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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

Case No. C 94-2307 CW

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO ENFORCE COMPLIANCE WITH MAY 30, 2006 ORDER; MEMORANDUM OF POINTS AND AUTHORITIES

HEARING

Date: July 26, 2007
Time: 2:00 p.m.
Dept: Courtroom 2, Fourth Floor
Judge: Hon. Claudia Wilken

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 26, 2007 at 2:00 p.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Claudia Wilken, located at 1301 Clay Street, Courtroom 2, Fourth Floor, Plaintiffs John Armstrong, *et al*., will and hereby do move the Court for an Order to Enforce Compliance with the May 30, 2006 Order in this action.

Plaintiffs seek an Order finding that the Defendants are in violation of this Court's May 30, 2006 Order Granting Motion to Enforce Revised Permanent Injunction ("May 30 Order"), which was entered in order to remedy Defendants' violations of Paragraphs 15, 16 and 17 of the Revised Permanent Injunction, the Americans with Disabilities Act, the Rehabilitation Act, and the Due Process Clause. Plaintiffs seek further remedial orders to ensure compliance and remedy Defendants' violations.

This motion is based on this Notice of Motion, the Memorandum of Points and Authorities, [Proposed] Order, and Declarations of Holly Baldwin and Anne Mania, filed and served herewith in support of this motion, the Court files in this action, and such other materials and argument as may be presented before or at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

More than six years after this Court issued the Revised Permanent Injunction, more than a year after this Court issued the May 30, 2006 remedial Order, and six months after Defendants' request for an extension of time to was denied, Defendants have still failed to bring their system into compliance.

Defendants have violated almost every deadline set out in the May 2006 Order. They were almost three months late in implementing a disability information tracking system for revocation and revocation extension proceedings, and have yet to fully implement use of the tracking system in all life prisoner and Mentally Disordered Offender ("MDO") proceedings. They filed an untimely Accommodations Plan that was deficient in multiple respects, including the failure to address serious problems with their sign language

interpreter contracts. They have yet to remedy most of those deficiencies, despite receiving notice of them nearly three months ago.

What is more, Defendants have shown only minimal commitment to implementing their Accommodations Plan, and have demonstrated no effort to obtain funding for it. They have conducted no training on the provisions of the Plan and have not even sent a paper copy to any staff involved in revocation extensions, MDO, and SVP proceedings.

Only after Plaintiffs' repeated demands and threats of further litigation did Defendants take any steps to address deficiencies in use of the tracking system and the Accommodations Plan. None of their proposed solutions have been implemented to date.

Some progress has been made. Defendants developed the DECS (Disability and Effective Communication System) database for use in revocation and revocation extension proceedings to track prisoners with disabilities and their accommodation needs. Defendants have not fully implemented the system, however, in life prisoner, MDO, and SVP proceedings.

After many meet-and-confer attempts, Plaintiffs have reluctantly concluded that only a further order from this Court will bring Defendants into compliance with the Permanent Injunction and the May 2006 Order. If a further order is not entered, Defendants will continue to incompletely implement their tracking system, to deny sign language interpretation, accessible transportation, and other needed accommodations to parolees who need them, and to delay parole proceedings while they scramble for accommodations. To assist Defendants in meeting their obligations, Plaintiffs have crafted a more detailed proposed Order to remedy Defendants' failures to comply with the May 30 Order, and to move Defendants toward a system where timely accommodations are provided in all parole proceedings.

RELEVANT FACTS

Procedural Background

The Court entered a Permanent Injunction in this action on December 22, 1999 against Defendants, government officials responsible for conducting parole proceedings

through the Board of Parole Hearings ("BPH," formerly "Board of Prison Terms"), following trial and findings that Defendants were in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Due Process Clause of the Fourteenth Amendment. The Permanent Injunction was supported by Findings of Fact and Conclusions of Law, also entered on December 22, 1999. The Court entered a Revised Permanent Injunction on February 11, 2002 (the "Revised Permanent Injunction"). Baldwin Declaration in Support of Motion to Enforce Compliance with May 30, 2006 Order ("Baldwin Decl."), ¶ 2, Exh. A.

The Revised Permanent Injunction requires, among other things, that Defendants create and maintain a system for tracking prisoners and parolee with disabilities; that Defendants take reasonable steps to identify prisoners and parolees with disabilities prior to parole proceedings, including checking the tracking system and reviewing all relevant and reasonably available information in the central or medical file; and that Defendants provide reasonable accommodations to prisoners and parolees with disabilities at all parole proceedings, including parole revocations and revocation extensions, life prisoner hearings, Mentally Disordered Offender (MDO) proceedings, and Sexually Violent Predator (SVP) proceedings. Baldwin Decl. ¶ 3, Exh. A at ¶¶ 15-17.

Based on Defendants' ongoing failure to comply with the above provisions of the Revised Permanent Injunction and the resulting harm to members of the plaintiff class, Plaintiffs filed an enforcement motion, which was heard by this Court on May 26, 2006. *Id.* ¶ 4.

Defendants' Failure to Comply with the May 2006 Order

On May 30, 2006, this Court entered an Order Granting Motion to Enforce Revised Permanent Injunction ("May 2006 Order"). Baldwin Decl., Exh. B (May 2006 Order). The Court found that Defendants were violating Paragraphs 15, 16 and 17 of the Revised Permanent Injunction, the ADA, the Rehabilitation Act, and the Due Process Clause, and were violating the rights of plaintiff class members by failing to provide necessary accommodations during parole proceedings. *Id.* (May 2006 Order) at 3-8.

Plaintiffs' counsel demonstrated numerous and ongoing failures of Defendants' existing systems for tracking prisoner and parolee disabilities and the accommodations they needed, and failures to provide reasonable accommodations during parole proceedings. Plaintiffs' evidence of these violations and the harm caused to class members was uncontested. *Id.* at 4:15-18, 5:1-6:14, 6:23-25, 8:11-14; *see also* Baldwin Decl. filed on 4/18/06, ¶¶ 43-59; Baldwin Reply Decl. filed on 5/18/06, ¶¶ 21-25. Deaf parolees were repeatedly denied sign language interpretation for revocation proceedings, including notice of charges, attorney consultations, and probable cause hearings. Parole proceedings were delayed for lack of accommodations such as sign language interpretation, or the class member was pressured to proceed without the accommodation. A paraplegic parolee had to drag himself upstairs to meet with his revocation defense attorney. Another wheelchair user was repeatedly denied accessible transport between prison and jail.

To remedy Defendants' violations, the Court ordered two principal steps: an improved tracking system and an accommodation plan. As this Court stated:

> Defendants must implement a State-wide, computerized, networked, real-time database system, preferably the Revocation Scheduling and Tracking System (RSTS), to ensure compliance with Paragraphs 15, 16 and 17 of the Revised Permanent Injunction in this action. For parole revocations and extensions, this system must be implemented on or before January 1, 2007. For life prisoner hearings, MDO proceedings, and SVP proceedings, this system must be implemented on or before May 1, 2007. It may be included in the RSTS, the LSTS or an equivalent system. In addition, Defendants must develop and implement a plan to assure that accommodations, including but not limited to sign language interpreters, are actually provided at each parole proceeding without delay.

Baldwin Decl., Exh. B (May 2006 Order), ¶ 1 at 8:15-9:3 (emphasis added). The Order outlined further requirements for the capabilities and use of the tracking system, and required that Defendants take a series of specific steps in connection with the tracking system and the accommodations plan, including deadlines for completion of intermediate steps and for final implementation of the remedy. *Id.* ¶¶ 1-6 at 8:15-11:2. These steps included a requirement that Defendants meet and confer with Plaintiffs' counsel regarding specifications for the tracking system, and that the parties certify their agreements regarding these specifications to the Court by August 25, 2006. *Id.* ¶ 4 at 10:1-6. Defendants were

also required to meet and confer with Plaintiffs' counsel regarding the plan to provide timely accommodations at each parole proceeding. *Id.* ¶ 4 at 10:6-11.

The May 2006 Order contained firm and explicit deadlines. By November 27, 2006, Defendants were required to certify to the Court that they had taken all necessary steps to secure funding for the tracking system and for the accommodations plan. Baldwin Decl., Exh. B (May 2006 Order), ¶ 5 at 10:12-18. By January 1, 2007, Defendants were required to certify to the Court "that they have fully implemented the RSTS, or other State-wide computerized tracking system for accommodations needed for parole revocations and extensions, and the plan to provide accommodations in a timely manner, including sign language interpreters." *Id.*, ¶ 6 at 10:19-24. By May 1, 2007, Defendants were required to certify to the Court "that they have fully utilized the RSTS, the LSTS, or other State-wide computerized tracking system, for accommodations needed for life prisoner hearings, MDO proceedings, and SVP proceedings." *Id.*, ¶ 6 at 10:24-11:2.

On November 27, 2006, Defendants filed a Request for Extension of Time, seeking to extend the implementation deadlines in the May 2006 Order for the tracking system and accommodations plan. Baldwin Decl. ¶ 11. The Court denied Defendants' request by order entered on December 14, 2006, finding that "[t]he declarations in support of the request demonstrate that Defendants have made some progress toward complying with the Court's order, but offer no evidence that Defendants have made any special effort to meet a deadline they anticipated would be difficult to achieve. Rather, it appears that Defendants have resigned themselves to being unable to meet the Court's deadlines." Order Denying Defendants' Request for Extension of Time, filed 12/14/06, at 4:6-8; Baldwin Decl. ¶ 12.

Despite this Court's Order, Defendants continued with their planned failure to meet the Court's deadlines. On January 3, 2007 Defendants filed their "Certification of Implementation of Interim Plan and Tracking System." Mania Declaration In Support of Motion to Enforce Compliance with May 30, 2006 Order ("Mania Decl."), Exh. O. The Tracking System failed to meet the requirements of the May 2006 Order. Mania Decl. ¶ 35.

On February 20, 2007, Defendants filed "Defendants' Plan to Ensure Reasonable Accommodations for Parole Proceedings" ("Accommodations Plan"). Mania Decl., Exh. A. As of March 26, 2007, the Disability and Effective Communication System ("DECS" or "DEC System"), a computerized, networked database to track the need for and provision of disability accommodations, was available for use in parole revocation and revocation extension proceedings. Baldwin Decl. ¶ 22. DECS, the procedures for its use, and the Accommodations Plan all fail to meet the Court's requirements, as outlined below.

ARGUMENT

I. Defendants Have Failed to Comply with the May 2006 Order's Requirements for the Tracking System.

The May 2006 Order required that the disability tracking database be a "State-wide, computerized, networked, real-time database system, preferably the Revocation Scheduling and Tracking System (RSTS)." Baldwin Decl. Exh. B (May 2006 Order), ¶ 1 at 8:16-19. Defendants have developed the DEC System software and have made it available via the world wide web and the CDCR's internal network (Intranet). Baldwin Decl. ¶ 17. Defendants have failed, however, to ensure both that staff performing critical functions in parole proceedings have access to the system, and that all necessary disability information is entered. Defendants have also failed to enable the system to transmit information back to databases maintained by the Division of Adult Institutions ("DAI") and the Division of Adult Parole Operations ("DAPO").

A. The Tracking System is Not Available Statewide.

Access to the DEC System is limited. Prison staff performing critical functions requiring effective communication in life prisoner, MDO and parole revocation extension proceedings do not have access to DECS. In addition, it is unclear whether staff conducting MDO notices of rights and arranging accommodations for MDO hearings in Department of Mental Health ("DMH") institutions have access to DECS.

1. There is Inadequate Access to the Tracking System in Prisons.

Defendants have represented that within prisons only Classification and Parole Representatives ("C&PRs"), some ADA Coordinators, and some correctional counselors have direct access to DECS at their computers. Mania Decl. ¶ 10. Plaintiffs have requested specific information on DECS connectivity, meaning what locations have computers that can access DECS using either the CDCR Intranet or the world wide web, on multiple occasions, but have yet to receive an intelligible response. Mania Decl. ¶ 11, Exh. N.

Defendants have failed to ensure that Level I Correctional Counselors ("CC-Is") involved in parole proceedings have routine access to the DEC System. This is a problem because CC-Is carry out many parole proceedings within prisons. For example, CC-Is serve notice of conditions of parole, revocation extension proceedings, and life prisoner hearings. *See* Baldwin Decl., Exh. C (Joint Certification), ¶¶ 7(b) and (g), 8(a); Mania Decl., Exh. A at 3-4. CC-Is also assist prisoners with many of the preparatory steps for life prisoner hearings, such as file reviews, drafting parole plans and review of the Life Prisoner Packets. Baldwin Decl., Exh. C (Joint Certification), ¶ 7(g). CC-Is also write reports for the Board based in part on interviews with the prisoner. *Id.* If Counselors cannot access the DEC System, they will be unable to ensure the provision of needed accommodations for these proceedings.

CDCR mental health staff also must have ready access to DECS, yet there is no evidence that they do. Mental health staff provide evaluations for both MDO and life prisoner hearings. Baldwin Decl., Exh. C (Joint Certification) ¶7(i)-(k) and (o)-(p). BPH Commissioners and Deputy Commissioners rely heavily on these reports when conducting hearings. Without DECS access, mental health staff cannot ensure that they are providing effective communication during these evaluations. Defendants reported at an April 17, 2007 meeting that providing DECS access to mental health staff would be problematic because of the lack of computer access. Mania Decl. ¶ 15.

Finally, Commissioners and Deputy Commissioners in life prisoner proceedings must have access to the DEC System in order to ensure that the system is checked prior to hearings. *See, e.g.*, Mania Decl., Exh. A at 5, Exh. I at 3. But, there is no DECS access in hearing rooms, unless the prison is also a Decentralized Revocation Unit ("DRU") for parole revocation proceedings. That is because there are no computers in BPH hearing rooms at non-DRU prisons. Mania Decl. ¶¶ 10, 16. Defendants must provide CC-Is with sufficient DECS access to enable them to routinely check the system prior to MDO, SVP and life prisoner proceedings.

2. Tracking System Access at DMH Institutions Is Also Deficient.

Plaintiffs also have serious concerns about access to DECS at Atascadero State Hospital ("ASH") and Patton State Hospital ("Patton"). Both are Department of Mental Health ("DMH") institutions where MDO proceedings are held. On a tour of ASH on April 26, 2007, neither the outgoing nor the incoming parole agent, who are responsible for arranging accommodations at parole proceedings, knew how to use DECS or was able to access it. Mania Decl. ¶ 19, Exh. F. Defendants represented in draft policies and procedures provided on May 25, 2007 that they had a plan to provide DECS access at both DMH institutions. *Id.* ¶ 20. What the draft policies failed to confirm, despite being provided at least ten days after the alleged establishment of DECS access at ASH and Patton, was that staff there actually had access to the system and were using it. *Id.* Defendants must certify to Plaintiffs and the Court that staff involved in MDO proceedings at ASH and Patton have access to DECS.

B. The Tracking System Does Not Include All Information Previously Gathered by the BPH Regarding Inmates' and Parolees' Disabilities.

The May 2006 Order requires that the disability tracking database "must include access to information previously gathered by the BPH regarding an inmate or parolee's disabilities and needs for accommodation." Baldwin Decl., Exh. B (May 2006 Order), ¶ 2 at

9:5-7. Defendants have failed to demonstrate that all disability information gathered in parole proceedings is entered into the DEC System.

1. Defendants Allowed A Seven-Week Gap Where Disability Information They Gathered in Parole Revocation Proceedings Was Not Tracked at All.

Defendants failed to input disability information into DECS for the seven-week period spanning the beginning of its implementation. Between March 10, 2007 and April 27, 2007, no staff input disability information gathered during the file review and notice of rights phase in parole revocation proceedings, and recorded on BPH Form 1073s, into the DEC System. Mania Decl. ¶ 31; Baldwin Decl. ¶ 24, Exh. H.

Despite admitting that the gap in information was a problem on April 17, 2007, Defendants have yet to remedy it. They report that they are manually entering information from the missed 1073s, but the only omitted information being entered is from 1073s that were completed between March 10 and March 26, 2007. Mania Decl. ¶ 32, Exh. T. There is no apparent plan to enter the information from March 26, 2007 through April 27, 2007. *Id.*

2. Defendants Do Not Have a Reliable System for Tracking Disability Information in MDO Proceedings.

Defendants reported on April 17, 2007 that BPH 1073 forms from MDO notice proceedings are not being routed to the MDO Unit staff who are responsible for entering the information into the DEC system. Mania Decl. ¶ 18. Defendants could not explain why, and have not informed Plaintiffs of any attempt to remedy the problem. *Id.* Defendants should certify to the Court and Plaintiffs' counsel that this problem has been investigated and addressed.

3. Defendants Do Not Ensure Prompt Entry of Information Into DECS for Life Prisoner Proceedings at Notice, Meaning the Information May Not Be Available for Later Steps in the Life Prisoner Process.

Prisoners who are indeterminately sentenced in California are entitled to hearings at regular intervals in front of the BPH to demonstrate their eligibility for release. Cal. Penal

Code § 3041. There are several steps that prisoners and CDCR staff take to prepare for a life prisoner parole consideration hearing and those steps take place over a period of up to six months. Baldwin Decl., Exh. C (Joint Certification), ¶ 7(f)-(n); Mania Decl. ¶ 12.

Staff responsible for ensuring that prisoners understand the many steps in the life prisoner process must be aware of the need to provide accommodations to the prisoner. Yet, there is no clear deadline for entering disability information gathered during initial notice in life prisoner proceedings into DECS. It is therefore unclear whether the disability information will be available to staff in later steps in the process.

Defendants must have a clear and early deadline for entering disability information gathered at notice into the DEC System.

C. Defendants Failed to Fully Implement the Tracking System in Life Prisoner, MDO or SVP Proceedings.

Defendants failed to meet the May 1, 2007 deadline for implementation of the disability tracking system in life prisoner, MDO and SVP proceedings. *See* Baldwin Decl., Exh. B (May 2006 Order) ¶¶ 1, 6 at 8:22-24, 10:24-11:2. Defendants failed to file any certification as to the status or projected implementation date for these proceedings as of May 1, 2007. The last representation of the projected implementation date was that contained in Defendants' November 27, 2006 Request for Extension of Time, in which Defendants stated that the necessary infrastructure upgrades would not be completed and DECS would not be implemented for life prisoner, MDO and SVP proceedings until November 30, 2007. *See* Michael Brady Decl., filed 11/27/06, ¶¶ 10-11.

The failure of Defendants is threefold. First, as discussed in Section I.A, *supra*, they have failed to provide adequate access to the tracking system for staff involved in the Life Prisoner and MDO proceedings. Second, even if there were sufficient access, they have failed to promulgate policies requiring DECS to be checked for all proceedings in the life prisoner parole consideration and MDO certification processes. Third, and most troubling, they have failed to address known structural impediments to effectively using the DEC System: they

have failed to require CC-Is to use computers to check DECS under any circumstances and have taken no steps to enhance DECS access within the prisons.

1. Defendants Have Failed to Require Staff to Check the DEC System for All Steps in the Life Prisoner Parole Consideration Process

The Accommodations Plan and the two additional draft sets of policies and procedures provided by Defendants since filing the Plan fail to require any staff to actually check the DEC System for all but one step[1] between notice of the life prisoner parole consideration hearing and the hearing itself. Mania Decl. ¶ 16, Exh. A, D, I. There are several steps between notice and the hearing that are critical to a life prisoner's ability to present his or her case at the hearing, such as the review of the Central file, the interview for, and presentation of, the Board Report and the presentation of the psychological evaluation report to the prisoner, as well as appeals. All of these steps require effective communication, yet Defendants have failed to ensure that DECS will be checked for any of them. This failure is troubling, not only because it demonstrates Defendants' lack of commitment to providing accommodations in all parole proceedings, but also because Defendants agreed in the August 2006 Joint Certification to require staff to check DECS for all of these steps. Baldwin Decl., Exh. C, ¶ 7(g)-(h). The Court should require Defendants to have CC-Is check the DEC System before all life prisoner proceedings.

2. Defendants Have No Plan to Ensure That the DEC System Is Checked for Any MDO Proceedings Prior to Notice of Certification as an MDO.

Defendants agreed in the Joint Certification to require staff to check the DEC System prior to multiple proceedings leading to possible MDO certification, among them clinician and correctional counselor interviews. Baldwin Decl., Exh. C, ¶ 7(o)-(t). Defendants failed

[1] Defendants have promulgated procedures requiring that mental health staff check the DEC System prior to interviewing a life prisoner to prepare a report for the hearing. Mania Decl. Exh. A at 4, Exh. I at 3. It is unclear, however, that mental health staff will actually have access to the system. Mania Decl. ¶ 15.

to include any provisions in the Accommodations Plan or subsequent policies for checking DECS to ensure effective communication in those proceedings. Defendants have contended in negotiations that any proceedings prior to a prisoner being certified as an MDO are not parole proceedings and therefore they are not covered by the Court's orders in this case. Mania Decl. ¶ 17, Exh. H. That contention is incorrect.

The 2002 Revised Permanent Injunction defines parole proceedings to include "…*any events related to the hearing*s that occur prior to or after the hearings, including, but not limited to, screening offers, psychological evaluations, central file reviews and administrative appeals." Baldwin Decl. Exh. A, ¶ 3 (emphasis added). Defendants rely on staff evaluations of prisoners at MDO hearings. The outcome of those hearings dictates whether the prisoner will be forced to serve his or her parole term confined to a state mental hospital. *See* Cal. Penal Code § 2962, *et seq*. Therefore, those evaluations and interviews are parole proceedings related to a hearing. Defendants must ensure that DECS is checked prior to those proceedings. The Court should require Defendants to have CC-Is check DECS prior to all MDO proceedings.

3. Defendants Have Not Demonstrated That They Are Providing Effective Communication in SVP Proceedings.

It is not clear what Defendants are doing to ensure effective communication in SVP proceedings, because they have fundamentally changed their procedures. Mania Decl., Exh. H at 1. If a prisoner has been referred to the DMH for an evaluation to determine whether s/he meets the criteria to be committed as an SVP (*see* Cal. Welf. & Inst. Code § 6600, *et seq*.), but that evaluation has not been completed prior to the prisoner's release date, Defendants may hold the prisoner for an additional 45 days past the release date upon a showing of good cause. *Id.* § 6601.3. Until April of this year, Defendants' regulations required a hearing conducted by the BPH to determine whether there was probable cause to find the prisoner met the SVP criteria before retaining the prisoner for an additional 45 days. 15 CCR § 2600.1 (superseded via emergency regulation, 4/18/07). Defendants have now completely done away with the hearing process via an emergency regulation. *See* Final

Statement of Emergency RN 07 at http://www.cdcr.ca.gov/DivisionsBoards/BOPH/docs/Final_Statement_of_Emergency.pdf.

In the absence of hearings, there is no assurance that the reason for prisoners' overdetention and the basis for Defendants' probable cause finding is being effectively communicated to the prisoners. According to Defendants, approximately 600 prisoners a month are being retained past their release date for these proceedings. *Id.* Defendants should provide policies and procedures to the Court demonstrating that they are effectively communicating their reasons for retaining prisoners past their release dates for SVP evaluations. Those policies should include a requirement to check DECS.

4. Defendants' Failure to Implement the Tracking System for Life Prisoner, MDO, and SVP Proceedings Was Willful Because They Failed to Require CC-Is to Use the DEC System and Have Taken No Steps to Enhance Connectivity.

Defendants have asserted that their problems implementing timely use of the DEC System for life prisoner and MDO proceedings are due to "labor" and "connectivity" problems. That is, Defendants contend that they cannot require Correctional Counselor I employees to use computers to check the DEC System, and there is not sufficient computer connectivity within the prisons. Mania Decl. ¶¶ 9-10.

The labor problem is of Defendants' own making. Defendants knew more than a year ago that their disability tracking system would be computerized. They agreed ten months ago to require CC-Is to check the DEC System for all steps in the MDO and Life Prisoner Hearing process. Baldwin Decl. Exh. C, ¶ 7. Despite that knowledge and the Joint Certification filed with the Court, and despite the fact that a federal Injunction requires them to track disabilities, Defendants have not even begun the union negotiations that they allege they need to complete in order to comply with the May 2006 Order. Mania Decl. ¶ 9. Defendants have presented no compelling reason why their long-delayed labor negotiations should further delay implementation of this court-ordered remedy.

Defendants have also failed to take any initiative to address the problem with connectivity. In their request for an extension of time, Defendants acknowledged that use of

DECS in the life prisoner process would require additions to the CDCR network and infrastructure. *See* Michael Brady Decl., filed 11/27/06 ¶ 10. Yet, Defendants are unable even to tell Plaintiffs what the current status is for access to DECS within the institutions. Mania Decl. ¶¶ 10-11. What is more, they have presented no evidence of their plan to provide adequate connectivity in the necessary locations for these proceedings. *Id.*

D. The Tracking System Does Not Transmit Information Back to Parole Staff for Future Use.

This Court ordered that the tracking system "must be able to transmit information back to CDCR Institutions and Parole for future use." Baldwin Decl., Exh. B (May 2006 Order), ¶ 2 at 9:14-15. Defendants have not complied with this requirement. The DEC System receives information from DAI and DAPO databases, but does not transmit information back to these databases for CDCR's future use in ensuring equal access to programs, services and activities during incarceration and parole supervision for prisoners and parolees with disabilities. Defendants contend that there is no need for the transmission of information back to DAI and DAPO databases, because the DEC System will be the definitive repository of disability and accommodations information for all staff. Baldwin Decl. ¶ 21. But, there is no evidence that DAPO staff will actually utilize DECS during institutional operations and parole supervision. *Id.* In addition, it is unclear at this time whether DAI staff have adequate access to the DEC System. Mania Decl. ¶ 10; Baldwin Decl. ¶ 21. Defendants must demonstrate to the Court and Plaintiffs' counsel that DAPO staff will use DECS to ensure the provision of needed accommodations in parole supervision, and that DAI staff will have adequate access to DECS during institutional operations.

E. Defendants Refuse to Require That the Tracking System Be Checked for Certain Parole Proceedings.

The parties' Joint Certification noted four points of disagreement as to whether certain proceedings are "parole proceedings" subject to the requirements of the Revised Permanent Injunction and the May 2006 Order:

(a) Notice of conditions of parole by Correctional Counselor I in CDCR Institutions and Parole Agent in parole field offices;

(b) Inclusion in the Life Prisoner Board Report by the Correctional Counselor I in CDCR Institutions of information regarding the life prisoner's ability to access programs previously recommended by the BPH under Paragraphs 36 and 37 of the Revised Permanent Injunction;

(c) Communication of special conditions of parole for parolees released to Not In Custody (NIC) status while parole revocation proceedings are pending; and

(d) Checking the tracking system to ensure that parolees with disabilities who are offered diversion to remedial sanctions programs can access the programs.

See Baldwin Decl., Exh. C (Joint Certification), ¶ 8.

All four of the proceedings listed above are "parole proceedings" as defined by the Revised Permanent Injunction, as they are "events related to the hearings that occur prior to … the [life prisoner or revocation] hearings." Baldwin Decl., Exh. A, ¶ 3. In addition, the four proceedings listed above are due process functions requiring a heightened standard for effective communication under Defendants' own policies and procedures. The *Armstrong* Remedial Plans and orders require that Defendants provide reasonable accommodations and effective communication to prisoners and parolees with disabilities in *all* programs, activities and services, whether these occur inside the institution, during parole supervision, or during a BPH proceeding.[2] Uncontested evidence presented in Plaintiffs' April 2006 enforcement motion included cases of deaf parolees who were denied sign language interpretation for notice of their conditions of parole or when accepting diversion to a remedial sanction. *See* Baldwin Decl. filed 4/21/06, ¶¶ 46, 50. Plaintiffs' counsel have attempted to secure an agreement from Defendants to check DECS for these four steps, without receiving any response. Baldwin Decl. ¶ 7, Exh. D. The DECS tracking

[2] In addition, the *Valdivia* Injunction and Remedial Plan require that parolees receive effective communication in the revocation process or diversion to remedial sanctions. *See* Stipulated Order for Permanent Injunctive Relief, *Valdivia v. Schwarzenegger*, E.D. Cal. No. Civ. S-94-0671 LKK/GGH, ¶ 18 and Exh. A at 3.

system must be checked by CDCR staff at each of the above four steps in order to determine disability information and accommodation needs.

II. Defendants Have Failed to Implement a Plan to Ensure Timely Accommodations for Parole Proceedings.

The May 2006 Order required Defendants to "…develop and implement a plan to assure that accommodations, including but not limited to sign language interpreters, are actually provided without delay." Baldwin Decl., Exh. B, at 8:26-9:3. By January 1, 2007, Defendants were required to certify to the Court that they had fully implemented the plan. *Id.* at ¶ 6 at 10:19-24. Defendants were required to meet and confer with Plaintiffs' counsel regarding the plan. *Id.* ¶ 4 at 10:6-11. They failed to do so. Baldwin Decl. ¶ 29. Instead, on February 20, 2007, without meeting and conferring with Plaintiffs' counsel, Defendants filed "Defendants' Plan To Ensure Reasonable Accommodations For Parole Proceedings" ("Accommodations Plan") with the Court. Mania Decl., Exh. A. The plan and its implementation are deficient. Defendants acknowledge this fact but have yet to remedy those deficiencies.

A. Defendants Have Failed to Address Known Problems with the Provision of Sign Language Interpreters in Their Plan.

Defendants have identified serious problems with their contracts to provide sign language interpretation at parole proceedings, including unacceptably long lead times of up to three weeks for securing interpretation, but have not developed any plan to address these problems. Baldwin Decl. ¶ 38, Exh. I. The Accommodations Plan relies on staff interpreters at designated prisons to provide accommodations in parole proceedings, but Defendants have failed to hire even one interpreter to date. *See* Cordy Declaration In Support of Joint Status Conference Statement, filed June 4, 2007. Defendants also plan to rely on videoconferencing as a backup method for providing sign language interpretation at parole proceedings, but have failed to demonstrate that there is sufficient connectivity and equipment to do so. Mania Decl. ¶ 28. Defendants have an egregious history of violations in this area. Baldwin Decl., Exh. B at 5. Their lack of initiative in addressing these known

deficiencies is unacceptable. Defendants must ensure they have the infrastructure to secure timely sign language interpretation.

B. Defendants' Plan Allows for Delays in Parole Proceedings Due to the Failure to Provide Accommodations.

Over a year ago, the Court found that Defendants were illegally requiring parolees to choose between a timely hearing and receiving a needed accommodation, and ordered Defendants to develop a plan to ensure that accommodations are actually provided at parole proceedings "*without delay*." Baldwin Decl., Exh. B at 5:26-6:6, 9:2-3 (emphasis added). *Cf.* Revised Permanent Injunction, Baldwin Decl., Exh. A ¶ 8. Yet, the Accommodations Plan and Defendants' draft policies permit DCs to postpone hearings due to Defendants' failure to provide needed disability accommodations. Mania Decl., Exh. A at 7, 8, 10, 12, 23-25; Exh. I at 3; Exh. J at 4; Exh. K at 5; Exh. L at 3.

Defendants have represented in meetings that postponements due to the failure to provide accommodations would only happen in very unusual circumstances where the failure to provide the accommodation was truly beyond the control of the State, but failed to include that information in their policies and procedures. Mania Decl. ¶ 24. Instead, Defendants' Accommodations Plan and Draft procedures explicitly allow a hearing to be delayed due to the failure to provide an accommodation, and fail to require Defendants to take any remedial action to address the delay or expedite the rescheduled hearing. *Id.*

Defendants' Plan must be amended to make it clear that failure to provide an accommodation at a hearing does not justify its postponement. In addition, Defendants must impose an expedited deadline for rescheduling life prisoner[3] and MDO hearings postponed due to the failure to provide an accommodation.

[3] Plaintiffs proposed a 35-day deadline which would allow five days for renoticing of witnesses and the 30 days' advance notice required for those witnesses. Defendants did not agree, stating they would propose an alternative deadline. Mania Decl. ¶¶ 23-24. In draft policies and procedures, rather than imposing a 35-day deadline, Defendants stated that 35

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C. The Plan Has Not Been Funded.

Despite the Order entered on December 14, 2006 clarifying Defendants' obligation to certify to the Court that they had obtained funding for the plan to provide accommodations (*see* December 14, 2006 Order at 4:6-8), Defendants have failed to do so. Baldwin Decl. ¶ 13. In the absence of such a certification, Plaintiffs have no confidence in Defendants' proposed plan to provide timely accommodations. Some of the elements of the Plan which should require funding are: staff training; providing adequate DECS access; enhancing the availability of accessible transportation; and providing timely access to sign language interpretation. Defendants must fund the Accommodations Plan.

D. Defendants Have Not Trained Staff on the Plan.

Despite multiple changes in procedures, Defendants have conducted no training for any staff on the provisions of their new plan apart from the DECS tracking system.[4] The sole mechanism for communicating this new information to staff has been to mail copies of a version of a Plan different from that filed with the Court to some staff involved in revocation proceedings. The cover memorandum with the mailing does not even reference the Plan. Baldwin Decl., Exh. G. Defendants' long history of failure to comply with their own procedures for meeting their obligations under the ADA requires more than a mailing to ensure that accommodations are provided in parole proceedings.

Defendants should provide training to all CDCR staff involved in revocation, revocation extension, life prisoner, MDO and SVP proceedings on their policies and procedures for ensuring that needed accommodations are provided.

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days is the *minimum* amount of time a prisoner will have to wait to receive a new hearing. Mania Decl., Exh. I.

[4] Defendants have provided training on the tracking system only to DCs, Board Revocation Representatives, and some high level Decentralized Revocation Units and headquarters staff. A PowerPoint presentation on use of DECS was mailed to DAPO staff. Baldwin Decl. ¶ 23, Exh. H.

E. Defendants Do Not Have a Plan to Provide Accommodations to Class Members Housed in County Jails.

In April 2007, the last month for which Plaintiffs have statistics, well over 37% of parole revocation cases were processed in county jails. Baldwin Decl. ¶ 37, Exh. L. Revocation extensions also occur in county jails. *Id.* Yet, Defendants have no information as to whether parolees with disabilities who are housed in county facilities are receiving needed accommodations. Defendants stated in their Interim Plan for Providing Accommodations, filed with the Court on January 3, 2007, that "CDCR has conducted a survey of county jails on providing ADA accommodations to *Armstrong* class members. The survey demonstrated that each county jail facility designated for parole revocation proceedings are [sic] accessible to *Armstrong* class members." Mania Decl., Exh. O at 4. After multiple requests for the survey from Plaintiffs, Defendants finally reported that "[a]fter conducting a diligent search, we regret that we are unable to locate this survey. However, we will keep you informed and let you know if we are able to locate the survey in the future." Baldwin Decl., Exh. K. This is not acceptable.

Defendants made unequivocal representations to this Court that they have performed a survey and that it demonstrated accessibility. Now they claim to have lost the survey. Given this record, it is unlikely that Defendants are ensuring that class members housed in county jails are provided with needed assistive devices and accessible locations. In fact, the uncontested evidence presented by Plaintiffs in April and May 2006 included many examples of prisoners denied timely accommodations for parole proceedings held at county jails. Defendants must conduct a survey of all county jails where parole proceedings take place and certify to the Court and Plaintiffs that they are structurally accessible and that parolees have access to needed assistive devices.

F. Defendants Have Not Demonstrated That There Are Structurally Accessible Locations for All Parole Proceedings at All Prisons.

Defendants have failed to demonstrate that there are structurally accessible locations for all steps of the parole proceedings that occur within CDCR institutions. They have provided a survey stating that all institutions except Folsom State Prison have structurally

accessible BPH hearing rooms, but despite Plaintiffs' requests, Defendants have failed to demonstrate accessible locations for any parole proceedings other than hearings, such as attorney consultations and file reviews. Baldwin Decl. ¶ 41, Exh. O. Defendants admit that there are *no* accessible hearing locations at all at Folsom, and have provided no procedures or plan for addressing or remedying this problem. *Id*. Defendants must certify to the Court and Plaintiffs that they have structurally accessible locations for non-hearing proceedings at all prisons and provide procedures for ensuring structurally accessible hearing rooms at Folsom.

G. Defendants' Plan to Ensure Accessible Transportation To and From Parole Proceedings Is Inadequate Because The Tracking System Does Not Contain a Field Alerting Staff to the Need for Accessible Transportation.

Defendants' Accommodations Plan instructs staff scheduling transportation to check the DEC system to determine whether the prisoner/parolee needs special transportation. Mania Decl., Exh. A at 14. The DEC System, however, does not have a field for noting a prisoner's need for accessible transportation. Mania Decl. ¶ 27. Defendants must develop procedures specifically instructing staff how to identify and track prisoners needing accessible transportation to and from parole proceedings. In addition, a field for transportation should be added to the DEC system.

H. Defendants' Plan Does Not Address the Long-Standing Problem of Inadequate Disability Training for BPH Panel Attorneys.

Defendants maintain a panel of attorneys appointed to represent prisoners in life prisoner, MDO and SVP proceedings. The Revised Permanent Injunction requires disability training for these attorneys. Baldwin Decl., Exh. A, ¶ 30. The BPH panel attorney disability training is grossly inadequate. It consists only of materials posted on the CDCR's website, containing outdated information on this lawsuit and general information on the ADA. Mania Decl. ¶ 30, Exh. R. The materials do not adequately instruct attorneys how to effectively communicate with their clients and ensure that their clients understand proceedings. There is no live training on disability accommodations and effective

communication. Plaintiffs' monitoring reports demonstrate that Deputy Commissioners rely on attorneys to ensure effective communication. Mania Decl. ¶ 30, Exh. R at 57. Plaintiffs have been demanding that the BPH improve its attorney training since 2003 without any response from Defendants. Mania Decl. Exh. R. Defendants have failed to respond to recent meet-and-confer requests on this topic. Mania Decl., ¶ 30, Exh. G. Defendants should require BPH panel attorneys to participate in the disability training provided to parole revocation defense attorneys employed by the California Parole Advocacy Program or its equivalent.

III. Defendants' Policies and Procedures to Ensure Reasonable Accommodations Are Incoherent.

Defendants' policies and procedures for providing accommodations during BPH proceedings are contained in multiple documents: the Interim Plan and Accommodations Plan filed with the Court, both of which Defendants have acknowledged are incomplete; some of the contents of the August 25, 2006 Joint Certification of Meet and Confer Results; the sections of the *Armstrong* II Remedial Plan that have not been rendered irrelevant by the *Valdivia* Injunction or subsequent Court orders; draft procedures provided to Plaintiffs in negotiations; and policy memoranda. This is simply too many different documents to check.

Defendants cannot provide staff with coherent and complete information about procedures for providing accommodations in parole proceedings when the information is so scattered and incomplete. Instead, Defendants must create a single, comprehensive document containing their plan for providing accommodations in parole proceedings. In addition, Defendants should integrate the policies and procedures for providing accommodations into the general policies and procedures governing parole proceedings. Defendants acknowledge they must integrate their procedures but have no plan, deadline, or incentive to make it happen. Baldwin Decl. ¶ 36.

Defendants have also failed to assign specific staff responsibility for ensuring compliance with the Remedial Plans and orders in this case in SVP, MDO and life prisoner

proceedings. Mania Decl. ¶ 34. Unless Defendants assign responsibility for compliance to specific staff members, their approach to compliance will continue to be scattered and incoherent. For this reason, Plaintiffs have requested appointment of a correctional counselor to coordinate compliance as part of their Proposed Order, filed herewith.

CONCLUSION

Defendants have failed to comply with the May 2006 Order. While they have made progress in some areas, they have fallen far short in too many others. Defendants' conscious decision not to fully implement the tracking system, their inadequate Accommodations Plan, and their sluggish and incomplete responses to Plaintiffs' requests for remedial action, have forced Plaintiffs to once again seek relief from the Court in order to safeguard the rights of the many parolees with disabilities forced to undergo parole revocation, revocation extension, lifer, MDO, and SVP proceedings without adequate accommodations for their disabilities. For these reasons, Plaintiffs respectfully request that the Court issue an Order finding that the Defendants are in violation of the May 30, 2006 Order, and entering further remedial orders, as detailed in the Proposed Order lodged and served herewith.

Dated: June 15, 2007

Respectfully submitted,

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