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UNITED STATES DISTRICT COURT
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,

Plaintiffs,

v.

RIPON UNIFIED SCHOOL DISTRICT,
RIPON UNIFIED SCHOOL DISTRICT
BOARD OF TRUSTEES, SAN JOAQUIN
COUNTRY OFFICE OF EDUCATION,
VALLEY MOUNTAIN REGIONAL
CENTER, 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 1-200 ,

Defendants.

No. 2:10-cv-00523-TLN-CKD

**ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT**

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

14 This matter is before the Court on two separate motions for summary judgment.
15 Defendant Valley Mountain Regional Center (“VMRC”) filed a motion for summary judgment
16 against Plaintiffs Z.F., M.A.F., J.F., L.H., J.H., J.A., J.R.H., A.N, G.N., and M.R. (jointly
17 “Plaintiffs”). (ECF No. 242.) Likewise, Defendants Ripon Unified School District (“RUSD”),
18 Ripon Unified School District Board of Trustees, and San Joaquin County Office of Education
19 filed a separate motion for summary judgment against Plaintiffs Z.F., M.A.F., J.F., A.N., G.N.,
20 and M.R. (ECF No. 250.) Plaintiffs oppose both motions. (ECF Nos. 266 & 264.) Moving
21 Defendants filed replies. (ECF Nos. 275 & 274.) Having carefully considered the arguments
22 raised by the parties and for the reasons set forth below, the Court hereby GRANTS both Motions
23 for Summary Judgment (ECF Nos. 242 & 250).

24 **I. FACTUAL BACKGROUND**

25 The claims at issue in the instant action arise from alleged discrimination in the special
26 education context. The Individuals with Disabilities Education Act (“IDEA”) was created to
27 provide full educational opportunities to disabled children and to ensure the protection of the
28 rights of disabled children and their parents. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516,
523 (2007). The ultimate goal of the IDEA is to provide free appropriate public education
 (“FAPE”), tailored to the individual needs of the child by means of an Individual Education
 Program (“IEP”). *Id.* at 524. In the districts at issue in this action, the district and its
 representatives, the child and its parents, and the regional center participated in the IEP meetings.

1 While the schools were required to fund FAPE, VMRC could voluntarily aid in funding services
2 through Early Intensive Behavioral Treatment (“EIBT”). (ECF No. 242 at 9.) The EIBT helped
3 fund an intensive treatment called Applied Behavioral Analysis (“ABA”). (ECF No. 242 at 9.)
4 VMRC used a document called EIBT Programs, Procedures, and Guidelines (“PP&G”) to help it
5 effectively implement funding under the EIBT for ABA services. (ECF No. 242 at 17.) The
6 instant action deals with the application of the EIBT to Plaintiffs.

7 A. Role of VMRC

8 VMRC is a private nonprofit organization established under the Lanterman
9 Developmental Disabilities Services Act. Cal. Welf. & Inst. Code § 4500 *et seq.* The Lanterman
10 Act is designed to facilitate access to various support services for California’s developmentally
11 disabled residents. (Pltfs.’ Resp. to Defs.’ Separate Statement of Undisputed Facts, ECF No. 267
12 ¶ 1.) The Lanterman Act requires VMRC to fund services for autistic persons under the age of
13 three. (ECF No. 267 ¶ 6.) VMRC is not required to fund services for persons over the age of
14 three, but does voluntarily co-fund certain educational placements for children over three. (ECF
15 No. 267 ¶ 13.)

16 A. Plaintiff Z.F.

17 Z.F. claims he was denied intensive ABA services prior to May 2009. (Pltfs.’ Resp. to
18 Defs.’ separate statement of undisputed facts, ECF No. 265 ¶ 1.) Z.F. was diagnosed with autism
19 on or about July 14, 2005. (ECF No. 267 ¶ 46.) On November 5, 2005, Z.F.’s parents, M.A.F.
20 and J.F., attended the first IEP meeting in Ripon. (ECF No. 267 ¶ 47.) During the meeting,
21 RUSD made two offers of FAPE for Z.F. (ECF No. 267 ¶ 49.) RUSD offered a placement at the
22 McFall autism preschool ABA program with a parent training component and a school program
23 of 30 hours of intensive training per week or an intensive ABA EIBT home program for 35–40
24 hours per week. (ECF No. 267 ¶ 49.) M.A.F and J.F. forewent the second option and enrolled
25 Z.F. in McFall Special Day Class. (ECF No. 267 ¶ 51.)

26 In May 2006, M.A.F. and J.F. met with RUSD for another IEP meeting and RUSD
27 offered Z.F. 35–40 hours per week of intensive ABA services at RUSD’s sole expense. (ECF No.
28 267 ¶ 55.) RUSD provided Z.F. with the agreed upon in-home ABA services for the 2006–2007

1 school year. (ECF No. 267 ¶ 57.) On January 30, 2008, M.A.F. and J.F. filed a Request for Due
2 Process and Mediation with the Office of Administrative Hearings (“OAH”). (ECF No. 267 ¶
3 58.) In their request, M.A.F. and J.F. argued that RUSD failed to provide Z.F. with an
4 appropriate education program. (ECF No. 114 ¶ 73.) On June 6, 2008, M.A.F. and J.F. entered
5 into a settlement agreement with Ripon Unified School District, San Joaquin County Office of
6 Education, and San Joaquin Special Education Local Plan Area (“SELPA”). (ECF No. 267 ¶ 59.)

7 **B. Plaintiffs J.H and L.H.**

8 Twin boys J.H. and L.H. relocated to the Modesto area from Santa Cruz. (ECF No. 267 ¶
9 63.) On September 10, 2007, IEP meetings were held for both children and the children were
10 each offered a 30-day interim placement in a Special Day Class at Garrison Elementary for 30
11 hours a week. (ECF No. 267 ¶¶ 63–64.) Their parents, J.A. and J.R.H., consented to the
12 placement. (ECF No. 267 ¶ 64.) At subsequent IEP meetings, Modesto School District
13 continued to offer placement at Garrison Special Day Class for both children. (ECF No. 267 ¶
14 66.) J.A. and J.R.H. also filed a request for Due Process and Mediation with the OAH on behalf
15 of their children alleging that the 4-way/EIBT agreement had denied them FAPE. (ECF No. 114
16 ¶ 67.) J.H. and L.H. received intensive ABA placement following the OAH ruling. (ECF No.
17 267 ¶ 71.) The Administrative Law Judge (“ALJ”) awarded J.H. and L.H. compensatory services
18 paid for by Modesto School District. (ECF No. 267 ¶ 72.) Since the completion of the
19 compensatory services, J.H. and L.H.’s placements were changed through the IEP process with
20 their parents’ consent. (ECF No. 267 ¶ 76.)

21 **C. Plaintiff A.N.**

22 A.N.’s mother, M.R. attended an IEP meeting for A.N. on August 9, 2007. (ECF No. 267
23 ¶ 82.) At the meeting, M.R. stated she was pleased with A.N.’s progress and approved continued
24 placement at McFall. (ECF No. 267 ¶¶ 83–84.) At a September 27, 2007, IEP meeting, the IEP
25 team agreed to A.N.’s continued placement at McFall. (ECF No. 267 ¶ 89.) M.R. filed a Request
26 for Due process with the OAH on March 24, 2009, challenging the placement decision made at
27 the September IEP meeting. (ECF No. 267 ¶ 91.) In the request, M.R. argued that RUSD failed
28 to provide A.N. with an appropriate education program. (ECF No. 114 ¶ 73.) M.R. voluntarily

1 settled the claims against Modesto School District on April 30, 2009. (ECF No. 267 ¶ 92.) M.R.
2 has consented to all educational placements following the OAH settlement. (ECF No. 267 ¶ 93.)

3 II. STANDARD OF LAW

4 Summary judgment is appropriate when the moving party demonstrates no genuine issue
5 as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed.
6 R. Civ. P. 56(a); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Under summary
7 judgment practice, the moving party always bears the initial responsibility of informing the
8 district court of the basis of its motion, and identifying those portions of “the pleadings,
9 depositions, answers to interrogatories, and admissions on file together with affidavits, if any,”
10 which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v.*
11 *Catrett*, 477 U.S. 317, 323 (1986). “[W]here the nonmoving party will bear the burden of proof
12 at trial on a dispositive issue, a summary judgment motion may properly be made in reliance
13 solely on the pleadings, depositions, answers to interrogatories, and admissions on file.” *Id.* at
14 324 (internal quotations omitted). Indeed, summary judgment should be entered against a party
15 who does not make a showing sufficient to establish the existence of an element essential to that
16 party’s case, and on which that party will bear the burden of proof at trial.

17 If the moving party meets its initial responsibility, the burden then shifts to the opposing
18 party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec.*
19 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *First Nat’l Bank of Ariz. v. Cities*
20 *Serv. Co.*, 391 U.S. 253, 288–89 (1968). In attempting to establish the existence of this factual
21 dispute, the opposing party may not rely upon the denials of its pleadings, but is required to
22 tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in
23 support of its contention that the dispute exists. Fed. R. Civ. P. 56(c). The opposing party must
24 demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the
25 suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that
26 the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for
27 the nonmoving party. *Id.* at 251–52.

28 In the endeavor to establish the existence of a factual dispute, the opposing party need not

1 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
2 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
3 trial.” *First Nat’l Bank*, 391 U.S. at 288–89. Thus, the “purpose of summary judgment is to
4 ‘pierce the pleadings and to assess the proof in order to see whether there is a genuine need for
5 trial.’” *Matsushita*, 475 U.S. at 587 (quoting Rule 56(e) advisory committee’s note on 1963
6 amendments).

7 In resolving the summary judgment motion, the court examines the pleadings, depositions,
8 answers to interrogatories, and admissions on file, together with any applicable affidavits. Fed.
9 R. Civ. P. 56(c); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305–06 (9th Cir. 1982). The evidence
10 of the opposing party is to be believed, and all reasonable inferences that may be drawn from the
11 facts pleaded before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S.
12 at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s
13 obligation to produce a factual predicate from which the inference may be drawn. *Richards v.*
14 *Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff’d*, 810 F.2d 898 (9th Cir.
15 1987). Finally, to demonstrate a genuine issue that necessitates a jury trial, the opposing party
16 “must do more than simply show that there is some metaphysical doubt as to the material facts.”
17 *Matsushita*, 475 U.S. at 586. “Where the record taken as a whole could not lead a rational trier of
18 fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Id.* at 587.

19 III. ANALYSIS

20 Over the course of this litigation, the Court has dismissed some of Plaintiffs’ claims and
21 the parties have voluntarily settled others. The remaining claims at issue in the instant motions
22 for summary judgment are as follows. Plaintiffs Z.F., A.N., and their respective parents seek
23 compensatory damages against RUSD Defendants under Section 504 of the Rehabilitation Act,
24 29 U.S.C. § 749 *et seq.*, and injunctive relief against RUSD Defendants under Title II of the
25 Americans with Disabilities Act, (“ADA”) 42 U.S.C § 12131 *et seq.* All Plaintiffs seek
26 compensatory damages against VMRC under Section 504 of the Rehabilitation Act and the Unruh
27 Civil Rights Act, Cal. Civ. Code § 51 *et seq.* (See ECF No. 114.)

28 In its motion for summary judgment, VMRC asserts that Plaintiffs failed to exhaust their

1 administrative remedies against VMRC. VMRC further argues that Plaintiffs' claim under
2 Section 504 is without merit because VMRC was under no legal duty to pay for Plaintiffs'
3 placements, that Plaintiffs cannot prove they were discriminated against "solely because of" their
4 disability, and that Plaintiffs cannot establish bad faith or gross misjudgment by VMRC. VMRC
5 contends that the Plaintiffs' claim under the Unruh Act is equally without merit because Plaintiffs
6 cannot prove intentional discrimination. In the alternative, VMRC seeks partial summary
7 judgment with respect to Plaintiffs' claims for declaratory and injunctive relief. (ECF No. 242 at
8 20–35.)

9 Defendants RUSD, RUSD Board of Trustees, and San Joaquin County Office of
10 Education (jointly "RUSD Defendants") seek summary judgment against Z.F., A.N., and their
11 respective parents. RUSD Defendants assert that these Plaintiffs released their Section 504 and
12 ADA claims against RUSD Defendants through settlement agreements reached at the OAH
13 proceedings. RUSD Defendants contend that Plaintiffs have no evidence that the 4-way or PP&G
14 agreements are improper barriers to ABA placements. Lastly, RUSD Defendants echo VMRC's
15 claims that Plaintiffs have no evidence of bad faith or gross misjudgment for their Section 504
16 claim.

17 B. Evidentiary Issues

18 The briefings raise two evidentiary issues that the Court will now address. First, VMRC
19 objects to most of Plaintiffs' evidence filed in support of their opposition. (*See* ECF No. 275–1.)
20 Plaintiffs filed a request for judicial notice (ECF No. 268) that they seek to use in opposition to
21 both motions for summary judgment. Plaintiffs also filed a multitude of other declarations. (*See*
22 ECF Nos. 269, 270, 271, & 272.) VMRC filed forty-four objections to Plaintiffs' proffered
23 evidence on various grounds. (ECF No. 275–1.) These objections include the argument that the
24 declaration of Shirley Nutt should not be included in its entirety because Shirley Nutt lacks
25 personal knowledge and her statements are irrelevant. (ECF No. 275–1 at 9–12.) VMRC does
26 not differentiate between the parts of the declarations that Plaintiffs use in support of their
27 opposition and those portions which are not used. RUSD Defendants filed seven objections, but
28 focus only on those paragraphs Plaintiffs cite as evidence in their opposition. (ECF No. 274–2.)

1 The Court does not address each evidentiary objection separately because doing so is
2 unnecessary to resolve the instant motions. *See Wynes v. Kaiser Permanente Hosps.*, 936 F.
3 Supp. 2d 1171, 1180 n.8 (E.D. Cal. 2013). Furthermore, much of VMRC’s objections revolve
4 around the relevance of the submitted material. To the extent that VMRC and the other moving
5 Defendants object to the declarations on the basis of irrelevance or speculation, such objections
6 are “more fruitfully and efficiently analyzed against the summary judgment standard itself.”
7 *Pinder v. Employment Development Department*, No. 2:13-cv-00817-TLN-DB, 2017 WL 56863,
8 at *7 (E.D. Cal. Jan. 5, 2017) (citing *Burch v. Regents of Univ. Cal.*, 433 F. Supp. 2d 1110, 1123
9 (E.D. Cal. 2006)). With respect to the declaration of Shirley Nutt, VMRC’s irrelevance
10 arguments are likewise dispensed with.

11 Second, the Court notes a lack of factual support and citations to the evidence submitted
12 in support of the parties’ arguments. Plaintiffs’ disputed facts offer little guidance to the Court on
13 where to find the necessary evidence to support Plaintiffs’ arguments. In most instances,
14 Plaintiffs merely state the title of the exhibit as if that is sufficient to point the Court to the
15 information necessary to dispute Defendants’ facts. (*See* ECF No. 267 at ¶ 33 “S.N. Dec. at ¶ 7;
16 RJN at Ex. B, Class Dec. of J.A. at Ex. B...”.) The nonmoving party must set forth “specific facts
17 showing that there is a genuine issue for trial.” *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors*
18 *Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). “The Court is not obliged to ‘scour the record in search
19 of a genuine issue of triable fact.’” *Leramo v. Premier Anesthesia Medical Group*, No. CV F 09-
20 2083 LJO JTL, 2011 WL 2680837, at *9 (E.D. Cal. July 8, 2011) (citing *Keenan v. Allan*, 91 F.3d
21 1275, 1279 (9th Cir. 1996)). Therefore, the Court limits its review to the parts of the record
22 specifically referenced by Plaintiffs, which are supported by the evidence and cited with
23 sufficient specificity. The Court will not read an entire exhibit in the hope of finding language
24 that supports Plaintiffs’ conclusions.

25 C. Plaintiffs’ Exhaustion of Administrative Remedies

26 VMRC argues that Plaintiffs have not exhausted their administrative remedies and thus
27 their claims against VMRC should be dismissed in full. (ECF No. 242 at 29.) VMRC contends
28 that Plaintiffs should have sought administrative relief against it in a fair hearing procedure under

1 the Lanterman act. (ECF No. 242 at 29.) Plaintiffs assert that they never had cause or standing to
2 request a fair hearing against VMRC. (ECF No. 266 at 14.) VMRC counters that Plaintiffs’
3 statement regarding cause and standing is an admission that they cannot bring any claims against
4 VMRC. (ECF No. 275 at 4.) However, VMRC’s contention contorts the fair hearing
5 requirement and Plaintiffs’ response.

6 Under the Individuals with Disabilities Education Act (“IDEA”), a plaintiff must exhaust
7 administrative remedies before bringing a civil action under Section 504 or the ADA. 28 U.S.C.
8 § 1451(l). “It is well established that a plaintiff may not circumvent this exhaustion requirement
9 by tailoring the complaint to exclude specific relief available under the IDEA.” *McElroy ex rel.*
10 *McElroy v. Tracy Unified School Dist.*, No. 2:07-cv-00086-MCE-EFB, 2008 WL 4754831, at *5
11 (E.D. Cal. Oct. 29, 2008) (citing *Robb v. Bethel School Dist. No. 403*, 308 F.3d 1047, 1049 (9th
12 Cir. 2002)). However, the statute only applies the IDEA to a “[s]tate educational agency, state
13 agency, or local education agency.” 28 U.S.C. § 1415(a). VMRC is a private non-profit agency,
14 and therefore, is not a state agency or local educational agency under the statute. *See St.*
15 *Johnsbury Acad. v. D.H.*, 240 F.3d 163, 171 (2d Cir. 2001) (holding that the IDEA does not
16 create liability for private entities). Accordingly, as a private entity VMRC is not subject to the
17 IDEA or its exhaustion requirements. Plaintiffs were not required or even able to bring VMRC
18 before a fair hearing procedure. Therefore, VMRC’s argument that Plaintiffs were required to
19 exhaust administrative remedies against it is without merit.

20 D. Release of Claims Against RUSD Defendants Through Settlement Agreement

21 RUSD Defendants contend that Plaintiffs Z.F. and A.N. and their respective parents
22 released RUSD Defendants from liability in this lawsuit in their settlement agreements at the
23 OAH proceedings. (ECF No. 251 at 7.) The relevant clause from the settlement agreement reads:

24 “[Respondents] are generally aware that [Student] and his Parents
25 are named plaintiffs in a pending class action in federal court and
26 acknowledge that this settlement does not settle the claims asserted
27 in the federal action, to the extent that the federal claims rely on a
28 different cause of action and seek relief that is not available at the
OAH or under the IDEA, or is not compensable at OAH or under
the IDEA.”

1 (ECF No. 257–4, Ex. 4 at 84.) (emphasis added) Plaintiffs assert that the language of the
2 settlement does not preclude the instant action because “OAH has no jurisdiction to address
3 claims for monetary damages or discrimination claims under Section 504 or Unruh.”¹ (ECF No.
4 264 at 3.) RUSD Defendants contend that Plaintiffs miss the point of the clause and that
5 relabeling the claims as Section 504 or ADA does not mean that the relief sought in the instant
6 action is not available at the OAH or under the IDEA.² (ECF No. 274 at 4.) RUSD Defendants
7 further contend that the OAH is permitted to award a wide variety of relief including injunctive
8 relief and monetary damages. (ECF No. 251 at 11.)

9 RUSD Defendants claim that the intent of the clause was to prevent claims similar to
10 those brought in the instant action. However, they do not assert that the phrase is ambiguous or
11 the terms should be awarded special meaning. Absent evidence that the parties intended a special
12 usage, words used in a contract should be interpreted in their “ordinary and popular sense.” Cal.
13 Civ. Code § 1644. The Court interprets the phrase to have its ordinary meaning. When given its
14 ordinary meaning, the clause requires first that Plaintiffs demonstrate that the causes of action are
15 different from those brought at the OAH proceeding and second that the relief sought is not
16 available or not compensable under the OAH or IDEA. RUSD Defendants state that the analysis
17 of this argument revolves around what type of relief Plaintiffs seek in the instant action and the
18 type of relief “available/compensable” at the OAH or under the IDEA. (ECF No. 251 at 9.)

19 RUSD Defendants do not discuss whether the causes of action are different and thus, concede this
20 point. Therefore, the Court turns to whether the relief at issue in the instant action is available or
21 compensable under OAH or the IDEA.

22 Plaintiffs seek injunctive relief on their ADA claim under Title II. (*See* ECF No. 114 ¶
23 90.) RUSD Defendants assert that “injunctive relief is clearly an available remedy under the
24 IDEA.” (ECF No. 251 at 12.) Plaintiffs do not respond to this argument. In fact, Plaintiffs do
25 not mention either the ADA or injunctive relief in response to RUSD Defendants’ argument.

26
27 ¹ Plaintiffs assert claims under Section 504 and the ADA against RUSD Defendants. Plaintiffs do not assert
an Unruh claim against RUSD Defendants. (*See* ECF No. 114 at 22–26.)

28 ² The Court finds below that the Plaintiffs have not met their burden on the Section 504 claim. *See, infra*,
section III. D. Therefore, the Court focuses this section solely on Plaintiffs’ ADA claim against RUSD Defendants.

1 Plaintiffs focus solely on whether compensatory damages are available at the OAH or under the
2 IDEA. (See ECF No. 264 at 3–4.) In any event, the Court agrees with RUSD Defendants. The
3 Ninth Circuit has stated that “injunctive relief is available under the IDEA” and is ordinarily the
4 remedy under the IDEA. *Mark H. v. Lemahieu*, 513 F.3d 922, 929 (9th Cir. 2008); *see also*
5 *Taylor v. Honig*, 910 F.2d 627, 628 (9th Cir. 1990) (stating that “injunctive or other prospective
6 relief is ordinarily the remedy under the [predecessor to the IDEA]”). The injunctive relief that
7 Plaintiffs seek was available at the OAH and compensable under the IDEA and thus, Plaintiffs’
8 claim against RUSD Defendants under the ADA was waived by the settlement agreement.
9 Accordingly, the Court GRANTS summary judgment on Plaintiffs ADA claim against RUSD
10 Defendants.

11 E. Section 504 Claim Against RUSD Defendants and VMRC

12 In order to obtain relief under Section 504, a plaintiff must show (1) that he was disabled
13 within the meaning of the act, (2) that he is “otherwise” qualified for the program he seeks to
14 enter, (3) that he was denied the services “solely by reason of his handicap,” and (4) that the
15 program in question receives federal financial assistance. *Dempsey ex rel Dempsey v. Ladd*, 840
16 F.2d 638, 640 (9th Cir. 1987). A plaintiff seeking monetary damages under Section 504 must
17 demonstrate a *mens rea* of “intentional discrimination,” which may be satisfied by a showing of
18 deliberate indifference. *Duvall v. County of Kitsap*, 260 F. 3d 1124, 1138 (9th Cir. 2001). The
19 parties do not dispute elements one, two, or four. Thus, the only remaining issue relates to
20 element three. VMRC and RUSD Defendants dispute whether the children were denied services
21 solely by reason of their handicap and whether Plaintiffs can demonstrate a triable issue of fact as
22 to intentional discrimination.

23 VMRC and RUSD Defendants cite to an Eastern District case for the proposition that
24 “[p]laintiffs bringing § 504 claims in the special education context must show that the educational
25 decisions relating to the student were so inappropriate as to constitute either bad faith or gross
26 misjudgment.” *Alex G. ex rel Dr. Steven G. v. Board of Trustees of Davis Joint Unified School*
27 *Dist.*, 387 F. Supp. 2d 1119, 1124 (E.D. Cal. 2005); *see also N.L. v. Knox County Schs.*, 315 F.3d
28 688, 695–96 (6th Cir. 2003) (“To prove discrimination in the education context, courts have held

1 that something more than a simple failure to provide a free appropriate public education must be
2 shown.”). Plaintiffs argue that the *Alex G.* case acknowledges that the deliberate indifference
3 standard applies under the circumstances in this case. (ECF No. 266 at 21.) However, the Court
4 need not decide which is the applicable standard in this case because Plaintiffs have not even
5 satisfied the less stringent deliberate indifference standard.

6 To satisfy the deliberate indifferent standard, a plaintiff must present evidence that shows
7 both: (1) knowledge that a federally protected right is substantially likely to be violated; and (2)
8 failure to act despite that knowledge. *Duval v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir.
9 2001). “Deliberate indifference does not require a showing of personal ill will or animosity
10 toward the disabled person.” *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011).
11 Instead, deliberate indifference requires a “deliberate choice, rather than negligence or
12 bureaucratic inaction.” *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 276 (2d Cir. 2009).

13 When Plaintiffs bear the burden at trial, VMRC and RUSD Defendants can carry their
14 burden on summary judgment by showing, through argument, that Plaintiffs do not have enough
15 evidence to establish intentional discrimination. *See Coomes v. Edmonds Sch. Dist. No. 15*, 816
16 F.3d 1255, 1261 (9th Cir. 2016) (citing *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d
17 1099, 1102 (9th Cir. 2000)). The burden then shifts to Plaintiffs to produce some evidence that a
18 triable issue of fact exists such that their Section 504 claim should be preserved for trial.
19 *Friedman v. Live Nation Merchandise, Inc.*, 833 F.3d 1180, 1188 (9th Cir. 2016). In attempting
20 to establish the existence of a factual dispute, Plaintiff “is required to tender evidence of specific
21 facts in the form of affidavits, and/or admissible discovery material, in support of its contention
22 that the dispute exists.” Fed. R. Civ. P. 56(c). “Bare assertions of a legal conclusion, not
23 supported by any other specific facts showing that there is a genuine issue for trial” are
24 insufficient to raise a genuine issue of material fact. *Bader v. N. Line Layer, Inc.*, 503 F.3d 813,
25 820 n.4 (9th Cir. 2007).

26 VMRC and RUSD Defendants argue that Plaintiffs cannot establish a Section 504 claim
27 because they have failed to present sufficient evidence from which a fact finder could conclude
28 that the required *mens rea* is met. (ECF No. 251 at 20–21; ECF No. 242 at 39–40.) In response

1 to VMRC, Plaintiffs offer nothing more than the statement that “Plaintiffs have established at
2 least a genuine issue of material fact that waitlists and arbitrary criteria put in place for students
3 who are acknowledged to required [sic] intensive ABA services is an act of deliberate
4 indifference.” (ECF No. 266 at 21.) Plaintiffs do not cite to any part of the record in support of
5 this statement. In the opposition to RUSD Defendants’ motion, Plaintiffs assert that they “have
6 submitted evidence that the EIBT program is set up as a barrier to the receipt of services by
7 children diagnosed with Autism. (Dec. of Shirley Nutt; RJN at Ex. E-H.)”. (ECF No. 264 at 5.)
8 Plaintiffs’ statement that waitlists and arbitrary criteria are acts of deliberate indifference amount
9 to nothing more than a legal conclusion. In order to prove deliberate indifference, Plaintiffs must
10 demonstrate Defendants had knowledge that a federally protected right was likely to be violated
11 and a failure to act despite that knowledge. *Duval*, 260 F.3d at 1139. Plaintiffs have failed to
12 present arguments as to either element. Plaintiffs state that “[u]sing eligibility criteria that might
13 screen out qualified people with disabilities is a violation of federal law. 34 C.F.R. §
14 104.4(b)(vii)(4).” (ECF No. 266 at 21.) Yet, Plaintiffs do not assert how this law indicates
15 knowledge or failure to act on the part of Defendants.

16 The burden is on Plaintiffs, not the Court, to present evidence which demonstrates a
17 triable issue of fact as to whether Defendants intended to discriminate against Plaintiffs. *See*
18 *Williams v. Eastside Lumberyard & Supply Co.*, 190 F. Supp. 2d 1104, 1114 (S.D. Ill. 2001) (“A
19 judge is the impartial umpire of legal battles, not a [party's] attorney. He is neither required to
20 hunt down arguments [the parties] keep camouflaged, nor required to address perfunctory and
21 undeveloped arguments.... [T]o the extent that [Defendant] failed to develop any additional
22 argument[s] or provide any legal support for them, [it] has waived them.”). Mere legal
23 conclusions and citations that fail to cite with specificity the portions of the record which present
24 evidence are insufficient.

25 Moreover, the evidence Plaintiffs present in support of their conclusion adds nothing in
26 the way of specific facts. Plaintiffs do not cite specific portions of the declarations that support
27 their argument that there is sufficient evidence that a finder of fact might conclude Defendants
28

1 acted with deliberate indifference.³ Nor do Plaintiffs identify how the EIBT, waitlist and
2 arbitrary criteria, were applied specifically to these children such that their application amounts to
3 deliberate indifference. Citing to the declarations as a whole does not cure Plaintiffs’ insufficient
4 arguments especially when Plaintiffs do not explain how the declarations support their
5 “argument.” “It is not [the Ninth Circuit’s] task, or that of the district court, to scour the record in
6 search of a genuine issue of triable fact. [The Court] rel[ies] on the nonmoving party to identify
7 with reasonable particularity the evidence that precludes summary judgment.” *Keenan v. Allan*,
8 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251
9 (7th Cir. 1995).

10 Accordingly, Plaintiffs have not met their burden to demonstrate a genuine issue of
11 material fact as to intentional discrimination. Summary Judgment as to Plaintiffs’ first cause of
12 action, discrimination under Section 504 of the Rehabilitation Act, is GRANTED as to VMRC
13 and RUSD Defendants.

14 F. The Unruh Act Claim Against VMRC

15 VMRC argues that there is no triable issue of fact with respect to Plaintiffs’ claim under
16 the Unruh Act because Plaintiffs cannot demonstrate intentional discrimination. (ECF No. 242 at
17 40.) The extent of Plaintiffs’ response to Defendants’ argument is a single sentence: “For the
18 reasons set forth above, Plaintiffs have established that Defendant VMRC was deliberately
19 indifferent because harm to a federally protected right is substantially likely, and there was a
20 failure to act upon that likelihood.” (ECF No. 266 at 21.) As the Court discussed above,
21 Plaintiffs failed to meet their burden on the issue of intentional discrimination for their Section
22 504 claim. In order to sustain a claim of discrimination under the Unruh Civil Rights Act, a
23 plaintiff must demonstrate either a violation of the ADA or intentional discrimination.⁴ *Lamark*
24 *v. Laiwalla*, No. Civ. 12–03034 WBS AC, 2013 WL 5703614, at *7 (E.D. Cal. Oct. 15, 2013).
25 Plaintiffs’ “argument” is simply a restatement of the law. *See Duvall v. County of Kitsap*, 260

26 _____
27 ³ Having reviewed the exhibits at issue, the Court notes that Plaintiffs refer to declarations made by parents
who sought to be part of the original class action.

28 ⁴ This Court dismissed Plaintiffs’ claim against VMRC under Title III of the ADA. (ECF No. 135.)
Accordingly, Plaintiffs’ claim survives only if they can demonstrate intentional discrimination.

1 F.3d 1124, 1139 (9th Cir. 2001) (“Deliberate indifference requires both knowledge that a harm to
2 a federally protected right is substantially likely, and a failure to act upon that [] likelihood.”).
3 This argument is not only unavailing, but also insufficient to carry Plaintiffs’ burden for their
4 Unruh Act claim. Therefore, the Court GRANTS summary judgment for VMRC as to Plaintiffs’
5 claim under the Unruh Act.

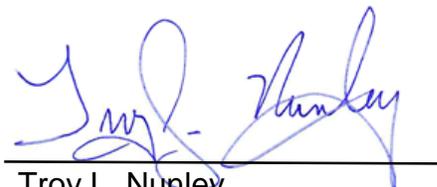
6 **IV. CONCLUSION**

7 The Court notes that Plaintiffs’ complaint raises serious issues that are personal and
8 important to the Plaintiffs. However, Plaintiffs’ Counsel’s shotgun approach in response to
9 Defendants’ arguments is simply inadequate. The Court cannot overlook Plaintiffs’ Counsel’s
10 failure to adequately respond to arguments raised by Defendants and it is not the Court’s role to
11 make arguments for the parties. Accordingly, the Court ORDERS as follows:

- 12 1. VMRC and RUSD Defendants’ separate Motions for Summary Judgment (ECF
13 Nos. 242 & 250) as to Plaintiffs’ Section 504 claim are hereby GRANTED.
- 14 2. VMRC’s Motion for Summary Judgment (ECF No. 242) as to Plaintiffs’ Unruh
15 Act claim is hereby GRANTED.
- 16 3. RUSD Defendants Motion for Summary Judgment (ECF No. 250) as to Plaintiffs’
17 ADA claim is hereby GRANTED.

18 IT IS SO ORDERED.

19 Dated: May 5, 2017

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23 Troy L. Nunley
24 United States District Judge
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