

ORIGINAL

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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15

16 \_\_\_\_\_ )  
DERRICK CLARK, et al., )  
17 )  
Plaintiffs, )  
18 vs. )  
19 STATE OF CALIFORNIA, et al., )  
20 Defendants. )  
21 \_\_\_\_\_ )

No. C 96-1486 FMS

SETTLEMENT AGREEMENT AND ORDER

FILED  
NOV 20 2001  
ORIGINAL FILED  
DEC - 3 2001  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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

1           B.     Parties

2           2.     The parties to this Settlement Agreement are plaintiffs Derrick Clark, Larry  
3 Dixon, Jr., Jack von Gunten, Mark Mitchell Morino, James Simmons, Estella Holloway and  
4 the class of plaintiffs that they represent, and defendants State of California, California  
5 Department of Corrections, Pete Wilson, Governor, Thomas M. Maddock, Secretary of the  
6 Youth and Adult Corrections Agency, Cal Terhune, Director of the California Department of  
7 Corrections, Susann Steinberg, M.D., Deputy Director for Health Care Services, Nadim  
8 Khoury, M.D., Assistant Deputy Director for Medical Services, and Marjorie TaVoularis,  
9 M.D., Chief, Mental Health Care Services and their successors. The plaintiff class consists of  
10 all present and future individuals with developmental disabilities<sup>17</sup> who are under the control of  
11 the California Department of Corrections.

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

17           C.     Terms and Conditions

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

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21           1.     For purposes of the class definition, a developmental disability is defined as a  
22 "disability which originates before an individual attains age 18, continues, or can be expected  
23 to continue, indefinitely, and constitutes a substantial disability for that individual.... [T]his  
24 term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall  
25 also include disabling conditions found to be closely related to Mental Retardation or to  
26 require treatment similar to that required for mentally retarded individuals, but shall not  
27 include other handicapping conditions that are solely physical in nature." Cal. Welfare and  
28 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           5.     **Jurisdiction.** The Court shall retain jurisdiction to enforce the terms of this  
2 agreement. The Court shall have the power to enforce the agreement through specific  
3 performance and all other remedies permitted by law.

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

14           7.     In the event that one or both of these experts can no longer serve, the parties  
15 shall attempt to agree on a replacement(s) within 30 days. If the parties do not agree,  
16 defendants and plaintiffs shall each nominate one replacement, and one of those nominated  
17 shall be jointly selected by the existing experts. In the event the experts cannot agree, each  
18 expert shall submit one name to the Honorable Eugene Lynch, who shall chose one and  
19 recommend that person's appointment by the Court.

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

1  
2           9.     If negotiations fail to resolve any issue, plaintiffs shall have the option of  
3 seeking relief from the Court. The Experts' report(s) shall be admissible as evidence at the  
4 request of any party.

5           10.    **Modification of Plan.** Defendants may seek to modify their plan if there is a  
6 significant change in the facts or the law; plaintiffs may seek to modify the plan if the plan  
7 does not effectively remedy defendants' violations or if a modification is necessary to ensure  
8 plaintiffs receive adequate supportive services to which they are entitled under the ADA, §504  
9 or the Constitution. Any party wishing to modify the plan must submit the proposed  
10 modification to the opposing party. The opposing party may request further information,  
11 request that the modifications be evaluated by the Court's experts and be the subject of  
12 negotiation with Judge Lynch. If the parties fail to reach agreement on the modification, the  
13 party proposing the modification may seek relief from the Court.

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

- 19           a.     A monthly report of the identity and location of all identified members  
20 of the plaintiff class;
- 21           b.     The complete medical, psychiatric and non-confidential central files of  
22 the plaintiff class;
- 23           c.     All internal reviews or audits of defendants' plan and programs;
- 24           d.     All budget change proposals to implement defendants' plan or programs;
- 25           e.     All evaluations of whether prisoners are developmentally disabled;
- 26           f.     All analyses and reports concerning the reliability of defendants'  
27 screening instruments; and
- 28           g.     Documents maintained at individual institutions that are relevant to

1 assessing the state of defendants' compliance.

2 12. Plaintiffs shall be able to conduct 33 tours of institutions housing members of the  
3 plaintiff class per year (including multiple tours of the same institutions), with or without their  
4 expert consultants. Such tours shall include access to institutional programs and classification  
5 and disciplinary hearings, housing facilities, recreational yards, and all other areas of the  
6 institution normally used by inmates. Defendants shall make available for interview  
7 departmental, custodial, clinical and program staff that have responsibility for the care,  
8 treatment, safety, classification, housing, discipline and programming of class members.  
9 Plaintiffs' counsel shall be able to have brief discussions with inmates during the tours and  
10 shall be able to provide prison staff with counsel's name and address for distribution to specific  
11 inmates. Defendants also shall provide plaintiffs' counsel access to confidential interviews  
12 with inmates before or after the tours, as arranged among counsel, during regular business  
13 hours without regard to regular visiting hours and days. Plaintiffs reserve their right to seek  
14 to depose departmental, custodial, clinical, and program staff members.

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

25 14. **Termination.** Defendants may move to vacate this Settlement Agreement and  
26 dismiss the case on the ground that they have substantially complied with the plan set forth in  
27 Appendix A as modified for a period of three years. Plaintiffs may oppose the motion, and  
28 shall have the burden of proving that defendants are not in substantial compliance. Defendants

1 will be in substantial compliance when at the time of assessment they have achieved, and may  
2 reasonably be expected to continue to achieve, satisfaction of each undertaking through  
3 established policy, routine and reliable practice. A finding of non-compliance shall not be  
4 based on isolated failures to follow established procedures, technical departures from such  
5 procedures that do not reduce the benefits to the plaintiff class, or unimportant violations of no  
6 consequence. The parties shall attempt to negotiate any disputes about defendants' compliance  
7 with the assistance of Judge Lynch and/or the evaluation of the Court's experts.

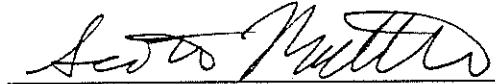
8       15.   **Liability and Necessity for Relief.** Defendants admit that they have violated  
9 the federal rights of plaintiffs in a manner sufficient to warrant the relief contained herein.  
10 The parties agree that the relief set forth herein is narrowly drawn, extends no further than  
11 necessary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

13  
14 IT IS SO AGREED AND STIPULATED.


15  
16 Dated: October 2, 2001

  
\_\_\_\_\_  
DONALD SPECTER  
Prison Law Office  
Attorney for plaintiffs

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19 Dated: October 22, 2001

  
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SCOTT MATHER, Deputy  
Attorney General on behalf of all  
defendants

20  
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22  
23 Dated: November 14, 2001

  
\_\_\_\_\_  
EDWARD S. ALAMEIDA, Director  
California Department of Corrections





# Appendix A

DECLARATION OF SERVICE

Case Name: *Derrick Clark, et al. v. State of California, et al.*

Case No.: C-96-1486 FMS

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 29, 2001, I placed the attached

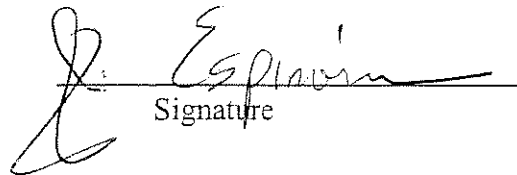
**SETTLEMENT AGREEMENT AND ORDER**

in the internal mail collection system at the Office of the Attorney General, 455 Golden Gate Avenue, Room 11000, San Francisco, California 94102, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

Donald Specter, Esq. Heather Mackay, Esq. Sara Norman, Esq. Prison Law Office General Delivery San Quentin, CA 94964	Mark A. Chavez, Esq. Chavez & Gertler 42 Miller Ave. Mill Valley, CA 94941
Shawn Hanson, Esq. Caroline N. Mitchell, Esq. Pillsbury Winthrop LLP 50 Fremont Street San Francisco, CA 94105	

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on November 29, 2001 at San Francisco, California.

\_\_\_\_\_  
J. Espinosa

  
Signature