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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MICHELLE COX,

Plaintiff(s),

v.

RYAN LEWIS, et al.,

Defendant(s).

Case No. 2:20-CV-1792 JCM (DJA)

ORDER

Presently before the court is defendants Ryan Lewis (“Lewis”), Jorge Palacios (“Palacios”), and Clark County School District’s (“CCSD”) (collectively “defendants”) motion to dismiss plaintiffs Michelle Cox (“Cox”) and M.C.’s (together “plaintiffs”), first and third claims for relief and to dismiss Lewis and Palacios from this matter in their official capacities. (ECF No. 7). Plaintiffs filed a response (ECF No. 9), to which defendants replied (ECF No. 13).

I. Background

During the 2018–2019 school year, Cox was employed by CCSD as a teacher at Edith Garehime elementary school (“Garehime”). (ECF No. 1 at 4). That year, Lewis and Palacios were the principal and assistant principal of Garehime, respectively. (*Id.* at 3). During the same period, Cox’s daughter, M.C., was a fifth-grade student at Garehime. (*Id.* at 4).

According to plaintiffs, beginning in fall of 2018, M.C. was bullied and threatened by another student in M.C.’s class, L. (*Id.* at 2, 4). Plaintiffs allege that Cox reported L.’s bullying and threatening of M.C. to M.C.’s teacher, Ms. Kress; Palacios; Lewis; and Lewis’ supervisor. (*Id.* at 4–5, 8).

However, when Cox complained about defendants’ failure to adequately address L.’s bullying and threats, defendants retaliated against her. (*Id.* at 2). Specifically, plaintiffs allege

1 that Cox had to take leave under the Family and Medical Leave Act to care for M.C., and, while
2 CCSD approved her leave, CCSD interfered with the leave by penalizing Cox and by ultimately
3 forcing her to resign. (*Id.*).

4 Plaintiffs further allege that defendants knew L. posed a danger to other students. (*Id.*).
5 Nevertheless, defendants put M.C. in proximity to L., thereby exacerbating M.C.’s severe
6 emotional distress. (*Id.*). Plaintiffs allege that, by ignoring L.’s dangerous proclivities and
7 allowing M.C. to be placed near L., defendants caused M.C. to develop severe anxiety and
8 depression, which negatively affected her access to school. (*Id.*).

9 Finally, according to plaintiffs, CCSD knew that M.C. had mental health conditions, yet
10 it did not identify M.C. as a student with disabilities under Section 504 of the Rehabilitation Act
11 of 1973. (*Id.*). By refusing to provide M.C. with accommodations, plaintiffs allege that CCSD
12 forced M.C. to withdraw from two schools, Leavitt Middle School (“Leavitt”) and Nevada
13 Learning Academy (“NVLA”). (*Id.* at 2, 22–23).

14 Accordingly, plaintiffs, represented by Cox as an individual and Cox on behalf of her
15 daughter, M.C., bring, *inter alia*, two claims for relief against all defendants: one under 42
16 U.S.C. § 1983 (“Section 1983”) for First Amendment retaliation and one for violation of Section
17 504 of the Rehabilitation Act of 1973. (*Id.* at 15–17, 20–24). Defendants now move to dismiss
18 those two claims against all defendants, as well as to dismiss defendants Lewis and Palacios
19 from this matter in their official capacities. (ECF No. 7).¹

20 **II. Legal Standard**

21 Federal Rule of Civil Procedure 8 requires every pleading to contain a “short and plain
22 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8. Although
23 Rule 8 does not require detailed factual allegations, it does require more than “labels and
24 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*,
25 556 U.S. 662, 678 (2009) (citation omitted). In other words, a pleading must have *plausible*

26
27 ¹ Defendants do not, however, move to dismiss Lewis and Palacios in their individual
28 capacities. ECF No. 13 at 3 (“While Lewis and Palacios will remain as defendants in their
individual capacity for purposes of this Motion, this issue will be addressed in a subsequent
request for dismissal, as each individual is immune from prosecution based on the facts of this
case.”).

1 factual allegations that cover “all the material elements necessary to sustain recovery under *some*
2 viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citation omitted)
3 (emphasis in original); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104
4 (9th Cir. 2008).

5 The Supreme Court in *Iqbal* clarified the two-step approach to evaluate a complaint’s
6 legal sufficiency on a Rule 12(b)(6) motion to dismiss. First, the court must accept as true all
7 well-pleaded factual allegations and draw all reasonable inferences in the plaintiff’s favor. *Iqbal*,
8 556 U.S. at 678–79. Legal conclusions are not entitled to this assumption of truth. *Id.* Second,
9 the court must consider whether the well-pleaded factual allegations state a plausible claim for
10 relief. *Id.* at 679. A claim is facially plausible when the court can draw a reasonable inference
11 that the defendant is liable for the alleged misconduct. *Id.* at 678. When the allegations have not
12 crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550
13 U.S. at 570; *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

14 If the court grants a Rule 12(b)(6) motion to dismiss, it should grant leave to amend
15 unless the deficiencies cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957
16 F.2d 655, 658 (9th Cir. 1992). Under Federal Rule of Civil Procedure 15(a), the court should
17 “freely” grant leave to amend “when justice so requires,” and absent “undue delay, bad faith or
18 dilatory motive on the part of the movant, repeated failure to cure deficiencies by
19 amendments . . . undue prejudice to the opposing party . . . futility of the amendment, etc.”
20 *Foman v. Davis*, 371 U.S. 178, 182 (1962). The court should grant leave to amend “even if no
21 request to amend the pleading was made.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)
22 (en banc) (internal quotation marks omitted).

23 **III. Discussion**

24 **A. Defendants in their official capacities**

25 A suit against a municipal officer in his or her official capacity is “equivalent to a suit
26 against the entity.” *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff’s Dep’t*, 533
27 F.3d 780, 799 (9th Cir. 2008). Thus, a court may dismiss an individual named in his or her
28 official capacity when both the official and the entity are named in the suit. *Id.*

1 Plaintiffs acknowledge the claims against Lewis and Palacios in their official capacities
2 are treated the same as the claims against CCSD but contend there is no practical purpose to
3 dismiss them. (ECF No. 9 at 21). Defendants contend it is duplicative to retain defendants
4 Lewis and Palacios in their official capacities. (ECF No. 13 at 12). The court agrees with
5 defendants.

6 Thus, the court GRANTS defendants' motion to dismiss as to defendants Lewis and
7 Palacios in their official capacities and DISMISSES them from this matter.

8 **B. Section 1983 First Amendment retaliation claim**

9 To survive a motion to dismiss a Section 1983 claim, plaintiffs must establish that a
10 constitutional violation occurred. 42 U.S.C. § 1983. To establish the constitutional violation of
11 First Amendment retaliation, plaintiffs must establish an adverse action occurred and must
12 satisfy their burden under the *Pickering* test. *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th
13 Cir. 2003); *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009) (discussing *Pickering v. Bd. of*
14 *Educ.* 391 U.S. 563 (1968)).

15 For liability to attach to a municipality defendant, like CCSD, plaintiffs must show that
16 some policy, final policymaker, ratification by a policymaker, or de facto policy propagated the
17 constitutional violation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Lytle v. Carl*,
18 382 F.3d 978, 982, 987 (9th Cir. 2004); see *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127
19 (1988).

20 **1. Plaintiffs sufficiently allege that Cox experienced an adverse employment**
21 **action**

22 For there to be First Amendment retaliation, a plaintiff must have suffered an adverse
23 employment action. *Coszalter*, 320 F.3d at 977. An adverse employment action is any action
24 taken by the defendant that is “reasonably likely to deter plaintiffs from engaging in speech
25 protected under the First Amendment.” *Id.* (internal quotations omitted). The action “need not
26 be severe and it need not be of a certain kind.” *Id.* at 975.

27 The Ninth Circuit has held an employee sufficiently stated an adverse employment action
28 for a Section 1983 claim when his employer “subjected him to an investigation that threatened to
revoke his clinical privileges . . . refused to rescind his resignation, and filed an adverse action

1 report against him.” *Ulrich v. City & Ctny. of San Francisco*, 308 F.3d 968, 977 (9th Cir. 2002).
2 Similarly, the Ninth Circuit held a plaintiff’s allegations that he was “temporarily suspended
3 from his coaching duties and insulted by his employer” constituted an adverse employment
4 action. *Coszalter*, 320 F.3d at 975 (describing the facts that constituted an adverse employment
5 action in *Anderson v. Cen. Point Sch. Dist.*, 746 F.2d 505, 506 (9th Cir. 1984)).

6 Here, plaintiffs generally allege that, after Cox complained that defendants’ efforts to
7 address M.C.’s bullying were inadequate, Cox was reprimanded by Lewis to the point Cox
8 feared losing her job. (ECF No. 1 at 16).

9 Plaintiffs specifically allege that Lewis initiated disciplinary action against Cox in the
10 form of a disciplinary meeting. (ECF No. 1 at 8, 16). Cox’s disciplinary meeting ultimately
11 resulted in a notation in her file. (ECF No. 9 at 10). Further, despite Cox allegedly submitting
12 evidence supporting the high quality of her job performance, Cox’s performance evaluation
13 score was lower than other teachers’ scores. (*Id.* at 11).

14 At this motion to dismiss stage, the court accepts as true all well pled allegations and
15 draws all inferences in favor of the non-moving party. *Iqbal*, 556 U.S. at 678–79. Accepting as
16 true that Cox’s grievance was followed by a disciplinary meeting which concluded with an
17 unmerited notation on her file and that Cox feared losing her job as a result, the court holds—for
18 pleading purposes only—that Lewis and Palacios’ actions reasonably deterred Cox from
19 exercising her right to express protected speech.

20 Accordingly, plaintiffs allege sufficient plausible facts to draw a reasonable inference that
21 an adverse employment action occurred.

22 **2. Plaintiffs satisfy their *Pickering* burden to establish First Amendment
23 retaliation by Lewis and Palacios**

24 Once adverse action has been established, the court analyzes a claim for First
25 Amendment retaliation toward state employees using the Ninth Circuit’s *Pickering* test. Under
26 the *Pickering* test, the court considers the following five factors:

- 27 (1) whether the plaintiff spoke on a matter of public concern; (2) whether the
28 plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s
protected speech was a substantial or motivating factor in the adverse
employment action; (4) whether the state had an adequate justification for treating
the employee differently from other members of the general public; and (5)

1 whether the state would have taken the adverse employment action even absent
2 the protected speech.

3 *Eng*, 552 F.3d at 1070 (unraveling *Pickering*'s tangled history to articulate a sequential five-step
4 series of considerations).

5 The *Pickering* test is a burden-shifting test. If the plaintiff alleges facts sufficient to
6 satisfy steps one through three, the burden shifts to the defendant to satisfy step four by showing
7 "adequate justification," or, alternatively, satisfy step five by demonstrating that the defendant
8 would have taken the same action absent the protected conduct. *Id.* at 1071–72.

9 Therefore, to state a *prima facie* claim of First Amendment retaliation, plaintiffs must
10 allege facts sufficient to show i) Cox spoke on a matter of public concern, ii) Cox spoke as a
11 private citizen, not a public employee, and iii) Cox's protected speech was a substantial or
12 motivating factor in the adverse employment action. *See Thomas v. City of Beaverton*, 379 F.3d
13 802, 808 (9th Cir. 2004).

14 **i. Plaintiffs sufficiently allege that Cox spoke on a matter of public**
15 **concern, whether the public can trust CCSD to safeguard students**
16 **from harm at school**

17 Speech is a matter of public concern when it relates to "any matter of political, social, or
18 other concern to the community." *Eng*, 552 F.3d at 1070 (internal quotations omitted). "The
19 focus must be upon whether the public or community is likely to be truly interested in the
20 particular expression, or whether it is more properly viewed as essentially a private grievance."
21 *Roe v. City & Cnty. of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997). A public employee's
22 protected speech is protected whether expressed privately or publicly. *Givhan v. W. Line Consol.*
23 *Sch. Dist.*, 439 U.S. 410, 414 (1979).

24 Here, plaintiffs allege that Cox complained about Garehime's failure to investigate and
25 address the bullying subjected onto M.C. (ECF No. 1 at 16). Bullying is a matter of public
26 concern that the state of Nevada has specifically attempted to address in recent years. *See, e.g.*,
27 NEV. REV. STATS. 388.122,² 388.1321.³ Indeed, Nevada's legislature agrees with plaintiffs that a

28 ² "Bullying" defined.

1 school's administration should provide a bullying free learning environment for the benefit of the
2 public. *See* NEV. REV. STAT. 388.132.⁴ Cox's speech thus relates to a public social concern;
3 whether community members can entrust public schools and administrations to provide a safe
4 learning environment by taking action against bullying at school.

5 Although defendants urge the court to consider that Cox's intended audience was not the
6 public (ECF No. 7 at 11–12), her private speech is no less protected than if she expressed it
7 publicly. *Givhan*, 439 U.S. at 414. Thus, plaintiffs adequately allege that Cox's speech is
8 plausibly of interest to the community's social concern of bullying, and not exclusively a private
9 grievance.

10 Accordingly, plaintiffs satisfy part one of the *Pickering* test.

11 **ii. Plaintiffs sufficiently allege that Cox spoke as a private citizen, not a
12 public employee**

13 For step two, Cox's speech must have been made as a private citizen rather than as a
14 public employee. *Eng*, 552 F.3d at 1070. Plaintiffs allege that Cox's speech was made as a
15 parent, not as a teacher. (ECF No. 1 at 16). Defendants do not dispute that contention. (*See*
16 ECF No. 7 at 8–9). Therefore, plaintiffs sufficiently allege that Cox's speech was made as a
17 private citizen, not a public employee.

18 Accordingly, plaintiffs satisfy part two of the *Pickering* test.

19 **iii. Plaintiffs sufficiently allege that Cox's speech was a substantial or
20 motivating factor in the adverse action**

21 Next, plaintiffs must allege that Cox's protected speech was a substantial or motivating
22 factor in the adverse employment action. Plaintiffs can show such a connection by introducing
23 evidence of one of the following: (1) "proximity in time" between the protected speech and the

24 ³ "The Legislature hereby declares that the members of a governing body and all
25 administrators and teachers have a duty to create and provide a safe and respectful learning
26 environment for all pupils that is free of bullying" NEV. REV. STAT. 388.1321(1).

27 ⁴ "All administrators, teachers and other personnel of the school districts and schools in
28 this State [will] demonstrate appropriate and professional behavior . . . by refusing to tolerate
bullying . . . and by taking immediate action to protect a victim or target of bullying . . . [when]
being notified that bullying . . . is occurring or has occurred." NEV. REV. STAT. 388.132(6)(b).
"By declaring this mandate . . . the Legislature is . . . requiring that pupils be free from physical,
emotional or mental abuse while at school and that pupils be provided with an environment that
allows them to learn." NEV. REV. STAT. 388.132(7).

1 adverse employment action, “from which a jury logically could infer . . . the [adverse
2 employment action was taken] in retaliation for [the] speech;” (2) her employer, CCSD,
3 “expressed opposition” to the speech; or (3) the reasons CCSD provided for the adverse
4 employment action “were false and pre-textual.” *Coszalter*, 320 F.3d at 977 (citing *Keyser v.*
5 *Sacramento City Unified Sch. Dist.*, 265 F.3d 741 (9th Cir. 2001)).

6 Here, plaintiffs allege that, on the day Cox complained about Lewis’ failure to address
7 M.C.’s bullying, Lewis yelled at Cox, reprimanded her, and told her she needed to “watch [her]
8 attitude.” (ECF No. 1 at 7). Plaintiffs further allege that CCSD initiated disciplinary action, in
9 the form of a disciplinary meeting, against Cox the following day. (*Id.* at 7–8). Next, plaintiffs
10 allege that Cox’s performance evaluation echoed statements from her disciplinary meeting. (*Id.*
11 at 11). Specifically, that Cox’s “Area for Growth” stated that she needed to “model integrity in
12 all interactions.” (*Id.*). Finally, plaintiffs allege that Palacios refused to clarify the meaning of
13 statements in Cox’s evaluation and refused to provide Cox with a copy of the evaluation. (*Id.*).

14 Drawing all inferences in favor of the non-moving party, plaintiffs have sufficiently
15 alleged that Cox’s disciplinary action was taken in retaliation for her speech. Therefore,
16 plaintiffs have sufficiently pled that Cox’s speech was a motivating or substantial factor in the
17 adverse employment action taken against her.

18 Accordingly, plaintiffs satisfy part three of the *Pickering* test.

19 Plaintiffs have thus established a *prima facie* First Amendment retaliation case, meeting
20 their burden to show a constitutional violation at the motion to dismiss stage. As Lewis and
21 Palacios in their individual capacities are not at issue in this motion (*See* ECF No. 13 at 3), the
22 court now determines whether liability for this violation may attach to CCSD as a municipality.

23 **3. Municipal liability may not attach to CCSD**

24 To assert a 42 U.S.C. § 1983 (“Section 1983”) constitutional violation claim against a
25 municipality, a plaintiff must sufficiently allege that the complained of constitutional violation
26 resulted from one of the following: (i) a municipal “policy, practice, or custom,” *see Dougherty*
27 *v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (citing *Monell*, 436 U.S. at 694); (ii) an

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1 employee “acting as a final policymaker,” *Lytle*, 382 F.3d at 982; (iii) the ratification of a final
2 policymaker, *Id.* at 987; or, (iv) a de facto policy, *see Praprotnik*, 485 U.S. at 127.

3 **i. Plaintiffs fail to show CCSD had a policy, practice, or custom of**
4 **retaliation**

5 To state the constitutional violation resulted from CCSD’s “policy, practice, or custom,”
6 Plaintiffs must allege facts sufficient to establish CCSD’s liability under *Monell*. *See Dougherty*,
7 654 F.3d at 900. Thus, plaintiffs must allege that: (1) Cox was deprived of a constitutional right;
8 (2) “[CCSD] had a policy;” (3) the policy “amount[ed] to deliberate indifference to [Cox’s]
9 constitutional right;” and (4) the policy was the “moving force behind the constitutional
10 violation.” *Id.*

11 As plaintiffs satisfy the *Pickering* First Amendment retaliation test, plaintiffs sufficiently
12 allege that Cox was deprived of a constitutional right. Further, plaintiffs allege a “policy” in that
13 CCSD has a “pattern and practice of permitting principals to retaliate against staff and parents
14 who complain.” (ECF No. 1 at 17). However, this allegation is merely a bare recitation of the
15 element that the municipality has a policy, and the court strikes this allegation from
16 consideration. *See Iqbal*, 556 U.S. at 678–79

17 Additionally, plaintiffs allege that “[n]umerous other staff have complained about
18 CCSD’s pattern and practice of retaliation against staff and parents who complain.” (*Id.*).
19 Plaintiffs also allege that “[o]ther staff and parents who have complained have experienced
20 retaliation and have found that CCSD took no action in response to reports of retaliation.” (*Id.*).
21 However, plaintiffs fail to otherwise allege facts sufficient to draw a reasonable inference that
22 any such policy officially existed.

23 Accordingly, plaintiffs fail to show CCSD had a policy, practice, or custom of retaliation.

24 **ii. Plaintiffs fail to show that Lewis was a final policymaker**

25 Liability may also attach to CCSD if the alleged constitutional violation resulted from a
26 CCSD employee who was “acting as a final policymaker.” *Lytle*, 382 F.3d at 982. In a school
27 district context, a final policymaker is someone “in a position of authority such that a final
28 decision by that person may appropriately be attributed to the District.” *Id.* While certain
employees may act as de facto policymakers, it is typically not justified to assume that

1 “municipal policymaking authority lies somewhere else than where the applicable law purports
2 to put it.” *Id.* at 982–83.

3 Here, plaintiffs allege that Lewis, Garehime’s principal, was a final policymaker because
4 CCSD gave him authority to initiate investigatory review and complete evaluations. (ECF No. 9
5 at 16). Plaintiffs also allege that no action was taken when Cox complained about the retaliation
6 to Mr. Lewis’ supervisor, CCSD investigators, CCSD’s superintendent, and a CCSD trustee.
7 (ECF No. 9 at 17; ECF No. 1 at 8, 9, 12, 14, 17). Further, plaintiffs allegedly received
8 confirmation that one supervisor, Ms. Hembrook “could not fully investigate the retaliation.”
9 (ECF No. 1 at 17).

10 Notwithstanding those facts, plaintiffs fail to show why Lewis, as a school principal,
11 would have de facto final policymaking authority for CCSD. Even drawing all inferences in
12 favor of plaintiffs, the allegations of Lewis’ ability to investigate and evaluate his own employee
13 are insufficient to establish Lewis had a “final” policymaker role within CCSD. That Lewis
14 required CCSD’s grant of authority to conduct the investigation is evident of his subservient role
15 within CCSD, not a final policymaker role.

16 Accordingly, plaintiffs fail to show that Lewis was a final policymaker.

17 **iii. Plaintiffs fail to show a final policymaker ratified a constitutional**
18 **violation**

19 Plaintiffs can also establish CCSD’s liability if the complained of constitutional violation
20 resulted from a CCSD employee’s actions and those actions were ratified by a final policymaker.
21 *Lytle*, 382 F.3d at 987. To establish ratification, plaintiffs must show that a policymaker had
22 “knowledge of the constitutional violation and actually approve[d] of it.” *Id.* That the
23 policymaker simply failed to overrule its employee’s actions is insufficient to establish
24 ratification. *Id.*; *Weisbuch v. Cnty. of Los Angeles*, 119 F.3d 778, 781–82 (9th Cir. 1997);
25 *Christie v. Iopa*, 176 F.3d 1231, 1239–40 (9th Cir. 1999).

26 Plaintiffs fail to sufficiently allege that any CCSD policymaker ratified Lewis’ actions.
27 Plaintiffs do allege that Cox notified CCSD leadership, including the superintendent, that she
28 was being retaliated against because of her speech. However, plaintiffs do not allege facts

1 sufficient to support a reasonable inference that CCSD leadership approved of Cox being
2 retaliated against for her speech.

3 Additionally, plaintiffs' mere assertion that CCSD's leadership failed to overrule Lewis'
4 actions is insufficient to support the inference that a final policymaker approved of the
5 constitutional violation. *See, e.g., Lytle*, 382 F.3d at 987; *Weisbuch*, 119 F.3d at 781–82;
6 *Christie*, 176 F.3d at 1239–40.

7 Accordingly, plaintiffs fail to show that Lewis' decision was ratified by a final
8 policymaker.

9 **iv. Plaintiffs fail to show that a de facto policy of retaliation existed**

10 In addition, plaintiffs can establish municipal liability if they sufficiently allege that
11 CCSD had a de facto policy that resulted in the constitutional violation. *Praprotnik*, 485 U.S. at
12 127. A de facto policy is a “widespread practice that, although not authorized by written law or
13 express municipal policy, is so permanent and well-settled as to constitute a custom or usage
14 with the force of law.” *Id.* (internal quotation marks omitted). “[I]solated or sporadic incidents”
15 are insufficient to enable municipal liability.” *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.
16 1996). Rather, plaintiffs' theory must be founded upon practices of “sufficient duration,
17 frequency and consistency that the conduct has become a traditional method of carrying out
18 policy.” *Id.*

19 As previously discussed, plaintiffs allege that “[n]umerous other staff have complained
20 about CCSD's pattern and practice of retaliation against staff and parents who complain.” (ECF
21 No. 1 at 17). Plaintiffs also allege that “[o]ther staff and parents who have complained have
22 experienced retaliation and have found that CCSD took no action in response to reports of
23 retaliation.” (*Id.*).

24 Plaintiffs' allegation that “numerous other staff have complained plausibly states CCSD's
25 policy of retaliation was frequent and consistent. (ECF No. 1 at 17). However, plaintiffs fail to
26 provide any factual specificity to support a reasonable inference that CCSD has a de facto policy
27 “with the force of law” to permit principals to retaliate against staff and parents who complain.
28 *Praprotnik*, 485 U.S. at 127.

1 Accordingly, plaintiffs fail to show a de facto policy existed.

2 As plaintiffs fail to show any sort of policy existed, the court need not determine whether
3 a non-existent policy was deliberately indifferent or the moving force behind the adverse action.

4 Therefore, defendants’ motion to dismiss is GRANTED as to plaintiffs’ Section 1983
5 First Amendment retaliation claim against CCSD.

6 **C. Section 504 Rehabilitation Act of 1973/Title II of the Americans with Disabilities Act**

7 Before considering the merits of plaintiffs’ Section 504 Rehabilitation Act claim, the
8 court must determine whether plaintiffs’ claim is properly brought before this court at this time.

9 Pursuant to the Individuals with Disabilities Education Act (“IDEA”), plaintiffs must
10 exhaust all administrative remedies under IDEA before seeking judicial relief for M.C. being
11 denied a “free appropriate public education” (“FAPE”). 20 U.S.C. § 1415(l); *Fry v. Napoleon*
12 *Cnty. Schs.*, 137 S. Ct. 743, 754 (2017).

13 To determine whether a suit seeks relief for FAPE, “a court should look to the substance,
14 or gravamen, of the plaintiff’s complaint.” *Id.* at 752. Whether plaintiffs use particular labels or
15 terms to name FAPE is unimportant. *Id.* at 755.

16 Two hypothetical questions can inform whether the gravamen of the complaint concerns
17 FAPE. *Id.* at 756. First, could plaintiffs have brought “essentially the same claim if the alleged
18 conduct had occurred at a public facility that was *not* a school—say, a public theater or library?”
19 *Id.* (emphasis in original). Second, “could an *adult* at the school—say, an employee or visitor—
20 have pressed essentially the same grievance?” *Id.* (emphasis in original). The gravamen of the
21 complaint likely concerns FAPE when the hypothetical questions are answered in the negative.
22 *Id.*

23 Here, plaintiffs fail to state that their claim is immune from the requirement to exhaust
24 administrative remedies under IDEA because they fail to allege any facts suggesting they are
25 seeking relief for something other than the denial of FAPE.

26 Plaintiffs allege that M.C. had two mental health conditions, anxiety and depression.
27 (ECF No. 1 at 21). Plaintiffs further allege that Cox had M.C. evaluated for a Section 504 plan
28 and M.C. was found to be an eligible student with a disability under Section 504. (*Id.*).

1 Thereafter, CCSD developed a Section 504 plan for M.C. to provide “accommodations of extra
2 time on homework and assignments of up to [two] days, as well as home support in the event of
3 more than [two] days of absences.” (ECF No. 1 at 21; ECF No. 7 at 5).

4 Plaintiffs further allege that CCSD failed to provide accommodations and modifications
5 it knew M.C. required because of L.’s harassment and bullying. (ECF No. 1 at 24). Specifically,
6 Plaintiffs allege CCSD so failed when it did the following: denied M.C. additional time to
7 complete assignments, denied M.C. a modification to the attendance policy or class scheduling to
8 allow her to reenter school gradually, withdrew M.C. from Leavitt and told her the only way she
9 could continue was to attend full time, and prevented M.C. from continuing at NVLA. (*Id.*).
10 Additionally, plaintiffs allege M.C. was denied equal access to CCSD’s programs and education
11 because CCSD failed to accommodate M.C. (*Id.*).

12 Nothing within those allegations suggests that plaintiffs could have brought this claim in
13 another public facility or that an adult could have brought this claim. The remainder of
14 Plaintiffs’ complaint is similarly deficient of such plausible factual allegations. Plaintiffs’ sole
15 contention that “[t]his is a claim that could have been brought in another setting and by an adult
16 with a disability,” is merely a threadbare recitation of the legal inquiry that the court strikes from
17 consideration. (ECF No. 9 at 20).

18 Thus, plaintiffs fail to allege facts that plausibly establish the gravamen of the complaint
19 is for anything other than denial of FAPE. Indeed, the facts alleged strongly suggest a claim for
20 denial of FAPE. Therefore, plaintiffs have not provided evidence of administrative exhaustion
21 for this claim, this claim must first be heard by an administrative agency before the court can
22 consider its merits.

23 Accordingly, defendants’ motion to dismiss plaintiffs’ third claim for relief is
24 GRANTED.


25 **IV. Conclusion**

26 Accordingly,

27 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants’ motion to
28 dismiss (ECF No. 7), be, and the same hereby is, GRANTED. Defendants Lewis and Palacios,

1 in their official capacities, are DISMISSED from this matter. Plaintiffs' First Amendment
2 retaliation claim is DISMISSED against defendant CCSD, without prejudice. Plaintiffs' Section
3 504 claim is DISMISSED, without prejudice.

4 DATED September 23, 2021.

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7 UNITED STATES DISTRICT JUDGE

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