.92114

MARK E. DAVIS—BAR NO. 79936
DAVIS, BENGTSON & YOUNG, APLC
1960 The Alameda, Suite 210
San Jose, CA 95126
Phone: 669.245.4200
Fax: 408.985.1814
Email: mdavis@dby-law.com

Attorneys for Defendants SCOTTS VALLEY UNIFIED SCHOOL DISTRICT; TANYA KRAUSE an individual public entity employee; JOSHUA WAHL, an individual public entity employee; and MEGHANN GELTER, an individual public entity employee.

No Filing Fee for a Public Entity or its Employees (Gov't Code §6103)

Helena J Hanson

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ

H.N., a minor by Justin Nordgreen his guardian,

Plaintiff,

v.

SCOTTS VALLEY UNIFIED SCHOOL DISTRICT, a school district, TANYA KRAUSE in her official capacity as superintendent of Scotts Valley Unified School District, JOSHUA WAHL, in his official capacity as principal of Brook Knoll Elementary, and MEGHANN GELTER, in her official capacity as teacher for Brook Knoll Elementary, and DOES 1-50, inclusive,

Defendants.

Case No. 22CV01828

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT

Date: November 28, 2022
Time: 8:30 a.m.
Dept.: 5
Judge: Timothy Volkmann

Complaint Filed: 8/24/2022
Trial Date: Not Yet Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE CODES

FEDERAL CODES

OTHER

I. INTRODUCTION

Defendants SCOTTS VALLEY UNIFIED SCHOOL DISTRICT (hereinafter "Defendant" or "District"), and District employees sued in their official capacities TANYA KRAUSE, JOSHUA WAHL, and MEGHANN GELTER (hereinafter "Individual District Defendants") hereby provide the following points and authorities in support of their Demurrer to Plaintiff's H.N., a minor by Justin Nordgreen his guardian, Complaint, filed with the Santa Cruz County Superior Court on August 24, 2022 ("Complaint").

The Complaint alleges a host of missteps taken by the District and its employees during the COVID-19 worldwide pandemic when Plaintiff, a seven-year-old boy, refused to comply with District-issued policies on vaccination, testing, and mask-wearing, and crusaded against such policies through a series of acts and omissions.

Defendants' Demurrer challenges the entire Complaint as woefully uncertain, and specifically challenges four causes of action as containing insufficient facts. Specifically, Defendants argue that a Demurrer without leave to amend is appropriate for Plaintiff's First Cause of Action for "False Imprisonment", the Third Cause of Action for "Intentional Infliction of Emotional Distress", the Fourth Cause of Action for "Violation of Civil Rights Civil Code Section 52.1 (Bane Act)", and the Fifth Cause of Action for "42 USC 19083 Civil Rights Violations".

Defendants have filed a concurrent Motion to Strike which should be heard alongside the subject Demurrer.

II. STATEMENT OF FACTS

A. Allegations in Complaint

The Complaint alleges that in January of 2022 the District advised parents that unvaccinated students who do not test for COVID weekly will need to quarantine at home and participate in independent study instructional program. (Complaint, ¶18). On or about January 24, 2022, Plaintiff's Principal sent out an exposure notice informing parents that the District policy would be implemented. (Complaint, ¶20). On January 26, 2022, the Principal offered a compromise to Plaintiff's father that the Plaintiff stay home for ten days. (Complaint,

¶22). On January 28, 2022, the Plaintiff was sent to the office for not being vaccinated and for not agreeing to weekly testing. (Complaint, ¶23).

On January 31, 2022, Plaintiff was not permitted to attend class with his classmates who complied with the District policy. (Complaint, ¶25). Plaintiff was isolated from other students and was taught by a substitute teacher in an unused classroom. (Complaint, ¶¶25-26). This happened on February 1st and February 2nd of 2002. (Complaint, ¶¶28-29). Plaintiff was permitted to return to his class on February 3, 2022. (Complaint, ¶30).

On February 15, 2022, Plaintiff's mother called the office and left a message stating that Plaintiff would be late due an appointment. (Complaint, ¶32). When the Plaintiff arrived at school he carried a sign which stated "END THIS NONSENSE!". (*Id.*, emphasis in original). A teacher took Plaintiff's sign and sent the Plaintiff to the school counselor. (Complaint, ¶33).

On February 22, 2022, this seven-year-old Plaintiff staged a "protest" and refused to wear a mask in the classroom. (Complaint, ¶36). He was sent home. (*Id.*)

From February 23-25, 2022, the Plaintiff "continued to refuse the mask daily and was again sent to the principal's office where was [sic] stayed for the day or was sent to a separate storage classroom with the distance learning teacher." (Complaint, ¶37).

On February 25, 2022, this seven-year-old Plaintiff "decided to write a book about his experience". (Complaint, ¶38).

The Plaintiff continued his refusal to wear a mask in the classroom, out of "protest." This happened on March 1, 2, 3, 4, 7, 8, 9, 10, and 11. (Complaint, ¶¶39-47). On one of these occasions, this seven-year-old Plaintiff advised a yard duty that his "freedom does not end where your fear starts." (Complaint, ¶46).

B. <u>The Causes of Action and Prayer</u>

Plaintiff alleges the following causes of action, though it is not clear which cause of action is lodged against which Defendant: 1) False Imprisonment; 2) Negligence; 3) Intentional Infliction of Emotional Distress ("IIED"); 4) Tom Bane Act (Civil Code Section 52.1); 5) 42 USC 1983 Civil Rights Violations.

The Prayer seeks nine separate forms of relief: 1) a judicial declaration stating that the school district policy forcing masking is invalid and unenforceable and is violative of Plaintiff's rights of free speech and expression; 2) general, compensatory and reliance damages in an amount to be determined at trial; 3) statutory damages in a sum to be determined at trial; 4) interest on the principal amount of damages due at the legal rate; 5) exemplary and punitive damages in an amount to be proven at trial per Civil Code section 3294; 6) civil penalties pursuant to Civil Code section 52 and other applicable law; 7) reasonable attorney's fees pursuant to all applicable provisions of law including but not limited to Civil Code section 52; 8) costs of suit incurred herein. (Complaint, p. 19-20).

C. Meet & Confer Obligations Fulfilled

The parties have met and conferred pursuant to statutory requirements. (See Decl. of Counsel).

D. Concurrently Filed Motion to Strike

Defendants have concurrently filed a motion to strike portions of the Complaint to eliminate Plaintiffs' Prayer for Declaratory Relief, Exemplary and Punitive Damages, and Attorney's Fees.

III. STANDARD ON DEMURRER

Code of Civil Procedure ("CCP") section 430.10 states in relevant part:

> "That a party against whom a complaint ... has been filed may object, by demurrer or answer, as provided in section 430.30 to the pleading on any one or more of the following grounds: . . .
>
> (e) The pleading does not state facts sufficient to constitute a cause of action
>
> (f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(Code of Civil Proc. § 430.10(e)(f).)

///

///

A demurrer tests the legal sufficiency of the pleading. Its function is to raise issues of law, not fact, regarding the content of the pleading. (*Donabedian v. Mercury Insurance Company* (2004) 116 Cal.App.4th 968, 994.) A demurrer challenges the defects which appear on the face of the pleading. (*Id.*) In determining whether the allegations of a pleading are sufficient to state a cause of action, "[a] demurrer admits all material and issuable facts properly pleaded. However, it does not admit contentions, deductions, or conclusions of fact or law alleged therein." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713.) Thus, any contentions, deductions, or conclusions of law or fact which are part of the plaintiff's Complaint may not be considered in making a determination that this pleading is sufficient to withstand the District's demurrer. (*See Kisesky v. Carpenter's Trust for So. Ca.* (1983) 144 Cal.App.3d 222, 228.)

A court should not be required by conjecture to supply a necessary but missing allegation, which, if it had been made, would run counter to reasonable probability, even though it would have to be accepted as true for the purpose of testing the sufficiency of the complaint. (*Garcia v. Superior Court of Santa Clara County* (1999) 50 Cal.3d 728, 737.)

IV. ARGUMENT

A. The Complaint Fails to Articulate Which Cause of Action Is Asserted Against Which Defendant, Rendering Entire Complaint Impermissibly Uncertain and Subject to Demurrer.

Defendants demur to the entire Complaint as uncertain because it fails to articulate which cause of action is being alleged against which Defendant. Such uncertain and ambiguity is objectionable and may be appropriately brought to the Court's attention through a Demurrer for uncertainty within the meaning of Cal. Code Civ. Proc. section 430.10(f). (*Pulver v. Avco Financial Services* (1986), 182 Cal.App.3d 622.)

B. The First Cause of Action for False Imprisonment Fails Because There Is No Common Law Governmental Tort Liability in California, The Individual District Defendants Have Immunity, And Because the Complaint Otherwise Fails to Articulate a Cause of Action.

A school district is a public entity. There is no common law governmental tort liability in California and a public entity is not liable for any act or omission of itself, a public

employee, or any other person unless otherwise provided by statute. (Gov. Code, § 815, subd. (a); see *Gibson v. City of Pasadena* (1978) 83 Cal.App.3d 651.)

Significantly, courts have specifically included the tort of false imprisonment among those common law torts which may not be asserted against public entities. (*See, e.g., Comm. for Immigrant Rights v. County of Sonoma* (N.D. Cal. July 31, 2009), 644 F.Supp.2d 1177, 2009 U.S. Dist. LEXIS 66485.

Furthermore, the individually named Defendants (Krause, Wahl, and Gelter) have immunity for the acts described in the Complaint because these were discretionary acts that fell within the scope of their authority. (*Hardy v. Vial* (1957) 48 Cal.2d 577, 582-584.) This would be true even if the employees abused their discretion. The rule is codified as follows: "[e]xcept 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, whether or not such discretion be abused." (Cal. Gov. Code, § 820.2.)

Indeed, this Section 820.2 immunity is often used for educators. For example, in an action based on a public school's rejection of a sign featuring the Ten Commandments, which was submitted by plaintiff private party in response to a fundraising solicitation for commercial advertisements to be posted on the school's baseball field, the trial court did not err in ruling that the individual respondents (the School District and its employees) were entitled to a grant of governmental immunity under Gov C § 820.2. (*DiLoreto v. Board of Education* (1999) 74 Cal.App.4th 267.)

Even if Plaintiff could somehow overcome the law codified in Section 815 or the immunities and caselaw cloaking the Individual District Defendants, the Complaint fails to articulate facts to support a civil claim of false imprisonment. The essential factual elements for such a cause of action are 1) That Defendants intentionally deprived Plaintiff of his freedom of movement by use of physical barriers, force, threats of force, menace, fraud, deceit, unreasonable duress; 2) that the restraint compelled the Plaintiff to stay or go somewhere for an appreciable time, however short; 3) That Plaintiff did not knowingly or

voluntarily consent; 4) That Plaintiff was actually harmed; and 5) That Defendants' conduct was a substantial factor in causing Plaintiff's harm. (CACI No. 1400).

Simply put, the Complaint fails to distinguish Plaintiff's experience from any other child attending school. Although the Complaint asserts that Plaintiff was separated from his classmates, the separation of the Plaintiff is not an element of a false imprisonment claim. Consequently, if the Court finds false imprisonment in this instance, it must also find false imprisonment in every other case of a minor child attending school. Furthermore, by the Plaintiff's own admission, they understood the consequences of sending their child to a public school without proof of COVID vaccine or negative COVID test. Nevertheless, they opted to send their child to school. In carrying out this second-hand form of protest, they assented to the consequences. They may not have agreed with the policies, but they understood them. The requisite third element could therefore never be achieved under these facts.

Consequently, the First Cause of Action for False Imprisonment is subject to Demurrer without leave to amend.

C. The Third Cause of Action for IIED Is Unavailable Against a Public Entity, The Individual District Defendants Have Immunity, And the Complaint Fails To Articulate Sufficient Facts to Support Such A Theory.

An IIED claim is simply not viable against a public school district because, as noted above, common law claims are unavailable against a public entity. (Gov. Code § 815, subd. (a).) A claim for IIED is indisputably a common law claim barred by Section 815 as a matter of law. (*Grosz v. Lassen Community College Dist.* (2008) 572 F.Supp.2d 1199, 1212, disapproved on other grounds [Intentional infliction of emotional distress is a common law claim, unsupported by a constitutional requirement or statute, and thus, plaintiffs may not allege this claim against defendants."]; *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1208 [county was statutorily immune for claims of intentional infliction of emotional distress arising from statements made by police officers.]) Plaintiff has no grounds to challenge these long-settled principles. As such, Plaintiff's claim for IIED against the

District is subject to Demurrer without leave to amend.

In addition, the same immunities described above protect the individual Defendants from Plaintiff's third cause of action. Sections 820.2 and 822.2 both cloak the Individual District Defendants with immunity.

Finally, even if the District and its employees acting in the course and scope of their duties could be sued for a common law tort, the Complaint fails to allege sufficient facts to support an IIED theory.

To establish an IIED claim, Plaintiff must prove: (1) Defendants' conduct was outrageous; (2) Defendants intended to cause Plaintiff emotional distress or acted with reckless disregard of the probability that Plaintiff would suffer emotional distress; (3) that Plaintiff suffered severe emotional distress; and (4) that Defendants were a substantial factor in causing Plaintiff's severe emotional distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051 (emphases added); see also California Civil Jury Instruction 1600). "Severe emotional distress [is] emotional distress of such substantial quantity or enduring quality that no reasonable [person] in a civilized society should be expected to endure it." (*Fletcher v. Western Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397.) The defendant's conduct must be "'intended to inflict injury or engaged in with the realization that injury will result.'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051, quoting *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.)

The "outrageous conduct" considered in the first element of intentional infliction of emotional distress is conduct that is so extreme, it goes beyond all possible bounds of decency. (California Civil Jury Instruction 1602.) "[W]hether conduct is outrageous is 'usually a question of fact' ...[However] many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235.)

The conduct alleged against the District does not fall into the category of conduct which could be described as "outrageous" or that which "has gone beyond all reasonable bounds of decency." Instead, Plaintiff's theory of IIED against the District relies entirely on

allegations that the District: 1) put a 6/7 year old "in solitary confinement" when they removed him from his vaccinated or COVID-negative (per test) peers and had Plaintiff attend school in a separate classroom monitored by either an educator or a Principal; 2) had Plaintiff run laps; 3) chased after Plaintiff to remind him to wear his mask; 4) sent Plaintiff to the office and nurse when he refused hand sanitizer; 5) isolated Plaintiff from vaccinated individuals and/or individuals who tested negative for COVID per District policies; 6) and confiscated a protest sign allegedly prepared by the Plaintiff, a 6/7 year old boy, which read "END THIS NONSENSE".

The facts offered in support of Plaintiff's IIED theory fall well short of the viability threshold. Plaintiff's own recitation of facts dispels the myth that he was placed in "solitary confinement". The Complaint never asserts that Plaintiff was isolated from human contact. The Complaint incorrectly equates Plaintiff's separation from his peers – a fate made known to all parents who elected not to vaccinate or test or mask their child – to a prisoner placed in a cell with no contact with other people. Nor does the Complaint successfully articulate how the District's actions, made to enforce policies based upon various mandates and guidelines put in place during a worldwide pandemic with crippling regional consequences, exceeded the bounds of decency.

D. The Fourth Cause of Action for Violation of Civil Rights Civil Code Section 52.1 Fails Because The Complaint Fails to Articulate A Viable Basis For A Bane Act Claim.

In the Fourth Cause of Action, Plaintiff alleges all defendants violated the Bane Act, California Civil Code § 52.1, which Act prohibits any person from "interfer[ing] by threat, intimidation, or coercion, or attempt[ing] to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual . . . of the rights secured by [federal or state law]." See Cal. Civ. Code § 52.1(b); see also Cal. Civ. Code § 52.1(c) (providing private cause action for violation of § 52.1(b)).

The rights on which Plaintiff bases the Fourth Cause of Action are his federal and state constitutional rights to free speech and expression and state constitutional equal rights and opportunities in education, and the statutory right to participate in the educational

process free from discrimination and harassment. (Complaint, ¶ 81.)

Plaintiff also contends that the District and its agents "interfered with and attempted to interfere with H.N.'s constitutional and statutory rights listed in paragraph 73 [sic] by threatening violence in the form of intimidation and coercion." (Complaint, ¶ 83.)

The Complaint articulates the following as the basis for the Bane Act claim: That the District and its employees: 1) placed H.N in solitary confinement; 2) bullied H.N.; 3) attempted to coerce H.N. into wearing a mask or getting the COVID injection under threat of violence by way of intimidation pressure and coercion; 4) discriminated against H.N. for exercising his right to free speech and to attend school; 5) harassed and otherwise emotionally harmed H.N. because he wasn't vaccinated and didn't wear a mask; and 6) chastised shunned and humiliated H.N. through violence or threats of violence by way of intimidation and coercion. (Complaint, ¶ 85.)

First, paragraph 73 does not articulate any rights. It is apparent that this is a typo and should likely instead read paragraph 81.

Second, Plaintiff's support for this cause of action fails to articulate a Bane Act claim because the cause of action is based either on an unsuccessful allegation of solitary confinement or upon a District's employee's speech, which was not accompanied by a threat of violence.

The reference to "solitary confinement" here and throughout the Complaint is patently misleading and false. The Complaint is clear that the Plaintiff was separated from his class but he was never left alone; he was always supervised by an instructor or Principal.

Next, speech alone is insufficient to support a Bane Act claim unless that speech threatens violence, that the person receiving the threat reasonably fears that violence would be committed against them, and that the person issuing the threat had an apparent ability to carry out the threat. (Cal. Civ. Code § 52.1(k).) The Complaint is devoid of any facts demonstrating that the District and its employees *threatened H.N. with violence*. This is a requirement for a Bane Act claim.

Consequently, the entire Bane Act is subject to demurrer for failure to state a claim.

E. The Fifth Cause of Action for 42 USC 1983 Civil Rights Violation Fails Because Public School District Are Not Persons Subject to 1983 and Because the Individual Defendants Are Shielded from Liability by Eleventh Amendment Sovereign Immunity.

It is indisputable that a school district is an arm of the state and that one cannot bring a 1983 action against the state because they are not persons under the statute. (*Sato v. Orange Cty. Dep't of Educ.* (9th Cir. 2017) 861 F.3d 923.)

Section 1983 provides: Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. The statute explicitly requires that there be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by the plaintiff. (See *Monell v. Dep't of Soc. Services* (1978) 436 U.S. 658, 692-95.) The defendants' actions must be both an actual and proximate cause of the plaintiff's injuries. (*Lemire v. Cal. Dep't of Corr. and Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074.)

The Ninth Circuit has held that "[a] person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally to do that causes the deprivation." (*Johnson v. Duffy* (9th Cir. 1978) 588 F.2d 740, 743.)

So-called *Monell* claims apply only to local government entities — not states or entities that are an arm of the state. States and entities that are an arm of the state, are not "persons" subject to liability under § 1983. (*See Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 69; *Will v. Mich. Dep't of State Police* (1989) 491 U.S. 58, 71; *Doe v. Lawrence Livermore Nat'l Lab.* (9th Cir. 1997) 131 F.3d 836, 839.) In *Will*, referenced *supra*, the Court expressly stated that while a municipality may be considered a person under Section 1983, a state cannot be sued under the statute because it is not a person for purposes of the statute.

///

In addition, all Individual District Defendants are shielded from liability by Eleventh Amendment sovereign immunity. In *Will v. Michigan Department of State Police* (1989) 491 U.S. 58 the United States Supreme Court ruled that a state, a state agency, and a state official sued in her official capacity for non-prospective relief are not suable as section 1983 "persons."

Consequently, Plaintiff's Fifth Cause of Action is subject to Demurrer without leave to amend.

F. This Demurrer Should Be Sustained Without Leave to Amend

If there is a reasonable possibility the defect in a Complaint can be cured by amendment, the court should allow the plaintiff leave to amend the complaint. (*Association of Community Organizations for Reform Now v. Department of Industrial Relations* (1995) 41 Cal. App. 4th 298, 302.) "The burden is on plaintiff, however, to demonstrate the manner in which the complaint might be amended." (*Id.*) Here, where the causes of action at issue could not survive even with an opportunity to add supplemental facts, an order sustaining the demurrer *without* leave to amend is appropriate.

V. CONCLUSION

The moving Defendants are sympathetic to the fact that the COVID-pandemic has been an extraordinarily challenging time for administrators, educators, students, and their families. The Complaint is replete with volatile allegations of misrepresentation and deception. The Plaintiff, a minor suing through his father, is certainly entitled to his opinions. What this minor Plaintiff cannot do is ignore longstanding legal principles to advance the contentions and/or agenda that are perhaps being advanced by others.

///

///

///

///

///

///

Plaintiff's first, third, fourth, and fifth causes of action are subject to Demurrer because they impermissibly seek to assert common law torts against a public entity and its immune employees, otherwise fail to articulate facts to support the claims, put forth unsuccessful allegations in support of an ill-fated Bane Act claim, and fail to recognize the procedural and legal limitations to a *Monell* claim. Consequently, the first, third, fourth, and fifth causes of actions asserted in the Complaint are subject to Demurrer without leave to amend.

DATED: 9-28-22

DAVIS, BENGTSON & YOUNG, APLC

By _____
Mark E. Davis
Attorneys for Defendants
SCOTTS VALLEY UNIFIED SCHOOL DISTRICT; TANYA KRAUSE an individual public entity employee; JOSHUA WAHL, an individual public entity employee; and MEGHANN GELTER, an individual public entity employee