PROPOSED TENTATIVE

The court has detailed the nature of this litigation and the parties in its October 29, 2024, order granting plaintiff's motion for relief from filing a timely claim with the government entity under the Government Claims Act. The substance of that detailed order will not be recounted here. Suffice it to say that the court in that order directed plaintiff, pursuant to *Wilson v. People Ex Rel. Dept. of Public Work*s (1969) 271 Cal.App.2d 665 to submit an amended pleading within 30 days of today's hearing, indicating the nature of today's order and the fact it authorized all causes of action associated with the September 28, 2023, incident, per Government Code section 946.6, subdivision (f). The court exhorted plaintiff to use the opportunity to distinguish between those causes of action that are predicated on the September 28, 2023, incident, those causes of action predicated on the March 6, 2024, incident, and those causes of action, if any, predicated on both. Plaintiff was also urged to remedy other defects in the operative pleading, correcting conflicts between the causes of action listed on the face sheet of the operative pleading and those detailed in the body of the complaint, as well as any duplicative numbered headings in the body of the complaint.

Plaintiff filed a first amended complaint (FAC) on November 25, 2024, advancing six causes of action. Because of the nature of both motions on calendar, the court will detail the allegations in the FAC. The FAC predicates all causes of action on either one or both of two incidents that occurred on school grounds. The first incident stemmed from plaintiff's suspension on September 28, 2023, which was based on "a photo taken during a pizza party at a private residence off campus on a weekend. That photo was of [plaintiff] playing with his friends and holding a plastic toy gun with an orange tip. The party was supervised by adults who allowed the kids to play with the toy gun. An unknown individual showed the photo to Los Olivos Elementary School District administrator Ray Vasquez, who decided to punish Plaintiff (for legal activities taking place on a weekend and off school property) by suspending him for one day from school and searching his backpack and locker for two weeks. . . ." (Hereafter, Incident One.)

The second incident occurred on March 6, 2024, when on the boys' "restroom mirror in the Los Olivos Elementary School, there were death threats written against Plaintiff and two of his friends. The death threats were from a student by the name of [H.R.] against Plaintiff. [H.R.] was threatening Plaintiff F.M. by writing on the boy's restroom mirror that '[F.M] will be shot.' Plaintiff F.M. was scared, feared for his life, and hid in another building. Defendant Vazquez, the "Principal and Superintendent of the school, did not notify the authorities or take necessary actions to protect Plaintiff F.M. when he was notified of the death threats against the Plaintiff, a minor. [H.R.] was only suspended for a few days and returned to the same classroom with Plaintiff. As a result of the death threats and remaining in the same classroom with H.R. Plaintiff sustained mental and emotional injuries, fear of returning to school, and mental anguish." (Hereafter, Incident Two.)

Defendant generally demurs to all six causes of action as advanced in the FAC, and has filed under separate cover a motion to strike. Plaintiff has filed opposition to each motion, and defendant has filed separate replies. All briefing has been read.

The court will explore each motion separately, including the relevant legal background and then the merits, starting with the demurrer and finishing with the motion to strike. The court will conclude with a summary of its conclusions.

A) Demurrer

i) First and Second Causes of Action

In his first cause of action predicated on title 42 U.S.C. sections 1983 and 1988 (alleged against all defendants, including defendants Los Olivos School District and Mr. Ray Vasquez in its/his official capacity), plaintiff claims that as to "Incident One" (i.e., his September 28, 2023, suspension), there was a violation of the Fourth and Fourteenth Amendment to the federal Constitution. (¶ 17.) With regard to the Fourteenth Amendment, plaintiff relies on *Goss v. Lopez* (1975) 419 U.S. 565; as to the Fourth Amendment violation, plaintiff claims his person and backpack were searched "for two weeks without rhyme or reason." The second cause of action involves the same facts as alleged in the first cause of action per Incident One, but advances direct violations of the Fourteenth and Fourth Amendments of the federal Constitution (i.e., advanced as freestanding constitutional torts unencumbered by title 42 U.S.C. section 1983). With regard to the second cause of action plaintiff describes the parties as "the District, Vasquez *in his individual* and official capacity, and Does 1 through 25, inclusive . . . " (Italics added.)

Defendants advance two challenges to these two causes of action. First, they claim that the only protections plaintiff can advance in association with a Fourteenth Amendment violation (through the prism of 1983 or otherwise) involve procedural due process, not substantive due process, and plaintiff has not alleged a violation of procedural due process. (See, e.g., *Granowitz v. Redlands Unified School Dist*. (2003) 105 Cal.App.4th 349. 358, citing *C.B. by and Through Breeding v. Driscolli* (11th Cir. 1996) 82 F.3d 383, 387 [a school suspension is an executive decision that does not implicate rights of substantive due process if 'proper procedural protections are afforded"].) Second, defendant claims that the second cause of action based on violations of the Fourth and Fourteenth Amendments of the federal Constitution are duplicative of the first cause of action.

Title 42 U.S. C. section 1983 "creates a cause of action in favor of 'the party injured' against '[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any ... person ... to the deprivation of any rights ... secured by the Constitution and laws....' (42 U.S.C. § 1983 [hereafter, section 1983])." (*County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 297) There are two essential elements of a claim advanced through section 1983: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States. (*Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1402.)

The court sustains defendant's demurrer to the first cause of action, albeit not for reasons articulated by defendants or addressed by plaintiff, ***without*** leave to amend. Defendant is the Los Olivos School District. Under the authority of *Kirchmann v. Lake Elsinore Unified School Dis*.

(2000) 83 Cal.App.4th 1098 and progeny, a school district is immune from suit under section 1983 as an arm of the state, which is not considered a "person" under the statutory provision., and is thus immune. (*Id*. at p. 1115 [District shared the state's immunity from suit under section 1983, and the trial court properly sustained the demurrer]; see also *McAllister v. Los Angeles Unified School Dist.* (2013) 216 Cal.App.4th 1198, 1207.) Further, it appears plaintiff is suing defendant Vazquez in the first cause of action in his official capacity ***only.*** Such suits are also treated as ones against the state, and thus are also subject to immunity per 1983 under the same rationale. (*McAllister v. Los Angeles Unified School Dist.. supra*, 216 Cal.App.4th at p. 1208 [an official sued in his official capacity is not subject to liability under section 1983].) Leave to amend is denied under the authority of *Kirchmann* and *McAllister*, cases not cited by either party.

The court sustains the demurrer to the second cause of action, both with *and* without leave to amend, also for reasons not discussed by either party. It is true, as our state high court has observed, that the United States Supreme Court has considered numerous cases in which plaintiffs have sought money damages under a constitutional cause of action premised upon the asserted violation of various federal constitutional provisions, including the Fourth and Fourteenth Amendments. (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 308, citing *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388.) But there is ***no*** authority for the proposition that plaintiff can sidestep the immunity provisions of section 1983 and sue defendant Los Olivos School District directly (as it is considered an arm of the state) for a federal constitutional tort predicated on violations of the Fourth and Fourteenth Amendments, in the same way as contemplated by *Bivens* and progeny. Put another way, plaintiff has failed to cite to ***any authority*** that allows him to advance a freestanding constitutional tort cause of action against defendant school district outside the context of section 1983, predicated on *Bivens*. (See, e.g., *Martinez v. City of Los Angeles* (9th Cir. 1998) 141 F.3d 1373, 1383.[1]) For this reason, the court sustains the demurer to the second cause of action *without leave to amend* as to defendant Los Olivos School District.

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[1] As was observed by the Ninth Circuit Court of Appeals in *Martinez*, the United States Supreme Court recognized that claims against federal agents for violations of the Fourth Amendment may be implied directly under the federal Constitution where no statute specifically creates a remedy, citing *Bivens*. However, "the Court has declined to create a *Bivens* remedy where 'Congress has provided what it considers adequate remedial mechanisms for constitutional violations . . . . [Citation.] Here, there is a statute which creates a remedy for constitutional violations *by state actors* – section 1983. . . . [F]or these reasons, we have held that a plaintiff may not sue a state defendant [or its functional equivalent here, the school district] directly under the Constitution where section 1983 provides a remedy, even if that remedy is not available to the plaintiff. . . ." (*Martinez, supra*, 141 F.3d at p. 1383, italics added; see also *Casa Bella Luna, LLC v. Government of U.S. Virgin Islands* (D.V.I., Sept. 30, 2024, No. 3:22-CV-0015) 2024 WL 4347767, at *10 [relevant to the instant case, the Ninth Circuit has declined to extend *Bivens* to allow direct constitutional claims against state actors in order to avoid the limitations on §1983 actions].) The court finds this line of reasoning persuasive in the present context; the court also applies this reasoning to bar any freestanding constitutional tort claim advanced against defendant Vazquez with regard to the second cause of action based on Mr. Vazquez's *official capacity*, in line with the first cause of action.

The court, however, sustains the demurrer as to the second cause of action ***with*** leave to amend as to individual defendant Ray Vazquez, but only with the following detailed explanations in mind. Plaintiff advances the second cause of action against defendant Ray Vazquez in both his official ***and*** personal/individual capacity, and the latter allegation makes the cause of action against Mr. Vazquez different. In saying this, plaintiff cannot advance a freestanding constitutional tort claim per *Bivens* against Mr. Vazquez in his official capacity (as he has done) for the very same reasons he cannot do so with regard to defendant Los Olivos School District; he can, however, sue Mr. Vazquez in his individual capacity, but only if plaintiff reconfigures the cause of action to advance a Fourth and/or the Fourteenth Amendment constitutional violation *as part of a section 1983 cause of action (not a freestanding constitutional tort), for only in that vein does relief remain available to plaintiff.* [2] It is settled that plaintiff can advance a section 1983 cause of action against an individual "state" official (or its functional equivalent) when that individual is not sued in official capacity ***but in his or her individual or personal capacity***. (*McAllister v. Los Angeles Unified School Dist., supra,* 216 Cal.App.4th at p. 1208 [officers for school districts sued in their personal capacity come to court as individuals; a government agent in the role of personal-capacity defendant thus fits comfortably within the statute term "person"].) Plaintiff seemingly attempts to do this by describing defendant Mr. Vazquez in both his "individual and official capacity."

The problem for plaintiff is that such a conclusory statement by itself is insufficient. In determining whether a section 1983 claim may lie in an individual capacity, the capacity in which the officer is sued is critical, not the capacity in which the officer inflicts the injury. The language of the complaint (as well as the supporting allegations) must indicate that the official is being sued as an individual, not in his official capacity. (*McAllister, supra,* 216 Cal.App.4th at p. 1208.) While the description of Mr. Vazquez offered by plaintiff provides that Mr. Vazquez acted in his "individual capacity and as Principal and Superintendent" (¶ 2), courts have found such vague references insufficient to withstand challenge. (*McAllister, supra,* at p. 1209.) Plaintiff must allege with more clarity that Mr. Vazquez is being sued not in his official capacity, but in his individual capacity.

In summary, the court sustains the demurrer to the first cause of action without leave to amend as to both defendants, for both are immune under section 1983 in their official capacity as they are treated as arms of the state, are thus not considered "persons" per section 1983, under the authority of *Kirchmann* and *McAllister.* The court sustains the demurrer to the second cause of action as to defendant Los Olivos School District also without leave to amend, as there is no authority to suggest that plaintiff can sidestep the limitations imposed by section 1983 by advancing a freestanding constitutional tort as contemplated by *Bivens* and progeny. That being

[2] This conclusion obviates the need for the court to examine in this context the sufficiency of the allegations associated with the alleged due process violation alleged with regard to the Fourteenth Amendment, the claims advanced by defendants in their motion. The court will address this issue in association with defendant's motion to strike.

said, the court sustains the demurrer to the second cause of action as to Mr. Ray Vazquez *with* leave to amend, as long as plaintiff 1) reconfigures the cause of action as one involving a section 1983 cause of action only, not a freestanding constitutional tort per *Bivens* and progeny; and 2) makes it clear that plaintiff is suing Mr. Vazquez in his personal/individual capacity only, not his official capacity, under the principles outlined in *McAllister* and progeny.

ii) Third Cause of Action for Negligence

Plaintiff alleges in the FAC that both defendants are liable for negligence as to both incidents, pursuant to Government Code sections 815.2 and 820, based on the acts or omissions of defendant Ray Vazquez. According to plaintiff, defendant Vazquez suspended plaintiff from school for no legitimate reason; improperly searched him daily for two weeks in the presence of peers and teachers; and placed plaintiff in the same classroom with the person who bullied him and made death threats, without any remedial action, all causing plaintiff's mental and emotional anguish, humiliation, and adversity. Plaintiff's underscores defendant's duty of care and breaches by pointing to Education Code sections 201, 32261, and 44807, claiming defendants failed to provide plaintiff with a supervised, safe, and secure educational environment as part of their mandatory duty.

Defendant contends that because Education Code sections 201 and 32261 do not create mandatory duties to create a safe, secure, and peaceful school, but are only statutory policy determinations to protect from discrimination, harassment engendered by race, general sexual orientation or disability; and because there is no allegations of harassment or discrimination based on protected characteristic, no claim has been stated.

It is important to detail the legal principles that define the issues before addressing the merits of defendant's challenges. Public entities in California are not liable for tortious injury unless liability is imposed by statute. (Gov. Code, § 815.) Although not expressly mentioned by plaintiff in the operative pleading, plaintiff clearly is relying on Government Code section 815.6, which provides for liability to a public entity for failure to discharge a mandatory statutory duty that is designed to protect against the particular kind of injury. This section has three discrete requirements, which must be met before governmental entity liability may be imposed: 1) an enactment must impose a mandatory duty; 2) the enactment must be meant to protect against the kind of risk suffered by the party assertion Government Code section 815.6 as a basis for liability; and 3) breach of the mandatory duty must be the proximate cause of the injury suffered. (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 428.) The mandatory duties identified by plaintiff in the operative pleading are those created by the following statutory provisions: 1) Education Code section 201; 2) Education Code section 32261; 3) Education Code section 44807 (as interpreted in *Rodriguez v. Inglewood Unified School Dist*. (1986) 186 Cal.App.3d 707); and 4) the mandatory duty discussed in *Dailey v. Los Angeles Unified School Dist*. (1970) 2 Cal.3d 741, 747. The authority relied upon must create and obligatory duties rather than merely discretionary or permissive, in its directions to the

public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498.)

Put another way, the California Supreme Court has articulated rigid requirements for imposition of government liability under Government Code section 815.6. " 'An enactment creates a mandatory duty if it requires a public agency to take a particular action. [Citation.] An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion.' [Citation.]" (*Lockhart v. County of Los Angeles* (2007) 155 Cal.App.4th 289, 308, 66 Cal.Rptr.3d 62.) "Courts have construed this first prong rather strictly, finding a mandatory duty only if the enactment 'affirmatively imposes the duty and provides implementing guidelines.' [Citations.]" (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898, 95 Cal.Rptr.3d 183, 209 P.3d 89; see also *Department of Corporations v. Superior Court* (2007) 153 Cal.App.4th 916, 932, 63 Cal.Rptr.3d 624.)

Our high court has also recognized that under Government Code section 815.6, inclusion of the term "shall" in an enactment "does not necessarily create a mandatory duty; there may be 'other factors [that] indicate that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion.' [Citations.]" (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898.) "In determining whether a mandatory duty actionable under[Government Code] section 815.6 had been imposed, the Legislature's use of mandatory language (while necessary) is not the dispositive criteria. Instead, the courts have focused on the particular action required by the statute, and have found the enactment created a mandatory duty under [Government Code] section 815.6 only where the statutorily commanded act did not lend itself to a normative or qualitative debate over whether it was adequately fulfilled." (*De Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 260, fn. omitted.) "It is not enough," the California Supreme Court has declared, "that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion." (*Haggis, supra,* 22 Cal.4th 490, 498; *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 429.)

School districts are liable for the acts or omissions of their employees per Government Code section 815.2, which holds a government entity vicariously liable for the acts and omissions of government employees acting in the course and scope of their employment. (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 140.) " 'Thus, "the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person [citation] and the public entity is vicariously liable for any injury which its employee causes [citation] to the same extent as a private employer [citation]." [Citation.]' [Citation.]" (*Barnhart v. Cabrillo Community College* (1999) 76 Cal.App.4th 818, 822.) "This '[v]icarious liability is a primary basis for liability on the part of a public entity, and flows from the responsibility of such an entity for the acts of its employees under the principle of respondeat superior.' [Citation.]" (*San*

Diego City Firefighters, Local 145 v. Board of Administration etc. (2012) 206 Cal.App.4th 594, 611.) However, a critical caveat is found in subdivision (b) of Government Code section 815.2, which states: " 'Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (*Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, 464-465.)

The court finds that plaintiff has adequately stated a cause of action for negligence, at least to the extent plaintiff is relying on the mandatory standards enunciated in *Dailey v. Los Angeles Unified School District, supra,* 2 Cal.3d 741, and the statutory authority it relied upon as the basis for creating a mandatory duty.[3] "While school districts and their employees have never been considered insurers of the physical safety of students, California law had long imposed on school authorities a duty to 'supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection," citing Education Code sections 13557 ***and 44807***. "The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care 'which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances.'" Our high court in *Peterson v. San Francisco Community College Dist*. (1983) 36 Cal.3d 799, described *Dailey* as follows: "*Dailey* arose in the context of a secondary school where a 16-year old was killed while engaging in a 'slap boxing match,. We observed that children of that age 'should not be expected to exhibit that degree of discretion, judgment, and concern for the safety of themselves and others which we associate with full maturity.' (*Id.* at p. 748.)" *Dailey* involved the "duty to supervise the activities of students who are too immature to exercise judgment for their personal safety . . . ." (36 Cal.3d at p. 807, fn. 3; compare with *Hoff v. Vacaville Unified School Dist*. (1998) 19 Cal.4th 925,[defendant cannot invoke *Dailey* and Education Code § 44807 for purpose of Government Code section 815.6 to support a negligence claim because the duty of supervision involving school district employees - and thus the district vicariously – only goes to students on school property and not the general public who are not on school property, and plaintiff was a member of general public not on school property].)

Here, plaintiff alleges as to Incident Two that plaintiff found death threats directed at him and two others on the school campus during school hours, made by a fellow student of plaintiff,

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[3] It is settled that a demurrer is inappropriate if ***any*** theory of liability has been stated in the cause of action, and it appears to the court that the failure to supervise the activities of the students on school ground as contemplated by *Dailey* and Education Code section 44807 are sufficient to survive defendants' challenges. (See, e.g., *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047 ["a demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy"]; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682, 40 Cal.Rptr.2d 169 (*PH II*) ["demurrer does ***385** not lie to a portion of a cause of action"].) Only one ground need be sufficient for the entire cause of action to survive demurrer as alleged. The sufficiency of the other two remaining statutory provisions offered as a basis to establish a mandatory duty will be addressed in association with plaintiff's motion to strike, discussed *ante.*

all seventh graders. Plaintiff feared for his life. Also according to plaintiff, defendant Vazquez did not notify authorities, or take any necessary actions to supervise and protect plaintiff against danger of him or other students; the offending student was suspended only a couple of days and was then "returned to the same classroom with Plaintiff," causing plaintiff agitation, fear, and anguish. All activities occurred on school grounds during school sessions, school activities, recesses and lunch periods. (*Iversion v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 227.) This situation raises the specter that defendants failed to appreciate -- in terms used by *Dailey* and a case it cited approvingly in *Charonnat v. San Francisco Unified Sch. Dist*. (1943) 56 Cal.App.2d 840, 844 -- that when students engage in violent behavior, "the law imposes a duty on the school authorities to provide sufficient supervision so that the fighting may be stopped before serious injury results." (*Dailey, supra*, 2 Cal.3d at p. 748, fn. 4.) Returning the very person who made death threats to the same classroom with the victim within two days of the threat may be negligent (at least for pleading purposes). (See, e.g., *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1851, fn. 1 [mandatory duty under Ed. Code, § 44807 has to do with supervision of pupils, and protects supervisor personnel from liability for exerting reasonably necessary control over students to protect the health and safety of pupils].) Here, the injury alleged based on Incident Two was the type of injury the supervision statutes at issue in *Dailey* were designed to protect against and plaintiff is one of the class of persons who are protected by the statutes. That is, as was observed in *Dailey* in discussing the predecessor sections of Education Code section 44807, "the purpose of the law . . . requiring supervision of pupils . . . is to regulate their conduct so as to prevent disorderly and dangerous practices which are likely to result in physical injury to immature scholars under their custody." (*Dailey, supra*, 2 Cal.3d at p. 748, fn. 4.) The allegations arguably implicate this mandatory duty.

Defendants contend that such a duty to supervise as a basis for liability cannot be stated pursuant to *Thompson v. Sacramento City Unified School Dist*. (2003) 107 Cal.App.4th 1352. Defendants' reliance on *Thompson* is misplaced, as *Thompson* is factually distinguishable. In *Thompson*, plaintiff, a minor, was injured during an argument in school when he was punched by another student; the injury occurred a day after it appeared the assailant had threatened to hit another student and was suspected of having set fire to a poster on school bulletin board. (*Id.* at p. 1357.) The trial court granted defendant school district's summary judgment award. The appellate court affirmed. As relevant for our purposes, the appellate court observed that a "special duty of care may arise when a person makes a specific threat against a specific person or otherwise presents a foreseeable danger to a readily identifiable potential victim. [Citation.] Here, however, no aspect of [the puncher's] prior conduct bore any relationship to plaintiff. It does not appear that the [puncher] and the plaintiff even knew each other before the lunch period on January 22 [when the punch was thrown.] The danger to plaintiff from [the puncher] arose suddenly during the lunch period in which plaintiff's injury occurred, when [the puncher] was told that plaintiff was a carrying a substantial amount of marijuana on his person. This does not constitute a basis upon which to attach a special duty of protection." (*Id.* at p. 1369.) To

establish a right of recovery under the *Dailey* standards, the *Thompson* court noted, a student "must prove the traditional elements of actionable negligence, including causation. . . . This does not impose an impossible burden on an injured student: the requirement merely precludes recovery where it cannot properly be said that an injury has been caused by negligent supervision." "Short of a prison-like lockdown situation, students who, for their own purposes, deliberated intend to escape the direct scrutiny of supervisory personnel will inevitably find a way to do so. [Citation] When, in such a case, an injury occurs with such rapidity that supervisorial personnel could have no opportunity to discover and respond to the situation, then claims of abstract negligence will not support recovery." (*Id.* at p. 1372.)

Thompson involved a summary judgment determination after all issues of material fact were presented. It was not a pretrial pleading challenge by demurrer, as is the case here. Further, based on the allegations in the FAC, a special duty as discussed in *Thompson* arguably existed because the student who made the death threats (H.R.) advanced it directly at and to plaintiff and two other individuals. Placing H.R. in the same classroom with plaintiff (as alleged) shortly after the death threats were made is very much ***unlike*** the contretemps at issue in *Thompson*. The lack of investigation, followed by intentional classroom propinquity (again, as alleged) could reasonably cause distress for a student at such a tender age, as is the case here. In terms utilized by *Thompson*, it can potentially be said that an injury to plaintiff may have been caused by defendants' negligent supervision of H.R. under the pleading circumstances. It may ultimately be true defendant will prevail on summary judgment purposes as was true in *Thompson*. But such a determination cannot (and should not) be made on demurrer.

The court overrules the demurrer to the third cause of action.

iii) Fourth Cause of Action

Based on the facts associated with Incident One (involving plaintiff's suspension), plaintiff alleges that defendants violated Education Code section 48900, which provides a "pupil shall not be suspended from school or recommended for expulsion, unless the superintendent of the school district or the principal of the school in which the pupil is enrolled determines that the pupil has committed an act as defined" pursuant to any of subdivisions (a) to (r) [these 18 categories involve identified offenses or categories that permit expulsion or suspension]. Subdivision (s) of this provision provides that a pupil "shall not be suspended or expelled for any of the acts enumerated in this section unless the act is related to a school activity or school attendance occurring within a school under the jurisdiction of the superintendent of the school district or principal or occurring within any other school district . . . ."

This statutory provision does not contain a private right of action for damages. As observed in *Tirpak v. Los Angeles Unified School Dist.* (1986) 187 Cal.App.3d 639, 645,

Education Code " sections 48900, 48911 and 48918 can only be read as part of a comprehensive legislative scheme designed to ensure procedural fairness in suspension and expulsion proceedings. Although, these sections are broader than those litigated in *Keech* because they apply to all children, they clearly retain their administrative character. They do not expressly set forth a private cause of action for damages for breach of their provisions. ***And we otherwise do not discern a mandatory duty of care owed to plaintiffs with respect to economic damages arising from educational injury. The appropriate remedy for a breach of these statutory provisions is to proceed by way of administrative mandamus or injunction to enforce the procedures contained therein.*** (See, e.g., *John A. v. San Bernardino City Unified School Dist.* (1982) 33 Cal.3d 301, 187.)" (Emphasis added.) The court in *Tirpak* affirmed the trial court's decision to sustain defendants' demurrer without leave to amend, concluding plaintiff cannot seek monetary damages. (*Tirpak, supra*, at pp. 641-643; see also *Granowitz, supra*, 105 Cal.App.4th at p. 358 [no damages were recoverable for violations of Ed. Code, § 48900, except those permitted by section 1983]; *MacDonald v. State of California* (1991) 230 Cal.App.3d 319, 332 [*Tirpak* found no private cause of action for damages under Ed. Code, § 48900, inter alia, and that the proper remedy to redress a breach of the statutory provisions is to proceed in administrative mandamus or seek injunctive relief]; *Doe v. Albany Unified School Dist*. (2010) 190 Cal.App.4th 668, 681 [*Tirpak* was distinguished because plaintiff was not seeking damages, but declaratory and injunctive relief through writ of mandate]; see also *Simonian v. Fowler Unified School Dist.* (E.D. Cal. 2007) 473 F.Supp.2d 1065, 1069 [distinguishing *Tirpak* because plaintiff's complaint was not based on tort or California law, but rather, alleged a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution]; see also *Henderson v. Newport-Mesa Unified School Dist.* (2013) 214 Cal.App.4th 478, 498 [distinguishing *Tirpak* with regard to Ed. Code, § 48900, and concluding Ed. Code, § 44918 does give rise to a private right of action].)

Plaintiff in opposition fails to address the impact of *Tirpak* or its progeny. He simply asks the court for leave to amend. But there is really nothing to amend – if plaintiff is seeking monetary damages based on a violation of Education Code section 48900, the court under the authority of *Tirpak* is required to sustain the demurrer without leave to amend. That is exactly what occurred in *Tirpak.* It is what should occur here.

The court sustains the demurrer to the fourth cause of action without leave to amend.

iv) Fifth Cause of Action

Plaintiff alleges that defendants "breached" their duty of care based in what appears to the court to be the exact same grounds articulated in the third cause of action, as discussed above. In fact, the body of the cause of action as presented in the fifth cause of action is predicated on Incidents One and Two, cites the same Government Code provisions noted above,

and the same cases in *Rodriguez v. Inglewood Unified School Dist., supra, and Dailey v. Los Angeles Unified School Dist., supra,* again as detailed above.

If plaintiff is attempting to advance a common law cause of action for negligence as an alternative to the third cause of action, he cannot. (See, e.g., *Williams v. Horvath* (1976) 16 Cal.3d 834, 838 [Gov. Code § 815 was enacted to eliminate public entity liability based upon common law tort claims].) Otherwise, the cause of action as pleaded appears utterly duplicative of the third cause of action, and thus is superfluous. Accordingly, the court sustains the demurrer to the fifth cause of action without leave to amend

v) Sixth Cause of Action

In the sixth cause of action, based on Incidents One and Two, plaintiff advances against defendant Los Olivos School District a claim that it negligently hired, trained, monitored, and supervised Mr. Vazquez in hiring and retention; plaintiff claims defendant knew or should have known that the Mr. Vazquez was "unfit for the specific tasks to be performed during the course of their employment and posed a danger to the students" at defendant's school.

Our high court has indicated that a plaintiff's theory of vicarious liability for negligent hiring, retention, and supervision is legally viable, for school personnel owe students under their supervision a protective duty of ordinary car, and a breach of which entails vicariously liability. (*C.A. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861 701, citing Gov. Code, § 815, 815.2, amongst others.) Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for student supervision. (*Id.* at p. 871.) There is no pleading requirement that plaintiff identity the specific person or persons responsible for failing to properly hire, train, and/or supervise Mr. Vazquez. (*Id.* at p. 872 [to survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually part of the plaintiff's proof need not be alleged].) Plaintiff need only allege that the defendant knew or should have known (based on defendant's special relationship with plaintiff as a student) of the employee's propensities and ongoing misconduct, and did nothing to prevent or stop it. (*Ibid*.) To plead a cause of action for negligent hiring, supervision, and retention, a plaintiff must generally allege that: (1) an employer hired and supervised an employee; (2) the employee was incompetent or unfit to perform their work duties; (3) the employer knew or should have known that undue risk of harm would exist because of the employee's unfitness; (4) the employee's unfitness caused the plaintiff harm; and (5) the employer's negligence was a substantial factor in causing plaintiff harm. (See CACI No. 426; *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1213–1214.)

Reading the complaint broadly, as this court must, the allegations adequately allege the elements of negligent hiring, supervision, and retention claim, as detailed above. Again, the court need only focus on one of the two Incidents alleged, for that is all that is required to survive

demurrer given the nature of the cause of action. Plaintiff has alleged that defendant Los Olivos School District hired and supervised Mr. Vazquez. He has alleged in the third cause of action that Mr. Vazquez acted negligently with regard to Incident One, (i.e., concerning the acts associated with the student death threat.), and thus he was unfit to perform work duties. He has alleged that defendant knew or should have known that an undue risk of harm would exist because of Mr. Vazquez's unfitness, as they were notified of Mr. Vazquez's acts, and the failure to train and supervise (the defendant's negligence) caused plaintiff injuries. Vicarious liability based on negligent hiring, retention and supervision has been adequate pleaded. Nothing more is required.

The court overrules the demurrer to the sixth cause of action.

B) Motion to Strike

The court grants defendant's request to strike or remove any reference to the first or last name of the other student alleged to have written the death threats, and to replace with initials, based on the stipulation of the parties. Any amended pleading should comport with this stipulation. The court has tried to utilize the initials in this order per this stipulation.

The court denies defendant's request to strike allegations on page 4, lines 3 to 4, (contained in 2(f))). There is nothing particularly remiss in alleging generally that defendant is responsible for violent, bullying, and threatening acts of its students, including but not limited to the acts of student [H.R.]. The allegation is relevant to the lawsuit.

The court grants defendant's request to strike plaintiff's requests for attorney's fees in the prayer for relief to the extent plaintiff has failed at this time to state a cause of action under section 1983. (Tit. 42 U.S.C., § 1988(b).) As the court, however, has allowed plaintiff an opportunity to state a section 1983 cause of action against defendant Mr. Vazquez individually, leave to amend is granted.

Plaintiff has not asked for punitive damages against Los Olivos School District, and thus there is no need to grant the motion to strike for that reason (Gov. Code, § 818 [a public entity is not liable for damages awarded per Civil Code section 3294]; *City of Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 271 [a public entity cannot be sued under § 1983 as a matter of law for punitive].) Plaintiff does, however, ask for punitive damages against any and all individual defendants under section 1983, and that is permissible. (*Estate of Trevor Loflin v. City of Huntington* (C.D. Cal., Oct. 24, 2024, No. 8:24-CV-01075-JVS-JDE) 2024 WL 5316365, at *7). With that said, the motion to strike technically is moot as to the second cause of action as to defendant Vazquez because plaintiff as of this writing has not properly advanced a section 1983 action against him. For efficiency, the court observes that plaintiff is required to plead specific (ultimate) facts to show the defendant's conduct was committed with one of the required mental states, i.e., oppression, fraud, or malice. (See *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041–1042; see also *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255;

Grieves v. Superior Court (1984) 157 Cal.App.3d 159, 166.) That has not been done. Specifically, plaintiff has failed to allege any facts that show Mr. Vazquez acted with malice, oppression or fraud. As an example, plaintiff, while cloaking his claims in the statutory language contained in Civil Code section 3294, at one point alleges that "***even if Mr. Vazquez truly believed that the gun was real*** . . . Mr. Vazquez violated Plaintiff's Fourth (4th) and Fourteenth (14th) Amendment rights under the United States Constitution." (¶ 29.) That highlighted language may not preclude constitutional liability – but it precludes a finding of malice, oppression, or fraud. More must be pleaded. Leave to amend is granted.

The court also grants defendants' motion to strike all references to Education Code section 201 and 32261, as alleged in the third cause of action. Where there is a substantive defect affecting a portion of a cause of action, a challenge can be made by motion to strike. (*PH II, Inc* (1995) 33 Cal.App.4th 1680, 1682-1683.) The court in *PH II* acknowledged that the use of the motion to strike is permissible when challenging portions of causes of action where a complaint fails to state particular facts, but warned the device should be used with caution and only sparingly, for the court had no "intention of creating a 'line item veto' for the civil defendant." (*Id*. at p. 1683.)

Keeping this circumspection in mind, the essence of these two provisions rests on prevention of discrimination and harassment, to combat racism, sexism, and other forms of bias, and to prevent harassment directed at individuals on the basis of personal characteristics or creating a hostile work environment (i.e., hate violence and bias-related incidents). (Ed. Code, § 201, subd. (a)-(c); 32261, subd. (d) [it is the intent of the Legislature in enacting this chapter to reduce hate crimes, bullying, teen relationship violence, discrimination and harassment, including sexual harassment].) It also appears a private right of action exists for damages for a plaintiff suffering discrimination, bias, and harassment by school officials for violations of either of these provisions, contrary to defendants' contentions. (See, e.g., Ed. Code, §§ 262.3 subd. (b) [civil law remedies may be available to complainants under this chapter, which includes section 201; 262.4 [provision under this chapter may be enforced through a civil action]; *C.N. v. Wolf* (C.D. Cal. 2005) 410 F.Supp.2d 894, 903–904 [Ed. Code, § 262.4 explicitly states that sections 200, 201, and 220 "may be enforced through a civil action," meaning it provides for a private right of action for damages];[4] see also *Rodriguez, supra*, 186 Cal.App.3d at p. [section 32261

[4] In its motion, defendant cites to *Roe by and through Slagle v. Grossmont Union High School Distric*t (2020 S.D. Cal.) 443 F.Supp.3d 1162. That case, upon close examination, is inapposite. In *Roe*, plaintiff claimed the defendants negligently failed to perform a mandatory duty to supervise students, to train staff, and to train students, pursuant to Government Code section 815.6. Defendants sought to strike the third theory based on failure to train students, based on violations of Education Code section 200 and 201. Plaintiff contended that these provisions created a mandatory affirmative duty to address all aspects of discrimination, bias and retaliation. The district court rejected plaintiff's claim, in relevant part as follows. "Here, the court finds Plaintiff's interpretation of a mandatory duty to train students [to address discrimination, bias and retaliation] attenuated by the statutory language. While the California Education Code recites legislative intent and highlights an urgent need to prevent and respond to the growing acts of hate violence and bias-related incidents at public schools, and to teach and inform pupils about their rights, ***there is no obligation created***. ***The statutory language does not affirmatively impose a mandatory duty, nor***

makes public entity liable for failure to discharge mandatory duty, meaning it could be liable under Gov. Code § 815.6, but at that time statute had prospective application only]; *Hector F. v. El Centro Elementary School Dist.* (2014) 227 Cal.App.4th 331, 333 ["The Legislature has imposed on public schools in California an affirmative duty to protect public school students from discrimination and harassment engendered by race, gender, sexual orientation and disability," citing inter alia section 201 and 33261 of the Education Code]; see generally *Brennon B. v. Superior Court of Contra Costa County* (2020) 57 Cal.App.5th 367, 396-397 and *Donovan v. Poway Unified School Dist*. (2008) 167 Cal.App.4th 567, 603-608.)

But *nothing* in the factual allegations as pleaded and associated with the third cause of action suggest either of these provisions has relevance to plaintiff. That is, there is no indication that plaintiff suffered either discrimination and/or harassment at the hands of defendants *as contemplated by these provisions*. (See, e.g., *All Angels Preschool/Daycare v. County of Merced* (2011) 197 Cal.app.4th 394, [the mandatory duty must protect against the particular kind of injury suffered by plaintiff as alleged].) For example, Incident One is based on the fact plaintiff was erroneously suspended from school based on off-school activities involving a toy gun while playing with friends, culminating in searches of plaintiff's person, backpack and locker for two weeks. Incident Two is predicated on Mr. Vazquez's failure to notify authorities or take necessary actions to protect when he was notified of death threats from H.R. Neither situation as pleaded involves discrimination and/or harassment as contemplated by the either Education Code section 201 and /or section 32261.

The court grants defendant's motion to strike all references to Education Code sections 201 and 32261 as associated with the third cause of action. The court, however, grants the motion to strike with leave to amend, meaning plaintiff will be afforded an opportunity to plead facts supporting discrimination and/or harassment, based on the characteristics and factors mentioned in these two provisions. Plaintiff asks for this alternative remedy in opposition, and it seems appropriate to afford him at least one such opportunity.

Finally, defendants asks the court to strike all references to Incident One in both the third and sixth causes of action (the claim is irrelevant to the fifth cause of action because the court will sustain the demurrer to the fifth cause of action without leave to amend). Defendants contend that the problems associated with Incident One – his suspension – do not give rise to a mandatory duty and thus cannot give rise to damages.

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does it provide any implementing guidelines, with respect to the training of students which is at issue here. Plaintiff therefore has failed to demonstrate an enactment imposes a mandatory duty to train students for a claim of negligence under Government Code Section 815.6." (*Id*. at p. 1168, emphasis added.) The issue here does not involve any claim that defendants had a mandatory duty to train students concerning discrimination or harassment, the issue at play in *Roe*; instead, it involves a claim that the defendants discriminated and/or harassed plaintiff based on the enumerated statutory categories.

The court denies defendant's request to strike all references to Incident One as pleaded to support the third cause of action for negligence. A "mandatory duty" breached by the public entity must be created by a "***constitutional provision***, statute, charter provision, ordinance of regulation (Gov. Code, 810.6 [defining enactment], emphasis added). Even though the court has stricken all references to Education Code sections 201 and 32261, as discussed above, plaintiff in his operative pleading has incorporated with regard to Incident One (the suspension) all procedural due process violations alleged with regard first and second causes of action (per *Goss v. Lopez* (1975) 419 U.S. 565, a case plaintiff expressly cited in the operative pleading) as the potential basis for a mandatory duty. (See, e.g., *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 400 [due process clause requires government entities to provide notice and an opportunity to be heard].) As incorporated, it acts a sufficient basis to survive a motion to strike.

Further, and not insignificantly, the court is not willing to strike all references to Incident One based on defendant's claim that the plaintiff has not expressly pleaded a procedural due process violation (as opposed to a possible substantive due process violation). (See, e.g., *Granowitz, supra*, 105 Cal.App.4th at p. 358 [a school suspension is an executive decision that does not implicate rights of substantive due process if proper procedural protections are afforded].) Plaintiff has expressly cited *Goss v. Lopez, supra*, which involves procedural due process concerns; it offers defendant sufficient notice of the nature of the claim to provide an answer. In saying all of this, the court is particularly cognizant of the limitations imposed on the motion to strike – that is, it should be used only cautiously and sparingly, and not amount to a procedural item veto to be used by the civil defendant. (*PH II, Inc. v. Superior Court, supra*, 33 Cal.App.4th at p. 1683.) At this stage defendant seems to be using the motion to strike as a line item veto.

Nor is the court persuaded that it should strike all references to Incident One as used in the sixth cause of action, which involves Los Olivos School District's alleged negligent hiring, retention, and supervision of Mr. Vazquez. Indeed, ***if*** Mr. Vazquez did violate plaintiff's Fourth and Fourteenth Amendments in his individual capacity as potentially alleged, these circumstances can arguably support a negligence cause of action against Los Olivos School District for failure to supervise an employee, under the standards detailed and enunciated above. Defendants present no authority to the contrary. Use of the motion to strike appear to the court to be a bridge too far. The motion to strike is denied as to the sixth cause of action.

Summary:

As for the Demurrer:

- The court sustains the demurrer ***without leave to amend*** as to the first cause of action based on violations of Title 42 U.S.C. 1983, for both defendants have been sued in their official capacity, and under existing published authority (overlooked by both parties), both Los Olivos School District and Mr. Ray Vazquez are considered arms of the state under the statute, and thus immune from liability under that provision.
- The court sustains the demurrer to the second cause of action ***without leave to amend*** as to defendant Los Olivos School District, for plaintiff cannot sidestep the protections discussed above by simply advancing a free standing constitutional tort claim, as he does. Federal case law is clear, which this court finds persuasive, that a free-standing constitutional tort (known as *Bivens* action) is inapplicable when a section 1983 avenue exists, even when section 1983 itself precludes liability, which is the case. (*Martinez v. City of Los Angeles* (9th Cir. 1998) 141 F.3d 1373, 1383.) This is the case here.
- The court sustains the demurrer as to the second cause ***with leave to amend*** as to defendant Mr. Ray Vazquez, but only if 1) plaintiff reconfigures the free-standing constitutional tort violation as one advanced through section 1983, for plaintiff indicates that he is suing Mr. Vazquez not in his official capacity but in his personal/individual capacity, which is permitted under section 1983; ***and*** 2) plaintiff must allege with greater sufficiency that he is suing Mr. Vazquez in his individual capacity. To be clear: Plaintiff cannot sidestep section 1983 by advancing a free-standing constitutional tort as to Mr. Vazquez (for the same reasons he cannot against Los Olivos School District), and cannot do so in the amended pleading.
- The court overrules the demurrer to the third cause of action for negligence.
- The court sustains the demurrer to the fourth cause of action ***without leave to amend***.
- The court sustains the demurrer to the fifth cause of action ***without leave to amend***, as the cause of action is duplicative of the third and thus superfluous.
- The court overrules the demurrer to the sixth cause of action.

As for the Motion to Strike:

- The court grants defendants' request to strike all references to the first and/or last name of the other student alleged to have written the death threats, and to replace with that name with the initials H.R., based on the stipulation of the parties. Any amended pleading should comport with this determination.
- The court denies defendant's request to strike allegations in on page 4, lines 3 to 4, (contained in 2(f)).
- The court grants defendant's request to strike all requests for attorney's fees in the prayer for relief to the extent plaintiff has failed at this time to state a cause of action under title 1983. (Tit. 42 U.S.C., § 1988(b).) ***Leave to amend is granted***.
- Plaintiff does not ask for punitive damages against Los Olivos School District, which are unavailable in any event. Although the motion to strike technically is

moot as to defendant Vazquez because plaintiff has not properly advanced a section 1983 action against him, the court determines that plaintiff is required to plead specific (ultimate) facts to show defendant's conduct was committed with one of the required mental states, i.e., oppression, fraud, or malice, something that has not been done. ***Leave to amend is granted.***

- The court grants defendant's motion to strike all references to Education Code sections 201 and 32261 as associated with the third cause of action, ***with leave to amend,*** as there are no facts to show plaintiff's discrimination and/or harassment *as contemplated by those provisions*.
- The court denies the motion to strike all references of Incident One from the third and sixth causes of action [the motion to strike as to the fifth cause of action in this regard is moot].

Plaintiff has 30 days from today's hearing to submit an amended pleading. The parties are directed to appear at the hearing in light of the CMC also scheduled for today. Zoom appearances are authorized.