutional defendants are also immune.

Discretionary immunity under Government Code section 820.2 is reserved for "basic policy decisions" that have been expressly committed to coordinate branches of government, and "as to which judicial interference would be unseemly." (*E.I. El Segundo Unified School Dist.* (2025) 111 Cal.App.5th 1267, 1282.) The procedural due process claims advanced by plaintiff are not predicated on such "basic policy decisions," and thus fall outside the immunity protection.

Defendants rely on *Skinner v. Vacaville Unified School Dist.* (1995) 37 Cal.App.4th 31 and *Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352 to argue they are immune under Government Code section 820.2. In *Skinner*, the appellate court reversed a jury's verdict finding that a school district was liable for failing to protect the plaintiff student who was injured during a playground fight. (*Skinner*, at pp. 37–43.) Relevant here, the court reasoned that the jury's verdict could not be supported by evidence that the school district failed to expel the aggressor student based on his prior behavioral issues at school. (*Id*. at p. 39.) The court explained, "[t]he power to expel students from public schools has been entrusted to the governing board of the school district, which must exercise this power pursuant to statutory guidelines [citation] and its own rules and regulations. [Citation]. Accordingly, the decision falls squarely within the discretionary immunity provision of Government Code section 820.2. The decision to expel entails 'the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination.' " (*Id*. at p. 39.)

In *Thompson*, the reviewing court affirmed summary judgment for the school district after the plaintiff student sued the district for injuries he sustained when another student punched him at school. Relevant here, the court rejected the plaintiff's argument that the school district should be held liable for readmitting the aggressor after he was expelled from middle school. (*Thompson*, *supra*, 107 Cal.App.4th at p. 1361.) Relying on *Skinner*, the court in *Thompson* explained, "[t]he decision to readmit a student to school is a matter for which there is statutory immunity. . . . [¶] A school district's exercise of authority to expel and/or readmit a pupil involves the type of decision that entails ' "the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination." ' " (*Thompson*, at p. 1361.)

While it may be true that there is an element of discretion in determining when to suspend a student, the authority to do so and the process by which that process must occur are

not discretionary decisions. There is nothing in either *Skinner* or *Thompson* to suggest that defendants are immune in such a situation, for the decisions at play here do not involve quasi-legislative policy making determinations entitled to immunity. (See, e.g., *E.I. v. El Segundo Unified School Dist., supra,* 111 Cal.App.5th at p. 1284.) Although a basic policy decision may be discretionary and hence warrant government immunity, subsequent ministerial decisions in the implementation of that basic policy decision must face case-by-case adjudication of the question of negligence. (*Ogborn v. City of Lancaster* (2002) 101 Cal.App.4th 448, 461 [while Gov. Code, § 820.2 provides immunity to basic policy decisions, it does not govern ministerial implementation of those basic policies, described as the difference between the planning and the operation of decision making].) The procedural due process claim at issue involves ministerial actions in the implementation of a policy decision, and thus fall outside the immune protection. Accordingly, the court denies summary adjudication for negligence predicated on any procedural due process violation.

As for negligence stemming from the second incident (i.e., based on threats written on the bathroom wall), the court agrees with defendant that plaintiffs' continued reliance on Evidence Code section 201 and Education Code section 32261 is misplaced. Plaintiffs have not alleged any basis for discrimination or harassment as those terms are used in these statutory provisions, which was true in earlier pleading iterations remains true here. The court will strike these allegations from the operative pleading on the court's own motion.

That being said, the gravamen of the negligence cause of action based on the threats and their aftermath involves Mr. Vazquez's breach of a mandatory duty owed to plaintiff F.M. pursuant to Education Code section 44807, through the raiment of Government Code sections 815.2 and 815.6. The court discussed this at length in its last order associated with the demurrer, citing to *Dailey v Los Angeles Unified School District* (1970) 2 Cal.3d 741, *Peterson v. San Francisco Community College Dist.* (1983) 36 Cal.3d 799, and *Charonnat v. San Francisco Unified Sch. Dist.* (1943) 56 Cal.App.2d 840, ultimately concluding that plaintiff had stated a viable theory in the operative pleading because, arguably, returning the very person who made the threats to the same classroom and placing him in the study group with F.M shortly after the threats were discovered may be negligent. The issue before the court now is whether there are disputed issues of material fact as to whether Mr. Vazquez was negligent.

In the court's view defendants have presented prima facie evidence to show there was no breach of duty, no causation, and no harm following Mr. Vazquez's decision, as outlined in Issue Nos. 11 to 32 of defendant's Separate Statement. This is supported by Mr. Vazquez's declaration and the declaration of plaintiff's expert, Mary Schillinger. The burden therefore has shifted back to plaintiff to show a disputed issues of material facts on the elements for negligence. (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998 [elements of negligence are: "the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury"].) Plaintiffs,

under this standard, have presented the declaration of expert Daniel Saborio, who declares, after examining the evidence presented by defendant, as well as all other relevant records including the declarations of Laurie Mateyko and minor F.M., that with respect to "Incident Two, Mr. Vazquez's investigation and response to the writing on the bathroom wall was inappropriate and did not meet the standard of practice for elementary school principals." According to Mr. Saborio, Mr. Vazquez should have notified law enforcement due to the vandalism to school property and the threat to students." Additionally, "Mr. Vazquez was informed by Plaintiff's parents and his psychologist that Plaintiff [was] scared, fearful for his life and did not want to return to school. When Mr. Vazquez was informed by Plaintiff's parents and his psychologist that upon his return to school, Plaintiff [was] requesting not to be placed in the same classroom with his potential assailant due to fear for his life, it was inappropriate that Mr. Vazquez did not inform Plaintiff's teachers regarding the threat incident in a timely manner, and because of this, Plaintiff was placed not only in the same classroom but in the same study group. Being in the same classroom with your potential assailant and in the same study group interferes with the student's instructional process." Plaintiffs bolster these claims with evidence marshalled in their own Separate Statement. In Issue No. 22, for example, and in reliance on the declaration of Lauren Mateyko, when F.M. and the harasser (H.R.) returned to school, "not only were they placed in the same classroom but in the same study group." In the classroom, H.R. "continuously" "stared down" at Plaintiff and made Plaintiff fearful of his life. Plaintiff did not want to return to school." All of this was brought to Mr. Vazquez's attention, and only then was "H.R. finally removed from the same study group but not the [came] classroom." (Issues No. 23 and 24.) This evidence creates disputed issues of material fact sufficient to overcome defendant's prima facie showing.

Defendants in reply contend that Mr. Saborio's declaration fails to create disputed issues of material fact. While defendants acknowledge Mr. Vazquez did not notify police, they observe that according to Ms. Mateyko's declaration, Ms. Mateyko did contact police, and argue that was enough, for plaintiff has the burden to show that any negligence was the proximate cause of the injuries, relying on *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 803.) *Searcy* does not aid defendants here. *Searcy* indicated that <u>*at trial*</u> plaintiff has the burden to show that a school official's on-site "supervision was negligent and such negligence was a proximate cause of those injuries." (*Ibid.*) We are at summary judgment, not trial, where it is defendant's burden to show evidence that plaintiff does not possess – or cannot show – that defendant's breach caused actual injury. Overlooked by d is the complete sentence contained in Ms. Mateyko's declaration: "I called the sheriff and reported the incident to Deputy Tyler. He was completely shocked that Mr. Vasquez did not call the authorities to come to the school to assess the situation. The sheriff's department followed up with the school after my report." There is nothing in this factual recitation to suggest plaintiff will be unable to show causation and harm from Mr. Vazquez's inaction. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 854 [defendant can obtain summary judgment by showing that an essential element cannot be established, and this is done by presenting evidence that plaintiff does not possess and cannot

reasonably obtain needed evidence].) Such evidence usually consists of admissions by plaintiff during discovery that plaintiff has discovered nothing to support an essential element of the cause of action. (*Id.* at pp. 854-856; *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 808 [it is not enough for defendant to claim that plaintiff has no evidence on a key element - defendant must also produce evidence showing plaintiff cannot reasonably obtain such evidence to support the claim].) Defendant has failed to show an absence of evidence on this point.

Defendants make much of undisputed Issue No. 29 in their Separate Statement, to the effect that it was "not possible to move the student or F.M. to a different class altogether. As Los Olivos Elementary School is a small school, and all students in each grade go to all classes together." According to defendants, this fact alone undermines Mr. Saborio's declaration. Not so (and least not completely or entirely and certainly not as a matter of law). The thrust of Mr. Saborio's declaration was Mr. Vazquez's failure to inform F.M.'s teachers of the nature of the threat to F.M. in detail: and the action of placing F.M. not only in the same classroom but in the same study group as H.R. In other words, while it may be true that should F.M. return to school he was required to be in the same classroom as H.R, that does not mean the two had to be in the same study group; indeed, arguably, by not informing the teachers of the specific problem and the scope of the fear suffered by F.M., more nuanced responses were possible. Plaintiffs can still advance a plausible case despite Undisputed Issue No. 29. Summary adjudication of the second cause of action for negligence based on the aftermath of the March 6, 2024 threats is also inappropriate.

Finally, in their motion, defendants contend that defendants are immune to this aspect of the negligence cause of action pursuant to Government Code section 820.2, this time focusing on Mr. Vazquez's discretionary decision associated with March 6, 2024 threats made to F.M. by H.R, and their aftermath. Defendants again rely on *Skinner* and *Thompson*, as discussed above. The court is not persuaded by the argument. Initially, the issue is completely omitted from defendant's "Separate Statement," and is otherwise discussed in only a half-page argument in their Memorandum of Points and Authorities. The argument is even more threadbare in the Reply, consisting of a single line. There is no reasonable way the court can make this determination as a matter of law based on such a limited showing.

This is particularly true in light of *E.I. v. El Segundo Unified School Dist., supra*, 111 Cal.App.5th 1267. There, plaintiff advanced a claim that defendants were negligent because they failed to protect the student from another student's bullying, a claim not far removed from plaintiffs' contention here (based on threats by H.R). There, defendants claimed immunity under Government Code section 820.2, also relying on *Skinner* and *Thompson*. The appellate court rejected the contention, concluding that pursuant to *Barner v. Leeds* (2000) 24 Cal.4th 676, "the District is not immune from liability arising out of the Middle School employees' responses to E.I.'s complaints that she was being bullied by other students. E.I. did not claim that the District or the Middle School was negligent in crafting its anti-bullying policies. Rather, E.I. claimed that the Middle School employees negligently failed to protect her from other students' bullying by,

among other things, not following the District's and the Middle School's safety policies that were already in place. As the Supreme Court explained in *Barner*, such "lower-level decisions that merely implement a basic policy already formulated" are not immune from liability under Government Code section 820.2." (*E.I. v. El Segundo Unified School Dist., supra,* 111 Cal.App.5th at pp. 1283–1284.) Defendants have failed to show that this analysis is inapplicable here.

The court therefore denies summary judgment/adjudication as to the second cause of action.

E) Third Cause of Action Against All Defendants for Negligent Hiring, Retention, and Supervision of Employees

Defendants do not challenge the theoretical viability of this cause of action per CACI 426 [detailing the elements of a negligent hiring, supervision, or retention of employee cause of action].) They contend instead in a half-page argument in their Memorandum of Points and Authorities), with emphasis added, as follows: "Plaintiff ***has failed to present any evidence*** to suggest that Defendant Vazquez was unfit or incompetent to perform his job as principal. Instead, the undisputed evidence confirms that Principal Vazquez acted appropriately at times and no act or omission on his part was a proximate cause of any of Plaintiff's alleged damages. Regardless, Plaintiff ***has not produced any evidence to meet his burden*** of showing that the District either knew or should have known Principal Vazquez was unfit or incompetent. (See CACI No. 426.) ***He has not produced any evidence*** to show that the school board was on notice of any alleged improper conduct on the part of Principal Vazquez, who notably also served as the Superintendent. Plaintiff ***is clearly unable to meet his burden of proving*** his cause of action for negligent hiring, retention, and supervision of employees, and his third cause of action must therefore be dismissed." Nothing further is added, and no case authority is cited. Defendants in their Reply recount the same analysis – almost jot-for-jot. Defendants in their Separate Statement simply incorporate Issue Nos. 1 to 39 in support.

This truncated effort is insufficient to support summary judgment/adjudication. To the extent the court has determined that disputed issues of material fact exist as to conduct by Mr. Vazquez (associated with the first two causes of action, as noted above), an evidentiary basis exists to show that Mr. Vasquez may have acted inappropriately, contrary to the foundational premise upon which defendants' entire challenge rests, as noted above.

Perhaps more significantly, as reflected in the highlighted language above, defendants consistently argue that plaintiffs have failed to and cannot produce evidence to show defendants' negligently retained, hired, or supervised Mr. Vazquez (i.e., that defendants did not have knowledge of any deficiency). Case law makes it abundantly clear that such bare-knuckled allegations are insufficient to carry the day. "[R]ather than affirmatively disproving or negating an element . . . a defendant moving for summary [adjudication] has the option of presenting evidence reflecting the plaintiff does not possess evidence to prove that element." (*Leyva v.*

Garcia (2018) 20 Cal.App.5th 1095, 1102; *Aguilar, supra*, 25 Cal.4th at p. 854.) While merely arguing the absence of evidence may be sufficient to obtain summary adjudication in federal practice (see *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 958; *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 170-171), "[n]o California case has concluded that a party moving for summary judgment can simply *argue* there is an 'absence' of facts to support the opposing party's case" (*Scheiding, supra,* 69 Cal.App.4th at p. 81). Instead, California law " ''diverges from federal law' in that it 'continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence.'" (*Aguilar, supra*, 25 Cal.4th at p. 854; *Krantz, supra*, 89 Cal.App.4th at pp. 173-174 ["There must be some 'affirmative showing'. . . that plaintiff could not obtain such evidence before summary judgment [is] proper."].) This evidentiary showing "may 'consist of' the deposition testimony of the plaintiff's witnesses, the plaintiff's factually devoid discovery responses, or admissions by the plaintiff in deposition or in response to requests for admission that he or she has not discovered anything that supports an essential element of the cause of action." (*Leyva, supra*, 20 Cal.App.5th at p. 1102; *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1302; *Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 240.) However, "[a]rgument alone is insufficient." (*Cassady*, at p. 240.) Here, defendant merely argues that plaintiff does not have and cannot obtain evidence to support the third cause of action, without reference to any facts or discovery responses to support the assertion. In other words, defendants merely assert the absence of evidence and proceed as if making that assertion alone is sufficient to shift the burden to plaintiff. It is not. Defendants as the moving party seeking summary adjudication bear the burden to either produce evidence to negate an essential element or, alternatively, *produce evidence* to show that plaintiffs do not possess, and could not reasonably obtain evidence to prove, their claim, under these standards. Defendants efforts fail to meet these standards. Summary judgment/adjudication as to the third cause of action is therefore inappropriate for this reason as well.

Summary of Conclusions:

- The court has not examined defendants' "Response Separate Statement," filed on April 16, 2026 with the Reply. Pursuant to Code of Civil Procedure section 437c, subdivision (b)(4), effectively January 1, 2025, a reply "shall not include" (inter alia) a "separate statement submitted with the reply and not presented in the moving papers or opposing papers."
- The court on its own authority will strike from the operative pleading allegations predicated on Education Code sections 201 and 32261.
- The court sustains defendants' evidentiary objections Nos. 3, 9, and 10, and overrules defendant's evidentiary objections Nos. 1, 2, 4, 5, 6, 7, 8, and 11.

- The court denies defendants' summary judgment/adjudication motions as to all three causes of action raised in the operative pleading, for the detailed reasons articulated above.
- The parties are directed to appear either in person or via Zoom for the CMC, also on calendar.