UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 16-6796-MWF (KSx) **Date: June 14, 2017**
Title: Charles Anthony Guerra, et al. v. West Los Angeles College, et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER RE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [46]; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [53]

Before the Court are two motions. Plaintiffs filed a Motion for Partial Summary Judgment as to Liability on April 17, 2017. ("Plaintiffs' Motion") (Docket No. 46). Defendants filed an Opposition and Plaintiffs filed a Reply. (Docket Nos. 60, 80).

Defendants filed a Motion for Summary Judgment as to Entire Complaint on April 17, 2017. ("Defendants' Motion") (Docket No. 53). Plaintiffs filed an Opposition and Defendants filed a Reply. (Docket Nos. 66, 73).

The Motions are in the nature of dueling summary judgment motions. Plaintiffs seek a judgment that Defendants are liable on each of Plaintiffs' claims for relief. Plaintiffs' Motion addresses liability only, and they do not request any specific remedy at this time. Defendants seek summary judgment in their favor on all of Plaintiffs' claims.

The Court held a hearing on June 1, 2017. For the reasons stated below, both Motions are **DENIED**. Because no party has demonstrated entitlement to judgment as a matter of law, denial of both motions is the appropriate course of action.

As to Plaintiffs' Motion, there remain genuine disputes of material fact on the ADA claim as to whether Plaintiffs were denied meaningful access, the reasonableness

of Plaintiffs' proposed accommodation, and as to whether the accommodation would present an undue burden to the Defendants. On the state law claims, Plaintiffs' have not conclusively established Defendants' liability.

As to Defendants' Motion, there remain genuine disputes of material fact on the ADA claim as to whether Plaintiffs were denied meaningful access, the reasonableness of Plaintiffs' proposed accommodation, and as to whether the accommodation would present an undue burden to the Defendants. In addition, Defendants are incorrect that the Unruh Act cannot apply to them as a matter of law.

I. BACKGROUND

The Court discussed the background to the case in its previous Order denying Plaintiff's motion for a preliminary injunction. (Docket No. 24).

Defendant West Los Angeles College ("WLAC") is a community college in Culver City, California, and is part of the Los Angeles Community College District, another Defendant. (Plaintiffs' Statement of Uncontroverted Facts ("PSUF"), Docket No. 57, ¶ 4). The WLAC campus is located on a hillside, with elevation changes between parking lots, campus entrances, classrooms, and other facilities. (*Id.* ¶¶ 13–16). Plaintiffs assert that certain points on campus are virtually inaccessible due to the elevation changes and distance between classrooms.

Until February 2016, WLAC offered a type of shuttle service that allowed students to request pick up and drop off at specific locations. (*Id.* ¶¶ 43–65). The service used "trams" that fit around five individuals, and provided a "door to door" service from campus parking lots and entrances. (*Id.*). In February 2016, this service ended. (*Id.*). In its place, WLAC offered rides to disabled students on golf carts. Some Plaintiffs found these golf carts inadequate for their needs. (*Id.* ¶ 70). In March 2016, WLAC ended this golf cart service after finding it was not ADA compliant.

The parties dispute the precise nature of the shuttle service and its replacement.

Plaintiffs are three students with difficulty accessing certain areas of the campus due to physical ailments. Charles Guerra is an Army veteran with a severe knee injury and a spinal cord injury that limits the use of his left leg. (*Id.* ¶¶ 81–110). He has difficulty walking on slopes, stairs, or uneven terrain. (*Id.*). Plaintiff Guerra has attended WLAC for years using the shuttle service previously offered. (*Id.*).

Plaintiff Chrystal, using one name, has attended WLAC since 2013. She has disabilities which affect her ability to move freely around the campus on foot, as she must keep an oxygen tank with her at all times, attached to a wheeled cart. (*Id.* ¶¶ 111–135). She previously used the campus shuttle service. (*Id.*).

Plaintiff Karlton Bontrager has attended WLAC since 2014. He has a traumatic brain injury that limits his balance and mobility. (*Id.* ¶¶ 136–158). He previously used the campus shuttle service. (*Id.*).

All three plaintiffs state that the discontinuation of the campus shuttle service has hampered their ability to get to class and receive the education they desire at WLAC. (*Id.*).

Plaintiffs' Motion asks that this Court rule that Defendants are liable under the Americans with Disabilities Act ("ADA"), as well as California law. Defendants' Motions seeks summary judgment in their favor on all of Plaintiffs' claims.

II. LEGAL STANDARD

"In deciding motions under Federal Rule of Civil Procedure 56, the Court applies *Anderson*, *Celotex*, and their Ninth Circuit progeny. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact. Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of

evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1259 n.2 (9th Cir. 2016) (citing *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010)).

"When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 987 (9th Cir. 2006) (quoting *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)). Once the moving party comes forward with sufficient evidence, "the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense." *C.A.R. Transp. Brokerage Co.*, 213 F.3d at 480 (quoting *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991)). "A motion for summary judgment may not be defeated, however, by evidence that is 'merely colorable' or 'is not significantly probative.'" *Anderson*, 477 U.S. at 249–50.

The Court has a duty to evaluate the evidence independently when it decides a dispositive pre-trial motion. *Credit Managers Ass'n of S. California v. Kennesaw Life & Acc. Ins. Co.*, 25 F.3d 743, 749 (9th Cir. 1994). The Court must grant summary judgment if it ultimately determines that no rational or reasonable jury might return a verdict in the nonmoving party's favor based on all the evidence. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

III. ANALYSIS

A. Section 504 and Title II of the ADA

Section 504 of the Rehabilitation Act provides, in relevant part: "No 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. .

. ." 29 U.S.C. § 794(a). Similarly, Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

To establish a prima facie Section 504 claim, Plaintiffs must establish that: (1) they are individuals with a disability; (2) they are otherwise qualified to receive the benefit; (3) they were "denied the benefits of the program solely by reason of" their disability; and (4) "the program receives federal financial assistance." *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001), *as amended on denial of reh'g* (Oct. 11, 2001) (citing *Weinreich v. Los Angeles County Metropolitan Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997)). Similarly, to prove a violation of Title II of the ADA, Plaintiffs must show: (1) they are qualified individuals with a disability; (2) they were "either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or [were] otherwise discriminated against by the public entity"; and (3) "such exclusion, denial of benefits, or discrimination was by reason of" their disability. *Weinreich*, 114 F.3d at 978 (emphasis removed).

For purposes of the ADA, "[t]he term 'qualified individual with a disability' means an individual with a disability who, ***with or without reasonable modifications*** to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131 (emphasis added). In the "Findings" section of the ADA, Congress observed that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices." 42 U.S.C. § 12101 (a)(5). The Department of Justice's ADA implementing regulations specify that a public entity must "make ***reasonable modifications*** in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications

would fundamentally alter the nature of the services, program, or activity." 28 C.F.R. § 35.130(b)(7) (emphasis added); *see also Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1046 (9th Cir. 1999).

Similarly, in the "public preschool elementary, secondary, or adult educational services" context, the Department of Education's implementing regulations for Section 504 define a "qualified handicapped person" as "a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act." 34 C.F.R. § 104.3(l)(2). "[T]he focus of the prohibition in § 504 is 'whether disabled persons were denied meaningful access to state-provided services.'" *Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008) (quoting *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996)) (internal quotation marks omitted).

In this vein, "although § 504 does not require 'substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals,' it, like the ADA, does require ***reasonable*** modifications necessary to correct for instances in which qualified disabled people are prevented from enjoying 'meaningful access to a benefit because of their disability.'" *Id*. (emphasis in original) (quoting *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410 (1979); *Alexander v. Choate*, 469 U.S. 287, 301 (1985)) (internal quotation marks omitted). In fact, the Ninth Circuit has noted that "[p]laintiffs may establish that an organization violated § 504 by showing that the public entity discriminated against, excluded, or denied the benefits of a public program to a qualified person with a disability," which "includes showing that the public entity denied the plaintiff a reasonable accommodation." *Mark H. v. Hamamoto*, 620 F.3d 1090, 1096 (9th Cir. 2010) (citing *Lemahieu*, 513 F.3d at 924-25).

The Ninth Circuit has recognized that, "[a]lthough Title II of the ADA uses the term 'reasonable modification' rather than 'reasonable accommodation,' these terms

do not differ in the standards they create." *Wong v. Regents of Univ. of California*, 192 F.3d 807, 816 n. 26 (9th Cir. 1999), *as amended* (Nov. 19, 1999).

"T]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act." *Zukle*, 166 F.3d at 1045 n.11; 42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights [applicable to ADA claims]."). Consequently, "courts have applied the same analysis to claims brought under both statutes." *Zukle*, 166 F.3d at 1045 n.11; *see also Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002).

The Ninth Circuit has previously evaluated the reasonableness of particular proposed modifications. For example, in *Crowder*, the Ninth Circuit held in an ADA action that a quarantine requirement affecting dogs (including guide dogs) was a policy, practice or procedure which discriminated against visually-impaired individuals; they were denied meaningful access to state services, programs and activities by reason of their disability in violation of the ADA, and a genuine issue of material fact existed as to whether the plaintiffs' proposed modifications to this quarantine amounted to "'reasonable modifications' which should be implemented, or 'fundamental[ ] alter[ations],' which the state may reject". 81 F.3d at 1485 (alterations in original)).

The Ninth Circuit has also noted in cases involving, for example, claims brought regarding access to public education pursuant to Section 504, that "[r]easonableness 'depends on the individual circumstances of each case, and requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to [enjoy meaningful access to the program.]'" *Hamamoto*, 620 F.3d at 1098 (alteration in original) (quoting *Vinson*, 288 F.3d at 1154). "'[M]ere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement; [the Rehabilitation Act] create[s] a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary.'" *Id.* (alterations in original)

(quoting *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001), *as amended on denial of reh'g* (Oct. 11, 2001)).

1. Analysis

Defendants do not dispute that Plaintiffs are qualified, disabled individuals for purposes of their federal claims. Nor do Defendants dispute that they are covered public entities for purposes of the statutes.

Plaintiffs must show that Defendants violated § 504 "intentionally or with deliberate indifference." *Lemahieu*, 513 F.3d at 938. Plaintiffs must also "establish that an organization violated § 504 by showing that the public entity discriminated against, excluded, or denied the benefits of a public program to a qualified person with a disability. This includes showing that the public entity denied the plaintiff a reasonable accommodation." *Hamamoto*, 620 F.3d at 1096 (internal citation omitted). The Ninth Circuit has stated plainly that a "failure to provide reasonable accommodation can constitute discrimination under section 504 of the Rehabilitation Act." *Vinson*, 288 F.3d at 1154.

Defendants argue first that Plaintiffs have failed to meet their prima facie burden. Defendants reason that Plaintiffs must submit evidence regarding discrimination, and absent such evidence their claims must fail. Specifically, Defendants urge the Court to deny Plaintiffs' Motion because Plaintiffs focus on the lack of reasonable accommodation, and not intentional discrimination. But as the above quote makes clear, the failure to provide a reasonable accommodation can constitute discrimination for purposes of § 504. Plaintiffs must show only that Defendants acted with "deliberate indifference" to Plaintiffs' needs. "Thus, a public entity can be liable for damages under § 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons." *Lemahieu*, 513 F.3d at 938.

a. *Meaningful Access*

Having established the correct standard, the Court will analyze whether Plaintiffs have shown a lack of meaningful access to Defendants' facilities and benefits. Under the two federal laws at issue, "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the [entity] offers." *Alexander*, 469 U.S. at 301; *see also Baughman v. Walt Disney World Co*., 685 F.3d 1131, 1135 (9th Cir.2012) ("[The ADA] guarantees the disabled more than mere access to public facilities; it guarantees them 'full and equal enjoyment.'"). "To establish a violation under the ADA or Rehabilitation Act, it is Plaintiffs' burden to show that they have been denied meaningful access to benefits on account of their disability." *G. v. Hawaii*, 2010 WL 3489632, at *16 (D. Haw. Sept. 3, 2010). Therefore, if Plaintiffs cannot show a lack of meaningful access, their claims must fail.

Plaintiffs state that the relevant benefit here is the educational experience at WLAC, and the Court agrees. WLAC serves as Plaintiffs' local community college and offers specific fields of study desirable to Plaintiffs. (PSUF ¶ 7). Plaintiffs argue that the lack of any on-campus transportation system after February 2016 makes it nearly impossible for them to take advantage of WLAC's services in-person. "An individual is excluded from participation in or denied the benefits of a public program if 'a public entity's facilities are inaccessible to or unusable by individuals with disabilities.'" *Daubert v. Lindsay Unified School Dist*., 760 F.3d 982, 987 (9th Cir. 2014) (quoting 28 C.F.R. § 35.149). Regulations require that public entities provide services "in the most integrated setting appropriate." 28 C.F.R. § 35.150(b)(1). Thus, an in-person experience, as opposed to an off-campus one, would seem to be required if possible.

Plaintiffs have submitted extensive evidence that the three Plaintiffs face physical challenges in getting to their classes on campus. The campus is on a hill with steep grades. (PSUF ¶¶ 12–15). Parking areas are located far away and at different elevations that the classrooms. (*Id.* ¶ 20). Architectural barriers exist along various paths of travel at the college, and these paths contain at least some minor deviations from accessibility standards. (*Id.* ¶ 23).

In 2016, WLAC prepared an ADA Transition Plan that identified for removal certain barriers on campus. (*Id.* ¶ 24). The Plan noted that not all buildings on campus were connected in a way that would be accessible for disabled students. (*Id.* ¶¶ 26–27). These removals have not yet occurred, however, and may not occur for at least several years. (*Id.* ¶ 28, 42). The Plan identifies over forty paths of travel with accessibility issues. (*Id.* ¶ 38). WLAC's own facilities director and ADA coordinator seemed to indicate at his deposition that the campus would not be fully accessible until these accessibility issues were addressed. (*Id.* ¶ 41).

Plaintiffs identify three specific paths of travel that prevent them from meaningfully accessing the campus. A path near Lot A along E Street that separates the north parking lots and the campus buildings contains a significant incline, which WLAC's Transition Plan describes as "deficient." (*Id.* ¶¶ 31–35). Second, Plaintiffs point to the path between the south parking structure and the classroom buildings, which requires nearly 500 feet of travel. (*Id.* ¶¶ 18–20). Finally, Plaintiffs note the path along Albert Vera Drive, which is over 1300 feet in length, has significant elevation changes, and involves twenty accessibility issues identified in the Plan. (*Id.* ¶¶ 21–22). Plaintiffs have themselves tripped or fallen along these routes in the past. (*Id.* ¶¶ 37, 96, 105).

Therefore, Plaintiffs have put into evidence proof that (1) they cannot walk long distances, (2) access to campus classrooms required walking long distances with significant elevation changes, and (3) that access to classrooms was a benefit offered by Defendants.

Defendants argue in their Opposition that the campus is accessible, and that any issues faced by Plaintiff in navigating the campus are not barriers to access under the law. Defendants point to evidence showing that WLAC officials told Plaintiffs they could park their cars in the south parking structure and access all buildings on the upper plaza of the campus. (Defendants' Response to Plaintiffs' Statement of Uncontroverted Facts ("DRPS") (Docket No. 63) ¶¶ 69–77). After reaching the upper plaza Plaintiffs could then use an elevator to reach the middle plaza. (*Id.*). For Plaintiffs who ride the bus, the official told the individuals they could avoid the slope

on Albert Vera Drive by taking the city bus or Access LA paratransit (a van service) and being dropped off on campus. (*Id.*). From here, individuals could take the elevator previously discussed. (*Id.*). Plaintiffs' expert conceded that every path need not be accessible to achieve meaningful access. (*Id.* ¶ 82).

As to Plaintiffs' difficulty in navigating the campus, Defendants argue that the evidence discussed in the previous paragraph is enough to show that access is available. That some paths might present a challenge to Plaintiffs is not enough, they argue, to show a lack of meaningful access. Plaintiffs' expert conceded that no law or regulation states that distance, in and of itself, is a barrier to access. (*Id.* ¶ 84).

In further support of this argument Defendants cite two cases for the proposition that Plaintiffs' lack of access was due to their own choice not to use "mobility aids, such as wheelchairs." (Defendants' Opposition at 16). First, in *Redding v. Lane Cmty. College*, 2012 U.S. Dist. LEXIS 165397, at *5-6 (D. Or. Nov. 19, 2012), the court granted summary judgment in favor of the defendant in a case involving plaintiff tripping over a hole in the parking lot. Because it was a one-time incident, the court concluded plaintiff could not make out a claim under the ADA or § 504. Here, Plaintiffs do not put forth evidence of a one-time occurrence, but rather an entire campus filled with barriers to their access.

In the other case cited by Defendants, *Ms. K v. City of South Portland*, 407 F. Supp. 2d 290, 294 (D. Me. 2006), the district court granted summary judgment to defendant on plaintiff's ADA claim concerning a slippery sidewalk because the sidewalk was a hazard for "disabled and non-disabled alike." Here, Plaintiffs' evidence shows barriers, such as long distances and steep slopes, that would not prevent the non-disabled from accessing classes. WLAC is accessible by the non-disabled, and Defendants do not argue that it is not. Therefore, both of these cases do not really support Defendants' argument.

In their Reply, Plaintiffs argue that distance can be a barrier to access; Defendants' expert conceded that distance can be a barrier for people with mobility disabilities. (Docket No. 68-1 at 26:20–27:1). Plaintiffs also argue that the routes

identified by the school official as providing access to classrooms are insufficient. Plaintiffs state that the school official's opinion regarding these routes is not enough to show that they are actually accessible. The official in question, Shalamon Duke, is not an expert witness and testified that he had limited knowledge about the particulars of the routes he advocated that Plaintiffs use, specifically the distance Plaintiffs would have to travel if they used the south parking structure. (Deposition of Shalamon Duke (Docket No. 78-1) at 105:8–106:16).

Plaintiffs also point to specific evidence that shows the paths advocated by Duke are not accessible. For instance, Plaintiffs argue that Duke's routes do not actually provide access to five buildings where classrooms and services are provided. The Court notes that the evidence shows Duke *told* Plaintiffs that each of these buildings would be accessible using the routes he suggested. (DRPS ¶¶ 69–73).

Defendants have put forth evidence that their own expert, Jasper Kirsch, has stated that accessible paths do exist to each building on campus. (*Id.* ¶ 83).

Whether the routes actually provide meaningful access is, thus, a disputed issue of fact. Plaintiffs point to evidence showing that the distance from the south parking structure—where Duke told Plaintiffs to park—to the nearest classroom building is 270 feet. The other side of campus is almost 1000 feet away. (PSUF ¶ 18). Plaintiffs' expert identified several problems with the south parking structure itself, and with the routes leading from the south parking structure to the school. (Expert Report of Jeff Mastin (Docket No. 56-1) at 19–22). He specifically found that Duke's proposed route "does not effectively address the students' accessibility needs" based on his evaluation of the site. (*Id.* at 21). Plaintiffs' expert also noted issues with the path leading to and from the elevator referenced by Duke in his discussions with Plaintiffs. These issues included excessive slopes on the path to the elevator. (*Id.* at 169–172). Plaintiffs have noted that the path to the elevator is very difficult for them to access. (Declaration of Charles Anthony Guerra (Docket No. 68-3) at 42–43; Declaration of Chrystal (Docket No. 68-4) at 55–56). Again, however, Defendants' expert submitted a report stating that there exists at least one accessible path to each of the buildings identified by Plaintiffs. (DPRS ¶ 83).

Plaintiffs also take issue with Defendants' suggestion that Plaintiff Bontrager, who often uses the city bus to get to school, rely on third parties to give him rides to school and drop him off at his classrooms. Plaintiffs note the federal laws' "emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons." *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D.C. Cir. 2008); *see also Disabled in Action v. Board of Elections in the City of New York*, 752 F.3d 189, 200 (2d Cir. 2014) (finding that access "should not be contingent on the happenstance that others are available to help"). Bontrager has submitted evidence that the bus is not an adequate solution for him because it runs infrequently and does not access certain parts of the campus. (Declaration of Karlton Bontrager (Docket No. 68-5) ¶¶ 28–29). In addition, the Access LA paratransit service will not provide transportation between locations on campus, which Bontrager requires. (*Id.*). Therefore, Plaintiffs argue, it is insufficient to provide him with meaningful access to the campus.

Although this is a close issue, the Court concludes that there exists a disputed issue of material fact as to whether Plaintiffs were denied meaningful access to the campus. Although Duke is not an expert, Plaintiffs and Defendants have submitted conflicting expert evidence as to whether Duke's proposed paths were accessible.

Accordingly, the Court concludes that, on the evidence presented in these Motions, there is a disputed factual question as to whether Plaintiffs were denied meaningful access. Accordingly, denial of both Motions is appropriate.

b. *Reasonable Accommodation*

Plaintiffs bear the "initial burden of producing evidence" both that a reasonable accommodation is possible and that this accommodation "would enable [them]" to access Defendants' facilities and benefits. *Zukle*, 166 F.3d at 1047. Production of that evidence shifts the burden to Defendants to produce evidence that the accommodation is not reasonable or feasible, or that the "requested accommodation would require a fundamental alteration or would produce an undue burden." *Pierce v. Cnty of Orange*, 526 F.3d 1190, 1217 (9th Cir. 2008) (citing 28 C.F.R. § 35.150(a)(3); *see also*

Hamamoto, 620 F.3d at 1098. In the same vein, "[a]ccommodations need not be free of all possible cost to the" defendant, and "financial considerations do not *automatically* disqualify a requested accommodation." *See Giebeler v. M & B Assocs*., 343 F.3d 1143, 1152 (9th Cir. 2003) (emphasis in original). As another circuit put it, "'[I]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits,' and once this is done 'the risk of nonpersuasion falls on the defendant.'" *Disabled in Action v. Board of Elections in the City of New York*, 752 F.3d 189, 202 (2d Cir. 2014) (quoting *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003)).

"Because the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might" provide meaningful access. *Wong*, 192 F.3d at 818. Where reasonable alternative methods achieve compliance, structural changes to existing facilities need not be made. 28 C.F.R. § 35.150(b)(1).

Plaintiffs' proposed reasonable accommodation is some form of on-campus transportation services for disabled students. (Plaintiffs' Motion at 21). Plaintiffs emphasize that their Motion seeks only a finding of liability, not an order for any specific remedy. Accordingly, the Court notes that the following discussion will include an analysis of whether the proposed accommodation—an on-campus shuttle for the handicap—is reasonable. This is because under the federal statutes at issue, a plaintiff is required to put forward a proposed accommodation that is reasonable in order to establish liability. But even if the Court were to conclude that the proposed accommodation here is reasonable, that would not necessarily mandate that this precise accommodation be adopted by Defendants. After a finding of liability, the parties would then be required to put forth additional briefing as the appropriate remedy.

With that caveat, the Court will proceed to analyze the reasonableness of the proposed accommodation.

One form of accommodation contemplated by the regulations is the use of "accessible rolling stock." 28 C.F.R. § 35.150(b)(1). Plaintiffs point to WLAC's provision of such a service—the tram service that ended in February 2016—as evidence of the accommodation's feasibility. They also point to the use of a shuttle by two other community colleges in Los Angeles. (PSUF ¶¶ 174–175). In the case of Pierce College, located in Woodland Hills, the shuttle service was the result of a lawsuit much like Plaintiffs'. *See Huezo v. Los Angeles Cmty. Coll. Dist.*, 2008 WL 4184659, at *2 (C.D. Cal. Sept. 9, 2008) ("IT IS FURTHER ORDERED that the District establish a regularly scheduled wheelchair accessible shuttle that will take disabled students to all portions of the campus that do not have accessible paths of travel as identified by plaintiff's expert . . . ."). Defendants note that the defendants in the *Huezo* case did not put forth any expert evidence, however, and that this failure influenced the court's decision. *See Huezo v. Los Angeles Cmty. Coll. Dist.*, 672 F. Supp. 2d 1045, 1059 n.68 (C.D. Cal. 2008).

Plaintiff provides further evidence of the requested accommodation's feasibility and cost-effectiveness. Testimony established that the vehicles envisioned by Plaintiffs could be purchased for between $7,500 and $40,000. (PSUF ¶¶ 55, 189–190). In addition, the Los Angeles community college system's budget is apparently $2.7 billion, $43 million of which is "unrestricted monies." WLAC's budget is over $61 million. (PSUF ¶¶ 184–188). One reason given by a school official for not using the unrestricted monies for such an accommodation is that it was not deemed the highest campus priority. (*Id.* ¶ 188). In that same deposition, however, the official noted that the budget simply is not enough to "do all the things that [the school is] supposed to do." (Docket No. 58-8 at 190). Plaintiffs also put forth evidence that WLAC's budget already allocates for two full-time Paratransit Shuttle Drivers, and that training for new drivers would take only one to two hours. (PSUF ¶¶ 192, 194–195). Based on this evidence, Plaintiffs argue that the requested accommodation is reasonable, facially plausible, and economically feasible for Defendants.

In response, Defendants argue that the requested accommodation is unreasonable, and (even assuming it is reasonable) unfeasible based on the school's

budget. Defendants first note that no regulation *requires* the provision of point-to-point transport. The Court first notes that Plaintiffs have not asked that this Court mandate any specific form of relief at this juncture. Plaintiffs use the example of point-to-point cart transportation as merely one example of what might be a reasonable accommodation. Rather, as discussed above, Plaintiffs bear the burden of putting forth evidence that the requested accommodation is facially plausible, and if successful, Defendants bear the burden of showing that the accommodation is unfeasible or presents an undue burden. In addition, just because no other case has required the use of point-to-point transportation, assuming that is true, does not mean that such an accommodation might not be required here. "[P]ublic entities must ensure that all normal governmental functions are reasonably accessible to disabled persons, irrespective of whether the DOJ has adopted technical specifications for the particular types of facilities involved." *Fortyune v. City of Lomita*, 766 F.3d 1098, 1106 (9th Cir. 2014). And "determining whether a modification or accommodation is reasonable always requires a fact-specific, context-specific inquiry," and thus different scenarios will always present different potential requirements for public entities. *Pierce*, 526 F.3d at 1217. Thus, the lack of any regulations requiring precisely the accommodation requested is not evidence that the accommodation is unreasonable.

Defendants then argue that the requested accommodation is not reasonable based on the submitted evidence. They point to the evidence that the prior golf cart system was not ADA compliant and was stopped for liability reasons. (DRPS ¶¶ 16–19, 27, 30, 33, 36, 37, 41, 81). The drivers for these carts were not trained in the ADA. (*Id.* ¶¶ 27, 29). The paths followed by the carts were never analyzed to show whether they were ADA-compliant or not. (*Id.* ¶¶ 35–37). Similarly, the carts themselves were never analyzed to see whether they were ADA-compliant. (*Id.* ¶¶ 30, 33).

Defendants further argue that Plaintiffs' evidence regarding Defendants' budget lacks any context. The Court tends to agree. Plaintiffs' evidence is, at best, generalized. It provides a thirty-thousand foot view of the school system's operating budget, which does not give the Court enough information to conclude, as a matter of law, that the requested accommodation is reasonable or feasible for WLAC. As

Defendants' note, unrestricted monies still must be used to pay salaries and general operating expenses at the school. (DRPS ¶ 93). The funds must be used to keep the school functioning. (*Id.* ¶ 93). A school official testified that WLAC "didn't have enough money" to purchase ADA accessible carts. (*Id.* ¶ 95). She further testified that all money not allocated to payroll is used for basic supplies and emergency repairs. (*Id.* ¶ 96).

Finally, Defendants note that any point-to-point system will necessarily have to travel over pedestrian areas, which might potentially harm others on campus.

A review of the relevant framework is appropriate. Plaintiffs' burden is, as discussed, to show that the requested accommodation is both possible and "reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Giebeler*, 343 F.3d at 1157 (quoting *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002)). They may also satisfy their burden by showing that "the requested accommodation was reasonable on the particular facts of this case." *Id.* (citing *Barnett*, 535 U.S. at 405). Financial costs to Defendants are a part of this calculus, but do not "automatically" end the analysis. *Id.* (citing *Cripe v. City of San Jose*, 261 F.3d 877, 880 (noting that the ADA requires accommodation "even when doing so imposes some costs and burdens)); *see also Arneson v. Sullivan*, 946 F.2d 90, 92–93 (8th Cir. 1991) (ordering that a "reasonable amount" be expended to accommodate disabled employee).

If Plaintiffs fulfill this burden, Defendants must show that the accommodation is not reasonable or that it presents an undue hardship. The hardship to Defendants must be "undue" or unfeasible for them to satisfy their burden. "Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business." *Weaving v. City of Hillsboro*, 2012 WL 526425, at *17 (D. Or. Feb. 16, 2012). The bar for undue hardship is "high." *Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 823 F. Supp. 2d 995, 1014 (N.D. Cal. 2011). "An accommodation imposes an undue financial or administrative burden if its costs are clearly disproportionate to the benefits it will produce." *Kulin v. Deschutes Cty.*, 872 F. Supp. 2d 1093, 1100 (D. Or. 2012) (citing *Borkowski v. Valley Cent. Sch. Dist.*, 63

F.3d 131, 138 (2nd Cir. 1995)). Employers need not be driven to the "brink of insolvency" to show an undue burden, and "where the employer is a government entity, Congress could not have intended the only limit on the employer's duty to make reasonable accommodation to be the full extent of the tax base on which the government entity could draw." *Borkowski*, 63 F.3d at 138; *cf. Johnson v. Georgia Dep't of Human Res.*, 983 F. Supp. 1464, 1474 (N.D. Ga. 1996) (noting that public agencies need not deplete "tight budgetary resources" to hire second employee to perform essential functions of an ADA plaintiff's job). On the other hand, reasonable accommodations "can and often will involve some costs." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 334–35 (2d Cir. 1995); *see also United States v. California Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416–17 (9th Cir. 1994) (holding that obligation to provide reasonable accommodation "may require landlords to assume reasonable financial burdens in accommodating handicapped residents").

When a party has previously granted a specific accommodation that fact may "undermine its showing of hardship." *EEOC v. Placer ARC*, 114 F. Supp. 3d 1048, 1059 (E.D. Cal. 2015) (denying summary judgment on defendant's undue hardship defense). And because it is so "fact-intensive," the undue hardship analysis is "rarely suitable for resolution on summary judgment." *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1256–57 (9th Cir. 2001).

The Court notes that the case law is somewhat unclear as to whether Defendants must show that the requested accommodation is *both* (1) unreasonable *and* (2) presents an undue burden, or whether *either* is sufficient. The Ninth Circuit noted that the burden has been described in some cases as requiring the production of "rebuttal evidence that the requested accommodation was not reasonable." *Giebeler*, 353 F.3d at 1156 (citing *Vinson*, 288 F.3d at 1154). In other cases, the burden requires showing an undue hardship. *Id.* (citing *Burnett*, 535 U.S. at 401). In the *Giebeler* case itself the Ninth Circuit ultimately held that

> [Defendant], however, failed to meet its burden of demonstrating that in the particular circumstances of this case the requested accommodation would cause it to suffer undue

> hardship. [Defendant] *also* failed to carry its burden as articulated in *Vinson* of rebutting the showing made by [Plaintiff] that the requested accommodation was in fact reasonable.

Id. (emphasis added).

Some recent decisions have worded the burden in the disjunctive: "The burden then shifts to Alta–Dena to show Plaintiff's proposed accommodations were unreasonable, *or* would cause Alta–Dena to suffer 'undue hardship.'" *Godinez v. Alta-Dena Certified Dairy, LLC*, 2016 WL 6915509, at *6 (C.D. Cal. Jan. 29, 2016) (emphasis added); *see also Berquist v. Lynch*, 2015 WL 4876344, at *6 (E.D. Wash. Aug. 14, 2015) (describing the burden as "proving that a proposed accommodation is *either* unreasonable *or* that it would pose an undue hardship upon the employer) (emphasis added); *Shepard v. Shinseki*, 2014 WL 2960384, at *9 (D. Nev. June 30, 2014) ("Because the accommodation requested by the plaintiff was not in fact reasonable, an examination of the issue of 'undue hardship' is unnecessary. Under the Rehabilitation Act, an employer must make a *reasonable* accommodation absent undue hardship, but has no obligation whatsoever to make an *unreasonable* accommodation.") (emphasis in original); *cf. Borkowski*, 63 F.3d at 138 ("[I]n practice meeting the burden of nonpersuasion on the reasonableness of the accommodation and demonstrating that the accommodation imposes an undue hardship amount to the same thing.").

Other decisions seem to require that a defendant submit some evidence of undue hardship as part of the reasonableness analysis. *See Casteel v. Charter Commc'ns Inc.*, 2014 WL 5421258, at *6 (W.D. Wash. Oct. 23, 2014) ("Here, although Charter argues that Casteel's leave of absence is unreasonable as a matter of law, Charter does not address 'undue hardship.' . . . The determination of whether a proposed accommodation is reasonable under ADA, *including whether it imposes undue hardship* on an employer, requires fact-specific, individualized inquiry."); *Farran v. First Transit, Inc.*, 2014 WL 496927, at *7 (D. Nev. Feb. 6, 2014) ("To show that a particular request is unreasonable, the employer must demonstrate that the requested

relief would pose an undue hardship."); *Shim v. United Air Lines, Inc.*, 2012 WL 6742529, at *9 (D. Haw. Dec. 13, 2012) ("Here, although United argues that Plaintiff's LOA was unreasonable as a matter of law, it did not address 'undue hardship' at all. And, on the current evidentiary record, 'undue hardship' is a disputed question of fact.").

The Court notes that the ADA itself seems to require a finding of undue hardship. *See* 42 U.S.C. § 12112(b)(5)(A) (providing that the term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee, *unless such covered entity can demonstrate that the accommodation would impose an undue hardship* on the operation of the business of such covered identity") (emphasis added).

Accordingly, it is not clear whether the "reasonableness" Plaintiffs must show is measured on the same scale as the "unreasonableness" Defendants must show in response. The Court is attempting to harmonize the conflicting case law as best it can.

Reviewing the evidence, the Court concludes that a genuine issue of fact remains as to both (1) the reasonableness of the requested accommodation, and (2) whether the accommodation would be unduly burdensome for Defendants. As a result, the proper course of action is to deny both Motions.

On the issue of reasonableness, the Court notes that Plaintiffs' burden is not meant to be monumental. If Plaintiffs' requested accommodation is plaintiff's proposal is "either clearly ineffective or outlandishly costly," then summary judgment should be granted for Defendants. *Borkowski*, 63 F.3d at 139–40.

Plaintiffs' evidence shows that Defendants used to offer a similar service, which cuts in favor of the accommodation's reasonableness. But Defendants have put forth persuasive evidence that the previous accommodation was not ADA-compliant, and was shut down in an attempt to protect the safety and well-being of disabled students. Although the case is not identical, the Court notes that a district court found that a

condominium resident's request for golf cart transportation was unreasonable, partly because the proposed driver was "not medically trained to assist in the care or transportation of a disabled child. To continue this practice would unreasonably expose Defendants to liability and endanger the safety of Plaintiffs." *Weiss v. 2100 Condo. Ass'n, Inc.*, 941 F. Supp. 2d 1337, 1343 (S.D. Fla. 2013).

In addition, Defendants' evidence shows that any cart system would need to drive on pedestrian walkways, something Plaintiffs do not seem to have taken account of in suggesting the accommodation. While monetary concerns are surely part of the undue burden calculus, the Court sees no reason why they cannot also touch on the reasonableness inquiry. *See Willis v. Conopco, Inc.*, 108 F.3d 282, 286 (11th Cir. 1997) ("[T]he evidence probative of the issue of whether an accommodation for the employee is reasonable will often be similar (or identical) to the evidence probative of the issue of whether a resulting hardship for the employer is undue . . . ."). In that regard, the evidence shows, on the one hand, that WLAC's budget is quite large—in the tens of millions of dollars. On the other hand, Defendants' evidence shows that the school is, in reality, cash-strapped, such that it barely has enough funds to make ends meet. Defendants also point out that Plaintiffs' requested accommodation will likely cost more than merely the cost of the vehicles and training employees, because Plaintiffs' request involves around-the-clock point-to-point transportation.

The Court concludes that neither party has conclusively shown an entitlement to judgment as a matter of law. A reasonable jury could conclude that the requested accommodation is reasonable, or it could conclude that the accommodation is unreasonable. As a result, summary judgment is inappropriate here.

Similarly, for the reasons just discussed, the "undue burden" question presents a genuine issue of material fact. Plaintiffs' evidence gives the Court a broad view of the school's budget, while Defendants' evidence provides a more detailed look. The evidence shows that the school likely cannot afford to provide the accommodation without suspending payroll checks or foregoing emergency costs. Whether this is burden is "undue" is a genuine issue not resolvable on these Motions. As many courts have noted, this question is highly fact-specific and "rarely suitable" for resolution on

summary judgment. *Morton*, 272 F.3d at 1256–57. While in some cases there is obviously no undue burden, this case is not so simple. *Cf. Smith v. Powdrill*, 2013 WL 5786586, at *7 (C.D. Cal. Oct. 28, 2013) (denying defendant-landlord's summary judgment motion and granting plaintiff-tenant's summary judgment motion because the extra cleaning costs from allowing plaintiff's "10-pound terrier" service-dog to live in plaintiff's apartment were not an undue burden on defendant). Defendants' evidence is insufficient to show, as a matter of law, that the requested accommodation (assuming it is reasonable) would be an undue burden. But Plaintiffs' evidence is insufficient to show conclusively that it is *not* an undue burden. Accordingly, denial of both Motions is appropriate here. *See Borkowski*, 63 F.3d at 143 (denying summary judgment because "we are unable to conclude that unreasonableness or undue hardship has been established, and we certainly cannot say that either has been established as a matter of law").

Because no party's evidence is sufficient as a matter of law to show that judgment is warranted, and that no disputed facts exist, the Court **DENIES** both Motions as to Plaintiffs' claims under the ADA and the Rehabilitation Act.

B. Plaintiffs' State Law Claims

Plaintiffs also brought claims under California Government Code section 11135, the Unruh Civil Rights Act, and the California Disabled Persons Act. *See* Cal. Gov't Code § 11135(b); Cal. Civ. Code § 51(f); Cal. Civ. Code §§ 54, 54.1(a). Plaintiffs argue in their Motion that Defendants' liability under the ADA automatically confers liability under these state law claims. Because the Court has already concluded that Plaintiffs have not shown Defendants' liability under the ADA, the Court **DENIES** Plaintiffs' Motion as to its state law claims.

Defendants' Motion argues that they cannot be held liable under the Unruh Act because Defendants are not "business establishments" within the definition of that statute. (Defendants' Motion at 21–22). If this contention is true, then Plaintiffs' Unruh Act claims cannot succeed, no matter the outcome of their federal claims. Therefore, the Court must address Defendants' arguments.

The Unruh Act provides:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Cal. Civ. Code § 51(b). California cases have held that an organization is not excluded merely because it is nonprofit. *See Hart v. Cult Awareness Network*, 13 Cal. App. 4th 777, 786, 16 Cal. Rptr. 2d 705 (1993). In addition, the courts have found that business establishments include a nonprofit religious corporation that sold advertisements in a "Christian Yellow Pages, *see Pines v. Tomson*, 160 Cal. App. 3d 370, 383–386, 206 Cal. Rptr. 866 (1984); a homeowners' association that "perform[ed] all the customary business functions" of a landlord, *see O'Connor v. Village Green Owners Assn.*, 33 Cal. 3d 790, 795–796, 191 Cal. Rptr. 320 (1983); a club that offered its members substantial "commercial advantages and business benefits," *see Rotary Club of Duarte v. Board of Directors*, 178 Cal. App. 3d 1035, 1056, 224 Cal. Rptr. 213 (1986); and (4) a club that operated a recreation center open to all local male children, *see Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 78–84, 219 Cal. Rptr. 150 (1985).

In contrast to these decisions, in *Curran v. Mount Diablo Council of the Boy Scouts*, 17 Cal. 4th 670, 696, 72 Cal. Rptr. 2d 410 (1998), the California Supreme Court held that, "with regard to its membership decisions, [the Boy Scouts of America] is not a business establishment within the meaning of the Unruh Civil Rights Act" because "no prior decision has interpreted the 'business establishments' language of the Act so expansively as to include the membership decisions of a charitable, expressive, and social organization, like the Boy Scouts, whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members." And in *Doe v. California Lutheran High Sch. Ass'n*, 170 Cal. App. 4th 828,

838, 88 Cal. Rptr. 3d 475 (2009), the court held that a private religious school was not a business entity.

Several federal district courts have concluded that public schools constitute business establishments under the Unruh Act. *See, e.g.*, *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 952 (E.D. Cal. 1990) ("[I]t appears relatively certain that it is 'reasonably possible' that 'business establishments' as used in the statute includes public schools."); *see also Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1123 (E.D. Cal. 2011) (citing *Sullivan* and reaching the same conclusion); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1388 (N.D. Cal. 1997) (same). These interpretations are consistent with the California Supreme Court's command that the Unruh Act be read ""in the broadest sense reasonably possible." *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 78, 219 Cal.Rptr. 150 (1985).

Accordingly, the Court agrees with the analysis of the other federal courts to address this issue, and concludes that the public community college at issue here is a "business establishment" under the Unruh Act. *Cf. K.T. v. Pittsburg Unified Sch. Dist.*, 2016 WL 6599466, at *9 (N.D. Cal. Nov. 8, 2016) ("The Court will not take the bold step of suggesting that the ADA does not apply to public schools. Accordingly, it holds that public schools are 'business establishments' under the Unruh Act, which accords with the weight of lower court authority. (citing cases)").

Defendants' Motion is thus **DENIED**.

IV. CONCLUSION

For the foregoing reasons, both Motions are **DENIED**. Genuine issues of fact remain as to whether Plaintiffs were denied meaningful access, as to the reasonableness of Plaintiffs' requested accommodation, and as to whether the accommodation presents an undue burden for Defendants.

IT IS SO ORDERED.