TENTATIVE RULINGS FOR March 6, 2023
Department S24 - Judge Gilbert G. Ochoa

This court follows California Rules of Court, rule 3.1308(a) (1) for tentative rulings. (See San Bernardino Superior Court Local Emergency Rule 8.) Tentative rulings for each law & motion will be posted on the internet (https://www.sb-court.org) by 3:00 p.m. on the court day immediately before the hearing.

If you do not have internet access or if you experience difficulty with the posted tentative ruling, you may obtain the tentative ruling by calling the Administrative Assistant. You may appear in person at the hearing but personal appearance is not required and remote appearance by Court Call is preferred during the Pandemic. (See www.sbcourt.org/general-information/remote-access)

If you wish to submit on the ruling, call the Court and your appearance is not necessary. If both sides do not appear, the tentative will simply become the ruling. If any party submits on the tentative, the Court will not alter the tentative and it will become the ruling. If one party wants to argue, Court will hear argument but will not change the tentative. If the Court does decide to modify tentative after argument, then a further hearing for oral argument will be reset for both parties to be heard at the same time by the Court.

UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF THE RULING.

CIVSB2215901
JANE RNW DOE

v.

REDLANDS UNIFIED SCHOOL DISTRICT et al.

Motions: **Demurrer & Motion to Strike**

Movant: Defendant Redlands Unified School District

Respondent: Plaintiff Jane RNW Doe

Discussion -

The District generally demurs to Plaintiff's first, fifth, eighth, tenth, and eleventh causes of action.

1. Plaintiff's First Cause of Action for Negligence

The elements of a cause of action for general negligence are: (1) defendant owed a duty of care to plaintiff; (2) defendant breached that duty; (3) defendant's breach was a substantial factor in causing the damages; and (4) plaintiff was damaged. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.)

Under her first cause of action for negligence, Plaintiff alleges the District "knew or should have reasonably known" Allen "had or was capable of" sexually abusing Plaintiff or other victims. (Compl. ¶98.) Plaintiff further alleges the District breached its duties by failing to supervise Allen and by failing to investigate and report Allen. (See *id*. at ¶¶100-102.) Plaintiffs allege the District negligently breached its statutory reporting duties under the Child Abuse and Neglect Reporting Act (CANRA), as set forth in Penal Code section 11166. (See *id*. ¶¶103-109.)

At the outset, Plaintiff's first cause of action for general negligence appears to be duplicative of her second cause of action for negligent supervision and third cause of action for negligent hiring/retention, neither of which are at issue in this demurrer.[1]

The District argues Plaintiff's first cause of action fails because Plaintiff cannot sue the District for common law negligence.

Because direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, they cannot be directly liable for negligence in the absence of a statute expressly imposing negligence liability. (*Eastburn v. Regional Fire Protection Auth*. (2003) 31 Cal.4th 1175, 1183.) A public entity cannot be directly liable for negligent training or supervision of its employees because no statute provides for such liability. (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1113 (*Munoz I*), disapproved on other grounds in *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639, fn 1.)

"That an individual school employee has committed sexual misconduct with a student or students does not of itself establish, or raise any presumption, that the employing district should bear liability for the resulting injuries." (*C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, 878.) A

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[1] There is a split of authority regarding whether a demurrer may be properly sustained on the ground that a cause of action is duplicative. (*Compare Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 290 [demurrer properly sustained to cause of action for "breach of governing documents" on ground that cause of action was duplicative of cause of action for breach of fiduciary duty], with *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890, [that a cause of action is duplicative "is not a ground on which a demurrer may be sustained"].)

school district cannot be held vicariously liable for its employee's torts, including sexual assault of a student. (*John R. v. Oakland Unified School Dist*. (1989) 48 Cal.3d 438, 441.) However, if a school district's administrators or supervisors knew, or should have known, of an employee's propensities for sexual misconduct, the school district "may be vicariously liable . . . for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student." (*Hart Union High, supra*, 53 Cal.4th at p. 879; *Virginia G. v. ABC Unified School Dist*. (1993) 15 Cal.App.4th 1848, 1855) ["if individual District employees responsible for hiring and/or supervising teachers knew or should have known of [teacher's] prior sexual misconduct toward students, and thus, that he posed a reasonably foreseeable risk of harm to students under his supervision, . . . the employees owed a duty to protect the students from such harm"].)

Stated more simply, *the District cannot be held vicariously liable for the sexual assault allegedly committed by Allen. However, it could conceivably be held liable under a theory of negligent hiring, supervision, or retention*.

Because much of Plaintiff's first cause of action appears to be based on the District's alleged failure to supervise Allen, it is not evidence the cause of action should be dismissed at this pleading stage (even if it is duplicative of other causes of action).

Relatedly the Court of Appeal recently rejected the District's argument that Plaintiff cannot plead a claim of negligence per se based on a violation of the CANRA. (*See* Dem. 4; see also *Roe v. Hesperia Unified School Dist*. (2022) 85 Cal.App.5th 13, 31 ["Plaintiffs argue that the trial court erred by concluding that their claims under CANRA and for negligence per se failed . . . We agree."].)

These authorities make clear that Plaintiff may sue the District *directly* for negligence based on the theories that the District negligently supervised Allen and negligently failed to report child abuse.

In short, Plaintiff sufficiently pleaded a cause of action for negligence against the District based on allegations of negligent hiring, supervision, and retention, as well as an alleged failure to report suspected child abuse. Therefore the Court OVERRULES the District's demurrer to Plaintiff's first cause of action for negligence.

2. Plaintiff's Fifth Cause of Action for IIED

The elements of a cause of action for IIED include: (1) extreme and outrageous conduct by defendant; (2) intention to cause or reckless disregard of the probability of causing emotional distress; (3) severe emotional suffering; and (4) actual and proximate causation of the emotional distress. (CACI 1600.) "To be outrageous, conduct must be 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" (*Ross v. Creel Printing & Publishing Co., Inc*. (2002) 100 Cal.App.4th 736, 745 (citation omitted).)

The District *correctly* argues it cannot be directly liable for common law torts, which would include IIED. (See, e.g., W*assman v. South Orange County Community College District* (2018) 24 Cal.App.5th 825, 854.)

However, the District ignores Plaintiff's vicarious liability-based allegations. For example, Plaintiff alleges "conduct toward Plaintiff" by administrators of the District like destroying evidence, dissuading victims from going to the police or the press, and removing complaining students while allowing Allen to remain in his position. (*See* Compl. ¶164.)[2]

To be sure, these allegations are vague and conclusory. Also, it is questionable whether Plaintiff alleged facts sufficient to show outrageous conducted of the District *directed at* Plaintiff or which occurred in her presence. (See *Christensen v. Superior Court (Pasadena Crematorium of Altadena)* (1991) 54 Cal.3d 868, 904.) Nevertheless, these are not grounds upon which the District demurred.

Because the District's demurrer to Plaintiff's IIED cause of action addresses *only* direct liability against the District, and fails to address Plaintiff's vicarious liability-based allegations, the Court OVERRULES the District's demurrer to Plaintiff's fifth cause of action.

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[2] The District cannot be vicariously liable for Allen's criminal conduct, which was not within the scope of his employment. (See C.*A. v. William Hart Union High School* (2012) 53 Cal.4th 861, 875; *John R. v. Oakland Unified School District* (1989) 48 Cal.3d 438.) To the extent Plaintiff's IIED cause of action is based on vicarious liability relating to the alleged sexual abuse committed by Allen, it fails as a matter of law.

3. Plaintiff's Eighth Cause of Action for Sexual Harassment

Plaintiff's eighth cause of action for violation of Civil Code section 51.9, subdivision (a), which provides that a person is liable for sexual harassment when: (1) there is a business, service, or professional relationship between the plaintiff and defendant or the defendant holds itself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party, including a teacher; (2) the defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe; and (3) the plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including emotional distress or violation of a statutory or constitutional right, as a result of the sexual harassment.

By its statutory language, Civil Code section 51.9 imposes liability on a person who engages in sexual harassment. A public entity is not a person for direct liability under Civil Code section 51.9. (*K.M. v. Grossmont Union High School District* (2022) 84 Cal.App.5th 717, 300 Cal.Rptr.3d 598, 623-626 ["*K.M.*"].)

Furthermore, a school district cannot be held vicariously liable for the sexual abuse/harassment of a student by a teacher because the authority conferred on teachers to carry out their instructional duties and the abuse of that authority to indulge in sexual misconduct is too attenuated to deem a sexual assault something within the range of risks allocated to the teacher's employer. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 447-52; *Steven F. v. Anaheim Union High School Dist.* (2003) 112 Cal.App.4th 904, 908-09.)

Nevertheless, Plaintiff argues the District can be liable under Civil Code section 51.9 for ratifying Allen's conduct. In *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1110-11 ["*C.R.*"], the Court of Appeal recognized if a corporate employer ratifies the employee's conduct it can be liable and that this principle applies to a Civil Code section 51.9 cause of action. The *K.M.* Court recognizes the *C.R.* decision but notes it concerned a private employer. (*K.M., supra,* 84 Cal.App.5th 717, 300 Cal.

Rptr.3d at p. 628.) It dismissed the proposition that a ratification form of liability under Civil Code section 51.9 applies to a public entity. (*Id.* at p. 575 & fn. 15.)

Because Plaintiff's cause of action for violation of Civil Code section 51.9 against the District fails as a matter of law, the Court SUSTAINS the District's demurer to Plaintiff's eighth cause of action.

4. Plaintiff's Tenth Cause of Action for Violation of Ed. Code, § 220

Education Code section 220 prohibits a student from being subjected to discrimination based on various protective classifications, including gender, in any program conducted by an educational institution that receives or benefits from state financial assistance or enrolls students who receive state financial aid.[3]

Plaintiff alleges she was subjected to harassment by the District and its administrators because of her gender. The District had "actual knowledge" of the harassment, abuse, and molestation because knew of the danger presented by Allen arising from investigating him for sexual misconduct and knew he had students in his classroom at all hours. With such knowledge, the District acted with deliberate indifference toward responding to the sexual harassment and abuse. (Compl. ¶¶206-09).

The District argues this provision addresses discrimination and harassment, not sexual abuse of a student. (Dem. 6-9.)

In *Franklin v. Gwinnett County Public School* (1992) 503 U.S. 60, 75 ("*Franklin*"), in considering the issue of a Title IX violation, the Court discussed that Title IX places a duty on the district not to discriminate based on sex. Title IX provides in part that: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." (20 U.S.C. § 1681(a).) The

[3] The elements for a damage claim under Education Code section 220 are (1) the plaintiff suffered severe, pervasive, and offensive harassment that effectively deprived him of the right of equal access to educational benefits and opportunities, (2) the school district had actual knowledge of that harassment, and (3) the school district acted with deliberate indifference in the face of such knowledge. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 579.)

Franklin Court stated that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' [Citation.]" (*Franklin, supra,* 503 U.S. at p. 75.) The Court concluded that the same rule applies when a teacher sexually harasses and abuses a student. (*Id.*)

In *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 579, the Court of Appeal was addressing the elements for an Education Code section 220 damage claim for peer harassment claims and whether money damages are available. In its analysis, the Court of Appeal held that antidiscrimination provisions in the Education Code are like Title IX, i.e., they both are designed primarily to prevent recipients of state funding from using funds in a discriminatory manner. (*Id.* at p. 603.) Education Code section 220 is analogous to Title IX. (*Id.*)

Unlike Title IX, Education Code section 220's list of protective characteristics does not list sex. However, Defendant ignores that gender under the statutory scheme is defined as meaning sex. (Educ. Code, §210.7). Furthermore, the statutory scheme includes a definition for sexual harassment, which includes unwelcome sexual advances and other verbal, visual, or physical conduct of sexual nature. (Educ. Code, §212.5).

The District cites no authority supporting the supposition that the District cannot be held liable under Education Code section 220 based on sexual abuse, as opposed to sexual harassment. The opposite appears to be true. (Cf. *Roe v. Hesperia Unified School Dist*. (2022) 85 Cal.App.5th 13, 33 ["plaintiffs' allegations are insufficient to constitute actual notice of a violation of Title IX or Education Code section 220. Plaintiffs do not allege that any school district employee, let alone one with the requisite level of authority, actually knew that Martinez was *sexually abusing* plaintiffs or any other students" (emphasis added)].)

The District has not shown, at this pleading stage, that Plaintiff's cause of action fails as a matter of law. The Court OVERRULES the District's demurrer to Plaintiff's tenth cause of action.

5. Plaintiff's Eleventh Cause of Action for Breach of Fiduciary Duty

"To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate the existence of a fiduciary relationship, breach of that duty and damages. [Citations]" (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 182.)

Plaintiff alleges the District breached its fiduciary duty by failing to properly supervise Allen and by failing to report his abuse. (*See* Compl. ¶215.)

The District argues Plaintiff's cause of action fails because a breach of fiduciary duty is a common law, not statutory, claim. (*See* Dem. 5:5-12.) While that may be true, Plaintiff's cause of action fails for a more fundamental reason.

There is no apparent authority supporting the claim that a fiduciary relationship exists between a public school and a student who attends that school. Indeed, many cases point out that such a relationship does not exist. *John R. v. Oakland Unified School District* held that while a special relationship may exist between a school and its student, that relationship is not a fiduciary relationship; the Court in *John R.* expressly held that teachers are not fiduciaries. (*John R. v. Oakland Unified School District* (1987) 240 Cal.Rptr.319, 325 (reversed in part on other grounds); see also *CA. v. William S. Hart Union High School Dist*. (2010) 189 Cal.App.4th 1166, 1176 [involving allegations of a teacher's sexual abuse of a student – "we have not found, any authority stating that a fiduciary relationship exists between a school district and an individual student"] (overruled on other grounds by *C.A. v. William S. Hart Union High School Dist*. (2011) 53 Cal.4th 861)].)

Because Plaintiff's breach of fiduciary duty claim fails as a matter of law, the Court SUSTAINS the District's demurrer to Plaintiff's eleventh cause of action.

Motion to Strike

Motions to strike can be used to strike any "irrelevant, false or improper matter inserted in any pleading," or to strike any pleading or part thereof "not drawn or filed in conformity with the laws of this state, a court rule or order of court." (Code Civ. Proc., § 436.) A motion to strike is the appropriate procedure for eliminating improper punitive damages allegations. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 164.)

Discussion -

The District moves to strike "any reference to treble damages against [the District] in [paragraphs] 66, 71, 96, 200 and in the prayer of Plaintiff's Complaint." (Mot. 4:16-19.) It also moves to strike Plaintiff's request for attorney fees in paragraph 200 and in the prayer. (Mot. 5:3-4.)

On May 21, 2021, in *Los Angeles Unified School District v. Superior Court* (*Jane Doe*) 64 Cal.App.5th 549 (*LAUSD*), review granted Feb. 24, 2021, S266254, the Court of Appeal held that treble damages under Code of Civil Procedure section 340.1 are not recoverable against school districts.

Later that same year, *our Court of Appeal affirmed Judge Ochoa's recent order holding treble damages in Section 340.1 is punitive in nature and were thereby precluded by Government Code section 818 as against a school district defendant*. (See *X.M. v. Hesperia Unified School Dist*. (filed Sept. 16, 2021) 68 Cal.App.5th 1014, 1020 [denying school district's writ petition – "we join our colleagues in Division Three of the Second District and hold that section 818's immunity applies when the defendant is a public agency like HUSD"].)

Just as with *LAUSD*, the Supreme Court has granted review of *X.M*. Based on these pending reviews, Plaintiff argues the cases are no longer binding authority.

In granting review of *LAUSD*, the Supreme Court explained:

> Pending review, the opinion of the Court of Appeal, which is currently published at 64 Cal.App.5th 549 [279 Cal. Rptr. 3d 52], may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 [20 Cal. Rptr. 321, 369 P.2d 937], to choose between sides of any such conflict. (See *Standing Order Exercising Authority Under California Rules of Court, Rule 8.1115(e)(3), Upon Grant of Review or Transfer of a Matter with an Underlying Published Court of Appeal Opinion*, Administrative Order 2021-04-21; Cal. Rules of Court, rule 8.1115(e)(3) and corresponding Comment, par. 2.)

(*Los Angeles Unified School Dist. v. Superior Court* (Sept. 1, 2021) 493 P.3d 195.)

This means that while review is pending, the superior courts may choose (but are not required) to "follow a published review-granted Court of Appeal opinion, even if that opinion conflicts with a

published, precedential Court of Appeal opinion." (Cal. Rules of Court, rule 8.1115, Adv. Comm. Comment to Subd. (e)(3).)[4]

Notably, around the time this motion was filed, the Court of Appeal in *K.M*. rejected Plaintiff's position, explaining: "Treble damages are available under Code of Civil Procedure section 340.1, subdivision (b)(1), "unless prohibited by another law." (§ 340.1, subd. (b)(1).) (17) We conclude Government Code section 818 *precludes application of this provision to public school districts*, joining our colleagues in other courts who have reached this conclusion." (*K.M. v. Grossmont Union High School Dist*. (Oct. 25, 2022) 84 Cal.App.5th 717, 742 & fn. 12, citing *LAUSD, supra*, and *X.M., supra*.)

The weight of authority supports the District's position that Plaintiff may not recover treble damages from the District.

As for Plaintiff's prayer for fees, she requests fees and costs against the District under Civil Code section 52 and Title IX, as well those fees and costs "otherwise . . . allowable by law." (Complaint Prayer at ¶8.)

The District argues Plaintiff's request for fees should be stricken because Plaintiff failed to plead a cause of action for violation of Civil Code section 51.9 or Education Code section 220. As discussed above, that is not accurate. Plaintiff sufficiently pleaded a cause of action for violation of Education Code section 220.

Of course, the District's motion is problematic for a couple of related reasons. First, it is procedurally defective. A notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. Specifications in a notice must be numbered consecutively." (Cal. Rules of Court, rule 3.1322.)

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[4] Subdivision (e)(2) of Rule 8.1115, which governs instances in which the Supreme Court has decided to grant review and that review is pending, states: "After decision on review by the Supreme Court, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter, and any published opinion of a Court of Appeal in a matter in which the Supreme Court has ordered review and deferred action pending the decision, is citable and has binding or precedential effect, except to the extent it is inconsistent with the decision of the Supreme Court or is disapproved by that court."

The District's notice of motion vaguely asks the Court to strike "portions of the Complaint referring to treble damages or attorney's fees." (Mot. 1:27-28.)

The treble damages are pleaded against the District *and Allen*. If the Court were to strike the entire paragraphs, Plaintiff might be prejudiced, as it is not clear at this point whether Plaintiff could recover treble damages against Allen (and it is not discussed by the parties).

Unless the Supreme Court rules at some point in the future to the contrary, *Plaintiff cannot recover treble damages against the District*. But for the reasons discussed above, the Court DENIES the District's motion to strike.

Leave to Amend

As discussed, Plaintiff's eighth and eleventh causes of action against the District fail *as a matter of law*. the Court DENIES leave to amend as to Plaintiff's eighth and eleventh causes of action.

Summary of Rulings

The District's Demurrer

The Court rules as follows: (1) **DENY** Plaintiff's request for judicial notice of her complaint as unnecessary; and (2) **OVERRULE** the District's demurrer to Plaintiff's first cause of action for negligence, fifth cause of action for IIED, and tenth cause of action for violation of Education Code section 220; **SUSTAIN** the District's demurrer to Plaintiff's eighth cause of action for violation of Civil Code section 51.9, and eleventh cause of action for breach of fiduciary duty, both *without* leave to amend.

The District's Motion to Strike

The Court rules as follows: (1) **GRANT** Plaintiff's request for judicial notice of Exhibits 1 through 8 (legislative materials); and (2) **DENY** the District's motion to strike.

Movants to give Notice and prepare Order.

Dated-

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Judge