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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SONOMA

10 REBEKAH RICE, et al.,

CASE NO. SCV-233600

11 Plaintiff,

TENTATIVE DECISION

12 v.

13 CLAUDINE GANS-RUGE BREGT,
et al.

14 Defendants.
15

16 TO: ALL PARTIES AND THEIR ATTORNEY OF RECORD

17 The above matter came on for Court Trial before the Honorable Elaine Rushing on February
18 2, 2007. Plaintiffs Elden M. Rice, et al. appeared by and through their attorney of record, Clark
19 J. Summers. Defendants Santa Rosa City Schools, et al. appeared by and through their attorney of
20 record, Mark D. Peters.

21 Having now reviewed the evidence by both sides, the Court makes the following Tentative
22 Decision.

23 I. Introduction

24 Elden M. Rice and Katherine J. Rice, plaintiffs, assert their statutorily protected right to
25 form and direct the moral upbringing of their minor child, plaintiff Rebekah Rice. They also assert
26 Rebekah's statutorily protected rights to be free from government-sponsored instruction which
27 undermines her family's values and which holds those family values and her private beliefs up to
28 public scrutiny and ridicule; government-sponsored censorship which penalizes her for the exercise

1 of her free speech rights; and government-sponsored discrimination and harassment based on religion
2 (First Amended Complaint, at 1:26-2:8). Plaintiffs complain of four separate incidents involving
3 Rebekah while attending Maria Carrillo High School in Santa Rosa, California.¹ The Rices believe
4 that their daughter has been targeted by both teachers and fellow students because of her
5 membership in the Church of Jesus Christ of Latter-day Saints. They assert that Rebekah was unfairly
6 punished for using the phrase "That's so gay" and as a result of her punishment, has been
7 ridiculed, teased, heckled and harassed to the point that her entire high school experience was
8 ruined.

9 According to the defense, "Immediately prior to embarking on this lawsuit against their
10 School District, Plaintiffs had been part of a political effort to shape curriculum within the School
11 District. As explained by [witness Orleen] Koehle, Plaintiffs were part of a group that specifically
12 objected to the inclusion of "gay presenters" in the Day of Dialogue at Santa Rosa High School and
13 believed that the program had been taken over by pro-homosexual groups. This litigation, with its
14 exclusive focus on issues related to homosexuality, is really a continuation of that political effort by
15 other means." (Defendants' Closing Argument at 12:6-13). At trial, the defense produced an
16 invitation to the Eagle Forum of California 6th Annual Education Conference held March 31, 2007,
17 with special guests Phyllis Schlafly, State Senator Tom McClintock and Barbara Simpson, from KSFO
18 Radio, at which plaintiff Dr. Eiden Rice was on the Speaker List as follows: "A brave dentist who
19 has a law suit with his school district because of their promoting the homosexual agenda - 'Diversity
20 In - Morality Out.' (Exhibit 114) Defendants argue that "[m]uch of what Plaintiffs complain of
21 falls within the statutory immunities of Defendants for their discretionary acts, establishment of
22 curriculum, and for instituting investigative matters. Other aspects of Plaintiffs' claims are the result
23 of peer-to-peer conduct that is not actionable under these circumstances. What little remains does
24 not remotely approach the level of actionable discrimination." (Ibid at 2:6-10)

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27 ¹There are numerous other events complained of, but the trial court " ...is required to state only ultimate
28 rather than evidentiary facts because findings of ultimate facts necessarily include findings on all intermediate
evidentiary facts necessary to sustain them." In re Cheryl E. (1984) 161 Cal.App.3d 587, 599.

1 Injunctive orders, permanent restraining orders, declaratory relief, monetary damages and attorneys
2 fees.

3 For over 3 years of litigation, this Complaint has functioned as the operative pleading. But
4 the court had its first clue that plaintiffs might wish to file a Second Amended Complaint when it
5 reviewed Plaintiffs' Response and Opposition to Defendants' Motion for Non-Suit filed December
6 14, 2006. Therein, plaintiffs argued for the first time that Education Code § 201 (g), as amended
7 in 1999, "specifically incorporates Government Code § 11135 and California Civil Code §§ 51-
8 53, Inclusive (Unruh Civil Rights Act)..." (at 10:5-7) and then devoted the following 4 pages citing
9 to those code sections and various cases construing them. For the first time, plaintiffs argued their
10 right to seek punitive damages (at 13:11-16). For the first time, plaintiffs argued their right to seek
11 civil penalties under Civil Code § 52(b)(2). Plaintiffs did, however, acknowledge that their reliance
12 on the California Constitution was "misplaced" (at 19:16).²

13 Defendants vigorously objected to what they perceived as plaintiffs' attempt to "effect a
14 silent, eleventh-hour amendment to state new legal theories pursuant to the Unruh Act and
15 Government Code § 11135" (Defendants' Reply Memorandum of Points and Authorities In
16 Support of Motion for Nonsuit/Directed Verdict at 4:10-11). Defendants argued that if plaintiffs
17 wished to amend their complaint, they should file a noticed motion and demonstrate some
18 cognizable excuse for the delay. Even then, they urged, the court retains wide discretion to deny a
19 legitimate amendment because of the prejudice to defendants caused by the delay. Defendants cited
20 to Record v. Reason (1999) 73 Cal. App. 4th 472, 486 [plaintiff knew of circumstances three
21 years prior to motion to amend; denied]; Magnali v. Farmers Group (1996) 48 Cal. App. 4th 471,
22 486 [new claim offered on eve of trial; prejudice to defendant; denied]; and People v. Jarvis
23 (1969) 274 Cal. App. 2d 217, 222 [prejudice to defendant in that either (1) forced to meet new
24 issues while engaged in trial, or (2) being faced with a continuance after preparing for a particular
25 trial date. (Ibid at 5 and 6, 25-27.)

26 At oral argument on defendants' motion for nonsuit, the court commented that it had
27

28 ²Thus, plaintiffs' right to relief necessarily flows from one or more of the statutes upon which they based
their First Cause of Action for breach of mandatory duty.

1 reviewed the entire matter and conducted research, looked at the First Amended Complaint, now
2 three years old, with its two Causes of Action, and noted its confusion at plaintiffs' brief arguing
3 claims under the Unruh Act and punitive damages. To this, plaintiffs' counsel responded: "...when
4 one reads Education Code §201, particularly 201(g), it makes it very specific this includes all
5 application of multiple federal rights. It includes Government Code 1135 [sic] and it includes the
6 Unruh Act." In response to the defense's arguments concerning amending the complaint, plaintiffs'
7 counsel simply stated that there should be no problem with his being able to amend to include the
8 Unruh Act because the total damages and the evidence that supports the Unruh Act" is identical".

9 At the close of trial on February 22, 2007, plaintiffs' counsel orally moved to amend the
10 Complaint to include claims based on Civil Code §§ 51, 51.5, 51.7 and 52 (the Unruh Act) which
11 he stated "through inadvertence" were not included in the complaint by previous counsel. Defense
12 counsel again objected and requested to brief the matter. The court stated it would consider the
13 matter on written motion to amend. Yet, having reviewed plaintiffs' 37-page Closing Argument
14 dated March 16, 2007 and their 43-page Reply to Defendants' Closing Argument dated April 17,
15 2007, plaintiffs to this day have yet to file a motion to amend the complaint, nor have they
16 presented the court with a proposed Second Amended Complaint.

17 Plaintiffs' ability to amend at this extremely late stage is one entirely "of grace, not of right"
18 (Leader v. Health Industries of America (2001) 89 Cal.App.4th 603, 612) and must be
19 accomplished, if at all, through a noticed motion, and a demonstration of some cognizable excuse
20 for the delay. As the Leader court held:

21 Under [CCP] § 472, a plaintiff may only amend as a matter of course before an
22 answer or demurrer is filed or before trial of the issue of law raised in the demurrer. At
23 that point "the plaintiff's right to amend as a matter of course *613 is gone." (Loser
24 v. E. R. Bacon Co. (1962) 201 Cal.App.2d 387, 389 [20 Cal.Rptr. 221].) After
25 expiration of the time in which a pleading can be amended as a matter of course, the
26 pleading can only be amended by obtaining the permission of the court. (See §§ 472,
27 473; People ex rel. Dept. of Pub. Wks. v. Clausen (1967) 248 Cal.App.2d 770, 783
28 [57 Cal.Rptr. 227].)

26 Second, to obtain the court's permission, plaintiffs were required to file a noticed
27 motion for leave. (Loser v. E. R. Bacon Co., *supra*, 201 Cal.App.2d at pp. 389-390.)
28 (6) Under § 473, subdivision (a)(1): "The court may, in furtherance of justice, and
on any terms as may be proper, ... in its discretion, after notice to the adverse party,
allow, upon any terms as may be just, an amendment to any pleading or proceeding"
(Italics added.) Assuming proper notice, the trial court has wide discretion in

1 determining whether to allow the amendment, but the appropriate exercise of that
2 discretion requires the trial court to consider a number of factors: "including the
conduct of the moving party and the belated presentation of the amendment. [Citation.]

3 The law is well settled that a long deferred presentation of the proposed
4 amendment without a showing of excuse for the delay is itself a significant factor to
uphold the trial court's denial of the amendment. [Citation.]" (*Bedolla v. Logan &*
5 *Frazer, supra*, 52 Cal.App.3d at pp. 135-136, italics added.) "The law is also clear that
6 even if a good amendment is proposed in proper form, unwarranted delay in presenting
it may of itself be a valid reason for denial." (*Roemer v. Retail Credit Co.* (1975) 44
Cal.App.3d 926, 939-940 [119 Cal.Rptr. 82].)

7 Ibid at 612-613.

8 On the record before this court, and at this late hour, the court has determined that it would
9 not be in the interests of justice to expand the scope of this protracted litigation. The only excuse
10 ever offered by plaintiffs for their tardiness was that the new theories were not pled originally
11 "through inadvertence" of prior counsel. Yet plaintiffs' trial attorney substituted into the case in
12 April 2004, over 3 years ago. Furthermore, even a cursory examination of the Unruh Act
13 compared to the Education Code sections at issue shows that there are numerous differences in the
14 statutory schemes. Defendants have had no opportunity to present and develop affirmative defenses
15 to the new claims. Different remedies are available under the Unruh Act. And in the end, there
16 has never been a formal motion filed to amend the Complaint nor a proposed Second Amended
17 Complaint produced.

18 Moreover, plaintiffs are bound to the theories of liability they enunciated in the Claims they
19 presented to the School District. See Fall River Joint Unified School District v. Superior Court
20 (1988) 206 Cal.App.3d 431, 434 [tort claim that did not allege facts of negligent supervision
21 insufficient to support cause of action for negligent supervision; "each cause of action must be
22 reflected in a timely claim." Here, neither the original Complaint for the First Amended Complaint
23 had any claims attached to them, despite the references thereto in the pleading. On October 14,
24 2003, plaintiffs filed Attachment "A" to Complaint, which is the referral form given to Rebekah.
25 On December 5, 2003, plaintiffs filed their First Amended Complaint in which they reference their
26 Formal Complaint Form and the Optional Complaint Form, stating that copies of these forms were
27 attached as Exhibit B. They were not. On December 8, 2003, plaintiffs filed "Exhibits 'A' and
28 'B' to First Amended Complaint", but these attachments consisted only of the referral form and

1 the claim concerning a search of Rebekah's backpack in September 2003. Trial exhibits 101 and
2 102 were admitted in evidence as claims the plaintiffs did present. Assuming arguendo that these
3 are the claims relied upon by plaintiffs to support a Second Amended Complaint, the court finds
4 they are insufficient. Plaintiffs now complain factually of numerous other incidents, including one
5 that occurred 4 months after the lawsuit was filed (the Peace Rally incident in April 2004).

6 Finally, even if the court permitted plaintiffs to amend the Complaint to include violations
7 of the Unruh Act, the court finds that there has been a failure of proof necessary to support
8 recovery under it. As will be clear from the discussion, *infra* at sections III, IV and V, the court
9 does not find any basis for monetary damages against defendants herein. A fortiori, the court finds
10 no basis for punitive damages, which in any event may not be awarded against public entities.
11 Government Code §818. Pursuant to stipulation between the parties, the individual defendants
12 have appeared in only their official capacities, and therefore is no right to proceed against them for
13 punitive damages either.

14 Thus, the court hereby denies plaintiffs' oral motion to amend the complaint. Having ruled
15 that the plaintiffs may not amend their Complaint, the court therefore will not address any legal
16 theories not propounded in the First Amended Complaint filed December 5, 2003, nor any events
17 after that date, as they are not supported by plaintiffs' claims presented pursuant to Government
18 Code §910 (the Tort Claims Act) or discussed in the First Amended Complaint.

19 Turning to those claims, the court first addresses the code sections relied upon by plaintiffs
20 in that pleading.

21 III. Liability for Failure to Discharge Mandatory Duties

22 First, plaintiffs seek relief for failure to discharge mandatory duties under Government Code
23 §815.6. That section provides that where a public entity is under a mandatory duty imposed by
24 an enactment designed to protect against the risk of a particular kind of injury, the entity is liable for
25 an injury of that kind proximately caused by its failure to discharge the duty, unless it establishes that
26 it exercised reasonable diligence to discharge the duty. Analytically, although the issues are
27 somewhat related, the question of possible governmental statutory liability for breach of a mandatory
28 duty ordinarily should precede the question of statutory immunity. Creason v. Department of Health

1 Services (1998) 18 Cal. 4th 623.

2 The statute applies to public entities the familiar rule of tort law that violation of a legislatively
3 prescribed standard of care creates a rebuttable presumption of negligence. Lehto v. City of Oxnard
4 (1985) 171 Cal. App. 3d 285.

5 The application of this liability provision requires that the enactment establish obligatory,
6 rather than merely discretionary or permissive, directives to the public entity. The enactment must
7 require, rather than merely authorize or permit, that a particular action be taken or not taken.
8 Creason, supra; Haggis v. City of Los Angeles (2000) 22 Cal. 4th 490. However, not every statute
9 which uses the word "shall" is obligatory rather than permissive. Thompson v. City of Lake Elsinore
10 (1993) 18 Cal. App. 4th 49; Morris v. County of Marin (1977) 18 Cal.3d 901.

11 Although statutory language is the most important guide in determining legislative intent,
12 there are instances when other factors will show that apparent obligatory language was not intended
13 to foreclose a governmental entity's or officer's exercise of discretion. There is no simple, mechanical
14 test for determining whether a provision should be given "directory" or "mandatory" effect. To
15 determine this, the court must ascertain the legislative intent. In the absence of express language, the
16 intent must be gathered from the terms of the statute construed as a whole, from the nature and
17 character of the act to be done, and from the consequences that would follow the doing or failure
18 to do the particular act at the required time. When the object is to subserve some public purpose,
19 the provision may be held directory or mandatory as will best accomplish that purpose. Ibid.

20 Whether a particular statute is intended to impose a mandatory duty, rather than a mere
21 obligation to perform a discretionary function, is a question of statutory interpretation for the courts.
22 Creason, supra. It is not enough, moreover, that the public entity or officer is under an obligation
23 to perform a function if the function itself involves the exercise of discretion. Haggis v. City of Los
24 Angeles, supra. It also requires that the mandatory duty be designed to protect against the particular
25 kind of injury the plaintiff suffered. The plaintiff must show the injury is one of the consequences
26 the enacting body sought to prevent through imposing the alleged mandatory duty. Hoff v.
27 Vacaville Unified School Dist. (1998) 19 Cal. 4th 925; Haggis v. City of Los Angeles, supra.
28 Finally, the breach of the mandatory duty must be a proximate cause of the injury suffered.

1 Beceira v. County of Santa Cruz (1998) 68 Cal. App. 4th 1450); Wilson v. County of San Diego
2 (2001).

3 If the court determines that a statute imposes merely discretionary duties, then Government
4 Code §820 provides that defendants are statutorily immune from liability. Thus, the court turns
5 to an examination of the statutes which plaintiffs claim impose mandatory rather than discretionary
6 duties.

7 IV. Education Code §§ 200 and 201.

8 In order to do that, it is necessary to discuss the legislative history of Education Code §§ 200
9 and 201. As originally drafted, these sections would have permitted the recovery of monetary
10 damages. However, when they were finally passed, all references to damages had been removed.
11 See California Civil Practice, Civil Rights Litigation, chapter 10, by Judge Harold E. Kahn and Robert
12 D. Links. Because the discussion at §10:27, Statutory History and Purpose, is so instructive to this
13 case, the court quotes from a large portion of it as follows:

14 "§10:27. Statutory history and purpose

15 The sections of the Education Code that are now referred to as the Sex Equity in Education
16 Act, Ed. Code, 221.5 to 231.5 and 66250 to 66292.4, have their origin in 1974
17 legislation declaring that "It is the policy of the state that elementary and secondary school
18 and community college classes and courses...be conducted, without regard to the sex of the
19 pupils enrolled in such classes and courses." [Statutes of 1974, Chapter 182, initially
20 codified at § 91 (a) of the now repealed Education Code of 1959] Through the course of
21 various amendments, the one code section enacted in 1974 has morphed into almost 40
22 code sections located in two disparate parts of the Education Code, not including more than
23 50 related code sections that all are part of the statutory scheme called "Educational Equity"
24 with regard to grade schools and "Sex Equity in Education Act" with regard to post
25 secondary educational institutions. [Ed. Code, §§ 200 through 283 and 66250 through
26 66292.4] The process by which all this occurred calls to mind Bismarck's famous dictum
27 that "No man should see how laws or sausages are made." Community Nutrition Institute v.
28 Block, 749 F.2d 50, 51 (D.C. Cir. 1984) [In analyzing the code sections that comprise the
Sex Equity in Education Act and the related §§ that are not so titled, it is important to keep
in mind that the language of a statute, not its title, is what controls. [Harrhill v. City Of
Monrovia, 104 Cal. App. 4th 761, 764, 128 Cal. Rptr. 2d 552, 172 Ed. Law Rep. 352
(2d Dist. 2002), review denied, (Mar. 19, 2003)].

In 1976, as part of the legislation repealing the Education Code of 1959 and establishing the
current Education Code, the original 1974 legislation was amended and recodified at Ed.
Code, §§ 40 and 41. [Statutes of 1976, Chapter 1010].

In 1982 the Legislature, while retaining the original declaration, added another one that is
far more expansive than the first: "It is the policy of the State of California to afford all
persons, regardless of their sex, equal rights and opportunities in the educational institutions
of the state." [Statutes of 1982, Chapter 1117, codified at Ed. Code, § 200] The

1 Legislature fleshed out this declaration by enacting a comprehensive set of code sections "to
2 prohibit acts which are contrary to the [declared] policy and to provide remedies therefor."
3 One of the new code sections stated that "No person shall be subjected to discrimination on
4 the basis of sex in any program or activity conducted by an educational institution which
5 receives or benefits from state financial assistance or enrolls students who receive state
6 financial aid." [Statutes of 1982, Chapter 1117, codified at Ed. Code, § 220] Other code
7 sections provided that the governing boards of the educational institutions are responsible for
8 "enforcement" of these new rules by way of regulations and "handling complaints of
9 prohibited discrimination." [Statutes of 1982, Chapter 1117, codified at Ed. Code, § 260
10 to 262].

11 In 1984 the legislature amended an existing code section to include sexual harassment as
12 prohibited misconduct and added a new section defining that term to cover both quid pro
13 quo and hostile "educational environment" harassment. [Statutes of 1984, Chapter 1371,
14 amending Ed. Code, § 230 and adding Ed. Code, § 212.5; see, generally, "Note,
15 Education; Sex Discrimination and Sexual Harassment," 16 Pacific Law Journal 658 (1985)
16 (discussing the 1984 legislation).]

17 In 1988 the legislature added another code section, Ed. Code, § 262.3, which provided for
18 the right to appeal a governing board decision on a complaint alleging discrimination to
19 specified state agencies. [Statutes of 1988, Chapter 1514].

20 In 1990 the Legislature added a new subdivision to Ed. Code, § 262.3, which referred to
21 "civil law remedies, including, but not limited to, injunctions, restraining orders, or other
22 orders" for violations of "prohibited discrimination," but did not provide any further
23 explanation of the nature of those "civil law remedies" or whether those remedies could be
24 pursued prior to the exhaustion of administrative remedies. [Statutes of 1990, Chapter
25 1372]

26 In 1992 the legislature required each educational institution in California to prepare and
27 disseminate a "written policy on sexual harassment." [Statutes of 1992, Chapter 906, then
28 codified at Education Code 212.6 and subsequently recodified at Ed. Code, § 231.5; see,
generally, "Note, Education; Notification of Policy on Sexual Harassment," 24 Pacific Law
Journal 843 (1993) (discussing the 1992 legislation)].

29 In 1994 the legislature enacted the "California Schools Hate Violence Reduction Act of
30 1995," which added six more code sections. [AB 2543, as chaptered on September 21,
31 1994, available at <http://www.leginfo.ca.gov/bilinfo.html>.] The declaration accompanying
32 this legislation stated that there is "an urgent need to prevent and respond to acts of hate
33 violence and bias-related incidents that are occurring at an increasing rate within the public
34 school system." [AB 2543; also found at Ed. Code, § 201, Historical and Statutory Notes]
35 This legislation stated that "California's public schools have an affirmative obligation to
36 combat racism, sexism, and other forms of bias, and a responsibility to provide equal
37 educational opportunity." [AB 2543, then codified at Ed. Code § 45, subd. (b) and
38 subsequently recodified at Ed. Code § 201, subd. (b)].

39 By 1998 there were dozens of code sections pertaining to the prohibition of sex
40 discrimination, sexual harassment, and hate violence "scattered throughout the Education
41 Code." [Analysis of AB 499 for the Assembly floor dated August 20, 1998, available at
42 <http://www.leginfo.ca.gov/bilinfo.html>] That year the legislature passed new legislation,
43 which "revise[d] and recast numerous provisions of the Education Code relating to the
44 prohibition of discrimination...and organized these provisions into 2 legislative schemes, one
45 of which...[is] applicable to elementary and secondary schools, and one of which...[is]
46 applicable to postsecondary schools." [Legislative Counsel Digest to AB 499, as chaptered
47 on September 28, 1998, available at <http://www.leginfo.ca.gov/bilinfo.html>.] The 1998
48 legislation also specified "that the provisions on discrimination may be enforced through a

1 civil action." At one point in the legislative process AB 499 explicitly referred to the
2 availability of "monetary damages" as among the remedies available in a civil action, but "all
3 references to damages" were removed from the bill before it was enacted. [Analysis of AB
4 499 for the Assembly Floor; Analysis of AB 499 for the Assembly Committee on Judiciary
5 dated April 15, 1997, available at the same website.]"

6 Indeed, Assembly Bill 499 as originally introduced February 24, 1997, provided in proposed
7 §262.4, "This chapter may be enforced through a civil action for damages, injunctive relief, and
8 other appropriate equitable relief." The Assembly Committee on Judiciary Bill Analysis of April 16,
9 1997 explained that existing law provides only remedial relief for discrimination against students in
10 educational institutions. It went on to discuss that the new bill would seek to strengthen the
11 enforcement of non-discrimination statutes under the Education Code by expanding the remedies
12 available to discrimination to include monetary damages, and by clarifying their right to a private
13 cause of action as well as administrative remedies.

14 But by August 17, 1998, when the bill finally passed, all references to monetary damages
15 were indeed removed from the bill. (A copy of AB 499 is attached hereto as Exhibit A). The
16 Assembly Committee on Judiciary Bill Analysis explained that the Senate amendments had removed
17 all references to damages in the bill.

18 As a result, plaintiffs may seek injunctive relief in their claims under Chapter Two
19 (Educational Equity) of the Education Code, §§200 through 280, but not monetary damages.
20 As to §201(g), it does not "specifically incorporate" or "include" vast portions of other laws,
21 state and federal. What it states is that "It is the intent of the Legislature that this chapter shall be
22 interpreted as consistent with...." various other laws. This is another reason the court is not inclined
23 to permit wholesale causes of action from other codes into this lawsuit at this point.

24 The court next turns to a discussion of the specific factual allegations underpinning the
25 Complaint.

26 V. The Four Incidents

27 1. Referral

28 The case begins in defendant Claudine Gans-Rugebregt's Freshman Humanities Class on
October 11, 2002. Rebekah Rice's name was already on the board, as she was not in her seat at
the beginning of the class. (She testified someone else was in her seat, but there was no evidence

1 that she asked the other student to move.) Gans-Rugebregt was leading a discussion on comparative
2 religion, during which, according to Rebekah, she was being teased by several classmates about her
3 Mormon religion. There is no evidence that Gans-Rugebregt heard or knew about any teasing (other
4 than extremely circumstantial evidence of the parties' respective physical locations in the classroom
5 at the time) when she heard Rebekah yell out "That's so gay." According to Gans-Rugebregt, the
6 Humanities Class is dedicated to learning about and valuing those who are culturally different. Gans-
7 Rugebregt also testified that she made a special point at the beginning of each school year to establish
8 a firm rule that if one used racial, gender, or other slurs, that would result in an instant referral.³
9 (Several former students of Gans-Rugebregt were called by plaintiffs, all of whom denied ever
10 hearing that such a policy existed. Rebekah could not recall one way or the other.)

11 Nevertheless, Gans-Rugebregt testified that in accordance with this policy, she put a
12 checkmark on the board next to Rebekah's name, indicating that Rebekah should speak to her
13 immediately after class. The court finds the following facts to be especially probative of events
14 following this incident. After class, Rebekah met with Gans-Rugebregt, who asked Rebekah if she
15 knew why she was being given a referral. Rebekah admitted that she did not know, and asked if it
16 was because she was talking in class with fellow classmates at a time when she shouldn't have been.
17 This testimony was persuasive for two reasons: (1) it showed that Rebekah was not even aware of
18 just having used the phrase "That's so gay" (she testified that it had become a "bad habit" for her)
19 and (2) if Rebekah did not know why she was being given a referral, then it is extremely unlikely that
20 anyone else did, either. This leads the court to conclude that if the Rice family had not told everyone
21 that Rebekah had been given a referral for saying "That's so gay" then no one else would have
22 known it either, and she would not have been referred to as the "That's so gay girl".

23 Also, very tellingly, if Rebekah did not know she was being given a referral for saying
24 "That's so gay" then that casts grave doubts on plaintiffs' arguments made many times in this
25 litigation that Rebekah was the only student who had ever been given a referral for using the phrase.
26

27 ³A referral is a written memorandum of a rules infraction that is signed by a teacher, an assistant principal
28 and the student, and is sent home to the student's parent. Next to a verbal reprimand, a referral is the most
minimal form of student discipline employed by the school.

1 Furthermore, plaintiffs' arguments to this effect have been rebutted by Principal Mark Kilck's
2 testimony that he found 5 or 6 written referrals given to students for saying "That's so gay" in the
3 2002-2003 time frame alone and defendant Gans-Rugebregt's testimony that she had just given
4 another student a referral the week before testifying and that every time she has heard that term in
5 her class she has given a referral.

6 Finally, plaintiffs' failure to conduct any discovery to verify their speculation on this point
7 seriously damages their claim that Rebekah Rice was singled out and punished excessively because
8 of her religious beliefs.

9 As to imposing liability on defendants for initially giving Rebekah the referral, the court finds
10 that the decision to impose graduated discipline on Rebekah is one that falls squarely within the
11 discretion of the defendants. The case is most similar to Skinner v. Vacaville Unified School District
12 (1995) 37 Cal.App.4th 31, 39 [decision of school district not to expel student was discretionary]
13 and Thompson v. Sacramento City Unified School District (2003) 107 Cal.App.4th 1352
14 [decision to readmit suspended student was discretionary].

15 As to not protecting Rebekah from other students' harassment on account of her religion,
16 Gans-Rugebregt testified that she didn't hear what Rebekah's group was talking about, and that
17 there were 34 students in the class, all involved in group discussion. She also testified at trial that
18 she did not recall Rebekah's telling her that anyone had teased her about her Mormon religion
19 when she gave Rebekah the referral out in the hallway after class. At Gans-Rugebregt's deposition,
20 she stated that at the referral, Rebekah may have said that people were insulting her based on her
21 religion. Rebekah testified on direct that she "believed" she had told Gans-Rugebregt that her
22 friends were "asking questions about her religion"⁴ and that Gans-Rugebregt did nothing about it.

23 In conclusion, the court finds that plaintiffs have failed to meet their burden of proof on this
24 claim and therefore declines to order that the referral be stricken from Rebekah's file. Not only
25 does the court find that the initial decision to give Rebekah the referral is subject to great deference,
26

27 ⁴Interestingly, Rebekah also testified that this was the first time she had been questioned about her faith and
28 that she had no training about how to deal with that.

1 but also the court finds that the referral ended up in what is called a "discipline" file, which goes
2 nowhere, as opposed to Rebekah's high school "cumulative" file, which can be forwarded, inter
3 alia, to institutions of higher learning, the military, and the like.

4 2. Diversity Club Presentation

5 On October 18, 2002, the School Diversity Club made a presentation to defendant Gans-
6 Rugebregt's Freshman Humanities Class on the subject of racial prejudice and stereotypes. A film
7 dealing with the subject was shown and students were invited to share examples of prejudice they
8 had encountered. According to what Rebekah later told her father, one female student stood up
9 and said she was bisexual and stated that she thought it was wrong to say "It's so gay". This lasted
10 10 or 20 minutes. According to Dr. Rice, "again there was snickering, pointing, teasing and
11 harassing, all directed at Rebekah, none of which was redressed or corrected by Gans-Rugebregt"
12 (Plaintiffs' closing argument at 23:10-14).

13 According to Gans-Rugebregt, the Diversity Club is organized to promote tolerance at
14 school. She has never been the advisor for that group. They made a presentation and showed a film
15 about students who were hurt by ethnic stereotyping. The video itself dealt strictly with ethnicity
16 and had nothing to do with sex. According to Gans-Rugebregt's testimony, she doesn't remember
17 any student's saying "that's so gay" and she did not recall Rebekah's being teased. She did state
18 that if a student had told her she was being insulted by other students, she would have referred her
19 to a counselor. (Rebekah testified that she knew she had an assigned counselor at school, but there
20 was no evidence that Rebekah ever spoke to the counselor.)

21 According to plaintiffs, this incident gives rise to two types of liability: first, even though the
22 announced subject matter of the Diversity Club⁵ presentation was recognizing racial prejudice and
23 stereotypes, nevertheless it was their duty to inform Rebekah's parents of their right to have
24 Rebekah opt-out of the presentation, because it ended up resulting in a discussion of one upper
25 classman's bisexuality in violation of Education Code § 51554; secondly, plaintiffs claim defendant
26 Gans-Rugebregt failed to protect Rebekah from the other students' teasing. The court finds that
27

28 ⁵(which plaintiffs claim is really a homosexual club)

1 plaintiffs have failed to meet their burden of proof on either claim.

2 First, Education Code §51554 (since repealed), related to sex education, not racial
3 prejudice and racial stereotypes. If plaintiffs' interpretation of the law were correct, every California
4 school would have had to send an opt out notice to the parent of every school child before any
5 presentation of ethnicity, national origin, religion, color, or mental or physical disability, no matter
6 how remote the possibility that the conversation might turn to human sexuality. Given the known
7 propensities of high school students to blurt out any and everything, the burden on the schools would
8 be intolerable. The text and history of Education Code §51554 simply does not support plaintiffs.

9 Secondly, the claim that defendant Gans-Rugebregt failed to protect Rebekah from her
10 peers' teasing depends entirely on a showing that she was aware of the teasing from either witnessing
11 it first hand or being told about it by Rebekah. Rebekah herself did not testify that Gans-Rugebregt
12 heard or saw any teasing. Only her father and mother, who were obviously not there at the time,
13 testified about it. Her father also testified that when he went to speak to Assistant Principal Kass
14 Mason about the referral, he said nothing about the Diversity Club presentation nor about any
15 teasing.

16 Principal Mark Klick testified that Dr. Rice sent him a letter on November 19, 2002,
17 following which he and Dr. Rice had two conversations, one on November 21 and one on December
18 4. Klick testified that in neither conversation did Dr. Rice mention any teasing, and that if he had,
19 Klick would have followed up on the complaint, he would have asked to speak to Rebekah to begin
20 the investigative process, and he would have followed up on the responsible individuals. This
21 testimony was unrefuted. Rebekah testified that she didn't tell Miss Mason she was being teased
22 about being a Mormon because she didn't trust her and didn't think she'd do anything about it.
23 Rebekah also testified that she never talked to Gans-Rugebregt about being teased after that one
24 conversation in the hall (the day of the referral incident) because she didn't feel she could trust her.

25 (Rebekah testified that she didn't trust any of the teachers at Maria Carrillo).

26 With regard to the teasing, as stated above, the court has already found that Education Code
27 §§ 200 and 201 only provide injunctive relief and therefore plaintiffs are not entitled to monetary
28 damages even if they had violated Education Code §§ 200 or 201 by their conduct. As to

1 injunctive relief, Rebekah is no longer a student at Maria Carrillo High School and therefore any
2 request for injunctive relief as to her would be moot.

3 As far as plaintiffs' request for a permanent injunction ordering them to comply with the
4 California Education Code, the Constitution and Santa Rosa City School Policy is concerned, this
5 court is at a loss to understand by what authority it could grant such relief. Defendants are already
6 required to comply with the law and a court may not issue a broad injunction to simply obey the
7 law, thereby subjecting a person to contempt proceedings for committing at any time in the future
8 some new violation unrelated to the original allegations. City of Redlands v. County of San
9 Bernardino (2002) 96 Cal.App.4th 398.

10 3. Search of Back Pack

11 On October 7, 2003 (about one year after the referral incident) a student named Molly
12 Kilass appeared at defendant Mason's office and reported that another female student had brought
13 a knife and cigarettes to school with her. Mason told her to write the information on a note. There
14 is a sharp factual dispute about exactly what next transpired and why, but it is undisputed that
15 Rebekah Rice's backpack was searched, nothing was found, and she returned to her class. Another
16 Rebecca, Rebecca Smith, was actually the girl referred to by Molly, but Mason testified she had
17 misplaced the note and did not remember which Rebecca was referred to. Plaintiffs strongly
18 disagree. Of all the witnesses in the trial, Mason did appear the most hostile to the plaintiffs and
19 their case. Plaintiffs noted her "immediate defensiveness and consternation" about being questioned
20 about her prior existing relationship with Rebecca Smith in their closing argument. The court agrees:
21 she did appear somewhat defensive and evasive.

22 Nevertheless, even if the court were inclined to believe plaintiffs' claims that Mason's
23 actions lacked probable cause, the court nevertheless finds that her decision to conduct a search of
24 Rebekah's backpack is protected by the statutory immunity contained in Government Code
25 §821.6. That section provides that a public employee is not liable for injury caused by his
26 instituting or prosecuting any judicial or administrative proceeding within the scope of his
27 employment, even if he acts maliciously and without probable cause. As the court held in Richards
28 v. Department of Alcoholic Beverage Control (2006) 139 Cal.App.4th 304, 317-318:

1 A public employee acting within the scope of employment is immune from liability
2 for an injury caused by the employee's "instituting or prosecuting any judicial or
3 administrative proceeding ... even if he acts maliciously and * 318 without probable cause."
4 (Gov. Code, § 821.6.) Courts liberally construe "administrative proceeding" to include
investigatory and other activities in preparation for more formal proceedings. (Amylou R.
v. County of Riverside (1994) 28 Cal.App.4th 1205, 1209-1211, 34 Cal.Rptr.2d
319.)

5 See also Tur v. City of Los Angeles (1996) 51 Cal.App.4th 897, 900, where the court
6 held that the immunity conferred by §821.6 is not limited to peace officers and prosecutors, but
7 has been extended to public school officials as well. Accord, Nicole M. V. Martinez (1997) 964
8 F.Supp. 1369, 1389, 1390 (disapproved on other grounds): "Generally speaking, a discretionary
9 act is one which requires the exercise of judgment or choice. Discretion has also been defined as
10 meaning equitable decision of what is just and proper under the circumstances." Kemmerer v.
11 County of Fresno, 200 Cal.App.3d 1426, 1437, 246 Cal.Rptr. 609 (1988) (quoting Burgdorf
12 v. Funder, 246 Cal.App.2d 443, 449, 54 Cal.Rptr. 805 (1966)); see also Lopez v. Southern Cal.
13 Rapid Transit Dist., 40 Cal.3d 780, 793-94, 221 Cal.Rptr. 840, 710 P.2d 907 (1985) .
14 Decisions by a school principal or superintendent to impose discipline on students and conduct
15 investigations of complaints necessarily require the exercise of *1390 judgment or choice, and
16 accordingly are discretionary, rather than ministerial, acts. Accord Petaluma I, 830 F.Supp. at
17 1582-83."

18 Here, Mason was clearly acting as a public employee within the scope of her employment at
19 Maria Carrillo High School when she searched Rebekah's backpack as part of her investigation into
20 the knife claim. The court agrees with the defendants that those charged with responsibility for
21 enforcing disciplinary rules in high schools must be encouraged to investigate and discipline those
22 responsible without fear of reprisal. That is particularly so here, where the reason for Mason to act
23 quickly involved the presence of a knife on campus—an undisputed public safety hazard.

24 As to the post-search conversation between Dr. Rice and Assistant Principal Mason, the court
25 specifically declines to make factual findings concerning this event as it does not find that it would
26 support liability no matter which version is believed.

27 4. The Peace Rally

1 Plaintiffs' final complaint⁶ concerns events at and after a peace rally that took place April
2 2, 2004. As there was no claim presented pursuant to the Tort Claims Act that supports this
3 complaint, and as the First Amended Complaint filed December 5, 2003, obviously makes no
4 reference to these events, and as the court has denied the request to amend the First Amended
5 Complaint, the court does not find that plaintiffs are entitled to pursue this complaint.

6 Plaintiffs may believe they can rely on the Substantial Compliance Doctrine (see City of San
7 Jose v. Superior Court (1974) 12 Cal. 3d 447) based upon the notion that it is not the purpose
8 of the claims statutes to prevent surprise, but merely to provide the public entity with sufficient
9 information to enable it to adequately investigate claims and settle them, if appropriate, without the
10 expense of litigation. However, this will not assist.

11 As explained in Fall River, supra, 206 Cal. App. 3d at 435-436: " [The substantial compliance
12 doctrine] is unavailing where the plaintiff seeks to impose upon the defendant public entity the
13 obligation to defend a lawsuit based upon a set of facts entirely different from those first noticed.
14 Such an obvious subversion of the purposes of the claims act, which is intended to give the
15 governmental agency an opportunity to investigate *436 and evaluate its potential liability, is
16 unsupportable." Here, defendants would have had no notice and no reason to investigate facts
17 occurring after the date their last claim was presented (November 2003) in order to assess their
18 potential liability for those acts. Plaintiffs are seeking to impose tort liability on defendants based on
19 alleged tortious acts that were not included in their tort claims and which occurred after their law
20 suit was filed.

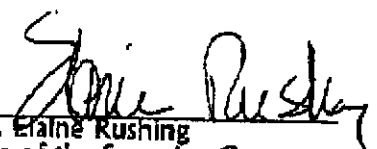
21 Given the statutory scheme and the purpose of the tort claim, plaintiffs should have filed a
22 tort claim with regard to the Peace Rally incident that occurred in the spring of 2004 and then
23 moved promptly to file an Amended Complaint at that time. Since a plaintiff is required by
24 California Government Code §911.2 (a) to file a tort claim not later than six months from the date
25 his cause of action accrues, it is clear that it is now far too late for plaintiffs to file such a claim based
26 on events that occurred in 2004.

27
28 ⁶Plaintiffs do make a number of other miscellaneous complaints (e.g., the alternative assignment) but the
court finds that they are not entitled to any relief on these claims.)

1 If either party desires a Statement of Decision, the court hereby designates defendants to
2 prepare the proposed Statement of Decision in accordance with CCP §632 and CRC 3.1590.⁷
3 This tentative decision shall become the statement of decision if no request is made within ten days
4 for a different Statement of Decision. The court also designates defendants to prepare the proposed
5 Judgment.

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7 IT IS SO ORDERED

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9 Dated: May 15, 2007


10 Hon. Elaine Rushing
11 Judge of the Superior Court
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27 ⁷"A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it
28 need do no more than state the grounds upon which the judgement rests....In other words, a trial court rendering a
statement of decision is required only to set out ultimate facts, rather than evidentiary ones" Musquiz v. City of
Emeryville (2000) 79 Cal.App.4th 1106, 112401125.