

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

IN THE MATTER OF LITIGATION)	
RELATING TO CONDITIONS OF)	CAUSE NO. CV 93-46-H-
CONFINEMENT AT MONTANA)	DWM-JCL
STATE PRISON,)	
_____)	
)	
THIS DOCUMENTS RELATES TO:)	
<i>Terry LANGFORD, et. al.,</i>)	
)	
Plaintiffs,)	PLAINTIFFS’ REPLY IN
)	SUPPORT OF MOTION FOR
v.)	SPECIFIC PERFORMANCE
)	
<i>Gov. Steve BULLOCK, et. al.,</i>)	
)	
Defendants.)	

The court-appointed experts identified seventeen different programs, services and areas at the Montana State Prison (MSP) that fail to substantially comply with the Americans with Disabilities Act (ADA) provision of the Settlement Agreement.¹ Defendants, in their opposition to Plaintiffs’ Motion for Specific Performance, assert that they have or will make changes to address ten of the deficiencies. However, in several instances, the changes Defendants propose are vague and unsubstantiated. Additionally, Defendants refuse to address the remaining problems, because they believe the ADA does not require the changes

¹ The experts identified ten additional subsidiary problems, specific to certain areas of the facility, which Plaintiffs detailed in section II.R of their brief.

the experts recommended or the deficiency has no effect on MSP's population. Again, Defendants, present vague and unsupported assertions and ask the Court to disregard the plain meaning of the ADA and its implementing regulations, as well as Ninth Circuit law, and instead rely on a 2004 Massachusetts state court decision. *See* Def.'s Br. at 8, 22.

Under the Agreement, Defendants must "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." Settlement Agreement [rec. no. 314], § V.9 [hereinafter "Agreement"]. While the experts' findings are not binding on the Court, *id.*, § II.3, Defendants have presented no evidence to rebut the experts' conclusions. Accordingly, Plaintiffs request that the Court compel Defendants to remedy the deficiencies the experts identified and extend the Agreement's monitoring period to ensure that Defendants make the improvements the Court orders as well as those they claim they will make.

I. Defendants Do Not Dispute that Several MSP Areas, Services and Programs Require Improvement.

Defendants indicate that they have or will make changes to address several of the deficiencies the experts identified. Defendants' plans to improve these programs, services, and areas represent a positive step towards achieving substantial compliance with the Agreement. However, several of the solutions

Defendants allege to have made or claim they will make are unsubstantiated and may be inadequate:

- **Sufficient Tracking System for Prisoners with Disabilities:** Defendants' plan to input information regarding prisoners' disabilities into the Offender Management Information System (OMIS) is a positive step. Def.'s Br. at 11. However, Plaintiffs have concerns whether this by itself will effectively facilitate communication among staff regarding prisoner disabilities. Unless staff are required to consult the system before key events, e.g., placement in educational settings and disciplinary, classification and parole hearings, placement of information in OMIS will be of minimal consequence. *See* ADA Experts' Report [rec. no. 1489-1], at 14 [hereinafter "Expert Report"] ("There is no requirement for staff to review file and OMIS to determine whether the inmate has a disability and may need a reasonable accommodation for equally effective communication.").
- **Additional ADA-Training for Staff:** Plaintiffs are encouraged by Defendants' willingness to provide staff additional ADA training. Def.'s Br. at 12. However, without information regarding the training's content, Plaintiffs cannot assess its sufficiency.

- **Provision of ADA Information to Prisoners During Orientation:**

Defendants state they will add information into the orientation slide-show on accommodations available to prisoners with disabilities. *Id.* at 13. They did not disclose these additional slides, so Plaintiffs cannot determine whether these changes are sufficient. Likewise, while Plaintiffs agree that individual meetings with prisoners during orientation are a good way to communicate information regarding the process for requesting accommodations, Defendants have not described the content of these meetings. *Id.* at 12. For example, the Martz Diagnostic and Intake Unit Plan, which Defendants reference, is silent as to whether prisoners are “told of or shown a copy of the form to use [to] request” an accommodation. Expert Report, at 13. Furthermore, while the MDIU Plan lists specific accommodations available to hearing impaired prisoners, the plan is silent regarding accommodations available to individuals with other disabilities.

- **Alternative Learning Environments for Prisoners with**

Disabilities: Plaintiffs are heartened by Defendants’ willingness to provide alternative learning environments for prisoners with disabilities. Def.’s Br. at 19. However, before Plaintiffs can assess whether the adjustments are sufficient, Defendants must provide

additional details regarding what changes will be made; as well as ensure that these changes will also assist prisoners confined to cell study.

- **Accessible Routes Within Buildings:** Defendants recognize that MSP must “provide an accessible route within buildings to areas that offer work opportunities to individuals with disabilities and provide them with accessible restrooms and break areas” and state they are working towards removing identified barriers. *Id.* at 25. The experts identified several areas where these problems exist. Because Defendants’ brief does not identify those barriers which MSP is in the process of removing, Plaintiffs cannot assess whether appropriate action has been or will be taken.
- **Accessible Routes Across the Facility:** Defendants allege that MSP has ground down the areas where the incline along the path of travel exceeded ADA standards. *Id.* at 26. They also allege that MSP will install additional walkways to comply with the 2010 ADA Standards for Accessible Design. *Id.* Continued monitoring is necessary to ensure that these changes have and will be made. Defendants’ assertion that, in the interim, MSP will provide Infirmity Aides is less than reassuring given that aides are not always available. Expert

Report, at 34. Finally, to the extent that MSP has building codes regarding the evacuation of prisoners with disabilities during emergencies, as Defendants allege, *id.* at 26, Plaintiffs request that Defendants produce these codes.

An extension of the monitoring period will ensure that MSP makes all necessary and proper changes in accordance with ADA standards and the experts' recommendations.

II. Defendants have Presented no Legal Authority or Evidence to Rebut the Experts' Other Conclusions.

A. The ADA Requires MSP to Identify Prisoners with Disabilities.

Defendants' allegation that the ADA does not require prisons to identify prisoners with disabilities conflicts with federal law. *Id.* at 6. 28 C.F.R. 35.130(b)(7) requires prisons to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to *avoid* discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.* (emphasis added). For Defendants to ensure that MSP *avoids* discriminating against prisoners with disabilities they must institute a screening program. The alternative, providing an accommodation after a prisoner complains of an inability to access a program or service is only corrective; rather than avoiding discrimination, this approach only provides relief after a prisoner has

been the victim of discrimination. Not surprisingly, the experts concluded that MSP should establish an identification program. Expert Report, at 8 (recommending that “MSP develop a comprehensive program to identify inmates with disabilities including those with developmental and learning disabilities”).

Nor is it sufficient, as Defendants imply, that MSP simply identify prisoners whose disabilities are “apparent to the casual observer.” Def.’s Br. at 7. This argument overlooks the reality that several categories of disabilities, such as learning and developmental disabilities, are not readily apparent. Compounding the problem is that many learning or developmentally disabled prisoners may not be able to request an accommodation from MSP staff, either because they are not aware they are disabled and entitled to accommodations, or may not be able to communicate about their disability effectively. Accordingly, if MSP does not identify such individuals, it may create a situation in which a disabled prisoner is never identified and is excluded from programs and services. It could hardly be said that such a situation would comply with the Agreement. *See* Agreement, § V.9 (requiring Defendants to “ensure” that prisoners with disabilities are not excluded from participating and receiving available programs and services.).

Defendants' attempts to distinguish the decisions in *Armstrong* and *Clark* are unpersuasive.² For example, Defendants complain that named Plaintiffs in this case do not include an individual with a developmental disability. Def.'s Br. at 9. Defendants, however, overlook that the Plaintiff class currently includes all prisoners who currently are and will be incarcerated at the facility, *see* Findings of Fact and Conclusions of Law and Order, January 14, 1994, at 2; several of whom, as the experts indicate, may have developmental disabilities. *See* Expert Report, at 23 (recommending that experts "develop a comprehensive program to identify inmates with disabilities including those with developmental and learning disabilities"). Defendants additionally attempt to distinguish *Clark* on the grounds that the size of the Plaintiff class in this case is smaller, and that the Agreement does not include an admission or finding of fault. Def.'s Br. at 9-10. Neither of these distinctions is of consequence. As highlighted in the experts' report, despite the relatively small size of the population, Defendants have been unable to provide accommodations to prisoners at MSP with learning and developmental disabilities. *See e.g.*, Expert Report at 25 ("MSP does not provide accommodations for inmates with developmental or learning disabilities to be removed from the regular academic education program and placed in an alternative learning environment as

² In most cases, Defendants fail to explain the significance of the distinctions they identify.

an accommodation if they cannot make progress toward their GED.’’). Defendants present no evidence challenging the experts’ conclusion.³

Defendants cite only a single state court decision, *Shedlock v. Dep’t of Corr.*, 818 N.E.2d 1022 (Mass. 2004), in support of their position. Def’s Br. at 8. In addition to the decision’s lack of precedential weight, it is easily distinguishable. In *Shedlock*, the defendants were already aware that the plaintiff suffered from a physical disability and had provided a cane as well as other accommodations in response. 818 N.E.2d at 1027-28. Despite these accommodations, plaintiff filed suit indicating that defendants should have provided him additional accommodations. *Id.* at 1034-35. The court rejected the plaintiff’s allegations noting that defendants were under no obligation to conclude that the accommodations they had provided the plaintiff were insufficient or that he required additional accommodations, unless the plaintiff indicated such. *See id.* at 1034 (“This is particularly true where, as here, prison officials had already

³ To the extent that Defendants are arguing that the court’s statements in *Clark* were a product of the settlement agreement the parties reached, they are mistaken. Rather, the court in *Clark* explained, as a practical matter, “to provide those accommodations [required by federal law], defendants must accurately identify prisoners who are developmentally disabled.” *Clark v. California*, 739 F.Supp.2d 1168, 1190 (N.D. Cal. 2010). Because defendants in *Clark* conceded that they could not provide protection for those prisoners they had not identified, the Court concluded that an identification process was necessary. *Id.* Although Defendants here have not conceded such, it is not clear, nor have they explained, how they would provide accommodations to prisoners with disabilities, as required by federal law and the Agreement, without identifying them.

accommodated Shedlock's disability by allowing him to have and use a cane."'). As the plaintiff in *Shedlock* suffered from a physical disability, and had been previously identified by the facility as suffering from a disability, it was reasonable for the court to conclude that the prison was not required to continue to follow up with the individual to determine whether the accommodation provided was sufficient.

This is not the case for prisoners with developmental or learning disabilities at MSP. As the experts explained, "[i]nmates with developmental disabilities do not have the ability to advocate for themselves. They cannot and will not request assistance in the performance of activities of daily living or when engaged in due process events" Expert Report, at 11.

Contrary to their contentions, Defendants could institute an identification system without "making assumptions about a prisoner's disability or resorting to assumptions and stereotypes concerning disabled persons." Def.'s Br. at 8. In fact, instituting a program that would require trained professionals to evaluate a prisoner upon admission based on widely used and validated assessment tools would avoid these problems altogether. Nor would the screenings have to be embarrassing. The screenings could be part of the same initial "health care screening/assessment [which] is completed during the initial admissions process at the MDIU to determine whether the inmate has diabetes, epilepsy or a history of

mental illness.” Expert Report, at 10. As Defendants indicate in their brief, MSP already makes determinations regarding a prisoner’s ability to read during one-on-one meetings that occur during orientation. *See* Def.’s Br. at 12.

B. Defendants Present only Unsubstantiated Allegations Regarding MSP’s Treatment of Prisoners with Hearing-Related Disabilities.

Plaintiffs in their opening brief recounted the experience of Prisoner 1 who was denied a sign language interpreter during his disciplinary hearing despite the fact that an audiologist whom MSP had contracted with to assess prisoners with hearing impairments concluded that “an ASL sign language interpreter would be most beneficial,” Expert Report, at 16, and directly questioned MSP’s refusal to provide one. *See id.* at 15 (“I am not sure where the prison received the information from our office that you could communicate with lip reading only.”). Defendants now respond that MSP’s ADA coordinator has since provided the audiologist additional unspecified information and that, as a result, she allegedly has changed her conclusion. Def.’s Br. at 16. Without further evidence as to the information provided or documentation of the audiologist’s change in assessment, Plaintiffs have no means to assess these allegations.

Defendants’ response regarding Prisoner 2 is similarly unpersuasive. Defendants do not dispute the experts’ finding that Prisoner 2 was not provided an interpreter during his disciplinary hearing. Instead, they justify the exclusion on the basis that an unidentified interpreter alleges that he is “difficult” to sign with.

Id. at 17. Even assuming this is true, the limited access an interpreter would provide is clearly preferable to the alternative – a complete denial of access to the program in violation of the ADA and the Agreement.

Defendants’ reliance on the availability of Video Remote Interpreting (VRI) services is likewise insufficient. *Id.* at 17. According to Prisoner 2, VRI services are frequently unavailable at the facility because of the lack of a sufficient internet connection or the non-availability of a video interpreter. At a minimum, further investigation is required to determine whether VRI services are an effective accommodation for prisoners with hearing impairments.

C. Defendants have not Shown that Prisoners Working Towards a GED Are Eligible for Employment at MSP.

Defendants refer to an unspecified facility policy providing that prisoners must simply be “working towards a GED” to obtain employment on a long term basis in the maintenance, warehouse or correctional enterprises work program. Def.’s Br. at 18. As Defendants did not produce the policy, Plaintiffs cannot assess its sufficiency. Assuming the policy is as the Defendants describe, it is not clear that it is being properly implemented. As the experts indicated in their report “a review of MSP and MCE job descriptions and eligibility criteria indicate that a high school diploma or GED is required as a basis for many jobs.” Expert Report, at 17.

D. Defendants have Presented no Evidence that Prisoners can Request or Will Be Provided Accommodations During Count.

As the experts' report states, "MSP does not provide accommodations for inmates with mobility impairment during standing count." *Id.* at 18. Defendants present nothing to dispute this finding. Defendants allege that prisoners may request an accommodation during count via D.O.C. policy 1.3.15, which only generally addresses the facility's approach towards accommodating disabled individuals. Def.'s Br. at 20. Defendants also state that they have provided "this accommodation" to several individuals. *Id.* However, Defendants provide no details as to precisely what the accommodation is or to whom or when it has been provided.

E. A Policy Addressing Accommodations During Body Searches Would Better Protect Prisoners with Mobility Impairments.

Defendants acknowledge that MSP does not have a policy ensuring that prisoners with mobility impairments be provided accommodations during body searches. *Id.* at 20. Rather, they argue that Plaintiffs are requesting that Defendants create a policy to address every conceivable situation in which a prisoner with a disability may require an accommodation. This is untrue: Plaintiffs have only requested changes in policies the experts have recommended. The prison has a policy on searches, and the experts recommended that the policy require that disabled prisoners be accommodated. That policy change would not

fundamentally alter the prison's search process, and is needed because MSP fails to provide staff proper training regarding compliance with the ADA. Expert Report, at 12.

F. Defendants' have not Presented any Evidence that Prisoners with Hearing Impairments are Provided Accommodations During Announcements.

MSP does not dispute that it has no policy to ensure that prisoners with hearing impairments are accommodated for announcements. Def.'s Br. at 21. Defendants claim that MSP's general disability policy provides adequate protection. *Id.* That policy is silent as to accommodations to hearing impaired persons for announcements. Additionally, Defendants assert that on several occasions they have provided "aides" to persons with hearing impairments for announcements. *Id.* Without further information regarding the number of times and the individuals to whom accommodations were provided, Plaintiffs cannot assess whether this accommodation is sufficient.

G. Defendants have not Demonstrated MSP Provides Prisoners with Disabilities Appropriate Housing-Related Accommodations.

Defendants do not dispute the experts' conclusion that prisoners with disabilities at MSP are denied appropriate housing-related accommodations. *Id.* at 21-22. Instead, Defendants cite to a single instance, cited in the expert's report, when a prisoner was provided a housing accommodation. *Id.* at 22. This single instance is insufficient to demonstrate substantial compliance.

H. The Deficiencies Plaintiffs Identify in the Final Section of Their Brief Discriminate Against Prisoners with Mobility Impairments.

In section “II.R” of their brief, Plaintiffs listed several other deficiencies at MSP identified by the experts that limit prisoners with mobility impairments from accessing various programs, services, and facilities. Among these deficiencies were: the unavailability of machines accessible for use by prisoners with mobility impairments; limited space in certain areas for maneuvering by prisoners who use wheelchairs; and sanitary facilities that are not accessible to prisoners with disabilities. Defendants do not deny the presence of these problems, but instead allege that they are not required to alleviate them because Plaintiffs have failed to identify any specific individual that has been disadvantaged by them. *Id.* at 26-27. The experts recounted speaking with several prisoners who, as a result of mobility impairments would not be able to climb stairs, may require use of a wheelchair, or who require a shower bar while taking a shower. See Experts’ Report, at 4, 17, 18, 31. Furthermore, in the event that the Court schedules a hearing on the matter, discovery will likely reveal additional information regarding persons disadvantaged by these deficiencies. Under the terms of the Agreement, Plaintiffs have been denied discovery to date. Agreement, § I.10.

Conclusion

For the aforementioned reasons, Plaintiffs respectfully move the Court to order Defendants to comply with the ADA provision of the Agreement and correct

the disability-related violations outlined in the experts' report. Plaintiffs also respectfully request that the Court extend the monitoring period so as to ensure that Defendants institute the changes they have identified and to allow the experts to determine if the ADA violations they identified have been remedied.

FILED this 3rd day of September, 2013.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)

I hereby certify that the foregoing Brief complies with Local Rule 7.1(d). It is 3,171 words, excluding the caption and certificates

/s/ Ajmel Quereshi
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CERTIFICATE OF SERVICE L.R. 5.2 (b)

I hereby certify that on September 3, 2013 a copy of this pleading was served upon the following persons by the following means:

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