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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ELLIOT KREITENBERG, a Minor, etc.,
et al.,

Plaintiffs and Appellants,

v.

LOS ALAMITOS UNIFIED SCHOOL
DISTRICT et al.,

Defendants and Respondents.

G043933

(Super. Ct. No. 30-2008-00114528)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William M. Monroe, Judge. Affirmed.

Carpenter, Zuckerman & Rowley, John C. Carpenter and Maureen Johnson, for Plaintiffs and Appellants.

Law Office of Janice M. Gordon and Janice M. Gordon for Defendant and Respondent Mark Clabough.

Carpenter, Rothans & Dumont, Louis R. Dumont and Justin Reade Sarno, for Defendant and Respondent Los Alamitos Unified School District.

It is often stated that whatever harms our children harms us. Implicitly relying upon that concept, Arthur and Melissa Kreitenberg sued the Los Alamitos Unified School District (the District), and Mark Clabough, the former baseball coach at Los Alamitos High School (LAHS), on various claims arising out of alleged discrimination practiced against their son, Elliot. However, the trial court determined, in a series of rulings on demurrers and motions to strike, that no matter how personally aggrieved the Kreitenbergs felt as a result of defendants' treatment of their son, they failed to state any viable cause of action alleging direct injury to themselves, rather than to Elliot, who is separately named as a plaintiff in this case. As a consequence, the trial court determined the Kreitenbergs lacked standing to pursue a cause of action in their own right. We agree and affirm the judgment.¹

I

The Kreitenbergs, along with Elliot,² filed a complaint against the District and Clabough in November of 2008. The complaint alleged that Elliot was entitled to attend public school within the District, and in fact had attended school at LAHS commencing in September of 2006.

As a regular aspect of its curriculum, LAHS offered a baseball program, and Clabough was the head coach in that program. Elliot tried out for, and was accepted into, the baseball program, and he allegedly participated on the freshman team during the 2006-2007 school year, and on the junior varsity team during the 2007-2008 school year.

¹ In light of our conclusion the Kreitenbergs lacked standing to pursue any of their claims, we need not separately address their contention the court erred by striking their allegations seeking a civil penalty against the District.

² Because Elliot is a minor (or at least was at the time this case was initiated), his claims are filed "by and through his [g]uardian [a]d [l]item, Melissa Kreitenberg." We express no opinion herein on the validity of any claims asserted by Elliot.

Even though Elliot allegedly participated and performed well in the LAHS baseball program, in November 2007 he was cut from the junior varsity team. Although Elliot's dismissal from the team was purportedly performance-based, that justification was allegedly a pretext, with the true motivation being animus against Elliot's Jewish ancestry and faith. According to the complaint, "Clabough, the head baseball coach for LAHS and other members of the baseball coaching staff employed by defendant District, had and have a demonstrated bias in favor of Christian persons of European descent, and a demonstrated bias against persons of non-Christian and/or non-European descent, including Jews."

The complaint alleged Elliot had been singled out based upon his Jewish faith by, among other things, being treated differently at a baseball program banquet. Specifically, while each of the other players at the banquet was presented with the baseball card of a Major-Leaguer who shared that player's own position, Elliot alone was presented with a baseball card depicting a player who did not share his position. Instead, Elliot's Major-Leaguer was Jewish.³

The Kreitenbergs requested that the District conduct an investigation of what they believed had been a discriminatory decision to drop Elliot from the LAHS baseball program. Despite the District's assurances it would proceed in good faith to determine whether Elliot had been discriminated against, the Kreitenbergs allege the true intent of the District's investigatory effort was to "obfuscate the existence of a pattern of discriminatory conduct by [the] baseball program."

³ In later versions of the complaint, the Kreitenbergs also alleged that, at the direction of Clabough, Elliot was punished for observing Jewish holidays and refusing to play baseball on those holidays. They further suggest that the incident at the banquet was intended to mock Elliot for that refusal, since the Jewish Major-Leaguer depicted on the baseball card presented to Elliot was Hank Greenberg, who was allegedly well known – and widely mocked – for his refusal to play baseball on Yom Kippur.

As part of the discussions between the Kreitenbergs and the District regarding the baseball program's treatment of Elliot, the Kreitenbergs provided the District with "private and confidential medical information relating to [] Elliot's medical condition," with the understanding that such information would be kept confidential. And on or about December 17, 2007, Clabough and the District ostensibly agreed that Elliot would be returned to the junior varsity baseball team, effective December 20, 2007.

However, on and after December 20, 2007, the Kreitenbergs allegedly learned that "the purported agreement by [the] District and [] Clabough to reinstate [] Elliot to the baseball program and to maintain [] Elliot's medical information in strict confidence, was not true and was a sham, used as a pretext to avoid or ignore plaintiffs' reasonable concerns, and that defendants' true intent was to further discriminate and retaliate" against both themselves and Elliot. Among other things, the District and Clabough allegedly refused to give Elliot any "real opportunity to participate in the program," they allegedly subjected Elliot to unfair treatment and humiliation by publicizing the circumstances underlying the agreement to return him to the team; and they allegedly intentionally disclosed Elliot's private and confidential medical information to the public by means which included Clabough disclosing that information directly to a newspaper in January 2008.

The complaint alleges that despite the Kreitenbergs' attempts to bring this misconduct to the attention of the District, the District did nothing to halt or correct it; to the contrary the District condoned and ratified the misconduct. As a result of the District's failure to reasonably address or rectify the discriminatory misconduct, the Kreitenbergs reasonably concluded that neither Elliot, nor his sister, could receive "an even minimally appropriate, satisfactory learning, athletic, or other school experience at LAHS . . ." and they were consequently "compelled" to enroll Elliot and his sister in an alternate high school, "at significant additional expense to plaintiffs."

The Kreitenbergs also allege they timely filed claims pertaining to the matters set forth in the complaint, pursuant to the Government Tort Claims Act (Govt. Code § 810, et seq.). Those claims were denied.

The Kreitenbergs themselves (as distinguished from Elliot) asserted causes of action for: discrimination in violation of the Unruh Civil Rights Act (Unruh Act);⁴ intentional infliction of emotional distress; negligent infliction of emotional distress; violation of Education Code section 49076⁵; violation of the Bane Act⁶; negligence; violation of the California Constitution’s guarantee of free education (against the District only); discrimination in violation of the Education Code (against the District only);⁷ and violation of the California Constitution’s guarantee of equal protection and freedom of expression (against the District only). The District demurred to the complaint, asserting

⁴ The Unruh Act prohibits discrimination on the basis of “sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation.” (Civ. Code, § 51, subd. (b).)

⁵ Education Code section 49076 restricts access to pupil records.

⁶ The Bane Act is often described as akin to a “hate-crime” law. “The Legislature enacted [Civil Code] section 52.1 to stem a tide of hate crimes. [Citation.]” (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338; *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 882.) It provides an individual damages remedy in cases where “a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state” (Civ. Code, § 52.1.)

⁷ Specifically, the Kreitenbergs allege violations of their rights under Education Code sections 200, 201, and 220, which embody the state’s public policy of affording “equal rights and opportunities in the educational institutions of the state.” (Ed. Code, § 200.) As the Kreitenbergs allege, these rights are made enforceable in a civil action by Education Code section 262.4.

the complaint failed to sufficiently allege any cause of action, and the Kreitenbergs lacked standing to assert any of the purported causes of action in their own right.

Prior to the scheduled hearing on the District's demurrer, the Kreitenbergs filed their first amended complaint. It relies upon the same set of underlying facts, and states the same causes of action, as the initial complaint, but it adds an additional paragraph addressing the Kreitenbergs' standing to maintain the claims: "Melissa Kreitenberg and Arthur Kreitenberg possess standing to bring this action, without limitation, for their own injuries, the injuries of their children, and the injuries they sustained by their association with their children Furthermore, and without limitation, [the Kreitenbergs] possess standing to bring this action as taxpayers and their vested rights to educate their children in a public non-discriminatory secondary school. Moreover, and without limitation, [the Kreitenbergs] possess standing due to their duty and legal obligation to nurture, support, and provide for the welfare of their children, including their education, of which the defendants have interfered and deprived them."

The District once again demurred to the complaint, arguing both that the complaint failed to state any cause of action, and that the Kreitenbergs lacked standing to assert any of the claims on their own behalf. Additionally, the District moved to strike the allegations seeking penalty assessments against it in connection with the cause of action for violation of the Bane Act. Clabough joined in that demurrer and motion to strike.

On September 29, 2009, the court sustained the demurrers, without leave to amend, as to the Kreitenbergs' claims for violation of the Unruh Act, negligent infliction of emotional distress, violation of Education Code section 49076, violation of the right to free education guaranteed by the California Constitution, violation of the Bane Act, and negligence. The court also sustained the demurrers with leave to amend as to the Kreitenbergs' claims for intentional infliction of emotional distress, discrimination in

violation of the Education Code, and violation of the California Constitution's guarantee of equal protection and freedom of expression.⁸ The court also granted Clabough's motion to strike the punitive damage allegations.

On November 4, 2009, the Kreitenbergs filed their second amended complaint, and again both the District and Clabough demurred. Clabough also moved to strike the punitive damages allegations in the complaint. For reasons not revealed in our record, the Kreitenbergs simply filed their third amended complaint on February 2, 2010, the date of the hearing scheduled for Clabough's demurrer and motion to strike

The Kreitenbergs' third amended complaint purported to allege nine causes of action on their own behalf: (1) violation of the Unruh Act (against Clabough only); (2) intentional infliction of emotional distress (against Clabough only); (3) violation of Education Code section 49076 (against Clabough only); (4) invasion of privacy; (5) violation of California Constitution, article IX; (6) violation of the Bane Act (against Clabough only); (7) discrimination in violation of the Education Code (against the District only); (8) unlawful denial of equal protection and freedom of expression (against the District only); and (9) negligence (against Clabough only).⁹

However, four of the Kreitenbergs' causes of action – violation of the Unruh Act, violation of Education Code section 49076, violation of the Bane Act, and negligence – had previously been disposed of by the order sustaining both defendants'

⁸ The court's order reflects that it also sustained the demurrer to the Kreitenbergs' cause of action for *invasion of privacy*, with leave to amend. However, the Kreitenbergs' first amended complaint states no such cause of action on their behalf. The cause of action for invasion of privacy is asserted on Elliot's behalf only.

⁹ By its terms, the third amended complaint asserts the causes of action for violation of Education Code § 49076, and for negligence, against both the District and Clabough. However, in their opposition to defendants' demurrers to the third amended complaint, the Kreitenbergs claimed this was a typographical error, and stated they intended to assert those causes of action against Clabough only.

demurrers to those claims without leave to amend. Once again, the District and Clabough demurred, and they also moved to strike the causes of action to which the court had previously sustained demurrers without leave to amend.

In their opposition to those demurrers and motions to strike, the Kreitenbergs explained why they had realleged four causes of action which were previously disposed of in response to defendants' demurrers to the first amended complaint. They claimed that Clabough had never before demurred to these claims, because his "joinder" in the District's demurrer to the first amended complaint was ineffective to extend the arguments to himself. That argument simply ignored the court's earlier order which implicitly concluded otherwise, and which explicitly sustained both the District's and Clabough's demurrers to those causes of action, without leave to amend.¹⁰

¹⁰ Both the record and the parties' briefs reflect a significant degree of confusion about the court's various rulings. Most significantly, while there are numerous references to the court's September 29, 2009, minute order, in which it initially ruled on the demurrers to the first amended complaint (which minute order is not included in our record), everyone (including the trial court) seems to be unaware that the trial court also issued a formal order with respect to the ruling on October 23, 2009, nearly *a month after the hearing*. That formal order, which is contained in our record, superseded the court's initial minute order, and states clearly that the court sustained the demurrers of both defendants to six of the Kreitenbergs' causes of action without leave to amend, and sustained demurrers to the other four causes of action with leave to amend. However, on December 1, 2009, the court purported to amend "the September 29, 2009 Ruling," (albeit with respect Clabough's separate motion to strike, not the demurrers) and then later purported to amend that same ruling "nunc pro tunc," for the purpose of clarifying that the demurrers to certain causes of action were intended to be sustained without leave to amend. ~(aa682)~ Of course, the court's formal order already did state, explicitly (and correctly) which portions of the demurrers had been sustained without leave to amend, and thus no such clarification was required.

The Kreitenbergs' opposition also reflected their express abandonment of their cause of action alleging violation of the California Constitution's guarantee of equal protection and freedom of expression.

The court largely sustained the demurrers and granted the motions to strike. However, for reasons that are unclear in our record, the court denied Clabough's motion to strike the Kreitenbergs' cause of action for negligence, and apparently allowed them to file a fourth amended complaint, which once again alleged that cause of action against him. Clabough once again demurred, and on May 18, 2010, the court for the second time issued an order sustaining Clabough's demurrer to the Kreitenbergs' negligence claim without leave to amend. On November 17, 2011, the court entered a judgment of dismissal in favor of the District and Clabough, and against the Kreitenbergs.

II

The Kreitenbergs contend the trial court erred in sustaining defendants' demurrers with respect to each one of their ten causes of action. We apply well-settled standards in reviewing that contention: "On appeal from a judgment dismissing an action after sustaining a demurrer . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

Moreover, the Kreitenbergs also assert that even if the court properly sustained the demurrers, it nonetheless abused its discretion by sustaining demurrers without leave to amend with respect to the Kreitenbergs' causes of action for violation of the Unruh Act, negligent infliction of emotional distress, violation of Education Code

section 49076, violation of the right to free education guaranteed by the California Constitution, violation of the Bane Act, and negligence.

This second assertion is easily disposed of, and we will consequently address it first. What the Kreitenbergs are contending is that because they voluntarily amended their original complaint before the court ruled on the District's demurrer, defendants' demurrers to their first amended complaint qualified as the initial challenges to their pleading, and thus the court, in effect, had a mandatory obligation to offer them leave to amend all of the causes of action included therein.

However, part of the Kreitenbergs' burden of proving the trial court abused its discretion in denying leave to amend is the obligation to demonstrate, *on appeal*, how they could have amended the complaint to state a cause of action. "Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. However, the burden is on the plaintiff to demonstrate the trial court abused its discretion. Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [internal quotations and citations omitted]; *Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 228.) In other words, a plaintiff must demonstrate on appeal what allegations could be added to cure the deficiencies in the pleading successfully demurred to. The Kreitenbergs made no effort to do this in their opening brief, and thus they have waived any contention that the court abused its discretion by denying them leave to amend.

III

The key issue in this appeal is whether the Kreitenbergs, as opposed to Elliot himself, have standing to maintain the causes of action they have alleged.

Defendants, and particularly the District, consistently challenged the Kreitenbergs' standing to assert these claims throughout the trial court proceedings.

“A litigant’s standing to sue is a threshold issue to be resolved before the matter can be reached on its merits. (*Hernandez v. Atlantic Finance Co.* (1980) 105 Cal.App.3d 65, 71) Standing goes to the existence of a cause of action (5 Witkin, *Cal. Procedure* (4th ed. 1997) Pleading, § 862, p. 320), and the lack of standing may be raised *at any time* in the proceedings. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361. . . .” (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128.)

“‘[S]tanding to sue . . . is the right to relief in court.’” (*Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1604.) And the right to seek relief for breach of a duty belongs to the person to whom the duty was owed. “In general terms, in order to have standing, the plaintiff must be able to allege injury – that is, some ‘invasion of the plaintiff’s legally protected interests.’” (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175 (*Angelucci*), italics added; see also Code Civ. Proc., § 367 [“Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute”].)

Despite defendants’ challenge to the Kreitenbergs’ standing as a basis for their demurrers in the trial court, the Kreitenbergs fail to address the issue as a distinct point in their opening brief on appeal.¹¹ Instead, they address standing only as it pertains to their cause of action alleging violation of the Unruh Act and perhaps assume their

¹¹ The Kreitenbergs do argue the standing issue to a great extent in their reply brief. However, it is well settled that “[a]rguments raised for the first time in a reply brief [will not be considered], because it deprives [respondent] of the opportunity to respond to the argument.” (*Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1387-1388.) Thus, to the extent the Kreitenbergs make distinct arguments in support of standing in their reply brief, we need not consider them.

argument will be applied to their other causes of action arising out of defendants' alleged discrimination in connection with Elliot's education. In addition to the alleged violation of the Unruh Act, those causes of action include intentional infliction of emotional distress; negligent infliction of emotional distress; negligence;¹² violation of Article IX, § 5 of the California Constitution; violation of the Bane Act; and violation of the Education Code.¹³

At the heart of the Kreitenbergs' contention that they – as opposed to merely Elliot alone – have standing to assert causes of action arising out of this misconduct, is their assertion of two constitutional rights. First, is the Kreitenbergs' "liberty interest . . . in directing the education of their children." (Quoting *Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1102.) However, since the Kreitenbergs expressly allege it was their decision to take Elliot out of LAHS, and enroll him in private school, and they do not allege defendants precluded them from exercising either option, we cannot see how they were deprived of any right to direct Elliot's education.

Further, the Kreitenbergs do not explain how defendants' discriminatory acts would have deprived them of the right to direct Elliot's education, except by reference to what they contend is their second constitutional right. The Kreitenbergs contend that Article IX, section 5 of the California Constitution (Article IX, § 5), which requires the establishment of "a system of common schools by which a free school shall be kept up and supported in each district . . .," reflects an enforceable obligation owed to

¹² To the extent the Kreitenbergs' cause of action for negligence is based on defendants' alleged discriminatory acts, it appears to duplicate their cause of action for negligent infliction of emotional distress.

¹³ The Kreitenbergs explicitly abandoned their cause of action based on the alleged denial of their constitutional rights to equal protection and freedom of expression, at the trial court level. Consequently, we need not address that claim.

parents directly, as well as to their children. Thus, in explaining why they have suffered a direct injury under the Unruh Act, the Kreitenbergs claim to have been deprived of “*the right to send their children to a free public school,*” which they characterize as an “option, available as a matter of law *to all parents* in California,” and which is “protected by [Cal.] Const. art[.] IX, § 5.” (Italics added.)

However, the very case relied upon by the Kreitenbergs to support this premise actually undercuts it. *Ward v. Flood* (1874) 48 Cal. 36, does not imply any obligation owed *to parents*. Instead, it states that “[t]he opportunity of instruction at public schools *is afforded the youth of the State* by the statute of the State, enacted in obedience to the special command of the Constitution of the State.” (*Id.* at p. 50, italics added.) Significantly, the petitioner in *Ward* was the student who was precluded from enrolling in a San Francisco school on the basis of her race, and she appeared in the litigation through her guardian ad litem.¹⁴ The parents of the student-plaintiff in *Ward* did not petition for relief in their own right.

Piper v. Big Pine School Dist. (1924) 193 Cal. 664, is similar. In that case, the petitioner was a student characterized by the court as an “Indian,” who also filed her claim through a guardian ad litem. Again, our Supreme Court characterized the right to a free public education as belonging directly to the children: “Both the constitution and statutes of the state provide for a uniform system and course of study as adopted and provided by the authority of the state. Under this uniform system pupils advance progressively from one grade to another and, upon the record made, are admitted from one school into another pursuant to a uniform system of educational progression. The enjoyment of these privileges are enforceable rights vouchsafed *to all who have a legal*

¹⁴ Uncomfortably, the plaintiff in *Ward* obtained no relief, as the case stands for the proposition that the maintenance of public schools segregated by race was an acceptable practice in 19th century California.

right to attend the public schools . . .” (*Id.* at p. 669, italics added.)¹⁵ Of course, only the students, and not their parents, have a legal right to attend the public schools.¹⁶

Finally, in a somewhat less hoary iteration, the Supreme Court once again stated this rule in *Hartzell v. Connell* (1984) 35 Cal.3d 899, 904-905: “The California Constitution requires the Legislature to provide for a system of common schools by which a *free school* shall be kept up and supported in each district. . . . This provision

¹⁵ Unfortunately, the resolution in *Piper* is also similar to the resolution in *Ward*. Technically, the court did grant relief to the petitioner in *Piper*, but only because the school district maintained no separate school for “Indians.” Under those circumstances, the district was obligated to allow “Indians” to attend the regular public school.

¹⁶ In their reply brief, the Kreitenbergs also rely on *Allen v. Wright* (1984) 468 U.S. 737, 756 (*Allen*), for the proposition that it is “well-settled that *parents* have standing to sue when their children are denied equal access to public education.” The case says no such thing. The issue in *Allen* was whether petitioners, a proposed nationwide class comprised of parents suing ““on behalf of themselves *and their children*,”” (*Allen, supra*, 468 U.S. at p. 743, italics added), had standing to bring a claim under federal law. In analyzing that issue, the Supreme Court drew no distinction between the parents and their children, before ultimately concluding that *none of the petitioners* had standing. Moreover, the court’s acknowledgement that the “children’s diminished ability to receive an education in a racially integrated school . . . is beyond any doubt . . . judicially cognizable,” cannot be read as implying a determination that the *parents alone* would have standing to assert such a claim. The court cites to *Brown v. Board of Education* (1954) 347 U.S. 483 (*Brown*), and *Bob Jones University v. United States* (1983) 461 U.S. 574 (*Bob Jones University*), in support of its point, and neither case was brought in the name of parents. In *Brown*, the petitioners were *the students*, not their parents, and in *Bob Jones University*, the petitioners were the schools. Neither case supports the proposition that the parents of minor children have direct standing to bring claims. However, of some significance here is the *Allen* court’s conclusion that petitioners would not have standing to assert a claim “based on the stigmatizing injury often caused by racial discrimination,” because “such injury accords a basis for standing only to ‘those persons who are *personally denied equal treatment*.’” (*Allen, supra*, 468 U.S. at p. 755, italics added.) Since it was Elliot, not the Kreitenbergs, whom they allege was personally denied equal treatment, *Allen* would appear to undercut the Kreitenbergs’ claims to standing.

entitles the youth of the State . . . to be educated at the public expense.” (Internal citations and quotation marks omitted.)

As these cases demonstrate, the right to a free public education in California is one secured to the children of the state, not to their parents. Consequently, it is only the children themselves – in this case, Elliot – who would have standing to enforce that right, or to claim injury caused by its denial.

Moreover, there is a second problem with the Kreitenbergs’ reliance on Article IX, § 5, as a basis for a cause of action herein. As explained in *Serrano v. Priest* (1971) 5 Cal.3d. 581, while Article IX, § 5, guarantees the establishment of a “system” of free schools, it does not guarantee that each of those schools will be equally good throughout the state – let alone that each student’s educational experience in the free public school system will be equally beneficial: “[W]e have never interpreted the constitutional provision to require equal school spending; we have ruled only that the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade.” (*Id.* at p. 596.)

Finally, even if the Kreitenbergs could demonstrate that they, as parents, had standing to petition the court for relief from the effects of an alleged violation of Article IX, § 5, and even if they could demonstrate that the defendants’ alleged discrimination against Elliot somehow constituted a violation of that provision, they would still fall short of establishing they could state any cause of action for damages based upon that violation.

In *Tirpak v. Los Angeles Unified School Dist.* (1986) 187 Cal.App.3d 639 (*Tirpak*), the court explained why, pursuant to relevant provisions of the California Tort Claims Act (Gov. Code, § 815, et seq.), neither a student nor his mother could state a cause of action for damages against a school district based upon its alleged wrongful expulsion of the student from the free public school. The court first noted “[a] public

entity is not liable for an injury except as otherwise provided by statute. (Gov. Code, § 815, subd. (a),” and that “[t]here is no duty at common law to provide general educational services.” (*Tirpak*, supra, 187 Cal.App.3d at p. 642.) Further, in order to state a cause of action against a government entity for violation of a duty based on a statute or other “enactment,” the plaintiff would have to establish that the mandatory duty established by the enactment is “designed to protect against the risk of a particular kind of injury” alleged in the complaint. (*Ibid.*)

In this case, similar to *Tirpak*, the injury alleged in the complaint is emotional distress and the expenses associated with the need to make alternative arrangements for a student’s education. However, relying on the analysis in *Keech v. Berkeley Unified School Dist.* (1984) 162 Cal.App.3d 464 (*Keech*), a case involving the alleged failure to provide adequate assessment services to an emotionally disturbed boy, the *Tirpak* court determined that the state’s provision of a free public school system, including its enactment of various statutes specifying the procedures to be followed when imposing suspensions or expulsions on a student, implied no intention to protect against emotional and financial injuries stemming from the denial of a public education. The *Tirpak* court quoted the reasoning employed in *Keech*: “[t]he statutes at issue were conceived as provisions directed to the attainment of stated educational goals, not as safeguards against ‘injury’ of any kind. . . . Clearly, society has a stake in furthering the provision of full educational opportunity to . . . children; but it does not follow that this interest is advanced by transforming statutory procedural provisions . . . into springboards for private damage suits. [Citation omitted.]” (*Tirpak*, supra, 187 Cal.App.3d at p. 644, quoting *Keech*, supra, 162 Cal.App.3d at pp. 470-471.) Thus, the *Tirpak* court concluded “we otherwise do not discern a mandatory duty of care owed to plaintiffs with respect to economic damages arising from educational injury.” (*Id.* at p. 645.)

In light of these authorities, we conclude the Kreitenbergs have failed to demonstrate how defendants' alleged discrimination against their son violated any constitutional right owed to them directly, or how they would have standing to pursue a cause of action for damages based upon such a violation. As they have asserted no other basis for their claim of damages stemming from the discrimination, we conclude they lack standing to assert a claim for violation of the Unruh Act. "In essence, an individual plaintiff has standing under the [Unruh] Act if he or she has been the victim of the defendant's discriminatory act. (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* [(1990)], 221 Cal.App.3d [1377,] 1383, 1386 [standing under the [Unruh] Act extends to persons 'actually denied full and equal treatment by a business establishment' – that is, to 'victims of the discriminatory practices'.])" (*Angelucci, supra*, 41 Cal.4th at p. 175.) Because Elliot was the only plaintiff in this case who was entitled to partake in a free public education, he is the only one with standing to complain that defendants denied him "full and equal treatment" in the provision of that education.

Moreover, we likewise find no basis for concluding the Kreitenbergs would have standing to assert their *other causes of action* stemming from defendants' alleged discrimination. First, our conclusion the Krietenbergs have failed to establish they enjoy any enforceable rights under Article IX, § 5, obviates the need to separately address the issue of whether they have standing to maintain their cause of action based explicitly on defendants' alleged violation of that constitutional provision.

And with regard to the Kreitenbergs' causes of action for intentional and negligent infliction of emotional distress, they simply argue the allegations of their complaint reflect the "school district engaged in a protracted campaign of anti-Semitism *against them.*" (Italics added.) But that is not what their complaint alleges. Instead, what their complaint alleges is that to the extent defendants engaged in any such campaign, it was directed at Elliot. Even in their opening brief on appeal, the

Kreitenbergs emphasize the outrageousness of defendants’ conduct vis-à-vis Elliot alone, relying upon his particular vulnerability: “[Defendants] – who were plaintiffs [*sic*] school supervisors – were plainly in a position of power to damage *his interest*.” (Italics added.)

The Kreitenbergs themselves were, at best, bystanders to a discriminatory assault on their child, and while we would agree such an experience must be quite distressing, the Kreitenbergs provide no authority suggesting such misconduct would give rise to any direct cause of recovery of damages for that distress. (See *Thing v. La Chusa* (1989) 48 Cal.3d 644 [restricting a parent’s ability to recover for her own emotional distress stemming from the injury to her child].)

The Kreitenbergs make only brief arguments in support of their causes of action for violation of the Bane Act and the Education Code, and neither addresses their own standing to assert such a claim. With respect to the Bane Act, we note it provides a private right of action to one whose “rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state . . .” have been interfered with. (Civ. Code, § 52.1.) And as we have already explained, the Kreitenbergs have not demonstrated how defendants’ alleged conduct interfered with their own rights. Thus, we are not persuaded the Kreitenbergs have standing to assert a Bane Act claim.

And with respect to their claim for violation of Education Code sections 200, 201 and 220, the Kreitenbergs establish only that violations of the statutes they cite would give rise to a private right of action. We agree. (See Education Code § 262.4 [“This chapter may be enforced through a civil action”].) What the Kreitenbergs do not establish is that such a right of action would belong to a parent. We conclude it does not.

Education Code section 200 simply states the “policy of the State of California to afford all persons *in public schools*, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in [s]ection 422.55 of the Penal Code, *equal rights and opportunities in the educational institutions of the state*. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor.” (Italics added.) Of course, it was Elliot, and not the Kreitenbergs, who was in a public school.

Education Code section 201 sets forth the legislative declarations and intent with respect to the law, and states “[a]ll pupils have the right to participate fully in the educational process, free from discrimination and harassment.” (Italics added.) Again, the only pupil here was Elliot.

And Education Code section 220 provides “[n]o person shall be subjected to discrimination . . . *in any program or activity conducted by an educational institution* that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.” (Italics added.) Only Elliot was alleged to be in the baseball program at LAHS.

As none of these statutes imply, let alone expressly state, an intention to protect the interests of anyone other than pupils, we discern no basis for concluding the Kreitenbergs would have standing to bring a civil cause of action grounded on their alleged violation. Based upon all of the foregoing, we conclude the Kreitenbergs have not established they have standing to assert any causes of action on their own behalf, arising out of defendants’ alleged discriminatory acts toward Elliot in this case.

IV

The Kreitenbergs also allege causes of action arising out of defendants’ alleged wrongful dissemination of Elliot’s private medical information to a local

newspaper. Those claims include invasion of privacy, violation of Education Code section 49076,¹⁷ and negligence.

The invasion of privacy claim was asserted by Elliot alone in the initial complaint, and in the first amended complaint. However, that cause of action was asserted by the Kreitenbergs themselves, in addition to Elliot, in their second and third amended complaints.

While the second amended complaint fails to contain any factual allegations suggesting the disclosure of medical information could have had any direct impact on the Kreitenbergs, they do allege in the third amended complaint that the disclosure of Elliot's medical information amounted to a disclosure of their own private medical information as well, because it specifically revealed a "genetic defect passed by the parents to their child."

However, "it is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded." (*Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62.) Further, "[i]t is clear that the publication must contain some *direct reference to the plaintiff*." (*Ibid.*, italics added.) In this case, the Kreitenbergs do not allege defendants' revelation about Elliot's genetic condition included any direct reference to them.

Nor do the Kreitenbergs allege defendants should have understood Elliot's condition necessarily revealed private information about them. The mere fact the private information revealed about Elliot was a genetic defect passed to him by his parents, does

¹⁷ Education Code section 49076 prohibits a school district from allowing unauthorized access to "pupil records," which are defined as "any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, § 49061, subd. (b).)

not establish that defendants should have recognized that link, let alone that they were actually aware of it. And because the Kreitenbergs do not actually identify Elliot's alleged condition in their pleadings, we have no basis to draw such an inference.¹⁸ Thus, the Kreitenbergs' complaint does not allege facts from which we could infer defendants intended their alleged disclosure to reveal any information about the Kreitenbergs themselves.

By the same token, we cannot infer the alleged revelation actually had the effect of imparting such information to third parties. Again, what is missing is any allegation the genetic origin of Elliot's condition was ever made explicit by defendants or anyone else. Thus, in the absence of an affirmative allegation that third parties should have been expected to grasp the significance of Elliot's condition as it related to his parents, we have no basis to conclude the condition's revelation would have been effective to convey private information about the Kreitenbergs themselves.

Finally, even if we assumed these allegations were otherwise sufficient to extend the alleged wrongdoing to Elliot's parents, we note their direct cause of action is nonetheless insufficient, because they failed to allege they suffered any damages as a result of the revelation. The third amended complaint alleges only that "[a]s a direct, proximate result of the conduct of defendants, and each of them, plaintiff Elliot suffered, and will continue to suffer, severe emotional distress, humiliation, anxiety, fear and related emotional injuries. . . ." The Kreitenbergs lack standing to pursue their own claim for that damage.

The Kreitenbergs' cause of action based on Education Code section 49076 is also flawed. They claim the statute, which prohibits dissemination of information

¹⁸ The condition is merely described, in vague terms, as "a private, rare, embarrassing, and highly stigmatized [thyroid] defect associated with mental retardation."

contained in a “pupil record” without parental consent, was violated when defendants revealed Elliot’s medical condition, information which they had shared with defendants in confidence during negotiations for Elliot’s return to the baseball program, to third parties.

However, we first note the Education Code specifically confines the definition of a “pupil record” as “any item of information directly related to an identifiable pupil . . . that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means.” (Education Code § 49061, subd. (b).) In other words, the statute governs actual records maintained by the district or an employee; it does not pertain to every piece of information conveyed orally to anyone employed or associated with the school or district.

The Kreitenbergs do not allege defendants made any recording of Elliot’s medical condition, or that they were required do so, and thus the Kreitenbergs have not alleged facts demonstrating Elliot’s medical condition would constitute a part of his “pupil record” governed by Education Code section 49076.¹⁹

But even if we believed the Kreitenbergs had stated facts sufficient to demonstrate that when defendants allegedly revealed Elliot’s medical condition to third

¹⁹ Education Code section 49062 further demonstrates that not every piece of information about a student which comes into the possession of a school employee can be characterized as a “pupil record.” As that statute reflects, the determination of what constitutes a “pupil record” is a matter of some complexity: “School districts shall establish, maintain, and destroy pupil records according to regulations adopted by the State Board of Education. Pupil records shall include a pupil’s health record. Such regulations shall establish state policy as to what items of information shall be placed into pupil records and what information is appropriate to be compiled by individual school officers or employees under the exception to pupil records provided in subdivision (b) of [s]ection 49061. No pupil records shall be destroyed except pursuant to such regulations or as provided in subdivisions (b) and (c) of [s]ection 49070.” (Ed. Code, § 49062.)

parties, they had revealed the content of Elliot's "pupil record" in violation of Education Code section 49076, we would still conclude they lacked standing to assert that claim.

Although Evidence Code section 49076 does condition access to pupil records on parental consent, and thus confers on the parents the power to make that decision, the clear purpose of the statute is to protect the pupil's interests, not the parents'. The fact the statute gives the parents the right to determine access to their child's records is simply a reflection of the basic precept that parents have the right to give (or withhold) consent on behalf of their minor children when it comes to the waiver of legal rights, including the right of privacy.

Education Code section 49076 simply recognizes this reality, in requiring "parental" consent before allowing most access to pupil records. Indeed, the statute goes on to specify that a child of 16 or older, who has completed the 10th grade, can access his or her own records without parental consent, and that the parents themselves are entitled to only restricted access once their child turns 18. (Ed. Code, § 49076, subd. (a)(1)(E) & (F).) These provisions make plain that the ultimate beneficiary of the statute's privacy protection is the student, not his or her parent.

The mere fact that parents have the right to give consent on their child's behalf does not transform an invasion of that consent right into a cause of action held by the parents. If it did, that would mean any cause of action for battery, based on an allegation that a physician performed an unconsented procedure on a minor, would be a cause of action owned by the minor's parents. That is not the law. (See e.g., *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483.) We thus conclude the Kreitenbergs lack standing to state a cause of action based on a violation of Evidence Code section 49076.

And finally, the Kreitenbergs' cause of action for negligence, to the extent it is based on defendants' revelation of Elliot's private medical information, is essentially derivative of their claim for violation of Evidence Code section 49076. And although the

Kreitenbergs do allege a separate basis for imposing a duty upon defendants to keep this information confidential, i.e., that defendants promised them Elliot's condition would be kept confidential, that duty would still be an insufficient basis to support a cause of action in favor of the Kreitenbergs' themselves. It is clear the intended beneficiary of the confidentiality promise was Elliot, not them, and Elliot was the one whose privacy was allegedly compromised. The Kreitenbergs seem to acknowledge this when they allege the effect of defendants' negligence included "improperly disclosing plaintiff Elliot's private medical information"

V

Because the Kreitenbergs lack standing, in their own right, to pursue any of the claims asserted in this case, we conclude the trial court did not err in sustaining demurrers to each of their causes of action. We consequently affirm the judgment of dismissal entered against them. The Respondents are entitled to recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

ARONSON, J.