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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Z.F, a minor, by and through his
parents M.A.F and J.F. and
M.A.F. and J.F. individually;
L.H., and J.H., minors, by and
through their parents J.A. and
J.R.H. and J.A. and J.R.H.
individually; A.N., a minor, by
and through his parents, G.N.
and M.R., and G.N. and M.R.
individually,

2:10-cv-00523-GEB-JFM

ORDER

Plaintiffs, on behalf
of themselves and all
others similarly
situated,

v.

RIPON UNIFIED SCHOOL DISTRICT
(RUSD); RIPON UNIFIED SCHOOL
DISTRICT BOARD OF TRUSTEES; SAN
JOAQUIN COUNTY OFFICE OF
EDUCATION; VALLEY MOUNTAIN
REGIONAL CENTER (VMRC), MODESTO
CITY SCHOOLS, MODESTO CITY
SCHOOLS BOARD OF EDUCATION,
RICHARD JACOBS, Executive
Director of VMRC, in his
official and individual
capacity, TARA SISEMORE-HESTER,
Coordinator for Autism Services
for VMRC, in her official and
individual capacity; VIRGINIA
JOHNSON, Director of Modesto
City Schools SELPA, in her
official and individual
capacity; SUE SWARTZLANDER,
Program Director for Modesto
City Schools, in her official
and individual capacity and Does

1 1 - 200.,)
2 Defendants.)
3)
4 _____)
5 VALLEY MOUNTAIN REGIONAL)
6 CENTER, RICHARD JACOBS and TARA)
7 SISEMORE-HESTER)
8 Counterclaimants,)
9 v.)
10 M.A.F. and J.A., SPECIAL NEEDS)
11 ADVOCATES FOR UNDERSTANDING,)
12 and AUTISM REFORM CALIFORNIA,)
13 Counterdefendants.)
14 _____)

13 Pending are two separate dismissal motions, brought under
14 Federal Rule of Civil Procedure ("Rule") 12(b)(6), seeking dismissal of
15 certain claims in Plaintiffs' Second Amended Complaint. Specifically,
16 Defendant Valley Mountain Regional Center ("VMRC") seeks an order
17 dismissing Plaintiffs' claims alleged under Title III of the American
18 with Disabilities Act ("ADA") and Plaintiffs' claims alleged
19 California's Unruh Act; and VMRC and Defendants Richard Jacobs
20 ("Jacobs") and Tara Sisemore-Hester ("Sisemore-Hester") seek an order
21 dismissing Plaintiffs J.H., L.H., J.A., and J.R.H.'s ("J.H. Plaintiffs")
22 claim alleged under 42 U.S.C. § 1983. Further, Defendants Virginia
23 Johnson ("Johnson") and Sue Swartzlander ("Swartzlander") seek dismissal
24 of the J.H. Plaintiffs' § 1983 claim.

25 Plaintiffs are four minors diagnosed with Autism Spectrum
26 Disorder, and their parents. (Pls.' Second Am. Compl. ("SAC") ¶¶ 20-
27 23.) Plaintiffs allege in the SAC that all Defendants named in this
28 action "have implemented a system under [the Early Intensive Behavioral

1 Treatment Program Procedures and Guidelines ('EIBT/PPG')] which has
2 unlawfully restricted access to intensive [Applied Behavior Analysis
3 ('ABA')] services for Plaintiffs, as well as those similarly situated,
4 in contravention of federal and state law." Id. ¶ 34.

5 **I. Legal Standard**

6 To avoid dismissal under Rule 12(b)(6), a plaintiff must
7 allege "enough facts to state a claim to relief that is plausible on its
8 face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim
9 has facial plausibility when the plaintiff pleads factual content that
10 allows the court to draw the reasonable inference that the defendant is
11 liable for the misconduct alleged." Ashcroft v. Iqbal, --- U.S. ----,
12 129 S. Ct. 1937, 1949 (2009).

13 In analyzing whether a claim has facial plausibility, a court
14 "accept[s] as true all well-pleaded allegations of material fact, and
15 construe[s] them in the light most favorable to the non-moving party."
16 Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010).
17 However, "the tenet that a court must accept as true all of the
18 allegations contained in a complaint is inapplicable to legal
19 conclusions." Iqbal, 129 S. Ct. at 1949. "A pleading that offers 'labels
20 and conclusions' or 'a formulaic recitation of the elements of a cause
21 of action will not do.' Nor does a complaint suffice if it tenders
22 'naked assertion[s]' devoid of 'further factual enhancement.'" Id.
23 (quoting Twombly, 550 U.S. at 555, 557). "In sum, for a complaint to
24 survive a motion to dismiss, the non-conclusory 'factual content,' and
25 reasonable inferences from that content, must be plausibly suggestive of
26 a claim entitling the plaintiff to relief." Moss v. United States Secret
27 Serv., 572 F.3d 962, 969 (9th Cir. 2009) (quoting Twombly, 550 U.S. at
28 557).

1 **II. Discussion**

2 **A. Title III of the ADA**

3 VMRC argues that Plaintiffs fail to state a claim for relief
4 under Title III of the ADA. Plaintiffs allege in their Title III claim:
5 "[VMRC] has discriminated against Plaintiffs by using the EIBT/PPG
6 . . . as a barrier that has denied them access to intensive ABA
7 services." (SAC ¶ 95.) VMRC argues: "Plaintiffs failed to properly
8 allege that VMRC is a 'place of public accommodation' under [Title
9 III]." (VMRC's Mot. 1:24-25.) Plaintiffs rejoin: "the SAC alleges that
10 Plaintiffs have been denied access to an education program, which is a
11 public accommodation as defined by the ADA." (Pls.' Opp. to VMRC's Mot.
12 4:16-18.)

13 Title III prescribes: "No individual shall be discriminated
14 against on the basis of disability in the full and equal enjoyment of
15 the goods, services, facilities, privileges, advantages, or
16 accommodations of any place of public accommodation by any person who
17 owns, leases (or leases to), or operates a place of public
18 accommodation." 42 U.S.C. § 12182(a). Public accommodations "are actual,
19 physical places where goods or services are open to the public, and
20 places where the public gets those goods or services." Weyer v.
21 Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

22 Although Plaintiffs allege they have been denied access to
23 intensive ABA services, Plaintiffs' allegations do not plausibly suggest
24 that intensive ABA services are "actual physical places." Id. Therefore,
25 Plaintiffs' Title III claim is dismissed.

26 **B. Unruh Act**

27 VMRC argues Plaintiffs' Unruh Act claim should be dismissed
28 since Plaintiffs have not sufficiently alleged that VMRC is a "business

1 establishment" under the Unruh Act. Plaintiffs allege: "[VMRC] is a
2 private non-profit agency [that] provide[s] services and
3 supports to persons with developmental disabilities [and]
4 employs more than 15 individuals[.]" (SAC ¶ 26.) VMRC contends it is not
5 a business establishment since it "is a non-profit organization existing
6 primarily for the purpose of serving the public good." (VMRC's Mot.
7 8:10-11.) Plaintiffs counter VMRC qualifies as a business establishment
8 under the Unruh Act even though it is a non-profit organization.

9 The Unruh Act prescribes:

10 All persons within the jurisdiction of this state
11 are free and equal, and no matter what their sex,
12 race, color, religion, ancestry, national origin,
13 disability, medical condition, marital status, or
14 sexual orientation are entitled to the full and
equal accommodations, advantages, facilities,
privileges, or services in all business
establishments of every kind whatsoever.

15 Cal. Civ. Code § 51(b). "[T]he California Supreme Court has directed
16 that the term 'business establishment' be interpreted 'in the broadest
17 sense reasonably possible.'" Michelle M. v. Dunsmuir Joint Union Sch.
18 Dist., No. 2:04-cv-2411-MCE-PAN, 2006 WL 2927485, at *7 (E.D. Cal. Oct.
19 12, 2006) (quoting Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal.
20 3d 72, 78 (1985)). Thus, "[a]n organization is not excluded from the
21 scope of [the Unruh Act] simply because it is nonprofit." Doe v. Cal.
22 Lutheran High Schl. Ass'n, 170 Cal. App. 4th 828, 836 (2009); see also
23 O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 796 (1983)
24 ("[H]ospitals are often nonprofit organizations, and they are clearly
25 business establishments to the extent that they employ a vast array of
26 persons, care for an extensive physical plant and charge substantial
27 fees to those who use the facilities.")

1 Here, Plaintiffs' allegation that VMRC is a "non-profit agency
2 [that] provide[s] services and supports to persons with
3 developmental disabilities [and] employs more than 15
4 individuals" plausibly suggests that VMRC is a business establishment
5 under the Unruh Act. (SAC ¶ 26.) Therefore, VMRC's motion to dismiss
6 Plaintiffs' Unruh Act claim is denied.

7 **C. § 1983 Claim for Violation of Right of Intrastate Travel**

8 Johnson, Swartzlander, VMRC, Sisemore-Hester, and Jacobs seek
9 dismissal of the J.H. Plaintiffs' claim alleged under § 1983, in which
10 Plaintiffs allege a violation of the right of intrastate travel under
11 the Equal Protection Clause of the Fourteenth Amendment of the United
12 States Constitution. These Defendants argue the right of intrastate
13 travel is not secured by the Constitution. These Defendants further
14 argue that even if there is a constitutional right of intrastate travel,
15 the J.H. Plaintiffs have failed to allege sufficient facts to show such
16 a right was violated. The J.H. Plaintiffs counter that the Court should
17 recognize a right of intrastate travel. The J.H. Plaintiffs further
18 argue they have sufficiently alleged their right of intrastate travel
19 was violated since they allege they were denied access to an ABA program
20 "based on a traveling restriction in the form of a durational residency
21 requirement." (Pls.' Opp. to VMRC's Mot. 14:1.)

22 The J.H. Plaintiffs allegations concerning their intrastate
23 travel claim are the following:

24 The Supreme Court has been clear that it is
25 "constitutionally impermissible" for a State to
26 enact durational residency requirements for the
27 purpose of inhibiting the migration of needy
28 persons into the State. . . . VMRC . . . through
its employee Tara-Sisemore-Hester [sic],
implemented the EIBT/PPG with Modesto City Schools,
through its employees Virginia Johnson and Sue
Swartzlander. [These Defendants] implemented the
EIBT/PPG to deny J.H. and L.H. access to an

1 intensive ABA program. Specifically, J.H. and L.H.
2 were denied access to the ABA program due to their
3 failure to satisfy a durational residency
4 requirement based on the date in which they
5 traveled to Modesto to establish residence.
6 Therefore, access was denied based on a traveling
7 restriction in the form of a durational residency
8 requirement.

9 (SAC ¶¶ 102-03.)

10 The question of whether there is a federal constitutional
11 right of intrastate travel need not be reached, since even assuming
12 arguendo that such a right exists, the J.H. Plaintiffs fail to allege a
13 plausible violation of that right. Therefore, the J.H. Plaintiffs'
14 § 1983 claim alleging a violation of the right of intrastate travel is
15 dismissed.

16 **D. Leave to Amend**

17 VMRC requests Plaintiffs' claim under Title III of the ADA be
18 dismissed with prejudice. VMRC, Johnson, Swartzlander, Sisemore-Hester,
19 and Jacobs also request the J.H. Plaintiffs' § 1983 claim for violation
20 of the right of intrastate travel be dismissed with prejudice. "The
21 power to grant leave to amend . . . is entrusted to the discretion of
22 the district court, which 'determines the propriety [of allowing
23 amendment] . . . by ascertaining the presence of any of four factors:
24 bad faith, undue delay, prejudice to the opposing party, and/or
25 futility.'" Serra v. Lappin, 600 F.3d 1191, 1200 (9th Cir. 2010)
26 (quoting William O. Gilley Enters. v. Atl. Richfield Co., 588 F.3d 659,
27 669 n.8 (9th Cir. 2009)). Plaintiffs were previously given leave to
28 amend their Title III claim, and the J.H. Plaintiffs were previously
given leave to amend their right of intrastate travel claim. Yet the
alleged claims are still not viable and it is evident that further
amendment to the Title III and right of intrastate travel claims "would

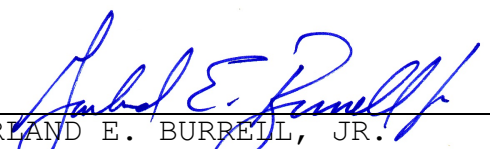
1 be futile [;therefore,] there [is] no need to prolong the litigation by
2 permitting further amendment." Lipton v. Pathogenesis Corp., 284 F.3d
3 1027, 1039 (9th Cir. 2002).

4 **III. Conclusion**

5 For the reasons stated herein, Plaintiffs' claim under Title
6 III of the ADA is dismissed with prejudice, and the J.H. Plaintiffs' §
7 1983 claim alleging a violation of the right of intrastate travel is
8 dismissed with prejudice.

9 VMRC's motion to dismiss Plaintiffs' Unruh Act claim is
10 denied.

11 Dated: September 9, 2011

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GARLAND E. BURRELL, JR.
United States District Judge