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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

EDMUND G. BROWN JR. et al.,

Defendants.

Case No. C94 2307 CW

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR FURTHER ENFORCEMENT ORDER TO PROHIBIT DEFENDANTS FROM HOUSING CLASS MEMBERS IN ADMINISTRATIVE SEGREGATION DUE TO LACK OF ACCESSIBLE HOUSING

Judge: Hon. Claudia Wilken
Date: January 29, 2014
Time: 2:00 pm
Ctrm: Courtroom Two, Fourth Floor

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INTRODUCTION

An injunction is necessary to stop Defendants from continuing to house prisoners with disabilities in administrative segregation just because of their disabilities. Defendants argue that no injunction is necessary because the violation is limited to one prison (the Richard J. Donavan Facility, or RJD), they are aware of the problems at RJD, and they have developed a policy to limit the number of prisoners RJD locks in administrative segregation because they have disabilities. Each of these arguments is fundamentally flawed.

- The problem is not just at RJD. Defendants' logs show that ten additional CDCR prisons put more than five dozen prisoners in segregation solely because of their disabilities, often for weeks or months at a time. Defendants' statements and charts suggesting otherwise are misleading and skewed.
- Although officials at eleven prisons have been reporting serious violations of the administrative segregation housing policy for more than a year, and Plaintiffs repeatedly raised the alarm about these reports, Defendants took *no steps* to address this matter at RJD or elsewhere until Plaintiffs filed this motion.
- The policy that Defendants belatedly implemented in response to this litigation is inadequate and wholly reactive. It does not aim to prevent prisons from using administrative segregation as an overflow unit for disabled prisoners; instead, Defendants' new policy anticipates that prisons system-wide *will continue indefinitely to confine class members to segregation because of their disabilities* (albeit in "limit[ed]" numbers). Opp. Br. at 3.

Defendants have the means – if not the will – to stop this practice outright. Defendants concede that the source of the "problem" is a "failure to effectively manage" housing for *Armstrong* class members. Opp. Br. at 1. As a former CDCR executive explained, Defendants continue sending prisoners with disabilities to institutions that have no available accessible beds, and then use administrative segregation – among the harshest settings in prison – as their

default overflow housing. Decl. of Richard Subia in Support of Plaintiffs' Reply ("Subia Decl."), ¶¶ 3, 16- 20. If this Court were to enjoin this practice, there are simple steps that Defendants could take to comply with the injunction: first, only transfer a prisoner with a disability if the receiving prison has an available accessible bed that is identified and reserved for that prisoner; second ensure that prisons manage their beds appropriately. Subia Decl., ¶¶ 28-34. If all else fails, Defendants should use non-segregation housing units as their overflow – there is no reason to default to administrative segregation as the overflow unit. Subia Decl., ¶¶ 33-34.[1]

ARGUMENT

I. One Third of CDCR Prisons Continue to House Prisoners with Disabilities in Segregation Because They Are Disabled, in Accordance With CDCR Policy.

CDCR policy permits Defendants to house prisoners with disabilities in segregation just because they are disabled: Defendants concede that in conformance with their policy, all the

[1] Defendants claim throughout their brief that Plaintiffs failed to meet and confer about the matters raised in this motion. This is untrue. Plaintiffs have written numerous letters seeking to bring Defendants to the table to discuss this issue, mostly without success. *See* Sept. 29, 2014 Evenson Decl. in support of Motion for Further Enforcement Order ("Evenson Decl.") ¶¶ 2-7, 24-25 & Exhs. A, B, D & S. When the parties finally did meet – twice in advance of the filing of this motion – Defendants refused to even discuss solutions, contending that there was no problem to solve. Evenson Decl., ¶¶ 24-25. It was only after Plaintiffs filed their motion to enforce that Defendants agreed to come to the table for a substantive discussion about solutions; unfortunately, those discussions failed to lead to resolution. ECF No. 2461-1 at ¶¶ 2-3 (describing additional meet and confer).

Oddly, while complaining about Plaintiffs purported failure to meet and confer, Defendants also move to strike as hearsay the paragraphs in Plaintiffs' counsel's declaration that recount the two meetings that the parties held in advance of filing the motion. Opp. Br. at 14. That motion must be denied. Plaintiffs' counsel was present at the meetings, and the statements are based on first-person experience. Evenson Decl., ¶¶ 24-25. The description of statements made by Defendants are not hearsay because they are statements of a party opponent. Fed. R. Evid. 801(d)(2).

Notably, Defense counsel submitted a declaration purporting to describe what transpired at those same meetings, and also purporting to describe what Plaintiffs' counsel said. Goldman Decl., ¶¶ 2-4. While Plaintiffs do not agree with Defendants' characterization of the events or statements, the mere fact that Defendants have submitted the declaration shows that their motion to strike is frivolous.

prisons are permitted to house "limit[ed]" numbers of class members in segregation just because of their disabilities. Opp. Br. at 3. They acknowledge that under their policy institutions will continue to use administrative segregation to house class members who have "multiple case factors that complicate their housing placement;" the best that a prison is expected to do under the State's policy is to take steps that will "usually" resolve the issue after the prisoner is already in segregation. *Id.*

Indeed, Defendants argue that their 2012 policy had been "work[ing] as intended" at every prison but RJD (Opp. Br. at 3.), even though ten other prisons put more than five dozen class members in segregation between July 2013 and November 2014 solely because of their disabilities:

- SVSP locked 21 prisoners with disabilities in segregation due to their disabilities; this occurred in seven different months. [2]
- WSP locked 6 prisoners with disabilities in segregation due to their disabilities; this occurred in four different months.[3]
- CMF locked 22 prisoners with disabilities in segregation due to their disabilities; this occurred in nine different months.[4]
- CCC locked 2 prisoners with disabilities in segregation due to their disabilities; this occurred in two different months.[5]
- CIM locked 5 prisoners with disabilities in segregation due to their disabilities; this occurred in four different months.[6]
- SAC locked 1 prisoner with a disability in segregation due to his disabilities.[7]

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[2] Evenson Decl., Exhs. G (1 prisoner); K (1); L (4); M (5); N (3); O (2); Knowles Decl., Exhs. I (2); K (3).

[3] Evenson Decl., Exhs. E (1 prisoner); G (1); H (2); O (2).

[4] Evenson Decl., Exhs. E (3 prisoners); F (6); G (6); H (2 – misidentified as CIW); I (1); J (1); L (1); M (1); Knowles Decl., Exh. M (1).

[5] Evenson Decl., Exh. J (1 prisoner); Knowles Decl., Exh. M (1).

[6] Evenson Decl., Exhs. K (1 prisoner); O (2); P (1); Knowles Decl., Exh. M (1).

[7] Evenson Decl., Exhs. O (1 prisoner).

- SATF locked 4 prisoners with disabilities in segregation due to their disabilities; this occurred in three different months.[8]
- DVI locked 1 prisoner with a disability in segregation due to his disabilities for more than three weeks. [9]
- KVSP locked 2 prisoners with disabilities in segregation due to their disabilities; this occurred in 2 different months.[10]
- MCSP locked 3 prisoners with disabilities in segregation due to their disabilities; this occurred in 2 different months.[11]

The length of time prisoners spent in administrative segregation has varied from month to month, but it has never dropped to zero. In July 2014, class members spent on average more than thirteen days in segregation due to their disabilities, while in August and September, the average jumped to more than three weeks. Second Decl. of Rebekah Evenson in support of Plaintiffs' Motion for Further Enforcement Order (hereinafter "Second Evenson Decl."), Exh. A at 14, 16-17 (calculating length of time in segregation).

Individual examples are instructive: Salinas Valley State Prison (SVSP) kept numerous class members in segregated housing for weeks and months because the prison had "no beds available to accommodate the [prisoner's] housing restrictions." Sept. 29, 2014 Decl. of Rebekah Evenson in support of Motion for Further Enforcement Order (hereinafter "Evenson Decl."), Exh. L & O (in May 2014, two class members held for more than 30 days; in March 2014, a different class member held for more than three weeks); Dec. 15, 2014 Decl. of Knowles in Support of Opposition ("Knowles Decl."), Exh. K (in August 2014, three class members held for 20 days, 12 days, and 13 days). The California Institution for Men kept a class member in segregation for nearly a month because "No DPW bed available upon arrival."

[8] Evenson Decl., Exhs. F (2 prisoners); G (1); M (1).

[9] Knowles Decl., Exh. I (1 prisoner).

[10] Evenson Decl., Exhs. E (1 prisoner); P (1).

[11] Evenson Decl., Exhs. E (2 prisoners); O (1).

Evenson Decl., Exh. P. The Deuel Vocational Institution reported locking only one class member in segregation due to his disabilities during the relevant period, but that prisoner was warehoused in segregation for more than three weeks just because he uses a wheelchair. Knowles Decl., Exh. I.

Defendants downplay these incidents as "isolated" (Opp. Br. at 11), but the testimony of four prisoners who were housed in administrative segregation at RJD illustrate the serious injuries caused by Defendants' policy. One prisoner, whom Defendants transferred into RJD even though RJD had no place to accommodate his wheelchair and his mental illness, was locked in administrative segregation for two months. Second Evenson Decl., Exh. C at ¶¶ 3, 13; Evenson Decl., Exh. P; Knowles Decl., Exh. J. The prisoner describes vividly the deprivations of being housed in administrative segregation, where he was locked up in his cell almost constantly, and in the rare instances when he was let out to exercise "cages," or to medical appointments, he was strip searched and shackled. Second Evenson Decl., Exh. C at ¶¶ 5-8. This contrasts sharply with the privileges he is permitted in the general population, where he is allowed outside of his cell for hours each day, attends mental health groups, and goes to the yard or library. *Id*. at ¶ 7-8. The severe conditions in administrative segregation caused this already fragile prisoner to deteriorate, becoming increasing paranoid and experiencing frequent nightmares, and even contemplating suicide: "I was in really, really bad shape." *Id*. at ¶¶ 13-14. Months after he was released from administrative segregation, the effects lingered. *Id.* at ¶ 13.

Another prisoner – also kept in administrative segregation for three weeks "due to lack of available housing" to accommodate his wheelchair – describes how the extremely restricted movement in administrative segregation made him feel like a "caged animal." Second Evenson Decl., Exh. D at ¶¶ 3, 12; Evenson Decl., Exh. P. RJD; Knowles Decl., Exh. I.

Another prisoner with mental illness who uses a walker and wheelchair and who was confined in administrative segregation for two weeks "due to lack of available housing"

(Second Evenson Decl., Exh. E at ¶¶ 2-4; Evenson Decl., Exh. P) describes his feelings of anxiety and depression after being locked in his cell "all the time with nothing to do." Second Evenson Decl., Exh. E at ¶¶ 4-7.

Yet another prisoner with both mental illness and physical disabilities was placed on "suicide watch," and then immediately transferred into administrative segregation "due to lack of available housing." Second Evenson Decl., Exh. F at ¶ 5; Evenson Decl., Exh. P. Like all others in administrative segregation, he had no access to normal prison activities such as yard, dayroom, phone calls, or even regular showers. Second Evenson Decl., Exh. F at ¶¶ 8-10. He describes how administrative segregation is "extremely dirty. I smelled of urine and feces. I requested cleaning supplies but staff refused to provide it to me. At times, it was difficult to get toilet paper; one time, I had to use the sheet as toilet paper." *Id*. at ¶ 12. The result was increasing feelings of stress and frustration: "the situation was so bad that it caused me to cry on multiple occasions. I sincerely hope that no one else has to experience the same type of discrimination that I did." *Id*. at ¶ 13.

These stories underscore the seriousness of the injuries suffered by all class members housed in administrative segregation just because of their disabilities; even those in prisons that experience what Defendants dismiss as "isolated" violations of policy. Opp. Br. at 11.

All of this suffering is unnecessary. Defendants concede that these prisoners' injuries are all caused by correctible management failures. Opp. Br. at 1-2. As a former high level CDCR official explained, Defendants are continuing to send prisoners with disabilities to institutions that have no available accessible beds because CDCR headquarters staff are mismanaging the transfer process. *See* Subia Decl., ¶¶ 16-19, 29-31. And, in Defendants' own words, individual prisons are "fail[ing] to effectively manage the process of locating and coordinating appropriate housing for *Armstrong* class members." Opp. Br. at 1. When they find themselves unable to locate an accessible bed, prison staff are turning to administrative

segregation as an overflow unit, rather than looking for temporary placements in alternate, less restrictive locations. Subia Decl., ¶¶ 20-27, 33-34.

II. The ADA Prohibits Defendants From Placing Prisoners With Disabilities In Segregation Because They Are Disabled.

Defendants apparently concede that the ADA prohibits them from housing class members in administrative segregation because of their disabilities, but argue that they should be allowed to place class members in segregation on a "temporary" or "short term" basis. Opp. Br. at 8. Their request for an exception must be denied.

Defendants rely exclusively on U.S. Department of Justice comments that say that the ADA allows an institution to place a prisoner with a disability "in a medical area at a stopover facility during a transfer from one facility to another," and even then only on a "temporary" or "short term" basis. Opp. Br. at 8 (quoting 28 C.F.R. Pt. 35, App. A., § 35.152). This analysis does not apply here. Defendants are not putting prisoners with disabilities in medical settings;[12] they are putting prisoners with disabilities in the most restrictive environment possible – administrative segregation, a prison within the prison.

Moreover, the class members are not locked in segregation on a "temporary" "stopover" basis – they are kept in segregation for days, weeks, and even months. Second Evenson Decl., Exh. A.

Nor are Defendants putting class members in segregation for "security or administrative purposes" as the Department of Justice comments discuss; Defendants admit that they are doing it because prison officials are "fail[ing] to effectively manage the process of locating and coordinating appropriate housing for Armstrong class members." Opp. Br. at 1.

At one prison – the California Institution for Men – a prisoner spent a full month in segregation because Defendants professed that there was "No DPW bed available upon

[12] If CDCR were to do *that*, it would not violate the *Armstrong* Remedial Plan. *See Armstrong* Remedial Plan § IV(I)(21)(e) [p. 34] (permitting holding in medical facility when "no accessible cell is available").

arrival." Evenson Decl., Exh. P. The September 2014 logs show eight men housed in RJD's administrative segregation unit for more than a month (in some cases two months), because "no beds [were] available to accommodate [their] housing restrictions." Knowles Decl. Exh. J. The October 2014 logs show three class members at Salinas Valley State Prison remained in segregation for twenty, twelve, and thirteen days due to "no beds available to accommodate the housing restrictions." *Id.*, Exh. K. All of these class members were denied access to basic prison programs, services and activities just because prison officials could not locate an accessible bed for them.

The U.S. Department of Justice plainly articulated why the regulations prohibit prisons from putting prisoners with disabilities in inappropriate security classifications:

> Historically, individuals with disabilities have been excluded from [prison] programs because they are not located in accessible locations, or inmates with disabilities have been segregated in units without equivalent programs. In light of the Supreme Court's decision in *Yeskey* and the requirements of title II, however, it is critical that public entities provide these opportunities to inmates with disabilities. In proposed § 35.152, the Department sought to clarify that title II required equal access for inmates with disabilities to participate in programs offered to inmates without disabilities.
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> 28 C.F.R. Pt. 35, App. A., Discussion of the new § 35.152.

CDCR's current policy ensures that Defendants will deny prisoners with disabilities equal access to prison programs; unless it is enjoined, that practice will continue.

III. Statewide Injunctive Relief Is Necessary.

A statewide injunction is necessary because Defendants' policy permits all California prisons to continue housing class members in segregation solely because they are disabled. "System-wide relief is required if the injury is the result of violations of a statute or the constitution that are attributable to policies or practices pervading the whole system (even though injuring a relatively small number of plaintiffs) . . ." *Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001) (emphasis added); *see also Fields v. Smith*, 653 F.3d 550, 558-59 (7th Cir. 2011) (affirming statewide injunction against state medical policy in case brought by three

individual plaintiffs); *Ashker v. California Dep't of Corrections*, 350 F.3d 917, 924 (9th Cir. 2003) (affirming injunction barring prison from implementing prison mail policy, even though action brought by single prisoner).

A statewide injunction is also necessary because the violations occurred at fully one third of CDCR prisons. *Supra* at 3-4. The fact that Defendants violated the rights of vast numbers of class members at RJD does not preclude the court from redressing the violations suffered by the sixty-plus class members at the ten other prisons. The Ninth Circuit has affirmed a system-wide injunction on far less evidence, including in this case. *See Armstrong v. Brown*, 732 F.3d 955 (9th Cir. 2013). In *Clement v. California Dep't of Corr*., 364 F.3d 1148, 1153 (9th Cir. 2004), the court upheld a systemwide injunction against a prison policy even though only eight prisons had adopted the offending policy, and other institutions were only considering it. "Because a substantial number of California prisons are considering or have enacted virtually identical policies, the unconstitutional policy has become sufficiently pervasive to warrant system-wide relief." *Id. see also Crawford v. Clarke*, 578 F.3d 39, 43-44 (1st Cir. 2009) (affirming statewide injunction requiring all state prisons to provide access to closed-circuit religious services in "special management units," even though action was brought by two individual plaintiffs and arose out of violations at a single "special management unit"); *Riley v. Brown*, 2006 WL 1722622, *14 (D.N.J., June 21, 2006) (entering statewide injunction requiring protections for prisoners from sex offender facility from assault, based on evidence that one dozen prisoners from the facility were threatened or assaulted).

Finally, statewide relief is also required because the violation is caused not just by staff at RJD, but by CDCR headquarters staff (who transfer class members to institutions that don't have available accessible beds), and by staff at the ten other prisons that have housed class members in segregation due to their disabilities. *See* Subia Decl., ¶¶ 3-5, 16-20.[13]

[13] Even if the violations only existed at RJD, however, an injunction would still be necessary there. As discussed *infra* at 11-12, Defendants' "corrective action plan" will not correct the violations at RJD.

IV. Defendants' "Corrective Action Plan" Is Inadequate.

A. Defendants Have Been Given More Than Enough Time to Correct the Violations.

Defendants argue that before the Court issues an injunction, it must first grant them an opportunity to develop a remedial plan that "'correct[s] the errors made in the internal administration of their prisons.'" Opp. Br. at 13 (quoting *Lewis v. Casey*, 518 U.S. 343, 362 (1996)). That argument must be rejected in light of the history of this case, and the decades that Defendants have already been given to correct the violations. *See, e.g.*, Sept. 20, 1996 Findings of Fact and Conclusions of Law at 2 (Doc. 159); March 21, 2001 Permanent Injunction (Doc. 694); Feb. 8, 2002 Order Requiring Defendants to Make Prison Facilities Structurally Accessible (Doc. 785); June 12, 2002 Order and Stipulation Regarding Defendants' Compliance With The Court's Order To Make Prison Facilities Structurally Accessible (Doc. 828); Jan. 18, 2007 Injunction (Doc. 1045); Oct. 20, 2009 Enforcement Order (Doc. 1661).

Defendants have also had ample opportunity to "correct the errors" in the specific administrative segregation practices at issue here. Opp. Br. at 13. After Defendants explicitly recognized that they are locking *Armstrong* class in Administrative Segregation "solely due to a lack of accessible bed space in the general population," Defendants developed their 2012 Operational Procedure. Evenson Decl., Exh. C. But then, for the next two years, Defendants *continued* housing prisoners with disabilities in segregation due to their disabilities, and utterly ignored their own internal reports – and Plaintiffs' repeated correspondence – showing the seriousness of the situation. Evenson Decl., Exhs. E-P & ¶¶ 2-7, 24-25; Knowles Decl., Exhs. I-M. Even now, Defendants do not aim to stop prisons from mis-using administrative segregation in this way, they aim only to "limit" the practice, and only at prisons that house more than 16 class members in segregation during a two-month period. Opp. Br. at 3, 7.

Defendants' failure to respond to the issues as they arose, and their decision to draft the halfhearted "corrective action plan" only in response to pending litigation, demonstrates a

failure of oversight, and underlines the need for injunctive relief. Subia Decl., ¶ 37. As the Ninth Circuit held in resolving another dispute between the same parties who are before this court, CDCR's "belated" investigation and corrective action taken "only after Plaintiffs filed their motion" does not "persuade [the court] that the State was fulfilling its [ ] obligations. In fact, the timing of these investigations persuades us of just the opposite: that the State has continued to shirk its duty to investigate and track alleged violations of the remedial plan, the court's orders, and federal statutory law." *Armstrong v. Brown*, 768 F.3d 975, 985 (9th Cir. 2014). The same reasoning applies here.

B. Defendants' "Corrective Action Plan" Will Not Correct the Violations.

An injunction is also necessary because the "corrective action plan" touted by Defendants does not even aim to correct the violations. The plan is predicated on the viability of CDCR's policy permitting prisons to lock at least some class members in segregation due to their disabilities. Accordingly, the plan does not include any steps to *prevent* the housing of class members in segregation due to their disabilities; it only describes what to do *after* this has happened to a large number of prisoners for two months running. Knowles Decl., ¶ 23.

Defendants describe the cause of the problem as a "failure to effectively manage" the housing of *Armstrong* class members. Opp. Br. at 1. But rather than taking proactive steps to address their management failures, Defendants' plan would only deal with the issue on the back-end, after class members have already been injured. This is a fatal flaw; under Defendants' plan, prisons can and will continue to house class members in segregation because of their disabilities.[14] Accordingly, Defendants' plan is not sufficient to resolve the issues raised in Plaintiffs' motion.

[14] Even if a plan that solely focuses on punishing wrongdoers would be sufficient, Defendants' plan fails even to do that. First, while Mr. Knowles describes what is in the plan, it is apparent that there is not even a written "plan" document. And there is no indication that anything has actually been done to implement the plan. Even though the RJD logs showed that prison was violating policy for more than a year, and even though Plaintiffs filed a motion to stop this practice months ago, and even though CDCR determined that RJD was violating policy,

(continued . . .)

Indeed, in November 2014 – two months after Plaintiffs filed their motion – RJD still housed seven class members in segregation just because they are disabled. Knowles Decl., Exh. L. And an investigation by prison medical officials showed that RJD only achieved this number by displacing medical patients who needed the accessible beds – that is, RJD freed-up accessible beds for *Armstrong* class members by moving medical patients into housing incompatible with their medical needs. Second Evenson Decl., Exh. B at 1 (Dec. 21, 2014, Memorandum).

V. Plaintiffs' Proposed Injunction Is The Appropriate Remedy.

A. The Proposed Injunction Is "Workable."

Defendants are wrong when they contend that an injunction barring CDCR from putting *Armstrong* class members in administrative segregation because of their disabilities would be "unworkable." Opp. Br. at 9. Since Defendants concede that "the problem" is caused by mismanagement by prison staff, (Opp. Br. at 1), it follows that Defendants could comply with a prohibitory injunction by reforming their housing management practices: first, do not send a prisoner with a disability to an institution until an accessible bed has been identified; second,

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Defendants apparently have still taken *no* steps to hold anyone accountable. *See, e.g.*, Knowles Decl., ¶ 23(a) (CDCR "will" take certain steps to address the violations at RJD).

Additionally, under their plan Defendants will not do anything to monitor or hold accountable the staff at CDCR headquarters responsible for overseeing transfers into prisons that do not have accessible beds. Subia Decl., ¶40. Nor does the plan monitor or hold responsible the staff at headquarters who are required by the 2012 Operational Plan to help prisons locate accessible beds. Opp. Br. at 4.

Also, because the plan would only kick in after an institution has locked more than eight class members in segregation for more than two months running, it would not address the serious problems that have arisen at any of the ten prisons that put dozens of class members in segregation in 2013 and 2014. *Supra* at 3-4.

Even if Defendants were to improve their "corrective action plan" to address these concerns, the plan would still be nothing more than a "beefed-up reaction to a problem that has already occurred." Subia Decl., ¶ 41. What needs to happen now is for the State to take proactive steps to stop putting class members in administrative segregation because of their disabilities.

keep the accessible bed empty until the prisoner with a disability arrives. Subia Decl., ¶¶ 28-31. In the event that these two steps fail, Defendants can locate an appropriate mainline cell within hours (not days) by employing appropriate "bed management" techniques such as moving prisoners around to free-up accessible cells, or finding an accessible cell that is "as close as possible to the prisoner's classification level." Subia Decl., ¶¶ 32-34; *see also* Opp. Br. at 3 (accord).

Defendants do not explain why they believe the proposed injunction would be "unworkable." Opp. Br. at 9. The closest they come to an explanation is the declaration of Mike Knowles, which describes the case factors that prisons consider in making decisions about housing, and asserts that some prisons move prisoners to administrative segregation "temporarily" for "administrative" reasons in order to evaluate these "inmate case factors." Knowles Decl., ¶¶ 5-6, 9. This explanation misses the mark. The logs produced by Defendants show prisoners who were placed in administrative segregation because of "lack of bed space to accommodate their disability," not to evaluate their "case factors." Evenson Decl., Exhs. E-P (explanatory footnote at end of detailed logs); Subia Decl., ¶¶ 23-27. There is simply no reason that prisons should use segregation as their overflow housing. Subia Decl., ¶¶ 5, 34.

B. The Proposed Injunction Tracks The Language Of the Governing Regulations.

Defendants object to two provisions in the proposed order which track the applicable ADA regulations. First, Defendants object to the language that would bar Defendants from housing *Armstrong* class members "in inappropriate security classifications, including administrative segregation, because no accessible cells or beds are available." Opp. Br. at 12; Proposed Order at 3 (ECF No. 2436-4). The governing ADA regulations provide that a prison shall not house prisoners with disabilities "in inappropriate security classifications because no accessible cells or beds are available." 28 CFR § 35.152(b)(2)(i). Second, Defendants object to the part of the proposed order that would bar Defendants from "placing prisoners with disabilities in facilities that do not offer the same programs as the facilities where they would

otherwise be housed." Opp. Br. at 12. This, too, is a verbatim quote from the governing regulations, which provide that a prison shall not place prisoners with disabilities "in facilities that do not offer the same programs as the facilities where they would otherwise be housed." 28 CFR § 35.152(b)(2)(iii). An order requiring Defendants to adhere to the plain text of the law complies with the PLRA. *Handberry v. Thompson*, 446 F.3d 335, 348 (2d Cir. 2006) ("We do not see how this prospective relief, which tracks the statutory language of the IDEA's Child Find requirement precisely, can be viewed as unnecessary, overbroad or over-intrusive").

C. The Proposed Regulation Does Not Conflict With *Coleman* Court Orders.

Defendants complain that the order sought by Plaintiffs "exceeds what is required" by the court in *Coleman v. Brown*. Opp. Br. at 9. That is true, but irrelevant, because the *Coleman* Court was addressing a different question, with different facts and different law.

The *Coleman* Court held that "placement of seriously mentally ill inmates in the harsh, restrictive and non-therapeutic conditions of California's administrative segregation units for non-disciplinary reasons for more than a minimal period necessary to effect transfer to protective housing or a housing assignment violates the Eighth Amendment." Defendants' Request for Judicial Notice ("RJN"), Exh. A at 55.

Unlike the situation here, however, the *Coleman* Plaintiffs had not proven that they were placed in segregation because of their disability; the *Coleman* Plaintiffs claimed only that they were placed in segregation for general "non-disciplinary" reasons. RJN, Exh. A at 52. CDCR decides whether a prisoner is in segregation for non-disciplinary (NDS) reasons at a "classification hearing;" that hearing must occur "within ten days of placement in an administrative segregation unit." RJN, Exh. B at 17. Thus, the fact that the *Coleman* Court approved a plan by which CDCR has ten days to hold a classification hearing to determine the *reason* for the administrative segregation placement (Opp. Br. at 9) is utterly irrelevant to the case at hand, where the reason for the administrative segregation placement is known: it is because of the prisoner's disability.

Second, CDCR's plan in *Coleman* requires that the inmate be transferred "within 72 hours of being designated NDS." RJN, Exh. B at 18. This was done to mimic the 2012 Operation Plan adopted by CDCR in *Armstrong*. Opp. Br. at 9. But as explained above and in the moving papers, that Operation Plan has not prevented CDCR from housing class members in segregation because of their disabilities for weeks and even months.

Finally, the *Coleman* Court approved Defendants' 72-hour grace period under the constraints inherent in Eighth Amendment litigation, wherein a constitutional violation only exists if prison officials are deliberately indifferent to a "substantial risk of serious harm." Defs' RJN, Exh. A at 38, 7-8; *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The case at hand, in contrast, arises in a very different legal framework: the ADA explicitly prohibits Defendants from housing prisoners with disabilities "in inappropriate security classifications because no accessible cells or beds are available." 28 CFR § 35.152(b)(2)(i). The governing statute gives prisoners with disabilities the affirmative right to equal access to all prison programs, services and activities. *Penn. Dept. of Corr. v. Yeskey*, 524 U.S. 206 (1998); 42 U.S.C. § 12131 et seq. This Court's orders reaffirm those obligations and order CDCR to ensure that there are sufficient numbers of accessible beds. Opening Br. at 6-7.

Thus, this Court is not constrained by the limits that bound the *Coleman* Court: it has the authority and the obligation under the ADA and its prior orders to prohibit Defendants from housing prisoners with disabilities in administrative segregation just because they are disabled.

CONCLUSION

Defendants will continue to use administrative segregation as the overflow unit for prisoners with disabilities unless this Court orders them to stop. The State's existing policy contemplates that they will continue to do so, and their "Corrective Action Plan" only addresses what to do *after* a prison keeps class members in segregation for too long. Defendants have the means to stop putting class members in segregation because they are disabled; they just lack the will to do so. An injunction is necessary to end this practice.

Dated: January 12, 2015

Respectfully submitted,

PRISON LAW OFFICE

/s/ Rebekah Evenson

By: Rebekah Evenson

Attorneys for Plaintiffs