

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:12-CV-22958-SEITZ/SIMONTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

**SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS and FLORIDA DEPARTMENT
OF CORRECTIONS,**

Defendants.

DEFENDANTS' SUPPLEMENTAL PROPOSED FINDINGS OF FACT

The defendants provide the following supplemental proposed findings of fact requested by the court at the hearing on preliminary injunction, June 5, 2013.

SUPPLEMENTAL PROPOSED FINDINGS OF FACT

The defendant has provided no-pork/meatless¹ and vegan diets as an accommodation to inmates' religious dietary practices at least since the 1990s. (Trans. vol. 1, pp. 27-28.) About 2003-2004, the Florida Department of Corrections (DOC) began discussions about providing kosher meals to inmates who required such a diet due to their religion. (Trans. vol. 1, p. 29.)

As a result of these discussions, DOC established a kosher diet program in 2004 known as the Jewish Dietary Accommodation Program, or JDAP. (Trans. vol. 1, p. 29; Jt. Exh.² 2, p.

¹ This no-pork/meatless meal is known as the "alternate entree."

² This is the report of the JDAP study group. Both the government and the defendant offered this exhibit separately. The government's exhibit was labeled Exhibit 2; the defendant's exhibit was labeled Exhibit 6. The Court later used the government's exhibit and called it Joint Exhibit 2. (Trans. vol. 2, p. 38.) References to the page numbers of Jt. Exh. 2 are to the actual

10.) The program operated in only 13 DOC facilities and originally provided kosher meals only to Jewish inmates. (Trans. vol. 1, p. 29-30; Jt. Exh. 2, p. 10.) Only seven of the facilities had kitchens for preparation of kosher meals; kosher foods were transported to the remaining six from the facilities having operational kitchens. (Trans. vol. 1, p. 29.) In order to participate in JDAP and receive kosher meals, qualifying inmates had to apply for, and receive, a transfer to one of the 13 designated JDAP facilities. (Trans. vol. 1, p. 29-30.) The department opened participation to non-Jews in 2006. (Jt. Exh. 2, p. 10.) By the time the program ended in 2007, there were 13 non-Jewish participants of whom five were Muslim. (Trans. vol. 2, p. 39.) Ninety-five applications for admittance were pending. (Jt. Exh. 2, p. 10.)

During JDAP's operation 784 inmates participated in the program, with an average participation of about 250 at any one time. (Trans. vol. 1, p. 34; Jt. Exh. 2, p. 10.) Five-hundred inmates voluntarily withdrew from the program, and of that number 90, or about 20 percent of those remaining in the prison system, changed their religions after withdrawing, an indication of lack of sincerity. (Trans. vol. 1, p. 34-35; Jt. Exh. 2, p. 10.)

James Upchurch, currently the department's assistant secretary of institutions, served on a 2007 committee appointed by the department secretary to study JDAP's operation. (Trans. vol. 1, p. 24, 30, 40.) Mr. Upchurch also participated in the development of JDAP. (Trans. vol. 1, p. 29.) The secretary charged the study group to:

1. Analyze requirements of the religious dietary laws of major faith groups in the inmate population.
2. Review the federal and other state prison systems as well as private prison systems

page number of the report itself.

with regard to religious diet accommodations.

3. Determine impact of the increasing number of participants in JDAP and how DOC might address that impact.

4. Review operational issues, such as food purchases and preparation, physical plant requirements, security and classification issues, administrative matters, utilization and participation and cost

(Trans. vol. 1, pp. 31-32; Jt. Exh. 2, p. 1.)

Mr. Upchurch testified about a number of problems the 2007 study group identified in JDAP's operation:

Q. Why is the fact that 90 changed their religious affiliations after dropping out of the program of significance?

A. Well, I think the change in religious preference, as well as the fact that that (sic) many dropped out, speaks to the level of sincerity and commitment they actually had to being Jewish in terms of receiving this diet.

Q. Then why would they participate in the program?

A. Well, because -- There were several reasons. One of which was, we discovered that a number of inmates were using the program, particularly gang members, to be able to move to institutions where they could get together, where they could group up. One of the advantages of having a large number of institutions we have is we're able to separate and segregate different groups of inmates who cause problems. And in this case, because we were limited to the 13 of our basically 48 major institutions that we -- It gave them an opportunity -- If they declared that they wanted this diet and change their religious preference, then they knew they had to go to one of these different places. And so, it gave them a chance to move.

The other reason is, the reasons why inmates move around in institutions generally is they'll build up a debt, they'll owe people money in the institution, and they'll want to move to another

place to get away from -- or get out of paying their debt. They may have not liked a particular dormitory where they're living, or an institution, the way it's being operated, and they'll use it as a means to get transferred to another location. They may think that by -- Especially if the institution is located in a -- where the diet is offered is one that's closer to their home, they may use it to move to an area closer to their home.

A number of them, at least initially, and maybe down after it was in place, probably believe that -- or may have believed that they could get better tasting or better quality food if they participated in the diet program.

So, there's a number of different manipulative reasons why they would do it that are different from being sincere adherence to the faith that they profess to get the diet.

(Trans. vol. 1, pp. 35-36.) Upchurch testified that the study group found that six percent of JDAP participants engaged in gang activity follower their transfers to JDAP facilities. (Trans. vol. 1, p. 37.)

Upchurch identified other problems. Participating inmates were found to barter their kosher for "for canteen items and other things. And any of this bartering and stuff has dangerous implications in an institution." (Trans. vol. 1, p. 39.)

There were security problems in supervision in the kitchens where there often was only one security officer. "In an institutional kitchen feeding thousands of meals a day, is a very fast-paced, complicated, many different areas to supervise, and this added an additional area of supervision. So, the issue of theft of the product was a concern." (Trans. vol. 1, p. 38-39.)

About three percent of the inmate population is in close management status. (Trans. vol. 1, p. 40.) These are the most difficult, recalcitrant, and dangerous inmates to manage in the population. Id. The JDAP study group found that approximately half of the participants in the JDAP, around 129 inmates, were in close management status. (Jt. Exh. 2, p. 10.) Checks of

trays being delivered to inmates in “close management,” who were disruptive and security problems, found the smuggling of contraband. (Trans. vol. 1, pp. 39-41.)

The study group also looked at participate rates for the program; that is, the percentage of enrolled inmates who ate the kosher meal. The study group found that on two specific occasions approximately 21 percent of participating inmates in fact refused the kosher meals and that during the months of April, May, June, and July 2007, an average of 24 percent of participating inmates refused the kosher meals. (Trans. vol. 1, p. 36; Jt. Exh. 2, p. 10.)

The study group made a number of recommendations to the department secretary. First, the group recommended eliminating all pork products from inmate meals. (Trans. vol. 1, p. 42.) Second, the group recommended retaining a kosher diet program, but limiting participation to those inmates who had been vetted as sincere by a rabbi. (Trans. vol. 1, p. 43.) Third, the group recommended eliminating JDAP kitchens and relying instead on prepackaged meals. (Trans. vol. 1, p. 43.) The department immediately implemented the first recommendation and followed with implementation of the second recommendation in 2010 when it established a pilot program at South Florida Reception Center. (Trans. vol., pp. 42-43.) This program was limited to a small number of inmates who were Jews determined to be sincere by a rabbi. (Trans. vol. 1, pp. 44, 45, 57.)

This pilot project led to the decision to expand the kosher diet program statewide, with discussions about the program extending back to November 2010. (Trans. vol.1, pp. 46-47; trans. vol. 2, p. 13.) Thus, the department is in the process of implementing the study group’s third recommendation by January 2013, provision of a kosher diet through a prepackaged meal, systemwide, starting first at Union Correctional Institution. (Trans. vol. 1, pp. 42- 48, 108.)

The defendants' witness, Shane Phillips, was appointed to the planning committee January 13. (Trans. vol. 1, pp. 108-109.) He testified that the task force was charged with developing a menu, making cost projections, identifying facility space to implement the program, and buying necessary preparation equipment. (Id.) The task force discussed kosher meal programs with various states and reviewed information obtained from the federal Bureau of Prisons (BOP) to develop new certified food option for kosher meals. (Trans. vol. 1, pp. 111-112.) The group adopted a menu very similar to that developed and used by BOP, with the primary difference being that the department must serve two hot meals to comply with American Correctional Association standards where BOP only needs to serve one hot meal. (Trans. vol. 1, p. 112.) The meals thus consist of two prepackaged, shelf-stable kosher meals a day that will be supplemented with fruit, bread, and other breakfast items like eggs and cereal, all of which will be certified kosher. (Trans. vol. 1, p.111.)

The daily cost of kosher meals per inmate is \$7.35. (Trans. vol. 1, p. 113.) The daily cost per inmate for nonkosher meals is \$1.54. (Trans. vol. 1, p. 114.) Thus, the daily cost per inmate to provide kosher meals is almost five times that for nonkosher meals. (Trans. vol. 1, p. 114.) The net additional cost, after subtracting the cost of nonkosher meals (\$7.35 - \$1.54), is **\$5.81/day** or an additional \$2,100 per inmate per year more than the department would otherwise spend.³ (Trans. vol. 1, p. 114.)

This is roughly comparable with BOP's cost of \$7.90 a day per inmate. (Trans. vol. 1, p. 145, 155.)

This additional cost of \$5.81 a day per inmate does not include costs for equipment,

³ Even the government's witness agreed that kosher diets cost more than regular ones. (Trans. vol. 1, p. 101.)

heated cabinets, microwaves, soup cookers, and disposable trays, cups, napkins. (Trans. vol. 1, p. 115.) The defendants' witnesses estimated that \$552,000 will need to be spent for kitchen equipment alone, 312 microwaves, 80 heated cabinets, and about 80 soup cookers.⁴ (Trans. vol. 1, pp. 115, 120.) The equipment is being bought through the competitive bidding process. (Trans. vol. 1, p. 119.) The department plans to put this equipment in about 64 facilities statewide by mid-October. (Trans. vol. 1, pp. 115, 120.) These numbers are based on 7,519 inmates participating in the kosher diet program. (Trans. vol. 1, p. 117.) If that number do not, in fact, take part, the department will put unused equipment in storage for future use as replacements for broken equipment, which avoids having to reorder replacements and reduces or eliminates down time. (Trans. vol. 1, pp. 116, 118.)

Providing a prepackaged, double-wrapped meal statewide reduces, but does not entirely eliminate, security concerns, according to Mr. Upchurch. (Trans. vol. 1, p. 49.) While concerns about the gaming of transfers for gang reasons and contraband smuggling should diminish, there could still be security issues with the statewide program that are unknown and which may be revealed as implementation unfolds. (Trans. vol. 1, p. 49.)

The department chose Union CI to be the first institution to implement the kosher meal plan because of its diverse inmate population and its variety of housing areas "which will give us a good read on what kind of problems we may encounter in implementing the CFO [kosher diet program] statewide." (Trans. vol. 1, p. 47.) Such problems could include unforeseen security concerns because "there are security problems in everything you do." (Trans. vol. 1, p. 49.) Mr. Upchurch said that the target date for systemwide implementation is "sometime in

⁴ Buying equipment and making alternations to prepare kosher meals at Union CI alone has cost about \$13,000. (Trans. vol. 1, p. 119.)

September or October.” (Trans. vol. 1, p. 47.)

The department plans to make this kosher diet program eligible not only to Jewish inmates, but to all those who claim that a kosher diet will satisfy their religious dietary needs. (Trans. vol. 2, pp. 43-44.) These religions are Jewish, Muslim, Nation of Islam (abbreviated to NOI), Messianic Jewish, Hebrew Israelite, Seventh Day Adventist, Muslim Sunni, Muslim Shiite. (Trans. vol. 2, p. 43.) The defendant estimates that as of April 19, 2013, there were 8,691 inmates in all department facilities, including privately operated ones, who have declared religious preferences falling into the categories which would be eligible to apply for a kosher diet. (Trans. vol. 2, p. 46.)

At UCI, there are currently 262 inmates in those categories. (Trans. vol. 2, p. 71.) As of the date of the hearing, 110 applied for the program, and 108 were approved, two having withdrawn. (Trans. vol. 2, p. 72.) Those approved are 41.2 percent of those eligible (108/262).

The number will fluctuate as inmates enter or leave the system. However, Chaplain Taylor reported that the numbers for those in eligible religions has increased as word has got out that the department plans to provide a kosher diet. (Trans. vol. 2, pp. 50, 85, 110.) Chaplain Taylor said he expected there to be a four-fold increase in inmates claiming to be Jewish, based on the JDAP experience in 2004. (Trans. vol. 2, p. 110.)

Not every one of these inmates can reasonably be expected to participate, and a key question in determining the fiscal impact of providing kosher meals to inmates is how many will, over the long run, chose to do so. This is not easy to do, but a reasoned estimate can be made. First, it is likely that there will be a surge in applications. (Trans. vol. 2, pp. 83-84.) It is

reasonable to anticipate, however, that numbers will fall off and remain in a lower, and fairly steady number. (Trans. vol. 2, p. 123.) Whatever that “surge” number will be, it is reasonable to expect that there will be at least 250 long term participants, the number taking part in the limited JDAP program. In fact, it is reasonable to think that far more will take part. Recall that at the time JDAP terminated there were 95 applications outstanding, and it is not unreasonable to suppose that 500 will take participate. (Trans. vol. 2, p. 113.)

If the program provides meals to 500 inmates, the additional cost of kosher food alone will be \$1.06 million per year ($500 \times \5.81×365).

If one uses the participation rate at Union CI as a guide, the additional cost of kosher food will be \$7.59 million per year ($.412 \times 8691 \times \5.81×365).

The experience of the BOP may be helpful. Dennis Watkins, a former regional food service director who retired from BOP in September 2000, testified that he had been told by BOP officials that current participation in BOP’s kosher diet program was around 1.2 percent of the total inmate population. (Trans. vol. 2, pp. 131, 136, 142, 143.) Applying that participation rate to the department’s total inmate population of about 100,000,⁵ means one could expect 1,200 inmates, making the additional cost of kosher food \$2.54 million per year ($.012 \times 100,000 \times \5.81×365).

Thus, the yearly additional cost of kosher food for this program should range from about \$1 million to as high as \$7.59 million, most likely falling somewhere between those limits, with around \$2.5 million a year highly likely.

The department’s witnesses repeatedly stated that its leadership was committed to

⁵ The Florida prison system has about 100,000 inmates. (Trans. vol. 2, p. 17.)

shouldering this additional cost despite the fact that the department is in fiscal crisis, with a fiscal year-end deficit of \$45 million.⁶ (Trans. vol. 1, p. 116; trans. vol. 2, pp. 5-29, 116.) Indeed, the department is taking the following measures to address the budget shortfall:

- holding vacancies by not hiring administrative staff; leaving security staff positions open to hold salary dollars for transfer to other areas of budget. (Trans. vol. 2, p. 6.)
- reducing amounts given to institutions for expenses. (Trans. vol. 2, p. 6.)
- not expanding programs. (Trans. vol. 2, p. 7.)
- delaying fixed capital outlay projects. (Trans. vol. 2, p. 8.)
- whittling expenditures down to the most pressing needs. (Trans. vol. 2, p. 8.)
- last session requested 12 million, but got 1.2 million, which will be used for one project at Baker. (Trans. vol. 2, p. 9.)
- taking \$3 million out of expenses and setting it aside for routine maintenance items, such as a roof for Jefferson Correctional Institution that's about to collapse. (Trans. vol. 2, p. 9.)
- This sort of repair is important to ensuring there is sufficient housing capacity so as not to trigger statutory early release of inmates due to overcrowding. (Trans. vol. 2, pp. 9-10.)

This is not the first year the department has struggled with its budget. The department's budget director testified that the last three years have been especially difficult. (Trans. vol. 2,

⁶ The original shortfall approaching the end of the fiscal year was \$88 million, but the DOC received a \$43 million transfer from the legislature to partially offset the shortfall, leaving the \$45 million balance to be deducted from the 2013-2014 budget starting July 1, 2013. (Trans. vol. 2, pp. 5, 11.)

pp. 10-11.)

Significantly, Mr. Tallent, the budget director, testified to how, practically speaking, budget cutters go about their task. They do not consider what percentage a line item might be of the overall budget, but the raw dollar figure of the expenditure:

Q. When you're doing your budget-cutting exercises or trying to balance your budget through some sort of cost-saving measures, is the dollar amount what is critical to you or some percentage of a line item?

A. I do not factor in percentages when we look at this at all. Everything we do is dollar related. What is the deficit -- the dollar value of the deficit? What are the dollar values I can get from certain areas to eliminate that deficit?

(Trans. vol. 2, p. 14.)

Q. Do you consider a half percent of your budget to be an insignificant amount?

A. There's nothing insignificant when you start the year \$45 million in the hole. Every penny counts.

(Trans. vol. 2, p. 29.)

Among one line item to suffer has been the department's food budget, which is about \$200,000 short. (Trans. vol. 2, p. 23.)

There is, in fact, no money in the budget to pay for the kosher diet program. (Trans. vol. 2, p. 26.) To fund the program, Mr. Tallent said the department would have to come up with money originally earmarked for other uses, primarily salaries.⁷ (Trans. vol. 2, p. 24-25.)

⁷ There is limited flexibility in how funds can be used and transferred across budget line items and some budget allocations are untouchable. For example, although the Department of Corrections has an overall budget of approximately \$2 billion, \$150-200 million of that budget is dedicated to the operation of private prisons and these funds are unavailable for use for any other purpose. (Trans. vol. 2, pp. 5, 20.) Similarly, there are other funds, such as those for People First operations, Risk Management insurance funds, and building funds are similarly untouchable. (Trans. vol. 2, p. 21.) Additionally, all fixed costs, such as utilities and phone bills, must be paid first before other expenditures are undertaken. (Trans. vol. 2, p. 6.) The

When cutting the budget by holding positions open, Mr. Tallent testified that 20 full time positions equate to \$ 1 million in savings. (Trans. vol. 2, p. 24.) To come up with \$3 million (the approximate cost of food alone) for the kosher diet program, 60 positions would have to be left vacant. (Trans. vol. 2, p. 24-25.)

This does not even take into account other costs the department anticipates, such as \$1 million for the hiring of temporary workers to take some of the workload of processing applications off the chaplains' shoulders, and the approximate \$500,000 for the purchase of food preparation equipment. (Trans. vol. 2, p. 26.)

After the department declared its intent to provide a kosher diet, the government took aim at three aspects of the department's plan for doing so, even though these facets of the plan are not mentioned in the complaint: 1) a requirement that an inmate demonstrate by his behavior for a period ranging from 30-90 days his commitment by eating the "alternate entree" or vegan diet offered by the department and refraining from eating otherwise nonkosher food;⁸ 2) the requirement that a participating inmate miss no more than 10 percent of kosher meals a month, otherwise he or she will be temporarily removed from the kosher diet program;⁹ and 3) the requirement that an inmate be removed temporarily from the program if he or she is found to eat nonkosher food, such as that purchased from the canteen;¹⁰ and 4) the sincerity interview process

most common way of addressing budget shortfalls and meeting department needs is holding vacancies by not hiring administrative staff or leaving security staff positions open to hold salary dollars for transfer to other areas of budget. (Trans. vol. 2, p. 6.)

⁸ Def. Ex. 1, Attachment 1, pp. 5-7.

⁹ Def..Ex. 10, p. 3, 6.

¹⁰ Def..Ex. 10, p. 6.

that an applicant must undergo in order to qualify.¹¹

Before the hearing on preliminary injunction, the department announced that it would no longer require the 30-90 waiting period, and dropped that provision from the kosher diet policy. The government presented no evidence that there was a substantial possibility the department would reinstate this provision absent the entry of injunctive relief. And as the government's own witness testified, kosher diet programs are works in progress that require frequent changes in policy — “tweaks” — to address unforeseen and sometimes intractable problems. (Trans. vol. 1, pp. 85, 90.) Indeed, BOP operated a kosher diet pilot program from 1983 to 1995 — 12 years, far longer than the department has experimented with a kosher diet — before going systemwide to determine how that agency could best and most economically provide such a diet. (Trans. vol. 1, p. 83-84, 86, 101.)¹² Thus, it is reasonable to accept the department's adjustment in its policy.

The “10-percent” policy states that an inmate who refuses 10 percent or more meals per month will be suspended from receiving kosher meals for 30 days for the first infraction, 120 days for the second infraction, and one year for the third infraction. For any subsequent infraction, the inmate is suspended for a year. (Def..Ex. 10, pp. 3, 6.) Meals missed for religious fasts do not count. (Trans. vol. 2, pp. 107-108.) This “10-percent” rule also applies to other special diets, such as therapeutic ones, which are prescribed by a physician in the course of medical treatment. (Trans. vol. 1, p. 61, 122-124.)

The department documented substantial percentages of inmates in the JDAP program —

¹¹ Def..Ex. 10, pp. 4-5.

¹² In fact, one government witness testified that BOP started investigating the possibility of providing a kosher diet in 1979. (Trans. vol. 2, p. 129.) If that is true, 16 years elapsed before BOP extended such a diet policy systemwide.

on average 24 percent — refusing the kosher meal. (Jt. Exh. 2, p. 10.) So the issue of inmates refusing special meals is a matter of critical concern.

The department's witnesses justified the rule on the grounds that it was impossible to project with any degree of reliability what percentage on any given day would refuse the special diet. (Trans. vol. 1, pp. 124, 158.) Food had to be prepared for the total number enrolled, and if that number did not take the special meal, it would have to be thrown out. (Trans. vol. 1, pp. 156-157.)

The government countered with testimony from retired BOP official Watkins that he had seen no problems arising from inmates' refusal of meals. (Trans. vol. 2, pp. 126-127.) He stated that meal participation rates regularly were less than 100 percent for all meals of the day. (Trans. vol. 2, p. 127.) He thus contended that it was not difficult to predict how many inmates could be expected to ask for a special meal on any given day. (Trans. vol. 2, p. 127.) One simply had to take a meal out of storage and heat it. (Id.)

The department opposed that contention by testimony that there was only 30 minutes available for an inmate to eat each meal. (Trans. vol. 1, pp. 124-125.) With such a limited time to feed masses of inmates, having to fetch extra meals from storage would create confusion and delay, which could lead to security issues. (Trans. vol. 1, pp. 124-125.) Moreover, the department's witnesses stated that there was limited food storage available at institutions, and that theft of food from storage was a major concern. (Trans. vol. 1, pp. 39, 156.)

When an inmate refuses 10-percent or more of her therapeutic diet, that event is referred to the medical department for a determination whether the diet is still medically indicated. (Trans. vol. 1, p. 62, 124.) The court also notes that anyone, including an inmate, has a right to

refuse medical treatment, and that can include not eating a specially prescribed diet.

For the kosher diet, no pre-suspension investigation is made. However, the inmate has post-suspension remedies available through the grievance process. (Trans. vol. 1, p. 156.)

The department documented the widespread practice of inmates buying nonkosher food from the canteen while claiming to require a kosher diet. Such purchases included food that was obviously not kosher such as cheeseburgers and pork rinds. (Trans. vol.1, pp. 132-134.) For instance all inmates but one participating in the pilot project at the SFRC bought nonkosher canteen fare. (Trans. vol. 1, p. 141-142.) The department has arranged for nonkosher items on canteen menus to be clearly marked. (Trans. vol. 1, pp. 135, 138, 142.) Upon applying for a kosher diet, inmates must sign an agreement promising to eat kosher only, and acknowledging that there would be adverse consequences if they do not. (Trans. vol. 2, p. 56.) The purchasing of nonkosher food by an inmate claiming to require a kosher diet calls her sincerity into question.

If an inmates violates this promise, the defendant's policy calls for removals from the kosher diet program for three months for the first infraction, six months for the second, and a year for the third. . (Def..Ex. 10, p. 6.) These removals are not intended to be punitive; rather they are intended to provide an opportunity to assess whether they diet the inmate has voluntarily entered into is appropriate for her, based on the department's limited resources. (Trans. vol. 2, pp. 57-58.)

Chaplain Taylor testified that the lack of consequences compromises the integrity of the program. (Trans. vol. 2, p. 58.)

The department adapted this policy from BOP's procedures. (Trans. vol. 2, pp. 58-59,

62-65; Def..Exh. 7.) It is also similar to that followed in other states such as Oklahoma, Wisconsin, Massachusetts, Washington, and Oregon. (Trans. vol. 2, pp. 65-66.)

If the inmate objects to a decision to remove her from the program, she can seek redress through the grievance process. (Trans. vol. 1, p. 156.)

The government's focus on the sincerity interview was a concern that chaplains would not uniformly apply whatever criteria was used to determine eligibility. (Trans. vol. 1, p. 87-88.) The government also appears to contend that there is no connection between an inmate's ability to articulate the basis for his or her need for a kosher diet and religious sincerity. (Trans. vol.1, p. 90.) However, the government's witnesses were neither offered nor qualified as experts,¹³ and did not demonstrate any basis for this opinion. (Trans. vol. 1, p. 11.) Apparently, the government's position is that an inmate must merely express an interest in a kosher diet to obtain one. (Trans. vol.1, p. 102.)

The department's policy says:

The Chaplain will ask the inmate to demonstrate the inmate's self-identified religious faith is sincerely held. Sincerity is evidenced by the inmate's basic knowledge of the religion and the requirements of keeping a religious diet. An inmate who does not know the requirements to keep a religious diet obviously cannot do so, and a lack of knowledge is a strong indication of insincerity."

(Def. Exh. 10, p. 4.) The chaplain is permitted, though not required, to confirm the assessment by seeking additional information such as through staff interviews, internet searches of religious diet requirements, and questioning clergy. (Id.)

¹³ The United States tendered two witnesses, both of whom are former officials of the FBOP, and who were retained as expert consultants by the United States in their investigation of Florida's dietary policies. However, the United States presented them at the preliminary injunction hearing "purely as fact witnesses about the Federal Bureau of Prisons' kosher diet policies." holding vacancies by not hiring administrative staff; leaving security staff positions open to hold salary dollars for transfer to other areas of budget. (Trans. vol. 2, p. 6.)

According to Chaplain Taylor, the department's interview policy would require an inmate "to articulate in some way in which that religious diet fits into their understanding of how they relate to their higher power." (Trans. vol. 2, p. 92.) Chaplain Taylor noted that there are inmates who do not have any idea of the religious basis for a special diet, yet will want one anyway. (Trans. vol. 2, p. 95.) Chaplain Taylor said that the purpose of the interview is to identify flagrant insincerity. (Trans. vol. 2, p. 112.) Although chaplains have not yet been formally trained in the interview process — which is expected to take place starting in September — those who have conducted interview so far at Union CI have been told to cast a "wide net." (Trans. vol. 2, pp. 95-96.)

In fact, the Union CI chaplains appear to have cast just such a wide net. None of the 110 inmates who applied for a kosher diet at that facility were denied. (Trans. vol. 2, p. 71-72.) These applicants claimed highly diverse religious backgrounds, including "Baptist, 7; Buddhist, 1; Catholic, 3; Christian, 9; Hebrew Israelite, 10; House of Yahweh, 1; Jewish, 46; Messianic Jewish, 12; Muslim, 10; Nation of Islam, 3; none, 3. . . . Protestant, 1; Seventh Day Adventist, 1; Jehovah Witness, 1." (Trans. vol. 2, p. 75.)

Based on the foregoing, the court reaches the following factual conclusions. First, the department has demonstrated a historical commitment to providing a kosher diet to inmates based on its pilot projects going back to 2004. The department has certainly moved more quickly to a decision to go systemwide than BOP, which operate kosher pilot programs at least 12 years, and perhaps as long as 16 years.

Second, the department's commitment is firm in light of the substantial financial hardship it faces in the current fiscal crisis.

Third, the evidence supports a conclusion that there is substantial reason to question the sincerity of inmates applying for or already participating in a kosher diet program. The large percentage refusing meals or changing their religion after leaving JDAP, and the fact many purchase nonkosher canteen items justifies questions about inmates' sincerity. Protestations of sincerity do not have to be taken at face value, especially in light of the significant cost of providing kosher meals.

Fourth, it is indisputable that providing kosher meals will impose a significant cost on the department. It is reasonable to expect additional costs for the purchase of kosher food alone to exceed \$1 million a year, and most likely approach \$2.5-3 million. The evidence indicates providing such a diet will significantly affect the department's operations in that perhaps as many as 60 positions will be left unfilled.

Fifth, the evidence indicates that administrators look to the precise dollar amounts of line items rather their percentage of an overall budget when contemplating budget cuts.

Sixth, the department's elimination of the 30-90 day waiting period appears to be a reasonable "tweak" in the operation of a complex program. As the government's witnesses testified, kosher diet programs require frequent adjustments as they are implemented to address unforeseen consequences. The government has not shown (nor even suggested) there is a substantial possibility that the department will reinstate this policy absent injunctive relief.

Seventh, the requirement not to miss more than 10-percent of special meals in a month is reasonable in light of the JDAP experience with substantial percentages missing meals. Skipping a substantial number of meals calls into question the inmate's sincerity and causes unnecessary waste.

Eighth, suspending an inmate from the kosher diet program for eating nonkosher food is reasonable because doing so is substantial evidence of the inmate's lack of sincerity.

Ninth, asking chaplains to have applicants articulate the religious basis for their need for a religious diet enables the provision of this expensive diet to be limited only to those who are truly sincere. The department does not have to accept an inmates declaration of sincerity at face value. The government has failed so show that unequal determinations of eligibility will be made based on the department's policy. This has not been the case at Union CI, and any contention on that point is purely conjectural.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by via transmission of Notices of Electronic Filing generated by CM/ECF on July 5, 2013, on all counsel or parties of record on the Service List below.

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United States of America v. Secretary, Florida Department of Corrections
Case No. 1:12cv22958-Seitz/Simonton
United States District Court, Southern District of Florida

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