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Rosen Bien & Asaro

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,
Defendants.

No. C 94-02307 CW

FILED

MAY 30 2006

ORDER GRANTING
MOTION TO ENFORCE
REVISED PERMANENT
INJUNCTION

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

On May 26, 2006 at 10:00 a.m., this matter came on regularly for hearing in Courtroom 2, Fourth Floor, of this Court, the Honorable Claudia Wilken presiding. Michael Bien and Ernest Galvan of Rosen, Bien & Asaro, LLP appeared on behalf of Plaintiffs John Armstrong, et al. Deputy Attorney General Benjamin Rice appeared on behalf of Defendants.

Having considered the parties' pleadings and the arguments of counsel, and good cause existing therefor, the Court hereby finds and orders:

The Court entered a Permanent Injunction in this action on December 22, 1999 as to Defendants, government officials

1 responsible for conducting parole proceedings by the Board of
2 Parole Hearings ("BPH," formerly the "Board of Prison Terms"),
3 following trial and findings that Defendants were in violation of
4 the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et
5 seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.
6 § 794, and the Due Process Clause of the Fourteenth Amendment. The
7 Court entered a Revised Permanent Injunction on February 11, 2002
8 (the "Revised Permanent Injunction"). The Permanent Injunction in
9 this action was supported by Findings of Fact and Conclusions of
10 Law, entered on December 22, 1999, with findings that the order for
11 relief was narrowly drawn, extended no further than necessary to
12 correct the violation of the federal right, and was the least
13 intrusive means necessary to correct the violation of the federal
14 right.

15 The Revised Permanent Injunction required, among other things,
16 that Defendants do the following:

17 15. The BPT shall create and maintain a system for tracking
18 prisoners and parolees that the BPT identifies as having
19 disabilities. However, to the extent that tracking is
20 conducted by the CDC, it is not necessary for the BPT to
21 duplicate that system, and the BPT may make use of the CDC's
22 tracking system as a permissible means of complying with the
23 injunction.

24 16. Prior to meeting with a prisoner or parolee about a
25 screening offer, and prior to parole revocation, parole
26 revocation extension, life prisoner parole date rescission,
27 life prisoner parole consideration, serious offender, mentally
28 disordered prisoner or sexually violent predator probable
cause hearings, the BPT shall take reasonable steps to
identify prisoners and parolees with disabilities. Such steps
shall include, but not be limited to:

a. Checking the system described in paragraph 15 to
determine whether the BPT has previously identified the
prisoner or parolee as having a disability.

1 b. Reviewing all relevant and reasonably available
2 information in the prisoner or parolee's central and
3 medical files.

4 c. Verifying the disability when the BPT disputes the
5 extent or existence of the disability. The prisoner or
6 parolee shall be expected to cooperate with all
7 verification efforts, but the BPT shall be responsible
8 for verifying the disability.

9 17. The BPT shall provide accommodations to prisoners and
10 parolees with disabilities at all parole proceedings. The
11 prisoner or parolee's request for a particular type of
12 accommodation shall be given primary consideration and shall
13 be granted unless the request is unreasonable for specific,
14 articulated reasons allowable under the ADA, or unless other
15 effective accommodations are available.

16 Revised Permanent Injunction ¶¶ 15-17.

17 The Revised Permanent Injunction defines parole proceeding as
18 follows:

19 "Parole proceedings" shall mean all hearings conducted by the
20 BPT (now BPH) to determine whether and/or when a prisoner or
21 parolee should be released on parole or involuntarily
22 confined, including parole revocation and revocation extension
23 hearings, life prisoner hearings (documentation hearings,
24 progress hearings, parole consideration hearings, parole date
25 rescission hearings and parole board rules hearings), mentally
26 disordered offender hearings and sexually violent predator
27 hearings. Parole proceedings also include any events related
28 to the hearings that occur prior to or after the hearings,
including, but not limited to, screening offers, psychological
evaluations, central file reviews and administrative appeals.

Revised Permanent Injunction ¶ 3.

The Court finds that Defendants are currently violating
Paragraphs 15, 16, and 17 of the Revised Permanent Injunction, the
ADA, the Rehabilitation Act, and the Due Process Clause, and are
violating the rights of members of the plaintiff class by failing
to provide necessary accommodations during parole proceedings.
Paragraph 15 requires Defendants to create and maintain a system

1 for tracking prisoners and parolees that the BPH identifies as
2 having disabilities. Paragraph 16 requires that Defendants take
3 reasonable steps to identify prisoners and parolees with
4 disabilities prior to parole proceedings, including checking the
5 tracking system to determine whether the BPH has previously
6 identified the prisoner or parolee as having a disability, and
7 reviewing all relevant and reasonably available information in the
8 prisoner or parolee's central or medical file. Paragraph 17
9 requires Defendants to provide accommodations to prisoners and
10 parolees with disabilities at all parole proceedings, including
11 parole revocations and extensions, life prisoner hearings, Mentally
12 Disordered Offender (MDO) proceedings, and Sexually Violent
13 Predator (SVP) proceedings.

15 Plaintiffs have demonstrated that Defendants are in violation
16 of the tracking system requirements of the Revised Permanent
17 Injunction (Paragraphs 15 and 16). Defendants do not dispute these
18 violations, but rather concede them. The current system for
19 tracking prisoner and parolee disabilities is unreliable,
20 non-comprehensive, and insufficient. It has failed on many
21 occasions. It does not capture information regarding the Board's
22 prior identification of disabilities in previous parole
23 proceedings. It also does not reliably and consistently record
24 information about disabilities and accommodations provided in
25 current parole proceedings.
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1 Plaintiffs have demonstrated that Defendants' failure to
2 comply with the tracking system requirements of the Revised
3 Permanent Injunction has resulted in violations of their obligation
4 to provide accommodations to prisoners and parolees with
5 disabilities (Paragraph 17). Defendants have not contested the
6 numerous specific examples submitted by Plaintiffs of prisoners
7 denied access to parole proceedings, and denied reasonable
8 accommodations and assistance needed to communicate during these
9 proceedings. The uncontested evidence submitted by Plaintiffs
10 demonstrates that some of the worst abuses proven at trial in April
11 and May, 1999 are continuing, almost seven years after this Court
12 issued the Permanent Injunction. Defendants have not contested
13 that within the past few months, a paraplegic parolee has been
14 required to drag himself up stairs in order to participate in
15 parole proceedings. Defendants have not contested that within the
16 past few months, Defendants have failed to provide sign language
17 interpreters for deaf parolees during critical notice proceedings
18 in advance of parole hearings, attorney consultations in
19 preparation for parole hearings, and parole hearings themselves.
20 Prisoners and parolees with disabilities are being denied
21 reasonable accommodations for their parole proceedings in violation
22 of the Revised Permanent Injunction, the ADA, the Rehabilitation
23 Act and the Due Process Clause of the Fourteenth Amendment to the
24 United States Constitution. Parolees are having their parolee
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1 proceedings delayed in order to provide needed accommodations, and
2 are being forced to choose between receiving a reasonable
3 accommodation or receiving a timely parole proceeding.

4 Defendants have not contested Plaintiffs' showing that these
5 violations are directly caused by Defendants' failure to maintain a
6 tracking system of prior disability identifications, as required by
7 the Revised Permanent Injunction. This direct causation is
8 illustrated by the case of one deaf parolee whose right to a sign
9 language interpreter during parole proceedings was violated in late
10 October, 2005, which was included as part of the evidence in
11 support of this motion, and whose rights were violated again in a
12 subsequent parole proceeding that took place while this motion was
13 pending.

14
15 Use of a tracking system to prevent such violations is
16 required not only by this Court's Permanent Injunction, but also by
17 the underlying law. "Because the regulations implementing the ADA
18 require a public entity to accommodate individuals it has
19 identified as disabled, 28 C.F.R. § 35.104, some form of tracking
20 system is necessary in order to enable the Board to comply with the
21 Act." Armstrong v. Davis, 275 F.3d 849, 876 (9th Cir. 2001).

22
23 Defendants do not contest the fact that they are in violation
24 of the Revised Permanent Injunction, the ADA, the Rehabilitation
25 Act and the Constitution. In their opposition papers, Defendants
26 contend that the required tracking system may operate separately
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1 from the computer networks on which Defendants maintain the basic
2 operational data regarding parole proceedings, and which are used
3 regularly by the same personnel who are responsible for ensuring
4 effective communication and reasonable accommodations for persons
5 with disabilities. While all other information related to these
6 processes is generated and transmitted in real-time, on a high-
7 speed, networked system, Defendants propose segregating the
8 disability tracking system onto a few separate computers scattered
9 in various offices around the state, with data coming in the mail
10 on CD-ROMs twice monthly. The Court finds that the tracking system
11 requirement cannot be met by such a segregated, slow system.
12 Defendants have instituted their much faster networked systems in
13 order to meet due process deadlines in the parole revocation
14 process that have been massively accelerated in compliance with the
15 Permanent Injunction in another federal civil rights class action,
16 Valdivia v. Schwarzenegger, CV 94-671 LKK (E.D. Cal.). This same
17 acceleration in the process results in the need to arrange
18 reasonable accommodations promptly so that persons with
19 disabilities are not shunted off to a slower process because of
20 their disabilities and needs for reasonable accommodations.
21 Similar changes are underway in the life prisoner hearing process.
22 The Court cannot condone a system that leaves required disability
23 tracking behind in an unworkable separate system, and that will
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1 inevitably result in continued egregious violations of due process,
2 the ADA and the Rehabilitation Act.

3 Defendants further contend that the requirement to check the
4 tracking system should not apply before prisoners or parolees are
5 given notices of rights or charges in connection with parole
6 proceedings. This contention is without merit. Notice of rights
7 and charges is a basic hallmark of due process. Prisoners and
8 parolees cannot meaningfully participate in parole proceedings
9 without effective communication of notices of rights and charges.
10 Plaintiffs have demonstrated, and Defendants have not contested,
11 that failure to check the tracking system as required by the
12 Revised Permanent Injunction has caused disabled prisoners and
13 parolees to be denied proper notice of rights and charges.
14

15 IT IS HEREBY ORDERED that, (1) In order to remedy these
16 violations, Defendants must implement a State-wide, computerized,
17 networked, real-time database system, preferably the Revocation
18 Scheduling and Tracking System (RSTS), to ensure compliance with
19 Paragraphs 15, 16 and 17 of the Revised Permanent Injunction in
20 this action. For parole revocations and extensions, this system
21 must be implemented on or before January 1, 2007. For life
22 prisoner hearings, MDO proceedings, and SVP proceedings, this
23 system must be implemented on or before May 1, 2007. It may be
24 included in the RSTS, the LSTS or an equivalent system. In
25 addition, Defendants must develop and implement a plan to assure
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1 that accommodations, including but not limited to sign language
2 interpreters, are actually provided at each parole proceeding
3 without delay.

4 (2) The State-wide computerized tracking system, preferably
5 the RSTS, must include access to information previously gathered by
6 the BPH regarding an inmate or parolee's disabilities and needs for
7 accommodation and maintain that information from one parole
8 proceeding to the next; must gather information from tracking
9 systems maintained by California Department of Corrections and
10 Rehabilitation (CDCR) Institutions, Department of Adult Parole
11 Operations (DAPO) and BPH; must be updated with new information
12 about disabilities identified during the parole proceedings and
13 accommodations requested and provided; and must be able to transmit
14 information back to CDCR Institutions and Parole for future use.

15 (3) The RSTS, or other State-wide computerized tracking
16 system, must be checked by Defendants' staff prior to the
17 initiation of each parole proceeding, including sufficiently in
18 advance of any notice of rights or charges to allow for needed
19 accommodations to be arranged before the notice of rights or
20 charges, and sufficiently in advance of any clinical interview,
21 file or documents review, or life prisoner planning process to
22 allow for needed accommodations to be arranged before these
23 scheduled processes.
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1 (4) Defendants are to meet and confer with Plaintiffs'
2 counsel regarding the specifications for the tracking system or
3 systems. The parties are to certify to the Court on or before
4 August 25, 2006, either that they have reached agreement regarding
5 these specifications, or that further briefing and/or evidence is
6 necessary on the specifications. In addition, Defendants are to
7 meet and confer with Plaintiffs' counsel regarding the plan to
8 provide, in a timely manner, accommodations, including but not
9 limited to sign language interpreters, at each parole proceeding,
10 without delay.

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12 (5) On or before November 27, 2006, Defendants shall certify
13 to the Court that they have taken all necessary steps to secure
14 funding for utilization of the RSTS, or other State-wide
15 computerized tracking system, and of the plan to provide
16 accommodations in a timely manner, including sign language
17 interpreters.

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19 (6) On or before January 1, 2007, Defendants shall certify to
20 the Court that they have fully implemented the RSTS, or other
21 State-wide computerized tracking system for accommodations needed
22 for parole revocations and extensions, and the plan to provide
23 accommodations in a timely manner, including sign language
24 interpreters. On or before May 1, 2007, Defendants shall certify
25 to the Court that they have fully utilized the RSTS, the LSTS, or
26 other State-wide computerized tracking system, for accommodations
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1 needed for life prisoner hearings, MDO proceedings, and SVP
2 proceedings.

3 (7) The Court finds that the relief ordered is narrowly drawn,
4 extends no further than necessary to correct the violation of
5 federal rights, and is the least intrusive means necessary to
6 correct the violation of the federal rights.
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9 IT IS SO ORDERED.

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11 Dated:

MAY 30 2006



CLAUDIA WILKEN
United States District Judge

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14 Copies mailed to counsel
15 as noted on the following page
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