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Court Expert

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. CV 94-2307 CW

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

**I. Introduction**

In the 60 days since the Court Expert's last report, there have been substantial developments regarding COVID-19 and the California prison system. CDCR experienced an enormous rise in infections, peaking at around 750 new cases per day and over 10,000 active cases – figures many times higher than previous surges. Those numbers have now improved dramatically, with cases steadily declining since reaching those highs.

CDCR has also reported encouraging data on vaccinations. To date, over 10,000 incarcerated persons have received at least one dose of a vaccine. The vaccine acceptance rate among the general population is 74%; among those aged 65 or older, the acceptance rate is 90%. Over three-quarters of individuals with COVID risk scores of 3 or above have received

one or both doses. Overall, roughly 56% of the population has either received at least one dose of the vaccine or has had COVID and recovered.

While these numbers are encouraging, it is important to remember that over 47,000 incarcerated people have contracted the virus to date. Of those, 192 have died. The *Armstrong* population has been especially hard hit. Class members make up roughly 11% of the prison population, and they do not appear to be contracting the virus at higher rates than others: they make up roughly 12% of active cases and 11% of resolved cases. However, *Armstrong* class members have died at a far greater rate than the general population: of 192 deaths to date, a stunning 53% – 101 individuals – have been class members. The fact that, to date, *Armstrong* class members have been almost five times more likely to die of COVID-19 than non-class members makes the work of protecting them all the more essential.

## **II. Adequacy of pandemic response plans for *Armstrong* class members (§§ 1-2)<sup>1</sup>**

As discussed above, CDCR has made progress in containing the spread of COVID-19 in its facilities, and both infection and death rates have fallen since the surge of cases in December. The availability of a vaccine and the high acceptance rates reported by CDCR are likewise encouraging, and the Court Expert is optimistic that vaccination will further reduce the rate of spread of the disease, particularly among *Armstrong* class members. However, the Court Expert believes it would be premature at this point to modify the approaches to containment and monitoring developed by the parties. To date, most of the incarcerated persons who have been vaccinated have received only one of the two doses necessary for full efficacy, and it is yet unknown when CDCR will receive sufficient vaccine doses for its entire population or how new variants of the coronavirus will respond to the currently available vaccines. Moreover, the infection and death rates remain high and of great concern, with an average of 107 new infections and nearly one death per day.

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<sup>1</sup> As in previous reports, the sections below correspond to the numbered paragraphs in the Court's September 9 order (Dkt. 3072), in which the Court set forth the categories of information on which the Court expert was to provide updates.

**Adequacy of isolation and quarantine space for class members.** As set forth in previous reports, Defendants have implemented a methodology for calculating the number of quarantine and isolation beds that must be accessible to class members with DPW and lower/lower classifications. That methodology is two-fold. Institutions where *Armstrong* class members are housed in shared spaces must have at least as many DPW and lower/lower isolation and quarantine beds as there are inmates requiring DPW and lower/lower beds in the two largest congregate living areas (the “congregate approach”). Institutions where such individuals are housed in individual cells and not congregate living areas must have accessible isolation and quarantine beds in proportion to the class member population (the “proportional approach”) – thus, an institution with 15% DPWs must ensure that at least 15% of its isolation and quarantine beds are DPW-accessible. As described in the Court Expert’s last report, the congregate approach can yield an insufficient number of beds where an institution houses a large number of class members but only a small number of them in congregate housing. Accordingly, the Court Expert recommended that the parties meet and confer regarding institutions where Plaintiffs believe application of the proportional approach will better ensure available of isolation and quarantine beds for class members. Currently, there are sufficient DPW and lower/lower isolation and quarantine beds at each institution under the methodology that the parties have agreed should apply at each institution. However, Plaintiffs raise two concerns with respect to the adequacy of the set-aside space.

**Designation of quarantine vs. isolation space.** Plaintiffs believe CDCR’s current response plans are insufficient in that they do not require institutions to provide a sufficient proportion of quarantine beds among the beds set aside for quarantine and isolation. Plaintiffs note that in August 2020, CDCR and CCHCS’s Public Health Workgroup wrote that “the point of the method proposed by the public health experts is to identify and respond to an outbreak at the earliest onset which means most of the space will be for quarantine[.]” Public Health Workgroup Recommendations (Aug. 17, 2020). Pointing to that recommendation, Plaintiffs ask the Court Expert to recommend that at least 51% of the isolation and quarantine beds that are accessible to class members be reserved for quarantine, rather than isolation.

1 As the Court Expert wrote in his previous report, this issue pertains to the entire prison  
 2 population, not only *Armstrong* class members, and it is therefore appropriate to address it in  
 3 *Plata* rather than here. The methodology applied under *Plata* does not require Defendants to  
 4 identify and set aside separate isolation and quarantine space. The *Armstrong*-accessible  
 5 housing is a subset of that designated in *Plata*, not a separate and additional group of beds.  
 6 Thus, the *Armstrong* Court cannot order CDCR to dedicate *Armstrong*-accessible beds to  
 7 quarantine space without disturbing the methodology applied by *Plata*. The Court Expert  
 8 recommends that Plaintiffs either raise this issue in *Plata* or continue to address it on an  
 9 institution-by-institution basis, as they have done to date.

10 **Equitable division of quarantine space.** Plaintiffs raise a related concern about the  
 11 extent to which *Armstrong* class members have unequal access to the safest type of quarantine  
 12 space. As noted in the Court Expert's last report, the parties agree that the safest place to  
 13 quarantine is in a single-person cell with a solid (rather than barred) door. The parties have met  
 14 and conferred about how to ensure that class members have equal access to such cells. In  
 15 November, Plaintiffs proposed a methodology pursuant to which CDCR would calculate the  
 16 percentage of the general population that could be housed in single-cell quarantine, compare it  
 17 to the percentage of the DPW and lower/ lower populations that could be so housed, and adjust  
 18 the available space to ensure equal access. In early December, defendants responded with a  
 19 letter in which they provided examples to illustrate why they believe Plaintiffs' approach is  
 20 unrealistic. Defendants suggested instead that the parties evaluate and address Plaintiffs'  
 21 concerns in this regard on an institution-by-institution basis.

22 The Court Expert believes Defendants have demonstrated that Plaintiffs' proposal, while  
 23 straight-forward on its face, would be difficult to implement given the subgroups to which the  
 24 methodology would have to be applied (for example, one might need to apply the methodology  
 25 based on a proportional approach for general population class members but a congregate  
 26 approach for SNY class members) and the fact that calculations would need to be reperformed  
 27 in response to changing populations. Because Plaintiffs have not shown that Defendants'  
 28

1 concerns are misplaced, the Court Expert declines to recommend that Defendants implement  
2 Plaintiffs' proposed methodology.

3       However, this does not change the fact that Defendants have an obligation to ensure that  
4 class members are treated equally, including in their ability to quarantine in single cells with  
5 solid doors. Plaintiffs have identified six institutions (SOL, CCWF, CMF, MCSP, SATF, and  
6 VSP) at which they believe class members are currently disadvantaged in this regard. As an  
7 example, CMF has 28 DPW class members in its two largest communal housing spaces and 72  
8 DPW-accessible isolation/quarantine beds. It thus has sufficient set-aside space under the  
9 congregate approach. However, Plaintiffs report that only 25 of the DPW-accessible beds are  
10 in single cells with solid doors, while CMF has enough celled quarantine beds to house its  
11 entire non-DPW population. The Court Expert agrees that Defendants have an obligation to  
12 ensure that class members have equal access to single-cell, solid-door quarantine space and  
13 recommends that the parties meet and confer to address any deficiency at CMF and at the other  
14 institutions identified by Plaintiffs, as well as at any other institutions with a deficiency of this  
15 sort.<sup>2</sup> The Court Expert notes that the obligation to identify such discrepancies  
16 does not lie solely with Plaintiffs and that CDCR must also work to identify and remedy  
17 instances of unequal access to preferable quarantine space prior to an outbreak.

18       **Separate isolation and quarantine spaces for specific populations.** As described in  
19 the Court Expert's last report, Plaintiffs have raised concerns about the need to designate  
20 separate isolation and quarantine space for different security classifications and for certain  
21 populations, such as those housed on special needs yards (SNY). Plaintiffs believe that the  
22 failure to designate separate spaces may be contributing to some individuals' refusal to move to  
23 quarantine or isolation during an outbreak. The Court Expert's view remains that this issue is

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25 <sup>2</sup> Plaintiffs raised concerns about specific institutions in a January 27, 2021 letter, meaning that  
26 Defendants did not have an opportunity to respond to those particular concerns prior to issuance  
27 of this report. Accordingly, while the parties should discuss Plaintiffs' concerns, the Court  
28 Expert does not in this report make any findings about the allegations in Plaintiff's letter and  
does not make specific recommendations with regard to CMF or the other five institutions  
described in the letter.

appropriately raised in *Plata*, not *Armstrong*. However, at institutions where CDCR has already designated separate spaces for different populations, it must ensure that each such space has sufficient housing for *Armstrong* class members in each of the separate spaces. Defendants report that the proportional or congregate approaches have been satisfied in each such space and that they will continue to evaluate and address Plaintiffs' concerns on an institution-by-institution basis.

### III. Notification of changes in housing designations (§ 3)

CDCR's November 5, 2020, directive ("Tracking of Isolation/Quarantine Units for *Armstrong* Class Members") implements the Court's requirement that Defendants give notice within 72 hours if they "designate substitute or additional quarantine and isolation space at any institution." Dkt. 3072, § 3. As of late January, however, Plaintiffs noted that Defendants did not appear to have actually ever provided the required notice under the directive. Defendants have since updated their procedures to ensure the notice is sent on time.

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

Defendants must "develop a reliable process . . . to ensure that adequate accessible quarantine and isolation space is set-aside in advance of *Armstrong* class members transferring into the institution, and in response to any changes in disability codes or movement within an institution." Dkt. 3072, § 4.

Due to the surge in infections, CDCR paused intake in November 2020. Intake has now resumed, and CDCR has implemented processes designed to ensure that receiving centers have sufficient accessible space in quarantine to house arriving *Armstrong* class members. Plaintiffs have expressed concern that there is a lack of accessible space at intake centers, giving rise to the possibility of class members either being housed inaccessibly or being forced to spend longer in county jails awaiting intake, with the concomitant risk of potential exposure to the virus. They note that at NKSP, one of only two reception centers for men, there are no accessible units designated for precautionary quarantine of new arrivals, and there are very few such units at WSP, the other available reception center. The parties should discuss Plaintiffs' concerns, and Defendants should implement changes to CDCR's intake procedures as necessary

1 to prevent disadvantaging class members transition from local facilities. Because Plaintiffs’  
 2 concerns were raised too recently for Defendants to provide a response prior to the filing of this  
 3 Report, the Court Expert does not make any findings. However, given the importance of this  
 4 issue, the Court Expert recommends the parties meet and confer on this matter promptly and  
 5 report to the Court Expert any unresolved issues.

#### 6 **V. Architectural and non-architectural modifications (§§ 5-7 and 10-15)**

7 As described in the Court Expert’s previous reports, the parties have established a  
 8 procedure for documenting and evaluating, through consultation with experts, the architectural  
 9 modifications Defendants have made to render isolation and quarantine space accessible to  
 10 class members. The process continues to work effectively, and the Court Expert commends  
 11 both parties for their efforts.

12 The Court Expert is also pleased to report that the parties have made significant progress  
 13 on non-architectural accommodations, an issue the Court Expert previously found had received  
 14 inadequate attention. *See* Dkt. 3142, at 7. The parties worked together to draft a memorandum  
 15 on this subject, which was finalized and disseminated in mid-January. That memorandum  
 16 (“COVID-19 Non-Architectural Accommodations for Americans with Disabilities Act Class  
 17 Members”) provides guidelines on issues such as availability of trapeze bars, electrical outlets,  
 18 TDD/TTY devices, and magnifiers and Braille materials. The memorandum also sets forth a  
 19 process for interviews of randomly selected class members to assess whether required  
 20 accommodations are in fact being provided and written follow-up by the institutions on any  
 21 deficiencies.

22 Defendants have also finalized and disseminated a memorandum entitled “Situating  
 23 Blind and Low-Vision Individuals to New Living Environments” to address the needs of DPV  
 24 class members. That memorandum, also prepared jointly with Plaintiffs, provides instructions  
 25 on issues such as designating sighted individuals who are trained to assist new DPV arrivals  
 26 and identifying preferred beds for DPV individuals, and it provides deadlines by which  
 27 institutions must conduct orientations and document the specific needs of DPV class members.  
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1 **VI. Housing of *Armstrong* class members, including rehousing of displaced class**  
 2 **members (§§ 16, 18)**

3 As noted in the last report, CDCR has issued a directive (“Procedures for Reviewing and  
 4 Reporting Housing for *Armstrong* Class Members During COVID-19”) aimed at ensuring that  
 5 class members are appropriately housed and that they receive necessary accommodations in the  
 6 event they are placed in nontraditional housing (such as gyms and chapels) or in areas that are  
 7 not designated for their DPP code. That directive requires, *inter alia*, that class members be  
 8 interviewed within 24 hours of such placement to ensure that their needs are being  
 9 accommodated, that institutions collect and report on numbers of class members in non-  
 10 designated and nontraditional spaces, and that class members not be placed in more restrictive  
 11 housing (e.g., placing a class member with level two security classification in a level four  
 12 facility) or in administrative segregation solely because there is no other accessible housing  
 13 available.

14 As of the last reporting date (January 22), there were over 310 class members not  
 15 housed in accordance with their DPP codes and approximately 60 class members not housed in  
 16 accordance with their lower/lower designations. These figures are of concern. It is obviously  
 17 preferable for class members to be housed in areas designated for their code, rather than for  
 18 CDCR to have to provide accommodations and monitoring to ensure their needs are being met  
 19 in a non-designated bed. The pandemic has necessitated the housing of individuals in locations  
 20 not designated for their disability, and the sooner the number of mis-housed class members can  
 21 be reduced and class members returned to designated housing, the better. In the meantime,  
 22 while Defendants have been conducting and producing the required interviews of mis-housed  
 23 class members, Plaintiffs have raised concerns that the process is at times incomplete or  
 24 inaccurate. In particular, Plaintiffs believe that in many instances, class members were mis-  
 25 housed despite the availability of appropriate beds. The parties should continue to meet and  
 26 confer regarding deficiencies identified by Plaintiffs and address the needs of individual class  
 27 members as they arise.  
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**VII. Other matters**

On July 20, 2020, the Court ordered defendants to “develop and implement a plan to ensure that the ADA worker program can safely and effectively function without undue risk of transmission of COVID-19.” Dkt. 3015, 1. The ADA worker program is not within the scope of matters on which the Court Expert is required to report. However, Plaintiffs have raised concerns with the program that implicate safe housing for *Armstrong* class members.

Based on a monitoring tour of SAC, Plaintiffs have alleged that ADA supervisors are not aware of their duties with respect to the ADA worker program and of the applicable requirements regarding PPE. Of direct concern to *Armstrong* class member housing, Plaintiffs also allege that supervisors appeared unaware of the directive that staff, rather than ADA workers, assist class members who are in quarantine; supervisors also appear not to be following the requirement that ADA workers not travel between housing units but assist only those class members in their own units. The Court Expert recommends that the parties continue to meet and confer on this issue to ensure that ADA workers do not inadvertently contribute to the spread of the disease in the facilities.

**VIII. Conclusion**

The Court Expert recommends that the Court order a further update in 60 days.

Dated: February 1, 2021

Respectfully submitted,

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/s/  
Edward W. Swanson  
SWANSON & McNAMARA LLP