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[No Fee - Govt. Code § 6103]

ATTORNEYS FOR DEFENDANTS GARDEN GROVE UNIFIED SCHOOL DISTRICT, a public entity (erroneously sued as GARDEN GROVE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, an entity); BEN WOLF; LAURA SCHWALM; KENT BAIRD; GARY LEWIS; LINDA REED; LAN QUOC NGUYEN; BOB HARDEN; TRUNG NGUYEN and KIMOANH NGUYEN-LAM

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - SANTA ANA DIVISION

CHARLENE NGOUN, by and through her next friend, CRYSTAL CHHUN, and the GAY-STRAIGHT ALLIANCE NETWORK,

Plaintiffs,

vs.

BEN WOLF, Principal of Santiago High School, in his official and personal capacity, LAURA SCHWALM, Superintendent of the Garden Grove Unified School District, in her official and personal capacity, KENT BAIRD, Assistant Superintendent of the Garden Grove Unified School District, in his official and personal capacity, GARY LEWIS, Assistant Superintendent of the Garden Grove Unified School District, in his official and personal capacity, LINDA REED, President of the Garden Grove Unified School District Board of Education, in her official capacity, LAN QUOC NGUYEN, Vice President of the Garden Grove Unified School District Board of Education, in his official capacity, BOB HARDEN, a member of Garden Grove Unified School District Board of Education, in his official capacity, TRUNG NGUYEN, a member of the Garden Grove Unified School District Board of Education, in his official capacity, KIMOANH NGUYEN-

Case Number: **SACV05-868 JVS (MLGx)**

DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

DATE : November 28, 2005
TIME : 1:30 p.m.
CRTRM : 10C

LAM, a member of the Garden Grove Unified School District Board of Education, in her official capacity, GARDEN GROVE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, an entity, and DOES 1-10, in their personal and official capacities, inclusive.

Defendants.

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Defendants GARDEN GROVE UNIFIED SCHOOL DISTRICT, a public entity (erroneously sued as GARDEN GROVE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, an entity)(hereinafter "defendant GGUSD"); LAURA SCHWALM (hereinafter "defendant SCHWALM"); KENT BAIRD (hereinafter "defendant BAIRD"); GARY LEWIS (hereinafter "defendant LEWIS"); LINDA REED (hereinafter "defendant REED"); LAN QUOC NGUYEN (hereinafter "defendant L. NGUYEN"); BOB HARDEN (hereinafter "defendant HARDEN"); TRUNG NGUYEN (hereinafter "defendant T. NGUYEN") and KIMOANH NGUYEN-LAM (hereinafter "defendant NGUYEN-LAM")(all defendants are collectively referred to as "defendants") hereby reply to the memorandum of points and authorities filed by plaintiffs CHARLENE NGOUN (hereinafter "plaintiff NGOUN"), by and through her next friend, CRYSTAL CHHUN, and the GAY-STRAIGHT ALLIANCE NETWORK (hereinafter collectively referred to as "plaintiffs") in opposition to defendants' Motion to Dismiss.

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This reply is based upon the memorandum of points and authorities filed and served concurrently herewith, the pleadings and other records on file in this action, and on such other and further oral and documentary evidence as may be presented at the time of hearing on this motion.

DATED: November 18, 2005

LAW OFFICES OF DENNIS J. WALSH, APC

By: Dennis J. Walsh

DENNIS J. WALSH, ESQ.
STEPHAN BIRGEL, ESQ.
Attorneys for Defendants GARDEN GROVE UNIFIED SCHOOL DISTRICT, a public entity (erroneously sued as GARDEN GROVE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, an entity); BEN WOLF; LAURA SCHWALM; KENT BAIRD; GARY LEWIS; LINDA REED; LAN QUOC NGUYEN; BOB HARDEN; TRUNG NGUYEN and KIMOANH NGUYEN-LAM

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I. INTRODUCTION

Plaintiffs request the Court deny defendants' Motion to Dismiss in its entirety (Opp. 4:14), yet admit that certain arguments are with merit. Plaintiffs concede that defendant GGUSD and its Board are entitled to assert Eleventh Amendment immunity. (Opp. 12, fn. 3.) They also concede that they are not entitled to seek punitive damages from defendant GGUSD. (Opp. 20, fn. 7.) Therefore, the motion cannot and should not be denied in its entirety.

With respect to the portions of the Motion to Dismiss plaintiffs oppose, plaintiffs' law and argument for the most part fails. And when it does not fail, there is confusion because the Complaint is poorly drafted in certain areas. Therefore, the Court should grant defendants' Motion to Dismiss in certain respects and require a more definitive statement in other respects.

II. LAW & ARGUMENT

A. AS TO PLAINTIFFS' FIRST CLAIM FOR RELIEF FOR 42 U.S.C. § 1983 - EQUAL PROTECTION UNDER U.S. CONSTITUTION AMEND. XIV; SECOND CLAIM FOR RELIEF FOR 42 U.S.C. §1983 - FREEDOM OF EXPRESSION UNDER U.S. CONSTITUTION AMEND. I; AND THIRD CLAIM FOR RELIEF FOR 42 U.S.C. §1983 - PRIVACY UNDER U.S. CONSTITUTION AMENDS. I, IV, IX, AND XIV.

1. PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH THE COURT CAN GRANT RELIEF BECAUSE DEFENDANTS ARE IMMUNE FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT.

a. As to defendant GGUSD.

Plaintiffs do not oppose defendants' argument that defendant GGUSD is immune from suit under the Eleventh Amendment. In fact, they concede that "the District and its Board ... are entitled to assert Eleventh Amendment immunity." (Opp. 12, fn. 3.)

Therefore, plaintiffs' First, Second and Third Claims for Relief must be dismissed as to defendant GGUSD.

b. As to defendants WOLF, BAIRD, LEWIS, and SCHWALM, as sued in their official capacities, and the Individual Board Members, as sued in their official capacities.

Defendants' motion sets forth authority for their argument that the individual defendants, sued in their official capacities, are not "persons" under §1983. This argument applies to claims for damages. *Will v. Michigan Department Of State Police* (1989) 491 U.S. 58, 71, 109 S.Ct. 2304, 2312.

Plaintiffs state that defendants are wrong because state officials sued for *injunctive relief* are persons under §1983. (Opp. 6:18-21.)

Defendants agree with plaintiffs' position; however, the confusion lies with plaintiffs' poorly drafted Complaint. In their First, Second and Third Claims for Relief, plaintiffs seek not only injunctive relief, but economic damages. (Complaint ¶¶ 39, 46, 53.) They are not entitled to damages. *Massey v. Banning Unified School District* (C.D. Cal. 2003) 256 F.Supp.2d 1090, 1093.

For these reasons, defendants move for a more definite statement because plaintiffs' first three Claims for Relief are vague and ambiguous as they seek remedies plaintiffs are not entitled to. *Federal Rules of Civil Procedure, Rule 12(e)*. Therefore, the Motion to Dismiss should be granted in this regard.

2. DEFENDANTS WOLF, BAIRD, LEWIS, AND SCHWALM, SUED IN THEIR PERSONAL CAPACITIES, ARE IMMUNE FROM LIABILITY.

a. As to Defendants BAIRD, LEWIS and SCHWALM.

Defendants argue that with respect to defendants BAIRD, LEWIS and SCHWALM, plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs' argue that defendant BAIRD, LEWIS and SCHWALM are liable for unconstitutional acts committed by another because they failed to take steps to remedy

the treatment of plaintiff. However, nowhere in plaintiffs' Complaint are such allegations clearly set forth. Plaintiffs merely allege that defendants SCHWALM and LEWIS were "responsible for setting and enforcing policies and practices of the Garden Grove Unified School District and Santiago High that continue to harm or threaten to harm plaintiffs." (Complaint ¶¶ 10, 13.) Nowhere do plaintiffs state that "Schwalm, Baird and Lewis failed to take steps to remedy the discriminatory treatment of Charlene." (Opp. 9:22-23.) Plaintiffs also claim paragraph 32 of their Complaint stands for the proposition that "Charlene submitted complaints of her discriminatory treatment to Schwalm and met with Baird and Lewis, all who failed to remedy — and thereby endorsed — the discriminatory treatment against Charlene." (Opp. 9:27 - 10:2, citing ¶ 32.) A close reading of paragraph 32 shows that the paragraph pertains to plaintiffs' attorneys attempt to informally resolve certain issues and their request for policies and regulations. It does not go so far as to say that plaintiff NGOUN submitted complaints of her discriminatory treatment to defendant SCHWALM, that she met with defendants BAIRD and LEWIS and that they "endorsed the discriminatory treatment against Charlene.

Plaintiffs further allege in paragraph 35 they "*directly* informed defendants Baird, Lewis, and Schwalm, who then took no action to remedy the discriminatory acts." (Opp. 10:9-21.)(Emphasis added.) Paragraph 35 does not go that far. It merely states that plaintiff NGOUN complained to defendant SCHWALM. It does not state that she *directly* informed defendants BAIRD and LEWIS nor does it state they knew or should have known of her complaint to defendant SCHWALM.

Plaintiffs cite to portions of *Larez v. City of Los Angeles* (9th Cir. 1991) 946 F.2d 630 and *Johnson v. Duffy* (9th Cir. 1978) 588 F.2d 740 where the Courts denied the motion to dismiss of the Chief of Police and County Sheriff, respectively. The motions were denied because they set in motion acts which caused others to inflict constitutional injury. *Larez v. City of Los Angeles*, supra, 946 F.2d at 645; *Johnson v. Duffy*, supra, 588 F.2d 743-744. Here, plaintiffs' Complaint is lacking in such allegations. There are no charging allegations against these defendants or facts demonstrating any wrongdoing by

these individuals. There are no facts stating these defendants were personally involved in the disciplinary incidents against plaintiffs. Therefore, they cannot be held liable. *See Doe ex rel. Doe v. State of Hawaii Dept. Of Educ.* (D. Hawaii 2004) 351 F.Supp.2d 998.

b. <u>As to Defendant WOLF.</u>

Defendants' position, with respect to defendant WOLF, is that he is qualifiedly immune because, at all times, he performed discretionary functions and the conduct attributed to him is not prohibited by federal law, constitutional or otherwise. Defendant WOLF took the actions he did because plaintiff NGOUN refused to stop engaging in certain disruptive behavior and defied school officials, as she admits in her Complaint.. (Complaint ¶¶ 19-32.)

Plaintiffs claim defendants' arguments are without basis because plaintiffs' Complaint does not state she engaged in disruptive behavior or that she defied authority. Plaintiff also argues that "similar behavior by heterosexual couples was not subject to discipline. (Opp. 11:2-6.)

This Court will note that plaintiffs' Complaint does in fact state she engaged in disruptive behavior, that she defied authority and that defendants treated heterosexual couples the same as plaintiffs. "Principal Wolf approached them [plaintiff and her girlfriend] and told Charlene and her girlfriend that they were not permitted to hug each other on campus." (Complaint ¶19.) They refused to follow defendant WOLF's directive. "... [O]n or about December 10, 2005 .... Charlene and her girlfriend were sitting with their arms around each other and talking with a heterosexual student couple and another student near the Santiago High parking lot. A school monitor approached the group and told the couples to report to Principal Wolf's office. At the office, Principal Wolf disciplined Charlene and her girlfriend by assigning them to Saturday school. *Principal Wolf also gave Saturday school to the heterosexual couple that Charlene and her girlfriend had been talking with.*" (Complaint ¶ 21.)(Emphasis added.) "In addition to Saturday school, Principal Wolf called Charlene's mother to inform her that Charlene was

'constantly' kissing another girl on campus." (Complaint ¶ 22.)[1] Plaintiff NGOUN continued to disrespect and defy authority. "About one week later, Charlene and her girlfriend gave each other a quick kiss after school while they were waiting for her girlfriend's bus. After Charlene's girlfriend got on the bus, a school monitor came up to Charlene and told her to report to Principal Wolf's office. ... Principal Wolf ... gave Charlene a one-day suspension. Charlene's girlfriend received the same punishment." (Complaint ¶ 23.) Next, in or about March 2005, Charlene and her girlfriend were sitting with their arms around each other and giving each other affectionate kisses in the Santiago High parking lot during the sixth period break. A school monitor and a vice principal came up to them and told them to report to Principal Wolf's office. At the office, Principal Wolf told Charlene and her girlfriend that he was going to suspend them again. ... He proceeded to yell at them and threatened that he could expel them for what they were doing. Both Charlene and her girlfriend received a week-long suspension for "defiance." (Complaint ¶ 26.) In or about March 2005, Charlene, in an online journal entry, "criticized another student for being materialistic and criticized teachers for favoring that student." Principal Wolf threatened to expel Charlene for this. (Complaint ¶ 28.)[2]

Based on the facts set forth in plaintiffs' Complaint, defendant WOLF performed discretionary functions. Plaintiff NGOUN was repeatedly told to stop engaging in certain disruptive behavior. (Complaint ¶¶ 19-32.) His actions were not directed at plaintiff NGOUN's sexual preference as evidenced by the fact that heterosexual couples were also asked to cease certain disruptive behavior. (Complaint ¶ 21.) His conduct was the result of plaintiff NGOUN's disruptive and defiant behavior. Plaintiff NGOUN refused and

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1 As discussed in defendants' Motion to Dismiss and further discussed below, plaintiff NGOUN does not have a legally-protected privacy interest in the fact that she is lesbian.

2 No action was taken against plaintiff NGOUN. Therefore, no First Amendment rights are implicated.

continued to defy defendant WOLF and other school officials. (Complaint ¶¶ 19-32.) Therefore, defendant WOLF is entitled to qualified immunity because his conduct was not prohibited by federal law or because plaintiff NGOUN's right not to be subjected to such conduct was not clearly established at the time. *Downing v. West Haven Board of Ed.* (2001) 162 F.Supp.2d 19, 29-30.

Plaintiffs' citations of certain authorities is not persuasive. In *Pruitt v. Chenney* (9th Cir. 1992) 963 F.2d 1160, 1165, *Pruitt* acknowledged she could be discharged for engaging in certain kinds of homosexual conduct.

Harlow v. Fitzgerald (1982) 457 U.S. 800, 818, confirms defendants' position that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

In *Saucier v. Katz* (2001) 533, U.S. 194, 201, the Court stated that "[a] court required to rule upon the qualified immunity issue must consider, ..., this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? ... If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established."

Again, defendant WOLF's conduct did not violate a constitutional right. The actions he took were not because plaintiff NGOUN is lesbian, but because of the behavior she engaged in. (Complaint ¶¶ 19-32.) See *Cook v. Board of Education for County of Logan* (1987) 671 F.Supp. 111 (finding defendants did not interfere with plaintiff's constitutional right of association when directing plaintiff not to communicate with students); *Pruitt*, supra, 963 F.2d at 1165.

B. AS TO PLAINTIFFS' FOURTH CLAIM FOR RELIEF UNDER CALIFORNIA CONSTITUTION ART. I, §§ 3(b)(4), 7(a) and (b), ART.

IV, § 16(a); FIFTH CLAIM FOR RELIEF UNDER FREEDOM OF EXPRESSION UNDER CALIFORNIA CONSTITUTION ART. I, § 2; SIXTH CLAIM FOR RELIEF FOR RIGHT TO PRIVACY UNDER CALIFORNIA CONSTITUTION ART. I, § 1; SEVENTH CLAIM FOR RELIEF UNDER CALIFORNIA *EDUCATION CODE* §§ 200, 201, 220; EIGHTH CLAIM FOR RELIEF UNDER UNRUH CIVIL RIGHTS ACTS CALIFORNIA *CIVIL CODE* §§ 51, 52(a)[3]; AND NINTH CLAIM FOR RELIEF FOR DECLARATORY RELIEF.

1. THE ELEVENTH AMENDMENT BARS PLAINTIFFS FROM PROCEEDING AGAINST DEFENDANT GGUSD, DEFENDANTS WOLF, BAIRD, LEWIS AND SCHWALM, IN THEIR OFFICIAL CAPACITIES, AND THE INDIVIDUAL BOARD DEFENDANTS, IN THEIR OFFICIAL CAPACITIES, ON ANY OF THE STATE LAW CLAIMS.

Defendants' position is that plaintiffs' Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Claims for Relief are barred by the Eleventh Amendment. *Ulaleo v. Paty* (9th Cir. 1990) 902 F.2d 1395, 1398; *Ex parte Young* (1908) 209 U.S. 123.

Plaintiffs do not challenge defendants' state law immunity arguments as to plaintiffs' damages claims, but argue that defendants have not asserted the immunity as to plaintiffs' claims for injunctive relief. (Opp. 13:4-14.) This is entirely untrue. Defendants' argument is directed at plaintiffs' request for monetary and nonmonetary relief. Defendants specifically argue plaintiffs' claims for damages and declaratory relief are barred by the Eleventh Amendment. (Mot. 15:2-20.)

Defendants also point out that plaintiffs' allegation that they fear future unlawful and unconstitutional actions is merely conclusory. (Complaint ¶ 88.) Plaintiffs argue that

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[3] The Eighth Claim for Relief is against defendants GGUSD and WOLF, BAIRD, LEWIS, and SCHWALM, in their personal capacities.

paragraphs 32, 55, 62 and 69 state plaintiffs "fear defendants will continue to selectively discipline and censor her because of her sexual orientation." (Opp. 13:27 - 14:1.) However, if the Court reviews these paragraphs, it will note the paragraphs do not go as far as plaintiff alleges.

For these reasons, plaintiffs Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Claims for Relief are barred by the Eleventh Amendment.

2. THE CALIFORNIA *GOVERNMENT CODE* BARS PLAINTIFFS FROM PROCEEDING AGAINST DEFENDANTS ON ANY OF THE STATE LAW CLAIMS.

Defendants set forth in their Motion to Dismiss a plethora of authority and argument showing that defendants are immune from liability. *Burgdorf v. Funder* (1966) 246 Cal.App.2d 443, 449, 54 Cal.Rptr. 805 (In interpreting what constitutes a "discretionary" act, courts uphold the immunity where an act is one which requires an exercise in judgment and choice and which involves some decision as to what is just and proper under the circumstances.); *Granowitz v. Redlands Unified School District* (2003) 105 Cal.App.4th 349, 354, 129 Cal.Rptr.2d 410 (Deference must be accorded to an administrator's decision to discipline a student.); *Education Code* §48900(k).

Plaintiffs fail to address the authority cited above, yet argue defendants' actions are not discretionary.

Again, *Education Code* §48900(k) allows a principal to suspend or recommend for expulsion a pupil who has "[d]isrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties." As previously set forth, action was taken against plaintiff NGOUN because she disrupted the school environment, was defiant and the staff was complaining. (Complaint ¶¶ 19, 22-28.)

Plaintiffs rely on *Barner v. Leeds* (2000) 24 Cal.4th 676, 102 Cal.Rptr.2d 97 and *Massey v. Banning Unified School District* (2003) 256 F.Supp.2d 1090. Neither is analogous to the case at hand. *Barner* involved a legal malpractice action against a

deputy defendant filed by an innocent man wrongfully convicted of bank robbery in a case of mistaken identity. The Supreme Court affirmed the Court of Appeal's judgment that defendant was not immune from liability under *Government Code* §820.2. Defendant's actions in representing an assigned client in a criminal action generally do not involve the type of basic policy decisions that are within the scope of the immunity afforded by §820.2, but involve operational judgments that implement the initial decision to provide representation to the client. *Id.* at 691-692.

In *Massey*, a student was barred from gym class because she was lesbian. School officials were not entitled to discretionary act immunity because the discrimination in question was not discretionary. *Id.* at 1096-97. But, actions of a school board exercising power pursuant to statutory guidelines and its own regulations are entitled to discretionary act immunity. *Id.* at 1097.

Here, plaintiffs' Complaint shows defendants exercised their power pursuant to *Education Code* §48900(k). Plaintiff NGOUN admits she was told in December 2004 that she and her girlfriend were "not permitted to hug each other on campus." (Complaint ¶ 19.) This policy also applies to heterosexual couples as evidenced by the fact that a heterosexual couple was disciplined for "openly engaging in affectionate behavior." (Complaint ¶ 21.) Plaintiff NGOUN openly defied this directive by "constantly" kissing her girlfriend. (Complaint ¶ 22.) Several days later, on December 10, 2005, plaintiff and her girlfriend were "sitting with their arms around each other." (Complaint ¶ 21.) Because of their defiance, they were assigned to Saturday school and defendant WOLF complained to plaintiff NGOUN's mother of her defiance. (Complaint ¶¶ 21, 22.)

Plaintiff NGOUN continued to defy defendant WOLF's directive. One week later, she gave her girlfriend a "quick kiss" while waiting for the bus. As a result, plaintiff NGOUN and her girlfriend received a one-day suspension. (Complaint ¶ 23.)

Plaintiff NGOUN and her girlfriend continued their defiance. A school counselor met with them in March 2005 to remind them to "stop expressing affection towards" each other. (Complaint ¶ 24.) Within this same month, plaintiff NGOUN and her girlfriend

"were hugging and kissing each other on the cheek during the sixth period." A vice-principal again warned them and asked "this is the last time, right, girls?" (Complaint ¶ 25.) But, it wasn't the last time because again, in March 2005, they were "sitting with their arms around each other and giving each other affectionate kisses in the Santiago High parking lot during the sixth period break." (Complaint ¶ 26.) Since they were repeatedly warned and repeatedly ignored those warnings, they were suspended for "defiance."(Complaint ¶ 26.) Defendant WOLF told plaintiff NGOUN's mother that she doesn't listen and that he needed to separate plaintiff NGOUN and her girlfriend. Plaintiff NGOUN *volunteered* to leave the school. (Complaint ¶ 27.)

For these reasons, defendants actions concerning the discipline of plaintiff NGOUN were discretionary.

C. AS TO PLAINTIFFS' SIXTH CLAIM FOR RELIEF FOR RIGHT TO PRIVACY UNDER CALIFORNIA CONSTITUTION ART. I, § 1.

1. PLAINTIFFS FAIL TO STATE A CLAIM FOR INVASION OF PRIVACY.

Defendants' position is that plaintiff NGOUN does not have a legally-protected privacy interest. She is "openly lesbian." (Complaint ¶¶ 2, 19, 21, 23, 26.)

Plaintiff NGOUN contends that even though she is "openly lesbian," she is permitted to decide who knows. This is nonsensical and the authority she cites does not stand for this proposition. In *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press* (1989) 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed. 774, and *Dep't of Def. v. Fed. Labor Relations Auth.* (1994) 510 U.S. 487, 114 S.Ct. 1006, 127 L.Ed.2d 325, the privacy interests were in things, i.e., a rap sheet and home address, not in one's open lifestyle. In *Virgil v. Time, Inc.* (9th Cir. 1975) 527 F.2d 1122, and *Times-Mirror Co. v. Superior Court* (1988) 198 Cal.App.3d 1420, 244 Cal.Rptr. 556, plaintiff disclosed information to *selected* individuals. The disclosure did not make the information public. Here, plaintiff did not disclose her lesbianism to *selected* individuals. She was openly lesbian before administrators, teachers, students, parents and anyone else on campus at two different

schools. She was openly lesbian before the Gay-Straight Alliance Network. She was openly gay in front of bus drivers. Therefore, she did not select individuals to whom she disclosed her homosexuality. If one was on campus and anywhere else plaintiff NGOUN was with her girlfriend, they would see that she is lesbian.

In response to plaintiffs' other arguments, it is obvious from a reading of plaintiffs' Complaint that plaintiff NGOUN did not struggle with her sexuality or individuality nor was she worried about alienation from her friends. She had no interest in controlling who obtained the information that she was a lesbian as she was "openly lesbian." (Complaint ¶ 2.) Therefore, plaintiffs' cites to *Chambers v. Babbitt* (D. Minn. 2001) 145 F.Supp.2d 1068, *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 99 Cal.Rptr.2d 627, and *Fed. Labor Relations Auth.*, supra, 510 U.S. 487, is not persuasive.

Plaintiffs go on to argue that defendants' argument cannot be argued on a motion to dismiss. This is not so. The Ninth Circuit has often granted motions to dismiss privacy claims. *Buckley v. U.S.* (9th Cir. 2005) 2005 WL 2921958 (motion to dismiss granted because plaintiff failed to state a privacy claim.); *Katzenback v. Grant* (9th Cir. 2005) 2005 WL 1378976 (defendant's Motion to Dismiss plaintiff's claim for invasion of privacy granted without leave to amend.)

For these reasons, defendants' motion to dismiss can be and should be granted.

D. AS TO PLAINTIFFS' ENTIRE ACTION.

1. IF THE COURT DISMISSES PLAINTIFFS' FIRST CLAIM FOR RELIEF FOR 42 U.S.C. § 1983 - EQUAL PROTECTION UNDER U.S. CONSTITUTION AMEND. XIV; SECOND CLAIM FOR RELIEF FOR 42 U.S.C. §1983 - FREEDOM OF EXPRESSION UNDER U.S. CONSTITUTION AMEND. I; AND THIRD CLAIM FOR RELIEF FOR 42 U.S.C. §1983 - PRIVACY UNDER U.S. CONSTITUTION AMENDS. I, IV, IX, AND XIV, THE ENTIRE ACTION MUST BE DISMISSED FOR LACK OF FEDERAL JURISDICTION.

Plaintiffs have not opposed defendants' argument that in the event this Court dismisses plaintiffs' first three Claims for Relief, the Court may dismiss the action in its entirety. Therefore, if the Court is so inclined, it should dismiss this action altogether.

E. AS TO PLAINTIFFS' PRAYER FOR PUNITIVE DAMAGES.

1. DEFENDANT GGUSD CANNOT BE SUED FOR PUNITIVE DAMAGES.

In their opposition, "Plaintiffs acknowledge that public entities cannot be sued for punitive damages under §1983 or the *Education Code*." (Opp. 20, fn. 7.) Therefore, plaintiffs' prayer for punitive damages against defendant GGUSD must dismissed and stricken. (Complaint ¶ 98.)

IV. CONCLUSION

Based on the foregoing, the Court should dismiss portions of plaintiffs' Complaint under *Federal Rules of Civil Procedure* 12(b)(6) and require more definitive statements in the areas of plaintiffs' Complaint discussed above.

DATED: November 18, 2005

LAW OFFICES OF DENNIS J. WALSH, APC

By: Dennis J. Walsh

DENNIS J. WALSH, ESQ.
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GARDEN GROVE UNIFIED SCHOOL DISTRICT, a public entity (erroneously sued as GARDEN GROVE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, an entity); BEN WOLF; LAURA SCHWALM; KENT BAIRD; GARY LEWIS; LINDA REED; LAN QUOC NGUYEN; BOB HARDEN; TRUNG NGUYEN and KIMOANH NGUYEN-LAM

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years of age, and am not a party to the within action; my business address is 16633 Ventura Boulevard, Suite 1210, Encino, California 91436.

On the date herein below specified, I served the foregoing document, described as set forth below on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, at Encino, California, addressed as follows:

DATE OF SERVICE : November 21, 2005

DOCUMENT SERVED : DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

COUNSEL SERVED : See Attached Service List

XXX (BY REGULAR MAIL)I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

___ (BY OVERNIGHT MAIL) I caused such envelope(s) to be delivered by air courier, with next day service.

___ (BY PERSONAL SERVICE)I delivered such envelope by hand to the addressee(s).

* * *

___ (STATE)I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

XXX (FEDERAL)I declare that I am employed in the office of a member of the bar of this Court, at whose direction the service was made.

EXECUTED at Encino, California on November 21, 2005

Deanna Zryd

SERVICE LIST

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