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(SPACE BELOW FOR FILING STAMP ONLY)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

T.A., a minor (by and through next friend) ANNA AMADOR,

Plaintiff,

v.

MCSWAIN UNION ELEMENTARY SCHOOL DISTRICT; TERRIE ROHRER, Principal of McSwain Elementary School, individually and in her official capacity; C.W. SMITH, Assistant Principal of McSwain Elementary, individually and in his official capacity, and MARTHA HERNANDEZ, Office Clerk for McSwain Elementary School, individually and in her official capacity,

Defendants.

Case No. 1:08-CV-01986-OWW-DLB

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS UNDER FRCP (12)(b)(6), OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT UNDER FRCP 12(e)

Date: April 13, 2009
Time: 10:00 a.m.
Dept.: 3

Complaint Filed: December 30, 2008
Trial Date: Unassigned

TABLE OF CONTENTS

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP
5 RIVER PARK PLACE EAST
FRESNO, CA 93720-1501

TABLE OF AUTHORITIES

Page

Cases

McCormick, Barstow, Sheppard, Wayte & Carruth LLP
5 River Park Place East
Fresno, CA 93720-1501

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Other Authorities

McCormick, Barstow, Sheppard, Wayte & Carruth LLP
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Fresno, CA 93720-1501

COMES NOW, Defendants MCSWAIN UNION ELEMENTARY SCHOOL DISTRICT (hereinafter "MUESD"); TERRIE ROHRER; C.W. SMITH; and MARTHA HERNANDEZ (hereinafter "Defendants," collectively), with this Memorandum of Points and Authorities in support of its Motion to Dismiss with regard to Plaintiff's Second Claim for Relief, Third Claim for Relief and Fourth Claim for Relief under FRCP 12(b)(6), or, in the alternation, Motion for More Definite Statement with regard to Plaintiff's Third Claim for Relief and Fourth Claim for Relief under FRCP 12(e).

I.

RELEVANT PROCEDURAL HISTORY

This litigation involves claims made by Plaintiff T.A., a minor, (by and through next friend), ANNA AMADOR (hereinafter "Plaintiff"), arising out of an alleged violation of Plaintiff's First Amendment Freedom of Speech while Plaintiff was at school. In her Complaint, Plaintiff alleges that at all times relevant herein Plaintiff was a minor and a student at McSwain Elementary School, a public school located in Merced, California and part of the MUESD.

On December 30, 2008, Plaintiff filed the subject Complaint for Damages, Declaratory and Injunctive Relief, Pursuant to the First Amendment, 42 U.S.C. § 1983 and California Law (hereinafter the "Complaint") against Defendants. In her Complaint, Plaintiff specifically takes issues with MUESD's dress codes, which Plaintiff alleges to state, in pertinent part:

> McSwain Dress Code describes (sic) basic requirements you must follow when deciding what to wear to school...It is a mark of maturity when students can freely choose apparel that demonstrates individuality without deviating from the standard of appropriateness (sic)...7. Personal articles, clothing, or manner of dress shall make no suggestion of tobacco, drug or alcohol use, sexual promiscuity, profanity, vulgarity, or other inappropriate subject matter...This Code shall be in effect at all school related activities except where modified for specific extracurricular activities or specific case.

(See Complaint, ¶ 23.)

Further, Plaintiff raises five (5) separate causes of action arising out Defendants' alleged violation of Plaintiff's First Amendment Freedom of Speech on April 29, 2008, including (1) Freedom of Speech- First Amendment under 42 U.S.C. §1983; (2) Unreasonable Seizure-Fourth

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Amendment under 42 U.S.C. §1983; (3) Equal Protection-Fourteenth Amendment under 42 U.S.C. §1983; (4) Due Process-Fourteenth Amendment under 42 U.S.C. §1983; and (5) Battery under California Common Law. For these causes of action, Plaintiff prays for damages including declaratory relief, injunctive relief, nominal and compensatory damages as well punitive damages and the recovery of attorneys fees, costs and expenses under 42 U.S.C. §1988 and other applicable law.

Defendants now brings this Motion to Dismiss in connection with Plaintiff's Second Claim for Relief, Third Claim for Relief and Fourth Claim for Relief pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, Motion for More Definite Statement regarding Plaintiff's Third Claim for Relief and Fourth Claim for Relief pursuant to Rule 12(e) of the Federal Rules of Civil Procedure.

II.

LAW AND ARGUMENT

A. Standard Applicable To The Instant Motions.

1. Standard for Motion to Dismiss Pursuant to Rule 12(b)(6).

The Federal Rules of Civil Procedure ("FRCP"), Rule 12(b)(6), permit dismissal for failure of the pleading to state a claim upon which relief can be granted. A motion to dismiss for failure to state a claim is properly granted if a cause of action lacks a cognizable legal theory or there is an absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990); Robertson v. Dean Witter Reynolds, Inc. 749 F.2d 530, 533-534 (9th Cir. 1984).

Only if it appears beyond reasonable doubt that the plaintiff can prove no set of facts in support of his or her claim can a claim be dismissed. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001); DeLaCruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978). For purposes of a motion to dismiss for failure to state a claim under FRCP 12(b)(6), the district court must treat all plaintiff's allegations of material fact as true, and must construe these facts in the light most favorable to the plaintiff. Maduka v. Sunrise Hosp., 375 F.3d 909, 911 (9th Cir. 2004); Balistreri, supra, 901 F.2d at 699. Reasonable inferences from those factual allegations are also taken to be true. Pareto v.

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F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). However, the court is not required to accept as true legal conclusions portrayed in the form of factual allegations, if those conclusions cannot reasonably be drawn from the facts alleged. Sprewell v. Golden State Warriors, 266 F3d 979, 988 (9th Cir 2001). Stated otherwise, the Court need not accept every allegation in the complaint as true; rather, the Court "will examine whether conclusory allegations follow from the description of facts as alleged by the plaintiff." Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992). Further, as a general rule, a district court may not consider any material beyond the pleadings in ruling on a motion to dismiss under FRCP 12(b)(6). Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001).

While plaintiff need not prove her claim in the Complaint, plaintiff "must state a claim therein," which "requires more than the mere recitation of boilerplate statutory language." Migdal v. Rowe Price-Fleming Int'l, Inc., 248 F.3d 321, 328 (4th Cir. 2001). In order for a plaintiff to be permitted to proceed to discovery, he or she "must have some factual basis for believing that a legal violation has actually occurred." Id., at 328. A pleading may not simply allege a wrong has been committed and demand relief. If a plaintiff cannot meet the pleading requirements of FRCP 8, then "defendants should not be required to respond to such a pleading either by motion or answer." Shakespeare v. Wilson, 40 F.R.D. 500, 504 (1966).

2. Standard for Motion For More Definite Statement Pursuant to Rule 12(e).

Rule 12(e) allows for a motion for a more definite statement if the pleading is "so vague or ambiguous that a party cannot be reasonably required to frame a responsive pleading." (Fed. R. Civ. P., Rule 12(e).) While such motions are generally viewed with disfavor, they are within the a court's discretion and may be appropriate in certain circumstances. A Rule 12(e) motion is proper where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted. In such cases, defendant cannot reasonably be expected to frame a proper response. See Famolare, Inc. v. Edison Bros. Stores, Inc., 525 F.Supp. 940, 949 (E.D. Cal. 1981); Cellars v. Pacific Coast Packaging, Inc., 189 F.R.D. 575, 578 (N.D. Cal. 1999).

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B. Plaintiff's Second Claim For Relief For Unreasonable Seizure-Fourth Amendment (42 U.S.C. § 1983) Fails As A Matter Of Law And Therefore Should Be Dismiss With Prejudice.

To state a 42 U.S.C. § 1983 claim, the plaintiff must plead that: (1) defendants acted under color of state law at the time the complained of act was committed; and (2) defendants deprived plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. Gibson v. Unites States, 781 F.2d 1334, 1338 (9th Cir. 1986).

Here, Plaintiff has alleged that Defendants committed an unreasonable seizure of her person and property in violation of the Fourth Amendment. Specifically, Plaintiff alleges:

> By reason of the aforementioned acts and omissions, and policies, practices and/or customs engaged in under the color of state law, Defendants unconstitutionally detained and seized Plaintiff's person and property, without a warrant, without probable cause or reasonable suspicion that a crime had been, was being, or would be committed, and without consent, and thus deprived Plaintiff of her right to be free from unreasonable government seizures, to be free from warrentless seizures, and to be free from seizures without probable cause, which are guaranteed to her under the Fourth Amendment to the United States Constitution as applied to the states and their political subdivisions under the Fourteenth Amendment and 42 U.S.C. § 1983.

(Complaint, ¶ 57.)

While the Fourth Amendment prohibitions of unreasonable searches and seizures apply to those conducted in the school setting by public school officials, a public school student's right against unreasonable search and seizure is different than elsewhere. Veronica School District v. Action, 515 U.S. 646 (1995). In such a context, the inquiry into whether a search is reasonable or unreasonable may not disregard the school's custodial and tutelary responsibility for students. Id. at 656.

Education is one of the most important functions of state and local government. In re Randy G., 26 Cal. 4th 556, 562 (2001), quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954).) To this end, minor students are required to be in school. See Ed. Code § 48200. Further, while students are in school, it is the primary duty of the school's official and teachers to educate and train them. In re Randy G., supra, 26 Cal.4th at 562. "'A State has a ***compelling interest*** in assuring that the schools meet this responsibility. Without first establishing discipline

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and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.'" In re Randy G., supra, 26 Cal.4th at 562, quoting New Jersey v. T.L.O., 469 U.S. 325, 341-342 (1985) [emphasis added].

Additionally, the interests implicated by a seizure as opposed to a search are different, with a seizure generally deemed to be less intrusive. In re Randy G., supra, 26 Cal.4th at 567. In the school environment any such intrusion is merely trivial as the minor is required to be at school. Id. at 566. Neither the Supreme Court of California nor the United States Supreme Court has "deemed stopping a student on school grounds during school hours, calling a student into the corridor to discuss a school-related matter, or summoning a student to the principal's office for such purposes to be a detention within the meaning of the Fourth Amendment." Id. at 565. Rather, the detention of a minor student on school grounds *does not* offend the United States Constitution so long as the detention is not arbitrary, capricious, or for the purposes of harassment. Id. at 567 [emphasis added].

Here, Plaintiff's allegation that her Fourth Amendment rights have been violated due to the unconstitutional seizure and detention of Plaintiff's person and property fails to state a cognizable claim upon which relief can be granted. Completely missing from Plaintiff's Second Claim for Relief is any allegation that Defendants' conduct, in calling Plaintiff into the Assistant Principal's office to discuss school related matters and holding her shirt for the school day, was arbitrary, capricious or for the purpose of harassment. Rather, Plaintiff bases her claim on the fact such conduct was done without probable cause, reasonable suspicion, consent or warrant. However, as described above, in the school context, neither a warrant, probable cause, reasonable suspicion nor consent are required for detention on school grounds.

In fact, neither the United State Supreme Court nor the California Supreme Court has found Defendants' conduct, as alleged by Plaintiff in her Complaint, to be a detention within the meaning of the Fourth Amendment. See In re Randy G., supra, 26 Cal. 4th at 565, 567. Further, the above-described standard can be extended to the Plaintiff's allegation that Defendants'

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unconstitutionally detained and seized her property. (Complaint, ¶ 57.) Here, Plaintiff alleges that her seized property (her t-shirt) was held on school grounds during school hours. (Complaint, ¶¶ 36, 57.) If the above-described arbitrary and capricious standard is appropriate for the detention of a *student's person* on school ground during school hours, then it should also be appropriate for the detention of property on school grounds and during school hours. Again, in this regard, Plaintiff's Second Claim for Relief fails to allege that the detention of Plaintiff's property for the school day was arbitrary, capricious, or for the purposes of harassment. As such, Plaintiff Second Claim for Relief for Unreasonable Seizure-Fourth Amendment should be dismissed, with prejudice, for lack of a cognizable legal theory.

C. Plaintiff's Third Claim For Relief For Equal Protection-Fourteenth Amendment (42 U.S.C. § 1983) Should Be Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted, Or, In The Alternative, Requires A More Definite Statement.

For the sake of brevity, Defendants incorporate by reference herein the requirements, described in Section B above, to state a claim for 42 U.S.C. § 1983.

Equal protection of the law is guaranteed by the Fourteenth Amendment to the United States Constitution. People v. Travis, 139 Cal.App. 4th 1271, 1291 (2006). The equality guaranteed by this Amendment is equality under the same conditions and among similarly situated persons. Id. Thus, the first prerequisite to a meritorious equal protection claim is a showing that the state has adopted a classification which affects two or more similarly situated groups in an unequal manner. Id.

Under the "similarly situated" requirement, an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that there are two groups which are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified. Id.

Here, Plaintiff alleges that Defendants violated her equal protection rights "...by censoring Plaintiff's speech while allowing other students to express various messages on their clothing at McSwain Elementary School, thereby treating Plaintiff differently from other

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similarly situated students, based solely on the content and viewpoint of her message." (Complaint, ¶ 60.) However, such broad sweeping statements fail to identify any similarly situated group which is treated in an unequal manner. Plaintiff fails to even identify her own class/group. Assuming for *argumendo* that Plaintiff's alleged class includes students who display pro-life messages in their dress or even students with pro-life political beliefs, Plaintiff fails to identify another similarly situated group which is treated differently and the actual differing treatment itself. For instance, Plaintiff fails to allege or provide any facts to show that students who wear pro-choice clothing to school are treated differently and do not suffer the same consequences. Further, Plaintiff fails to allege that students with differing political beliefs receive unequal treatment, or that students who convey differing political messages in their dress receive unequal treatment. Rather, Plaintiff merely makes a conclusory statement that she was treated differently "from other similarly situated students," and compares herself to *all* other students at MUESD who express "various messages" on their clothing. Such conclusory allegations and mere recitation of boilerplate language is insufficient to state a cognizable claim.

However, should the Court disagree, Plaintiff's Third Claim for Relief is, in the very least, patently uncertain as Defendants are unable to ascertain from the Complaint the nature of the claim, including the similarly situated students or groups to which Plaintiff refers. Therefore Defendants cannot reasonably be expected to frame a proper response.

As such, Defendants respectfully request that Plaintiff Third Claim for Relief for Equal Protection-Fourteenth Amendment be dismissed, under FRCP 12(b)(6), for lack of a cognizable legal claim, or, in the alternative, that the Court grant Defendants' Motion for a more Definite Statement as to Plaintiffs' Third Claim for Relief.

D. Plaintiff's Fourth Claim For Relief For Due Process-Fourteenth Amendment (42 U.S.C. § 1983) Fails To State A Claim Upon Which Relief Can Be Granted, Or, In The Alternative, Requires A More Definite Statement.

For the sake of brevity, Defendants incorporate by reference herein the requirements, described in Section B above, to state a claim for 42 U.S.C. § 1983.

"The touchstone of due process is protection of the individual against arbitrary action of

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government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). This is true whether the issue is procedural due process or substantive due process. See County of Sacramento v. Lewis 523 U.S. 833, 845-846 (1998). However, the criteria to identify what is fatally arbitrary differs depending on which category the claim falls under, whether it is legislation or a specific act of a governmental officer that is at issue. Id.

For instance, to state a claim for violation of Procedural Due Process, a plaintiff must allege (1) the existence of a "liberty" or "property" interest afforded protection by the Due Process Clause; and (2) a deprivation of that liberty or property interest without notice or an opportunity to be heard. See Baker v. McCollan, 443 U.S. 137, 140 (1979) [noting that in order to state a claim for deprivation of Due Process the aggrieved party must establish that the deprivation relates to a life, liberty or property interest secured by Federal law].

However, even under such a claim, in the school context, the Supreme Court has recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 686 (1986). Further "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." (Id.)

In Bethel Sch. Dist. v. Fraser, the Court held that even two days worth of suspension from school does not call for the "full panoply of procedural due process protections applicable to a criminal prosecution." Id. To the contrary, the Court found that the admonitions of teachers and the school's policy proscribing "obscene" language gave the Plaintiff adequate warning that a lewd speech could subject him to punish. Id)

In the case at hand, Plaintiff's Fourth Claim for Relief, for Defendants' alleged violation of Due Process under the Fourteenth Amendment, alleges that Defendants' violated due process "...in that Defendants' policies are vague over broad, and lack sufficient standards and safeguards to curtail the discretion of school officials, thereby allowing Defendants' unbridled discretion to enforce said policies in an ad hoc and discriminatory manner." (Complaint, ¶ 63.)

Such allegations fail to clearly set forth whether Plaintiff is asserting a substantive due

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process or procedural due process claim. However, assuming for *argumendo* that Plaintiff is attempting to allege the latter, such a claim by Plaintiff under the facts of this case and in the school context fails to state a cognizable claim. In this regard, there is no allegation that Plaintiff did not have fair notice or an opportunity to be heard under Defendants' dress code policy. Furthermore, a school's duty to maintain security and order in the schools requires a certain degree of flexibility in the school's procedures and policies. Fraser, supra, 478 U.S. at 686.

In this case, Defendants' dress code provided, in relevant part and as alleged in Plaintiff's Complaint, "Personal articles, clothing, or manner of dress shall make no suggestion of tobacco, drug or alcohol use, sexual promiscuity, profanity, vulgarity, or other inappropriate subject matter..." Such a policy is sufficiently detailed for the school context, providing a clear structure while allowing Defendants' the flexibility and latitude required to react to unanticipated situations and events. The law does not require that Defendants to explicitly list each and every subject matter which could be inappropriate or be as detailed as would be required in other contexts, and Plaintiff fails to allege otherwise.

The described policy Plaintiff cites in her Complaint, ¶ 23, clearly provides students with notice that they are not to wear clothing which suggests an inappropriate subject matter. Further, in this case, unlike Bethel Sch. Dist. v. Fraser, supra, Plaintiff was not sent home or suspended from school, rather Plaintiff was merely taken to the Assistant Principal's office to discuss the matter, instructed not to wear such clothing to school again and provided with an alternative shirt for the day, all as conceded in Plaintiff's Complaint. (See Complaint, ¶¶ 30, 36, 37.). As such, Plaintiff, who knew and had notice of the dress code policy, cannot properly sustain her claim that she was denied her procedural due process rights.

In the very least, Plaintiff's Fourth Claim for Relief remains unclear. Defendants cannot with confidence ascertain the nature of the claim, as to whether Plaintiff intends this cause of action to relate to substantive or procedural due process. To file a responsive pleading absent such a distinction and a clear understanding of Plaintiff's claim, could compromise the defense of Defendants', and Defendants' cannot reasonable be expected to respond absent a more definite statement.

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Accordingly, should the Court believe Plaintiff's Fourth Claim for Relief for Due Process-Fourth Amendment clearly sets forth a procedural due process claim, this claim should be dismissed, with prejudice, for lack of a cognizable legal theory. In the alternative, a more definite statement is required and Defendants' Motion for a More Definite Statement should be granted.

III.

CONCLUSION

For the forgoing reasons, Plaintiff's second, third and fourth claims for relief should be dismissed for failure to state a cognizable claim. However, should the Court disagree, Plaintiff's third and forth claims for relief are, in the very least, uncertain and require a more definite statement.

As such, Defendants respectfully request that the Court grant Defendants' Motion to Dismiss with regard to Plaintiff's Second Claim for Relief, Third Claim for Relief and Fourth Claim for Relief pursuant to Rule 12(b)(6) of the FRCP, or, in the alternation, grant Defendants' Motion for More Definite Statement with regard to Plaintiff's Third Claim for Relief and Fourth Claim for Relief pursuant to Rule 12(e) of the FRCP.

Dated: January 28, 2009

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By: _____

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