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United States District Court  
For the Northern District of California

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

S.M, by and through his next friend  
Carol Allen; P.M., by and through his  
next friend Carol Allen; and CAROL  
ALLEN,

No. C 07-5829 CW

Plaintiffs,

ORDER GRANTING  
DEFENDANTS' MOTION  
TO DISMISS

v.

WEST CONTRA COSTA COUNTY UNIFIED  
SCHOOL DISTRICT FINANCING  
CORPORATION, et al.,

Defendants.

Defendants West Contra Costa County Unified School District  
(the District), West Contra Costa Unified School District Board of  
Education, Bruce Harter, Wendell Greer, Steve Collins, Darlene  
Jones, Ken Talken, Craig Crossley and Terry Nicholson move to  
dismiss this action under Rules 12(b)(1) and 12(b)(6) of the  
Federal Rules of Civil procedure. Plaintiffs S.M. and P.M., both  
minors, and Carol Allen, their mother, oppose the motion. The  
matter was taken under submission on the papers. Having considered  
all of the papers filed by the parties, the Court grants

1 Defendants' motion.<sup>1</sup>

2 BACKGROUND

3 According to the complaint, S.M. is a student with a learning  
4 disability. For years, he has allegedly been physically and  
5 verbally abused by other students and unfairly punished by teachers  
6 and administrators. He asserts that District officials have done  
7 nothing to protect him from other students, but instead have gone  
8 "out of [their] way to brand him as and treat him as a criminal and  
9 encourage school site staff to be biased against him." SAC ¶ 27.  
10 "Rather than appropriately addressing the harmful behavior of other  
11 students and staff, Defendants shifted S.M. from classroom to  
12 office and office to home and school to school." Id. ¶ 33. He  
13 "has been segregated to a campus for students with disabilities  
14 where staff regular[ly] uses physical discipline on students, and  
15 isolated from the general education population." Id. ¶ 30.

16 P.M. is S.M.'s older brother. According to the complaint, he  
17 was subjected to "continuous harassment, through disciplinary  
18 procedures and verbal put downs by staff" after he "spoke out  
19 against the harassment and abuse suffered by his brother." Id.  
20 ¶ 43.

21 S.M. and Ms. Allen originally filed suit against the District  
22 and its agents in 2006, asserting, among others, claims under the

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24 <sup>1</sup>The motion does not appear to have been filed on behalf of  
25 Defendant Harry Culbertson. However, the claims against Mr.  
26 Culbertson fail for the same reasons as the claims against the  
27 other Defendants, and are dismissed on this basis. See Silverton  
28 v. Dep't of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) ("A  
District Court may properly on its own motion dismiss an action as  
to defendants who have not moved to dismiss where such defendants  
are in a position similar to that of moving defendants or where  
claims against such defendants are integrally related.")

1 Individuals with Disabilities Education Act (IDEA). This Court  
2 dismissed that case in January, 2007 because S.M. had not exhausted  
3 his administrative remedies.

4       Shortly before the dismissal of the previous case, S.M. and  
5 Ms. Allen filed a request for due process with the District's  
6 Office of Administrative Hearings (OAH), charging the District with  
7 failing "to adequately monitor and address [S.M.'s] educational  
8 needs and provide appropriate services." Collins Dec. Ex. A at 5.<sup>2</sup>  
9 A January, 2007 amendment to the request describes attacks by other  
10 students due to the District's failure to place S.M. in an  
11 appropriate setting. Id. Ex. C at 5-6. It also alleges that S.M.  
12 was assaulted by school staff. Id. at 5.

13       On March 7, 2007, Ms. Allen, S.M. and the District resolved  
14 the OAH proceedings by entering into a "Final Mediation Agreement."  
15 The settlement agreement contains a section entitled "General  
16 Release and Discharge" that provides in part:

17       Petitioner hereby fully releases and discharges each  
18 other [sic] from all claims, damages, liabilities, rights  
19 and complaints of whatever kind or nature arising from or  
related to Student's educational program through the date  
of the IEP team meeting provided for herein.

20       This release and discharge precludes Petitioner and  
21 anyone acting on behalf of Petitioner from hereafter  
22 initiating or maintaining any actions or proceedings,  
other than proceedings to enforce this Agreement, arising  
from or related to Student's educational program through  
the date of execution of this Agreement.

23       This release and discharge applies to any action or  
24 proceeding based on any state or federal statute,  
25 regulation, case decision, or common law including, but  
26 not limited to, claims under the Individuals with  
Disabilities Education Act (20 U.S.C. § 1400, et seq.),

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27       <sup>2</sup>The Court grants Defendants' request for judicial notice of  
28 the documents from the OAH proceedings, the authenticity of which  
Plaintiffs do not dispute.

1 42 U.S.C. section 1983, Section 504 of the Rehabilitation  
2 of [sic] Act of 1973 (29 U.S.C. § 732), the Americans  
3 with Disabilities Act (42 U.S.C. § 12101), California  
4 Education Code § 5600, et seq., and School Committee of  
the Town of Burlington v. Dept. of Ed., 471 U.S. 359, 105  
S.Ct. 1996 (1985). However, this release and discharge  
does not apply to state tort claims.

5 Moreover, this release and discharge applies to all  
6 claims for injuries, damages, or losses related to  
7 Student's educational program through the date of the  
8 full execution of this Agreement, regardless of whether  
those injuries, damages, or losses are currently known or  
unknown, foreseen or unforeseen, or patent or latent.

9 Id. Ex. D at 4-5.

10 Plaintiffs filed the present lawsuit in November, 2007. It is  
11 based on many of the same events as the original 2006 case.  
12 Plaintiffs assert claims under the Constitution and federal  
13 statutes, as well as under California statutory and common law.  
14 Defendants now move to dismiss the complaint in its entirety.

#### 15 LEGAL STANDARD

##### 16 I. Motion to Dismiss for Failure to State a Claim

17 A complaint must contain a "short and plain statement of the  
18 claim showing that the pleader is entitled to relief." Fed. R.  
19 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a  
20 claim is appropriate only when the complaint does not give the  
21 defendant fair notice of a legally cognizable claim and the grounds  
22 on which it rests. See Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
127 S. Ct. 1955, 1964 (2007).

23 In considering whether the complaint is sufficient to state a  
24 claim, the court will take all material allegations as true and  
25 construe them in the light most favorable to the plaintiff. NL  
26 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). When  
27 granting a motion to dismiss, the court is generally required to  
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1 grant the plaintiff leave to amend, even if no request to amend the  
2 pleading was made, unless amendment would be futile. Cook, Perkiss  
3 & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-  
4 47 (9th Cir. 1990).

5 II. Motion to Dismiss for Lack of Subject Matter Jurisdiction

6 Subject matter jurisdiction is a threshold issue which goes to  
7 the power of the court to hear the case. Federal subject matter  
8 jurisdiction must exist at the time the action is commenced.

9 Morongo Band of Mission Indians v. Cal. State Bd. of Equalization,  
10 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed  
11 to lack subject matter jurisdiction until the contrary  
12 affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873  
13 F.2d 1221, 1225 (9th Cir. 1989).

14 Dismissal is appropriate under Rule 12(b)(1) when the district  
15 court lacks subject matter jurisdiction over the claim. Fed. R.  
16 Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either attack the  
17 sufficiency of the pleadings to establish federal jurisdiction, or  
18 allege an actual lack of jurisdiction which exists despite the  
19 formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen.  
20 Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v.  
21 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

22 DISCUSSION

23 I. S.M.'s Claims Based on Events Prior to March 7, 2007

24 The settlement agreement provides a broad release of "all  
25 claims" of "whatever kind or nature arising from or related to  
26 [S.M.'s] educational program through the date of the IEP team  
27 meeting." It has not been established when the IEP team meeting  
28 took place, but the settlement agreement was signed on March 7,

1 2007. Accordingly, Defendants move to dismiss all of S.M.'s claims  
2 that are based on events that took place prior to March 7, 2007.

3 Although the complaint is not always clear, it appears that  
4 all of the claims based on Defendants' treatment of S.M. either  
5 arise from or are related to his educational program. The crux of  
6 the complaint is that District officials failed to place S.M. in an  
7 appropriate educational setting, permitting his abuse at the hands  
8 of other students and punishing him (sometimes physically) for no  
9 reason other than his disability. These are the very claims that  
10 were the subject of the OAH proceedings and were settled.

11 The only claim Plaintiffs identify as not "arising from or  
12 related to" S.M.'s educational program is violation of California  
13 Education Code § 49001, which prohibits corporal punishment as a  
14 disciplinary measure. Setting aside the fact that the complaint  
15 does not actually assert a claim for violation of this statute and  
16 does not allege any details concerning the use of force against  
17 S.M. by District employees, it is difficult to see how the form of  
18 punishment S.M. received -- a matter that was clearly at issue in  
19 the OAH proceedings -- does not relate to his educational program.  
20 Moreover, violation of the California Education Code is not a  
21 federal claim. Because S.M. has plead no viable federal claims,  
22 the Court would, in any event, decline supplemental jurisdiction  
23 over any claim for violation of § 49001.

24 Plaintiffs argue that the Court cannot consider the settlement  
25 agreement because release is an affirmative defense that can be  
26 raised only on a motion for summary judgment. However, Plaintiffs  
27 have not cited any authority for the proposition that an  
28 affirmative defense cannot be adjudicated on a motion to dismiss.

1 And although a court generally may not consider matters beyond the  
2 pleadings on a Rule 12(b)(6) motion,<sup>3</sup> "when [the] plaintiff fails  
3 to introduce a pertinent document as part of his pleading, [the]  
4 defendant may introduce the exhibit as part of his motion attacking  
5 the pleading." Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir.  
6 1994), overruled on other grounds, Galbraith v. County of Santa  
7 Clara, 307 F.3d 1119 (9th Cir. 2002) (quoting 5 Charles Alan Wright  
8 & Arthur R. Miller, Federal Practice and Procedure § 1327, at  
9 762-63 (2d ed. 1990)). The purpose of this rule is to prevent  
10 plaintiffs "from surviving a Rule 12(b)(6) motion by deliberately  
11 omitting references to documents" that are determinative of their  
12 claims. Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)  
13 superseded by statute on other grounds, as noted in Abrego v. Dow  
14 Chem. Co., 443 F.3d 676, 681 (9th Cir. 2006). The complaint refers  
15 to the settlement, though not explicitly to the settlement  
16 agreement itself. FAC ¶ 40. Plaintiffs do not dispute the  
17 authenticity of the agreement that was filed, and the Court may  
18 properly consider it on the present motion.

19 Plaintiffs also contend that, even if the Court were to  
20 consider the settlement agreement, they did not intend to release  
21 the federal claims asserted in this lawsuit, and the release should  
22 not be interpreted as doing so. However, a party may not rely on  
23 his or her own subjective understanding of the meaning of a  
24 contractual term to contradict the unambiguous language of the term

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26 <sup>3</sup>Defendants assert that the release deprives the Court of  
27 subject matter jurisdiction over the claims. A release, however,  
28 is an affirmative defense and does not go to the issue of subject  
matter jurisdiction. Stephen H. v. W. Contra Costa County Unified  
Sch. Dist. Fin. Corp., 2007 U.S. Dist. LEXIS 41672 (N.D. Cal.).

1 itself. See, e.g., Powerine Oil Co., Inc. v. Superior Court, 37  
2 Cal. 4th 377, 390 (2005) ("If contractual language is clear and  
3 explicit, it governs."); Merced County Sheriff's Employees' Ass'n  
4 v. County of Merced, 188 Cal. App. 3d 662, 672 (1987) ("Our holding  
5 [concerning the meaning of the term "said average"] does not mean  
6 that the County did not entertain a contrary subjective meaning  
7 but, as we have previously explained, the existence of mutual  
8 assent is determined by an objective rather than a subjective  
9 standard, i.e., what a reasonable person would believe from the  
10 outward manifestations of consent."). The unambiguous language of  
11 the release covers the federal claims asserted by S.M. and Ms.  
12 Allen, all of which arise from or are related to S.M.'s education  
13 program.

14 The Court therefore finds that S.M.'s claims, other than state  
15 tort claims, arising from conduct that occurred prior to March 7,  
16 2007 are barred by the settlement agreement.

17 II. S.M.'s Claims Based on Events Subsequent to March 7, 2007

18 "The IDEA requires a plaintiff to exhaust his or her  
19 administrative remedies before commencing suit if that person is  
20 'seeking relief that is also available under' the IDEA." Robb v.  
21 Bethel Sch. Dist. # 403, 308 F.3d 1047, 1049 (9th Cir. 2002)  
22 (quoting 20 U.S.C. § 1415(1)). If a plaintiff is required to  
23 exhaust administrative remedies under the IDEA, but fails to do so,  
24 federal courts are without jurisdiction to hear the plaintiff's  
25 claims. Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1274 (9th  
26 Cir. 1999). Defendants argue that the Court lacks subject matter  
27 jurisdiction over S.M.'s federal claims arising after March 7, 2007  
28 because he did not exhaust his administrative remedies with respect

1 to those claims.

2 The IDEA's exhaustion requirement applies to causes of action  
3 based on the IDEA as well as to causes of actions based on other  
4 federal statutes, such as the Americans with Disabilities Act or  
5 § 1983. See Robb, 308 F.3d at 1048-50; 20 U.S.C. § 1415(1). The  
6 Ninth Circuit has held that "when a plaintiff has alleged injuries  
7 that could be redressed to any degree by the IDEA's administrative  
8 procedures and remedies, exhaustion of those remedies is required."  
9 Robb, 308 F.3d at 1048. The "primary concern in determining  
10 whether a plaintiff must use the IDEA's administrative procedures  
11 relates to the source and nature of the alleged injuries for which  
12 he or she seeks a remedy, not the specific remedy requested." Id.  
13 at 1050. In considering whether the injuries are of the type the  
14 IDEA is meant to remedy, it must be kept in mind that the IDEA was  
15 enacted "to ensure that all children with disabilities have  
16 available to them a free appropriate public education that  
17 emphasizes special education and related services designed to meet  
18 their unique needs . . . [and] to ensure that the rights of  
19 children with disabilities and parents of such children are  
20 protected." Robb, 308 F.3d at 1049 (alterations in Robb) (quoting  
21 20 U.S.C. § 1400(d)).

22 In determining whether exhaustion is required, the  
23 "dispositive question generally is whether the plaintiff has  
24 alleged injuries that could be redressed to any degree by the  
25 IDEA's administrative procedures and remedies. If so, exhaustion  
26 of those remedies is required. If not, the claim necessarily falls  
27 outside the IDEA's scope, and exhaustion is unnecessary." Id. at  
28 1050. Even in situations where it is not clear whether the IDEA can

1 remedy a particular injury, "exhaustion should be required to give  
2 educational agencies an initial opportunity to ascertain and  
3 alleviate the alleged problem." Id.

4 It is clear that Plaintiffs' injuries are of the type that may  
5 be redressed by the IDEA's administrative remedies. Plaintiffs  
6 contend that S.M. need not exhaust those remedies because his  
7 claims are based on a "policy or . . . practice of general  
8 applicability that is contrary to the law," a category of claims  
9 that are, in some cases, exempted from the exhaustion requirement,  
10 see Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1304 (9th  
11 Cir. 1992). However, although Plaintiffs have described S.M.'s  
12 treatment as flowing in part from Defendants' general practice of  
13 physically and verbally abusing students and denying them meals as  
14 a form of punishment, "[s]tructuring a complaint as a challenge to  
15 policies, rather than as a challenge to an individualized education  
16 program formulated pursuant to these policies, . . . does not  
17 suffice to establish entitlement to a waiver of the IDEA's  
18 exhaustion requirement. Plaintiffs must demonstrate in addition  
19 that the underlying purposes of exhaustion would not be furthered  
20 by enforcing the requirement." Id.

21 Plaintiffs have not demonstrated a basis for being excused  
22 from the IDEA's exhaustion requirement because S.M.'s claims, no  
23 matter how they are phrased, are fundamentally specific to  
24 Defendants' particular treatment of S.M. Plaintiffs' pursuit of  
25 administrative remedies would afford the District "an opportunity  
26 to consider and correct errors" concerning S.M.'s current education  
27 program, even if those errors result from an unlawful policy of  
28

1 corporal punishment.<sup>4</sup> Id. S.M.'s claims based on post-March 7,  
2 2007 events will therefore be dismissed.

3 III. P.M.'s Claim

4 In the complaint, P.M. asserts a claim under the Equal  
5 Protection Clause "on the basis of disability and race."  
6 Defendants move to dismiss this claim because P.M. does not allege  
7 that he is disabled. Defendants do not explicitly address the race  
8 discrimination claim. In opposing the motion, Plaintiffs do not  
9 refute Defendants' argument, but instead claim that P.M. may state  
10 a claim for retaliation under the Rehabilitation Act. They do not  
11 discuss the viability of any claim for race discrimination.  
12 Whether P.M. may pursue a Rehabilitation Act claim is not before  
13 the Court because he does not assert such a claim in the  
14 complaint.<sup>5</sup> As for the race claim, the complaint contains nothing  
15 more than conclusory allegations that Defendants have adopted  
16 racially discriminatory policies. Plaintiffs do not identify any  
17 particular policy. Nor do they provide any facts to support the  
18 conclusion that P.M. was singled out for discriminatory treatment  
19 because of his race. Their bare assertion of discrimination is not  
20 sufficient to state an Equal Protection claim, and this claim is  
21 therefore dismissed. See Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
22 127 S. Ct. 1955, 1964-65 (2007) ("While a complaint attacked by a

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23  
24 <sup>4</sup>In addition, although Plaintiffs assert that the District's  
25 alleged policy of corporal punishment violates California law, they  
26 do not explain how a policy that violates state law can form the  
27 basis of their federal claims.

28 <sup>5</sup>Plaintiffs were previously ordered to list each claim for  
relief separately and to identify the person asserting the claim  
and the statute pursuant to which the claim is brought. Docket No.  
57.

1 Rule 12(b)(6) motion to dismiss does not need detailed factual  
2 allegations, a plaintiff's obligation to provide the grounds of his  
3 entitlement to relief requires more than labels and conclusions,  
4 and a formulaic recitation of the elements of a cause of action  
5 will not do."). P.M. may amend the complaint to assert a  
6 retaliation claim under the Rehabilitation Act or to specify a  
7 factual basis for a race discrimination claim.

8 IV. Ms. Allen's Claim

9 Ms. Allen asserts that Defendants violated her First Amendment  
10 right to freedom of speech by retaliating against her for opposing  
11 their unlawful practices. She has not, however, identified any  
12 specific action taken against her, and it is not clear that she can  
13 state a First Amendment claim for the alleged adverse actions taken  
14 against her son. In any event, Ms. Allen does not specify the date  
15 on which any of Defendants' alleged conduct occurred, and any claim  
16 based on conduct that occurred prior to March 7, 2007 would be  
17 barred by the settlement agreement. The Court therefore dismisses  
18 this claim with leave to amend.

19 V. State Law Claims

20 Defendants argue that Plaintiffs' state law claims should be  
21 dismissed because Plaintiffs have not complied with the procedural  
22 prerequisite of first filing an administrative claim, as required  
23 by the California Tort Claims Act. Because the Court is dismissing  
24 Plaintiffs' federal claims, it will defer ruling on the viability  
25 of any of the state-law claims. If Plaintiffs file a third amended  
26 complaint as permitted by this order and assert claims under  
27 California law, Defendants may move to dismiss at that time.

28

1 VI. Eleventh Amendment Immunity

2 Before this case was re-assigned to the undersigned judge, the  
3 Honorable Charles R. Breyer dismissed, without leave to amend,  
4 Plaintiffs' § 1983 claims for monetary damages against the District  
5 and against any Defendants in their official capacities. He also  
6 dismissed, without leave to amend, Plaintiffs' state law claims  
7 against the District and against any Defendants sued in their  
8 official capacities for monetary damages. Plaintiffs have  
9 improperly re-asserted these claims, which Judge Breyer found were  
10 barred by the Eleventh Amendment, in the second amended complaint.  
11 The claims are therefore stricken and may not be asserted in any  
12 third amended complaint.

13 CONCLUSION

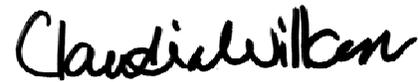
14 For the foregoing reasons, the complaint is dismissed. S.M.  
15 is given leave to amend to assert a federal claim based on events  
16 that are not related to his educational program. As explained, any  
17 claim based on S.M.'s discipline or placement at school is related  
18 to his educational program. S.M.'s education-related claims  
19 arising subsequent to March 7, 2007 are dismissed without prejudice  
20 to re-filing after he has exhausted the administrative procedures  
21 and remedies provided by the IDEA. P.M.'s claim is dismissed with  
22 leave to amend to assert a retaliation claim under the  
23 Rehabilitation Act and/or to state facts sufficient to make out a  
24 claim for race discrimination. Ms. Allen's claim is dismissed with  
25 leave to amend to identify the dates on which the conduct giving  
26 rise to her First Amendment claim took place and to specify a  
27 factual basis for concluding that her First Amendment rights were  
28 violated.

1           Although the complaint alleges that P.M. is a minor, it also  
2 alleges that P.M. has already graduated from high school. It is  
3 possible that, since this lawsuit was filed in 2007, P.M. has  
4 attained majority status. If he is no longer a minor, P.M. must  
5 decide whether he wishes to pursue this action on his own behalf  
6 and, if so, must sue in his own right and not through Ms. Allen.  
7 If P.M. is still a minor, the third amended complaint must state  
8 his date of birth.

9           Any third amended complaint must be filed within ten days of  
10 the date of this order. If Plaintiffs do not file a third amended  
11 complaint, the case will be closed.

12           IT IS SO ORDERED.

13  
14 Dated: 4/16/09



\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge