NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CANDACE M. ERMELS, as guardian for other W.P.B., Plaintiff-Appellant, v. SHORELINE SCHOOL DISTRICT, Defendant-Appellee.	No. 22-35802 D.C. No. 2:20-cv-00893-RAJ MEMORANDUM[*]

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Submitted January 17, 2024[**]

Before: S.R. THOMAS, McKEOWN, and HURWITZ, Circuit Judges.

Candace M. Ermels, guardian of W.P.B., appeals pro se from the district court's judgment dismissing her action under the Americans with Disabilities Act ("ADA"), and Section 504 of the Rehabilitation Act ("Section 504"). We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

court's judgment on the pleadings. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). We affirm.

The district court properly granted judgment on the pleadings on Ermels's Section 504 accommodation claim because Ermels failed to allege facts sufficient to show that defendant deprived W.P.B. of special education services where Ermels refused to consent to an evaluation of W.P.B. without which defendant could not provide the requested services. *See* 20 U.S.C. § 1414(a)(1)(A) (Individuals with Disabilities Education Act evaluation requirement); 34 C.F.R. § 104.35(a) (Section 504 evaluation requirement); *see also Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) ("[I]ssue preclusion bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment even if the issue recurs in the context of a different claim." (citation and internal quotation marks omitted)); *C.M.E. on behalf of W.P.B. v. Shoreline Sch. Dist.*, No. 21-35538 (9th Cir. Mar. 14, 2023).

The district court properly granted judgment on the pleadings on Ermels's ADA accommodation claim because Ermels failed to allege facts sufficient to identify any programs or services W.P.B. was unable to access because of his disability. *See A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 (9th Cir. 2016) ("A plaintiff bringing suit under . . . Title II of the ADA must show . . . [he] was denied a reasonable accommodation that [he] needs in order to

enjoy meaningful access to the benefits of public services . . . ." (internal quotation marks omitted)).

The district court properly granted judgment on the pleadings on Ermels's retaliation claims because Ermels failed to allege facts sufficient to demonstrate that defendant took any adverse action against her or W.P.B. for advocating on his behalf. *See T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015) (elements of an ADA retaliation claim); *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1055 n.1 (9th Cir. 2005) (ADA and Section 504 create "the same rights and obligations").

The district court did not abuse its discretion in denying Ermels's motions for default judgment because Ermels had not properly served defendant when she filed these motions. *See* Fed. R. Civ. P. 4(j)(2) (method for serving state or local governments); Wash. Rev. Code § 4.28.080(3) (method for serving school districts in Washington); *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986) (standard of review and relevant factors).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.