

1 Edward W. Swanson, SBN 159859  
2 SWANSON & McNAMARA LLP  
3 300 Montgomery Street, Suite 1100  
4 San Francisco, California 94104  
5 Telephone: (415) 477-3800  
6 Facsimile: (415) 477-9010

7 Court Expert

8  
9  
10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 JOHN ARMSTRONG, et al.,

13 Plaintiffs,

14 v.

15 GAVIN NEWSOM, et al.,

16 Defendants.  
17

Case No. CV 94-2307 CW

**SECOND REPORT AND  
RECOMMENDATIONS REGARDING  
HOUSING OF ARMSTRONG CLASS  
MEMBERS DURING THE COVID-19  
PANDEMIC**

18 **I. Background**

19 In July 2020, in an effort to ensure there would be “sufficient space at each institution to  
20 allow the institution to follow public health guidance on isolating and quarantining patients in  
21 the event of a COVID-19 outbreak,” Judge John Tigar ordered CDCR to set aside at least 100  
22 beds per institution and then to “assess whether additional space is required at the institution for  
23 isolation and quarantine purposes[.]” *Plata* Dkt. 3401, 3-4. Pursuant to stipulation, the Court  
24 in this matter subsequently ordered the Court Expert to review the sufficiency of CDCR’s  
25 accessible housing, “including for purposes of medical isolation and quarantine in the event of  
26 COVID-19 outbreaks[.]” Dkt. 3015, 2. The Court Expert issued a report on August 19, 2020,  
27 addressing whether the space set aside pursuant to Judge Tigar’s order in *Plata* was adequate  
28 for the needs of *Armstrong* class members. Dkt. 3048. On September 9, 2020, pursuant to

1 stipulation, the Court ordered CDCR to take several steps to implement the Court Expert’s  
2 recommendations. The Court further ordered the Court Expert to “review Defendants’  
3 compliance with the above orders and the sufficiency of the designated quarantine and isolation  
4 space and present his findings and recommendations to the Court[.]” Dkt. 3072, ¶ 17.

5 This report discusses the status of CDCR’s response to the September 9 order. The  
6 sections below correspond to the numbered paragraphs in the September 9 order, with the  
7 relevant paragraph numbers identified in parentheses in the header of each section. The Court  
8 Expert notes that the parties engaged in several meet-and-confer sessions to address these  
9 issues, and he commends both sides for their hard work, creativity, and commitment to  
10 addressing the complicated issues involved in ensuring there is adequate housing for disabled  
11 inmates during a disruptive and unprecedented epidemic. Despite the parties’ hard work, there  
12 remain several areas where CDCR has yet to come into compliance with the Court’s order. As  
13 a result, this report identifies areas that are works-in-progress and recommends the Court  
14 instruct the Court Expert to issue a further report in 30 days in which the Court Expert hopes to  
15 report that most of the outstanding issues have been resolved.

## 16 **II. Adequacy of pandemic response plans for *Armstrong* class members (¶¶ 1-2)**

17 The Court ordered CDCR to “revisit and revise pandemic response plans” at institutions  
18 where the Court Expert had found there to be insufficient quarantine or isolation space for  
19 *Armstrong* class members and to “identify which buildings or portions of buildings will be used  
20 for quarantine and which will be used for isolation, as well as any planned limitations on which  
21 type of people will be housed in each area[.]” Dkt. 3072, ¶ 1. In each space, CDCR is to  
22 “ensure there are both necessary architectural accommodations and sufficient DPW-accessible  
23 and lower/lower beds according to the methodologies applied in the Court Expert’s Report.”  
24 *Id.* at ¶ 2.

### 25 **a. Review of methodology**

26 The Court Expert’s August 19 report reflected the Court Expert’s understanding of how  
27 CDCR and the Receiver’s Office, following the guidance of their public health experts, were  
28 structuring isolation and quarantine space. The Court Expert noted that isolation beds are for

1 individuals who are confirmed to have contracted COVID-19 and that inmates therefore can be  
2 housed together in isolation (because there is no risk of further infection). Dkt. 3048, 6. The  
3 report also stated that “individuals in quarantine cannot be housed in a common space with any  
4 other individual because of the risk that an infected quarantined inmate could spread the virus to  
5 others in quarantine who may not yet be infected.” *Id.* at 7.

6 However, the Receiver’s Office has since issued guidance permitting inmates in  
7 quarantine to be housed together under certain circumstances. The current “COVID-19  
8 Screening and Testing Matrix for Patient Movement” provides that “cohorting” of up to 10  
9 quarantined individuals is permissible where private rooms are not available and where the  
10 cohorted individuals do not have different exposure dates or different exposure types (e.g.  
11 individuals coming from jail versus individuals exposed in the CDCR facility). Plaintiffs have  
12 raised concerns with this practice and note that the Receiver’s guidance on cohorting differs  
13 from the methodology recommended by the Court Expert’s earlier report. As noted in the  
14 August 19 report, the scope of the Court Expert’s work pursuant to the Court’s order is to  
15 determine whether the space set aside in *Plata* is adequate for the needs of *Armstrong* class  
16 members, not whether the space set aside by CDCR and the Receiver is adequate or appropriate  
17 for the entire population. *See* Dkt. 3048, 2-3. To the extent Plaintiffs have objections to the  
18 Receiver’s guidance allowing quarantined inmates to be housed together, the Court Expert  
19 understands that should be addressed in *Plata*.

20 The Court Expert’s August 19 report also explained that, in assessing how many  
21 accessible beds should be set aside for isolation and quarantine, the Court Expert had followed  
22 the methodology applied in *Plata* in assuming that the most likely scenario for a wide-spread  
23 outbreak was one in which infection breaks out in a congregate living space, i.e., a dorm or a  
24 unit where the cells have barred or perforated doors. The Receiver determined that each  
25 institution should have at least as many isolation and quarantine beds as there are inmates in the  
26 two largest congregate living areas. Consistent with that methodology, the Court Expert  
27 recommended that for purposes of housing *Armstrong* class members, the isolation and  
28 quarantine spaces set aside in response to Judge Tigar’s orders should have at least as many

1 DPW and lower/lower beds as there are DPW and lower/lower inmates in the two largest  
2 congregate living areas in the institution. The Court Expert further recommended that where  
3 there are no DPW or lower/lower inmates in congregate housing at an institution, the isolation  
4 and quarantine space must have accessible beds in numbers proportionate to the relevant  
5 population; in other words, an institution with 15 percent DPW inmates must ensure that at least  
6 15 percent of its isolation and quarantine beds are DPW beds. *See* Dkt. 3048, 6-9. The Court  
7 Expert continues to recommend that this methodology be applied.

8 **b. Current status**

9 Exhibit B to the Court Expert's August 19 report set forth the number of required DPW  
10 and lower/lower beds based on application of the above methodology to the then-current  
11 populations at each institution. At that time, nine institutions had insufficient DPW beds, and  
12 fourteen had insufficient lower/lower beds. Dkt. 3048-2. CDCR has worked to remedy these  
13 deficiencies. Based on data produced by Defendants on September 30, every institution now  
14 has sufficient lower/lower beds. Only RJD has insufficient DPW beds, with two available but  
15 four needed.

16 However, the parties continue to evaluate several matters with respect to the sufficiency  
17 of beds for *Armstrong* class members. First, some prisons have "special needs yards" (SNY)  
18 for inmates who are housed separately from the general population (GP). Some of those  
19 institutions have designated separate GP and SNY isolation/quarantine spaces. In those  
20 institutions, CDCR should apply the above methodology for determining the sufficiency of  
21 DPW and lower/lower beds separately to the SNY and the GP populations. CDCR should  
22 ensure there is adequate and appropriate space in the GP isolation and quarantine housing based  
23 on the *Armstrong* population in GP housing, and then do the same for the SNY population and  
24 report the information to the Court Expert.

25 Plaintiffs have taken the position is that every institution with a special needs yard  
26 should be required to designate separate isolation and quarantine space for its special needs  
27 inmates. This is based on a concern that GP inmates may refuse to move into a quarantine or  
28 isolation unit located in a special needs yard, and vice versa. Because this issue goes to the

1 totality of the quarantine and isolation spaces rather than to the specific needs of *Armstrong*  
2 class members, Plaintiffs should raise it in *Plata*.

3 Plaintiffs similarly believe that institutions should be required to designate separate  
4 quarantine and isolation space for inmates with different security classifications. Again, the  
5 Court Expert believes this issue should be addressed in *Plata*. However, to the extent  
6 institutions have designated such separate quarantine and isolation spaces, CDCR should  
7 evaluate the sufficiency of the DPW and lower/lower beds in each space separately to  
8 determine the space is adequate for the relevant population at each institution and then should  
9 report the information to the Court Expert.

10 Finally, the parties continue to discuss a number of specific concerns Plaintiffs have  
11 raised about accessibility in quarantine and isolation spaces at various institutions. Those  
12 discussions are ongoing, and issues as to which the parties cannot reach agreement will be the  
13 subject of any future report ordered by the Court.

### 14 **III. Notification to Plaintiffs of changes in housing designations (§ 3)**

15 The Court ordered that if Defendants “designate substitute or additional quarantine and  
16 isolation space at any institution,” they must notify Plaintiffs and the Court Expert within 72  
17 hours and “identify which buildings or portions of buildings will be used for quarantine and  
18 which will be used for isolation, as well as any planned limitations on which type of people will  
19 be housed in each area.” Dkt. 3072, ¶ 3. The parties agree that Defendants’ policy for  
20 “Tracking of Isolation/Quarantine Units for *Armstrong* Class Members” satisfies this  
21 requirement.

### 22 **IV. Adjustment of Set-Aside Space (§ 4)**

23 The Court ordered Defendants to “develop a reliable process . . . to ensure that adequate  
24 accessible quarantine and isolation space is set-aside in advance of *Armstrong* class members  
25 transferring into the institution, and in response to any changes in disability codes or movement  
26 within an institution.” Dkt. 3072, ¶ 4. The parties have devoted significant time and resources  
27 to this issue. There do not appear to be major substantive disagreements remaining, but the  
28

1 policies and procedures necessary to comply with this aspect of the Court’s order are still the  
2 subject of negotiation.

3 Specifically, the Court Expert notes that CDCR has yet to present proposals on several  
4 aspects of the plan to assure adequate set-aside space in advance of transfers. Those include:

- 5 • Procedures to ensure that institutions are adequately monitoring changes in the number  
6 of inmates who require lower/lower housing to ensure there are enough lower/lower  
7 beds available in isolation and quarantine spaces.
- 8 • Procedures to ensure that if an institution changes the spaces it intends to use for  
9 isolation or quarantine, there remain enough lower/lower beds.
- 10 • Procedures to ensure that Plaintiffs and the Court Expert will be notified in 72 hours if  
11 the isolation and quarantine space is no longer adequate for *Armstrong* purposes and to  
12 set an appropriate time period in which to remedy the deficiency.
- 13 • Procedures to ensure there is sufficient quarantine space from an *Armstrong* perspective  
14 for both transferees and class members who may need to be housed in the event of an  
15 outbreak.
- 16 • Procedures to ensure that if an institution sets aside separate housing for SNY and GP  
17 inmates, or separate housing based on classification, those separate spaces are evaluated  
18 based on the relevant population at the institution to ensure they are adequate from an  
19 *Armstrong* perspective.

20 Any policies and procedures that are developed to comply with this subject of the Court’s  
21 order will be the subject of a future report, if ordered by the Court.

## 22 **V. Architectural Modifications (¶¶ 5-7)**

23 Depending on their disabilities, *Armstrong* class members require various architectural  
24 accommodations. Exhibit A to the Court Expert’s August 19 report listed the minimum  
25 required architectural features based on CDCR’s Disability Placement Codes. *See* Dkt 3048-1.

26 The Court ordered Defendants to “make all necessary modifications to render any existing  
27 designated quarantine or isolation space at an institution accessible to all DPP codes housed at  
28 that institution” and to document those modifications. Dkt. 3072, ¶ 5. The Court further  
ordered that necessary modifications were to be made within 14 days of Defendants’  
designation or use of additional quarantine space and within 48 hours of an *Armstrong* class  
member being placed in a space that lacks necessary architectural features. *Id.* at ¶¶ 6-7.

CDCR has made a number of modifications and has provided photographs to Plaintiffs, and the  
parties’ experts are meeting and conferring to ensure that the modifications are adequate for

1 class member needs. The results of those discussions will be the subject of any future report  
2 ordered by the Court.

3 **VI. Non-Architectural Modifications (¶¶ 10-15)**

4 Defendants must ensure that *Armstrong* class members in quarantine and isolation  
5 housing have the same access to whatever programming, recreation and outside communication  
6 is available to other quarantined or isolated inmates. Dkt. 3072, ¶ 10. The Court ordered  
7 Defendants to “provide all necessary non-architectural accommodations to render any existing  
8 designated quarantine or isolation space at an institution accessible . . . and produce an  
9 inventory of such accommodations.” *Id.* at ¶ 11. Defendants must make a good-faith effort to  
10 provide necessary non-architectural modifications within 14 days of designating or using  
11 additional space for quarantine or isolation and within 48 hours of placing an *Armstrong* class  
12 member in a space that lacks such accommodations. *Id.* at ¶¶ 12-13.

13 Defendants’ draft policy directive for “Tracking of Isolation/Quarantine Units for  
14 *Armstrong* Class Members” instructs institutions what steps they must take to comply with the  
15 Court’s order, and on September 30, Defendants produced an inventory of telephones,  
16 teletypewriters and telecommunication for the deaf (TTY/TDD) devices, power outlets, and  
17 video relay service (VRS) devices in each institution’s isolation and quarantine space. As  
18 Plaintiffs have noted, however, this inventory does not list other necessary devices such as  
19 magnifiers and other reading aids. Plaintiffs have also raised concerns that the draft directive is  
20 insufficiently specific. Defendants have not yet responded to these issues, although they have  
21 set a deadline by which they will.

22 While the Court Expert appreciates the diligence with which the parties have addressed  
23 many aspects of the Court’s order, the subject of non-architectural modifications has not  
24 received sufficient attention and must be addressed promptly.

25 **VII. Rehousing of displaced *Armstrong* class members (¶16)**

26 Any *Armstrong* class member who is displaced because his or her housing was  
27 designated as isolation or quarantine space must be appropriately rehoused. Dkt. 3072, ¶ 16.  
28 As discussed below, Defendants have drafted policies to ensure that class members, including

1 those displaced by the designation of quarantine and isolation space, are accessibly housed.  
2 Defendants recognize the need for additional policies to ensure that displaced class members are  
3 not rehoused in a more restrictive environment or at a higher security level than necessary  
4 solely because there is no other way to accommodate their disabilities. Defendants have  
5 outlined the general parameters of such policies and are working to formulate specific language  
6 for review by Plaintiffs and the Court Expert.

### 7 **VIII. Housing of *Armstrong* class members**

8 Finally, the Court ordered the Court Expert to “review the housing of *Armstrong* class  
9 members not on isolation or quarantine status, including those displaced from quarantine and  
10 isolation areas.” Dkt. 3072, ¶ 18.

11 Defendants produced a “snapshot” of class member housing as of September 1, 2020,  
12 which showed that nine class members were housed improperly either according to their DPP  
13 code or a lower/lower designation. Each of those inmates was appropriately re-housed.

14 Defendants drafted a directive entitled “Procedures for Reviewing and Reporting  
15 Housing for *Armstrong* Class Members During COVID-19” and have revised and updated that  
16 directive in response to Plaintiffs’ suggestions. The directive requires, *inter alia*, that class  
17 members be interviewed within 24 hours of being moved into non-designated or non-traditional  
18 housing and that institutions collect and report to the Warden, on a daily and weekly basis,  
19 information on *Armstrong* class members who are inappropriately housed. It also addresses the  
20 need to ensure that no class member is placed in administrative segregation (ASU) solely  
21 because the facility lacks other accessible housing. The parties continue to revise this directive,  
22 with Plaintiffs recently providing input on specific language as well as on the steps required to  
23 ensure class members are not inappropriately placed in ASU housing. The Court Expert  
24 understands that there are no substantive disagreements between the parties and that they are  
25 working towards finalizing the language of the directive.

26 Plaintiffs have noted that blind class members cannot be appropriately housed unless  
27 they are properly oriented to new living space, and in response to Defendants’ request have  
28 outlined suggestions on how best to situate blind and low-vision class members in new housing.



1 **IX. Conclusion**

2 The Court Expert recommends that the Court order a follow-up report on quarantine and  
3 isolation housing for *Armstrong* class members in 30 days.

4  
5 Dated: October 23, 2020

Respectfully submitted,

6 \_\_\_\_\_  
7 /s/  
8 Edward W. Swanson  
9 SWANSON & McNAMARA LLP  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28