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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES**

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| TARON MALKHASHYANPlaintiff,vs.LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.Defendants. |  Case No.: BC658007 Assigned For All Purposes to: Judge: Hon. Dennis J. Landin Dept: 93 **PLAINTIFF’S MEMORANDUM OF**  **POINTS AND AUTHORITIES IN**  **OPPOSITION TO DEFENDANT** **LAUSD’S MOTION TO STRIKE RE**  **PLAINTIFF’S SECOND AMENDED**  **COMPLAINT** **DATE: MARCH 21, 2018** **TIME: 1:30 p.m.** **DEPT.: 93 06**   **Reservation ID: 180213289560**  **Complaint filed: April 14, 2017** **Trial Date: October 15, 2018**   |

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I**

**INTRODUCTION**

 CCP sections 436 and 437 state:

 436: The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper:

 (a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

 (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

 437. (a) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice.

CCP § 435.5(a) states in pertinent part:

  “Before filing a motion to strike pursuant to this chapter, the moving party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to the motion to strike for the purpose of determining if an agreement can be reached that resolves the objections to be raised in the motion to strike. If an amended pleading is filed, the responding party shall meet and confer again with the party who filed the amended pleading before filing a motion to strike the amended pleading.” CCP § 435.5(a)(3) requires the moving party on a motion to strike to file and serve a meet-and-confer declaration.

  Here, the moving papers fail to include a meet-and-confer declaration as required by CCP § 435.5(a).  In fact, Defendant LAUSD did not meet and confer before filing its Motion to Strike and indeed its silence on that subject in its moving papers admits as such. The LAUSD Motion to Strike as to Plaintiff’s Second Amended Complaint (SAC) must therefore be denied.

 The moving Defendant LAUSD claims that the face of the SAC “fails to state facts sufficient to constitute a breach of mandatory duty against LAUSD.” This statement is one associated with a Demurrer, not a motion to strike. There is nothing in CCP sections 435, 436 or 437 that support such a ground for a motion to strike.

 The moving party then goes on to claim that the cited statutes and regulation do not impose mandatory duties on a school district. The moving party is wrong.

**II.**

**THE CITED STATUTORY AND REGULATORY AUTHORITY, UNLESS OTHERWISE NOTED HEREIN, SUPPORT THE ALLEGATGIONS AGAINST THE LAUSD SET FORTH IN PLAINTIFF’S FIRST CAUSE OF ACTION, SECOND AMENDED COMPLAINT**

 The best way to address the moving party’s inaccurate characterization of the statutes and their connection to the facts of this case and LAUSD’s duties of care to Plaintiff, one of their students, is to simply list the cited statutes and how they apply to this case. The moving papers ignored a number of the statutes cited in the SAC.

 The present motion addresses four paragraphs within the First Cause of Action of the SAC. The First Cause of Action is the only one directed to the LAUSD. In addition, a material fact ignored by the moving party is that the four paragraphs, numbers 25, 27, 28 and 29 cannot be read in isolation; they must be read in conjunction with the detailed incorporated factual allegations set out in paragraphs 1 through 21 as well as the other paragraphs that make up the First Cause of Action. It is also reasonable and necessary to apply each statute in context, which means not only to look at all facts alleged, including those incorporated into the First Cause of Action, but to apply each cited statute in context with the other cited code sections. It is the totality of the law regarding public schools and their students that inform Plaintiff’s First Cause of Action directed at the LAUSD. With that in mind, Plaintiff addresses the statutes/regulation and the facts alleged:

1. Government Code sections 815.2, 815.4, 815.6, 820, 835, 835.2, 840, 840.2, 840.4,

840.6: All of the cited provisions from the California Government Code fall within the Government Tort Claims Act, referenced as “Liability of Public Entities and Public Employees.” Sections 815.2 and 815.6 will be separately addressed. There is no dispute that the moving party is a government entity and that the allegations against the LAUSD are specifically directed to Plaintiff’s high school and the school employees who were required to supervise all aspects of Plaintiff’s participation in the subject robotics event. It is likewise without dispute that the Government Code broadly addresses the public employees involved in this case while the Education Code provisions are more narrowly addressed to the school environment. These statutory provisions must be read in context with each other and not in isolation.

 Section 815.4 addresses liability in the context of independent contractors, which could be an issue in this case based upon the factual allegations contained in the SAC. Section 820 is the general provision that subject to other code sections, a public employee is liable for his/her acts or omissions to the same extent as a private person. Sections 835, 835.2, 840, 840.2, 840.4 and 840.6 all address liability of public entities and public employees regarding the “dangerous condition of public property.”

 At page 11 of the moving papers, Defendant LAUSD argues that “public property” is limited to a place or location. Again, the moving party is mistaken. California Government Code section 830(c) states “‘’Property of a public entity’ and ‘public property’ means real or personal property owned or controlled by the public entity….” Paragraph 18 of the SAC explicitly references the subject robot that failed at the event, resulting in Plaintiff’s injuries, as having been “funded, designed, constructed, built, tested, assembled, managed, owned and controlled by LAUSD.” The SAC goes on in paragraph 18 to allege that the LAUSD robot was defective and dangerous and that LAUSD had actual or constructive notice of such defects and dangerous conditions. In other words, the SAC does in fact describe a dangerous condition of public (LAUSD) property.

1. Government Code section 815.2: “(a) A public entity is liable for injury proximately

 caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.” Subsection (b) addresses non-liability where the employee enjoys immunity. This is a statute of general principle that takes on its true meaning only when read with the other cited code sections and the facts that form the basis for this case: a LAUSD high school student was injured while engaged in a school sponsored and sanctioned activity.

1. Government Code section 815.6: “Where a public entity is under a mandatory duty

imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” Section 815.6 is at the heart of this case. At the pleading stage, the Court accepts the alleged facts as true. In addition, section 815.6 cannot be read in isolation. The section “cross-references” another enactment that imposes a mandatory duty on the public entity. The factual question that cannot be resolved by the Court at the pleading stage is whether the public entity exercised reasonable diligence. But, section 815.6 has clear relevance to the claims against the LAUSD set forth in the First Cause of Action.

1. California Constitution Article 1: Plaintiff will concede that a citation merely to Article I

of the Constitution is not ideal. Section 1, as part of the Declaration of Rights, refers to safety. As more fully discussed below, our appellate courts have cited Art. 1, section 28(f), which states that students have an inalienable right to attend safe, secure and peaceful campuses in order to promote learning.

1. Education Code section 220: “No person shall be subjected to discrimination on the

basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.” The factual allegations of the SAC include the exposing of plaintiff to an ultra-hazardous activity involving a dangerous device and involving plaintiff in a school sponsored robotics competition without adult supervision. At present, such facts at least suggest potential discrimination.

1. Education Code section 44807: “Every teacher in the public schools shall hold pupils

to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess.  A teacher, vice principal, principal, or any other certificated employee of a school district, shall not be subject to criminal prosecution or criminal penalties for the exercise, during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning.  The provisions of this section are in addition to and do not supersede the provisions of Section 49000.” This section, read with the other cited statutes and regulation governing the school, teacher and student relationship, clearly applies to the facts alleged in this case and the clear mandatory duty of public schools to keep its students safe. The tortured reading by the moving party along with its insistence on reading section 44807 apart from the other statutes is no basis for striking the allegation from the SAC.

1. California Code of Regulations Title 5, sections 701 and 5530: Plaintiff agrees that

CCR Title 5, section 701 has no application to this case and may be stricken. Section 5530 says that

“All certificated personnel shall exercise careful supervision of the moral conditions in their respective schools. The governing board, principals, and other certificated personnel shall not tolerate any act of a pupil described in Section 301.” Again, it must be said that the detailed factual allegations in this case, at least at the pleading stage, can reasonably be viewed as addressing “moral conditions” (it appears that Education Code section 301 has been repealed).

1. Education Code sections 44660, 44662, 44664, 44830, 44870, 44932: The cited

Education Code sections are from Title 2 (Elementary and Secondary Education), Division 3 (Local Administration), Part 25, Chapters 3 and 4 regarding employees and particularly teachers. The sections Plaintiff has cited set forth duties wherein the word “shall” is used, the trigger word for that which is “mandatory.” Section 44660 is a legislative intent section regarding a uniform system for teacher evaluation and assessment of performance. Section 44662 refers to the requirement for establishment of a “suitable learning environment.” Section 44664 addresses the frequency of evaluations. Section 44800 et seq. addresses the rights and duties of certificated employees which includes teachers. Sections 44807 and 44808 are separately addresses in this brief. Section 44830 is a general introduction to provisions regarding teacher qualifications. Section 44870 addresses the qualifications for those who supervise teachers. Section 44932 identifies unprofessional conduct or unsatisfactory performance as grounds for termination of employment. All of these sections, taken together, create the general environment within which teachers and their schools operate when it comes to student welfare and safety. Thus, all reasonably form the basis for the elements for the First Cause of Action directed at the LAUSD in this case.

1. Education Code section 44808: “Notwithstanding any other provision of this code,

no school district, city or county board of education, county superintendent of schools, or any officer or employee of such district or board shall be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district, board, or person has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances. In the event of such a specific undertaking, the district, board, or person shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board.” This section is applicable by its terms to this case and by its use of the phrase “shall be liable” under the circumstances presented, will apply to this case according to proof. But taking the facts as alleged, section 44808 provides the statutory authority, along with the other cited statutes, for Plaintiff’s First Cause of Action.

All of the stated facts, as noted above, taken together, form a clear and complete basis for Plaintiff’s First Cause of Action for Negligent Supervision and Protection of Plaintiff as well as Negligent Hiring, Training, Retention of those public employees (including Defendant teacher Punjatorn Chanudomchuck, who has not yet been served in this case and who for some reason is not being represented in this case by the LAUSD lawyers) charged with the responsibility for Plaintiff’s safety.

The approach taken by the moving party in its Motion to Strike is to argue the facts, an inappropriate exercise on a motion to strike. The moving party also offers a perspective on the special relationship between public school and students that is at odds with the strong public policy mandating affirmative and diligent action to protect students. The moving party fails to cite any appellate authority that limits the obligation of a school and its teachers to protect its students from dangers and defects in property it owns and controls (that property in this case being the robot, as well as the school’s assigned space that it controlled during the robotics event).

The fact is that the case law authority supporting Plaintiff’s First Cause of Action is largely based on the statutes Plaintiff has cited. The affirmative duty to supervise was established in Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal.3d 508. There is a special relationship between a school district and its students and their families and thus an affirmative duty on the district to take all reasonable steps to protect its students. *See* Rodriguez v. Inglewood Unified School Dist. (1986) 186 Cal.App.3d 707. Students have an inalienable right to attend safe, secure and peaceful campuses in order to promote learning. Cal. Const., art. I, § 28, subd. (c). As employees of a school district, public school teachers have a statutory duty to supervise their students in order to maintain a safe and welcoming environment. Dailey v. Los Angeles Unified School Dist. (1970) 2 Cal.3d 741. Finally, as set forth in Education Code section 44808 and in Castro v. Los Angeles Bd. of Education (1976) 54 Cal.App.3d 232, the affirmative duty of care on the part of a school and its teachers for it students is no different when the activity is a school sponsored one off campus.

 For the reasons set forth above, The LAUSD Motion to Strike should be denied.

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| DATE: March 2, 2018 | CARPENTER, ZUCKERMAN & ROWLEY, LLPBY:  GARY N. STERN Attorneys for Plaintiffs |
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**PROOF OF SERVICE**

***Malkhasyan v. Los Angeles Unified School District, et al.***

Los Angeles County Superior Court Case No. BC658007

**STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

 On March 5, 2018, I served the following document described as **PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT LAUSD’S MOTION TO STRIKE RE PLAINTIFF’S SECOND AMENDED COMPLAINT** on all parties in this action by placing [ X ] a true copy [ ] the original thereof enclosed in a sealed envelope addressed as follows:

**[SEE PROOF OF SERVICE LIST]**

[ ] BY MAIL: By placing true and correct copies thereof in individual sealed envelopes, with postage thereon fully prepaid, which I deposited with my employer for collection and mailing by the United States Postal Services. I am “readily familiar” with my employer’s practice for the collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, this correspondence would be deposited by my employer with the United States Postal Service on that same day.

[ X ] BY OVERNIGHT DELIVERY/COURIER: I deposited such envelope in a box or facility regularly maintained by the express service carrier in an envelope or package designated by the express service carrier with delivery fees provided for.

[ ] BY MESSENGER SERVICE: I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed above and providing them to a professional messenger service (A proof of service executed by the messenger will be filed in compliance with Code of Civil Procedure.)

[ ] BY FACSIMILE: I caused such document to be sent via facsimile to the names and facsimile numbers listed in the Mailing list and received confirmed transmission reports indicating that this document was successfully transmitted to such parties.

[ X ] (STATE) I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

[ ] I declare that I am employed in the office of a member of the bar of this court at whose direction the service is made.

 Executed on March 5, 2018, at Beverly Hills, California.

 LADY LUNA

SERVICE LIST

***Malkhasyan v. Los Angeles Unified School District, et al.***

Los Angeles County Superior Court Case No. BC658007

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