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Rosen Bien & Asaro

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

JOHN ARMSTRONG, et al.,  
Plaintiffs,

No. C 94-02307 CW

FILED

MAY 30 2006

ORDER GRANTING  
MOTION TO ENFORCE  
REVISED PERMANENT  
INJUNCTION

v.

ARNOLD SCHWARZENEGGER, et al.,  
Defendants.

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

United States District Court  
For the Northern District of California

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

21 Defendants do not contest the fact that they are in violation  
22 of the Revised Permanent Injunction, the ADA, the Rehabilitation  
23 Act and the Constitution. In their opposition papers, Defendants  
24 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

16 (3) The RSTS, or other State-wide computerized tracking  
17 system, must be checked by Defendants' staff prior to the  
18 initiation of each parole proceeding, including sufficiently in  
19 advance of any notice of rights or charges to allow for needed  
20 accommodations to be arranged before the notice of rights or  
21 charges, and sufficiently in advance of any clinical interview,  
22 file or documents review, or life prisoner planning process to  
23 allow for needed accommodations to be arranged before these  
24 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.

11  
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.

18  
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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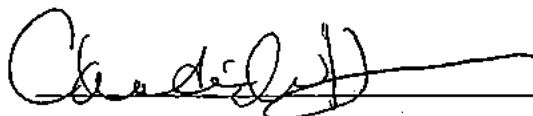
1 needed for life prisoner hearings, MDO proceedings, and SVP  
2 proceedings.

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.  
7

8  
9 IT IS SO ORDERED.

10  
11 Dated:

**MAY 30 2006**



12 CLAUDIA WILKEN  
13 United States District Judge

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