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United States District Court,
N.D. California.

Roxanne LOPEZ and Hugo Lopez, as guardians ad litem of L.L., et al., on behalf of themselves and all others similarly situated, Plaintiffs,
v.
The SAN FRANCISCO UNIFIED SCHOOL DISTRICT ("SFUSD"), Linda Davis, in her official capacity as Acting Superintendent, and the School Board, Defendants.

No. C 99–3260 SI. | April 20, 2004.

Attorneys and Law Firms

Guy Burton Wallace, Schneider Wallace Cottrell Brayton Konecky LLP, Jose R. Allen, Skadden Arps Slate Meagher & Flom, Lewis Loy Bossing, Jr., Sarah Colby, San Francisco, CA, for Plaintiffs.

James Moxon Emery, Kathryn Luhe, City Attorney's Office, San Francisco, CA, for Defendants.

ORDER

(i) GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT;

(ii) DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT;

(iii) GRANTING PLAINTIFFS' MOTION TO BIFURCATE; and

(iv) DENYING PLAINTIFFS' MOTION TO STRIKE THE DECLARATION OF LOGAN HOPPER

SUSAN ILLSTON, District Judge.

***1** On April 16, 2004, the Court heard argument on several motions: (i) plaintiffs' motion for partial summary judgment; (ii) defendants' motion for partial summary judgment; (iii) plaintiffs' motion for bifurcation; and (iv) plaintiffs' motion to strike the declaration of defendants' expert Logan Hopper. Having carefully considered the arguments of counsel and the papers submitted, the Court hereby GRANTS plaintiffs' motion for summary judgment, DENIES defendants' motion for summary judgment, GRANTS plaintiffs' motion for bifurcation, and DENIES plaintiffs' motion to strike.

BACKGROUND

This is a civil rights action brought on behalf of two classes of persons with mobility and/or vision disabilities. This action was first filed on July 6, 1999 and amended in December, 1999. The second amended complaint seeks "declaratory and injunctive relief ... against the defendants for severely limiting Plaintiffs' access to programs, facilities, services, activities and educational opportunities by knowingly refusing to eliminate architectural and programmatic barriers, resulting in emotional and physical distress to Plaintiffs and violating Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and its accompanying regulations; and 42 U.S.C. § 1983." Second Am. Compl. at 3:19–25.

On May 2, 2001 the Court certified two plaintiff classes pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, based on a stipulation by the parties. Those classes were defined as follows:

> (1) All persons disabled by mobility and/or visual impairments who have enrolled as students in the San Francisco Unified School District since July 6, 1996 and who have allegedly been denied their rights under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and 42 U.S.C. § 1983 to access to the programs, services, activities and/or facilities of the San Francisco Unified School District as a result of physical barriers.
>
> (2) All persons (other than students) disabled by mobility and/or visual impairments who have allegedly been denied their rights under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and 42 U.S.C. § 1983 to access to the programs, services, activities and/or facilities of the San Francisco Unified School

District as a result of physical barriers.

Order Re: Class Certification at 4.

Now, over four years after the first filing of plaintiffs' claims, the Court considers in turn plaintiffs' and defendants' motions for partial summary judgment, plaintiffs' motion for bifurcation, and plaintiffs' motion to strike the declaration of Logan Hopper.

DISCUSSION

1. Plaintiffs' motion for partial summary judgment on defendants' failure to comply with federal "new construction" regulations

Plaintiffs move for partial summary judgment on the grounds that the San Francisco Unified School District ("SFUSD") designed and constructed school buildings since January 26, 1992, in violation of Title II of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, the regulations implementing these federal anti-discrimination statutes, and the accessibility design standards incorporated by reference in these regulations. The schools at issue here and their respective construction dates are: Argonne Child Development Center (1995); Las Americas Child Development Center (1995); Jean Parker Elementary School ("Jean Parker") (1996)[1]; Argonne Elementary School (1997); George Moscone Elementary School (1997); Gloria R. Davis Middle School ("Davis") (1997)[2]; Rooftop Alternative Middle School (1997); Tenderloin Elementary School (1998); and John O'Connell High School (1999). Decl. of Lewis Bossing in Supp. of Pls.' Mot. for Partial Summ. J. ("Bossing Decl."), Exs. C–M. Plaintiffs seek an order determining that the nine SFUSD school facilities identified were designed and constructed in violation of the accessibility design standards incorporated by reference into the ADA and Section 504 implementing regulations.[3]

[1] Defendants argue that Parker is incorrectly listed because its design plans were completed prior to January 26, 1992. However, the operative date for purposes of this motion and the governing ADA regulations is the date of construction. In the "Ten Year Facilities Master Plan for San Francisco Unified School District," Parker's construction date is listed as 1996. Decl. of Lewis Bossing, Ex. C.

[2] Defendants also contend that Davis is incorrectly listed because it was initially constructed in 1976. However, in 1997, the SFUSD renovated the main building and constructed a new wing. As discussed in greater detail below, the relevant regulations also cover new "alterations" to schools. Furthermore, in the "Ten Year Facilities Master Plan for San Francisco Unified School District," the construction date for Davis Middle School is listed as both 1976 and 1997. *Id.*

[3] In their moving papers, plaintiffs also sought an order enjoining SFUSD from designing and constructing school facilities in the future in violation of these accessibility standards. At oral argument, however, plaintiffs withdrew that request at this time.

A. Legal standard

***2** Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need only point out to the Court that there is an absence of evidence to support the non-moving party's case. *See id.* at 325.

The burden then shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324 (quoting Fed.R.Civ.P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence ... will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In deciding a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate

inferences from the facts are jury functions, not those of a judge [when she] is ruling on a motion for summary judgment." *Id.*

B. SFUSD must strictly comply with the federal "new construction" design accessibility standards in constructing its school buildings

"All facilities designed, constructed, or altered by, on behalf of, or for the use of a public entity must be readily accessible and usable by individuals with disabilities, if the construction or alteration is begun after January 26, 1992." ADA Title II Technical Assistance Manual at § II–6.1000, Bossing Decl., Ex. A. "Readily accessible and usable" mean that "the facility must be designed, constructed, or altered in strict compliance with a design standard." *Id.* The regulation gives a choice of two standards that may be used: (i) the Uniform Federal Accessibility Standards (UFAS) or (ii) the Americans with Disabilities Act Accessibility Guidelines (ADAAG).

Plaintiffs may sue to enforce the new construction or alteration regulations. *See Chaffin v. Kansas State Fair Board,* 348 F.3d 850, 857–859 (10th Cir.2003). Further, this Court need not find that all of plaintiffs' factual allegations are uncontroverted to find defendants liable for violations of the ADAAG standards.[4] *See United States v. AMC Entm't, Inc.,* 245 F.Supp.2d 1094, 1100 (C.D.Cal.2003) (granting partial summary judgment where "hundreds of ADAAG violations" were established and defendant's evidence "at best, creates a triable issue of fact as to only a small subset of these violations"). Using data gathered by both plaintiffs and defendants[5], plaintiffs identify several areas in which the SFUSD's failure to comply with applicable "new construction" standards created safety hazards for persons with disabilities at school buildings. These violations included, *inter alia,* non-compliant off-street parking spaces; the failure to provide compliant passenger loading zones at the schools; lack of, or noncompliant, curb ramps between passenger loading zones and school entrances; noncompliant gratings in the path of travel to school entrances; noncompliant slopes and cross-slopes in the path of travel to school entrances; hazardous changes in level at school entrance thresholds; improper door width, door opening force, and door hardware; internal and external ramps that are too steep; internal and external paths of travel that are too narrow; objects protruding dangerously into paths of travel; failure to provide compliant handrails at ramps and stairs; failure to provide contrast striping on stair risers; lack of or noncompliant elevators; toilet stalls that are too small or single-toilet rooms without adequate adjacent floor space; toilet seats that are too high or too low; lack of or noncompliant toilet grab bars; exposed pipes underneath restroom lavatories; improper reach ranges for restroom features like toilet paper, soap, and paper towel dispensers; lack of or noncompliant exterior and interior signage; noncompliant drinking fountains; noncompliant workstations in computer or science labs; and failure to provide wheelchair accessible seating in assembly areas.[6]

4 In1997, SFUSD retained Beverly Prior Architects (BPA) and Disability Access Consultants, Inc. (DAC) to prepare ADA self-evaluation and transition plans. Bossing Decl., Exs. Z (Grier Dep. Transcript), AA (Thrope Dep. Transcript), BB (Prior Dep. Transcript). The DAC and BPA inspectors analyzed compliance with ADAAG, and not UFAS, because their contract with SFUSD did not call for a UFAS assessment, and because they believed that ADAAG compliance generally provides for greater accessibility than does UFAS. *Id.* at Exs. AA, Z. At that time, inspectors identified "nearly 50,000 recommendations for modifications." *Id.* at Ex. AA at 238:16–239:9.

5 SFUSD was required to have completed a self-evaluation plan by January 26, 1993, to identify, among other things, steps to be taken to achieve compliance with Title II. Bossing Decl., Ex. A, at § II.–8.2000. If structural changes to facilities were deemed necessary, a government entity was to develop a transition plan setting forth the steps needed to complete such changes. *Id.* Under Court order, in 2001 and 2002 SFUSD developed, as part of its Facilities Master Plan, ADA self-evaluation and transition plans. *See* Order Re: Facilities Master Plan, Bossing Decl., Exs. V–X. SFUSD retained Logan Hopper Associates to prepare the plans, which the San Francisco Board of Education, the body that determines all SFUSD policies and procedures, did not adopt until June 25, 2002. *See id.,* Ex. M (Irons Dep. Transcript) at 80:12–13. Hopper evaluated certain SFUSD schools to assess physical accessibility. *Id.,* Ex. Y (Ilyin Dep. Transcript) at 85. Hopper relied largely on findings of access violations made by earlier accessibility consultants, discussed *supra,* n. 3. Plaintiffs' access experts, including Peter Margen and Gary Waters, surveyed almost 50 SFUSD school facilities.

6 Exhibit A of the Declaration of Lisa Sandberg in Support of Plaintiffs' Motion for Partial Summary Judgment is a chart that lists all of the findings of noncompliance with the ADAAG. While developing the chart, the following documents were reviewed: SFUSD "ADA Facility Evaluations" for all nine schools dated March 25, 2002; SFUSD "Facility Action Reports" for all nine schools produced to plaintiffs on February 10, 2004; plaintiffs' expert Peter Margen's

report of his survey of John O'Connell High School on June 5, 2003; and, plaintiffs' expert Gary Waters' report of his survey of Argonne Elementary School on September 23, 2003. After reviewing defendants' moving papers and supporting documents, plaintiffs attached to their Reply a revised copy of the chart that is responsive to defendants' objections. *See* Reply Decl. of Lisa Sandberg, Ex. A

***3** Defendants oppose plaintiffs' motion, arguing that the listing of a particular building element in the SFUSD's site surveys does not establish a "violation" of the ADAAG. To the contrary, defendants argue, the surveys find "barriers and issues." They contend that "many of these barriers and issues clearly are not violations of any ADAAG provisions. For others, it cannot be determined from the site surveys whether there is a violation or not." Defs.' Opp'n to Pls.' Mot. for Partial Summ. J. at 3:19–22.[7]

[7] Despite this earlier posture, at oral argument defendants conceded, without hesitation, to the existence of ADAAG violations at SFUSD newly constructed schools.

Defendants rely primarily on the declaration of their expert Logan Hopper, "who was involved in the process of developing the [SFUSD's] Transition Plan." *Id.* at 3–4. Hopper insists that "the surveys themselves do not attempt to make ... a determination [on what items contained in the survey data specifically constitute a 'violation']." Decl. of Logan Hopper at ¶ 4. Defendants address issues relating specifically to the following: stair issues where there is an elevator, unnecessary signage, child dimensions, door opening pressures, and passenger loading zones and curb cuts in the public streets. While identifying some items that are not ADAAG violations and others that are not clearly identified as such, defendants and their expert Logan fail to demonstrate that there are no violations of the ADAAG; instead, there appear to be numerous and significant violations at SFUSD's newly constructed or altered schools. As plaintiffs point out, defendants have made no evidentiary responses to 369 of plaintiffs' allegations of noncompliance with the ADA, Section 504 and the ADAAG. *See* Reply Decl. of Lisa Sandberg in Supp. of Pls.' Mot. for Partial Summ. J., Ex. A. In fact, Hopper's declaration is most helpful in proving that the presence of ADAAG violations within new buildings is not unusual. If anything, defendants' entire presentation, on balance, proves that noncompliance is commonplace. This admission does not comfort the Court. The fact that defendants' expert can testify to the frequency of noncompliance does not exculpate the SFUSD, nor does it persuade the Court that the SFUSD fully approaches its accessibility mandates with the requisite seriousness and diligence. Certainly, this evidence does not persuade the Court to deny summary judgment. The fact remains that there are substantial incidences of noncompliance, which this Court finds, and both parties agree, violate the ADAAG.

Accordingly, the Court has no trouble concluding that the SFUSD has violated numerous sections of the ADAAG. The Court hereby GRANTS plaintiffs' motion for partial summary judgment.

2. Defendants' motion for summary judgment

Defendants move the Court to grant partial summary judgment (i) limiting plaintiffs' ADA and § 504 claims to their contention that physical, architectural barriers render the District's programs, services and activities inaccessible to them and (ii) dismissing plaintiffs' third cause of action based on 42 U.S.C. § 1983. Defendants bring this motion on the grounds that (i) plaintiffs must exhaust their administrative remedies with respect to all injuries that can be addressed to any degree through the Individuals with Disabilities Education Act ("IDEA"); (ii) the District's elevator maintenance and the District's emergency evacuation plans for disabled students are adequate as a matter of law; and (iii) the individual defendants are not subject to suit under § 1983. Defs.' Mot. for Summ. J. at 1:5–9. In their Reply brief, defendants concede that for the purposes of summary adjudication, plaintiffs' opposition has raised issues of fact regarding whether or not the SFUSD's elevator maintenance complies with the ADA. In addition, in their opposition, plaintiffs reassert that they are suing the superintendent and board members in their official capacities for prospective injunctive relief. Defendants, in their reply, agree that the § 1983 claim may proceed as it is limited to prospective injunctive relief. Defendants' arguments regarding administrative remedies with respect to services available through each students' Individualized Education Programs (IEPs) and the SFUSD's evacuation plans for disabled students is left for consideration by the Court.

***4** Consistent with the Court's earlier findings, the Court agrees that "the substantive legal rights to physical access that Plaintiffs seek to vindicate are guaranteed by the ADA and Section 504 and their accompanying regulations, not the IDEA." *See* Order Den. Defs.' Mot. to Decertify the Class. Administrative exhaustion under the IDEA is not required in an action based on a systemic

denial of access, like the case at hand. *See Hoeft v. Tucson United School Dist.,* 967 F.2d 1298, 1303–1304 (9th Cir.1992) (where a systemic policy is challenged, IDEA exhaustion is generally not required). Further, the IDEA in no way provides relief for the adult class of persons with mobility and/or vision disabilities that has been certified by this Court.

With respect to emergency evacuation plans, defendants contend that the SFUSD has "carefully and thoughtfully" developed an individual evacuation plan for each disabled student. Defs.' Mot. for Partial Summ. J. at 9:5–6. Defendants further state that the current evacuation plans for class representatives L.L. and K.K. demonstrate the plans' adequacy. However, not only is plaintiffs' argument for systemic relief relevant here, there are triable issues of material fact regarding the plans' adequacy. Class representative L.L., for example, has not been provided with a written evacuation plan for any school that he has attended other than James Denman Middle School. Pls.' Opp'n to Defs. Mot. for Partial Summ. J. at 5:10–26. Further, when the school performed a drill of the plan it was, according to plaintiffs, "a fiasco." *Id., see also* Decl. of Hugo Lopez in Supp. of Pls.' Opp'n to Defs.' Mot. for Partial Summ. J. at ¶ 4. Due to the inadequacy of the emergency evacuation plans in addressing system wide as well as individual needs, the Court again refuses to limit relief to the IDEA.

Defendants' motion for partial summary judgment is, therefore, DENIED.

3. Plaintiffs' motion for bifurcation

Plaintiffs seek an order of bifurcation of issues at trial, requiring trial of this action in two stages. The first stage would determine liability for the two classes, and the second, if plaintiffs prevail in stage one, would determine the scope of injunctive and declaratory relief necessary to remediate the violations of plaintiffs' civil rights.

Under Federal Rule of Civil Procedure Rule 42(b) "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, or third-party claim, or of any separate issues or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." The Court finds bifurcation appropriate here and adopts the two phase trial procedure proposed by plaintiffs:

(i) Phase One

1. Whether defendants have violated Section 504 of the Rehabilitation Act of 1973 and its accompanying regulations;

• The nature and the scope of defendants' violation of Section 504 of the Rehabilitation Act of 1973 and its accompanying regulations from the effective date through the present;

***5** 2. Whether defendants have violated Title II of the Americans with Disabilities Act of 1990 and its accompanying regulations;

• The nature and scope of defendants' violations of Title II of the Americans with Disabilities Act of 1990 and its accompanying regulations from the effective date through the present;

(ii) Phase Two (if needed)

1. What scope of injunctive and declaratory relief is necessary to remediate the violations of plaintiffs' civil rights;

2. What short term and long term remedial actions defendants would be required to undertake to remedy the violations; and

3. What timeline should the Court establish for the implementation of any necessary remedial actions.

4. Plaintiffs' motion to strike the declaration of Logan Hopper

Defendant SFUSD submitted a declaration from Logan Hopper, as its Americans with Disabilities Act expert. Plaintiffs move the Court to strike the Hopper declaration submitted with defendants' opposition to plaintiffs' motion for partial summary judgment. Specifically, plaintiffs argue that (i) Hopper's opinions regarding "typical" construction discrepancies do not meet the expert testimony requirements of Federal Rules of Evidence Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d 469 (1993) (district court must determine whether evidence in expert testimony "both rests on a reliable foundation and is relevant to the task at hand"); (ii) Hopper's declaration testimony directly contradicts his deposition testimony and suggests that the district violated the Court's order in preparing a transition plan; (iii) Hopper's attacks on plaintiffs' experts are not supported by his own measurements, data or methodology; and (iv) Hopper's assertions regarding the cause of the barriers at the new construction sites lack foundation and his interpretation of the law regarding such barriers is incorrect.

SFUSD brought Mr. Hopper specifically to proffer testimony on whether it is common to find conditions or elements in new construction that are not in full compliance with ADAAG or California Title 24 standards and "the related issue of whether the new construction at issue in Plaintiffs' partial summary judgment motion is typical in this regard." Defs.' Opp'n to Pls.' Mot. to Strike Decl. at 3:14–19. After considering Hopper's qualifications and the content of his declaration and deposition testimony, the Court DENIES plaintiffs' motion to strike and allows the inclusion of such testimony. Though considered in its analysis of plaintiffs partial summary judgment motion, the Court finds that Hopper's declaration does not create triable issues of fact precluding summary judgment *See* discussion *supra,* Part I.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS plaintiffs' motion for partial summary judgment [docket # 400], DENIES defendants' motion for partial summary judgment [docket # 428], GRANTS plaintiffs' motion for bifurcation [docket # 412], and DENIES plaintiffs' motion to strike the declaration of Logan Hopper [docket # 452].

***6 IT IS SO ORDERED.**