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SCHOOL DISTRICT; STEPHANIE HANKS  
8 AND ANDREW BOLLS, Individually, and as  
Employees of City of Clovis and/or Clovis  
9 Unified School District

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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

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14

ANDY E. CASTRO,

Case No. 1:17-cv-01063-DAD-BAM

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Plaintiff,

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS  
PLAINTIFF'S FIRST, SECOND, THIRD  
AND FOURTH CAUSES OF ACTION IN  
PLAINTIFF'S COMPLAINT PER FRCP  
RULE 12(b)(6)**

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v.

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CITY OF CLOVIS; CLOVIS UNIFIED  
SCHOOL DISTRICT; STEPHANIE HANKS  
18 & ANDREW BOLLS, Individually, and as  
Employees of City of Clovis and/or Clovis  
19 Unified School District,

Date: September 17, 2019  
Time: 9:30 am  
Room: 5  
Judge: Hon. Dale A. Drozd

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Defendants.

Action Filed: June 13, 2017

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COMES NOW Defendants CLOVIS UNIFIED SCHOOL DISTRICT ("CUSD"), Ms.

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Stephanie Hanks ("Hanks"), and Mr. Andrew Bolls ("Bolls") (collectively "Defendants") and hereby

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submits the following Memorandum of Points and Authorities in Support of its Motion to Dismiss

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ANDY E. CASTRO's ("Plaintiff") Complaint.

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I.

**INTRODUCTION**

Defendants bring this Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(6) as to Plaintiffs first, second, third, and fourth causes of action filed on June 13, 2019. Plaintiff's Complaint fails to state facts upon which relief may be granted, and what little is included in Plaintiff's Complaint is conclusory, and need not be accepted by this court. Defendants have not violated Plaintiff's Constitutional Right to free speech, nor have they deprived Plaintiff of his Fifth Amendment Right to Due Process. For the reasons discussed below, Plaintiff's Complaint must be dismissed without leave to amend.

II.

**FACTUAL ALLEGATIONS**

Plaintiff, a former student at Clovis High School ("CHS"), was scheduled to participate in his graduation ceremony on or about May 30, 2019. (Complaint, 2:19-22.) On May 14, 2019, Plaintiff turned 18, and on May 22, 2019 had successfully completed his high school education. (Id, 2:23-25.) On an unspecified date in May 2019, Plaintiff used his online social media Twitter account to "tweet" a friend. In his "tweet" he used the words "nigga" and "nigger". (Id, 2:25-26.) An unspecified Twitter user found Plaintiff's use of "nigga" and "nigger" offensive, and reported Plaintiff to Defendants. (Id, 3:1.) In response, Defendants denied Plaintiff the opportunity to "participate in his graduation ceremony." (Id., 3:5-6.) Plaintiff filed his Complaint on June 13, 2019, alleging four (4) causes of action; 1) 1st Amendment Freedom of Speech; 2) 5th Amendment Due Process; 3) California Constitution Art. I § 2, and 4) California Ed. Code § 48950(a).

III.

**LAW AND ARGUMENT**

A. **Standard for Consideration of Motion to Dismiss Pursuant to Rule 12(b)(6)**

The Federal Rules of Civil Procedure, Rule 12(b)(6) permits dismissal for failure of the pleading to state a claim upon which relief can be granted. A motion to dismiss for failure to state a claim is properly granted if a cause of action (1) lacks a cognizable legal theory or there is (2) an absence of sufficient facts alleged under a cognizable legal theory. (*Balistreri v. Pacifica Police Dept.*

1 901 F.2d 696, 699 (9th Cir. 1990) ; see also *Robertson v. Dean Witter Reynolds, Inc.* 749 F.2d 530,  
2 533-534 (9th Cir. 1984).)

3 While plaintiff need not prove his claim in the Complaint, plaintiff “must state a claim  
4 therein,” which “requires more than the mere recitation of boilerplate statutory language.” (*Migdal v.*  
5 *Rowe Price-Fleming Int’l, Inc.* 248 F.3d 321, 328 (4th Cir. 2001) .) Before a plaintiff should be  
6 permitted to proceed to discovery, they “must have some factual basis for believing that a legal  
7 violation has actually occurred.” (*Id.*, at 328.) If a plaintiff cannot meet the pleading requirements of  
8 FRCP 8, then “defendants should not be required to respond to such a pleading either by motion or  
9 answer.” (*Shakespeare v. Wilson* 40 F.R.D. 500, 504 (1966) .) A pleading may not simply allege a  
10 wrong has been committed and demand relief. The underlying requirement is that a pleading give  
11 “fair notice” of the claim being asserted and the “grounds upon which it rests.” (*Conley*, supra, at 47-  
12 48.) The court need not, however, “accept legal conclusions cast in the form of factual allegations if  
13 those conclusions cannot reasonably be drawn from the facts alleged.” (*Clegg v. Cult Awareness*  
14 *Network* 18 F.3d 752 (9th Cir. 1994) .)

15 **B. Plaintiff’s Causes Of Action Were Required To Comply With The California**  
16 **Government Tort Claims Act, And Plaintiff Has Failed To Show Compliance With The**  
17 **Government Tort Claims Act (California Government Code §§ 810-996.6).**

18 Plaintiff’s Complaint concedes that Clovis Unified School District is a school district in  
19 Clovis, California. While somewhat in-artfully pled, Stephanie Hanks and Andrew Bolls are  
20 employees of the Clovis Unified School District (Plaintiff’s Complaint is somewhat vague as to the  
21 role which Defendant Hanks and Bolls play in the case, and otherwise fails to state a cause of action if  
22 Plaintiff were to allege that they are not public employees). In California, Plaintiff is required to file a  
23 government tort claim with Clovis Unified School District for any action asserting money or damages  
24 before filing an action (Government Code §§ 905 et seq.). Though this is a state statute, the Federal  
25 Court has held that a Plaintiff must similarly allege compliance with the California Tort Claims Act  
26 (CTCA). (*Dowell v. Contra Costa County*, , 928 F.Supp.2d 1137 (N.D.Cal.2013).)

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1 Plaintiff's Complaint is for four causes of action, all of which allege money damages  
2 (general damages and punitive damages included therein). As such, Plaintiff was required, and is  
3 required, to allege timely compliance with the Government Tort Claims Statute (see *E.G., J.M. v.*  
4 *Huntington Beach Union High School District* 2 Cal. 5<sup>th</sup> 648, 652 (2017) ). The failure to timely  
5 present a claim for money damages to a California public entity bars a Plaintiff from filing a lawsuit  
6 against that entity. (*State of California v. Superior Court* 32 Cal. 4<sup>th</sup> 1234, 1239 (2004).)

7 **1. Plaintiff's Two California State Court Claims, For Violation Of The California**  
8 **Constitution Under Articles One And Two, And For A Statutory Violation Of**  
9 **California Education Code § 48950(A), Which Are Claims Three And Four Of**  
10 **Plaintiff's Complaint, Must Be Dismissed For Failure To Comply With The**  
11 **Government Tort Claims Act.**

12 In this Federal Court case, Plaintiff alleges two pendant causes of action of State Law tort  
13 claims for money damages, which are Claims Three and Four (an alleged personal injury for violation  
14 of the California Constitution, and an alleged personal injury for violation of a California Educational  
15 Statute). Those two State Law claims are subject to the Government Tort Claims Act, even though  
16 attached is pendant claims to a Federal Court action. (see *E.G., Karim-Panahi v. Los Angeles Police*  
17 *Dep't* 839 Fed. Sec. 621, 627 (9<sup>th</sup> Cir 1988).) Plaintiff has not alleged compliance with the  
18 Government Tort Claims Act, and therefore, Claims Three and Four must be dismissed, without  
19 regard to the Federal filing status of the case.

20 **2. Plaintiff's Federal Claims, In The First And Second Claims, Must Be Dismissed**  
21 **For Failure To Comply With The Government Tort Claims Act.**

22 Plaintiff's First and Second claims in his Complaint are for Federal causes of action, the first  
23 being an alleged violation of the First Amendment for free speech, and the second for a violation of  
24 the Fifth Amendment due process, both of which request tort money damages, which are subject to the  
25 California Government Tort Claims Act. While it is true that some Federal claims are not subject to  
26 the Government Tort Claims Act, namely 42 USC § 1983, the instant two Federal claims brought by  
27 the Plaintiff are for money damages for the exact allegations found in the State Court claims, and are  
28 not found in the cases as being specifically exempt from the California Government Tort Claims Act  
(42 USC § 1983 claims are exempt, see *Donovan v. Reinbold*, 433 et seq. 738 (9<sup>th</sup> Cir 1970)), and

1 that exemption from the California Tort Claims Act can be extended to other Federal civil right  
2 statutes, such as age discrimination and disability discrimination, it does not appear that the exemption  
3 has been applied to First Amendment of free speech and Fifth Amendment due process tort claims;  
4 see California Government Tort Liability Practice, 4th ed., Volume 1, § 5.55, Page 5-43, 5-44). The  
5 core of Plaintiff's Complaint is for money damages, not an injunction (graduation has passed) or  
6 injunctive relief, but rather straight tort money damages. Plaintiff does not allege a specific civil  
7 rights statutory violation under Federal statute. As such, it does appear that there is no exemption to  
8 the Government Tort Claims Act for Claims One and Two, and they should be dismissed.

9 Plaintiff has failed to allege that Plaintiff filed the appropriate government tort claim under the  
10 act, which applies to bar Plaintiff's Complaint against both Clovis Unified School District and the  
11 employees of Clovis Unified School District, Ms. Hanks and Mr. Bolls (Government Code § 950.2).  
12 As such, Plaintiff does not have a viable legal claim against Defendants and this Motion to Dismiss  
13 under FRCP 12(b) must be granted.

14 C. **Plaintiff's First Cause of Action Fails to State a Cause of Action For a First Amendment**  
15 **Free Speech Violation.**

16 In his first cause of action, Plaintiff alleges that Defendants violated Plaintiff's right to  
17 Freedom of Speech under the First Amendment of the United States Constitution because Defendants  
18 disciplined Plaintiff for using language that is almost universally considered to be profane in nature.  
19 Although the First Amendment of the United States Constitution guarantees broad speech liberties to  
20 persons residing within the United States, it is not without limit. Of note, certain speech activities of  
21 pupils at public schools may be limited. The California Education Code § 48907(a) states that "Pupils  
22 of the public schools, including charter schools, shall have the right to exercise freedom of speech and  
23 of the press including, but not limited to, the use of bulletin boards, the distribution of printed  
24 materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in  
25 official publications, whether or not the publications or other means of expression are supported  
26 financially by the school or by use of school facilities, **except that expression shall be prohibited**  
27 **which is obscene, libelous, or slanderous."** (Emphasis added.)

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1 In this case, Plaintiff used the word “nigga” and “nigger” which was seen by someone who  
2 took offense to the use of Plaintiff’s choice of words. So much so, that this (unidentified) person  
3 reported Plaintiff’s speech activities to Defendants. As noted in California Education Code §  
4 48907(a), Pupils of California schools do not have the right to expression which is obscene, libelous,  
5 or slanderous. As the words “nigga” and “nigger” are universally considered obscene, Plaintiff does  
6 not have Constitutional protection for this expression. Because Plaintiff does not have any First  
7 Amendment protection for said obscene language, his First Amendment Right related to this particular  
8 expression cannot be violated.

9 **D. Plaintiff’s Second Cause of Action Fails to State A Claim For A Fifth Amendment**  
10 **Violation of Due Process.**

11 In his Second Cause of Action, Plaintiff alleges that Defendants denied Plaintiff his 5th  
12 Amendment right to due process, specifically his right to notice and an opportunity to be heard. Here  
13 however, Plaintiff fails to state a claim for relief because his Complaint fails to state sufficient facts to  
14 allege a cognizable legal theory. First, Plaintiff’s Complaint fails to allege when the offensive tweet  
15 was made by Plaintiff. Was the tweet published shortly after May 22, 2019, as Page 2 of the  
16 Complaint suggests? Or was the offensive tweet published on May 30, 2019, shortly before  
17 graduation, as Page 3 of the Complaint seems to suggest? In order for Defendants to appropriately  
18 respond to Plaintiff’s allegation, Plaintiffs must allege with some specificity the relevant timeframe.

19 Second, without a relevant timeframe, Plaintiff’s allegation is conclusory at best. California  
20 Law holds that, “When facing a temporary short-term suspension, a student has minimal procedural  
21 due process rights, including the right to a hearing.” (Granowitz v. Redlands Unified School Dist.  
22 (App. 4 Dist. 2003) 129 Cal.Rptr.2d 410, 105.) If Plaintiff’s tweet was published a mere three hours  
23 prior to graduation, then by any measure, any action taken by the school district would be short term  
24 in nature. Although Plaintiff attempts to make the discipline enacted by Defendants seem like an  
25 “expulsion” there are no facts indicating that an expulsion ever actually took place... instead, all that  
26 is truly alleged is that Plaintiff was prevented from graduation, that he was removed from campus, and  
27 that he was required to remove the offensive tweet. (Complaint, 3: 4-6.) Due to Plaintiff’s lack of  
28 factual allegations in his complaint, Plaintiff has failed to state a claim upon which relief may be

1 granted, and this motion must be sustained.

2 **E. Plaintiff's Third Cause of Action Fails to State A Claim For A Violation of The**  
3 **California Constitution, Article I, § 2**

4 The California Constitution Article I, Section 2 provides broad freedom of speech protections  
5 and dovetails the protections afforded by the United States Constitution. However, these protections  
6 have been limited in very narrow circumstances. One such circumstance is obscene material. "At the  
7 lowest rung of the hierarchy of First Amendment values are forms of expression that are accorded no  
8 First Amendment protection, such as obscenity and speech calculated to provoke a fight. (*Law*  
9 *School Admission Council, Inc. v. State of California* (App. 3 Dist. 2014) 166 Cal.Rptr.3d 647, 222.)  
10 In this case, the words that Plaintiff published on a social media website, "nigga" and "nigger" are  
11 words that are generally considered to be the most obscene words in the English language. Because  
12 First Amendment protection, and therefore California Constitutional Article I, Section 2 protections  
13 do not apply to the obscenities published by Plaintiff, Plaintiff cannot state a valid cause of action.

14 **F. Plaintiff's Fourth Cause of Action Fails to State A Claim For A Violation of the**  
15 **California Education Code Section 48950(a).**

16 In Plaintiff's Fourth Cause of Action, he states that Defendants violated protections granted  
17 him by the California Education Code Section 48950(a), specifically, Defendants deprived him of his  
18 "vested right to participate in his graduation ceremony ... without any right to be heard  
19 administratively or judicially in any form." Additionally, Plaintiff also alleges that this statute  
20 guarantees him additional freedom of speech protections. California Ed. Code Section 48950(a)  
21 states, "A school district ... shall not make or enforce a rule subjecting a high school pupil to  
22 disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when  
23 engaged in outside of the campus, **is protected from governmental restriction by the First**  
24 **Amendment to the United States Constitution or Section 2 of Article I of the California**  
25 **Constitution."** (Emphasis added.)

26 As the Supreme Court noted, although the First Amendment Protects most speech activity,  
27 "obscene material is unprotected by the First Amendment." (*Miller v. California* (1973) 413 U.S. 15,  
28 23.) California Mirrors the Supreme Court in not recognizing any free speech protection for

1 obscenity. “Obscenity is not protected by the First Amendment. (In re Martinez 216 Cal.App.4th  
2 1141, 1153 (2013) ; see also In re M.S. 10 Cal.4th 698, 720 (1995) .) Due to the fact that the use of  
3 words such as “nigger” and “nigga” are considered obscene, Plaintiff had no Federal or State  
4 protections in his use of those words. Therefore, any reasonable action Defendants took in response to  
5 Plaintiff’s egregious behavior did not contravene California Education Code Section 48950(a).

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**IV.**  
**PUNITIVE DAMAGES**

In Plaintiff’s prayers for damages, Plaintiff has improperly asserted punitive damages against all Defendants. Plaintiff has two California State Law Claims, Claim Three and Claim Four. California State Law applies to these state claims, and as discussed below, Plaintiff cannot recover punitive damages under California damages laws. (*Erie R. Co. v. Tompkins* 304 U.S. 64, 78 (1938) .) The law governing what damages are recoverable is substantive in Federal Court. (*Homoki v. Conversion Services, Inc.* 717 F.3d 388, 398 (5th Cir. 2013).) Plaintiff seeks state court based personal injury damages in his Complaint, not subject to the Federal Tort Claims Act, so Defendant asserts that the State laws of California apply to the Federal Questions Claims one, and two as well, and Punitive damages are not recoverable.

First, punitive damages are not allowed against public entities by California express law. In Government Code Section 818, it is specifically stated that “notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing defendant.” Despite the clear legal bar prohibiting a punitive damage claim against CUSD, Plaintiff has asserted such punitive damages in their Complaint. This court must grant the motion to strike punitive damages as to CUSD as a matter of express law.

Under California law, punitive damages are appropriate when plaintiff establishes, by clear and convincing evidence, that defendant is guilty of fraud, oppression, or malice. (*In re First Alliance Mortg. Co.*, C.A.9 (Cal.)2006, 471 F.3d 977.) In addition, California law generally does not favor the imposition of punitive damages, and such punitive damages are justified only in the “clearest” and “most outrageous” of cases of defendant conduct. (*Woolstrum v. Mailloux* 141 Cal.App.3d Sup. 1,9



1 (1983); *Egan v. Mutual of Omaha Ins. Co.* 24 Cal.3d 809, 828 (1979).) To bring a successful action  
2 for punitive damages, the allegation of punitive conduct must "not only be wilful in the sense of  
3 intentional, but it must also be accompanied by aggravating circumstances, amounting to malice."  
4 (*Ebaugh v. Radkin* 22 Cal.App.3d 891,894 (1972).) Malice is defined by Civil Code §3294 as  
5 "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct  
6 which is carried on by the defendant with willful and conscious disregard of the rights or safety of  
7 others."

8 Here, Plaintiff's Complaint is completely devoid of any facts showing that either Stephanie  
9 Hanks, or Andrew Bolls acted with any fraud, oppression, or malice. As Plaintiff has so utterly failed  
10 to meet the heightened pleading standard for punitive damages, this allegation against the individual  
11 defendants must also be dismissed.

12 **V.**  
13 **LEAVE TO AMEND SHOULD NOT BE GRANTED WHERE AMENDMENT WOULD**  
14 **BE FUTILE**

15 Where it would be futile to allow Plaintiff to amend their claim because there are no legitimate  
16 grounds upon which they can base their cause of action, the Court should grant the Rule 12(b)(6)  
17 motion with prejudice. Leave to amend should be denied if the court determines that allegations of  
18 other facts consistent with the challenged pleading could not possibly cure the deficiency. (*Schreiber*  
19 *Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986).)

20 Here, as discussed throughout this Motion, Plaintiff has failed to plead the factual elements  
21 required to maintain any of his claims against Defendants. Instead, he asserts conclusory allegations,  
22 devoid of facts, that are wholly insufficient. Therefore, because Plaintiff cannot state any facts that  
23 would grant him freedom of speech to use obscene language such as "nigga" and "nigger", and  
24 because Plaintiff's due process rights have not been violated, Plaintiff should not be granted leave to  
25 amend.

26 **VI.**  
27 **CONCLUSION**

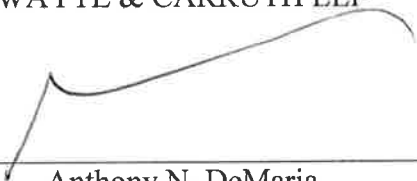
28 For the above reasons, Plaintiff's Complaint should be dismissed without leave to amend.

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Dated: July 16, 2019

MCCORMICK, BARSTOW, SHEPPARD,  
WAYTE & CARRUTH LLP

By:   
Anthony N. DeMaria  
Ryan W. Porte  
Attorneys for Defendants CLOVIS UNIFIED  
SCHOOL DISTRICT, STEPHANIE HANKS, and  
ANDREW BOLLS.

005339-000012 6174477.1

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

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 Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

On July 16, 2019, I served true copies of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST, SECOND, THIRD AND FOURTH CAUSES OF ACTION IN PLAINTIFF'S COMPLAINT PER FRCP RULE 12(B) (6)** on the interested parties in this action as follows:

Andy E. Castro  
[REDACTED]  
Clovis, California [REDACTED]

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

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

Executed on July 16, 2019, at Fresno, California.

  
Teri L. Maxwell