No. 19-

IN THE

Supreme Court of the United States

DIANE B. WEISSBURG, ESQ.,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is a matter of first impression in the Federal and California Court systems.

1. Are Individual Educational Placement ("IEP") meetings Official Proceedings?

2. Do parents have the right to record IEP meetings, and use the content of those recorded IEP meetings in subsequent court actions?

3. Is an IEP meeting an "issue of public interest."

4. Whether a parent, guardian, or local educational agency has a right under federal law to audio record IEP meetings and use the content of those recordings, without fear of retribution?

Petitioner Diane B. Weissburg ("Petitioner") requests review of the decision of the United States Court of Appeal For The Ninth Circuit, App., *infra*, 1a-4a, which affirmed the trial court's denying of their Anti-SLAPP motion against the Counter-Claim filed by Los Angeles Unified School District. ("LAUSD"), App., *infra*, 5a-16a.

In 2018, Mother Christine Truong ("Mother" or "Truong") and her counsel Diane B. Weissburg ("Weissburg") attended a series of IEP assessment and placement meetings with Los Angeles Unified School District ("LAUSD" or "Respondent") regarding an IEP program for Truong's son D.N. Truong recorded the meetings as allowed by California Education Code § 56341.1. Following one of the meetings, Truong was told by

Counsel for LAUSD that Truong had left the tape recorder on during lunchtime while the father was in the room.

While the 2018 IEP meetings were taking place, Truong, as the Guardian ad Litem of DN, filed a complaint in the District Court seeking reversal of Due Process hearing decisions made by an Administrative Law Judge in 2017. LAUSD's answer to Truong's complaint included a counterclaim against DN, Truong, and Weissburg for violation of California's Invasion of Privacy Act ("CIPA"), Penal Code § 632 alleging the recordings were privileged, even though DN's Father, Vincent Nguyen ("Nguyen") was in the room, and that the recording itself was a violation of Penal Code § 632.

Counter-Defendants filed Anti-SLAPP Motions in the District Court, *Code of Civil Procedure* §425.16, seeking to strike LAUSD's counterclaim, and Motion to Dismiss. The District Court denied Counter-Defendants' Anti-SLAPP Motions and Motions to Dismiss. Counter-Defendants appealed that decision to the 9th Circuit, who denied the appeal. The 9th Circuit Court ruled the "Appellants have failed to make a threshold showing that the recording relates to a public issue". App. 1a-4a at pg. 4.

This lower-court decision will chill the rights of parents and the right to have counsel throughout the United States.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

1) D.N., a minor, by and through Christine Truong, parent; Counter-Defendant.

2) Christine Truong, Counter-Defendant.

3) Diane B. Weissburg, Counter-Defendant and Petitioner.

4) Los Angeles Unified School District, Counter-Claimant and Respondent.

There are no corporations involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Diane B. Weissburg respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS BELOW

The decision of the court of appeals was not published, and is reprinted in the Appendix (App.) at 1a-4a. The district court's opinion was not published, and is reprinted at App. 5a-16a.

JURISDICTION OF THE SUPREME COURT

The jurisdiction of this Court to review the Judgment of the United States Court of Appeals For the Ninth Circuit decision on April 23, 2019, is invoked under 28 U.S.C. § 1254(1), and has been timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

California Education Code § 56341.1(g) states in part,

(1) "Notwithstanding Section 632 of the Penal Code, the parent or guardian or local educational agency shall have the right to audio record the proceedings of individualized education program ("IEP") team meetings……

(2) The Legislature hereby finds as follows:

(A) Under federal law, audio recordings made by a local educational agency are subject to the federal Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Sec. 1232g), and are subject to the confidentiality requirements of the regulations under Sections 300.610 to 300.626, inclusive, of Title 34 of the Code of Federal Regulations.

(B) Parents or guardians have the right, pursuant to Sections 99.10 to 99.22, inclusive, of Title 34 of the Code of Federal Regulations, to do all of the following:

(i) Inspect and review the audio recordings.

(ii) Request that the audio recordings be amended if the parent or guardian believes that they contain information that is inaccurate, misleading, or in violation of the rights of privacy or other rights of the individual with exceptional needs.

(iii) Challenge, in a hearing, information that the parent or guardian believes is inaccurate, misleading, or in violation of the individual's rights of privacy or other rights."

Parents are not specifically authorized by Federal Law to record IEP meetings, or use those recordings for any purpose. This has to change to allow parents to advocate for their children.

PETITIONER'S STATEMENT OF THE CASE

1. The 2018 IEP Meetings

A series of IEP meetings were scheduled between LAUSD and Truong to develop an IEP for D.N. Truong was represented by counsel, Diane B. Weissburg.

On all IEP notices, Truong advised in writing that she would be recording all IEP meetings as allowed by California Education Code 56341.1, and that she was represented by Counsel. Further, DN's Father, Nguyen, has joint physical and legal custody of DN, but does not have educational rights (pursuant to a family law order). Nguyen did attend all IEP meetings. LAUSD was represented by Mary Kellogg, Esq ("Kellogg") at all meetings, and D.N. and Truong were represented by Diane B. Weissburg. DN was attending Westmark due to a diagnosis of Auditory Processing Disorder (with parent placement) at Rosemead School district expense, pending full reassessments for transfer to high school.

Ms. Shapiro and Mr. Pitt, LAUSD employees, were responsible for LAUSD's recorder; Mother was solely responsible for her recorder and taping of the IEP meetings. No rules regarding the use of a recorder either orally or in writing were ever provided to the participants. At no time did LAUSD personnel ever tell mother when to turn her recorder on or off, including breaks and lunches.

People came and went during the meeting, including those not included in the meetings, like the Information Technology, and maintenance employees.

The first IEP meeting was held January 30, 2018. Although all assessments were not complete, and all goals, placements, and services had not been developed, Counsel for LAUSD, Ms. Kellogg, got the team to agree that D.N. remained eligible for Special Education and Services, and that his primary disability category was SLD due to his Auditory Processing Disorder. Goals, types of placements, and services continued to be discussed.

The second day of the IEP meeting was February 5, 2018. Suddenly, Counsel for District claimed that D.N. might have Autism or that he suffers from Autistic-like behaviors or characteristics, and that D.N.'s primary eligibility category should change to Autism.

None of the evaluators, including Dr. Shelly Berger, the school psychologist, ever asserted that D.N. had autism or suffered from any autistic like behaviors or characteristics. In fact Dr. Berger's report, and Dr. Berger's Gilliam Autism Rating Scale (GARS-3), clearly indicated that autism criteria was not met for D.N. Both Truong and Nguyen disagreed with the sudden change of disability and the primary label to autism or autistic like behaviors or characteristics, and the issue was tabled. Goals, placement, and services continued to be discussed.

The third IEP meeting was held February 8, 2018. Once again, Kellogg raised the issue that D.N. had autism or suffers from autistic like behaviors or characteristics. Dr. Berger clearly stated during that meeting that D.N.

never exhibited any stereotypical behaviors of autism when she assessed him at his school. Further, most of the other assessors agreed they never saw any stereotypical behaviors of autism or autistic-like behaviors during their assessments of D.N. Goals, types of placements, and services continued to be discussed.

The fourth IEP meeting was held February 28, 2018. Goals, types of placements, and services continued to be discussed. No possible school placements and/or teacher credentials were offered by LAUSD for Truong to assess, although previously requested by her.

Suddenly, after lunch at the fourth IEP meeting on February 28, 2018, Kellogg asserted orally to Weissburg that Truong may have left her tape recorder on during the February 8, 2018 lunch with her clients, and/or the lunch break, and to turn off recording devices during the lunch break. Further, Kellogg requested that the recordings be checked for privileged content. The IEP meeting resumed, and Goals, types of placements, and services continued to be discussed. No possible school placements and/or teacher credentials were offered by LAUSD, for Truong to assess, although previously requested by her.

The fifth IEP meeting was to be held March 8, 2018. That meeting was cancelled due to pre-determination of Autism by the District.

2. Counsel For Mother Checks The Recordings

As a result of Kellogg's request, Weissburg requested a copy of the February 8, 2018 recording from Truong; Truong provided that copy on March 7, 2018.

It was discovered that the entire IEP meeting including the lunch and break periods had been recorded by Truong. Truong had intended to take the recorder to listen to the proceedings during lunch; but was rushed out by Kellogg and Truong left the recorder on the table. Lunch was from 12:05 to 12:50 p.m. Truong and her Counsel left at approximately 12:05 p.m. and returned at approximately 12:50. Due to being rushed out of the meeting by Kellogg, Truong forgot the recorder. District employees knew Nguyen stayed in the room during that lunch meeting, and that he spoke during the meeting.

That lunch break recording of February 8, 2018, which lasted approximately 50 minutes, showed a clear case of pre-determination that DN had Autism by LAUSD employees and LAUSD counsel against D.N., even though there was no evidence that D.N. ever had autism, ("we are tasked by the district and our partners to want the autism as the primary one"). The lunch meeting took place with Nguyen, Kellogg, and LAUSD employees, and included all participants except Truong and her Counsel. People came and left the room during that 50 minute period. Since Nguyen remained at the lunch meeting, no attorney/client privilege can be invoked of this meeting.

The participants continued talking about (among other issues not addressed here) D.N.'s needs, goals, and services; the reasons why the team had to give D.N. a primary disability label of autism or suffers from any autistic-like behaviors or characteristics (their superiors wanted him labeled that way); statements about Truong and Weissburg; and detailed reference to the case of *Weissburg v. Lancaster School District*, 591 F.3d 1255 (9th Cir. 2010), in relation to D.N.'s case, in violation of procedural safeguards and FAPE.

Statements made on the February 8, 2018 recording included but are not limited to:

A. Kellogg: "Autism is first category, it's hard to get into Westmark. If they do not agree with it, we no longer care"; "She does not want D.N. labeled Autistic, because Westmark is not an Autistic school"; "we made our peace, if she does not like it, she can file; I need to prep you guys". (D.N. was attending Westmark at Rosemead School District expense, as parentally placed.)

B. Berger: "The reason he is going to Westmark is because they can give him services." Kellogg: "oh please never say that, let's move on."

C. Berger: …."the autistic-like characteristic is not identified anywhere in his educational history." Kellogg: "Please don't revisit it."

D. Diaz-Rempel: "Don't you have to at the end to say what his eligibility is? Kellogg: "And we are tasked by the district and our partners to want the autism as the primary one…."

F. Berger: "He is not identified anywhere in other school districts." Kellogg: "Don't revisit it." "We are tasked by school district to identify him as autistic like behavior." Excerpt of Records ("ER")[1]

On March 8, 2018, the fifth IEP meeting was scheduled. Counsels for Mother and District had a meet and confer

1. Excerpt of Records will be provided with the Brief after the Court grants review.

about Kellogg's request to check the recordings, and the above information, prior to the meeting starting. Weissburg told Kellogg that the conversation was recorded; that there was no intent to record any privileged communication, as Truong always left the recorder on; that Nguyen was in the room, and no attorney/client privilege attached; that Truong would not go forward with the IEP meeting as it was pre-determined and a useless exercise; and that Truong would file for a due process hearing.

3. District Court Proceedings

On February 27, 2018, Truong, as the Guardian ad Litem of DN, filed a complaint in the district court against LAUSD, as well as El Monte Union High School District, and Birmingham Community Charter High School involving other issues. That complaint sought reversal of decisions made by an Administrative Law Judge having to do with parents' right to select the school the minor is attending, and the Autism label, in a series of Due Process Hearings. That matter is now pending in the district court, Case No. 2:18-cv-01582-AB-AFM.

When LAUSD filed their Corrected Answer to Plaintiff's Complaint on March 28, 2018, they included a Counterclaim against Appellants and Weissburg for violation of California's Invasion of Privacy Act ("CIPA"), Penal Code § 632, asserting that Appellants engaged in unlawful invasion of privacy when they "intentionally and without consent of all parties to a confidential communication, used a recording device to record the confidential communication and thereafter retained, transcribed, disclosed, and used such confidential communications."

On April 16, 2018, Counsel for Weissburg filed an Anti-SLAPP Motion in the District Court, *Code of Civil Procedure* §425.16, seeking to strike LAUSD's counterclaim against Weissburg, and a Motion to Dismiss. On May 8, 2018, Weissburg filed an Anti-SLAPP Motion in the District Court, *Code of Civil Procedure* §425.16, seeking to strike LAUSD's counterclaim against D.N. and Truong, and a Motion to Dismiss. It was argued in these motions to strike and Motions to Dismiss that the counterclaim arose from protected activity during an official proceeding; and there can be no intent to record privileged lunch meeting proceedings as father was in the room during the entire lunch.

In opposition LAUSD argued that the counterclaim did not arise from protected activity, as the conduct underlying the counterclaim is the act of recording itself, and that the conduct underlying the counterclaim did not further the exercise of free speech; and that LAUSD would prevail on the counterclaim.

A. Oral arguments were held on June 15, 2018.

On June 26, 2018, the Court denied Counter-Defendants' Motions to Strike (Anti-SLAPP) Counter-Claimant's Counterclaim, and Motion to Dismiss. App., *infra*, pgs. 5a-16a. The Court concluded that Counter-Defendants had not shown that the challenged cause of action arose from activity taken in furtherance of their right to petition or free speech. App., pgs. 5a-16a. In its written decision, the court stated that Counter-Defendants failed to establish the recording of LAUSD conversations during a lunch break was in furtherance of their right to petition or free speech.

On July 9, 2018, Counter-Defendants timely filed a Notice of Appeal to the Ninth Circuit with regard to the Anti-SLAPP Order, based on the Court's jurisdiction pursuant to the collateral order doctrine and pursuant to 28 USC § 1291. The Ninth Circuit ruled the recording did not relate to a matter of public interest, and affirmed the district court's holding. (*D.N. et al. v. LAUSD v. Diane B. Weissburg et al*, April 23, 2019 decision, 18-55913, unpublished, App. *infra*, 1a-4a.)

REASONS FOR GRANTING THE PETITION

Pursuant to the United States Constitution, and the 1st amendment, Petitioner respectfully submits review should be granted, for the reasons set forth below.

The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904]. Parental participation in the IEP process is also considered "(A)mong the most important procedural safeguards." (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.) To that end, California law allows the recording of IEP meetings, and the use of those recordings in subsequent court actions. California Education Code § 56341.1(g) states in part,

(1) "Notwithstanding Section 632 of the Penal Code, the parent or guardian or local educational agency shall have the right to audio record the proceedings of individualized education program ("IEP") team meetings……

In this matter, review is necessary to resolve conflicts for whether a IEP meeting is an Official Proceeding thereby making it subject to California's anti-SLAPP statute; that IEP meetings and that recordings relate to a matter of public interest; review is necessary to establish a parent has a right to record an IEP meeting, and use that recording without fear of reprisal; and to settle important questions of law for the application of the rights to protected activity in furtherance of the right of petition or free speech of the individuals who are pursuing their rights through IEP's and Due Process Hearings; and the right of an attorney to represent parents and children in these proceedings, also without fear of reprisal for bringing those actions. These are important questions of federal law that has not been, but should be, settled by this Court.

1. The Ninth Circuit Appeal Decision Violated A Parent's Right of Petition

A. In the appeal to the Ninth Circuit, the Ninth Circuit did not consider if IEP meetings were Official Proceedings.

Petitioner contends the procedures detailed in IEP meetings are an official proceeding authorized by law, comparing it to the hospital peer review proceedings detailed in the Business Professions Code (Bus. & Prof. Code, § 809 et seq.) and discussed in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192 (Kibler).

"Peer review is the process by which a committee comprised of licensed medical personnel at a hospital

'evaluate[s] physicians applying for staff privileges, establish[es] standards and procedures for patient care, assess[es] the performance of physicians currently on staff,' and reviews other matters critical to the hospital's functioning." (*Kibler*, supra, 39 Cal.4th at p. 199, quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10; Bus. & Prof. Code, § 805, subd. (a)(1)(A)(i)-(ii).) IEP meetings for a special needs child review a child's performance and needs, and create a plan for the child. This Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. *Winkleman*, supra, 550 U.S. at 524, making the parents' role in those proceedings crucial. The need to record those proceedings is the only way for a parent to prove that the District failed to comply with FAPE.

Business and Professions Code section 809 explains that the peer review process is "essential to preserving the highest standards of medical practice," and "fairly conducted," it "aid[s] the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners." (Bus. & Prof. Code, § 809, subds. (a)(3) & (5).) The purpose of the peer review process is "[t]o protect the health and welfare of the people of California" by excluding practitioners who "provide substandard care or who engage in professional misconduct," and the Legislature expects peer review to "be done efficiently, on an ongoing basis." (Bus. & Prof. Code, § 809, subds. (a)(6) & (7).)

In *Kibler*, the Supreme Court concluded a hospital's peer review proceeding qualifies as an "'official proceeding authorized by law" under Code of Civil Procedure section 425.16, subdivision (e)(2). (*Kibler*, supra, 39 Cal.4th at

p. 198.) The court reasoned that the proceedings were statutorily mandated and heavily regulated, and that hospitals were required to report the results of the proceedings to state licensing boards, showing their proceedings play a "significant role" in regulation and discipline of practitioners. (Id. at pp. 199-200.) The court also commented that the decisions resulting from the proceedings are subject to judicial review by administrative mandate, making the proceedings quasi-judicial. (Id. at p. 200.) Federal law requires the IEP process is also statutorily mandated, heavily regulated, and the IEP proceedings are required to be reported to the State Department of Education, showing the proceedings play a "significant role" in regulation, services for children, and discipline of practitioners. The IEP process also plays a significant role in services to children in the education arena, and in California, parents have the right to have an attorney present.

B. In the appeal to the Ninth Circuit, the Ninth Circuit stated that the recording "did not relate to a matter of public interest."

Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564, 571 (Cal. 1999). This Court only has to look at the high volume of due process hearing requests for Districts' failure to comply with FAPE that are filed by parents in California every year, and subsequent actions in the Federal Courts, to determine that this is a huge matter of public interest.

Further, LAUSD's position that all children in their school district should be labeled Autistic, Kellogg: "And we are tasked by the district and our partners to want

the autism as the primary one…." violates every child's rights in the district to a FAPE. Predetermination in the development of an IEP occurs when "(A) school district . . . independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (Vashon Island). As what happened in D.N.'s case, predetermination also occurs when an educational agency enters an IEP meeting with a "take it or leave it" position. *W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484 (Target Range).) According to California *Education* Code section 56505, subdivision (f)(2), a procedural violation may result in a substantive denial of FAPE only if it:

1. Impeded the child's right to a free appropriate public education;

2. Significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or

3. Caused a deprivation of educational benefits. (Target Range, supra, 960 F.2d at p. 1084.)

Having LAUSD pre-determine a child's classification as Autistic, and services to a child as Autistic who does not have Autism, but has Auditory Processing disorder, due to funding issues, placement, or services issues as in this case, is a great matter of public concern.

The California Supreme Court has identified three nonexclusive categories of conduct that satisfy the requirement of matters of public interest: 1) conduct concerning "a person or entity in the public eye"; 2) "conduct that could directly affect a large number of people beyond the direct participants"; and 3) conduct involving "a topic of widespread, public interest." *Rand Res., LLC v. City of Carson*, 433 P.3d 899, 907 (Cal. 2019) (quoting *Rivero v. Am. Fed'n of State, Cty., & Mun. Emps.*, 130 Cal. Rptr. 2d 81, 89 (Cal. Ct. App. 2003)). App., *infra*, pgs. 3a-4a.

The Ninth Circuit Court's ruling did not consider that when a school district files a lawsuit accusing a parent of violation of privacy because they exercised their right to record IEP and use those recordings in a subsequent court action, and that right to record can be extinguished by such actions. Although parents have the right to record IEP meetings in California, parents will be very fearful and hesitant to exercise that right if they fear being sued by the school district in retribution for their recordings and use of those recordings. This right could especially have a deleterious effect on parents who do not have the money or education to defend themselves against a retaliatory lawsuit by a school district. Allowing school districts to be able to retaliate against parents through lawsuits has the potential to unlawfully deter parents from advocating with the district on behalf of their child's rights under federal law.

The lower court opinion's far-reaching consequences, and the plainly important nature of the issues it raises make this case a compelling vehicle by which to provide the lower courts needed guidance.

2. Rights of Parent(s) to Record IEP Proceedings Without Fear of Retaliation

Pursuant to California Education Code § 56341.1(g)(1), parents are entitled to record IEP team meetings, as long as the parent provides 24-hour written notice.

Even though the recorder was on the table in front of LAUSD personnel, LAUSD sued Counter-Defendants for violation of CIPA, Penal Code § 632, in an effort to chill protected speech. LAUSD asserts Counter-Defendants "engaged in unlawful invasion of privacy within the meaning of the California's Invasion of Privacy Act, Penal Code §§ 630 et seq., including, but not limited to, Penal Code § 632, subdivision (a), when they intentionally and without consent of all parties to a confidential communication, used a recording device to record the confidential communication and thereafter retained, transcribed, disclosed, and used such confidential communications."

California Penal Code 632(a) states that "Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment."

The term "confidential communication" is defined by California Penal Code 632(c) as including "any communication carried on in circumstances as may

reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

CIPA protects only confidential communications. *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 117 (interpreting § 632). Communication during an IEP meeting is not reasonably considered a "confidential communication" (among its participants and as defined in the Penal Code), and important federal anti-discrimination laws are in place to protect the interests of special needs students so that they are not retaliated against by those public officials who would, without proper justification, try to wield the state criminal laws against them.

In applying state law, the key element is whether the communication is of the type that is reasonably expected to be private and not recorded, and thus "confidential." The IEP is not such a meeting.

Under California state law the school officials can hardly expect their communications during an IEP meeting to be private and unrecorded, especially if they are informed that the parent will be recording. Here, Truong notified LAUSD of her intent to record all IEP meetings in writing, which LAUSD does not dispute. No one revoked that consent either orally or in writing. LAUSD had recorders going as well.

Nguyen who is the father, was in the room during the entire IEP meeting, including during the lunch and breaks. LAUSD counsel and LAUSD employees knew Nguyen was sitting in the room, that he overheard the entire conversation, and that he participated in some of the conversations with Counsel for LAUSD. The IEP Team and counsel could not have had an objectively reasonable expectation that their conversations were private.

"[T]he attorney-client privilege applies only to confidential communications." *Anten v. Superior Court* (2015) 233 Cal.App.4th 1254, 1260, fn. 6, see *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal. App.4th 1116, 1129, fn. 5, ["the attorney-client privilege attaches only to confidential communication made in the course of or for the purposes of facilitating the attorney-client relationship"]; *Benge v. Superior Court* (1982) 131 Cal. App.3d 336, 346["[t]he privilege includes only confidential communications"].)

LAUSD staff and their Counsel were free to get up, as many did, and leave the room and go to another room to have a "confidential meeting" if one was desired. LAUSD is very embarrassed by the fact that they showed their true colors (to label all children autistic), and do not want the information public; LAUSD and their staff believe have told their staff that every special education child is to be labeled Autistic.

Weissburg had no control of the recording devise, and there is no evidence that she ever touched the devise, or instructed anyone about using any recording devise. Truong, who is Vietnamese and has limited English, had no *intent* to record a confidential communication during

the lunch or break on February 8, 2018. Truong set the recorder on the conference table, and let it run all day, as was her habit. On some days, Truong would take her recorder with her during lunch, or short breaks during the day, to review the prior statements made at the meeting, and return the recorder to the table when she returned. Truong had no way to even know that a confidential communication was going to occur on that date, or during the lunch or break. Weissburg never recorded a confidential meeting, and never instructed Truong or anyone else to record any meeting. Weissburg never had or controlled any recording device.

Had Weissburg not learned of the recording through Kellogg's late inquiry, she would not have even known about the recording. It is not enough that the conspiring individual knew of an intended wrongful act, the individual must agree to achieve it. *Choate v. County of Orange*, 86 Cal.App.4th 312, 333 (2000). LAUSD provided no rules to mother, counsel and/or the participants by LAUSD staff or Counsel at any time, either oral or written, to ensure confidentiality of communications. Further, LAUSD did nothing to check the recorders, either their own or Truong's on any day, including February 8, 2018, to know when recorders were on or off. LAUSD has not provided their own recording to validate that they did not record Nguyen all of the time he was in the room during lunch and breaks as well.

The parent has a right to record the IEP meeting under California law. And there are good reasons for this parental prerogative. Having a recording of a meeting can be very helpful to a parent in understanding the complex issues involving their child, as IEP meetings

often involve multiple professional opinions and reports. It can be an important aid to a parent's decision-making and in formulating effective advocacy for the health and education of their child. California Education Code § *56341.1(g)(2) states that a parent has the right to* inspect and review audio recordings; and challenge information perceived to be inaccurate, misleading, or violating the individual›s rights. No such federal law exists that allows parents to record IEP meetings.

For a school official to deny this right to a parent by filing a lawsuit against them is not consistent with the parent serving the best interests of their child. No school district should seek to use an IEP meeting recording against the parents to prevent the recording to be used in a subsequent court action. State law doesn't prohibit this type of recording under the Penal Code, and to claim that it does constitutes unlawful retaliation against the parent, chilling the parents' right to participate.

LAUSD's counter-claim was filed to intimidate Truong. It is inherently wrong to deny a parent their statutorily protected right to record administrative proceedings and use that recording on behalf of their child. The statutes are designed to protect parents and parents should not have to defend themselves against a frivolous lawsuit due to their recording. Otherwise, parents would fear using the recordings that they are entitled to take, due to fear of a lawsuit. It is a matter of right to be able to file an appeal of an administrative decision in a district court; if a parent is met with a cross-complaint when they do so, then Parents will be intimidated into sitting on their rights and fail to proceed.

3. Claims Against Counter-Defendants Are From Activities That Are Protected Speech Under CCP § 425.16, And Protected By California Education Code § 56341.1 et seq.

California Code of Civil Procedure § 425.16 protects against meritless suits known as "Strategic Lawsuits Against Public Participation" or "SLAPP" suits, which aim at chilling the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. See C.C.P. § 425.16(a); *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 1042 (1997). A plaintiff's claim which arises from an act, by a defendant, made in furtherance of that defendant's "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue," has no merit and will not stand under California's anti-SLAPP statute. Cal. Civ. Code § 425.16(b)(1). Anti-SLAPP safeguards are designed to "protect individuals from meritless, harassing lawsuits whose purpose is to chill protected expression." *Metabolife Intern. Inc. v. Wornick*, 264 F.3d 832, 837, n. 7 (9th Cir. 2001).

"[S]ection 425.16 expressly 'defines the kinds of claims that are subject to the anti-SLAPP procedures.'" *City of Cotati v. Cashman*, 29 Cal. 4th 69, 75 (2002), citing *Chaves v. Mendoza*, 94 Cal. App. 4th 1083, 1087. Under that statute, protected activities include:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding

authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. Cal. Code Civ. Proc. § 425.16(e).

Activities within subsection (3) and (4) require a specific showing that the action concerns a matter of public interest; the first two categories of activities do not. *Briggs v. Eden Council for Hope & Opportunity,* 19 Cal. 4th 1106, 1117-18 (1999). Any speech by a public or private party falling within these categories is protected under the statute, and a lawsuit arising out of that speech is subject to a special motion to strike.

Ruling upon an anti-SLAPP motion requires a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity . . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002). "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action, but rather, the defendant's activity that gives rise to his or her asserted liability - - and whether that activity constitutes protected speech or petitioning." *Navellier v. Sletten*, 29 Cal. 4th 82, 92 (2002) (emphasis in original). Consequently, a trial court must initially "focus on the substance of the plaintiff's lawsuit in analyzing the first prong of a special motion to strike." *Flores v. Emerich &*

Fike, 416 F. Supp. 2d 885, 897 (E.D. Cal. 2006), citing *Scott v. Metabolife Intern., Inc.*, 115 Cal. App. 4th 404, 413-14 (2004). As the California Supreme Court has noted, the critical point in that regard "is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." *City of Cotati*, 29 Cal. 4th at 78 (emphasis in original). To that end, "[a] defendant meets it burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e)." Id.

If the court finds that the first step for adjudicating an anti-SLAPP motion is satisfied, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. Cal. Code Civ. P. 425.16(b)(1). *Equilon Enterprises*, 29 Cal. 4th at 67. The anti-SLAPP statute must be construed broadly in order to both encourage continued participation in matters of public significance and to restrict the chilling of such protected activity through abuse of the judicial process. Code of Civil Procedure § 425.16(a).

In determining the propriety of a special motion to strike under the statute a court must look to whether the challenged claims are indeed premised on those activities and must "examine the *principal thrust or gravamen* of a plaintiff's cause of action" by "identifying the allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim" to determine whether section 425.16 applies. *Hylton v. Frank E. Rogozienski, Inc.*, 177 Cal. App. 4th 1264, 1272 (2009) (emphasis in original).

Statutory hearing procedures qualify as "official proceedings authorized by law" for purposes of protection under the anti-SLAPP statute. California enacted §§ 56500-56507 of the Education Code to comply with the exhaustion requirement of IDEA. 20 U.S.C. § 1415; *Porter v. Board of Tr.*, 307 F.3d 1064, 1068 (9th Cir. 2002). Investigations by public employers, including administrative trial-type hearings, qualify as "official proceedings authorized by law." *Olaes v. Nationwide Mutual Ins. Co.*, 135 Cal.App.4th, 1501, 1507 (2006); see *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App.4th 719, 839 (2005).

Courts have found that actions taken in anticipation of further legal proceedings are also entitled to the benefits of § 425.16(e)(2) and do not require that the topic be of public interest. *Dible v. Haight Ashbury Free Clinics, Inc.* (App. 1 Dist. 2009) 88 Cal.Rptr.3d 464; *Bleavins v. Demarest* (App. 2 Dist. 2011) 127 Cal.Rptr.3d 580; *County of Riverside v. Public Employment Relations Bd.* (App. 4 Dist. 2016) 200 Cal.Rptr.3d 573, review filed, review denied. See also *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106, 1115 (1999) ("Just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16.").

Here, the complained of conduct which forms the basis for LAUSD's claim against Counter-Defendants was taken in furtherance of the right of petition or free speech. *Braun*, supra, 52 Cal.App.4th 1036, 1043 (1997).

As analyzed below, Counter-Defendants' conduct falls within Cal. Code. Civ. Proc. §426.16(e), subds. (1),(2) and (4) as the allegations against Counter-Defendants are based solely on their participation in an official proceedings. See *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App.4th 719, 839 (2005). Once a defendant makes the threshold showing that a plaintiff's action is one arising from statutorily protected activity, the burden then shifts to the plaintiff to establish the probability that he will prevail on the merits of each of its causes of action. Cal. Code. Civ. Proc. § 425.16(b).

Here, LAUSD's claim against Counter-Defendants is based upon the activities at the IEP meeting, and Request for Due Process hearing, both of which constitute official proceedings authorized by law. See *Fontani v. Wells Fargo Investments, LLC*, at 839. The IEP is an administrative hearing, and a due process hearing is a judicial proceeding as it is established by Federal and State law, to allow an individual to bring an action to challenge the District, and is protected under Cal. Code. Civ. Proc. §425.16(e)(1). Further, the protection also extends to statements made outside of court, which were made in connection with a judicial or official proceeding or in furtherance of the exercise of the right of petition. Code of Civ. Proc. § 425.16(e)(2), (4).

LAUSD's counterclaim seeks to penalize, restrain and otherwise unlawfully restrict and chill rights of Counter-Defendants. Specific statutory law, Ed. Code 56341.1, et seq. authorizes the recording of IEP meetings, notwithstanding Penal Code § 632. LAUSD now wants to pick and choose who can record, and when. If a parent files a due process complaint LAUSD as in this case will

move to exclude the content of the recording; and then if the parent appeals to the district court, LAUSD has to only file a counterclaim alleging violation of Penal Code § 632 to chill parent's rights to the courts. The weight of the suspected illegal behavior must be balanced against the chilling effect of the retaliation. This Court cannot let that happen.

CONCLUSION

It is respectfully requested that this Court resolve the issue about the rights of parents to record administrative proceedings without fear of reprisal. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated:July 8, 2019

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 23, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-55913
No. 2:18-cv-01582-AB-AFM.

D. N., BY AND THROUGH CHRISTINE TRUONG, PARENT; CHRISTINE TRUONG,

Plaintiffs-Appellants,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT; *et al.*,

Defendants-Appellees,

v.

DIANE B. WEISSBURG,

Counter-Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California.
Andre Birotte, Jr., District Judge, Presiding.

April 8, 2019, Argued and Submitted,
Pasadena, California
April 23, 2019, Filed

Appendix A

MEMORANDUM[*]

Before: PAEZ and CLIFTON, Circuit Judges, and KATZMANN, Judge.[**]

Christine Truong and her counsel Diane Weissburg (collectively, "Appellants") appeal the district court's denial of their motion to strike Appellee Los Angeles Unified School District ("LAUSD")'s counterclaim alleging Appellants recorded its confidential communications in violation of California law. *See* Cal. Penal Code § 632. We affirm.

Appellants moved to strike under California's anti-SLAPP statute, which permits a court to strike claims arising out of activity in furtherance of a defendant's right of petition or free speech. *See* Cal. Civ. Proc. Code § 425.16. To succeed, Appellants must show the activity underlying LAUSD's cause of action fell within one of the four categories of activity protected under the statute. *See id.* § 425.16(e); *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507, 52 P.3d 685, 693 (Cal. 2002). The first three categories protect "written or oral statement[s]." Civ. Proc. § 425.16(e)(1)-(3). The fourth category covers "other conduct" in furtherance of the right of petition or free speech but contains a "limitation" that the conduct be "in connection with a public issue" or an "issue of public interest." *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471, 969

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

P.2d 564, 571 (Cal. 1999); *see also Old Republic Constr. Program Grp. v. Boccardo Law Firm, Inc.*, 230 Cal. App. 4th 859, 179 Cal. Rptr. 3d 129, 140 (Cal. Ct. App. 2014) ("[O]nly one of the four categories of protected activity covers [noncommunicative] conduct . . . ." (alteration original) (citation omitted)).

Here, the act underlying LAUSD's counterclaim was the noncommunicative act of recording, not any subsequent publication or use of that recording. *See Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 1 Cal. Rptr. 3d 536, 541 (Cal. Ct. App. 2003) ("A section 632 violation is committed the moment a confidential communication is secretly recorded regardless of whether it is subsequently disclosed."). As recording a conversation does not involve making an oral or written statement, Appellants must therefore show their recording fell within this fourth category of conduct in connection with a public issue.

Assuming the recording furthered Truong's right of petition, it did not relate to a matter of public interest. The California Supreme Court has identified three nonexclusive categories of conduct that satisfy this requirement: 1) conduct concerning "a person or entity in the public eye"; 2) "conduct that could directly affect a large number of people beyond the direct participants"; and 3) conduct involving "a topic of widespread, public interest." *Rand Res., LLC v. City of Carson*, 6 Cal. 5th 610, 243 Cal. Rptr. 3d 1, 433 P.3d 899, 907 (Cal. 2019) (quoting *Rivero v. Am. Fed'n of State, Cty., & Mun. Emps.*, 105 Cal. App. 4th 913, 130 Cal. Rptr. 2d 81, 89 (Cal. Ct. App. 2003)). The recording did not fit within any of these three categories as it contained typical lunch talk among coworkers with scattered statements that Appellants

contend are relevant to establishing LAUSD employees inappropriately predetermined Truong's son (D.N.) had autism. The recorded individuals are not in the public eye, nor does the fact that these individuals worked for a publicly funded institution transform the recorded conversation into a matter of public interest. *See Rivero*, 130 Cal. Rptr. 2d at 90. Nothing said in the recording affects a large number of people. D.N.'s educational plan is not the subject of widespread, public interest. Unlike other cases involving surreptitious recordings intended to gather news or expose wrongdoing to the public, Appellants have not provided any evidence that the recording would affect, or be of interest to, anyone outside of the current litigation. *See, e.g.*, *Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1122 (9th Cir. 2017); *Lieberman*, 1 Cal. Rptr. 3d at 541. Because Appellants have failed to make a threshold showing that the recording relates to a public issue, we need not decide whether LAUSD demonstrated a reasonable probability of prevailing on its counterclaim. *See Santa Monica Rent Control Bd. v. Pearl St., LLC*, 109 Cal. App. 4th 1308, 135 Cal. Rptr. 2d 903, 910 (Cal. Ct. App. 2003).

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED JUNE 26, 2018

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 18-01582 AB (AFMx)

D.N., A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, CHRISTINE TRUONG, PLAINTIFF,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, EL MONTE UNION HIGH SCHOOL DISTRICT, AND BIRMINGHAM COMMUNITY CHARTER HIGH SCHOOL,

Defendants.

ORDER DENYING (1) DEFENDANT BIRMINGHAM'S AND DEFENDANT EL MONTE'S MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT (DKT. NOS. 20, 29); (2) COUNTER-DEFENDANT WEISSBURG'S, AND COUNTER-DEFENDANTS D.N. AND TRUONG'S MOTIONS TO DISMISS LAUSD'S COUNTERCLAIM (DKT. NOS. 33, 40); AND (3) COUNTER-DEFENDANT WEISSBURG'S, AND COUNTER-DEFENDANTS

Appendix B

D.N. AND TRUONG'S MOTIONS TO STRIKE (ANTI-SLAPP) LAUSD'S COUNTERCLAIM (DKT. NOS. 34, 41)

I. INTRODUCTION

Pending before the Court are the following six motions: (1) Birmingham Community Charter High School's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim Pursuant to FRCP 12(b)(6) (Dkt. No. 20); (2) Defendant El Monte Union High School District's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Dkt. No. 29); (3) Counter[-]Defendant Diane Weissburg's Motion to Dismiss Counter[c]laimant's Complaint for Failure to State a Claim Pursuant to FRCP 12(b)(6) (Dkt. No. 33); (4) Counter[-]Defendants D.N. and Christine Truong's Motion to Dismiss Counter[c]laimant's Complaint for Failure to State a Claim Pursuant to FRCP 12(b)(6) (Dkt. No. 40); (5) Special Motion to Strike (Anti-SLAPP) Counterclaims against Diane B. Weissburg (Dkt. No. 34); (6) Special Motion to Strike (Anti-SLAPP) Counterclaims against D.N. and Christine Truong Pursuant to Code of Civil Procedure § 425.16 (Dkt. No. 41).

II. BACKGROUND

Plaintiff D.N. ("D.N. or "Plaintiff"), a minor, by and through Christine Truong ("Truong"), filed a Complaint against El Monte Union High School District ("El Monte"), Los Angeles Unified School District ("LAUSD"), and Birmingham Community Charter School ("Birmingham") in this Court on February 27, 2018. (Dkt. No. 1 ("Compl.").)

Appendix B

The factual background of this case concerns D.N., a fourteen year-old male in the ninth grade (at the time of the filing of the Complaint in this Court), who has been diagnosed with (1) central auditory processing disorder; (2) mixed receptive-expressive language disorder; (3) other specified cognitive deficits (verbal memory and executive function deficit); (4) specific learning disorder; and (5) speech/language disorder. (Compl. ¶¶ 1, 12.)

D.N.'s underlying claims stem from Truong's requests to various school districts/school entities to evaluate D.N. for certain disabilities and establish an individualized education program ("IEP") to ensure that D.N. was receiving the appropriate educational instruction and assistance in school. (*See* Compl. ¶ 39.) According to Plaintiff, the various school districts did not conduct all of the necessary evaluations, and delayed the IEP process. (*See* Compl. ¶ 28.) Additionally, D.N. alleges that because of the failure of various school districts to conduct the necessary evaluations, D.N. did not receive the instruction he needed, and Truong ultimately had to pay for schooling that should have been covered by the state. (*See* Compl. ¶ 14.) Thus, according to Plaintiff, his right to free and public education ("FAPE") was denied. (*See* Compl. ¶¶ 5, 8, 60.) Ultimately, these issues resulted in D.N. filing a Due Process Hearing Request against LAUSD, El Monte, and Birmingham with the Office of Administrative Hearings ("OAH"). (*See* Compl. ¶¶ 37, 55.)

According to D.N., the OAH issued four interim written decisions and one final hearing decision. (*See, e.g.*, Dkt. No. 35 at 2–3.) D.N. appeals four of those decisions through the instant Complaint filed with this Court. (Compl. ¶¶ 56–60.)

Appendix B

Relevant to the Motions to Dismiss Plaintiff's Complaint, one of the decisions that D.N. characterizes as an "interim written decision" concerns the dismissal of El Monte and Birmingham from the administrative hearing process. (Compl. ¶¶ 3, 58; Dkt. No. 1-3, Ex. 11.) The Administrative Law Judge ("ALJ") determined that D.N.'s residence fell within LAUSD's boundaries, and not Birmingham's or El Monte's boundaries. (Dkt. No. 1-3, Ex. 11 at 12.) Thus, the ALJ determined that only LAUSD should remain a party to the subsequent proceedings, and Birmingham and El Monte should be dismissed. (Dkt. No. 1-3, Ex. 11 at 12.)

In response to Plaintiff's Complaint, Birmingham and El Monte filed Motions to Dismiss Plaintiff's Complaint on the basis that Plaintiff's appeal of the ALJ's decision to dismiss Birmingham and El Monte is untimely. (Dkt. Nos. 20, 29.)

LAUSD answered Plaintiff's Complaint, and filed a Counterclaim against D.N., Truong, and Diane Weissburg ("Weissburg") (D.N. and Truong's attorney in this action). (Dkt. No. 22.) The Counterclaim asserts one cause of action for violation of California Invasion of Privacy Act, Penal Code § 632, against D.N., a minor, by and through Truong, Truong, and Weissburg, for Truong's intentional recording, at Weissburg's direction, of confidential and attorney-client privileged communications between LAUSD representatives and LAUSD's counsel, Mary Kellogg ("Kellogg"), without their knowledge or consent. (Dkt. No. 22.)

Weissburg, and D.N. and Truong filed Motions to Dismiss and Motions to Strike (Anti-SLAPP) LAUSD's Counterclaim against them. (Dkt. Nos. 33–34, 40–41.)

The Court held a hearing on the pending Motions on June 15, 2018, and took the Motions under submission. (Dkt. No. 57.)

III. LEGAL STANDARD

A. MOTION TO DIMSISS

"Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (ellipsis in original; internal quotation marks omitted). But Rule 8 "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Rule 12(b)(6) allows an attack on the pleadings for failure to state a claim upon which relief can be granted. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson*, 551 U.S. at 94. However, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "Nor

does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id.* (alteration in original; citation and internal quotation marks omitted). A complaint must "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. This means that the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

Ruling on a motion to dismiss will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief." *Id.* at 679 (alteration in original; internal quotation marks and citation omitted). The court must discount conclusory statements, which are not presumed to be true; and then, assuming any factual allegations are true, the court must determine "whether they plausibly give rise to entitlement to relief." *See id.*; *accord Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012).

B. MOTION TO STRIKE (ANTI-SLAPP)

California's anti-SLAPP statute allows defendants (or, in this case, counter-defendants) in courts applying California substantive law to bring a special motion to strike a claim if that claim arises from an act by the

defendants to further their right of petition or free speech in connection with a public issue. Cal. Civ. Proc. Code § 425.16(b)(1); *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (concluding that the twin aims of the *Erie* doctrine "favor application of California's anti-SLAPP statute in federal cases"). An act qualifies for protection under this statute if it falls within one of four categories:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Civ. Proc. Code § 425.16(e).

In considering an anti-SLAPP motion, the court must engage in a two-step process. First, the court "ask[s] if the defendant [(or in this case, the counter-defendant)] has shown the challenged cause of action 'aris[es] from'

activity taken 'in furtherance' of the defendant's right to petition or free speech." *Safari Club Intern'l v. Rudolph*, 862 F.3d 1113, 1119 (9th Cir. 2017). "If so, the burden shifts to the plaintiff [(or in this case, the counterclaimant)] to show 'a [reasonable] probability of prevailing on the challenged claims.'" *Id.* The plaintiff must provide admissible evidence to establish that "the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001). "If the plaintiff fails to make this showing by a preponderance of the evidence, the court must grant the motion to strike and award the prevailing defendant his or her attorney's fees and costs." *See Forever 21, Inc. v. Nat'l Stores Inc.*, 2:12-CV-10807-ODW, 2014 WL 722030, at *3–4 (C.D. Cal. Feb. 24, 2014); Cal. Civ. Proc. Code § 425.16(c)(1).

IV. DISCUSSION

There are three categories of Motions pending before the Court: (1) Defendant Birmingham's and Defendant El Monte's Motions to Dismiss Plaintiff's Complaint (Dkt. Nos. 20, 29); (2) Counter-Defendant Weissburg's, and Counter-Defendants D.N. and Truong's Motions to Dismiss LAUSD's Counterclaim (Dkt. Nos. 33, 40); and (3) Counter-Defendant Weissburg's, and Counter-Defendants D.N. and Truong's Motions to Strike (Anti-SLAPP) LAUSD's Counterclaim (Dkt. Nos. 34, 41). Because the two motions within each category are largely similar, the Court addresses both motions in each category together.

Appendix B

A. BIRMINGHAM'S AND EL MONTE'S MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT[1]

Birmingham and El Monte each filed a Motion to Dismiss Plaintiff's Complaint on the basis that Plaintiff's appeal was untimely. (Dkt. Nos. 20, 29.)

Plaintiff filed his Due Process Hearing Request with the OAH on July 14, 2017, against Birmingham, El Monte, and LAUSD. (Compl. ¶ 55; Dkt. No. 1-1 at 9.) On August 31, 2017, the OAH bifurcated the determination of D.N.'s residency from the issue regarding whether D.N.'s right to a FAPE was violated. (Dkt. No. 1-1 at 9; Dkt. No. 20-3, Ex. A at 3.) The purpose of bifurcating the proceedings was to first determine which of the three respondents (Birmingham, El Monte, and LAUSD) in the OAH

1. Along with their Motion to Dismiss, Defendant Birmingham and Defendant El Monte each filed a Request for Judicial Notice, requesting that the Court take judicial notice of the ALJ's Order Denying Motion to Dismiss and Granting Motion to Bifurcate. (Dkt. No. 20-3, Ex. A; Dkt. No. 29-3, Ex. A.) Because "[a] court may take judicial notice of records and reports of administrative bodies," the Court grants Birmingham's and El Monte's Requests for Judicial Notice. *See Lindquist v. Cont'l Cas. Co.*, 394 F. Supp. 2d 1230, 1243 (C.D. Cal. 2005) (internal quotation marks omitted). Further, because district courts may consider "documents attached to the complaint, documents incorporated by reference in the complaint," and matters of public record of which the court may take judicial notice under Federal Rule of Civil Procedure 201, the Court considers this ALJ Order in connection with Birmingham's and El Monte's Motions to Dismiss. *United States v. Ritchie*, 342 F.3d 903, 908–09 (9th Cir. 2003).

proceedings was responsible for providing D.N. with a FAPE for the 2017–2018 school year. (Dkt. No. 20-3, Ex. A at 3.)

Ultimately, on October 31, 2017, the ALJ determined that D.N. was a resident of the LAUSD, and dismissed Birmingham and El Monte from the due process hearing. (Dkt. No. 1-3 at 30.) The ALJ ultimately issued its final decision in the due process hearing on January 24, 2018, about three months after the ALJ dismissed Birmingham and El Monte. (Dkt. No. 1-1 at 29.)

The statute of limitations to appeal the ALJ's hearing decision is 90 days after receipt of the hearing decision. *See* Cal. Educ. Code § 56505(k) ("An aggrieved party also may exercise the right to bring a civil action in a district court of the United States without regard to the amount in controversy, pursuant to Section 300.516 of Title 34 of the Code of Federal Regulations. *An appeal shall be made within 90 days of receipt of the hearing decision*." (emphasis added)).

The key issue here is whether the clock started running on October 31, 2017 when the ALJ dismissed Birmingham and El Monte, or whether it started running on January 24, 2018, when the ALJ completed the due process hearing.

The Court finds that the clock did not start running until the entire due process hearing proceedings were complete on January 24, 2018. (*See* Dkt. No. 1-1 at 29.) After review of the relevant code section, California Education Code § 56505, the statute refers to "the hearing

proceedings;" it does not appear to make a distinction between the hearing proceedings at large and individual orders or decisions that the ALJ might issue during the process. Thus, the 90 days did not start running until January 24, 2018, when the "hearing decision" was complete. *See* Cal. Educ. Code § 56505(k) ("An appeal shall be made within 90 days of receipt of the hearing decision.").

Further, it does not appear that it was the ALJ's intention to start the appeal process clock after the ALJ issued the October 31, 2017 decision because it is only the hearing decision on January 24, 2018 that contains the following language from the 2018 OAH Special Education Handbook: "RIGHT TO APPEAL[,] This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code § 56505, subd. (k).)" (Dkt. No. 1-1 at 29.)

Because the clock started running on January 24, 2018, and Plaintiff's Complaint was filed on February 27, 2018 (Dkt. No. 1), this appeal is timely. Thus, Birmingham's and El Monte's Motions to Dismiss are **DENIED**.

B. WEISSBURG'S, AND D.N. AND TRUONG'S MOTIONS TO DISMISS LAUSD'S COUNTERCLAIM

Weissburg filed a Motion to Dismiss LAUSD's Counterclaim on the basis that it failed to state a claim

under Rule 12(b)(6). (Dkt. No. 33.) D.N. and Truong also filed a separate Motion to Dismiss LAUSD's Counterclaim on the same basis. (Dkt. No. 40.)

The Court denies these Motions to Dismiss because LAUSD's Counterclaim alleges sufficient facts to state a claim. The Counterclaim alleges one cause of action for violation of California Invasion of Privacy Act, Penal Code § 632. (Dkt. No. 22.) "California Penal Code § 637.2 provides for a civil action when a person has been injured because of a violation of § 632." *Vera v. O'Keefe*, 791 F. Supp. 2d 959, 962 (S.D. Cal. 2011). California Penal Code § 632 states, in relevant part:

> (a) ***A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication***, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000) per violation, by imprisonment in a county jail

> not exceeding one year, or in the state prison, or by both that fine and imprisonment.
>
> . . .
>
> (c) For the purposes of this section, ***"confidential communication" means any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto***, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

See Cal. Penal Code § 632 (emphasis added).

Here, LAUSD has pleaded facts that, when taken as true, state a claim for relief: "On February 8, 2018, . . . Counterclaim[-]Defendants Truong and Weissburg, on their own behalf and on behalf of Counterclaim Defendant D.N., intentionally and surreptitiously recorded confidential attorney-client communications between the District and its legal counsel, Mary Kellogg, without their knowledge or consent. Counterclaimant is informed and believes and thereon alleges that Truong recorded the confidential communications at the direction of Weissburg." (Dkt. No. 22 ¶ 8.)

Counterclaim-Defendants D.N. and Truong, and Weissburg make a myriad of arguments in their Motions to Dismiss that are centered upon facts outside the four corners of the Counterclaim that they attempt to use to discount the allegations in the Counterclaim. But because "a judge must accept as true all of the factual allegations contained in the complaint" "when ruling on a . . . motion to dismiss," the Court ignores the Counterclaim-Defendants' attempts to discount the facts in the Counterclaim by bringing in outside facts at the motion to dismiss stage. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Thus, the Court **DENIES** Weissburg's, and D.N. and Truong's Motions to Dismiss LAUSD's Counterclaim.

C. WEISSBURG'S, AND D.N. AND TRUONG'S MOTIONS TO STRIKE (ANTI-SLAPP) LAUSD'S COUNTERCLAIM

Weissburg filed a Motion to Strike (Anti-SLAPP) LAUSD's Counterclaim. (Dkt. No. 34.) D.N. and Truong also filed a largely similar Motion. (Dkt. No. 41.)

"California's anti-SLAPP statute authorizes a 'special motion to strike' any 'cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue.'" *Safari Club Intern'l*, 862 F.3d at 1119. "Courts evaluating anti-SLAPP motions first ask if the [counter-]defendant has shown the challenged cause of action 'aris[es] from' activity taken 'in furtherance' of the [counter-]defendant's right to petition or free speech." *Id.*

"If so, the burden shifts to the [counterclaimant] to show 'a [reasonable] probability of prevailing on the challenged claims.'" *Id.*

Counter-Defendants, Weissburg, D.N., and Truong, have not shown that the challenged cause of action—the purportedly accidental recording of conversations between LAUSD's representatives and LAUSD's counsel during a lunch break—arises from activity taken in furtherance of their right to petition or free speech.

This case is different from *Safari Club International*, where the Ninth Circuit concluded that the defendant's conduct in the creation of the recording was "akin to . . . 'newsgathering[,]'" and thus "constitute[d] conduct undertaken in furtherance of [the defendant's] subsequent exercise of free speech." 862 F.3d at 1121. Here, according to the Counter-Defendants' story advanced in their Motions, Truong did not intend to record during the lunch break, and only accidentally recorded the conversations between LAUSD's counsel and her client that occurred during a lunch break of an IEP meeting. (Dkt. No. 34 at 17; Dkt. No. 41 at 17.) Thus, Truong's act of accidentally recording LAUSD's counsel's communications with LAUSD during this lunch break could not have been in furtherance of the Counter-Defendants' right to petition or free speech. *See Safari Club Intern'l*, 862 F.3d at 1119.

Because the Counter-Defendants have failed to establish that the conduct was in furtherance of their right to petition or free speech, the Court **DENIES** the Motions to Strike.

V. CONCLUSION

For the foregoing reasons, (1) Birmingham's and El Monte's Motions to Dismiss (Dkt. Nos. 20, 29); (2) Weissburg's, and D.N. and Truong's Motions to Dismiss LAUSD's Counterclaim (Dkt. Nos. 33, 40); and (3) Weissburg's, and D.N. and Truong's Motions to Strike (Anti-SLAPP) LAUSD's Counterlcaim are all **DENIED** (Dkt. Nos. 34, 41).

IT IS SO ORDERED.

Dated: June 26, 2018

/s/
HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT
JUDGE