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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 KATHARINE PRESCOTT, an
12 individual, and KATHARINE
13 PRESCOTT, on behalf of KYLER
14 PRESCOTT, a deceased minor,

15 Plaintiffs,

16 v.

17 RADY CHILDREN'S HOSPITAL-
18 SAN DIEGO,

19 Defendant.
20

Case No.: 16-cv-02408-BTM-
JMA

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS [ECF No. 27]**

21 Before the Court is Defendant Rady Children's Hospital, San Diego's
22 ("RCHSD") motion to dismiss. (ECF No. 27.) For the reasons discussed below,
23 RCHSD's motion is granted in part and denied in part.

I. BACKGROUND

24 On September 27, 2017, the Court granted Plaintiffs Katharine Prescott, an
25 individual, and Katharine Prescott on behalf of her deceased minor son Kyler
26 Prescott, leave to file a First Amended Complaint ("FAC") as to the claims under
27 California Government Code section 11135 for equitable relief and as to Kyler's
28 claim under California's Fair Advertising Law, Cal. Bus. & Prof. Code § 17500 et

1 *seq.* (“FAL”). On October 12, 2017, Plaintiffs filed an FAC. Because the parties
2 are familiar with the facts, the Court need not recite them here.

3 **II. STANDARD**

4 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should
5 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or
6 sufficient facts to support a legal claim. *Balistreri v. Pacifica Police Dept.*, 901
7 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss, the
8 allegations of material fact in a plaintiff's complaint are taken as true and
9 construed in the light most favorable to the plaintiff. *Parks Sch. of Bus., Inc. v.*
10 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In deciding a motion to dismiss,
11 a court may consider the facts alleged in the complaint, exhibits attached to the
12 complaint, and documents whose authenticity is not questioned and upon which
13 the plaintiff's complaint necessarily relies on, even if not physically attached to
14 the complaint. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

15 Although detailed factual allegations are not required, factual allegations
16 “must be enough to raise a right to relief above the speculative level.” *Bell*
17 *Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). “A plaintiff's obligation to prove
18 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
19 conclusions, and a formulaic recitation of the elements of a cause of action will
20 not do.” *Id.* “[W]here the well-pleaded facts do not permit the court to infer more
21 than the mere possibility of misconduct, the complaint has alleged - but it has not
22 show[n] that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 565 U.S. 662, 679
23 (2009) (internal quotation marks omitted). Only a complaint that states a
24 plausible claim for relief will survive a motion to dismiss. *Id.*

25 **III. DISCUSSION**

26 **A. California Government Code Section 11135 Claims**

27 Ms. Prescott alleges that RCHSD denied her and Kyler “full and equal
28 access to services” by discriminating against them on the basis of “sex” and

1 “disability” under California Government Code sections 11135 and 11139.

2 RCHSD moves to dismiss these claims on several grounds.

3 **1. Administrative Exhaustion**

4 First, RCHSD argues that Ms. Prescott is required to exhaust
 5 administrative remedies before bringing these claims and has failed to do so.
 6 RCHSD relies on title two of the California Code of Regulations section 11140 *et*
 7 *seq.*¹, the implementing regulations of section 11135, to argue that there is an
 8 exhaustion requirement for these claims. Section 11143, titled “Exhaustion of
 9 Administrative Remedies” states:

10 Exhaustion of administrative remedies available under this Division or
 11 implementing regulations shall not be a prerequisite to the bringing of
 12 actions for judicial enforcement of violations of Chapter 2 and 3 or
 13 regulations implementing such Chapters if a showing is made that the
 14 state agency involved has not adhered to the time limit set forth in
 15 Section 98346 of this Division.

16 On its face, this regulation does not expressly state that exhaustion of
 17 administrative remedies is a prerequisite for bringing a private civil action against
 18 a recipient of state funding. Indeed, RCHSD has not cited to any statute or
 19 regulation that affirmatively imposes such requirement. At best, the regulation
 20 can be read to imply that exhaustion is generally a prerequisite but where an
 21 action seeks to enforce violations of Chapter 2 and 3, the requirement is relaxed
 22 if a showing is made that the state agency has delayed its investigation.
 23 However, when read alongside California Government Code section 11139, this
 24 interpretation conflicts with the underlying statute.

25 The California legislature broadened the scope of section 11135 by
 26 providing for a private right of action for equitable relief in section 11139. In
 27 2001, the California legislature further amended the statute with the passage of

28 ¹ This section was formerly numbered 22 Cal. Code. Regs. Section 98000 *et seq.*

1 Assembly Bill No. 677 (2001–2002 Reg. Sess.) by adding that a private right of
2 action for equitable relief shall “be independent of any other rights and remedies.”
3 Cal. Gov’t Code § 11139. The Court finds that the most reasonable
4 interpretation of this indicates that no exhaustion of administrative remedies is
5 required. Courts interpreting California statutes “must give statutes a reasonable
6 construction which conforms to the apparent purpose and intention of the
7 lawmakers.” *Clean Air Constituency v. California State Air Resources Bd.*, 11
8 Cal.3d 801, 815 (1974).

9 The Assembly Floor Analysis for the 2001 amendment explains that the
10 “bill clarifies that a victim of unlawful discrimination in programs or activities
11 funded by the state need not pursue administrative or any other remedies prior
12 to, or instead of, bringing an action for equitable relief, nor would any victim be
13 required to elect one remedy.” Assembly Floor Analysis on Bill No. 677 (2001–
14 2002 Reg. Sess.) (Aug. 30, 2001) *available at* [http://www.leginfo.ca.gov/pub/01-](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0651-0700/ab_677_cfa_20010830_194243_asm_floor.html)
15 [02/bill/asm/ab_0651-0700/ab_677_cfa_20010830_194243_asm_floor.html](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0651-0700/ab_677_cfa_20010830_194243_asm_floor.html); see
16 *also Blumhorst v. Jewish Family Servs. of Los Angeles*, 126 Cal. App. 4th 993,
17 1002 (2005) (“The fourth paragraph was added to clarify the legislative intent that
18 ‘a victim of unlawful discrimination’ could enforce the prohibition against
19 discrimination in section 11135 through an action for equitable relief without
20 pursuing administrative remedies first.”); *Donovan v. Poway Unified Sch. Dist.*,
21 167 Cal. App. 4th 567, 594 (2008) (noting that the 2001 amendment was
22 necessary to clarify that a victim of discrimination did not need to pursue
23 administrative or any other remedies prior to bringing a suit). RCHSD primarily
24 relies on *J.E.L. v. S.F. Unified Sch. Dist.*, 185 F. Supp. 3d 1196, 1201 (N.D. Cal.
25 2016) to support its argument that there is an exhaustion requirement for a claim
26 under section 11135. However, in light of the clear legislative intent supported by
27 the legislative history, the Court is not persuaded by the *J.E.L.*’s court’s holding
28 that there is an exhaustion requirement.

1 Accordingly, the Court denies RCHSD's motion to dismiss on this ground.

2 **2. Ms. Prescott's Claim**

3 Second, RCHSD argues that Ms. Prescott's claim should be dismissed
4 because she lacks standing to assert a claim under section 11135. Sections
5 11135 and 11139 require that a plaintiff allege that he or she was personally
6 damaged. *Blumhorst*, 125 Cal. App. 4th at 1002. "The right to sue for a violation
7 of section 11135 exists in injured victims of unlawful discrimination." *Id.* at 1003.
8 Subsection (d) of section 11135 provides for associational claims by stating "[t]he
9 protected bases used in this section include a perception that a person has any
10 of those characteristics or that the person is associated with a person who has,
11 or is perceived to have, any of those characteristics." Cal. Gov't Code §
12 11135(d).

13 RCHSD argues that Ms. Prescott's claim fails because she was not
14 personally denied medical services and benefits. In determining whether Ms.
15 Prescott has sufficiently alleged an independent injury, the Court finds instructive
16 cases discussing associational discrimination claims under the Americans with
17 Disabilities Act, 42 U.S.C. § 12132 ("ADA") and the Rehabilitation Act of 1973, 29
18 U.S.C. §§ 794–794a ("RA").

19 In *Glass v. Hillsboro School District*, 142 F. Supp. 2d 1286, 1292 (D. Or.
20 2001), the court dismissed the parents' associational discrimination claim under
21 the ADA because they failed to plead a separate and direct injury. The parents
22 alleged that they were discriminated against because their experts were denied
23 access to their children's special education classroom. *Id.* at 1292. Because
24 they did not attempt to exercise some independent and separate right to have
25 access to the classroom for *their own* benefit, the parents did not have a valid
26 associational discrimination claim. *Id.* Similarly in *Simenson v. Hoffman*, No. 95
27 C 1401, 1995 WL 631804, at *5–6 (N.D. Ill. 1995), the court dismissed the
28 parents' associational claim because it was based on an injury to their child.

1 There the parents were ejected from a medical center because a doctor refused
2 to treat their ill son. *Id.* at * 6. The court found that their son's ejection, and that
3 of his parents, did not constitute a separate injury because they were not at the
4 medical center for "any purpose other than to seek treatment for [their son]." *Id.*

5 Here, however, Ms. Prescott's claim is more akin to the associational
6 discrimination claims raised in *Loeffler v. Staten Island University Hospital*, 582
7 F.3d 268, 283 (2d. Cir. 2009) and *Eskenazi-McGibney v. Connetquot Central*
8 *School District*, 84 F. Supp. 3d 221, 230 (E.D.N.Y. 2015). The Second Circuit in
9 *Loeffler* upheld an associational discrimination claim where the children of a deaf
10 man had to provide sign language interpretation for their father while he was
11 hospitalized and had to miss school as a result. 585 F.3d at 283. The court held
12 that the children and their mother were denied "the service of adequate sign
13 language interpretation to understand their father's medical complications and
14 the procedures he underwent," a separate injury that gave them standing under
15 the RA. *Id.* Similarly, in *Eskenazi-McGibney*, the court held that the parents of a
16 disabled student had sufficiently alleged standing under the ADA and RA
17 because they were denied access to their child's teacher and to the school
18 grounds based on their association with their disabled son. 84 F. Supp. 3d at
19 230. The parents alleged that they were prohibited from speaking to their son's
20 teacher and going to his bus stop and school in retaliation for advocating on
21 behalf of their son who was being bullied by another student. *Id.* at 227–28.
22 While the court recognized that the parents did not enjoy a right to unfettered
23 access to school grounds, it held that the school district could not deny the
24 parents access based on their association with their child. *Id.*

25 Unlike the claims in *Glass* and *Simenson*, Ms. Prescott does plead an
26 injury that is separate and apart from the discrimination that Kyler suffered. Ms.
27 Prescott alleges that she repeatedly called RCHSD to share Kyler's reports of
28 misgendering and remind the staff that it was essential that Kyler be referred to

1 with exclusively masculine pronouns. (FAC ¶ 44.) She claims that in response
 2 RCHSD blocked *her* phone number and prevented *her* from soliciting updates on
 3 her son's condition. (Id. ¶ 45.) While she may not have a right to unconditional
 4 access to RCHSD's staff, if she was denied the access because of her
 5 association with Kyler, it is conduct prohibited under section 11135. Accordingly,
 6 she has standing under section 11135 and RCHSD's motion to dismiss this claim
 7 is denied on this ground.

8 **3. Ms. Prescott's Claim on Behalf of Kyler**

9 Lastly, RCHSD seeks to dismiss Ms. Prescott's claim on behalf of Kyler,
 10 arguing that the FAC has failed to establish that he would be entitled to restitution
 11 because he has no "ownership interest" in any money sought to be recovered.

12 Remedies for violations of section 11135 are limited to "a civil action for
 13 equitable relief." Cal. Gov't Code § 11139; see *Donovan*, 167 Cal. App. 4th at
 14 594 ("Government Code section 11139 demonstrates that when the Legislature
 15 wanted to limit the remedies available in a private enforcement to equitable or
 16 injunctive relief, it clearly knew how to do so.").

17 The parties have not cited to, nor has the Court's independent research
 18 revealed, cases addressing the issue of restitution within the context of section
 19 11135. However, both parties have cited to cases discussing it under California's
 20 Unfair Competition Law ("UCL"), which the Court finds helpful. In *Korea Supply*
 21 *Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1149 (2003), the Supreme Court
 22 of California stated that "an order for restitution is one 'compelling a UCL
 23 defendant to return money obtained through an unfair business practice to those
 24 persons in interest from whom the property was taken, that is, to persons who
 25 had an ownership interest in the property or those claiming through that person."
 26 (quoting *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal.4th 116, 127 (2000)). The
 27 court further explained that "the object of restitution is to restore the status quo by
 28 returning to the plaintiff funds in which he or she has an ownership interest." *Id.*

1 The Supreme Court of California went on to articulate two theories under which a
2 plaintiff could recover restitution: (1) where the plaintiff is seeking the return of
3 money or property that was once in its possession; and (2) where the plaintiff has
4 a vested interest in the money it seeks to recover. See *id.* at 1149–1150. Here,
5 as Defendant points out, the FAC does not allege that Kyler has an ownership or
6 vested interest in the money sought to be recovered from RCHSD. Accordingly,
7 Kyler's section 11135 is dismissed.

8 **B. FAL Claim**

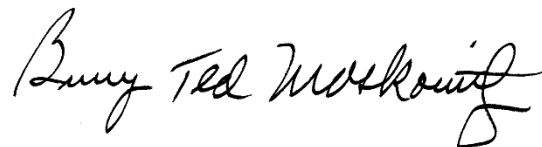
9 RCHSD moves to dismiss Kyler's FAL claim, arguing that the FAC has
10 failed to allege that he relied on RCHSD's misrepresentations. In the Opposition,
11 Ms. Prescott makes it clear that she is not pursuing an FAL claim on Kyler's
12 behalf, in accordance with this Court's previous order. As such, RCHSD's
13 motion to dismiss Kyler's FAL claim is denied as moot.

14 **IV. CONCLUSION**

15 For the reasons discussed above, RCHSD's motion to dismiss (ECF No.
16 27) is granted in part and denied in part. The Court dismisses Kyler's California
17 Government Code section 11135 claim. Because there is no showing that Kyler
18 is entitled to restitution, leave to amend is denied without prejudice at this time.

19 **IT IS SO ORDERED.**

20 Dated: May 11, 2018



21
22 Barry Ted Moskowitz, Chief Judge
23 United States District Court
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