



1 Plaintiffs' claims are based on physical abuse Plaintiff  
2 Allen Elseth ("Allen") allegedly suffered at B.T. Collins, a juvenile  
3 hall in Sacramento, California. Plaintiffs Roger Arden Elseth and  
4 Patricia Ann Elseth ("the Elseths") are Allen's parents.

## 5 **I. LEGAL STANDARDS**

### 6 **A. Motion to Dismiss under Rule 12(b) (6)**

7 When deciding a Rule 12(b) (6) dismissal motion, all material  
8 allegations in the complaint must be accepted as "true and construed  
9 in the light most favorable to the nonmoving party." Cahill v. Liberty  
10 Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However, this  
11 "tenet" "is inapplicable to legal conclusions." Ashcroft v. Iqbal,  
12 129 S.Ct. 1937, 1950 (2009). Further, "[t]hreadbare recitals of the  
13 elements of a cause of action, supported by mere conclusory  
14 statements, do not suffice" to state a claim. Id.

### 15 **B. Motion to Dismiss under Rule 12(b) (1)**

16 "[T]he court may determine jurisdiction on a motion to  
17 dismiss for lack of jurisdiction under Rule 12(b) (1) of the Federal  
18 Rules of Civil Procedure" "[u]nless the jurisdictional issue is  
19 inextricable from the merits of a case." Kingman Reef Atoll Invs.,  
20 L.L.C. v. United States, 541 F.3d 1189, 1195 (9th Cir. 2008). "Once  
21 challenged, the party asserting subject matter jurisdiction has the  
22 burden of proving its existence." Rattlesnake Coal. v. E.P.A., 509  
23 F.3d 1095, 1102 n. 1 (9th Cir. 2007) (internal reference omitted).

### 24 **C. Plaintiffs' Request for Judicial Notice**

25 Plaintiffs filed an opposition to each motion, and request  
26 that judicial notice be taken of four documents: (1) a "[Probation]  
27 Order of Commitment, pages 11 to 13, to Juvenile Hall" ("Probation  
28 Order"); (2) a "Consent Decree, David Porter v. Verne Speirs, etc,

1 Sacramento Superior Court, No. 06AS03654" ("Consent Decree"); (3)  
2 "Photographs of Allen upon which Dr. Rosas [allegedly] relied for her  
3 report [of Allen's alleged abuse, on which Plaintiffs base their  
4 claims of abuse alleged in the FAC]" ("Photographs of Allen"); and (4)  
5 a Sacramento Superior Court Grand Jury Report, which Plaintiffs filed  
6 in this action on February 3, 2009 ("Grand Jury Report"). (Request  
7 for Judicial Notice ("RFJN") 1.) Gordon opposed Plaintiffs' judicial  
8 notice request.

9 "Federal Rule of Evidence 201(b) permits judicial notice of  
10 an adjudicative fact that is 'not subject to reasonable dispute in  
11 that it is either (1) generally known within the territorial  
12 jurisdiction of the trial court or (2) capable of accurate and ready  
13 determination by resort to sources whose accuracy cannot reasonably be  
14 questioned.'" United States v. Daychild, 357 F.3d 1082, 1099 (9th  
15 Cir. 2004) (citing FED. R. EVID. 201).

16 Gordon argues the Probation Order has not been authenticated  
17 and is disputed. Further, Gordon argues "neither the cover page which  
18 identifies the document [,] nor any type of signature page is present,  
19 and some portions of page 12 are crossed off." (Opp'n to RFJN 3:21-  
20 25.) Gordon argues "[a] trial court . . . is not permitted to take  
21 judicial notice of any facts found by a court in another judicial  
22 proceeding" and therefore, "regardless of whether or not  
23 [P]laintiff[s] can establish that this document is what [they]  
24 claim[], the Court cannot take [judicial notice] of any of the facts  
25 that are represented by this document." (Id. 4:1-7.) Lastly, Gordon  
26 argues the document is irrelevant to the claims against him. (Id.  
27 4:8.)  
28

1 Plaintiffs have not established the foundation required for  
2 the judicial notice they seek of the Probation Order; the document is  
3 not signed or otherwise authenticated. Therefore, Plaintiffs' request  
4 for judicial notice of the Probation Order is denied.

5 Gordon also objects to judicial notice being taken of the  
6 Consent Decree, arguing it is not properly subject to judicial notice  
7 because there are no adjudicative facts in this document. Gordon also  
8 argues what Plaintiffs seek to do is to use factual findings in  
9 another case to "establish[] [Plaintiffs'] argument," which is  
10 inappropriate because another case "cannot be used to establish the  
11 factual context for the instant case." (Opp'n to RFJN 5:7-12.)  
12 Further, Gordon argues the Consent Decree is irrelevant since it  
13 states explicitly that it "does not address or in any way resolve  
14 claims against [Gordon];" and as to the actual defendants involved  
15 in the Consent Decree case, the Consent Decree states: "[n]othing  
16 herein shall constitute or be used as evidence of any admission of  
17 wrongdoing or liability by Defendant[s]." (Id. 5:20-21.) Gordon also  
18 argues that the Consent Decree states it "shall not be used in any  
19 other case, claim or administrative proceeding, except . . . to assert  
20 issue preclusion or *res judicata*." (Id. 5:24-25) (emphasis in  
21 original).

22 "[T]aking judicial notice of findings of fact from another  
23 case exceeds the limits of Rule 201." Wyatt v. Terhune, 315 F.3d  
24 1108, 1114 (9th Cir. 2003). Since Plaintiffs have not shown it is  
25 appropriate to take judicial notice of the Consent Decree, this  
26 request is denied.

27 Gordon also objects to Plaintiffs' request for judicial  
28

1 notice of the Photographs of Allen, arguing they are not authenticated  
2 and it is unknown "who took the photos, when they were taken,  
3 [whether] they were in fact relied upon by Dr. Rosas [a doctor who  
4 allegedly witnessed the consequences of Allen's alleged abuse], or in  
5 what manner [Dr. Rosas] 'relied' upon them." (Opp'n to RFJN 6:9-15.)  
6 Further, Gordon argues the Photographs of Allen are "irrelevant to the  
7 issues alleged against Gordon" since "[Allen] has not alleged that  
8 Gordon ever saw [or was aware of] any part of the incident which  
9 [Plaintiffs'] claim[] resulted in [Allen's] injuries." (Id. 6:16-20.)

10 "Authentication is a condition precedent to admissibility  
11 and this condition is satisfied by evidence sufficient to support a  
12 finding that the matter in question is what its proponent claims." Orr  
13 v. Bank for America, NT & SA, 285 F.3d 764, 773 (9th Cir.2002)  
14 (internal quotes and citation omitted). Plaintiffs have not  
15 authenticated the Photographs of Allen. Therefore, the issue whether  
16 judicial notice may be taken of these photographs is not decided since  
17 Plaintiffs have shown that the unauthenticated photographs should be  
18 considered in the decision on the motions. Therefore, Photographs of  
19 Allen are disregarded.

20 Gordon also objects to Plaintiffs' request that judicial  
21 notice be taken of Grand Jury Reports filed in this case on February  
22 3, 2009. Plaintiffs argue the Grand Jury Reports support "the  
23 proposition that the conditions [at the juvenile hall] were generally  
24 known, and given the investigation, it hardly seems plausible that  
25 [Saxton and] Gordon could have been unaware of the problems prior to  
26 Allen's presence at, and injuries in, the facility." (Opp'n 1:17-26.)  
27 Gordon counters the Grand Jury Reports are "double hearsay" and  
28 irrelevant since most of the reports concern a time period several

1 years before Allen arrived at juvenile hall, and have not been shown  
2 relevant to the matters about which Plaintiffs complain. (Opp'n to  
3 RFJN 6:24-7:21.)

4 Plaintiffs have not shown it is appropriate to take  
5 judicial notice of the pages from the Grand Jury Reports they have  
6 provided, or that those pages are relevant to their claims.  
7 Therefore, this portion of Plaintiffs' request for judicial notice is  
8 also denied.

## 9 II. ANALYSIS

10 Saxton and Gordon each seek dismissal of Plaintiffs' Eighth  
11 and Fourteenth Amendment claims, arguing the claims are not viable.  
12 Allen alleges he has a "constitutional[] right to be free of  
13 gratuitously-inflicted corporal punishment" and a court-ordered right  
14 to services necessary for his rehabilitation. (FAC ¶¶ 8.2, 9.2.)  
15 Allen also alleges Gordon violated his "**statutory** right" to be free of  
16 gratuitously inflicted corporal abuse . . . ." (FAC ¶ 8.2) (emphasis  
17 added). Allen does not specify the source of the referenced statutory  
18 and court-ordered rights.

19 The Elseths allege they "have a constitutionally[] protected  
20 right to parental notification with respect to the care and treatment  
21 of Allen, including abuse and denial of services." (Id. ¶¶ 8.3, 9.3.)  
22 The Elseths also allege against Gordon that a "**court[-]ordered**" "basic  
23 services for his rehabilitation." (Id. ¶ 8.3) (emphasis added).  
24 However, the Elseths have also failed to explain what is referenced by  
25 "court-ordered" or that whatever this means applies to any of their  
26 allegations.

27 Plaintiffs allege each movant violated their constitutional  
28 rights by acting "with deliberate administrative indifference or

1 willful neglect [and] contribut[ing] to the corporal abuse of Allen  
2 and an environment that led to the failure of service to Allen by  
3 failing to report the abuse and failure of services to the Elseths,  
4 Child Protective Services, and other authorities outside the juvenile  
5 system." (Id. ¶¶ 8.4, 9.4.) Plaintiffs also allege that "[a]s a  
6 direct and proximate result of [each movant's] conduct, Child  
7 Protective Services, and other authorities, were not notified, and the  
8 Elseths were denied[] information necessary to take appropriate action  
9 on behalf of Allen concerning his physical abuse and denial of  
10 remedial services while in the Juvenile Detention Facilities." (Id. ¶¶  
11 8.5, 9.5.) Further, Allen alleges due to Gordon's specific conduct,  
12 he "was injured and otherwise denied services necessary for  
13 rehabilitation." (Id. ¶ 8.6.)

14 The movants seek dismissal of Allen's claims that they were  
15 deliberately indifferent or willfully neglectful in violation of the  
16 Eighth Amendment's proscription against cruel and unusual punishment.  
17 Plaintiffs concede to a portion of Gordon's motion in their opposition  
18 brief, stating they "had no intent to allege [an Eighth Amendment  
19 claim of] inadequate medical care against Gordon; only against  
20 Saxton." (Opp'n to Gordon's Mot. 10:6.) Plaintiffs reveal in their  
21 opposition brief that Allen's Eighth Amendment claim against Saxton is  
22 based on the alleged abuse and inadequate medical care Allen received,  
23 and his Eighth Amendment claim against Gordon is based only on the  
24 alleged abuse.

25 As was previously explained in a prior order dismissing  
26 Allen's Eighth Amendment claims, Allen is required to allege that  
27 Saxton was "'deliberate[ly] indifferen[t]'" to Allen's "'serious  
28 medical needs'" or subjected Allen to a "substantial risk of serious

1 harm." Estelle v. Gamble, 429 U.S. 97, 104 (1976); Farmer v. Brennan,  
2 511 U.S. 825, 828 (1994). Further, Allen is required "show a serious  
3 medical need by demonstrating th[ere was a] failure to treat [a  
4 specified] condition [and this failure] could result in further  
5 significant injury or the unnecessary and wanton infliction of pain  
6 [, and that Saxton's] response to the need was deliberately  
7 indifferent." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.  
8 2006) (internal citations and quotations omitted). Allen is also  
9 required to show that Saxton "acted or failed to act despite [his]  
10 knowledge of a substantial risk of serious harm" to which Allen was  
11 exposed. Farmer, 511 U.S. at 842.

12 Allen has again failed to allege "facts from which the  
13 inference could be drawn" that Saxton's response to Allen's serious  
14 medical need, or to a substantial risk of serious harm to which Allen  
15 was allegedly subjected or experienced, was deliberately indifferent.  
16 Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004). Therefore,  
17 Allen's Eighth Amendment claim against Saxton is dismissed.

18 Allen also fails to allege that Gordon had knowledge of the  
19 "substantial risk of serious harm" or of the abuse to which Allen was  
20 allegedly subjected at B.T. Collins. Plaintiffs state in their  
21 opposition to Gordon's motion that Gordon "should have known" of the  
22 alleged abuse at B.T. Collins; however, the FAC is devoid of factual  
23 allegations supporting this conclusory statement. (Opp'n to Gordon's  
24 Mot. 14:17.) Therefore, Allen's Eighth Amendment claim against Gordon  
25 is dismissed.

26 The movants also seek dismissal of Allen's Fourteenth  
27 Amendment Due Process claims in which Allen alleges each movant is  
28 liable for failure to report lack of rehabilitative services at B.T.



1 Collins. "A due process claim is cognizable only if there is a  
2 recognized liberty or property interest at stake." Rizzo v. Dawson,  
3 778 F.2d 527, 530 (9th Cir. 1985). Since "there is no constitutional  
4 right to rehabilitation" for prisoners, Rizzo, 778 F.2d at 531, see  
5 also Moody v. Daggett, 429 U.S. 78, 88 n. 9 (1976), and "Plaintiffs  
6 concede that Allen [was] a 'prisoner' within the meaning of the  
7 [Prisoners Legal Remedies Act]," (FAC ¶ 5.3), Allen has "alleged no  
8 liberty or property interest sufficient to trigger due process  
9 protection in his . . . complaint." Rizzo, 778 F.2d at 530.  
10 Therefore, these claims are dismissed.

11 The movants also seek dismissal of the Elseths' Fourteenth  
12 Amendment due process claims which are based on allegations that each  
13 movant was required to inform the Elseths about the alleged abuse to  
14 which Allen was subjected. The Elseths' Fourteenth Amendment due  
15 process claims are based on conclusory allegations which fail to  
16 implicate a protected liberty interest that required either movant to  
17 inform the Elseths about the alleged abuse to which Allen was  
18 subjected. The Elseths point to no state statute that "contain[s]  
19 'explicitly mandatory [reporting] language,' i.e., specific directives  
20 to the . . . [movants] that if . . . substantive predicates are  
21 present, a particular outcome must follow . . . " Kentucky Dep't of  
22 Corrections, 490 U.S. 454, 462 (1989) (internal citations omitted).  
23 Sufficient factual allegations made under this type of authority is  
24 required to show that a liberty interest is at stake. Id. at 463.  
25 Since this showing has not been made, these claims are dismissed.

26 Further, Gordon seeks dismissal of Plaintiffs' educational  
27 accommodations claim under Rule 12(b)(1), arguing the Court lacks  
28 jurisdiction over this claim. Gordon argues the court lacks

1 jurisdiction over this claim because Plaintiffs have still failed to  
2 allege they exhausted administrative remedies under the Individuals  
3 with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 ("IDEA"),  
4 applicable this claim. This claim was dismissed in a prior order  
5 because of Plaintiffs' failure to allege that they exhausted the IDEA  
6 administrative remedies, and Plaintiffs still have not alleged that  
7 they have exhausted the IDEA administrative remedies.

8 Plaintiffs allege in the FAC that "[t]he Probation  
9 Department is directed to monitor the school district's compliance  
10 with the individual Education Program." (FAC ¶ 6.1.1.1.) Plaintiffs  
11 also allege that Allen "suffer[s] from a number [of] mental  
12 disabilities," (Id. ¶ 4.2), and that a court previously found "that  
13 Allen [is] an individual with exceptional needs." (Id. ¶ 6.1.1.2)  
14 Further, Plaintiffs allege Allen "turned 18 on June 14, 2007," and "is  
15 no longer confined at B.T. Collins. (Id. ¶¶ 4.2, 5.4). Although  
16 Plaintiffs indicate Allen did not receive educational services  
17 sufficient to accommodate his mental disabilities, Plaintiffs fail to  
18 clearly state how the educational services Allen received were  
19 deficient.

20 Further, to the extent that Allen's educational services  
21 allegations are based on educational accommodations subject to  
22 administrative remedies in the IDEA, exhaustion of those  
23 administrative remedies is required. Fraser v. v. Tamalpais Union  
24 School Dist., 281 Fed.Appx. 746, 2008 WL2338073 at \*2 (9th Cir.  
25 2008) (unpublished) (stating that even where Plaintiff "has already  
26 graduated from high school and cannot now receive any benefit from the  
27 IDEA process, exhaustion is required). Since the IDEA provides  
28 "procedural safeguards" for issues regarding a disabled child's

1 educational programs and Plaintiffs do not allege they exhausted  
2 applicable administrative remedies under the IDEA, this educational  
3 accommodations claim against Gordon is dismissed under Rule 12(b)(1)  
4 for lack of subject matter jurisdiction. See Robb v. Bethel School  
5 Dist. No. 403, 308 F.3d 1047, 1053-54 (9th Cir. 2002) (noting that "the  
6 exhaustion requirement embodies the notion that educational agencies,  
7 not the courts, ought to have primary responsibility for the  
8 educational programs that Congress has charged them to administer" and  
9 discussing the IDEA administrative procedures and remedies exhaustion  
10 issue) (internal citation omitted).

11 Gordon also seeks dismissal of Plaintiffs' allegations made  
12 on behalf of other wards at the juvenile hall, arguing Plaintiffs lack  
13 standing to challenge what allegedly was experienced by wards other  
14 than Allen.

15 "Plaintiff[s], as the only signatory to the complaint . . .  
16 [have not shown they have] standing to bring any claims on behalf of  
17 other [wards]." Wiggins v. Alameda County Bd. Of Sup'ers, No. C  
18 94-1172 VRW, at \*2, n.1 1994 WL 327180 (N.D. Cal. June 22, 1994)  
19 referencing Jackson v. Official Representatives & Employees of Los  
20 Angeles Police Dep't, 487 F.2d 885, 886 (9th Cir. 1973) (plaintiff does  
21 not have standing to complain about deprivations of constitutional  
22 rights of others). Plaintiffs allegations include complaints about  
23 what other wards allegedly experienced at B.T. Collins; however,  
24 Plaintiffs have not shown they have standing to allege a claim on  
25 behalf of another ward. To establish this standing, Plaintiffs are  
26 required to show "by reason of their own injuries [they have standing]  
27 to raise the third-party constitutional challenges" of other wards.  
28 Darring v. Kincheloe, 783 F.2d 874, 877 (9th Cir. 1986) (finding

1 Plaintiff lacked personal and third party standing to assert a claim  
2 for money damages without alleging he suffered an "actual injury."  
3 Further, since Allen "is no longer confined at B.T. Collins," (FAC ¶  
4 5.4), Plaintiffs' request for injunctive relief concerning conditions  
5 at B.T. Collins is moot. Darring, 783 F.2d at 876 (finding  
6 Plaintiff's claim for injunctive relief based on prison conditions was  
7 moot when Plaintiff was not likely to return to the prison).  
8 Therefore, Plaintiffs' third-party damage and injunctive relief  
9 allegations are dismissed.

10 Lastly, Plaintiffs ask the Court to certify for  
11 interlocutory appeal the dismissal of their IDEA claims. However,  
12 Plaintiffs have not demonstrated that this ruling should be certified  
13 for interlocutory appeal. Therefore, this request is denied.

### 14 **III. LEAVE TO AMEND**

15 Each movant seeks a ruling that all dismissals are with  
16 prejudice. Plaintiffs counter, requesting leave to amend. Since  
17 Plaintiffs have been given leave to amend three times before and yet  
18 have still failed to state sufficient claims against Saxton and  
19 Gordon, Plaintiffs' request for leave to amend their claims against  
20 Saxton and Gordon is denied. Saul v. United States, 928 F.2d 829, 843  
21 (9th Cir. 1991) (stating leave to amend should be denied "where . . .  
22 amendment would be futile") (internal citation omitted).

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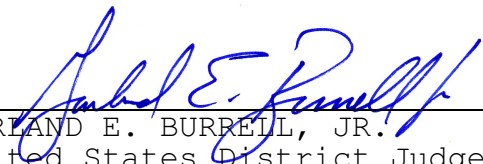
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1 **IV. CONCLUSION**

2 For the stated reasons, Plaintiffs' conclusory allegations  
3 do not survive the dismissal motions. Therefore, the dismissal  
4 motions are granted and Plaintiffs' request for leave to amend is  
5 denied.

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7 Dated: April 14, 2010

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10 GARLAND E. BURRELL, JR.  
11 United States District Judge  
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