

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:10-CT-3166-BO

CHAD BUMGARNER, EDMUND GAUD,)
RAYMOND HALL, ROGER HOWELL,)
RANDY JOHNSON, and WAYNE PAYNE)

Plaintiffs,)

v.)

NORTH CAROLINA DEPARTMENT OF)
CORRECTION, ALVIN W. KELLER,)
ROBERT LEWIS, LAURA YATES, and)
PAULA Y. SMITH,)

Defendants.)

**STIPULATED CONSENT
DECREE**

The parties hereto, through counsel, having agreed and stipulated to the entry of this Consent Decree, and the Court having reviewed the record herein and being sufficiently advised and following the Rule (e)(2) Fairness Hearing on 30 July 2013,

THE COURT FINDS AS FACT AND LAW:

1. This Consent Decree will grant prospective relief with respect to the equal opportunity and access of the Plaintiff Class to the Sentence Credits of the Division of Adult Correction of the Department of Public Safety,¹ Section of Prisons.

2. The relief granted herein is narrowly drawn, extends no further than necessary to correct a violation of a federal right, and is the least intrusive means necessary to correct the violation of a federal right.

¹Pursuant to Session Laws 2011-145, s. 19.1(h) and (I), effective January 1, 2012, the Department of Correction is the "Division of Adult Correction of the Department of Public Safety."

3. None of the provisions of this Consent Decree violate the restrictions on prospective relief set forth in 18 U.S.C. § 3626(a).

NOW THEREFORE IT IS ORDERED,

1. The Defendants and their subordinates and their successors in positions within the administration of the Division of Adult Correction of the Department of Public Safety, Section of Prisons (hereinafter collectively referred to as "DAC") shall establish and implement a policy to provide access to Sentence Credits to qualified inmates with disabilities under the Americans with Disabilities Act of 1990 ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Rehab Act"), consistent with legitimate penological interests. DAC shall uniformly apply and enforce the policy entitled *Reasonable Accommodation for Inmates with Disabilities Policy* (the "ADA Policy"), as set forth in Attachment A hereto, for uniform application and enforcement throughout its prison facilities; provided, however, that minor, occasional, non-willful deviations from the time limits for completing disability assessments (DC-927) and processing Inmate Reasonable Accommodation Request Determination Forms (DC-746) or from other administrative provisions of the ADA Policy shall not be considered a violation of this Consent Decree so long as DAC uses its best efforts to minimize such deviations and to correct them when they occur. Further, within sixty (60) days of the date this Consent Decree is filed the following DAC policies and forms shall be amended and modified, as set forth in Attachments B through E hereto.

- a. Developmental Disabilities, TX VII-1 (Attachment B)
- b. Department of Correction, Division of Prisons Policy and Procedure, Chapter B § .0112, "GAIN TIME;" Chapter B, § .0113 "EARNED TIME CREDITS;" and Chapter B, § .0117, "GAIN and EARNED TIME CREDIT FOR MEDICALLY AND PHYSICALLY UNFIT

INMATES,” within Chapter B, § .0100, Title: Sentence Credits (Attachment C)

- c. Inmate Reasonable Accommodation Request (“IRAR”) Form, DC-746 (Attachment D)
- d. Evaluation Criteria for Persons Under the ADA, Form DC-927 (Attachment E)

2. Unless exigent circumstances necessitate a shorter advance notice period or no advance notice (in which case DAC shall provide written notice as soon as possible), DAC shall provide counsel for the Plaintiff Class, North Carolina Prisoner Legal Services, Inc. (“NCPLS”), with written notice of any substantive proposed change to the DAC policies and forms attached hereto as Attachments A through E (including the perceived penological objective of the proposed change) at least forty-five (45) days in advance of the effective date of such proposed change. Within fifteen (15) days after receiving such notice, NCPLS shall submit to DAC its written comments and suggestions regarding the proposed change, which DAC shall consider in good faith. If NCPLS objects to the change (as proposed by DAC after considering NCPLS’s comments and suggestions) for reasons based on the ADA and Rehab Act, NCPLS may move the Court to disallow or modify the change, as provided in Paragraph 10 herein.

3. Any good-faith denial by DAC of an IRAR form (DC-746) submitted by an inmate/guardian requesting the accommodation based on one or more of the justifications for denial of requests for accommodations set forth in the ADA Policy shall not be considered a violation of the ADA Policy or this Consent Decree; provided, however, that this Consent Decree shall not be construed to prevent an inmate with standing from legally challenging any such denial in an independent legal action; provided, further, that the ADA Policy shall not be construed as a waiver by DAC of any requirement that an inmate exhaust his or her available

administrative remedies before filing a lawsuit.

4. DAC, under the direction of the Division ADA Coordinator, shall define the purpose and essential functions of every work assignment and program activity available to inmates that are eligible for the application of Sentence Credits. Further, every work assignment and program activity will be modifiable to accommodate all qualified inmates with disabilities unless such modification would require the cancellation of an essential function or would result in a fundamental alteration to the work assignment or program activity; *i.e.*, the nature or business of the work assignment or program activity would not be met as intended. Each and every eligible otherwise qualified inmate with a disability shall have the same opportunity for access to the work assignment and program activity options as eligible otherwise qualified non-disabled inmates.

5. DAC shall provide information on the ADA and Rehab Act to all employees and inmates in the following ways.

- a. Means of communication to employees:
 - i. Policy and Procedure Manual; and
 - ii. Announcements at meetings and in memos; and
 - iii. ADA training sessions
- b. Means of communication to inmates:
 - i. Facility orientation; and
 - ii. Posting at all prison facilities; and
 - iii. Correctional Case Managers; and
 - iv. Inmate Handbook (next revision)

6. DAC will create and fund a new full-time (LCSW/MSW) position (Social Work Program Supervisor BEACON #60061323) dedicated to compliance and monitoring of the new ADA policy that will report to the Social Work Program Director/Division ADA Coordinator.

This person will be responsible for tracking, monitoring, and reporting DAC's compliance with this Consent Decree. DAC will also create and fund three new full-time, permanent positions within DAC/Prisons Section as follows: (1) ADA Facilitator (Social Worker III BEACON #65013796), (2) ADA Facilitator (Social Worker III BEACON #65011117), and (3) ADA Compliance Specialist in Programs (Correctional Program Director III BEACON #60066931). The ADA Facilitators will be responsible for facilitating the determination process for all potentially eligible inmates considered for accommodations under the ADA and Rehab Act. The ADA Compliance Specialist will be tasked with an overall responsibility to ensure that the Prisons Section complies with the ADA and Rehab Act and other federal and state laws and regulations pertaining to persons with disabilities. The DAC will also create and fund two new forty hour per week contract positions in Program Services. The duties and responsibilities of the two new contract positions will include developing essential and non-essential (marginal) job functions for all full-time jobs for inmates in the custody and control of DAC as well as doing a review of programs, practices, activities and services to assure accessibility (structural and programmatic) to inmates. The ADA Compliance Specialist and the two new forty hour per week contract positions will work under the guidance and supervision of the Assistant Chief of Program Services and in collaboration with the Social Work Program Director/ADA Coordinator and ADA Facilitators in Social Work.

7. NCPLS shall administer a program to monitor DAC's compliance with this Consent Decree, which will include the retention of an outside consultant by NCPLS. The Monitor and NCPLS shall be entitled to reasonable access to information sufficient to monitor

DAC's compliance with plans, policies, and procedures that are outlined in this Consent Decree. DAC shall provide NCPLS with relevant documents for provision to the monitoring entity. The DC-746 will be retained in accordance with the DAC forms retention schedule. Every ninety (90) days DAC will make available to NCPLS true and accurate copies of all new DC-746 forms and, DC-927 forms, and DC-410 forms which have been properly submitted by inmates consistent with all applicable DAC policies. These forms and accompanying documents will be reviewed for compliance by the Monitor and/or NCPLS. These reviews will continue every ninety (90) days for a period of two (2) years. In the event that the Monitor and/or NCPLS objects to the conclusion of a DC-746 form, or discovers any noncompliance with the Consent Decree, NCPLS will report any objections and concerns to a person designated by DAC who is able to substantively respond. The designee will provide a response to NCPLS within thirty (30) calendar days. DAC will provide all materials used in trainings regarding the policy changes arising from this Consent Decree for both staff and inmates to the Monitor and NCPLS within thirty (30) days of a training being offered to staff or inmates. As new trainings are implemented DAC will provide those materials to the Monitor and NCPLS within thirty (30) days of the new training being offered. In the event that DAC changes, modifies or alters any policy relating to this Consent Decree, DAC will provide the draft policy to NCPLS and the Monitor at least thirty (30) days before it is enacted and will offer NCPLS a comment period prior to implementation. NCPLS will be allotted ten (10) working days for comments.

8. DAC shall establish and implement a review process for potential eligibility to prospectively correct an inmate's projected release date. This internal process will identify

inmates eligible to petition to have their projected release date adjusted. It will be upon the inmate to produce documentation showing that he or she fits at least one of the descriptions for inmates allowed to petition.

a. Inmates allowed to petition

i. Any qualified, disabled inmate who has been identified by NCPLS and is currently still in the custody and control of the DAC that have made a complaint that he or she was denied an award of sentence reduction credits by reason of his or her disability. These qualified, disabled inmates must have submitted either a DC-746 Inmate Reasonable Accommodation Request or a DC-410 grievance in a manner consistent with applicable DAC policies and procedures no later than the date this Consent Decree is Approved and Ordered by this Court.

ii. Any qualified, disabled inmate who submits a new IRAR Form DC-746 in the manner proscribed in paragraph (g) under the Procedures section of the Reasonable Accommodation for Inmates with Disabilities Policy as provided in paragraph 9 of this Consent Decree. The new IRAR Form DC-746 shall include reference to the inmate's previous written complaint about the denial of sentence credits because of his or her disability.

b. DAC internal review process

i. Programs and/or Custody staff at each of the prison facilities will review the DC-410 grievances submitted by those inmates allowed to petition and listed at their facility since the start date of the review (September 17, 2007) until the date this Consent

Decree is Approved and Ordered by this Court. Programs and/or Custody staff will then forward true and accurate copies of all said grievances and IRAR forms for each of the listed inmates that note disability, lost gain time, medically unfit gain time requests, or denial of access to jobs/programs/services/activities based on disability to the Social Work Program Director/ADA Coordinator in Raleigh. The Programs and/or Custody staff will receive appropriate ADA training prior to performing these tasks.

ii. The Social Work Program Director/ADA Coordinator and Social Work staff will review all of the DC-746 Inmate Reasonable Accommodation Requests and the DC-410 grievances received since the start date of the review (September 17, 2007) and ending with the date this Consent Decree is Approved and Ordered by this Court and pull for further review all of the denials related to disability, lost gain time, medically unfit gain time requests, or denial of access to jobs/programs/services/activities based on disability. The Social Work Program Director/ADA Coordinator and Social Work staff will determine the start date of the individual review for each inmate based upon the earliest date of the identified denial related to disability, lost gain time, medically unfit gain time requests, or denial of access to jobs/programs/services/activities based on disability located in either the DC-746 Inmate Reasonable Accommodation Request or the DC-410 grievance. The earliest identified date becomes the start date of the review if this date is not earlier than September 17, 2007. If no specific date is referenced in either the DC-746 or the DC-410 the review will start on September 17, 2007, or on the date of the inmate's admission in the custody and control of DAC, whichever is later.

iv. Using that established start date, each inmate will be reviewed for eligibility utilizing the protocols pursuant to the policy outlined in the DC-927 Evaluation for Inmates under the ADA. Each inmate's eligibility will be re-determined annually using the DC-927 form.

v. The Social Work Program Director/ADA Coordinator and Social Work staff will review the inmate movement and assignments screens in OPUS and determine any period of ineligibility based upon Out to Court, ASeg, DSeg, ICON, MCON, HCON or any other status making inmates ineligible for gain/earned time credits.

vi. The Social Work Program Director/ADA Coordinator and Social Work staff will review inmate assignments to jobs/programs/services/activities for which the inmate received gain/earned time sentence reduction credits and determine if such would make the inmate ineligible for retroactive gain/earned time credits.

vii. Once the periods of eligibility are determined, Division Programs staff or Senior Programs staff at the facility level as identified by the Assistant Section Chief of DAC, Section of Prisons will determine the number of days each inmate may be eligible for under the Sentence Credit Policy in effect at the time of each period of potential eligibility.

viii. Once the numbers of days are computed, the Division Programs staff or Senior Programs staff at the facility level as identified by the Assistant Section Chief of DAC, Section of Prisons will report those numbers to the Social Work Program Director/ADA Coordinator and the ADA Compliance Specialist in Programs for each

inmate.

ix. The Social Work Program Director/ADA Coordinator will report these numbers to the Section Chief and the Deputy Section Chief for notification of the inmate of the award of retroactive gain/earned time credits within sixty (60) days.

9. As soon as practicable after the filing of this Consent Decree, counsel for the parties shall prepare and submit to the Court a notice summarizing this Consent Decree and the right, pursuant to Federal Rule of Civil Procedure 23(e), of any member of the Plaintiff class to object to it. Upon a finding by this Court that said notice meets the reasonable notice requirements of said Rule, DAC shall within thirty days (30) days of said finding by this Court post said notice in each of its prison facilities on a bulletin board regularly used for posting notices to inmates at the expense of the Division. For any inmates that during this period are confined in disciplinary segregation that do not have access to the prison's bulletin board regularly used for posting notices to inmates will be provided a copy of this Notice. This notice will include a provision in plain language that informs the inmate population that if any inmate has previously submitted either a grievance Form DC-410 or an IRAR Form DC-746 from September 17, 2010 until this Consent Decree is Approved and Ordered by this Court that includes a complaint that the inmate was denied an award of sentence reduction credits by reason of his or her disability the inmate may submit a new IRAR Form DC-746 in the manner proscribed in paragraph (g) under the Procedures section of the Reasonable Accommodation for Inmates with Disabilities Policy. The new IRAR Form DC-746 shall include reference to the previous complaint about the denial of sentence credits because of his or her disability and must

be submitted no later than thirty days (30) days from when the notice is posted in each prison facility. Inmates specifically identified by NCPLS prior to the enactment of this Consent Decree, as provided for in paragraph 8(a)(i) of this Consent Decree, will not be required to submit a new IRAR Form DC-746 in order to be considered for potential eligibility to prospectively correct an inmate's projected release date.

10. Pursuant to the provisions of 18 U.S.C. § 3626(b)(1)(A)(i), the requirements of this Consent Decree shall terminate two (2) years following its date of entry. Prior to the expiration of this two (2) year period, this Court shall retain jurisdiction to enforce the terms of this Consent Decree. If NCPLS has reason to believe that DAC is not complying with the terms of this Consent Decree it shall notify DAC in writing to the Division ADA Coordinator. The parties shall attempt to resolve the issue informally before pursuing any judicial remedy. Upon appropriate motion the Court may issue any order permitted by law necessary to ensure that DAC complies with the terms of this Consent Decree as set forth above.

11. As soon as practicable after the filing and Court approval of this Consent Decree, DAC shall pay fifty-six thousand one hundred ninety-nine U.S. Dollars and two cents (\$56,199.02) in a lump sum by check payable to North Carolina Prisoner Legal Services, Inc. (Employer Identification Number 58-1342594), for expenses associated with the implementation of this Consent Decree, including the cost for the retention of the Monitor. NCPLS agrees that it is not entitled to reimbursement of any attorney fees from DAC. Except for rights and remedies set forth in this Consent Decree, NCPLS agrees and covenants not to institute, initiate, or voluntarily participate in any action or suit against DAC in any state or federal court, agency, or

other tribunal with respect to the claims alleged in the Complaint filed with the Court on September 17, 2010 related to the class of inmates' access to Sentence Credits awarded by DAC.

By their counsels' signatures hereto, the parties stipulate to the findings of fact and conclusions of law set forth herein.

7/3/13
Date

Julie C Solms
Julie C. Solms
North Carolina Prisoner Legal Services, Inc.
Counsel for Plaintiffs

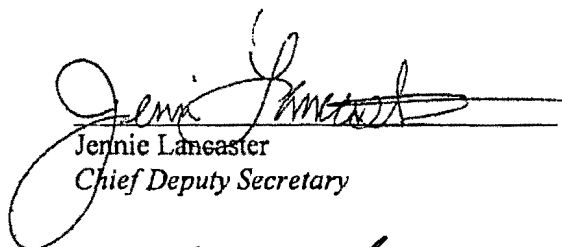
DIVISION OF ADULT CORRECTION
NORTH CAROLINA DEPARTMENT
OF PUBLIC SAFETY, SECTION OF PRISONS

1/2/13
Date



Mikael R. Gross
Chief Deputy Secretary/Chief Operating Officer

12/31/12
Date



Jennie Lancaster
Chief Deputy Secretary

1/2/13
Date



Casandra G. White
General Counsel

1/2/13
Date



Myron B. Ricci
Assistant Attorney General
North Carolina Department of Justice
Counsel for Defendants

APPROVED AND ORDERED:

August 15, 2013
Date



TERRENCE W. BOYLE
United States District Judge