UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

FRED PIERCE et al., Plaintiffs, vs. COUNTY OF ORANGE et al. Defendants.	Case No. SA CV 01-981-GLT (MLGx) ORDER GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's motion for summary judgment is GRANTED IN PART.

I. BACKGROUND

Plaintiffs, former pretrial detainees in the Orange County jail, brought class-action claims under 42 U.S.C. § 1983 against Defendants Orange County and Sheriff Michael Carona alleging violations of Plaintiffs' civil rights, rights established under Stewart v. Gates, 450 F. Supp. 583 (C.D. Cal. 1978), constitutional rights, and the Americans with Disabilities Act ("ADA"). Plaintiffs alleged Defendants, in violation of Stewart, impermissibly denied to Plaintiffs seats in holding cells, outdoor exercise, dayroom and telephone access, fifteen-minute meal breaks, visitation, and also violated the ADA and the United

States and California constitutions.

On March 1, 2004, the Court granted in part and denied in part Defendants' motion for summary judgment. The remaining Plaintiffs are Timothy Conn, Laurie Ellerston, Fred Pierce, and Fermin Valenzuela. The County of Orange is the only remaining Defendant. Defendant now moves for summary judgment on Plaintiffs' remaining eleven claims, which are as follows: (1) Section 1983/Fourteenth Amendment, (2) Section 1983/violations of Stewart, (3) Section 1983/violations of Stewart and California law, (4) Section 1983/equal protection, (5) California Civil Code section 52.1, (6) California Constitution, (7) ADA, (8) mandatory duties under Title 15, (9) California Civil Code section 54.1, (10) mandatory duties under the California Constitution, and (11) injunctive and declaratory relief.

II. DISCUSSION

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

A. Mootness

Defendant argues the case is moot because, with the exception of Plaintiff Conn, Plaintiffs no longer seek damages (Ct.'s Scheduling Order & Order for Consolidation & Review Mar. 11, 2004 at 2); instead, they seek injunctive and declaratory relief already in effect under Stewart. Under Cornblum v. Board of Supervisors, 110 Cal. App. 3d 976, 981-82 (Ct. App. 1980), Defendant argues this case is almost entirely moot.

Plaintiffs assert no case, including Cornblum, holds a preexisting injunction moots a later request for injunctive relief; in any event, Plaintiffs argue they seek to modify and expand Stewart. Plaintiffs

also contend Defendant's conduct fits within the "capable of repetition yet evading review" exception to mootness. Last, assuming injunctive relief is moot, Plaintiffs argue declaratory relief is not.

1. Cornblum

Cornblum is on point and persuasive. In Cornblum, taxpayers brought an action to enjoin "cruel and inhuman conditions" in a county jail. Id. at 978. Earlier, detainees of the county jail had filed a class action, alleging violation of their constitutional rights. Id. at 981. Pending appeal in the Cornblum case, a judgment was entered in the class action to compel the county to fix the conditions the taxpayers sought to enjoin in the Cornblum case. Id. at 981-82. In light of this development, the court concluded, "To authorize a taxpayer's suit by these plaintiffs when another suit . . . has in fact ripened into judgment . . . is to invite a duplicative, unnecessary lawsuit. Later events have mooted plaintiffs' lawsuit." Id. at 982.

Given recent developments, the scope of this case has narrowed: Plaintiffs no longer seek damages; they seek only injunctive and declaratory relief, with one exception. The injunctive and declaratory relief Plaintiffs seek, however, is addressed by Stewart. Like Cornblum, where the preexisting injunction fixed the conditions the taxpayers' sought to fix, here Stewart provides the relief Plaintiffs seek.

2. Modification or Expansion of the Stewart Injunction

Plaintiffs argue the Stewart injunction does not provide the relief they seek, which is modification or expansion of the Stewart injunction. There are two problems with Plaintiffs' argument.

First, Defendant correctly contends the proper vehicle to modify or expand an injunction is not to file an entirely new lawsuit, but to

file an application in the underlying Stewart case. See, e.g, Sys. Fed'n No. 91 v. Wright, 364 U.S. 642, 647-48 (1961); Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1298 (11th Cir. 2002); A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1098-99 (9th Cir. 2002).

Second, the Fifth Amended Complaint does not mention equitable relief beyond Stewart, and Plaintiffs presented this for the first time in their Opposition. In Armani v. Maxim Healthcare Services, Inc., 53 F. Supp. 2d 1120, 1132-33 (D. Colo. 1999), the first time plaintiff mentioned a particular "basis for relief was one year after filing his Complaint in his . . . Opposition to [defendant's] Motion for Summary Judgment." The court did "not allow him to amend his Complaint," id. at 1132, and did not consider the relief. Id. at 1133.

Here, Plaintiffs may not raise their request to modify or expand Stewart in their Pierce case opposition to Defendant's motion for summary judgment.

3. Capable of Repetition Yet Evading Review

An exception to mootness is for "wrongs capable of repetition yet evading review." To meet this exception, "(1) the duration of the challenged action [must be] too short to allow full litigation before it ceases, and (2) there [must be] a reasonable expectation that plaintiffs will be subjected to it again." Greenpeace Action v. Franklin, 14 F.3d 1324, 1329 (9th Cir. 1993).

As to the first element, the injury must be of a type inherently limited in duration and must be likely to always become moot before litigation is completed. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 178-80 (1968) (holding a ten-day restraining order on a protest demonstration was deemed capable of repetition and always likely to evade review because litigation never would be completed

before the ten days expired).

Plaintiffs argue, "For many of the class members, the duration component is satisfied, since they will be released or moved to another area of the jail, after being subjected to loss of rights guaranteed by Stewart, without allowing sufficient time for appellate or Supreme Court review." (Pls.' Opp'n at 26-27.) Relying on Gerstein v. Pugh, 420 U.S. 103, 111 n.11 (1975), Plaintiffs argue the second element is also met.

The duration component is met for "many" of the class members, indicating the injury is not "inherently limited," as required by Carroll. The presence of detainees who remain for an extended period of time likely ensures review cannot be evaded.

To meet the "capable of repetition" element, Plaintiffs must show there is a "reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149 (1975). Here, Plaintiffs cite only Gerstein, which notes, "Pretrial detention is by nature temporary . . . . [But the] individual could nonetheless suffer repeated deprivations . . . ." Id. This is not enough under Weinstein, especially because Plaintiffs are no longer incarcerated in the Orange County jail. The exception has not been met.

4. Whether Declaratory Relief is Separately Available

Plaintiffs argue their request for declaratory relief is not moot, even assuming their request for injunctive relief is. This argument, based on Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1174-75 (9th Cir. 2002), depends on whether the facts alleged show "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance

of a declaratory judgment." In other words, to resolve this argument, the Court must evaluate the merits of Plaintiffs' claims. Given the evidence and the Court's rulings, the Court concludes declaratory relief is still available. Tinoqui-Chalola Council v. United States Dep't of Energy, 232 F.3d 1300, 1303 (9th Cir. 2000) ("The party asserting mootness has the heavy burden of establishing that there is no effective relief remaining for a court to provide.").

Defendant's motion for summary judgment based on mootness is GRANTED, except declaratory relief is available to Plaintiffs.

B. First to Third Claims and Sixth and Tenth Claims

"[T]he California[1/] and federal[2/] due process clauses are co-extensive." Cornwell v. Cal. Bd. of Barbering & Cosmetology, 962 F. Supp. 1260, 1274 (S.D. Cal. 1997). The parties agree the same arguments apply under either clause. (Def.'s Mot. Summ. J. at 34; Pls.' Opp'n at 35; Def.'s Reply at 25.)

Given the Court's March 1, 2004 Order, Plaintiffs are limited to claiming violations of due process. Accordingly, in their sixth and tenth state claims, Plaintiffs contend Defendant violated Article I, section 7 of the California Constitution.

Defendant questions whether Plaintiffs can claim due process violations under the California Constitution. Plaintiffs argue Katzberg v. Regents of University of California, 29 Cal. 4th 300, 306-07 (2002), holds an "individual has standing directly to bring an action under the California Constitution," including Article I, section 7. (Pls.' Opp'n at 35.) Defendant, however, contends Katzberg simply does not stand for

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[1/] Plaintiffs' sixth and tenth claims.

[2/] Plaintiffs' first to third claims.

this proposition.

Plaintiffs' reading of Katzberg is correct. In Katzberg, the court stated, "It is clear [] the due process clause of article I, section 7(a) is self-executing . . . . [I]t also is clear . . . this section supports an action, brought by a private plaintiff against a proper defendant, for declaratory relief or for injunction." 29 Cal. 4th at 307. In short, Katzberg allows Plaintiffs to assert state due process violations.

Plaintiffs' state due process claims are based on whether there was a policy or custom of violating detainees' rights, or whether incidents were random or isolated. Under Section 1983, municipal liability can be imposed only for injuries inflicted pursuant to a widespread and longstanding official government policy or custom, Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 694 (1978), including a policy of being deliberately indifferent to the rights of individuals. City of Canton v. Harris, 489 U.S. 378, 389 (1989).

The policy or custom need not be a rule promulgated by a legislative body; a decision by a government agency's authorized decisionmaker may qualify as an official policy. Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (plurality opinion). As for custom, "proof of random acts or isolated events are insufficient to establish custom." Thompson v. City of L.A., 885 F.2d 1439, 1444 (9th Cir. 1989).

1. Dayroom Policy

Plaintiffs contend there is evidence of an unconstitutional policy of denying detainees in administrative segregation the minimum two hours of dayroom every day, as required by Stewart. Plaintiffs argue the jail's written policy provides only two hours every other day to

detainees in Module J. (Pls.' Evidence Vol. 3 Ex. 9.)

On behalf of Defendant, Richard Himmel declares administrative-segregation detainees are "rarely housed in Module J, and make up only approximately 0.014% of the inmates housed in Module J." (Himmel Decl. ¶ 7.) When they are housed in Module J, "they are provided with dayroom access in compliance with the written policies applicable to Administrative Segregation inmates . . . ." (Himmel Decl. ¶ 7.)

The parties' evidence raises a triable issue. Plaintiffs identify a written policy inconsistent with the Stewart injunction, while Defendant represents the written policy is "trumped" by different written policies applicable to administrative-segregation detainees. Defendant points to no evidence showing its policies "trump" Plaintiffs'.

Defendant notes this issue was previously raised in Stewart and adjudicated in its favor; however, the issue was discussed in a contempt proceeding, and Plaintiffs had not supported their claim with admissible evidence, as they now do. A triable issue exists.

Viewing the evidence in the light most favorable to Plaintiffs, the Court DENIES Defendant's motion for summary judgment.

2. Custom

Plaintiffs contend Henry v. County of Shasta, 132 F.3d 512 (9th Cir. 1997), controls. In Henry, the Ninth Circuit held the testimony of three detainees, relying on similar violations by officers in their treatment after they were arrested, raised triable issues as to plaintiff's municipal liability claim. Id. at 518. Here, Plaintiffs argue they have provided ample evidence of custom, exceeding the evidence found adequate in Henry.

Defendant argues stating "a particular type of event occurred a

certain number of times over a period of time says little if anything about the existence of a custom." (Def.'s Reply at 7-8.) According to Defendant, context is key. For example, when Plaintiffs contend they were denied fifteen minutes to eat a meal, one must recognize the average daily population of the Orange County jail is 6,000 detainees; each detainee gets three meals a day, which amounts to 18,000 meals a day; over a one year period, the number of meals is 6,570,000; and because the class period dates back to October 2001, the number against which to compare any allegation of denial of fifteen minutes is 19,710,000.

a. Outdoor Exercise

Under Stewart, pretrial detainees in administrative segregation are entitled to "rooftop exercise and recreation at least twice each week for a total time of not less than two hours per week." 450 F. Supp. at 590-91.

Stewart is limited to administrative-segregation detainees, who are housed in Modules F-29 or F-30. (Himmel Decl. ¶ 11.) Plaintiff's reliance on Judd Stephen Gartenberg's and Plaintiff Ellerston's statements is misplaced, as Mr. Gartenberg does not refer to Modules F-29 or F-30 in his declaration (Gartenberg Decl. ¶¶ 1-18) and Plaintiff Ellerston was not classified as an administrative-segregation detainee.

Plaintiffs also offer statements by James Earl Weaver, who was placed in administrative segregation. When asked how often he got outdoor exercise, he answered, "Once to twice a week," and "An hour, two hours." (Weaver Dep. at 353.)[3/]

[3/]Plaintiff's proposed survey evidence is not probative at this summary judgment stage. It is not a summary of voluminous writings under Federal Rule of Evidence 1006 because

(continued...)

Defendant's expert, Peter Morrison, concluded 0.7 percent of administrative-segregation detainees were denied rooftop access without any explanation, and 1.2 percent were denied rooftop access with an "accompanying explanation." (Morrison Decl. ¶ 4.) To show a custom, Monell requires a "permanent and well-settled" practice. 436 U.S. at 691.

At the hearing on this motion, Plaintiff called the Court's attention to the statements of five other witnesses concerning outdoor exercise. Three of those witnesses are not helpful: there is no showing of being in administrative segregation by Mr. Hopper; Mr. Sherwin states in a single sentence he was denied two hours of weekly outdoor exercise, but no particulars of that denial (when?, how often?, etc.) are given; and Ms. Valenzuela only says, without details, that she was denied rooftop access, and no administrative segregation is shown. However, Mr. Rials says he was in administrative segregation, and was only allowed exercise access twice since July 2003, and then only for 45 minutes to an hour. Also, Mr. Valenzuela says between April 2002 and September 2003, while in administrative segregation, he was given less than 2 hours outdoor exercise for 30 to 50 weeks, and no exercise for 15 to 20 weeks.

On balance, there is a triable issue. Defendant's motion for

[3/](...continued)
admissibility of underlying materials is not shown. It is not state-of-mind evidence under Rule 803(3) because it purports to show facts, not someone's sense impressions. It does not meet the exceptionally-used residual exception of Rule 807 because, as administered, it is not inherently trustworthy. It is not offered as the basis for an expert's opinion, but as direct fact. Although parts of the survey evidence could be deemed to be declarations like those admissible on summary judgment motions, they have no probative value when the fixed list of usable trial witnesses does not include such witnesses.

summary judgment is DENIED on the outdoor exercise issue.

b. Dayroom Access

Stewart requires two hours per day of dayroom access for administrative-segregation detainees. 450 F. Supp. at 590-91. Again, Plaintiffs' reliance on Mr. Gartenberg's and Plaintiff Ellerston's testimony is misplaced because Mr. Gartenberg's declaration does not discuss dayroom access for administrative-segregation detainees, and Plaintiff Ellerston was not classified as an administrative-segregation detainee.

Plaintiffs, however, also offer the declaration of Plaintiff Valenzuela, who stated he was denied access to the dayroom "about 300 days" from April 2001 to November 2002. (Valenzuela Dep. at 88.) In 2002, excluding the times Plaintiff Valenzuela was denied access to the dayroom for disciplinary reasons, he was denied access about fifty to sixty times on an arbitrary basis. (Valenzuela Dep. at 116.) Plaintiff Valenzuela adds he observed other detainees denied dayroom access. (Valenzuela Dep. at 229.)

In viewing the evidence in the light most favorable to Plaintiffs, drawing all justifiable inferences in their favor, there is a triable issue. Plaintiffs' evidence shows Plaintiff Valenzuela was arbitrarily denied dayroom access for sixty days out of the year. The fact he observed others denied access suggests they were also arbitrarily excluded, and it might be inferred others he did not witness were denied.

While Mr. Weaver testified he was never denied two hours of dayroom access (McCown Decl. ¶ 8a & Exs. X, Y), at summary judgment, this implies his situation was unique and not indicative of the general practice of which Plaintiff Valenzuela testified.

Plaintiffs have shown enough evidence to raise a triable issue, and the Court DENIES Defendant's motion for summary judgment on the dayroom access issue.

c. Fifteen Minutes to Eat

Under Stewart, all pretrial detainees must have "not less than fifteen minutes at the meal table." 450 F. Supp. at 588.

Plaintiffs show the following evidence: Plaintiff Ellerston was given about eight minutes to eat on a daily basis for two or three months (Ellerston Dep. at 265-67, 281-84, 307-09); Plaintiff Pierce had less than ten minutes to eat three or four times per week (Pierce Dep. at 261-62, 268-69, 283, 296, 365, 384); and Mayling Kao reviewed five videotapes of chow-hall sessions, which revealed "90 percent of the time, detainees had less than fifteen minutes to eat their meals." (Kao Decl. ¶ 19.)

Defendant, however, disputes Ms. Kao's declaration, stating most of the sessions lasted fifteen minutes or longer. (Himmel Decl. ¶¶ 8-10.) A factual dispute on meal time exists. The Court DENIES Defendant's motion for summary judgment on the meal time issue.

d. Chapel and Visitation Rights

Under Stewart, the Orange County jail may not arbitrarily deprive detainees in administrative segregation of visitation, and is required to permit detainees to receive visitors at least twice a week. 450 F. Supp. at 590-91. Also, the Orange County jail must permit detainees in administrative segregation to attend "regularly scheduled religious services of their own selection once each week or, alternatively, to make individual visits to the chapel once each week for not more than twenty minutes." Id. at 591.

Plaintiffs contend there was a custom of denying visitation rights

to detainees. Plaintiff Valenzuela testified he was denied visits with his wife on at least ten occasions during the summer of 2002 and December 2002. (Valenzuela Dep. at 118-19, 121-23.)

Plaintiffs' evidence does not raise a triable issue on visitation. Plaintiff Valenzuela's testimony is the only admissible evidence provided in support of the existence of a custom denying visitation rights. Ten occasions of denied visitation in one year from only one detainee cannot, as a matter of law, constitute a "permanent and well-settled" custom. Monell, 436 U.S. at 691. On visitation, Defendant's motion is GRANTED.

As to chapel, Plaintiff Valenzuela has never been permitted to see a chaplain or attend chapel service (Valenzuela Dep. at 132-33, 135), and deputies told him administrative segregation detainees are not permitted to attend chapel. (Valenzuela Dep. at 133; see also Taylor Decl. ¶ 2-3 (stating that, during her incarceration since 2000 in administrative segregation, she has never been permitted to attend chapel)).[4/] Mr. Weaver, however, testified he received visits from a Catholic priest at his request. (Pls.' Evidence Vol. 2 at 467-68.)

Plaintiffs have raised a triable issue. At least two detainees testified they have never been permitted to attend chapel, and one was told administrative-segregation detainees cannot attend. Mr. Weaver does not state he attended chapel; he only received visits from a priest. These facts suggest the existence of a custom denying detainees the right to attend "regularly scheduled religious services of their own selection." Stewart, 450 F. Supp. at 591. On the chapel issue, the

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[4/] The Court does not consider Plaintiff Ellerston's testimony regarding access to a chaplain or chapel because she was not an administrative-segregation detainee.

Court DENIES Defendant's motion for summary judgment.

e. Adequate Seats in Holding Cells

Stewart requires a seat for all detainees in holding cells either going to or returning from court. Id. at 590-91.

Plaintiffs rely on testimony from Plaintiffs Ellerston and Valenzuela, as well as Dominic Bagarozzi, Keith Engel, James Shipp, and Guadelupe Valverde; however, all of this testimony concerns seating in holding cells during the booking process, not when detainees are going to or returning from court. Consequently, the Court does not consider this testimony.

Douglas Hopper's and Mahogany Ota's declarations are relevant. Mr. Hopper states that, as to "inmates on their way to and from court, I have personally seen inmates packed in the holding cells -- the inmates are forced to stand, lie and sit on the floors." (Hopper Decl. ¶ 7.) Ms. Ota adds, "when I am placed in a holding cell to await the bus to go to court or when I return from court and wait to be placed in a cell, I have had to either stand or sit on the floor. This has happened at least 50% (fifty) percent of the time." (Ota Decl. ¶ 5.)

This evidence raises a triable issue. Together, this evidence indicates multiple detainees have had to go without seating almost half the time they are going to or returning from court, which may violate Stewart and may suggest the existence of a general practice by Defendant.

Here, the Court DENIES Defendant's motion for summary judgment on the seating issue.

C. Fourth Claim

Plaintiffs bring an equal protection claim. "Although disabled people do not constitute a suspect class, the Equal Protection Clause

prohibits irrational and invidious discrimination against them." Dare v. California, 191 F.3d 1167, 1174 (9th Cir. 1999).

Plaintiffs contend Defendant's treatment of detainees is irrational and invidious. In making this contention in the context of equal protection, Plaintiffs compare disabled detainees to nondisabled detainees. Plaintiffs assert, for example, "the jail has a practice of . . . denying detainees in wheelchairs the same access to the dayroom as [detainees] with no disabilities [and] refuse[s] to give disabled detainees the same access to the roof as non-disabled detainees." (Pls.' Opp'n at 30.)

Plaintiffs' contention misses the mark. To establish a claim under the Equal Protection Clause, Plaintiffs must show Defendant did not treat them "in the same manner as other similarly situated prisoners." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). A disabled and nondisabled detainee are not similarly situated for equal-protection purposes. Crayton v. Terhune, No. C 98-4386, 2002 WL 31093590, at *2 (N.D. Cal. Sept. 17, 2002).

In Crayton, the court stated, "Crayton fails to show that defendant . . . treated him any differently than other disabled inmates. Accordingly, on these facts, no reasonable jury could conclude that defendant . . . treated Crayton differently than 'similarly situated' inmates." Id. at *3. Because Plaintiffs compare treatment of disabled detainees to nondisabled detainees, this Court GRANTS Defendant's motion for summary judgment on Plaintiffs' equal protection.

D. Fifth Claim

Plaintiffs argue they were deprived of "the exercise or enjoyment of . . . rights secured by the Constitution" by "threats, intimidation or coercion" in violation of California Civil Code section 52.1.

The parties appear to agree there is no evidence of threats, intimidation, or coercion. The issue instead centers on whether evidence of threats, intimidation, or coercion is required under the applicable law.

Under section 52.1, if a person "interferes by threats, intimidation, or coercion" with the exercise or enjoyment of rights secured by law, a civil action may be brought.

Interpreting section 52.1, the California Supreme Court in Venegas v. County of Los Angeles, 32 Cal. 4th 820 (2004), stated, "Civil Code section 52.1 does not extend to all ordinary tort actions because its provisions are limited to threats, intimidation, or coercion that interfere with a constitutional or statutory right." Id. at 843. Later, the court held, "All we decide here is that, in pursuing relief for [] constitutional violations under section 52.1, plaintiffs need not allege that defendants acted with discriminatory animus or intent, so long as those acts were accompanied by the requisite threats, intimidation, or coercion." Id.

Here, there is no evidence of threats, intimidation, or coercion; therefore, as a matter of law, the Court GRANTS Defendant's motion for summary judgment on Plaintiffs' fifth claim.

E. Seventh and Ninth Claims

The ADA and California Civil Code section 54.1 are coextensive. Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131, 1134 n.4 (9th Cir. 2001). Plaintiff Conn argues he was denied full and equal access to various facilities, programs, and services while housed in Sheltered Living at the Orange County jail, in violation of federal and state law.

Here, triable issues of fact exist on whether Defendant complied with federal and state law. After touring the Orange County jail, Peter

Robertson concluded a "significant number of existing conditions observed throughout the facility [] limit access to and participation in OC Jail's programs, services and activities by detainees with disabilities." (Robertson Decl. ¶ 10; see also Keeny Decl. ¶¶ 6-13 (reporting numerous incidents where Plaintiff Conn was denied access to facilities).) Ron Bihner, however, disagrees. In his declaration, he asserts the jail's facilities, programs, and services are accessible to the disabled. (Bihner Decl. ¶¶ 6-13.)

The conflicting declarations are not reconcilable. Triable issues exist. The Court DENIES Defendant's motion for summary judgment on Plaintiffs' seventh and ninth claims.

The parties have not sufficiently joined issue in their briefing for the Court to rule whether Conn can also assert claims on behalf of other detainees. See, Laxalt v. McClatchey, 809 F.2d 885, 891 (D.C. Cir. 1987); Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1238 (9th Cir. 2001). The parties may take this up by a motion specifically briefing this issue if they wish.

F. Eighth Claim

Plaintiffs contend they are entitled to relief under California Government Code section 815.6 because Defendant violated mandatory duties imposed by Title 15 of the California Code of Regulations. Section 815.6 states, "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable . . . unless . . . it exercised reasonable diligence to discharge the duty." The parties first dispute whether Title 15 imposes mandatory duties. The Court finds it does.

A regulation, like Title 15, may impose mandatory duties. Cal. Gov't Code §§ 810.6, 815.6 (West 2003). Moreover, Title 15 applies to jails. See Cal. Code Regs. tit. 15, § 1010 (2003).

Title 15 repeats the word "shall" several times. See, e.g., id. § 1053 ("Administrative segregation shall consist of separate and secure housing but shall not involve any other deprivation of privileges than is necessary to obtain the objective of protecting the inmates and staff."). While the word "shall" "does not necessarily create a mandatory duty," County of L.A. v. Superior Court, 102 Cal. App. 4th 627, 639 (Ct. App. 2002), it is "explicit and forceful language" akin to mandatory language. See Quackenbush v. Superior Court, 57 Cal. App. 4th 660, 663 (Ct. App. 1997). And here, Title 15 itself states the word "shall" is deemed "mandatory." Cal. Code Regs. tit. 15, § 2000(a)(5).

Next, the parties dispute whether Title 15 is mandatory for purposes of section 815.6. Defendant argues the word "shall" is not dispositive for purposes of section 815.6. See Sutherland v. City of Forth Bragg, 86 Cal. App. 4th 13, 20 (Ct. App. 2000). In Sutherland, the court stated, "even where language in the predicate enactment appears mandatory, *if significant discretion is required to carry out* any duty imposed, that duty is not mandatory within the meaning of section 815.6." Id.

Defendant contends jail officials have significant discretion in carrying out the day-to-day operations of a county jail, and Title 15 recognized this: "Nothing contained herein shall be construed to deny the power of any facility administrator to temporarily suspend any standard or requirement herein prescribed . . . ." Cal. Code Regs. tit. 15, § 1012.

Title 15 sets the floor below which jails cannot fall. Cal. Code Regs. tit. 15, § 1005 (stating counties cannot adopt standards for correctional facilities below the standards listed in Title 15). Therefore, jails officials have discretion either to enact stricter policies or temporarily suspend policies. Whether this constitutes "significant" discretion is a triable issue. The Court DENIES Defendant's motion for summary judgment on Plaintiffs' eighth claim.[5/]

G. Eleventh Claim

Plaintiffs appear to abandon their claim under California Code of Civil Procedure 526a. (Pls.' Opp'n at 35 ("Plaintiffs do not oppose dismissal of the taxpayer claim under C.C.P. § 526a.").) Having reviewed Defendant's argument, the Court GRANTS Defendant's motion for summary judgment on Plaintiffs' eleventh claim.

III. DISPOSITION

Defendant's motion for summary judgment is GRANTED IN PART. Defendant's motion for summary judgment based on mootness is GRANTED, except declaratory relief is available to Plaintiffs. Defendant's motion for summary judgment on Plaintiffs' first, second, third, sixth, and tenth claims is GRANTED IN PART. Defendant's motion for summary

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[5/] Assuming Title 15 imposes mandatory duties for purposes of section 815.6, Defendant contends it has exercised reasonable diligence to comply with Title 15. As evidence, Defendant refers to this Court's December 12, 2002 Order, in which the Court stated, "Defendants . . . produce substantial evidence that Defendants are attempting in good faith to comply with the Court's orders."

The Court's statement was based on evidence before it in 2002, and it cannot assume this evidence is the same today. (See Pls.' Opp'n at 34 n.25 (asserting Plaintiffs' showing at this stage is "far more extensive").) Based solely on the December 12, 2002 Order, the Court cannot find Defendant exercised reasonable diligence.

judgment on Plaintiffs' fourth and fifth claims is GRANTED. Defendant's motion for summary judgment on Plaintiffs' seventh, eighth, and ninth claims is DENIED.. Defendant's motion for summary judgment on Plaintiffs' eleventh claim is GRANTED.

DATED: November 2, 2004

GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE