

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KATHARINE PRESCOTT, an individual, and KATHARINE PRESCOTT, on behalf of KYLER PRESCOTT, a deceased minor,  
Plaintiff,  
v.  
RADY CHILDREN'S HOSPITAL-SAN DIEGO,  
Defendant.

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

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

Before the Court are Defendant Rady Children’s Hospital, San Diego’s (“RCHSD”) motion to dismiss and motion to stay. (ECF No. 9, 15.) The Court discusses each below.

**I. BACKGROUND**

Plaintiff Katharine Prescott brought this action against RCHSD on behalf of herself, and on behalf of Kyler Prescott, her deceased minor son. (ECF No. 1 (“Compl.”).) RCHSD is a nonprofit healthcare organization affiliated with the University of California, San Diego School of Medicine that receives federal and state assistance. (Compl. ¶ 20–22.) Mr. Prescott alleges that RCHSD

1 “advertises its expertise in treating transgender and gender nonconforming  
2 children and adolescents through its Gender Management Clinic . . . .” (Id. at ¶  
3 23.) “RCHSD held itself out and warranted itself to the public as competent,  
4 careful, and experienced in the care and treatment of patients, particularly  
5 transgender patients and those with gender dysphoria<sup>1</sup>.” (Id.) Additionally,  
6 RCHSD’s website states that transgender youth “deserve to have a medical  
7 home at Rady Children’s Hospital—San Diego.” (Id.)

8 Kyler was assumed to be female at birth. (Id. at ¶ 29.) However, at the  
9 age of ten Kyler began exhibiting signs that he was a boy. (Id.) At the age of  
10 twelve, due to increasing gender dysphoria, Kyler began engaging in self-  
11 harming behaviors. (Id.) When Kyler was thirteen, he told Ms. Prescott that he  
12 was a boy. (Id. at ¶ 30.) As Kyler entered puberty, his gender dysphoria  
13 significantly worsened and he continued to engage in severe self-harming  
14 behaviors. (Id.) Concerned about his mental health, Kyler’s parents and then-  
15 therapist focused their therapy sessions on helping him cope with his gender  
16 dysphoria and depression. (Id.) When Kyler was thirteen, with the support of his  
17 parents, he socially transitioned<sup>2</sup> to living life as a boy. (Id. at ¶ 34.) At fourteen  
18 Kyler began seeing Darlene Tando, an expert in providing therapy to transgender  
19 youth. (Id.) In September 2014, Kyler’s endocrinologist, a physician in the  
20 Gender Management Clinic at RCHSD, approved him for puberty-delaying  
21 medication. (Id. at ¶ 35.) In October 2014, Kyler received his first treatment.  
22 (Id.)

---

23  
24  
25 <sup>1</sup> Gender dysphoria is defined “as a marked difference between a person’s gender identity and their assumed  
26 gender at birth, which persists for at least six months and manifests itself in at least two other symptoms (e.g., “a  
27 desire to prevent the development of the anticipated secondary sex characteristics,” “a strong desire to be of the  
28 other gender,” and/or “a strong desire to be treated as the other gender”). (Compl. ¶ 26.)

<sup>2</sup> “Transition is the process by which a person brings their outer appearance and identity into close alignment with  
their gender identity, or affirmed gender. Social transition specifically refers to steps of a transition that do not  
involve medication or surgical intervention, and can include changing one’s name and pronouns, and wearing  
clothes that match the person’s affirmed gender.” (Compl. ¶ 32.)

1           Despite the positive effects Kyler’s transition had on his mental health, he  
2 still experienced depression and gender dysphoria. (Id. at ¶ 36.) For a  
3 transgender person with gender dysphoria, being referred to by the wrong  
4 gender pronoun is often incredibly distressing. (Id. at ¶ 37.) For Kyler, being  
5 misgendered caused him psychological distress. (Id. at ¶ 38.) This led Kyler to  
6 withdraw from his charter school and instead participate in a private independent  
7 study. (Id.)

8           On April 5, 2015, Ms. Prescott took Kyler to the Sam S. and Rose Stein  
9 Emergency Care Center of RCHSD because of his suicidal thoughts related to  
10 gender dysphoria and to treat his self-inflicted lacerations. (Id. at ¶ 39.) In the  
11 early morning of April 6, 2015, Kyler was admitted to RCHSD’s Child and  
12 Adolescent Psychiatry Services (“CAPS”) unit on a Cal. Welf. & Inst. Code  
13 section 5150 hold for psychiatric inpatient care. (Id.) The RCHSD and CAPS  
14 staff was informed by Ms. Prescott of Kyler’s male identity and “his need to be  
15 referred to exclusively with male gender pronouns.” (Id. at ¶ 40.) Kyler’s medical  
16 records reflected his legal name and gender change. (Id. at ¶ 40.) His male  
17 gender identity was also denoted on his RCHSD medical wrist bracelet. (Id.)  
18 Upon intake, the RCHSD staff assured Ms. Prescott “that Kyler’s sex and gender  
19 identity would be respected and affirmed” and that “all staff would refer to Kyler  
20 with male gender pronouns and would otherwise treat him as a boy.” (Id. at ¶  
21 41.)

22           Despite knowing that Kyler was a “transgender boy in acute psychological  
23 distress,” “nursing and other RCHSD staff repeatedly addressed and referred to  
24 Kyler as a girl, using feminine pronouns.” (Id. at ¶ 43.) Kyler complained to his  
25 mother during his stay that the staff referred to him with feminine pronouns,  
26 which caused him extreme distress. (Id. at ¶ 44.) Kyler also reported that while  
27 the other children who were patients initially referred to him with male pronouns,  
28 after the RCHSD staff’s repeated use of female pronouns, the children also

1 began calling him “she.” (Id.) After Kyler was discharged, he also told Ms.  
2 Prescott that one RCHSD employee told him, “Honey, I would call you ‘he,’ but  
3 you’re such a pretty girl.” (Id.) Every time Ms. Prescott observed staff calling  
4 Kyler “she,” she reiterated that “it was essential to exclusively refer to Kyler with  
5 male gender pronouns, and that misgendering caused him serious harm.” (Id. at  
6 ¶ 46.)

7 During Kyler’s stay, Ms. Prescott called RCHSD numerous times to share  
8 Kyler’s reports of misgendering and remind the staff of the need to refer to Kyler  
9 with male pronouns. (Id. at ¶ 46.) The Complaint alleges that in response,  
10 RCHSD blocked her number, “leaving her unable to call the CAPS unit, which  
11 had control over her son during his time of distress, as well as leaving her unable  
12 to solicit updates on Kyler’s condition.” (Id. at ¶ 47.) As a result of RCHSD  
13 staff’s conduct, Kyler suffered severe emotional distress and harm, and Ms.  
14 Prescott was and continues to be traumatized by the experience. (Id.) Despite  
15 concerns over Kyler’s continuing depression and suicidal thoughts, Kyler’s  
16 medical providers concluded that he should be discharged early from the hold at  
17 RCHSD because of the staff’s conduct. (Id. at ¶ 51.) On April 7, 2015, Kyler was  
18 discharged from RCHSD’s facility. (Id. at ¶ 52.) After being discharged, Kyler  
19 continued to feel anxious and depressed as a result of RCHSD staff’s treatment  
20 during his stay. (Id. at ¶ 53.) On May 18, 2015, Kyler died by suicide. (Id. at ¶  
21 54.)

22 Ms. Prescott now brings this action against RCHSD alleging numerous  
23 causes of action including violations of the Affordable Care Act § 1557, 42 U.S.C.  
24 § 18116 (“ACA”), California’s Unruh Civil Rights Act, Cal. Civ. Code. § 51,  
25 California Government Code § 11135, California’s Unfair Competition Law, Cal.  
26 Bus. & Prof. Code § 17200 *et seq.* (“UCL”), and California’s Fair Advertising Law,  
27 Cal. Bus. & Prof. Code § 17500 *et seq.* (“FAL”).

28 //

## II. STANDARD

### **A. Motion to Dismiss**

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

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

### **B. Motion to Stay**

"A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). The rule does

1 not require that the issues in the independent proceeding be necessarily  
2 controlling of the action before the court. *Id.* 863–64. When deciding whether to  
3 stay a pending proceeding, a court must weigh competing interests including: (1)  
4 the possible damage which may result from the granting of a stay; (2) the  
5 hardship or inequity which a party may suffer in being required to go forward; and  
6 (3) the orderly course of justice measured in terms of the simplifying or  
7 complicating of issues, proof, and questions of law which could be expected to  
8 result from a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). The  
9 moving party bears the burden of making out a clear case of hardship on inequity  
10 in being required to go forward. *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936).

### 11 **III. DISCUSSION**

#### 12 **A. Motion to Dismiss**

##### 13 **1. Affordable Care Act Section 1557 Claim**

14 Under section 1557 of the ACA, health programs or activities receiving  
15 federal financial assistance are prohibited from discriminating against individuals  
16 on the basis of any ground listed under four different civil rights statutes including  
17 Title IX, which prohibits discrimination on the basis of sex. 42 U.S.C. § 18116(a);  
18 20 U.S.C. § 1681.

##### 19 ***i. The ACA Protects Against Gender Discrimination***

20 RCHSD moves to dismiss the ACA claim arguing that transgender  
21 individuals were not protected at the time of the alleged conduct because the  
22 U.S. Department of Health & Human Services Office for Civil Rights’ (“HHS”)  
23 regulation,<sup>3</sup> prohibiting discrimination on the basis of gender identity, did not go  
24 into effect until July 18, 2016 and cannot be applied retroactively. Ms. Prescott  
25 argues that the claim is not based on the HHS’ regulation, but is instead  
26

---

27  
28 <sup>3</sup> When implementing the Title IX portion of section 1557, HHS defines discrimination “on the basis of sex” to include “termination of pregnancy” and “gender identity.” 45 C.F.R. § 92.4.



1 grounded in the language of the statute itself. Because the Court does not rely  
2 on the HHS's regulation in concluding that the claim survives under the plain  
3 language of the ACA, the Court need not decide whether the regulation applies  
4 retroactively.

5 At the outset it is worth noting that in evaluating Title IX claims, federal  
6 courts regularly look to Title VII cases for guidance. *Franklin v. Gwinnett Cnty.*  
7 *Pub. Sch.*, 503 U.S. 60, 75 (1992); *Patricia H. Berkeley. Unified Sch. Dist.*, 830 F.  
8 Supp. 1288, 1290 (C.D. Cal. 1993). In *Schwenk v. Hartford*, 204 F.3d 1187,  
9 1202 (9th Cir. 2000), the Ninth Circuit relying on *Price Waterhouse v. Hopkins*,  
10 490 U.S. 228 (1989), reasoned that "'sex' under Title VII encompasses both  
11 sex—that is, the biological difference between men and women—and gender." It  
12 explained that while earlier cases distinguished between "sex" and "gender," the  
13 Supreme Court in *Price Waterhouse* abandoned this distinction and held that  
14 Title VII bars discrimination based on both an individual's sex and failure to  
15 conform to socially-constructed gender expectations. *Id.* In *Kastl v. Maricopa*  
16 *Cnty. Cmty. Coll. Dist.*, 325 Fed. Appx. 492, 493 (9th Cir. 2009), the Ninth Circuit  
17 reaffirmed that "it is unlawful to discriminate against a transgender (or any other)  
18 person because he or she does not behave in accordance with an employer's  
19 expectations for men or women."

20 Other Circuits have similarly interpreted the sex discrimination provisions  
21 under Title IX and Title VII to protect transgender individuals from discrimination.  
22 See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011)  
23 ("[D]iscrimination against a transgender individual because of her gender-  
24 nonconformity is sex discrimination, whether it's described as being on the basis  
25 of sex or gender."); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)  
26 ("[A] label, such as 'transsexual,' is not fatal to a sex discrimination claim where  
27 the victim has suffered discrimination because of his or her gender non-  
28 conformity."); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st

1 Cir. 2000) (holding that a transgender individual stated a claim for sex  
2 discrimination under the Equal Credit Opportunity Act); *Whitaker v. Kenosha*  
3 *Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1049 (7th Cir. 2017) (granting a  
4 preliminary injunction and holding that the plaintiff had established a likelihood of  
5 success under Title IX where the school denied a transgender boy access to the  
6 boy's restroom). Because Title VII, and by extension Title IX, recognize that  
7 discrimination on the basis of transgender identity is discrimination on the basis  
8 of sex, the Court interprets the ACA to afford the same protections.

9 RCHSD attempts to narrowly construe *Schwenk* by arguing that it is limited  
10 to protecting transgender individuals only under a theory of sex stereotyping. It  
11 argues that unlike in *Schwenk*, here, the Complaint fails to state a plausible claim  
12 of transgender discrimination based on sex stereotyping because there are no  
13 allegations that Kyler was discriminated against because he failed to look, act, or  
14 speak in the way expected of a male or female. Even if the Court were to read  
15 *Schwenk* so narrowly, the ACA claim nevertheless survives. As other courts  
16 have recognized, “[b]y definition, a transgender individual does not conform to  
17 the sex-based stereotypes of the sex that he or she was assigned at birth.”  
18 *Whitaker*, 858 F.3d at 1048; see also *Glenn*, 663 F.3d at 1316 (“A person is  
19 defined as transgender precisely because of the perception that his or her  
20 behavior transgresses gender stereotypes.”). The Complaint alleges that the  
21 RCHSD staff discriminated against Kyler by continuously referring to him with  
22 female pronouns, despite knowing that he was a transgender boy and that it  
23 would cause him severe distress. RCHSD's staff allegedly refused to treat Kyler  
24 as a boy precisely because of his gender non-conformance. In fact, the  
25 Complaint alleges that one RCHSD employee told him, “Honey, I would call you  
26 ‘he,’ but you’re such a pretty girl.” (Compl. ¶ 44.) Accordingly, Ms. Prescott’s  
27  
28



1 claim on behalf of Kyler survives under the ACA<sup>4</sup>.

2 **ii. Standing**

3 RCHSD argues that Ms. Prescott lacks standing to assert a section 1557  
4 claim on her own behalf because she is not an aggrieved party. However, as  
5 Ms. Prescott has noted, she is not bringing the claim on her behalf, but instead  
6 on behalf of Kyler. While Ms. Prescott is unable to bring a claim as an individual,  
7 she certainly can bring the claim on behalf of Kyler within her representative  
8 capacity. *See Lopez v. Regents of Univ. of Cal.*, 5 F. Supp. 3d 1106, 1114–1115  
9 (N.D. Cal. 2013) (holding that while parents may not bring a Title IX claim as  
10 individuals, they may bring such claim on behalf of a deceased child).

11 **iii. Declaratory and Injunctive Relief Under the ACA**

12 RCHSD argues that Ms. Prescott lacks standing to seek declaratory or  
13 injunctive relief under section 1557 of the ACA. The Court agrees.

14 Lack of standing deprives this Court of Article III jurisdiction. *Steel Co. v.*  
15 *Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998). “[A] plaintiff must  
16 demonstrate standing separately for each form of relief sought.” *Friends of the*  
17 *Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (9th Cir. 2000).

18 A plaintiff seeking injunctive relief must allege “continuing, present adverse  
19 effects” stemming from the defendant’s actions,” “past exposure to illegal conduct  
20 does not in itself show a present case or controversy.” *City of Los Angeles v.*  
21 *Lyons*, 461 U.S. 95, 102 (1983). Here, Ms. Prescott seeks injunctive relief “so  
22 that in the future RCHSD will provide appropriate, nondiscriminatory care to all of  
23 its patients, regardless of sex, gender identity, and/or disability.” (Compl. ¶ 11.)  
24 If not enjoined, Ms. Prescott alleges, “Defendant will continue to engage in the  
25 unlawful acts and practices of discrimination complained of herein.” (Id. at ¶ 12.)  
26

---

27  
28 <sup>4</sup> Because the Court holds that Ms. Prescott has sufficiently stated a claim under section 1557 of the ACA, it need not decide whether she has sufficiently pled claims under other theories of liability.

1 Ms. Prescott is unable to demonstrate a likelihood of facing future similar harm.  
2 Additionally, she has not alleged how an injunction or declaratory relief will  
3 redress Kyler's injuries. Therefore, Ms. Prescott is unable to seek declaratory or  
4 injunctive relief and RCHSD's motion to dismiss is granted as to these remedies.

#### 5 ***iv. Pain and Suffering Damages***

6 The parties dispute whether non-economic compensatory damages, such  
7 as damages for pain and suffering, survive Kyler's death under the ACA<sup>5</sup>.  
8 RCHSD argues that California's survival statute, California Code of Civil  
9 Procedure section 377.34, applies to federal claims and bars Ms. Prescott from  
10 recovering emotional distress damages. RCHSD relies on *Walsh v. Tehachapi*  
11 *Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1127 (E.D. Cal. 2011) to argue that  
12 under the ACA, Ms. Prescott cannot recover damages for the purported  
13 emotional distress that Kyler suffered before his death. The district court in  
14 *Walsh* held that the plaintiffs were precluded from recovering damages related to  
15 the decedent's emotional distress because California's survival statute applies  
16 under 42 U.S.C. section 1988(a)<sup>6</sup>. *Walsh*, 827 F. Supp. 2d at 1127. Ms.  
17 Prescott, on the other hand, relies on *Lopez v. Regents of the Univ. of Cal.*, 5 F.  
18 Supp. 3d 1106, 1119 (N.D. Cal. 2013) to argue that federal common law, not  
19 California law, governs and therefore permits her to recover damages for pain  
20 and suffering. First, the court in *Lopez* reasoned that section 1988(a) does not  
21 apply to modern civil rights provisions such as Title IX. *Lopez*, 5 F. Supp. 3d at  
22

---

23  
24 <sup>5</sup> The parties do not appear to dispute that damages for emotional distress under the California claims are  
25 unavailable. See Cal. Civ. Proc. § 377.34 ("In an action or proceeding by a decedent's personal representative or  
26 successor in interest on the decedent's cause of action, the damages recoverable . . . do not include damages for  
27 pain, suffering, or disfigurement.").

28 <sup>6</sup> This provision provides: "The jurisdiction in civil and criminal matters conferred on the district courts by the  
provisions of titles 13, 24, and 70 of the Revised Status for the protection of all persons in the United States in  
their civil rights . . . shall be exercised and enforced in conformity with the laws of the United States . . . but in all  
cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable  
remedies and punish offenses against law, the common law, as modified and changed by the constitution and  
statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same  
is not inconsistent with the Constitution and laws of the United States . . . . 42 U.S.C. § 1988(a).

1 1119 (“Section 1988 is clear—it applies to *specific* claims brought under *specific*  
2 provisions that do not include the more modern civil rights actions of the  
3 twentieth century.”). Second, the court concluded that even if section 1988(a) did  
4 apply to Title IX, California’s survival statute does not apply to Title IX because its  
5 application would be inconsistent with the broad remedial purpose of Title IX. *Id.*

6 Because the ACA draws on Title IX’s prohibition on discrimination on the  
7 basis of sex, the Court is persuaded by the *Lopez* court and holds that federal  
8 common law governs the question of whether Ms. Prescott may recover  
9 damages for Kyler’s emotional distress. As such, she can recover for emotional  
10 distress damages under the ACA.

## 11 **2. California’s Unruh Civil Rights Act Claim**

12 RCHSD argues that Ms. Prescott lacks standing to assert an Unruh Civil  
13 Rights Act claim on behalf of Kyler and herself. Because she does not seek to  
14 bring an action as an individual, the Court need only address her ability to assert  
15 an Unruh Act claim on behalf of Kyler.

16 RCHSD relies on cases that address an organization’s standing under  
17 Unruh to argue that Ms. Prescott lacks standing to assert a claim on behalf of  
18 Kyler. *See Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221  
19 Cal. App. 3d 1377, 1386 (1990) (holding that a nonprofit organization lacked  
20 standing under Unruh because its civil rights had not been personally violated  
21 and it failed to show that any of its members would suffer injury); *see also*  
22 *Bowden v. Redwood Inst. For Designed Educ., Inc.*, No. C98–1312, 1999 WL  
23 138889, at \*5 (N.D. Cal. Mar. 9, 1999) (holding that a teacher could not sue as a  
24 representative of her students under Unruh). These cases, however, are  
25 inapplicable because Ms. Prescott brings this action as Kyler’s personal  
26 representative under California’s survivorship statute, Cal. Civ. Code Proc. §

27 //

28 //

1 377.30. California’s survivorship statute states that “a cause of action that  
2 survives the death of the person entitled to commence an action or proceeding  
3 passes to the decedent’s successor in interest . . . and an action may be  
4 commenced by the decedent’s personal representative or, if none, by the  
5 decedent’s successor in interest.” Cal. Civ. Proc. § 377.30.

6 Accordingly, Ms. Prescott, as Kyler’s mother and within her capacity as his  
7 personal representative, may bring California state law anti-discrimination claims,  
8 including Unruh causes of action, on his behalf. RCHSD’s motion to dismiss is  
9 therefore denied as to the Unruh claim.

### 10 **3. California Government Code Section 11135 Claims**

11 Ms. Prescott asserts claims under California Government Code section  
12 11135, alleging that RCHSD denied Kyler and her “full and equal access to  
13 services” by discriminating against him on the basis of “sex” and “disability” under  
14 the statute. Remedies for violations of Government Code section 11135, which  
15 prohibits entities receiving funding from California from discriminating on the  
16 basis of sex and disability, are limited to “a civil action for equitable relief.” Cal.  
17 Gov’t Code § 11139; see *Donovan v. Poway Unified Sch. Dist.*, 167 Cal. App. 4th  
18 567, 594 (2008) (“Government Code section 11139 demonstrates that when the  
19 Legislature wanted to limit the remedies available in a private enforcement to  
20 equitable or injunctive relief, it clearly knew how to do so.”). While RCHSD does  
21 not raise the issue of standing as to this claim, the Court must raise such  
22 jurisdictional issues sua sponte. *Bernhardt v. Cnty. Of Los Angeles*, 279 F.3d  
23 862, 868 (9th Cir. 2002). As discussed above within the context of the ACA, Ms.  
24 Prescott has not demonstrated a threat of future harm or how an injunction would  
25 redress the alleged injuries. Because remedies are limited to equitable relief,  
26 Ms. Prescott cannot support a claim based on RCHSD’s alleged discrimination  
27 under Government Code section 11135. Therefore, RCHSD’s motion to dismiss  
28 this claim is granted and the Court need not reach RCHSD’s separate

1 arguments.

#### 2 **4. UCL Claims**

3 The UCL prohibits “unlawful, unfair or fraudulent business act[s] or  
4 practice[s].” Cal. Bus. & Prof. Code § 17200. “Each of these three adjectives  
5 captures a separate and distinct theory of liability.” *Rubio v. Capitol One Bank*,  
6 613 F.3d 1195, 1203 (9th Cir. 2010). As to an unlawful business practice, the  
7 UCL’s coverage is broad and sweeping, and embraces “anything that can  
8 properly be called a business practice and that at the same time is forbidden by  
9 law.” *Cel-Tech Commc’ns v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999).  
10 “By proscribing ‘any unlawful’ business practice, ‘section 17200 borrows  
11 violations of other laws and treats them as unlawful practices’ that the unfair  
12 competition law makes independently actionable.” *Id.* (quoting *State Farm Fire &*  
13 *Casual Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1103 (1996)). Under the  
14 unfair prong of the UCL, a plaintiff must allege sufficient facts to demonstrate that  
15 RCHSD’s “unfair” business practice: (1) offends an established public policy or is  
16 immoral, unethical, oppressive, unscrupulous or substantially injurious to  
17 consumers; or (2) is tied to a legislatively declared policy. See *Lozano v. AT&T*  
18 *Wireless Servs.*, 504 F.3d 718, 736 (9th Cir. 2007); *S. Bay Chevrolet v. Gen.*  
19 *Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886–87 (1999) (internal  
20 quotations omitted). Finally, a fraudulent business practice is one that is likely to  
21 deceive the public and can be based “on representations to the public which are  
22 untrue, and also those which may be accurate on some level, but will  
23 nonetheless tend to mislead or deceive.” *McKell v. Washington Mutual, Inc.*, 142  
24 Cal. App. 4th 1457, 1471 (2006) (internal citations omitted).

25 RCHSD argues that the UCL claims should be dismissed because Ms.  
26 Prescott does not have standing to assert a UCL claim as an individual or on  
27 behalf of Kyler.  
28

1 ***i. Failure to State a Claim on Her Own behalf***

2 First, RCHSD challenges Ms. Prescott's standing to assert a UCL claim as  
3 an individual, arguing that she has failed to demonstrate that the alleged unfair  
4 business practices caused the alleged economic injury and that she relied on the  
5 alleged misrepresentations.

6 A plaintiff injured by a violation of the UCL may only seek restitution and  
7 injunctive relief.<sup>7</sup> See Cal. Bus. & Prof. § 17203. A plaintiff bears the burden of  
8 establishing that she has standing for each type of relief sought. *Summers v.*  
9 *Earth Island Inst.*, 555 U.S. 488, 493 (2009). Standing under the UCL is  
10 substantially narrower than federal standing under Article III, section 2 of the U.S.  
11 Constitution. *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 324 (2011).  
12 Under the UCL, only a plaintiff who has suffered an injury in fact and has lost  
13 money or property as a result of unfair competition has standing to bring an  
14 action for relief. *Id.* at 320–21; Cal. Bus. & Prof. § 17204. To satisfy this  
15 standing requirement, the California Supreme Court requires a plaintiff to “(1)  
16 establish a loss or deprivation of money or property sufficient to qualify as injury  
17 in fact, i.e. *economic injury*, and (2) show that the economic injury was the result  
18 of, i.e., caused by the unfair business practice . . . that is the gravamen of the  
19 claim.” *Kwikset Corp.*, 51 Cal.4th at 322. Where a plaintiff alleges fraudulent  
20 business practices, the UCL's standing requirement imposes an actual reliance  
21 requirement on named plaintiffs seeking relief under the fraudulent prong.  
22

23 \_\_\_\_\_  
24  
25 <sup>7</sup> Though not raised in RCHSD's motion to dismiss, Ms. Prescott also moves for injunctive relief under both the  
26 UCL and FAL. (Compl. at ¶ 110). To establish standing to seek injunctive relief, a plaintiff must allege facts that  
27 indicate that a defendant is likely to continue utilizing unfair competition practices or that she will face a similar  
28 future harm. See *Lyons*, 461 U.S. at 111. Here, there is no evidence in the record that there is any probability  
that RCHSD will continue to use unfair competitive practices. Likewise, Ms. Prescott has not provided evidence  
to show that they will face similar harm in the future. As such, the Court finds that she does not have standing to  
seek injunctive relief.



1 *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1257 (2009). The  
2 Supreme Court of California has explained that “while a plaintiff must allege that  
3 the defendant's misrepresentations were an immediate cause of the injury-  
4 causing conduct, the plaintiff is not required to allege that those  
5 misrepresentations were the sole or even the decisive cause of the injury-  
6 producing conduct.” *In Re Tobacco II Cases*, 46 Cal.4th 298, 328 (2009). A  
7 plaintiff can establish that a defendant’s misrepresentation was “an immediate  
8 cause . . . by showing that in absence the plaintiff in all reasonable probability  
9 would not have engaged in the injury-producing conduct.” *Id.* at 326.

10 Ms. Prescott rests her individual UCL claim under the fraudulent prong,  
11 alleging that RCHSD “[u]nfairly and falsely represented itself to Katharine, Kyler,  
12 and to the general public as being capable of working with transgender patients  
13 and patients with dysphoria . . . .” (Compl. ¶ 104(a).) She alleges that these  
14 representations were made through “operation of RCHSD’s Gender Management  
15 Clinic, through statements and information contained on its website and in  
16 statements to Katharine prior to and during Kyler’s stay at RCHSD.” (*Id.*) Ms.  
17 Prescott further alleges that she “would not have sought medical care for Kyler at  
18 RCHSD had she known that RCHSD’s claims were false.” (*Id.* at ¶ 105.) The  
19 Court finds that Ms. Prescott has sufficiently demonstrated that as a result of  
20 RCHSD’s alleged misrepresentations, she suffered economic injury, including but  
21 not limited to medical and hospital costs, counseling fees, travel expenses, and  
22 other out-of-pocket expenses. Ms. Prescott sufficiently alleges that but for  
23 RCHSD’s misrepresentations, she would not have sought medical care for Kyler  
24 at RCHSD and taken him to another local emergency room.

25  
26 Second, RCHSD argues that the UCL claim fails because the statements  
27 on its website were referencing the Gender Management Clinic, located within  
28 the Endocrinology and Diabetes program, not in the CAPS unit, which Kyler was

1 admitted to. While the statements on the website may have been related to  
2 RCHSD's Gender Management Clinic, whether it was "material" to Ms. Prescott's  
3 choice in taking Kyler to RCHSD's emergency room is a question of fact for a  
4 trier of fact to decide at a later time. See *In re Tobacco II Cases*, 46 Cal.4th at  
5 327 ("A misrepresentation is judged to be material if a reasonable man would  
6 attach importance to its existence or nonexistence in determining his choice of  
7 action in the transaction in question, and such materiality is generally a question  
8 of fact unless the fact misrepresented is so obviously unimportant that the jury  
9 could not reasonable find that a reasonable man would have been influenced by  
10 it.") (internal citations omitted).

11  
12 Finally, RCHSD challenges Ms. Prescott's reliance on the assurances that  
13 RCHSD staff made that Kyler's sex and gender identity would be respected  
14 because they do not constitutes "commercial speech." Ms. Prescott in turn  
15 argues that false speech is not required to state a UCL claim. While true that a  
16 plaintiff may allege an independent UCL claim under the unfair or unlawful  
17 prongs, Ms. Prescott's UCL claim depends on RCHSD's alleged  
18 misrepresentations. "California's consumer protections laws, like the unfair  
19 competition law, govern only *commercial* speech." *Rezec v. Sony Pictures*  
20 *Entm't, Inc.*, 116 Cal. App. 4th 135, 140 (2004) (citing *Kasky v. Nike, Inc.*, 27  
21 Cal.4th 939, 967 (2002)). Typically, commercial speech is "speech that does no  
22 more than propose a commercial transaction." *Rezec*, 116 Cal. App. 4th at 141  
23 (internal citations omitted). The Court finds that the assurances made by  
24 RCHSD's staff do not constitute commercial speech. However, because Ms.  
25 Prescott has sufficiently alleged a UCL claim based on the alleged  
26 misrepresentations on RCHSD's website, RCHSD's motion to dismiss her UCL  
27 claim is denied.

28 //

1                   **ii. Standing on Behalf of Decedent**

2           Ms. Prescott has standing, as an individual representative, to bring a UCL  
3 claim on behalf of Kyler under California’s survivorship statute if Kyler was able  
4 to bring the suit on his own behalf prior to his death. *See Lintz v. Bank of*  
5 *America, N.A.*, No. 13-cv-01757, 2013 WL 5423873, at \*9 (Sept. 27, 2013) (“[A]  
6 case of action for or against a person is not lost by reason of the person’s death,  
7 but survives subject to the applicable limitations period. . . . Thus, the correct  
8 inquiry is not whether it was impossible for Plaintiff to bring suit, but whether it  
9 was impossible for [the decedent] or his successor in interest to bring suit.”).  
10 Thus, RCHSD’s cases discussing representative class standing and assignment-  
11 based rights to bring claims under the UCL are inapplicable. *See Arias v. Super.*  
12 *Ct.*, 46 Cal.4th 969, 977–80 (2009) (holding that a private party could pursue a  
13 representative action on behalf of others under the UCL only if the party met the  
14 requirements for a class action); *see also In re WellPoint, Inc. v. Out-of-Network*  
15 *“UCR” Rates Litig.*, 903 F. Supp. 2d 880, 898 (C.D. Cal. 2012) (holding that  
16 plaintiffs could only pursue UCL claims via assignment if they satisfied class  
17 action requirements). Here, as to the fraudulent prong of the UCL, the Complaint  
18 does not allege that Kyler actually relied on RCHSD’s misrepresentations.  
19 Nevertheless, the claim survives because Ms. Prescott has sufficiently alleged  
20 claims for Kyler under the UCL’s unlawful and unfair prongs. Thus, RCHSD’s  
21 motion to dismiss the UCL claim is denied.

22                   **5. FAL Claims**

23           RCHSD challenges Ms. Prescott’s standing to bring claims on behalf of  
24 Kyler and herself. The standing requirements under California’s UCL and FAL  
25 are the identical. *See Kwikset Corp.*, 51 Cal.4th at 320–21. Therefore, as  
26 already discussed within the context of the UCL, Ms. Prescott has sufficiently  
27 alleged a claim for herself, but has failed to allege actual reliance as to Kyler.  
28 Accordingly, RCHSD’s motion to dismiss is denied as to Ms. Prescott’s FAL

1 claim, but granted as to Kyler's.

2 **B. Motion to Stay**

3 RCHSD argues that a stay of this action is appropriate for two reasons: (1)  
4 pending the Supreme Court's decision in *Gloucester Cnty. Sch. Bd. V. G.G.*, 136  
5 S.Ct. 2442 (2016); and (2) due to the nationwide injunction issued in *Franciscan*  
6 *Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016). Because,  
7 as Ms. Prescott notes, the Supreme Court has remanded *Gloucester Cnty.* to the  
8 Fourth Circuit for further consideration, RCHSD's first argument is moot. As to  
9 RCHSD's second justification, the Court exercises its discretion to deny the  
10 motion to stay on this ground because this action does not depend on the  
11 constitutionality of the HHS's regulation. In *Franciscan Alliance, Inc.*, the District  
12 Court for the Northern District of Texas addressed the issue of whether the HHS  
13 exceeded its authority under the ACA in the challenged regulations' interpretation  
14 of sex discrimination. 227 F. Supp. 3d at 6570. In finding that the plaintiffs would  
15 likely succeed on the merits, the district court enjoined enforcement of the HHS's  
16 regulation interpreting section 1557. As already discussed above, the ACA claim  
17 and the Court's decision under the ACA do not depend on the enforcement or  
18 constitutionality of the HHS's regulation. Unlike in *Rumble v. Fairview Health*  
19 *Servs.*, No. 14-cv-2037, 2017 WL 401940, at \*3 (D. Minn. Jan. 30, 2017), where  
20 the district court relied in part on an opinion letter from the Director of the OCR, a  
21 sub-agency of HHS, which stated that section 1557 extended to claims of gender  
22 identity-based discrimination, here the Court only relies on the language of  
23 section 1557. Therefore, the Court agrees with Ms. Prescott that this action  
24 remains unaffected by the injunction in *Franciscan Alliance, Inc.*. As a result,  
25 because RCHSD has not met its burden as the moving party in demonstrating a  
26 need for a stay, its motion to stay is denied.

27 //

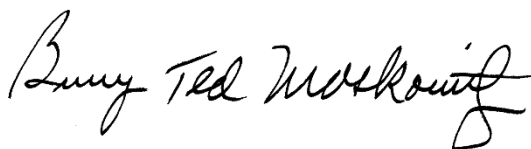
28 //

**IV. CONCLUSION**

For the reasons discussed above, RCHSD’s motion to dismiss (ECF No. 9) is **GRANTED IN PART AND DENIED IN PART** and motion to stay (ECF No. 15) is **DENIED**. The Court dismisses (1) the prayer for injunctive and declaratory relief under the ACA, (2) claims under California Government Code section 11135, and (3) Kyler’s FAL claim. The Court grants Ms. Prescott leave to file a First Amended Complaint (“FAC”) as to her claims under Government Code section 11135—if Ms. Prescott seeks other forms of equitable relief apart from injunctive or declaratory relief—and as to Kyler’s FAL claim. Plaintiff must file an FAC that complies with Local Rule 15.1(c) within 15 days of the entry of this Order

**IT IS SO ORDERED.**

Dated: September 27, 2017



---

Barry Ted Moskowitz, Chief Judge  
United States District Court

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28