DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ED and PATRICIA HANCE, on behalf of minor child, C.H.,	)	1 CA-CV 09-0281
Plaintiffs/Appellants,	)	Department D
v.	)	
FOUNTAIN HILLS UNIFIED SCHOOL DISTRICT, an Arizona school district; DR. MARIAN HERMIE, Superintendent of Fountain Hills Unified School District; PATRICK SWEENEY, Principal of Fountain Hills High School,	)	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendants/Appellees.	)	

Appeal from the Superior Court of Maricopa County

Cause No. CV 2008-018175

The Honorable Bethany Hicks, Judge

AFFIRMED

Law Office of Gary L. Lassen — Phoenix
By Gary L. Lassen
Attorneys for Appellants

Gust Rosenfeld P.L.C. — Phoenix
by Robert D. Haws
Karl H. Widell
Attorneys for Appellees

T H O M P S O N, Judge

¶1 Ed and Patricia Hance (appellants) assert that the trial

court erred in dismissing their complaint against appellees (school officials). Finding no error, we affirm.

¶2 This claim originates out of the care and treatment of appellants' minor daughter, C.H., while a student at Fountain Hills High School during the Fall of 2006 and the damages she allegedly suffered as a result. Specifically, appellants assert that C.H., although academically gifted, has visual and spacial integration issues in addition to autism and a fragile social condition, requiring her to have navigational assistance around the school. Appellants allege that the school assigned security guards and untrained students to this task, rather than teaching assistants or learning aides, which resulted in C.H. "many times being left alone, hopeless and in situations where she became absolutely terrified." Appellants allege that this resulted in C.H. not feeling safe in her day-to-day school environment. This, in addition to overhearing the principal make "humiliating and embarrassing remarks about C.H." and her disabilities in front of her honors English class, allegedly caused her to suffer a nervous breakdown requiring her to be hospitalized for an extended period of time.

¶3 In August 2007, appellants filed a federal lawsuit, CV 07-01623-PHX-MHM, asserting claims under the Individuals with Disabilities Education Act (IDEA), which was dismissed for failure to exhaust administrative remedies. Appellants then filed the

instant complaint in July 2008 in state court. School officials filed a motion to dismiss pursuant to Arizona Rule of Civil Procedure 12, (Rule 12), asserting among other defects that appellants failed to exhaust their administrative remedies as required by law. Appellants' position was that, although their daughter had disabilities and related services provided through the Fountain Hills school district, the complaint stated tort claims and did not arise from or implicate the IDEA, 20 U.S.C. §§ 1400-85 (2000) or its Arizona counterpart, Arizona Revised Statutes (A.R.S.) § 15-763 (2000). After oral argument, the trial court granted school officials' motion to dismiss, stating:

> the core of their claim is the alleged failure of the defendants to provide appropriate accommodations to address their minor child's disabilities. Under those circumstances, both Federal and State law require the plaintiffs to exhaust the available administrative remedies prior to filing suit. *Robb v. Bethel Sch. Dist. No. 403*, 308 F.3d 1047, 1048 (9th Cir. 2002). Failure to do so deprives the Court of the jurisdiction to hear the case. *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 920-21 (9th Cir. 2005). Nor does the plaintiffs' prayer for money damages exempt their claim from this requirement.

(Citations omitted). The trial court declined to rule on the additional bases for dismissal.[1] Appellants' motion for reconsideration was denied and judgment was entered. Appellants filed a timely notice of appeal and we have jurisdiction.

¶4 When we review a trial court's dismissal of a claim

[1] School officials had asserted that appellants also did not comply with the Notice of Claim statute (A.R.S. § 12-821 (2003)), meet the statute of limitations and that school officials were

pursuant to Rule 12 of the Arizona Rules of Civil Procedure, we accept the complaint's allegations as true and resolve all inferences in plaintiff's favor. *Wallace v. Casa Grande Union High Sch. Dist. No. 82*, 184 Ariz. 419, 424, 909 P.2d 486, 491 (App. 1995). We review questions of law de novo. *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997). We will uphold a dismissal when it is certain that a plaintiff could not prove any set of facts entitling her to relief. *See Wallace*, 184 Ariz. at 424, 909 P.2d at 491.

¶5 We begin first with the IDEA. The principal purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs . . . [and] to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(A)-(B). The IDEA requires plaintiffs to exhaust his or her administrative remedies before commencing a lawsuit if that person is "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*).[2]

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further immune.

[2] The IDEA's administrative exhaustion requirement distinguishes it from *Bailey-Null v. ValueOptions*, 221 Ariz. 63, 209 P.3d 1059 (App. 2009), which did not include a statutory exhaustion requirement.

¶6 The Ninth Circuit, along with the First, Sixth, Seventh, Tenth, and Eleventh Circuits, have held that a plaintiff cannot avoid the IDEA's exhaustion requirement by limiting a prayer for relief to money damages which are unavailable under the IDEA. *See Robb*, 308 F.3d at 1049 (citations omitted). The Ninth Circuit in *Robb* stated:

> We understand "available" relief to mean relief suitable to remedy the wrong done the plaintiff, which may not always be relief in the precise form the plaintiff prefers. *Charlie F.*, 98 F.3d at 992; *Padilla*, 233 F.3d at 1274. Our primary concern in determining whether a plaintiff must use the IDEA's administrative procedures relates to the source and nature of the alleged injuries for which he or she seeks a remedy, not the specific remedy requested. The dispositive question generally is whether the plaintiff has alleged injuries that could be redressed *to any degree by the IDEA's administrative procedures and remedies. If so, exhaustion of those remedies is required.* If not, the claim necessarily falls outside the IDEA's scope, and exhaustion is unnecessary. Where the IDEA's ability to remedy a particular injury is unclear, exhaustion should be required to give educational agencies an initial opportunity to ascertain and alleviate the alleged problem.

308 F.3d at 1049-50 (emphasis added). In *Robb,* a fourth-grader with cerebral palsy was given extended "peer tutoring" by junior high and high school students on the floor of the school hallway. *Id.* at 1048. The child's parents' federal suit seeking monetary damages was dismissed for failure to exhaust their administrative remedies under the IDEA. *Id.* In affirming the dismissal in *Robb*, the court drew specific attention to the fact that the parents sought money damages not for physical injury to the child but rather "lost educational opportunities" and "emotional distress,

humiliation, embarrassment, and psychological injury" which is exactly the type of remedy that a school district may be able to redress under the IDEA. *See id*. at 1049-50.

> The IDEA requires a school district to provide not only education but also "related services," including "such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services ...) as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(22). The regulations implementing the statute provide that "psychological services" include "psychological counseling for children and parents." 34 C.F.R. § 300.24(b)(9)(v).

Id. at 1050.

¶7 Arizona law likewise provides for supportive "related services" in the provision of special education to disabled children. A.R.S. § 15-761(28) (2001). Although appellants couch their claims in tort language, appellants allege a breach of duties arising under C.H.'s individualized educational plan and damages from the allegedly inadequate or unsafe provision of "related services" to C.H. Further, as in *Robb*, appellants seek future money damages in part for future "years of psychological and counseling interventions" that they allege will be required to remedy C.H.'s emotional and psychological damage. These services, at least, are exactly the type of related services discussed in *Robb*.

¶8 Appellants bear the burden of showing the futility or inadequacy of the IDEA procedures. *See Doe v. Ariz. Dep't of Educ.*, 111 F.3d 678, 681 (9th Cir. 1997) (citation omitted). Appellants assert that C.H. could "never return to Fountain Hills High School" and therefore any administrative proceedings would have been "unavailable and futile." We note that C.H. voluntarily changed schools the following school year to a school where she would receive the related vision and navigation services that formed the underlying basis for the complaints here. Appellants cannot avoid the exhaustion requirements simply by moving C.H. to a new district. *See N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996). Appellants did not comply with the threshold procedural requirements and did not meet their burden of proof that such compliance would have been wholly futile.

¶9 For these reasons, we agree with the trial court that the IDEA's administrative and procedural remedies might have offered redress, if not entirely, then to some degree as in *Robb*. Because we find that appellants did not exhaust their administrative remedies, we need not reach the notice of claim and statute of limitations issues raised by school officials.

¶10 Both parties seek their attorneys' fees. In their reply brief, without citation to statutory authority, appellants seek attorneys' fees on the basis that the school officials' arguments are "of no merit." That request is denied. School officials seek

fees pursuant to A.R.S. §§ 12-341.01 and -349 (2003). In our discretion, we decline this request.

¶11 The judgment of the trial court is affirmed.

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JON W. THOMPSON, Judge

CONCURRING:

/S/

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PATRICIA A. OROZCO, Presiding Judge

/S/

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DIANE M. JOHNSEN, Judge