UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

EVERETT H., a minor, by and through his Guardians Ad Litem REBECCA HAVEY and HEATH HAVEY; REBECCA HAVEY, an individual; and HEATH HAVEY, an individual,

Plaintiffs,

v.

DRY CREEK JOINT ELEMENTARY SCHOOL DISTRICT, BOARD OF TRUSTEES OF DRY CREEK JOINT ELEMENTARY SCHOOL DISTRICT; MARK GEYER, individually and in his official capacity of Superintendent of Dry Creek Joint Elementary School District; EVONNE ROGERS, individually in in her official capacity as Assistant Superintendent of Educational Services; LYNN BARBARIA, individually and in her official capacity as Director of Special Education; ANDREW GIANNINI, individually and in his official capacity as Principal at Olive Grove Elementary School; CALIFORNIA DEPARTMENT OF EDUCATION; and TOM TORLAKSON, individually and in his official capacity as State Superintendent of Public Instruction for the State of California,

Defendants.

No. 2:13-cv-00889-MCE-DAD

MEMORANDUM AND ORDER

Through the present action, Plaintiffs Heath and Rebecca Havey, both individually and on behalf of their son Everett H. (hereinafter "Plaintiffs" unless otherwise indicated) allege educational harms based on purported violations of Everett's right as a disabled student to a free and appropriate public education ("FAPE") pursuant to the provisions of the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400m et seq. ("IDEA") and various state statutes. Plaintiffs also assert associated violations of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. ("ADA") and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504"). Finally, Plaintiffs assert claims under the auspices of 42 U.S.C. § 1983 ("§ 1983"), which include both failure to accommodate claims and claims for civil rights discrimination and retaliation. By way of damages, Plaintiffs seek compensatory education and reimbursement, compensatory and punitive damages, attorneys' fees and injunctive relief.

The Dry Creek Joint Elementary School District, Everett's local school district, is named as a Defendant by Plaintiffs, along with Dry Creek's Board of Trustees and four individual Dry Creek administrators. In addition, Plaintiffs name the California Department of Education (the "CDE") and State Superintendent of Public Instruction Tom Torlakson ("Torlakson" in his official and individual capacities.

Torlakson now moves to dismiss himself as a defendant in both his official and individual capacities from Plaintiff's Second Amended Complaint ("SAC").[1]

BACKGROUND[2]

Everett H. is a disabled student who, according to the Complaint, suffered from delayed myelination and has been diagnosed with an autism spectrum disorder and resulting motor and neurological delays such as language impairment. Everett attended

[1] Because oral argument will not be of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local R. 230(g).

[2] The allegations in this section are derived from the assertions made by Plaintiffs in their Second Amended Complaint. SAC, May 23, 2014, ECF No. 45.

school within the Dry Creek Elementary School District ("Dry Creek") for approximately five years, from 2007 to March 2, 2012. During that period, Plaintiffs and Dry Creek had disagreements about the special education program provided by the District to Everett. According to Plaintiffs, Dry Creek made various errors with respect to the provision of FAPE, including in the IEP process, Everett's disability designation placement and providing education to Everett in the least restrictive environment ("LRE").

Plaintiffs allege that in order to shoehorn Everett into its special education agenda, Dry Creek intentionally misrepresented its testing as showing that he was "mentally retarded" in order to remove Everett from a general education classroom into a segregated classroom where severely handicapped children were warehoused and where little education purportedly took place. According to Plaintiffs, beginning in 2010, they resisted Dry Creek's attempt to provide fewer services than contemplated within Everett's IEP dated September 9, 2009. Specifically, Plaintiffs claim that the district withheld some 290 minutes of daily Specialized Academic Services required under the IEP and failed to rectify that shortcoming even after Plaintiffs demanded that the services called for under the IEP be provided.

Dry Creek, eventually on September 12, 2011, filed for a special education due process hearing before the OAH with regard to FAPE and assessment issues. According to Plaintiffs, once they began advocating for Everett's rights in the summer of 2010, the District began to engage in retaliatory activity which intensified in March of 2012, when Plaintiffs claim they had to remove Everett from school for his own safety. Plaintiffs assert that the District began delaying the IEP meeting process, began misrepresenting what occurred at IEP meetings when they did take place, and began manipulating IEP documentation to delay and mislead Plaintiffs. In addition, Plaintiffs assert that Dry Creek engaged in retaliatory behavior that endangered Everett's safety, including depriving him of food and refusing to monitor his food intake, sending him home disheveled and dirty with feces, and otherwise subjecting Everett to repeated

humiliation. Plaintiffs further claim that Dry Creek interfered with Plaintiff's attempt to move Everett to another school district.

Between January and October of 2012, when the due process hearing between Plaintiffs and Dry Creek was pending at the OAH, and for a short time thereafter, Plaintiffs filed at least five CRPs against Dry Creek with the CDE which alleged that Cry Creek was out of compliance with special educations laws. Plaintiffs claim that the CDE found Dry Creek out of compliance with state and federal laws in both Everett's case and others, and issued a report that Dry Creek was in "systemic non-compliance." On July 25, 2012, several months after Everett left Dry Creek, the District dismissed the OAH case it had initiated. Given that dismissal, no final administrative due process hearing decision was ever issued on any of the alleged educational shortcomings raised by Plaintiffs.

Plaintiffs allege that the Administrative Law Judge ("ALJ") assigned to the case made errors. They also claim the CDE itself made various errors in handling the CRPs, including, among other claimed mistakes, declining to address and/or investigate some of Plaintiffs' allegations and denying requests for reconsideration. Plaintiffs sent multiple letters addressed to Torlakson explaining Dry Creek's violations as to their treatment of Everett, their failure to abide by the corrective actions required by the CDE, and the CDE's failure to investigate said violations.

STANDARD

On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,337-38 (9th Cir. 1996). Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell

Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (internal citations and quotations omitted). A court is not required to accept as true a "legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (quoting Twombly, 550 U.S. at 555). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must contain something more than "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.")).

Furthermore, "Rule 8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to relief." Twombly, 550 U.S. at 556 n.3 (internal citations and quotations omitted). Thus, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. (citing 5 Charles Alan Wright & Arthur R. Miller, supra, at § 1202). A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." Id. at 570. If the "plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. However, "[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

A court granting a motion to dismiss a complaint must then decide whether to grant leave to amend. Leave to amend should be "freely given" where there is no "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the

amendment . . . ." Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to be considered when deciding whether to grant leave to amend). Not all of these factors merit equal weight. Rather, "the consideration of prejudice to the opposing party . . . carries the greatest weight." Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) ("Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility . . . .")).

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ANALYSIS

Defendant Torlakson is sued under § 1983 in his official and individual capacities for violations of equal protection, due process, the First and Fourth Amendments, Plaintiffs' right to a FAPE under IDEA, and Title II of the ADA.[3] SAC at 46.

A. § 1983 Official Capacity

Plaintiffs accuse Torlakson of violating Plaintiffs' rights through "an express policy," "making decisions as the person with final policymaking authority," and failure to train and supervise to an extent manifesting deliberate indifference. SAC at 47. The allegations that Torlakson personally failed to train the employees that committed the alleged violations is without factual backing, as is the assertion that Torlakson's inaction was pursuant to an express policy. These allegations are conclusory and do not meet the standard necessary to withstand a motion to dismiss. See Twombly, 550 U.S. at 555 ("a plaintiff's obligation to provide the grounds of his entitlement to relief requires more

[3] Despite the ambiguity in Plaintiffs' SAC, Plaintiffs clarify in their Opposition that only the twelfth claim for relief, under § 1983, is alleged against Torlakson in his individual or official capacities. Pl.'s Opp'n at 19, July 10, 2014, ECF No. 51.

than labels and conclusions").

The only specific factual allegation regarding Torlakson's culpable inaction included in the SAC is his alleged failure to sanction Dry Creek for persistent noncompliance. SAC at 38-39. Because the various forms of relief sought in Plaintiffs' prayer are not specifically apportioned between any of the twelve claims in Plaintiffs' SAC, in construing the SAC in the light most favorable to Plaintiffs, the Court assumes all forms of relief are alleged against Torlakson. See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). A claimant can sue for both monetary damages and injunctive relief under § 1983. Lodestar Co. v. Mono Cnty., 639 F. Supp. 1439, 1443 (E.D. Cal. 1986). Plaintiffs' claims against Torlakson in his official capacity are not viable for purposes of seeking either monetary or injunctive relief.

As an initial matter, "State officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983," thus Plaintiffs' claim for monetary damages against Torlakson in his official capacity are barred. Arizonans for Official English v. Arizona, 520 U.S. 43, 69 (1997). However, this does not bar a claim for injunctive relief against a state officer in their official capacity under § 1983. Injunctive relief is possible where the officer has "some connection with the enforcement of the [unconstitutional act], or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party" which the Eleventh Amendment prohibits. Ex parte Young, 209 U.S. 123, 157, 28 S. Ct. 441, 453, 52 L. Ed. 714 (1908).

Here, Plaintiffs note that under California law, the State Superintendent of Public Instruction alone has the authority to sanction a noncompliant school district: "The Superintendent may withhold, in whole or in part, state funds or federal funds allocated under [IDEA] from a [school district] . . . if the Superintendent finds" that the school district failed to comply with the law or an administrative order. Cal. Educ. Code § 56845. The Superintendent's authority to sanction in that regard, however, is discretionary, not mandatory. See id. In addition, the Superintendent's power to

sanction is granted by state law, and "[a] federal court may not grant injunctive relief against state officials on the basis of state law when those officials are sued in their official capacity," else such claims would violate the Eleventh Amendment. Vasquez v. Rackauckas, 734 F.3d 1025, 1041 (9th Cir. 2013) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984)).

Furthermore, suits for injunction can only seek prospective relief. Papasan v. Allain, 478 U.S. 265, 277-278 (1985). The Defendant challenges Plaintiff's standing, pointing out that the Plaintiff no longer attends Dry Creek Elementary, where the alleged violations took place. Mot. to Dismiss at 5. To show standing, Plaintiff "must demonstrate that he has suffered an injury-in-fact, that the injury is traceable to [Defendant's] actions, and that the injury can be redressed by a favorable decision." Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 946 (9th Cir. 2011). Additionally, "to establish standing to pursue injunctive relief . . . [Plaintiffs] must demonstrate a real and immediate threat of repeated injury in the future." Papasan, 468 U.S. at 278.

If Plaintiffs sought to attend Dry Creek again in the future, Plaintiffs' alleged injuries might then be repeatable, thus satisfying standing. See Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 946 (9th Cir. 2011) ("to establish standing to pursue injunctive relief, . . . [Plaintiffs] must demonstrate a real and immediate threat of repeated injury in the future") (internal citations omitted). Yet Plaintiffs, in responding to Defendant's argument that he has no standing, merely argue that "Plaintiffs still reside in California, and the CDE's violative policies and practices affect Plaintiffs without regard to the public school where Everett attends." Opp'n at 14. First, this argument is directed at the CDE, not Torlakson in his official or individual capacity. Second, even if it were directed at Torlakson, the argument that Torlakson's failure to sanction Dry Creek would affect Plaintiffs elsewhere in California is speculative. Plaintiffs plead no facts to support the conclusion that Torlakson's failure to sanction Dry Creek would cause another school to violate Everett's rights in the way that Dry Creek allegedly has. Such a speculative

contention does not meet the standard required to withstand a motion to dismiss pursuant to 12(b)(6). See Twombly, 550 U.S. at 555.

Therefore, Plaintiffs' § 1983 claim against Torlakson in his official capacity is dismissed.

B. § 1983 Individual Capacity

Plaintiffs' twelfth claim for relief pursuant to § 1983 is also made against Torlakson in his individual capacity as a supervisor, for culpable inaction and deliberate indifference. SAC at 47-48. "A defendant may be held liable as a supervisor under § 1983 if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011). Plaintiffs must allege that Torlakson "breached a duty to plaintiff which was the proximate cause of the injury." Id. This causal connection can be established by alleging that Torlakson "knowingly refus[ed] to terminate a series of acts by others," which Torlakson "knew or reasonably should have known would cause others to inflict a constitutional injury." Courts in the Ninth Circuit have found that constructive knowledge can suffice. See Young v. Hawaii, 548 F. Supp. 2d 1151, 1166 (D. Haw. 2008).

Plaintiffs claim that Torlakson should be held individually liable because he knew about Dry Creek's violations as Plaintiffs had sent letters addressed to him, because of previous legal actions (one of which involved Dry Creek), and because of the ongoing administrative actions between Everett's parents and Dry Creek. See SAC at 21, 26, 29, 31-32. Though Plaintiffs assert that Torlakson had actual knowledge of the alleged misconduct perpetrated by the other defendants named in Plaintiffs' SAC, the SAC does not provide any facts as to Torlakson's actual knowledge. SAC at 47. Plaintiffs sent Torlakson many letters, but Plaintiffs do not allege that Torlakson read them, nor do they assert any facts supporting that conclusion. SAC at 35-38. Neither do Plaintiffs allege that Torlakson was personally familiar with either the related cases that Plaintiffs refer to or the administrative actions that ruled in Plaintiffs' favor. See SAC at 21, 26, 29, 31-32. Absent any allegations of fact, Plaintiffs' allegations regarding Torlakson's actual

knowledge are insufficient to withstand a motion to dismiss. See Twombly, 550 U.S. at 555.

Plaintiffs also allege that Torlakson, due to the aforementioned reasons, had constructive knowledge of the alleged constitutional deprivations perpetrated by defendants. SAC at 47. That these avenues are sufficient to allege Torlakson's constructive knowledge of the events leading to this action, even taken together, is speculative and insufficient to hold him liable in his individual capacity. The California system of public education is massive, with over 6.2 million students, 10,000 schools, and over 1,000 distinct school districts. Torlakson sits at the highest point of this sprawling organization. The Complaint alleges that the parents sent letters "addressed directly to him," but sending letters to the head of an agency that caters to so many does not suffice for constructive notice in this case. The very size of the California system of public education renders such a contention speculative. That legal actions of a similar nature have been filed against the CDE in the past is neither surprising nor enough to suggest that Torlakson should have personal knowledge of their details. Likewise, the suggestion that Torlakson has or should have personal knowledge of every administrative action filed against the CDE is unrealistic absent facts showing that he knew or should have known of their details. These allegations do not "raise a right of relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

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CONCLUSION

For the reasons set forth above, Defendant Tom Torlakson's Motion to Dismiss Plaintiffs' Second Amended Complaint (ECF No. 48) is GRANTED. Because Plaintiffs have already been afforded leave to amend, and inasmuch as the Court does not believe that the defects of Plaintiffs' claims against Torlakson can be remedied through additional amendment, no further leave to amend will be permitted.[4]

IT IS SO ORDERED.

Dated: August 4, 2014

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[4] The Court has reviewed Plaintiffs' Objections to Reply Brief, as well as their request for oral argument and/or leave to file surreply, and none of the contentions made in that filing change this result. Plaintiffs' request for oral argument and/or surreply is accordingly denied.