

1 Claudia Center, State Bar No. 158255
Lewis Bossing, State Bar No. 227492
2 THE LEGAL AID SOCIETY OF SAN FRANCISCO
- EMPLOYMENT LAW CENTER
3 600 Harrison St., Suite 120
San Francisco, CA 94107
4 Telephone: (415) 864-8848
Facsimile: (415) 864-8199

5 Michael W. Bien, State Bar No. 96891
6 Amy Whelan, State Bar No. 215675
Ernest Galvan, State Bar No. 196065
7 Kenneth M. Walczak, State Bar No. 247389
ROSEN BIEN & GALVAN, LLP
8 315 Montgomery Street, 10th Floor
San Francisco, CA 94104
9 Telephone: (415) 433-6830
Facsimile: (415) 433-7104

10 Attorneys for Plaintiffs

11 **UNITED STATES DISTRICT COURT**

12 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

13 ROBERT HECKER, *et al.*,

14 Plaintiffs,

15 v.

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

17 Defendants.

No. 2:05-CV-02441 LKK JFM

Plaintiffs' Motion for Relief From Stay to Pursue Mediation, Seek Class Certification, and Update Plaintiffs by Filing Third Amended Complaint

18
19
20 **INTRODUCTION**

21 Plaintiffs are persons with psychiatric disabilities who allege disability-based discrimination in
22 numerous programs, services and activities conducted by defendant California Department of Corrections
23 and Rehabilitation (CDCR), and who seek to represent a class of similarly situated individuals. Since
24 March 15, 2007, plaintiffs' action has been stayed by Court order. Given the passage of time since the
25 entry of the stay (about nine months), the ongoing injuries to the plaintiffs and the putative class, and the
26 fact that the purpose of the stay has been served, plaintiffs respectfully request that the Court lift the stay.
27 In the alternative, plaintiffs request limited relief from the stay to pursue mediation, seek class
28 certification, and update the status of various plaintiffs by filing a Third Amended Complaint.

PROCEDURAL AND FACTUAL BACKGROUND

This action was filed two years ago, on December 5, 2005. Amended complaints were filed on February 23, 2006 and October 20, 2006. On November 17, 2006, the defendants filed a Rule 12(b) and (f) motion to dismiss the case; all briefing was completed on January 4, 2007. Defendant’s motion to dismiss was heard on February 8, 2007, and has not yet been decided. The case was stayed on March 15, 2007.

In their complaint, their responses to interrogatories, and their motion for class certification (which was drafted in early 2007 but never filed due to the Court’s stay), plaintiffs allege that defendants have engaged in the following policies and practices in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act:

Adding four points to the classification scores of incoming inmates with psychiatric disabilities, without lawful basis;

Excluding qualified inmates with psychiatric disabilities from conservation and fire camp programs;

Excluding qualified inmates with psychiatric disabilities at the Enhanced Outpatient Program (EOP) level of care from mainline vocational and educational programs;

Failing to provide “reasonable modifications” to enable inmates covered by heat plans to access equivalent programming;

Excluding qualified inmates with psychiatric disabilities from Prison Industry Authority (PIA) jobs and other employment positions;

Excluding qualified inmates with psychiatric disabilities at the EOP level of care from the Substance Abuse Program (SAP);

Assigning inmates with psychiatric disabilities to higher-security housing based upon their need for psychiatric services;

Excluding inmates and parolees with psychiatric disabilities from numerous community-based and/or minimum security programs, including Community Correctional Facilities (CCFs), Minimum Support Facilities (MSFs), Restitution Centers, Community Re-Entry Centers, and similar programs;

Failing to give inmates at the EOP level of care classification score deductions for “average or above average performance” in vocational and educational programs;

Failing to give service credits to inmates with psychiatric disabilities who experience disability-based delays at receptions centers;

Excluding parolees with psychiatric disabilities at the EOP level of care from the in-home electronic monitoring (EID) program;

1 Excluding parolees with psychiatric disabilities from the Parolee Substance Abuse Programs (PSAPs); and

2 Excluding parolees with psychiatric disabilities from numerous In-Custody Drug Treatment
3 Programs (ICDTPs).

4 Declaration of Claudia Center, ¶ 5.

5 Plaintiffs, defendants, and the Court have all noted the connection between this action, filed in
6 2005, and the *Coleman* case, filed in 1990 and tried in 1993. The putative class in *Hecker* is essentially a
7 sub-set of the certified class in *Coleman*, but with substantively different – and later arising – claims.¹
8 The *Coleman* case includes Eighth Amendment claims only, and is in a monitoring phase that was crafted
9 following a 1995 order. There are no disability discrimination claims in the *Coleman* case – the presiding
10 judge decertified the class in *Coleman* as to any Rehabilitation Act claims. Declaration of Claudia Center,
11 ¶ 6, Exh. A.

12 The March 2007 stay was issued to obtain and consider “a report and recommendation as to
13 whether the claims raised [in *Hecker*] can be resolved within the remedial phase of [*Coleman*].”
14 Thereafter, the parties met with respect to this question, and reached a standstill. Plaintiffs explained that
15 the *Coleman* process as presently designed is not well suited to the resolution of disability discrimination
16 claims, and sought an agreement to expand the mandate of *Coleman* to include such claims. Defendants
17 declined. The special master’s report of June 12, 2007 followed.

18 Due to the ongoing stay, plaintiffs have not been able to file their motion for class certification.
19 The motion was completed on March 15, 2007, but the stay order issued just before plaintiffs’ counsel
20 intended to file. Center Decl. ¶¶ 3, 4. Class certification (either by motion or stipulation) is essential in a
21 case such as *Hecker* – without a certified class, claims become moot when individuals are transferred to
22 another prison, switched from one level of care to another (e.g. from EOP to CCCMS), paroled, and/or
23 released from parole. Such changes have already affected the claims of named plaintiffs during the
24 pendency of the stay, causing prejudice to all of the members of the putative class. For similar reasons –
25 because of the changes that have occurred with the passage of time – plaintiffs seek to file a third

26 ¹ There may be members of the *Hecker* class who are not *Coleman* class members (for example, inmates
27 with a record of or perceived psychiatric disability who received four points at reception), so “sub-set” is
28 not precise. However, if one pictures a Venn diagram with two circles, a *Hecker* class member circle and
a *Coleman* class member circle, most of the *Hecker* circle is inside of the *Coleman* circle.

1 amended complaint to update the names and current statuses of the plaintiffs.

2 Accordingly, plaintiffs now seek an order from the Court lifting the stay, and permitting this case
3 to go forward. In the alternative, plaintiffs seek relief from the stay to pursue mediation, file their motion
4 for class certification, and seek leave to file an amended complaint.

5 ARGUMENT

6 “A trial court may, with propriety, find it is efficient for its own docket and the fairest course for
7 the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear
8 upon the case.” *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir.1979); *but*
9 *see Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (“[W]hile
10 it is the prerogative of the district court to manage its workload, case management standing alone is not
11 necessarily a sufficient ground to stay proceedings.”). In deciding whether to stay an action, the court
12 must weigh the harms faced by the stay applicant against the harms that a stay would impose upon the
13 opposing party. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005); *see also CMAX, Inc.*, 300
14 F.2d 265, 268 (9th Cir. 1962) *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982). “[T]he
15 supplicant for a stay must make out a clear case of hardship or inequity in being required to go forward, if
16 there is even a fair possibility that the stay for which he prays will work damage to someone else.” *Landis*
17 *v. North American Co.*, 299 U.S. 248, 254-55 (1936).

18 Consistent with the required balancing of interests, “[a] stay should not be granted unless it
19 appears likely the other proceedings will be concluded within a reasonable time.” *Leyva*, 593 F.2d at 864;
20 *accord Landis*, 299 U.S. at 259 (remanding to consider whether to grant a stay of what was likely to be
21 fairly short duration). In a recent opinion, the Ninth Circuit reviewed the “general policy favoring stays of
22 short, or at least reasonable, duration,” noting: “Generally, stays should not be indefinite in nature.”
23 *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066-67 (9th Cir. 2007). This is
24 so because undue delay can cause substantial prejudice to a litigant.

25 I. The Purpose of the Stay Has Been Satisfied, and the Stay Should Be Lifted.

26 The Court here stayed the action for the following stated purpose:

27 This matter is referred to the special master in *Coleman v. Schwarzenegger*, No. CIV S-90-0520
28 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; [and]

1 This action is stayed until said report from the Coleman special master has been filed and
2 considered by this court[.]

3 Order dated Mar. 15, 2007, at 3:4-9.

4 Following this Court's referral, the *Coleman* special master and the deputy special master
5 conferred with the parties in *Hecker* by meeting jointly and separately, by telephone and in person. *See*
6 Report and Recommendation of the Coleman Special Master ("Report and Recommendation") (June 12,
7 2007), pp. 3, 4. The parties submitted their positions to the special master, and provided additional
8 information and documents. Report and Recommendation at pp. 4; 5 ; Exhs. A (letter from Ernest Galvan
9 dated May 23, 2007) & B (letter from Lisa Tillman dated May 30, 2007); Declaration of Ernest Galvan in
10 Support of Plaintiffs' Objections to Special Master's Report and Recommendation ("Galvan Decl."), Exh.
11 1 (letter from Ernest Galvan dated June 1, 2007).

12 On June 12, 2007, the special master and the deputy special master tendered their report and
13 recommendation. The parties thereafter filed responses. *See* Plaintiffs' Objections to Special Master's
14 Report and Recommendation (June 21, 2007); Defendants' Response [and Request to Strike] (June 22,
15 2007). The report concludes that the parties' differences "present an insurmountable obstacle to
16 negotiating an agreement to consolidation or merger of the *Hecker* claims into the *Coleman* case at this
17 time." Report and Recommendation, p. 6.

18 As an intermediate step, the stay enabled the parties and the Court to explore the role of the
19 *Coleman* remedial process in resolving claims in this case. The conditions and purposes of the stay have
20 been satisfied: the Court has the benefit of the report from the *Coleman* special master and deputy special
21 master. The stay should be lifted, and the case should proceed. *See* Report and Recommendation, p. 6
22 ("This leaves the parties to their respective legal positions, which are beyond the special master's
23 jurisdiction and must be decided by the court."). Further extension of the stay is no longer constructive.
24 Fed. R. Civ. Proc. 1 ("These rules ... shall be construed and administered to secure the just, speedy, and
25 inexpensive determination of every action.").

26 **II. The Stay Should Be Lifted, and the Parties Referred to Mediation.**

27 The plaintiffs have no opposition to negotiating a settlement of the claims in *Hecker*. Plaintiffs did
28 not object to the often-successful ADR aspect of *Coleman*, but to its legal constraints relative to the

1 *Hecker* action: as explained in prior filings, the *Coleman* context lacks the jurisdiction and incentives to
 2 reach an enforceable and effective ADA settlement. Whether or not the stay continues or is lifted,
 3 plaintiffs seek a referral to a mutually agreeable mediator. Such a referral would enable the parties to try
 4 to fashion – in the context of *Hecker* – a settlement or a settlement process for the claims raised by this
 5 matter.

6 Plaintiffs will pursue mediation with or without a stay. However, plaintiffs believe that a ruling on
 7 the defendants' motion to dismiss would further mediation. Mediation is difficult to pursue while one side
 8 (the Defendants) continues to hope that Plaintiffs' claims will be dismissed in their entirety.

9 **III. The Stay Should Be Lifted, and the Plaintiffs Permitted to Seek Leave to File an Amended
 10 Complaint.**

11 It has been more than one year since plaintiffs filed their Second Amended Complaint. Since that
 12 time, there have been changes in the statuses of the named plaintiffs. For example, plaintiffs' counsel and
 13 named plaintiff Askia Ashanti have agreed that Mr. Ashanti should be dismissed from the *Hecker* case.
 14 Other plaintiffs have been transferred or paroled, such that their descriptions for purposes of a class action
 15 complaint are no longer accurate. These include:

16 Plaintiff Christopher Jenkins, previously at Correctional Training Facility (CTF), has paroled;

17 Plaintiff Daniel Hunley, previously at California State Prison, Los Angeles (LAC), has been
 18 transferred to Richard J. Donovan Correctional Facility (RJD);

19 Plaintiff Joseph Cox, previously at California Institute for Men (CIM), has paroled;

20 Plaintiff Eddie Thomas, previously at RJD, has paroled;

21 Plaintiff Brian Stafford, previously at California State Prison, Folsom (FOL), has been transferred
 22 to California State Prison, Corcoran (COR);

23 Plaintiff Michael Lovelace, previously at LAC, has paroled;

24 Plaintiff Quinton Gray, previously at California Mens Colony (CMC), has paroled;

25 Plaintiff John Wesley Williams, previously at California State Prison, Sacramento (SAC), has been
 26 transferred to LAC;

27 Plaintiff Samuel D'Angelo Jr., previously at RJD, has paroled, and has completed his parole; and

28 Plaintiff John Schooley, previously at COR, has been transferred to FOL.

Declaration of Claudia Center, ¶ 7. Further, named plaintiffs have experienced additional incidents of
 disability discrimination relevant to this action, and additional potential plaintiffs have come forward. It is

1 appropriate under Rules 15(a)² and 16(b)(1), and Local Rule 16-240(a)(3), for plaintiffs to be granted the
2 opportunity to update their claims and add all necessary parties.

3 **IV. The Stay Should Be Lifted, and the Plaintiffs Permitted to File Their Motion for Class
4 Certification.**

5 As the Ninth Circuit has noted, inmates who may be paroled or transferred face special concerns
6 regarding whether their claims for injunctive relief might be mooted, *see Johnson v. Moore*, 948 F.2d 517,
7 519 (9th Cir. 1991); *Daring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986), unless their suit has been
8 certified as a class action. *Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995) (citing *Preiser v. Newkirk*,
9 422 U.S. 395, 402-03 (1975)). *See also Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985) (danger of
10 mootness “may render a denial of certification improper”); *Guckenberger v. Boston Univ.*, 957 F. Supp.
11 306, 326-27 (D. Mass. 1997) (“The danger of mootness is great enough in the instant litigation to
12 necessitate class certification. Students graduate, transfer, drop out, move away, grow disinterested, fall
13 in love...all too often student-initiated disputes escape review.”); *Nehmer v. United States Veterans’*
14 *Admin.*, 118 F.R.D. 113, 119 (N.D. Cal. 1987)(“[C]lass actions enable plaintiffs to avoid the mootness of
15 important claims.”).

16 Here, class certification is critical to reaching enforceable and effective relief. Accordingly,
17 plaintiffs’ counsel prepared a motion for class certification, with supporting declarations, for filing in
18 March 2007; the stay prevented plaintiffs’ proceeding. Since the entry of the stay, six named plaintiffs
19 have been paroled and/or have completed parole (more than one-third of the named plaintiffs). While
20 these changes alone do not determine whether plaintiffs’ claims are moot, class certification remains
21 critically important to ensure live claims. And, as additional time elapses, the threat of mootness
22 increases. Class certification would also allow the Court to fully address the claims of parolees against
23 whom CDCR and DAPO have promulgated and applied discriminatory policies. There is no remedy, or
24 process for shaping a remedy, for these violations in *Coleman*.

25 ² Leave to amend “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). Leave to amend
26 is freely given unless the opposing party makes a showing of undue prejudice, bad faith, or dilatory
27 motive. Unless the opposing party can show that the amendment would cause undue prejudice to the
28 opposing party, is sought in bad faith, or creates undue delay, the amendment should be granted. *Ascon*
Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989). This policy is to be applied with
“extreme liberality.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

1 **CONCLUSION**

2 For all of the reasons stated herein, the stay should be lifted, and the *Hecker* plaintiffs should be
3 permitted to pursue their claims for discrimination in violation of the Americans with Disabilities Act and
4 the Rehabilitation Act. In the alternative, the stay should be lifted for the following purposes: (1) a
5 judicial referral to mediation; (2) plaintiffs' pursuing the filing of a Third Amended Complaint; and (3)
6 plaintiffs' motion for class certification.

7
8 Respectfully submitted,

9 THE LEGAL AID SOCIETY –
10 EMPLOYMENT LAW CENTER

11
12 Dated: December 14, 2007

13 By: /s/ Claudia Center
14 Claudia Center, Counsel for Plaintiffs