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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

A.G., a student, by and through Parents WILLIAM GRUNDEMANN and RHONDA GRUNDEMANN; et al, Plaintiffs, v. PARADISE VALLEY UNIFIED SCHOOL DISTRICT, et al., Defendants.	**NO. 2:11-CV-01899-PHX-NVW** **SCHOOL DISTRICT DEFENDANTS' AMENDED RESPONSE BRIEF ON § 504 REGULATION CLAIMS**

Defendants, PARADISE VALLEY UNIFIED SCHOOL DISTRICT and INDIVIDUAL DISTRICT DEFENDANTS (collectively referred to as the "District"), by and through their undersigned counsel, hereby submit this Amended Response Brief to Plaintiffs' Brief on § 504 Claims.

I. Introduction

The Ninth Circuit's articulation of this issue, which this Court ordered the parties to brief, is: (1) which claims for violation of § 504 regulates plaintiffs preserved; (2) whether those regulations "fall within the scope of the prohibition contained in § 504 itself;" (3) whether the school district violated those regulations; and, (4) whether the

school district's violation of those regulations prevented A.G. from accessing her public education. Mandate Attach. 2, at 19, ECF No. 211 (internal citations omitted). Each numbered issue is addressed herein.

The District will show that (1) the Plaintiffs failed to plead any claims under the implementing regulations of Section 504, and thus there was nothing to preserve; (2) while certain Section 504 implementing regulations "authoritatively construe" the statute and can be enforced through a private right of action, Plaintiffs failed to establish in their brief that such an action can be maintained in this case; (3) the District did not violate any implementing regulations; and (4) the District provided A.G. with meaningful access to her free *appropriate* public education within the context of her significant behavior problems. The District therefore requests a ruling that there are no claims for violation of any of the implementing regulations of Section 504 at issue in this litigation.

II. Plaintiffs Neither Pled nor Preserved any Claims Under the Implementing Regulations of Section 504.

A. Plaintiffs Failed to Meet the Notice Pleading Requirements of Federal Rule of Civil Procedure 8 for a Claim Under Section 504 Implementing Regulations.

The Plaintiffs did not plead or even mention the implementing regulations of Section 504 at any point in the proceedings in this Court until the day discovery closed, September 28, 2012. On that date, in their final supplemental responses to the District's interrogatories, Plaintiffs for the *first time* stated that "the regulations implementing Section 504 are applicable to Plaintiffs' claims as well."[1] The discovery responses are not part of the record before this Court, and were not part of the record on the appeal.

[1] Plaintiffs' discovery response is not part of the record before this Court, and in accord with the June 29, 2016 Order, ECF No. 223, Defendant does not attach it hereto. Instead, Defendants' counsel attests that this is an accurate reference to this discovery document. If this Court would like to review the discovery response, counsel will promptly provide it.

Plaintiffs have again violated this Court's Order and attached discovery responses to their Amended Brief. As Plaintiffs failed to ever identify the implementing regulations as a basis for any claim, this is the only document they could point to where the regulations are mentioned.

Plaintiffs' first mention of the Section 504 implementing regulations in any court record was in their Opening Brief before the Ninth Circuit Court of Appeals. While the Ninth Circuit chose to thoroughly consider Section 504's implementing regulations as it reviewed this case, it also asked this Court to determine if the Plaintiffs had preserved any claims under the implementing regulations. Plaintiffs have not preserved such claims because they never made them.

A plaintiff must adhere to basic pleading requirements in order to articulate a claim for violation of Section 504's implementing regulations, as compared to a claim under Section 504 itself. The Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When evaluating whether Plaintiffs pled violations of Section 504's implementing regulations, the question is whether the pleading gave the District fair notice of the claim. *U.S. v. Maricopa County, Ariz.*, 915 F. Supp. 2d 1073, 1077 (D. Ariz. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). This "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S 506, 512 (2002).

Plaintiffs filed three Complaints: the original Complaint, filed June 16, 2011, in the state Superior Court (Notice of Removal Attach. 1, ECF No. 1-1); an Amended Complaint, filed February 24, 2012 (Am. Compl., ECF No. 22); and the Second Amended Complaint ("SAC"), filed July 5, 2012 (Second Am. Compl., ECF No. 51). The relevant count in the SAC is Count VII, entitled "Civil Rights Violations." Second Am. Compl. 30, ECF No. 51. The SAC has 109 paragraphs in the sections before the counts, including one entitled "Fact" section, and twelve counts. At the outset of Count

VII, Plaintiffs incorporate all preceding 145 paragraphs. Nowhere in the SAC (or its predecessors) did Plaintiffs identify the federal or state civil rights statutes on which they based Count VII, or mention Section 504's implementing regulations. Rather, Plaintiffs allege in Count VII that the District "violated the federal Civil Rights Act and corresponding Arizona civil rights law, in that Student, who is a student with a disability, is either not provided programs, services and activities that are provided to non-disabled students, or is provided programs, activities and services that are inferior to the services provided to students who are not physically or developmentally disabled." Second Am. Compl. ¶ 147, ECF No. 51.

District Defendants asked Plaintiffs' counsel numerous times and in a variety of ways, including by way of interrogatory, what the actual statute was that Plaintiffs persistently called the "federal Civil Rights Act." On June 12, 2012, Plaintiffs first identified (in a supplemental response to interrogatories) Section 504 of the Rehabilitation Act and 29 U.S.C. § 794 as the basis of Count VII. There was no mention of implementing regulation claims; if there had been, the District would have wanted to conduct discovery on the bases of those implementing regulation claims or otherwise defend against.

On the day discovery closed, September 28, 2012, Plaintiffs provided District's counsel with a final supplementation of the interrogatory response, which stated: "In addition, the regulations implementing Section 504 are applicable to Plaintiffs' claims as well. These include 34 C.F.R. Part 104.4." The School District Defendants moved for summary judgment in December 2012. Def.'s Mot. Summ. J., ECF No. 142. In their Response to the District's Motion for Summary Judgment, Plaintiffs' single reference to a Section 504 implementing regulation is contained within a citation. Pl.'s Resp. to Mot. Summ. J. 12, ECF No. 187.

Plaintiffs failed to meet Rule 8's notice pleading standard for violation of Section 504's implementing regulations in their Complaints as not once was an implementing regulation referenced in the pleading. Moreover, Plaintiffs' failed to articulate any

claim in their subsequent discovery or their summary judgment briefing. While Plaintiffs have arguably pled a claim for discrimination under Section 504 itself, they have neither pled nor preserved any claims under Section 504's implementing regulations.

B. Plaintiffs Failed to Meet the Pleading Requirements under Section 504.

The standard for pleading a claim for violation of a Section 504 implementing regulation, versus a claim under Section 504 itself, was first articulated by the Ninth Circuit Court of Appeals in *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008). The Ninth Circuit held that to plead a claim for a violation of Section 504's implementing regulations, Plaintiffs must have alleged (1) "precisely which § 504 regulations are at stake," and (2) "in what regard" those regulations were violated. *Id.*, 513 F.3d at 925.

The District Court for the Northern District of California recently addressed the *Lemahieu* standard for a plaintiff to successfully plead Section 504 implementing regulations claims in the context of a motion to dismiss. *L.H. v. Mill Valley Sch. Dist.*, No. 15-cv-05751, 2016 WL 3162174 (N.D. Cal. June 7, 2016). The *Mill Valley* Court reiterated the federal *Twombly* standard that "[a] plaintiff must provide 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Id.* at *2 (citing *Twombly*, 550 U.S. at 570). In *Mill Valley*, the plaintiffs' second amended complaint alleged a violation of "Section 504 … and the regulations promulgated thereunder," but was "devoid of any allegations that establish 'precisely which § 504 regulations are at stake' or 'in what regard' those regulations were violated." *Id.* at *4 (citing *Lemahieu*, 513 F.3d at 925 and *J.W. ex rel J.E.W. v. Fresno Unif. Sch. Dist.*, 570 F. Supp. 2d 1212, 1226-27 (E.D. Cal. 2008)). The *Mill Valley* Court determined that the plaintiffs' failure to identify the specific Section 504 regulations or the specific facts to support violations of those regulations in their complaint mandated a dismissal of plaintiffs' claim under Section 504's implementing regulations. *Mill Valley* at *4.

Similarly, in *J.W. ex rel J.E.W. v. Fresno Unified School District*, the court reviewed the plaintiffs' pleading of a Section 504 claim in the context of a motion to dismiss. 570 F. Supp. 2d at 1226-27. The *Fresno* Court found that while the plaintiff had recited the language of the Section 504 regulations in his complaint, "he fail[ed] to explain 'in what regard' … those regulations were violated." *Id.* at 1227 (citing *Lemahieu*, 513 F.3d at 925). In *Fresno*, the plaintiff incorporated by reference all of the prior paragraphs of the amended complaint as the factual allegations to support their Section 504 regulation claim. The court found this to be unacceptable, holding that plaintiff there "impermissibly relies on his general allegations to support his Section 504 claim," and failed to identify which factual allegations were specific to each of his claims. *Id.* The plaintiff in *Fresno* did, at least, recite the language of the implementing regulation, as did the plaintiff in *Mill Valley*, but that was not sufficient in either case. The *Fresno* Court dismissed plaintiffs' Section 504 claim.

In this case, Plaintiffs did not plead even the bare-bones criticized in *Mill Valley* or *Fresno*. Specifically, Plaintiffs did not include an identification or recitation of the Section 504 implementing regulations they now claim were at issue in their SAC. Instead, Plaintiffs' Count VII incorporates the preceding 145 paragraphs, and asserts that "Defendants' actions violated the federal Civil Rights Act and corresponding Arizona civil rights law." This does not plead a claim for violation of any Section 504 regulations. "Without some clarity about precisely which [Section] 504 regulations are at stake *and why*, we cannot determine whether [Plaintiff] has sufficiently alleged a privately enforceable cause of action for damages [pursuant to Section 504]." *Fresno*, 570 F. Supp. 2d at 1227 (emphasis in original) (citing *Lemahieu*).

The Ninth Circuit Opinion states that "it is unclear from the appellate record exactly which [Section 504] regulations plaintiffs alleged were violated by defendants and which violations allegedly prevented A.G. from meaningfully accessing public education." Mandate Attach. 2, at 19, ECF No. 211-2. It is unclear because the

Plaintiffs never articulated a claim under Section 504's implementing regulations in the proceedings before this Court.

Plaintiffs assert in their Brief that the District must have known Plaintiffs were making claims under the implementing regulations, based on the District's affirmative defenses (Def.'s Answer, ECF No. 57) which Plaintiffs claim "confirms that they were on notice of Plaintiffs' Section 504 Regulation claims." Pl.'s Br. on Sect. 504 Reg. Claims 7:15-18, ECF No. 232. This is disingenuous, at best. Faced with Plaintiffs refusal to articulate a coherent claim, District's counsel was left to guess what Plaintiffs were claiming and cover every possible base. It is unconscionable for the Plaintiffs to now attempt to rely on thorough legal work by the District to shore up their failures, and essentially say "the District guessed right" so we do not have to plead according to the Federal Rules of Civil Procedure or any of the case law.

Plaintiffs' never pled a violation of a Section 504 implementing regulation, thus there was nothing for them to preserve. Pursuant to *Lemahieu* and its progeny, in accord with the Federal Rules of Civil Procedure, Plaintiffs have no viable claims for violations of the implementing regulations.

III. Whether Those Regulations "Fall Within the Scope of the Prohibition Contained in § 504 Itself" allowing for a Private Cause of Action on the 504 Regulations Plaintiffs' Allege they Preserved.

As Plaintiffs never pled claims for violations of Section 504's implementing regulations, the Court need not reach this issue. If this Court determines that Plaintiffs have pled and preserved any violations under Section 504's implementing regulations, it is Plaintiffs' burden to demonstrate that a private cause of action exists under those regulations. Plaintiffs have not met this burden.

If Plaintiffs had appropriately addressed this prong, it was their burden to address whether each of the four implementing regulations at issue now support a private cause

of action. While Plaintiffs address §§ 104.33 and 104.34,[2] they have failed to articulate how and why §§ 104.35 and 104.4 qualify to support a private right of action. Thus Plaintiffs have failed to meet their burden to proceed as to §§ 104.35 and 104.4. However, as Plaintiffs cannot satisfy the requirements to establish that they either pled or preserved any claims under the implementing regulations, even if there was a private cause of action for these regulations, Plaintiffs cannot avail themselves of it.

IV. The School District did not Violate any Implementing Regulations.

The Plaintiffs did not plead (or preserve) any claims for the violation of any Section 504's implementing regulations. Even if they had, the District did not violate any of the Section 504 implementing regulations. An abbreviated version of the District's defense to each of these unpled claims is set forth here.

A. The District Provided Student with FAPE Under § 104.33.

Implementing regulation 34 C.F.R. § 104.33 is the "free appropriate public education" regulation for Section 504. For the purposes of Section 504, a free appropriate public education is defined as "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based on adherence to procedures that satisfy the requirements of" Section 504's implementing regulations as to educational setting, evaluation and placement, and provision of procedural safeguards. 34 C.F.R. § 104.33(b)(1). Following the requirements of the IDEA in developing an IEP is sufficient to establish that a district has met this requirement. 34 C.F.R. § 104.33(b)(2). In other words, in order to provide a free appropriate public education, the District needed to develop and implement an

[2] The Ninth Circuit specifically held that §§ 104.33 and 104.34 were within the scope of the prohibition of Section 504 itself, and thus satisfied the test to support a private cause of action. *Lemahieu*, 513 F.3d at 936-37; *see also, Mark H. v. Hamamoto*, 620 F.3d 1090, 1101 (2010).

IEP that was designed to provide specialized instruction and accommodations so that A.G. could made progress in the general education curriculum. It did so.

Plaintiffs contend that the District violated §104.33 by failing to provide A.G. with her desired behavioral supports. Pl.'s Br. 10-11, ECF No. 232. This theory fails for a variety of reasons.

First, as foundation for this claim, Plaintiffs allege that prior to A.G. beginning at Vista Verde in August 2009, she "was doing well," and the events of the 2009-2010 school year caused her emotional harm. *See id.* at 9:12. A.G.'s education history demonstrates that this is a falsehood; never since the start of her education in 2002 was A.G. "doing well," and certainly not before starting at Vista Verde in August 2009.

Since at least 2007, A.G.'s parents, therapists, and the District have reported incidents of violence, aggression, non-compliance, and task avoidance. Defs' Joint Stmt. Facts ¶¶ 3-5, ECF No. 146. From April to November 2007, when A.G. was ten years old and in fifth grade, she was referred to a child psychiatrist for suicidal ideation with plan and means. *Id.* at ¶ 3. Also at this time, A.G. first exhibited an interest in guns and intent to harm herself – indicating to her therapist an interest in shooting herself in the head. *Id.* at ¶ 4.

A.G.'s behavior in 2007 was very much the same as it was in 2009-2010 – she was noncompliant, tantrumed on the floor, threw furniture, pushed over tables, all of which often necessitated all other students being removed from her classroom so the teachers could deal with A.G.'s behaviors. *Id.* at ¶5. In November 2007, A.G. physically attacked District personnel, destroyed property, and had to be restrained. *Id.* at ¶ 6. After these events, A.G.'s IEP team determined that a public school setting was not her least restrictive environment, despite behavior supports and interventions provided as accommodations for her disability. *Id.* at ¶ 6. In December 2007, Plaintiff Parents sent A.G. to a private school at District expense; she attended for one day and was not allowed to return, because of her behavior. *Id.* at ¶ 7. Also in December 2007, Plaintiff Parents took A.G. to see Dr. Drake Duane, a behavioral neurologist, to address

what Plaintiff Parents described as an "acute deterioration" in A.G.'s behavior. *Id.* at ¶ 8.

In September 2008, when A.G. was eleven years old and in sixth grade, she again physically assaulted a teacher. *Id.* at ¶ 9. In June 2009 – weeks before starting at Vista Verde –when A.G. was twelve years old, she was found by Plaintiff Parents at 2 a.m. with a butcher knife to her throat. *Id.* at ¶ 10. Thus it is a matter of perspective as to whether A.G. was "doing well" when she started at Vista Verde a few weeks after this latest incident.

Plaintiffs further allege that if the District had hired a "behaviorist" to conduct another FBA and developed a better/different/other Behavior Intervention Plan (BIP) in the Fall of 2009, A.G. (who was supposedly "doing well") could have been successful at Vista Verde. Pl.'s Br. 10:12-21, ECF No. 232. As the underlying premise of Plaintiffs theory is false, the remainder of their theory fails.

Plaintiffs contend that another FBA was required to "determine the function of the behaviors that A.G. was displaying" (*id.* at 10:24-25), as behavior intervention plans are only effective when the function of behavior is understood. District personnel were very clear, after seven years with A.G. as a student, on the functions of her behavior. In fact from the District FBA in 2007 through to an FBA conducted by a behaviorist of Plaintiffs choosing (and District expense) in 2012, the functions of A.G.'s behaviors remained the same – attention (seeking) and escape (task avoidance). These are the functions on which the Vista Verde behavior intervention plans were premised. Defs' Joint Stmt. Facts ¶13 Exs 16-17, ECF No. 146. Conducting another FBA was not necessary to enable the IEP team or the District itself to determine what modifications to the educational environment (accommodations) might be effective to allow A.G. access to her free appropriate public education.

There was no new knowledge to be gained by the District performing another FBA in 2009 at Vista Verde – nothing had changed or would change as to why A.G. behaved as she did from 2007 until at least 2012. That the District did not do another

FBA did not violate § 104.33; it was not required and there was nothing to be gained by it.

The same analysis defeats Plaintiffs' claim that a different BIP would have altered A.G.'s educational path in some way. Throughout her years in District schools, and on to Howard S. Gray School (the private school of Plaintiffs' choosing, paid for by the District), A.G. exhibited the same behaviors. *See infra* Part V. The only approach to A.G.'s behavior that brought about a different result was the comprehensive behavior-intensive educational model at Roadrunner School. Only at Roadrunner were A.G.'s behaviors controlled sufficiently that she was able to attend a full day of school and made "tremendous progress." Defs' Joint Stmt. Facts ¶ 133; Ex. 38, ECF No. 146. The District did not violate § 104.33.

B. Roadrunner was Comparable to Vista Verde.

Implementing regulation 34 C.F.R. § 104.34, provides, in relevant part:

> A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

Plaintiffs now allege that A.G. was not provided with facilities and services at Roadrunner comparable to those at the District's comprehensive campuses. Pl.'s Br. 15:1-7, ECF No. 232. Specifically, Plaintiffs allege the facilities are not comparable because "A.G. was denied gifted, art and music services at Roadrunner." *Id.* It is odd that Plaintiffs have continued with this allegation because they learned in discovery that, in fact, Roadrunner does and did offer gifted, art and music. *See*, *e.g.*, Defs' Joint Stmt. Facts Ex. 33, 20:3-10, ECF No. 146.[3] This information came out inadvertently in

[3] The other deposition transcripts which provided the information that Roadrunner has art and music are not part of the record before this Court, but the witness(es) will testify in accord with their deposition testimony at trial.

depositions, as Plaintiffs never asked District staff if Roadrunner offered the same electives as Vista Verde. They had no need to; they had not pled a violation of this regulation.

The facilities and services at both schools were comparable, and there is no violation of this regulation. Plaintiffs' allegations as to this regulation ignore the obvious: the priority in 2009-2010 for the education of A.G. was how to appropriately address her behaviors that impacted her ability to even attend school. A.G. could not avail herself of art, music or gifted until her behaviors were addressed. A.G.'s behaviors were of the utmost concern, and Roadrunner (not Vista Verde) provided the environment where A.G. finally learned to function in a school setting. Gifted and elective classes were of absolutely no benefit to A.G. – as the record reflects – because she could not or would not attend to them until her behaviors were addressed.

C. <u>The District Defendants Conducted the Necessary Evaluations of A.G.</u>

Implementing regulation 34 C.F.R. § 104.35 provides, in relevant part, that:

> A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

Plaintiffs for the first time in this brief (Pl.'s Br., ECF No. 232) contend that the District violated an obligation to perform an evaluation of A.G. before she began at Roadrunner. There is no mention of this implementing regulation in Plaintiffs' three complaints. The voluminous discovery in this case is devoid of any mention of an evaluation of A.G. before she was moved to Roadrunner – Plaintiffs never asked, not in written discovery and not in depositions. Plaintiffs own citations in this section of the brief refer to paragraphs that have nothing to do with evaluations; that is because evaluations have never been an issue in this lawsuit. Pl.'s Br. 12:11, ECF No. 232.

The District did not violate this regulation, but because it was never addressed in the course of this litigation, counsel cannot direct this Court to evidence in the record to support this position – simply the lack of it. This is an example of the prejudice to the District if Plaintiffs are allowed to proceed with these new claims now.

D. The District Defendants did not Exclude A.G. from any Public Program or Activity by Failing to Reasonably Accommodate Her.

Implementing regulation 34 C.F.R. § 104.4 generally fleshes out the discrimination provisions of the statute itself and provides: No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. Plaintiff's lone reference to this regulation prior to the Ninth Circuit proceedings was in their response to the District's Motion for Summary Judgment. Pl.'s Resp. Mot. Summ. J. 12:6, ECF No. 187. The reference is contained in a parallel cite to the statutory language of Section 504.[4] *Id.* That said, the case law interpreting § 104.4 indicates that this implementing regulation is co-extensive with the prohibitions of Section 504 itself, and is intended to elaborate on the statutory language, rather than create additional procedural or substantive obligations, as the other implementing regulations do. *See, Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010).

Even in this awkward posture of defending against claims that were never made, the record before this Court clearly evidences that the District did not violate this implementing regulation. To the contrary, the District provided A.G. with every reasonable accommodation to enable her to meaningfully access her education.

[4] The same parallel citation was contained twice in Plaintiffs' Opening Brief in the Ninth Circuit Court of Appeals. This regulation was not otherwise argued before the Ninth Circuit.

1. Plaintiff cannot establish that the District failed to reasonably accommodate A.G. such that she was denied meaningful access to her education as required by 34 C.F.R. § 104.4.

In the Ninth Circuit, the legal framework to assess whether the District violated Section 504's implementing regulations by allegedly failing to provide A.G. appropriate behavioral supports is derived from the "reasonable accommodation" framework in the employment section of Section 504. *See, e.g., Hamamoto*, 620 F.3d at 1101-02; *Lemahieu*, 513 F.3d at 937; *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999); *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999).

Subpart D of Section 504's implementing regulations does not impose a "reasonable accommodation" requirement on preschool, elementary, and secondary educational programs. 34 C.F.R. 104.31 *et seq.* However, courts have transposed the "reasonable accommodation" framework, which appears in the employment section of Section 504, to students where accommodations are necessary to ensure that disabled students have meaningful access to educational programs. *See, e.g., Hamamoto*, 620 F.3d at 1101-02; *Lemahieu*, 513 F.3d at 937; *Wong*, 192 F.3d 807; *Zukle*, 166 F.3d 1041. Perhaps because the regulations do not articulate a reasonable accommodation requirement for educational programs, there is no clear regulatory or case law-created standard for determining (1) when a reasonable accommodation must be provided or (2) what constitutes a reasonable accommodation in an educational setting.

In the employment setting, a reasonable accommodation is generally understood to be any modification to the work environment or the way a job task is completed. 29 C.F.R. § 1630.02(o). When considering reasonable accommodations for an educational program, the Ninth Circuit has looked to the employment context for guidance. *Wong*, 192 F.3d at 818. In *Wong*, the Ninth Circuit held that the plaintiff has the initial burden of producing evidence that a reasonable accommodation exists and that the accommodation would enable the plaintiff to meet the educational program's essential eligibility requirements. *Wong*, 192 F.3d at 816; *see also Zukle*, 166 F.3d at 1047.

Once plaintiff meets that burden, it falls to the educational program to produce rebuttal evidence that the accommodation is not reasonable or that even with the accommodation, the student is not qualified. *Wong*, 192 F.3d at 816. An educational institution may not rely on "mere speculation" that an accommodation is not feasible, but rather must "gather sufficient information from the [disabled individual] and qualified experts as needed to determined what accommodations are necessary." *Id.* at 818 (citing *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993)).

Though *Wong* involved a postsecondary medical school program, and thus does not implicate the FAPE requirement set out in 34 C.F.R 104.33(b)(1), it is reasonable to apply the basic burden-shifting framework the Court set out in *Wong* to other educational settings. *See, e.g.*, *C.O. v. Portland Pub. Schs.*, 679 F.3d 1162 (9th Cir. 2012) (extending the defense to an educational institution's academic decisions in ADA and Rehabilitation Act cases set out in *Zukle* to the elementary/secondary school setting when considering whether magnet schools can adopt admission requirements).

Plaintiff did not produce evidence that the District failed to provide reasonable accommodations or that, during her education at Vista Verde and Roadrunner, any additional reasonable accommodations existed that would have been effective to allow her to gain meaningful access to an education program in a less restrictive environment. Plaintiff cannot meet its burden under this analysis.

2. <u>The accommodations the District did provide were effective and allowed A.G. to gain meaningful access to her education</u>.

Plaintiff's only articulated allegation of failure to accommodate comes in the form of an allegation that the District failed to provide A.G. appropriate behavioral supports. Using the reasonable accommodation framework to consider whether the District violated Section 504's implementing regulations by allegedly failing to provide A.G. appropriate behavioral supports, we must consider whether the behavioral supports Plaintiffs contend were not provided were reasonable, and whether provision of such supports would have enabled A.G. to have "meaningful access" to the educational

program if they were provided. "Reasonableness" is a fact specific inquiry – it is not a constant and must be analyzed in light of the totality of the circumstances. *Zukle*, 166 F.3d at 1048; *D.A. v Meridian Joint Sch. Dist. No. 2*, 289 F.R.D 614, 623 (D. Idaho 2013).

In A.G.'s case, a formal legal structure existed for considering what accommodations were reasonable and appropriate to enable her to gain meaningful access to the educational program – the IEP process. As contemplated by the *Wong* Court, the District gathered a team of experts (teachers, related service provides, and administrators) and the disabled student (through her parents) to obtain information and discuss appropriate accommodations each time it convened an IEP meeting.

A.G.'s IEP team, which included her Parents, was fully cognizant of her behavioral issues dating back to the beginning of her public education. To address her behavior, A.G. received a myriad of behavior-related reasonable accommodations throughout her enrollment as a District student, including:

- Behavior goals in her IEPs (Defs' Joint Stmt. Facts Ex.1, ECF No. 146, DIST-ED 227; Ex. 2, DIST-ED 218-219; Ex. 3, DIST-ED 157)
- Self-contained classroom (*Id.*, Ex. 1, DIST-ED 228; Ex. 3, DIST-ED 158)
- Occupational therapy (*Id.*, Ex. 1, DIST-ED 228; Ex. 3, DIST-ED 158; Ex. 32, DIST-ED 120)
- Speech and language group therapy (*Id.*, Ex. 3, DIST-ED 158)
- Sensory support (*Id.*, Ex. 1, DIST-ED 228-229; Ex. 3, DIST-ED 158)
- More frequent verbal cues, highly structured curriculum, more time on tasks, may take work home, frequent use of computers (*Id.*, Ex. 3, DIST-ED 158; Ex. 32, DIST-ED 120)
- Extra time to complete tasks, prompting to stay on task, graphic organizers, sensory diet, self-calming techniques, modified behavior/discipline plan, social skills group (*Id.*, Ex. 1, DIST-ED 229; Ex. 32, DIST-ED 120)
- Functional Behavioral Assessment (Plts' Amd. Contr. Stmt. Facts, Ex. 5)
- Positive behavior interventions, strategies and supports (Defs' Joint Stmt. Facts ¶¶ 2, 13, 29, ECF No. 146; Ex. 1, DIST-ED 0225, 0229; Ex. 2,

DIST-ED 0217; Ex. 3, DIST-ED 0157; Exs 16–17; Ex. 32, DIST-ED 0119)

- Shortened day (Defs' Joint Stmt. Facts Ex. 3, ECF 146, DIST-ED 0155)
- Assistive technology (Defs' Joint Stmt. Facts Ex.2, ECF No. 146, DIST-ED 219; Ex. 3, DIST-ED 159)
- Placement at a private school for children with disabilities, including autism, but she was asked not to return after one day (Defs' Joint Stmt. Facts ¶ 7, ECF No. 146)
- Placement at a positive behavior intervention school, Roadrunner (Defs' Joint Stmt. Facts ¶¶ 28–34, Exs 8, 33, 34, ECF No. 146)
- Placement at another positive behavior intervention school, Banner Children's Academy (f/k/a Howard S. Gray School) (Defs' Joint Stmt. Facts ¶ 134, ECF No. 146)

These are only the behavior supports and assessments that are in the record before the Court; there were many others provided to A.G. by the District. She received behavior support accommodations that were appropriate, individually designed to meet her needs, and adopted by her personal team of experts, her IEP team. The District did not violate Section 504 or its implementing regulations. A.G. received appropriate accommodations that enabled her to gain meaningful access to the educational program in her least restrictive environment. At no time did the District fail to provide A.G. with an educational setting. When it became clear to A.G.'s IEP team that certain accommodations being implemented were not effective in allowing her to gain meaningful access in a particular setting, the IEP team moved to implement a new accommodation that was effective – that of a more restrictive educational environment.

V. The District Provided A.G. with Meaningful Access to Her Free Appropriate Public Education Within the Context of Her Severe Behavior Problems.

The District complied with all applicable state and federal laws in its provision of a public education to A.G., but there was nothing the District could do to change A.G.'s significant behavioral problems, particularly as Parents shared very little with the District as to what was really going on with A.G. outside of school hours. The

District's Section 504 obligation was to provide effective reasonable accommodations that were designed to meet her individual educational needs so that she could gain meaningful access to her educational program ***without*** fundamentally altering the nature of the program. *Wong*, 192 F.3d at 816. The District's provision of public education to A.G., with all of the supports outlined above, provided A.G.'s meaningful access to her education within the context of her significant disability.

In their brief, Plaintiffs' include in their "meaningful access" section the following allegations: the District failed to provide behavioral assessments (Pl.'s Br. 16:12, ECF No. 232); the District provided improper behavioral supports and services at Vista Verde and Roadrunner (*id.* at 16:10-11); the District had inappropriate behavior related goals and services on A.G.'s IEP (*id.* at 16:20-21); the District did not conduct an evaluation before A.G. moved to Roadrunner (*id.* at 16:24-25); the District did not provide A.G. with sufficient time with a behavioral aide at Roadrunner (*id.* at 16:26-27); A.G. was subjected to improper restraints (*id.* at 17:12-21); a throw-in reference to disciplinary suspensions under 34 C.F.R. § 300.536(a)(2) (another new regulatory reference) (*id.* at 17:16); A.G.'s IEP was not designed to address her "worsening behaviors" (*id.* at 18:1-6). These arguments, lumped by Plaintiffs' under the auspices of "meaningful access," make not a mention about how those claimed acts or omissions affected A.G.'s *meaningful access* to her public education.

A.G.'s ability to access her education – "meaningful access" – was integrally interwoven with her significant behavior issues. Her behavioral trajectory was set in motion long before the fall of 2009, and continued on the same exact course for years to follow. The Ninth Circuit helped Plaintiffs along, suggesting that A.G. may have been denied "meaningful access" if she was denied art, music and gifted classes at Roadrunner. The evidence at trial will show that art, music and gifted were available to Roadrunner students. Plaintiffs did not address this issue in discovery, but at least one witness testified that art and music classes were available to A.G. at Roadrunner. All of this begs the question: are art and music electives required for A.G. to have meaningful

access to her education? Certainly not, if her behavior prevented her from actually going to those classes. "Meaningful access" for A.G. meant specialized instruction, related aids and services, and implementation of effective accommodations that would modify and restrict her severe behaviors so that she could learn and this is exactly what the District provided her.

Most telling is what Plaintiffs do not say in their brief – a clear response as to what they believe A.G. would have gained (i.e., meaningful access) if the District had conducted another FBA or provided A.G. with a full-time aide. What would that new FBA have done? Nothing, which is why Plaintiffs continue to conflate the issues. Where is the denial of "meaningful access?" There is none.

A.G.'s educational history reveals that there was no reasonable accommodation that the District should have offered, and did not, that would have altered A.G.'s "meaningful access" of her public education. Her significant behavior issues leading up to her semester at Vista Verde are set forth above at Section IV.A. These behavior issues continued for years after she left Roadrunner, while attending Howard S. Gray School. Given the context of these behaviors, the District and A.G.'s IEP team developed accommodations designed to allow her access to her educational program in the most appropriate setting.

VI. Conclusion.

The Plaintiffs' neither pled nor preserved any claims for violation of the implementing regulations of Section 504. The Plaintiffs' cannot cite to one document in the record prior to the dispositive motion stage that contained so much as a citation to the implementing regulations of Section 504. No further analysis of these issues is necessary because the pleading requirements of *Lemahieu* were not met and no claim under the implementing regulations of Section 504 can proceed. If this Court chooses to entertain the alleged Section 504 implementation regulations, the District did not violate these regulations. Rather, the District provided A.G. with reasonable accommodations to meaningfully access her education. Unfortunately, it was A.G.'s

behavior, not a failure of the District, which impeded her ability to successfully access her education. It was never the responsibility of the District, under any law, to eradicate A.G.'s behaviors (or her disabilities), only to offer reasonable accommodations so that she could meaningfully access her education. As such, Plaintiffs must be precluded from referencing or arguing any claims under Section 504's implementing regulations, or making any allegations at trial related thereto.

DATED: this 10th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system, which will send notification of such filing to all parties of record.

By: */s/ Gayle A. Lindsay*

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