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NO JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

S.L., a minor, by and through her guardian ad litem, MARY L., Plaintiffs, v. DOWNEY UNIFIED SCHOOL DISTRICT, Defendant.	Case No. CV 13-06050 DDP (PJWx) **ORDER RE MOTIONS FOR SUMMARY JUDGMENT** [Dkt. Nos. 63, 73]

Presently before the Court are the parties cross-motions for partial summary judgment. (Dkt. Nos. 63, 73.) Having hear oral argument and considered the parties' submissions, the Court adopts the following order.

I. BACKGROUND

Plaintiff is a high school student at Downey High School, a school operated by Defendant, a local school district. (Decl. S.L., ¶¶ 14-17.) She has had seizures since the seventh grade, including "partial simple, partial complex, absence, and grand mal seizures." (Id. at ¶¶ 2, 4.) These seizures can have fairly mild

effects, or they can be "strong," involve loss of consciousness and/or loss of memory, and take two days to recover from. (Id. at ¶¶ 5-10.)

Plaintiff states in her declaration that at the start of her freshman year at Downey (2011-2012), she told all her teachers that she suffered from seizures. (Id. at ¶ 18.) That year, Plaintiff took English with David Kraus, Driver's Education with Tim Meledy, advanced choir/jazz with Corneliu Olariu, and science with Beverlee Harris. (Id. at ¶¶ 20-23.)

Defendant alleges, and presents evidence to show, that it has policies in place for dealing with students who have a qualifying disability under Section 504 of the Rehabilitation Act. (Def.'s Ex. 3, Dkt. No. 73-3.) Defendant's policy allows a "Section 504 Service Plan" to be created either by request or when "a student is exhibiting academic, attendance, social and/or behavioral problems." (Id. at 8.) Defendant also alleges, and presents evidence to show, that it created service plans for Plaintiff's sophomore, junior, and senior years. (Def.'s Exs. 19, 31, 56, Dkt. No. 73-3.) These plans are alleged to have included instructions on first aid for seizures. (E.g., Def.'s Exs. 31 at 69.) However, there does not appear to have been a plan in place during Plaintiff's freshman year.

Plaintiff's mother, Mary, alleges and provides evidence to show that she kept a log of her daughter's seizures, starting in 2009. (Decl. Mary L., Ex. A.) This log shows seizures occurred on 19 separate occasions during (or immediately before or after) Plaintiff's freshman year, including in summer school classes, at color guard tryouts, and in the ordinary classroom. Plaintiff

alleges that during these incidents, teachers and staff did not respond properly – at times doing nothing (e.g., the Sept. 26, 2011 entry in the log: "[T]eacher didn't bother to call the nurse or notify me"), and at other times overreacting (e.g., the Apr. 2, 2012 entry: "School called the ambulance, they brought her to the ER."). Plaintiff alleges that these improper responses from Defendant's failure to provide an adequate care plan and, as a result, failure to properly inform and train staff how to care for Plaintiff during seizures.

Plaintiff further alleges that in later years in high school, although the district and the school approved a care plan and attempted to provide services, those services were inadequate, because Defendant hired unsatisfactory aides; failed to follow through on the agreed-upon academic accommodations; did not create new accommodations when Plaintiff's grades declined; and excluded her from the school's jazz choir based on openly-expressed discriminatory animus.

Plaintiff brings this action alleging violations of the anti-discrimination provisions of Section 504 of the Rehabilitation Act[1], the Americans with Disabilities Act[2] ("ADA"), and state disability discrimination laws. (Dkt. No. 10.)

II. LEGAL STANDARD

Summary judgment is appropriate where the materials in the record show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

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[1]29 U.S.C. § 794.

[2]42 U.S.C. § 12132.

Fed. R. Civ. P. 56(a), (c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). All reasonable inferences from the evidence must be drawn in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986).

Once the moving party meets its burden, the burden shifts to the nonmoving party opposing the motion, who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. Summary judgment is warranted if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. There is no genuine issue of fact "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. DISCUSSION

A. Sovereign Immunity

Defendant asserts sovereign immunity as a defense. (Def.'s Opp'n at 12-13.) Plaintiff, however, argues that, first, Defendant has waived any sovereign immunity privilege by substantially

litigating the case, and second, because sovereign immunity is abrogated by Title II of the ADA and waived by states' acceptance of federal funds under Section 504 of the Rehabilitation Act. (Pl.'s Reply at 2-3.)

In California, primarily because of the state's unique school-financing scheme, a local school district is an arm of the state for purposes of Eleventh Amendment immunity from suit. Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 254 (9th Cir.1992); C.W. v. Capistrano Unified Sch. Dist., 784 F.3d 1237, 1247 (9th Cir. 2015). Nonetheless, "like every other defendant, a state must timely object to the forum or be deemed to have waived its objections." Hill v. Blind Indus. & Servs. of Maryland, 179 F.3d 754, 763 (9th Cir.). A state has waived Eleventh Amendment immunity when it actively litigates the merits of the case. Id. The concerns underlying the waiver doctrine include preventing states from using immunity as a hedge against a negative ruling on the merits, avoiding costly tactical delays, and preventing states from invoking federal jurisdiction only to later undermine it.[3]

Here, Defendant has filed a motion to dismiss the complaint, (Dkt. No. 17), a motion to strike portions of the complaint, (Dkt. No. 18), an answer, (Dkt. No. 39), and a motion for partial summary

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[3]See Hill, 179 F.3d at 756 ("By waiting until the first day of trial, BISM hedged its bet on the trial's outcome."); Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1022 (9th Cir. 2010) ("[W]e deem the defendant to have made a tactical decision to delay asserting the sovereign immunity defense. Such tactical delay . . . wastes judicial resources, burdens jurors and witnesses, and imposes substantial costs upon the litigants.") (citations and internal quotation marks omitted); Lapides v. Bd. of Regents of Univ. Sys. of Georgia, 535 U.S. 613, 623 (2002) ("A rule of federal law that finds waiver through a state attorney general's invocation of federal-court jurisdiction avoids inconsistency and unfairness.").

judgment, (Dkt. No. 73), as well as engaging in costly discovery, all without mentioning sovereign immunity. Now, two months before trial, Defendant raises this defense solely in its opposition to Plaintiff's summary judgment motion. Although not quite as extreme as the behavior of the defendant in Hill, who waited until the day before the trial to raise the immunity issue, Defendant's actions nonetheless evince an intent to litigate the case on the merits. Defendant's extensive litigation on the merits has also created significant expense and delay for Plaintiff.

Defendant nonetheless argues that sovereign immunity is a jurisdictional bar and may therefore be raised at any time. This exact argument was raised and rejected in Hill. 179 F.3d at 760.

The Court finds that Defendant has waived its sovereign immunity.[4]

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[4]Even if it had not, sovereign immunity would presumably not apply to Plaintiff's Section 504 claims, because Defendant has not disputed that it accepts federal funds. Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir. 2003) ("[A] state waives its immunity from suit under the Rehabilitation Act by accepting federal funds."). It might also not apply to her ADA claims. Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (holding that "Title II, as it applies to the class of cases implicating the fundamental right of access to the courts," validly abrogates Eleventh Amendment immunity); id. at 525 (noting in dicta that public education was one of the fields in which disabled persons traditionally faced discrimination); K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1097 (9th Cir. 2013) ("There is . . . no question that public schools are among the public entities governed by Title II."). However, neither the Supreme Court nor the Ninth Circuit has directly held that Title II abrogates Eleventh Amendment immunity as to education. Because the Court finds that Defendant has waived the immunity defense, it need not and therefore does not reach the complex constitutional questions involved in the Title II issue. See Chadam v. Palo Alto Unified Sch. Dist., No. C 13-4129 CW, 2014 WL 325323, at *4 (N.D. Cal. Jan. 29, 2014) ("[T]he district courts and other circuit courts have interpreted Lane to mean that courts must engage in a case-by-case analysis of whether an ADA Title II case involves 'fundamental rights' to determine whether Congress rightfully abrogated state immunity . . . .").

C. Mental State Standard for ADA and Unruh Act Damages

To recover damages under Title II of the ADA, a plaintiff must prove intentional discrimination, which requires, at a minimum, "deliberate indifference" – i.e., knowledge of a substantially likely harm and failure to act on that knowledge. Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1138-39 (9th Cir. 2001). Plaintiff asserts that this mental state standard does *not* apply to damages under California's Unruh Civil Rights Act ("Unruh"), which incorporates the ADA's substantive provisions. Cal. Civ. Code § 51(f) ("A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 . . . shall also be a violation of this section."). Defendant, on the other hand, cites to Harris v. Capital Growth Investors XIV for the proposition that proof of intentional discrimination *is* required. 52 Cal.3d 1142, 1175 (1991).

However, at least as to claims brought under § 51(f) – i.e., claims rooted in a violation of rights under the ADA – Harris has been overruled. In Munson v. Del Taco, Inc., the California Supreme Court held that "[t]he Legislature's intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52." 46 Cal. 4th 661, 665 (2009). Although Munson was decided in a case brought as to violations of Title III of the ADA, there is nothing in the opinion or the plain language of § 51(f) distinguishing between Title II and Title III cases. Federal courts in the Ninth Circuit have routinely applied Munson to public

education cases. See K.M. ex rel. Bright v. Tustin Unified Sch. Dist., No. SACV 10-1011 DOC, 2011 WL 2633673, at *14 (C.D. Cal. July 5, 2011) ("To prove a claim of discrimination under the Unruh Act, K.M. must prove intentional discrimination, or, alternatively, a violation of the ADA.") aff'd in part, 725 F.3d 1088, 1094 (9th Cir. 2013).

Thus, the Court considers, in the claims analyzed below, both the deliberate indifference standard (for the federal claims) and the strict liability standard (for the claims on the same facts as to Unruh damages). Those different standards would obviously also apply at trial.

C. Plaintiff's Freshman Year

Plaintiff seeks partial summary judgment as to events that took place in her first year. (Pl.'s Mot. Summ. J.) A prima facie case for violation of Section 504 and Title II of the ADA require a plaintiff to show essentially the same elements: (1) that she has a disability under the act, (2) that she is "otherwise qualified" to participate in a particular program or receive a particular benefit, (3) she was excluded from participation or did not receive the benefit, and (4) the exclusion resulted from the disability. McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004). Additionally, a claim under Section 504 requires a showing that the defendant receives federal financial assistance, while a claim under Title II requires a showing that the defendant is a public entity. Zukle v. Regents of Univ. of California, 166 F.3d 1041, 1045 (9th Cir. 1999).

There is no dispute, in this case, that Defendant receives federal funding and is a public entity, and there is likewise no

dispute that Plaintiff has a disability and was otherwise qualified to attend high school. If there are disputes in this case, then, they center around whether Plaintiff was excluded from participation and, if so, whether that exclusion was the result of her disability. Defendant also disputes that it acted with deliberate indifference.

Preliminarily, Defendant argues that Plaintiff was not excluded from participation because she did, in fact, go to high school, her disability notwithstanding. (Def.'s Opp'n at 14.) Defendant appears to argue that only if Plaintiff were unable to attend high school *at all*, or at least unable to attend some "part" of high school, would she have a claim.

The standard, however, is not whether a disabled person is excluded entirely, but whether they have meaningful access to the school's services. Alexander v. Choate, 469 U.S. 287, 301 (1985) The benefit itself "cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled," and reasonable accommodations must be made to ensure that the access available is meaningful. Id. Moreover, schools must provide accommodations sufficient to "afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity," unless such an accommodation would fundamentally alter the nature of the service or create an undue burden. K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1096-97 (9th Cir. 2013). Thus, in the education context, a student must be provided an *equal* opportunity to learn and to participate in the life of the school – mere attendance is not enough. "In

particular, a disabled individual may be denied 'meaningful access' to public education when that education is not designed to meet her needs as adequately as the needs of other students are met." Mark H. v. Lemahieu, 513 F.3d 922, 938 n.14 (9th Cir. 2008)

For example, in Mark H. v. Hamamoto, the Ninth Circuit found that summary judgment in favor of a state department of education was improperly granted where the department allegedly had not provided autistic students with autism-specific educational services that could result in "much greater development of their cognitive, adaptive, communication, and social skills." 620 F.3d 1090, 1094, 1098 (9th Cir. 2010). In J.W. ex rel J.E.W. v. Fresno Unified Sch. Dist., the district court held that a hearing-impaired child could state a claim against the district for "failing to implement an appropriately-designed educational plan" and placing him with a teacher who "refused to implement modifications and accommodations, had no training or experience with hearing impaired students, and discriminated against Student on the basis of his disability." No. CV F 07-1625 LJO DLB, 2008 WL 5329946, at *1, *5 (E.D. Cal. Dec. 19, 2008). Conversely, the Third Circuit in T.F. v. Fox Chapel Area Sch. Dist. affirmed summary judgment for a school district that had developed a plan for dealing with a student's severe food allergies, the student's physician approved the accommodations, and staff were trained to identify anaphylaxis and administer medication. 589 F. App'x 594, 599 (3d Cir. 2014).

As these cases show, the inquiry into meaningful access is fact-intensive and focuses on whether the school took steps to provide the disabled student with the same education that other students get. Where, as in T.F., the disability does not present a

direct barrier to learning but does present safety risks, the key will be creating and implementing an effective response plan to mitigate those risks. Plaintiff's disability, consisting of intermittent seizures of varying intensity, appears to pose safety risks *and* to be an occasional, albeit temporary, barrier to learning.

As to Plaintiff's safety in her freshman year, which is the focus of her motion for partial summary judgment, Plaintiff alleges that, because of her seizures, the school was required to adopt a care plan and prepare teachers and staff to provide care during a seizure. There is a factual dispute as to whether Plaintiff turned in a care plan for the school to act on. However, it is undisputed that Plaintiff told each of her regular teachers that she experienced seizures at the beginning of the school year. (Def.'s SIMF at ¶ 25.) Plaintiff therefore "alerted the public entity to [her] need for accommodation . . . satisf[ying] the first element of the deliberate indifference test," at least to the regular school year. Duvall, 260 F.3d at 1139. (See also Depo. Laura McKee at tr 56 (school nurse acknowledged that she was aware of Plaintiff's disability in September 2011); Def.'s Opp'n to Pl.'s Mot., Ex. 7 (email to teachers alerting them to Plaintiff's disability).)

Less clear is when the district was alerted to Plaintiff's condition in the summer before her freshman year, when she attended summer school and color guard tryouts at the high school. The inquiry is complicated somewhat by the fact that Plaintiff's middle school was also part of Defendant as an "entity." Strictly speaking, therefore, it is undisputed that someone in "the

district" had notice of Plaintiff's disability, because the middle school had notice. It is always possible, however, that segments of a large system do not communicate with one another, and that this does not reflect deliberate indifference so much as ordinary bureaucratic compartmentalization. And certainly knowledge of *some* employee of the system does not necessarily translated to knowledge legally imputable to the entity – it would likely not suffice to show that custodial staff knew of Plaintiff's disability, for example. The relevant question is what the employees at the high school who had a duty to provide Section 504 accommodations knew about Plaintiff's disability. Mark H. v. Hamamoto, 849 F. Supp. 2d 990, 1003 (D. Haw. 2012).

Plaintiff alleges that the high school received notice of her disability from her middle school counselor, but the duty of the individuals who received the email is disputed.[5] Thus, there remains a factual question as to what the district "knew" at the

[5](Decl. Janeen Steel, Ex. H (email from middle school counselor to high school psychologist and high school counselor not assigned to Plaintiff alerting them to Plaintiff's disability); Depo. Denise Evans at tr 36-38 (high school psychologist received email). In deposition testimony, Robert Jagielski, the district director of student services, also noted that "in reality" information frequently passes through informal channels, including the guidance counselors, who "[a]t the middle school level . . . tend to serve beyond the capacity of just dealing with academics. They also . . . pass information along about health needs . . . ." (Id. at tr 34.) Defendant disputes that the psychologist and the high school counselor who received the email were under a duty to use or share this information, because they were not directly involved with creating Section 504 plans and because the email was sent on June 24, in the middle of summer vacation. (Def.'s SIMF, ¶ 21, 32.) The Court cannot resolve the factual question of their duty on this record. Nor can it resolve the question of whether it would have been reasonable not to act during the summer, since that involves determining whether these employees knew that Plaintiff was in summer school or color guard tryouts – a fact not before the Court in the parties' papers.

beginning of the summer. However, once Plaintiff was actually on campus and began having seizures, the district was sufficiently on notice of her disability. Plaintiff's mother's log states that there was a seizure sometime in June 2011 during color guard tryouts. (Decl. Mary L., Ex. A.) Although it is not clear from the log whether teachers or staff were aware of that seizure, the next seizure recorded in the log was July 14, 2011 and resulted in Plaintiff having to leave school. (Id.) Thus, regardless of disputes over the email or other sources of information, summary judgment is appropriate on the question of knowledge as to events after July 14, 2011.

The second key question is what Defendant should have done with this knowledge. Plaintiff argues that Defendant failed to meet her safety needs in several ways: by not adopting the care plan that she alleges she turned in at the beginning of the school year; by not following her care plans from middle school regardless of whether a new plan was in place; by not informing summer school teachers or other non-regular teachers that she might have seizures; and by not training teachers to respond to her seizures appropriately – either under one of the care plans or, at a minimum, pursuant to its own guidelines. (Pl.'s Mot. at 6-12.) This allegedly resulted in the teachers and staff failing to respond adequately to her seizures when they occurred – by, for example, failing to alert the school nurse, failing to reposition her body for safety, and failing to document the seizures. (Id. at 9-10, 12-13.) Additionally, during the summer 2012 term, the school allegedly required Plaintiff's brother to act as her aide

rather than hiring an aide to care for her and would not let her attend classes unless he was present. (Id. at 13-14.)

There is a factual dispute as to whether the school ever received care plans for the freshman year from Plaintiff and her mother. Laura McKee, the nurse, testified in deposition that she provided Plaintiff a copy of a blank care plan to take home. (Depo. Laura McKee at tr 55-56.) Plaintiff's mother testified that she gave the completed care plan to Plaintiff to turn in. (Depo. Mary L. at tr 101-102.) It is unclear from testimony what happened to that plan; Adair Lima states in a declaration that it was not returned, but Plaintiff disputes this point. (Decl. Adair Lima, ¶ 5; Depo. Mary L. at tr 104:16-20 (Plaintiff's mother states affirmatively that she provided the plan to the school).) Plaintiff's family provided a second care plan near the end of the year. (Id.)

Plaintiff argues that even if Defendant's receipt of the care plan is in dispute, Defendant had "two seizure care plans on file" – i.e., the middle school plans – and could also have relied on "district guidelines." (Pl.'s Reply; see Decl. Mary L., Ex. B (middle school care plan for school year 2010-11); Def.'s Opp'n to Pl.'s Mot., Exs. 41, 42 (district guidelines for seizure care). Plaintiff argues that the high school could have "rolled over" her previous care plans from the middle school, as was the district's custom. (Depo. Robert Jagielski at tr 31 (district director of student services acknowledged that it was typical for the health care plan to be rolled over when a student changed schools within the district).) Defendant emphasizes that Mr. Jagielski also said that families would usually be asked to submit new care plans;

nonetheless, when questioned about care at the start of the school year, he noted that "if there's no updated plan turned in then you – we utilize the previous year's plan. Because you're not just going to stop service." (Id. at tr 33; see also Depo. Laura McKee at tr 47 (school nurse acknowledged that if there was no new care plan, she would not ignore the old one).)

Defendant responds that even Plaintiff's prior care plans did not require the district to train teachers to care for seizing students. (Def.'s Opp'n at 3.) This argument is not a strong one – it seems obvious that if seizures occur suddenly and care must be rendered right away, the staff in closest proximity to the disabled student ought to know how to provide such care. (See Vol. I Depo. Adair Lima at tr 35-36 (starting in the 2012-13 school year school provided "in-service" training on seizure care to Plaintiff's new teachers).) Moreover, the training that was needed was fairly minimal: after all, the care plan outlined in Plaintiff's 2010-11 care plan essentially calls on care providers to (1) "Lie child on her side," (2) "Do not put anything in mouth," and (3) "Call parent, call 911 if seizure $\geq$ 5 minutes," as well as to "follow school protocol" in providing first aid. (Decl. Mary L., Ex. B.) Such information is not extensive and could be delivered informally or even in writing.

But it was not. (See Depo. Tim Meledy at 15-17 (teacher who did not provide care during seizure had not been trained on either Plaintiff's care plan or the district guidelines for seizure care, although he remembered some basic information from a first aid class); Depo Corneliu Olariu at 77-78 (teacher who "[j]ust sat there next to her" during seizure had not received Plaintiff's care

plan or training on how to care for her in the event of a seizure).)

In its brief and at oral argument Defendant made much of the fact that it made several attempts to procure a new care plan – this, the district argues, shows that it was not deliberately indifferent. The Court does not agree. Given that Defendant was on notice of Plaintiff's disability, and given the minimal effort that would have been needed to ensure teachers and staff could carry out the basic instructions in the prior-year care plans, the Court concludes that summary judgment for Plaintiff is appropriate as to liability for failure to provide reasonable accommodation during and before Plaintiff's freshman year, starting July 14, 2011.

C. Plaintiff's Sophomore, Junior, and Senior Years

Defendant's motion for summary judgment focuses on Plaintiff's last three years of high school, when, there is no dispute, care plans were in place. Plaintiff's allegations as to these years focus primarily on two issues: whether the one-to-one aides assigned to her during those years constituted a reasonable accommodation to Plaintiff's safety needs, and whether the district's plan and the implementation of that plan adequately enabled her to pursue her education on an equal footing with other students, including participation in the school's jazz choir. (See generally Pl.'s Opp'n to Def.'s Mot.)

1. One-to-One Aides

Plaintiff asserts, in her opposition, that the family requested that teachers be trained in seizure care, but the school responded with an offer of a personal aide instead. (Id. at 2.)

Nonetheless, Plaintiff alleges that the family decided to accept the offer to ensure her safety. (Id.) Plaintiff argues, however, that the aides hired during her sophomore yea were improperly trained and incompetent and were also a hindrance to her social life at school. (Id. at 3-5.) It appears, however, that Plaintiff concedes that the aides provided in her junior and senior years were satisfactory. (See Pl.'s Opp'n generally (no discussion of aides in latter two years); Decl. Mary L. ISO Opp'n, ¶ 34 (Plaintiff was safe with later aides); Decl. S.L. ISO Opp'n, ¶ 27 (Plaintiff liked later aides, they blended in socially, and they were properly trained).)

"The reasonableness of an accommodation is ordinarily a question of fact" to be submitted to the jury. Lujan v. Pac. Mar. Ass'n, 165 F.3d 738, 743 (9th Cir. 1999). However, summary judgment is appropriate where, given the undisputed facts, no rational trier of fact to could conclude the accommodation was unreasonable. Matsushita, 475 U.S. at 587.

Plaintiff alleges that the sophomore year aides were not properly trained or able to properly assist her. Plaintiff states in a declaration that Digna, the first aide assigned to her, would "always" ask her what to do if Plaintiff were to have a seizure. (Decl. S.L. ISO Opp'n, ¶ 23.) Plaintiff also states in both her declaration and her deposition testimony that Digna was more comfortable in Spanish than in English, while Plaintiff was more comfortable in English and was concerned that in an emergency they would not be able to communicate. (Id. at ¶ 22; Depo. S.L. at 167.) Plaintiff also states in her deposition that Digna "look[ed] scared" when Plaintiff had seizures. (Id. at 171.) As to the

second aide, Debbie, Plaintiff makes similar allegations – that she had the impression that Debbie "did not know what she was doing," that she "was not qualified" to provide seizure care. (Decl. S.L. ISO Opp'n at 24-26.)

Defendant counters that it has provided evidence that "Digna had prior experience assisting individuals with epilepsy" and that the school nurse trained her to properly respond to Plaintiff's seizures. (Def.'s Reply at 5.) Defendant also argues that Plaintiff's evidence does not show deliberate indifference.

Even if those issues could be overcome, however, there is a more fundamental problem, which is that Plaintiff does not present evidence to show that the aides could not provide adequate care, or that any damages arose from the alleged shortcomings of her aides. The Court cannot credit the hearsay statements of Plaintiff's friend Hailee, recorded secondhand in Plaintiff's and her mother's declarations, (Decl. S.L., ¶ 26; Decl. Mary L., ¶ 30.), and apart from those statements there is simply no evidence that the aides handled any seizure poorly or failed to provide adequate care. Plaintiff does allege that the aides did not log certain seizures, but even if true that does not show that they were either incompetent or acting with deliberate indifference to risks to Plaintiff; occasional clerical oversights not resulting in harm are not enough to create damages.

As to the social aspects of Plaintiff's interaction with her aides, Plaintiff alleges that Digna and Debbie hindered her socially, both because they were older women who did not blend in well with high school students and because Digna would not allow Plaintiff free movement among the other students, especially at

lunch, but required her to eat in the auditorium. (E.g., Decl. S.L. ISO Opp'n, ¶ 21.)

It is difficult to imagine a rational trier of fact concluding that it was an unreasonable accommodation for Plaintiff's aide to be an older woman. And Plaintiff's own testimony shows that her aides made a conscious choice to prioritize her safety and the ability to react quickly in an emergency keeping her in locations where there were fewer people around. (Depo. S.L. at 170 (aide told Plaintiff to stay in certain places because "It's safer. It's safer."); id. at 171 (aide chose "safer" area because there were fewer kids, and "probably" because there were fewer hard things to hit if Plaintiff fell).) For a school employee to decide between competing interests and err on the side of safety rather than socialization does not constitute an unreasonable accommodation – especially when Plaintiff was allowed to bring some friends with her into the auditorium. (Decl. S.L. ISO Opp'n, ¶ 21.)

A rational trier of fact could not conclude that the aides failed to provide reasonable care or that their presence was so socially burdensome as to constitute an unreasonable accommodation.

2. Academic Accommodations

Academic learning is, obviously, the primary service the school district provides, and it must provide disabled students a "free appropriate public education" to comply with Section 504. See 34 C.F.R. § 104.33(b)(1) (under Section 504 school must provide education and services "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met").

During the latter three years, Plaintiff's approved care plan, signed by Plaintiff and her mother as well as Mr. Lima, nurses, and administrators, included the following academic accommodations: extended time on tests and assignments, review and repetition of assignments as needed, small group test taking, the ability to make up work she missed when out sick, use of teacher or peer notes, and preferential seating in class. (Def.'s Ex. 56.) Classroom teachers were the "persons responsible" for implementing these accommodations on an "as needed" basis. (Id.) The plan also included counseling for stress management. (Id.)

Plaintiff contends that Defendant failed to adequately implement this plan, however, because (1) Mr. Lima did not meet with teachers to personally instruct them on how to implement the plan, (2) teachers did not give her extra time or allow her to test under the right conditions, (3) Plaintiff's teachers did not provide her with tutoring, and Mr. Lima did not recommend an evaluation, although Plaintiff's grades declined in her junior year, (4) no additional accommodations were created as to Plaintiff's growing emotional needs, and (5) Defendant did not adopt the recommendations of Plaintiff's private consultant. (Pl.'s Opp'n to Def.'s Mot. at 6-12.)

Individually, some of these allegations do not appear to constitute failure to act on a known substantial risk of harm. Mr. Lima's decisions about whether to email or meet in person with teachers, or whether to follow up in person on certain questions, likely fall into this category, especially given that the plan itself makes the teachers the persons responsible for day-to-day

implementation.[6] But collectively, these alleged decisions arguably show a pattern of failure to respond to clear signals that Plaintiff was academically struggling due to her disability. Sometimes, "repeated acts, viewed singly and in isolation, would appear to be mere negligence; however, viewed together and as a pattern, the acts show deliberate indifference." Brooks v. Celeste, 39 F.3d 125, 128 (6th Cir. 1994).

The care plan itself clearly contemplated that Plaintiff's disability – including the emotional and social stresses that accompanied it – could impact her academic performance. (Def.'s Ex. 56 (requiring academic accommodations and stress management counseling).) Plaintiff alleges, and provides reasonable evidence to show, that Defendant received information via numerous channels that there was a substantial risk that Plaintiff's disability was affecting both her stress levels and her academic performance: Mr. Lima monitored her academic progress and knew her grades were declining; Plaintiff asked her teacher directly for both the agreed-upon accommodations and additional tutoring; Plaintiff told at least one teacher that she had made a suicide attempt; Plaintiff sought counseling provided by the district when she was dissatisfied with Mr. Lima's counseling; and, finally, Plaintiff sought the advice of an expert in crafting new accommodations and presented the expert's recommendations to the school.

[6]At the other end of the spectrum, of course, the allegation that Plaintiff's teachers simply ignored the agreed-upon care plan – denying her the extra time and "small-group" test conditions that it required – could presumably stand by themselves as violations of the ADA and Section 504.

Plaintiff alleges that despite having his information, Mr. Lima did not seek to re-evaluate her academic care plan; her teachers did not provide even the agreed-upon accommodations, let alone additional support; the teacher who knew she had attempted to commit suicide did not act to get her more or better emotional support; and the school did not act on the expert recommendations for additional accommodations that Plaintiff brought to their attention. Taken together as a pattern, these alleged omissions could show that Defendant was deliberately indifferent.

Of course, all this must still be proven at trial, and it remains for a jury to determine, for example, whether Defendant's decision not to adopt Plaintiff's expert's recommendations was a failure to reasonably accommodate. Nonetheless, there are genuine disputes of material fact here, and a rational trier of fact could conclude that there is cumulative evidence of deliberate indifference and that Defendant's alleged failure to provide new accommodations in light of the information available to it deprived Plaintiff of the school's services and/or a free, appropriate public education.

3. Jazz Choir

Plaintiff alleges that she was excluded from the school's jazz choir in two separate auditions because the teacher, Mr. Olariu, had discriminatory animus against her based on her disability. Defendant counters, first, that Plaintiff is "barred" from arguing "disparate treatment" because her Section 504 claims in the complaint focus on failure of reasonable accommodation, not disparate treatment based on animus, (Def.'s Reply at 11) and

second, that Plaintiff was actually excluded because she did not meet the selection criteria for the choir. (Id. at 13-14.)

As to the first point, Defendant overlooks ¶ 5 of Plaintiff's Complaint, which is incorporated by reference into her Section 504 claims and which states that she "faced discrimination at the public school by her teachers," for example by being "excluded from participation in the Jazz Choir" and "treated differently than her non-disabled peers." It also ignores the general factual allegations about the jazz choir auditions, ¶¶ 61-69, also incorporated by reference into Plaintiff's Section 504 claims. The Court concludes that Plaintiff is not raising a "new theory" at summary judgment, as Defendant argues, but is simply fleshing out a theory already plain on the face of the complaint.

Defendant's next argument is that the Court should not consider the June 2012 audition for purposes of this motion, because it occurred outside the time frame on which Defendant seeks partial summary judgment. (Def.'s Reply at 12.) Fair enough; the Court does not grant Defendant summary judgment as to the June 2012 audition.

Nonetheless, the events leading up to the 2012 audition are relevant to Plaintiff's contentions about the 2013 audition. Plaintiff provides considerable evidence that, if true, would tend to show that Mr. Olariu had some discriminatory animus against her based on her disability. Plaintiff alleges via deposition testimony and exhibits that Mr. Olariu openly expressed frustration with Plaintiff's seizures, that he was worried she would miss practice days, "which [he] can't have in this group," and that he told Plaintiff's mother that he could not handle Plaintiff's

seizures.[7] (Pl.'s Opp'n to Def.'s Mot. at 13-14.) Defendant does not challenge this evidence but insists that it does not matter, because the real reason Plaintiff did not make jazz choir in 2013 was that she did poorly in her audition. (Def.'s Reply at 13-14.)

Defendant relies heavily on the deposition testimony of Nathan Diaz, a student judge. But Diaz admitted that Plaintiff sang her audition song "just fine" and only received poor marks on technical exercises. (Depo. Nathan Diaz at 46-47.) Diaz also admitted that the decision was not based purely on the scores of the student judges and that it was Mr. Olariu who made the final decision as to who would be accepted into the choir, independent of the student judges. (Id. at 48.) In any event, the scores are not in the record, and Mr. Diaz could not recall Plaintiff's exact scores. (Id. at 49.) Additionally, Plaintiff herself believes that she did well on all parts of the audition except pitch matching. (Depo. S.L. at 245.) She also received an "A+" in jazz choir her first semester (in her freshman year) and an "A" the second semester, and Mr. Olariu agreed that she was "pretty comparable" to the other first-year members of the choir. (Depo. Corneliu Olariu at 73-75.)

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[7]Plaintiff also alleges that Mr. Olariu suggested Plaintiff should be homeschooled. (Pl.'s Opp'n to Def.'s Mot. at 14.) The evidence available in the record does not quite show this. Plaintiff's mother testified in her deposition that Mr. Olariu called her during one of Plaintiff's seizures, panicked, and that the vice principal then took the phone and told her Plaintiff should be kept at home. (Depo. Mary L. at 146.) While the vice principal's conduct is regrettable if accurately stated, it does not go to show Mr. Olariu's state of mind. Plaintiff testified in her deposition that a friend asked her when she was going to be home schooled and then said that Mr. Olariu had talked to some students about it. (Depo. S.L. at 89-92.) However, the friend's statements are hearsay and cannot be considered as part of the record. There is therefore no competent evidence currently in the record to show that Mr. Olariu said or thought that Plaintiff should be home schooled.

There is therefore enough evidence for a rational trier of fact to conclude that discriminatory animus was either a "motivating factor" in or even the sole cause of Plaintiff's exclusion from the jazz choir.[8]

D. State Law Causes of Action

Defendant argues that the state law causes of action should be dismissed for the same reasons as the federal causes of action. However, to the extent that Plaintiff has presented sufficient evidence to allow a trier of fact to conclude that she was not sufficiently accommodated or directly discriminated against, she can go forward with her state causes of action as well.

IV. CONCLUSION

The Court GRANTS Plaintiff partial summary judgment as to liability only for ADA, Section 504, and Unruh violations from July 14, 2011 to the end of Plaintiff's freshman year. As to the latter three years, the Court GRANTS Defendant's motion as to the one-to-one aides; the Court DENIES Defendant's motion as to allegations that Defendant did not provide adequate academic accommodations and the allegation that Plaintiff was excluded from jazz choir based on discriminatory animus.

IT IS SO ORDERED.

Dated: August 20, 2015

DEAN D. PREGERSON
United States District Judge

[8] See K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1099 (9th Cir. 2013) (describing causal standards for discriminatory animus claims under ADA (motivating factor) and Section 504 (sole cause)).