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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Akelia Adger,

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CIV-10-2118-PHX-MHB

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Plaintiff,

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ORDER

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vs.

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Mary Beyda; Roosevelt School District
#66; Benjamin Bassey,

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Defendants.

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Pending before the Court are Plaintiff’s Motion to Remand (Doc. 8) and Defendants’

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Motion to Dismiss (Doc. 14). After considering the arguments raised by the parties in their

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briefing, the Court now issues the following ruling.¹

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BACKGROUND

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This lawsuit arises from Plaintiff Akelia Adger’s allegation that Defendant Benjamin

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Bassey assaulted her while in school and on school property on October 12, 2009. Plaintiff

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filed a Complaint against Defendants Mary Beyda (“Beyda”), Roosevelt School District #66

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(“School District”), and Benjamin Bassey (“Bassey”) (named in Plaintiff’s Complaint as

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John Doe Bassey), in the Maricopa County Superior Court on September 10, 2010. In her

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Complaint, Plaintiff alleges a violation of her civil rights pursuant to 42 U.S.C. § 1983, the

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¹ Plaintiff’s request for oral argument (Doc. 9) will be denied because the parties have fully briefed the issues and oral argument will not aid in the Court’s decision. See Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998); Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp., 933 F.2d 724, 729 (9th Cir. 1991).

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1 United States Constitution, and Arizona constitutional and statutory provisions. Plaintiff also
2 alleges other numerous state law claims against Defendants including negligence, assault,
3 and intentional infliction of emotional distress. Defendants, subsequently, removed the
4 action to this Court on October 4, 2010.

5 DISCUSSION

6 A. Motion to Remand

7 Despite including a 42 U.S.C. § 1983 claim in her Complaint, Plaintiff has filed a
8 motion to remand this case to state court. Plaintiff concedes that she pleaded a federal cause
9 of action, but argues that the “remedial provision of § 1983” fails to confer jurisdiction to this
10 Court. The Court finds this argument unpersuasive. 28 U.S.C. § 1441(b) provides that any
11 action over which a federal court would have original federal question jurisdiction may be
12 removed. Count 4 of Plaintiff’s Complaint alleges, *inter alia*, a violation of civil rights
13 pursuant to 42 U.S.C. § 1983 and the United States Constitution. The Court has original
14 jurisdiction of § 1983 claims, see Lee v. City of Beaumont, 12 F.3d 933, 935 (9th Cir. 1993)
15 (overruled in part on other grounds), and over all claims that arise under the Constitution,
16 laws, or treaties of the United States, see 28 U.S.C. § 1331.

17 Because the Court has original federal question jurisdiction over the § 1983 claim,
18 Defendants properly removed this case. See 28 U.S.C. § 1441(a). Further, under 28 U.S.C.
19 § 1367(a), the Court may exercise supplemental jurisdiction over Plaintiff’s state law claims.
20 The Court finds no reason to decline to exercise its supplemental jurisdiction because all of
21 the claims derive from the same set of facts and do not involve complex or novel issues of
22 Arizona law.

23 Because the Court has jurisdiction over this case, the Court will deny Plaintiff’s
24 Motion to Remand (Doc. 8).

25 B. Motion to Dismiss

26 In their Motion to Dismiss, Defendants contend that (1) Plaintiff’s state law claims
27 against the School District and Bassey should be dismissed for failure to comply with
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1 Arizona’s notice of claim statute; (2) Plaintiff has failed to state a § 1983 claim against the
2 School District or Beyda; and (3) Plaintiff has failed to state a claim for any state law
3 violation against Beyda.²

4 The Federal Rules of Civil Procedure require a “short and plain statement of the claim
5 showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2); Gilligan v. Jamco Dev.
6 Corp., 108 F.3d 246, 248-49 (9th Cir. 1997). Thus, dismissal for insufficiency of a complaint
7 is proper if the complaint fails to state a claim on its face. See Lucas v. Bechtel Corp., 633
8 F.2d 757, 759 (9th Cir. 1980). A Rule 12(b)(6) dismissal for failure to state a claim can be
9 based on either: (1) the lack of a cognizable legal theory; or (2) insufficient facts to support
10 a cognizable legal claim. See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir.
11 1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

12 In determining whether an asserted claim can be sustained, all allegations of material
13 fact are taken as true and construed in the light most favorable to the non-moving party. See
14 Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994). As for the factual
15 allegations, the Supreme Court has explained that they “must be enough to raise a right to
16 relief above the speculative level.” Bell Atl. Corp. v. Twombly, --- U.S. ----, ----, 127 S.Ct.
17 1955, 1965, 167 L.Ed.2d 929 (2007). In ruling on a motion to dismiss, the issue is not
18 whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer
19 evidence to support the claims. See Gilligan, 108 F.3d at 249.

20 **1. Plaintiff’s state law claims against the School District and Bassey**

21 Defendants have moved to dismiss the state law claims asserted against the School
22 District and Bassey claiming that Plaintiff has failed to comply with Arizona’s notice of
23 claim statute. Defendants contend that Plaintiff was required to file a notice of claim with
24 each of these Defendants, and that her failure to do so bars her state law claims against them.

26 ² Defendants also allege that Plaintiff has failed to properly serve the Complaint. The
27 Court will address this portion of Defendants’ Motion at the conclusion of this Order.

1 “A claimant who asserts that a public employee’s conduct giving rise to a claim for
2 damages was committed within the course and scope of employment must give notice of the
3 claim to *both* the employee individually and to his employer.” See Crum v. Superior Court,
4 922 P.2d 316, 317 (Ariz. Ct. App. 1996) (citing Johnson v. Superior Court, 763 P.2d 1382,
5 1384 (Ariz. Ct. App. 1988)). The statute authorizing claims against public employees
6 provides, in relevant part:

7 Persons who have claims against a public entity or a public employee shall file
8 claims with the person or persons authorized to accept service for the public
9 entity or public employee as set forth in the Arizona rules of civil procedure
10 within one hundred eighty days after the cause of action accrues. The claim
11 shall contain facts sufficient to permit the public entity or public employee to
12 understand the basis upon which liability is claimed. The claim shall also
13 contain a specific amount for which the claim can be settled and the facts
14 supporting that amount. Any claim which is not filed within one hundred
15 eighty days after the cause of action accrues is barred and no action may be
16 maintained thereon.

17 A.R.S. § 12-821.01(A). These statutory requirements serve “to allow the public entity to
18 investigate and assess liability, to permit the possibility of settlement prior to litigation, and
19 to assist the public entity in financial planning and budgeting.” Falcon ex rel. Sandoval v.
20 Maricopa County, 144 P.3d 1254, 1256 (Ariz. 2006) (quoting Martineau v. Maricopa
21 County, 86 P.3d 912, 915-16 (Ariz. Ct. App. 2004)). Claims that do not comply with the
22 statute are barred and no action may be maintained. See A.R.S. § 12-821.01.

23 A failure to exhaust non-judicial remedies should be treated as a matter in abatement,
24 which is subject to an unenumerated Rule 12(b) motion to dismiss. See Wyatt v. Terhune,
25 315 F.3d 1108, 1119 (9th Cir. 2003). In deciding a motion to dismiss for failure to exhaust
26 non-judicial remedies, the court may look beyond the pleadings and decide disputed issues
27 of fact. See id. at 1119-20.

28 In support of their Motion to Dismiss, Defendants have attached the “Notice of Claim
concerning Ms. Akelia Adger,” which was specifically addressed to “Mary Beyda” as
Superintendent of Roosevelt School District #66 and served upon Beyda’s assistant, Raquel
Robles (“Robles”). Defendants also attached Robles’ affidavit stating that (1) she received

1 the “Notice of Claim concerning Ms. Akelia Adger” addressed to Beyda; (2) she did not
2 receive a notice of claim addressed to the School District or Bassey; and (3) she is not
3 authorized to accept service on behalf of either the School District or Bassey. Lastly,
4 Defendants attached the affidavit of Beyda stating that she is not authorized to accept service
5 of behalf of the School District.

6 In response, Plaintiff asserts that she “timely and properly served her Notice of Claim”
7 on April 8, 2010, by serving all parties. Plaintiff directs the Court to an affidavit of service
8 – but has failed to provide any such document to Defendants or the Court.

9 Rule 4.1(i) of the Arizona Rules of Civil Procedure provides that service upon the
10 School District be effected by serving legal papers upon the chief executive officer, the
11 secretary, or clerk of the Board. For the purposes of Rule 4.1(i), the governing board is the
12 chief executive officer of the School District and to properly effect service upon the chief
13 executive officer of the School District, each member of the governing board must be
14 served.³ Further, Rule 4.1(d) provides that service upon an individual be effected by serving
15 legal papers upon the individual in person or at their place of abode with some person of
16 suitable age and discretion then residing therein.

17 The evidence before the Court demonstrates that the only person served with any legal
18 papers⁴ was Robles, Beyda’s assistant – not each member of the governing board and not
19 Bassey. Robles is not authorized to accept service on behalf of the School District or Bassey.
20 Plaintiff’s conclusory statement that she did “perfect service” of her Notice of Claim lacks
21 support.

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25 ³ Falcon, 144 P.3d 1254; Batty v. Glendale Union High School District No. 205, 212
26 P.3d 930 (Ariz. Ct. App. 2009).

27 ⁴ Robles was served the Notice of Claim, as well as the Complaint, Summons, Civil
28 Coversheet, Verification, and Certification of Arbitration.

1 Thus, Plaintiff having failed to comply with Arizona's notice of claim statute as to the
2 School District and Bassey, the Court will grant Defendants' Motion to Dismiss with respect
3 to the state law claims against these Defendants.

4 **2. Plaintiff's § 1983 claims against the School District and Beyda**

5 To state a claim under 42 U.S.C. § 1983, "a plaintiff must show (1) that the conduct
6 complained of was committed by a person acting under color of state law; and (2) that the
7 conduct deprived the plaintiff of a federal constitutional or statutory right." Wood v.
8 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989)). "In order for a person acting under color of
9 state law to be liable under section 1983 there must be a showing of personal participation
10 in the alleged rights deprivation: there is no respondeat superior liability under section 1983."
11 Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

12 To succeed on a § 1983 cause of action against the School District, Plaintiff must
13 allege that she was the victim of some official act of the School District, that the violation
14 resulted from the enforcement of some official policy, custom, or practice of the School
15 District, or that the deprivation was the product of deliberate indifference to the need for
16 training. See, e.g., Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 694-95
17 (1978). As the Supreme Court has summarized, a political subdivision "cannot be held liable
18 unless a ... policy or custom caused the constitutional injury." Leatherman v. Tarrant
19 County Narcotics Intell. & Coordination Unit, 507 U.S. 163, 166 (1993); see also McGrath
20 v. Scott, 250 F.Supp.2d 1218, 1222-23 (D. Ariz. 2003) ("municipal liability depends upon
21 enforcement by individuals of a municipal policy, practice, or decision of a policymaker that
22 causes the violation of the Plaintiff[']s federally protected rights").

23 Plaintiff makes no such allegation here. She does not claim that the alleged
24 deprivation was the product of any official act or policy by the School District. She does not
25 allege that the denial of rights resulted from the enforcement of any practice or custom of the
26 School District. Nor does she allege that the supposed deprivation was caused by the School
27 District's own deliberate indifference to some alleged need for training in some area. The
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1 Court finds that Plaintiff’s Complaint fails to allege any wrongful action or inaction by the
2 School District. Therefore, Plaintiff fails to state a viable claim against the School District
3 pursuant to § 1983.⁵

4 As to Beyda, “[s]upervisory liability is imposed against a supervisory official in his
5 individual capacity for his own culpable action or inaction in the training, supervision, or
6 control of his subordinates, for his acquiescence in the constitutional deprivations of which
7 the complaint is made, or for conduct that showed a reckless or callous indifference to the
8 rights of others.” Menotti v. City of Seattle, 409 F.3d 1113, 1149 (9th Cir. 2005) (quoting
9 Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991)).

10 Plaintiff, again, makes no such allegation. The Complaint does not assert any
11 “personal participation” by Beyda in the alleged deprivation of rights, and Plaintiff fails to
12 plead any facts that would suggest that Beyda took part in the denial of a federal,
13 constitutional or statutory right. Further, Plaintiff fails to state that Beyda has demonstrated
14 a callous indifference towards Plaintiff’s rights. Thus, Plaintiff fails to state a claim against
15 Beyda pursuant to § 1983.

16 Accordingly, the Court will grant Defendants’ Motion to Dismiss as to Plaintiff’s
17 claims alleged pursuant to § 1983 against the School District and Beyda.

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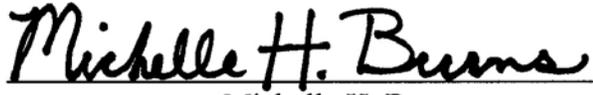
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23 ⁵ Plaintiff fails to respond to Defendants’ argument regarding her § 1983 claim
24 against the School District except to state that Defendants have made contradictory assertions
25 in their Motion to Dismiss and their Response to Plaintiff’s Motion to Remand. Plaintiff
26 apparently finds it incongruous that Defendants argue that Plaintiff has failed to state a claim
27 pursuant to § 1983 in their Motion to Dismiss, and “state just the opposite in their Response
28 to the Plaintiff’s Motion to Remand.” The Court, however, has subject matter jurisdiction
to decide a federal claim on the merits – even if the claim is unsuccessful. See, e.g., Keniston
v. Roberts, 717 F.2d 1295, 1298 (9th Cir. 1983).

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IT IS FURTHER ORDERED that Bassey shall file an answer to Plaintiff's Complaint no later than twenty (20) days from the date of this Order.

DATED this 9th day of June, 2011.



Michelle H. Burns
United States Magistrate Judge