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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 K.C., by and through his Guardian ad Litem,
16 MYISCHA THOMPSON; D.B., by and through
17 his Guardian ad Litem, LIBRA WHITE,

18 Plaintiffs,

19 v.

20 TOWN OF ATHERTON, a municipal
21 corporation; DAVID METZGER, individually
22 and in his official capacity as a police sergeant
23 for the TOWN OF ATHERTON; DIEGO
24 ROMERO, individually and in his official
25 capacity as a police officer for the TOWN OF
26 ATHERTON; IGOR DAVIDOWICH,
27 individually and in his official capacity as a
28 police officer for the TOWN OF ATHERTON;
JOSHUA GATTO, individually and in his
official capacity as a police officer for the
TOWN OF ATHERTON; DIMITRI
ANDRUHA, individually and in his official
capacity as a police officer for the TOWN OF
ATHERTON; SEQUOIA UNION HIGH
SCHOOL DISTRICT, a municipal corporation;
STEPHEN EMMI, individually and in his
official capacity, NICK MUYS, individually
and in his official capacity, and DOES 1-100,
inclusive, individually, jointly, and severally,

Defendants.

Case No. 3:24-cv-00507

**DEFENDANTS SEQUOIA UNION HIGH
SCHOOL DISTRICT, STEPHEN EMMI AND
NICK MUYS' MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED COMPLAINT**

Date: June 25, 2024
Time: 10:00 a.m.
Crtrm: Courtroom 15, 18th Floor

Hon. Rita F. Lin

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NOTICE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on June 25, 2024 at 10:00 a.m., in Courtroom 15 – 18th Floor, located at 450 Golden Gate Ave., San Francisco, California, Defendants SEQUOIA UNION HIGH SCHOOL DISTRICT, STEPHEN EMMI and NICK MUYS (collectively “District Defendants”), pursuant to Federal Rule of Civil Procedure 12(b)(6), will and hereby do move for dismissal of the claims specified below and contained in Plaintiff’s First Amended Complaint. This motion is brought pursuant to Federal Rules of Civil Procedure (“FRCP”), Rule 12(b), subsection (6), as set forth more fully in the memorandum of points and authorities below, on the grounds that dismissal is appropriate because the First Amended Complaint fails to allege facts sufficient to state each of the claims upon which relief can be granted against the District Defendants. This motion is based on this notice, the memorandum of points and authorities, the papers and pleadings on file herein, and on such oral and documentary evidence as may be adduced at the hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT AND STATEMENT OF ISSUES TO BE DECIDED

Plaintiffs K.C., by and through his Guardian ad Litem, MYISCHA THOMPSON and D.B., by and through his Guardian ad Litem, LIBRA WHITE (“Plaintiffs”) bring this action against Defendants TOWN OF ATHERTON (“TOWN”), DAVID METZGER, DIEGO ROMERO, IGOR DAVIDOWICH, JOSHUA GATTO, DIMITRI ANDRUHA, the SEQUOIA UNION HIGH SCHOOL DISTRICT (the DISTRICT”), STEPHEN EMMI and NICK MUYS, for violations of civil rights under 42 U.S.C. Section 1983, state law torts and statutory violations arising out of two separate and distinct incidents that allegedly occurred on April 28, 2023. K.C. also asserts discrimination claims against the DISTRICT. While there are two Plaintiffs (K.C. and D.B.), only K.C. has brought claims against the DISTRICT, EMMI and MUYS (collectively “District Defendants”). The TOWN and its police officers, METZGER, ROMERO, DAVIDOWICH, GATTO and ANDRUHA, are represented by separate counsel. Therefore, only K.C.’s respective claims against the District Defendants are subject to this Motion to Dismiss.

Plaintiff’s First Amended Complaint (“FAC”) is subject to dismissal because Plaintiff K.C. fails to meet his pleading burden to state facts showing a plausible right to relief on each of the claims asserted

1 against the District Defendants. (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v.*
2 *Twombly*, 550 U.S. 544 (2007).) Specifically, dismissal of Plaintiff’s FAC is warranted because:

- 3 (1) The fourth claim for negligence is unsupported by facts to state a claim against MUYS;
- 4 (2) The fifth claim for assault and battery is unsupported by facts to state a claim against EMMI;
- 5 (3) The sixth claim for intentional infliction of emotional distress is unsupported by facts to
6 state a claim against EMMI;
- 7 (4) The seventh claim for violation of Civil Code §52.1 is unsupported by facts to state a claim
8 against EMMI;
- 9 (5) The eighth claim for violation of Civil Code §51.7 is unsupported by facts to state a claim
10 against EMMI;
- 11 (6) Plaintiff K.C.’s fifth, seventh and eighth claims for assault and battery, violations of the Bane
12 Act and Ralph Act are barred by his Failure to Comply with the Government Claims Act;
- 13 (7) The tenth and eleventh claims fail to state claims for discrimination against the DISTRICT
14 under Section 504 of the Rehabilitation Act and Title II of the ADA; and
- 15 (8) The FAC’s prayer for punitive damages against the DISTRICT is improper and
16 unsupported by the facts as to EMMI and MUYS.

17 II. FACTS ALLEGED IN THE FAC

18 Plaintiff K.C.’s FAC alleges the following facts as to the District Defendants¹:

19 A. Parties and Background

20 K.C. alleges he is a disabled minor with an intellectual disability and emotional disturbance. (First
21 Amended Complaint, Docket No. 12 (“FAC”) ¶ 7.) He alleges that due to his disability, he is entitled to
22 the legal rights and remedies set forth in the Individuals with Disabilities Act (“IDEA”) and is an
23 individual with exceptional needs pursuant to California Education Code § 56026. (*Id.*) Plaintiff K.C.
24 alleges that he has a mental impairment that substantially limits one or more major life activities within
25

26 ¹ For purposes of this Motion to Dismiss, the District Defendants have only included allegations that
27 pertain to the District Defendants and have not included allegations relating to the TOWN and TOWN
28 police officers, who are represented by separate counsel in this matter. Further, the allegations pertaining
to Plaintiff D.B. have similarly been omitted from this Motion, given that D.B. has not brought any
claims against any of the District Defendants.

1 the meaning of 34 C.F.R. § 104.3(j). (*Id.*) The DISTRICT is a public entity duly incorporated and
2 operating under existing law of the State of California and receives federal financial assistance. (FAC ¶
3 15.) Defendant STEPHEN EMMI was a vice-principal at Menlo Atherton High School (“MAHS”), a
4 public school maintained and operated by the DISTRICT. (FAC ¶ 17.) Defendant NICK MUYS was also
5 a vice-principal at MAHS during the relevant time periods alleged within the FAC. (FAC ¶ 18.)
6 DISTRICT individuals, EMMI and MUYS are sued in their individual and official capacities. (FAC ¶¶
7 17-18.) Plaintiff K.C. presented a government tort claim to the DISTRICT on October 24, 2023, which
8 was deemed rejected by operation of law on December 8, 2023. (FAC ¶ 20.)

9 The FAC alleges that Plaintiff K.C. is a 16-year-old Black male student at MAHS who
10 experiences pervasive feelings of anxiety and depression and has deficits in auditory processing, short
11 term memory, executive functioning, visual motor integration skills, and social language. (FAC ¶ 21.) He
12 alleges his impairment, at times, can cause him to exhibit signs of frustration and being overwhelmed,
13 which requires positive behavior intervention strategies and that K.C. requires consistent proactive
14 positive behavior interventions, effective coping skills, and informed de-escalation strategies. (*Id.*) K.C.
15 alleges that the DISTRICT has never provided him with an appropriate behavior intervention plan that
16 addresses his behavioral needs, nor has the DISTRICT properly trained the staff at MAHS to implement
17 positive behavior intervention strategies and employ appropriate de-escalation strategies for students with
18 mental health needs. (*Id.*)

19 The FAC alleges that K.C.’s individualized education plan (“IEP”) placed him in MAHS’s
20 Successful Transition Achieved with Responsive Support (“STARS”) program, where he attended one
21 school period per day in the STARS classroom where he received academic, behavioral, and
22 social/emotional special education support. (FAC ¶ 22.) The FAC further alleges that MAHS policy
23 provides that when a STARS student is agitated and unresponsive to adult directives, staff is encouraged
24 to immediately contact a STARS teacher for that particular student for assistance. To carry this policy
25 out, all administrators at MAHS have been given the cell phone number for each STARS teacher so they
26 may be immediately contacted when a student is dysregulated. The FAC alleges that pursuant to K.C.’s
27 IEP, school staff are not supposed to contact police in response to an emotional disturbance episode. (*Id.*)
28

B. The Incident at MAHS

On April 28, 2023, Plaintiff went to the Principal's office at MAHS to retrieve a water toy, which had been confiscated by school staff earlier that week. (FAC ¶¶ 23-24.) The FAC alleges that K.C. "politely" asked a school secretary for his water toy back, which was located behind the secretary. (FAC ¶ 24.) The FAC alleges that as the secretary was about to return the water toy to K.C., EMMI "suddenly came out of his office" and instructed the secretary not to return the toy to K.C. (*Id.*) The FAC alleges EMMI spoke to K.C. in a demeaning and confrontational manner and repeatedly told him he would not get his water toy back. (*Id.*)

The FAC alleges that K.C. asked EMMI for his water toy back multiple times but EMMI loudly stated, "Who is the adult here?" (*Id.*) It alleges that when K.C. attempted to retrieve the water toy, EMMI "forcibly grabbed the toy and physically pushed into" K.C.'s body. (*Id.*) The FAC alleges that K.C. became frustrated, emotionally distressed, and began to shout at EMMI. (*Id.*) It further alleges that at some point during the interaction, EMMI began to surreptitiously record K.C. on his cell phone rather than call a STARS teacher for assistance and failed to implement a de-escalation tactic. (*Id.*)

The FAC alleges that MUYS soon intervened and stepped in between K.C. and EMMI and that K.C., while crying, asked EMMI and MUYS to go somewhere to discuss the situation but MUYS said "No." (FAC ¶ 25.) It further alleges that MUYS and EMMI then ordered K.C. to leave the office immediately while K.C. was in an agitated state. (*Id.*) The FAC alleges that K.C. then turned around, walked out of the office, and headed towards the bus stop. (*Id.*) The FAC alleges that while K.C. was in the office, one of the school secretaries called the police and that during the 911 call, the caller informed the operator that K.C. was a "mental health student" who was "easily triggered." (*Id.*) The FAC alleges, upon information and belief, that all MAHS administrators and staff who were present in the office during the incident were aware that K.C. qualified for an IEP due to an emotional disturbance. (*Id.*) The FAC alleges that while at the bus stop, K.C. encountered TOWN officers, whom he claims used unwarranted and excessive force against him. (FAC ¶¶ 26-28.)

C. Post-Incident

The FAC alleges that immediately following the incident, MAHS Principal, Karl Losekoot,

1 convened a meeting among staff and affirmed that the actions of school administration on April 28th were
2 appropriate and if the same circumstances were to arise in the future, the police should be called. (FAC ¶
3 33.) It alleges that at some point prior to May 8, 2023, an unknown employee of the DISTRICT played
4 the surreptitious recording captured by EMMI to the DISTRICT Board of Trustees. (*Id.*)

5 The FAC further alleges that on May 8, 2023, the DISTRICT convened a Manifestation
6 Determination meeting with K.C.'s IEP team to determine if the conduct on April 28, 2023, was caused
7 by or had a direct and substantial relationship to K.C.'s disabilities, or if the conduct resulted from
8 MAHS's failure to implement K.C.'s IEP. (*Id.*) It alleges that after the meeting concluded, K.C.'s legal
9 representatives received K.C.'s police report from the Atherton Police Department, which included
10 signed and dated witness statements from various school administrators, including EMMI and MUYS.
11 (*Id.*) It alleges the police report also included a Person Summary Report that contained K.C.'s personal
12 identifying information, including student ID, contact information and a Behavior Detail Report that
13 detailed his behaviors exhibited at MAHS since 9th grade. (*Id.*) The FAC alleges that K.C.'s mother,
14 never provided consent for the DISTRICT to release K.C.'s educational records to the Atherton Police
15 Department, and no court order had been issued compelling such release. (*Id.*) It alleges that the Detail
16 Report was provided to Defendant ANDRUHA by an unknown "school adminitrat[or]." (FAC ¶ 34.)

17 III. LEGAL ARGUMENT

18 D. The FAC Fails to State Sufficient Facts and is Subject to Dismissal

19 Federal Rules of Civil Procedure, Rule 8(a)(2) requires that a pleading present a "short and plain
20 statement of the claim showing that the pleader is entitled to relief." **A plaintiff suing multiple**
21 **defendants "must allege the basis of his claim against each defendant** to satisfy Federal Rule of Civil
22 Procedure 8(a)(2), which requires a short and plain statement of the claim to put defendants on sufficient
23 notice of the allegations against them." [Emphasis added.] (*Gauvin v. Trombatore*, 682 F.Supp. 1067,
24 1071 (N.D.Cal.1988); *Reyes ex rel. Reyes v. City of Fresno*, No. CV F 13-0418 LJO SKO, 2013 WL
25 2147023, at *4 (E.D. Cal. May 15, 2013).) "Specific identification of the parties to the activities alleged
26 by the plaintiffs is required ... to enable the defendant to plead intelligently." (*Reyes ex rel. Reyes*, 2013
27 WL 2147023, at *4.)

1 FRCP Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed me
 2 accusation...**A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the**
 3 **elements of a cause of action will not do.’**...Nor does a complaint suffice if it tenders ‘naked assertions’
 4 devoid of ‘further factual enhancement.’” [Emphasis added.] (*Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S.
 5 at 555.) “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as
 6 true, to ‘state a claim to relief that is plausible on its face.’ ... **A claim has facial plausibility when the**
 7 **plaintiff pleads factual content that allows the court to draw the reasonable inference that the**
 8 **defendant is liable for the misconduct alleged.** ... The [allegations must show] more than a sheer
 9 possibility that a defendant has acted unlawfully. ... Where a complaint pleads facts that are ‘merely
 10 consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of
 11 ‘entitlement to relief.’” [Emphasis added.] (*Iqbal*, 556 U.S. at 678; *Moss v. U.S. Secret Servs.*, 572 F.3d
 12 962, 969 (9th Cir. 2009).) “**Threadbare recitals of the elements of a cause of action, supported by**
 13 **mere conclusory statements, do not suffice.** ... Rule 8 ... does not unlock the doors of discovery for a
 14 plaintiff armed with nothing more than conclusions.” [Emphasis added.] (*Iqbal*, 556 U.S. at 678-679.)

15 [A]legations in a complaint ... may not simply recite the elements of a
 16 cause of action, but must contain sufficient allegations of underlying facts
 17 ... the factual allegations that are taken as true must plausibly suggest an
 18 entitlement to relief, such that it is not unfair to require the opposing party
 to be subjected to the expense of discovery and continued litigation.

19 (*Eclectic Prop.’s East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014); *AE ex rel.*
 20 *Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th
 21 Cir. 2011).) Further, “leave to amend may be denied...if amendment of the complaint would be futile.”
 22 (*Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir.
 23 2000).) Here, the FAC fails to state facts sufficient to state the following claims: the fourth claim against
 24 MUYS; the fifth, sixth, seventh and eighth claims against EMMI; and the tenth and eleventh claims against
 25 the DISTRICT, and are therefore subject to dismissal. Argument and authorities on these points follow.

26 **B. The Fourth Claim for Negligence as to MUYS in Unsupported By the Facts**

27 To state a claim for negligence under California law, a plaintiff must allege: 1) a duty of care; 2)
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1 breach of that duty; 3) injury resulting from that breach; and 4) compensable damages. (See, e.g.,
2 *Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 129.)

3 The FAC alleges that Vice Principal MUYS “intervened and stepped in” between K.C. and
4 EMMI during their interaction over the water toy, that MUYS said “No” when K.C. asked him if they
5 could discuss the situation elsewhere and that MUYS told K.C. to leave the office. As to the negligence
6 claim specifically, the FAC alleges that EMMI and MUYS had “a heightened duty of care given their
7 special relationship with minor K.C., a student attending their school. This heightened duty of care not
8 only requires both to avoid causing unnecessary physical harm and distress when interacting with a
9 minor with disabilities, but to use reasonable measures to protect students from foreseeable injury at the
10 hands of third parties acting negligently or intentionally.” (FAC ¶ 57.) The FAC states that “Defendants”
11 had notice of K.C.’s mental impairment, “Defendants” injured K.C. when interacting with him and that
12 the “wrongful conduct of Defendants” failed to comply with the applicable standard of care. (*Id.*)

13 No facts are alleged to support a negligence claim against MUYS. The FAC fails to identify specific
14 conduct attributable to MUYS such that the Court or MUYS could determine whether MUYS breached any
15 duty of care owed to K.C. and how any such breach caused injury to K.C. Further, the negligence claim
16 cannot be premised on the conduct of others, and thus the multiple allegations pertaining to “Defendants” are
17 improper for purposes of pleading a negligence claim that is specific to MUYS. (Govt. Code § 820.8.)

18 C. The Fifth Claim For Assault And Battery as to EMMI Is Unsupported By Facts

19 Plaintiff’s claim for assault and battery is unsupported by facts to state this claim against EMMI.
20 An assault is “a demonstration of an unlawful intent by one person to inflict immediate injury on the
21 person of another then present.” (*Lowry v. Standard Oil Co. of Cal.*, 63 Cal.App.2d 1, 6-7 (1944); *So v.*
22 *Shin*, 212 Cal.App.4th 652, 668 (2013).) Words alone do not amount to an assault. (*Tromblinson v.*
23 *Nobile*, 103 Cal.App.2d 266, 269 (1951); *Plotnik v. Meihaus*, 208 Cal.App.4th 1590, 1604 (2012).) “The
24 essential elements of a cause of action for assault are: (1) defendant acted with intent to cause harmful or
25 offensive contact, or threatened to touch plaintiff in a harmful or offensive manner; (2) plaintiff
26 reasonably believed [he] was about to be touched in a harmful or offensive manner or it reasonably
27 appeared to plaintiff that defendant was about to carry out the threat; (3) plaintiff did not consent to
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1 defendant's conduct; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in
2 causing plaintiff's harm." (*So v. Shin* (2013) 212 Cal.App.4th 652, 668–669.)

3 Battery "is any intentional, unlawful and harmful contact by one person with the person of
4 another. (*Ashcraft v. King*, 228 Cal.App.3d 604, 611 (1991).) In California, the elements of battery are:
5 "(1) defendant touched plaintiff, or caused plaintiff to be touched, with the intent to harm or offend
6 plaintiff; (2) plaintiff did not consent to the touching; (3) plaintiff was harmed or offended by defendant's
7 conduct; and (4) a reasonable person in plaintiff's position would have been offended by the touching."
8 (*Lawrence v. City & Cty. of San Francisco*, 258 F. Supp. 3d 977, 998 (N.D. Cal. 2017) (quoting *So v.*
9 *Shin*, 212 Cal. App. 4th 652, 669 (2013)).

10 As to the assault claim, the FAC alleges, "Defendants METZGER, ROMERO, DAVIDOVICH,
11 GATTO, and EMMI acted with intent to cause harmful or offensive contact or threatened to touch
12 Plaintiff K.C. in a harmful or offensive manner. Plaintiff K.C. reasonably believed he was about to be
13 touched in a harmful or offensive manner. It reasonably appeared to Plaintiff K.C. that Defendants were
14 about to carry out the threat. Plaintiff K.C. did not consent to Defendants' harmful contact." Defendants
15 cannot be liable for the conduct of anyone else, including the TOWN officers and Plaintiff must state
16 facts showing the individual liability of each defendant. (Govt. Code §820.2.)

17 While the FAC recites the elements of an assault claim, there are no specific facts supporting any
18 such conduct on behalf of EMMI. The FAC states no facts that EMMI, in his brief dealing with Plaintiff
19 K.C. over the water toy, acted with any intent to cause harmful or offensive contact with K.C. or threaten
20 same. The FAC also does not allege that EMMI intentionally threatened to touch K.C. in a harmful or
21 offensive manner, nor does it allege that K.C. reasonably believed he was about to be touched in a
22 harmful or offensive manner specifically by EMMI or that it reasonably appeared to him that EMMI was
23 about to carry out the threat. Instead, the facts demonstrate that EMMI, as Vice Principal, interacted with
24 a student over a disputed matter: the return of a water gun that had been confiscated by MAHS staff
25 earlier that week. While the FAC continuously states that EMMI "pushed into" Plaintiff K.C. as K.C.
26 attempted to retrieve his water toy, these allegations do not, however, show that EMMI committed a
27 "demonstration of an unlawful intent by one person to inflict immediate injury on the person of another
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1 then present.” (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1603-04.)

2 In *Plotnik*, defendants approached the plaintiff “aggressively” and threatened to beat and kill him.
3 (*Id.* at 1604.) The court held that, while the defendants’ “actions and words were aggressive and
4 threatening,” they did not commit an act that “could or was intended to inflict immediate injury on
5 Plotnik.” (*Id.*) The defendants in *Plotnik* did not display a weapon, take a swing at him, or otherwise
6 attempt to touch him. (*Id.*) Here, there are no facts in the FAC suggesting EMMI committed any acts that
7 “could or was intended to inflict immediate injury” on K.C. and therefore the facts plead are insufficient
8 to state a claim for assault as to EMMI.

9 As to the battery claim, the FAC alleges that battery occurred when EMMI “pushed into” Plaintiff
10 K.C. while K.C. tried to reach to retrieve his water toy from the school secretary. Putting aside the
11 apparent vagueness of the term “pushed into,” there are no facts in the FAC suggesting that any physical
12 contact by EMMI, if any, was intentional or that Plaintiff was harmed by the contact. Thus, the factual
13 allegations of the FAC are insufficient to support assault or battery claims against EMMI.

14 **D. The Sixth Claim For Intentional Infliction Of Emotional Distress against EMMI is**
15 **Unsupported by the Facts**

16 Under California law, the elements of a tort claim for intentional infliction of emotional distress
17 are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless
18 disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme
19 emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s
20 outrageous conduct. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) “Conduct to be
21 outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized society.” *Id.*
22 Conduct is extreme and outrageous when it is of a nature which is especially calculated to cause, and
23 does cause, mental distress. Liability does not extend to mere insults, indignities, threats, annoyances,
24 petty oppressions, or other trivialities. (*Fisher v. San Pedro Peninsula Hosp.*, 214 Cal.App.3d 590, 617
25 (1989).) The conduct must be more than “intentional and outrageous. It must be conduct directed at the
26 plaintiff....” (*Christensen*, 54 Cal.3d at 903.) The conduct also must be “intended to inflict injury or
27 engaged in with the realization that injury will result.” (*Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th
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1 965, 1001 (1993).)

2 The FAC states no facts showing outrageous conduct by EMMI, or any facts showing intentional
 3 or reckless disregard by EMMI of the probability of causing severe emotional distress to Plaintiff K.C.
 4 The FAC states only EMMI’s conduct in “confronting, demeaning, and physically pushing into Plaintiff
 5 K.C., despite being aware of Plaintiff K.C.’s disabilities” after Plaintiff K.C. asked to retrieve his water
 6 toy was “extreme, unreasonable, and outrageous.” (FAC ¶ 67.) The FAC further states, “In engaging in
 7 the above-described conduct, **Defendants** intentionally ignored or recklessly disregarded the foreseeable
 8 risk that Plaintiffs would suffer extreme emotional distress as a result.” [Emphasis added.] (FAC ¶ 69.)
 9 The allegations of the FAC fail to show unreasonable conduct by EMMI, much less, outrageous conduct
 10 or intentional or reckless disregard of causing severe emotional distress as to Plaintiff K.C. Moreover,
 11 K.C.’s generalized allegations relating to “Defendants” are again improper, as EMMI is not liable for the
 12 conduct of the TOWN law enforcement personnel or anyone else. (Govt. Code § 820.8.) The intentional
 13 infliction of emotional distress claim is unsupported by facts to state a claim against EMMI.

14 **E. The Seventh Claim For Relief For Violation Of Civil Code §52.1 against EMMI Is**
 15 **Meritless**

16 Plaintiff K.C.’s seventh claim as to EMMI is subject to dismissal on the grounds that the FAC
 17 fails to state facts to support a claim for violation of §52.1. Section 52.1 proscribes interference or
 18 attempted interference by any person by threats, intimidation or coercion with rights secured by the
 19 Constitution or laws of the United States. (§52.1(a); *Austin B. v. Escondido Union Sch. Dist.*, 149
 20 Cal.App.4th 860, 883 (2007); *Barsamian v. City of Kingsburgh*, 597 F.Supp.2d 1054, 1057 (E.D. Cal.
 21 2009); *Arres v. City of Fresno*, 2011 WL 284971 at *25 (E.D. Cal. 2011).) **It does not extend to**
 22 **regular tort actions.** (§52.1(a); *Shoyoye v. Cnty. of Los Angeles*, 203 Cal.App.4th 947 (2012); *Meyers v.*
 23 *City of Fresno*, 2011 WL902115 (E.D. Cal. 2011); *Venegas v. Cnty. of Los Angeles*, 32 Cal.4th 820, 843
 24 (2004).) To state a claim under §52.1, “Plaintiff **must plead facts showing violence or intimidation by**
 25 **threat of violence by the accused defendant.**” (*Cabesuela v. Browning-Ferris Indus.*, 68 Cal.App.4th
 26 101, 111 (1998); *see also Wintaro v. America Electronics Components, Inc.*, 274 F.3d 1276 (2001).
 27 Speech alone is insufficient... [unless] the speech itself...threaten[s] violence and places the victim in
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1 reasonable fear of violence. Cal. Civ. Code § 52.1(j).” [Emphasis added.] (*Clifford v. Regents of Univ. of*
 2 *California*, 2:11–CV–02935–JAM–GGH, 2012 WL 1565702, *9 (E.D. Cal. Apr. 30, 2012), *aff’d*, 584
 3 F.App’x 431 (9th Cir. 2014); *Sandoval v. Cnty. of Sonoma*, 11-CV-05817-TEH, 2016 WL 612905, at *2
 4 (N.D. Cal. Feb. 16, 2016).) To withstand dismissal, “a plaintiff must allege that the defendant engaged in
 5 violence or threat of violence.” (*Gottschalk v. City & Cnty. of San Francisco*, 964 F.Supp.2d 1147, 1163
 6 (N.D. Cal. 2013), *citing Corales v. Bennett*, 567 F.3d 554, 564, 570-571 (9th Cir. 2009); §52.1(j).)

7 Here, the FAC states no facts showing that EMMI used violence or threatened to use violence
 8 against Plaintiff K.C. *at any point*. It alleges only that EMMI grabbed the water toy (which Plaintiff was
 9 not holding), when K.C. *attempted* to retrieve it. It further alleges that EMMI “physically pushed into”
 10 K.C.’s body, *not* that EMMI *pushed* K.C. No facts are alleged showing any violence or threats of
 11 violence by EMMI and the allegations are wholly inadequate to support a §52.1 claim against EMMI.
 12 Further, the FAC alleges that EMMI “interfered with and demonstrated a reckless disregard for Plaintiff
 13 K.C.’s right to be protected from bodily restraint, harm, or personal insult by physically blocking and
 14 pushing into Plaintiff K.C. when Plaintiff K.C. tried to reach to retrieve his water toy from the school
 15 secretary.” (FAC ¶ 75.) Factually unsupported conclusions and recitation of the elements of a §52.1
 16 claim are insufficient.

17 Further, while the FAC contains allegations of alleged violence regarding the TOWN officers as
 18 to the *separate and subsequent* incident, it fails to attribute any specific conduct to EMMI who was not
 19 even present during the incident involving officers, as Plaintiff K.C. had already left the office and school
 20 premises when that interaction occurred. Notwithstanding, EMMI cannot be vicariously liable for the
 21 alleged misconduct of others as a matter of law. (Govt. Code § 820.8.) The FAC fails to state a claim for
 22 violation of §52.1 against EMMI and the seventh claim should be dismissed without leave to amend.

23 **F. The Eighth Claim For Relief For Violation Of Civil Code §51.7 against EMMI Is**
 24 **Meritless**

25 The Ralph Act provides that “[a]ll persons within the jurisdiction of this state have the right to be
 26 free from any violence, or intimidation by threat of violence, committed against their persons or property
 27 because of” their disability (Civil Code Sections 51(b), 51.7.) For a Ralph Act claim, Plaintiff must
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1 plead: (1) That defendant committed a violent act against Plaintiff; (2) That a substantial motivating
 2 reason for defendant's conduct was defendant's perception of Plaintiff's protected status; (3) That
 3 Plaintiff was harmed; and (4) That defendant's conduct was a substantial factor in causing Plaintiff's
 4 harm. (Civil Code section 51.7; CACI 3063.)

5 The FAC alleges that EMMI "push[ed] into Plaintiff K.C. when Plaintiff K.C. tried to retrieve his
 6 water toy from the school secretary." (FAC ¶ 80.) It further alleges, upon information and belief, that
 7 EMMI's conduct was motivated by prejudice against Plaintiff K.C. because of K.C. mental impairment."
 8 (*Id.*) However, the factual allegations are again insufficient. Plaintiff K.C. cannot be allowed to proceed on
 9 this claim as to EMMI based solely on qualified allegations "on information and belief." The FAC fails to
 10 state a claim for violation of §51.7 against EMMI and the eighth claim for relief should be dismissed without
 11 leave to amend.

12 **G. Plaintiff's Fifth, Seventh and Eighth Claims for Assault and Battery and Violations of**
 13 **the Bane Act and Ralph Act are Barred by His Failure to Comply with the Government**
Claims Act.

14 As an alternate basis for dismissal, Plaintiff's fifth, seventh and eighth causes of action for assault
 15 and battery and violation of the Bane Act and Ralph Act are barred by his failure to comply with the
 16 claim filing requirements of the Government Claims Act ("GCA"). Claims for damages under Cal. Civ.
 17 Code § 52.1 are conditioned on compliance with the claim presentation requirements of the Claims Act.
 18 (*Gatto v. Cnty. of Sonoma*, 98 Cal.App.4th 744, 763, 765 (2002).) Further, it is well settled that "each
 19 cause of action must have been reflected in a timely claim." (*Fall River Joint Unified Sch. Dist. v. Sup.*
 20 *Court*, 206 Cal.App.3d 431, 434 (1998); *Munoz v. State of Cal.*, 33 Cal.App.4th 1767, 1776 (1995).)
 21 "[T]he factual circumstances set forth in the written claim must correspond with the facts alleged in the
 22 complaint; even if the claim were timely, the complaint is vulnerable to a demurrer or motion for
 23 judgment on the pleadings if it alleges a factual basis for recovery which is not fairly reflected in the
 24 written claim." (*Fall River, supra*, at 434; *Turner v. State of Cal.*, 232 Cal.App.3d 883, 888 (1991).)
 25 "Courts have consistently interpreted the Tort Claims Act to bar actions alleging matters not included in
 26 the claim filed with the public entity." (*State of Cal. ex rel. Dept. of Transp. v. Superior Court*, 159
 27 Cal.App.3d 331, 336 (1984).)

1 Plaintiff K.C.’s Claim presented to the DISTRICT on or about October 24, 2024 included no
2 reference to assault and battery, §52.1 or §51.7 claims against EMMI or factual allegations to assert
3 same. (See Plaintiff’s K.C.’s Claim Form attached to the District Defendants’ Request For Judicial
4 Notice (“RFJN”) as Exhibit A.) K.C.’s Claim states that the conduct of DISTRICT employees, including
5 EMMI, include “negligence, negligent hiring, negligent supervision, defamation, and intentional
6 infliction of emotional distress.” Notably, none of the facts set forth in K.C.’s Claim reflect allegations of
7 any physical conduct by EMMI, let alone any violence or threats of violence by EMMI. In fact, the
8 allegations set forth in K.C.’s Claim are squarely inconsistent with those alleged in the FAC as to
9 EMMI’s interaction with Plaintiff K.C. K.C.’s Claim states that EMMI “physically blocked K.C. from
10 retrieving his ‘water toy,’ causing K.C. to bump into him” and that K.C. shouted at EMMI in the main
11 office. [Emphasis added.] (RFJN, Exhibit A, p. 3, paragraph 2.) Thus, the claim presented did not fairly
12 reflect claims of assault and battery, violations of Civil Code Sections 52.1 and 51.7 as to EMMI and
13 these claims do not correspond with the claims and factual circumstances set forth in his written claim.
14 Plaintiff’s K.C.’s claims for assault and battery, Civil Code Sections 52.1 and 51.7 against EMMI are
15 therefore barred by K.C.’s failure to file a timely claim.

16 **H. The Tenth and Eleventh Causes of Action Fail to State Claims for Discrimination**

17 Plaintiff K.C.’s tenth and eleventh causes of action allege claims for discrimination under Section
18 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, respectively. Claims
19 under both Section 504 of the Rehabilitation Act and Title II of the ADA can be analyzed together
20 because they are based on the same standard. (*Douglas v. Cal. Dep’t of Youth Auth.*, 285 F.3d 1226, n.3
21 (9th Cir. 2002) [“cases interpreting either [Section 504 or the ADA] are applicable and
22 interchangeable”], quoting *Allison v. Dep’t of Corr.*, 94 F.3d 949, 497 (9th Cir. 1996).)

23 Title II of the ADA provides that “no qualified individual with a disability shall, by reason of
24 such disability, be excluded from participation in or be denied the benefits of the services, programs, or
25 activities of a public entity, or be subjected to discrimination by any such entity.” (42 U.S.C. § 12132.)
26 The plaintiff alleging discrimination bears the burden of proving that he or she is disabled within the
27 meaning of the Act. (*Wong v. Regents of the University of California*, 410 F.3d 1052, 1063 (2005).) In
28

1 addition, the plaintiff must show that the discrimination was intentional and “by reason of” her disability.
 2 (See 42 U.S.C. § 12132; 29 U.S.C. § 794; *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138–39 (9th Cir.
 3 2001); see also *E.R.K. ex rel. R.K. v. Haw. Dep’t of Educ.*, 728 F.3d 982, 992 (9th Cir. 2013) (holding, in
 4 part, that a student must demonstrate that he or she was either excluded from participation in or denied
 5 benefits of public services, programs, or activities by reason of his or her disability).)

6 In order to state a claim under Title II and Section 504, a plaintiff must allege that: (1) he is an
 7 individual with a disability under the Act; (2) he is “otherwise qualified” to participate in or receive the
 8 benefit of the entity’s services, programs, or activities, *i.e.*, he meets the essential eligibility requirements
 9 of the entity, with or without reasonable accommodation; (3) he was either excluded from participation in
 10 or denied the benefits of the entity’s services, programs, or activities, or was otherwise discriminated
 11 against by the public entity **solely by reason of his disability**; and (4) the entity is a public entity (for the
 12 ADA claim) or receives federal financial assistance (for the Rehabilitation Act claim). (*Zukle v. Regents*
 13 *of University of California*, 166 F.3d 1041, 1045 (9th Cir. 1999).)

14 The FAC alleges that Plaintiff K.C. is a qualified individual with a disability and that the
 15 DISTRICT discriminated against K.C. by failing to provide an appropriate education (FAC ¶¶ 88-89.) It
 16 further alleges, in a conclusory fashion, that the discrimination “was based on” K.C.’s intellectual
 17 disability and emotional disturbance” and that the DISTRICT discriminated against K.C. by failing to
 18 provide him with an appropriate education. (FAC ¶¶ 90-91, 100, 102.) However, despite the FAC’s
 19 conclusory allegations to the contrary, the FAC fails to allege that any alleged discriminatory acts by the
 20 DISTRICT against K.C. were because of, or by reason of, his disability. Therefore, Plaintiff K.C.’s tenth
 21 and eleventh causes of action for discrimination must be dismissed as to the DISTRICT.

22 **I. Plaintiff’s Prayer For Punitive Damages Against The DISTRICT Is Improper and**
 23 **Unsupported by the Facts as to EMMI and MUYS.**

24 Plaintiff’s FAC contains a prayer for punitive and exemplary damages as to all defendants,
 25 including the DISTRICT, EMMI and MUYS (FAC 26:19-21.) Punitive damages may not be awarded
 26 against California public entities. (Cal. Gov. Code § 818; see also *Los Angeles Unified School Dist. v.*
 27 *Superior Court* (2021) 64 Cal.App.5th 549, 554 (“[S]ection 818 means a plaintiff who alleges injury
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1 caused by a public entity may be entitled to actual damages for that injury, but not punitive damages.
2 [citation]”) [emphasis in original; quotation marks removed].) Here, it is undisputed that the DISTRICT
3 is a public entity and is thus immune to any claims for punitive damages. (See FAC ¶ 15.)

4 To state a claim for punitive damages against individuals, a plaintiff “must include allegations
5 that the defendant has been guilty of oppression, fraud or malice.” (*Turman v. Turning Point of Central*
6 *California, Inc.* (2010) 191 Cal.App.4th 53, 63.) Oppression means conduct subjecting persons to “cruel
7 and unusual hardship in conscious disregard of that person’s rights. (*Id.*) Fraud is “an intentional
8 misrepresentation, deceit, or concealment of a material fact” intended to deprive someone “of property or
9 legal rights or otherwise causing injury.” (*Id.*) Malice constitutes conduct intended “to cause injury to
10 plaintiff, or despicable conduct . . . with a willful and conscious disregard for the rights or safety of
11 others.” (*Id.*)

12 As for the individual DISTRICT defendants, EMMI and MUYS, the FAC’s allegations do not
13 rise to the level of constituting any of the required elements described above. Plaintiff K.C.’s allegations
14 about EMMI surround his brief interactions with K.C. in the MAHS office over a water toy. The FAC
15 alleges that EMMI “pushed into” K.C., as K.C. attempted to retrieve a water toy that he was told could
16 not be released to him. Plaintiff’s only allegations regarding MUYS are that he intervened between K.C.
17 and EMMI to attempt to diffuse the situation, that MUYS said “No” when K.C. asked to discuss the
18 situation elsewhere and that MUYS asked K.C. to leave the office. None of these allegations rise to the
19 high bar required to show oppression, fraud, or malice to award punitive damages against either of them.

20 Therefore, Plaintiff K.C.’s claim for punitive damages against the DISTRICT is barred as a
21 matter of law, and Plaintiff failed to sufficiently plead allegations meriting an award of punitive damages
22 against EMMI or MUYS. Plaintiff’s K.C.’s claims for punitive damages against the DISTRICT, EMMI
23 and MUYS should be dismissed with prejudice.

24 IV. CONCLUSION

25 The District Defendants respectfully submits that their Motion to Dismiss Plaintiffs’ First
26 Amended Complaint should be granted.

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Dated: May 10, 2024

BERTRAND, FOX, ELLIOT, OSMAN & WENZEL

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