

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**ROBERT HECKER, et al.,  
Plaintiffs.**

vs.

**No. 2:05-CV-02441-LKK**

**CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATION, et al.,  
Defendants.**

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**REPORT AND RECOMMENDATION  
OF THE COLEMAN SPECIAL MASTER  
REGARDING CONSOLIDATION AND/OR RESOLUTION  
OF HECKER CLAIMS**

On February 26, 2007, this Court recommended that the special master in Coleman v. Schwarzenegger, Case No. CIV S-90-0520 LKK JFM P, submit a report and recommendation on whether the claims raised in Hecker v. California Department of Corrections and Rehabilitation, Case No. 2:05-CV-02441-LKK, may be consolidated for resolution within the remedial phase of the Coleman action. An order to the same effect was entered on March 15, 2007.

The Hecker plaintiffs, as recipients of services provided by the California Department of Corrections and Rehabilitation (CDCR) Mental Health Services Delivery System (MHSDS), are by definition also members of the Coleman plaintiff class. They allege that as inmates incarcerated in the institutions of the CDCR, they have been denied access to, or participation in, certain programs, services and activities made available to

non-disabled inmates, in violation of Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act) and Title II of the Americans with Disabilities Act of 1990 (ADA). (See Plaintiffs' Second Amended Complaint. ¶¶71, 72). In particular, plaintiffs contend that the following practices of the CDCR amount to violations of their rights under the ADA and Rehabilitation Act:

- Four points: Automatic addition of four points to their inmate classification scores upon entering any CDCR institution, by virtue of their histories of mental illness,
- Segregation of inmates: Segregation from CDCR programs, services and activities, including vocational programs and educational activities, based on their designation at the EOP level of care,
- Heat Plan Status: Automatic denial of access to certain programs, services, and activities (e.g. fire camps) without suitable substitutes, for inmates on heat-sensitive psychotropic medications.
- Denial of Transfer to Out-of-State Facilities: Automatic exclusion from transfers to out-of-state correctional facilities, based on Coleman plaintiff class status.<sup>1</sup>

These points represent practical, if not strictly legal, common issues and concerns of the two cases. The issues of automatic four classification points, segregation of EOP inmates, heat plan status, and most recently, transfer to out-of-state facilities, have all been parsed within Coleman. The four-points issue and the separation of EOP inmates from general population have been, and continue to be, negotiated and managed

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<sup>1</sup> Plaintiffs also allege that additional unlawful discrimination under the Rehabilitation Act and the ADA has occurred in the operation of CDCR programs, services and activities, including but not limited to those in the area of parole.

within Coleman Program Guide provisions. The special needs of Coleman plaintiff class members who take heat-sensitive psychotropic medications figure prominently in the CDCR's compliance with the heat plan, which is monitored regularly by the Coleman special master. The CDCR policy on transfer of Coleman plaintiff class members to out-of-state facilities has evolved at least in part from litigating within Coleman issues of special concern for caseload inmates (for example, plaintiffs' motion to enjoin out-of-state transfers of caseload inmates that was based on question of whether receiving institutions are equipped to offer adequate mental health services).

The legal positions of the parties, however, do not suggest the same parity which exists between the practical aspects of the two cases, as described above. The defendants have moved to dismiss Hecker based on Fed.R.Civ.P.12(b)(1),6), 12(f)(f), *res judicata* and failure of plaintiffs to exhaust administrative remedies under the Prison Litigation Reform Act of 1995 (PLRA). In addition, defendants contend that the claims raised in Hecker are covered within Coleman, and that that they may be appropriately and more efficiently resolved via Program Guide discussion and application. The defendants' motion to dismiss is pending.

In April 2007, the Coleman special master conferred separately with counsel for plaintiffs and defendants in Hecker and Coleman. This was followed by a teleconference with all counsel in May 2007 to explore and facilitate possible agreement between the parties regarding consolidation of the two cases. Discussion topics suggested by the special master included the four issues specified above as well as any other ADA and Rehabilitation Act issues the parties wished to cover. The parties' legal arguments were not explored, as they fall beyond the scope of the special master's

jurisdiction. Unable to chart any common course that could circumvent their respective legal positions, the parties reached no agreement. They submitted their positions on consolidation in writing to the special master (*see* plaintiffs' letter, Exhibit A; defendants' letter, Exhibit B). Plaintiffs decided to cancel a previously scheduled follow-up meeting for June 5, 2007 as moot.

Clearly, the parties are not prepared to reach a consensus on consolidating any common or related claims and issues in the Coleman and Hecker litigation. Plaintiffs have asserted that, as a condition of any consolidation, defendants must stipulate to liability under the ADA and under the Rehabilitation Act to ensure that Coleman is "binding" with respect to Hecker issues. They stated at the teleconference with the special master and in their letter to him that in order to reach a settlement, the parties would have to enter into a process by which:

(1) the full extent of CDCR's systemic policies of discrimination against persons with psychiatric disabilities are revealed through civil discovery or an equivalent process, and, (2) remedial orders can be reached in a legal context that permits the enforcement and monitoring of the rights of the putative Hecker class under the ADA and Rehabilitation Act (e.g. a stipulated settlement within the context of the Hecker case, or an agreement within an expanded Coleman case).

(See Exhibit A) During the May 22, 2007 teleconference, plaintiffs stated that they would not compromise on this condition.

Defendants asserted that the plaintiffs' ADA and Rehabilitation Act claims cannot be maintained for the legal reasons set forth in their pending motion to dismiss, and that in any event the issues in Hecker and Coleman fall within and are controlled by the Coleman Revised Program Guide. They point out that "the Coleman

Court retains jurisdiction over the Revised Program Guide and must ensure it complies with all federal laws, including disability-access laws.” (See Exhibit B). Defendants also point to considerations of judicial economy in disposing of the common issues and claims under Coleman, which has already been decided, rather than re-litigating them in Hecker, which could consume another two years. Defendants have expressed willingness to work toward resolution of the Hecker claims of inadequate disability-access within the Coleman Program Guide, and to revisit the four-points inmate classification issue. However, the defendants have stated unequivocally that they will not stipulate to liability under the ADA and the Rehabilitation Act.

The common issues and claims have been, or can be, addressed within the Coleman Revised Program Guide context. Back in January 1997, the Coleman court directed the special master to work with the parties to complete and submit for approval plans, policies and protocols for meeting the requirements of the court’s remedial order. In response, a collection of standards for the delivery of mental health services were compiled. At the same time, some continuing differences between the parties were addressed in recommendations submitted by the special master, all of which culminated in the court’s provisional approval of the submitted plans, policies and protocols, known generically at that time as the “program guides.” They were a work in progress, with many aspects revisited and amended over time. In late 2002, the Coleman parties resumed the process of further refining the program guides. This marked the beginning of a three-year round of meetings, intense review, analysis and negotiation, followed by seemingly endless reiteration and critique of draft versions of the final product. In February 2006, the program guides were organized into a more formalized set that has

since been referred to as the “Program Guide.” Still, it remains a responsive work in progress, and expressly affords it own process for annual review and revision. At least to some degree, it could accommodate a meaningful approach to addressing and resolving many of the concerns and claims that have been raised in Hecker.

However, it appears presently that the plaintiffs’ demand for the defendants’ stipulation to liability under the Rehabilitation Act and the ADA, and the defendants’ unwillingness to assume that liability voluntarily, present an insurmountable obstacle to negotiating an agreement to consolidation or merger of the Hecker claims into the Coleman case at this time. This leaves the parties to their respective legal positions, which are beyond the special master’s jurisdiction and must be decided by the court.

Respectfully submitted,

/s/

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J. Michael Keating, Jr.  
Special Master

/s/

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Matthew A. Lopes, Jr.  
Deputy Special Master

June 12, 2007

EXHIBIT A

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May 23, 2007

VIA EMAIL & US MAIL

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Re: *Hecker v. Schwarzenegger*, No. 2:05-CV-02441 LKK-JFM (E.D. Cal.);  
*Coleman v. Schwarzenegger*, No. Civ S 90-0520 LKK-JFM (E.D. Cal.)  
Our File Nos. 489-3 & 935-1

Dear Counsel:

This is to confirm the results of yesterday morning's meeting at the Attorney General's Office in Sacramento. The *Coleman* Special Master's office presented an agenda document at the meeting, which is attached hereto for reference. In attendance for CDCR were Michael Stone, Misha Igra, Michael Quinn, Lisa Tillman and Rochelle East, as well as outside counsel, Paul Mello and Kurt Franklin from Hanson Bridgett Marcus Vlahos & Rudy LLP. Deputy Special Master Matthew Lopes chaired the meeting in person. Special Michael Keating participated by telephone. Present for the *Coleman* class and the putative *Hecker* class were plaintiffs' counsel Claudia Center of

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the Legal Aid Society – Employment Law Center, and Jane Kahn and Ernest Galvan of Rosen, Bien & Galvan, LLP.

Special Master Keating reminded the parties of the impending June 15, 2007 deadline for the Special Master's report to the *Hecker* Court under the March 15, 2007 Order referring the matter "to the special master in *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P for a report and recommendation as to whether the claims raised herein can be resolved within the remedial phase of that action, said report to be filed within ninety days from the date of this order." Special Master Keating stated that little time remained for additional negotiations before the reporting deadline. Mr. Lopes reported that he had met separately in April with counsel for CDCR and for the Plaintiffs.

Plaintiffs' counsel asked whether Defendants would agree to a process that would lead to functional, efficient, and enforceable relief for the putative *Hecker* class that would be binding and enforceable under the Americans with Disabilities Act (ADA) and Rehabilitation Act (Rehabilitation Act). Defendants' counsel stated their continued position that relief under the ADA and Rehabilitation Act is barred in *Coleman*.

Defendants' counsel further stated that they were prepared only to discuss the specific individual issues listed in the attached agenda: heat plan, separation of inmates, transfer, and extra classification points due to mental illness.

Plaintiffs clarified, however, that these particular factual issues should not be confused with the claims asserted in *Hecker*. The claims in *Hecker* are that CDCR systematically violates the rights of persons with psychiatric disabilities under the ADA and the Rehabilitation Act in the operation of CDCR's programs, services and activities. The four issues listed and discussed are examples of the way in which CDCR's systematic policies of discrimination harm persons with disabilities in violation of federal law. Plaintiffs reiterated that the *Hecker* class has been harmed by numerous additional discriminatory policies in the administration of other CDCR programs, services and activities, including but not limited to, parole programs, services and activities.

In order to resolve the *Hecker* claims within the remedial phase of *Coleman*, plaintiffs explained, the parties would have to enter into a process by which (1) the full extent of CDCR's systemic policies of discrimination against persons with psychiatric disabilities are revealed through civil discovery or an equivalent process, and, (2) remedial orders can be reached in a legal context that permits the enforcement and monitoring of the rights of the putative *Hecker* class under the ADA and Rehabilitation Act (e.g. a stipulated settlement within the context of the *Hecker* case, or an agreement within an expanded *Coleman* case). Defendants' counsel stated several times in the meeting that they could not agree to such a framework, and did not even agree to discuss such a framework with their clients.

The parties briefly discussed some of the steps that would be needed to bring the four specific disputed policies listed on the agenda into compliance with the ADA and the

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Rehabilitation Act. Defendants' counsel discussed various modifications of policies. Plaintiffs' counsel clarified that policy modifications without a commitment of resources to make reasonable accommodations and modifications in actual programs, services and activities would not be sufficient.

Although the four specific policies areas were discussed, Defendants' counsel again would not agree to a framework whereby specific agreements even regarding these four policy areas would be enforceable under the ADA and the Rehabilitation Act.

The parties discussed whether a follow-up meeting on June 5, 2007 would be appropriate. Defendants' counsel stated that they would only be prepared to discuss the four specific policy areas on the agenda at such a meeting, and not the overall framework for resolving the *Hecker* claims, or even for agreeing on ADA and Rehabilitation Act remedies regarding the individual policy areas discussed. Given this impasse, we do not believe that a meeting on June 5, 2007 would be productive.

Plaintiffs' counsel has a duty to the *Hecker* named plaintiffs, and to the putative *Hecker* class, to diligently prosecute their rights under the ADA and Rehabilitation Act. We cannot simply yield those claims without any assurance that the agreements reached in return will have any binding effect under ADA and Rehabilitation Act standards.

Given Defendants' firmly stated position that ADA and Rehabilitation Act claims are barred in *Coleman*, we respectfully request that the Special Master report to the *Hecker* court that the claims raised in *Hecker* cannot be resolved in the *Coleman* remedial process. Defendants deserve a prompt ruling on their Rule 12 motion, and Plaintiffs need the case to move forward to the end of discriminatory policies and procedures that are causing grievous and daily harm.

Finally, I note briefly that Defendants attempted to inject attorneys' fees issues into the discussions. It is insulting and unethical to discuss attorneys' fees as a trade off for our clients' rights and we will not do so.

Sincerely Yours,

ROSEN, BIEN & GALVAN, LLP



By: Ernest Galvan

EG

Enclosure

cc:

Special Master, Michael Keating

Deputy Special Master Matthew Lopes

Co-counsel

**EXHIBIT B**

EDMUND G. BROWN JR.  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



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May 30, 2007

J. Michael Keating, Jr.  
Special Master  
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Via Email and U.S. Mail

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RE: Coleman v. Schwarzenegger  
USDC, Eastern District of California, Case No. 2:90-cv-00520 LKK JFM P

Dear Mr. Keating and Mr. Lopes:

Thank you for meeting with us on Tuesday to discuss the *Coleman/Hecker* matter. In light of the Plaintiffs' counsel statements at that meeting as well as in Mr. Galvan's subsequent letter, Defendants believe it is necessary to reemphasize that the claims raised in *Hecker* can be, and must be, resolved within the remedial phase of the *Coleman* action.

**1. Because *Hecker* Concerns Outstanding Program Guide Issues, the *Hecker* Claims Must Be Determined Within the *Coleman* Remedial Scheme.**

The *Coleman* Plaintiffs have repackaged the last five percent of the *Coleman* case into the nascent *Hecker* lawsuit. The disability-access concerns must continue to be discussed and ultimately resolved in the remedial phase of the *Coleman* action. As you know, these *Hecker* issues are not new but *Coleman* *deja vu*: (1) the heat plan injunction; (2) the mandated separation of EOP inmates from general population inmates; and (3) the four classification points given to those diagnosed as class members at reception. These issues have and continue to be considered within the ongoing dialogue around the Revised Program Guides. As much as the *Coleman* court ordered implementation of non-disputed and certain disputed areas of the Revised Program Guide, the Revised Program Guide, including its disputed portions, remain subject to the *Coleman* court's jurisdiction. (Order, 3/3/06.) In accord, Judge Karlton's order of March 15, 2007 did not request a determination as to whether the *Hecker* claims could be mediated and resolved by the *Coleman* Special Master. Rather, it referred the *Hecker* matter to the Special

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Master for a "report and recommendation as to whether the claims raised [in *Hecker*] can be resolved within the remedial phase of [*Coleman*]."

**2. Plaintiffs' 'Deal Breaker' Requests Are Misinformed and Must Be Disregarded To Ensure Judicial Efficiency and Economy.**

As in many litigation cases, both Plaintiffs and Defendants have lodged legal objections to their respective claims and defenses. Defendants have asserted the *Hecker* Plaintiffs' ADA and Rehabilitation Act causes of action should be dismissed on a variety of legal grounds. But, with those legal objections reserved, Defendants are willing to work towards resolving the claims of inadequate disability-access for the already-certified class under the *Coleman* Program Guides. At our May 22 meeting, Defendants were prepared to review specific disability-access concerns with an eye toward problem solving and finding common ground. This approach benefits the *Coleman* class, of which the *Hecker* plaintiffs are a putative subclass, because inmate-patients will be able to obtain functional, efficient and enforceable relief more quickly than if *Hecker* is litigated for, at the very least, two more years. Even if Plaintiffs survive the 12(b)(6) motion, summary judgment motions, class certification motions, and prevail at trial and on appeal, the Court will be left addressing the very same issues that Defendants are prepared to discuss today.

At the May 22 meeting, we heard Plaintiffs' counsels' refusal to discuss the specific relief sought in *Hecker* without a "framework" involving Defendants stipulating to ADA and Rehabilitation Act liability to ensure the *Coleman* order is "binding." This position does a disservice to the class members, to the Special Master, and to the work accomplished - by way of stipulations and orders - already in *Coleman*. The Revised Program Guide exceeds the requirements of the Eighth Amendment in many respects thanks to the consensus-building work of you and your team. Further, the *Coleman* Court has issued numerous orders which have changed Defendants' policies, even those policies not directly addressing Eighth Amendment concerns. There is no doubt that the *Coleman* remedial process can be appropriately and effectively used to address *Hecker* claims. The *Coleman* Court can oversee this relief because the *Coleman* Court retains jurisdiction over the Revised Program Guide and must ensure it complies with all federal laws, including disability-access laws. Because the *Coleman* Court has jurisdiction to oversee disability-access concerns in its implementation of the Revised Program Guides, Plaintiffs' counsels' refusal to participate in good faith in this process and their assertion of "deal breakers" must be disregarded.

Defendants have already embarked upon good faith resolution of one of the disputed items. Defendants committed at the meeting to reviewing the four-points classification issue. Defendants submitted Supplemental Brief in Response to Plaintiffs' Motion for Referral to a Three-Judge Panel provides an update on the status of their review of the four-points issue. (Supp. Brief, filed 5/25/07.)

Mr. Keating and Mr. Lopes

May 30, 2007

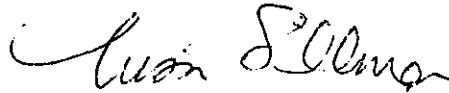
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### 3. Conclusion

In sum, Judge Karlton asked the Special Master to report on whether the *Hecker* claims can be resolved within the remedial phase of *Coleman*. Because they are the very same claims already raised in *Coleman*, the answer is: Yes, the claims raised in *Hecker* can be resolved within the remedial phase of *Coleman*. Doing so will avoid inconsistent judgments, duplicative remedial frameworks, and years of additional litigation. Moreover, the *Coleman* Court still has jurisdiction over the disputed areas and issues of the Revised Program Guides, and must ensure the Revised Program Guides comport with federal laws such as disability-access laws.

Defendants are committed to working with the Special Master, the *Coleman* Court, and Plaintiffs in order to find solutions to the Plaintiffs' claimed disability-access concerns. Accordingly, Defendants respectfully request that the Special Master's meeting with counsels on June 5, 2007 remain scheduled.

Sincerely,



LISA A. TILLMAN  
Deputy Attorney General

For EDMUND G. BROWN JR.  
Attorney General

cc:

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Jane Kahn

Claudia Center