

Rebekah J. French  
Special Assistant Attorney General  
Risk Management & Tort Defense Division  
P.O. Box 200124  
Helena, MT 59620-0124  
406/444-2421

McKenzie Hannan  
Special Assistant Attorney General  
Montana Dep't of Corrections  
P.O. Box 201301  
Helena, MT 59620-1301  
406/444-3918

**Attorneys for Defendants**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
HELENA DIVISION**

**IN THE MATTER OF LITIGATION  
RELATING TO CONDITIONS OF CONFINEMENT  
AT MONTANA STATE PRISON,**

**THIS DOCUMENT RELATES TO:**

**LANGFORD, et al.,**  
Plaintiffs,

v.

**GOV. BRIAN SCHWEITZER, et  
al.,**

Defendants.

CV 93-46-H-DWM-JCL

**DEFENDANTS' RESPONSE TO  
PLAINTIFFS' MOTION FOR  
SPECIFIC PERFORMANCE**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... v  
EXHIBIT INDEX ..... vi

I. Historical Background.....2

II. Plaintiffs have not met their burden of establishing by a preponderance of the evidence that there is a substantial and widespread failure to comply with the ADA at Montana State Prison. ....5

A. The ADA does not require MSP to establish a comprehensive screening process to identify prisoners with disabilities.....6

B. MSP is working on a system to track prisoners with disabilities. ....11

C. MSP is working on system to better communicate information about those inmates who have been identified as requiring reasonable accommodation. ....11

D. MSP already provides ADA training to staff and is willing to provide additional training. ....12

E. MSP orientation includes individual one-on-one meetings between case managers and inmates and this is the best place for providing information about the ADA and reasonable accommodation.....12

F. MSP is willing to work with experts and Plaintiffs to ensure that inmates receive needed accommodation during classification and disciplinary hearings. However, MSP does not agree that the Plaintiffs have provided sufficient evidence to support a finding that MSP has substantially failed to provide reasonable accommodation during classification and disciplinary hearings.....14

G. The isolated incidents cited by experts are not sufficient to demonstrate that MSP has substantially failed to provide reasonable accommodation to hearing impaired prisoners. ....15

H. The ADA does not prohibit public entities from imposing a requirement that participants in some programs have a GED or high school diploma. Furthermore, there is no factual support for the expert finding that inmates with disabilities are excluded from many jobs and vocational training. ....17

I. MSP willing to work on issue of providing alternative learning environments to individuals with learning disabilities. .... 19

J. DOC Policy Number 1.3.15 provides a mechanism for inmates with disabilities to request reasonable accommodation during count. ....20

K. DOC Policy Number 1.3.15 provides a mechanism for inmates with disabilities to request reasonable accommodation during body searches. ....20

L. DOC Policy Number 1.3.15 provides a mechanism for inmates with disabilities to request reasonable accommodation regarding announcements. ....21

M. MSP has a system in place that ensures that disabled prisoners can request and receive necessary housing related accommodations. ....21

N. MSP Meets or Exceeds the Building Codes Requirements for the Number of Accessible Cells for Inmates with Disabilities.....22

O. When Viewed in its Entirety, MSP provides Inmates Access to Vocational Training and Work Opportunities Throughout MSP. ....23

P. MSP has Modified Tables in the Dining Areas to Provide Sufficient Seating for Inmates with Disabilities. ....25

Q. The Plaintiffs’ Assertion that “MSP must take corrective action to ensure that all areas of the facility are accessible to disabled prisoners” is not Supported by Either the ADA or the Expert Report....25

R. The Experts and Plaintiffs Have Failed to Identify any Inmate with a Disability that was Denied Access to a Program or Service because of the Issues Raised in this Section. ....26

III. CONCLUSION.....27

CERTIFICATE OF SERVICE .....29

CERTIFICATE OF COMPLIANCE.....30

**TABLE OF AUTHORITIES**

**U.S. SUPREME COURT CASES**

*Pennsylvania Dept. of Corrections v. Yeskey*  
524 U.S. 206, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215 (1998)..... 6

**NINTH CIRCUIT COURT OF APPEALS CASES**

*Armstrong v. Davis*,  
275 F.3d 849 (9<sup>th</sup> Cir. 2001)..... 8, 9

*Armstrong v. Wilson*,  
124 F.3d 447 (9<sup>th</sup> Cir. 1996)..... 6

*Duffy v. Riveland*,  
93 F.3d 447(9<sup>th</sup> Cir. 1996)..... 6

*In re: Conditions of Confinement at Montana State Prison*,  
227 Fed. Appx. 670 (9<sup>th</sup> Cir. 2007) ..... 4

*Lovell v. Chandler*,  
303 F.3d 1039 (9<sup>th</sup> Cir. 2002)..... 7

**OTHER CIRCUIT COURT OF APPEALS CASES**

*Bircoll v. Miami-Dade County*,  
480 F.3d 1072, (11<sup>th</sup> Cir. 2007)..... 20

*Morisky v. Broward County*,  
80 F.3d 445 (11<sup>th</sup> Cir. 1996)..... 19

**U.S. FEDERAL DISTRICT COURT CASES – OTHER DISTRICTS**

*Bohnert v. Mitchell*,  
2010 U.S. Dist. LEXIS 114587 (D. Ariz. Oct. 26, 2010). ..... 7

*Rios v. Cate*,

2010 U.S. Dist. LEXIS 141100 (S.D. Cal. Dec. 30, 2010).....17  
*Clark v. California*,  
739 F.Supp. 2d 1168 (N.D. Cal. 2010).....9, 10

**STATE CASES**

*Shedlock v. Dep't of Corr.*,  
442 Mass. 844 (Mass. 2004).....8, 22

**U.S. FEDERAL STATUTES AND REGULATIONS**

42 U.S.C. § 12131(2).....6  
42 U.S.C. § 12132.....6  
28 C.F.R. § 35.104.....11

**EXHIBIT INDEX**

- Exhibit 1 Monitors' First Compliance Report
- Exhibit 2 Monitors' Second Progress Report
- Exhibit 3 Monitors' Third Progress Report

Rebekah J. French  
Special Assistant Attorney General  
Risk Management & Tort Defense Division  
P.O. Box 200124  
Helena, MT 59620-0124  
406/444-2421

McKenzie Hannan  
Special Assistant Attorney General  
Montana Dep't of Corrections  
P.O. Box 201301  
Helena, MT 59620-1301  
406/444-3918

**Attorneys for Defendants**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
HELENA DIVISION**

**IN THE MATTER OF LITIGATION  
RELATING TO CONDITIONS OF CONFINEMENT  
AT MONTANA STATE PRISON,**

---

**THIS DOCUMENT RELATES TO:**

**LANGFORD, et al.,**  
Plaintiffs,

v.

**GOV. BRIAN SCHWEITZER, et  
al.,**

Defendants.

CV 93-46-H-DWM-JCL

**DEFENDANTS' RESPONSE TO  
PLAINTIFFS' MOTION FOR  
SPECIFIC PERFORMANCE**

Rather than following the Dispute Resolution procedures set forth in Section IV of the Settlement Agreement, Plaintiffs seek an order of specific performance requiring Defendants to remedy the violations of the Americans with Disabilities

Act (“ADA”) that they allege are identified in the report submitted by the parties’ joint experts. Plaintiffs also ask the Court to extend the monitoring period.

Although Defendants do not oppose Plaintiffs’ request for an extension of the monitoring period, Defendants oppose Plaintiffs’ motion for specific performance.

Before Plaintiffs can obtain specific performance, they must establish by a preponderance of the evidence that Defendants have failed to comply with the ADA provision of the settlement agreement and that such non-compliance is not minimal or isolated, but substantial and widespread. Plaintiffs’ reliance on the expert report to meet that standard is misplaced because the report does not meet the standard of proof required by the Settlement Agreement.

### **I. Historical Background**

As this Court is well aware, this case resulted from the consolidation of numerous complaints filed in the wake of a 1991 disturbance at Montana State Prison (“MSP” or “the Prison”). In October 1994, the parties entered into a Settlement Agreement to resolve all claims. (Dkt. 314).

The initial court appointed experts conducted four tours at MSP and issued three reports. In their first report, dated July 23 1995, they made no findings as to whether prison officials had complied with the ADA provision. (Exh. 1: Monitors’ First Compliance Report). In their second report, dated January 24, 1996, they



found the prison in substantial compliance with the ADA provision “[to the extent the Monitors are competent to determine compliance.” (Exh. 2: Monitors’ Second Progress Report at p.18.) In their third report, dated May 24, 1997, the experts “[made] no findings concerning ADA compliance, recommending instead that the Court rule on whether substantial compliance had been achieved by MSP officials.” (Exh. 3: Monitors’ Third Progress Report at p.5).

The first order of dismissal under the Agreement was entered in August of 1997, and dismissed numerous general penal conditions, but did not address the ADA provision. (Dkt. 1103). By August 29, 2000, numerous correctional provisions and all but one (the patient referral provision) of the Agreement’s provisions regarding inmate medical care, dental care, and mental health care had been dismissed. In March of 2002, each party filed a status report notifying the Court that the lone issue remaining to be resolved in the case was the “patient referral provision” in Paragraph V, Section 1 (I). (Dkt. 1263 and 1266).

In June of 2005, in response to the Court’s request for additional status reports, Plaintiffs advised the Court for the first time that there were ten issues in addition to the patient referral provision on which they intended to seek review of substantial compliance. (Dkt. 1313). One of those issues was the ADA provision. *Id.* at 7.

On August 5, 2005, third-party monitors issued a final report finding substantial and sustained compliance with the patient referral provision. (Dkt. 1319, Exh. 1). Defendants thereafter moved for dismissal of the case and termination of prospective relief under the Agreement. (Dkt. 1319). The Court entered an order on January 26, 2006 denying Defendants' request to dismiss the case or terminate further prospective relief. The Court ruled that Section V.9 of the Agreement, entitled "ADA Compliance," required further review and a determination regarding substantial compliance. (Dkt. 1350). Defendants appealed this decision to the Ninth Circuit Court of Appeals, which dismissed in part, affirmed in part, and remanded to this Court. *In re: Conditions of Confinement at Montana State Prison*, 227 Fed. Appx. 670 (9<sup>th</sup> Cir. 2007).

In February of 2008, this Court entered an order establishing a procedure for the parties to agree on a joint ADA expert and limiting the scope of that expert's review. (Dkt. 1402). When the parties could not agree, the Court chose the expert proposed by Plaintiffs. That expert's appointment was terminated after he failed to complete his report. (Dkt. 1451). In June of 2012, the Court appointed Paul Bishop to conduct a barriers/physical plant assessment of MSP (Dkt. 1477) and in July of 2012 appointed Rafael Frazier to conduct an ADA program assessment. (Dkt. 1480). On May 30, 2013, Plaintiffs filed the expert report. (Dkt. 1489).

**II. Plaintiffs have not met their burden of establishing by a preponderance of the evidence that there is a substantial and widespread failure to comply with the ADA at Montana State Prison.**

In 1994, when Defendants agreed to include a provision requiring ADA compliance in the Settlement Agreement, they did not admit any failure up to that point to comply with the ADA, nor did they agree to assume the burden of proving that they had complied with the ADA. Defendants specifically disclaimed any admission of liability in Paragraph I (3) of the Settlement Agreement. (Dkt. 314 at p. 2). Defendants also specified that should Plaintiffs move, as they now do, “for an order to obtain relief based upon Defendants’ alleged non-compliance, Plaintiffs must establish by a preponderance of the evidence that Defendants’ failure or omissions to meet the terms of this agreement are not minimal or isolated, but are substantial and widespread.” (Dkt. 314 at p. 9, ¶ III (1)).

Although Plaintiffs appear to have taken the position that the expert report is sufficient in and of itself to support their motion for specific performance, that position is contrary to the terms of the settlement agreement, which provides that the “impartial experts’ reports will be considered as evidence, but not be binding on the Court which will make the final determination of substantial compliance.” (Dkt. 314 at p. 9, ¶ II(5)).

Plaintiffs' Brief in Support of Plaintiffs' Motion for Specific Performance references 18 separate categories of non-compliance by Defendants. For the Court's convenience, Defendants will respond to these alleged deficiencies in the same manner in which Plaintiffs presented them.

**A. The ADA does not require MSP to establish a comprehensive screening process to identify prisoners with disabilities.**

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity." 42 U.S.C. § 12132. Title II of the ADA applies to inmates within state prisons. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215 (1998); *see also Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997); *Duffy v. Riveland*, 98 F.3d 447, 453-56 (9th Cir. 1996). An individual is "qualified" if he "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

“To establish a violation of Title II of the ADA, a plaintiff must show that (1) [he] is a qualified individual with a disability; (2) [he] was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities; and (3) such exclusion or discrimination was by reason of [his] disability.” *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). Because the third element of an ADA violation requires the plaintiff to show that he was discriminated against based on his disability, it follows that where the disability is not obvious “there can be no liability under the ADA without actual or constructive notice of such disability.” *Bohnert v. Mitchell*, 2010 U.S. Dist. LEXIS 114587, 6 (D. Ariz. Oct. 26, 2010).

While some disabilities, such as the need for a wheel-chair, are apparent to the casual observer, many disabilities are not easily detected. Title II does not require a public entity to subject each individual seeking to participate in the services or programs it offers to intrusive questioning or testing to determine whether that individual has some non-obvious disability that requires an accommodation. This is no less true in the context of programs and services offered by a prison than in the context of programs and services offered by any other public entity. “Prison officials are not required to anticipate a prisoner's unarticulated need for accommodation or to offer accommodation sua sponte.

Indeed, such a requirement would effectively require prison officials to make assumptions about a prisoner's disability, whereas resort to assumptions and stereotypes concerning disabled persons is a harmful practice that Congress sought to deter by means of the ADA. *Shedlock v. Dep't of Corr.*, 442 Mass. 844, 856 (Mass. 2004).

Plaintiffs cite *Armstrong v. Davis* and *Clark v. California* to support their argument that the ADA imposes a requirement on prisons to identify prisoners with developmental disabilities. (Dkt. 1494 at 6). The fact that the State of California has entered into a remedial plan that requires it to identify and track inmates with developmental disabilities does not support Plaintiffs' argument that either the settlement agreement entered into in this case or the ADA imposes such a duty. Defendants in this case have never been found liable for violating the ADA, nor have they admitted to such conduct.

In contrast, the district court conducted a 10-day bench trial in *Armstrong v. Davis* and found that "the State of California regularly discriminated against disabled prisoners and parolees during its parole and parole revocation hearing processes." *Armstrong v. Davis*, 275 F.3d 849, 854 (9<sup>th</sup> Cir. 2001). At any rate, the requirements imposed in *Armstrong* did not impose a duty on defendant to "to discover non-apparent disabilities possessed by disabled prisoners or parolees." *Id.*

at 876, n. 38. Instead, defendant was required to keep track of such disabilities, once it became aware of them. *Id.*

The plaintiffs in *Clark v. California* were California prisoners with developmental disabilities. *Clark v. California*, 739 F.Supp. 2d 1168, 1174 (N.D. Cal. 2010). In contrast, the class representatives named in the Fifth Amended Complaint in the instant case did not include an individual with a developmental disability. (Dkt. 23 at ¶ 4). The only class representatives identified as having disabilities in the Fifth Amended Complaint were Jeff Delaphiano, who has a mental disability, and Trueman Conrad, who is “physically disabled and in a wheelchair.” *Id.* Neither Mr. Delaphiano nor Mr. Conrad are currently incarcerated at MSP.

In the settlement agreement entered in *Clark v. California*, the defendants admitted that they had “violated the federal rights of plaintiffs in a manner sufficient to warrant” imposition of the relief contained in the agreement. *Clark*, 739 F. Supp. at 1174. No such admission has been made by the defendants in this case. The Clark Remedial Plan was designed to remedy known violations of the ADA in a system whose size and complexity require remedies that are not needed at MSP. The California Department of Corrections and Rehabilitation (CDCR) has 33 prisons, housing approximately 166,000 prisoners. As of 2010, there were

1,348 prisoners identified as members of CDCR's Developmental Disability Program. *Id.* at 1182. While the Clark Remedial Plan (a 62 page document cited by Plaintiffs as *available at* [http://www.clearinghouse.net/chDocs/public/PC\\_CA-0005-0003.pdf](http://www.clearinghouse.net/chDocs/public/PC_CA-0005-0003.pdf)) contains specific provisions requiring inmates to be screened for developmental disabilities, the Agreement in this case has no such language, and therefore, MSP has no such obligation.

In addition, the expert report does not support Plaintiffs' argument that MSP has an obligation to establish a screening and classification system to identify prisoners with disabilities.<sup>1</sup> The expert report states that MSP's obligation is "to have a process where staff can refer an inmate for a disability evaluation. Thus, once the disability has been identified, (either through self identification or referral), verified, and accommodations have been granted, MSP has an obligation to track the disability, the needed accommodations, and MSP must document any accommodations provided to ensure that the individual inmate's ADA needs are being met and that he or she can fully participate in available and appropriate programs." Paul Bishop & Subia Consulting Services, Program Access Assessment & Facility Accessibility Survey Report ("Expert Report"), p. 10. (Dkt. 1495 -1).

---

<sup>1</sup> Although Plaintiffs use the term "disabled prisoners" throughout their brief, Defendants attempt to avoid that language, in recognition that the person should always come before the disability.



**B. MSP is working on a system to track prisoners with disabilities.**

MSP recognizes that some sort of tracking system may be necessary given that the regulations implementing the ADA require a public entity to accommodate individuals it has identified as disabled. 28 C.F.R. § 35.104. MSP therefore plans to implement the tracking system suggested in the expert report on page 10: “Thus, once the disability has been identified, ((either through self identification or referral)), verified, and accommodations have been granted, MSP has an obligation to track the disability, the needed accommodations, and MSP must document any accommodations provided to ensure that the individual inmate’s ADA needs are being met and that he or she can fully participate in available and appropriate programs.” MSP has the capability to add this to its existing Offender Management and Information System (OMIS) and plans to effectuate this type of tracking system by December 1, 2013.

**C. MSP is working on system to better communicate information about those inmates who have been identified as requiring reasonable accommodation.**

As explained in Section B above, once MSP adds a field to OMIS for tracking disabilities and requested accommodations, prison personnel will be able to check that field to determine whether an inmate has been identified as needing an accommodation.

**D. MSP already provides ADA training to staff and is willing to provide additional training.**

Although Defendants do not agree with the expert's assessment of the ADA training provided to staff as being inadequate, Defendants are willing to provide additional training.

**E. MSP orientation includes individual one-on-one meetings between case managers and inmates and this is the best place for providing information about the ADA and reasonable accommodation.**

Both the expert report and the Plaintiffs' brief discuss the orientation presentation at MSP. Expert Report at 12-13. However, both fail to address the one-on-one meetings between the case managers and inmates that occur prior to the classroom orientation presentation. The classroom presentation occurs approximately one week after an inmate arrives at MSP and is designed to be a recap of information that has already been presented and explained to the inmate in one-on-one meetings with their case manager during the previous week.

When an inmate arrives in admissions, the admissions officer will identify any literacy problems through the intake process and will assist the person through the process. This information is then communicated to the assigned case manager immediately. Along with this information, the case manager also collects data on each inmate to identify any risks and needs. This process is outlined in the Martz

Diagnostic & Intake Unit (MDIU) Plan, a copy of which was provided to experts and counsel for plaintiffs. The case manager then continues to assist the inmate when they move onto their assigned block.

Most of the orientation packet information MSP gives to the inmate is in written format and if a person cannot read, the case manager reads the packet to him and ensures the offender understands all of the information in the packet. The classroom process is a re-cap of this initial, one-on-one orientation, and allows an additional question and answer session for offenders to ensure clarity and help address any additional questions they have are addressed. The classroom presentation is a power point and formally explains the information already given them.

Defendants recognize that they can improve upon this process by ensuring that any needs that are identified by the case manager are continued to be communicated to other prison staff. To accomplish this, Defendants have plans to put any reasonable accommodations identified by the case manger into OMIS.

In addition, Defendants took notice of the expert's finding that inmates were not aware of the Reading for the Blind program and have added this information to the audio-visual orientation, along with examples of other possible accommodations as suggested by the expert.

**F. MSP is willing to work with experts and Plaintiffs to ensure that inmates receive needed accommodation during classification and disciplinary hearings. However, MSP does not agree that the Plaintiffs have provided sufficient evidence to support a finding that MSP has substantially failed to provide reasonable accommodation during classification and disciplinary hearings.**

The expert did not make a finding that MSP failed to provide reasonable accommodations during classification and disciplinary hearings. Instead he found that “MSP does not have sufficient policies or procedures to ensure inmates with disabilities are provided reasonable accommodation for equally effective communication for classification and disciplinary hearings.” Expert Report at 13. Indeed, the expert noted that he observed a classification hearing where the classification staff provided considerable assistance to the inmate to ensure equally effective communication, but just failed to document that assistance. *Id.* at 14.

Defendants would like to respond to the expert “finding” that prisoners with disabilities have been punished for behavior that was a product of their disabilities due to the lack of effective accommodations provided to them cited in Pls. brief (Dkt. 1494) at pp. 15 – 16; however Defendants are unable to locate that finding. Rather than identifying a single instance in which a mentally ill prisoner was actually punished as a result of his mental illness, Plaintiffs and the program expert presume that there must have been such incidents because the two individuals the expert asked about disciplinary hearings could not specifically recall an incident

when mental health staff intervened on behalf of a mentally ill prisoner in the disciplinary process. A member of the mental health staff currently reviews all disciplinary write ups of inmates that are in the mental health treatment unit and they intervene if the behavior was a result of the inmate's mental illness.

**G. The isolated incidents cited by experts are not sufficient to demonstrate that MSP has substantially failed to provide reasonable accommodation to prisoners with hearing impairments.**

MSP relies on audiologists' recommendations when determining whether an inmate needs a sign language interpreter. Contrary to the Plaintiffs' assertion, the audiologists are not a part of the prison, or even the Department of Corrections. They are independent professional audiologists in Missoula, Montana.

In regards to Prisoner 1 cited in the Plaintiffs' brief, who Plaintiffs allege was denied an interpreter during a disciplinary hearing; MSP denies the inmate needed an interpreter. MSP sent this inmate to the audiologist's office in Missoula for evaluation. The audiologist then provided MSP with recommendations for settings when the inmate needed an interpreter based on his specific hearing impairments. The inmate requested an interpreter for a disciplinary hearing and MSP denied it, based on the recommendations from the audiologist. The inmate then wrote to the audiologist questioning why the audiologist said he didn't need an interpreter in that setting. The audiologist responded that she thought an

interpreter would have been appropriate in that setting. ADA Coordinator Cynthia Davenport reached out to the audiologist to clarify the confusion and the audiologist noted that once MSP provided her with all of the details, she thought MSP was making completely appropriate accommodations for Prisoner 1.

Prisoner 1 filed a complaint with the Montana Human Rights Bureau (HRB) over this issue. The investigator from the HRB found there was no cause to believe that discrimination occurred because MSP relied on the audiologist's recommendations. She further found that MSP effectively accommodated Prisoner 1's deafness in the disciplinary hearing when it relied on a reasonable interpretation of the audiologist's recommendations.

In regards to Prisoner 2, who Plaintiffs allege was disciplined after refusing to obey an order he could not hear because he is deaf, MSP denies that was the reason why Prisoner 2 was disciplined. The expert took the inmate's account of this event at face value, without speaking to any member of staff. According to the staff supervisor involved, the supervisor made it clear to the inmate that he was not to mop the floor since he had not yet swept. The inmate then got agitated and threw the mop down. The supervisor disciplined Prisoner 2 for throwing the mop down, not for behavior that was a product of his disability. Furthermore, interpreters who have worked with Prisoner 2 have told MSP staff that since the

inmate taught himself to sign, communicating with him via sign language is very difficult and may not be the most effective communication method for him.

Plaintiffs are correct that MSP does not have a contract for interpretive services. MSP currently uses a company that does video remote interpreting (VRI). State law dictates that when an amount paid by a governmental agency to one company exceeds a certain amount, it is at that point, and not before, that the agency has to put the contract out to bid. Because MSP has not reached that amount yet with the company providing the VRI, there is no point in putting the contract out to bid.

**H. The ADA does not prohibit public entities from imposing a requirement that participants in some programs have a GED or high school diploma. Furthermore, there is no factual support for the expert finding that inmates with disabilities are excluded from many jobs and vocational training.**

Inmate claims related to employment within the prison setting should be analyzed under Title II of the ADA. *Rios v. Cate*, 2010 U.S. Dist. LEXIS 141100 (S.D. Cal. Dec. 30, 2010). To state a claim under Title II, a Plaintiff must show (1) that he is a qualified individual with a disability, (2) who was denied the benefits of a program of a public entity, and (3) that such discrimination was the result of the individual's disability. The MSP procedure that governs long-term work assignments for placement in an MSP maintenance, warehouse or correctional

enterprises work program provides that an inmate must either have a high school diploma or GED *or be working towards a GED* (emphasis added). Furthermore, the procedure allows Montana Correctional Enterprises (“MCE”) to waive this requirement if someone is unable to attain a GED because of their disability, but still qualifies for the work program.

Inmates at MSP are unable to show that they have been denied the benefits of employment because of this GED requirement. Furthermore, they are unable to show the denial of that benefit was a result of their disability. MSP has only received one grievance from an inmate regarding the GED requirement. This particular inmate was removed from his position because he did not have his GED and he refused to participate in the GED class.

MSP has a legitimate penological interest in requiring inmates to work toward getting GEDs. GEDs are considered a critical part of preparing offenders for a successful reentry back into society. Reentry involves any program, initiative, or partnership that addresses the issues necessary to ensure that offenders successfully transition and maintain a crime-free existence post-release.

The Expert Report makes a finding that “A review of the industries, kitchen and other prison jobs revealed that disabled inmates were not hired.” Expert Report at 6. There is no factual basis for this finding. Since MSP does not track



inmates with disabilities, there may very well be inmates working in these jobs that do not have obvious disabilities. Secondly, even assuming that there are low numbers of inmates with disabilities that are employed, it cannot be shown that any inmates with disabilities have applied for and been denied a job based on their disability. The statement “disabled inmates were not hired” is inaccurate and misleading.

**I. MSP is willing to provide alternative learning environments to individuals with learning disabilities.**

MSP is committed to ensuring that individuals with learning disabilities are provided with the accommodation needed to participate in those programs for which they are otherwise qualified. MSP has recently hired an instructor trained in special education to lead its sex offender programs. Defendants plan to consult with this new employee to adjust programming for other groups to accommodate inmates with developmental disabilities.

Defendants do not agree, however, that every inmate who has difficulty reading or obtaining his GED must have a learning disability which entitles him to an alternative learning environment. “While illiteracy is a serious problem, it does not always follow that someone who is illiterate is necessarily suffering from a physical or mental impairment.” *Morisky v. Broward County*, 80 F.3d 445, 448 (11<sup>th</sup> Cir. 1996).

**J. DOC Policy Number 1.3.15 provides a mechanism for inmates with disabilities to request reasonable accommodation during count.**

DOC Policy Number 1.3.15 provides that DOC will make reasonable accommodations; that is the mechanism for inmates to request a reasonable accommodation to not stand during count. In fact, MSP has granted this accommodation to several inmates. The expert spoke to one inmate who stated it was difficult to stand during count. However, the inmate also indicated that he had never requested an accommodation. Expert Report at 18. A passing comment from one inmate is not sufficient to support a blanket statement that MSP does not provide accommodations for inmates with mobility impairments during count.

**K. DOC Policy Number 1.3.15 provides a mechanism for inmates with disabilities to request reasonable accommodation during body searches.**

As stated above, DOC Policy Number 1.3.15 provides that DOC will make reasonable accommodations. The reasonableness of the requested accommodation should be analyzed on a case-by-case basis because the term “reasonable” is “relative to the particular circumstances” of each individual case. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085 (11<sup>th</sup> Cir. 2007). It would be counterproductive to attempt to create a policy or procedure to deal with every eventuality because it is impossible to anticipate every disability and resulting

appropriate accommodation. There needs to be some discretion for the officers performing the searches. The expert report gives MSP employees no credit for having common sense to deal with unexpected issues that may come up.

Moreover, MSP has never received a request for accommodation or a complaint of discrimination for failure to accommodate a disability during a search.

**L. DOC Policy Number 1.3.15 provides a mechanism for inmates with disabilities to request reasonable accommodation regarding announcements.**

As stated above, DOC Policy Number 1.3.15 provides that DOC will make reasonable accommodations. This includes accommodations to inmates with disabilities for facility announcements. Plaintiffs are incorrect when they state that MSP does not provide accommodations to prisoners with hearing impairments. MSP has provided aides to several inmates with hearing impairments to notify them of announcements. In addition, the expert found there was an informal system in place that seemed to be working just fine. Expert Report at 19.

**M. MSP has a system in place that ensures that disabled prisoners can request and receive necessary housing related accommodations.**

Last year, MSP responded to 346 ADA related requests from inmates. The previous year, MSP responded to 220 requests and 150 requests the prior year. These numbers indicate that inmates know how to request accommodations. And

if an inmate needs an accommodation, it is their obligation to request one. “Prison officials are not required to anticipate a prisoner's unarticulated need for accommodation or to offer accommodation sua sponte. Indeed, such a requirement would effectively require prison officials to make assumptions about a prisoner's disability, whereas resort to assumptions and stereotypes concerning disabled persons is a harmful practice that Congress sought to deter by means of the ADA.). *Shedlock*, 442 Mass. At 856.

Plaintiffs state the expert found some evidence that prisoners are being denied appropriate accommodations; however they fail to point out that the expert also found that they were being granted accommodations. An inmate indicated to the expert that he needed a shower chair and within ten minutes, staff placed a shower chair on the unit. Expert Report at 18. In addition, the expert did not make a finding that MSP was not providing necessary housing related accommodations, as the Plaintiffs suggest, nor did the expert recommend that MSP make any changes to its current system for providing housing related accommodations. *Id.*

**N. MSP meets or exceeds the building codes requirements for the number of accessible cells for inmates with disabilities.**

MSP has modified non-accessible high security housing units and constructed new high and low security units to provide a reasonable distribution of accessible cells. Overall, seven percent of MSP's cells are accessible and 2.2

percent of the cells within the secure perimeter are accessible. MSP exceeds the 1991 ADAG requirement for two percent accessible cells within the secure perimeter and is more than double the three percent 2010 ADAS requirement for new construction when the housing outside the secure perimeter (the Work Re-entry Center) is taking into consideration. Advisory 232.2 of 2010 ADAS clarifies the ADA Title II standard that the public entity, *when viewed in its entirety*, be readily accessible and usable by individuals with disabilities (emphasis added).

MSP recognizes that while it meets the requirements when viewed as a whole, there are some custody areas that have fewer than the desired distribution of accessible cells. MSP continues to make accessibility improvements a priority. MSP's capital projects request included modifying 3 cells in locked housing to be accessible and replacing 324 of the low security housing units which are not structurally feasible to modify to make accessible. The low side project was the executive branch's highest statewide capital construction priority presented to the 2013 legislature. However, the legislature did not appropriate funding for this project. Thus, MSP is in the process of modifying additional cells in Unit D of the low security compound to make them accessible.

**O. When viewed in its entirety, MSP provides inmates access to vocational training and work opportunities throughout MSP.**

MSP, when viewed in its entirety, must ensure that inmates with disabilities

are afforded the opportunity to participate in training and work programs. MCE provides inmates access to vocational training and work opportunities throughout MSP. Specifically opportunities are provided high side inmates at the high side food service and laundry/vo-ed building, low side inmates are provided opportunities within the low compound and in the industries compound and honor dorm inmates are provided opportunities at various locations outside the secure fence. Many of the jobs are appropriate for and accessible to inmates with disabilities.

MSP acknowledges that not all routes in the industries area meet all the requirements of ADA. ADA stipulates an accessible route from a parking space into the building and to access accessible areas within the building. MSP provides a reasonable accommodation to individuals with disabilities by providing them an assistant to navigate challenging routes.

In regards to accessible work stations, MSP must provide individuals reasonable accommodations when necessary to perform specific tasks. MSP is not required to make any specific work function accessible, but must, integrate individuals with disabilities into their programs wherever feasible. MCE currently has many accessible work areas, including stations for food preparation, dishwashing, inventory control, clerical and motor vehicle maintenance.

MSP acknowledges the need to provide an accessible route within buildings to areas that offer work opportunities to individuals with disabilities and provide them with accessible restrooms & break areas. Barriers that have been identified, that are readily achievable and that limit an inmate's access to programs are being removed.

**P. MSP has modified tables in the dining areas to provide sufficient seating for inmates with disabilities.**

MSP has already modified all the tables in the dining area to comply with the findings made by the expert.

**Q. The Plaintiffs' assertion that "MSP must take corrective action to ensure that all areas of the facility are accessible to disabled prisoners" is not supported by either the ADA or the expert report.**

This assertion exceeds standard of the settlement agreement to ensure that inmates with disabilities are not excluded from participation in, or denied the benefits of housing, services, facilities and programs because of their disabilities. MSP's inmate population is larger than Fort Benton, Montana's 46th largest city. MSP recognizes its obligation to make services available to inmates but just as with any community, accessibility to every corner is not a realistic expectation.

The expert found, "The MSP campus is generally quite accessible due to its level topography." Expert Report at 34. Where there is excessive vertical

displacement caused differential movement at concrete sidewalk joints, MSP has ground the raise portion to slope. MSP will monitor future permanent displacements and grind those that become obstacles to accessibility. New walkways will be installed to comply with 2010 ADAS. In the interim, MSP will continue to utilize “pushers” to assist inmates that need help maneuvering. This accommodation provides access to all programs.

The ADA building codes provide for life safety for occupants including those with disabilities. These codes include provisions for rescue assistance and do not require that ADA egress extend to compliant walkways. All buildings were built in compliance with the building code and have required provisions for safety of occupants, including those with disabilities. Plaintiff’s request that sidewalks be extended exceeds 2009 International Building Code requirement 1007.7 and conflicts with MSP security management.

**R. The experts and Plaintiffs have failed to identify any inmate with a disability that was denied access to a program or service because of the issues raised in this section.**

While the Plaintiffs and experts state there are other physical barriers which raise serious issues regarding facility access for inmates with disabilities, they fail to identify any inmates who have been denied access to program or services in regards to these issues. MSP has made modifications to facilities that provide



housing, services and programs are accessible to inmates with disabilities such that they are readily accessible to inmates with disabilities. Furthermore, MSP has already corrected or is in the process of correcting all the readily achievable modifications identified in the expert report.

### **III. Conclusion**

Defendants first demonstrated their commitment to the ADA by agreeing to include Paragraph III, Section 9 in the Settlement Agreement – even though when the Agreement was entered in 1994 there was a split in the circuits as to whether the ADA even applied to prisons. Defendants have continued to demonstrate their commitment to making both the physical plant and the various programs at Montana State Prison accessible to all MSP inmates through the past 18 plus years that this case has been pending. MSP has completed two large scale construction projects designed to eliminate barriers to access in the last three years. Defendants appreciate the extensive ADA program and accessibility assessment done by the parties' joint experts and have taken steps to implement changes based on those recommendations that they believe are supported by the facts and the law.

Defendants concur with Plaintiffs that it may be in the best interests of both parties to agree to an additional monitoring period of six months to allow the parties to work with the joint experts to resolve some of the issues raised by the Expert

Report. Defendants oppose Plaintiffs' motion for specific performance because Plaintiffs have not met their burden of establishing by a preponderance of the evidence that there is a substantial and widespread failure to comply with the ADA at Montana State Prison. Defendants also oppose Plaintiffs' motion for specific performance Plaintiffs request relief that exceeds the requirements of the ADA and the Settlement Agreement.

DATED this 31st day of July, 2013

/s/ Rebekah J. French

Rebekah J. French

Montana Department of Administration,  
Risk Management and Tort Defense  
Division

1625 Eleventh Avenue, Middle Floor  
P. O. Box 200124  
Helena, MT 59620-0124

**Attorney for Defendants**

**CERTIFICATE OF COMPLIANCE L.R. 7.1(d)(2)(A and E)**

I certify that this brief, excluding caption and certificates of compliance and service, does not exceed 6,000 words.

**CERTIFICATE OF SERVICE**

I hereby certify that, on July 31, 2013, a copy of the foregoing document was served upon the following persons through CM/ECF:

1. Clerk, U.S. District Court
2. Eric Balaban  
Ajmel Quereshi  
National Prison Project of the ACLUF  
915 15th St. NW, Seventh Floor  
Washington, DC 20005
3. Anna Conley  
ACLU of Montana  
P.O. Box 9138  
Missoula, MT 59807

/s/ Rebekah J. French  
Rebekah J. French  
Montana Department of  
Administration, Risk Management  
and Tort Defense Division  
625 Eleventh Avenue, Middle Floor  
P. O. Box 200124  
Helena, MT 59620-0124

**Attorneys for Defendants**