

Rodney L. Levin, SB #169360
Eliza J. McArthur, SB #152312
Jeffery W. Maisen, SB #271809
MCARTHUR & LEVIN, LLP
637 N. Santa Cruz Avenue
Los Gatos, CA 95030
(408) 741-2377 (Telephone)
(408) 741-2378 (Facsimile)

ATTORNEYS FOR DEFENDANT PALO ALTO
UNIFIED SCHOOL DISTRICT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JAMES CHADAM and JENNIFER)	Case No.: CV13-04129 CW
CHADAM, individually and on)	
behalf of their minor children)	MEMORANDUM OF POINTS AND
A.C. and C.C.,)	AUTHORITIES IN SUPPORT OF
)	MOTION TO DISMISS PURSUANT TO
Plaintiffs,)	FRCP 12(b)(1) and 12(b)(6)
)	
vs.)	
)	
PALO ALTO UNIFIED SCHOOL)	Date: December 5, 2013
DISTRICT, a governmental entity)	Time: 2:00 p.m.
created and existing under the)	Courtroom: 2
laws of the State of)	Honorable Claudia Wilken
California,)	
)	
Defendant.)	
)	
)	

Defendant Palo Alto Unified School District ("PAUSD")
presents the following as its Memorandum of Points and

1 Authorities in Support of its Motion to Dismiss Pursuant to Rule
2 12(b)(1) and 12(b)(6)¹:

3
4 I. INTRODUCTION.

5 Plaintiffs' skeletal complaint seeks relief based upon an
6 alleged inappropriate disclosure by PAUSD of plaintiff C.C.'s
7 educational information. Specifically, that the District
8 improperly disclosed confidential health information in
9 possession of the District. Plaintiffs assert five (5) causes
10 of action based upon this alleged disclosure: two based upon 42
11 USC §1983 (Section 504 and ADA), one based upon the U.S.
12 Constitution, one based upon the California Constitution, and
13 one based upon the state-law tort of negligence.

14 For various reasons, as discussed in detail below, all of
15 these claims are subject to dismissal.

16 II. STATEMENT OF ISSUES TO BE DECIDED.

17 This motion presents the following issues for this Court's
18 consideration and decision:

19 (1) This Court should dismiss plaintiff's entire complaint
20 under FRCP 12(b)(1) and (6) in that their claims are barred
21 under the Eleventh Amendment.

22
23
24 ¹ As it must, in filing this motion, defendant treats the allegations of the
25 complaint as being true. However, to be clear, outside of the context of
this motion, defendants do not agree that any inappropriate disclosure(s)
was/were made. The accuracy of plaintiffs' complaint in this regard does not
impact the legal arguments made in this motion to dismiss.

1 (2) This Court should dismiss plaintiff's first, second
2 and third causes of action for violation of rights under 42 USC
3 §1983 under FRCP 12(b)(1) and (6) because a California public
4 school district are not "persons" within the meaning of Section
5 1983.

6 (3) This Court should dismiss plaintiffs' fourth and fifth
7 cause of action (state law claims) under FRCP 12(b)(1) and
8 12(b)(6) in that plaintiffs have failed to allege compliance
9 with the California Tort Claims Act.

10 (4) This Court should dismiss plaintiffs' fifth cause of
11 action for negligence under FRCP 12(b)(1) and 12(b)(6), as they
12 have failed to alleged the required statutory basis for such a
13 claim.

14 (5) This Court should dismiss plaintiffs' first and second
15 causes of action under FRCP 12(b)(1) and 12(b)(6) in that the
16 actions asserted by plaintiff do not form the basis of a claim
17 under Section 504 and/or the ADA.

18 (6) This Court should dismiss plaintiffs' entire complaint
19 under FRCP 12(b)(1) and 12(b)(6) in that the actions asserted by
20 plaintiff are allowed by law and therefore cannot for the basis
21 of a claim.

22 (7) This Court should dismiss plaintiffs' entire complaint
23 under FRCP 12(b)(1) and 12(b)(6) in that the actions asserted by
24 plaintiff fall under the protections of the Family Education
25 Rights and Privacy Act (FERPA).

1 (8) This Court should dismiss plaintiffs' first, second
2 and third causes of action under FRCP 12(b)(1) and 12(b)(6) in
3 that plaintiffs do not allege the requisite mens rea to support
4 a Section 504 and/or ADA and/or Constitutional privacy claim.

5 (9) This Court should dismiss plaintiffs' fourth and fifth
6 causes of action under FRCP 12(b)(1) and 12(b)(6) in that
7 defendant is immune under California Government Code §§820.2 and
8 815.2(b).

9
10 III. ARGUMENT

11 A. THIS COURT HAS THE AUTHORITY TO CONSIDER DEFENDANT'S
12 MOTION TO DISMISS.

13 Federal Rule of Civil Procedure Section 12(b) states, in
14 pertinent part,

15 "Every defense, in law or fact, to a claim for
16 relief in any pleading, whether a claim, counterclaim,
17 cross-claim, or third-party claim, shall be asserted
18 in the responsive pleading thereto if one is required,
19 except that the following defenses may at the option
20 of the pleader be made by motion: (1) lack of
21 jurisdiction over the subject matter... (6) failure
22 to state a claim upon which relief can be granted."

23 Thus, this Court has the authority to consider defendant's
24 within motion.

25 //

//

B. PLAINTIFFS' CAUSES OF ACTION EACH FAIL FOR
A VARIETY OF REASONS.

1. All of Plaintiffs' causes of action are barred by the
Eleventh Amendment.

The Eleventh Amendment prohibits federal courts from hearing suits brought against a state by its own citizens or citizens of other states. And, it is the well-established rule within the Ninth Circuit that a California public school district is an arm of the state, *Belanger v. Madera Unified School District* 963 F.2d 248, 251 (9th Cir. 1992).

Plaintiffs' fourth and fifth causes of action are based upon California state law. Such state law claims are also barred by the Eleventh Amendment, *O.H. v. Oakland Unified School District* 2000 U.S. Dist. LEXIS 21725, *4 (N.D. Cal. 2000); See also, *Lanier v. Fresno Unified School District* 2011 U.S. Dist. LEXIS 111736, *21-*22 (E.D. Cal 2011).

Thus, plaintiffs' claims are barred by the Eleventh Amendment.

2 Plaintiffs may not properly assert Section 1983 claims
(first, second and third causes of action) against
defendant District.

Plaintiffs' first two causes of action are expressly predicated upon 42 USC §1983 (See Complaint, ¶¶20 and 25)². In

² Section 1983 itself grants no substantive rights. Instead, it is the procedural vehicle for enforcement of an individual's federal constitutional and statutory rights, *Albright v. Oliver* (1994) 520 U.S. 266.

1 addition to Eleventh Amendment immunity, a California public
 2 school district is an arm of the state, and therefore not a
 3 "person" within the meaning of 42 USC §1983, *Belanger v. Madera*
 4 *Unified School District* 963 F.2d 248 (9th Cir. 1992). Thus,
 5 plaintiffs may not assert §1983 claims against defendant
 6 District.

7 Plaintiffs' third cause of action is styled as a violation
 8 of the right to privacy embodied in the First Amendment to the
 9 U.S. Constitution³. The U.S. Constitution does not contain
 10 rights of action; rather, Constitutional violations are asserted
 11 through 42 USC §1983⁴. Consequently, plaintiffs also cannot
 12 assert their third cause of action against defendant District.

13 Thus, in addition to Eleventh Amendment liability,
 14 defendant District is also not subject to suit under Section
 15 1983, as alleged by plaintiffs in their first, second and third
 16 causes of action.

17
 18 3. Plaintiffs' state law claims (fourth and fifth causes of
 19 action) fail for failure to allege compliance with the
 20 California Tort Claims Act.

21 Plaintiffs' fourth and fifth causes of action allege state
 22 law causes of action for damages which plaintiffs assert against

23 ³ The federal right to privacy regarding disclosures resides within the
 24 Fourteenth Amendment, not the First Amendment and plaintiffs' third cause of
 action also fails for this reason.

⁴ See, generally, *Davis v. Bucher* 853 F.2d 718 (9th Cir. 1988)

1 a public entity. State law claims for relief against public
2 entities are subject to the claims presentation requirements of
3 the California Tort Claims Act (California Government Code §§900
4 *et seq.*) In order to sue on such claims, the plaintiff must
5 first have timely presented a claim for damages against the
6 government entity, California Government Code §§910, 911.2. The
7 statutory deadline is six months from when the cause of action
8 accrued, California Government Code §911.2. The failure to
9 present a claim results in a complete bar, akin to limitations,
10 of the cause of action against both the public entity and the
11 public employee, California Government Code §945.4.

12 In order to plead a cause of action for damages against a
13 California public entity, the plaintiff's complaint must
14 expressly allege compliance with the claims presentation
15 requirement, *Wood v. Riverside General Hospital* (1994) 25
16 Cal.App.4th 1113. The failure to allege compliance subjects the
17 complaint to general demurrer, *Tietz v. Los Angeles Unified*
18 *School District* (1965) 238 Cal.App.2d 905. The state law
19 presentation requirement is enforced, in federal court, as to
20 pendent state law claims for damages against public entities and
21 public employees, See *Dennis v. Thurman* 959 F.Supp.1253 (C.D.
22 Cal. 1997).

23 Plaintiff's complaint is barren of any allegation of
24 compliance with the claims presentation requirement of
25

1 California Government Code §§900 et seq. Defendant's motion to
 2 dismiss plaintiffs' fourth and fifth causes of action should
 3 therefore be granted.

4
 5 4. Plaintiff's fifth cause of action for negligence is barred.

6 A common law negligence claim, as alleged in plaintiffs'
 7 fifth cause of action, is not a proper claim against a public
 8 entity in California,

9 "California law bars liability for any public
 10 entity or employee for injuries caused by their
 11 act or omissions, unless otherwise provided by
 12 statute. Cal. Gov't Code §815. The legislative
 13 committee comment for this section described the
 14 purpose of this statute as "abolish[ing] all common law
 15 or judicially declared forms of liability for public
 16 entities, except for such liability as may be required
 17 by the state or federal constitution. . . ."

18 The California Supreme Court explained that this
 19 Section is to restrict governmental liability to
 20 narrow and statutorily-delineated circumstances.
 21 *Williams v. Horvath*, 16 Cal.3d 834, 838, 129
 22 Cal.Rptr. 453, 548 P.2d 1125 (Cal. 1976). Courts
 23 have held specifically that this section grants
 24 immunity to public school districts and employees
 25 for negligence, intentional infliction of
 emotional distress, and negligent infliction of
 emotional distress. See, e.g., *Davidson ex rel. Sims*
v. Santa Barbara High School District, 48 F.Supp.2d
 1225, 1232 (C.D. Cal. 1998),"

(*Flanagan v. Benicia Unified School District*, 2007 U.S.Dist.
 LEXIS 89288, *10 (E.D. Cal. 2007)).

22 Here, plaintiffs have alleged no statutory basis for their
 23 common law negligence claim, and their fifth cause of action
 24 therefore must be dismissed.

1
2 5. Plaintiffs do not plead a proper claim under Section 504
3 and the ADA (first and second causes of action).

4 Plaintiffs conclusorily allege that C.C. is a protected
5 individual under Section 504 and the ADA (Complaint ¶¶19 and
6 23). However, plaintiffs fail to allege exactly how the alleged
7 disclosure of private information deprived them of rights
8 secured under Section 504/ADA. Indeed the right to
9 confidentiality of student records/information is a right shared
10 by all students, and is protected under the Family Education
11 Rights and Privacy Act (FERPA), 12 USC §1232g (discussed further
12 below). In other words, plaintiffs fail to allege how plaintiff
13 C.C.'s alleged status as a protected person transforms a breach
14 of student confidentiality (FERPA) claim into a Section 504/ADA
15 claim. Indeed, it does not. In the case of *O'Neal v. Remus*,
16 2010 U.S. Dist. LEXIS 35566 (E.D. Mich. 2010), the plaintiff
17 attempted to assert a Section 504 claim and an ADA claim based
18 upon actions related to student records and violative of FERPA.
19 In dismissing the Section 504 and ADA claims, the *O'Neal* court
20 stated:

21 "Plaintiff has not identified any public service,
22 program, or activity provided by the Detroit Board of
23 Education that he claims to have been denied. Plaintiff
24 appears to be alleging that defendants, by either failing
25 to provide documentation in violation of MFOIA [Michigan
Freedom of Information Act] or providing false
information in violation of FERPA, violated the ADA
and RA [Rehabilitation Act]. Nothing in the ADA or
RA or cases interpreting these statutes suggests that

1 the violation of the FERPA or MFOIA is the equivalent
 2 of the denial of a public service, program, or activity,
 3 under the ADA/RA. Moreover, such an expansive
 4 interpretation would be contrary to the Supreme Court's
 5 decision in Gonzaga that the FERPA does not provide
 6 a private right of action and would contravene the limited
 7 remedies expressly available under MFOIA,"

8 ((Emphasis added) *O'Neal v. Remus*, at *13-*14).

9 Thus, Plaintiffs may not assert Section 504 and ADA claims
 10 predicated upon an alleged inappropriate disclosure of
 11 educational information covered under FERPA.

12 6. Defendant's alleged actions are expressly allowed by law,
 13 and therefore cannot constitute a claim upon which relief
 14 may be granted (all causes of action).

15 Plaintiffs' complaint, in essence, alleges that defendant
 16 improperly released plaintiff C.C.'s health information to other
 17 students with an active genetic disease (Complaint ¶12). While
 18 defendants dispute these allegations, even if such a release did
 19 occur, it was within the appropriate use of student
 20 records/information.

21 Student information is protected under the Family Education
 22 Rights and Privacy Act (FERPA), 12 USC §1232g. California law
 23 contains similar protections (Cal. Ed. Code 49073 et seq.).
 24 Under these laws, student information may be disclosed, without
 25 consent, to protect the health/safety of students (among other
 exceptions, see 34 CFR 99.31(a)(10) and Cal. Education Code
 §49076(a)(2)(A)). Again, plaintiffs allege that the information

disclosed related to plaintiff C.C.'s medical condition and its relation to other students having an active disease (Complaint ¶12). Consequently, the alleged disclosure would be allowable under law, and therefore could not form the basis of a claim. Even if school officials were incorrect in their alleged disclosure, such exercise of discretion would fall under the immunity provisions of Cal. Gov't Code §§820.2 and 815.2(b) (see below).

Thus, the disclosure of health information alleged in the complaint does not form the basis of a cognizable claim.

7. The confidentiality of student records is a right secured under FERPA, not Section 504, the ADA and/or federal/state Constitutions and may not be asserted under these theories (all causes of action).

As mentioned above, the confidentiality of student records is protected under the Family Education Rights and Privacy Act (FERPA), 12 USC §1232g. California law mimics this federal law (Cal. Ed. Code 49073 et seq.). Given the fact that educational record confidentiality is specifically governed by FERPA, plaintiffs cannot assert a FERPA claim by labeling it a Section 504, ADA or Constitutional claim (See, *Oneal v. Remus*, supra, "...such an expansive interpretation would be contrary to the Supreme Court's decision in *Gonzaga* that the FERPA does not provide a private right of action and would contravene the limited remedies expressly available under MFOIA)". Rather, the

proper course would be for plaintiffs to assert a FERPA claim through the vehicle of Section 1983⁵.

In sum, plaintiffs' attempt to transform a FERPA-based educational privacy claim into a civil rights violation should not be allowed.

8. Plaintiffs do not plead the required intent/motivation to support their Section 504, ADA and U.S. Constitutional claims (first, second and third causes of action)

To establish a claim for damages under Section 504 and the ADA, a plaintiff must prove that a defendant operated with either an intent to discriminate, or with deliberate indifference (*Duvall v. County of Kitsap* 260 F.3d 1124, 1135-1136 (9th Cir. 2001). Not only must the complained of action be intentional, but the alleged action (omission) must have been motivated by/based upon the plaintiff's disability (*Id.* at 1135).

Similarly, a claim for Constitutional privacy requires an intent element (*Weisberg v. Riverside Township Board of Education* 180 Fed.Appx. 357, 365 (3rd Cir. 996)).

In our case, aside from asserting that he is a protected individual under Section 504 and the ADA (Complaint, ¶¶19 and

⁵ The assertion of FERPA claims through Section 1983 has been a well-traveled course taken by litigants. These claims have resulted in the decision that FERPA does not create a private right of action, *Gonzaga University v. Doe* 356 U.S. 273, 287 (2002). Thus, as referenced above, plaintiffs' educational privacy rights claims simply do not provide the proper basis for litigation.

23), the complaint is completely devoid of any allegations regarding intent. Indeed, the only description of intent in the complaint is a negligence (i.e., non-intentional) standard (Complaint, ¶¶32-34).

Thus, Plaintiffs first, second and third causes of action have not plead the requisite elements supporting their Section 504, ADA and Constitutional privacy claims and must be dismissed.

9. Defendant is immune from plaintiffs' state law claims (fourth and fifth causes of action).

California law provides immunity to public entities for the discretionary acts of public employees. This immunity is codified in California Government Code §§820.2 and 815.2(b). Discretion is also conferred upon public entities for decisions relating to health issues under California Government Code §855.4.

Discretion is defined as:

"Generally speaking, a discretionary act is one which requires the exercise of judgment or choice. Discretion has also been defined as meaning equitable decision of what is just and proper under the circumstances.'" *Kemmerer v. County of Fresno*, 200 Cal. App. 3d 1426, 1437, 246 Cal. Rptr. 609 (1988) (quoting *Burgdorf v. Funder*, 246 Cal. App. 2d 443, 449, 54 Cal. Rptr. 805 (1966)); see also *Lopez v. Southern Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 793-94, 221 Cal. Rptr. 840, 710 P.2d 907 (1985).

(*Nicole M. v. Martinez Unified School District* 964 F.Supp. 1369,

1 1389-1390 (N.D. Cal. 1997))

2 The act of disclosing information has been construed by
3 courts to be a discretionary act subject to immunity. For
4 example, in the case of *Nguon v. Wolf* 517 F.Supp.2d 1177 (C.D.
5 Cal. 2006), a school Principal's disclosure to a student's
6 parent that the student's discipline was based upon the (female)
7 student's kissing other girls (i.e., revealing to parent the
8 student's previously private sexual orientation) was held to be
9 a discretionary disclosure subject to immunity.

10 In the case at hand, the alleged disclosure was associated
11 with plaintiff C.C.'s health condition (Complaint ¶12). The
12 basis for a disclosure of this condition is necessarily within
13 the ambit of a health/safety concern – i.e., a textbook
14 discretionary decision. Whether or not such a disclosure was
15 necessary or appropriate is not relevant to the immunity
16 analysis (i.e., a discretionary disclosure is protected whether
17 or not it is an abuse of discretion (See. Cal. Gov't Code
18 §820.2)). Thus, the alleged disclosure of health information
19 would be a discretionary action, subject to immunity.

20
21 Dated: October 11, 2013

Respectfully submitted,

22 MCARTHUR & LEVIN, LLP

23
24 /s/ Rodney L. Levin

25 By: Rodney L. Levin