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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

ROBYN CANNISTRA, individually and on behalf of JORDAN CANNISTRA, as his guardian in fact;

Plaintiff,

vs.

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

Assigned to: Hon. Oscar A. Pardo
Department: 19

PLAINTIFF'S OPPOSITION TO DEFENDANT TOMÁS ARAGÓN'S DEMURRER TO FIRST AMENDED COMPLAINT

Date: December 11, 2024
Time: 3:00 p.m.
Dept.: 19

Action Filed in Sacramento Superior Court: August 14, 2023

Action Transferred to Sonoma County Superior Court: March 28, 2024

First Amended Complaint Filed: June 13, 2024

Trial Date: None Set

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I. INTRODUCTION

Plaintiff Robyn Cannistra, individually and on behalf of Jordan Cannistra ("Jordan"), as his guardian in fact ("Plaintiff"), hereby opposes the demurrer ("Demurrer") filed by Defendant Tomás Aragón, in his official capacity as Department of Public Health Director and as the State Public Health Officer ("Defendant Aragón") against the First Amended Complaint ("FAC").[1]

The lawsuit seeks relief that would permit Jordan and similarly situated students to attend California schools, provided they demonstrate *immunity* to the ten specific childhood illnesses currently required for school admission under Health and Safety Code section 120335.

Defendant Aragón and Defendant PCS (collectively "Defendants") mandate that Jordan be *vaccinated* rather than *immunized* from certain diseases, or else be excluded from in-person instruction and participation in extracurricular activities on PCS's campuses and be coerced into an independent study program. (FAC ¶ 1.)

Jordan has proven and documented immunity. (FAC ¶¶ 31-44.) Such full immunity arises from traditional vaccinations, infection, and titer testing.

An antibody titer is a laboratory test that measures the level of antibodies in a blood sample, which confirms that a person possesses sufficient antibodies for immunity from a specific virus. Both the University of California system and California State University system recognize titer tests as a valid means of satisfying immunization requirements in lieu of vaccines. For instance, at the University of California, Irvine, titer tests showing immunity are accepted for viruses such as MMR, Varicella, and Tdap. As explicitly stated by California State University, "Titer test records are official immunization records," providing students an alternative method to demonstrate their immunity. (FAC ¶¶ 25-29.)

PCS itself advised Plaintiff that titer tests in lieu of vaccination would be sufficient to satisfy Jordan's immunization requirements to attend PCS. (FAC ¶ 45.)

As a PCS student since kindergarten, the sixth grade is not a vaccination "checkpoint." (FAC ¶ 32.) Jordan has had the same vaccination status since before entering kindergarten. (FAC ¶ 33.) Jordan

[1] Defendant Petaluma City Schools ("PCS") has never responded to the FAC, nor has it joined in the Demurrer.

has been vaccinated with:

- Three of four doses of the Polio vaccine
- Five of five doses of the DTaP vaccine
- One of two doses of the MMR vaccine
- Three doses of the Hepatitis B vaccine (FAC ¶ 34)

Jordan was previously infected with chicken pox (Varicella) and so has immunity for that disease. (FAC ¶ 35.) Accordingly, Jordan needed to demonstrate immunity for MMR (second dose) and Polio (fourth dose). (FAC ¶ 36.) Jordan underwent titer testing. (FAC ¶ 37.) Jordan's titer testing confirmed immunity for:

- MMR (measles, mumps, and rubella)
- Polio Type 1
- Polio Type 3 (FAC ¶ 38)

The Polio Type 2 titer was not included from the lab. Per the CDC, "Serologic testing for antibodies against poliovirus type 2, an assay that uses live virus, is becoming increasingly unavailable as US laboratories conform 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. (FAC ¶ 41.)

Moreover, Jordan received the IPV vaccine which covers all three types of Polio. (FAC ¶ 42.) Jordan does not need a second dose of the MMR vaccine or a fourth dose of the Polio vaccine due to his titer-confirmed immunity via positive antibodies to each of the diseases. (FAC ¶ 43.) Jordan is immune to all applicable diseases and therefore poses no risk to anyone at PCS concerning these diseases, and has provided proof of his immunization. (FAC ¶ 44.)

Jordan demonstrated his immunity via vaccinations, infection, and titer testing, but Defendants have refused and continue to refuse to recognize Jordan as having the required immunity for in-person attendance at California schools. At the same time, California law permits several categories of schoolchildren to attend public and private schools without any proof of immunity (foster children, homeless children, and military family members' children) – a double standard without any justification. (FAC ¶ 30.)

Defendants refuse to recognize Jordan's immunized status and seek to enforce their vaccination

mandate against Jordan to his grave detriment, including exclusion from in-person instruction and participation in extracurricular activities on PCS's campuses, and prohibition from entering PCS property for any educational or social purpose. Should Defendants continue not to recognize Jordan's immunized status, Jordan will suffer irreparable harm including, without limitation, academic, social, and mental health harms. (FAC ¶¶ 61, 72, 83, 93, 98, 128, 138.)

By implementing a stringent and discriminatory *vaccine* mandate – rather than recognizing immunity via titer testing as already recognized by the University of California system and California State University system – Defendants are denying California schoolchildren like Jordan their fundamental right to an education that provides a "general diffusion of knowledge and intelligence essential to the preservation of the rights and liberties of the people" and ensures the opportunity to become proficient according to the state of California's standards, to develop the skills and capacities necessary to achieve economic and social success in our competitive society, and to participate meaningfully in political and community life. (FAC ¶ 98.)

The legal arguments herein confirm that Defendant Aragón's Demurrer should be overruled in its entirety or, as an alternative, that Plaintiff should be granted leave to amend.

II. STANDARD ON DEMURRER

"It is 'black-letter law' a demurrer tests the pleading alone." (*Gould v. Maryland Sound Indus., Inc.* (1995) 31 Cal.App.4th 1137, 1144); see Code Civ. Proc., § 430.30, subd. (b).) "The rules of pleading require, with limited exceptions not applicable here, only general allegations of ultimate fact. [Citations.] The plaintiff need not plead evidentiary facts supporting the allegation of ultimate fact. [Citations.] A pleading is adequate so long as it apprises the defendant of the factual basis for the plaintiff's claim." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1469–1470.) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47, internal quotation marks and alterations omitted.) "When any ground for objection to a complaint or cross-

complaint does not appear on the face of the pleading, the objection may be taken by answer." (Code Civ. Proc., § 430.30, subd. (b).) "Defendants cannot set forth allegations of fact in their demurrers which, if true, would defeat plaintiff's complaint." (*Gould*, *supra*, 31 Cal.App.4th at 1144.) The only exception is for matters of which the court is required to or may take judicial notice. (*Id*.; see Code Civ. Proc., § 430.30, subd. (a).)

Defendant Aragón has requested that the Court take judicial notice of sixteen documents. As explained in Plaintiff's objection to Defendant Aragón's request for judicial notice, filed concurrently herewith and incorporated by reference herein, while judicial notice as to the existence of those documents may be appropriate, judicial notice as to the truth of the facts they assert is not. (*Unruh-Haxton v. Regents of Univ. of Cal.* (2008) 162 Cal.App.4th 343, 365.) "[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom." (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.) Because "'[a] demurrer is simply not the appropriate procedure for determining the truth of disputed facts,' [citation], judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed." (*Id*.) Thus, notwithstanding Defendant Aragón's citation to "official" state and other publications, this Court cannot take judicial notice of disputed factual matters.

The Demurrer should be overruled because it is premised on assumptions, improper conclusions, and disputed facts and because Plaintiff has adequately pleaded her claims.

III. ARGUMENT

A. Plaintiff's First, Second, and Third Causes of Action State Claims for Relief.

Plaintiff's First, Second, and Third Causes of Action seek relief under the Health and Safety Code, the California Code of Regulations, and the Education Code. The mandate at issue here – that Jordan be *vaccinated* rather than *immunized* (FAC ¶ 1 *et seq*.) – conflicts with Jordan's fundamental rights to education as provided by these Codes: admission and attendance at school without forced enrollment in independent study. Applying California's preemption framework confirms that Plaintiff

has adequately pled myriad violations.

The California Supreme Court has explained the principle of preemption as follows: "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation is duplicative of general law when it is coextensive therewith. Similarly, local legislation is 'contradictory' to general law when it is inimical thereto." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897–898, internal citations and quotation marks omitted.) Defendants' mandate, as specifically implemented by PCS, is "contradictory" and "inimical" to the cited Codes for any or all of the following reasons:

First, any refusal by PCS to admit Jordan or allow Jordan's continued attendance, following CDPH's revocation of his medical exemption, violates Title 17, Section 6025 of the California Code of Regulations because it excludes him even though Jordan has all the immunizations required by Section 6025. (FAC ¶ 69.) Any mandate by Defendants requiring Jordan to be vaccinated rather than immunized violates Section 120335 of the Health and Safety Code and Title 17, Section 6025 of the California Code of Regulations, because such mandate recognizes only vaccination, and not "immunization," which can be acquired naturally through prior infection and/or evidenced by antibodies. (FAC ¶ 70.) Jordan has a fundamental right to a free public education (FAC ¶ 71), and should Defendants continue not to recognize Jordan's immunized status, Jordan will suffer irreparable harm (including, without limitation, academic, social, and mental health harms) each day that Defendants exclude Jordan from in-person instruction and participation in extracurricular activities on PCS's campuses and each day that Defendants prohibit Jordan from entering PCS property for any educational or social purpose. (FAC ¶ 72.)

Second, should Jordan not be admitted or allowed to continue attendance, PCS will enroll Jordan in PCS's independent study program. (FAC ¶ 77.) Under Title 5, Section 11700 of the California Code of Regulations, "Independent study is an optional educational alternative in which no pupil may be required to participate." (Cal. Code. Regs., tit. 5, § 11700, subd. (d).) (FAC ¶ 78.) Additionally, Title 5, Section 11700 of the California Code of Regulations provides that "a pupil's … choice to commence, or to continue in, independent study must not be coerced." (Cal. Code. Regs., tit. 5, § 11700, subs.

(d)(2)(A).) (FAC ¶ 79.) Moreover, "instruction may be provided to the pupil through independent study only if the pupil has the continuing option of classroom instruction." (Cal. Code. Regs., tit. 5, § 11700, subd.(d)(2)(B).) (FAC ¶ 80.) Defendants' vaccination policy violates California Code of Regulations, Title 5, Section 11700, because it will lead to the forced and involuntarily enrollment of Jordan in PCS's independent study program and will require the exclusion of Jordan from any school property within PCS, in-person classes, and extracurricular activities, including sports, at any PCS school, unless Jordan provides proof of vaccination. (FAC ¶ 81.)

Third, the Education Code provides that "independent study is an optional educational alternative in which no pupil may be required to participate." (Ed. Code, § 51747, subd. (f)(8).) (FAC ¶ 86.) A school may enroll a child in such a program only if there has been a "pupil-parent-educator conference" to determine whether enrollment in independent study is in the best interest of the child (*id*., § 51747, subd. (h)(2)) and "a signed written agreement for independent study from the pupil, or the pupil's parent or legal guardian if the pupil is less than 18 years of age" (*id*., § 51747, subd. (f)(9)(F)). (FAC ¶ 87.) Additionally, a child enrolled in a remote learning or independent study program cannot be excluded from school facilities. Rather, the school "shall ensure the same access to all existing services and resources in the school in which the pupil is enrolled … as is available to all other pupils in the school." (Ed. Code, § 51746.) (FAC ¶ 88.) A child enrolled in an independent study program always retains the option to return to his or her regular classroom for in-person instruction. The school is required to "transition pupils whose families wish to return to in-person instruction from independent study expeditiously, and, in no case, later than five instructional days." (Ed. Code, § 51747, subd. (f).) (FAC ¶ 89.) Jordan is immune to all applicable diseases and therefore poses no risk to anyone at PCS concerning these diseases, and has provided proof of his immunization. (FAC ¶ 90.) Defendants' vaccination policy violates Education Code Sections 51746 and 51747 because it will lead to the forced and involuntarily enrollment of Jordan in PCS's independent study program and will require the exclusion of Jordan from any school property within PCS, in-person classes and extracurricular activities, including sports, at any PCS school, unless Jordan provides proof of vaccination. (FAC ¶ 91.)

In addition to Defendants' mandate being "contradictory" and "inimical" to the cited Codes, the mandate invades a fully occupied field. "[L]ocal legislation enters an area that is fully occupied by

general law when the Legislature has expressly manifested its intent to fully occupy the area, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at 898.) Here, state law fully occupies the field of vaccine requirements for school admission.

PCS, like all California schools, lacks authority to mandate vaccines requirements in addition to those historically required by state law. The intent of the Legislature to reserve this power to itself and only to state health authorities is clear: "The control of smallpox is under the direction of the State Department of Health Services, and *no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities*." (Ed. Code, § 49405, emphasis added.)

The Legislature's intent to establish a statewide standard for school vaccinations is confirmed by the legislative history. For example, the authors of SB 277, the current version of the state's school vaccine statute, stated in the Senate Judiciary Committee report that the purpose of the legislation is "[t]o provide a statewide standard [that] allows for a consistent policy that can be publicized in a uniform manner, so districts and educational efforts may be enacted with best practices for each district." Likewise, the Assembly's health committee report on SB 277 states that vaccine requirements are a matter of state law: "States enact laws or regulations that require children to receive certain vaccines before they enter childcare facilities and school, but with some exceptions, including medical, religious, and philosophical objections."

Besides these explicit statements, there are also numerous indicia within the statutory scheme itself that the Legislature intended to occupy the field. For example, as is clear from the foregoing, "the subject matter has been so fully and completely covered by general law" — right down to the forms that must be used and the establishment of a state vaccination database — "as to clearly indicate that it has become exclusively a matter of state concern." (*Sherwin-Williams*, *supra*, 4 Cal.4th at 898.)

Alternatively, if the Court finds that the subject matter has only been "partially covered" by state law, the law is "couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." In particular, the regulations promulgated by CDPH under state law unequivocally direct that schools "*shall* unconditionally admit or allow continued attendance" to students who have the vaccinations required by state law. (Cal. Code Regs., tit. 17, § 6025, emphasis added.)

Finally, assuming the subject matter has only been "partially covered" by state law, "the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality." (*Sherwin-Williams*, *supra*, 4 Cal.4th at 898.) As explained in the Assembly health committee report on AB 277, the Legislature has statutorily prescribed a regime of ten childhood vaccinations "after careful consideration of the public health risks of these diseases, cost to the state and health system, communicability, and rates of transmission." The Legislature has also established an orderly process for the state's public health agency, CDPH, to add to the list through administrative rulemaking only after "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 & Safety Code § 120335, subd. (b)(11).) Schools also must also recognize medical and personal belief exemptions. (Health & Safety Code, § 120338.)

Plaintiff has adequately pled myriad violations by Defendants.

B. Plaintiff States a Claim for Violation of the Right to Education.

California children have a constitutional right to attend school. (*Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 880; Cal. Const., art. IX, §§ 1, 5.) As discussed in detail, *supra*, to the extent Defendants' policies exclude healthy children from school, or force them into inferior independent study programs, children's constitutional rights are being violated. Plaintiff's Fourth Cause of Action thus states a claim.

C. Plaintiff's Fifth Cause of Action States a Claim for Violation of the Equal Protection Clause.

"A person may not be … denied equal protection of the laws." (Cal. Const., art. I, §7, subd. (a).)

The California Constitution thus prohibits any governmental actor — including Defendants — from making a law, rule, or regulation that restricts the freedom of one group while other similarly situated group remain unrestricted unless there is a rational basis connected to a legitimate governmental interest sufficient to justify the disparate treatment.

i. Defendants Cannot Satisfy Strict Scrutiny.

When "the disparate treatment has a real and appreciable impact on a fundamental right of interest," strict scrutiny applies. (*Butt v. State of California* (1992) 4 Cal.4th 668, 685–86.) A child's right to education is one such right or interest: "In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis." (*Jackson v. Pasadena City Sch. Dist.* (1963) 59 Cal.2d 876, 880.) It is "well settled that the California Constitution makes public education uniquely a fundamental concern of the State…." (*Butt*, *supra*, 4 Cal 4th at 685; see also Cal. Const., art. IX, § 5.)

Under the strict scrutiny standard, "the governmental entity 'bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." (*Hartzell v. Connell* (1984) 35 Cal. 3d 899, 921, quoting *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 785.) The law also "must 'be narrowly tailored that is, the least restrictive means)' to promote the compelling interest." (*Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 491–492, quoting *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952.)

Plaintiff alleges that Defendants' mandate that Jordan be *vaccinated* rather than *immunized* places a substantial burden on Jordan's fundamental constitutional right to education because he is being excluded from school if he is unable to show full vaccination. (FAC ¶¶ 69-72, 77-81, 88-91.) Accordingly, Defendants' mandates and restrictions must satisfy strict scrutiny.

Alas, such mandates cannot survive strict scrutiny. Though Defendants arguably have a compelling interest in slowing the spread of disease, the subject mandate is not narrowly tailored to reduce transmission rates. (FAC ¶ 113-115.) Instead, Jordan is forced to sacrifice his right to an in-person education because he cannot get all require vaccines, yet he has confirmed immunity and poses no risk.

The distinction made by Defendants between vaccinated and unvaccinated schoolchildren — and

even different classes of unvaccinated schoolchildren (i.e., migrant, foster, homeless, and military family members' schoolchildren) — cannot survive strict scrutiny. Naturally acquired immunity has been found to be equal or superior to vaccine-induced immunity. Defendants' preferential treatment of vaccinated individuals and certain classes of unvaccinated individuals discriminates, without justification, against all other unvaccinated individuals, including those with natural immunity. It also creates three classes of schoolchildren: those who have been vaccinated, those who have not been vaccinated but fall within a certain class of schoolchildren subject to preferential treatment, and those schoolchildren who do not fall within one of those classes but have not been vaccinated. (FAC ¶¶ 110, 116.)

Further, Defendants' mandates treat schoolchildren who have not been vaccinated and are not members of an exempt group as an inferior class, in that those schoolchildren cannot attend the school of their choice within PCS, cannot participate in in-person classes, and cannot enter a school property for any purpose, including extracurricular and other activities, while the schoolchildren who have been vaccinated or are a member of an exempt group are allowed to attend the school of their choice within PCS, to participate in in-person classes, and to enter a school property for extracurricular and other activities. (FAC ¶ 117.)

Courts must look at the impact of a law when assessing its constitutionality, not merely the intent behind it. (Cf. *City of Santa Monica v. Stewart* (2005) 126 Cal. App. 4th 43, 78.) Here, Plaintiff has pleaded facts showing that impact includes learning losses, social losses, and exclusion from school and activities. (FAC ¶¶ 69-72, 77-81, 88-91.) Defendants thus cannot meet their burden to demonstrate that their mandate serves a compelling interest or that it is the least restrictive means to do so.

ii. Defendants Cannot Satisfy Rational Basis.

"[E]ven in the ordinary equal protection case calling for the most deferential of standards, courts must ascertain the relation between the classification adopted and the object to be attained. The search for the link between classification adopted and the objective gives substance to the Equal Protection Clause." (*People v. Hofsheier* (2006) 37 Cal. 4th 1185, 1201, citations omitted.)

Defendants' mandate fails rational basis scrutiny for all the reasons state above. As alleged, Naturally acquired immunity has been found to be equal or superior to vaccine-induced immunity.

Defendants' preferential treatment of vaccinated individuals and certain classes of unvaccinated individuals discriminates, without justification, against all other unvaccinated individuals, including those with natural immunity. It also creates three classes of schoolchildren: those who have been vaccinated, those who have not been vaccinated but fall within a certain class of schoolchildren subject to preferential treatment, and those schoolchildren who do not fall within one of those classes but have not been vaccinated. (FAC ¶ 116.)

This is the height of irrationality. Plaintiff has sufficiently pleaded that Defendants' mandate fails even rational basis scrutiny.

D. Plaintiff Adequately Alleges Injunctive Relief.

The Demurrer only contends that because none of the causes of action are "legally sufficient," Plaintiff's request for a temporary restraining order or injunctive relief must also fail. (Demurrer, p. 18, ln. 7.) This Opposition confirms that *all* of the FAC's causes of action suffice. Thus, injunctive relief is properly sought and should be ordered.

E. Plaintiff Adequately Alleges Declaratory Relief.

The Demurrer claims that Plaintiff has not adequately alleged declaratory relief because there are no allegations about actual injury or harm, and without an actual controversy, declaratory relief does not apply. But an authority cited in the Demurrer – *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 648 – supports Plaintiff's request for judicial declarations.

The *Meyer* case held that a demurrer is properly sustained where there are no allegations that the declaratory relief would "have any practical consequences." *Id*. at 648. Plaintiff alleges at least six times that Jordan and other similarly situated children "will suffer irreparable harm each day that they are excluded from PCS's school campuses, whether for in-person instruction, extracurricular activities, or other educational or social purposes." (FAC ¶¶ 72, 83, 93, 103, 128, 138.)

The FAC's prayer seeks declarations that Defendants' mandates as alleged herein are null and void as preempted by state law; that Defendants' mandates as alleged herein are invalid and unlawful; that antibody titer tests be recognized as immunity and be presented in lieu of vaccination records; that antibody titer tests fully support medical exemptions or, in the alternative, that medical exemptions are not necessary when a student has titer tests demonstrating immunity; that Defendants cannot exclude a

student with titer tests demonstrating immunity from in-person learning; and that Defendants cannot involuntarily enroll any student in an independent study program.

Should the Court make these declarations, concrete "practical consequences" as contemplated by *Meyer* will follow. Jordan and other similarly situated children will no longer be at risk of suffering the irreparable harm that arises from being excluded from PCS's campuses. Thus, Plaintiff properly seeks declaratory relief.

F. Plaintiff Adequately Seeks a Writ.

The FAC seeks a "writ of mandate restraining and preventing Defendants and their officers, agents, or any other persons acting with them or on their behalf from implementing and enforcing a policy that requires *vaccination* rather than *immunity* to the exclusion of Jordan from in-person instruction and participation in extracurricular activities on PCS's campuses and from entering PCS property for any educational or social purpose." (FAC Prayer (emphasis in original).)

The Demurrer claims that the FAC fails to identify a ministerial duty of Defendant Aragón or any abuse of discretion by Defendant Aragón. (Demurrer, p. 20, ln. 11.) But the Demurrer completely misses Plaintiff's case theory: that Defendants must be restrained and prevented from implementing and enforcing the existing mandate requiring *vaccination* rather than *immunity*. This illegal and unconstitutional mandate is precisely the wrongful conduct of Defendant Aragón that a writ corrects.

G. PCS Has Failed To Respond To the FAC.

Plaintiff's First through Fifth Causes of Action are alleged against Defendants together. Plaintiff also pleads two of action against PCS alone: 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.)

Because PCS has failed to respond to the FAC by either answer or demurrer, these two causes of action survive without challenge.

H. Should the Court Sustain the Demurrer, Plaintiff Should Be Granted Leave To Amend.

A demurrer should be sustained without leave to amend *only* if there is no reasonable possibility the complaint can be cured by amendment. (*Levya v. Nelson* (2000) 83 Cal.App.4th 1061, 1063.) Even

if a demurrer is sustained, leave to amend the complaint is routinely granted. Courts are very liberal in permitting amendments, not only where a complaint is defective in form, but also where substantive defects are apparent: "Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Sup.Ct. (Hiemstra)* (1995) 37 Cal.App.4th 1217, 1227; *Stevens v. Sup.Ct. (API Ins. Services, Inc.)* (1999) 75 Cal.App.4th 594, 601.)

"Unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested or not." (*McDonald v. Sup.Ct. (Flintkote Co.)* (1986) 180 Cal.App.3d 297, 303-304; *Tarrar Enterprises, Inc. v. Associated Indemnity Corp.* (2022) 83 Cal.App.5th 685, 688-689 (citing text); *Eghtesad v. State Farm Gen. Ins. Co.* (2020) 51 Cal.App.5th 406, 411-412 (citing text); see also *City of Stockton v. Sup.Ct. (Civic Partners Stockton, LLC)* (2007) 42 Cal.4th 730, 747 ("leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment").

It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349, *Bounds v. Sup.Ct. (KMA Group)* (2014) 229 Cal.App.4th 468, 484 (citing text) (court should grant leave to amend if in all probability plaintiff will cure defect); *Amy's Kitchen, Inc. v. Fireman's Fund Ins*. Co. (2022) 83 Cal.App.5th 1062, 1073.)

Should the Court sustain the Demurrer, Plaintiff should be granted leave to amend.

IV. CONCLUSION

Wherefore, Plaintiff requests that the Court overrule the Demurrer in its entirety.

Respectfully submitted,

DATED: November 26, 2024

THE NICOL LAW FIRM

By: 

Jonathon D. Nicol
Attorneys for Plaintiff Robyn Cannistra,

individually and on behalf of
Jordan Cannistra, as his guardian in fact

PROOF OF SERVICE

Cannistra et al. vs. Tomás Aragón

Sonoma County Superior Court 24CV01964

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1801 Century Park East, 24th Floor, Los Angeles, CA 90067.

On November 26, 2024, I served true copies of the following document(s) described as **PLAINTIFF'S OPPOSITION TO DEFENDANT TOMÁS ARAGÓN'S DEMURRER TO FIRST AMENDED COMPLAINT** on the interested parties in this action as follows:

Stacey Leask Stacey.Leask@doj.ca.gov Darrell Spence Darrell.Spence@doj.ca.gov Office of the Attorney General California Department of Justice 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004	Counsel for Defendant Tomás Aragón, in his official capacity as Department of Public Health Director and as the State Public Health Officer
Frank Zotter fzotter@sclscal.org School & College Legal Services of California 5350 Skylane Blvd. Santa Rosa, CA 95403	Counsel for Defendant Petaluma City Schools

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address jdn@nicolfirm.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 26, 2024, at Los Angeles, California.

Jonathon D. Nicol