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24
25 **UNITED STATES DISTRICT COURT**
26 **CENTRAL DISTRICT OF CALIFORNIA**
27 **WESTERN DIVISION**
28

29 Disability Rights California, California
30 Protection and Advocacy Agency For
31 Persons With Disabilities,

32 Plaintiff,

33 v.

34 SunBridge Braswell Enterprises, Inc.,
35 dba Sierra Vista Rehabilitation Center

36 Defendant.

37 **CASE NO.: CV09-3664 VBF (FFMx)**

38 **MEMORANDUM OF POINTS AND**
39 **AUTHORITIES IN SUPPORT OF**
40 **PLAINTIFF'S MOTION FOR**
41 **ATTORNEY FEES**

42 Dept: Spring Street, 9
43 Judge: Hon. Valerie Baker Fairbank
44 Hearing Date and Time: July 12,
45 2010, 1:30 p.m.
46 Action Filed: May 22, 2009

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Disability Rights California, in accordance with state and federal law, is
3 California's designated protection and advocacy agency and therefore is
4 entitled to access to records, individuals and facilities in order to advocate for
5 people with disabilities.
6

7 Disability Rights California requested and was denied access to
8 statistical information and other general records by Sierra Vista. Disability
9 Rights California also requested and was denied access to Sierra Vista and its
10 residents.
11

12 Disability Rights California brought the underlying action to enforce its
13 access authority. Following an extensive period of briefing on cross motions
14 for summary judgment and dismissal, the parties engaged in settlement
15 discussions to resolve their dispute. As a result of the lawsuit and settlement,
16 Disability Rights California obtained access to the requested information and
17 records, as well as to the facility and residents, as entitled under federal and
18 state law. Welf. & Inst. Code Secs 4900 et seq are based on the federal laws
19 and provide substantially the same rights as the federal laws.
20

21 Disability Rights California now brings this motion to recover its
22 reasonable attorneys' fees expended from March 2009 to the present.
23 According to well-established legal standards, Disability Rights California is
24

1 entitled to an award of attorneys' fees pursuant to *Mangold v. P.U.C.*, 67 F.3rd
2 1470, 1478-79 (9th Cir. 1995) and to California Code of Civil Procedure section
3 1021.5. Such an award reflects the skill and hard work required to litigate the
4 case and respond to the vigorous advocacy of Sierra Vista, as well as strong
5 efforts made to reach a settlement agreement on the important issues in the
6 case, and the excellent results obtained through the negotiations.
7

9 **II. STATEMENT OF FACTS & PROCEDURAL HISTORY**

10 Disability Rights California is the designated protection and advocacy
11 system for California pursuant to the Protection and Advocacy for Individuals
12 with Mental Illness Act ("PAIMI Act"), 42 U.S.C. § 10801 *et seq.* (1986); the
13 Developmental Disabilities Assistance and Bill of Rights Act ("PADD Act"), 42
14 U.S.C. § 15041 *et seq.* (1978); the Protection and Advocacy for Individual
15 Rights ("PAIR Act"), 29 U.S.C. § 794e (1992); and California Welfare and
16 Institutions Code section 4900 (West 2010) *et seq.* Disability Rights
17 California's federal and state mandate is to protect and advocate for people
18 with disabilities.
19

20 In late October 2008, Disability Rights California began receiving reports
21 from multiple residents of excessive or inappropriate use of restraints by staff
22 toward them or other residents at Sierra Vista Rehabilitation Center, a facility
23 serving individuals with mental health and developmental disabilities.
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1 Residents complained of “wall slamming” by staff with the following
2 characteristics: staff forcibly holding residents in an elevated position against
3 the wall for extended time periods, forcing their limbs apart, and then dropping
4 them to their knees on the floor. Residents reported bruising, pain, fear, and
5 trauma. This procedure was associated with a manual restraint known as
6 “PRO-ACT”. (First Amended Complaint (FAC) at ¶ 6)

9 Subsequent to the individual complaints, Disability Rights California
10 received information from outside agencies (e.g., San Bernardino County
11 Patients Rights Office, California Department of Mental Health) that Sierra
12 Vista may not be using restraints in compliance with Federal or State laws and
13 regulations. *Id.* at ¶¶ 45, 49.

16 Disability Rights California determined there was probable cause to
17 believe that Sierra Vista staff may be using inappropriate and unlawful
18 physical restraints, and had reason to believe that all residents who were
19 subjected to restraint at the facility may be at significant risk of serious injury
20 or death. In addition, improper restraint practices are likely to cause physical
21 or psychological harm or result in long-term harm if such practices continue.
22 *Id.* at ¶¶ 3, 25, 46.

26 Prior to filing the Complaint, Disability Rights California sought and was
27 denied access on a number of items, which Sierra Vista had an obligation to
28

1 provide. Following the filing of the Complaint, Sierra Vista changed its
2 position on these issues. These items included:

3
4 A. "Data from January 1, 2008 to the present regarding the number of
5 restraint incidents at Sierra Vista, by type of restraint used and facility
6 program" was requested as of December 26, 2008 Stortz Decl. ¶ 13, Exh. 6.

7
8 The parties attempted to resolve the issue but could not. Stortz Decl. at ¶¶ 14-
9 19, Exhs. 8, 9, 10, 11, 12. Plaintiff then sought the information in the FAC, ¶¶
10 48, 67-91. Defendant now has provided Plaintiff with the data from the period
11 July 1, 2008 to June 30, 2009 by type of restraint used and facility program,
12 and has agreed to provide updated information for the next 18 months. Stortz
13 Decl., Exh. 1; Stortz Decl., Exh. 2, Joint Report From Plaintiff And Defendant
14 RE:Status Of Resolved Issues, Docket No.46 ("Joint Report"), filed with the
15 Court on September 3, 2009, at 69.

16
17
18
19 B. Restraint logs at the facility were requested as of March 20, 2009.
20 Stortz Decl. at Exh. 10, pp.44-45. The parties attempted to resolve the issue
21 but could not. Stortz Decl. ¶¶ 14-19, Exh. 11, p.48 and 12. Plaintiff sought the
22 information in the FAC at ¶¶ 56, 67-91. Defendant has now provided Plaintiff
23 with a copy of restraint logs at the facility. Stortz Decl. Exh. 18, p.69.

24
25
26 C. Information about staff training on the use of restraints was
27 requested on March 20, 2009. Stortz Decl., Exh. 10. The parties attempted to
28

1 resolve the issue but could not. Stortz Decl. ¶¶ 14-19, Exh.s 11, p.48 and 12.
2 Plaintiff sought the information in the FAC at 56, 67-91¶. Defendant now has
3 provided Plaintiff with information about the training of all staff on use of
4 behavioral restraints and the frequency of such training and has provided
5 copies of the training materials for such training. Stortz Decl., Exh. 18 at p.69.
6
7

8 D. Copies of the complete medical files of residents for whom we had
9 signed authorizations for release of information were sought from Sierra Vista.
10 Scherer Decl.¶ 23. Subsequent to filing, Plaintiff discovered that Defendant
11 had not provided certain of these individual records with authorization as
12 Defendant considered such records to be protected under quality assurance
13 privileges. Scherer Decl. ¶ 24. Defendant now has agreed [did provide?] to
14 provide the following documents, which it had previously declined to provide:
15 Notable Incident Reports, "Special Incident Report/Other Observation and
16 Events" reports, "Confidential Adverse Incident Initial Reporting Form –
17 California Specific" forms, and/or SOC 341 Suspect Elder/Dependent Abuse
18 Reports for those residents with respect to whom Disability Rights California
19 has obtained authorization to access records. See Parties' Proposed
20 Discovery Plan and Case Management Statement, Docket No. 45, filed with
21 the Court on August 31, 2009 at pp. 7-8; see also Stortz Decl., Exh. 18, at
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1 pp.69-70.¹

2 E. Access to the Sierra Vista facility and its residents was sought on
3 April 8, 2010. Stortz Decl. ¶ 20, Exh. 13. The parties attempted to resolve the
4 issue but could not. Stortz Decl. at Exhs. 14, 15, 16, 12 and 17. Plaintiff
5 sought judicial resolution in its FAC at ¶¶ 59-63, 92-104. The parties
6 subsequently reached an Agreement on Physical Access, which has been
7 submitted to the Court under seal, and which governs access as in
8 accordance with state and federal law, as follows:
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11

12 1. Plaintiff's right of access for abuse investigations in
13 accordance with Welf. & Inst. Code Code § 4902(b) and 42 C.F.R. §
14 51.42(b). Stortz Decl. at Exh. 16. Defendant proposed to restrict access
15 for all activities to "normal" business hours. Plaintiff obtained the access
16 it sought through the Parties' Agreement on Physical Access, submitted
17 to the Court under seal, See Sections IV(I); V(A)-(E).
18
19

20 2. Plaintiff's right to unannounced access for the purpose of
21 abuse investigation and monitoring in accordance with Welf. & Inst.
22
23

24 ¹ Disability Rights California further sought and did not obtain other redacted
25 records of individuals at the facility relating to restraint and possible abuse as
26 well as names and contact information for legal guardians or representatives
27 of facility residents. However, the parties agreed that Plaintiff would dismiss
28 these remaining claims without prejudice upon concluding an Agreement on
Physical Access, discussed below, and upon Court retention of jurisdiction for
purposes of considering Plaintiff's motion for attorneys' fees.

1 Code § 4902(b)(1)&(2) and 42 C.F.R. § 51.42. Exh. 16. Defendant
2 proposed to require 5 days advance notice for all activities. Exh. 17.
3 Plaintiff obtained the access it sought through the Parties' Agreement on
4 Physical Access. See Sections V(A)(1), V(B)(1)&(2), V(C)(2), V(D)(1)
5 and V(E).
6
7

8 3. Defendant's proposed requirement that advance written
9 notice include information on the nature and purpose Plaintiff visits to
10 the facility. Exh. 17. Plaintiff obtained the access it sought through the
11 Parties' Agreement on Physical Access. See Sections V(A)(2),
12 V(B)(1)&(2), V(C)(2)&(3), Section V(D)(1)&(2), & Section V(E).
13
14

15 4. Plaintiff's right to unaccompanied access in accordance with
16 Welf. & Inst. Code § 4902(b)(1)&(2) and 42 C.F.R. § 51.42. Defendant's
17 proposed a restriction allowing Defendant to observe Plaintiff's activities.
18 Exh. 17. Plaintiff obtained the access it sought through the Parties'
19 Agreement on Physical Access. See Sections III(A),(C) & (D); IV(I);
20 V(A)(5); and VII.
21
22

23 5. Defendant's proposed that it have the right to refuse access
24 if it unilaterally determined that access was deemed "inconsistent with
25 the operations of the facility or the treatment plan of any resident." Exh.
26 17. Plaintiff obtained the access it sought through the Parties'
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Agreement on Physical Access. See Sections IV(D), (E), (F) & (G); V(B)(2).

III. PLAINTIFF IS ENTITLED TO FEES

A. Plaintiff's Lodestar

Disability Rights California seeks attorneys' fees for the work of four attorneys performed in this case. (Decls. of Rachel Scherer, Kevin Bayley, Michael Stortz and Dara Schur.) Counsel has kept records containing detailed descriptions of the work they performed, which are filed herewith. Stortz Decl. ¶¶ 30-31; Scherer Decl. ¶¶ 6, 11; Schur Decl. ¶¶ 6, 11-12; Bayley Decl. ¶¶ 8-9.

The following details the calculation of the base line attorneys' fees (hourly rates multiplied by hours spent, or "lodestar"), for which Disability Rights California seeks an award:

Attorney	Years of Experience	Total Hours	2010 Hourly Rate	Lodestar Fee
Dara Schur	29	154.3	700	\$108,010.00
Michael Stortz	13	147.6	495	73,062.00
Kevin Bayley	3	92.4	335	30,954.00
Rachel Scherer	1	113.7	305	34,678.50
Totals		508.0		\$246,704.50

Disability Rights California's lodestar of \$246,704.50 is based on the hours reasonably and necessarily incurred multiplied by counsels' current standard hourly rates. Scherer Decl., ¶11, Exh.20. The hourly rates are

1 comparable to the prevailing market hourly rates billed by attorneys of similar
2 experience and practices. Decls. of Dara Schur ¶¶ 10-11; Richard Pearl ¶ 17;
3 , Linda Dardarian ¶ 13; and Virginia Keeny ¶¶ 13-15. This amount will
4 increase with further proceedings on the fee motion, and Disability Rights
5 California will supplement the requested amount on reply to this motion.
6
7

8 **B. Plaintiff Is Entitled To Fees On Its State Court Claim**

9 The Ninth Circuit has applied state law not only to the right to fees, but in
10 the method of calculating the fees. *Mangold v. California Public Utilities*
11 *Commission*, 67 F.3d 1470, 1478 (9th Cir. 1995), citing *Kern Oil and Refining*
12 *Co. v. Tenneco Oil Co.*, 792 F.2d 1380 (9th Cir. 1986), cert. denied, 480 U.S.
13 906, 107 S.Ct. 1349. In *Mangold*, the Ninth circuit determined that where
14 plaintiffs prevail on claims under both state and federal law, the federal court
15 shall apply state law in determining the right to fees and also as to how fees
16 are determined. Therefore, plaintiffs are entitled to fees under Ca. Code of
17 Civ. Proc. sec 1021.5 for prevailing on their state law claims under Welf & Inst.
18 code secs 4900 et seq.
19
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23 **C. Disability Rights California Is Entitled to Reasonable Attorney**
24 **Fees under California Code of Civil Procedure section 1021.5**

25 Disability Rights California satisfies each of the statutory criteria for such
26 an award. It is "a successful party" vis-à-vis Defendant Sierra Vista in an
27 action that resulted in the enforcement of important rights affecting the public
28

1 interest. Cal. Code Civ. Proc. § 1021.5. It has conferred significant benefit on
2 the general public or a large class of persons. *Id.* § 1021.5(a). The necessity
3 and financial burden of such action make the award appropriate. *Id.* §
4 1021.5(b). And such fees cannot be paid out of the recovery because there is
5 none. *Id.* § 1021.5(c). Therefore, Disability Rights California may recover its
6 fees under this statute for preparation and prosecution of the case as well as
7 for successful settlement negotiations and fees incurred related to this motion.
8
9

10
11 California Code of Civil Procedure authorizes the Court to award
12 attorneys' fees to a successful party

13 in any action which has resulted in the enforcement of an
14 important right affecting the public interest if: (a) a significant
15 benefit, whether pecuniary or nonpecuniary, has been
16 conferred on the general public or a large class of persons, (b)
17 the necessity and financial burden of private enforcement...are
18 such as to make the award appropriate, and (c) such fees
19 should not in the interest of justice be paid out of the recovery.

20 Cal. Code Civ. Proc. § 1021.5. *See also Folsom v. Butte County Ass'n of*
21 *Gov'ts*, 32 Cal.3d 668, 683-84 (1982) ("[W]e rule it no barrier to a section
22 1021.5 award that the attorneys are employed by publicly funded legal
23 services organizations."). Disability Rights California is the successful party in
24 this action having obtained a significant change in the position of the facility
25 with respect to access to information and records, as well as with physical
26 access to the facility and residents therein. It also meets each of the other
27
28

1 three criteria for an attorneys' fees award under section 1021.5.

2 **1. Disability Rights California is the prevailing or**
3 **successful party under the catalyst theory.**

4 Disability Rights California's state and federal law claims permit the
5 Court to award fees under the "catalyst theory" pursuant to section 1021.5. A
6 party is successful under the catalyst theory "even if the litigations does not
7 result in a judicially-sanctioned change in the parties' legal relationship, when
8 the defendant voluntarily changes its behavior because of, and in the manner
9 sought by, the litigation." *Skaff v. Meridien N. Am. Beverly Hills LLC*, 506 F.3d
10 at 832, 844 n.11 (9th Cir. 2007) (citing *Graham v. DaimlerChrysler Corp.*, 34
11 Cal.4th 553 (2004)). Disability Rights California can obtain an award of
12 attorney fees under the catalyst theory because it can show that (i) the lawsuit
13 was the catalyst motivating Sierra Vista to provide the primary relief sought;
14 (ii) its lawsuit had merit and achieved its catalytic effect by threat of victory, not
15 by dint of nuisance and threat of expense; and (iii) it reasonably attempted to
16 settle the litigation prior to filing the lawsuit. *Tipton-Whittingham v. City of Los*
17 *Angeles*, 34 Cal.4th 604, 608 (2004).

18 **(a) This lawsuit motivated Sierra Vista**
19 **to provide primary relief**

20 The factual/legal conditions that Disability Rights California sought to
21 change or affect, and the outcome of the case, sufficiently show that its suit
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1 motivated Sierra Vista to change its legal position and provide the primary
2 relief sought. See *Folsom*, 32 Cal.3d at 685. Plaintiff has obtained access
3 information and records on restraint incidents, restraint logs, staff training on
4 use of restraint, individual records on special incidents involving restraint, as
5 well as access to the facility and its residents, all of which defendant denied
6 prior to Plaintiff's filing.
7

8
9 The chronology of events in this case is compelling. Sierra Vista
10 repeatedly asserted defenses not to produce aggregate restraint data. First, it
11 asserted protection from disclosure under state and federal peer review and
12 quality assurance privileges. Stortz Decl., Exh. 9. Next, it argued that such
13 information was beyond the scope of our access authority under state and
14 federal law. Stortz Decl., Exh. 11. It similarly denied our access to facility
15 restraint logs. Exh. 11.
16
17

18
19 As evidenced by the exchange in communication prior to filing on May
20 21, 2009 and the Joint Report, Disability Rights California's suit substantially
21 contributed to or was demonstrably influential in Sierra Vista's about-face in
22 agreeing to provide aggregate restraint data, restraint logs, and staff training
23 on restraint use. *Wallace v. Consumers Coop. of Berkeley, Inc.*, 170
24 Cal.App.3d 836, 843-44 (1985); *Godinez v. Schwarzenegger*, 132 Cal.App.4th
25 73, 91 (2005).
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1 With regard to Disability Rights California's state and federal authority
2 for physical access to the facility and residents therein, there are different
3 standards governing access for a specific purpose: (1) to provide information
4 and training; (2) to monitor a facility's compliance with applicable law; and (3)
5 to investigate reports of abuse and neglect. Exh. 16. Sierra Vista failed to
6 take into account these differences when it objected to access prior to the
7 filing of the Complaint. Exh. 17. As shown by the above-referenced Sections
8 of the Agreement on Physical Access, submitted to the Court under seal,
9 Sierra Vista changed its position vis-à-vis Disability Rights California's
10 authority to access the facility and its residents.
11

12 As indicated by the Joint Report, during the course of the litigation,
13 Sierra Vista moved substantially to Plaintiff's position, including with respect
14 to: "access to the facility and the resident[s] therein in accordance with state
15 and federal law"; "Plaintiff's request for reasonable unaccompanied access to
16 the facility and its residents"; "request permitting all residents to visit with
17 Plaintiff's advocates and attorneys at a place and time of their choosing";
18 "permitting Plaintiff to ask questions of and interview staff, except if such staff
19 person declines to be interviewed or requests to be accompanied by the
20 facility administrator or counsel for the facility". Exh. 18 at 70.
21

22 Thus, Disability Rights California obtained its primary relief vis-à-vis its
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1 state law claims to access Sierra Vista and its residents.

2 The fact that Disability Rights California engaged in a deliberative
3 process with Defendant from December 2008 to May 2008 without any
4 success in securing access to data on restraint incidents at the facility, further
5 substantiates Plaintiff's position that the case caused Defendant to change its
6 position significantly.
7

8
9 Further, as part of the litigation, the parties engaged in four months of
10 negotiation, resulting in the Agreement on Physical Access. The Stipulations
11 submitted by the parties evidence the lengthy and complicated nature of the
12 negotiations to settle the physical access issues. (STIPULATIONS dated July
13 2, 2009, Docket No.36; July 13, 2009, Docket No. 39; September 21, 2009,
14 Docket No. 52;September 28, 2009, Docket No. 54; October 20, 2009, Docket
15 No. 56; November 16, 2009, Docket No. 59; January 8, 2009 [sic], Docket No.
16 61). It is unlikely that the parties would have resolved the physical access
17 issues absent the pending action and the extensive negotiations that
18 accompanied it.
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23 Plaintiff is a successful party and is entitled to attorney fees under the
24 private attorney general rule given that its lawsuit motivated Sierra Vista to
25 private the relief sought; the catalyst theory provides for attorneys' fees where,
26 as here, it can be reasonably presumed that the litigation was a substantial
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1 factor – if not the only cause for acquiescence – in contributing to Sierra
2 Vista's turnabout. See *Hogar v. Cmty. Dev. Com. of City of Escondido*, 157
3 Cal.App.4th 1358, 1365-66, as modified (2007).
4

5 **(b) Plaintiff's suit achieved effect by its merit**

6 Disability Rights California also meets the second catalyst requirement
7 that its claims had sufficient merit to show that it was not a nuisance lawsuit.
8 *Graham*, 34 Cal.4th at 575. This is proven by the fact that it obtained much of
9 what it sought at the outset of the case, namely access to records relevant to
10 its abuse investigation and physical access to the facility and residents therein
11 for purposes of training, monitoring and investigation and other advocacy.
12 Stortz, Decl., Exhibit 1, pp.11-14. The substantial briefing on issues of first
13 impression also establish that the case was meritorious. See Plaintiff's
14 Memoranda of Points and Authorities in Support of Motion for Preliminary
15 Injunction and in Opposition to Dismiss, Docket Nos. 3 and 19, respectively .
16 At the time of filing, there were no reported Ninth Circuit or California cases on
17 the issues in dispute. However, one Ninth Circuit case decided since the filing
18 of the case supports Plaintiff's position as to the scope of its probable cause
19 for access. *Disability Law Center Alaska, Inc. v. Anchorage School District*,
20 581 F.3d 936 (9th Cir. 2009).
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27 **(c) Plaintiff reasonably**
28 **attempted to settle before filing**

1 Finally, Disability Rights California meets the third catalyst requirement
2 in that it made reasonable efforts to settle the matter before filing the litigation.
3
4 *Graham*, 34 Cal.4th at 577, citing *Grimsley v. Bd. of Supervisors*, 169
5 Cal.App.3d 960, 966 (1985). Disability Rights California sent repeated letters
6 to the facility seeking to resolve the matter outside an adversarial process.
7
8 Stortz Decl., Exh. 1. Only when such efforts were rejected did it raise the
9 possibility of judicial intervention, but there again presented an outline of how
10 the parties could resolve their disputes. Stortz Decl., Exh. 10. Finally, two days
11 prior to filing Disability Rights California notified counsel for the facility of its
12 intent to file and attempted one final push to settle the matter. Stortz Decl.
13 Exh. 12. Plaintiff has established that it engaged in reasonable efforts to settle
14 the matter before filing the litigation.
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18 **3. Plaintiff Enforces Important Rights Affecting**
19 **a Large Class of Persons and the Public Interest**

20 Through this action, Disability Rights California vindicated important
21 federal and state rights affecting a large class of persons and the public
22 interest. The PADD and PAIMI Acts were enacted based on findings that
23 individuals with developmental and psychiatric disabilities are vulnerable to
24 abuse, neglect, serious injury, and death, and that existing systems were
25 inadequate to protect them. 42 U.S.C. § 15041 (PADD) and 42 U.S.C. §
26 10801(a)(1)-(4) (PAIMI). Congress established protection and advocacy
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1 systems to advocate on behalf of, and as necessary, take action to protection
2 individuals with disabilities from harm. *Id.* § 15043, §10801(b). Congressional
3 monitoring authority includes explicit provisions for access to facilities (*Id.* §
4 15043(a)(2)(H); § 10805(a)(3)); authorization to investigate incidents of abuse
5 and neglect (*Id.* § 15043(a)(2)(B); § 10805(a)(1)(A)); and access to records
6 (*Id.* § 15043(a)(2)(I) & (J); §§ 10805(a)(4) and 10806.)
7

8
9 Additionally, the California Supreme Court has recognized “important
10 rights” as those that related “to the achievement of fundamental legislative
11 goals.” *Woodland Hills Residents Ass’n v. City Council of Los Angeles*, 23
12 Cal.3d 917, 935 (1979). It expressly recognized “the rights of mental patients”
13 as important. *Id.* at 936.
14

15
16 The importance of the rights vindicated in the underlying litigation is
17 demonstrated by the societal importance of the rights of vulnerable persons
18 and Plaintiff’s achievement of fundamental legislative goals.
19

20 Disability Rights California’s success in obtaining data on restraint use at
21 the facility, restraint logs, and in successfully obtaining an agreement on
22 physical access to the facility and its residents vindicates the one of the
23 foremost legislative goals of California Welfare and Institutions Code sections
24 4900 to 4906. The legislative findings and declarations relating to these
25 sections are found in the notes under section 4514.3 and includes the
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1 following legislative goal: “[I]t is the interest of people with disabilities in
2 California that protection and advocacy services be available to all people with
3 disabilities who may be subject to abuse or neglect or who request or require
4 the advocacy services of the protection and advocacy agency.”
5

6 Further, in passing landmark legislation on the use of seclusion and
7 behavioral restraints in facilities such as Sierra Vista, the legislature found and
8 declared the following: “The use of seclusion and restraints is not treatment,
9 and their use does not alleviate human suffering or positively change
10 behavior.” See Historical and Statutory Notes, Cal. Health & Safety Code, §
11 1180 (West 2010). The legislature expressly set a goal regarding
12 transparency and data collection:
13
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16 In order to achieve the goal of reduction in the use of seclusion and
17 behavioral restraints, California must utilize the best practices
18 developed in other states, and use the most efficient modern
19 resources to accomplish these goals, including computerized data
20 collection and analysis, public access to information on the Internet,
21 strategies for organizational change, staff training in risk assessment,
22 crisis prevention and intervention, debriefing models, and recovery-
23 based treatment models.

24 *Id.* Disability Rights California has vindicated the important rights, ensuring
25 transparency of restraint incidents and data collection as well as ensuring that
26 statutorily mandated protection and advocacy services are available to
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1 persons it is mandated to serve.²

2 **3. The Necessity and Financial Burden of Private Enforcement**
3 **Favors a Grant of Attorney's Fees under Section 1021.5**

4 Disability Rights California's action was necessary and the financial
5 burden of enforcement warrants an attorneys' fees award. *Lyons v. Chinese*
6 *Hosp. Ass'n*, 136 Cal.App.4th 1331, 1348 (2006) (quoting Pearl, Cal. Attorney
7 Fee Awards (Cont.Ed.Bar 2d ed.2005) § 4.31 p.117).

8
9 The need for private enforcement criterion "looks to the adequacy of
10 public enforcement and seeks economic equalization of representation in
11 cases where private enforcement is necessary." *Lyons*, 136 Cal.App.4th at
12 1348. Here, Disability Rights California's private enforcement of Sierra Vista's
13 obligation to disclose data on its restraint use was clearly necessary, and in
14 order for Disability Rights California to continue to carry out its important
15 public functions it must be compensated. Disability Rights California has
16 expended considerable resources, and such expenditure were necessarily
17 required once Sierra Vista decided to deny access to facility records and
18 residents. Therefore, the necessity and financial burden of private
19 enforcement clearly require an award of Disability Rights California's fees
20 under section 1021.5.
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28 ² Code of Civil Procedure section 1021.5 also authorizes fee awards in actions
that resulted in the enforcement of federal statutory rights. *Maria P. v. Riles*,

1 **4. Plaintiff's Fees Cannot Be Paid Out of Its Recovery**

2 The final factor under section 1021.5 is whether the fee request
3 should "in the interest of justice be paid out of the recovery." § 1021.5(c).
4
5 There was no monetary recovery sought or obtained in this case and thus,
6 Disability Rights California is entitled to its attorneys' fees given satisfaction of
7 all the section 1021.5 criteria.
8

9 **5. The Amount of Fees Plaintiff Requests Is Reasonable**

10 A determination of an attorneys' fee award to the prevailing party
11 requires the Court to compute the reasonable market value of services
12 rendered in the case. *Serrano v. Unruh*, 32 Cal.3d 621, 625 (1982); *Ketchum*
13 *v. Moses*, 24 Cal.4th 1122, 1132, 1134, 1138 n.3 (2001). The initial step is to
14 calculate the lodestar, which multiplies time spent by the attorneys by their
15 reasonable hourly rates. Disability Rights California seeks a lodestar of
16 \$246,704.50 for work performed on the merits of the litigation and settlement.
17 Scherer Decl., Exh. 20. This is reasonable given the hard work and
18 achievements by the attorneys for Disability Rights California in this matter.
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23 **(a) The Time Spent by Counsel Is**
24 **Documented and Reasonable**

25 Disability Rights California seeks compensation for four attorneys who
26 worked on the case: Dara Schur, Michael Stortz, Kevin Bayley, and Rachel
27

28 43 Cal.3d 1281, 1293, 240 Cal.Rptr. 872 (1987).

1 Scherer. Each attorney provided detailed time records. Scherer Decl., Exh.
2 21. Those records establish Disability Rights California's prima facie
3 entitlement to compensation for the time recorded. *Gates v. Rowland*, 39 F.3d
4 1439, 1449 (9th Cir. 1994).

5
6 Disability Rights California is entitled to compensation for "all the hours
7 reasonably spent." See *Ketchum*, 24 Cal. 4th at 1133. It seeks reimbursement
8 for 508.0 hours. Scherer Decl., Exh. 21. These hours were necessary to the
9 successful prosecution and resolution of the case. Stortz Decl. ¶¶29; Schur
10 Decl. ¶¶12; Scherer Decl. ¶¶10-11; Bayley Decl. ¶8. Counsel spent time
11 researching and drafting the complaint and motion for preliminary injunction,
12 responding to a motion to dismiss filed by Sierra Vista, and preparing for
13 further prosecution of the case while on at the same time working extensively
14 with opposing counsel toward resolution of the claims. Stortz Decl. ¶31. While
15 work was divided among counsel to maximize efficiency and avoid duplication,
16 counsel for Disability Rights California have exercised billing judgment,
17 eliminating time that appeared to be duplicative or for any reason
18 unnecessary. Schur Decl. ¶¶12; Scherer Decl. ¶¶12-22. Thus, the time
19 claimed is fully compensable.
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26 **(b) Plaintiff's Counsels'**
27 **Hourly Rates Are Reasonable**

28 Counsel for Disability Rights California are entitled to compensation at

1 current hourly rates that reflect the reasonable market value of their work as
2 compared to attorneys with similar experience, skill and reputation engaged in
3 similar litigation in the local community. *Serrano*, 32 Cal.3d at 625, 640n.31,
4 643.

5
6 Disability Rights California's counsels' rates are comparable to those
7 prevailing in the Los Angeles region for similarly experienced attorneys. For
8 example, Dara Schur, Director of Litigation for Disability Rights California, has
9 over 30 years of experience litigating civil rights, public interest, and disability
10 discrimination cases and is highly regarded in this field. Pearl Decl. ¶16. Ms.
11 Schur's rate of \$700.00 is reasonable given her experience. Keeney Decl.
12 ¶13. All other rates claimed by counsel for Disability Rights California are
13 similarly reasonable. Dardarian Decl. ¶ 13; Keeney Decl. ¶¶ 14-15. These
14 rates are justified for work performed on pleadings, in negotiations and on
15 activities related to this fee motion.
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20 **(c) Plaintiff Achieved the Relief Sought**

21 As described in more detail above, Plaintiff obtained the relief it sought,
22 including data on the number of restraint incidents; restraint logs; information
23 on staff training regarding restraints; individual records for identified clients
24 including Notable Incident Reports, Special Incident Reports, Adverse Incident
25 Reports, and abuse reports; and access to the facility and its residents in
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1 accord with federal and state law. Plaintiff obtained substantial relief on all of
2 its claims. See FAC. The information obtained allowed Plaintiff to proceed
3 with its further investigations of possible excessive restraint use at Sierra
4 Vista. Scherer Decl. ¶25.

5
6 Although a few requests for specific information (guardian contact
7 information and some additional quality assurance documents) were
8 dismissed without prejudice and reserved for a later date [Exh. 18; Stipulation,
9 Docket No. 61, filed by the parties on January 8, 2010], all of the Causes of
10 Action in Plaintiffs' case were resolved favorably. The few documents not
11 provided were sought based on a common core of facts and legal theories.
12 Furthermore, time spent on these documents was inextricably related to the
13 time spent on the successful access issues. Therefore no deduction is
14 appropriate for those few requests. See *Harmon v. City & County of San*
15 *Francisco*, 158 Cal.App.4th 407, 417, 422-424(2007)

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20 **6. This Court Should Grant Attorneys' Fees**
21 **Incurred on This Motion**

22 Disability Rights California also seeks compensation for attorney fees for
23 the time spent incurred in pursuing its attorneys' fees recovery as this is
24 routinely awarded. See *Serrano*, 32 Cal.3d at 639. Counsel will spend
25 additional time responding to Sierra Vista's opposition to this motion and will
26 provide a supplemental declaration as to additional fees at the conclusion of
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1 the litigation of this fee motion.

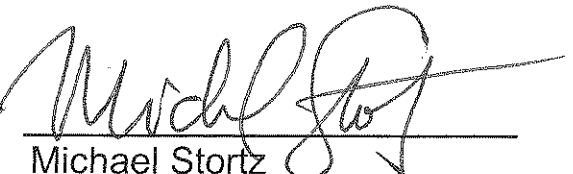
2 **III. CONCLUSION**

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4 Disability Rights California respectfully requests that the Court award its
5 lodestar fees for time related to the prosecution of the case, including but not
6 limited to time in settlement negotiations and on this fee litigation.
7

8 Respectfully submitted,

9
10 Dated: June 1, 2010

Disability Rights California, California

11
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13 By: 
14 Michael Stortz
15 Attorneys for Plaintiff
16 Disability Rights California
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