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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

A. G., a Student, by and through Parents William Grundemann and Rhonda Grundemann; and William Grundemann and Rhonda Grundemann, individually, Plaintiffs, v. PARADISE VALLEY UNIFIED SCHOOL DISTRICT (PVUSD), et al. Defendants.	No. CV 11-01899-PHX-NVW **PLAINTIFFS' REPLY BRIEF ON SECTION 504 REGULATION CLAIMS**

Plaintiffs, A.G., by and through her parents and guardians *ad litem*, William and Rhonda Grundemann, and William and Rhonda Grundemann, individually, respectfully submit Plaintiffs' Reply Brief on Section 504 Regulation Claims and state as follows:

Introduction: The District argues it did not know Plaintiffs were pursuing claims based on the Section 504 regulations. But the record shows Plaintiffs plead appropriate facts to put the District on "fair notice" of the Section 504 regulations claims. Plaintiffs have not only preserved the 504 regulations claims but established triable factual disputes concerning those claims so that the claims should proceed to trial. Further, in its Response the District makes a number of incorrect and false statements in an effort to get the 504 Regulations claims dismissed. In addition, the District attempts to re-litigate claims

addressed by the Ninth Circuit and approved to proceed to trial – the Section 504 reasonable accommodations claim. Plaintiffs will address that issue first.

I. Plaintiffs have already created an issue of material fact on their reasonable accommodations claim that A.G. was denied meaningful access: The District is improperly attempting to address Plaintiffs' reasonable accommodations claim. The Ninth Circuit determined Plaintiffs' claim that the District denied A.G. reasonable accommodations to address her escalating behaviors and denied her meaningful access to the benefits of her education will proceed to trial. The sole issue currently before the Court is whether Plaintiffs can proceed to trial on a *separate* claim the District violated certain Section 504 regulations which denied A.G. meaningful access to her education. But, the District spends almost four pages arguing it provided A.G. with "every reasonable accommodation to enable her to meaningfully access her education." (Doc. 237, p. 13-17) Framing the issue as "reasonable accommodations" is not proper for Section 504 regulation claims. While the facts supporting the claims are similar, the District is conflating the legal standards in an effort to confuse the issue for the Court.

The District is free to argue to *the jury* that it provided reasonable accommodations but cannot re-litigate issues the Ninth Circuit has already decided. The Ninth Circuit held summary judgment was improper because: ". . . a triable factual dispute exists as to whether the services plaintiffs fault the school district for failing to provide were actually reasonable, necessary, and available accommodations for A.G." *A.G. v. PVUSD*, 815 F.3d 1195, 1207 (9th Cir. 2016) This Court cannot revisit the decision based on the law of the case doctrine. "Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Lower Elwha Band of S'klallams v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir., 2000)

II. Plaintiffs sufficiently plead and preserved their Section 504 regulation claims: Plaintiffs admit the terms 34 C.F.R. §§ 104.4, 104.33 - 104.35 do not appear in their complaints. Nonetheless, the District had "fair notice" of the claims. *Swierkiewicz v.*

Sorema N.A., 534 U.S. 506, 512 (2002). Plaintiffs alleged facts that support their Section 504 regulations claims in the Second Amended Complaint. Plaintiffs specifically alleged the District failed to provide A.G. FAPE under Section 504. (Doc. 51, ¶ 109) Plaintiffs alleged the District's "unlawful abuse and discriminatory practices" denied A.G. "equal access to basic school activities and educational opportunities. . .." (Doc. 51, ¶ 109) Plaintiffs also alleged the District denied A.G. FAPE by failing to meet her behavior needs and improperly placing her. (Doc. 51, ¶ 107) The allegations are sufficient to plead a Section 504 regulations claim because FAPE is set out in 34 C.F.R. § 104.33 *et seq.*

The District falsely claims "Plaintiffs' failed to articulate any [regulation] claim in their subsequent discovery or their summary judgment briefing." (Doc. 237, p. 4) However, Plaintiffs included 34 C.F.R. § 104.4 in its response to discovery. (Doc. 232, p. 5) Further, in its motion for summary judgment, the District argued Plaintiffs had brought claims for "disparate treatment," i.e., not being provided equal access under Section 504, and reasonable accommodations. (Doc. 152-1, pp. 8-9) Section 504 regulations claims involve comparisons to non-disabled students. 34 C.F.R. § 104.33. The District claimed A.G. had presented "no evidence to show that she was disparately treated in comparison to other students or that the District's actions disparately impacted her in ways they did not impact other students." (*Id.*, p. 9) In fact, A.G. had produced such evidence. (Doc. 187, p. 12; Doc. 232) Plaintiffs addressed the 504 FAPE regulations in their response to the District's Motion for Summary Judgment, arguing: "By failing to address A.G's behaviors . . . by an FBA and BIP, by changing A.G's placement without conducting an MDR[1], and improperly restraining A.G. in the absence of danger and in violation of her IEP, the District failed in its obligations under § 504 to properly design and implement A.G.'s IEPs." (Doc. 187, p, 12) Further there was no reason for the District to argue disparate impact claim on summary judgment if such claims were never made.

Allowing Plaintiffs' 504 regulations claims to proceed is consistent with

1 Manifestation Determination Review

Swierkiewicz, supra, cited by the District. There the Supreme Court held "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." *Id*, at 512 (emphasis added) *Swierkiewicz* confirmed pleadings must be "construed as to do substantial justice." *Id.* at 513-514, citing then F.R.C.P. Rule 8(f). *See also* Rule 8(e).

A. The District was not confused by Plaintiffs' Complaint. The District claims without citation that it "asked Plaintiffs' counsel numerous times and in a variety of ways" about their claims. (Doc. 237, p. 4) It also claims that Plaintiffs "refus[ed] to articulate a coherent claim" which the District claims forced it to file affirmative defenses to claims it now argues Plaintiffs never raised. Plaintiffs never refused a request to clarify their claims. The District claims it was left to guess at Plaintiffs' claims. (Doc. 237, p. 7) But the Federal Rules provide clear options: the District could have filed a motion to dismiss counts of the complaint[2] or a motion for a more definite statement if it could not "reasonably prepare a response." F.R.C.P. Rule 12 (e), *Swierkiewicz* at 514.

Instead, the District made a tactical decision to lay in the weeds and not raise this issue until summary judgment to prevent Plaintiffs from amending the complaint. The District should not be rewarded for this tactic. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Swierkiewicz* at 514. The Plaintiffs' have consistently plead and proceeded through discovery claiming the District utterly failed to comply with its obligations by failing to conduct appropriate assessments including an FBA. (Doc. 51, ¶¶ 30, 34, 142, 150; Doc. 189, ¶¶ 12, 174, 181, 184, D. Ex. 44) Now it is claiming prejudice because Plaintiffs identified a regulation at the close of discovery and responded to the District's motion for summary judgment with evidence **in the record**. Its answer (Doc. 57) and summary judgment motion belie any claim it was not on notice.

2 The District filed a motion to dismiss but not Counts VI or VII. (Doc. 6)

B. The Ninth Circuit's request for clarification confirms the pleadings do not end the issue. The District claims the Ninth Circuit's opinion asked for clarity because the Plaintiffs never articulated a regulation claim. (Doc. 237, pp. 6:24-7:2) However, Plaintiffs' complaint was part of the Appellate Record. If the inquiry was simply whether Plaintiffs' complaint included the precise allegations, the Court could have so held and kept Plaintiffs' claims dismissed. The fact the Ninth Circuit asked for further clarification confirms a more detailed inquiry is warranted.

C. The *Fresno* and *Mill Valley* cases are not applicable. The District cites two District Court cases in which Section 504 regulations claims were dismissed on motions. (Doc. 237, p. 5-6) These cases are not applicable. In each case, plaintiffs appealed a due process hearing decision and brought Section 504 claims. *L.H. v. Mill Valley Sch. Dist.*, No. 15-cv-05751, 67 IDELR 259, p 1 (N.D. Cal. June 7, 2016) and *J.W. ex rel. J.E.W. v. Fresno Unified School Dist.*, 570 F.Supp.2d 1212, 1218 (E.D. Cal. 2008) So it was not clear which facts and allegations related to which claims. As a result, the plaintiffs had to amend their complaints. Here, there was no appeal of a due process case to confuse the issue. Count X was dismissed before the Second Amended Complaint so there is no similar confusion as in *Fresno* and *Mill Valley*. It is clear the allegations remaining in this case pertained to the District's failure to address A.G.'s needs under Section 504 FAPE (implicating 34 C.F.R. §§ 104.33 – 104.36), 34 C.F.R. § 104.4 and Section 504 itself.

III. 34 C.F.R. 104.4 and 104.35 support a private right of action: The District argues Plaintiffs did not address how regulations §§104.4 and 104.35 support a private right of action. (Doc. 237, p. 8:1:3) This is not true. (Doc. 232, pp. 2, 8-10) Further, the District conceded Section 104.4 is effectively the same as Section 504 itself (Doc. 237, p. 13:12-17), which should end the inquiry on §104.4's private right of action. Moreover, the District agreed §104.33 supports a private right of action. *Mark H. v. Lemahieu*, 513 F.3d 922, 935-936 (9th Cir. 2008). To provide FAPE, the District must also "satisfy the requirements of 104.34, 104.35, and 104.36." 34 C.F.R. § 104.33 (b). So §104.35 is

incorporated in § 104.33. As §104.33 is within the scope, so is § 104.35.

IV. The District failed to comply with the Section 504 regulations: The District changed A.G.'s placement without an evaluation and denied her appropriate, comparable services at Roadrunner which was not an appropriate placement. Plaintiffs have created a triable issue for the jury on these Section 504 regulations claims.

A. An FBA is an evaluation (Violation of §104.35). The District was on notice that Plaintiffs contend an FBA should have been conducted for A.G. before her placement change. "An FBA is generally understood to be an individualized **evaluation** of a child" (U.S. Dep't of Educ., *Questions and Answers on Discipline Procedures* (Jan. 14, 2009), Q. E-4) So, a failure to do an FBA is a failure to evaluate under § 104.35.

The District's argument on § 104.35 shows the District does not hesitate to make unsupported statements. The District argues that Plaintiffs made this claim about evaluations for the first time in its brief. (Doc. 237, p. 12:19-20) This is false. Plaintiffs plead that appropriate behavioral assessments were not conducted before the change in placement. (Doc. 51, ¶¶ 26-30, 142, 150) The District's claim "Plaintiffs never asked, not in written discovery and not in depositions" about an evaluation of A.G. before she was moved to Roadrunner is also false. Plaintiffs asked Dr. Kurklen in an interrogatory to:

> "IDENTIFY any and all assessments considered, recommended or conducted . . . of A.G. after her suspension . . . and before YOU made the recommendation for placement of A.G. at Roadrunner."
>
> Response: "None. It was and is my opinion that, because of the severity of A.G.'s behavior, it was inappropriate for her to remain at Vista Verde. No assessment would have changed my mind." (Doc. 189, ¶¶ 230, 281, Ex. 9)

Plaintiffs also argued in the summary judgment response based on evidence provided through discovery that the District failed to conduct an MDR before changing A.G.'s placement. (Doc. 189, ¶¶ 238-241)[3] In addition, Plaintiffs alleged the District failed to

3 It also claims that Plaintiffs' citations in their Brief do not relate to evaluations. (Doc. 237, ¶ 23-26) However, Dr. Kurklen's discovery responses which are referenced in Plaintiffs' Brief belie that claim as well. (Doc. 232, p. 12:11)

consider alternatives before changing her placement. (Doc. 51, ¶ 30)

The District's argument begs the question, had Plaintiffs alleged specifically in the complaint that the failure to conduct an FBA or the MDR was a violation of 34 C.F.R. § 104.35, how would that have changed their handling of the case? The District either evaluated A.G. or it did not. No discovery would change that. There was no assessment, no evaluation, no FBA, and no MDR. The District unilaterally decided it would not allow A.G. to return and no assessments would change that. (Doc. 189, ¶ 229-230, 233-241)

B. A.G. was denied access to gifted, music and art services at Roadrunner (Violation of Section 104.34). The District argues that "Plaintiffs **now** allege that A.G. was not provided with facilities and services at Roadrunner comparable to those at the District's comprehensive campuses." (Doc. 237, p. 11:17-18, emphasis added) This is also false. Plaintiffs' Second Amended Complaint contains numerous factual allegations that Roadrunner was not an appropriate placement for A.G. and it is clear Plaintiffs were challenging the District's improper decision to place A.G. there. Further, Plaintiffs specifically alleged in Count VII, A.G. was "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." (Doc. 51, ¶ 147, emphasis added) These factual allegations support claims for 34 C.F.R. §§ 104.4 (b) and 104.34. There is no reason for the District not to have developed discovery or defended against the claims.

Also, during discovery, the District admitted A.G. was not provided gifted services at Roadrunner. (Doc. 189, ¶ 307) The District knew Plaintiffs were pursuing a claim based on the lack of gifted services. The District now claims gifted services were available at Roadrunner based on one statement alleged to be in the record. But the cited testimony does not support the District's claim and only describes that all students in Roadrunner have an IEP so instruction is individualized. This is not enough to claim that gifted services were made available. (Doc. 237, p. 11:22-25, Doc. 146, Ex. 33) Further,

Plaintiffs addressed A.G.'s lack of music and art in response to the District's motion for summary judgment based on evidence in the record to show that A.G. did not receive those services. (Doc. 187, pp. 5, 10-11) Therefore, the District was not prejudiced.

The District's argument that art, music and gifted services may be available for some students at Roadrunner is not only unsupported, it is also irrelevant. As the Ninth Circuit held: "evidence that appropriate services were provided to *some* disabled individuals does not demonstrate that others were not denied meaningful access 'solely on the basis of their disability.' . . . appropriate treatment of some disabled persons does not permit it to discriminate against other disabled people under any definition of 'meaningful access.'" *Lemahieu*, at 938 (internal citations omitted) So, even if such services were available, A.G. was not provided access to those services in violation of § 104.35.

C. The District admits it never provided for A.G.'s behavior needs. The District curiously argues "never since the start of her education in 2002 was A.G. 'doing well.'" (Doc 237, p. 9:7-8) The District is effectively admitting any statements of progress in its educational records for A.G. are false and that it was never able to address her behaviors. This argument illustrates the way the District felt about A.G.: Nothing was going to work so why bother to make any changes? That is a clear illustration of its deliberate indifference to A.G.'s needs and rights. The District is claiming A.G. is just a bad kid with difficult behaviors and nothing other than Roadrunner could address them. The District attempts to argue that it was doing all that was required to assist A.G. with her behaviors and despite their efforts, her behavior worsened resulting in the change of placement. Nothing could be further from the truth. Even with a fully developed record on A.G.'s behaviors, the last incident before Vista Verde was September 2008. (Doc. 237, p. 10:3-4) A.G.'s behaviors escalated in 2009 and the District's failed to respond.

1. The District admits A.G.'s behaviors worsened at Vista Verde. While claiming that A.G. never did well, the District also claims that the "priority" for A.G. in the 2009-2010 school year was to appropriately address her behaviors. (Doc. 237, p. 12:4-

6) In the oral argument, the Ninth Circuit criticized the District's arguments as a "shell game" and that is what this is. The District is arguing both that A.G. just consistently had bad behaviors at school **and** that in 2009-2010 her behaviors became the "priority" such that it was permissible to change her placement and exclude her from gifted, art and music services. If behavior was the priority, then the District should have done more than the bare-bones PBIPs and wait for something to happen that would change her placement.

The August PBIP was not implemented with fidelity because data was not collected daily. (Doc. 146, Ex. 16, Doc. 189, ¶¶ 191-192) The September PBIP was not even completely filled out. (Doc. 146, Ex. 17) Dr. Hudson did not know what the crisis intervention guidelines referenced in the PBIPs were. (Doc. 189, ¶¶ 194-195) Neither PBIP addressed her behavior of leaving the class and A.G. had not exhibited aggressive behavior at Vista Verde before the PBIPs were drafted. (Doc. 189, ¶ 188) The District simply took the 2007 FBA and developed inadequate PBIPs. The PBIP also included the "ABC behavior plan" which was simply a school-wide plan. (Doc. 189, ¶ 215, Ex. 8) Not surprisingly with these bare and inadequate PBIPs, A.G.'s behaviors worsened. On November 9, 2009, Dr. Hudson emailed Dr. Kurklen about A.G.'s behaviors and requested ideas for additional supports because the current plan was not meeting A.G.'s needs. (Doc. 189, ¶ 215) Rather than offer any changes or additional support, Dr. Kurklen told Dr. Hudson her information would be useful if they had to change A.G.'s placement. (Doc. 189, ¶ 216) The District moved A.G. from an all gifted program at Vista Verde without changing a single element of her bare-bones and admittedly ineffective behavior plans from September 2009 through January 2010 because they gave up on A.G. It was the District's obligation to design a plan to attempt to reduce her behaviors and make changes if it was not working, not blame A.G. for her behaviors. It failed. These are not the actions of a District doing what was required to address the student's behavior.

2. The District's argument that a new FBA was not going to change anything should be rejected. The District also claims it had a good enough understanding of the

functions of her behavior – attention seeking and task avoidance – such that a new FBA would not have mattered. It claims "There was no new knowledge to be gained by the District performing another FBA." (Doc. 237, p. 10:24-25) But that should be a team decision not an after the fact justification for inaction. This is the same argument from its summary judgment motion which was rejected by the Ninth Circuit based on Dr. Ferro's opinions and Dr. Hudson seeking additional assistance in November 2009. The Ninth Circuit held that this evidence created an issue of material fact as to whether the accommodations would have helped A.G. *A.G.,* at 1206. Accordingly, it should not be re-litigated as it is the law of the case. *See Lummi*, *supra.*

Plaintiffs have brought forth sufficient evidence to proceed on a claim that A.G. needed an FBA based on her escalating behaviors in the fall 2009 through January 2010 at Vista Verde and also while at Roadrunner. Since the 2007 FBA, A.G. had been removed from North Ranch, attempted a private school, received homebound instruction, returned to North Ranch and transitioned to the Vista Verde To suggest that the almost two year old three page FBA was sufficient to address A.G.'s escalating behaviors is just an after the fact attempt to justify the District's inaction and failures.

The District also violated this Court's order by several times making unsupported claims about A.G.'s behavior at Howard Gray to support its argument. (Doc. 237, pp. 10:24-26, 11:2-4, 19:11-13) There is no evidence in the record about her behaviors at Howard Gray. Accordingly, this Court should ignore any unsupported statements.

Moreover, the District also noted in discovery responses that it did not even know if A.G.'s behaviors were related to her disability. (Doc. 189, Ex. 9, Interrogatory Responses 17-20) If it did not even know if her behaviors were disability related, how could it possibly have had sufficient information to determine that A.G. did not need more supports at Vista Verde or that her behaviors were not going to get better?

On August 1, 2016, the Department of Education issued a "Dear Colleague" letter concerning behavioral interventions which provides a good synopsis of why A.G. needed

an updated FBA: ". . . the failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit or FAPE. In addition, a failure to make behavioral supports available throughout a continuum of placements . . . could result in an **inappropriately restrictive placement** and constitute a denial of placement in the LRE . . . [T]his guidance is intended to focus attention on the need to consider and include **evidence-based behavioral supports** in IEPs that, **when done with fidelity**, often serve as effective alternatives to unnecessary disciplinary removals, increase participation in instruction, and may prevent the need for more restrictive placements." United States Department of Education, *Dear Colleague Letter*, August 1, 2016, p. 3 (emphasis added) The District cannot decide not to assess or evaluate or conduct an FBA and then claim because of their decision there is no evidence to support that a change would have made a difference. Such a ruling would provide District's with an incentive not to provide updated behavior assessments. Further, Dr. Ferro's report explains why A.G. needed an FBA to meaningfully access her education. (Doc. 189, D. Ex. 44) The District's failure to address A.G.'s behaviors led to her increased behaviors, A.G.'s placement in an inappropriate setting and denial of services.

D. Roadrunner was not an appropriate placement for A.G (Violation of 104.33). To state that A.G. made progress at Roadrunner is belied by the evidence that includes that A.G. was arrested twice for felonies (that were later dismissed), had to be physically restrained and forcibly moved to the Intervention Room eleven (11) times. (Doc. 189, ¶¶ 248-249) She also missed over 60 hours of instruction while she was in the Intervention Room. (Doc. 189, ¶¶ 303-304) While at Roadrunner, A.G. increased the frequency of her cutting behavior and became more depressed. (Doc. 189, ¶¶ 434-441)

Also, in April 2007, the District evaluated A.G. and determined that "Minor failings which are not particularly important or crucial to the issue should be overlooked." (Doc. 189, ¶ 272) However, they sent A.G. to Roadrunner whose philosophy is diametrically opposed to that statement. The Roadrunner Handbook section on "accepting criticism"

contains numerous infractions that are nothing but "minor failings." (Doc. 189, ¶ 274, 282-291) If the District was going to overlook its own most recent evaluation and subject a tactile sensitive student with autism to Roadrunner, it was not too much to ask that they conduct an evaluation or make some changes -- indeed any changes -- to the Roadrunner program or conduct an investigation whether such a program might work with students with autism. The District did none of that. (Doc. 189, ¶¶ 268-271, 281)

Conclusion: The District was on fair notice of Plaintiffs' § 504 regulations claims which have been preserved.[4] Plaintiffs have produced evidence on each of its claims that the District failed to comply with the regulations, 34 C.F.R. §§ 104.4, 104.33-104.35. A.G.'s behaviors deteriorated during the fall 2009 with little to no effort on the part of the District to find out any more information, collect appropriate data or make any changes. After A.G. violated a code of conduct she was shipped off to an inappropriate school in a more restrictive environment without any investigation into whether such a placement would work for her. That is unacceptable and deliberately indifferent to her rights. Plaintiffs have created a triable issue for the jury on these Section 504 regulations claims.

Respectfully Submitted on August 16, 2016.

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/s/ Richard J. Murphy
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4 The District has waived any claim that the Plaintiffs released any regulations claims in the due process settlement by not responding to Plaintiffs' argument in their Brief (Doc. 232, pp. 5-7, Section (1)A.

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2016, I electronically filed and transmitted the attached document to the Arizona District Court's Clerk's Office using the CM/ECF system, which will send notification of the filing to all parties of record.

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