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12 IN THE UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION
15

16 JOHN ARMSTRONG, et al.,
17 Plaintiffs,
18 v.
19 ARNOLD SCHWARZENEGGER, et al.,
20 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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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 26, 2007 at 2:00 p.m., or as soon thereafter as
3 the matter may be heard, in the Courtroom of the Honorable Claudia Wilken, located at
4 1301 Clay Street, Courtroom 2, Fourth Floor, Plaintiffs John Armstrong, *et al.*, will and
5 hereby do move the Court for an Order to Enforce Compliance with the May 30, 2006
6 Order in this action.

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

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

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **INTRODUCTION**

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

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

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

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

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

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

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

25 **RELEVANT FACTS**

26 **Procedural Background**

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

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

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

18 Based on Defendants’ ongoing failure to comply with the above provisions of the
19 Revised Permanent Injunction and the resulting harm to members of the plaintiff class,
20 Plaintiffs filed an enforcement motion, which was heard by this Court on May 26, 2006. *Id.*
21 ¶ 4.

22 **Defendants’ Failure to Comply with the May 2006 Order**

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

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

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

15 Defendants must implement a State-wide, computerized, networked, real-time
16 database system, preferably the Revocation Scheduling and Tracking System
17 (RSTS), to ensure compliance with Paragraphs 15, 16 and 17 of the Revised
18 Permanent Injunction in this action. For parole revocations and extensions,
19 this system must be implemented on or before January 1, 2007. For life
20 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.

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

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

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

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

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

28

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

8 ARGUMENT

9 **I. Defendants Have Failed to Comply with the May 2006 Order’s Requirements 10 for the Tracking System.**

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

21 **A. The Tracking System is Not Available Statewide.**

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

27
28

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

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

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

20 CDCR mental health staff also must have ready access to DECS, yet there is no
21 evidence that they do. Mental health staff provide evaluations for both MDO and life
22 prisoner hearings. Baldwin Decl., Exh. C (Joint Certification) ¶¶7(i)-(k) and (o)-(p). BPH
23 Commissioners and Deputy Commissioners rely heavily on these reports when conducting
24 hearings. Without DECS access, mental health staff cannot ensure that they are providing
25 effective communication during these evaluations. Defendants reported at an April 17,
26 2007 meeting that providing DECS access to mental health staff would be problematic
27 because of the lack of computer access. Mania Decl. ¶ 15.

28

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

9 **2. Tracking System Access at DMH Institutions Is Also**
10 **Deficient.**

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

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

25 The May 2006 Order requires that the disability tracking database “must include
26 access to information previously gathered by the BPH regarding an inmate or parolee’s
27 disabilities and needs for accommodation.” Baldwin Decl., Exh. B (May 2006 Order), ¶ 2 at
28

1 9:5-7. Defendants have failed to demonstrate that all disability information gathered in
2 parole proceedings is entered into the DEC System.

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

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

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

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

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

25 **3. Defendants Do Not Ensure Prompt Entry of Information**
26 **Into DECS for Life Prisoner Proceedings at Notice, Meaning**
27 **the Information May Not Be Available for Later Steps in the**
28 **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

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

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

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

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

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

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

1
2 have failed to require CC-Is to use computers to check DECS under any circumstances and
3 have taken no steps to enhance DECS access within the prisons.

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

7 The Accommodations Plan and the two additional draft sets of policies and
8 procedures provided by Defendants since filing the Plan fail to require any staff to actually
9 check the DEC System for all but one step¹ between notice of the life prisoner parole
10 consideration hearing and the hearing itself. Mania Decl. ¶ 16, Exh. A, D, I. There are
11 several steps between notice and the hearing that are critical to a life prisoner's ability to
12 present his or her case at the hearing, such as the review of the Central file, the interview
13 for, and presentation of, the Board Report and the presentation of the psychological
14 evaluation report to the prisoner, as well as appeals. All of these steps require effective
15 communication, yet Defendants have failed to ensure that DECS will be checked for any of
16 them. This failure is troubling, not only because it demonstrates Defendants' lack of
17 commitment to providing accommodations in all parole proceedings, but also because
18 Defendants agreed in the August 2006 Joint Certification to require staff to check DECS for
19 all of these steps. Baldwin Decl., Exh. C, ¶ 7(g)-(h). The Court should require Defendants
20 to have CC-Is check the DEC System before all life prisoner proceedings.

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

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

27 ¹ Defendants have promulgated procedures requiring that mental health staff check the DEC
28 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.

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

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

16 3. Defendants Have Not Demonstrated That They Are 17 Providing Effective Communication in SVP Proceedings.

18 It is not clear what Defendants are doing to ensure effective communication in SVP
 19 proceedings, because they have fundamentally changed their procedures. Mania Decl., Exh.
 20 H at 1. If a prisoner has been referred to the DMH for an evaluation to determine whether
 21 s/he meets the criteria to be committed as an SVP (*see* Cal. Welf. & Inst. Code § 6600, *et*
 22 *seq.*), but that evaluation has not been completed prior to the prisoner's release date,
 23 Defendants may hold the prisoner for an additional 45 days past the release date upon a
 24 showing of good cause. *Id.* § 6601.3. Until April of this year, Defendants' regulations
 25 required a hearing conducted by the BPH to determine whether there was probable cause to
 26 find the prisoner met the SVP criteria before retaining the prisoner for an additional 45 days.
 27 15 CCR § 2600.1 (superseded via emergency regulation, 4/18/07). Defendants have now
 28 completely done away with the hearing process via an emergency regulation. *See* Final

1 Statement of Emergency RN 07 at

2 [http://www.cdcr.ca.gov/DivisionsBoards/BOPH/docs/Final Statement of Emergency.pdf](http://www.cdcr.ca.gov/DivisionsBoards/BOPH/docs/Final_Statement_of_Emergency.pdf).

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

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

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

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

28 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

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

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

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

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

26 The parties’ Joint Certification noted four points of disagreement as to whether
27 certain proceedings are “parole proceedings” subject to the requirements of the Revised
28 Permanent Injunction and the May 2006 Order:

- 1
- 2 (a) Notice of conditions of parole by Correctional Counselor I in CDCR
- 3 Institutions and Parole Agent in parole field offices;
- 4 (b) Inclusion in the Life Prisoner Board Report by the Correctional
- 5 Counselor I in CDCR Institutions of information regarding the life
- 6 prisoner's ability to access programs previously recommended by the
- 7 BPH under Paragraphs 36 and 37 of the Revised Permanent Injunction;
- 8 (c) Communication of special conditions of parole for parolees released to
- 9 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.

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

11 All four of the proceedings listed above are “parole proceedings” as defined by the

12 Revised Permanent Injunction, as they are “events related to the hearings that occur prior

13 to ... the [life prisoner or revocation] hearings.” Baldwin Decl., Exh. A, ¶ 3. In addition,

14 the four proceedings listed above are due process functions requiring a heightened standard

15 for effective communication under Defendants’ own policies and procedures. The

16 *Armstrong* Remedial Plans and orders require that Defendants provide reasonable

17 accommodations and effective communication to prisoners and parolees with disabilities in

18 *all* programs, activities and services, whether these occur inside the institution, during

19 parole supervision, or during a BPH proceeding.² Uncontested evidence presented in

20 Plaintiffs’ April 2006 enforcement motion included cases of deaf parolees who were denied

21 sign language interpretation for notice of their conditions of parole or when accepting

22 diversion to a remedial sanction. *See* Baldwin Decl. filed 4/21/06, ¶¶ 46, 50. Plaintiffs’

23 counsel have attempted to secure an agreement from Defendants to check DECS for these

24 four steps, without receiving any response. Baldwin Decl. ¶ 7, Exh. D. The DECS tracking

25

26 ² In addition, the *Valdivia* Injunction and Remedial Plan require that parolees receive

27 effective communication in the revocation process or diversion to remedial sanctions. *See*

28 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.

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

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

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

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

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

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

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

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

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

20 Defendants' Plan must be amended to make it clear that failure to provide an
21 accommodation at a hearing does not justify its postponement. In addition, Defendants
22 must impose an expedited deadline for rescheduling life prisoner³ and MDO hearings
23 postponed due to the failure to provide an accommodation.
24

25
26 ³ Plaintiffs proposed a 35-day deadline which would allow five days for renoticing of
27 witnesses and the 30 days' advance notice required for those witnesses. Defendants did not
28 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
(continued on next page)

1 **C. The Plan Has Not Been Funded.**

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

10 **D. Defendants Have Not Trained Staff on the Plan.**

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

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

22
23
24
25 (continued from previous page)

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

27 ⁴ Defendants have provided training on the tracking system only to DCs, Board Revocation
28 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.

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

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

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

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

27 Defendants have failed to demonstrate that there are structurally accessible locations
 28 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

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

9
10 **G. Defendants' Plan to Ensure Accessible Transportation To and From**
11 **Parole Proceedings Is Inadequate Because The Tracking System Does**
12 **Not Contain a Field Alerting Staff to the Need for Accessible**
13 **Transportation.**

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

21
22 **H. Defendants' Plan Does Not Address the Long-Standing Problem of**
23 **Inadequate Disability Training for BPH Panel Attorneys.**

24 Defendants maintain a panel of attorneys appointed to represent prisoners in life
25 prisoner, MDO and SVP proceedings. The Revised Permanent Injunction requires
26 disability training for these attorneys. Baldwin Decl., Exh. A, ¶ 30. The BPH panel
27 attorney disability training is grossly inadequate. It consists only of materials posted on the
28 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

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

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

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

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

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

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

5 **CONCLUSION**

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

17 Dated: June 15, 2007

Respectfully submitted,

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19
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