



PC-CA-005-002

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12 Attorneys for Plaintiffs

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15

DERRICK CLARK, et al.,)	No. C 96-1486 FMS
)	
Plaintiffs,)	<u>INTERIM AGREEMENT AND</u>
vs.)	<u>STIPULATION</u>
)	
STATE OF CALIFORNIA, et al.,)	
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Defendants.)	
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22 A. Introduction

23 1. On April 22, 1996, two prisoners with developmental disabilities incarcerated

1 within the California Department of Corrections filed this action against the State of
2 California, the Governor, the California Department of Corrections and various prison
3 officials alleging that defendants were discriminating against them on the basis of their
4 disability in violation of the Equal Protection Clause, the Americans with Disabilities Act
5 (ADA), 42 U.S.C. § 12131 et seq., and § 504 of the Rehabilitation Act (§504), 29 U.S.C.
6 § 794, that defendants were depriving them of due process in violation of the Fourteenth
7 Amendment, and that plaintiffs were living under conditions that were cruel and unusual
8 punishment in violation of the Eighth Amendment. The Court denied defendants' motion to
9 dismiss and certified the case as a class action. Plaintiffs filed an Amended Complaint
10 adding additional plaintiffs. The parties engaged in extensive discovery, conducting more
11 than 175 depositions and producing tens of thousands of pages of documents. The Court
12 denied defendants' motion for summary judgment, except for the equal protection claim,
13 which was dismissed with prejudice. The case was set for a two month trial on June 29,
14 1998. Prior to trial the parties engaged in settlement negotiations under the supervision of
15 Judge Eugene Lynch, which produced the framework for this agreement. Further
16 negotiations between the parties produced this document.

17 B. Parties

18 2. The parties to this Interim Agreement and Stipulation (Stipulation) are
19 plaintiffs Derrick Clark, Larry Dixon, Jr., Jack von Gunten, Mark Mitchell Morino, James
20 Simmons, Estella Holloway and the class of plaintiffs that they represent, and defendants
21 State of California, California Department of Corrections, Pete Wilson, Governor,
22 Thomas M. Maddock, Secretary of the Youth and Adult Corrections Agency, Cal Terhune,
23 Director of the California Department of Corrections, Susann Steinberg, M.D., Deputy

1 Director for Health Care Services, Nadim Khoury, M.D., Assistant Deputy Director for
2 Medical Services, and Marjorie TaVoularis, M.D., Chief, Mental Health Care Services.

3 The plaintiff class consists of all present and future individuals with developmental
4 disabilities¹⁷ who are under the control of the California Department of Corrections.

5 3. Each party to this Stipulation was represented by counsel during its negotiation
6 and execution. Plaintiffs and the plaintiff class are represented by Donald Specter, Prison
7 Law Office, Caroline Mitchell, Pillsbury Madison & Sutro LLP, and Mark Chavez,
8 Chavez & Gertler, et al. Cal Terhune and the other defendants are represented by Peter
9 Siggins and William Jenkins of the Office of the Attorney General of California.

10 4. Defendants waive their right to contest liability. The Supreme Court has held
11 that the ADA and §504 of the Rehabilitation Act apply to state prisons (Penn. Dept. of
12 Corrections v. Yeskey, ___ U.S. ___, 1998 WL 309065 (1998)) and the petition for
13 certiorari in this case has been denied. Therefore, defendants intend to remedy the
14 constitutional and statutory violations, and have agreed to develop a screening process to
15 identify developmentally disabled prisoners and to develop and implement a policy to ensure

16 _____
17 1. For purposes of the class definition, a developmental disability is defined as a
18 "disability which originates before an individual attains age 18, continues, or can be
19 expected to continue, indefinitely, and constitutes a substantial disability for that
20 individual. . . . [T]his term shall include mental retardation, cerebral palsy, epilepsy, and
21 autism. This term shall also include disabling conditions found to be closely related to
22 Mental Retardation or to require treatment similar to that required for mentally retarded
23 individuals, but shall not include other handicapping conditions that are solely physical in
nature." Cal. Welfare and Institutions Code § 4512(a). Mental Retardation means
"[s]ignificantly subaverage intellectual functioning: an IQ of approximately 70 or below on
an individually administered IQ test . . . [with] [c]oncurrent deficits or impairments in
present adaptive functioning (i.e., the person's effectiveness in meeting the standards
expected for his or her age by his or her cultural group) in at least two of the following
areas: communication, self-care, home living, social/interpersonal skills, use of community
resources, self-direction, functional academic skills, work, leisure, health and safety. . . .
The onset is before age 18 years." DSM-IV at 46.

1 the provision of necessary supportive services to prisoners with developmental disabilities.

2 C. Interim Remedial Plan

3 1. *Screening*

4 5. Defendants shall develop and begin to implement a reliable method to identify
5 prisoners who are developmentally disabled by September 15, 1998. Any such method shall
6 include an assessment of new prisoners and those currently incarcerated.

7 6. If defendants adopt an initial screening instrument that already has been
8 validated by scientific study, they may use that instrument immediately. If defendants
9 develop their own initial screening instrument or adopt one that has not been validated, they
10 shall perform a statistically valid study to determine whether it is reliable and report the
11 results to plaintiffs by September 1, 1998. The methodology of any such study and the
12 criteria for determining whether it is reliable and valid will be approved by the Court's
13 Experts prior to the study. If the study determines that the instrument is unreliable,
14 defendants shall immediately use an instrument that is recommended by the Court's Experts.

15 7. Defendants shall develop a plan to identify those prisoners already incarcerated
16 who are developmentally disabled by September 1, 1998.

17 2. *Other Programs*

18 8. Defendants agree to develop a plan to ensure the provision of necessary
19 supportive services and remedy the violations of the ADA, §504, and the Constitution.
20 Defendants' plan shall take into account the opinions expressed by plaintiffs' expert witnesses
21 and the factual bases therefor, and shall include:

- 22 a. **Training.** Adequate and reliable training of all custodial, clinical and
23 departmental staff that identify, interact with and have responsibility for
inmates with developmental disabilities.

- 1 b. **Education.** Appropriate education for eligible inmates with developmental
2 disabilities. Such education shall include, but is not limited to, class size that is
3 appropriate for educating inmates with developmental disabilities, curriculum
4 based testing, a basic literacy program and individually tailored education
5 programs as they may be required under the ADA or §504.
- 6 c. **Programs.** Reasonable access to work, vocational and other programs
7 available to non-disabled inmates. Reasonable access shall include, but is not
8 limited to, eligibility criteria that do not screen out or tend to screen out
9 inmates with developmental disabilities who have the ability to participate in
10 the programs being offered. Reasonable access also shall include graduated
11 supervision and training. Other programs include, but are not limited to,
12 religious services, meals, recreation, substance abuse, anger management,
13 libraries, telephones, emergency procedures, visiting, orientation, sick call,
14 mail and other written documents, and exercise.
- 15 d. **Medical Care.** Reasonable access to medical, psychiatric and dental care.
16 Reasonable access shall include, but is not limited to, assistance in obtaining
17 and getting to a medical appointment, and the availability of clinical staff who
18 are trained to elicit information from inmates with developmental disabilities.
- 19 e. **Protection, Housing and Classification.** Appropriate housing and
20 classification of prisoners with disabilities to assure that they are not exposed
21 to a significant risk of harm, abuse or harassment from staff or other inmates.
- 22 f. **Staff Assistance.** Appropriate assistance by properly trained staff to enable
23 inmates with developmental disabilities to understand and to participate in to
24 the best of their ability disciplinary, classification and other administrative
25 hearings, and to complete any forms or documents, such as administrative
26 appeals and credit restoration applications, necessary to secure any rights or
27 benefits available to non-disabled inmates.
- 28 g. **Internal Reviews and Audits.** An adequate internal mechanism to review and
29 audit compliance with the plan developed pursuant to this Stipulation to ensure
30 that defendants are effectively identifying and meeting the needs of inmates
31 with developmental disabilities.
- 32 h. **Limitation.** The plan need not include more than is required to remedy the
33 violations of the ADA, §504 and the Constitution.
- 34 9. Defendants' plan shall be developed in stages. Defendants shall provide drafts
35 of their plan to plaintiffs at least every 90 days. The parties shall meet at least every 60
36 days, from July 1, 1998, to December 31, 1999, to discuss defendants' plan. Defendants

1 shall provide the complete draft of their remedial plan to plaintiffs by February 1, 1999.

2 D. Final Remedial Plan

3 10. Defendants shall submit their final plan to plaintiffs by December 31, 1999.

4 Such plan shall be consistent with any orders issued by the Court. After all components of
5 the final plan have been accepted by plaintiffs or approved by the Court, the plan shall be
6 attached to the Settlement Agreement described below and shall be enforceable by the Court.

7 11. Defendants shall make all reasonable efforts to implement the plan as soon as
8 reasonably possible and shall undertake their best efforts to secure promptly the funding
9 necessary to implement the plan.

10 E. Implementation of Remedial Plan

11 12. If necessary to implement the plan, defendants shall seek from the California
12 legislature funds sufficient to implement their remedial plan in the Fiscal Year 1999/2000.

13 Defendants shall provide a copy of any budget request to plaintiffs at the time it is submitted
14 to the legislature, and shall inform plaintiffs of any other funds that are being redirected or
15 otherwise used to implement their plan. Defendants shall use all available measures and
16 make their best efforts to ensure enactment of any budget request. If defendants fail to
17 secure or redirect the funds necessary to implement their plan, plaintiffs may move the court
18 for an injunction requiring defendants to implement their plan.

19 13. With the exception of initial screening, which is to begin to be implemented by
20 September 15, 1998, defendants agree to begin implementation of their remedial plan
21 immediately after the FY 1999/2000 budget is enacted.

22 14. During the first 6 months of the implementation process defendants may
23 propose modifications to their plan to provide a more effective remedy or one that will

1 provide effective relief at less cost. Any proposed modifications shall be provided to
2 plaintiffs by November 1, 1999.

3 F. Monitoring and Access to Information

4 15. Defendants shall provide plaintiffs' counsel with reasonable access to
5 information sufficient to monitor defendants' compliance with this Stipulation and to evaluate
6 the adequacy and implementation of defendants' proposed plan. Access to such information
7 shall be provided in the ordinary course of business from the date this Stipulation is executed
8 until the Settlement Agreement is approved by the Court. Such information shall include,
9 but is not limited to, the following documents:

10 a. A monthly report of the identity and location of all identified members of the
11 plaintiff class;

12 b. The complete medical, psychiatric and non-confidential central files of the
13 plaintiff class;

14 c. All internal reviews or audits of defendants' plan and programs;

15 d. All budget change proposals to implement defendants' plan or programs;

16 e. All evaluations of whether prisoners are developmentally disabled;

17 f. All analyses and reports concerning the reliability of defendants' screening
18 instruments; and

19 g. Documents maintained at individual institutions that are relevant to assessing
20 the state of defendants' compliance.

21 16. Plaintiffs shall be able to conduct 33 tours of institutions per year (including
22 multiple tours of the same institutions), with or without their expert consultants. Such tours
23 shall include access to institutional programs and classification and disciplinary hearings,

1 housing facilities, recreational yards, and all other areas of the institution normally used by
2 inmates. Defendants shall make available for interview departmental, custodial, clinical and
3 program staff that have responsibility for the care, treatment, safety, classification, housing,
4 discipline and programming of class members. Plaintiffs' counsel shall be able to have brief
5 discussions with inmates during the tours and shall be able to provide prison staff with
6 counsel's name and address for distribution to specific inmates. Defendants also shall
7 provide plaintiffs' counsel access to confidential interviews with inmates before or after the
8 tours, as arranged among counsel, during regular business hours without regard to regular
9 visiting hours and days. Plaintiffs reserve their right to depose departmental, custodial,
10 clinical, and program staff members.

11 G. Independent Court Experts

12 17. The parties agree that they will jointly request that the Court appoint two
13 experts pursuant to Federal Rules of Evidence, Rule 706 to advise the Court on the adequacy
14 of defendants' plan and any other matter that appropriately may be the subject of the experts'
15 testimony. The parties shall propose to the Court that the experts' duties specified in Exhibit
16 A shall be provided to the experts pursuant to Rule 706(a). The experts shall be entitled to
17 reasonable compensation in an amount approved by the Court and shall be paid by the
18 California Department of Corrections.

19 18. The parties agree that the Court should appoint Peter Leone, Ph.D. and
20 Melissa Warren, Ph.D. as the Rule 706 experts. In the event that one or both of these
21 experts can no longer serve, the parties shall attempt to agree on a replacement(s) within 30
22 days. If the parties do not agree, defendants and plaintiffs shall each nominate one
23 replacement, and one of those nominated shall be jointly selected by the existing experts. In

1 the event the experts cannot agree, each expert shall submit one name to the Honorable
2 Eugene Lynch, who shall chose one and recommend that person's appointment by the Court.

3 19. The Court experts shall have access to all parts of any institution, with or
4 without notice, all relevant documents, all individuals (including confidential interviews with
5 staff or inmates) and all institutional meetings, proceedings and programs to the extent that
6 such access is needed to fulfill his or her obligations.

7 H. Negotiation, Evaluation and Judicial Review of Defendants' Plan

8 20. Upon receipt of any plan or modifications thereof required by this Stipulation,
9 plaintiffs shall notify defendants within 30 days of receipt whether they are acceptable. If
10 the plan or any component thereof is not acceptable, plaintiffs shall provide defendants with a
11 brief description of the perceived deficiencies and a request that the parties enter into
12 negotiations about the adequacy of the plan. Upon receipt of plaintiffs' request for
13 negotiations, any party may inform the Court's Experts of the area of disagreement and
14 request that the experts evaluate the issue and prepare a report. At the option of any party,
15 the negotiations shall include the Court's Experts, and any unresolved issues shall be
16 mediated by the Honorable Eugene Lynch, or, if he is not available, any other person
17 satisfactory to the parties.

18 21. If negotiation and mediation fail to resolve any issue, plaintiffs shall have the
19 option of seeking injunctive relief from the Court on any unresolved issues. The substance
20 of the mediation and any statements made by a party are confidential and not admissible in
21 any subsequent proceeding. The Experts' report(s) shall be admissible as evidence at the
22 request of any party. Defendants waive their right to oppose injunctive relief on the grounds
23 that they are not liable under the ADA, §504, or the Constitution; that plaintiffs lack

1 standing or lack proof of pervasive or widespread injury; that plaintiffs have not exhausted
2 their administrative remedies in this case; and that plaintiffs' claims are barred by the statute
3 of limitations and the laches doctrine. Defendants reserve all other defenses to injunctive
4 relief, including, but not limited to, any defenses occasioned by future changes in the
5 statutory or decisional law addressing the ADA, the Rehabilitation Act or the constitutional
6 rights of the plaintiff class, or the jurisdiction or powers of the court. All parties reserve
7 their right to appeal the Court's decision to grant or deny the injunction.

8 I. Liability for Injunctive Relief

9 22. With the exception of the equal protection claim, defendants waive all their
10 rights to contest liability in any manner for any of the causes of action set forth in the
11 Amended Complaint and agree that they have violated the same rights of plaintiffs and some
12 members of the plaintiff class. Defendants acknowledge that this Stipulation will be a
13 complete, final and binding waiver of their rights to a trial, to present evidence, to cross-
14 examine witnesses and to make arguments on the issue of liability. This Stipulation shall be
15 admissible in this case as conclusive evidence of defendants' liability in any proceeding for
16 injunctive relief. Defendants reserve their right to assert that the substance of any particular
17 injunction that plaintiffs might seek is not an appropriate remedy under existing law, and the
18 defenses as set forth in ¶21, above.

19 J. Settlement Agreement

20 23. After the final plan has been accepted by plaintiffs or approved by the Court a
21 Settlement Agreement in the form set forth in Exhibit B shall be submitted to the Court for
22 approval pursuant to Federal Rules of Civil Procedure, Rule 23(e).
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K. Alternative Relief

25. If at any time before the Settlement Agreement is approved by the Court plaintiffs believe that defendants are not in substantial compliance with this Stipulation, they may seek any form of injunctive relief permitted by law.

L. Transfer and Evaluation of Plaintiffs and Class Members

26. Within 30 days after the date this Stipulation becomes effective defendants shall evaluate the named plaintiffs and the 19 class members listed in Exhibit C to determine whether in order to satisfy defendants' obligations under existing law the identified inmates need any further supportive or habilitative services to obtain access to defendants' programs, services, or activities; whether they need placement in protective housing to protect them from a significant risk of harm; or whether they should be transferred to the California Men's Colony, the California Medical Facility, the California Institution for Women, or any other facility for provision of such services and protection. Defendants shall provide plaintiffs' counsel with a statement of the actions defendants intend to take with respect to each named plaintiff and class member listed in Exhibit C. Defendants' decision shall be subject to the negotiation and mediation process set forth in Section H of this Stipulation and shall be one of the subjects of the first meeting between the parties.

M. Trial

27. The parties will request that the trial of this case be continued until June 1999. Plaintiffs reserve the right to move for any earlier date to be set no less than 60 days from the date they notify defendants of their intention to seek a trial date. Defendants agree not to oppose such a request.

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N. Attorney Fees and Costs

28. Plaintiffs are the prevailing party and are entitled to reasonable attorneys fees and \$500,000.00 in litigation expenses and costs as provided by 42 U.S.C. § 12205, 29 U.S.C. § 794a for all work performed in this matter prior to the date this Stipulation is executed. Defendants shall pay to plaintiffs' counsel \$500,000.00 in expenses within 45 days of the date that this Stipulation is executed.

29. The amount of attorneys fees shall be subject to negotiation between the parties. Plaintiffs will provide to defendants' counsel detailed time runs by July 2, 1998. These time runs and the previously provided expense statements shall be confidential; they shall not be disclosed by defendants' counsel or their agents to any other persons; and the detailed time runs shall not be used by defendants' counsel for any purpose other than negotiating or arbitrating plaintiffs' fee award in this case. The disclosure of plaintiffs' time runs shall not be deemed a waiver of their work-product or attorney-client privileges.

30. The parties shall meet on or before August 31, 1998, to negotiate plaintiffs' fees. If this negotiation is unsuccessful the parties agree to participate in binding arbitration in the manner set forth below before the Honorable Edward Stern (retired) of JAMS/ENDISPUTE. Each party shall pay one half of Judge Stern's fees. The arbitration shall be conducted at JAMS/ENDISPUTE in San Francisco, California. It shall be completed in a one-day proceeding to occur no later than September 30, 1998.

31. One week prior to the hearing date, the parties shall exchange their arbitration statements and provide a copy to Judge Stern. These statements may be accompanied by supporting exhibits and declarations and shall include the parties' positions on the total dollar amount of fees to be awarded by the arbitrator. Defendants shall not propose an amount less

1 than \$1.8 million (one million eight hundred thousand dollars) and plaintiffs shall not propose
2 an amount in excess of \$3 million (three million dollars).

3 32. At the hearing, each side shall have two hours to make a presentation to Judge
4 Stern regarding that party's position on the amount of fees to be awarded. The presentation
5 may include the testimony of witnesses, documents, and/or other evidence, whether or not it
6 would be admissible in a court of law. At the conclusion of a party's presentation, the other
7 side shall be entitled to conduct no more than thirty minutes of cross-examination of the
8 opposing party's witnesses, if any. At the conclusion of the presentation, Judge Stern may
9 pose whatever questions he deems appropriate to the parties or witnesses.

10 33. Within ten (10) days of the arbitration hearing, Judge Stern shall issue his
11 arbitration award, which shall accept one of the parties' positions on the amount of attorneys'
12 fees to be paid by defendants to plaintiffs' counsel. More specifically, Judge Stern shall
13 select and award the dollar amount proposed by one of the parties and may not award any
14 other amount. In this respect, the arbitration will be conducted in the manner of baseball
15 arbitration. The parties shall accept Judge Stern's award on the amount of fees as final,
16 binding, and non-appealable. The award shall be entered as a judgment of the Court and
17 shall be paid within 45 days of the date judgment is entered. If the award is not paid within
18 45 days, interest shall accrue starting on the 46th day at the legal rate set forth in 28 U.S.C.
19 § 1961.

20 31. Defendants shall pay plaintiffs for all work performed in connection with this
21 Stipulation in an amount not to exceed \$360,000 in fees per year plus reasonable expenses,
22 expert witness fees and costs. Plaintiffs shall submit a detailed invoice for their services and
23 expenses at the end of every quarter and defendants shall pay the amount requested by

1 plaintiffs within 45 days of receipt of each invoice, provided that defendants need not pay
2 any fees that exceed \$360,000 per year. If plaintiffs' counsel take additional steps to
3 enforce this Stipulation through litigation they shall be entitled to seek a reasonable award of
4 attorneys fees, notwithstanding the monetary limits set forth above.

5 O. Construction of Stipulation.

6 32. This Stipulation and the Appendices attached hereto reflect the entire
7 agreement of the parties and supersede any prior written or oral agreements between them.
8 No extrinsic evidence whatsoever may be introduced in any judicial proceeding to provide
9 the meaning or construction of this Stipulation. Any modification to the terms of this
10 Stipulation must be in writing and be signed by a representative of the Department of
11 Corrections and attorneys for the plaintiffs to be effective or enforceable.

12 33. This Stipulation shall be governed by and be construed according to California
13 law. The parties waive any common law or statutory rule of construction that ambiguity
14 should be construed against the drafter of this Stipulation, and agree that the language in all
15 parts of this Stipulation shall in all cases be construed as a whole, according to its fair
16 meaning.

17 34. This Stipulation shall be valid and binding upon, and faithfully kept, observed,
18 performed and be enforceable by and against the parties, their successors and assigns and the
19 plaintiff class.

20 35. The obligations governed by this Stipulation are severable. If for any reason a
21 part of this Stipulation is determined to be invalid or unenforceable, such a determination
22 shall not affect the remainder.

23 36. The waiver by one party of any provision or breach of this Stipulation shall

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not be deemed a waiver of any other provision or breach of this Stipulation.

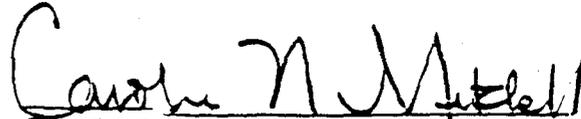
37. This Stipulation shall become effective upon its execution by all of the undersigned. This Stipulation may be executed in counterparts, and execution of counterparts shall have the same force and effect as if all parties had signed the same instrument.

IT IS SO STIPULATED AND AGREED.

Dated: July 20, 1998


DONALD SPECTER
Prison Law Office
Attorney for plaintiffs

Dated: July 20, 1998


CAROLINE N. MITCHELL
Pillsbury Madison & Sutro LLP

Dated: July 20, 1998


PETER SIGGINS, Senior Assistant
Attorney General on behalf of all
defendants

Dated: July 27, 1998

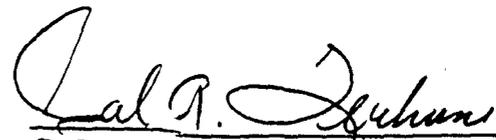

CAL A. TERHUNE, Director
California Department of Corrections

EXHIBIT A

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12 Attorneys for Plaintiffs

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16	DERRICK CLARK, et al.,)	No. C 96-1486 FMS
17)	
18	vs.)	ORDER APPOINTING EXPERTS
19	STATE OF CALIFORNIA, et al.,)	AND PRESCRIBING DUTIES
20)	
21	Defendants.)	
)	

22 At the request of the parties and good cause appearing therefor, the Court hereby
23 appoints, with their consent, Peter Leone, Ph.D. and Melissa G. Warren, Ph.D. as court

1 experts pursuant to Federal Rules of Evidence, Rule 706. Compensation for these experts
2 shall be approved by the Court and paid by the California Department of Corrections.

3 Pursuant to Rule 706(a) the Court hereby informs the experts that their duties shall be
4 as follows:

5 1. At the request of any party or the Court the experts shall evaluate defendants'
6 plans to determine whether they are sufficient to satisfy defendants' obligations set forth in
7 part C of the Interim Agreement and Stipulation.

8 2. At the request of any party or the Court the experts shall evaluate any
9 modifications proposed by defendants to determine whether those modifications in
10 combination with the rest of the plans are sufficient to satisfy defendants' obligations set
11 forth in part C of the Interim Agreement and Stipulation.

12 3. At the request of any party or the Court the experts shall evaluate any
13 modifications proposed by plaintiffs to determine whether those modifications are necessary
14 to satisfy defendants' obligations set forth in part C of the Interim Agreement and
15 Stipulation.

16 4. At the request of any party or the Court the experts shall evaluate defendants'
17 compliance with their plans.

18 5. Any evaluations by the experts shall be transmitted to the parties in a written
19 report(s). Such reports shall contain the experts' conclusions and shall specify the
20 information upon which any conclusions are based.

21 6. At the request of any party or the Court the experts shall attend any negotiations,
22 mediation sessions or court hearings.

23 7. The experts shall be available to meet with the parties in person or by phone in

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such a manner as is reasonable and convenient. The experts shall be available to meet with the plaintiffs or defendants separately or jointly as the occasion may warrant.

8. The experts shall have access to all parts of any institution, with or without notice, all relevant documents, all persons (including confidential interviews with staff or inmates) and all institutional meetings, proceedings and programs to the extent that such access is needed to fulfill their obligations.

IT IS SO ORDERED.

Dated: July __, 1998

FERN M. SMITH
UNITED STATES DISTRICT COURT

EXHIBIT B

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Attorneys for Plaintiffs

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SETTLEMENT AGREEMENT AND ORDER

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A. Introduction

1. On April 22, 1996, two prisoners with developmental disabilities incarcerated within the California Department of Corrections filed this action against the State of California, the Governor, the California Department of Corrections and various prison officials alleging that defendants were discriminating against them on the basis of their disability in violation of the Equal Protection Clause, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., and § 504 of the Rehabilitation Act (§504), 29 U.S.C. § 794, that defendants were depriving them of due process in violation of the Fourteenth Amendment, and that plaintiffs were living under conditions that were cruel and unusual punishment in violation of the Eighth Amendment. The Court denied defendants' motion to dismiss and certified the case as a class action. Plaintiffs filed an Amended Complaint adding additional plaintiffs. The parties engaged in extensive discovery, conducting more than 175 depositions and producing tens of thousands of pages of documents. The Court denied defendants' motion for summary judgment, except for the equal protection claim, which was dismissed with prejudice. The case was set for a two month trial on June 29, 1998. Prior to trial the parties engaged in settlement negotiations under the supervision of Judge Eugene Lynch, which produced the framework for this agreement. Further negotiations between the parties produced an Interim Agreement and Stipulation that was filed with the Court on July 20, 1998.

Pursuant to the Interim Agreement and Stipulation defendants proposed a plan to remedy the constitutional and statutory violations identified by plaintiffs. This plan was subject to negotiation between the parties and, evaluated by experts appointed by the Court. As a result of this process, defendants have a final plan each component of which has been

1 accepted by the plaintiffs or approved by the Court. Through this Settlement Agreement
2 defendants agree to implement this plan, subject to monitoring by plaintiffs' counsel,
3 evaluation by the Court's experts, negotiation between the parties and, if necessary,
4 enforcement by the Court.

5 B. Parties

6 2. The parties to this Settlement Agreement are plaintiffs Derrick Clark, Larry
7 Dixon, Jr., Jack von Gunten, Mark Mitchell Morino, James Simmons, Estella Holloway and
8 the class of plaintiffs that they represent, and defendants State of California, California
9 Department of Corrections, Pete Wilson, Governor, Thomas M. Maddock, Secretary of the
10 Youth and Adult Corrections Agency, Cal Terhune, Director of the California Department of
11 Corrections, Susann Steinberg, M.D., Deputy Director for Health Care Services, Nadim
12 Khoury, M.D., Assistant Deputy Director for Medical Services, and Marjorie TaVoularis,
13 M.D., Chief, Mental Health Care Services and their successors. The plaintiff class consists
14 of all present and future individuals with developmental disabilities¹⁷ who are under the
15 control of the California Department of Corrections.

16 _____
17 1. For purposes of the class definition, a developmental disability is defined as a
18 "disability which originates before an individual attains age 18, continues, or can be
19 expected to continue, indefinitely, and constitutes a substantial disability for that
20 individual.... [T]his term shall include mental retardation, cerebral palsy, epilepsy, and
21 autism. This term shall also include disabling conditions found to be closely related to
22 Mental Retardation or to require treatment similar to that required for mentally retarded
23 individuals, but shall not include other handicapping conditions that are solely physical in
nature." Cal. Welfare and Institutions Code 54512(a). Mental Retardation means
"[s]ignificantly subaverage intellectual functioning: an IQ of approximately 70 or below on
an individually administered IQ test . . . [with] [c]oncurrent deficits or impairments in
present adaptive functioning (i.e., the person's effectiveness in meeting the standards
expected for his or her age by his or her cultural group) in at least two of the following
areas: communication, self-care, home living, social/interpersonal skills, use of community
resources, self-direction, functional academic skills, work, leisure, health and safety....
The onset is before age 18 years." DSM-IV at 46.

1 3. Each party to this agreement was represented by counsel during its negotiation
2 and execution. Plaintiffs and the plaintiff class are represented by Donald Specter, Prison
3 Law Office, Caroline Mitchell, Pillsbury, Madison & Sutro LLP, and Mark Chavez, Chavez
4 & Gertler LLP, et al. Cal Terhune and the other defendants are represented by Peter Siggins
5 and William Jenkins of the Office of the Attorney General of California.

6 C. Terms and Conditions

7 4. **Implementation of Plan.** Defendants shall fully implement all of the
8 provisions of their remedial plan, which is attached hereto as Appendix A.

9 5. **Jurisdiction.** The Court shall retain jurisdiction to enforce the terms of this
10 agreement. The Court shall have the power to enforce the agreement through specific
11 performance and all other remedies permitted by law.

12 6. **Experts.** The parties agree that the appointments of Peter Leone, Ph.D. and
13 Melissa Warren, Ph.D. as Court experts will continue pursuant to Federal Rules of
14 Evidence, Rule 706 to advise the Court on the adequacy of defendants' implementation of
15 their plan and any other matter that appropriately may be the subject of the experts'
16 testimony. The experts' duties specified in Appendix B shall be provided to the experts
17 pursuant to Rule 706(a). The experts shall be entitled to reasonable compensation in an
18 amount approved by the Court and shall be paid by the California Department of
19 Corrections. The Court experts shall have access to all parts of any institution, with or
20 without notice, all relevant documents, persons (including confidential interviews with staff
21 or inmates) and institutional meetings, proceedings and programs to the extent that such
22 access is needed to fulfill his or her obligations.

23 7. In the event that one or both of these experts can no longer serve, the parties

1 shall attempt to agree on a replacement(s) within 30 days. If the parties do not agree,
2 defendants and plaintiffs shall each nominate one replacement, and one of those nominated
3 shall be jointly selected by the existing experts. In the event the experts cannot agree, each
4 expert shall submit one name to the Honorable Eugene Lynch, who shall chose one and
5 recommend that person's appointment by the Court.

6 8. **Enforcement.** Plaintiffs' counsel shall monitor defendants' compliance with
7 the plan set forth in Appendix A. If plaintiffs believe that defendants are not complying with
8 some or all of the plan they shall notify defendants of the perceived problems. Defendants
9 shall investigate the allegations and respond within twenty calendar days. If plaintiffs are not
10 satisfied with defendants' response they may request that the matters be evaluated by the
11 Court's experts and/or be subject to mediation with the Honorable Eugene Lynch, or, if he is
12 not available, any other person satisfactory to the parties. The substance of the mediation
13 and any statements made by a party are confidential and not admissible in any subsequent
14 proceeding. The Experts' report(s) shall be admissible as evidence at the request of any
15 party.

16 9. If negotiations fail to resolve any issue, plaintiffs shall have the option of
17 seeking relief from the Court. The Experts' report(s) shall be admissible as evidence at the
18 request of any party.

19 10. **Modification of Plan.** Defendants may seek to modify their plan if there is a
20 significant change in the facts or the law; plaintiffs may seek to modify the plan if the plan
21 does not effectively remedy defendants' violations or if a modification is necessary to ensure
22 plaintiffs receive adequate supportive services to which they are entitled under the ADA,
23 §504 or the Constitution. Any party wishing to modify the plan must submit the proposed

1 modification to the opposing party. The opposing party may request further information,
2 request that the modifications be evaluated by the Court's experts and be the subject of
3 negotiation with Judge Lynch. If the parties fail to reach agreement on the modification, the
4 party proposing the modification may seek relief from the Court.

5 **11. Monitoring and Access to Information.** Defendants shall provide plaintiffs'
6 counsel with reasonable access to information sufficient to monitor defendants' compliance
7 with their plan. Access to such information shall be provided in the ordinary course of
8 business from the date this Settlement Agreement is approved by the Court. Such
9 information shall include, but is not limited to, the following documents:

10 a. A monthly report of the identity and location of all identified members
11 of the plaintiff class;

12 b. The complete medical, psychiatric and non-confidential central files of
13 the plaintiff class;

14 c. All internal reviews or audits of defendants' plan and programs;

15 d. All budget change proposals to implement defendants' plan or
16 programs;

17 e. All evaluations of whether prisoners are developmentally disabled;

18 f. All analyses and reports concerning the reliability of defendants'
19 screening instruments; and

20 g. Documents maintained at individual institutions that are relevant to
21 assessing the state of defendants' compliance.

22 **12.** Plaintiffs shall be able to conduct 33 tours of institutions housing members of the
23 plaintiff class per year (including multiple tours of the same institutions), with or without

1 their expert consultants. Such tours shall include access to institutional programs and
2 classification and disciplinary hearings, housing facilities, recreational yards, and all other
3 areas of the institution normally used by inmates. Defendants shall make available for
4 interview departmental, custodial, clinical and program staff that have responsibility for the
5 care, treatment, safety, classification, housing, discipline and programming of class
6 members. Plaintiffs' counsel shall be able to have brief discussions with inmates during the
7 tours and shall be able to provide prison staff with counsel's name and address for
8 distribution to specific inmates. Defendants also shall provide plaintiffs' counsel access to
9 confidential interviews with inmates before or after the tours, as arranged among counsel,
10 during regular business hours without regard to regular visiting hours and days. Plaintiffs
11 reserve their right to seek to depose departmental, custodial, clinical, and program staff
12 members.

13 13. **Attorney Fees.** Defendants shall pay plaintiffs for all work performed in
14 connection with monitoring implementation of their plan and the terms and conditions thereof
15 in fees per year plus reasonable expenses, expert witness fees and costs. Plaintiffs shall
16 submit a detailed invoice for their services and expenses at the end of every quarter and
17 defendants shall pay the amount requested by plaintiffs within 45 days of receipt of each
18 invoice, provided that defendants need not pay any fees that exceed \$393,333 in year 2000,
19 \$426,666 in year 2001 and \$460,000 in each year thereafter in which this stipulation remains
20 effective. If plaintiffs' counsel take additional steps to enforce this stipulation through
21 litigation they shall be entitled to seek a reasonable award of attorneys fees, notwithstanding
22 the monetary limits set forth above.

23 14. **Termination.** Defendants may move to vacate this Settlement Agreement and

1 dismiss the case on the ground that they have substantially complied with the plan set forth in
2 Appendix A as modified for a period of three years. Plaintiffs may oppose the motion, and
3 shall have the burden of proving that defendants are not in substantial compliance.
4 Defendants will be in substantial compliance when at the time of assessment they have
5 achieved, and may reasonably be expected to continue to achieve, satisfaction of each
6 undertaking through established policy, routine and reliable practice. A finding of non-
7 compliance shall not be based on isolated failures to follow established procedures, technical
8 departures from such procedures that do not reduce the benefits to the plaintiff class, or
9 unimportant violations of no consequence. The parties shall attempt to negotiate any disputes
10 about defendants' compliance with the assistance of Judge Lynch and/or the evaluation of the
11 Court's experts.

12 15. **Liability and Necessity for Relief.** Defendants admit that they have violated
13 the federal rights of plaintiffs in a manner sufficient to warrant the relief contained herein.
14 The parties agree that the relief set forth herein is narrowly drawn, extends no further than
15 necessary to correct the violation of the federal rights and is the least intrusive means
16 necessary to correct the violation of the federal rights.

17
18 IT IS SO AGREED AND STIPULATED.

19 Dated: July 20, 1998

20 _____
DONALD SPECTER
Prison Law Office
Attorney for plaintiffs

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22
23 Dated: July 20, 1998

CAROLINE N. MITCHELL

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Pillsbury Madison & Sutro LLP

Dated: July 20, 1998

PETER SIGGINS, Senior Assistant
Attorney General on behalf of all
defendants

Dated: July __, 1998

CAL A. TERHUNE, Director
California Department of Corrections

Having reviewed the terms and conditions set forth above, any comments from class members, the arguments of counsel and the records on file in this case, the Court hereby finds that the terms of this Settlement Agreement are fair and reasonable and that defendants' plan, once fully implemented, shall provide effective relief to the plaintiff class. Accordingly, the Court will retain jurisdiction over this case to enter any order necessary to ensure compliance with and implementation of the terms and conditions set forth above.

IT IS SO ORDERED.

Dated:

UNITED STATES DISTRICT COURT

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12 Attorneys for Plaintiffs

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16	DERRICK CLARK, et al.,)	No. C 96-1486 FMS
17)	
17	Plaintiffs,)	ORDER APPOINTING EXPERTS
18	vs.)	AND PRESCRIBING DUTIES
19	STATE OF CALIFORNIA, et al.,)	
20)	
20	Defendants.)	
21)	

22 At the request of the parties and good cause appearing therefor, the Court hereby
23 appoints, with their consent, Peter Leone, Ph.D. and Melissa G. Warren, Ph.D. as court

1 experts pursuant to Federal Rules of Evidence, Rule 706. Compensation for these experts
2 shall be approved by the Court and paid by the California Department of Corrections.

3 Pursuant to Rule 706(a) the Court hereby informs the experts that their duties shall be
4 as follows:

5 1. At the request of any party or the Court the experts shall evaluate defendants'
6 plans to determine whether they are sufficient to satisfy defendants' obligations set forth in
7 part C of the Interim Agreement and Stipulation.

8 2. At the request of any party or the Court the experts shall evaluate any
9 modifications proposed by defendants to determine whether those modifications in
10 combination with the rest of the plans are sufficient to satisfy defendants' obligations set
11 forth in part C of the Interim Agreement and Stipulation.

12 3. At the request of any party or the Court the experts shall evaluate any
13 modifications proposed by plaintiffs to determine whether those modifications are necessary
14 to satisfy defendants' obligations set forth in part C of the Interim Agreement and
15 Stipulation.

16 4. At the request of any party or the Court the experts shall evaluate defendants'
17 compliance with their plans.

18 5. Any evaluations by the experts shall be transmitted to the parties in a written
19 report(s). Such reports shall contain the experts' conclusions and shall specify the
20 information upon which any conclusions are based.

21 6. At the request of any party or the Court the experts shall attend any negotiations,
22 mediation sessions or court hearings.

23 7. The experts shall be available to meet with the parties in person or by phone in

1 such a manner as is reasonable and convenient. The experts shall be available to meet with
2 the plaintiffs or defendants separately or jointly as the occasion may warrant.

3 8. The experts shall have access to all parts of any institution, with or without notice,
4 all relevant documents, all persons (including confidential interviews with staff or inmates)
5 and all institutional meetings, proceedings and programs to the extent that such access is
6 needed to fulfill their obligations.

7 IT IS SO ORDERED.

8 Dated: July __, 1998

9 FERN M. SMITH
UNITED STATES DISTRICT COURT

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