Law Office of Richard J. Murphy, P.L.C.
1928 E. Highland Ave., Suite F104-278
Phoenix, AZ 85016
Telephone: (602) 296-4962
Email: Richard@phoenixspedlaw.com
Richard J. Murphy, State Bar #026551
-and-
Cirkiel & Associates, P.C.
1907 E. Palm Valley, Blvd.
Round Rock, TX 78664
Telephone: 512-244-6658
Email: Marty@Cirkielaw.com
Martin J. Cirkiel, State Bar (TX) #00783829
Attorneys for Plaintiffs

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' AMENDED 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' Amended Brief on Section 504 Regulation Claims in response to this Court's June 29, 2016 and July 19, 2016 Orders (Docs. 223 and 231) and state as follows:

In its June 29th Order, the Court recognized that the Ninth Circuit Court of Appeals determined there are triable issues of fact on Plaintiffs' Section 504 and ADA claims that the District denied A.G. reasonable accommodations. As the Ninth Circuit held in its Opinion in this case and in *Mark H. v. Lemahieu,* 513 F.3d 922 (9th Cir., 2008), Section 504 allows for a claim for denying reasonable accommodations and a separate claim for denying meaningful access based on a violation of Section 504 regulations. Accordingly,

this Brief only addresses issues pertaining to Plaintiffs' meaningful access claims based on Section 504 regulations.

Based on the Court's July 19, 2016 Order, Plaintiffs will cite to the existing District Court record by filed document number. But, when the District's Motion for Summary Judgment was being briefed, the issue of what Section 504 regulations claims were preserved as framed by the Ninth Circuit was not raised by the Defendants or specifically before this Court. As such, Plaintiffs should be permitted to address the Ninth Circuit's directive by referring to any filed document and relevant discovery responses served on the District.

(1) Plaintiffs preserved their Section 504 regulations claims for denial of meaningful access. The Section 504 regulations at 34 C.F.R. 104.33 - 104.35 require the District to provide A.G. a free appropriate public education ("FAPE"). 34 C.F.R. § 104.33 requires a District to provide 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 upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36." 34 C.F.R. § 104.33(b)(1). So, Section 504's FAPE regulations incorporate the requirements of §§ 104.34 – 104.36 to determine if a school district satisfied its obligations under Section 504 to provide FAPE. *See also, Mark H. v Hamamoto*, 620 F.3d at 1090, 1101 (9th Cir. 2010). If the District failed to properly design A.G.'s placement, it can be liable for denying access under the 504 regulations.

34 C.F.R. § 104.34 (a) provides that "A recipient **shall** place a handicapped person in the regular educational environment operated by the recipient unless it is **demonstrated by the recipient** [i.e., the District] that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." (emphasis added). So, for Section 504 FAPE, the District must place A.G. in the least restrictive environment until it is demonstrated that such a placement does not work with appropriate supplementary aids and services.

Plaintiffs' Second Amended Complaint (Doc. 189, ¶ 146) includes factual allegations for a claim for denial of meaningful access based on Section 504 FAPE regulations. Specifically, Plaintiffs alleged the District failed to address A.G.'s educational and behavioral needs throughout the fall of the 2009 school year or conduct appropriate behavioral assessments. (Doc. 189, ¶ 146 -- Doc. 51, ¶¶ 23-24) Plaintiffs alleged the District's failure to address A.G.'s behaviors led to the District's improper decision to change A.G.'s placement from Vista Verde to Roadrunner following a behavior incident for which she was disciplined. (Doc. 189, ¶ 146 -- Doc. 51, ¶¶ 25-30) Plaintiffs also alleged the District placed A.G. at a more restrictive educational setting, without conducting proper assessments or considering alternatives. (Doc. 189, ¶ 146 -- Doc. 51, ¶¶ 30, 32, 34) Plaintiffs specifically alleged the District failed to provide A.G. with FAPE under Section 504 and the ADA. (Doc. 189, ¶ 146 -- 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, causing her irreparable harm." (Doc. 189, ¶ 146 -- Doc. 51, ¶ 109, emphasis added)

In Count VI - Discrimination on the Basis of Disability, Plaintiffs incorporated by reference all of the factual allegations in the preceding paragraphs. Plaintiffs claimed the Defendants failed to provide A.G. with appropriate behavioral assessments and supports and failed to appropriately address A.G.'s disability-related behaviors. Plaintiffs alleged that in doing so, the Defendants denied her **full and equal access** to its education facilities and services. (Doc. 189, ¶ 146 -- Doc. 51, ¶¶ 140-145, emphasis added)

In Count VII - Civil Rights Violations, Plaintiffs incorporated by reference all of the factual allegations in the preceding paragraphs. Plaintiffs alleged Defendants' actions violated Civil Rights laws by not providing A.G. with access to programs, services and activities that are provided to non-disabled students or that what she was provided was inferior to the services provided to non-disabled students. Plaintiffs alleged A.G. was not provided with appropriate behavioral assessments. The lack of appropriate assessments

resulted in A.G. not being provided **equal access** to appropriate programs and services. She was subjected to abuse including inappropriate restraints at Roadrunner as a result. (Doc. 189, ¶ 146 -- Doc. 51, ¶¶ 146-154, emphasis added)

All of these allegations relate to the District's obligations under Section 504's regulations to provide FAPE to students. 34 C.F.R. § 104.33 – 104.35. Plaintiffs alleged that A.G. was denied full and equal access to appropriate services as a result of her disability at Vista Verde and in her placement at Roadrunner. Further, Plaintiffs referred to 34 C.F.R. § 104.33 in their Amended Response to the District's Motion for Summary Judgment. (Doc. 187, p. 12:15-26)

The District acknowledged in its Reply that Plaintiffs had brought Section 504 FAPE claims before this Court. (Doc. 193, p. 10:5-11:3) While they claim it is a repeat of the IDEA claim, which it is not, the District admits it knew Plaintiffs had brought a Section 504 FAPE claim. The District argued that such a claim is predicated on a comparison to other students. Plaintiffs agree and argue the District's IEP and placement failed to provide A.G. with equal access to appropriate services. Plaintiffs have preserved their Section 504 FAPE regulations claims.

In addition, Plaintiffs preserved claims under 34 C.F.R. § 104.4 which lists a number of discriminatory actions that are prohibited. Per paragraph (b), the District cannot: "(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service; (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others; or (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;" 34 C.F.R. § 104.4 (b)(1)(i) – (iv). Section 104.4 (b)(2) provides that for a recipient to comply with the

regulation it need not provide equal results but must afford equal opportunity in the most integrated setting appropriate to the person's needs. 34 C.F.R. § 104.4 (b)(2). In their Amended Response (Doc. 187), Plaintiffs referred to 34 C.F.R. § 104.4 in addressing Plaintiffs' Section 504 claims, meaningful access, *Hamamoto* and *Lemahieu.* (Doc. 187, pp. 11-12) So, Plaintiffs preserved § 504 regulations claims under 34 C.F.R. § 104.4.

For the first time in their Reply, the District mentioned Plaintiffs' response to discovery about Count VII. But they did not accurately relate the scope of Plaintiffs' claims. (Doc. 193, p. 5:15-18) As Plaintiffs' response to discovery was referenced by the District and considered by this Court, Plaintiffs should be permitted to clarify the record. Plaintiffs did reference that Count VII refers to Title II of the ADA and Section 504. But on September 28, 2012, Plaintiffs served a supplemental discovery response which provided: ". . . the regulations implementing Section 504 are applicable to Plaintiffs' claims as well. These include 34 C.F.R. Part 104.4" (Ex. A, Interrogatory No. 1)1

The Federal Rules of Civil Procedure provide for notice pleading. F.R.C.P. Rule 8 (a)(2) provides that a "claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief." It is sufficient, therefore, to place the defendant on notice of the claims being pursued. Plaintiffs preserved their Section 504 regulations claims with the complaint allegations and discovery responses.

A. Plaintiffs did not release their Section 504 and ADA FAPE claims: On February 24, 2012, Plaintiffs filed their Amended Complaint (Doc. 189, ¶ 145 -- Doc. 22) which consisted of ten Counts including Count VI, Count VII and Count X – Failure to Provide a Free and Appropriate Public Education. The allegations in Counts VI and VII are outlined above. In Count X, Plaintiffs alleged A.G. was entitled to a FAPE under Federal and State law. Specifically, they alleged the District failed to provide A.G. FAPE

1 Plaintiffs are aware the citation to the discovery responses is contrary to this Court's July 19, 2016 order. However, these documents should be considered by the Court to assess whether Plaintiffs preserved their Section 504 regulations claims and fully respond to the District's incomplete reference in its Reply.

and refused to provide any placement other than Roadrunner. Plaintiffs sought a private day school at public expense. (Doc. 189, ¶ 145 -- Doc. 22, ¶¶ 160-166)

At the time the Amended Complaint was filed, Plaintiffs still had an administrative due process complaint pending before the Arizona Office of Administrative Hearings under case number 11C-DP-054-ADE. This was A.G.'s IDEA claim for denial of FAPE. On April 13, 2012, Parents and the District settled the due process complaint and signed a Settlement Agreement and Release of Claims. (Doc 189, ¶ 159) In the Agreement, the District agreed among other remedies to continue A.G.'s placement at the Howard S. Gray Educational Program through the 2012-2013 school year, reimburse Parents for a Functional Behavioral Assessment ("FBA") and convene an IEP meeting to discuss a Behavior Intervention Plan ("BIP"). (Doc. 189, ¶ 159, DIST 1006-1008, 1003)

With the Settlement Agreement, Parents agreed to release the District from liability for **administrative** remedies for IDEA claims. The Settlement Agreement provided: "This release applies **only to claims redressable and remedies available in an administrative proceeding under the IDEA**, that involve the District's alleged failure to properly identify, evaluate, place, or provide FAPE to the Student . . .." (Doc. 189, ¶ 159, emphasis added)

The Settlement Agreement went on to specifically preserve Plaintiffs' claims in the instant litigation by providing: ". . . this release of claims does not apply to any claims . . . except for Count X, which relates to claims for the District's alleged failure to provide FAPE during the 2009-2010 and 2010-2011 school years." Plaintiffs agreed not to seek administrative remedies in Count VI that were available in the due process proceeding. (Doc. 189, ¶ 159) The only remedies available in the due process hearing related to denial of FAPE were administrative remedies. Monetary damages are not available under the IDEA for due process claims. *Witte ex rel. Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999) Plaintiffs' monetary damage claims were preserved.

Finally, the Settlement Agreement required the Plaintiffs dismiss Count X and

provided: "This Agreement is not intended to, nor shall it operate to, bar Parents from proceeding on all of the remaining claims and counts in that lawsuit, including but not limited to the claims for civil damages for discrimination and civil rights violations, even if the claims are factually related to the District's failure to properly identify, evaluate, place, or provide FAPE to the Student. (Doc 189, ¶ 159, DIST 1003)

Plaintiffs filed their Voluntary Dismissal with Prejudice of Count X. (Doc. 152-1, p. 4:10) On July 5, 2012, Plaintiffs filed their Second Amended Complaint. (Doc. 189, ¶ 146) Count VI and Count VII remained substantially the same in their allegations and again incorporated the factual allegations in the preceding paragraphs. Even though Count X was dismissed, Plaintiffs continued to allege claims related to denial of equal access and the FAPE regulations under Section 504 and the ADA. The District filed its Answer to the Second Amended Complaint on July 19, 2012. (Doc. 57) At no point in its Answer did the District claim Plaintiffs released 504 and ADA claims for FAPE.2

B. The District's responsive pleading confirms they were on notice of Plaintiffs' Section 504 Regulation claims: In their Answer (Doc. 57), the District included a section entitled "Affirmative Defenses" which consisted of 45 separate paragraphs. Among the so-called affirmative defenses, the District included several that confirm the District was on notice of Plaintiffs' Section 504 regulation claims.

The District claimed: "Plaintiff Student was provided with a Free Appropriate Public Education as required by the IDEA, **the ADA and the Rehabilitation Act**." (Doc. 57, Affirmative Defense, ¶ 4, emphasis added) The District claimed "District Defendants complied at all times with the applicable federal **regulations**, including the IDEA, 20 U.S.C. § 1415(1), Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act." (Doc. 57, Aff. Def., ¶ 8, emphasis added.) If the District was not on

2 The District's Answer was not addressed in the briefing on the Summary Judgment. But it should be considered by this Court as it is a document in the District Court record and is relevant to the issue of what claims Plaintiffs made and preserved in light of the Ninth Circuit's opinion.

notice that it was defending against a claim for a FAPE under Section 504 regulations and the ADA, then the claimed affirmative defenses make no sense.

The District further claimed they "provided A.G. with a free and appropriate public education as required by the IDEA, **Section 504 of the Rehabilitation Act and the Americans With Disabilities Act."** (Doc. 57, Aff. Def., ¶ 18, emphasis added) The District claimed they had not engaged in intentional discrimination in violation of Section 504 or the ADA and cited *Lemahieu, supra.* (Doc. 57, Affirmative Defense, ¶ 26) The fact that the District cited to the Ninth Circuit case on Section 504 regulation claims confirms their knowledge of Plaintiffs' preserved claims. Additionally, the District made a number of claims that it complied with Section 504 and ADA such that Plaintiffs could not recover under those allegations. Specifically, the District claimed it provided appropriate education aides and services to meet A.G.'s needs as adequately as the needs of non-handicapped students, did not exclude her from participation or deny her benefits, and did not deny services solely on the basis of disability. (Doc. 57, Affirmative Defense, ¶¶ 36-38) Based on the allegations in the Second Amended Complaint and the District's "Affirmative Defenses" the District was on notice that Plaintiffs' Count VI and VII claims included Section 504 regulations claims including Section 504 FAPE claims.

(2) The Section 504 regulations in 34 C.F.R. 104.4, 104.33-35 fall within the scope of the prohibition in Section 504 itself. Plaintiffs have a right of action under the regulations of Section 504 if the regulations fall within the scope of the prohibition of the Section. *Lemahieu* at 935. Section 504 provides: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .." 29 U.S.C. § 794(a).

In *Mark H. v. Lemahieu,* 513 F.3d 922, (9th Cir. 2008), the Ninth Circuit addressed the very issue of whether the Section 504 FAPE regulations authoritatively construe Section 504. The *Lemahieu* Court determined that Section 104.33 permitted a private

right of action because it did not create "free-floating 'affirmative obligations.'" *Lemahieu*, at 935-936. The inquiry to determine if a regulation comes within the substantive scope of Section 504 is whether the claim is that the student was denied meaningful access. *Lemahieu* at 938. The Court reasoned that enforcing the regulations through a private right of action was proper because school districts could avoid liability simply by designing education programs that meet the needs of the disabled students to the same degree that the needs of non-disabled students are met. *Lemahieu* at 936-937. As the 504 FAPE regulations are focused on design rather than effect, the regulations authoritatively construe the statute. *Lemahieu* at 939. The Court also held that claims on 34 C.F.R. § 104.34 (a)-(c) are permitted as they do not impose affirmative obligations beyond Section 504 itself. *Lemahieu* at 937. So, if by complying with the regulation a District provides meaningful access to the student, then the regulation falls within the scope of Section 504. Plaintiffs can bring claims for violations of those regulations.

34 C.F.R. § 104.4 (b) and the discriminatory actions that are prohibited therein are related to providing meaningful access to the benefits, aids and services of the public benefit. 34 C.F.R. § 104.4 is a regulation implementing Section 504 entitled "Discrimination prohibited." It includes in paragraph (a) language that is remarkably similar to Section 504 itself: "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." 34 C.F.R. § 104.4 (a).

Similar to 34 C.F.R. § 104.33 (b)(1), compliance with § 104.4 (b) requires a comparison to aids, benefits, and services provided to persons without disabilities. As such, it does not create free-floating obligations and falls within the scope of Section 504 itself. 104.4 (b)(2) provides that for a recipient to comply with the regulation it need not provide equal results but must afford equal opportunity in the most integrated setting appropriate to the person's needs. Therefore, Plaintiffs can bring a claim for violations of

34 C.F.R. § 104.4 as it authoritatively construes Section 504. *See Lemahieu, supra.*

(3) The District violated regulations 104.4, 104.33, 104.34 and 104.35. The District was obligated to design A.G.'s IEPs to meet her needs as adequately as it meets the needs of students without disabilities including complying with 34 C.F.R. § 104.33, 104.34 and 104.35. The District also had to comply with Section 104.4.

A. The District violated regulations at Vista Verde: At all times relevant, A.G. was a student with autism and other disabilities who required special education and related services to access her education. (Doc. 189, ¶¶ 2, 175-176) Before attending Vista Verde in August 2009, A.G. was doing well. (Doc. 189, ¶¶ 5, 9, 180, 183) Almost immediately, A.G. began having behavioral difficulties, which were documented by Dr. Karen Hudson (A.G.'s teacher), Dr. Robert Kurklen (School Psychologist), and others. (Doc. 189, ¶¶ 186-191) These behavioral difficulties included task avoidance, leaving the classroom, and refusing to go to classes. (Doc. 189, ¶¶ 189-191) The District developed two Positive Behavior Intervention Plans ("PBIPs") in August and September 2009. (Doc. 189, ¶¶ 186-196. The PBIPs were developed without the benefit of an FBA and did not address A.G.'s current behaviors. (Doc. 189, ¶¶ 184-185, 188, 200-201) The PBIPs were also not implemented properly. (Doc. 189, ¶¶ 187-195) According to Plaintiffs' Expert, Dr. Jolenea Ferro, the PBIPs failed to address A.G.'s behaviors, failed to give staff the appropriate strategies to deal with A.G.'s behavior, and failed to identify any triggers for her behavior. (Doc. 189, ¶¶ 199-201) As the semester progressed, A.G.'s behaviors escalated and would cause other students in the class to hide under their desks. (Doc. 189, ¶¶ 202-211)

Although Dr. Hudson knew that the behaviors were disability-related, she did not know what caused them. (Doc. 189, ¶ 212) These facts should have prompted District personnel to engage a qualified behaviorist to conduct an FBA to determine the function of the behaviors that A.G. was displaying, and then to develop and properly implement a BIP based on the findings, to try to modify A.G.'s behavior.[3] (Doc. 189, ¶¶ 185, 200-201, 207

3 The District was aware of the procedure to conduct an FBA and develop a BIP to address issues with A.G.'s behaviors; this course of action was taken following the

& D. Ex. 44, DIST-FERRO 0038-39). When behavioral functions are not properly understood and behavior plans are not designed to address the correct reinforcers, the plans will be ineffective in modifying behavior. (D. Ex. 44, DIST-FERRO 0039-40) As a result, neither PBIP addressed A.G.'s behaviors. (Doc. 189, ¶¶ 181, 199-201 and D. Ex. 44.)

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) On November 23, 2009, an IEP meeting was held to discuss A.G.'s progress. Despite her continuing behavioral difficulties, no additional supports or services were put into place for A.G. (Doc. 189, ¶¶ 184, 217-218) In order to meet A.G.'s needs, the District needed to include an FBA and BIP and other appropriate behavioral intervention and supports. (Doc. 189, ¶¶ 181, 184-185, 199-201, 207, 232, 429-430, 251, 255-256, 266, 301) The District violated 34 C.F.R. § 104.33 (a)(1).

A.G.'s behavior continued to deteriorate in November and December. (Doc. 189, ¶¶ 219-220, 26, 225-226) In the classroom on January 15, 2010, A.G. wrapped an occupational therapy belt around her neck. (Doc. 189, ¶ 26) On January 19, 2010, A.G. wrote graffiti on the wall, was uncooperative with and hit the School Resource Officer. (Doc. 189, ¶ 226) She was suspended, not arrested for her actions. (Doc. 189, ¶ 227) Dr. Hudson believed the school should consider additional supports for A.G. (Doc. 189, ¶ 228) According to Dr. Ferro, these two incidents "were the result of Vista Verde's failure to adequately address A.G.'s behaviors by completing an FBA from August 2009 and on an ongoing basis and inconsistently applying what behavior interventions were put in place" and resulted in the change of placement. (Doc. 189, ¶¶ 232, 429-430) Instead of adding supports at Vista Verde, on January 25, 2010, Dr. Kurklen sent a prior written notice ("PWN") stating the District would place A.G. at Roadrunner. (Doc. 189, ¶ 233)

B. The District violated regulations with A.G.'s placement at Roadrunner: The District violated Section 504's regulations by changing A.G.'s placement to

---

behavioral incidents in November 2007. (Doc. 189, ¶ 6)

Roadrunner before it was demonstrated that she could not be educated with non-disabled peers with the appropriate supplementary aids and services. 34 C.F.R. § 104.34 (a), 104.4 (b)(iv). A.G.'s behaviors worsened at Vista Verde and impeded her progress. (Doc. 189, ¶¶ 214, 429-430) But the District changed A.G.'s placement without making any changes to A.G.'s inadequate behavior plans from September 11, 2009 forward. (Doc. 189, ¶ 222) The placement at Roadrunner was not necessary. 34 C.F.R. § 104.4 (b)(iv), 104.34(a).

Further, 34 C.F.R. § 104.35 requires that the District conduct an evaluation for any student with a disability "**before** taking any action with respect to . . . **any subsequent significant change in placement."** 34 C.F.R. § 104.35 (a) (emphasis added). In changing A.G.'s placement from Vista Verde to Roadrunner without conducting any evaluation, the District violated this regulation as well. (Doc. 189, ¶¶ 229-230, 233-241)

C. Roadrunner was not an appropriate placement for A.G: In addition, the District placed A.G. at Roadrunner without any investigation into whether it would be appropriate for A.G. (Doc. 189, ¶¶ 268-271, 281) Roadrunner is a school for "students with severe emotional disabilities." (Doc. 189, ¶ 261 and Ex. 72) Although Roadrunner had recently begun accepting students with autism, such students consistently comprised less than 3% of Roadrunner's student population. (Doc. 189, ¶¶ 262, 265) Roadrunner uses the Boys Town Model, which is an evidence-based system for students with emotional disabilities. (Doc. 189, ¶ 266) But A.G. has never been diagnosed as "emotionally disabled" ("ED"), nor has the District ever identified her as eligible for special education services under the "ED" category. (Doc. 189, ¶ 175) In Arizona, autism and ED are mutually exclusive categories; i.e., a student with autism cannot be identified as ED. Arizona Revised Statutes § 15-761 (1).

The Boys Town Model requires students to "accept criticism" and respond in a prescribed manner. (Doc. 189, ¶ 286) Roadrunner students who do not "accept criticism" in the prescribed manner, are sent to the "Intervention Room" to practice appropriate behaviors. In the Intervention Room, students work on social skills, not academic work.

(Doc. 189, ¶¶ 274, 302) The Roadrunner Handbook lists "Behaviors Constituting Not Accepting Criticism," including: no eye contact, glaring, rolling eyes, mumbling, not answering when asked to, turning or walking away, moving or making noise with hands, feet, or other objects, and disrespectful hand gestures. Many of these behaviors are exhibited by students with autism. (Doc. 189, ¶¶ 287-290) A.G. was frequently sent to the Intervention Room for autism-related behaviors such as lack of eye contact or not answering when asked, and would often remain there for more than an hour (sometimes several hours) at a time. (Doc. 189, ¶¶ 303-306) Accordingly, many of the required elements of the program were difficult for A.G. to demonstrate based on her disability.

Further, when A.G. did not comply, the District would physically escort A.G. to the Intervention Room which would further escalate A.G. due to her disability including her tactile defensiveness. The District knew A.G. was tactile defensive and noncompliance was an ongoing problem for A.G. (Doc. 189, ¶¶ 252-253) The District did not modify the Roadrunner program to make it appropriate for A.G. (Doc. 189, ¶¶ 275-278) The District did not even think her tactile defensiveness was relevant. (Doc. 189, ¶ 254)

Upon A.G.'s placement at Roadrunner, the Grundemanns expressed concern about Roadrunner's restraint policies in light of A.G.'s tactile defensiveness. (Doc. 189, ¶¶ 252-253) A.G.'s treating physician, Dr. Drake Duane, sent a letter to Dr. Kurklen warning that harsh punishment would be ineffective. (Doc. 189, ¶¶ 293-294) Dr. Kurklen did not share this letter with the IEP team. (Doc. 189, ¶ 295) The Grundemanns were assured (and a statement was added to A.G.'s IEP) that A.G. would not be restrained unless she was a danger to herself or to others. (Doc. 189, ¶ 297) But this statement did not modify Roadrunner's existing restraint policies and provided A.G. with no more protection. (Doc. 189, ¶ 298) The IEP team also did not tell A.G.'s parents that Roadrunner staff would physically escort A.G. if she was non-compliant. (Doc. 189, ¶¶ 243-248)

The Boys Town Model at Roadrunner is not appropriate for students with autism in general or for A.G. in particular. (Doc. 189, ¶¶ 260, 288) The behaviors of a child such as

A.G., with autism, obsessive-compulsive, and biological impulsivity, are driven by a biological state, not by an emotional or intellectual desire to oppose authority. (Doc. 189, ¶ 294) Attempting to deal with OCD behaviors in the same way that oppositional defiant behaviors are handled can cause behavioral deterioration in an obsessive-compulsive student. (Doc. 189, ¶ 292) Plus, due to A.G.'s tactile defensiveness, touching during a physical escort could and did escalate unwanted behaviors. (Doc. 189, ¶¶ 255-256) Placing A.G. in Roadrunner violated 34 C.F.R. §104.4 (b)(iii) which prohibits a District from providing aids, benefits or services that are not as effective as that provided to others.

The fact that Roadrunner's use of physical escort was not appropriate is borne out by three instances in which physical escorts resulted in A.G. becoming more agitated. A.G. ended up being restrained on February 2, 2010 after a physical escort agitated her to the point where she was banging her head against the wall. (Doc. 189, ¶ 250) Also, on February 3, 2010 A.G. was physically escorted by two District staff members when she was not a danger to herself or others which led directly to A.G. being arrested and charged with a felony. (Doc. 189, ¶¶ 35-37, Ex. 23, 333-343, 38-39, 49-50, 347-349, 63) While at Roadrunner, A.G. was physically escorted eleven times and arrested twice within two months for engaging in disability-related behaviors. (Doc. 189, ¶¶ 248-249)

To make matters worse, the District permitted an off duty police officer with no knowledge of A.G.'s disabilities and no training in the Boys Town model to work as another member of the Roadrunner team. (Doc. 189, ¶¶ 315-326, 328, 354, 363, 365) Officer Lori Welsh is not trained as an Interventionist and lacks knowledge of A.G.'s disabilities specifically, and autism generally. (Doc. 189, ¶¶ 316-317, 328, 330-331) Because handling an emotionally escalated student inappropriately can lead to unnecessary confrontation and escalation of unwanted behaviors, the District's actions in encouraging untrained police officers to interact with emotionally escalated students heightened the risk of "unlawful" behaviors and subsequent student arrests. (Doc. 189, ¶¶ 255-256)

On March 23, 2010, A.G. refused to go to the Intervention Room. (Doc. 189, ¶¶ 75-

76, 351-353) A.G. walked out of the building instead of heading toward the Intervention Room. (Doc. 189, ¶ 366) Officer Welsh and Cyndi Gilmore grabbed A.G.'s arms and physically walked her to the Intervention Room as A.G. struggled "mightily" against the escort, trying to pull away. (Doc. 189, ¶¶ 78, 366-367) Physical escort while a student is struggling is contrary to the CPI training, which advises stopping and using calming strategies. (Doc. 189, ¶¶ 367-369) When A.G. entered the Intervention Room, she began pacing – an allowed calming technique, according to Principal Green, and a common behavior among autistic persons. (Doc. 189, ¶¶ 370-371, 376) Officer Welsh interrupted this behavior to require A.G. to sit down to begin the social skills activities and get back to class. (Doc. 189, ¶¶ 374-375, 380, 382)

When Officer Welsh and another staff member pushed A.G. down into a seat, A.G. reached up and scratched at Officer Welsh's face. (Doc. 189, ¶¶ 388-389) Officer Welsh arrested A.G. for assaulting a police officer. (Doc. 189, ¶¶ 81-82) Although A.G. could have been released to her parents, the decision was made to press charges and to transport her to the Desert Horizon Police Precinct. (Doc. 189, ¶¶ 89, 396) The District staff failed to inform the officers who picked up A.G. that A.G. was a student with autism or other disabilities or recommend A.G. be released to her parents. (Doc. 189, ¶¶ 397, 403-406)

While at the Precinct, A.G. was significantly traumatized including being handcuffed to a wall with a spit mask over her head and screaming that she wanted to die. (Doc. 189, ¶¶ 108-109, 410-411, 415 and Ex. 17 and 23) A.G. was later transported to the Maricopa County Juvenile Detention Facility, where she was strip searched and placed in a four-point restraint for 1 hour and 15 minutes and a spit mask applied. (Doc. 189, ¶¶ 114, 419-423) A.G. only calmed down when told that her parents were coming to pick her up. (Doc. 189, ¶¶ 424, 444) A.G. was released, traumatized, after six hours in custody. (Doc. 189, ¶¶ 427-428) A.G. was further traumatized when she was formally charged with assault and forced to attend court hearings. (Doc. 189, ¶ 442) The charges were eventually dropped. (Doc. 189, ¶ 119)

D. Roadrunner did not provide comparable services: 34 C.F.R. § 104.34 (c) provides that if a recipient operates a facility solely for students with disabilities that the facilities and services must be ". . . comparable to the other facilities, services, and activities of the recipient." (34 C.F.R. § 104.34(c)) Roadrunner is such a facility. A.G. provided evidence that she was not provided comparable services as she was denied gifted, art and music services at Roadrunner. (Doc. 189, ¶¶ 183, 307-308) *See Lemahieu* at 937. Her placement at Roadrunner violated 34 C.F.R. § 104.34 (c), 104.4 (b)(i) and (ii).

(4) The District's violations of the Section 504 regulations prevented A.G. from accessing her public education. A.G. was denied access to services and supports at both Vista Verde and Roadrunner. The District failed to provide appropriate behavioral supports and services at both schools. As noted above, the District's failure to provide A.G. with appropriate behavioral assessments led to A.G.'s behavior deteriorating in the fall 2009. The August and September PBIPs were insufficient to address her behaviors. Dr. Hudson did not know how to address A.G.'s behaviors but knew that they were disability-related and that A.G. needed more supports to address her behavior. (Doc. 189, ¶¶ 212, 215, 228) The District knew A.G.'s behaviors were escalating and impeding her progress and that the existing plan was not working but made no changes to the IEP. The District chose not to change or add any behavioral interventions, supports or strategies for A.G. despite knowing that her behaviors were impeding her progress. (Doc. 189, ¶¶ 200-222) The IEP contained one behavior-related goal for compliance and task completion. There are no goals or services designed to address A.G.'s aggressiveness. A.G. was provided with only 70 minutes per quarter of sensory/calming strategies. (Doc. 189, ¶ 218, Ex.10, DIST-ED 0129)

The District compounded these failures at Vista Verde by deciding to change A.G.'s placement to Roadrunner without conducting any evaluations or assessments in violation of 34 C.F.R. § 104.35. When A.G. was improperly placed at Roadrunner, she was provided 30 minutes per day of a behavioral aide based on medical necessity. (Doc.

189, ¶ 175, Ex. 53, DIST-ED 0120) This was utterly inadequate to address A.G.'s educational and behavioral needs as adequately as those of non-disabled peers particularly with a placement that punished her for her disability.

The District provided no gifted services, art and music to A.G. while at Roadrunner. (Doc. 189, ¶¶ 183, 308) Thus, A.G. was denied access to gifted services and educational opportunities that are provided to non-disabled students in the District. (Doc. 189, ¶¶ 307-308) This was particularly concerning for A.G. because she is interested in music and art and it could have provided a sense of calm. The District did not ensure that A.G. was afforded access to comparable services. In addition, A.G. was denied academic instruction for over 60 hours while at Roadrunner in the Intervention Room. (Doc. 189, ¶¶ 302-306) 34 C.F.R. § 104.34(c), 104.4 (b) (i) and (ii).

A.G. was also subjected to improper restraints when she was not a danger to herself or others and arrested for two felonies while at Roadrunner which caused her to miss further instruction time. To help provide context the denial of meaningful access, under the IDEA, a period of over suspensions totaling over 10 school days in a school year is so significant that it is deemed a change in placement. 34 C.F.R. § 300.536 (a)(2). With A.G. suspended from Vista Verde, missing well over 60 hours of instruction being in the Intervention Room and missing further instruction on February 3, 2010 and March 23, 2010 when she was arrested, it is apparent that A.G. was denied meaningful access to her education as she was removed from the educational setting for the equivalent of well over 10 school days for based on the District's violations.

After less than a semester at Roadrunner, the District placed A.G. at Howard S. Gray, where she was able to attend for over two years. (Doc. 189, ¶¶ 134, 177) The District is only required to place a student at a private school as part of the IEP process if the District is unable to provide FAPE to the student. (Doc. 189, ¶ 444) See 20 U.S.C. § 1412(a)(10)(B)(i). This placement is an admission that the District was not able to provide A.G. meaningful access at Roadrunner.

By failing to design A.G's IEP to address her worsening behaviors at Vista Verde and Roadrunner including by not conducting an FBA or implementing a proper BIP, by changing A.G's placement without conducting any evaluations or assessments, and by improperly restraining A.G. in the absence of danger and in violation of her IEP, the District violated Section 504, its FAPE regulations and 34 C.F.R. § 104.4 and denied her meaningful access.

Conclusion: Based on the record cited above, Plaintiffs have preserved their claims that the District denied A.G. meaningful access to her education under Section 504 regulations of 34 C.F.R. §§ 104.4, 104.33 – 104.35. The District failed to meet her needs at Vista Verde and Roadrunner. The District's actions prevented A.G. from accessing and participating in educational opportunities and services available to other disabled and non-disabled students, including all academic instruction while in the Intervention Room, and all gifted services, art and music instruction. In addition, she was treated differently than other students, both disabled and non-disabled, as a result of her disability by inappropriately placed in an environment designed for emotionally disabled students without assessing whether the program could work for her. 34 C.F.R. § 104.4 (b)(iii). Thus, the District denied her "meaningful access" to the educational opportunities available to non-disabled students. This Court should permit these regulation claims to go to the jury at the trial of this matter in addition to Plaintiffs' Section 504 and ADA claims that the District denied A.G. reasonable accommodations with deliberate indifference.

Respectfully Submitted on August 2, 2016.

The Law Office of Richard J. Murphy, P.L.C.

/s/ Richard J. Murphy
Richard J. Murphy
Attorney for Plaintiffs

EXHIBIT A

The Law Office of JoAnn Falgout, P.L.C.
3116 S Mill Avenue, #427
Tempe, AZ 85282-3657
Telephone: (480) 529-1937
Email: jfalgout.law@gmail.com
JoAnn Falgout, State Bar #015052
-and-
Law Office of Richard J. Murphy, P.L.C.
1928 E. Highland Ave., Suite F104-278
Phoenix, AZ 85016
Telephone: (602) 296-4962
Email: Richard@phoenixspedlaw.com
Richard J. Murphy, State Bar #026551
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

William and Rhonda Grundemann, et al, Plaintiffs, v. PARADISE VALLEY UNIFIED SCHOOL DISTRICT, et al, Defendants.	**NO. 2:11-CV-01899-PHX-NVW** **PLAINTIFFS WILLIAM AND RHONDA GRUNDEMANN'S *SUPPLEMENTAL* RESPONSE TO SCHOOL DISTRICT DEFENDANTS' FIRST SET OF INTERROGATORIES TO: PLAINTIFFS WILLIAM AND RHONDA GRUNDEMANN**

PLAINTIFFS WILLIAM AND RHONDA GRUNDEMANN'S

RESPONSES TO INTERROGATORIES

GENERAL NOTE APPLICABLE TO ALL RESPONSES: Discovery / disclosure has not been completed. Plaintiffs reserve the right to supplement or amend these interrogatory answers if / when new information is learned or discovered.

INTERROGATORY NO. 1: Please identify by Title and Section of the United States Code the "Federal Civil Rights Act" referred to in ¶ 145 of Plaintiffs' Amended Complaint.

RESPONSE:

Plaintiffs note that ¶ 145 of the Amended Complaint corresponds to ¶ 147 of the Second Amended Complaint, submitted July 5, 2012.

United States Code, Title 42, Chapter 21, "Civil Rights" contains many provisions that protect persons with disabilities and Chapter 126, "Equal Opportunity for Individuals with Disabilities" also contains many protective provisions. Several of these provisions are relevant to this lawsuit, including but not limited to: 42 U.S.C. §§ 1981, 1983, and 12131-50 (Title II of Americans With Disabilities Act).

Additionally, section 504 of the Rehabilitation Act (29 U.S.C. § 794) prohibits discrimination, based on an individual's disability, in any program receiving federal funding.

SUPPLEMENTAL RESPONSE:

Plaintiffs have assumed that the District Defendants are referring to Paragraph 146 of the Amended Complaint, which corresponds to Paragraph 147 of the currently effective Second Amended Complaint, addressing the Civil Rights Violations alleged in Count VII.

The primary applicable statutes are 42 U.S.C. §§ 12131-12133, as well as sections 12202 (immunity abrogated) and 12205 (attorney fees); and 29 U.S.C. § 794 (Section 504 of the Rehabilitation Act of 1973); and 42 U.S.C. § 1983 as applied to Officer Welsh only. In addition, the regulations implementing Section 504 are applicable to Plaintiffs' claims as well. These include 34 C.F.R. Part 104.4

INTERROGATORY NO. 2: Identify all behavioral psychologists you and/or A.G.

for resources and ideas regarding how to get appropriate services for A.G.

The AzDOE web site does not appear to list Barbara Ross specifically, but gives PINS contact information for Maricopa-East as: PINS@azed.gov and (877) 230-7467. *See*: http://www.azed.gov/special-education/pins/.

Respectfully Submitted on September 28, 2012.

The Law Office of JoAnn Falgout, PLC

s/ JoAnn Falgout
JoAnn Falgout
Attorney for Plaintiffs

The Law Office of Richard J Murphy, PLC

s/ Richard J. Murphy
Richard J. Murphy
Attorney for Plaintiffs

VERIFICATION

We are parties to this action. We have read the foregoing PLAINTIFFS WILLIAM AND RHONDA GRUNDEMANN'S *SUPPLEMENTAL* RESPONSE TO SCHOOL DISTRICT DEFENDANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFFS WILLIAM AND RHONDA GRUNDEMANN and know its contents.

The matters stated in the foregoing document are true of our own knowledge except as to those matters which are stated on information and belief, and as to those matters we believe them to be true.

We declare under penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct.

Dated: September 28, 2012

William Grundemann, Individually and on behalf of A.G.

Dated: September 28, 2012

Rhonda Grundemann, Individually and on behalf of A.G.

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2012, I served the attached document on counsel for Defendants to their addresses listed below via email.

By: s/ JoAnn Falgout

Attorneys for Police Defendants
Kathleen L. Wieneke, Bar #011139
Tara B. Zoellner, Bar #027364
STRUCK WIENEKE & LOVE, P.L.C.
3100 West Ray Road, Suite 300
Chandler, Arizona 85226
Telephone: (480) 420-1600
Fax: (480) 420-1695
kwieneke@swlfirm.com
tzoellner@swlfirm.com

Attorneys for District Defendants
Erin H. Walz, Bar #023853
R. Scott Currey, Bar # 013197
UDALL, SHUMWAY & LYONS, P.L.C.
30 WEST FIRST STREET
MESA, ARIZONA 85201-6695
Telephone: (480)461-5300
Fax: (480)833-9392
ehw@udallshumway.com
rsc@udallshumway.com

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 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.

By: Richard J. Murphy

Attorneys for Defendants
Erin H. Walz – #023853
Stockton D. Banfield
UDALL SHUMWAY P.L.C.
1138 North Alma School Road, Suite 101
Mesa, Arizona 85201
Telephone: (480)461-5300
Fax: (480)833-9392
ehw@udallshumway.com
sdb@udallshumway.com