

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BELINDA K.,)	Case No.: 10-CV-05797-LHK
)	
Plaintiff,)	
v.)	ORDER GRANTING MOTIONS TO
)	DISMISS ¹
COUNTY OF ALAMEDA et al.,)	
)	
Defendants.)	

I. INTRODUCTION

On December 21, 2010, Belinda K. (Plaintiff), proceeding pro se, filed a complaint alleging 20 causes of action against 23 named defendants on behalf of herself and her minor son, J.H. See Compl. (Dkt. No. 1). Plaintiff's Complaint alleges that her minor son was taken from her custody on the basis of falsified, misleading and incomplete information [REDACTED]. Based on these allegations, Plaintiff asserts constitutional violations and violations of the Indian Child Welfare Act (ICWA, 25 U.S.C. §§ 1901 et seq.) via 42 U.S.C. § 1983, as well as a number of claims arising under state law such as malicious prosecution, intentional infliction of emotional distress, invasion of privacy, and attorney malpractice. At the same time Plaintiff filed the Complaint in this case, she filed an identical complaint in the Superior Court for the County of Alameda. The second

¹ This Order has been redacted to remove confidential information, pursuant to Civil Local Rule 79-5. A nonredacted Order has been filed under seal and served on the parties.

1 complaint was removed to this Court by some of the defendants, and subsequently related to and
2 consolidated with the above-captioned case. *See* Dkt. No. 86.

3 Seven different groups of defendants (collectively, “Defendants”) filed motions to dismiss
4 the complaint. The Defendants are grouped as follows. “County Defendants” include Alameda
5 County; social workers Mary Chew, Linda Fuchs, Tracy Fernandez, and Bruce Jackson; former
6 Alameda County Counsel Richard E. Winnie (now deceased); and Alameda County Department of
7 Social Services Director Yolanda Baldovinos. County Defendants’ motion to dismiss was joined
8 by the “City Defendants,” including the City of San Leandro and City of San Leandro Police
9 Department employees Officer Wong, Detective Luis Torres, Sergeant Decosta, and Kamilah
10 Jackson. A separate motion to dismiss was filed by “Plaintiff’s Counsel Defendants,” including
11 Patrick O’Rourke, Cheryl Smith, and Dennis Reid (three of Plaintiff’s appointed attorneys). A
12 third motion to dismiss was filed by “J.H.’s Counsel Defendants,” including the Alameda County
13 Public Defender’s Office and attorney Shanna Noel Connor (former appointed counsel for J.H. in
14 the state court dependency proceedings). A fourth motion to dismiss was filed by defendant Geri
15 Isaacson (“Isaacson”), J.H.’s elementary school principal. A fifth motion to dismiss was filed by
16 Lezley Crowell (“Crowell”), who also served as appointed counsel for Plaintiff. A sixth motion to
17 dismiss was filed by the Alameda County Bar Association. A seventh motion to dismiss was filed
18 by EMQ Families First, Inc. (“EMQ”). An eighth motion to dismiss was filed by “EBCLO
19 Defendants,” the East Bay Children’s Law Offices and Jonna Thomas (currently appointed counsel
20 for J.H. in the ongoing dependency proceedings in state court).

21 Plaintiff filed one opposition to all of the motions, except for the EBCLO Defendants’
22 motion, which was not timely served on Plaintiff. Dkt. No. 126 (Opp’n). In response, all
23 Defendants other than EBCLO filed reply briefs. Plaintiff responded with a sur-reply. Dkt. No.
24 133. The City Defendants moved to strike Plaintiff’s sur-reply. Dkt. No. 136. Although Plaintiff
25 did not move for leave to file the sur-reply, and it was therefore improperly filed, the Court will not
26 strike it and has reviewed it because of Plaintiff’s pro se status. In the future, however, Plaintiff
27 must follow the Civil Local Rules and move for leave to file any sur-reply (unless otherwise
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1 permissible under Civil Local Rule 7-3(d)). Accordingly, the City Defendants’ motion to strike is
2 DENIED.

3 For the reasons set forth below, the Court GRANTS Defendants’ Motions to Dismiss with
4 leave to amend as specified.

5 II. BACKGROUND

6 The Court summarizes the relevant allegations from Plaintiff’s Complaint as follows.²
7 Plaintiff is the mother of J.H., a minor. J.H. is an Indian child as defined by the Indian Child
8 Welfare Act (ICWA), and both J.H. and Plaintiff are registered members of the Cow Creek Band
9 of the Umpqua Tribe of Native Americans. On December 19, 2006, when J.H. was seven years
10 old, [REDACTED]. Based on this information, employees of the San Leandro Police Department
11 including Officers Wong, Jackson and DeCosta removed J.H. from his school and brought him to
12 an Alameda County Department of Social Services Assessment Center. Compl. ¶¶ 12-13. The
13 police removed J.H. from school and placed him in foster care without a warrant and based only on
14 Isaacson’s account of J.H.’s statements about abuse. Compl. ¶¶ 12, 27. After removing him, the
15 police questioned J.H. without the presence or consent of his mother or other guardian. Compl. ¶
16 18. Plaintiff alleges that J.H. later made statements inconsistent with Isaacson’s account at the
17 “CALICO” (Child Abuse Listening, Interviewing and Coordination Center) Interview. Plaintiff
18 does not allege when this interview took place. Compl. ¶ 28.

19 On December 21, 2006, the Alameda County Health and Human Services Agency
20 (“Agency”) filed a petition in Alameda County Superior Court (“Superior Court”) alleging that
21 J.H. was a child described by section 300(c) of the California Welfare and Institutions Code.
22 Compl. ¶ 20. The petition stated that J.H. was suffering or at substantial risk of suffering serious
23 emotional damage [REDACTED]. Compl. ¶ 20. Plaintiff alleges that the petition did not contain
24 any specifics regarding her conduct. *Id.* On December 22, 2006, the Superior Court held a
25 detention hearing, and Crowell was appointed counsel for Plaintiff. Compl. ¶ 31.

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27 ² Plaintiff’s Complaint references a declaration and numerous attachments, but no declaration or
28 attachments were filed. Although Plaintiff submitted a Request for Judicial Notice (RJN) in
connection with her opposition to the motions to dismiss, it appears that many of the documents
referenced in the Complaint are not attached to the RJN, either.

1 On January 2, 2007 the Superior Court held a jurisdictional hearing on the petition. The
2 Agency filed and served a Report the same day. Compl. ¶ 34. Plaintiff alleges that the January 2,
3 2007 Agency Report contained misrepresentations, including that the Board of Indian Affairs had
4 been notified but that Plaintiff’s tribe had not been contacted, and that there was an ongoing police
5 investigation awaiting the results of an exam of J.H. before bringing the case to the District
6 Attorney.³ Compl. ¶ 32. Plaintiff claims that the County Counsel representative at the hearing
7 made an admission that the Court lacked jurisdiction over the petition, but that her attorney did not
8 follow up or ask questions about this. Compl. ¶ 37. At the hearing, Plaintiff signed a waiver
9 wherein she pleaded no contest to the allegations in the petition. Compl. ¶ 38.

10 Plaintiff claims she did not meet with Crowell until just before the hearing began despite
11 her efforts to meet beforehand. Compl. ¶ 31. Plaintiff further claims that she signed the waiver
12 form during a recess in the hearing while being pressured by Crowell to sign, and that Crowell did
13 not explain the consequences of signing the form or that “if the court were to find the petition to be
14 true, that [Plaintiff] would have difficulty getting her child back unless she admitted
15 [REDACTED].” Compl. ¶¶ 35, 98.h. Plaintiff claims that her waiver “did not comply with the
16 procedural requirements for a ‘knowing and intelligent’ waiver because the Superior Court did not
17 comply with the California Rules of Court in accepting it.” Compl. ¶ 39. At the January 2, 2007
18 hearing, the Superior Court found that J.H. was a dependent child as described by section 300, and
19 that he should remain in foster care. After the hearing, Plaintiff alleges that she was “intercepted in
20 the hallway” by defendant Fuchs, an Agency social worker, who presented her with a release form
21 for a [REDACTED] exam for J.H., which Plaintiff signed. Compl. ¶ 40. Plaintiff alleges that she
22 did not possess the authority to sign the form in light of the outcome of the hearing, and that in any
23 event it should have been presented to attorney Crowell rather than directly to Plaintiff. *Id.*

24 On January 16, 2007, the Superior Court held a hearing and noted that notice had not been
25 provided to Plaintiff’s tribe pursuant to ICWA. Compl. ¶ 41. Crowell stated that Plaintiff “is
26 contesting this whole recommendation” and that she “wants her child back in her home.” Compl. ¶

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28 ³ It is not clear from the Complaint which of these statements is false or upon what basis Plaintiff
alleges that they are false.

1 43. Accordingly, the matter was re-set for a contested dispositional hearing on April 5, 2007.
2 Compl. ¶ 45. Also on January 16, 2007, J.H. was examined by a doctor at “Children’s Hospital.”
3 Compl. ¶ 44. Plaintiff alleges that this exam was an illegal search in violation of the Fourth
4 Amendment. Plaintiff alleges that Fuchs submitted false information to the doctor in advance of
5 the exam, stating that J.H. disclosed during the CALICO interview that [REDACTED], but that the
6 CALICO tapes prove that J.H. never said this. Compl. ¶ 52. Plaintiff claims that the exam
7 revealed no signs of [REDACTED] abuse. *Id.*

8 On April 5, 2007, the Superior Court held a dispositional hearing. Plaintiff claims that
9 there was still no proof of notice to her tribe and that the Court granted “a 30 day grace [period]”
10 for County Counsel to supply this notice. Compl. ¶ 45. However, Plaintiff also alleges that a
11 Tribal Representative from her tribe, Rhonda Malone, appeared at the hearing. Compl. ¶ 46.
12 Plaintiff alleges that Ms. Malone testified that she did not know what was going on in the case, and
13 only agreed to recommend that J.H. should be removed from Plaintiff’s custody because she was
14 asked to assume that the facts in the Report were true. Compl. ¶ 50. At the dispositional hearing,
15 the Superior Court concluded that J.H. should remain a dependent child in the custody of the state.
16 Compl. ¶ 53. J.H. is still living in foster care. His placement has been reviewed by the Superior
17 Court approximately every six months since his initial placement. *See* Compl. ¶¶ 54-83.

18 Throughout the Superior Court proceedings, Plaintiff has been represented by a series of
19 court-appointed counsel, and J.H. has been represented by separate appointed counsel. *Id.*
20 Plaintiff alleges that throughout the Superior Court proceedings, including the six month status
21 reviews, all appointed counsel have failed to adequately represent Plaintiff and her son, because
22 they have refused to communicate with their clients, file pleadings on their clients’ behalf, and
23 investigate the facts of the case and Plaintiff’s defense. Compl. ¶¶ 54-83, 89-94. Plaintiff asserts
24 that appointed counsel have served only as “bare counsel” throughout these proceedings, appearing
25 in court but nothing more. *Id.* Plaintiff attributes these failures to the policies of Alameda County,
26 which provided inadequate compensation for appointed counsel and overloaded them with cases
27 such that their representation was not competent. Compl. ¶¶ 164-170.
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1 On June 11, 2010, before filing the underlying complaint, Plaintiff attempted to remove the
2 ongoing status reviews from the Superior Court proceedings to this Court, and filed a Petition for
3 Habeas Corpus seeking injunctive relief and J.H.’s return to Plaintiff’s custody. *See J.H. v.*
4 *Baldovinos*, No. 10-cv-02507 (N.D. Cal.). The Court found that Plaintiff could not file a habeas
5 petition on the stated grounds, and could not remove the underlying status reviews from Superior
6 Court. However, Plaintiff’s claims for violation of ICWA at the initial child custody proceedings
7 are still pending. At the recommendation of this Court, Plaintiff was referred to the Pro Bono
8 Project of Silicon Valley and pro bono counsel have appeared on Plaintiff’s behalf in that case.⁴

9 III. LEGAL STANDARD

10 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if
11 it fails to state a claim upon which relief can be granted. To survive a motion to dismiss, the
12 plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
13 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the
14 plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted
15 unlawfully.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). In deciding whether the plaintiff has
16 stated a claim, the court must assume the plaintiff’s allegations are true and draw all reasonable
17 inferences in the plaintiff’s favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).
18 However, the court is not required to accept as true “allegations that are merely conclusory,
19 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536
20 F.3d 1049, 1055 (9th Cir. 2008). Leave to amend must be granted unless it is clear that the
21 complaint’s deficiencies cannot be cured by amendment. *Lucas v. Dep’t. of Corr.*, 66 F.3d 245,
22 248 (9th Cir. 1995). The rule favoring liberality in granting leave to amend is particularly
23 important for pro se litigants. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000).

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26 ⁴ Plaintiff makes several references in her briefing to her hope that the Court will recommend
27 appointment of pro bono counsel in this matter as well. The Court does not believe this case
28 warrants appointment of pro bono counsel, and will not make this recommendation. The Plaintiff
may always consult the Federal Legal Assistance Self-Help Center located on the Fourth Floor of
the San Jose courthouse (telephone 408-297-1480).

1 IV. APPLICATION

2 A. Claims Brought on Behalf of J.H.

3 Several defendants argue that Plaintiff cannot sue on behalf of her son. Under Rule
4 17(c)(1)(A), a general guardian may sue on a minor's behalf. If a minor does not have a general
5 guardian or other qualifying representative to sue on his behalf, "[a] minor . . . may sue by a next
6 friend or by a guardian ad litem." Fed. R. Civ. P. 17(c)(2). The minor's guardian ad litem must be
7 appointed by the court. *See id.*; *see also Castillo-Ramirez v. County of Sonoma*, No. C-09-5938
8 EMC, 2010 U.S. Dist. LEXIS 35076, at *2 (N.D. Cal. Apr. 9, 2010) ("[A] court must formally
9 appoint the guardian ad litem to protect the unrepresented minor.") (citations omitted).⁵

10 Plaintiff filed the instant lawsuit on behalf of herself and as next friend for J.H., a minor.
11 While a parent can move the Court to be appointed as a guardian ad litem, such an appointment is
12 improper if there is a conflict of interest between the parent and child. "[I]f the parent has an actual
13 or potential conflict of interest with his child, the parent has no right to control or influence the
14 child's litigation." *Williams v. Super. Ct.*, 54 Cal. Rptr. 3d 13, 23 (Cal. App. 2007). As alleged in
15 Plaintiff's Complaint, an actual conflict of interest between herself and J.H. has been found by the
16 Superior Court in the dependency proceedings. Even if the Superior Court had not formally found
17 a conflict of interest, the Complaint shows that a conflict exists. Therefore, Plaintiff is ineligible to
18 serve as guardian ad litem or next friend to bring claims on behalf of J.H. in this matter.

19 Even if an appropriate guardian ad litem could be identified, the Ninth Circuit has held that
20 a parent or guardian cannot bring an action on behalf of a minor child without retaining a lawyer.
21 *Johns v. County of San Diego*, 114 F.3d 874, 876-77 (9th Cir. 1997) (citing *Osei-Afriyie v. Medical*
22 *College*, 937 F.2d 876, 882-83 (3d Cir. 1991); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*,
23 906 F.2d 59, 61-62 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (per
24 curiam)). According to the Ninth Circuit, "[t]he issue of whether a parent can bring a pro se

25 ⁵ Under Rule 17(b)(1), an individual's capacity to sue is determined by the law of the individual's
26 domicile. Fed. R. Civ. P. 17(b)(1). Under California law, minors may not file suit unless a
27 guardian conducts the proceedings. *See Castillo-Ramirez*, 2010 U.S. Dist. LEXIS 35076, at *2
28 ("When minors are involved, California Family Code §§ 6502 and 6601 provide that a minor, or an
individual under the age of eighteen, may file a civil suit as long as the action is conducted by a
guardian.") (citing Cal. Fam. Code §§ 6502, 6601). Because J.H. has no individual capacity to sue,
he can only pursue his claims through a representative.

1 lawsuit on behalf of a minor ‘falls squarely within the ambit of the principles that militate against
2 allowing non-lawyers to represent others in court.’” *Id.* at 877 (quoting *Brown v. Ortho Diagnostic*
3 *Sys., Inc.*, 868 F. Supp. 168, 172 (E.D. Va. 1994)). Thus, an attorney would need to appear to
4 prosecute J.H.’s claims.

5 Because Plaintiff cannot serve as J.H.’s guardian ad litem and because no attorney has
6 appeared to prosecute the claims brought on behalf of J.H., the Court DISMISSES these claims
7 without prejudice to J.H. bringing these claims through the appropriate means. *See Johns*, 114
8 F.3d at 877 (dismissing without prejudice complaint brought by a minor’s guardian ad litem
9 because no attorney had appeared); *Watson v. County of Santa Clara*, 468 F. Supp. 2d 1150, 1155
10 (N.D. Cal. 2007) (dismissing without prejudice actions brought by plaintiff minors because no
11 guardian ad litem was formally appointed by the court). Although Plaintiff asserts most claims in
12 her individual capacity, she asserts Counts Three, Four and Five on behalf of J.H. only.
13 Accordingly, the Court will not consider Defendants’ other arguments as to why Counts Three,
14 Four, and Five should be dismissed.⁶ To the extent any of Plaintiff’s other claims are brought on
15 behalf of both J.H. and Plaintiff, they are dismissed as to J.H. without prejudice. To clarify, the
16 Court dismisses these claims without prejudice to J.H. However, Plaintiff does not have leave to
17 amend to state any claims as J.H.’s next friend, in light of the conflict of interest between them.⁷

18 Certain defendants were sued based solely on their representation of J.H. These include
19 Jonna Thomas, Shanna Noel Connor, the Alameda County Public Defender’s Office, and the East
20 Bay Children’s Law Offices. Plaintiff is not given leave to amend her claims as to these
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23 ⁶ In addition, all subsequent discussion regarding Plaintiff’s claims does not apply to J.H.’s claims.
24 This is especially true of the statute of limitations analysis because “[u]nder California law, a
25 minor’s time in which to file an action is tolled until the time he reaches the age of majority.”
Schmidt v. United States, 2010 WL 2179904, at *11 (E.D. Cal. May 27, 2010) (citing Cal. Civ.
Proc. Code § 352).

26 ⁷ In her Opposition, Plaintiff disputes that she cannot serve as next friend to bring claims on behalf
27 of J.H., but asks that the Court appoint an attorney to represent him and to “protect him from any
28 potential or actual conflict of interest.” Because the Court finds that Plaintiff cannot serve as next
friend to J.H., it will not recommend representation of J.H. for pro bono assistance in this case.
The Court has appointed a guardian ad litem and counsel for J.H. in the related *J.H. v. Baldovinos*
case.

1 defendants, as she has not alleged any basis to sue them other than on behalf of J.H. These
2 defendants are DISMISSED with prejudice as to Plaintiff and without prejudice as to J.H.⁸

3 B. 42 U.S.C. § 1983 Claims Relating to Removal of J.H.

4 “For actions under 42 U.S.C. § 1983, . . . courts apply the forum state’s statute of
5 limitations for personal injury actions, along with the forum state’s law regarding tolling, including
6 equitable tolling, except to the extent any of these laws is inconsistent with federal law.” *Canatella*
7 *v. Van De Kamp*, 486 F.3d 1128, 1132 (9th Cir. 2007) (quoting *Jones v. Blanas*, 393 F.3d 918, 927
8 (9th Cir. 2004)) (quotation marks omitted). In California, the statute of limitations for personal
9 injury actions is two years. *Action Apartment Ass’n, Inc. v. Santa Monica Rent Control Bd.*, 509
10 F.3d 1020, 1026 (9th Cir. 2007) (citing *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985); Cal. Civ.
11 Proc. Code § 335.1).

12 “Federal law determines when a civil rights claim accrues.” *Maldonado v. Harris*, 370 F.3d
13 945, 955 (9th Cir. 2004) (citing *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001)). “Generally,
14 the statute of limitations begins to run when a potential plaintiff knows or has reason to know of
15 the asserted injury.” *Action Apartment*, 509 F.3d at 1026-27 (quoting *De Anza Properties X, Ltd. v.*
16 *County of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir. 1991)) (quotation marks omitted). Stated
17 another way, “it is the standard rule that accrual occurs when the plaintiff has a complete and
18 present cause of action, that is, when the plaintiff can file suit and obtain relief.” *Wallace v. Kato*,
19 549 U.S. 384, 387 (2007) (citations, quotation marks, and brackets omitted). The Ninth Circuit
20 previously addressed the accrual of § 1983 search and seizure claims: “where . . . illegal search and
21 seizure is alleged, the conduct and asserted injury are discrete and complete upon occurrence, and
22 the cause of action can reasonably be deemed to have accrued when the wrongful act occurs.”
23 *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983); *Pearce v. Romeo*, 299 Fed. Appx. 653,
24 655 (9th Cir. 2008) (“An injury from an illegal search and seizure accrues when the act occurs.”).

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26 ⁸ The EBCLO Defendants filed a motion to dismiss, but through inadvertence, did not serve the
27 Plaintiff with it when it was filed. Plaintiff moved to strike the EBCLO Defendants’ motion as
28 untimely. *See* Dkt. No. 143. Because the Court finds that the EBCLO Defendants must be
dismissed from this case based on arguments raised by other parties, the Court need not consider
the untimely-served motion to dismiss filed by the EBCLO Defendants. Therefore, Plaintiff’s
motion to strike it is DENIED as moot.

1 Although this Court has been unable to locate published Ninth Circuit authority addressing
2 the question of when civil rights claims based on child removal accrue, the Sixth Circuit has
3 concluded that they accrue when the child is removed from the parent. *See Kovacic v. Cuyahoga*
4 *Cnty Dep't of Children and Family Servs.*, 606 F.3d 301, 307 (6th Cir. 2010). For example, in
5 *Kovacic*, the plaintiff mother brought substantive and procedural due process claims as well as
6 Fourth Amendment claims based on the removal of her children by the police. *Kovacic*, 606 F.3d
7 at 307. The court found that the plaintiff's claim accrued on the day the juvenile court magistrate
8 found probable cause to keep her children in the temporary care of Family Services. *Id.* The court
9 rejected the plaintiff's argument that the 10-month removal of her children was a "continuing
10 violation" which did not end until their return to her, because "the precipitating event in this action
11 was the initial removal of her children from her custody on March 26, 2002." The Court finds the
12 Sixth Circuit's reasoning persuasive. Therefore, all of Plaintiff's claims based on J.H.'s removal
13 from her custody assert an injury that accrued no later than the day the Superior Court found that
14 J.H. was a dependent child of the state, on January 2, 2007. Plaintiff has cited no cases in the civil
15 child dependency context where the child's placement outside parental custody was held to be a
16 continuing violation, such that claims relating to the child's removal continue to accrue until the
17 child's return to the parent. Such a rule would make the two year statute of limitations for civil
18 rights claims meaningless in this context.

19 Plaintiff filed her Complaint on December 21, 2010. Because the Court finds that her
20 claims based on removal of J.H. accrued well before December 21, 2008, these claims are time-
21 barred.

22 1. Counts One, Two, Six and Nine of the Complaint Are Time-Barred

23 In Counts One and Two, Plaintiff alleges that Officers Wong, Jackson, DeCosta, and
24 Torres—San Leandro City police officers at the time—unlawfully seized J.H. on December 19,
25 2006 in violation of the Fourth Amendment, and caused him to be searched by a doctor at
26 Children's Hospital on January 16, 2007. Compl. ¶¶106-13. Similarly, in Count Six, she alleges
27 that Officer Wong unreasonably removed J.H. from her care and control. Compl. ¶ 128. In Count
28 Nine, Plaintiff alleges that Alameda County, through the Department of Social Services and the

1 Alameda County Counsel’s Office, violated her First and Fourteenth Amendment rights to be free
2 from unwanted governmental intrusion into protected relationships. Compl. ¶¶ 149-51. As a basis
3 for this claim, Plaintiff cites the seizure of J.H. and the medical exam performed on J.H. at
4 Children’s Hospital.

5 First, the Court finds that under the facts alleged, Plaintiff has no individual right under the
6 Fourth Amendment to challenge the allegedly unlawful seizure or search of her child. *See Wallis v.*
7 *Spencer*, 202 F.3d 1126, 1137 n.8 (9th Cir. 2000) (observing that claims of parents for the unlawful
8 seizure of their children “should properly be assessed under the Fourteenth Amendment standard
9 for interference with the right to family association” (citations omitted)). Although it is at least
10 theoretically possible for a parent to establish standing to bring a Fourth Amendment claim based
11 on the search of a child, the parent must “allege her own distinct injuries” as a result of the seizure
12 to demonstrate standing to bring such a claim. *J.B. v. Wash. Cnty*, 127 F.3d 919, 928 (10th Cir.
13 1997). Plaintiff has failed to allege any injury of her own distinct from injury to J.H. But, more
14 importantly, Plaintiff alleges that at the time J.H. was examined, he was not in her legal custody,
15 and her consent was not required for the examination. Compl. ¶ 40. Under these circumstances,
16 the Court finds that Plaintiff cannot assert a violation of her Fourth Amendment rights based on the
17 search or seizure of J.H. As discussed above, Plaintiff cannot vicariously assert J.H.’s rights.
18 Accordingly, the Fourth Amendment allegations in Counts One and Two are DISMISSED with
19 prejudice (as to claims brought on Plaintiff’s own behalf) and without prejudice (as to J.H.’s
20 claims). Because only Fourth Amendment violations are asserted in Count Two, that claim is
21 DISMISSED with prejudice as to Plaintiff.

22 In Counts One, Six and Nine, Plaintiff asserts that her fundamental liberty interest to be
23 with her son was violated by the wrongful seizure of J.H. “Parents and children have a well-
24 elaborated constitutional right to live together without governmental interference.” *Wallis v.*
25 *Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000) (citations omitted). “That right is an essential liberty
26 interest protected by the Fourteenth Amendment’s guarantee that parents and children will not be
27 separated by the state without due process of law except in an emergency.” *Id.* “[T]he state may
28 not remove children from their parents’ custody without a court order unless there is specific,

1 articulable evidence that provides reasonable cause to believe that a child is in imminent danger of
2 abuse.” *Id.* at 1138 (citations omitted). “Moreover, the police cannot seize children suspected of
3 being abused or neglected unless reasonable avenues of investigation are first pursued, particularly
4 where it is not clear that a crime has been—or will be—committed.” *Id.* (citations omitted).
5 Plaintiff’s allegations certainly implicate the liberty interest discussed in the *Wallis* decision. She
6 alleges that J.H. was unlawfully seized without a court order and without probable cause. Since
7 that seizure, Plaintiff has been denied the opportunity to live with J.H. Although, even based on
8 the Complaint, it appears that the Defendants had some cause to seize J.H., “[t]he existence of
9 reasonable cause, and the related questions, are all questions of fact to be determined by the jury.”
10 *Id.* (citations omitted).

11 The Court need not, however, determine whether Plaintiff has stated a substantive due
12 process claim. As outlined above, the “[two year] statute of limitations under § 1983 begins to run
13 when the cause of action accrues, which is when the plaintiffs know or have reason to know of the
14 injury that is the basis of their action.” *Ventura Mobilehome Cmtys. Owners Ass’n v. City of San*
15 *Buenaventura*, 371 F.3d 1046, 1052 n.4 (9th Cir. 2004) (quoting *RK Ventures*, 307 F.3d at 1058)
16 (quotation marks and alterations omitted). Here, Plaintiff had reason to know of J.H.’s seizure and
17 medical exam long before December 21, 2008. Officer Wong allegedly participated in the seizure
18 of J.H. on December 19, 2006. Plaintiff alleges that on January 2, 2007 the Superior Court found
19 that the allegations in the petition were true, and declared J.H. a dependent child of the state. Also
20 on January 2, 2007, Plaintiff signed a consent form regarding J.H.’s medical exam. J.H. was
21 examined on January 16, 2007. These events all occurred almost four years prior to Plaintiff filing
22 her complaint. Therefore, as currently pled, these claims are time-barred. For the reasons stated
23 below, the statute of limitations on these claims cannot be tolled.

24 Plaintiff does not dispute that the events giving rise to Counts One, Six and Nine occurred
25 more than two years prior to the filing of her complaint, but argues that these claims are not subject
26 to dismissal because she has alleged ongoing misconduct. Plaintiff is correct that in certain
27 circumstances, the “very nature” of a claim “involves repeated conduct.” *National R.R. Passenger*
28 *Corp. v. Morgan*, 536 U.S. 101, 115 (2002) (citation omitted). For such claims, a plaintiff can

1 adequately plead an ongoing violation by showing “a systematic policy or practice that operated, in
2 part, within the limitations period—a systematic violation.” *Mansourian v. Regents of the Univ. of*
3 *Cal.*, 594 F.3d 1095, 1110 (9th Cir. 2010) (quoting *Douglas v. Cal. Dep’t. of Youth Auth.*, 271 F.3d
4 812, 822 (9th Cir. 2001) (quotation marks and footnote omitted). Nevertheless, “[d]iscrete acts are
5 not actionable if time-barred, even if related to acts alleged in timely filed charges.” *Cholla Ready*
6 *Mix, Inc. v. Civish*, 382 F.3d 969, 974 (9th Cir. 2004) (citing *Morgan*, 536 U.S. at 113-14;
7 *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 828-29 (9th Cir. 2003);
8 *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1061-62 (9th Cir. 2002)). Furthermore, “[a]
9 continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an
10 original violation.” *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) (citing *Collins v. United*
11 *Airlines, Inc.*, 514 F.2d 594, 596 (9th Cir. 1975)); see also *Knox v. Davis*, 260 F.3d 1009, 1013 (9th
12 Cir. 2001) (“[A] mere continuing impact from past violations is not actionable.”) (quotation and
13 quotation marks omitted).

14 Plaintiff cannot allege that Wong, Jackson, DeCosta, Torres, or any other defendant is
15 currently participating in the seizure or search of J.H. The alleged acts of the police officers and
16 social workers that form the basis of Counts One, Six and Nine are discrete, not continual. Even
17 though the allegedly unlawful seizure of J.H. has led, in part, to J.H.’s continued separation from
18 Plaintiff, this is an effect of the original alleged violation. And, as stated above, the Court rejects
19 the argument that Plaintiff’s claim continually accrues as long as J.H. is out of her custody.
20 Therefore, the continuing or ongoing violation doctrine does not apply to Count One.

21 Because Plaintiff’s claims for violations of the Fourteenth Amendment based on the seizure
22 of J.H. accrued no later than January 2, 2007, these claims are time-barred, and their amendment
23 would be futile. Therefore, they are DISMISSED with prejudice.

24 2. Counts Eight and Fifteen Fail to State a Claim

25 In Count Eight, Plaintiff alleges that the City of San Leandro, through the San Leandro City
26 Police Department, the Alameda County Department of Social Services, Alameda County, and
27 Richard Winnie seized and took J.H. into custody without probable cause and without a hearing in
28 violation of Plaintiff’s Fourteenth Amendment right to be free from unwanted government

1 intrusion into protected relationships. Compl. ¶¶ 135-37. Plaintiff also alleges that Alameda
2 County, through its Department of Social Services and County Counsel, caused J.H. to undergo an
3 intrusive medical exam without probable cause. *Id.* ¶ 139. These allegations mirror those made in
4 Counts One, Six and Nine, and are time-barred for the same reasons discussed regarding each of
5 those Counts, above. Therefore, to the extent these Counts are based on the same facts alleged in
6 Counts One, Six and Nine, these Counts are DISMISSED with prejudice.

7 In addition to these allegations, Plaintiff alleges in Count Eight that Alameda County,
8 through its Department of Social Services and the Alameda County Counsel’s office, conspired to
9 subject her to illegal and unconstitutional procedures in the Alameda County Superior Court. *Id.* ¶
10 140. These alleged illegal and unconstitutional procedures include the development of fabricated
11 claims of child [REDACTED] abuse, the constant coercion of J.H. to remember events of abuse as
12 Defendants believed them, the subornation and delivery of perjured testimony by State witnesses,
13 the creation of false and fraudulent documentation to support the State’s case, and the intentional
14 refusal to investigate exculpatory evidence. *Id.* Likewise, in Plaintiff’s Count Fifteen, she asserts
15 that all Defendants “agreed and conspired to manipulate J.H. . . . into the role of [REDACTED]
16 victim, and then neglecting to inform any present or subsequent judicial officer of the months and
17 months of such manipulation or of the exculpatory evidence that the minor had never been
18 [REDACTED] abused as alleged.” Compl. ¶ 204. Plaintiff also alleges in Count Fifteen that
19 Defendants created false evidence of [REDACTED] abuse in their reports to the Superior Court,
20 and thereby violated her right to privacy under the First and Fourteenth Amendments. While
21 Plaintiff appears to assert both federal constitutional violations as well as California law violations
22 in Count Fifteen, the state law aspect of Count Fifteen is addressed below in Section IV.C.

23 In their Motion to Dismiss Count Eight, the County Defendants argue that these claims are
24 time-barred because the dependency proceeding took place on April 5, 2007. However, it is not
25 clear from the Complaint when Plaintiff learned of the allegedly falsified testimony or creation of
26 false documents. No party addressed this question in the briefing on Defendants’ motions.
27 However, based on the rule regarding accrual of fraud claims, it is not clear from the face of
28 Plaintiff’s Complaint that these claims would have accrued at the hearing itself. *Merck & Co. v.*

1 *Reynolds*, 130 S. Ct. 1784, 1793 (2010) (“where a plaintiff has been injured by fraud and remains
2 in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute
3 does not begin to run until the fraud is discovered” where “discovery” includes information the
4 plaintiff should have learned through the exercise of reasonable diligence.) Therefore, the Court
5 cannot conclude based on the face of the Complaint that these claims are time-barred.

6 “To obtain relief on a procedural due process claim, the plaintiff must establish the
7 existence of ‘(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the
8 interest by the government; and (3) lack of process.’” *Shanks v. Dressel*, 540 F.3d 1082, 1090 (9th
9 Cir. 2008) (quoting *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993))
10 (brackets omitted). “The Due Process Clause forbids the governmental deprivation of substantive
11 rights without constitutionally adequate procedure.” *Id.* at 1090-91 (citing *Cleveland Bd. of Educ.*
12 *v. Loudermill*, 470 U.S. 532, 541 (1985)). In a context similar to the case at hand, the Ninth Circuit
13 held that “deliberately fabricating evidence in civil child abuse proceedings violates the Due
14 Process clause of the Fourteenth Amendment when a liberty or property interest is at stake.”
15 *Costanich v. Dep’t of Soc. & Health Servs.*, 627 F.3d 1101, 1108 (9th Cir. 2009). “To sustain a
16 deliberate fabrication of evidence claim,” the Ninth Circuit has “held that a plaintiff must, ‘at a
17 minimum, point to evidence that supports at least one of . . . two propositions.’” *Costanich*, 627
18 F.3d at 1111 (quoting *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc)). Under
19 *Devereaux*, a plaintiff must show that “Defendants [either] continued their investigation of plaintiff
20 despite the fact that they knew or should have known that [she] was innocent” or “used
21 investigative techniques that were so coercive and abusive that they knew or should have known
22 that those techniques would yield false information.” *Costanich*, 627 F.3d at 1111 (quoting
23 *Devereaux*, 263 F.3d at 1076) (quotation marks and brackets omitted).

24 Plaintiff alleges that she possesses a Fourteenth Amendment right to be free from unwanted
25 government intrusion into her relationship with her son. This is a constitutionally protected liberty
26 interest. Plaintiff also alleges that Alameda County Superior Court deprived her of this protected
27 liberty interest based on fabricated and fraudulent evidence. Plaintiff’s allegations are conclusory,
28 stating (for example) that the unconstitutional procedures included “[t]he development of

1 fabricated claims of child [REDCATED] abuse,” and “the subornation of perjured testimony by
2 witnesses for the State.” The Court is not required to accept as true “allegations that are merely
3 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec.*
4 *Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). The Court finds that Plaintiff has not adequately
5 alleged facts to support this claim. As currently pled, the defendants have no way to know what
6 information was allegedly falsified, what testimony was perjured, or what exculpatory evidence
7 was withheld. Though the “Factual Allegations” section of the complaint contains some facts that
8 are presumably relevant to this claim (such as Plaintiff’s allegation that the January 16, 2006
9 medical exam of J.H. produced exculpatory evidence which was never disclosed to the Superior
10 Court), Plaintiff should specify the facts that this claim is based upon in the claim itself, so that the
11 defendants implicated in Count Eight know what they are defending against. “[A]llegations in a
12 complaint or counterclaim must be sufficiently detailed to give fair notice to the opposing party of
13 the nature of the claim so that the party may effectively defend against it.” *Starr v. Baca*, 633 F.3d
14 1191, 1204 (9th Cir. 2011). Accordingly, Counts Eight and Fifteen are DISMISSED. Plaintiff
15 may amend these claims to more clearly indicate their factual basis, which Defendants are
16 implicated, and how Plaintiff was injured.

17 C. Claims Subject to the California Torts Claims Act

18 Defendants argue that Counts Seven, Twelve, Thirteen, Fourteen, Fifteen, Seventeen, and
19 Twenty should be dismissed because Plaintiff failed to comply with California’s Tort Claims Act.
20 “Under the California Tort Claims Act . . . , a plaintiff may not maintain an action for damages
21 against a public entity or a public employee unless he timely files a notice of tort claim.” *Anderson*
22 *v. County of San Diego*, No. 10-CV-00705-IEG, 2011 U.S. Dist. LEXIS 33379, at *19 (S.D. Cal.
23 Mar. 29, 2011) (citations omitted).⁹ The purpose of the California Tort Claims Act¹⁰ “is to provide

24 ⁹ Under California Government Code § 945.4, “failure to timely present a claim for money or
25 damages to a public entity bars a plaintiff from filing a lawsuit against that entity.” *State of*
26 *California v. Superior Court*, 32 Cal. 4th 1234, 1239, 90 P.3d 116, 13 Cal. Rptr. 3d 534 (2004)
27 (footnote omitted). California Government Code § 950.2 requires that those who wish to sue a
28 public employee based on acts or omissions within the scope of the employee’s employment must
first file a claim against that employee’s public-entity employer. *See Briggs v. Lawrence*, 230 Cal.
App. 3d 605, 612-13 (1991); *see also Dennis v. Thurman*, 959 F. Supp. 1253, 1264 (C.D. Cal.
1997) (“When defendants are public employees, the plaintiff must first submit a written claim to
the public entity that employs them before filing a lawsuit seeking monetary damages for violations

1 the public entity sufficient information to enable it to adequately investigate claims and to settle
2 them, if appropriate, without the expense of litigation.” *Connelly v. County of Fresno*, 146 Cal.
3 App. 4th 29, 37-38, 52 Cal. Rptr. 3d 720 (2006) (quotation and quotation marks omitted). “Timely
4 claim presentation is not merely a procedural requirement, but rather, a condition precedent to a
5 plaintiff’s maintaining an action against a defendant, and thus, an element of the plaintiff’s cause of
6 action.” *Garber v. City of Clovis*, 698 F. Supp. 2d 1204, 1211 (E.D. Cal. 2010) (citing *K.J. v.*
7 *Arcadia Unified School Dist.*, 172 Cal. App. 4th 1229, 1238, 92 Cal. Rptr. 3d 1 (2009)). “Failure
8 to allege facts in a complaint demonstrating or excusing compliance with” the Tort Claims Act
9 “subjects the complaint to a motion to dismiss for failure to state a cause of action.” *Comm. for*
10 *Immigrant Rights v. County of Sonoma*, 644 F. Supp. 2d 1177, 1205 (N.D. Cal. 2009) (citation
11 omitted); *see also Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 627 (9th Cir. 1988)
12 (dismissing plaintiff’s claims against public employees and entities for failure to allege compliance
13 with California tort claim procedures). However, “[i]n general, state notice of claim statutes have
14 no applicability to § 1983 actions.” *Silva v. Crain*, 169 F.3d 608, 610 (9th Cir. 1999).

15 Counts Seven, Twelve, Thirteen, Fourteen, Seventeen, and Twenty assert state law torts
16 claims rather than federal Constitutional rights. Count Seven asserts malicious prosecution against
17 social workers Fuchs and Chew; Count Twelve asserts negligence against Alameda County, the
18 Department of Social Services, the City of San Leandro, the Alameda County Bar Association, and
19 the East Bay Children’s Law Offices; Count Thirteen asserts negligence and gross negligence
20 against all Defendants; Count Fourteen asserts intentional infliction of emotional distress against
21 all Defendants; Count Seventeen asserts intentional interference with Plaintiff’s right to counsel
22 under California law against all Defendants; and Count Twenty asserts attorney negligence and
23 misfeasance against the Alameda County Public Defender’s Office, Alameda County Bar
24 Association, East Bay Children’s Law Offices, and the individual appointed attorneys.

25
26 of California law.” (citing CAL. GOV’T CODE §§ 945.4, 950.2)). “Section 910 lists the information
27 that must be included in a notice of claim.” *Connelly v. County of Fresno*, 146 Cal. App. 4th 29,
37, 52 Cal. Rptr. 3d 720 (2006) (footnote omitted).

28 ¹⁰ The California Tort Claims Act is also called the Government Claims Act and the Government
Tort Claims Act.

1 It is unclear whether Count Fifteen, for invasion of privacy against all Defendants, asserts a
2 state law or federal cause of action. Unlike Counts Seven, Thirteen, Fourteen, Seventeen, and
3 Twenty, Count Fifteen references federal law. In particular, Plaintiff claims in Count Fifteen that
4 she has a right to privacy under the First and Fourteenth Amendments to the U.S. Constitution.
5 Compl. ¶ 202. Count Fifteen alleges that J.H. was removed from Plaintiff's custody without
6 reasonable cause or exigent circumstances, that J.H. was manipulated to provide false evidence,
7 that defendants suppressed exculpatory evidence showing that J.H. was not abused, and that these
8 acts invaded Plaintiff's family relationships. To the extent these allegations form the basis of a
9 Fourteenth Amendment claim via 42 U.S.C. § 1983, they are duplicative of Counts One and Eight,
10 discussed above. However, Count Fifteen also asserts that Plaintiff's privacy rights have been
11 violated, and that defendants' acts were aimed at portraying Plaintiff in a false light. To the extent
12 Count Fifteen is based on a violation of a California-law-based right to privacy, it asserts a state
13 law tort claim. Therefore, Counts Seven, Twelve, Thirteen, Fourteen, Fifteen, Seventeen, and
14 Twenty, and the state-law-based portion of Count Fifteen are subject to the California Tort Claims
15 Act.

16 The Tort Claims Act applies only to public entities or their employees acting within the
17 scope of their employment. Most of the defendants named in the Complaint are clearly public
18 entities or their employees: Alameda County, the City of San Leandro, the police officers and
19 social workers, County Counsel Winnie, Department of Social Services supervisors Jackson and
20 Baldovinos, and public school Principal Isaacson. The Complaint alleges facts showing that all of
21 these individuals were acting in the scope of their employment during the alleged acts. The
22 California Supreme Court has held that public defenders representing appointed clients are public
23 employees for purposes of the Tort Claims Act. *Barner v. Leeds*, 24 Cal. 4th 676, 683 (2000). In
24 light of the analogous roles performed by a public defender and appointed counsel in child
25 dependency proceedings, the Court tentatively finds that the appointed attorneys who represented
26 Plaintiff in the child dependency proceedings and their employers are also public employees and
27 entities for purposes of the Tort Claims Act. Should Plaintiff amend her claims to re-assert state
28 law claims against her appointed counsel without alleging that she first presented her claims to the

1 relevant agencies, the parties shall address this question in later motions to dismiss. The only
2 Defendant that does not appear to be a public entity for purposes of the Act is EMQ Families First,
3 which operates the facility where J.H. currently resides. However, while some of Plaintiff's
4 California law-based claims are asserted against all Defendants, it is not clear from the Complaint
5 that any of these claims are actually asserted against EMQ Families First. If Plaintiff amends the
6 Complaint and re-asserts a state law cause of action specifically against EMQ Families First, the
7 parties shall address this issue in any subsequent motion to dismiss.

8 In her Complaint, Plaintiff has not alleged that she complied with the claim presentation
9 requirements of the California Tort Claims Act. She does, however, argue that she should be
10 excused from compliance. In her Opposition, Plaintiff states that she could not have filed a
11 complaint in compliance with the Tort Claims Act because her appointed counsel provided her
12 incompetent advice and prevented her from filing complaints. As the Supreme Court of California
13 has stated, "a plaintiff may arguably be able to satisfy the claim presentation requirement by
14 alleging an appropriate excuse, such as equitable estoppel." *State of California v. Super. Ct.*
15 (*Bodde*), 32 Cal. 4th 1234, 1245, (Cal. Sup. Ct. 2004) (citing *Ard v. County of Contra Costa*, 93
16 Cal. App. 4th 339, 346-47 (Ct. App. 2001)). In *Ard*, the court explained what may excuse a
17 plaintiff from satisfying the claim presentation requirement: "It is well settled that a public entity
18 may be estopped from asserting the limitations of the claims statute where its agents or employees
19 have prevented or deterred the filing of a timely claim by some affirmative act." *Ard*, 93 Cal. App.
20 4th at 346-347 (quoting *John R. v. Oakland Unified School Dist.*, 48 Cal. 3d 438, 445 (Cal. Sup.
21 Ct. 1989)) (quotation marks omitted).

22 Plaintiff's argument that her appointed counsel prevented her from filing complaints does
23 not excuse her from complying with the Tort Claims Act. Under *Ard*, Plaintiff must allege that
24 Defendants performed some affirmative act to prevent or deter her from filing her claim with the
25 public entities that allegedly violated her constitutional rights. She has failed to do so. Plaintiff's
26 allegations that her appointed counsel prevented her from filing complaints with the Superior Court
27 do not excuse her failure to file complaints with the agencies that oversee the named Defendants.
28 Because timely presentation of claims is a "condition precedent to a plaintiff's maintaining an

1 action against a defendant,” the Court must dismiss the Counts of Plaintiff’s Complaint based on
2 state law. Therefore, Counts Seven, Twelve, Thirteen, Fourteen, Seventeen and Twenty are
3 DISMISSED, and to the extent it is based on state law, Count FIFTEEN is DISMISSED as well.
4 Because Plaintiff could correct these deficiencies, the Court grants her leave to amend. If Plaintiff
5 chooses to amend her claims, she must allege facts demonstrating or excusing her compliance with
6 the Tort Claims Act, at least as to all the defendants who are clearly public entities and
7 employees.¹¹ As for the individual appointed attorneys, their employers, and EMQ Families First,
8 if Plaintiff re-asserts these claims against them and does not allege compliance with the Tort
9 Claims Act, the defendants shall address this issue in any second motions to dismiss.

10 D. Count Ten Fails to State a Claim

11 In Count Ten, Plaintiff attempts to state a claim for violation of her right to equal protection
12 of the law under the Fourteenth Amendment. Plaintiff alleges that she was “subjected to malicious,
13 false and fraudulent ‘prosecution’ in a Juvenile Court, without criminal jurisdiction . . . to destroy
14 the familial relations of the Plaintiff and her son.” Compl. ¶ 155.

15 To state a § 1983 claim for violation of the Equal Protection Clause of the Fourteenth
16 Amendment, a plaintiff “must show that the defendants acted with an intent or purpose to
17 discriminate against the plaintiff based upon membership in a protected class,” and that plaintiff
18 was treated differently from persons similarly situated. *Barren v. Harrington*, 152 F.3d 1193, 1194
19 (9th Cir. 1998). A plaintiff may state an equal protection claim by alleging four separate elements:
20 (1) that the municipal defendant treated plaintiff differently from others similarly situated; (2) this

21 ¹¹ Plaintiff may also allege facts showing that she substantially complied with the claim
22 presentment statutes. “Where a claimant has attempted to comply with the claim requirements but
23 the claim is deficient in some way, the doctrine of substantial compliance may validate the claim
24 ‘if it substantially complies with all of the statutory requirements even though it is technically
25 deficient in one or more particulars.’” *Connelly v. County of Fresno*, 146 Cal. App. 4th 29, 38
26 (2006) (quoting *Santee v. Santa Clara County Office of Education*, 220 Cal. App. 3d 702, 713
27 (1990)) (alterations omitted). “The doctrine is based on the premise that substantial compliance
28 fulfills the purpose of the claims statutes, namely, to give the public entity timely notice of the
nature of the claim so that it may investigate and settle those having merit without litigation.” *Id.*
(quotation and quotation marks omitted). “The doctrine of substantial compliance, however,
‘cannot cure total omission of an essential element from the claim or remedy a plaintiff’s failure to
comply meaningfully with the statute.’” *Id.* (quotation omitted). “The test for substantial
compliance is whether the face of the filed claim discloses sufficient information to enable the
public entity to make an adequate investigation of the claim’s merits and settle it without the
expense of litigation.” *Id.*

1 unequal treatment was based on an impermissible classification; (3) the municipal defendant acted
2 with discriminatory intent in applying this classification; and (4) plaintiffs suffered injury as a
3 result of the discriminatory classification. *See, e.g., Fobbs v. City of Union City*, No. C 09-2723
4 PJH, 2011 U.S. Dist. LEXIS 9187 at *14-18 (N.D. Cal. Jan. 31, 2011). In her Opposition, Plaintiff
5 concedes that she inadvertently omitted facts relating to her equal protection claim from the
6 Complaint. Although elsewhere in the Complaint Plaintiff alleges that she is a member of a Native
7 American Tribe, she does not allege that any defendant treated her differently from others similarly
8 situated based on any impermissible classification, that any defendant acted with discriminatory
9 intent in applying the classification, or that she suffered injuries resulting from such a
10 classification. Although Plaintiff has made conclusory allegations of harmful treatment, her failure
11 to allege any *disparate* treatment is fatal to her claim as currently pled. *Byrd v. Maricopa County*
12 *Sheriff's Dep't.*, 629 F.3d 1135, 1140 (9th Cir. 2011). However, Plaintiff may be able to plead
13 facts sufficient to state an equal protection claim. Accordingly, Count Ten is DISMISSED with
14 leave to amend.

15 E. Count Eleven Fails to State a Claim

16 Plaintiff's Count Eleven attempts to state a claim for *Monell* liability against Alameda
17 County, the Alameda County Department of Social Services, the Alameda County Bar Association,
18 and the East Bay Children's Law Offices (the "Employer Defendants" for purposes of this Count),
19 based on the actions of their "Employee Defendants" (social workers Fuchs and Chew; Department
20 of Social Services supervisors Jackson and Baldovinos; police officers Jackson, DeCosta, Wong,
21 Torres; appointed counsel for Plaintiff Crowell, Smith, Reid, O'Rourke; appointed counsel for J.H.
22 Connor and Thomas). Plaintiff alleges that the Employer Defendants "were all aware that they
23 failed to adequate[ly] train and supervise their employees to competently interview children about
24 whom allegations of [REDACTED] abuse had been made" and that "[i]n the case of appointed
25 attorneys for the indigent, to provide proper compensation and freedom of choice in defense
26 actions to the attorneys required to have the freedom to exercise independent judgment"
27 Compl. ¶ 165. Plaintiff asserts that her appointed attorneys were paid under a fixed fee agreement
28 that she asserts violated Welfare and Institutions Code § 218 and limited the freedom of attorneys,

1 while assigning case loads “over and above any safe recommendations preventing the attorneys
2 from having the time to consult or competently represent their clients.” Compl. ¶ 170.

3 Plaintiff also alleges (without specifics) that the Employer Defendants “had all learned of
4 previous incidents involving the [Employee Defendants] . . . in which these Defendants allegedly
5 violated the statutory and Constitutional rights of other citizens” and that these allegations are
6 “likely to have additional evidentiary support after a reasonable opportunity for further
7 investigation and discovery.” Compl. ¶¶ 166-67. Plaintiff alleges that the Employer Defendants
8 did not discipline their employees, but instead “tacitly authorized” their “improper conduct.”
9 Compl. ¶ 169. Plaintiff does not specify how she was injured by the practices asserted in Count
10 Eleven, although elsewhere in the Complaint she asserts § 1983 and other claims based on the
11 actions of the individual Employee Defendants. For example, Counts One, Two and Three assert
12 claims based on actions of the police officers; Count Seven asserts a claim based on the actions of
13 the social worker defendants; and Count Seventeen asserts a claim based on the actions of
14 appointed counsel for Plaintiff.

15 “Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory,
16 or injunctive relief where . . . the action that is alleged to be unconstitutional implements or
17 executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated
18 by that body’s officers.” *Monell v. Department of Social Services of City of New York*, 436 U.S.
19 658, 690, 98 S.Ct. 2018 (1978). A local government may not be sued under a theory of respondeat
20 superior for injuries inflicted solely by its employees or agents. *Monell*, 436 U.S. at 691; *Anderson*
21 *v. Warner*, 451 F.3d 1063, 1070 (9th Cir. 2006). Rather, a plaintiff must demonstrate that the
22 government’s official policy or custom was the “moving force” responsible for infliction of her
23 injuries. *Monell*, 436 U.S. at 694. Under *Monell*, a plaintiff may establish municipal liability by
24 demonstrating that “(1) the constitutional tort was the result of a longstanding practice or custom
25 which constitutes the standard operating procedure of the local government entity; (2) the
26 tortfeasor was an official whose acts fairly represent official policy such that the challenged action
27 constituted official policy; or (3) an official with final policy-making authority delegated that
28

1 authority to, or ratified the decision of, a subordinate.” *Price v. Sery*, 513 F.3d 962, 966 (9th Cir.
2 2008).

3 In “limited circumstances,” the failure to train municipal employees can serve as the policy
4 underlying a *Monell* claim. *Bd. of the Cnty. Comm’rs v. Brown*, 117 S. Ct. 1382, 1390 (U.S. 1997).
5 “If a program does not prevent constitutional violations, municipal decisionmakers may eventually
6 be put on notice that a new program is called for. Their continued adherence to an approach that
7 they know or should know has failed to prevent tortious conduct by employees may establish the
8 conscious disregard for the consequences of their action—the ‘deliberate indifference’—necessary
9 to trigger municipal liability.” *Id.*

10 Plaintiff has failed to adequately state a claim for *Monell* liability for any of the defendants
11 named in this Count. First, regarding the East Bay Children’s Law Offices and defendants Thomas
12 and Connor, because these defendants provided representation for J.H. and not for Plaintiff, a claim
13 against these defendants is J.H.’s claim to bring. For the reasons discussed in section IV.A., above,
14 Plaintiff cannot bring these claims on J.H.’s behalf. Regarding the claims asserted on her own
15 behalf, Plaintiff has not adequately alleged what her constitutional injury or injuries were. Plaintiff
16 has also failed to tie those injuries to “a longstanding practice or custom which constitutes the
17 standard operating procedure of the local government entity” or to plead that the failure to train
18 employees resulted in specific constitutional violations and a resulting deliberate indifference to
19 those constitutional violations. Finally, while Plaintiff alleges that appointed counsel were
20 systematically underpaid and overworked, she does not assert any injury flowing from this asserted
21 policy. Accordingly, Count Eleven is DISMISSED without prejudice, except that Plaintiff may not
22 reassert claims on behalf of J.H.

23 F. Count Sixteen Is Dismissed for Failure to State a Claim

24 1. ICWA as § 1983 Predicate

25 Plaintiff’s Count Sixteen is a § 1983 claim based on her allegation that her ICWA right to
26 competent counsel in the Superior Court dependency proceedings was violated. Plaintiff alleges
27 that the defendants “conspired and agreed that appointed attorneys would not as a custom and
28 practice produce any written pleadings for the defense of their clients, nor would they be paid for

1 their time to consult with their appointed clients.” Compl. ¶ 212. Plaintiff alleges that appointed
2 counsel appeared in court but provided no “substantive actual effort, no investigation of the facts or
3 the law nor vigorous defense or responsive pleadings” on behalf of appointed clients. Compl. ¶
4 214. Plaintiff is asserting a direct claim for violation of ICWA (on the basis of ineffective
5 assistance of counsel and on a number of other bases as well) in the related action, *J.H. v.*
6 *Baldovinos*, pending before this Court. In Count Sixteen’s § 1983 claim, Plaintiff seeks to hold
7 defendants liable for money damages and attorney’s fees based on this alleged violation. These
8 remedies are not available to Plaintiff in her direct ICWA claim.

9 County Defendants argue that Plaintiff cannot bring an ICWA claim via § 1983 because the
10 “express” remedies available under ICWA indicate that Congress did not intend that the ICWA
11 right could be enforced via § 1983. In a different context, the Ninth Circuit has previously found
12 that a claim based on an implied right under ICWA may be asserted via § 1983. “There are two
13 issues necessary to determining whether . . . ICWA claims are enforceable by § 1983: 1) whether
14 the federal statute was intended to create an enforceable right; and 2) whether the statutory scheme
15 indicates an intent to preclude resort to § 1983. *Native Village of Venetie IRA Council v. State of*
16 *Alaska*, 155 F.3d 1150, 1152 (9th Cir. 1998). ICWA clearly creates enforceable rights, including
17 judicial review of dependency proceedings. *Id.* Therefore, the “only remaining question is
18 whether the ICWA include[s] a sufficiently exhaustive remedial scheme within the underlying
19 statute to preclude enforcement under § 1983.” *Id.*

20 In *Native Village*, the Ninth Circuit found that ICWA’s remedial scheme was not
21 sufficiently exhaustive to preclude enforcement of ICWA’s § 1911(d) under § 1983. In that case,
22 the plaintiffs (the Village and certain individuals) sued the State of Alaska for recognition of Indian
23 adoption decisions made by the tribal court, pursuant to ICWA’s full faith and credit clause (25
24 U.S.C. § 1911(d)). Although ICWA creates a right to invalidate state court adoption decrees for
25 violations of ICWA §§ 1911, 1912 or 1913, *Native Village* did not involve an attempted
26 invalidation of state court adoption decrees. Therefore, the Ninth Circuit “had to imply a federal
27 cause of action precisely because none was explicitly included in the statutory scheme.” *Native*
28 *Village*, 155 F.3d at 1153. Because the cause of action had to be implied, the Ninth Circuit

1 concluded that “[i]t would seem strange indeed for a statute to include a remedial scheme
2 sufficiently comprehensive to preclude a § 1983 suit where an enforceable federal right had to be
3 implied by the court. The ICWA, therefore, does not provide any exclusive means for enforcing
4 the rights recognized in § 1911(d).” *Id.*

5 In contrast to the § 1911(d) claim brought in *Native Village*, in the present case Plaintiff’s
6 claims are based on the ICWA § 1912 right to appointed counsel. Through 25 U.S.C. § 1914,
7 Congress “explicitly authorized federal courts to invalidate state court judgments” for violations of
8 ICWA § 1912. *Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 2005). Therefore, Plaintiff’s claim
9 meets the first requirement of “a federal statute . . . intended to create an enforceable right.”
10 Regarding Congressional intent to preclude § 1983 actions, the Supreme Court has held that “[t]he
11 provision of an express, private means of redress in the statute itself is ordinarily an indication that
12 Congress did not intend to leave open a more expansive remedy under § 1983.” *City of Rancho*
13 *Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005). In particular, “the existence of a more
14 restrictive private remedy for statutory violations has been the dividing line between those cases in
15 which we have held that an action would lie under § 1983 and those in which we have held that it
16 would not.” *Id.* For example, in *Rancho Palos Verdes*, the plaintiff could not bring a claim under
17 the Telecommunications Act of 1996 (TCA) as the basis for a § 1983 claim, because the TCA
18 provided for more limited relief than § 1983. *Rancho Palos Verdes*, 544 U.S. at 121-23. Under the
19 TCA, claims had to be brought within 30 days of the government’s final action, and decided on an
20 expedited basis. *Id.* It was not clear if the TCA authorized recovery of damages, but unlike § 1983
21 (via 42 U.S.C. § 1988), it did not provide for attorney’s fees. *Rancho Palos Verdes*, 544 U.S. at
22 121-24. *Id.* The Court concluded that permitting a § 1983 claim based on a TCA claim would
23 “distort the scheme of expedited judicial review and limited remedies.” *Id.*, 544 U.S. at 127. In its
24 holding, the Court rejected the government’s argument that *any* statute expressly providing a
25 private right of action precludes § 1983 relief, holding that the “ordinary inference that the remedy
26 provided in the statute is exclusive can surely be overcome by textual indication, express or
27 implicit, that the remedy is to complement, rather than supplant, § 1983.” 544 U.S. at 122.
28

1 The County argues that because ICWA expressly provides an enforceable right, and
2 because it does not authorize an award of damages or attorney’s fees, the Court should find that
3 Congress did not intend to allow ICWA claims to serve as the basis for § 1983 claims.
4 “[L]imitations upon the remedy contained in the statute are deliberate and are not to be evaded
5 through § 1983.” *Rancho Palos Verdes*, 544 U.S. at 121-124. Although this is a close question,
6 the Court finds that the fact that ICWA does not provide for damages or attorney’s fees does not
7 preclude § 1983 claims based on ICWA claims. Unlike the “statutory schemes” analyzed by the
8 Supreme Court in cases finding preclusion of § 1983 claims, ICWA does not contain extensive
9 procedural limitations. *See, e.g., Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*,
10 453 U.S. 1, 14 (1981) (finding that the “elaborate enforcement provisions” of several laws,
11 including authorization under the Federal Water Pollution Control Act of citizen suits for certain
12 injunctive relief, requiring 60 days’ advance notice to defendants, indicated that Congress did not
13 intend to allow enforcement of the Act through § 1983). Instead, ICWA simply authorizes Indian
14 children, their parents, custodians, and tribes to challenge state dependency court decisions in “any
15 court of competent jurisdiction.” 25 U.S.C. § 1914. There are no “elaborate” or restrictive
16 administrative requirements, such as brief periods to file for review. Moreover, when interpreting
17 laws pertaining to Indians, “[s]tatutes are to be construed liberally in favor of the Indians;
18 ambiguous provisions are to be interpreted to the Indians’ benefit.” *Venetie I.R.A. Council v.*
19 *Alaska*, 944 F.2d 548, 553 (9th Cir. 1991). Construing ICWA liberally and in favor of Indians, the
20 Court finds that ICWA’s failure to provide for attorney’s fees or damages does not indicate clear
21 Congressional intent to preclude plaintiffs from seeking these remedies via § 1983.

22 County Defendants argue that “the Ninth Circuit has found that Section 1983 is not means
23 to avoid the remedial limitations of federal statutes.” County Defendants’ MTD at 9. They cite
24 *Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 937-38 (9th Cir. 2007). In this case, the Ninth
25 Circuit found that a parent could not bring a § 1983 claim based on the Individuals with
26 Disabilities Education Act (IDEA). *Id.* The fact that IDEA contained a “comprehensive
27 enforcement scheme demonstrated congressional intent to preclude § 1983 claims.” *Id.* In this
28 decision, the Ninth Circuit cited the “thoughtful, well-reasoned opinion of the Third Circuit” on the

1 same issue, citing *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 802 (3d Cir. 2007). In *A.W.*, the
2 Third Circuit noted that IDEA’s enforcement scheme provides aggrieved parties the right to submit
3 a complaint to either the state educational agency, or an impartial due process hearing. *Id.* Any
4 party unhappy with the outcome of the hearing has 90 days to file a complaint in district court,
5 which may then grant injunctive relief and attorney’s fees. *Id.* Unlike ICWA, but like the laws at
6 issue in *Rancho Palos Verdes* and *Sea Clammers*, IDEA’s enforcement scheme contains specific
7 procedural limitations. In light of the absence of such limitations from ICWA’s enforcement
8 provisions, and particularly in light of presumptions applying to Indian law, the Court finds that
9 *Blanchard* is distinguishable. Accordingly, the Court rejects County Defendants’ argument
10 regarding dismissal of Count Sixteen.

11 2. Timeliness of Count Sixteen

12 County Defendants argue, as they do for all of Plaintiff’s § 1983 claims, that Count Sixteen
13 is time-barred. Plaintiff appears to base at least a portion of this claim on events that occurred
14 more than two years before she filed the Complaint. For example, Plaintiff asserts that she has
15 been deprived of competent counsel since December 22, 2006, when the first attorney was
16 appointed to represent her in the child dependency proceedings. Compl. ¶ 212. Thus, it seems that
17 at least a portion of Plaintiff’s allegations under this Count may be time-barred. However, this
18 Count contains few specifics and it is therefore impossible to tell what portions of the claim are
19 dismissible due to being untimely. Therefore, the Court will not dismiss the claim on this ground.

20 3. Failure to State a Claim

21 Finally, the County Defendants argue that Count Sixteen fails to state a claim for
22 conspiracy. In order to state such a claim, Plaintiff must plead 1) the existence of an express or
23 implied agreement among the defendants to deprive Plaintiff of her constitutional rights; and 2) an
24 actual deprivation of those rights resulting from that agreement. *Ting v. U.S.*, 927 F.2d 1504, 1512
25 (9th Cir. 1991). While Plaintiff generally alleges a “conspiracy to put on a show of attorney
26 representation while actually doing nothing,” she does not specify who the parties to this alleged
27 conspiracy were or are. Nor does Plaintiff specify how the agreement resulted in a deprivation of
28 her rights. A “formulaic recitation of the elements of a constitutional discrimination claim” does

1 not suffice to state a claim. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (U.S. 2009). In this case,
2 Plaintiff has not alleged (even conclusorily) all of the elements of the asserted claim. Accordingly,
3 the Court DISMISSES this claim with leave to amend. In any amended complaint, Plaintiff should
4 clarify and add specificity to this claim, to indicate what parties this Court is directed to, what
5 those parties conspired or agreed to do, and what constitutional deprivations resulted.

6 G. Count Eighteen Is Dismissed for Failure to State a Claim

7 Plaintiff brings Count Eighteen against Richard Winnie, the former County Counsel for
8 Alameda County. Plaintiff alleges that Winnie had policies in place that directly caused
9 unconstitutional conduct by “assistant County Counsels.” Compl. ¶ 227. Plaintiff asserts that
10 Winnie failed to train his subordinates to provide exculpatory evidence to “the opposition”
11 pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963)¹². Plaintiff asserts that Winnie was aware that
12 the lack of training would lead to improper conduct, including “allegations of . . . child
13 [REDACTED] abuse [based on] inadmissible hearsay,” and that he “acted with deliberate
14 indifference” to the rights of families involved in child custody determinations. Plaintiff seeks
15 declaratory relief “to prevent the abuse of Plaintiffs’ well known rights.” Compl. ¶ 233.

16 The Ninth Circuit has held that

17 A defendant may be held liable as a supervisor under § 1983 if there exists either
18 (1) his or her personal involvement in the constitutional deprivation, or (2) a
19 sufficient causal connection between the supervisor’s wrongful conduct and the
20 constitutional violation. A plaintiff must show the supervisor breached a duty to
21 plaintiff which was the proximate cause of the injury. The law clearly allows
22 actions against supervisors under section 1983 as long as a sufficient causal
23 connection is present and the plaintiff was deprived under color of law of a
24 federally secured right.

25 *Starr v. Baca*, 633 F.3d 1191, 1196-97 (9th Cir. 2011) (alterations and internal citations
26 omitted).

27 As with many of Plaintiff’s claims, it is difficult to make out exactly what this claim
28 attempts to address. Plaintiff does not specifically discuss this Count in her Opposition to the
County Defendants’ Motion to Dismiss. From Count Eighteen itself, it is not possible to tell how

¹² It is not well-established that the *Brady* rule applies to child dependency proceedings. *See Clarke v. Upton*, No. CV-F-07-888 OWW/SMS, 2009 U.S. Dist. LEXIS 44045 at *52 (E.D. Cal. May 26, 2009).

1 Winnie’s policies caused Plaintiff’s alleged injuries. The alleged injuries appear to have been
2 caused by social workers who withheld exculpatory evidence and made false statements in
3 connection with the child dependency proceedings. The Complaint fails to tie any policies enacted
4 by Winnie (alleged to be County Counsel at the time) to the actions of the social workers. In fact,
5 Plaintiff’s allegations against her attorneys suggest that they could not have withheld any
6 exculpatory evidence, because they failed to discover it. For example, Plaintiff asserts that
7 attorney Crowell “never . . . sought review of the medical records, nor did she consult with a
8 medical expert.” Since the only exculpatory evidence Plaintiff has identified is the medical exam
9 of J.H. performed at Children’s Hospital, it is not clear how her attorney could have withheld this
10 evidence if Plaintiff also contends that she was not aware of it. And it is even less clear how any
11 policy set forth by Winnie as County Counsel could have resulted in such a withholding.

12 Plaintiff’s Count Eighteen is simply too vague to state a claim. “[A]llegations in a
13 complaint or counterclaim must be sufficiently detailed to give fair notice to the opposing party of
14 the nature of the claim so that the party may effectively defend against it.” *Starr v. Baca*, 633 F.3d
15 1191, 1204 (9th Cir. 2011). Plaintiff’s incorporation of all the preceding paragraphs in the
16 Complaint is not sufficient to put Defendants on notice of the basis for this claim. Plaintiff must
17 allege facts showing a “causal connection” between Winnie’s wrongful conduct and the asserted
18 injury. Plaintiff must also clearly identify what the injury was, and which specific individuals
19 caused it. Accordingly, Count Eighteen is DISMISSED with leave to amend.

20 H. Count Nineteen Is Dismissed For Failure to Allege State Actors

21 Count Nineteen of Plaintiff’s Complaint is titled “Attorney Malpractice” and “Civil Rights
22 Violations.” As the title suggests, the claim appears to be a hybrid of attorney malpractice based
23 on state law and a § 1983 claim based on the same underlying allegations. In this Count, Plaintiff
24 names her appointed attorneys (Crowell, Smith, Reid, and O’Rourke) as well as appointed counsel
25 for J.H. (Connor and Thomas). For the reasons set forth in Section IV.A., Plaintiff cannot bring
26 claims against J.H.’s attorneys on J.H.’s behalf. Because Plaintiff herself had no attorney-client
27 relationship with Connor or Thomas, Plaintiff cannot proceed with a claim against these two
28

1 defendants. Thus, the claim against Connor and Thomas is DISMISSED with prejudice as to
2 Plaintiff and without prejudice as to J.H.

3 Regarding her own appointed counsel, to the extent Count Nineteen is based on attorney
4 malpractice in violation of California law, the Court has tentatively found that this claim is subject
5 to the California Tort Claims Act claim presentation requirement. Accordingly, as set forth in the
6 analysis in Section IV.C., the state law portion of the claim is DISMISSED on this basis with leave
7 to amend.

8 In addition, attorney Crowell argues that Plaintiff's claims are time-barred as to her.
9 Plaintiff alleges that Crowell's representation of her ended as of January 14, 2008, after Plaintiff
10 expressed her dissatisfaction with Crowell to the Superior Court through a "verbal *Marsden*
11 motion" on December 13, 2007. Compl. ¶ 57. Because Plaintiff complained to the Superior Court
12 about Crowell on December 13, 2007, and the Superior Court interpreted this as a request to
13 replace Crowell as Plaintiff's appointed counsel, it appears that as of this date Plaintiff was aware
14 of the facts constituting her malpractice claim against Crowell. California provides a one-year
15 statute of limitations for attorney malpractice claims. Cal. Code Civ. Proc. § 340.6. Accordingly,
16 Crowell argues that Plaintiff's claim against her accrued at least by January 14, 2008, when another
17 attorney was appointed to represent Plaintiff, and that the claim is now time-barred. In her
18 Opposition, Plaintiff responds that she believes her claim should be tolled. Section 340.6 states
19 that:

20 In no event shall the time for commencement of legal action exceed four years
21 except that the period shall be tolled during the time that any of the following exist:
22 (1) The plaintiff has not sustained actual injury.
23 (2) The attorney continues to represent the plaintiff regarding the specific subject
24 matter in which the alleged wrongful act or omission occurred.
25 (3) The attorney willfully conceals the facts constituting the wrongful act or
26 omission when such facts are known to the attorney, except that this subdivision
27 shall toll only the four-year limitation.
28 (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's
ability to commence legal action.

29 In opposing Crowell's motion to dismiss, Plaintiff argues that the second, third and fourth
30 exceptions apply to her. Plaintiff does not identify any specific reasons why these exceptions
31 should apply, however. Nor does Plaintiff argue that her claim did not accrue when she

1 complained about Crowell’s performance to the Superior Court. Although, based on the facts
2 alleged in the Complaint, it appears that the claim against Crowell is time-barred, the Court will
3 give Plaintiff leave to amend to state the reasons supporting tolling of this claim.

4 To the extent Count Nineteen asserts a § 1983 claim against the appointed attorneys, the
5 law is clear that such attorneys do not act under color of state law. *Miranda v. Clark Cnty.*, 319
6 F.3d 465, 469 (9th Cir. 2003). In *Miranda*, the Ninth Circuit considered § 1983 claims brought
7 against an appointed public defender. Even though he was “paid by government funds and hired
8 by a government agency . . . his function was to represent his client, not the interests of the state or
9 county.” *Id.* Because he was performing the traditional function of a lawyer, he was not a state
10 actor. *Id.* Plaintiff alleges that her appointed counsel were performing the traditional functions of
11 lawyers while representing her (though she was unhappy with their performance). In fact, Count
12 Nineteen is based on Plaintiff’s allegations that her attorneys failed to “file any action” or “obtain
13 exculpatory evidence” while representing her. Accordingly, Plaintiff cannot state a § 1983 claim
14 against the individual appointed attorneys named in Count Nineteen because, as a matter of law,
15 they were not state actors while serving as her appointed counsel. Plaintiff argues that “by
16 participating in contracts under the DRAFT program,” the appointed counsel acted under color of
17 state law. The Ninth Circuit’s finding that even a full-time public defender “paid by government
18 funds” is not a state actor rebuts Plaintiff’s argument. Thus, the portion of Count Nineteen based
19 on § 1983 is DISMISSED without leave to amend. The remainder of Count Nineteen is
20 DISMISSED with leave to amend to plead compliance with the Tort Claims Act (if possible) and
21 to plead facts supporting tolling of Plaintiff’s malpractice claim against attorney Crowell. If
22 Plaintiff renews her claims against her appointed counsel and does not allege compliance with the
23 Tort Claims Act, the relevant defendants shall address whether or not they are public employees for
24 purposes of the Tort Claims Act in any motion to dismiss.

25 I. Social Workers May Be Entitled to Qualified Immunity for False Statements

26 In addition to the arguments addressed above, the County Defendants argue that the
27 individual social workers named as defendants (Chew, Fuchs, Fernandez, and Jackson) are entitled
28 to absolute immunity for most of their actions as alleged in the Complaint (such as failing to

1 disclose exculpatory evidence and manipulating J.H. to “remember” events that did not really
2 occur). County Defs.’ Mot. at 12-16. Regarding the alleged falsification of information, County
3 Defendants argue that the social workers are entitled to qualified immunity. County Defs.’ Mot. at
4 17-18. In support of their absolute immunity argument, County Defendants rely on older Ninth
5 Circuit authority holding that a social worker is “entitled to absolute immunity because her actions
6 involved the initiation and pursuit of child dependency proceedings.” *Doe v. Lebbos*, 348 F.3d
7 820, 825 (9th Cir. 2003). County Defendants argue that although the Ninth Circuit has since
8 limited social workers’ immunity, the “quasi-prosecutorial” absolute immunity still applies when
9 social workers initiate child dependency proceedings. *See Beltran v. Santa Clara Cnty.*, 514 F.3d
10 906, 908 (9th Cir. 2008) (overruling *Doe* and finding that a social worker was not immunized for
11 “fabricat[ing] evidence during a preliminary investigation, before he could properly claim to be
12 acting as an advocate, or mak[ing] false statements in a sworn affidavit.”) (citations and alterations
13 omitted).

14 It is true that “social workers, like prosecutors, are entitled to absolute immunity for
15 instituting child removal proceedings.” *Costanich v. Dept. of Social and Health Servs.*, 627 F.3d
16 1101, 1115 (9th Cir. 2010). However, the County Defendants interpret “instituting child removal
17 proceedings” too broadly. The County Defendants argue they are immunized for alleged acts of
18 “encouraging false testimony” and “ignoring evidence and statements which tended to show
19 Plaintiff did not commit the acts alleged,” and that only false, sworn statements could subject them
20 to lesser or no immunity. *See* County Defs.’ Mot. at 14.

21 In *Costanich*, the Ninth Circuit held that a social worker is not entitled to immunity when
22 he fabricates evidence during a child abuse investigation, *or* submits false statements in a sworn
23 declaration seeking to remove a child from parental custody. *Costanich*, 627 F.3d at 1109.
24 Therefore, the County Defendants’ argument that only sworn statements are outside the immunity
25 is incorrect. In *Costanich*, the defendant social worker allegedly falsified evidence while
26 investigating possible child abuse. *Costanich*, 627 F.3d at 1113. These statements were “not
27 questions of tone or characterization but actual misrepresentations.” *Id.* For example, the social
28 worker allegedly attributed statements to certain witnesses who denied making the statements, and

1 stated that she had interviewed the children’s doctors when she had not actually done so. *Id.*, 627
2 F.3d at 1112. The Ninth Circuit held that the social worker was not entitled to absolute immunity
3 for such acts. However, when a right is not “clearly established” at the time of an alleged
4 violation, state actors enjoy qualified immunity if they violate the right (even if the right is later
5 clearly established). *Id.* at 1114. Because the right not to be accused based on fabricated evidence
6 in a child dependency proceeding was not clearly established at the time the *Costanich*
7 investigation was made (2001), the social worker was entitled to qualified immunity. *Id.*, 627 F.3d
8 at 1116.

9 Based on the *Costanich* case, and the facts currently alleged, it is likely that the social
10 worker defendants are entitled to qualified immunity. Plaintiff alleges that the social workers
11 “manipulated” J.H. while interviewing him, withheld exculpatory evidence, and falsified evidence.
12 While defendant social workers would not be immunized for committing these acts today, they
13 were likely entitled to qualified immunity for committing them during 2006 and 2007, when the
14 underlying events took place. However, the Court finds that it would be premature to dismiss all §
15 1983 claims against the social workers based on qualified immunity. Plaintiff’s allegations,
16 especially regarding the “falsified” evidence and perjured testimony, are very vague, and the Court
17 has given Plaintiff leave to amend her claims to more clearly specify the facts upon which she is
18 relying, against which defendant(s) each claim is asserted, and how the Plaintiff was injured in
19 each case. Since it is very unclear exactly what claims are directed against the social workers by
20 the current Complaint, the Court reserves judgment on this question. Plaintiff may amend her
21 Complaint as set forth in this Order. If she re-asserts § 1983 claims against individual social
22 workers based on the investigation leading up to J.H.’s removal, the County Defendants may raise
23 the question of qualified immunity in a second motion to dismiss.

24 J. The *Rooker-Feldman* Doctrine Does Not Apply

25 Finally, the Court addresses County Defendants’ argument that all of Plaintiffs’ § 1983
26 claims are barred by the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine holds that
27 federal courts do not have subject matter jurisdiction to review the judgments or final
28 determinations of state courts, even if the state court decision might involve federal constitutional

1 issues. See *Ignacio v. Judges of the United States Court of Appeals for the Ninth Circuit*, 453 F.3d
2 1160, 1165 (9th Cir. 2006). In the Ninth Circuit, the *Rooker-Feldman* doctrine “applies only when
3 the federal plaintiff both asserts as her injury legal error or errors by the state court *and* seeks as her
4 remedy relief from the state court judgment.” See *Kougasian v. Kougasian*, 359 F.3d 1136, 1140
5 (9th Cir. 2004).

6 In their motion to dismiss Plaintiff’s complaint, County Defendants argue that “Plaintiffs
7 attempt to disrupt or ‘undo’ the state court judgment,” and that “Plaintiffs’ claims are clearly and
8 inextricably entwined with the prior . . . decision.” County Defs.’ Mot. (Dkt. No. 66) at 11. In
9 support of their assertion that this is a forbidden de facto appeal, County Defendants cite the Ninth
10 Circuit’s 2003 statement that “federal claims [which] would undercut the state ruling” are barred
11 under *Rooker-Feldman*. County Defs.’ Mot. at 10. (citing *Bianchi v. Rylaarsdam* 334 F.3d 895,
12 898 (9th Cir. 2003).

13 However, both the Ninth Circuit and the Supreme Court have clarified the *Rooker-Feldman*
14 doctrine since *Bianchi*. The Ninth Circuit has since stated that “where the federal plaintiff does not
15 complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by
16 an adverse party, *Rooker-Feldman* does not bar jurisdiction.” *Noel v. Hall*, 341 F.3d 1148, 1163
17 (9th Cir. 2003). This results from the exclusive grant of jurisdiction over appeals from final state
18 court judgments to the United States Supreme Court. *Id.*, 341 F.3d at 1154-55. The Supreme
19 Court approvingly cited *Noel* in its opinion examining *Rooker-Feldman*, and held that the doctrine
20 is confined to “cases brought by state-court losers complaining of injuries *caused by state-court*
21 *judgments.*” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (emphasis
22 added). Because Plaintiff complains of legal injuries caused by the Defendants’ actions, rather
23 than by the Superior Court’s judgment, her claims are not barred by the *Rooker-Feldman* doctrine.
24 As Plaintiff neither seeks relief from the state court’s judgment, nor alleges error on the part of the
25 state court, she is not “a ‘state-court loser’ looking to the federal court to second-guess a previously
26 rendered state-court judgment on the merits.” County Defs.’ Reply Br. at 12.

27 This case is distinguishable from *Bianchi*, in which the plaintiff sought “an injunction
28 vacating a decision by the California Court of Appeal.” *Bianchi*, 334 F.3d at 896. The Ninth

1 Circuit denied Bianchi’s request, as he “essentially asked the federal court to review the [state
2 court’s judgment] and to afford him the same individual remedy he was denied in state court.” *Id.*
3 at 898 (citation and quotation marks omitted). Here, Plaintiff seeks monetary damages, not
4 injunctive relief.

5 This case is likewise distinguishable from *Doe v. Mann*, also cited by County Defendants.
6 Defendants assert that “Plaintiff’s claims are clearly and inextricably intertwined with the prior . . .
7 decision.” Defs.’ Mot. at 11. Defendants cite *Doe v. Mann*, a Ninth Circuit dismissal of a
8 challenge to a state court judgment to terminate parental rights. *Id.* (citing *Doe v. Mann*, 415 F.3d
9 at 1041). The plaintiff in *Doe* sought “a declaration that the state court judgments . . . were null
10 and void.” *Doe*, 415 F.3d at 1041. *Doe* argued that the state court had no jurisdiction to issue the
11 judgment. Thus, she asked the Ninth Circuit to “‘undo’ a prior state court judgment.” *Doe*, 415
12 F.3d at 1042. In contrast, Plaintiff does not ask the Court to vacate the custody determination
13 issued by the Superior Court. Thus, *Doe* is not controlling.

14 In *Noel*, the Ninth Circuit specified that “[o]nly when there is already a forbidden de facto
15 appeal in federal court does the ‘inextricably intertwined’ test come into play.” *Noel*, 341 F.3d at
16 1158. That is, for a claim to be barred because it is inextricably intertwined with a forbidden de
17 facto appeal, that appeal must be brought to the court as well. The Ninth Circuit later clarified that
18 “[t]he inextricably intertwined test . . . allows courts to dismiss claims closely related to claims that
19 are themselves barred under *Rooker-Feldman*.” *Kougasian*, 359 F.3d at 1142. Though the plaintiff
20 in *Kougasian* requested that the court set aside a judgment, this request was based on the
21 defendant’s commission of extrinsic fraud, not because of legal error on the part of the state court.
22 *Id.* at 1143. Although the plaintiff resuscitated several claims previously adjudicated by the state
23 court in her federal complaint, she did not allege legal error. Therefore, the Ninth Circuit found
24 that the plaintiff did not seek a de facto appeal. *Id.* at 1142. Because an “inextricably intertwined”
25 claim can only be dismissed when brought in conjunction with a de facto appeal, none of
26 *Kougasian*’s claims were barred under *Rooker-Feldman* (though the court noted that preclusion
27 might apply). *Id.* at 1143.
28

1 Here, as in *Kougasian*, Plaintiff is not alleging legal error on the part of the state court, and
2 therefore is not making a de facto appeal. Because there is no de facto appeal, Plaintiff's claims
3 cannot, as County Defendants assert, be "clearly and inextricably intertwined" with a forbidden
4 appeal. Accordingly, County Defendants' motion to dismiss Plaintiff's § 1983 claims under the
5 *Rooker-Feldman* doctrine is DENIED.

6 V. CONCLUSION

7 For the reasons stated above, Plaintiff's Complaint is DISMISSED with leave to amend as
8 specified. To summarize, Counts Three, Four and Five, and the portions of any other Counts
9 brought exclusively on behalf of J.H. are DISMISSED without prejudice as to J.H. and with
10 prejudice as to Plaintiff. Counts One, Two, Six, and Nine of the Complaint are DISMISSED with
11 prejudice because they are time-barred. Counts Seven, Eight, Ten, Eleven, Twelve, Thirteen,
12 Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen and Twenty are DISMISSED with leave
13 to amend as specified in this Order. Plaintiff shall submit any amended complaint within **30 days**
14 **of the date of this Order.**

15 **IT IS SO ORDERED.**

16 Dated: July 8, 2011

17 
LUCY H. KOH
United States District Judge