

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

| | | |
|-------------------------------|---|-------------------------------------|
| EDWARD L. KEMPER, |) | |
| |) | |
| Plaintiff, |) | 2:08-cv-02777-GEB-DAD |
| |) | |
| v. |) | <u>ORDER DENYING IN PART AND</u> |
| |) | <u>GRANTING IN PART DEFENDANT'S</u> |
| FOLSOM CORDOVA UNIFIED SCHOOL |) | <u>MOTION TO DISMISS</u> |
| DISTRICT, a public entity, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

Defendant moves for an order dismissing with prejudice Plaintiff's Second Amended Complaint ("SAC") under Federal Rule of Civil Procedure ("Rule") 12(b)(6), and striking Plaintiff's request for a self-evaluation plan and for punitive damages under Rule 12(f). Plaintiff argues the motion was not timely filed, but fails to show it is untimely.

I. LEGAL STANDARDS

When deciding a Rule 12(b)(6) dismissal motion, the Court must "accept[] as true all facts alleged in the complaint, and draw[] all reasonable inferences in favor of the plaintiff." al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009). Factual allegations are required to be sufficient to state a claim. However, mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient

1 facts under a cognizable legal theory.” Robertson v. Dean Witter
2 Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

3 Defendant attaches to its motion Plaintiff’s “Claim for
4 Damages,” which was submitted to Defendant on September 9, 2008, and
5 concerns alleged architectural barriers at Folsom Middle School, Gold
6 Ridge Elementary School, Sutter Middle School, and the Folsom Cordova
7 Unified School District (“FCUSD”) administrative offices. (Def’s Ex.
8 A). Plaintiff references this document in the SAC, where he alleges
9 he “has complied with the California Government Claims Act” by
10 submitting a Claim for Damages and that this claim “was rejected by
11 operation of law on October 23, 2008.” (SAC ¶¶ 40, 47.)

12 Generally, when deciding a dismissal motion only the
13 complaint is considered. Knieval v. ESPN, 393 F.3d 1068, 1076 (9th
14 Cir. 2005) (internal citations and quotations omitted). However, the
15 incorporation by reference doctrine allows the Court to consider
16 “documents, whose contents are alleged in a complaint and whose
17 authenticity no party questions, but which are not physically attached
18 to the [plaintiff's] pleading.” Since the authenticity of the “Claim
19 for Damages” attached to Defendant’s motion is not disputed and this
20 document is referenced in the SAC, it is considered under the
21 incorporation by reference doctrine. Considering this document does
22 not convert the dismissal motion into a motion for summary judgment.
23 Id.

24 Further, Rule 12(f) provides in relevant part that “[t]he
25 Court may strike from a pleading any insufficient . . . matter.” Fed.
26 R. Civ. P. 12(f).

1 **II. FACTUAL ALLEGATIONS**

2 Plaintiff alleges federal claims against Defendant under
3 Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §
4 12132 ("Title II"), and Section 504 of the Rehabilitation Act, 29
5 U.S.C. § 794 ("Section 504"), and state claims under the California
6 Government Code § 11135, the Disabled Persons Act, Cal. Civ. Code § 54
7 ("DPA"), and the Unruh California Civil Rights Act, Cal. Civ. Code
8 § 51 ("Unruh Act"). Specifically, Plaintiff alleges that because of
9 architectural barriers he encountered at Defendant's public schools,
10 campuses, facilities, public buildings, and in public rights of way,
11 he has been denied "the full, equal, and meaningful use," of
12 Defendant's facilities offered to the public as a program, service, or
13 activity on the basis of his disability. (Id. ¶¶ 30, 31, 35, 36, 41,
14 42.) Plaintiff also alleges he has been denied the benefit of the
15 following specific "programs, services, and activities" Defendant
16 offered: "Back to School Night, choir performances, Open House,
17 parent-teacher conferences, sporting events and related public
18 functions," and the invitation, as a step-parent, "to enter
19 [Defendant's] school campuses to drop off and pick up [his] school-age
20 children." (Id. ¶¶ 14, 22.)

21 Plaintiff seeks declaratory and injunctive relief under
22 federal and state law, and statutory and compensatory damages under
23 the DPA and the Unruh Act. Plaintiff's Prayer for Relief includes the
24 equitable request that Defendant be enjoined "to develop plans and
25 implement all actions necessary to bring [Defendant] into full
26 compliance with the requirements of Title II . . . [and] Section 504
27 . . ." (SAC Prayer for Relief.)
28

III. DISCUSSION

1
2 Since Defendant has not provided clear authority justifying
3 its motion to dismiss several of Plaintiff's claims, that portion of
4 the motion is denied without further discussion.

5 Defendant's argument that its motion should be granted
6 because Plaintiff did not request an accommodation has not been shown
7 applicable to any of Plaintiff's claims. Therefore, this portion of
8 Defendant's dismissal motion is also denied.

9 However, Defendant's argument that Plaintiff did not exhaust
10 applicable administrative remedies under California Government Code
11 Section 901 for "all claims for money or damages against a local
12 public entity" has merit. (Mot. 4:12-14.) Specifically, Defendant
13 argues Plaintiff's "Claim for Damages," which Defendant received in
14 September 2008 only concerns Folsom High School, Folsom Middle School,
15 Gold Ridge Elementary School, Sutter Middle School, and the FCUSD
16 administrative offices. (Id. 4:4-5:3.) Defendant argues
17 consequently the incidents Plaintiff alleges to have occurred after
18 September 2008 are barred, and Plaintiff cannot seek damages for the
19 following: the Back to School Night in August 2009, the choir
20 performance at CSU Sacramento in March 2009 and new claims involving
21 Vista Del Lago High School. (Id.)

22 Plaintiff does not dispute Defendant's position. Therefore,
23 these damage claims are dismissed since Plaintiff failed to exhaust
24 administrative remedies applicable to these claims.

25 Defendant also argues Plaintiff's claim under Title II, in
26 which Plaintiff seeks to enforce a "Self-Evaluation Plan" under 28
27 C.F.R. 35.105 or a "Transition Plan" under 28 C.F.R. 35.150(d), should
28 be stricken because there is no private cause of action under these

1 regulations. (Mot. 6:26-8:19.) Plaintiff counters he is not asserting
2 a private right of action to enforce a "Self-Evaluation Plan" or
3 "Transition Plan" under Title II. (Opp'n 15:4-11.) Therefore, the
4 words in the SAC "to develop plans" are stricken from Plaintiff's
5 Prayer for Relief.

6 Defendant also seeks to have stricken Plaintiff's request
7 for exemplary or punitive damages under the DPA and Unruh Act. Since
8 a public entity is not liable for punitive damages, Defendant's motion
9 to strike is granted. See CAL. GOV'T CODE § 818 (stating a public entity
10 is not liable for punitive damages).

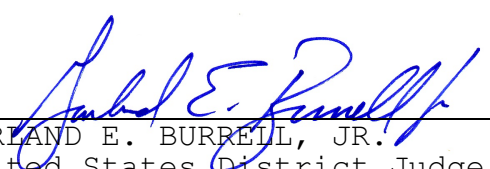
11 **V. Leave to Amend**

12 Since the portions of Plaintiff's SAC that were dismissed
13 have not been shown likely to be remedied with further factual
14 allegations, Plaintiff is not granted leave to amend. Abagninin v.
15 AMVAC Chemical Corp., 545 F.3d 733, 742 (9th Cir. 2008) (stating leave
16 to amend could be denied if "a court determines that allegation of
17 other facts consistent with the challenged pleading could not possibly
18 cure the deficiency").

19 **VI. CONCLUSION**

20 For the stated reasons, Defendant's motion to dismiss is
21 granted and denied in part, and Defendant's motion to strike is
22 granted.

23 Dated: March 29, 2010

24
25 
26 _____
27 GARLAND E. BURRELL, JR.
28 United States District Judge