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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 DENYING PLAINTIFFS'  
MOTION FOR CLASS  
CERTIFICATION AND MOTION FOR  
JOINDER OF DEFENDANTS

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; and  
Does 1 - 200,

Defendants.

\_\_\_\_\_  
AND RELATED COUNTER-CLAIM  
\_\_\_\_\_

Plaintiffs seek certification under Federal Rule of Civil  
Procedure ("Rule") 23(a) and 23(b)(3) of the following class: "All  
children assessed with [Autism Spectrum Disorder ("ASD")] who resided  
within the jurisdictional boundaries served by [Defendant Valley

1 Mountain Regional Center] from November 9, 2005 to present and who may  
2 have benefitted from [Applied Behavior Analysis] services." (Pls.' Mem.  
3 of P.&A. in Supp. of Mot. for Class Certification ("Class Mot.") 7:17-  
4 8:3, ECF No. 153.)<sup>1</sup> Plaintiffs "propose[d amending] the class definition"  
5 in their reply brief "to conform to the [following] three categories[,]"  
6 to remove any ambiguity as to the class definition:

7 (1) those children assessed with ASD who did  
8 receive services under the [Early Intensive  
9 Behavioral Treatment Program] but had to accept  
10 illegal conditions and waive rights; (2) those  
11 children assessed with ASD who were denied services  
12 due to the illegal criteria; and, (3) those  
13 children assessed with ASD who were never informed  
14 of the right to receive [Early Intensive Behavioral  
15 Treatment Program] services.

16 (Pls.' Reply to Class Mot. 1:16-23, ECF No. 181.)

17 Plaintiffs also move to add Tracy Unified School District,  
18 Stockton Unified School District, Lodi Unified School District, Sylvan  
19 Union School District, Stanislaus County Office of Education, and the  
20 Stanislaus County Special Education Local Plan Area ("SELPA") as  
21 Defendants "in place of DOE Defendants 1-6." (Pls.' Mot. for Joinder of  
22 Defs. ("Joinder Mot.") 2:19-28, ECF No. 164.)

23 Defendants oppose both motions.<sup>2</sup>

#### 24 I. BACKGROUND

25 This action concerns the provision of intensive applied  
26 behavior analysis ("ABA") to children diagnosed with ASD within a  
27 certain geographic region of California. Plaintiffs allege that they are  
28 diagnosed with ASD and were denied access to intensive ABA services in

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29 <sup>1</sup> Plaintiffs also seek certification two subclasses. (Class Mot.  
30 7:20-25.)

31 <sup>2</sup> All defendants oppose Plaintiffs' motion for class  
32 certification. All defendants, with the exception of Modesto City  
33 Schools, oppose Plaintiffs' motion to join defendants.

1 violation of Section 504 of the Rehabilitation Act ("RA"), Title II of  
2 the Americans with Disabilities Act ("ADA"), and California's Unruh  
3 Civil Rights Act.

4 Plaintiffs allege that "[c]urrently, in 'Region 6' of  
5 California, . . . [there exists] an inter-agency, co-funded program  
6 called the "Early Intensive Behavioral Treatment" ("EIBT")  
7 program[, which] provides intensive one-to-one behavior treatment based  
8 on the UCLA/Lovaas model (a.k.a. Applied Behavior Analysis or ABA)."  
9 (Pls.' Second Am. Compl. ("SAC") ¶ 13.) Plaintiffs allege "the EIBT  
10 program is described in its entirety in a contract called the "EIBT  
11 Program, Procedures & Guidelines [(the "EIBT Guidelines")] . . . ." (Id.  
12 at ¶ 15.)

13 Plaintiffs allege that families "in Region 6 do not have  
14 access to intensive one-to-one behavioral treatment outside of the EIBT  
15 arrangement." (Id. at ¶ 14.) "Entrance [to], continuation [of], and exit  
16 [from intensive ABA services] is based upon the child's ability to meet  
17 the EIBT [Guidelines,] which by [their] own terms [are] not uniquely  
18 tailored to the unique needs of each student." (Id.)

19 Plaintiffs allege that they "requested [intensive] ABA  
20 services . . . but were denied access to intensive [ABA] treatment . . .  
21 because of the [EIBT Guidelines'] eligibility criteria, referral  
22 process, and/or the actions of agencies and individuals involved with  
23 the agreement . . . ." (Id. at ¶ 17.) The named plaintiffs "were  
24 [subsequently] able to obtain, either through settlement or through an  
25 award from the California Office of Administrative Hearings, ABA  
26 services without the necessity of proceeding through the EIBT/PPG  
27 program." (Class Mot. 6:13-17.) Plaintiffs allege that use of the EIBT  
28 Guidelines "operates as a programmatic barrier under the [ADA] and

1 Section 504 of the [RA] because it denied all Plaintiffs access to an  
2 intensive ABA program . . . ." (SAC ¶ 19.)

## 3 II. DISCUSSION

### 4 A. Class Certification

5 Plaintiffs move to certify the above-defined class, arguing  
6 certification is proper under Rule 23(a). Plaintiffs further argue that  
7 their proposed class meets the predominance and superiority elements of  
8 Rule 23(b)(3). (Class Mot. 17:23-19:20.)

9 Each Defendant opposes Plaintiffs' class certification motion  
10 on multiple grounds. (See ECF Nos. 171, 173, 174.) Defendants contend  
11 that Plaintiffs have not met their burden of proof on the four required  
12 elements of Rule 23(a), and Plaintiffs have not satisfied the  
13 predominance and superiority requirements of Rule 23(b).

#### 14 1. Legal Standard

15 "Parties seeking class certification bear the burden of  
16 demonstrating that they have met each of the four requirements of [Rule]  
17 23(a) and at least one of the requirements of Rule 23(b)." Ellis v.  
18 Costco Wholesale Corp., 657 F.3d 970, 979-80 (9th Cir. 2011). "When  
19 considering class certification under Rule 23, district courts are not  
20 only at liberty to, but must perform a rigorous analysis . . . ." Id. at  
21 980 (internal quotation marks omitted).

22 Here, "Plaintiffs have not met their burden of showing that  
23 common questions predominate, which is fatal to class certification  
24 under Rule 23(b)(3) [; therefore,] the Court does not address the  
25 threshold requirements of Rule 23(a) or the Rule 23(b)(3) requirement of  
26 superiority." Moua v. Jani-King of Minn., Inc., No. 08-4942 ADM/JSM,  
27 2010 WL 935758, at \*2 (D. Minn. Mar. 12, 2010) (citing Steering Comm. v.  
28 Exxon Mobile Corp., 461 F.3d 598, 601, 604 (5th Cir. 2006)); see also

1 Edwards v. Ford Motor Corp., No. 11-CV-1058-MMA (BLM), 2012 WL 2866424,  
2 at \*2, 4-11 (S.D. Cal. June 12, 2012) (declining to address other  
3 elements relevant to class certification when predominance under Rule  
4 23(b) (3) not met).

5 **2. Predominance under Rule 23(b) (3)**

6 Plaintiffs argue that “[u]nder the circumstances of this case,  
7 common issues predominate over individual issues.” (Class Mot. 17:23.)  
8 Specifically, Plaintiffs argue:

9 [T]here are numerous common issues for the putative  
10 class members vis-à-vis the EIBT/PPG scheme. The  
11 liability analysis will be identical for each class  
12 member: (a) did the EIBT/PPG deny access to ABA  
13 services to which a class member is otherwise  
14 entitled to under law; (b) does the EIBT/PPG  
15 discriminate against class members by reason of the  
16 requirements of their disability; (c) does the  
EIBT/PPG impose conditions upon the receipt of ABA  
services that violate state and federal law? The  
multitude of factual issues surrounding the  
EIBT/PPG, its implementation[,] and impacts upon  
class members’ ability to obtain ABA services are  
all common to class members - not individual  
determinations.

17 (Id. at 17:24-18:4.) Plaintiffs also contend that “[a]ny individual  
18 issues . . . are overshadowed by the standardized EIBT/PPG.” (Id. at  
19 19:10-11.)

20 Defendants rejoin that “this is not a case where common issues  
21 of law or fact predominate over individual issues. Rather, individual  
22 determinations of legal and factual issues would need to be made in  
23 order to provide the relief sought by [P]laintiffs.” (Modesto City  
24 School (“MCS”)’s Opp’n to Class Mot. 1:20-23, ECF No. 173; see also  
25 VMRC’s Opp’n to Class Mot. 23:3-4, ECF No. 174; Ripon USD’s Opp’n to  
26 Class Mot. 23:7-13, ECF No. 171.) Defendants argue:

27 [W]hile [P]laintiffs conclusorily state that the  
28 EIBT/PPG program denied each putative class member  
access to ABA services, in order to reach this  
conclusion, a very detailed factual analysis must

1 occur. For example, each student's particular needs  
2 must be established and examined, the actions of  
3 each student's Individualized Education Program  
4 (IEP) team must be established and examined, and  
the various options for special education  
programming for each student and the application of  
this program analysis must be performed.

5 (Ripon USD's Opp'n to Class Mot. 24:8-17.) Defendants contend:

6 There are many varying services, treatments, and  
7 therapies available for children with autism. Even  
8 among experts in the field of autism, there is no  
9 consensus about what is the best education  
10 treatment or intervention for young children with  
autism. . . . There is no blanket approach or  
intervention strategy that works for all students  
with ASD, it is an individual determination made  
through the IEP process.

11 (MCS's Opp'n to Class Mot. 3:26-4:23.) Defendants further argue that  
12 "each class member would have his own issues of, among others . . .  
13 damages to prove[,] and "[c]lass certification . . . would prevent  
14 [Defendants] from litigating their statutory defenses to individual  
15 claims, such as failure to exhaust, compliance with the IEP process,  
16 parental consent and waiver, and more." (Ripon USD's Opp'n to Class Mot.  
17 28:2-5; MCS's Opp'n to Class Mot. 16:26-28.)

18 In support of their oppositions, Defendants filed, *inter alia*,  
19 the Declarations of Tara Sisemore-Hester and Virginia Johnson. Ms.  
20 Johnson is the Associate Superintendent of Education Services for MCS  
21 and has "oversight and supervision over [MCS's] special education  
22 program and services." (Johnson Decl. ¶ 1, ECF No. 173-1.) Ms. Sisemore-  
23 Hester is the Coordinator of Autism Services for [VMRC] . . . . [and]  
24 facilitate[s] and perform[s] quality management of autism services  
25 provided by VMRC . . . ." (Sisemore-Hester Decl. ¶ 2, ECF No. 179.)

26 Concerning the provision of special education to children with  
27 ASD, Ms. Sisemore-Hester avers:

1 6. Once a child under the age of three is  
2 diagnosed with autism by a diagnostic clinician,  
3 VMRC's Service Coordinator . . . organizes an  
4 Individual Family Service Plan ("IFSP") meeting in  
5 order to determine the appropriate course of  
6 intervention. The IFSP meeting is attended by  
7 VMRC's Service Coordinator, the child, his or her  
8 parents, and other parties who have information  
9 concerning the child. . . . During the IFSP  
10 meeting, the parties in attendance discuss whether  
11 further assessment is needed, and which form of  
12 intervention is appropriate. Once the parties  
13 determine which of the three forms of Applied  
14 Behavioral Analysis ("ABA") treatment would be most  
15 beneficial to the child, VMRC's Service Coordinator  
16 contacts me and asks me to coordinate the provision  
17 of the treatment. I then arrange for one of the  
18 [Non-Public Agencies ("NPAs)] which VMRC contracts  
19 with to provide intervention services to the child.

11 7. One of the forms of ABA treatment which  
12 VMRC may fund for a child under the age of three is  
13 Early Intensive Behavioral Treatment ("EIBT"). As  
14 its name implies, EIBT is an intense and aggressive  
15 form of treatment which is not appropriate for all  
16 children with autism. Instead, it best serves those  
17 children who can handle the rigor of treatment. The  
18 determination of whether EIBT is appropriate for a  
19 child is based on assessments provided by any NPAs  
20 which are not treating the child as well as the  
21 diagnostic clinician who diagnosed the child. If  
22 EIBT is not determined to be an appropriate form of  
23 treatment for a child, VMRC will ensure that an NPA  
24 provides an alternative ABA treatment to the child,  
25 unless the parents decline ABA altogether.

19 (Id. at ¶¶ 6-7.) Ms. Johnson declares:

20 3. Students with [ASD] who qualify for  
21 special education services from [MCS] also have  
22 their educational placement, services, and  
23 therapies determined through the IEP process."

23 4. For students with ASD between the ages of  
24 three and five, the District may provide [ABA]  
25 therapies either in a District school setting or in  
26 an intensive in home setting depending on the needs  
27 of the individual child. Other therapies and  
28 services may be provided in lieu of ABA dependent  
on the individual needs of the individual student.  
There is no single therapy that is required by  
every student with ASD.

. . . .

1           8. The determination of whether a student  
2 with ASD requires ABA services is an IEP team  
3 determination made through the IEP process.

4 (Johnson Decl. ¶¶ 3-4, 8.)

5           “In order to certify a class under [Rule 23(b)(3)], a court  
6 must find ‘that the questions of law or fact common to class members  
7 predominate over any questions affecting only individual members, and  
8 that a class action is superior to other available methods for fairly  
9 and efficiently adjudicating the controversy.’” Erica P. John Fund, Inc.  
10 v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011).

11           “Implicit in the satisfaction of the predominance test is the  
12 notion that the adjudication of common issues will help achieve judicial  
13 economy.” Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th  
14 Cir. 1996). “Where the issues of a case ‘require the separate  
15 adjudication of each class member’s individual claim or defense, a Rule  
16 23(b)(3) action would be inappropriate.’” Casida v. Sears Holdings  
17 Corp., No. 1:11-cv-01052 AWI JLT, 2012 WL 3260423, at \*7 (E.D. Cal. Aug.  
18 8, 2012) (quoting Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180,  
19 1189 (9th Cir. 2001)).

20           Accordingly, “[c]onsider[ation of] whether ‘questions of law  
21 or fact common to class members predominate’ begins . . . with the  
22 elements of the underlying cause of action.” Erica P. John Fund, Inc.,  
23 131 S. Ct. at 2184. “[T]he court must take into account the claims,  
24 defenses, relevant facts, and applicable substantive law to assess the  
25 degree to which resolution of the classwide issues will further each  
26 individual class member’s claim against the defendant[s].” Klay v.  
27 Humana, Inc., 382 F.3d 1241, 1254 (11th Cir. 2004) (internal quotation  
28 marks and internal citation omitted), *abrogated in part on other grounds*  
by Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008).



1 Plaintiffs allege that "Defendants . . . discriminated against  
2 [them] by using the [EIBT Guidelines] as a barrier which has denied them  
3 access to intensive ABA services" in violation of section 504 of the RA,  
4 Title II of the ADA, and the California Unruh Civil Rights Act. (See SAC  
5 ¶¶ 81, 88, 100.) "The prima facie standard for all three statutes is  
6 essentially coterminous." Colombini v. Members of Bd. of Dirs. of Empire  
7 Coll. Sch., No. C9704500CRB, 2001 WL 1006785, at \*5 n.5 (N.D. Cal. Aug.  
8 17, 2001); see Zukle v. Regents of Univ. of Cal., 166 F.3d 1041, 1045  
9 (9th Cir. 1999) ("There is no significant difference in the analysis of  
10 the rights and obligations created by the ADA and the [RA]. Thus courts  
11 have applied the same analysis to claims brought under both  
12 statutes . . . ."); see also Kramer v. Regents of the Univ. of Cal., 81  
13 F. Supp. 2d 972, 976-77 (N.D. Cal. 1999) ("The Unruh [Civil Rights]  
14 Act . . . [is] directly analogous to federal disability discrimination  
15 laws.")

16 To establish a violation of these statutes, a plaintiff must  
17 show that "(1) she is a qualified individual with a disability; (2) she  
18 was excluded from participation in . . . [a] service[], program[], or  
19 activit[y], and (3) such exclusion . . . was by reason of her  
20 disability." Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002)  
21 (stating prima facie elements of § 504 claim); see also Zukle, 166 F.3d  
22 at 1045 (stating prima facie elements of ADA and § 504 claims).

23 "To determine the scope of the term 'otherwise qualified  
24 . . . ,' courts consider the eligibility requirements of the [services  
25 sought]." Dempsey v. Ladd, 840 F.2d 638, 640 (9th Cir. 1988). "An  
26 otherwise qualified individual is one who is able to meet all of [the  
27 service's] requirements in spite of h[er] [disability]." Se. Cmty. Coll.  
28 v. Davis, 442 U.S. 397, 406 (1979).

1           Accordingly, to prevail on their claims, Plaintiffs will have  
2 to establish that they are "otherwise qualified" to receive the  
3 intensive ABA services sought. And as set forth in the Declarations of  
4 Tara Seisemore-Hester and Virginia Johnson, the appropriate therapy(ies)  
5 for children diagnosed with ASD are determined through an IEP process;  
6 there is no single therapy that is required by every student. Further,  
7 Plaintiffs are seeking damages in addition to injunctive and/or  
8 declaratory relief. Therefore, individualized inquiries would have to be  
9 conducted concerning each plaintiff's alleged damages.

10           For the stated reasons, Plaintiffs have not shown that the  
11 alleged common questions concerning Defendants' use of the EIBT  
12 Guidelines will predominate. Therefore, Plaintiffs' motion for class  
13 certification is DENIED.

14 **B. Joinder/Substitution of Doe Defendants**

15           Plaintiffs also move to join Tracy Unified School District,  
16 Stockton Unified School District, Lodi Unified School District, Sylvan  
17 Union School District, Stanislaus County Office of Education and the  
18 Stanislaus County SELPA in place of Doe Defendants 1-6. (Joinder Mot.  
19 2:19-25.) Plaintiffs argue that joinder/substitution is proper under  
20 Rule 20(a) "because each of the Proposed Defendants utilized the [EIBT  
21 Guidelines] and thus numerous common facts and legal questions exist."  
22 (Id. at 2:25-28.)


23           Defendants oppose the proposed joinder of Doe Defendants,  
24 arguing, *inter alia*, that "the named plaintiffs have no standing to  
25 complain against the Proposed Defendants, as they do not live within the  
26 educational jurisdiction boundaries of the Proposed Defendants, and  
27 therefore have no connection to the Proposed Defendants." (Ripon USD's  
28 Opp'n to Joinder Mot. 3:12-17 (internal citation omitted), ECF No. 172;

1 see also VMRC's Opp'n to Joinder Mot. 5:23-6:3, 6:24-7:2, ECF No. 180.)

2 In their reply brief, Plaintiffs do not contest that the named  
3 plaintiffs have no connection to the defendants sought to be joined.  
4 Rather, they indicate that the defendants sought to be added "are  
5 currently utilizing the [EIBT Guidelines] to create a barrier which has  
6 deprived **the potential class plaintiffs** from accessing intensive [ABA  
7 services]." (Pls.' Reply to Joinder Mot. 3:20-4:2 (emphasis added), ECF  
8 No. 182.)

9 Since Plaintiffs' motion for class certification is denied,  
10 and Plaintiffs have not shown that the named plaintiffs have any right  
11 to relief against the defendants sought to be added, Plaintiffs' joinder  
12 motion is DENIED.

13 Dated: March 21, 2013

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16 \_\_\_\_\_  
GARLAND E. BURRELL, JR.  
Senior United States District Judge