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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL GAREDAKIS, et al.,
Plaintiffs,

v.

BRENTWOOD UNION SCHOOL
DISTRICT, et al.,
Defendants.

Case No. 14-cv-4799-PJH

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
AS TO PLAINTIFF M.G.**

Defendants previously moved for summary judgment as to all claims – federal and state – asserted by plaintiffs in the third amended complaint. Defendants argued that the state-law claims should be dismissed for failure to comply with the claims presentation requirements of the California Tort Claims Act (also referred to as the "Government Claims Act"), California Government Code §§ 900, et seq.

Plaintiffs conceded that dismissal of the state-law claims for failure to comply with the claims presentation requirement was warranted, as to all plaintiffs apart from plaintiff M.G. They asserted that M.G.'s claims should not be dismissed, because of an exception, in § 905(m), to the claims presentation requirement for claims alleging "childhood sexual abuse." The court granted summary judgment as to all claims, with the exception of the state-law claims asserted by M.G., and ordered further briefing with regard to those claims.

1 **BACKGROUND**

2 Under the Government Claims Act, "no suit for 'money or damages' may be
3 brought against a public entity until a written claim therefor has been presented to the
4 public entity and either has been acted upon or is deemed to have been rejected."
5 Alliance Fin. v. City & Cnty. of S.F., 64 Cal. App. 4th 635, 641 (1998) (citing Cal. Gov't
6 Code § 945.4). "Compliance with the [Government Claims Act] is mandatory; and failure
7 to file a claim is fatal to the cause of action." Hacienda La Puente Unified Sch. Dist. v.
8 Honig, 976 F.2d 487, 495 (9th Cir. 1992) (internal quotation marks and citation omitted);
9 see also Karim-Panahi v. L.A. Police Dept., 839 F.2d 621, 627 (9th Cir. 1988).

10 On June 11, 2014, plaintiff M.G. and his parents, plaintiffs Michael and Tamara
11 Garedakis, filed written claims with the Brentwood Union School District ("the District")
12 pursuant to the Government Claims Act, alleging "abuse" during the period M.G. was a
13 student in Dina Holder's classroom (the 2008/2009 and 2009/2010 school years). M.G.
14 was three years old during the 2008/2009 school year, and had received a diagnosis of
15 autism. The claims submitted alleged that employees of the District "observed and/or
16 had knowledge of information giving rise to a reasonable suspicion that Dina Holder . . .
17 had committed acts of child abuse or neglect as defined by Penal Code § 11165.3
18 against special needs children in her classroom."

19 California Penal Code § 11165.3, which is part of the Child Abuse and Neglect
20 Reporting Act, Cal. Pen. Code §§ 11164, et seq., defines "willful harming or endangering
21 of a child" to mean "a situation in which any person willfully causes or permits any child to
22 suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or willfully . . .
23 permits the person or health of the child to be placed in a situation in which his or her
24 person or health is endangered." Cal. Pen. Code § 11165.3. A separate section of the
25 Act – not referenced in the plaintiffs' claims – defines "sexual abuse," "sexual assault,"
26 and "sexual exploitation." See Cal. Pen. Code § 11165.1.

27 The claim forms submitted by the Garedakis plaintiffs stated that both parents
28 described a "game" M.G. played in class, which

1 resulted in their child becoming sexually aroused by toes. When
2 confronted by Mr. and Mrs. Garedakis, Holder laughed and said [redacted]
3 was 'becoming a little man.' The parents became increasingly concerned
4 but Margaret Olsen assured them that everything was okay.

5 [Redacted] suffers from trauma and is still fixated on feet. This has proven
6 to also be a source of great embarrassment for his parents. His
7 behavioral changes can be attributed to the mental and/or physical abuse
8 he experienced and witnessed in Holder's classroom.

9 On June 27, 2014, the District's claims administrator denied the claims, on the
10 basis that they were not presented within six months after the event or occurrence, as
11 required by Government Code §§ 901 and 911.2. The denial letters added that plaintiffs'
12 only recourse was to apply to the Contra Costa Solano JPA for leave to present a late
13 claim, per Government Code §§ 911.4-912.2; § 946.6. Plaintiffs did not apply for leave to
14 file a late claim.

15 The Garedakis plaintiffs (along with the other plaintiffs whose claims have since
16 been dismissed) filed the complaint in the present action on October 28, 2014, asserting
17 causes of action under both federal and state law.¹ A plaintiff suing a public entity "must
18 plead facts showing or excusing compliance with the claims filing requirement." State of
19 Cal. v. Sup. Court, 32 Cal. 4th 1234, 1243-44 (2004); see also Perez v. Golden Empire
20 Transit Dist., 209 Cal. App. 4th 1228, 1236 (2012); Ovando v. Cnty. of L.A., 159 Cal. App.
21 4th 42, 65 (2008); see also Del Real v. City of Riverside, 95 Cal. App. 4th 761, 767
22 (2002) (to establish liability of a public entity, the plaintiff must prove compliance with
23 claim presentation requirement, or excuse for noncompliance).

24 The original complaint did not allege that plaintiffs had complied with the claims
25 presentation requirement of the Government Claims Act, although it did include
26 allegations similar to those in the rejected government claims. See Cplt ¶ 31 (individual
27 District defendants "observed or had knowledge of information giving rise to a reasonable
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¹ Plaintiffs asserted state-law claims for (1) violation of the Bane Act, California Civil Code § 52.1; (2) battery; (3) intentional infliction of emotional distress; (4) negligence; (5) negligent supervision; (6) violation of mandatory duty under California Penal Code § 11166 to report abuse of a child; (7) violation of the Unruh Civil Rights Act, California Civil Code § 51; and (8) violation of California Education Code § 220.

1 suspicion that Holder had committed acts of child abuse or neglect as defined by Penal
2 Code § 11165.3 against the students in her classroom.”).

3 In addition, the original complaint alleged the following with regard to M.G. –

4 During his time in Holder’s classroom, the adults introduced a "game" which
5 resulted in M.G. becoming sexually aroused by the sight of toes. When
6 confronted by Mr. and Mrs. Garedakis, Holder laughed and said M.G. was
"becoming a little man." The parents became increasingly concerned, but
Margaret Olsen assured them that everything was okay.

7 Cplt ¶ 72.

8 M.G. suffers from trauma as a result of his exposure to Holder’s classroom
9 and is still fixated on feet. This has proven to also be a source of great
10 embarrassment for his parents. His behavioral changes can be attributed to
the mental and/or physical abuse he experienced and witnessed in Holder's
classroom

11 Cplt ¶ 73.

12 On December 15, 2014, plaintiffs filed the first amended complaint ("FAC"). The
13 FAC did not allege compliance with the Government Claims Act, although it did include
14 the same allegations as in Cplt ¶¶ 31, 72-73. See FAC ¶¶ 31, 72-73. On January 30,
15 2015, plaintiffs filed the second amended complaint ("SAC"), and on October 21, 2015,
16 they filed the third amended complaint ("TAC"). Both the SAC and the TAC asserted that
17 "[p]laintiffs have complied with all procedural requirements of the California Government
18 Tort Claims Act." SAC ¶ 27; TAC ¶ 27.

19 Both the SAC and the TAC also included allegations similar to those in the original
20 complaint, regarding the District defendants’ “knowledge of information giving rise to a
21 reasonable suspicion that Holder had committed acts of child abuse or neglect as defined
22 by Penal Code § 11165.3 against students in her classroom.” See SAC ¶ 32; TAC ¶ 32.
23 Finally, both included allegations similar to those in the original complaint regarding the
24 “game’ which resulted in M.G. becoming sexually aroused by the sight of toes.” See
25 SAC ¶¶ 73, 74; TAC ¶¶ 76-77. However, neither the SAC nor the TAC alleged that M.G.
26 was excused from compliance with the claims presentation requirements based on
27 allegations of "sexual abuse" and neither asserted a claim of “sexual abuse.”

28 Defendants now seek summary judgment as to M.G.’s state-law claims. Plaintiffs

1 contend that those claims are not barred, because they are based on "childhood sexual
2 abuse" and as such have been excepted from California's claim filing requirements by
3 Government Code § 905(m). Section 905(m) provides that claims made pursuant to
4 Code of Civil Procedure § 340.1 for "recovery of damages suffered as a result of
5 childhood sexual abuse . . . arising out of conduct occurring after January 1, 2009" are
6 excepted from the claim filing requirements. Section 340.1(e) defines "childhood sexual
7 abuse" as including "any act committed against the plaintiff that occurred when the
8 plaintiff was under the age of 18 years and that would have been proscribed by"
9 California Penal Code §§ 266j; 285; 286; 288(b), (c); 288a(b), (c); 289(h), (i), (j); 647.6.
10 Cal. Civ. P. Code § 340.1(e). The TAC does not mention § 340.1, and does not include
11 any claim that references conduct proscribed by the listed Penal Code sections.

12 At the April 13, 2016, hearing on the prior motion, the court asked plaintiffs'
13 counsel which of the state-law causes of action could be construed as asserting a claim
14 of "sexual abuse." See Transcript ("Tr."), Apr. 13, 2016 (Doc. 208) at 12. Plaintiffs'
15 counsel pointed to the allegations in TAC ¶ 76 ("During his time in Holder's classroom,
16 the adults introduced a 'game' which resulted in M.G. becoming sexually aroused by the
17 sight of toes."). Tr. at 12-13. The court asked, "Which cause of action does that conduct
18 give rise to?" Tr. at 13. Plaintiffs' counsel responded, "We have alleged factually that
19 conduct. We have alleged claims arising out of . . . that conduct, including IIED, the Bane
20 Act, the Unruh Act, and those claims flow from those facts." Tr. at 13.

21 The court asked, "Well, which claims, specifically? . . . [E]ach of the claims has a
22 standard. And if this is the conduct upon which each is based, I need to be able to figure
23 out how. So tell me specifically which claims." Tr. at 14. Plaintiffs' counsel responded
24 that it was unnecessary for plaintiffs to plead a claim under Code of Civil Procedure
25 § 340.1, "since we've put them on notice as to the factual basis of those claims." Tr. at
26 15. Following further discussion, the court ordered additional briefing, directing that
27 defendants could move for summary judgment on the state-law claims as to M.G. Tr. at
28 14-17, 38-39.

1 **DISCUSSION**

2 A. Legal Standard

3 A party may move for summary judgment on a “claim or defense” or “part of . . . a
4 claim or defense.” Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there
5 is no genuine dispute as to any material fact and the moving party is entitled to judgment
6 as a matter of law. Id.

7 A party seeking summary judgment bears the initial burden of informing the court
8 of the basis for its motion, and of identifying those portions of the pleadings and discovery
9 responses that demonstrate the absence of a genuine issue of material fact. Celotex
10 Corp. v. Catrett, 477 U.S. 317, 323 (1986). Material facts are those that might affect the
11 outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A
12 dispute as to a material fact is “genuine” if there is sufficient evidence for a reasonable
13 jury to return a verdict for the nonmoving party. Id.

14 Where the moving party will have the burden of proof at trial, it must affirmatively
15 demonstrate that no reasonable trier of fact could find other than for the moving party.
16 Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). On an issue
17 where the nonmoving party will bear the burden of proof at trial, the moving party can
18 prevail merely by pointing out to the district court that there is an absence of evidence to
19 support the nonmoving party’s case. Celotex, 477 U.S. at 324-25. If the moving party
20 meets its initial burden, the opposing party must then set out specific facts showing a
21 genuine issue for trial in order to defeat the motion. Anderson, 477 U.S. at 250; see also
22 Fed. R. Civ. P. 56(c), (e).

23 When deciding a summary judgment motion, a court must view the evidence in the
24 light most favorable to the nonmoving party and draw all justifiable inferences in its favor.
25 Anderson, 477 U.S. at 255; Hunt v. City of L.A., 638 F.3d 703, 709 (9th Cir. 2011).

26 B. Defendants' Motion

27 Defendants argue that summary judgment should be granted as to the state-law
28 claims asserted by plaintiff M.G. First, defendants contend that no iteration of the

1 complaint, including the TAC, provided defendants with fair notice that plaintiffs intended
2 to assert a claim for childhood sexual abuse, whether under § 340.1 or otherwise. They
3 note that the term "sexual abuse" does not appear in the TAC, that none of the causes of
4 action reference sexual abuse, and that each of the state-law claims is asserted by all the
5 minor plaintiffs, including M.G., and none of the claims differentiates in any way among
6 any of the plaintiffs.

7 In particular, defendants assert, the allegations in TAC ¶¶ 76 were insufficient to put
8 them on notice that M.G. was attempting to bring a separate claim for childhood sexual
9 abuse, or that any of the state claims pled in the TAC could be fairly understood to
10 include a claim for childhood sexual abuse on behalf of M.G. They argue that the
11 paragraph does not specify who introduced the "game" or what it entailed – just that as a
12 result of the game, M.G. became sexually aroused at the sight of toes. They contend
13 that there are no facts pled showing that the “game” involved a “lewd and lascivious act”
14 committed by defendants with the intention of arousing their own sexual desires or those
15 of M.G., required under Penal Code § 288.

16 Defendants argue further that nothing in plaintiffs' responses to defendants'
17 discovery requests put them on notice that a childhood sexual abuse claim was being
18 made as to M.G. They assert that the discovery responses lumped all the minor plaintiffs
19 together, indicating that they had suffered from the same abuse and sustained the same
20 type of damages. For instance, defendants note, plaintiffs' amended initial disclosures
21 state, with regard to the damages being sought in the case, that damages were sought
22 for "physical, emotional and psychological harm" to “[p]laintiffs M.G., B.G., A.G., B.R.,
23 M.R., and E.R., resulting from the hostile educational environment they experienced in
24 Dina Holder's classroom."

25 Defendants assert that having failed to plead a claim for childhood sexual abuse or
26 otherwise put defendants on notice that such a claim was being made, plaintiffs cannot
27 now manufacture a triable issue and avoid summary judgment by relying on a claim or
28 theory that was not pled in the complaint and as to which neither the court nor the

1 defendants had notice.

2 In their second main argument, defendants note that plaintiffs never requested
3 leave to amend to add a childhood sexual abuse claim on behalf of M.G., and assert that
4 plaintiffs would not be entitled to do so under the Ninth Circuit's five-factor analysis, which
5 looks at bad faith, undue delay, prejudice to the opposing party, futility of amendment,
6 and whether the plaintiff has previously amended the complaint. See Johnson v.
7 Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004).

8 First, defendants contend that plaintiffs have demonstrated bad faith in failing to
9 raise these issues prior to their opposition to defendants' previous motion for summary
10 judgment. Second, defendants assert that plaintiffs' delay in raising this issue is undue
11 and unjustifiable, and that in any event, the deadline to amend has long passed. Third,
12 defendants argue that they would be prejudiced by any amendment, as discovery has
13 closed, and they have not had a fair and full opportunity to develop evidence or witnesses
14 regarding the precise details and timing of plaintiffs' allegations regarding M.G. and his
15 issues with women's toes. Finally, defendants contend that leave to amend should also
16 be denied because plaintiffs have already amended the complaint on several occasions,
17 and that they could have properly pled a claim for childhood sexual abuse of M.G. if they
18 in fact had believed they had adequate grounds to do so.

19 In opposition, plaintiffs argue that the TAC adequately states a claim for childhood
20 sexual abuse. They assert that no amendment to the complaint is necessary, but that to
21 the extent that the court finds that the childhood sexual abuse allegations in the TAC
22 require "clarification," they should be permitted to "amend the pleading to conform to
23 proof." Plaintiffs contend that defendants have had knowledge of the nature of the
24 childhood sexual abuse claims and the relief sought since the beginning of the case,
25 because the TAC pleads facts that give rise to the claims, and because defendants have
26 thoroughly litigated the facts giving rise to and damages flowing from these claims.

27 Plaintiffs point to the allegations in TAC ¶¶ 30, 71-77, where they assert that M.G.
28 was born in March 2005, attended Holder's class during the 2008-2009 school year, has

1 been diagnosed with autism and is non-verbal, and was unable to communicate what
2 was happening to him; that during his time in Holder's classroom "the adults introduced a
3 'game' which resulted in M.G. becoming sexually aroused by the site of toes," and that
4 when confronted by Mr. and Mrs. Garedakis, Holder laughed and said M.G. was
5 "becoming a little man;" that when the parents expressed concern, Margaret Olson
6 assured them that everything was OK; that each defendant "had knowledge of" the abuse
7 since 2008; and that M.G. "suffers from trauma as a result of his exposure to Holder's
8 classroom and is still fixated on feet" and that the behavior is so serious the family cannot
9 go out in public places with M.G.

10 Plaintiffs also contend that despite defendants' representation that they had no
11 notice of the childhood sexual abuse claims, their conduct during discovery proves
12 otherwise. Plaintiffs cite to deposition testimony by M.G.'s parents, and assert that 95
13 pages of Mr. Garedakis' deposition transcript and 51 pages of Mrs. Garedakis' deposition
14 transcript relate to facts surrounding, and damages arising out of, M.G.'s childhood
15 sexual abuse claim.

16 In the cited deposition excerpts, Mr. Garedakis testified that he came to the school
17 on one occasion when M.G. was three years old, and briefly witnessed female aides
18 putting their feet in M.G.'s face, which caused M.G. to become "sexually aroused."
19 Plaintiffs note that defendants directly asked Mr. Garedakis whether he thought M.G. was
20 "sexually abused," whether what he saw was "sexual abuse," whether he thought the
21 aides were "pedophiles," whether he thought M.D. was "sexually arouse[d]," whether he
22 told anyone from the District that M.G. was "sexually molested or abused in Mrs. Holder's
23 classroom," and whether he told anyone at Lyon Center (the school M.G. attended after
24 the District school) that M.G. had been "sexually molested by Brentwood Union School
25 District employees." Plaintiffs argue that these questions about "sexual abuse" show that
26 defendants were on notice of the "sexual abuse" claim as to M.G.

27 Likewise, plaintiffs contend, defendants' "repeated[]" and "relentless[]"
28 questioning of Mrs. Garedakis shows that they were on notice of the "sexual abuse"

1 claim. In particular, plaintiffs assert, defendants directly asked Mrs. Garedakis whether
2 she heard Mr. Garedakis say that Holder and her aides acted as "sexual predators or
3 pedophiles," whether she agreed with the term "sexual predators or pedophiles," whether
4 she heard Mr. Garedakis say he saw "sexual abuse" of M.G., and whether Mr. Garedakis
5 told her he saw Holder "sexually abusing" M.G.; and whether she asked Kelly Knapp
6 (one of the classroom aides) whether Knapp was one of the "perpetrators of this sexual
7 abuse," whether she asked Knapp whether Knapp saw M.G. being "sexually abused,"
8 and whether she told Knapp she believed M.G. was "sexually assaulted."

9 Plaintiffs also assert that defendants asked Mrs. Garedakis how long after Mr.
10 Garedakis told her about M.G. being "sexually assaulted" she asked him who was
11 involved, whether she told anyone that the aides involved in the "sexual assault" were
12 named Connie or Leslie, whether Mr. Garedakis specified how long the "sexual abuse"
13 was going on when he saw it through the window, or whether Mr. Garedakis told her what
14 he did when he saw the "sexual assault" of M.G., and whether she took M.G. out of the
15 classroom immediately upon learning that he had been "sexually assaulted," and
16 whether she knew by 2011 that M.G. had been "sexually assaulted" or whether she had
17 heard anything, other than from Mr. Garedakis, that M.G. was "sexually abused;" whether
18 she reported the "sexual assault" to the police, whether Mr. Garedakis told anyone about
19 M.G. being "sexually assaulted," whether she told any of M.G.'s medical providers that
20 M.G. had been "sexually assaulted," and whether she had done any research about
21 "sexualized behavior by autistic children," and whether she agreed there is a difference
22 between M.G. having a fixation with feet and being "sexually assaulted."

23 In their second main argument, plaintiffs contend that they are not required to
24 assert Government Code § 905(m) – whether to plead compliance with the Government
25 Claims Act or to plead an excuse for non-compliance. They assert that § 905(m) is
26 neither a requirement to comply with the Claims Act nor an excuse from the compliance,
27 but rather simply provides that a plaintiff alleging a claim of childhood sexual abuse is not
28 required to file a written claim under the Government Claims Act.

1 Plaintiffs also assert that they are not required to plead a claim under Civil Code
2 § 340.1, as that section relates to the statute of limitations for claims seeking “recovery of
3 damages suffered as a result of childhood sexual abuse.” They contend that § 340.1
4 does not provide the substantive basis for a cause of action such as negligence, battery,
5 or IIED. Indeed, they contend, the plain language of § 340.1 does not expressly discuss
6 or refer to these claims or causes of action, but rather, simply extends the statute of
7 limitations for all claims seeking "recovery of damages suffered as a result of childhood
8 sexual abuse."

9 In this case, plaintiffs assert, they allege that M.G. was three years old at the time
10 of the alleged incident, and that under § 340.1, his state claims arising out of the
11 childhood sexual abuse are still timely, and "[n]othing more needs to be alleged in the
12 TAC." Plaintiffs contend that because there is no civil state cause of action or claim for
13 sexual abuse in California, § 340.1(a) anticipates many different types of claims or
14 causes of action that might be brought based on childhood sexual abuse. They argue
15 that they have adequately alleged facts supporting the state-law claims.

16 Defendants' motion is GRANTED. M.G.'s claims are not saved by the operation of
17 Government Code § 905(m) because M.G. has not brought a claim of childhood sexual
18 abuse pursuant to Code of Civil Procedure § 340.1. No such claim was pled in the TAC
19 or in any prior iteration of the complaint, and there is no evidence that defendants were
20 on notice that plaintiffs were asserting a claim of childhood sexual abuse.

21 Neither the facts nor the evidence suggest a claim that qualifies under § 340.1,
22 which defines "childhood sexual abuse" as including "any act committed against the
23 plaintiff that occurred when the plaintiff was under the age of 18 years and that would
24 have been proscribed by" Penal Code § 266j (procurement of child for lewd or lascivious
25 acts); § 285 (incest); § 286(b), (c) (act of sodomy with minor); § 288(a), (b) (lewd or
26 lascivious acts upon a child); § 288a(b), (c) (oral copulation with minor); § 289(h), (i), (j)
27 (sexual penetration of minor); § 647.6 (child molestation). Cal. Civ. P. Code § 340.1(e).

28 In order to state a claim for battery or negligence or any other legal theory, based

1 on "sexual abuse," a plaintiff must allege facts showing underlying childhood sexual
2 abuse, as did the plaintiffs in Quarry v. Doe 1, 53 Cal. 4th 945 (2012), a case cited by
3 plaintiffs herein. As indicated above, "childhood sexual abuse" is defined by reference to
4 the Penal Code. Here, however, there are no facts pled in the TAC, and no evidence
5 presented, showing any inappropriate physical or sexual contact between M.G. and any
6 adult that would qualify as "childhood sexual abuse" within the meaning of § 340.1.

7 Plaintiffs' "sexual abuse" theory is based solely on the allegation that "[d]uring his
8 time in Holder's classroom, the adult's introduced a 'game' which resulted in M.G.
9 becoming sexually aroused by the sight of toes." The only evidence presented is the
10 testimony of M.G.'s father that he briefly observed several unidentified adults sitting in a
11 circle sticking their feet in M.G.'s face, as M.G. was lying on the floor and clutching his
12 genitals.²

13 Defendants were plainly on notice of the claim based on the "toes," which was not
14 pled as a claim of sexual abuse. Had plaintiffs submitted a written claim to the District
15 within six months of the event, they might have fit the claim within one of the state-law
16 causes of action. Instead, plaintiffs belatedly chose to try to fit the claim within a statute
17 that limits conduct to specified Penal Code sections, but have provided no evidence of
18 any such conduct. The deadline to seek leave to amend has long passed. Having failed
19 to file the written claim with the District within the statutory limitation period, and having
20 failed to plead or prove a claim of sexual abuse, plaintiffs are barred from proceeding with
21 the state-law claims as to M.G.

22 As for plaintiffs' contention that the questions defendants' counsel asked Mr. and
23 Mrs. Garedakis in their depositions demonstrate that defendants were on notice of the
24 purported claim of "sexual abuse," the evidence shows that it was not until the first day of
25 Mrs. Garedakis' deposition (September 9, 2015) that Mr. Garedakis stated in an off-the-

26 _____
27 ² Plaintiffs claim that this conduct was a regular occurrence, based on Mrs. Garedakis'
28 testimony that the aide Kelly Knapp told her that it occurred several times a week, and
Mr. Garedakis' testimony that Ms. Knapp told him "something was wrong" and it had
been "going on for a long time" – all of which is inadmissible hearsay.

1 record comment that the aides in Holder's classroom were "sexual predators" and
2 pedophiles." The evidence also shows that it was in an attempt to discover whether
3 plaintiffs were in fact attempting to assert a claim of sexual abuse that defendants'
4 counsel questioned Mr. and Mrs. Garedakis on this issue in their depositions.

5 Mr. Garedakis testified that his outburst was made in a moment of frustration. In
6 addition, however, he refused on the record to characterize the "toe" incident as "sexual
7 abuse" or to label the aides and teachers in Holder's classroom "pedophiles." He testified
8 further that he did not report the incident to the police or to Child Protective Services, and
9 that M.G. had not seen a therapist or any professional in connection with his behavior
10 toward feet.

11 Plaintiffs filed the TAC on October 21, 2015, less than a week after Mr. Garedakis'
12 deposition. If plaintiffs believed – as they are now arguing – that the testimony of Mr. and
13 Mrs. Garedakis supported a claim for "sexual abuse," they could easily have asserted
14 that claim in the TAC. Nevertheless, as was true with the prior iterations of the complaint,
15 the TAC does not contain the phrase "sexual abuse." The sole use of the word "sexual"
16 in the TAC is in the allegation that during M.G.'s time in Holder's classroom, "the adults
17 introduced a 'game' which resulted in M.G. being sexually aroused by the sight of toes."
18 TAC ¶ 76. The following paragraph alleges that M.G.'s "behavioral changes can be
19 attributed to the mental and/or physical abuse he experienced and witnessed in Holder's
20 classroom." TAC ¶ 77. However, there is no claim that M.G. suffered sexual abuse.

21 **CONCLUSION**

22 In accordance with the foregoing, defendants' motion for summary judgment as to
23 M.G.'s state law claims is GRANTED.

24
25 **IT IS SO ORDERED.**

26 Dated: June 30, 2016



27
28

PHYLLIS J. HAMILTON
United States District Judge