

ERIC BALABAN
AJMEL QUERESHI
National Prison Project
of the ACLUF
915 15th Street, NW
7th FLOOR
Washington, DC 20005
(202) 393-4930

ANNA CONLEY
ACLU Of Montana
PO Box 9138
Missoula, MT 59807
(406) 830-3009

Attorneys for Plaintiffs

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,)

CAUSE NO. CV 93-46-H-
DWM-JCL

THIS DOCUMENTS RELATES TO:)
Terry LANGFORD, et. al.,)

Plaintiffs,)

v.)

Gov. Steve BULLOCK, et. al.,)

Defendants.)

**BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION
FOR SPECIFIC
PERFORMANCE**

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. The Settlement Agreement Requires Defendants to Achieve Substantial Compliance with the Americans with Disabilities Act and Grants Plaintiffs the Right to Seek Specific Performance and to Extend the Monitoring Period.....	2
II. Defendants Have Failed to Substantially Comply with the Agreement’s ADA Provision.....	4
A. MSP Has Not Established an Effective Screening and Classification System to Identify Disabled Prisoners.....	5
B. MSP Does Not Track Prisoners with Disabilities.....	8
C. MSP Does Not Have an Effective System for the Communication of Disability-Related Information.....	9
D. MSP Does Not Train Staff to Interact with and Respond to Disabled Prisoners.....	10
E. MSP Does Not Provide Disabled Prisoners with Sufficient Information About Accommodations During Orientation.....	11
F. MSP Does Not Provide Prisoners with Reasonable Accommodations During Classification and Disciplinary Hearings.....	12
G. MSP Does Not Provide Hearing Disabled Prisoners Sign Language Interpreters.....	17
H. MSP Regularly Excludes Prisoners with Disabilities from Jobs if They Do Not Have a High School Diploma or GED.....	19
I. MSP Does Not Provide Prisoners with Developmental or Learning Disabilities Access to Alternative Learning Environments.....	21
J. MSP Does Not Provide Disabled Prisoners with Accommodations During Standing Count.....	22

K.	MSP's Policy Regarding Body Searches Does Not Make Accommodations for Disabled Prisoners.....	22
L.	MSP Policies do not Provide Accommodations to Disabled Prisoners for Facility Announcements.....	22
M.	MSP Does Not Have a System in Place to Ensure Disabled Prisoners Have Necessary Housing Related Accommodations.....	23
N.	MSP Does Not Have A Sufficient Number of Accessible Cells for Disabled Inmates.....	23
O.	Physical Barriers in the Industries Complex Make the Area Inaccessible to Physically Disabled Prisoners.....	24
P.	MSP Does Not Provide Sufficient Seating for Disabled Prisoners in Day Rooms and Kitchens.....	25
Q.	Several Areas of the MSP Campus Include Physical Barriers Making Them Inaccessible to Disabled Prisoners.....	25
R.	MSP Has Failed to Ensure that the Facility Complies with the ADA In Several Other Regards.....	26
III.	Plaintiffs, Upon Review of the Facility, Discovered Several Additional Problems.....	28
	CONCLUSION.....	29

TABLE OF AUTHORITIES

Cases

<i>Alexander v. Choate</i> , 469 U.S. 287 (1985).....	5
<i>Armstrong v. Davis</i> , 275 F.3d 849 (9th Cir. 2001).....	8
<i>Armstrong v. Davis</i> , 857 F. Supp. 2d 919 (N.D. Cal. 2012).....	8, 9
<i>Armstrong v. Davis</i> , Case No. 94-2307 (N.D. Cal. 1999).....	6
<i>Chase v. Baskerville</i> , 508 F. Supp. 2d 492 (E.D. Va. 2007).....	5
<i>Clark v. California</i> , 739 F. Supp. 2d 1168 (N.D. Cal. 2010).....	<i>passim</i>
<i>Crawford v. Ind. Dep't of Corr.</i> , 115 F.3d 481 (7th Cir. 1997).....	4
<i>Duffy v. Riveland</i> , 98 F.3d 447 (9th Cir. 1996).....	13, 17
<i>In re: In the Matter of Litigation Relating to Conditions of Confinement at Montana State Prison</i> , (D. Mont. Oct. 28, 1994).....	2,3,4
<i>Olmstead v. L.C.</i> , 527 U.S. 581 (1997).....	16
<i>Penn. Dep't of Corrections v. Yeskey</i> , 524 U.S. 206 (1998).....	4
<i>Robertson v. Las Animas County Sheriff's Dept.</i> , 500 F.3d 1185 (10th Cir. 2007)	17

Statutes

28 C.F.R. § 35.104.....	8
28 C.F.R. § 35.130.....	<i>passim</i>
28 C.F.R. § 35.130(7).....	16
28 C.F.R. § 35.130(b)(2).....	5, 16

28 C.F.R. § 35.130 (b)(3)(i)-(ii).....20

28 C.F.R. § 35.130(d).....17

28 C.F.R. § 35.150.....5

28 C.F.R. § 35.152(b)(1)..... 25

28 C.F.R. § 35.152(b)(2).....24

28 C.F.R. § 35.152(b)(3).....24

28 C.F.R. § 35.160.....*passim*

28 C.F.R. § 35.163.....11

28 C.F.R. § 40.3.....29

35 C.F.R. § 35.107(a).....29

36 C.F.R. § 1195.....27

29 U.S.C. § 794.....5

42 U.S.C. §12101(1)(A).....5

42 U.S.C. §12101(2)(A).....5

42 U.S.C. § 12111.....2

42 U.S.C. § 12132.....4

Other Authorities

1999 remedial plan, *available at* <http://www.clearinghouse.net/chDocs/public/PC-CA-0005-0003.pdf>.....6

ACA, Standards for Adult Correctional Institutions, §4-4429 (4th ed. 2003 and 2010 supp.).....21

USDOJ, 2010 ADA Standards for Accessible Design, *available at*
http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards_prt.pdf
.....27

Pursuant to the Settlement Agreement [“Agreement”], Plaintiffs move for specific performance with regards to those programs, services, activities, and facilities that the parties’ joint experts found failed to substantially comply with the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111 *et seq.* Plaintiffs further move to extend the monitoring period in this case. The grounds for their Motion are set forth below.

I. The Settlement Agreement Requires Defendants to Achieve Substantial Compliance with the Americans with Disabilities Act and Grants Plaintiffs the Right to Seek Specific Performance and to Extend the Monitoring Period.

The Agreement states as follows with regard to Defendants’ compliance with the ADA:

Defendants shall 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. The Defendants shall develop and implement plans to integrate the disabled inmates into the mainstream of the institution.

Settlement Agreement [rec. no. 314] ¶V.9., *In re: In the Matter of Litigation Relating to Conditions of Confinement at Montana State Prison*, No. CV 92-13-H-LBE [“Langford”] (D. Mont. Oct. 28, 1994). In the event that Defendants failed to substantially comply, the Agreement granted Plaintiffs the right to seek court-ordered compliance, and to seek an extension of the monitoring period. *Id.* ¶III.2.

On June 29, 2012, the Court appointed Paul Bishop “as the parties’ expert to assess Defendants’ compliance with the ADA provision of the Settlement

Agreement.” Order [rec. no. 1477] at 3, *Langford* (D. Mont. June 29, 2012). Mr. Bishop was appointed to conduct a barriers/physical plant assessment of Defendants’ ADA compliance. *See id.* The Court later appointed Rapheal Frazier and Subia Consulting, LLC, as the parties’ joint ADA programmatic expert. *See* Order [rec. no. 1480], *Langford* (D. Mont. July 12, 2012). In its June 29 Order, the Court stated: “Within 30 days of their receipt of the experts’ report, the parties shall file their motions for relief based on the report as provided in sections II.5 and III.2 of the Agreement[.]” *Id.* at 2.

Mr. Bishop and Mr. Frazier conducted a four-day site assessment at Montana State Prison [“MSP”] during the week of September 17, 2012. The experts reviewed programs, services, and activities offered in 32 MSP buildings, including housing units, vocational buildings, educational buildings, medical units, the gymnasium, and support buildings. The experts also reviewed relevant MSP policies, training materials, architectural plans, orientation materials, ADA and grievances packets, and individual prisoner records, and they interviewed MSP staff and prisoners.

On May 25, 2013, Mr. Bishop and Subia Consulting submitted their report finding that MSP’s programs, as well as the facility, did not substantially comply with the ADA provision of the Agreement. *See* Ex. A, Notice of Filing Joint ADA Experts’ Report [rec. no. 1489] *Langford* (D. Mont. May 30, 2013). They also

made a number of recommendations for Defendants to implement that could result in their reaching substantial compliance. *See id.*

Plaintiffs now seek specific performance under the Agreement to remedy the ADA deficiencies highlighted in the experts' report, and an extension of the monitoring period so Defendants' future compliance efforts can be assessed by Mr. Bishop and Mr. Frazier.

II. Defendants Have Failed to Substantially Comply with the Agreement's ADA Provision.

Under Title II of the ADA, "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." 42 U.S.C. § 12132; 28 CFR § 35.130 (prohibiting public entities from denying individuals with disabilities an equal opportunity to participate in or benefit from their programs simply because they have a disability). State prisons are public entities for the purpose of Title II of the ADA. *Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 210 (1998). Moreover, "The ADA encompasses all services, programs, and activities provided by a prison to its prisoners." *Clark v. California*, 739 F. Supp. 2d 1168, 1177 (N.D. Cal. 2010), citing *Crawford v. Ind. Dep't of Corr.*, 115 F.3d 481, 483 (7th Cir. 1997) ("The use of a library is, equally clearly, an activity, and so, only a little less clearly, is the use of the dining hall."); *Chase v. Baskerville*,

508 F. Supp. 2d 492, 506 (E.D. Va. 2007) (defining the provision of “telephones, computers, cable televisions, and books” as “services” under the ADA).

A “qualified individual with a disability” suffers from “a physical or mental impairment that substantially limits one or more major life activities,” including, but not limited to, “caring for oneself . . . , learning, reading, concentrating, thinking communicating and working.” 42 U.S.C. §§ 12101(1)(A), (2)(A).

Pursuant to the ADA, Defendants must provide prisoners “with ‘reasonable accommodations’ and ‘reasonable modifications’ so that they can avail themselves of prison services and participate in prison programs and activities.” *Clark*, 739 F. Supp. 2d at 1177, *quoting* 29 U.S.C. § 794; 28 C.F.R. § 35.130(b)(7). A reasonable accommodation must provide disabled prisoners meaningful access to the service, program, or activity in question. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). The law does not require a “public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of the service, program, or activity or in undue financial and administrative burden.” 28 CFR § 35.150.

There are several MSP programs and areas that the experts found were not in substantial compliance with the ADA. Plaintiffs highlight the deficiencies the experts identified below.

A. MSP Has Not Established an Effective Screening and Classification System to Identify Disabled Prisoners.

MSP has failed to establish a comprehensive screening process to identify prisoners with developmental, learning, mobility, vision, speech and hearing disabilities, as the ADA requires. Paul Bishop & Subia Consulting Services, Program Access Assessment & Facility Accessibility Survey Report[“Expert Report”], p. 10; *see Clark v. California*, 739 F. Supp. 2d 1168, 1188 (N.D. Cal. 2010) (“[I]t is important for staff to provide proactive assistance and to monitor the support needs of all developmentally disabled prisoners, even those who appear high functioning.”); *id.* at 1190 (“To provide . . . accommodations [required by federal law], defendants must accurately identify prisoners who are developmentally disabled.”); *Armstrong v. Davis*, Case No. 94-2307 (N.D. Cal.), 1999 remedial plan, *available at* <http://www.clearinghouse.net/chDocs/public/PC-CA-0005-0003.pdf> (“The BPT shall hire at least one full-time ADA coordinator with expertise in Title II of the ADA, the identification of people with disabilities, and the needs of people with disabilities . . .”).

As a result, Defendants fail to accommodate disabled prisoners in programs and facilities they cannot utilize. *See e.g., id.*, at 11 (noting that prisoners with developmental disabilities may not be able to effectively participate in due process events such as disciplinary, classification, or parole board appearances).

These denials violate the Agreement, *see* Agreement, p. 21 (“The Defendants shall develop and implement plans to integrate the disabled inmates

into the mainstream of the institution.”), as well as the ADA. *See* 28 CFR § 35.130 (prohibiting public entities from denying individuals with disabilities an equal opportunity to participate in or benefit from their programs simply because they have a disability).

While MSP conducts an initial health care screening upon a prisoner’s admission to the facility, the screening is limited to identifying whether the prisoner has a history of certain chronic medical conditions, such as diabetes or epilepsy, or mental health problems. Expert Report at 10. MSP does not have comprehensive screening in place for identifying inmates with developmental, learning, mobility, vision, speech or hearing disabilities. As a result, several classes of disabled prisoners go unidentified.

The expert’s report explicitly rejects Defendants’ current approach, which requires a disabled individual to proactively seek assistance from MSP:

Inmates 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 such as disciplinary, classification, or parole board appearances. . . . Without a proper identification process in place, staff have no way of knowing that these inmates need assistance or the type of assistance needed.

Id. at 11. Prisoners also may not identify themselves for fear that may lose any benefits they receive. *See id.* (“During the interviews, one inmate claimed that he was reluctant to ask for reasonable accommodation for fear that he would be fired

from his job.”); *see also Clark*, 739 F. Supp. 2d at 1204 (“If prisoners fear, or feel demeaned by custody staff, they are far less likely to approach officers, counselors, or clinicians for help”).

B. MSP Does Not Track Prisoners with Disabilities.

MSP does not track disabled prisoners. Expert Report at 11. *Id.* Accordingly, even if a disabled individual is properly identified, it is unlikely he will receive the necessary accommodation.

Defendants have defended their refusal to institute a tracking system by citing alleged privacy and labeling concerns. *Id.* at 11. These concerns are not only “misguided”, *id.*, but are irreconcilable with Ninth Circuit law requiring tracking of prisoner disabilities. *See Armstrong v. Davis*, 275 F.3d 849, 876 (9th Cir. 2001) (affirming injunction requiring parole board to institute a tracking system for disabled prisoners eligible for parole hearings, reasoning, “[b]ecause the regulations implementing the ADA require a public entity to accommodate individuals it has identified as disabled, 28 C.F.R. 35.104, some form of tracking system is necessary in order to enable the Board to comply with the Act.”); 857 F. Supp. 2d 919, 939-40 (N.D. Cal. 2012) (ordering the California DOC to implement a tracking system requiring the DOC to notify county jails holding state prisoners about those prisoners’ disabilities and their accommodation needs as identified through DOC’s own tracking system).

C. MSP Does Not Have an Effective System for the Communication of Disability-Related Information.

“MSP does not have policies that require the sharing of disability related information and the need for accommodations among program, custody, and other staff,” as the ADA requires. Expert Report at 11; *see Armstrong*, 857 F. Supp. 2d at 934 (finding “Defendants county jail plan . . . insufficient to ensure accommodation of [prisoners] housed in county jails” because, among other things, it did not “provide for Defendants to share information regarding class members’ disabilities and accommodation needs.”).

Procedure No. MSP HS A-0.80 creates a limited requirement that health care staff notify other staff if a prisoner is physically disabled. Expert Report at 11. However, even this limited requirement is not instituted properly. Physical disability information entered into the Offender Management Information System (OMIS), created to communicate such information, is used primarily for employment purposes. *Id.* at 12. Additionally, the data entered is often unhelpful and ignored by staff: “There were some entries in OMIS reflecting that an inmate may need assistance. This entry, while attempting to alert staff of an inmate’s possible need for accommodation, is vague and does little to help the staff with any specific assistance needed.” *Id.*

Accordingly, even prisoners MSP has identified as disabled are denied necessary accommodations. For example, Mr. Frazier reviewed the custodial files

and medical charts of hearing impaired prisoners and one prisoner with a learning disability which “revealed no documentation that any accommodations were provided to ensure equally effective communication during classification or disciplinary hearings.” *Id.* at 12.

D. MSP does not Train Staff to Interact with and Respond to Disabled Prisoners.

MSP staff lack training to respond appropriately to disabled prisoners’ requests for accommodations. *Id.* MSP’s failure to provide appropriate training conflicts with case law in the Ninth Circuit interpreting the ADA. *See Clark v. California*, 739 F. Supp. 2d. 1168, 1231 (N.D. Cal. 2010) (“staff training is essential to the provision of necessary services.”).

While staff receive general ADA training, MSP “is not sufficient in training custody staff of the type of reasonable accommodations that may be necessary when conducting body searches, standing count, making public address announcements, bed assignments, transporting inmates with mobility impairments, etc.” Expert Report at 12. MSP classification staff, disciplinary officers and health care providers do not have basic training “to ensure . . . effective communication during these encounters.” *Id.*

MSP has failed to train even those individuals the facility has designated to respond to disabled prisoners’ requests. Procedure No. MSP 3.4.1 provides that a prisoner may request the assistance of an advisor during the disciplinary process.

However, “there is no specific training provided to staff assigned the role of advisor.” *Id.* Nor does MSP provide specialized training to persons tasked with assisting mentally ill prisoners during disciplinary hearings. *Id.*

E. MSP Does Not Provide Disabled Prisoners with Sufficient Information About Accommodations During Orientation.

Given the facility’s failure to properly track and identify prisoners with disabilities, the responsibility to seek accommodations falls largely upon prisoners. Unfortunately, prisoners are not given sufficient information during the prison’s orientation program about the accommodations available. *Id.* 28 CFR § 35.163 requires that: “a public entity . . . ensure that interested persons, including persons with impaired vision and hearing, can obtain information as to the existences and location of accessible services, activities and facilities.”

Upon a prisoner’s admission to MSP, he/she is housed in the Martz Diagnostic Intake Unit until completion of the admission and orientation process. Expert Report at 12. The orientation program consists of a review of the prisoner handbook, an explanation of facility rules and services, a description of MSP activities and goals, an explanation of testing that will be conducted and an opportunity to identify special needs and problems. *Id.* at 12-13. While prisoners are told how to request accommodations, they are “not told of or shown a copy of the form to use for such request.” *Id.*, p. 13. Nor was there a “slide with a list of services or accommodations available at MSP,” in the audio-visual orientation

program. *Id.* The orientation may be particularly confusing for prisoners with a learning or developmental disability. *Id.* at 22; *see also Clark*, 739 F. Supp. 2d at 1178 (“A developmentally disabled person’s literacy level can impede his or her ability to participate in prison activities or programs.”). As Mr. Frazier found, “[t]he information is too complicated and there are not enough breaks in between subjects.” *Id.* at 22.

Accordingly, prisoners “with disabilities are unaware of some services and accommodations and fail to request them.” *Id.* at 13; *see also id.* at 4 (finding that the Reading for the Blind program, which allows prisoners to receive audio books, “was not being utilized as [the librarian] suspected the inmate population was probably unaware of it.”).

F. MSP Does Not Provide Prisoners with Reasonable Accommodations During Classification and Disciplinary Hearings.

Disabled prisoners at MSP are frequently placed in programs in which they must effectively communicate, but cannot do so due to disability. *Id.* at 13-14. 28 CFR § 35.160 requires “a public entity [to] take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communication with others.” MSP regularly fails to take the necessary and appropriate steps to ensure effective communication by disabled prisoners during classification and disciplinary hearings, *id.* at 13-14, in

violation of the ADA. *See Clark*, 739 F. Supp. at 1192-93 (“[Prisoners] are entitled to assistance and protection they need in order to have access to prison programs, services, and activities. That right includes assistance in disciplinary and other administrative proceedings.”); *id.* at 1179 (“[D]efendants must not only provide staff assistants to developmentally disabled prisoners in disciplinary, administrative, and classification proceedings, but they also must ensure that those staff assistants are providing prisoners with effective communication Only through effective communication can defendants guarantee that developmentally disabled prisoners have meaningful access to these proceedings and, thus, satisfy their obligations to the plaintiff class under federal law.”); *see also Duffy v. Riveland*, 98 F.3d 447, 456 (9th Cir. 1996) (reversing summary judgment in favor of prison on deaf prisoner’s claim that he was denied qualified interpreter at disciplinary hearing in violation of ADA).

Procedure No. MSP 4.2.1, Inmate Classification System, requires all prisoners to appear at classification hearings while confined. Expert Report at 13. An initial hearing is typically held within forty-five days of the prisoners’ arrival at the facility. *Id.* After the initial hearing, reclassification hearings are held once every six months thereafter. *Id.* The hearings address a variety of important issues affecting every aspect of the prisoner’s life, including:

custody level, appropriate housing assignments, assessing the inmate’s needs and recommending appropriate program/treatment

placement, review of eligibility for assignment to a particular housing unit, special review when an inmate has been found guilty of certain serious rule infractions, convictions on a new charge, detainer, behavior problems, separation needs, assignment or removal from a job, and recommending and determining overrides of objective classification scores when appropriate.

Id.

While staff meet with prisoners prior to hearings to ask preliminary questions they may have, staff are not required to review a prisoner's file or consult the OMIS "to determine whether the inmate has a disability and may need a reasonable accommodation for equally effective communication." *Id.* at 14. Nor are they required to take any other preliminary measures to ensure that hearings are accessible for disabled inmates:

There is no requirement of documentation of disability status and needed accommodations on the classification hearing documents. There is no requirement to provide reasonable accommodation for equally effective communication and there is no requirement to document what accommodations were provided to ensure equally effective communication.

Id.

Similar problems exist during disciplinary hearings. *Id.* Procedure No. MSP 3.4.1, Institutional Discipline, creates a process by which MSP punishes prisoners for violating prison rules and regulations, as well as federal and state laws. *Id.* While prisoners technically are afforded a number of rights during such

hearings – such as the right to present a defense – disabled prisoners are unable to exercise such rights. *Id.*

The program expert observed a sample hearing held in a non-contact visiting room and reported the following results: “This form of contact was exacerbated due to the noisy environment of the constant opening and closing electric door and the conversations of the staff just outside the area . . . [I]t was a challenging environment for even an inmate without a hearing impairment.” *Id.* Additionally, the hearing officer failed to take appropriate measures to accommodate disabled prisoners:

The DHO did not review the inmate’s file or OMIS to determine whether the inmate was disabled or required a reasonable accommodation for effective communication. The DHO . . . does not document any assistance he provides to ensure inmates understand and participate in the disciplinary hearing nor does he mak[e] any findings or determinations that with the accommodations provided allow the inmate to meaningfully participate in the hearing.

Id.

The DHO told Mr. Frazier he had not received any training in effective communication with disabled prisoners, and in his seven years as DHO had not continued a single hearing due to communications problems with disabled prisoners. *Id.* at 16.

Mr. Frazier concluded that disabled prisoners had been punished for behavior that was a product of their disabilities due to the lack of effective

accommodations provided to them. *See* Expert Report at 4. The expert likewise noted that there is no system in place to prevent seriously mentally ill prisoners from being punished for behavior that is a product of their mental illness, and that mentally ill prisoners are not provided with staff assistance during the disciplinary process. *Id.* at 16. Neither Jill Buck, MSP's Director of Mental Health, nor DHO Cozby could specifically recall a single instance when mental health staff intervened on behalf of a mentally ill prisoner in the disciplinary process. *Id.* at 17.

As a result of these violations, MSP unlawfully segregates and warehouses disabled prisoners in disciplinary segregation units, where they must endure some of the most restrictive housing conditions in the entire prison. Disabled prisoners housed in these conditions are denied the benefits of the prison's housing and classification systems, including out-of-cell time, interaction with other prisoners, and other property, programming and movement privileges denied to them while in disciplinary segregation. *See, e.g.,* Expert Report at 23 ("Inmates in locked housing are provided [only] cell study and provided no assistance from a teacher. The teacher merely gives work and picks it up. No assistance [is] provided for inmates with learning or developmental disabilities."). This form of discrimination violates the ADA. *See* 28 C.F.R. § 35.130(b)(2),(7), (d); *see also* *Olmstead v.*

L.C., 527 U.S. 581, 592, 597 (1997) (“unjustified isolation, we hold, is properly regarded as discrimination on the basis of disability.”).

G. MSP Does Not Provide Hearing Disabled Prisoners Sign Language Interpreters.

MSP does not provide prisoners with hearing disabilities “sign language interpreters for classification, disciplinary, group therapy, religious services or medical appointments. *Id.* 28 CFR § 35.160 requires a public entity to “furnish appropriate auxiliary aides and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of a service, program, or activity conducted by a public entity.” *See Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996) (overruling district court’s grant of summary judgment denying a prisoner’s claim that prison violated the ADA by denying him an interpreter during classification and disciplinary hearings); *Robertson v. Las Animas County Sheriff’s Dept.*, 500 F.3d 1185, 1199 (10th Cir. 2007) (holding that a deaf arrestee was injured as a result of Defendants’ failure to provide him with an auxiliary aid at his probable cause hearing: “Though the charges against plaintiff were dismissed, he was denied the ability to participate in his probable cause hearing to the same extent as non-disabled individuals.”). The appropriateness of the assistance provided will depend on the context:

In some instances a notepad and written materials may be sufficient to permit effective communication, in other circumstances, it may not. A qualified interpreter may be necessary when the information being

communicated is complex, or is exchanged for a lengthy period of time. Generally factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.

28 CFR § 35.160.

Despite the regulation's discussion of sign language interpreters, MSP does not have a contract in place for the provision of sign language interpreter services. Expert Report at 15. Accommodations for hearing disabled prisoners are necessities in "classification hearings, disciplinary hearings, parole board appearances, and health care appointments" in which effective communication with prisoners "is critical and must be ensured." *Id.* at 15.

In some cases, prisoners with hearing disabilities are denied assistance despite having requested an accommodation. For example, Prisoner 1¹ requested a sign language interpreter to assist him during his disciplinary hearing in December 2011: "Even though he justified his need for the sign language interpreter by citing the ADA . . . MSP denied him the services of a sign language interpreter based on the fact that the hearing was in a one on one setting and not a group setting." *Id.* The basis for the decision appeared to be a letter from the facility's Director of Audiology concluding that Prisoner 1 could effectively communicate during the

¹ The names of the prisoners have been excised from the experts' report, and are not used in this Brief.

hearing through lip reading alone. However, after the hearing, the Director of explicitly rejected that conclusion.

Prisoner 2 was disciplined after refusing to obey an order from his supervisor to stop mopping. Prisoner 2, who is deaf, could not hear his supervisor's command. *Id.* at 16. Like Prisoner 1, "he requested a sign language interpreter for his disciplinary hearing, but he was denied and told that he can read lips and do it in writing." *Id.* Despite the fact that the infraction was a result of his disability, he was found guilty and fired from his position. *Id.* Disciplinary sanction in these circumstances violates the ADA. *See Clark*, 739 F. Supp. 2d at 1179 ("The ADA also requires prison staff to try to counsel [prisoners], rather than subjecting them to the disciplinary process, when they break prison rules that they do not understand.").

H. MSP Regularly Excludes Prisoners with Disabilities from Jobs if They Do Not Have a High School Diploma or GED.

MSP excludes disabled prisoners from vocational programs and jobs if they do not have a high school diploma or general equivalency degree (GED). *Id.* As a result of their disabilities, prisoners with developmental or learning disabilities may not be able to obtain a GED. Their resulting exclusion from jobs and vocational programs violates the ADA and the Agreement. *See* 28 CFR § 35.130 ("A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out and individual with a disability or any class of individuals with

disabilities from fully and equally enjoying any service program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”)

The prison’s GED requirement applies to all jobs and vocational educational programs with Montana Correctional Enterprises (MCE). This is despite the fact that prisoners with learning disabilities, who “have plateaued in academic education, but [are] able to perform the essential functions of the vocational program and who could benefit from it [are] categorically excluded on the basis of not having a GED.” Expert Report at 6. There are a number of other MSP jobs, such as a janitor or certain classes of laundry workers, where having a GED is not necessary. *Id.* at 17.

The experts found that disabled prisoners were not hired for the vast majority of industries and other jobs at MSP. Expert Report at 6. By way of example, during his site visit the programmatic expert spoke with the laundry supervisor who indicated that despite the fact that “he was not opposed to hiring an inmate with a disability to work in the laundry,” he could not recall ever hiring a prisoner “with mobility impairment, even [for those] positions that could accommodate that inmate.” Expert Report at 17.

Defendants’ exclusion of disabled prisoners unable to complete their GED from MCE programs and jobs also excludes them from being housed in the Work

Re-Entry Center. This unit is the most coveted housing unit at MSP among prisoners, since it affords them the least restrictive housing conditions in the entire prison. This denial of the benefits of being housed in the Work Re-Entry Center violates the ADA. *See* 28 C.F.R. § 35.130 (b)(3)(i)-(ii) (prohibiting the prison from utilizing “criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.”).²

I. MSP Does Not Provide Prisoners with Developmental or Learning Disabilities Access to Alternative Learning Environments

MSP’s requirement that all employed prisoners have a high school diploma or GED is particularly onerous for prisoners with learning or developmental disabilities, given the facility’s failure to provide these disabled prisoners access to alternative learning environments. *Id.* at 23. Most disabled prisoners are kept in normal classrooms “until they either quit or become a behavioral problem with no opportunity to pursue vocational training.” *Id.* The situation is even worse for prisoners in locked housing. “Inmates in locked housing are provided [only] cell study and provided no assistance from a teacher. The teacher merely gives work

² The American Correctional Association Standards similarly provide:

The institution may be required to take remedial action, when necessary, to afford program beneficiaries and participants with disabilities an opportunity to participate in and enjoy the benefit of services, programs, or activities. Remedial action may include, but is not limited to: . . . making reasonable modifications to policies, practices, or procedures.

ACA, Standards for Adult Correctional Institutions, §4-4429 (4th ed. 2003 and 2010 supp.)

and picks it up. No assistance [is] provided for inmates with learning or developmental disabilities.” *Id.*

J. MSP Does Not Provide Disabled Prisoners with Accommodations During Standing Count.

MSP policy requires all prisoners to stand at their cell doors when a count is conducted. *Id.* The procedure ensures that prisoners “are physically present and not deceiving the observer through the use of dummies or other simulations.” *Id.* Physically disabled prisoners may be unable to stand and, thus, may be subject to discipline as a result of their disability.

K. MSP’s Policy Regarding Body Searches Does Not Make Accommodations for Disabled Prisoners.

MSP policy requires disabled prisoners to remove any prosthetic devices during the course of an unclothed body search. While the policy provides that the search may be conducted in “an area that ensures privacy and dignity when possible,” the policy is silent as to the provision of accommodations during the course of the removal. *Id.* at 19. Prisoners with a prosthetic leg, for example, may require a chair while removing their appendage. *Id.*

L. MSP Policies Do Not Provide Accommodations to Disabled Prisoners for Facility Announcements.

MSP does not have any policies requiring hearing impaired prisoners to be provided with accommodations during facility wide announcements. *Id.* As a

result, prisoners are frequently left to rely on other prisoners to obtain relevant information. *Id.*

M.MSP Does Not Have a System in Place to Ensure Disabled Prisoners Have Necessary Housing Related Accommodations.

MSP does not track which prisoners have disabilities; thus, it was not possible for the expert to determine the number of prisoners with disabilities who were not being provided lower bunks, shower chairs or other housing related accommodations. The expert, however, found some evidence that prisoners are being denied appropriate accommodations. *Id.* at 18. A prisoner indicated that despite using a wheelchair, he was initially placed in a housing unit that had neither an accessible bathroom nor shower. *Id.* When he attempted to use accessible facilities in another unit, staff informed he that he could not use the accessible facilities because he did not reside in that unit. *Id.*

N. MSP Does Not Have A Sufficient Number of Accessible Cells for Disabled Inmates

In addition to the program deficiencies highlighted above, many areas of the facility are not physically accessible to disabled prisoners. Mr. Bishop, the ADA barriers expert, produced a report highlighting a number of these violations of the ADA. He also submitted a detailed 69-page survey listing the specific deficiencies in each building and path of travel he reviewed. *See Ex. A.*

Mr. Bishop found the facility lacks a sufficient number of ADA compliant cells. 28 C.F.R. § 35.152(b)(2) provides that “public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Additionally, § 35.152(b)(3) provides that “public entities shall implement reasonable policies, including physical modifications to additional cells . . . , so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary the inmate access to safe, appropriate housing.”

Mr. Bishop found that as of the time of his site visit, “[three] inmates who use wheelchairs were housed in B Unit, even though there are no accessible cells in that Unit. The same documents indicated that 18 inmates who use wheelchairs are housed at D Unit, which exceeds the capacity provided by the [five] accessible cells.” Expert Report at 31. Accordingly, additional cells must be retrofitted such that they are accessible to prisoners who use wheelchairs.

Additionally, both the Sexual Offender Program Intensive Unit and the Chemical Dependency Intensive Treatment Unit are located in housing units that have no ADA-accessible cells or shower facilities. As a result, disabled prisoners are all but excluded from participating in these programs. 28 CFR § 35.130.

O. Physical Barriers in the Industries Complex Make the Area Inaccessible to Physically Disabled Prisoners

“The one area of MSP that presents the most physical barriers is the Industries Complex.” Expert Report at 33. 28 CFR § 35.152 (b)(1) provides:

Public entities shall ensure that qualified inmates or inmates with disabilities shall not, because a facility is inaccessible, to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

Barriers in the Area include: “excessive slopes along the exterior path of travel connecting [the] buildings and leading to other areas, lack of accessible work stations, and lack of compliant restroom facilities.” *Id.* The result is that “inmates with disabilities are significantly underrepresented in the work population.” *Id.*

P. MSP Does Not Provide Sufficient Seating for Disabled Prisoners in Day Rooms and Kitchens.

MSP does not provide sufficient seating in kitchen and day room areas for disabled prisoners. “Although some stools have been removed at existing fixed dining tables, the tables do not provide a knee space that allows a wheelchair user to roll completely under a table and have use of a dining surface equivalent to able bodied inmates.” *Id.* at 34. Replacement tables are needed that allow disabled and able bodied prisoners to dine “as able bodied companions.” *Id.*

Q. Several Areas of the MSP Campus Include Physical Barriers Making Them Inaccessible to Disabled Prisoners.

While MSP often relies on “pushers” to transport physically disabled prisoners around the facility, pushers are not always available. Expert Report at

34. Thus, MSP must take corrective action to ensure that all areas of the facility are accessible to disabled prisoners. *Id.* There are a number of areas where the concrete has moved vertically “and level changes along the path of travel exceed the maximums allowed by the ADA.” *Id.* The level changes must be ground down to a compliant level on a regular basis. *Id.* Additionally, “several buildings provide emergency exits that lead to unpaved areas, creating a hazard for inmates with disabilities who exit through those doors.” *Id.* All emergency exits should lead to a compliant walkway which disabled prisoners can use to reach safe distance from the facility.

R. MSP Has Failed to Ensure that the Facility Complies with the ADA In Several Other Regards

Mr. Bishop also highlighted in his report several other physical barriers which raised serious issues regarding facility access for disabled prisoners.

- Prisoners at the Work Dorm operate motor vehicles, but the expert was not able to find any hand operated vehicles for use by disabled prisoners. *Id.* at 31.
- Some cell arrangements provide limited space above the bunk, creating potential difficulty for a prisoner who uses a wheel chair to move between his chair and the bunk. *Id.*
- Sanitary facilities are not designed and constructed to be accessible to disabled prisoners. *Id.* at 34. Some of the changes required include:

“replacement of penal-style plumbing fixtures, grab bars, shower configurations, tiled surfaces and other more involved features.” *Id.*

- MSP does not have new adjustable examination tables and other medical diagnostic equipment that complies with the US Access Board’s latest standards. *Id.* at 32; Standards for Accessible Medical Diagnostic Equipment, 77 Fed. Reg. 6916 (proposed Feb. 9, 2012) (to be codified at 36 CFR § 1195).
- The facility does not provide a 60 inch diameter maneuvering space in several areas, thus preventing prisoners who use a wheelchair from entering these spaces. *Id.* The 2010 Americans with Disabilities Act Standards require that, as of March 15, 2012, 3 percent of cells in every facility to meet this standard. United States Department of Justice, 2010 ADA Standards for Accessible Design, *available at* http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards_prt.pdf.
- While some cells include grab bars close to their toilets, the bars are not attached to the wall. Expert Report, at 32. This creates difficulties for disabled prisoners as they commonly grasp the grab bar and then lean against the adjacent wall for support. *Id.*

- The elevator to the 2nd floor of Rothe Hall was not working during the facility expert's visit. *Id.* As the elevator is the only accessible route to the building's second floor, proper maintenance of the elevator is a necessity. *Id.*
- Knob type door hardware must be replaced with level hardware that is accessible for disabled prisoners. *Id.* at 35.
- Non-compliant door thresholds must be replaced. *Id.* at 35.
- MSP must provide disabled prisoners with accessible changing benches and loop-handled shower curtain wands. *Id.* at 35.

The expert report found no evidence that MSP has determined that the changes required to correct “any of the services, programs and activities [would] represent a fundamental alteration of these services, programs or activities or would result in an undue financial burden.” *Id.* at 27.

III. Plaintiffs Seek an Order of Specific Performance to Remedy the ADA Violations the Experts Identified.

Plaintiffs by their motion seek an Order requiring Defendants to remedy the specific ADA violations that Mr. Bishop and Mr. Frazier identified in their report. They also seek an extension of the monitoring period so that Mr. Bishop and Mr. Frazier can both assist Defendants in reaching substantial compliance with the Agreement's ADA provision, and can assess Defendants' future efforts to reach compliance. Plaintiffs note that there were a number of programs and services that

the experts did not have the time to assess that were nonetheless subject to their review under the Court's Orders appointing them: these include the operations of the state's prerelease programs and the boot camp, as well as an assessment of parole hearings. *See* Ex. 1, June 29, 2012 Order. Should the monitoring period be extended, then the experts could review these limited areas as they assess Defendants' efforts to remedy the ADA issues they found in their report.

CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully move the Court to order Defendants to comply with the ADA provision Agreement and correct the disability-related violations outlined in Mr. Frazier's and Mr. Bishop's report.

FILED this 24th day of June, 2013.

/s/ Eric Balaban

Eric Balaban
National Prison Project
Of the ACLU Foundation
915 15th Street, NW
7th Floor
Washington, DC 20005
(202) 393-4930

/s/ Anna Conley (by permission)

Anna Conley
ACLU of Montana
PO Box 9138
Missoula, MT 59807
(406) 830-3009

Attorneys for Plaintiffs

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 6,197 words, excluding the caption, certificates, table of contents and table of authorities.

/s/ Eric Balaban
Eric Balaban

CERTIFICATE OF SERVICE LOCAL RULE 5.2 (b)

I hereby certify that on June 24, 2013 a copy of this pleading, and annexed exhibit, were served upon the following persons by the following means:

1,2,3 CM/ECF

- Hand Delivery
- Mail
- Overnight Delivery Service
- Fax
- E-Mail

1. Clerk, U.S. District Court

2. McKenzie Hannan
Montana Department Corrections
5 South Last Chance Gulch
P. O. Box 201301
Helena, MT 59620-1301

3. Rebekah French
Montana Department of Administration
Risk Management and Tort Defense Division
PO Box 2000124
Helena, MT 59620

/s/ Eric Balaban

Eric Balaban

National Prison Project of the
American Civil Liberties Union
Foundation, Inc.

915 15th Street, N.W., Seventh Floor
Washington, DC 20005

(202) 393-4930