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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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A.P. (a minor); ROBIN MAMMEN  
and LARRY MAMMEN individually  
and as Guardian Ad Litem for  
A.P.,

No. 2:13-cv-01588 JAM AC

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Plaintiffs,

**ORDER GRANTING DEFENDANT  
COMMUNITY CARE LICENSING'S  
MOTION TO DISMISS**

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v.

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COMMUNITY CARE LICENSING, et  
al.,

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Defendants.

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Defendant Community Care Licensing ("CCL") brings this

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Motion to Dismiss the fourth and fifth causes of action for

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discrimination and retaliation in Plaintiffs' Third Amended

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Complaint ("TAC") under Federal Rule of Civil Procedure 12(b)(6).

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For the reasons set forth below, CCL's Motion to Dismiss is

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GRANTED WITH PREJUDICE.<sup>1</sup>

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<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for August 20, 2014.

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1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 Plaintiffs A.P., Robin Mammen and Larry Mammen filed their  
3 original Complaint on August 1, 2013, against CCL and several  
4 other defendants. Plaintiffs filed a First Amended Complaint and  
5 then a Second Amended Complaint ("SAC"). On June 9, 2014, the  
6 Court dismissed with leave to amend several causes of action in  
7 the Second Amended Complaint against CCL and Defendant Michelle  
8 Wong, and dismissed without leave to amend a single cause of  
9 action against both CCL and Defendant Wong.

10 Plaintiffs filed the TAC shortly thereafter. The TAC  
11 includes the following two causes of action against CCL which are  
12 the subject of this motion to dismiss: a discrimination claim  
13 alleging a violation of Section 504 of the Rehabilitation Act, 29  
14 U.S.C. § 794; and a retaliation claim alleging a Title II  
15 violation of the Americans with Disabilities Act ("ADA), 42  
16 U.S.C. § 12132. The remaining claims in the TAC are asserted  
17 against other named defendants and not CCL. For this reason the  
18 Court need not address the first, second, third, sixth, seventh,  
19 eighth and ninth causes of action in the TAC.

20 Plaintiffs allege that A.P. was removed from his birth  
21 parents at a young age due to abuse and neglect. TAC ¶ 15. On  
22 November 2, 2009, at age 3, A.P. was placed in the Mammen's home,  
23 a certified Foster home of the St. Francis Foster Family Agency.  
24 Id. ¶¶ 25-26. On November 17, 2009, the Juvenile Court suspended  
25 A.P.'s biological parents' rights and Ms. Mammen was appointed  
26 A.P.'s educational representative. Id. ¶ 27. Between November  
27 2009 and August 2011, the Mammens sought and obtained medical  
28 evaluations and treatments for A.P. Id. ¶ 28. In 2009, A.P. was

1 diagnosed with Autism and was later diagnosed with Sensory  
2 Integration Disorder, Moderate Intellectual Disability, and ADHD.  
3 Id. ¶ 21.

4 On August 17, 2011, reunification services were terminated  
5 due to failures on the part of A.P.'s biological parents, and in  
6 September 2011, the Mammens sought to make A.P.'s home with them  
7 permanent. Id. ¶ 37. A.P.'s case was transferred to a different  
8 unit in the County, the adoptions unit. Id. ¶ 39. The County  
9 pursued institutionalization of A.P. Id. ¶¶ 40-41.

10 On September 29, 2011, the Mammens filed a grievance with  
11 the Sacramento County disability compliance office alleging  
12 violations of the ADA and Olmstead v. L.C., 527 U.S. 581 (1999).  
13 Id. ¶ 43. They filed an amended grievance on October 13, 2011.  
14 Id. ¶ 44. The same day, Defendant Stephanie Lynch emailed  
15 another County Defendant about her concern that the Mammens were  
16 "wrapping [A.P.] like a burrito." Id. ¶ 45. Defendant Lynch  
17 contacted CCL, a division of the California Department of Social  
18 Services which licenses and oversees foster family agencies.  
19 Defendant Lynch told CCL "this cannot be done" and CCL confirmed  
20 that the wrapping technique was a personal rights' violation.  
21 Id. On November 8, 2011, a CCL investigator visited the Mammens  
22 to investigate the allegation they had received that the "foster  
23 parent [was] violating the personal rights of foster child." Id.  
24 ¶ 54. The investigator presented findings that "the foster  
25 parent admitted she used wrapping technique to calm her child."  
26 Id. Ms. Mammen was cited under 22 California Code of Regulation  
27 ("CCR") § 89372 with a finding of a personal rights' violation of  
28 A.P. Id. This CCL violation was raised as a concern in A.P.'s

1 adoption process, and resulted in a delay in the process. Id.  
2 ¶¶ 67-68. Plaintiffs adopted A.P. on October 31, 2012. Id.  
3 ¶ 15.

## 5 II. OPINION

### 6 A. Discrimination

7 Title II of the ADA prohibits a public entity from  
8 discriminating against a qualified individual with a disability  
9 on the basis of disability. 42 U.S.C. § 12132 (1994); Weinreich  
10 v. L.A. County Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir.  
11 1997). To state a claim, a plaintiff must allege the following  
12 elements:

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14 (1) he is a "qualified individual with a  
15 disability"; (2) he was either excluded from  
16 participation in or denied the benefits of a public  
17 entity's services, programs or activities, or was  
18 otherwise discriminated against by the public entity;  
19 and (3) *such exclusion, denial of benefits, or*  
20 *discrimination was by reason of his disability.*  
21 Weinreich, 114 F.3d at 978 (emphasis in original).

22 Similarly, under Section 504 of the Rehabilitation Act, a  
23 plaintiff must show: "(1) he is an 'individual with a  
24 disability'; (2) he is 'otherwise qualified' to receive the  
25 benefit; (3) he was denied the benefits of the program *solely by*  
26 *reason of his disability*; and (4) the program receives federal  
27 financial assistance." Id. (citing 29 U.S.C. § 794) (emphasis in  
28 original). Because Title II of the ADA was modeled on Section  
504, "courts have applied the same analysis to claims brought  
under both statutes." Zukle v. Regents of Univ. of Cal., 166  
F.3d 1041, 1045 n. 11 (9th Cir. 1999) (citations omitted).

Defendant argues that Plaintiffs have failed to allege that

1 CCL discriminated against A.P. by reason of his disability. Mot.  
2 at 12. Rather, Defendant argues, CCL was required by statute to  
3 find a personal rights' violation for conduct that violated CCR  
4 § 89475.2 and, "[r]egardless of whether A.P. had a disability,  
5 the Mammens' use of the wrapping technique would have violated  
6 [the terms of the CCR]." Mot. at 13. Plaintiffs respond that  
7 "[b]ut for A.P.'s severe disability, the [wrapping technique]  
8 would have been unnecessary and Ms. Mammen would never have been  
9 cited by CCL." Opp. at 8. Therefore, Plaintiffs argue, "it  
10 categorically is because of A.P.'s disability that the State took  
11 the action it did." Opp. at 8.

12 Plaintiffs' use of a "but for" causation test is  
13 unconvincing. To establish that A.P. was denied services "by  
14 reason of his disability," Plaintiffs must allege that the  
15 disability was a "motivating factor" in the CCL citation. Martin  
16 v. California Dep't of Veterans Affairs, 560 F.3d 1042, 1048 (9th  
17 Cir. 2009). Thus, the "but for" causation test is far too broad:  
18 not all "but for" causes are also "motivating factors." For  
19 example, "but for" A.P.'s residing in California, CCL would not  
20 have been prompted to investigate the wrapping technique. Of  
21 course, it cannot be said that CCL's finding of a personal  
22 rights' violation was "by reason of" A.P.'s residence in  
23 California.

24 Rather, the "motivating factor" behind CCL's finding of a  
25 personal rights' violation was the fact that the wrapping  
26 technique violated the regulations it was legally required to  
27 enforce. Under California Health and Safety Code § 1538(c), CCL  
28 was required to make an onsite inspection of the Mammens' home

1 after it was notified of the complaint by County Defendant Lynch.  
2 The regulations that CCL was required to apply include the  
3 provision that "[u]nder no circumstances shall postural supports  
4 include tying, depriving, or limiting a 'child' from use of hands  
5 or feet." Cal. Code of Regs. § 89475.2. The wrapping technique  
6 is a direct violation of § 89475.2's prohibition on limiting a  
7 child's use of his hands or feet. Accordingly, CCL's finding of  
8 a personal rights' violation was not "by reason of" A.P.'s  
9 disability: rather, CCL would have made the same statutorily-  
10 required finding regardless of whether or not A.P. had a  
11 disability.

12 Plaintiffs' attempt to analogize the wrapping technique to a  
13 "belted high chair [or] a seat belt" misreads the relevant  
14 regulations. Opp. at 7. Plaintiffs argue that § 89475.2, on its  
15 face, would prohibit the use of any "restraints" on a child,  
16 including belted high chairs or seat belts. Opp. at 7.  
17 Therefore, Plaintiffs argue, CCL's decision to selectively  
18 enforce the regulation in this case can only be explained by a  
19 discriminatory animus. Opp. at 7. In relevant part, § 89475.2  
20 provides: "[e]xcept for postural supports and protective devices  
21 as provided in this section, the caregiver shall not restrain or  
22 use any restraining devices on a 'child.'" Cal. Code Regs. §  
23 89475.2. Elsewhere in the Code, a "restraining device" is  
24 defined as "any physical or mechanical item that is attached or  
25 next to the body of a "child" that a "child" cannot remove easily  
26 and keeps the "child" from moving freely *as specified in Section*  
27 *89475.2, Postural Supports and Protective Devices.*" Cal. Code  
28 Regs.

1 § 89201 (emphasis added). Although inartfully drafted, the  
2 cross-reference to § 89475.2 suggests that "restraining devices"  
3 are only prohibited if they run afoul of § 89475.2. Belted high  
4 chairs or seat belts do not violate the terms of § 89475.2;  
5 conversely, the wrapping technique violates § 89475.2's  
6 prohibition on restraining devices that deprive or limit a  
7 child's use of his hands or feet. Therefore, § 89475.2 did not  
8 grant CCL the wide discretion argued by Plaintiffs, and CCL did  
9 not selectively enforce the regulations in this case.

10 Plaintiffs' argument that Defendant's conduct violated  
11 Olmstead and "as a result [its] actions must be deemed to have  
12 occurred by reason of A.P.'s disability" also fails. In Olmstead  
13 v. L.C. ex rel. Zimring, the Supreme Court held that "unjustified  
14 isolation" in an institution can, in certain circumstances, be  
15 "properly regarded as discrimination based on disability." 527  
16 U.S. 581, 597 (1999). As Defendant notes, however, "[a]ll  
17 references to any Olmstead violations in Plaintiff's TAC are  
18 [only] directed against County Defendant." Reply at 7. In its  
19 June 9, 2014 Order, this Court rejected Plaintiffs' Olmstead  
20 argument on precisely these grounds: "there are no allegations  
21 against [CCL] for violation of Olmstead integration in the SAC;  
22 all Olmstead allegations are against the County Defendants."  
23 Order at 6. Therefore, even assuming Olmstead is relevant to  
24 this case, there are no allegations to support an inference that  
25 the State Defendant committed an Olmstead violation. Plaintiffs  
26 have not remedied this deficiency in the TAC.

27 Plaintiffs' remaining allegations as to CCL are also  
28 insufficient to state a claim for discrimination. Plaintiffs

1 make the following three conclusory allegations: (1) "Defendants  
2 County and CCL took the position that A.P. should be denied a  
3 permanent home based on his disability, thus advocating for a  
4 deprivation solely based on A.P.'s disability"; (2) CCL "took  
5 actions to intimidate Mrs. Mammen for trying to protect A.P.'s  
6 federal rights"; and (3) "CCL's actions violated the parents'  
7 rights in that it interfered with their ability to care for and  
8 treat their adoptive son." TAC ¶¶ 132, 141, 142. Absent any  
9 other factual support in the TAC, these allegations are thread-  
10 bare assertions that CCL engaged in discrimination. Post-Twombly  
11 and Iqbal, such "legal conclusions" are not entitled to the  
12 presumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 678  
13 (2009) (citing Bell Atlantic Corp. v. Twombly, 556 U.S. 662, 570  
14 (2007)). The Court finds that Plaintiffs have failed to state a  
15 claim for discrimination in violation of the ADA or section 504  
16 of the Rehabilitation Act and dismisses this cause of action as  
17 to CCL.

18 B. Retaliation

19 Plaintiffs' claim for retaliation must be dismissed,  
20 according to CCL, because Plaintiffs have failed to adequately  
21 allege a causal link between a protected activity and an adverse  
22 action taken by Defendant. Mot. at 16. Specifically, CCL argues  
23 that Plaintiffs have made substantially the same allegations in  
24 the TAC as those made in the SAC, which the Court found  
25 insufficient to state a claim for retaliation. Mot. at 17.  
26 Plaintiffs argue that the temporal proximity between the Mammen's  
27 grievance and the CCL investigation warrants a reasonable  
28 inference that one event caused the other. Opp. at 13.



1 An individual who has advocated on behalf of a person with a  
2 disability has standing to assert a claim for retaliation under  
3 the Rehabilitation Act and Title II of the ADA. Barker v.  
4 Riverside Cnty. Office of Educ., 584 F.3d 821, 825-27 (9th Cir.  
5 2009). “[T]o state a claim for retaliation, a plaintiff must  
6 show that he or she acted to protect his or her rights, that an  
7 adverse action thereafter was taken against him or her, and that  
8 a causal link exists between the two events.” Smith v.  
9 Harrington, C 12-03533 LB, 2013 WL 132465, at \*5 (N.D. Cal. Jan.  
10 9, 2013) (citing Pardi v. Kaiser Foundation Hospitals, 389 F.3d  
11 840, 849 (9th Cir. 2004)). Temporal proximity between a  
12 protected activity and an adverse act may, under certain  
13 circumstances, raise an inference of a causal relationship.  
14 Pardi, 389 F.3d at 850.

15 Plaintiffs allege that, on October 13, 2011, the Mammens  
16 filed an amended grievance with “the Sacramento county disability  
17 compliance office alleging that CPS’s actions and decisions  
18 regarding A.P.’s case were in violation of the ADA and Olmstead.”  
19 TAC ¶¶ 43-44. That same day, two CPS workers called CCL to  
20 inform them of the Mammens’ use of the wrapping technique. TAC ¶  
21 45. CCL subsequently initiated an investigation, visiting the  
22 Mammens’ home on November 8, 2011. TAC ¶ 54.

23 In its June 9, 2014 Order, the Court made the following  
24 finding:

25 “[B]ased on [identical allegations in the Second  
26 Amended Complaint], CCL conducted an investigation  
27 because of the County’s communication not because of  
28 Plaintiffs’ grievances. Moreover, CCL was statutorily  
required to make an onsite inspection of the home  
within 10 days after receiving a complaint. See Cal.  
Health and Saf. Code § 1538(a), (b), and (c).”

1           Therefore, even though there is temporal proximity, the  
2           allegations themselves negate the causal link."  
3           Order at 7.

4           After making this finding, the Court granted Plaintiffs leave to  
5           amend their complaint. Order at 8. However, the only relevant  
6           addition to the TAC is a single sentence that CCL's "wrongful  
7           citation was in retaliation for Plaintiffs' exercise of their  
8           rights under the ADA and Section 504 of the Rehabilitation act to  
9           advocate for interventions that were recommended by their medical  
10          provider." This conclusory allegation is insufficient to  
11          overcome the fact that Plaintiffs' (unchanged) allegations  
12          continue to negate the causal link: the CCL investigation was  
13          prompted by its communication with the County - and its statutory  
14          duty to investigate the potential violation - not by Plaintiffs'  
15          filing of a grievance. TAC ¶¶ 45, 54. Plaintiffs' suggestion  
16          that the communication between the County and CCL entailed  
17          anything other than a report of a potential personal rights'  
18          violation has no factual support in the TAC. Opp. at 13.  
19          Accordingly, Plaintiffs have failed to state a claim against CCL  
20          for retaliation in violation of the ADA and section 504 of the  
21          Rehabilitation Act.

22           C.    Leave to Amend

23           Plaintiffs have had multiple opportunities to amend their  
24           complaint to properly state their claims against CCL and have  
25           repeatedly been unable to do so successfully. In opposing this  
26           motion to dismiss, Plaintiffs have also attempted to reargue  
27           legal theories that have been rejected by the Court. See Opp. at  
28           13 (making an argument with regard to causation and temporal

1 proximity that was expressly rejected in the Court's June 9, 2014  
2 Order). Providing Plaintiffs with yet another opportunity to  
3 amend their claims against CCL would be futile and, therefore,  
4 CCL's Motion to Dismiss Plaintiffs' fourth and fifth causes of  
5 action is GRANTED WITHOUT LEAVE TO AMEND. See, e.g., Rhodes v.  
6 Placer Cnty., 2011 WL 1302240 (E.D. Cal. Mar. 31, 2011) report  
7 and recommendation adopted, 2011 WL 1739914 (E.D. Cal. May 4,  
8 2011) (dismissing claims with prejudice where the plaintiff had  
9 multiple prior opportunities to amend her complaint).

10  
11 III. ORDER

12 The Court GRANTS WITHOUT LEAVE TO AMEND Defendant CCL's  
13 Motion to Dismiss Plaintiffs' fourth and fifth causes of action.  
14 As Defendant CCL is not named in any of the remaining causes of  
15 action in Plaintiffs' TAC, the matter will proceed without  
16 Defendant CCL:

17 IT IS SO ORDERED.

18 Dated: October 8, 2014

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JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE