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(Gov. Code § 6103)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

ROBYN CANNISTRA, individually and on behalf of JORDAN CANNISTRA, as his guardian in fact, Plaintiffs, **v.** **TOMÁS ARAGÓN, in his official capacity as Department of Public Health Director and as the State Public Health Officer; PETALUMA CITY SCHOOLS; and DOES 1 through 20, inclusive,** Defendants.	Case No. 24CV01964 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT TOMÁS ARAGÓN'S DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** Date: Time: Dept: 19 Judge: Honorable Oscar A. Pardo Trial Date: Not yet set Action Filed in Sacramento Sup. Ct: August 14, 2023 Action Transferred to Sonoma County Sup Ct: March 28, 2024 First Amended Complaint Filed: June 13, 2024

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INTRODUCTION

This litigation follows the administrative decision of the authorized state agency, the California Department of Health and Human Services (CalHHS), to deny Plaintiffs' requested medical exemption from immunizations set by the Legislature and statutorily required for in-person instruction in public school. Plaintiff Robyn Cannistra, individually and on behalf of Jordan Cannistra, as his guardian in fact (Plaintiffs) filed a Complaint for Injunctive and Declaratory Relief in Superior Court against the state's Public Health Director and Officer (Dr. Aragón), and against Petaluma City Schools (PCS). After meet and confer , Plaintiffs filed a First Amended Complaint for Injunctive and Declaratory Relief (FAC).

Dr. Aragón now demurs to the FAC on the grounds that: (1) the first, second and third causes of action fail because no private right of action exists under the statutes and regulations plead; (2) the fourth cause of action fails because it fails to state facts sufficient to constitute a cause of action for violation of the California right to education and because mandatory immunization requirements for school-aged children do not violate the right to attend school; (3) the fifth cause of action for violation of the California Equal Protection Clause fails to state facts sufficient to give rise to an Equal Protection claim; and (4) the FAC fails to allege facts necessary to obtain the relief sought. Accordingly, Dr. Aragón's demurrer must be sustained.

FACTUAL BACKGROUND

I. CALIFORNIA'S SCHOOL IMMUNIZATION REQUIREMENTS

California law requires students be immunized against certain diseases[1] in order to attend public or private schools. (Health & Saf. Code, §§ 120335, 120370.) In particular, California state law requires that schools shall not admit students unless they have been fully immunized against the specified 10 diseases or qualify for an exemption recognized by statute. (Health & Saf. Code, §§ 120335, subd. (b) & (g)(3), 120370.) For Kindergarten through twelfth grade,

[1] These communicable diseases include (1) Diphtheria; (2) Hepatitis B; (3) Haemophilus influenza type b; (4) Measles; (5) Mumps; (6) Pertussis (whooping cough); (7) Poliomyelitis; (8) Rubella; (9) Tetanus; (10) Varicella (chickenpox); and "any other disease deemed appropriate by [CDPH], taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians." (Health & Saf. Code § 120325.)

students must have the following vaccine doses: Polio (4 doses); DTaP (5 doses); Hep B (3 doses); MMR (2 doses); and Varicella (2 doses). (Cal. Code Regs., tit 17, §6025; Declaration of Stacey Leask (Leask Decl.), ¶ 13, Exhibit (Exh) H to Leask Decl.; FAC ¶ 18.)

The law allows for medical exemptions, provided certain requirements are met. (Health & Saf. Code, § 120370, §120372.) Starting in 2021, a law enacted by Senate Bills 276 and 714 requires that all new medical exemptions be issued using a state database (the California Immunization Registry-Medical Exemption (CAIR-ME)) and a standardized medical exemption form, which, if approved, are the only medical exemptions that schools may accept. Medical exemptions are subject to agency review and may be revoked. (*In re S.P.* (2020) 53 Cal.App.5th 13, 18; Health & Saf. Code, § 120372.)

Health and Safety Code section 120372.05 establishes the general requirements for processing appeals of medical exemption revocations and requires CalHHS to establish the process and guidelines for the appeals process. If the basis for the medical exemption is at issue, an independent expert review panel, consisting of three licensed physicians and surgeons with relevant knowledge, training, and experience relating to primary care or immunization, shall evaluate the appeal and submit its determination to the CalHHS Secretary. (Health & Saf. Code, § 120372.05(b).) The independent expert review panel "shall evaluate appeals consistent with the federal Centers for Disease Control and Prevention, federal Advisory Committee on Immunization Practices, or American Academy of Pediatrics guidelines or the relevant standard of care, as applicable." (Health & Saf. Code, § 120372.05(c); Cal. Code Regs., tit 17, §6000 et seq.) The CalHHS Secretary shall adopt the determination of the independent expert review panel and shall promptly issue a written decision to the child's parent or guardian. (Health & Saf. Code § 120372.05(d); Cal. Code Regs., tit 17, §6000 et seq.; Request for Judicial Notice in Support of Demurrer ("RJN"), Exh. 2.[2])

[2] The immunization requirements are detailed in the Health and Safety Code sections 120325 through 120380 and California Code of Regulations section 6000-6075, including Tables A-D.

II. DENIAL OF PLAINTIFFS' MEDICAL EXEMPTION APPEAL

Plaintiff Jordan Cannistra (Jordan) is eleven years old and entering the sixth grade at PCS. (FAC ¶¶ 7, 31.) Jordan has not received all of the statutorily required vaccinations under the law; Jordan has not received the second dose of the Measles, Mumps, Rubella (MMR) vaccine and Jordan has not received a fourth dose of the Polio vaccine. (FAC ¶¶ 33-34, 38; Health & Saf. Code, § 120335.) Jordan's mother sought a medical exemption on Jordan's behalf via CAIR-ME for both the MMR and Polio vaccines. (FAC ¶¶ 52-53.) Jordan's mother received notice that Jordan's previous medical exemption had been revoked and that "Jordan [could] either: (1) start receiving the required vaccines, or (2) appeal the decision." (FAC ¶¶ 56-58.)

Jordan's mother appealed the decision and submitted documentation of Jordan's titer laboratory results. (FAC ¶ 59.) Jordan's tests confirmed his immunity to MMR, poliovirus type 1 and poliovirus type 3, but not poliovirus type 2. (FAC ¶ 40.) The FAC alleges, "[t]he Polio Type 2 titer was not included from the lab" because "[p]er the CDC, 'Serologic testing for antibodies against poliovirus type 2, an assay that uses live virus, is becoming increasingly unavailable as US laboratories confirm to WHO's laboratory containment strategy to destroy type 2 poliovirus in their facilities, this started in late 2015.' Thus, labs no longer test for Polio Type 2.[3]" (FAC ¶¶ 41.) Plaintiffs nonetheless claim that Jordan does not need the required fourth dose of the Polio vaccine. (FAC ¶¶ 43.)

Jordan's appeal underwent Independent Medical Review (IMR). (RJN, Exh. 1.) Three medical experts assigned to conduct the review determined that the appeal should be denied. (RJN, Exh. 1.) The decision was based in part on the finding that, "the submitted documentation fails to demonstrate Jordan's immunity against poliovirus," and that "without laboratory evidence of immunity to poliovirus type 2, it is not possible to judge the child's immunity against poliovirus and the need for further doses. Per ACIP guidelines, completing the full series of the vaccine is recommended instead." (RJN, Exh. 1, p. 5.) As to MMR, the documentation was deemed sufficient to establish immunity, however, because an appeal cannot be approved or denied in part, the denial "will apply to all immunizations referenced in the request," and Jordan

[3] The acronym "WHO" stands for the World Health Organization.

was informed that he can submit a new medical exemption request for MMR. (RJN, Exh. 1, p. 5.)

III. THE INSTANT ACTION

Plaintiffs filed their initial complaint in Sacramento Superior Court. (Decl. Leask, ¶ 2, Exh. A.) The complaint pleaded three causes of action against Dr. Aragón and PCS, which were based on alleged violation of the Health and Safety Code statutes and regulations and of Education Code sections 51746 and 51747. (Decl. Leask, ¶ 2, Exh. A.) Prior to either defendant filing a responsive pleading, the case transferred from the Sacramento County Superior to the Sonoma County Superior Court. (Decl. Leask, ¶¶ 2-4.) Upon meet and confer, Plaintiffs' counsel regarding a demurrer to the complaint, and Plaintiffs subsequently filed and electronically served the FAC on June 17, 2024. (Decl. Leask, ¶¶ 2-13, Exh. H.)

The FAC pleads five causes of action against Dr. Aragón and PCS, which includes the same three causes initially plead against Dr. Aragón and PCS for violation of the same California statutes and regulations, albeit with the words "preemption by" added to the headings. The FAC also added two additional causes for violation of Article IX of the California Constitution and Violation of the Equal Protection Clause of the California Constitution. (FAC p. 9-15.[4])

The parties met and conferred as required by Code of Civil Procedure section 430.41, prior to the filing of this demurrer. (Decl. Leask, ¶¶ 2-16, Exh. A-F.)

STANDARD OF REVIEW

A complaint that fails to allege facts sufficient to constitute a cause of action is subject to demurrer. (Code Civ. Proc., § 430.10, subd. (e).) In ruling on a demurrer, "the trial court examines the pleading to determine whether it alleges facts sufficient to state a cause of action under any legal theory, with the facts being assumed true for purposes of this inquiry." (*Campaign for Quality Educ. v. State of California* (2016) 246 Cal.App.4th 896, 904.) A court may also consider judicially noticeable matters that are outside the pleading and may disregard allegations that are contrary to law, or are contrary to a fact of which judicial notice may be taken.

[4] The FAC also pleads two of action against PCS: a sixth cause of action for Violation of Education Code Section 220 and a seventh cause of action for Violation of Government Code Section 11135. (FAC p.16-18.) Neither of these causes are relevant to this demurrer.

(*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1141; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 ["[C]ourts may – and indeed, must – disregard allegations that are contrary to judicially noticed facts and documents."].) "[L]eave to amend should not be granted where . . . amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; see also *Brown, supra,* 24 Cal.App.5th at 1148 (leave to amend denied).

ARGUMENT

I. THE FAC FAILS TO ALLEGE ANY VIABLE CAUSES OF ACTION AGAINST DR. ARAGÓN

A. The First, Second and Third Causes of Action All Fail Because There Is No Private Right of Action Under the Statutes and Regulations Pled, and There Is No Viable Preemption Claim

1. No private right of action

The FAC pleads as the first, second and third causes of action, violation of California Health and Safety Code section 120335, California Code of Regulations, Title 17, sections 6025, 6060, and 6065, and Title 5, section 11700; and Education Code sections 51746 and 51747). (FAC ¶¶ 63, 70, 78-81, 86-91.) However, simply pleading a violation of a state statute or regulation is not a sufficient basis for a cause of action; there must be a private right of action under the statute. (*Lu v. Hawaiian Gardens Casino, Inc*. (2010) 50 Cal.4th 592, 596; *Vikco Ins. Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.5th 55, 62.)

Whether a party has a right to sue depends on whether the Legislature has "manifested an intent to create such a private cause of action" under the statute. (*Id*., citing *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305.) A court is tasked with examining the statutory text to see if it contains "clear, understandable, unmistaken terms" "which strongly and directly" indicate a private right of action is allowed. (*Mayron v. Google LLC* (2020) 54 Cal.App.5th 566, 571.) Where the text does not contain unmistakable directive, the legislative history may indicate whether the Legislature intended to create a private cause of action. (*Id*., citing *Lu, supra*, at 598.) It is the plaintiffs' burden to offer the authority that creates a private right of action. (*Rondeau v. Mosinee Paper Corp*. (1975) 422 U.S. 49, 63.)

In this case, the FAC does not plead any express private right of action under any of the statutes or regulations cited. The FAC also does not cite to any part of the statute's text that affords Plaintiffs the right to bring this action, nor cite to any statutory language or legislative intent that "unmistakably" confers any private right to sue. Nor do the statutes contain any such private right of action. (Health & Saf. Code § 120335; Cal. Code Regs., tit. 17, §§ 6025, 6060, 6065; Cal. Code Regs., tit. 5, § 1700; Educ. Code §§ 51746, 51747.)

2. No viable preemption claim

Plaintiffs appear to argue that CalHHS's vaccination policies are preempted by state law. (FAC, ¶ 21; see also First, Second and Third Causes of Action ["Preemption By"].) If this is in fact the case, the argument fails.

An essential prerequisite of a state law preemption claim is a conflict between local legislation of a county or city and state law. (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067.) "Under article XI, section 7 of the California Constitution, a county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general state laws. If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." (*Id*. (citations and internal quotations omitted).)

Here, Plaintiffs do not identify any ordinance or regulation of a county or city that actually conflicts with state law, nor do they allege any act by Dr. Aragón that allegedly violates or is pre-empted by state law. Furthermore, the doctrine of state law preemption only applies to local ordinances or local legislation by "a county or city," and not to Dr. Aragón's authority as the state public health director. (Cal. Constitution, Art. XI, § 7.) Thus, the first, second, and third causes of action fail and the demurrer should be sustained.

B. The Fourth Cause of Action Fails Because There Is No Violation of the California Right to Education

For the fourth cause of action, the FAC alleges that "[b]y implementing a stringent and discriminatory vaccine mandate, Defendants are denying California schoolchildren like Jordan their fundamental right to an education . . ." afforded under Article IX of the California constitution. (FAC ¶¶ 96-98.) The FAC, however, does not identify any regulation of Dr.

Aragón or CalHHS that violates any right of Plaintiffs or that contradicts state law. Plaintiffs instead claim there is a vaccine mandate without any reference to such mandate and make only conclusory arguments that Plaintiffs' rights are being violated. Such conclusory allegations are insufficient to withstand a demurrer. (*Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 354.)

In addition, well-established California case law has held that mandatory immunization requirements for school-aged children **do not** violate the right to attend school. For example, in *Brown v. Smith*, a lawsuit that challenged amendments that eliminated the personal belief exemption from the school immunization requirements, the court acknowledged that "federal and state courts . . . have held, 'either explicitly or implicitly' that 'society has a compelling interest in fighting the spread of contagious diseases through mandatory vaccination of school-aged children." (*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1145-1147 [citing *Whitlow v. Cal. Dept. of Education* (S.D. Cal. 2016) 203 F.Supp.3d 1079, 1089-1090].)

In *Love v. State Department of Education*, the Third District Court of Appeal followed *Brown* and the California Supreme Court's holding in *French v. Davidson* (1904) 143 Cal. 658, 662, when it similarly held that statutes that eliminated personal belief exemption from the mandatory immunization requirements for school-aged children did not violate the right to attend school. (*Love v. State Department of Education* (2018) 29 Cal.App.5th 980, 994-995.)

Accordingly, even if the FAC were to have pleaded that the statutes and regulations for mandatory immunizations in schools or for those as to the medical exemptions are unconstitutional, such a claim would likewise fail given that such similar statutes and regulations are already deemed to be necessary and narrowly drawn to serve compelling government interests of achieving total immunization of appropriate age groups against childhood diseases. Thus, the fourth cause of action fails and the demurrer should be sustained.

C. The Fifth Cause of Action Likewise Fails to Establish a Violation of California's Equal Protection Clause

Plaintiffs allege a violation of the Equal Protection Clause of the California Constitution, Cal. Const., Art. I, § 7, subd. (a), asserting that "Defendants' mandates" (1) distinguish between

vaccinated and unvaccinated schoolchildren, and impose independent study as the sole option for education for schoolchildren, including schoolchildren who have natural immunity from prior infection . . .; (2) wholly ignore the efficacy of naturally acquired immunity, while only recognizing vaccinated immunity . . .; and (3) treat unvaccinated migrant, foster, homeless, and military family members' schoolchildren more favorably than all other unvaccinated schoolchildren by permitting [them] to attend school in-person . . . even if they are unvaccinated." (FAC ¶ 110.) Plaintiffs assert that such statutes are subject to strict scrutiny. (FAC ¶¶ 111-118.)

To establish a violation of the Equal Protection Clause, a party must first demonstrate that the State has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Wutzke* (2002) 28 Cal.4th 923, 943.) The constitutional doctrine of equal protection of the laws ensures that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. (*Purdy and Fitzpatrick v. State* (1969) 71 Cal.2d 566, 578.) Equal protection, however, does not require "uniform operation of the law with respect to persons who are different." (*People v. Guzman* (2005) 35 Cal.4th 577, 591.)

However, the FAC does not identify "Defendants' mandates" and there is no allegation that the State's immunization statutes or regulations themselves are unconstitutional or inconsistent with state law. Indeed, neither Dr. Aragón nor CalHHS has any such mandates or policies that "impose independent study" or that "ignore naturally acquired immunity." Rather, CalHHS follows state law as proscribed and as the law was intended, namely, to achieve "total immunization" against childhood diseases. (Health & Saf. Code, § 120325.) Moreover, as demonstrated by the appeal decision letter, individuals who demonstrate immunity through acceptable laboratory test results can qualify for medical exemption through CalHHS. (RJN Exh. 1.) Thus, under the facts pled, the fifth cause of action fails.

The FAC also fails to plead similarly-situated groups that would give rise to equal protection. "As its name suggests, equal protection of the laws assures that people who are 'similarly situated for purposes of [a] law' are generally treated similarly by the law. (*Vergara v. State* (2016) 246 Cal.App.4th 619, 644, quoting *Cooley v. Superior Court* (2002) 29 Cal.4th 228,

253.) Thus, an Equal Protection claim requires proof that two or more similarly situated groups are being treated in an unequal manner. (*Id*.)

Here, none of the classifications alleged in the FAC support an Equal Protection claim. Vaccinated children are not similarly situated to those who are not vaccinated; and neither are school children who are migrant, foster, homeless, or military family versus those are not. (See *Whitlow, supra,* 203 F.Supp.3d at 1087; see also, *Brown, supra*, 24 Cal.App.5th at 1147 (the alleged classifications of home-based vs. classroom-based students, medically-exempt students vs. students without medical exemptions, children with individualized education plans and those without, "do not involve similarly situated children, or are otherwise entirely rational classifications.") Accordingly, even if the Court finds that Plaintiffs have alleged the elements of an Equal Protection claim, rational basis review, not strict scrutiny, applies. (*Id*.)

Under a rational basis review, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. (*Whitlow, supra,* 203 F.Supp.3d at 1087-1088 [citing *Nordlinger v. Hahn* (1992) 505 U.S. 1, 11.].) Here, it is undisputed that a rational basis exists for the classification of foster, homeless and military children and youth.

The first statute referenced in the FAC – Education Code section 48850, *et seq*. – arose out of Assembly Bill No. 490 (AB 490), which sought to address barriers to equal educational opportunity for foster children and homeless youth. The legislative intent behind the statute is to ensure that such pupils have meaningful opportunity to meet the state pupil achievement standards and to allow for immediate enrollment when transferring to a new school, while records are located. (RJN, Exhs. 13, 14) Clearly, a rational basis exists for the statutory scheme

The second statute referenced in the FAC – Education Code section 48852.7(c)(3) – was enacted to align with the McKinney-Vento Homeless Assistance Act (McKinney-Vento Act) (42 U.S. Code § 11431-11435), which is federal law that ensures the educational rights of children and youth experiencing homelessness. The McKinney-Vento Act mandates that states must

review and revise laws, regulations, policies, and practices that may act as a barrier to the enrollment and attendance of homeless students, and to ensure that students experiencing homelessness are afforded the same free, appropriate public education as provided to other children and youth. (42 U.S.C. § 11431(2).) Here too, there is a rational basis for treating homeless students differently, given the unique challenges they face in obtaining an education. (RJN, Exh. 15.)

The last statute referenced in the FAC – Education Code section 48204.6 (Assembly Bill No. 2949) – was enacted to eliminate barriers faced by children of military parents who move and/or end their service and where there may be a delay in retrieving the students' records. (RJN, Exh. 16.) Likewise, a rational basis for treating such students differently under the law.

None of these statutes contravene the State's interests in establishing total immunity or protecting against diseases, and none on their face *eliminate* the requirements that students be immunized for school attendance; rather, the statutes only prohibit the delay of enrollment while immunization records are located or immunizations are administered. Accordingly, a rational basis for the differing treatment of these classes of students exists. (See e.g., *Whitlow*, *supra,* 203 F.Supp.3d at 1088.)

Notwithstanding, even if strict scrutiny applies, well-established precedent in California and by the United States Supreme Court has upheld the right of the states to enact and enforce laws requiring citizens to be vaccinated, and in particular, school children. (*Whitlow supra,* 203 F.Supp.3d at 1083-1086, 1091-1092 ["State Legislatures have a long history of requiring children to be vaccinated as a condition to school enrollment, and for as many years, both state and federal courts have upheld those requirements against constitutional challenge."]; *Brown, supra,* 24 Cal.App.5th at 1145-1148, citing *Butt v. State of California* (1992) 4 Cal.4th 668, 682.) The State's interest in protecting the health and safety of its citizens, and particularly of school children, means that the medical exemption statutes and regulations would be deemed justified by a compelling state interest under the strict scrutiny test and upheld in the same manner as other laws relating to immunization requirements for school children. (*Love, supra,* 29 Cal.App.5th at 990. Thus, the fifth cause of action fails and demurrer should be sustained.

II. THE FAC FAILS TO SEEK ANY AVAILABLE RELIEF

A. No Injunctive Relief

"Injunctive relief is a remedy, not a cause of action. [Citations.] A cause of action must exist before a court may grant a request for injunctive relief." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 65; accord, *City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293 ["'A permanent injunction is merely a remedy for a proven cause of action. It may not be issued if the underlying cause of action is not established.'"].) Because none of the causes of action are legally sufficient, Plaintiffs' request for a temporary restraining order or injunctive relief necessarily fails as well. (*Id*.) Thus, the demurrer should be sustained.

B. No Declaratory Relief

Declaratory relief requires an "actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1061.) To state a declaratory relief claim, the plaintiff must allege a proper subject of declaratory relief and an actual controversy involving justiciable questions relating to the party's rights or obligations. (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909; *Wilson &Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.)

Plaintiffs have not alleged that they have suffered any actual injury or harm that is redressable. Plaintiffs allege only that "[a]ny mandate by Defendants" that requires Jordan to be *vaccinated* rather than *immunized* would violate section 120335 of the Health and Safety Code and section 6025 of the California Code of Regulations. (FAC ¶ 70.) Yet, as explained herein, Plaintiffs have not cited to any mandate or policy of Dr. Aragón or CalHHS that actually requires "vaccination" over "immunization" or that alleges that they have acted beyond the statutes in any way. The FAC also does not allege that the statutes or regulations are unconstitutional.

Moreover, Jordan is currently attending school at PCS and thus, he has not alleged any facts to demonstrate an actual justiciable controversy. (*DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 545; see also *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 648 [demurrer properly sustained where no allegations that declaratory relief would "have any practical consequences."].)

In addition, "[w]here a trial court has concluded that a plaintiff did not state sufficient facts to support a statutory claim and therefore sustained a demurrer as to that claim, a demurrer is also properly sustained as to a claim for declaratory relief which is 'wholly derivative' of the statutory claim." (*Ball v. FleetBoston Financial Corp*. (2008) 164 Cal.App.4th 794, 800, citing *Ochs v. PacifiCare of Californi*a (2004) 115 Cal.App.4th 782, 794.) As the Supreme Court has confirmed, "[t]he requirement that plaintiffs seeking declaratory relief allege 'the existence of an actual, present controversy' would be illusory if a plaintiff could meet it simply by pointing to the very lawsuit in which he or she seeks that relief. Obviously, the requirement cannot be met in such a bootstrapping manner; 'a request for declaratory relief will not create a cause of action that otherwise does not exist.'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80.)

Under the facts pled, declaratory relief is improper. (*Id.*; see also *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 249, 251 [declaratory relief action is not an appropriate remedy to challenge the application of such statute, regulation or ordinance]; *Walter Leimert Co. v. Calif. Coastal Comm*. (1983) 149 Cal.App.3d 222, 230 ["…declaratory relief is not appropriate to review an administrative decision."].) Thus, the demurrer should be sustained.

C. No Writ of Mandate Under California Code of Civil Procedure Sections 1085 or 1094.5

Section 1085 of the Code of Civil Procedure provides for the issuance of a writ of mandate to "any inferior tribunal, corporation board, or person, to compel the performance of an action which the law specifically enjoins, as a duty resulting from an office, trust, or station." (Code Civ. Pro., § 1085, subd. (a).) "Generally, mandamus is available to compel a public agency's performance or to correct an agency's abuse of discretion when the action being compelled or corrected is ministerial." (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700.) "A ministerial act is an act that a public officer is required to perform in a proscribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916; *Carancho v. California Air Resources Bd*. (2005) 111 Cal.App.4th

1255, 1267 [A duty is ministerial when the law specifically prescribes the duties or course of conduct that must be taken and leaves nothing to the discretion of the agency.].) It is the petitioner's burden to demonstrate that the department is subject to "a duty which is purely ministerial in character." (*Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center* (2001) 93 Cal.App.4th 607, 618.)

Conversely, a writ of administrative mandamus is used to review the quasi-judicial or adjudicative acts of a state agency. "In general, 'quasi-judicial' or 'adjudicative acts,' that is, acts that involve the actual application of a rule to a specific set of existing facts are reviewed by administrative mandamus under Code of Civil Procedure section 1094.5." (*Beach and Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244, 258.)

In this case, Plaintiffs fail to plead either a writ of mandate cause of action under section 1085 of the Civil Code of Procedure (traditional mandamus) or a cause of action under section 1094.5 of the Civil Code of Procedure (administrative mandamus). The FAC states only that the Court has jurisdiction to issue writs of mandate pursuant to California Code of Civil Procedure sections 1085 and 1094.5. (FAC ¶ 11.) The FAC does not plead any ministerial duty of Dr. Aragón; the FAC does not plead that Dr. Aragón violated any ministerial duty owed by Dr. Aragón; and the FAC does not plead that Dr. Aragón abused his discretion under law. The FAC also does not plead that the administrative agency's review of the appeal denial was improperly denied or unsupported by substantial evidence, nor do Plaintiffs seek review of the medical exemption denial.[5] Simply put, there are no facts in the FAC that serves as a basis for a Section 1085 writ action or a Section 1094.5 writ action, and the demurrer should be sustained.

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[5] Plaintiffs also have failed to exhaust their administrative remedies by refiling the medical exemption request as to the MMR vaccine, which is a jurisdictional prerequisite for access to the courts, and would bar any mandamus actions or declaratory relief actions. (*Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432; (*Tri-County Special Educ. Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, 576.)

III. LEAVE TO AMEND SHOULD BE DENIED

The mere assertion of a statutory or constitutional violation, followed by simply a citation to the statute or constitutional provision, does not merit a judicial response. (*Woods v. Horton* (2008) 167 Cal.App.4th 658, 677.) Because there is no express right of action pled and none that exists in the statutes, granting leave to amend as to the first, second and third causes of action is futile.

Plaintiffs also concede that "[c]hildhood immunization requirements are within the sole province of the California Legislature and CDPH, whose authority is limited by statute." (FAC ¶ 16.) As demonstrated, well-established precedent has upheld the right of the states to enact and enforce laws requiring schoolchildren to be vaccinated. (*Whitlow, supra,* 203 F.Supp.3d at 1083-1086, 1091-1092 ["State Legislatures have a long history of requiring children to be vaccinated as a condition to school enrollment, and for as many years, both state and federal courts have upheld those requirements against constitutional challenge."]; *Brown, supra,* 24 Cal.App.5th at 1145-1148, citing *Butt v. State of California* (1992) 4 Cal.4th 668, 682.) The State's interest in protecting the health and safety of its citizens, and particularly of schoolchildren, means that the medical exemption statutes and regulations would be deemed justified by a compelling state interest under the strict scrutiny test and upheld in the same manner as other laws relating to immunization requirements for schoolchildren. (*Love, supra,* 29 Cal.App.5th at 990.) Thus, there is no plausible way to amend the complaint to plead viable causes of action for violation of the California right to education or the California Equal Protection clause. Both causes would fail under the well-established case law precedent in California.

Moreover, it is undisputed that Jordan has **not** received all four doses of the polio vaccine. (FAC ¶¶ 34,40-41; Health & Saf. Code, § 120335.) Plaintiffs cite to no authority that requires the acceptance of Jordan's titer tests as proof of immunity for the poliovirus type 2 in this instance. Rather, the undisputed facts are that the decision was made in conformity with the state statute that requires appeals to be evaluated "consistent with the federal Centers for Disease Control and Prevention, federal Advisory Committee on Immunization Practices, or American Academy of Pediatrics guidelines or the relevant standard of care, as applicable." (Health & Saf. Code, §

120372.05(c); RJN, Exhs. 1-10.) Jordan's appeal review followed the guidance from the CDC and the ACIP, which specifies that with respect to poliovirus, "serologic testing is no longer recommended to assess immunity,"; that "[w]ithout laboratory evidence of immunity against poliovirus type 2, immunity could not be determined [in Jordan's case]; and that "[p]er ACIP guidelines, completing the full series of the vaccine is recommended instead." (RJN, Exh. 1, p.5)

Plaintiffs' reference to colleges' acceptance of titer tests is inconsequential. Jordan seeks admission to a public school, not a college. Further, our courts have consistently recognized that there are particular concerns with respect to mandatory immunizations among *schoolchildren*. *Whitlow*, *supra,* 203 F.Supp.3d at 1092. Plainly put, it is for the Legislature, not the court, to determine medical exemption provisions and what constitutes proper documentation of "immunity." *Allen*, supra, 234 Cal.App.4th at 47 [the choice among competing policy considerations in enacting laws relating to homeless persons is a legislative function]; *Let Them Choose v. San Diego Unified School Dist.* (2022) 85 Cal.App.5th 693, 707 ["Since 1911, the Legislature has regulated student vaccination. (See Stats. 1911, ch.134 [smallpox vaccine].)"].)

Accordingly, any request for leave to amend should be denied.

CONCLUSION

For the above reasons, Dr. Aragón respectfully requests that the demurrer as to each and every cause of action alleged against Dr. Aragón (the first, second, third, fourth and fifth causes of action) be sustained without leave to amend.

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Respectfully submitted,

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