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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

L. H., et al.,

 Plaintiffs,

 v.

MILL VALLEY SCHOOL DISTRICT,

 Defendant.

Case No. 15-cv-05751-HSG

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Re: Dkt. No. 14

United States District Court
Northern District of California

Pending before the Court is Defendant’s motion to dismiss Plaintiffs’ second claim for relief for violation of § 504 of the Rehabilitation Act of 1973. Dkt. No. 14 (“Mot.”). Having considered Defendant’s motion to dismiss, Plaintiffs’ opposition, and all related papers, the Court finds the matter appropriate for decision without oral argument. *See* Civil L.R. 7-1(b). For the reasons articulated below, the Motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

On December 15, 2015, Plaintiff L.H., a minor, by and through his parents Mike and Kelly Huff, (together, “Plaintiffs”) filed an action against Defendant Mill Valley School District, asserting three claims: (1) partial appeal of an administrative due process hearing under 20 U.S.C. § 1415 (“IDEA”); (2) violation of § 504 of the Rehabilitation Act of 1973 (“§ 504”); and (3) a request for attorney’s fees and costs for prevailing at the due process hearing. Dkt. No. 1. On September 17, 2015, Plaintiffs filed a first amended complaint, adding a claim under Title II of the Americans with Disabilities Act. Dkt. No. 10 (“FAC”).

For purposes of this Motion, the Court accepts the following as true: L.H. is a seven-year-old student with Down Syndrome, who has disabilities in the areas of cognitive functioning, self-help skills, academics, occupational therapy, speech, and behavior. *Id.* ¶ 9. From 2011 through

1 the summer of 2013, L.H. attended preschool at Marindale, an extremely small, structured
2 preschool program designed for students with moderate to severe special needs. *Id.* ¶ 10. At
3 Marindale, L.H.’s individualized education plan (“IEP”) provided him with weekly speech,
4 language, and occupational therapy. *Id.* Despite the extremely structured Marindale environment
5 and L.H.’s IEP, L.H. “exhibited intensive behaviors” and failed to progress towards many of his
6 IEP goals. *Id.* ¶¶ 10, 11.

7 In May and June 2013, L.H.’s IEP team met for his triennial IEP evaluation and his
8 kindergarten transition meeting. *Id.* ¶ 12. L.H.’s parents expressed numerous concerns regarding
9 his transition into kindergarten, but their requests went unheeded, and L.H. was placed in a general
10 education kindergarten class at Tam Valley Elementary. *Id.* Also during these meetings, L.H.’s
11 IEP was altered to include reduced speech therapy and no occupational therapy. *Id.* ¶ 13.

12 Upon his transition to kindergarten, L.H. was “overwhelmed,” which resulted in escalated
13 behavior, including “growling, shouting, throwing things into the air, grabbing items, and
14 sometimes hitting kids and aides.” *Id.* ¶ 19. When L.H. failed to meet any of his IEP goals,
15 Defendant assigned him two aides beginning in December 2013. *Id.* ¶ 22. However, L.H.’s
16 situation did not improve. L.H.’s aides removed him from class frequently, walking him around in
17 a field or secluding him in an occupational therapy trailer. *Id.* ¶ 26. Predictably, L.H.’s behaviors
18 continued, and he regressed in almost all areas of need. *Id.* ¶ 29.

19 In response to the aforementioned issues, Plaintiffs requested an administrative due
20 process hearing with the Office of Administrative Hearings. Following an 8-day hearing, the
21 Administrative Law Judge (“ALJ”) issued an order finding in part for Plaintiffs and in part for
22 Defendant. *Id.* ¶¶ 52-53. The ALJ held that despite L.H.’s “inordinate removals” from the
23 classroom and Defendant’s failure to address his behavior, L.H. benefitted from his academic,
24 social, language, communication, and self-help goals during the 2012-2013 school year. *Id.* ¶ 53.
25 Thereafter, Plaintiffs filed the current action.

26 **II. DISCUSSION**

27 In the pending motion, Defendant moves to dismiss Plaintiffs’ second claim for relief,
28 which alleges a violation of § 504 of the Rehabilitation Act.

1 **A. Legal Standard**

2 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
3 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
4 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
5 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard
6 requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant
7 has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff must provide
8 “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
9 will not do.” *Twombly*, 550 U.S. at 555. On a motion to dismiss, the court accepts as true a
10 plaintiff’s well-pleaded factual allegations and construes all factual inferences in the light most
11 favorable to the plaintiff. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th
12 Cir. 2008). But, the plaintiff must allege facts sufficient to “raise a right to relief above the
13 speculative level.” *Twombly*, 550 U.S. at 555.

14 **B. Section 504 of the Rehabilitation Act**

15 Section 504 of the Rehabilitation Act provides that “[n]o otherwise qualified individual
16 with a disability . . . shall, solely by reason of her or his disability, be excluded from the
17 participation in, be denied the benefits of, or be subjected to discrimination under any program or
18 activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). The Ninth Circuit recognizes
19 claims for relief under § 504 itself, *see Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir.
20 2001), *as amended on denial of reh’g* (Oct. 11, 2001), as well as under § 504’s implementing
21 regulations, *see Mark H. v. Lemahieu*, 513 F.3d 922, 935 (9th Cir. 2008). However, because
22 § 504 focuses on the *implementation* of a student’s IEP whereas § 504’s regulations focus on the
23 *design* of a student’s IEP, the pleading requirements under each differ significantly. *See M.M. v.*
24 *Lafayette Sch. Dist.*, No. C 10-04223 SI, 2011 WL 830261, at *9 (N.D. Cal. Mar. 3, 2011)
25 (adopting the rationale in *Wiles v. Dep’t of Educ.*, 555 F. Supp. 2d 1143 (D. Haw. 2008)).
26 Accordingly, characterization of Plaintiffs’ § 504 claim is determinative of whether they state a
27 claim for relief.

28 Defendant’s Motion assumes that Plaintiffs assert their second claim for relief under

1 § 504’s implementing regulations. *See* Mot. However, Plaintiffs’ allegations are more
 2 ambiguous. For example, in the FAC, Plaintiffs allege that “*Section 504* of the Rehabilitation Act
 3 of 1973, as amended 29 U.S.C. § 794 (‘section 504’) *and the regulations promulgated thereunder*,
 4 34 C.F.R. Part 104, prohibits [*sic*] discrimination against persons with disabilities.” FAC ¶ 77
 5 (emphasis added). Additionally, in their opposition to Defendant’s Motion, Plaintiffs assert that
 6 “[i]nstead of relying on implementing regulations, it is also sufficient to state a claim under the
 7 general standard for liability [under § 504].” Dkt. No 17 (“Opp’n”) at 7. Given this ambiguity,
 8 the Court will address both pleading standards to determine whether Plaintiffs state a claim for
 9 relief under § 504 itself or § 504’s implementing regulations.

10 **i. Plaintiffs State a Claim for Relief Under § 504**

11 The Ninth Circuit has long recognized a private cause of action under § 504. *See Kling v.*
 12 *County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. Cal. 1980). To bring a claim under § 504, a
 13 plaintiff must show “(1) he is an individual with a disability; (2) he is otherwise qualified to
 14 receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability;
 15 and (4) the program receives federal financial assistance.” *Duvall*, 260 F.3d at 1135; *Wong v.*
 16 *Regents of Univ. of California*, 192 F.3d 807, 816 (9th Cir. 1999), *as amended* (Nov. 19, 1999). A
 17 challenge under § 504 “requires something more than an incorrect evaluation, or a substantively
 18 faulty individualized education plan, in order for liability to exist.” *T. R. v. Humboldt Cty. Office*
 19 *of Educ.*, No. 14-CV-04839-NJV, 2015 WL 4129539, at *5 (N.D. Cal. July 8, 2015) (internal
 20 quotations and citations omitted). “To establish a claim for damages under the Rehabilitation Act
 21 . . . a plaintiff must prove that the defendant intended to discriminate on the basis of his or her
 22 disability, or was deliberately indifferent to the disability.” *T.B. ex rel. Brenneise v. San Diego*
 23 *Unified Sch. Dist.*, 806 F.3d 451, 466 (9th Cir. 2015). Deliberate indifference requires that a
 24 defendant had knowledge of a substantial likelihood of harm to a federally protected right and
 25 failed to act. *Duvall*, 260 F.3d at 1139; *Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002).

26 The Court finds that Plaintiffs have pled sufficient non-conclusory facts to plausibly
 27 support a § 504 claim at the motion to dismiss stage. Plaintiffs allege, and Defendant does not
 28 dispute, the following § 504 elements: (i) L.H. is disabled due to Down Syndrome, FAC ¶¶ 9, 79;

1 (ii) L.H. qualifies to receive a free and appropriate education from Defendant, *id.* ¶¶ 2, 5; and (iii)
 2 Defendant receives federal financial assistance, *id.* ¶¶ 4, 78. Defendant maintains, however, that
 3 even if Plaintiffs allege a claim under § 504 itself rather than its implementing regulations,
 4 Plaintiffs' § 504 claim fails because Plaintiffs do not allege non-conclusory facts to show that (1)
 5 L.H. was denied his free and appropriate education solely by reason of his disability or (2) that
 6 Defendant acted with deliberate indifference.¹ Dkt. No. 19 ("Reply") at 3-5. The Court disagrees
 7 with Defendant on both points.

8 The FAC clearly alleges that Defendant denied L.H. access to his education solely due to
 9 his Down Syndrome. Plaintiffs contend that L.H. was consistently removed from the classroom
 10 and walked around in a field or isolated in an occupational therapy trailer as a direct result of
 11 behaviors associated with his disability. FAC ¶¶ 24, 26, 80. According to Plaintiffs, when L.H.
 12 was present in the classroom, his teacher often ignored him and failed to include him with his
 13 peers. *Id.* ¶ 23. Moreover, Plaintiffs assert that Defendant failed to provide appropriately trained
 14 teachers and staff to help L.H. fully access his education in light of his disability. *Id.* ¶ 80. These
 15 statements rise beyond mere labels or conclusions and are sufficient at the motion to dismiss stage
 16 to plausibly allege that Defendant denied L.H. his free and appropriate education based solely on
 17 his Down Syndrome.

18 Furthermore, the FAC plausibly pleads that Defendant acted with deliberate indifference in
 19 denying L.H. his public education. It is undisputed that Defendant was aware of L.H.'s disability
 20 and consequent need for an IEP. Indeed, Defendant's representatives participated in L.H.'s IEP
 21 team meetings in May and June 2013. *Id.* ¶¶ 12-18. Moreover, Plaintiffs allege that key district
 22 administrators such as the school's principal and L.H.'s case manager and Learning Center teacher
 23 directed un-credentialed aides to remove L.H. from the classroom and take him to a field, despite
 24

25 ¹ Defendant frames § 504's *mens rea* element as requiring that Defendant's educational decisions
 26 were made in "bad faith or with gross misjudgment." *See* Reply at 3. However, the Ninth Circuit
 27 has consistently held that § 504 requires intent or deliberate indifference. *See, e.g., T.B. ex rel.*
 28 *Brenneise*, 806 F.3d at 466; *Lovell*, 303 F.3d at 1056; *Duvall*, 260 F.3d at 1139. While the Court
 cannot tell whether Defendant contends the result in this case would differ based on the standard
 applied, the Court is bound by the Ninth Circuit's holdings and thus applies the deliberate
 indifference standard.

1 their knowledge of his disability. *Id.* ¶ 26. According to Plaintiffs, L.H.’s kindergarten teacher
 2 acted with similar deliberate indifference when she failed to implement L.H.’s behavior support
 3 plan except to tell L.H. and his aides to “get out” of the classroom so as not to disturb other
 4 students. *Id.* ¶ 30. These specific, non-conclusory allegations that Defendant acted with
 5 deliberate indifference are sufficient to survive a motion to dismiss.

6 Accordingly, the Court holds that Plaintiffs have adequately pled a violation of § 504 of
 7 the Rehabilitation Act. *See S.D. by & through Brown v. Moreland Sch. Dist.*, No. 5:14-CV-
 8 00813-LHK, 2014 WL 3772606 (N.D. Cal. July 29, 2014); *E.H. v. Brentwood Union Sch. Dist.*,
 9 No. C13-3243 TEH, 2013 WL 5978008 (N.D. Cal. Nov. 4, 2013); *K.S. ex rel. P.S. v. Fremont*
 10 *Unified Sch. Dist.*, No. C06-07218 SI, 2007 WL 915399 (N.D. Cal. Mar. 23, 2007). The Court
 11 DENIES Defendant’s motion to dismiss Plaintiffs’ second claim for relief to the extent that
 12 Plaintiffs bring a statutory claim under § 504.

13 **ii. Plaintiffs Do Not State a Claim for Relief Under § 504’s Implementing**
 14 **Regulations**

15 In contrast to a § 504 statutory claim, whether a plaintiff can bring an action to enforce
 16 § 504’s implementing regulations will depend on whether the regulations asserted “come within
 17 the § 504 implied right of action.” *Mark H.*, 513 F.3d at 935. In the Ninth Circuit, a plaintiff must
 18 allege (1) “precisely which § 504 regulations are at stake” and (2) “in what regard” those
 19 regulations were violated. *Id.* at 925; *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 570 F.
 20 Supp. 2d 1212, 1227-28 (E.D. Cal. 2008). Notably, while both IDEA and § 504’s implementing
 21 regulations require free and equal access to public education (“FAPE”), “FAPE” is “defined
 22 differently for purposes of section 504 than it is for IDEA.” *A.G. v. Paradise Valley Unified Sch.*
 23 *Dist. No. 69*, No. 13-16239, 2016 WL 828095, at *4 (9th Cir. Mar. 3, 2016). Thus, a plaintiff may
 24 not obtain damages for denial of FAPE as defined by § 504’s implementing regulations “simply
 25 by proving that the IDEA FAPE requirements were not met.” *Mark H.*, 513 F.3d 922 at 933.

26 Plaintiffs’ second claim for relief specifically invokes § 504’s implementing regulations.
 27 *See* FAC ¶ 77 (“Section 504 of the Rehabilitation Act of 1973, as amended 29 U.S.C. § 794
 28 (‘section 504’) and the regulations promulgated thereunder, 34 C.F.R. Part 104, prohibits [*sic*]

1 discrimination against persons with disabilities.”) (emphasis added). However, Plaintiffs’ FAC is
2 devoid of any allegations that establish “precisely which § 504 regulations are at stake” or “in
3 what regard” those regulations were violated. *See* FAC; *Mark H.*, 513 F.3d 922 at 925; *J.W. ex*
4 *rel. J.E.W.*, 570 F. Supp. 2d at 1227-28. Indeed, the FAC fails to identify any specific § 504
5 regulations, and in their opposition, Plaintiffs contend that “the FAC does not attempt to plead
6 violation of Section 504 regulations.” Opp’n at 10.

7 Consequently, the Court GRANTS Defendant’s motion to dismiss Plaintiffs’ second claim
8 for relief to the extent that Plaintiffs seek to assert a claim under § 504’s implementing
9 regulations.

10 **III. CONCLUSION**

11 The Court DENIES Defendant’s Motion to the extent that Plaintiffs’ second claim for
12 relief pleads a violation of § 504 itself, and GRANTS the Motion to the extent that Plaintiffs seek
13 to bring a claim under § 504’s implementing regulations. Plaintiffs may file a second amended
14 complaint (“SAC”) consistent with this Order within 21 days. Based on their position in the
15 opposition, the Court presumes that Plaintiffs’ SAC will eliminate references to § 504’s
16 regulations. If the SAC continues to reference § 504’s regulations, it must include the allegations
17 described in section II.B.ii. of this Order.

18 The Court sets a case management conference for July 5, 2016.

19
20 **IT IS SO ORDERED.**

21 Dated: June 7, 2016

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23 HAYWOOD S. GILLIAM, JR.
24 United States District Judge
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