UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FRED PIERCE, et al.; Plaintiffs, v. COUNTY OF ORANGE, et al.; Defendants.	CV 75-3075 ABC SACV 01-981 ABC (MLGx) ORDER RE: PRELIMINARY TRIAL ISSUES

The Court trial in this case ended on March 24, 2010, and the Court issued an Order outlining several issues it believed would be better resolved before the parties undertake post-trial merits briefing and closing arguments. (Docket No. 719.) Those issues are: (1) the scope of the issues remanded by the Ninth Circuit Court of Appeals; (2) what accessibility guidelines apply to the Orange County Jail facilities; (3) whether the Pretrial Conference Order includes Plaintiffs' claim of lack of notice and grievance procedure under the ADA; and (4) whether certain expert testimony must be stricken from the record.

The parties filed simultaneous briefs on April 15, 2010,

addressing these issues. In conjunction with their brief, Plaintiffs also submitted a request for judicial notice of, inter alia, budget documents from the County of Orange (the "County"). On April 22, the parties filed simultaneous responsive briefs and the County objected to and moved to strike the budget-related documents submitted by Plaintiffs. The Court finds oral argument on these specific issues unnecessary and declines to set a hearing on them. Fed. R. Civ. P. 78; Local Rule 7-15. The Court rules as follows.[1]

I. Objections to Testimony

Plaintiffs have objected to certain trial testimony of the County's expert, Michael Gibbons, and have objected to the entire direct testimony of the County's fact witness Ron Bihner.

A. Testimony of Michael Gibbens

Before trial, Plaintiffs moved in limine to preclude expert Michael Gibbens from offering legal opinions and from testifying to matters beyond the scope of his Rule 26 report. The Court denied the motion with respect to Gibbens offering legal opinions because, in the context of the Court trial, the Court could disregard any improper legal opinions offered and, in any case, Gibbens had to refer to and rely on the law to some extent in rendering his opinions. (Trial Tr. 9—10.) In contrast, the Court granted the motion to preclude any testimony from Gibbens that exceeded the matters disclosed in his Rule 26 reports and during his deposition. (Id. at 10.)

At trial, Michael Gibbens testified as an expert for the County.

[1]The Court has concurrently issued a Minute Order addressing the schedule for the limited additional trial testimony ordered herein and discussed infra, the closing arguments, and the briefing on the findings of fact and conclusions of law.

At one point, he opined regarding administrative procedures governing the adoption of regulations by a federal agency and whether specific guidelines for correctional facilities have or have not gone through that process. (Trial Tr. 1076:10—1077:7, 1077:9—19, 1080:23—1081:4.) Plaintiffs lodged a standing objection to this testimony as beyond the scope of his expertise and as improper legal opinion. (Id. at 1080.) Plaintiffs renew that objection that Gibbens was not qualified to testify to the Administrative Procedures Act, that he had no foundational knowledge of the subject, that this was an improper legal opinion, and his opinion was vague, conclusory, and incomprehensible. The County responds that the Court need not rule on Plaintiffs' objections because, as the Court previously ruled, it is capable of simply ignoring any testimony that amounts to improper legal opinions.

The Court agrees with the County that the prior ruling on the motion in limine did not compel sustaining Plaintiffs' objections to Gibbens's testimony as improper legal opinions. However, Gibbens was not established as an expert on the administrative procedures necessary for the Department of Justice, or any other entity, to adopt regulations. Thus, his testimony on this topic involved matters outside his qualifications as an expert. The Court SUSTAINS Plaintiffs' objections and, for the sake of maintaining a clear record, STRIKES from the record the testimony at pages 1076:10—1077:7, 1077:9—19, and 1080:23—1081:4 of the trial transcript.

Plaintiffs further object to testimony by Gibbens regarding the Ninth Circuit's interpretation of the law and the Department of Justice's interpretation of the ADA as improper legal opinion, irrelevant, confusing, and misleading. (Trial Tr. 1089:12—1093:1, 1107:2—1108:5, 1109:19—23, 1110:8—1111:2.) This testimony does

reflect legal opinion to some extent, but it falls squarely within the Court's ruling denying Plaintiffs' motion in limine. The Court is capable of considering this evidence with Plaintiffs' concerns in mind, so this objection is OVERRULED.

B. Testimony of Ron Bihner

Plaintiffs object to and move to strike the testimony given by Ron Bihner on examination by the County.[2] He was identified as a fact witness for the County. First, Plaintiffs object that he was not designated as an expert witness, and therefore cannot give an opinion on whether aspects of the facilities complied with applicable regulations (such as "ADAAG" or CalDAG") or how much modifications would cost. (Trial Tr. 942:4—7, 948:24—949:13, 951:7—16, 961:10—962:16.) Second, Plaintiffs object that portions of Bihner's trial testimony exceeded the testimony he gave at his deposition regarding modifications at the Women's Central Jail and the Musick facility and how much any modifications would cost. (Trial Tr. 969:24—971:20, 973:25—974:9 (Women's Central Jail); id. at 978:15—979:12 (Musick facility).)[3] Third, Plaintiffs move to strike all of Bihner's testimony on whether a particular building, facility,

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[2]The County claims that Plaintiffs waived any objection to his testimony by failing to raise objections during trial. But Plaintiffs strenuously objected to aspects of Bihner's testimony at trial as beyond his designation as a fact witness. (Trial Tr. 972—73.) And they cross-examined him extensively on his lack of knowledge and expertise. (Id. at 980—87.) Moreover, the Court encouraged the parties to brief these issues, rather than spend any significant time on them at trial. (Id. at 973.) Plaintiffs therefore have not waived their objections to this testimony.

[3]Although Plaintiffs expend significant effort demonstrating the scope of Bihner's deposition testimony, they only point to these specific portions of his trial testimony as exceeding the scope of his deposition testimony. Thus, the Court rules only on the portions identified by Plaintiffs.

or piece of equipment was accessible to individuals with disabilities because he was not qualified as an expert in that area.[4]

First, with regard to striking Bihner's testimony as to the application of regulations or that any particular building or area was accessible to disabled detainees, the Court generally agrees that Bihner was not qualified to offer legal opinions on those topics and those opinions were not within the scope of his designation as a witness. See Fed. R. Civ. P. 26(a)(1)(A)(i) (requiring the "subjects of the information" of any witness to be disclosed). Indeed, the County does not respond to this objection, but instead admits that "Mr. Bihner was simply not qualified to make blanket admissions that alleged barriers violated the ADA since these are legal conclusions beyond his level of competence and expertise." (County Opening Br. 3.)

However, the pages of the trial transcript Plaintiffs cite as the improper opinion testimony were not, in fact, improper. (Trial Tr. 948:24—949:13, 951:7—16, 961:10—962:16.) In these excerpts, Bihner testified only that Gibbens had told him that a grab bar installed in the Sheltered Living Dayroom toilet would make the toilet accessible (id. at 948:24—949:13), that he had followed the CalDAG guidelines in installing water fountains in the Sheltered Living Dayroom (id. at 951:7—16), and that the height of the phone in the Women's Central Jail infirmary was consistent with the CalDAG guidelines (id. at 961:10—962:16). None of this testimony set forth what he thought the ADA legally required; rather, Bihner was testifying that, in his

[4]Plaintiffs identify no specific portions of Bihner's trial testimony that fit into this category.

personal knowledge, certain aspects of facilities were consistent with what he had read in the CalDAG guidelines and with what Gibbens had told him. Therefore, the Court OVERRULES the objections to this testimony.

Second, Plaintiffs move to strike Bihner's testimony regarding costs of modifications to the rooftop restrooms at the Women's Central Jail and of any modifications to Musick facility as exceeding the scope of his deposition testimony. (Trial Tr. 969:24—971:20, 973:25—974:9, 978:15—979:12.) The County produced Bihner as the person most knowledgeable in response to several subjects designated by Plaintiffs, including costs of modifications. (Pl. Opening Br., Ex. 4 (Bihner Dep. Tr.) at Ex. 1, Nos. 15, 16, 20.) However, at the deposition the County's counsel immediately disclaimed that Bihner, "for the most part, will not be able to talk about the cost of modifications, cost analysis." (Pl. Opening Br., Ex. 4 (Bihner Dep. Tr.) at 12.) Indeed, when asked, Bihner was unable to testify to costs of most modifications. (See id. at 27, 56—60, 62—63, 70, 73—74, 78—86.) The Court generally agrees with Plaintiffs that any of Bihner's trial testimony regarding modification costs that exceeded his deposition testimony was inadmissible.[5]

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[5]The County explains that Bihner's deposition testimony did not include information on specific costs because the deposition preceded the two reports issued by Plaintiffs' expert, Logan Hopper. However, the County concedes that Hopper's reports also did not contain cost estimates, so the Court is baffled as to why Hopper's reports are relevant to this issue. In any case, the information contained in Hopper's report should have had no impact on how the County pursued the cost issue. As the Ninth Circuit explained, the County — not Plaintiffs — bear the burden to establish that alterations would result in "'undue financial or administrative burdens.'" Pierce v. County of Orange, 526 F.3d 1190, 1215 & n.26 (9th Cir. 2008). Thus, had the County wanted Bihner to testify at trial regarding costs of modifications, it should have prepared him to testify to those topics

Plaintiffs point to three portions of trial testimony that exceeded Bihner's deposition testimony on costs. (Trial Tr. 969:24—971:20, 973:25—974:9, 978:15—979:12.) In the first two portions, Bihner testified that altering the rooftop bathroom at the Women's Central Jail to make it accessible would cost more than a hundred thousand dollars and would not be feasible because of the major structural renovations it would require. (Trial Tr. 969:24—971:20, 973:25—974:9.) At his deposition, Bihner testified briefly that he did not believe that this bathroom area could be made accessible because of structural issues, but he admitted that he had not done an assessment on whether modifications would be feasible and he provided no testimony on what it would cost to make any alterations. (Pl. Opening Br., Ex. 4 (Bihner Dep. Tr.) at 82—83.) The Court SUSTAINS Plaintiffs' objection to these portions of Bihner's trial testimony and STRIKES the testimony at 969:24—971:20 and 973:25—974:9[6] from the record.

In the third portion of trial testimony challenged by Plaintiffs, Bihner testified that wheelchair-bound inmates would have difficulty navigating the elevation changes on the grounds of the Musick facility. (Trial Tr. 978:15—979:12.) Plaintiffs' counsel interposed an objection at trial (id. at 976, 977—78), but the Court ruled that Bihner could testify to this topic because his deposition testimony fairly encompassed the physical layout of the Musick facility. (Pl.

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at his deposition (as requested by Plaintiffs in the deposition notice), without regard to how Plaintiffs prepared their case.

[6]During this portion of the trial, the Court overruled Plaintiffs' objection to this testimony, but the Court did so to allow the testimony into the record before addressing the merits of the objection after trial. (Trial Tr. 973.)

Opening Br., Ex. 4 (Bihner Dep. Tr.) at 11.) The Court sees no reason to revisit this ruling and OVERRULES Plaintiffs' objection.

Finally, Plaintiffs interpose a blanket objection that all of Bihner's testimony must be stricken because he was unqualified to testify as an expert on whether a particular building, facility, or piece of equipment was accessible to individuals with disabilities. Bihner's testimony did not pertain exclusively to accessibility, yet Plaintiffs identify no particular trial testimony on these topics that must be stricken. The Court finds this objection insufficiently specific to support striking all of Bihner's testimony, so the objection is OVERRULED.

II. Scope of Issues on Remand

In its opinion in this case, the Ninth Circuit identified three issues with regard to Plaintiffs' ADA claim: (1) the existence of "physical barriers" in the areas where mobility- and dexterity-impaired detainees were housed at that time, Pierce, 526 F.3d at 1217—20; (2) the need to integrate mobility- and dexterity-impaired detainees because the County allegedly had a policy of "segregating disabled detainees, rather than allowing them to reside, recreate, and consume meals in integrated settings," id. at 1220; and (3) the need to provide access to programs, activities, and services for mobility- and dexterity-impaired inmates because "the County had not 'operate[d] each service, program, or activity so that the service, program, or activity, when viewed in its entirety, [was] readily accessible to and usable by individuals with disabilities,' as required by 28 C.F.R. § 35.150(a)," id. (brackets in original).

A. Physical Barriers

The scope of the issue regarding physical barriers is clear from

the Ninth Circuit's opinion. As the Ninth Circuit explained, at the time of the first trial:

> the County housed mobility- and dexterity-impaired pre-trial detainees in two of its five facilities — the Men's and Women's Central Jails. Male inmates with such disabilities were placed in one of three parts of Module O in the Men's Jail: Sheltered Living, Ward C, or Ward D. Female inmates with such disabilities were housed in either Sheltered Living in Module P of the Women's Jail or the infirmary.

Id. at 1217—18. The Court affirmed the district court's finding that structural barriers existed in these areas, but reversed the district court's conclusion that the County had remedied them. Id. at 1218—19. That issue was remanded so the Court could "conduct further fact-finding on the current state of physical barriers to adequate access to bathrooms, showers, exercise areas, day rooms, dining rooms, cells and all other areas to which disabled persons should have access and order remedial remedies as required." Id. at 1226. Thus, the issue to be decided now is whether barriers to access to facilities that currently house mobility- and dexterity impaired detainees exist and if so, what remedial measures are necessary to assure ADA compliance.[7]

B. Integration and Mainstreaming

In the prior appeal, Plaintiffs argued that the County had a policy of improperly "segregating disabled detainees, rather than allowing them to reside, recreate, and consume meals in integrated settings." Id. at 1220. The Ninth Circuit labeled this contention as

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[7]The Court does not interpret the phrase "all other areas to which disabled persons should have access" to include entire facilities where mobility- and dexterity-impaired detainees are not being housed. As is clear from the entire sentence, the Ninth Circuit was referring to areas within each facility housing disabled detainees, such as bathrooms, showers, dayrooms, etc., that disabled detainees should have access to, but do not.

"mainstreaming," and rejected it: "Sheriff's Department officials testified at some length regarding the security concerns related to housing mobility- and dexterity-impaired detainees with non-disabled detainees. The district court's finding that plaintiffs did not refute this evidence is not clearly erroneous." Id. The parties now disagree on the breadth of this ruling.

Plaintiffs argue that the ruling was narrow. First, they point to regulations implementing the ADA that require a public entity to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," see 28 C.F.R. § 35.130(d), also known as an "'integration mandate.'" Arc of Wash. State Inc. v. Braddock, 427 F.3d 615, 618 (9th Cir. 2005). The requirement "serves one of the principal purposes of Title II of the ADA: ending the isolation and segregation of disabled persons." Id. On that basis, Plaintiffs argue that, "while the Ninth Circuit declined to order that mobility and dexterity-impaired [detainees] be mainstreamed into every area of the Orange County jails where the general inmate population is housed, Defendants may not refuse to provide services to disabled people in an integrated environment at any time, even where reasonably feasible." (Pl. Opening Br. 2.)

In invoking the "integration mandate" here, Plaintiffs ignore the prison context of this case. The Ninth Circuit explained that the application of ADA standards in the realm of prison administration requires the Court to determine whether a regulation "is reasonably related to the prison's legitimate interests," and, to meet that burden under the ADA, "inmates must show that the challenged prison policy or regulation is unreasonable." Pierce, 526 F.3d at 1216–17.

Security of inmates and guards is one such interest. Id. at 1217. In affirming the district court's ruling that mainstreaming was not required, the Ninth Circuit accepted the County's proffered security interest in segregation as legitimate in the prison context and segregation as reasonable, which defeated Plaintiffs' request for integration. Id. at 1220.

Plaintiffs argue that the record on the issue of mainstreaming was spare, and thus, the Ninth Circuit could only have ruled on the mainstreaming issue with regard to the "chow hall," not throughout the facilities, and "dozens of factual issues with regards to the limited integration" were left undecided. (Pl. Opening Br. 6.)[8] But the Ninth Circuit's language was not so limited. For example, the court characterized Plaintiffs' claim as requesting that detainees should be allowed to "reside, recreate, and consume meals in integrated settings," but nevertheless credited Sheriff's Department officials' testimony regarding security concerns related to "housing mobility- and dexterity-impaired detainees with non-disabled detainees." Id. at 1220 (emphasis added). Indeed, the parties' appellate briefs did not limit to issue to the chow hall. (Pl. Opening Br., Exs. 2, 3.) The Court will not (and indeed, cannot) now pick through the appellate record to impose a limitation that would contradict the plain language of the Ninth Circuit's opinion.

Plaintiffs argue that, even if the Ninth Circuit's opinion is construed broadly, two issues touching on the issue of integrating

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[8]The Court admonishes Plaintiffs for their repeated veiled complaints regarding the short length of the first trial. (Pl. Opening Br. 4 n.5, 5.) The Ninth Circuit squarely rejected Plaintiffs' claim that three days was not enough time to present their case. See Pierce, 526 F.3d at 1200.

mobility- and dexterity-impaired detainees remain open: (1) that the County currently houses in Module O at Theo Lacy mobility- and dexterity-impaired detainees who must use canes, crutches, and walkers, but excludes detainees who must use wheelchairs; and (2) that the County could house low-security disabled detainees (such as individuals with a prosthetic or missing limb) with other low-security non-disabled detainees and inmates at Theo Lacy and Musick.

On the first issue, the Court agrees that the Ninth Circuit's mainstreaming decision does not prevent the Court from considering whether wheelchair-bound detainees could be housed with other disabled detainees and inmates in Module O at Theo Lacy. This is not a form of "mainstreaming" disabled detainees with non-disabled detainees and inmates, but is a remedy directed at including a subset of mobility- and dexterity-impaired detainees at a facility already housing similarly disabled detainees. Because disabled detainees already live in this facility, different security interests than those presented to the Ninth Circuit could be implicated, so the parties are not precluded from addressing that issue on the merits.

However, the Ninth Circuit's opinion precludes this Court from revisiting the second issue regarding low-security disabled and non-disabled detainees and inmates. Plaintiffs' argument is simply a dressed-down request for integration foreclosed by the Ninth Circuit's rejection of mainstreaming. Therefore, Plaintiffs are precluded from advancing this claim during post-trial briefing and argument.

C. Access to Programs, Activities, and Services

As with physical barriers, the scope of the issue regarding access to programs, activities, and services is also straightforward based on the Ninth Circuit's opinion. In the previous appeal,

Plaintiffs argued that "the County had not 'operate[d] each service, program, or activity so that the service, program, or activity, when viewed in its entirety, [was] readily accessible to and usable by individuals with disabilities,' as required by 28 C.F.R. § 35.150(a)." Pierce, 526 F.3d at 1220. The court rejected the district court's conclusion that disabled inmates had access to all programs, activities, and services, reasoning that disabled detainees were not housed at Theo Lacy and Musick, yet those facilities offered many programs, services, and activities that were not offered at the Central Jail Complex. Id. at 1221. While "[t]he ADA does not require perfect parity among programs offered by various facilities that are operated by the same umbrella institution, . . . an inmate cannot be categorically excluded from a beneficial prison program based on his or her disability alone." Id.

To remedy the violation, the court indicated that the County "would not have to make Musick and Theo Lacy physically or structurally ADA compliant," and it could consider "redistributing some programs available at those two facilities to make them available at the Central Jail so that when 'viewed in [their] entirety' the County's programs are 'readily accessible to and usable by individuals with disabilities.'" Id. (quoting 28 C.F.R. § 35.150(a)) (brackets in original). "But the County may not shunt the disabled into facilities where there is no possibility of access to those programs." Id. The issue was remanded so this Court could "conduct further fact finding as to the programs and activities disabled persons currently have access to and order such remedial measures as required to make the County's provision of programs and services, when viewed in their entirety, accessible to mobility- and dexterity-impaired inmates."

Id. at 1226.

The Court's task now is to resolve two issues: (1) whether, when viewing the programs, activities, and services offered by the County "in their entirety," mobility- and dexterity-impaired detainees are "categorically excluded" from programs, activities, and services offered to non-disabled detainees and inmates; and, if so, (2) what is the proper remedy. On the first issue, the Court will not engage the parties at this time in a discussion of whether or not Plaintiffs have proven their case. However, the parties should be aware of the breadth of the Court's inquiry. In discussing the scope of programs, activities, and services, the Ninth Circuit quoted the Supreme Court's explanation of the issue: "Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')." Pierce, 526 F.3d at 1221 (quoting Penn. Dept. of Corrections v. Yeskey, 524 U.S. 206, 210 (1998)). Moreover, the Ninth Circuit identified the types of programs, activities, and services offered at Theo Lacy and Musick, but not at the Men's and Women's Central Jails, such as the vocational opportunities of "agriculture, woodworking, and welding," opportunities to work on "off-site or community work projects," and recreational opportunities involving "a softball field, volleyball courts, pool tables, and other indoor and outdoor facilities." Id. at 1221. The parties should consider this broad definition of programs, activities, and services in presenting their findings of fact and conclusions of law and their closing arguments.

On the second issue of the proper remedy, Plaintiffs argue that,

if integration is unavailable, the only possible remedy is to bus mobility- and dexterity-impaired inmates to Theo Lacy and Musick. The Court will not rule on the issue at this time. While bussing may prove to be an appropriate remedy, the Court will not rule out other possible remedies, such as allowing the County to offer programs, activities, and services at the facilities where mobility- and dexterity-impaired detainees are currently housed. Indeed, the Ninth Circuit left open the possibility that the Court could order redistribution of services and programs, as well as "other appropriate remedies" in addressing any violations. Id. at 1222. Ruling on the proper remedy now is premature.

III. Applicable Accessibility Guidelines

The Court ordered the parties to brief what accessibility guidelines might apply to the Orange County Jails, such as ADAAG, UFAS, and CalDAG.

A. Application of ADAAG and UFAS Guidelines and the CalDAG Manual

The parties agree that Title II of the ADA applies to the Orange County Jail. Id. at 1214. The Attorney General has promulgated regulations implementing Title II, which are contained in Title 28, part 35. See 28 C.F.R. §§ 35.149—35.151. Section 35.150(a) applies to facilities existing before and unaltered after the effective date of the ADA on January 26, 1992. Section 35.150 requires a public entity to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." This section places boundaries on what the County must do to make existing facilities compliant, however: "(1) a public entity is not necessarily

required 'to make each of its existing facilities accessible to and usable by individuals with disabilities,'"; and "(2) a public entity is not required 'to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.'" Pierce, 526 F.3d at 1215 (citing § 35.150(a)(1), (a)(3)).[9] The Ninth Circuit explained that the County may make existing facilities "readily accessible" by the "'reassignment of services to accessible buildings'" or by the "'alteration of existing facilities and construction of new facilities.'" Id. (citing § 35.150(b)(1)).

For facilities built or structurally modified after the effective date of the ADA, § 35.151 applies. While § 35.150 embodies a "flexible concept" of compliance for existing facilities, § 35.151 imposes "substantially more stringent" requirements. Kinney v. Yerusalim, 9 F.3d 1067, 1071 (3d Cir. 1993). Under § 35.151, a public entity may comply with either the Uniform Federal Accessibility Standards ("UFAS"), 41 C.F.R. Pt. 101-19.6, App. A, or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG"), 28 C.F.R. Pt. 36, App. A. Pierce, 526 F.3d at 1216 (citing § 35.151(a), (c)).[10] Even though compliance with

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[9]Appendix A to Part 35 explains that "the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases" and "compliance with § 35.150(a) . . . would in most cases not result in undue financial and administrative burdens on a public entity." 28 C.F.R. part 35, App. A.

[10]Appendix A of Part 35 explains that the ADAAG guidelines were issued by the Architectural and Transportation Barriers Compliance Board to apply to private buildings under Title III of the ADA, but were adopted by the Department of Justice to apply to Title II. 28

either ADAAG or UFAS is considered satisfactory, the regulations allow for "[d]epartures from particular requirements of either standard by use of other methods . . . when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided." § 35.151(c).

Despite these regulatory directives under the ADA, Plaintiffs claim that any facility construction before 1992 must still comply with UFAS guidelines because the Rehabilitation Act calls for those guidelines to apply to any facility receiving federal funds.[11] See 29 C.F.R. part 35, App. A.

[11]As part of their post-trial briefing, Plaintiffs request the Court take judicial notice of ten budget-related documents that were not introduced at trial. (Request for Judicial Notice, Exs. 3–12.) In addition, Plaintiffs ask the Court to consider what appears to be Plaintiffs' summary of those documents. (Pl. Post-Trial Br., Ex. 5.) Plaintiffs offer these documents to support their position that the Orange County Jails receive federal funding, subjecting them to the Rehabilitation Act. The County objected to the documents on myriad grounds, including that they were undisclosed in the parties' Exhibit List, that they go beyond the scope of the trial and post-trial briefing, and that they lack foundation, authentication, and relevance, and constitute inadmissible hearsay.

Judicial notice of a fact is proper if the fact is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Plaintiffs are correct that the Court may generally take judicial notice of public records. See United States v. Ritchie, 342 F.3d 903, 908–09 (9th Cir. 2003). However, a party must authenticate documents to be judicially noticed. Madeja v. Olympic Packers, LLC, 310 F.3d 628, 639 (9th Cir. 2002).

The budget documents submitted as Exhibits 3–12 by Plaintiffs are judicially noticeable because they are not subject to reasonable dispute and are properly authenticated, having been obtained from the County's website. See Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 551–52 (D. Md. 2007). The Court rejects the County's objections of lack of foundation and hearsay because circumstances of the documents' preparation and the identity of the authors are well within

U.S.C. § 794(a) ("[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]"). As the County correctly points out, however, Plaintiffs have not pursued a Rehabilitation Act claim. See Pierce, 526 F.3d at 1214. Nevertheless, the Ninth Circuit noted that "'[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act.'" Pierce, 526 F.3d at 1216 n.27 (citation omitted). Thus, the issue is whether, absent a claim under the Rehabilitation Act, Plaintiffs may force the County to comply with UFAS for pre-1992 facilities because the Orange County Jail receives federal funding, even though § 35.150 does not call for any particular guidelines to apply to facilities existing before 1992.[12]

Based on the lack of reference in § 35.150 to any particular guideline and the fact that, in contrast to § 35.150, § 35.151 specifically invokes the more stringent ADAAG and UFAS standards, the Court finds that the County need not strictly comply with UFAS

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the County's own knowledge and the documents fall squarely within the public records hearsay exception in Rule 803(8). For similar reasons, the Court can identify no possible prejudice to the County in considering them.

The Court will not consider Plaintiffs' summary of those documents at Exhibit 5 of their brief, however. It is not a public record, but rather Plaintiffs' own summary and interpretation of the budget documents. Plaintiffs have offered no grounds upon which the summary is judicially noticeable or otherwise admissible and the County never had the opportunity to challenge its accuracy.

[12]The Court questions whether Plaintiffs even have standing to raise this argument, having brought no Rehabilitation Act claim, but the Court does not decide that issue.

guidelines to satisfy § 35.150. It would be both improper and unfair to allow Plaintiffs to impose the stricter requirements of the Rehabilitation Act on the County without pleading a claim under that Act.[13]

With that said, the Court may look to UFAS or ADAAG guidelines to decide whether barriers to access exist under that section. See Flynn v. Doyle, 672 F. Supp. 2d 858, 879–80 (E.D. Wis. 2009) (finding that, for facilities built before 1992 and subject only to § 35.150 standards, "evidence regarding the alleged failure to meet the UFAS/ADAAG standards could still be relevant in the context of a 'program accessibility' case. A program could be rendered inaccessible if it is held in an inaccessible facility."); Pascuiti v. N.Y. Yankees, 87 F. Supp. 2d 221, 226 (S.D.N.Y. 1999) ("[E]ven though only new construction and alterations must comply with the Standards, those Standards nevertheless provide valuable guidance for determining whether an existing facility contains architectural barriers.").[14]

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[13]Of course, the practical impact of this ruling is slight, since the Orange County Jail system receives federal funds and must therefore comply with the Rehabilitation Act. However, any review of the County's compliance with that Act's requirements must wait for the proper case asserting claims under that Act.

[14]The case law on this issue is not entirely consistent. Compare Lockyer v. County of Santa Cruz, No. C-05-04708 RMW, 2006 WL 3086706, at *4 (N.D. Cal. Oct. 30, 2006) (finding failure to comply with ADAAG guidelines for buildings used by county as polling places did not necessarily violate § 35.150) with Cooper v. Weltner, No. 97-3105-JTM, 1999 WL 1000503, at *6 (D. Kan. Oct. 27, 1999) (finding failure to comply with ADAAG guidelines in prison shower facility built before 1992 gave rise to violation of § 35.150) and Carter v. Wilkinson, No. 05-0765-A, 2007 WL 3003173, at *2, 4 (W.D. La. Oct. 12, 2007) (applying without explanation UFAS and ADAAG guidelines applicable to prison built before 1992). Given the clear distinction between § 35.150, which does not invoke any guidelines, and § 35.151, which incorporates both UFAS and ADAAG, the Court finds the discussions in Flynn and Pascuiti both persuasive and correct.

Therefore, Plaintiffs may rely on ADAAG and UFAS standards in presenting their accessibility claims for existing facilities under § 35.150 and for newly built or altered facilities under § 35.151.[15]

Also during trial, the County raised the specter that the Department of Justice — the agency tasked with adopting regulations under Title II of the ADA, see Pierce, 526 F.3d at 1215 n.25 — has not formally adopted the ADAAG and UFAS guidelines for prison facilities. However, the Ninth Circuit considered the standards in this case. See id. at 1216 (explaining that § 35.151 allows compliance with either ADAAG or UFAS); id. at 1219 (approving Plaintiffs' expert's testimony that he "drew upon the minimum standards set out in the UFAS or the ADAAG for proposed structural changes"). Moreover, the Department of Justice has indicated that ADAAG and UFAS can be applied to prisons under Title II. (See, e.g., Docket No. 706, Ex. 1 (ADA/Section 504 Design Guide: Accessible Cells in Correctional Facilities)[16]; Pl. Request for Judicial Notice, Ex. 1 (Department of Justice "Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement") at No. 22 (indicating that newly constructed prison must meet UFAS or ADAAG guidelines), Ex. 2 (Department of Justice Title II Technical Assistance Manual) at 6.330 No. 6 (addressing differences between UFAS and ADAAG guidelines for jails and prisons).[17]) Thus, the Court may consider the UFAS and ADAAG guidelines in this case.

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[15]The Court declines at this time to review the record and rule on which facilities at issue fall into which category. The parties may address those issues in their post-trial merits briefing.

[16]This document was admitted at trial as Exhibit 47. (Docket No. 714.)

[17]The Court GRANTS Plaintiffs' unopposed request for judicial notice of these two documents.

In contrast to either ADAAG or UFAS guidelines, the "California Disabled Accessibility Guidebook Interpretive Manual & Checklist" (referred to as "CalDAG") is not an official regulation, but an interpretive manual published and periodically updated by the County's expert, Michael Gibbens. To create the manual, Gibbens compiled state and federal guidelines, including ADAAG, UFAS, and Title 24 of the California Code of Regulations, and provided a guide on how all those standards interact and apply to certain facilities. The parties agree that CalDAG is not binding, but may be "useful" to the Court's decision.

Therefore, for purposes of the parties' post-trial merits briefing and arguments, the Court concludes that the parties may use ADAAG and UFAS as useful guides in determining whether barriers to access exist in facilities built before 1992 and unaltered after that date. See § 35.150. For facilities built or altered after 1992, § 35.151 requires the County to demonstrate compliance with either UFAS or ADAAG, or by alternative methods only when it is "clearly evident" that those methods provide equivalent access to the facilities. The parties may also refer to the CalDAG manual as a useful guide, but it is not binding.

C. ADA Requirements in the Prison Context

In considering any of the above guidelines in the prison context of this case, however, the Court must also apply the standard from Turner v. Safley, 482 U.S. 78, 89 (1987), that "a regulation that would impinge on inmates' constitutional rights is nevertheless valid if it reasonably related to the prison's legitimate interests." Pierce, 526 F.3d at 1216–17 (footnote omitted). The Ninth Circuit clearly set out the framework for the Court's inquiry:

> In ADA cases, the plaintiff bears the burden of establishing the elements of the prima facie case, including — if needed — "the existence of a reasonable accommodation" that would enable him to participate in the program, service, or activity at issue. The public entity may then rebut this by showing that the requested accommodation would require a fundamental alteration or would produce an undue burden. . . . [D]etermining whether a modification or accommodation is reasonable always requires a fact-specific, context-specific inquiry. This analysis permits a court to consider, with deference to the expert views of facility administrators, a detention or correctional facility's legitimate interests (namely, in "maintaining security and order" and "operating [an] institution in a manageable fashion,") when determining whether a given accommodation is reasonable.

Id. at 1217 (internal citations omitted; brackets in original). The Court will address this standard in any final decision, so the parties should address it in their post-trial merits briefing and arguments.

IV. Notice and Grievance Procedure

The Ninth Circuit also remanded the issue of whether Plaintiffs were given adequate notice of their rights under the ADA and an appropriate grievance procedure:

> Finally, the district court's Final Pierce Order did not address plaintiffs' claims that they were denied adequate notice of their rights under the ADA and an appropriate grievance procedure, as required by the regulations. See 28 C.F.R. §§ 35.106, 35.107. On remand, the district court also should make findings on these issues.

Pierce, 526 F.3d at 1223. The County argues that the Pretrial Conference Order did not encompass this issue, so Plaintiffs have abandoned it.

"A pretrial order . . . should be liberally construed to permit any issues at trial that are 'embraced within its language.'" Miller v. Safeco Title Ins. Co., 758 F.2d 364, 368 (9th Cir. 1985). Liberally interpreted, the Final Pretrial Conference Order encompassed

the notice issue. The Order provided that the issue remaining to be tried was "whether the County of Orange is denying individuals with disabilities participation in, or the benefits of, the services, programs, or activities of its jails as required by 42 U.S.C. § 12132 and related provisions of California law." (Docket No. 692 ¶ 8.) Section 12132 is the ADA's general discrimination prohibition, and the regulations promulgated at § 35.106 and § 35.107 contain specific requirements regarding notice and grievance procedures to enforce § 12132. Indeed, Plaintiffs understood the issue to be preserved because they addressed it in their Memorandum of Contentions of Fact and Law and in their Trial Brief. (Docket No. 686 ¶¶ 108–09; Docket No. 694 at 19.) The County's contrary understanding is not supported by the record.

However, the Court must ensure that the County had adequate notice of the issue and "a fair opportunity to present evidence refuting" it. DP Aviation v. Smiths Indus. Aerospace & Defense Sys. Ltd., 268 F.3d 829, 843 (9th Cir. 2001). Therefore, to ameliorate any prejudice to the County, the Court will reopen the trial proceedings to allow each side one hour to present evidence on this issue. The details of the further proceedings are set forth in a concurrently issued minute order.

IT IS SO ORDERED.

DATED: May 7, 2010

Audrey B. Collins

AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE