



1 **I. Plaintiff's Motion to Include Additional IDEA Violations**

2 Plaintiff's May 15, 2017 motion to include additional IDEA violations in the second  
3 amended complaint was not noticed for a hearing before the undersigned as required under Local  
4 Rule 230(b) which states that "all motions shall be noticed on the motion calendar of the assigned  
5 Judge or Magistrate Judge." Moreover, Local Rule 220 requires that every pleading be "complete  
6 in itself without reference to the prior or superseded pleading."

7 In this regard, plaintiff cannot simply add new violations to her second amended  
8 complaint in a separate document. Instead, plaintiff would have to amend the second amended  
9 complaint. To amend the second amended complaint, plaintiff would need to comply with Rule  
10 15 of the Federal Rules of Civil Procedure ("Rule 15"). Under Rule 15, a party "may amend its  
11 pleading once as a matter of course" if they do so "21 days after service of a motion under Rule  
12 12(b)." Fed. R. Civ. P. 15(a)(1). A party may also amend its pleading "with the opposing party's  
13 written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).

14 Thus, if plaintiff wishes to add new allegations to the second amended complaint, plaintiff  
15 must either obtain defendants' consent to file a third amended complaint or file a motion seeking  
16 leave to file a third amended complaint. That motion should be noticed for hearing before the  
17 undersigned in compliance with Local Rule 230 and should include a copy of plaintiff's proposed  
18 third amended complaint pursuant to Local Rule 137(c).<sup>2</sup> Accordingly, plaintiff's motion to  
19 include new IDEA violations will be denied.

20 **II. DJUSD's Motion to Dismiss**

21 With respect to defendant DJUSD's motion to dismiss, DJUSD seeks dismissal pursuant  
22 to Rule 12(b)(5) for plaintiff's failure to properly serve process on DJUSD.<sup>3</sup> (DJUSD's MTD

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24 <sup>2</sup> To the extent plaintiff intends to allege additional IDEA claims, plaintiff should consider  
25 whether those claims have been exhausted. See K.M. ex rel. Bright v. Tustin Unified School  
26 Dist., 725 F.3d 1088, 1097 (9th Cir. 2013) ("the IDEA does not foreclose any additional  
27 constitutional or federal statutory claims that children with disabilities may have, so long as they  
28 first exhaust their IDEA claims through the IDEA administrative process.").

<sup>3</sup> DJUSD also seeks dismissal pursuant to Rule 12(b)(1). Because the undersigned will grant  
DJUSD's motion to dismiss pursuant to Rule 15(b)(5), the undersigned will not reach this  
argument. See Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987)  
("Before a federal court may exercise personal jurisdiction over a defendant, the procedural

1 (ECF No. 56) at 10.) Pursuant to Rule 12(b)(5), a defendant may move to dismiss the action  
2 where the plaintiff has failed to effect proper service of process in compliance with the  
3 requirements set forth under Federal Rule of Civil Procedure 4 for serving a defendant. Fed. R.  
4 Civ. P. 12(b)(5). When a defendant challenges service, the plaintiff bears the burden of  
5 establishing the validity of service as governed by Rule 4 of the Federal Rules of Civil Procedure.  
6 See Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004).

7 Here, plaintiff has provided a signed return of service. (ECF No. 53.) ““A signed return  
8 of service constitutes prima facie evidence of valid service which can be overcome only by strong  
9 and convincing evidence.”” S.E.C. v. Internet Solutions for Business Inc., 509 F.3d 1161, 1166  
10 (9th Cir. 2007) (quoting O’Brien v. R.J. O’Brien & Associates, Inc., 998 F.2d 1394, 1398 (7th  
11 Cir. 1993)). “The burden of producing strong and convincing evidence to rebut this presumption  
12 cannot be met by a mere conclusory denial of service.” Freeman v. ABC Legal Services Inc., 827  
13 F.Supp.2d 1065, 1075 (N.D. Cal. 2011).

14 Here, DJUSD has provided a declaration from Pamela Gilleste, the individual plaintiff  
15 served, establishing the Gilleste is a secretary for the DJUSD in the special education department  
16 and is “not authorized to accept service on behalf of DJUSD as a secretary in the special  
17 education department.” (Gilleste Decl. (ECF No. 56-1) at 2.) Rule 4(j) of the Federal Rules of  
18 Civil Procedure provides that a state may be sued by: (A) delivering a copy of the summons and  
19 complaint to the CEO; or (2) by any manner prescribed by state law.

20 Moreover, California Code of Civil Procedure § 416.50 provides that:

21 (a) A summons may be served on a public entity by delivering a  
22 copy of the summons and of the complaint to the clerk, secretary,  
president, presiding officer, or other head of its governing body.

23 (b) As used in this section, “public entity” includes the state and  
24 any office, department, division, bureau, board, commission, or  
25 agency of the state, the Regents of the University of California, a  
political subdivision or public corporation in this state.

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28 requirement of service of summons must be satisfied.”).

1 Additionally, while California Code of Civil Procedure provides for substitute service (e.g., Cal.  
2 Code Civ. P. §§ 415.20 & 415.30), here there is no indication that DJUSD was also served with  
3 copies of the summons and complaint via U.S. Mail.

4 Nonetheless, if the court determines that a plaintiff has not properly served the defendant  
5 the court has discretion to either dismiss or retain this action. See S.J. v. Issaquah School Dist.  
6 No. 411, 470 F.3d 1288, 1293 (9th Cir. 2006); Montalbano v. Easco Hand Tools, Inc., 766 F.2d  
7 737, 740 (2nd Cir. 1985); Stevens v. Sec. Pac. Nat'l Bank, 538 F.2d 1387, 1389 (9th Cir. 1976).  
8 “Generally service will be quashed in those cases in which there is a reasonable prospect that the  
9 plaintiff will be able to serve the defendant properly.” Crayton v. Rochester Medical Corp.,  
10 No.1:07-CV-01318-OWW-GSA, 2008 WL 3367604, at \*5 (E.D. Cal. Aug. 8, 2008) (quoting  
11 Wishart v. Agents for Int'l Monetary Fund I.R.S., No. C-95-20178 SW, 1995 WL 494586, at \*2  
12 (N.D. Cal. Aug. 14, 1995). And “Rule 4(m) explicitly permits a district court to grant an  
13 extension of time to serve the complaint . . . .” Mann v. American Airlines, 324 F.3d 1088, 1090  
14 (9th Cir. 2003).

15 Here, it appears that plaintiff employed a process server and successfully served the  
16 WJUSD. In this regard, the undersigned finds that there is a reasonable prospect that plaintiff  
17 will be able to properly serve DJUSD. Moreover, DJUSD has not been prejudiced by the  
18 insufficient service. See Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992); United Food &  
19 Commercial Workers Union, Locals 197 v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984)  
20 (noting that technical defects in service of process do not justify dismissal unless actual prejudice  
21 is shown).

22 Accordingly, the undersigned will grant DJUSD’s motion pursuant to Rule 12(b)(5),  
23 quash service on DJUSD, retain this action, and grant plaintiff an extension of time to complete  
24 service on DJUSD.

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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's May 15, 2017 motion to include new IDEA violations (ECF No. 54) is denied;
2. Defendant DJUSD's May 19, 2017 motion to dismiss (ECF No. 56) is granted in part as discussed above;
3. Service of process on defendant DJUSD is quashed;
4. Within twenty-eight (28) days of the date of this order plaintiff shall complete proper service of process on defendant DJUSD;
5. Seven days after completing service of process on defendant DJUSD plaintiff shall file proof of service on DJUSD; and
6. Defendant WJUSD's May 19, 2017 motion to dismiss (ECF No. 55) is taken under submission.

Dated: June 30, 2017



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DEBORAH BARNES  
UNITED STATES MAGISTRATE JUDGE

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