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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DERRICK CLARK, et al.,
Plaintiffs,
v.
STATE OF CALIFORNIA, et al.,
Defendants.

Case No. CV 96-1486 CRB
[PROPOSED] FINDINGS OF FACT
AND CONCLUSIONS OF LAW

I. Introduction and Background

1. The State of California, the Governor and various state prison officials initiated the current proceedings by bringing a motion pursuant to the Prison Litigation Reform Act (“PLRA”), 18 U.S.C. § 3626(b), to terminate the prospective relief in this case. That relief is contained in a 2001 Settlement Agreement and Order that requires these defendants to comply with a set of policies and procedures, known collectively as the Clark Remedial Plan (“CRP”), which they drafted to ensure that California prisoners with developmental disabilities were protected from serious injury and discrimination on the basis of their disability. See Americans with Disabilities Act, 42 U.S.C. § 12132; § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a); U.S. Constitution amends. VIII, XIV. Defendants maintain that prospective relief should be terminated because there are no current and ongoing violations of the plaintiff class members’ rights under federal law.

2. Plaintiffs and members of the plaintiff class are prisoners with developmental disabilities incarcerated within California’s prison system. They oppose defendants’ motion and seek further injunctive relief. They argue that an order requiring

1 compliance with the policies and procedures in the Clark Remedial Plan would be
2 insufficient to cure those statutory and constitutional violations, and that further relief is
3 therefore necessary.

4 3. Much of the evidence before the Court is not in dispute. First, there is no
5 dispute about the nature of the class. These prisoners represent an extremely small
6 percentage of the overall prison population who, because of their disability, are vulnerable
7 to physical, sexual and verbal abuse, exploitation, theft, and harassment. They also
8 require accommodations from the normal routines of prison life if they are to be safe and
9 able to participate meaningfully in prison activities and programs.

10 4. Second, there is no dispute about the utility of the Settlement Agreement
11 and the Clark Remedial Plan. Prison officials testified that the Remedial Plan has been
12 valuable to the California Department of Corrections and Rehabilitation (CDCR). These
13 witnesses also agreed that most of the Remedial Plan would continue regardless of the
14 Court's ruling.

15 5. What is in dispute, therefore, is whether the Order requiring compliance
16 with the Plan, including monitoring by plaintiffs' counsel and Court experts, is necessary.
17 To help answer that question one of the Court's experts, Dr. Peter Leone, conducted a
18 systemic review of the treatment of developmentally disabled prisoners in the CDCR.
19 Based on over 150 prisoner interviews, a review of extensive prison documents and
20 interviews with 29 prison staff at the seven prisons that house a majority of class
21 members, he concluded that "[w]hile some dedicated CDCR staff were providing
22 appropriate services and support to inmates with DD, the system as a whole appeared
23 indifferent to the needs of these inmates" and that "[t]he breadth and severity of problems
24 described in this report suggest that with some exceptions, inmates with DD do not
25 receive the protections and supports as described in the Clark Remedial Plan." Report of
26 Dr. Peter Leone, February 15, 2010, (Tr. Ex. 1) (Leone Report) at 4, 19.

27 6. The weight of the evidence supports and amplifies Dr. Leone's conclusions.
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1 In total the evidence demonstrates that mentally retarded prisoners and those with autism
2 spectrum disorders are regularly verbally, physically, and sexually assaulted, exploited,
3 and discriminated against in California prisons. Illiterate prisoners are not given the help
4 they need to understand or fill out important prison documents, leaving them with no way
5 to use sick call slips or grievance forms, unless they can pay other prisoners or beg them
6 for help. Developmentally disabled prisoners are punished for violating prison rules that
7 they do not understand, and are punished at hearings which they cannot comprehend.
8 These conditions violate those prisoners' rights to due process and to be free of unlawful
9 discrimination based on their disabilities.

10 7. In 2001, defendants admitted "that they [had] violated the federal rights of
11 plaintiffs in a manner sufficient to warrant the relief contained herein." Settlement
12 Agreement and Order, December 3, 2001 (Dkt # 194) (Settlement Agreement & Order),
13 ¶ 15. Today, defendants no longer admit that they are violating the federal rights of
14 prisoners with developmental disabilities, nor that continued relief is necessary because of
15 those violations. Based upon the evidence adduced at trial, this Court disagrees. For the
16 reasons explained below, this Court DENIES in part and GRANTS in part defendants'
17 motion for relief. Moreover, this Court GRANTS in part and DENIES in part plaintiffs'
18 motion for further relief.

19 **A. Procedural Background**

20 8. California prisoners with developmental disabilities filed this action in 1996,
21 claiming that defendants discriminated against them on the basis of their disabilities in
22 violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, and § 504 of
23 the Rehabilitation Act (§ 504), 29 U.S.C. § 794; that defendants were depriving them of
24 due process in violation of the Fourteenth Amendment; and that plaintiffs were living
25 under conditions that constituted cruel and unusual punishment in violation of the Eighth
26 Amendment. First Amended Complaint, October 31, 1996 (Dkt # 32), at 21-25. In their
27 First Amended Complaint, plaintiffs alleged that they were denied adequate
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1 accommodations, protection, and services because of their developmental disabilities. Id.
2 at 2-4. In particular, plaintiffs alleged that defendants did not protect the plaintiff class
3 from physical violence and manipulation by other prisoners; denied them due process in
4 disciplinary, grievance, parole, or other administrative proceedings; and denied them
5 equal access to good time credits and medical and mental health care, among other prison
6 services. Id. at 7-9, 12-13.

7 9. In 1998, at the parties' request, this Court ordered the appointment of two
8 neutral experts to assist the parties and the Court by, among other things, evaluating
9 defendants' proposed remedial plans and modifications to, and compliance with, the
10 plans. Order Appointing Experts and Prescribing Duties, August 18, 1998 (Dkt # 180).
11 The parties together chose Dr. Peter Leone and Dr. Melissa Warren to fill the expert roles.
12 Id. at 1.

13 10. Over the next several years, the parties, with assistance from Dr. Leone and
14 Dr. Warren, negotiated and agreed on specific remedial measures necessary to protect
15 class members' rights, formalized in the Clark Remedial Plan. The Remedial Plan sets
16 forth policies for identifying, classifying, housing, and accommodating each class
17 member, based upon the individual prisoner's level of disability. In the Settlement
18 Agreement and Order filed with this Court on December 3, 2001, defendants admitted
19 "that they [had] violated the federal rights of plaintiffs in a manner sufficient to warrant
20 the relief contained herein." Settlement Agreement & Order, ¶ 15. Defendants agreed to
21 implement the Clark Remedial Plan, subject to monitoring by plaintiffs' counsel,
22 evaluation by the Court experts, negotiation between the parties, and, if necessary,
23 enforcement by the Court. Id. ¶¶ 5, 8. Specifically, they agreed that "[t]he Court shall
24 retain jurisdiction to enforce the terms of this agreement. The Court shall have the power
25 to enforce the agreement through specific performance and all other remedies permitted
26 by law." Id. ¶ 5. As part of the settlement, all parties agreed that Dr. Leone and Dr.
27 Warren would continue in their roles as Court experts, with the same duties set forth in the
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1 Court's Order from August 18, 1998. Id. ¶ 6.

2 11. On July 24, 2009, defendants filed a motion to terminate the Settlement
3 Agreement & Order, claiming that there are no current or ongoing violations of plaintiff
4 class members' federal rights. Defendants' Motion to Terminate Settlement Agreement,
5 July 24, 2009 (Motion to Terminate) (Dkt #205). In the same motion, defendants moved
6 to dismiss relief in this case pursuant to Federal Rule of Civil Procedure 60(b)(5).
7 Plaintiffs filed an opposition on August 7, 2009, alleging that defendants had not met their
8 burden of proof and that current and ongoing violations of the rights of the plaintiff class
9 justified the continuation of relief in this case. Plaintiffs' Opposition to Defendants'
10 Motion to Terminate Settlement Agreement, August 7, 2009 (Opposition to Termination
11 Motion) (Dkt # 244). On March 9, 2010, plaintiffs filed a motion for further relief (Dkt #
12 329), which defendants opposed on April 5, 2010 (Dkt # 384).

13 12. This Court held an evidentiary hearing to determine whether there exist
14 current and ongoing violations of federal law and, if so, whether further relief is necessary
15 to cure those violations. The hearing began on May 10, 2010, and continued until May
16 18, 2010. Clerk's Notice, April 12, 2010 (Dkt # 395); Civil Trial Minutes, May 18, 2010
17 (Dkt #465).

18 13. In preparation for the hearing, the Court's expert in this case, Dr. Peter
19 Leone, visited seven institutions, spoke with 152 class members and 29 staff members,
20 and reviewed prisoner files and other documents. Peter Leone Expert Report (Tr. Ex. 1)
21 at 2-3. Based on these visits, Dr. Leone produced an expert report on February 15, 2010,
22 detailing his findings and his recommendations. See generally id.

23 14. During the six-day trial, this Court heard testimony from three expert
24 witnesses and more than 30 lay witnesses (18 by deposition), including class members,
25 correctional administrators, and prison staff members. The parties also submitted into
26 evidence close to 700 trial exhibits.

27 **B. Statutory Framework for the Motions**
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1 consent decree.” Rufo, 502 U.S. at 383.

2 17. The PLRA also requires that the Court “promptly rule on any motion to . . .
3 terminate prospective relief in an action with respect to prison conditions.” 18 U.S.C.
4 § 3626(e)(1). Prompt resolution is necessary because, under the PLRA, a termination
5 motion stays all prospective relief until the Court enters a final ruling. Id. § 3626(e)(2).
6

7 **2. Plaintiffs’ Motion for Enforcement and Further Remedial
8 Orders**

9 18. Plaintiffs move for enforcement of, and further relief under, the Settlement
10 Agreement & Order in this case. Pursuant to that Agreement, defendants committed to
11 implement the Clark Remedial Plan. The Clark Remedial Plan is a series of measures
12 developed with the assistance of Court-appointed experts and designed to address, in a
13 “fair and reasonable” manner, the violations of federal law that plaintiffs had identified in
14 their complaint. Settlement Agreement & Order, ¶ 15. In agreeing to the Remedial Plan,
15 defendants acknowledged that “they had violated the federal rights of plaintiffs in a
16 manner sufficient to warrant the relief contained herein.” Id.; see also Subia at RT 256:7-
17 12 (“[w]hen I first came into this department . . . we would just watch[] these inmates who
18 are filthy and walking around looking at the sun and picking up bugs and eating them on
19 the facility and consistently getting into trouble.”). As the Court has noted and defendants
20 have conceded, “as of 2001, the parties agreed that there was a need at that point, there
21 were violations at that point, there was a plan at that point, and the plan was narrowly
22 drawn at that point.” RT 8:14-17; see also Settlement Agreement & Order at ¶ 15.

23 19. The Court “retain[s] jurisdiction to enforce the terms of this agreement.”
24 Settlement Agreement & Order at ¶ 5. Moreover, the Settlement Agreement & Order
25 contemplated that plaintiffs could bring a motion for enforcement and further relief in
26 circumstances such as those presented here, by expressly allowing plaintiffs to move to
27 modify “if the plan does not effectively remedy defendants’ violations or if a modification
28 is necessary to ensure plaintiffs receive adaptive support services to which they are
entitled under the ADA, § 504 [of the Rehabilitation Act], or the Constitution.” Id. ¶ 11.

1 Plaintiffs bear the burden of proving that enforcement or modification of the Clark
2 Remedial Plan is necessary to address defendants’ violations of federal law.

3
4 **C. Defendants’ Obligations under Federal Law**

5 **1. ADA and § 504**

6 20. Under Title II of the Americans with Disabilities Act (ADA), “no qualified
7 individual with a disability shall, by reason of such disability, be excluded from
8 participation in or be denied the benefits of the services, programs, or activities of a public
9 entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. A
10 “qualified individual with a disability” suffers from a “physical or mental impairment that
11 substantially limits one or more major life activities,” including, but not limited to “caring
12 for oneself . . . , learning, reading, concentrating, thinking, communicating, and working.”
13 *Id.* at § 12102(1)(A), (2)(A). It is undisputed that the Clark class members fit these
14 criteria. See Settlement Agreement & Order at ¶¶ 1-2, 15; see also CRP (Tr. Ex. 476)
15 at 1. Furthermore, state prisons are “public entities” for the purposes of Title II. Penn.
16 Dep’t of Corrs. v. Yeskey, 524 U.S. 206, 210 (1998).

17 21. Section 504 of the Rehabilitation Act (§ 504) guarantees the same right of
18 non-discrimination to disabled individuals “under any program or activity receiving
19 Federal financial assistance” 29 U.S.C. § 794(a). Because Title II of the ADA was
20 modeled on § 504, “courts have applied the same analysis to claims brought under both
21 statutes.” Zukle v. Regents of Univ. of Cal., 166 F.3d 1041, 1045 n.11 (9th Cir. 1999)
22 (citations omitted); see also 42 U.S.C. § 12133 (“The remedies, procedures, and rights set
23 forth in [§ 504] shall be the remedies, procedures, and rights this subchapter provides to
24 any person alleging discrimination in violation of [section 12132 of this title].”).
25 Moreover, “courts routinely look to Rehabilitation Act case law to interpret the rights and
26 obligations created by the ADA.” Zukle, 166 F.3d at 1045 n.11. Like Title II of the
27 ADA, § 504 applies to state prisons. Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir.
28 1997).

1 22. Under the ADA and the Rehabilitation Act, defendants must provide Clark
2 class members with “reasonable accommodations” and “reasonable modifications” so that
3 they can avail themselves of prison services and participate in prison programs and
4 activities. 29 U.S.C. § 794; 28 C.F.R. § 35.130(b)(7); see also The Americans with
5 Disabilities Act Title II Technical Assistance Manual, § II-3.6100 (requiring public
6 entities to make reasonable modifications to their policies, practices, or procedures to
7 avoid discrimination), *available at* <http://www.ada.gov/taman2.html>.¹ To be “reasonable”
8 the accommodation or modification must give disabled prisoners “meaningful access” to
9 the service, program, or activity in question. Alexander v. Choate, 469 U.S. 287, 301
10 (1985).

11 23. The ADA encompasses all services, programs, and activities provided by a
12 prison to its prisoners. See, e.g., Crawford v. Ind. Dep’t of Corrs, 115 F.3d 481, 483 (7th
13 Cir. 1997) (“The use of a library is, equally clearly, an activity, and so, only a little less
14 clearly, is the use of the dining hall.”); Chase v. Baskerville, 508 F. Supp. 2d 492,
15 506 (E.D. Va. 2007) (defining the provision of “telephones, computers, cable televisions,
16 and books” as “services” under the ADA). Thus, “virtually every interaction between
17 prison officials and disabled inmates potentially exposes the State[] to liability . . . unless
18 the State[] promptly provide[s] reasonable accommodation.” Chase, 508 F. Supp. 2d at
19 505 (citing Kiman v. N.H. Dep’t of Corrs., 451 F.3d 274, 289-90 (1st Cir. 2006); Chisolm
20 v. McManimon, 275 F.3d 315, 327-30 (3d Cir. 2001)).

21 **2. Eighth Amendment**

22 24. The Eighth Amendment prohibits the government from exacting “cruel and
23 unusual punishment” on its citizens. U.S. Const. amend. VIII. “[T]he treatment a
24 prisoner receives in prison and the conditions under which he is confined are subject to
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26 ¹ Because the Title II Technical Assistance Manual provides the Department of
27 Justice’s interpretation of its own regulations, it “must . . . be given substantial deference
28 and will be disregarded only if ‘plainly erroneous or inconsistent with the regulation.’”
Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 732
n.11 (9th Cir. 1999) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512
(1994)).

1 scrutiny under the Eighth Amendment.” Helling v. McKinney, 509 U.S. 25, 31 (1993).
2 As such, prison officials “must provide humane conditions of confinement . . . and must
3 take reasonable measures to guarantee the safety of the inmates.” Farmer v. Brennan, 511
4 U.S. 825, 832 (1994) (internal quotations and citations omitted).

5 25. For an Eighth Amendment violation to lie, the deprivation suffered by the
6 prisoner must be sufficiently serious, and prison officials must be “deliberately
7 indifferent” to the deprivation. Farmer, 511 U.S. at 834. A prisoner need not establish
8 that he actually suffered a sufficiently serious deprivation; he must show only that “he is
9 incarcerated under conditions posing a substantial risk of serious harm.” Id. (citing
10 Helling, 509 U.S. at 35). As explained by the Supreme Court, it would be illogical “to
11 deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in
12 their prison on the ground that nothing yet had happened to them [A] remedy for
13 unsafe conditions need not await a tragic event.” Helling, 509 U.S. at 33.

14 26. “[D]eliberate indifference can be predicated upon knowledge of a victim’s
15 particular vulnerability (though the identity of the ultimate assailant not known in advance
16 of attack), or, in the alternative, an assailant’s predatory nature (though the identity of the
17 ultimate victim not known in advance of attack).” Brown v. Budz, 398 F.3d 904, 915 (7th
18 Cir. 2005).

19 **3. Fourteenth Amendment Due Process**

20 27. The Fourteenth Amendment provides that no state shall “deprive any person
21 of life, liberty, or property[] without due process of law.” U.S. Const. amend. XIV, § 1.
22 In the prison context, “States may under certain circumstances create liberty interests
23 which are protected by the Due Process Clause.” Sandin v. Conner, 515 U.S. 472, 483-84
24 (1995); see also Youngberg v. Romero, 457 U.S. 307, 307 (1982) (involuntarily
25 committed, mentally retarded individual had “constitutionally protected liberty interests
26 under the Due Process Clause”). Specifically, due process protections attach to state
27 actions that (1) affect a prisoner’s sentence in an unexpected manner, or (2) impose an
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1 “atypical and significant hardship on the inmate in relation to the ordinary incidents of
2 prison life.” Sandin, 515 U.S. at 484.

3 **D. The Clark Remedial Plan**

4
5 28. In 2001, the parties agreed that the Clark Remedial Plan represented the
6 narrowest, least intrusive set of procedures that could effectively ensure the federal rights
7 of developmentally disabled prisoners. From that time, the Remedial Plan has served as
8 the cornerstone of defendants’ efforts to comply with the Settlement Agreement reached
9 by the parties and effectuated by this Court.

10 **1. Identification**

11 29. As a threshold matter, defendants must ensure that developmentally disabled
12 prisoners are properly identified in order to provide reasonable accommodations to those
13 prisoners under the ADA and § 504. See Armstrong v. Davis, 275 F.3d 849, 876 (9th Cir.
14 2001) (because regulations implementing ADA require public entity to accommodate
15 persons identified as disabled, tracking system is necessary part of compliance). The
16 Clark Remedial Plan also requires that “[e]fforts to identify inmates with developmental
17 disabilities . . . be continuous.” CRP at 14.

18 **2. Reading and Writing Assistance**

19 30. A developmentally disabled prisoner’s literacy level can impede his or her
20 ability to use prison services or participate in prison activities or programs. Garcia v.
21 Taylor, No. 07-cv-474, 2009 WL 2496521, at *11 (N.D. Fla. Aug. 11, 2009). Thus, the
22 regulations implementing the ADA require public entities to “take appropriate steps” to
23 ensure that the communication of information concerning prison services, activities, and
24 programs is “as effective” for the disabled as for the non-disabled. 28 C.F.R. § 35.160. In
25 doing so, the prisons must provide such services as are necessary “to afford an individual
26 with a disability an equal opportunity to participate in” prison programs and activities. Id.
27 In determining what services are necessary, defendants must give “primary consideration
28 to the requests of the individual.” Id.

1 31. As stated by one appellate court charged with determining whether a prison
2 library provided meaningful access to its materials, “[i]t is not enough simply to say the
3 books are there, when the plaintiffs contend that they do not have the assistance necessary
4 to use the books properly.”² Cruz v. Hauck, 627 F.2d 710, 720 (5th Cir. 1980).

5 32. The Clark Remedial Plan recognizes that developmentally disabled
6 prisoners “may have poor ability to express themselves . . . in writing.” CRP at 6.
7 Further, “[t]hey will likely have difficulty with any task requiring reading or processing
8 written material,” and, in particular, “they may have difficulty with disciplinary,
9 classification, and/or appeal processes[, which] require reading and understanding.” Id.
10 Accordingly, corrections officers are duty-bound to provide reading and writing assistance
11 to the Clark class members who need it. See id. at 42 (officers must “[p]rovide support
12 services as directed by [the prisoner’s Interdisciplinary Support Team]”). And designated
13 institutions “must ensure that [CDCR] notices, orientations packages, announcements, and
14 similar printed materials are accessible to inmates with developmental disabilities.” Id. at
15 45.

17 **3. Meaningful Assistance in Disciplinary, Administrative, and** 18 **Classification Proceedings**

19 33. As noted above, defendants must, under the ADA, “take appropriate steps”
20 to ensure that staff members’ communications with developmentally disabled prisoners
21 are “as effective” as their communications with non-disabled prisoners. 28 C.F.R. §
22 35.160. Accordingly, defendants must not only provide staff assistants to
23 developmentally disabled prisoners in disciplinary, administrative, and classification
24 proceedings, but they also must ensure that those staff assistants are providing the

25 ² Indeed, because the Rehabilitation Act’s goals “should . . . mirror the goals of prison
26 officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives once
27 their sentences are complete,” providing prisoners with reading and writing assistance – in an
28 effort to “ensur[e] that inmates have meaningful access to prison activities” – serves “the goals of
both the institution and the Rehabilitation Act.” Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir.
1988).

1 prisoners with effective communication. Cf. Duffy v. Riveland, 98 F.3d 447, 456 (9th
2 Cir. 1996) (reversing summary judgment in favor of prison on deaf prisoner’s claim that
3 he was denied qualified interpreter at disciplinary hearing in violation of ADA). The
4 Clark Remedial Plan expressly recognizes this obligation. CRP at 8; see also id. at 42
5 (DDP counselor must serve as staff assistant as required), 61-62 (requiring training for
6 staff assistants).

7 34. Only through effective communication can defendants guarantee that
8 developmentally disabled prisoners have meaningful access to these proceedings and,
9 thus, satisfy their obligations to plaintiff class members under federal law. And, “[b]y
10 ensuring that inmates have meaningful access to . . . [such] proceedings . . . , the goals of
11 both the institution and the Rehabilitation Act are served.” Bonner v. Lewis, 857 F.2d
12 559, 562 (9th Cir. 1988).

13 35. The ADA also requires that prison staff try to counsel Clark class members,
14 rather than subjecting them to the disciplinary process, when they break prison rules that
15 they do not understand. The Ninth Circuit has “repeatedly recognized that facially neutral
16 policies may violate the ADA when such policies unduly burden disabled persons, even
17 when such policies are consistently enforced.” McGary v. City of Portland, 386 F.3d
18 1259, 1265 (9th Cir. 2004) (citations omitted); cf. Salley v. Circuit City Stores, Inc., 160
19 F.3d 977, 981 (3d Cir. 1998) (in employment context, entity “may not use established
20 policies regulating behavior to short-circuit the required analysis of whether . . . a
21 reasonable accommodation” is due to disabled person). In accordance with that
22 precedent, the Clark Remedial Plan mandates that, when addressing prisoner misconduct,
23 staff members “must take into consideration the severity of the inmate’s disability and the
24 inmate’s need for adaptive services when determining the [appropriate] method of
25 discipline.” CRP at 49. When the prisoner does not understand that he has broken a rule,
26 staff should provide the “reasonable accommodation” of “direct instructions, prompting,
27 or verbal counseling.” Id. Only if the developmentally disabled prisoner continues to
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1 engage in the misconduct should the employee resort to the disciplinary process. *Id.*

2 36. Like the ADA, § 504, and the Clark Remedial Plan, the Due Process Clause
3 requires that staff assistants provide effective communication to developmentally disabled
4 prisoners during disciplinary proceedings where there is a protected liberty interest at
5 stake.

6 37. “Due process [also] requires that a prisoner have ‘an opportunity to present
7 his views’ to the official ‘charged with deciding whether to transfer him to administrative
8 segregation.” Toussaint v. McCarthy, 926 F.2d 800, 803 (9th Cir. 1990) (quoting Hewitt
9 v. Helms, 459 U.S. 460, 476 (1983)).

10 4. Meaningful Access to Prisoner Grievance Procedures

11 38. Prison grievance procedures must be “readily available to all . . . inmates,”
12 and staff must make “appropriate provisions” to communicate those procedures to “the
13 impaired and the handicapped.” 28 C.F.R. § 40.3. Moreover, institutions must “ensure
14 that the procedure[s are] accessible to impaired and handicapped inmates.” Id. § 40.4.
15 The regulations implementing the ADA also require defendants to “adopt and publish
16 grievance procedures providing for prompt and equitable resolution of complaints alleging
17 any action that would be prohibited by [the Act].” 28 C.F.R. § 35.107(b).

18 39. Because access must be “meaningful,” Alexander, 469 U.S. at 301, prison
19 staff must ensure that developmentally disabled prisoners can submit grievances. See
20 Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995) (“The right of meaningful access to
21 the courts extends to established prison grievance procedures.” (citation omitted)). In
22 recognition of this obligation, the Clark Remedial Plan requires staff members to “provide
23 the necessary assistance to all DDP inmates on a case-by-case basis to ensure that those
24 who have difficulty . . . communicating in writing will be provided reasonable access to
25 [grievance] procedures.” CRP at 45.

26 40. The right of meaningful access to grievance procedures is particularly
27 important because a prisoner must exhaust the prison’s administrative remedies by
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1 complying with that procedure before he can access the courts. 42 U.S.C. § 1997e(a). As
2 the Ninth Circuit has recognized, “[t]he reality and substance of any of a prisoner’s
3 protected rights are only as strong as his ability to seek relief from the courts or otherwise
4 to petition the government for redress of the deprivation of his rights.” Bradley, 64 F.3d
5 at 1280.

6 **5. Assistance with Self-Care and Daily Living Activities**

7 41. Like almost all services provided by a prison, daily living activities such as
8 the use of showers, the exchange of laundry, and the receipt of medication constitute
9 “services, programs, or activities” under the ADA and § 504. See, e.g., Phipps v. Sheriff
10 of Cook County, 681 F. Supp. 2d 899, 916 (N.D. Ill. 2009) (“showering, toileting, and
11 lavatory use . . . regarded as programs and/or services under the ADA”).

12 42. In recognition that developmentally disabled prisoners “may show evidence
13 of poor self care[, such as] seldom bathing, soiled or unkempt clothing, poor eating
14 habits,” and a “disorganized” or “dirty” living area, the Clark Remedial Plan extends the
15 same obligations to defendants. CRP at 6, 8; see also id. at 42 (officers must “[p]rovide
16 support services as directed by [the prisoner’s Interdisciplinary Support Team]”).

17 **6. Protection from Abuse**

18 43. Defendants acknowledge that they “have a duty to protect all inmates,
19 including members of the [p]laintiff class, from violence at the hands of other inmates.”
20 Defendants’ Trial Brief, March 26, 2010 (Dkt # 361), at 15 (citing Clem v. Lomeli, 566
21 F.3d 1177, 1181 (9th Cir. 2009)). Defendants also recognize that the developmental
22 disabilities of Clark class members put those prisoners at greater risk for abuse and
23 exploitation than non-developmentally disabled prisoners. Subia at RT 247:8-15.
24 Specifically, developmentally disabled prisoners “may give up possessions to other
25 inmates” or “become vulnerable to sexual predators [or] manipulation by other inmates.”
26 CRP at 6. Accordingly, in adopting the Clark Remedial Plan, defendants acknowledged
27 that it was necessary for prison staff members to monitor these prisoners to promote their
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1 personal safety. Id. at 8, 42. Also for safety reasons, defendants agreed to accommodate
2 Clark class members in the housing assignment process. For example, DD1s with abuse
3 concerns and DD2s “must only be placed in the building designated for [them],” and
4 “[n]on-DDP inmates with a history of sexual [abuse] and/or predatory behavior against
5 ‘weaker’ individuals’ must not be housed in . . . designated buildings.” Id. at 39-40.

6 44. Failing to accommodate plaintiff class members in these manners also raises
7 concerns under the Eighth Amendment. When a prisoner demonstrates either that he has
8 suffered physical or sexual assault at the hands of other prisoners, or that he lives with the
9 “substantial risk” of such assault, he establishes “sufficiently serious deprivation” and,
10 presuming the institution’s deliberate indifference to that deprivation, the infliction of
11 cruel and unusual punishment. See Berg v. Kincheloe, 794 F.2d 457, 460-61 (9th Cir.
12 1986) (prisoner who was beaten and raped by another prisoner stated an Eighth
13 Amendment claim); Johnson v. Johnson, 385 F.3d 503, 524-27 (5th Cir. 2004) (Eighth
14 Amendment protects prisoners from assault occasioned by staff’s failure to respond to
15 known risk of assault). As explained below, the crucial question with regard to the Eighth
16 Amendment is whether it has been established that Plaintiffs, on a class basis, have proved
17 the necessary deliberate indifference.

18 7. Adequate Notice of Parole Conditions

19 46. The ADA and § 504 mandate that defendants effectively communicate
20 conditions and terms of parole to developmentally disabled prisoners. Because defendants
21 provide notice of parole conditions as a service to their prisoners, they must afford
22 plaintiff class members the “reasonable accommodation” of effective communication to
23 ensure that the prisoners understand what they must do to avoid being reincarcerated.
24 Armstrong, 275 F.3d at 861-62.

25 47. Furthermore, “due process mandates that [a] petitioner cannot be subjected
26 to a forfeiture of his liberty for [otherwise non-criminal] acts unless he is given prior fair
27 warning [that the acts are proscribed].” United States v. Grant, 816 F.2d 440, 442 (9th
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1 Cir. 1987) (internal quotation and citation omitted). While Grant addressed the conditions
2 of probation, not parole, the Supreme Court has recognized that, from a due process
3 standpoint, parole and probation are analogous. See Gagnon v. Scarpelli, 411 U.S. 778,
4 782 (1973) (same liberty interests at stake in probation revocation and parole revocation
5 hearings). As such, the Fourteenth Amendment requires that prisoners approaching parole
6 are notified of the conditions of their parole.

7 48. It is axiomatic that, to fulfill the requirements of due process, notice must be
8 “reasonably calculated, under all the circumstances, to apprise interested parties” of that
9 which is noticed. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
10 Given that many developmentally disabled prisoners either cannot read or do not fully
11 comprehend what they read, the only way for defendants to ensure that plaintiff class
12 members receive sufficient notice of their parole conditions before leaving prison is for
13 prison staff members to effectively communicate those conditions. Cf. Mastrangelo v.
14 U.S. Parole Comm’n, 682 F.2d 402, 405 (2d Cir. 1982) (it would be “manifestly unfair” if
15 petitioner was reincarcerated because he was unaware of conditions of special parole).

16 49. CDCR rules track federal law in this regard. Wells at RT 500:21-24. Under
17 those rules, “what’s required is to have a staff member to be present . . . to effectively
18 communicate with the inmate.” Id. at 504:18-505:1. As an extension of this obligation,
19 the Clark Remedial Plan requires “[p]arole staff [to] ensure that upon reporting to a parole
20 unit, parolees with developmental disabilities are provided parole instructions in such a
21 manner as to ensure that the parolee understands . . . the parole process, the parolee’s
22 responsibilities, and the available assistance and services.” CRP at 57. So that parole
23 staff can provide this service, institutions must “notify parole field staff . . . of any inmate
24 with a verified developmental disability, as well as identified adaptive deficits and
25 prescribed support services.” Id. at 56.

26 **E. Characteristics of CDCR and the Clark program**

27 54. Basic facts regarding the California prison system and the *Clark* remedial
28

1 program are not in dispute.

2 55. CDCR includes 33 prisons, 12 community facilities, and 41 conservation
3 camps throughout the State of California. Joint Proposed Final Pretrial Order (Dkt # 366)
4 at 6; Subia at RT 218:11-16. There are currently approximately 166,000 prisoners in the
5 33 prisons. Subia at RT 226:25. There are over 100,000 parolees in California at any
6 given time. Id. at 230:14-18. Every year, CDCR receives approximately 130,000 new
7 prisoners and releases approximately the same number. Id. at 230:19-231:1. CDCR
8 employs 66,000-67,000 people with approximately 600-900 custodial staff per institution.
9 Id. at 231:2-7.

10 56. There are 1,348 prisoners currently identified as members of defendants'
11 Developmental Disability Program (DDP). Salz at RT 85:19-86:8. That is the "highest []
12 point" for the number of prisoners the CDCR has had in the DDP. Wells at RT 560:6-10.
13 In the past 10 years, the number of budgeted positions for DDP staff has been reduced
14 from 143 total positions to 137 total positions. Id. at 556:3-23. Not all of these 137
15 budgeted DDP staff positions are filled. Id. at 561:21-562:13. Every prison in California
16 has developmentally disabled prisoners from time to time. Salz at RT 133:17-25. The
17 biggest challenge defendants face in maintaining compliance with the Clark Remedial
18 Plan is the size of CDCR. Subia at RT 230:7-13.

19 57. At present, seven institutions are designated for permanent placement of
20 DD1 and DD2 prisoners: Central California Women's Facility; California Men's Colony
21 (CMC); California Medical Facility (CMF); California State Prison-Corcoran; California
22 Rehabilitation Center (CRC); California State Prison-Los Angeles County (Lancaster);
23 and the California Substance Abuse Treatment Facility and State Prison at Corcoran
24 (SATF). Joint Proposed Final Pretrial Order (Dkt # 366) at 7. Five prisons are designated
25 for permanent placement of DD3 prisoners: California State Prison-Sacramento; Central
26 California Women's Facility; CMC; CMF; and Valley State Prison for Women. *Id.*

27 58. Richard J. Donovan Correctional Facility (R.J. Donovan) currently houses
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1 prisoners who are dually diagnosed DDP and Enhanced Outpatient Program (EOP)
2 (specialized housing for mentally ill prisoners) and retains some DDP staff. *Id.* Within
3 these institutions, staff usually designate specific units for placement of developmentally
4 disabled prisoners. *Id.* Approximately 300 developmentally disabled prisoners are not
5 housed in designated institutions. Salz at RT 133:12-16.

6 59. To better accommodate the particular needs of prisoners designated as
7 developmentally disabled, CDCR “clusters” these prisoners in designated institutions.
8 Joint Proposed Final Pretrial Order (Dkt # 366) at 7. In other words, CDCR aims to place
9 prisoners with similar needs together. *Id.*

10 60. Although most plaintiff class members are sent to designated prisons,
11 medical and psychiatric needs may override the clustering criteria. *Id.* Thus, class
12 members with serious medical or mental health needs may be housed in a health care
13 setting. *Id.*

14 61. According to the sole defense expert, it is “essential to have a plan such as
15 the [Clark Remedial Plan] for developmentally disabled prisoners.” Scaramozzino at RT
16 891:8-12. Other witnesses agreed: the Clark Remedial Plan is “very beneficial, and . . . all
17 parties have agreed on that from the beginning.” Salz at RT 157:23-158:1. It is “a
18 program that makes sense.” *Id.* at 159:4-23. The Clark Remedial Plan is “very useful.”
19 Subia at RT 255:24-256:18. “[I]t’s . . . a good thing to have the [Clark Remedial Plan]
20 and in terms of how [CDCR is] administering the prisons, it’s helpful.” *Id.* at 257:3-6.
21 The DDP works very well and is a necessary program. Serna at RT 355:16-19, 356:19-
22 21. The Clark Remedial Plan “made some savings to the operation of the prison” by
23 managing the problems that developmentally disabled prisoners face. Scaramozzino at
24 RT 892:2-14. The Clark Remedial Plan “creates a safer environment for [CDCR] staff
25 and for the inmates.” Subia at RT 256:19-257:2.

26 62. Providing the services required by the Clark Remedial Plan does not create a
27 burden for defendants. Subia at RT 256:19-257:2. The placement of developmentally
28

1 disabled prisoners in the DDP ensures that these prisoners no longer “carr[y] a lot of staff
2 time” and saves defendants money by not requiring “a lot of higher, more expensive
3 levels of custody.” *Id.* at 159:17-23. “[I]t’s not a very expensive program to run.” Salz at
4 RT 159:9.

5 **F. Definition and Characteristics of Developmental Disabilities**

6 63. The parties are in full agreement regarding the definition and characteristics
7 of people with developmental disabilities. CRP at 1-2; Joint Proposed Final Pretrial Order
8 (Dkt # 366) at 6. There is no dispute that individuals with developmental disabilities have
9 cognitive deficits and functional impairments. CRP at 6-7; Dkt # 366 at 6. The parties
10 agree that such individuals require support accommodations and are entitled to receive
11 them in prison. CRP at 1-3, 7-9; Dkt # 366 at 6. The only dispute in this case is whether
12 prisoners with developmental disabilities are being adequately identified and
13 accommodated.

14 **1. Individuals with Developmental Disabilities**

15 64. Prisoners with developmental disabilities are not always easy to distinguish
16 from non-disabled prisoners. According to Dr. Nancy Cowardin, only a small percentage
17 of people with developmental disabilities have identifying physical characteristics or
18 impairments in physical or motor skills. Expert Report of Nancy Cowardin, Ph.D (Tr. Ex.
19 5) (Cowardin Report) at 10. Dr. Donald Salz, a CDCR Chief Psychologist with oversight
20 of the Clark program as it applies to mental health issues, agrees. Salz at RT 42:4-9, 91:5-
21 8.

22 65. In addition, many developmentally disabled people work hard to mask their
23 disabilities. Cowardin Report at 10, 16; Cowardin at RT 626:15-23. Masking behavior is
24 even more common among developmentally disabled people who are considered to be
25 higher functioning with only “mild” support needs—the majority of developmentally
26 disabled prisoners. Cowardin Report at 16. Masking results in compensatory behaviors
27 such as wearing a broken watch to provide a reason to ask another person what time it is
28

1 or carrying a book to pretend to be literate. Cowardin at RT 624:4-625:2. Thus, plaintiff
2 class members may appear to have skills in areas in which they actually require help.

3 66. Individuals with developmental disabilities also have inconsistent and
4 uneven skill development, which can mask areas of impairment. Cowardin at RT 621:7-
5 20, 626:4-14; Salz at RT 75:25-76:16; Leone at RT 781:18-25. A person with adequate
6 self-care skills, for example, may have significant functional impairments in other areas.
7 Cowardin at RT 621:7-20. Dr. Salz described encountering a prisoner who was able to
8 read entire novels yet was so impaired socially that he required a very high level of
9 supervision. Salz at RT 75:25-76:16.

10 67. People with developmental disabilities might have deficits in information
11 durability. In other words, they might need repeated reminders, even if the task is one
12 they have undertaken before. Cowardin Report at 12-13; Cowardin at RT 621:21-623:3.

13 68. Many individuals with developmental disabilities have trouble transferring
14 information: taking a skill they have learned in one area and applying it to a similar task in
15 another area. Cowardin Report at 12-13. At the evidentiary hearing, Dr. Cowardin
16 described how a developmentally disabled prisoner might learn to stay inside the yellow
17 boundary lines painted in his housing unit, but may not apply that skill to another prison if
18 transferred. Cowardin at RT 623:4-624:3; see also Leone at RT 769:6-10.

19 69. People with developmental disabilities can function well in highly
20 structured environments such as prisons, where personal choices regarding food, clothing
21 and activities are eliminated. Cowardin Report at 36. Prisons, however, also have
22 numerous and complex rules. Id. The stress of learning, understanding, remembering,
23 and complying with the multitude of rules that govern prison life can offset the potential
24 benefits of the highly structured environment for developmentally disabled prisoners. Id.

25 70. Dr. Cowardin reports that myths about the functional capacities of people
26 with developmental disabilities perpetuate the idea that such “people . . . perform poorly
27 due to ignorance, insufficient education, or poor motivation/effort” Id. at 10. In fact,
28

1 “a developmental disability is a severe, chronic condition that manifests in the
2 developmental period (birth through age 18), requires an array of mild to intensive
3 supports, and is expected to last for a lifetime. Developmental disabilities may be
4 cognitive, physical, or a combination of both.” Id.; see also CRP at 1.

5 Mental Retardation

6 72. The most common form of developmental disability is mental retardation.
7 Cowardin Report at 14. Mental retardation is characterized by limitations in intellectual
8 functioning, typically reflected in intelligence quotients of approximately 70 or below and
9 concurrent limitations in adaptive behavior originating prior to the age of 18. Id.
10 Limitations in adaptive behavior required to meet the criteria include deficits in at least
11 one of the following: conceptual skills (reading, writing, math), social skills (gullibility,
12 interpersonal skills, following rules) and practical skills (such as activities of daily living,
13 safety, use of money). Id.

14 73. Mental retardation is commonly classified as “mild,” “moderate,” or
15 “severe” in diagnostic and clinical settings. Id. at 15. However, the term “mild” mental
16 retardation is misleading. In fact, everyone with mental retardation has significant
17 functional impairments, compared to people without mental retardation. Id. at 15-16;
18 Cowardin at RT 630:4-631:18. “People with mental retardation have subaverage abilities
19 in multiple areas that impact learning and adaptive functioning.” Cowardin Report at 12.
20 Thus, compared to people without mental retardation, they have “low functional skills
21 across the board (e.g., communication, socialization, community/home, independence,
22 and functional academics).” Id.

23 Autism and Spectrum Disorders

24 74. Autism and autism spectrum disorders are also developmental disabilities.
25 Id. at 13-14. Autism is a severe cognitive disorder that “originat[es] in infancy or early
26 childhood” and is “characterized by self-absorption, an inability to interact socially,
27 repetitive behavior, language dysfunction, inflexible adherence to specific nonfunctional
28

1 routines or rituals, stereotyped and repetitive motor mannerisms, and persistent
2 preoccupation with parts of objects.” Id. at 13; see also Cowardin 632:7-633:24.

3 Asperger’s Syndrome, which is an autism spectrum disorder and “considered a ‘milder’
4 variant of autism, is characterized by social isolation, clumsiness, and obsessive
5 preoccupation with limited conversation topics.” Cowardin Report at 13; see also
6 Cowardin at RT 633:18-24 (characterized by “perseveration on a topic” of conversation),
7 633:7-9 (explaining perseveration as a fixation on a particular area).

8 Other Developmental Disabilities

9 75. Epilepsy, cerebral palsy, and traumatic brain injury are also developmental
10 disabilities. Cowardin Report at 11. Mental illness, on the other hand, is not a
11 developmental disability. Cowardin at RT 631:22-24. Mental illness can co-occur with
12 developmental disabilities, but not all developmentally disabled people have mental
13 illness, and vice versa. Id. at 631:25-632:6. Mental illness is not a cognitive disability; it
14 does not affect intelligence. Id. at 635:16-636:1.

15 **2. Functional Impairments of Prisoners with Developmental** 16 **Disabilities**

17 76. The parties agree that plaintiff class members may require assistance in
18 multiple areas. CRP at 6-7; Salz at RT 82:21-84:16; Leone at RT 749:4-10; see generally
19 Cowardin Report at 18-36. The Court finds the following are examples of areas in which
20 developmentally disabled prisoners have deficits.

21 77. Many developmentally disabled prisoners have impaired communication
22 skills. CRP at 6; Cowardin Report at 26. Many are unable to read and write. Salz at RT
23 83:4-7, 116:18-21. They have difficulty understanding instructions, especially multi-step
24 instructions, and difficulty with any task that requires writing, such as filling out requests
25 for medical or mental health care and grievances. Cowardin Report at 25-27, 29-30, 32-
26 33. It is difficult for them to express themselves, and they often need assistance choosing
27 words to make their point. Id. at 26. As a result, developmentally disabled prisoners
28 often have difficulty communicating, self-advocating, and understanding what takes place

1 during prison administrative proceedings and grievance processes. Id. at 25-28; CRP at 6;
2 Salz at RT 83:13-17. They are therefore at risk for unintentionally waiving their rights.
3 CRP at 6.

4 78. Many prisoners with developmental disabilities have poor socialization
5 skills. Id.; Cowardin Report at 18-21; Salz at RT 83:18-25. These prisoners have a
6 “mental youngness,” Cowardin at RT 620:19, and are naive with respect to prison culture
7 and routines. Cowardin at RT 625:3-13; CRP at 6; Salz at RT 83:18-25. This “mental
8 youngness” is especially problematic in prison settings because prisoners exhibiting this
9 characteristic are vulnerable to abuse and manipulation by other prisoners. Cowardin
10 Report at 19-21; Salz at RT 123:11-14, 124:21-125:4; CRP at 6. These prisoners become
11 easy targets for abuse “as their weaknesses becomes obvious to other prisoners in their
12 housing units.” Cowardin Report at 19. They might make poor social choices, such as
13 giving their property to other prisoners, increasing their vulnerability and risk of abuse.
14 Id.; CRP at 6; Salz at RT 84:4-16. They are susceptible to becoming involved in a cycle
15 of disciplinary infractions involving other prisoners and staff members as a result of their
16 lack of judgment and inability to understand consequences. CRP at 6; Leone at RT
17 765:23-766:2; see also Cowardin Report at 18 (failure to “understand the fine points or
18 nuance of complex social situations . . . increases the risk that they will misunderstand
19 changing rules and regulations, make poor decisions based on confusion or
20 misunderstanding, and get into trouble”).

21 79. Many prisoners with developmental disabilities are also naïve about health
22 and safety. These prisoners have difficulty identifying, treating, or preventing illness,
23 administering first aid to themselves, and understanding sexuality and basic safety. CRP
24 at 7; Cowardin Report at 30. This deficit is especially problematic among
25 developmentally disabled prisoners with poor self-advocacy skills. Because these
26 prisoners may be masking their disabilities, or simply unaware that there is a problem or
27 how to access assistance, they are not likely to request help. Cowardin Report at 24-25;
28

1 Cowardin at RT 624:4-12. If they do attempt to self-advocate, they have difficulty
2 complying with multi-step procedures for accessing resources, such as medical and dental
3 services, grievances, the law library, and religious services. Cowardin Report at 30-33.

4 80. Many developmentally disabled prisoners have poor self-care skills. Id. at
5 28-30; see also CRP at 6; Salz at RT 84:4-5. They may need reminders to bathe, brush
6 their teeth, and wash their clothes, and they can have soiled or unkempt clothing, poor
7 eating habits, and dirty or disorganized cells. CRP at 6; Cowardin Report at 28. Poor
8 hygiene further increases plaintiff class members' risk for abuse in a prison environment.
9 Cowardin Report at 29; Salz at RT 113:18-114:8.

10 81. Prisoners are subject to "an abundance of rules regarding all aspects of their
11 lives." Cowardin Report at 30. Developmentally disabled prisoners often have difficulty
12 following rules and seeking needed assistance. CRP at 6; Salz at 114:9-115:2. Because
13 they have "[i]ssues pertaining to durability of learning," they require repeated reminders
14 about the same rules. Cowardin Report at 31. Developmentally disabled prisoners might
15 have difficulty understanding some rules that may be intuitive to others. Id. at 30-31.
16 Thus, "[s]taff members who suspect a prisoner of being in violation of a rule must
17 consider whether his or her disability was a factor in the transgression." Id. at 31. In
18 addition, to the extent that rules are posted in writing, many plaintiff class members have
19 difficulty reading and comprehending them. Id.

20 82. Developmentally disabled prisoners often have difficulty with self-direction
21 and making choices. CRP at 7; Cowardin Report at 36. It is difficult for such prisoners to
22 follow schedules, initiate activities that are appropriate to particular settings, complete
23 required tasks, problem-solve, and demonstrate appropriate assertiveness and self-
24 advocacy. CRP at 7. For example, these prisoners have difficulty choosing and initiating
25 leisure activities and appropriately engaging in those activities by taking turns,
26 communicating with others, and behaving in an acceptable manner. Id. A lack of self-
27 direction can increase their vulnerability. Cowardin Report at 18-19.
28

1 83. Similarly, these prisoners have difficulty maintaining work assignments due
2 to inappropriate social behavior and a lack of relevant work skills. Id. at 7. They may be
3 unable to apply functional academic skills to work assignments including managing
4 oneself at work and communicating with individuals in the workplace. Id.

5 **3. Support Services Required by Prisoners with Developmental**
6 **Disabilities**

7 84. The parties agree that prisoners with developmental disabilities require
8 varied support services to access programs, services, and protection in prison. CRP at 7-
9 9; Salz at RT 82:25-84:16,128:6-17; see generally Cowardin Report at 18-37.

10 85. Many developmentally disabled prisoners require prompting to begin or
11 complete activities, such as showers, tooth-brushing, access to medical care, laundry
12 exchange, and timely attendance at work and meals. Id.; Cowardin Report at 28-30; Salz
13 at RT 112:19-25.

14 86. Prisoners with developmental disabilities require assistance by trained staff
15 members to understand and participate in disciplinary, classification, and administrative
16 processes. CRP at 8; Salz at RT 83:13-17. They require staff assistance to understand
17 what is taking place during these proceedings. Salz at RT 83:13-17. They also need help
18 choosing appropriate words to describe their positions. Cowardin Report at 26. Where
19 forms or documents are provided, they need help reading, writing, and understanding
20 those forms. Salz at RT 83:4-7; Cowardin Report at 25-28.

21 87. Developmentally disabled prisoners often require monitoring and additional
22 supervision of their safety, property, behavior, and self-care. CRP at 8; Cowardin Report
23 at 18-24. Staff members must closely monitor the behavior of developmentally disabled
24 prisoners to ensure that they are not being manipulated to give up property or to violate
25 prison rules. Cowardin Report at 31-32; Leone at RT 771:18-24, 772:16-20. Monitoring
26 is required so that developmentally disabled prisoners do not fall prey to prolonged abuse
27 without understanding that help is available. Cowardin Report at 21; Leone at RT 807:10-
28 16.

1 88. Many prisoners with developmental disabilities require coaching, especially
2 in work and academic assignments, to acquire the skills necessary to complete the
3 activities independently. CRP at 8; see also Salz at RT 84:17-85:1.

4 **4. All Developmentally Disabled Prisoners Require Individualized**
5 **and Proactive Help**

6 89. The parties agree that the level of support required by each prisoner varies.
7 Cowardin Report at 17; Salz at RT 82:25-84:16, 85:2-5. Moreover, staff members must
8 consider the individual support needs of each prisoner when providing adaptive support.
9 Leone at RT 755:5-16, 762:23-763:8; see also Salz at RT 122:23-123:10 (officers must
10 monitor developmentally disabled prisoners in proceedings that implicate their due
11 process rights). Simply making generalizations about prisoners based on their
12 classifications as DD1, DD2, or DD3 will not account for uneven skill development and
13 anomalies in support needs that exist between prisoners with the same classification.
14 Cowardin Report at 17-18; Salz at RT 75:25-76:16. Staff members must communicate
15 frequently with developmentally disabled prisoners to determine what adaptive supports
16 they require to access prison programs and services. Cowardin Report at 35-36; see also
17 Salz at RT 122:6-123:2.

18 90. Because of plaintiff class members' individualized support needs and
19 uneven skill development, it is impossible to make broad generalizations about the
20 support needs of an individual prisoner. Cowardin at RT 621:7-622:19; Leone Report at
21 2; Leone at RT 749:11; Salz at RT 75:25-76:16, 91:2-18. Rather, an individualized
22 classification system that identifies a prisoner's required level of help in multiple areas is
23 more appropriate. Cowardin at RT 653:12-654:4.

24 91. Developmentally disabled prisoners who are considered higher functioning
25 and are masking their deficits may forgo asking for help if they think it will make them
26 appear disabled. Cowardin Report at 16. Further, prison culture dictates that prisoners
27 avoid seeking help from prison staff. Salz at RT 122:6-13. It also discourages revealing
28 instances of abuse to staff. *Id.* at 122:14-19, 126:17-127:9.

1 92. Thus, it is important for staff to provide proactive assistance and to monitor
2 the support needs of all developmentally disabled prisoners, even those who appear high
3 functioning. Cowardin Report at 16, 35-37; see also Salz at RT 122:6-123-10.

4 **5. CDCR Classification System for Prisoners with Developmental**
5 **Disabilities**

6 93. Defendants have developed a system for classifying prisoners with
7 developmental disabilities into three categories—DD1, DD2, and DD3—based on their
8 level of support needs. CRP at 21-23; Salz at RT 75:3-24. Prisoners classified as DD1
9 are equivalent to those with “mild” mental retardation. Cowardin Report at 16-18.
10 Although considered higher functioning, DD1 prisoners still require a variety of adaptive
11 supports. Cowardin Report at 17; CRP at 21-22; Salz at RT 75:5-10. Prisoners classified
12 as DD2 function in the “moderate” range of mental retardation and, therefore, require
13 more frequent prompts and adaptive supports than DD1 prisoners. Cowardin Report at
14 17; CRP at 22-23; Salz at RT 75:11-16. Prisoners classified as DD3 are in the “severe”
15 range of impairment and require regular, intensive prompts and assistance to complete
16 self-care and daily living tasks. Cowardin Report at 17; CRP at 23; Salz at RT 75:17-24.
17 The majority, approximately 55 %, of the prisoners identified as developmentally disabled
18 by defendants are DD1. Cowardin Report at 16. DD2 prisoners comprise 40 %, and DD3
19 prisoners 5 %, of the prisoners in the DDP. *Id.*

20 **II. The Weight of the Evidence Demonstrates Current and Ongoing Violations of**
21 **the Federal Rights of the Plaintiff Class**

22 **A. Expert Testimony**

23 94. In addressing the central issue of whether there exist current and ongoing
24 violations of the federal rights of plaintiff class members, the Court places great weight on
25 the conclusions of Dr. Peter Leone, who has served as the Court’s expert for 12 years.
26 Order Appointing Experts and Prescribing Duties, August 18, 1998 (Dkt. # 180), at 1. Dr.
27 Leone, who was selected and agreed upon by both parties, is highly qualified to serve as
28 an expert. *Id.* He has a Ph.D. in special education, has long standing memberships in the

1 Council for Exceptional Children and the American Statistical Association, has received
2 numerous research grants over the years, and is currently a professor at the University of
3 Maryland, where his research focuses on, among other things, behavioral problems in
4 institutional settings. Leone at RT 716:21-718:13. Dr. Leone also has extensive
5 experience working with adult corrections in Maryland, Florida, Texas, Illinois,
6 Pennsylvania, New York, Connecticut, and New Hampshire. Leone at RT 719:14-719:24.
7 Dr. Leone has prepared teachers in the Maryland Department of Corrections to work with
8 developmentally disabled individuals, and researched and prepared a report for the
9 National Institute of Corrections on the Texas Mentally Retarded Offender Program.
10 Leone at RT 719:2-719:13. Defendants have never previously challenged his ability to
11 assess compliance with the Clark Remedial Plan (CRP). Leone at RT 726:8-726:11. Nor
12 have defendants previously questioned Dr. Leone's expertise to opine about the
13 Developmentally Disabled Program (DDP) in the prisons. Leone at RT 721:17-21.

14 95. To reach his conclusions in this action, Dr. Leone conducted an extensive
15 and rigorous investigation, including site visits at seven state prisons, at which more than
16 half of the identified *Clark* class members reside. Peter E. Leone, Ph.D., *On the Status of*
17 *Inmates with Developmental Disabilities in the California Department of Corrections and*
18 *Rehabilitation*, Feb. 15, 2010 (Tr. Ex. 1) (Leone Report) at 2; see also Tr. Ex. 20 (listing
19 numbers of developmentally disabled prisoners at each prison, including those Dr. Leone
20 visited). He interviewed 152 prisoners (more than 10 % of identified Clark class
21 members) and 29 prison staff members. Leone Report at 2-3.

22 96. Dr. Leone has conducted thousands of interviews of prisoners to develop his
23 interview methodology. Leone at RT 734:22-735:4. For this investigation, he
24 interviewed prisoners in a confidential setting and used a standard set of questions for his
25 interviews. Leone at RT 735:5-13, 732:19-24. He developed a standardized rating system
26 to rank prisoners' well-being at the various prisons, and placed prisoners in the three
27 categories conservatively: if in doubt, he categorized the prisoner as having fewer
28

1 problems. Leone Report at 5, Leone at RT 802:7-13. He also conducted a correlation
2 study to determine whether developmentally disabled prisoners considered more impaired
3 (*i.e.*, DD2 or DD3) reported proportionally more problems than developmentally disabled
4 prisoners considered less impaired (*i.e.*, DD1). The study demonstrated that there was
5 little or no connection between the level of a developmentally disabled prisoner's
6 disabilities and the severity of the problems reported. Leone at RT 743:11-746:11.

7 97. Moreover, Dr. Leone did not take everything prisoners told him as true.
8 Instead, using a method he calls "triangulation," he evaluated the credibility of the
9 prisoners and corroborated the statements with other prisoners, prison documents, staff
10 interviews, his own personal observations, and conversations with persons outside of
11 prison. Leone at RT 729:14-730:1, 740:18-741:4.

12 98. The conclusions Dr. Leone reached were highly consistent with much of the
13 testimony, deposition excerpts and evidence presented at trial. Defendants introduced no
14 evidence at the hearing to contest any fact on which Dr. Leone based his opinions.³ The
15 only rebuttal defendants offered was that of Dr. Scaramozzino. As discussed *infra* in §
16 III.C, Dr. Scaramozzino provided no credible rebuttal testimony because he is not an
17 expert in the relevant areas and knows little about actual conditions for developmentally
18 disabled prisoners in California prisons. Further, as § III.C sets forth in greater detail, he
19 withdrew some of his criticisms of Dr. Leone after being presented with evidence that his
20 assumptions were incorrect, and the remainder of the criticisms are unconvincing.

21 99. In sum, Dr. Leone's expertise, depth of knowledge, experience in this case,
22 and reasonable conclusions are entitled to great weight.

23 **B. Defendants Fail to Adequately Identify Developmentally Disabled**
24 **Prisoners**

25 100. The parties agree that prisoners identified as having developmental

26 _____
27 ³ Defendants sought to introduce a rebuttal report after the close of evidence. For
28 reasons explained more thoroughly below, this Court has declined to consider that
evidence. Even if it were considered, the testimony and report of Dr. Leone are more
persuasive.

1 disabilities in California prisons are entitled to receive accommodations under federal law
2 and the Clark Remedial Plan. Leone Report at 1-2; Settlement Agreement & Order (Dkt #
3 194) at 2; Joint Proposed Final Pretrial Order (Dkt # 366) at 6-8. To provide those
4 accommodations, defendants must accurately identify prisoners who are developmentally
5 disabled. Defendants concede that they cannot guarantee protection and accommodation
6 for class members who are not identified. Salz at RT 128:2-17. Thus, it is essential that
7 defendants accurately identify prisoners with developmental disabilities in order to ensure
8 those prisoners receive the protections and accommodations required under the Clark
9 Remedial Plan and federal law. Nevertheless, the evidence at trial raises serious questions
10 about whether defendants are identifying all prisoners with developmental disabilities.

11 **1. Multiple Reliable Sources Suggest that 2-4 % of the Prison**
12 **Population is Developmentally Disabled**

13 101. Both the Court expert, Dr. Leone, and plaintiffs' expert, Dr. Nancy
14 Cowardin, agree that, although they vary widely, the most conservative and reliable
15 estimates suggest that developmentally disabled prisoners comprise at least 2-4 % of the
16 prison population. Leone at RT 793:13-794:1 (“[t]he prevalence currently in the system .
17 . . is significantly below the most conservative estimates that researchers and scholars
18 have opined about”); Leone Report, 1 n.1; Cowardin at RT 641:7-11, 644:23-645:10
19 (citing studies that show expectations of 2-10 % of prisoners have mental retardation); *see*
20 *also* Cowardin Report at 15-17.

21 102. Multiple studies on the prevalence of developmental disabilities in prison
22 support the opinions of Dr. Leone and Dr. Cowardin that the prevalence rate for
23 developmental disabilities in prison should be at least 2-4 %. Dr. Leone relies primarily
24 on two studies that discuss the prevalence rate of developmental disabilities in prison. *See*
25 *J. Jones, Persons with Intellectual Disabilities in the Criminal Justice System*, Int’l J. of
26 *Offender Therapy & Comp. Criminology*, 723 (2007) (Jones); and J.H. Noble & R.W.
27 *Conley, Toward an Epidemiology of Relevant Attributes, The Criminal Justice System*
28 *and Mental Retardation: Defendants and Victims* (R. W. Conley et al. eds., 1992) (Noble

1 & Conley). Both publications are surveys of other more in-depth studies. Jones at 724-
2 25, Noble & Conley at 27-34. The Noble & Conley text is a comprehensive survey of
3 studies conducted for the purpose of identifying the percentage of mentally retarded
4 people in state and federal prisons. Noble & Conley at 28-34. Drs. Noble and Conley
5 identify and list the specific tests that were used in different states and describe the
6 methods for administering testing in those states. Id. The Noble & Conley study
7 identifies where the reliability of the data was tested and validated. Id. at 28, 30. Despite
8 noting wide variations in the prevalence rates between states, both studies find a
9 prevalence rate of 2 % to be on the low end of rates identified by states. Id. at 37; Jones at
10 724.

11 103. Dr. Petersilia's report, relied on by Dr. Cowardin, like the studies cited by
12 Dr. Leone, surveys research examining the prevalence rate of people in prison with
13 developmental disabilities. Tr. Ex. 477 at 25-26, J. Petersilia, *Doing Justice? Criminal*
14 *Offenders with Developmental Disabilities* (California Policy Research Center 2000)
15 (Petersilia) at 5. Dr. Petersilia concludes that research confirms an estimated 4-5 % of
16 people in prison have mental retardation/developmental disabilities. Id. at 25-26.

17 104. The Court finds the opinion of the experts on this issue is reliable and
18 persuasive.

19 **2. Defendants Have Only Identified .80 Percent of the Prison**
20 **Population as Having a Developmental Disability**

21 105. Defendants use a three-step screening process to identify prisoners with
22 developmental disabilities. CRP (Tr. Ex. 476) at 3-11; Salz at RT 44:13-45:13, 46:8-
23 47:13. The first step in the screening process includes a brief, ten-minute IQ screen called
24 the Quick Test. CRP at 4-5; Salz at RT 44:11-45:13. Only prisoners who score 80 or less
25 on the Quick Test will move on to the second step in the screening process, a more
26 extensive cognitive screening tool called the Test of Nonverbal Intelligence or TONI-
27 Third Edition (TONI). Salz at RT 44:11-45:13. Those prisoners who score 80 or less on
28 the TONI will be evaluated by prison staff to measure their adaptive functioning deficits

1 in the correctional setting. Id. at RT 46:25-47:16. Prisoners who pass all screening tests
2 can be referred for reevaluation later by any staff member who observes behavior
3 indicating that the prisoner may have a developmental disability. Id. at RT 73:6-74:2;
4 CRP at 15-16.

5 106. Under the current process for screening, defendants have identified
6 approximately 1,348 prisoners, or .80 % of the total prison population, as developmentally
7 disabled. Salz at RT 51:8-20, 66:13-25. The prevalence rate of developmental disabilities
8 in California prisons, as determined by defendants, has remained constant at .80 % since
9 2002 when defendants completed testing of all existing prisoners. Id. at RT 66:13-25.

10 107. None of defendants' evidence credibly explains the disparity between the
11 two figures—the .80 % of prisoners identified by defendants and 2-4 % that Drs. Leone and
12 Cowardin believe are in the prison system. Defendants justify the lower figure on two
13 grounds. First, defendants state that since completing testing of prisoners in 2002, they
14 have consistently identified .80 % of the population as developmentally disabled. Id. The
15 Court rejects this circular reasoning. Defendants have presented no evidence
16 demonstrating that the screening process has been validated to ensure that it identifies
17 developmentally disabled prisoners accurately and reliably. And, to the knowledge of the
18 Court expert, no validation tests have been conducted. Leone at RT 794:2-18, 795:9-13.
19 Thus, the only conclusion that can be drawn from this fact is that the screening process
20 identifies a consistent percentage of prisoners as disabled, not that the screening process
21 *accurately* identifies a certain percentage of prisoners as disabled.

22 108. The only support for defendants' position is the testimony of Dr. Salz about
23 the prevalence of developmental disabilities in other state prison systems. Dr. Salz
24 testified that he received information regarding prevalence rates in other states from a
25 collegial survey, based on self-reporting by states, put together by an Oklahoma prison
26 psychologist. Salz at RT 145:22-146:6, 146:22-24, 148:15-21, 149:1-21. The survey is
27 unpublished and was not offered or admitted into evidence. Id. at 149:15-24. Dr. Salz
28

1 does not know what states are covered in the survey, what definition of developmental
2 disabilities is being used, what tests or other criteria are used, or whether the self-reported
3 information from the states is even accurate. Id. at 146:25-147:10, 147:22-148:8.
4 Furthermore, Dr. Salz admits that he is unaware of any empirical research studies
5 regarding the prevalence rate of mental retardation in prison. Id. at RT 64:1-9.

6 109. The Court finds the mutual opinion of experts Drs. Leone and Cowardin
7 more reliable. First, Dr. Leone is the neutral Court-appointed expert in this case, who has
8 direct experience in numerous other correctional systems. Leone at RT 719:14-7:20:5.
9 He has served in this role for 12 years. Id. at RT 719:25-720:5. Defendants have never
10 contested his expertise to opine about the developmental disabilities program in California
11 and, in fact, defendants have called on his expertise and opinions regarding the
12 developmental disabilities program multiple times. Id. at RT 720:2-721:21. Defendants
13 have similarly called on the expertise of Dr. Cowardin. Cowardin at RT 616:13-617:1,
14 638:7-18; Cowardin Report at 7. Dr. Salz, on the other hand, was not called as an expert
15 by defendants, has apparently never served as an expert, has experience which is limited
16 to California, and is responsible for the screening procedures that are being called into
17 question. Salz at RT 40:7-23, 42:4-9, 42:15-43:3, 64:21-66:5, 67:17-68:7.

18 110. Second, the opinions of Drs. Leone and Cowardin are grounded in the
19 scientific literature on this issue. Both of these experts rely on published studies of the
20 prevalence of developmentally disabled individuals in prison and published articles
21 analyzing those studies. Tr. Ex. 1 at 1, 4; Cowardin at RT 667:10-668:9, 670:24-674:19.
22 Dr. Salz, on the other hand, relies exclusively on the California's experience with the
23 results of the procedure he supervises and an unpublished informal survey by a prison
24 psychologist from Oklahoma, neither of which is an adequate basis for his opinion. Salz
25 at RT 64:12-67:6, 149:15-21. Accordingly, the Court finds that the opinions of Drs.
26 Leone and Cowardin are entitled to more weight.

27 111. Credible expert opinions compel the finding that the methodology used by
28

1 defendants to identify prisoners with developmental disabilities likely under-identifies the
2 number of developmentally disabled people in California prisons.

3
4 **C. The Evidence Demonstrates that Defendants Continue to Fail to
5 Provide Plaintiff Class Members with Access to Prison Programs,
6 Services, and Activities**

7 112. Plaintiff class members are entitled to assistance and protection they need in
8 order to have access to prison programs, services, and activities. See infra § I.C.1. That
9 right includes assistance with due process proceedings. See infra § II.C.3. It also
10 includes the right to protection from the unreasonable risk of harm. See infra § II.C.2.
11 The weight of the evidence demonstrates that defendants currently fail to provide the
12 assistance required to secure these rights.

13 **1. Defendants Systematically Fail to Provide Required Help with
14 Reading and Writing**

15 113. Most developmentally disabled prisoners need help reading and writing.
16 Salz at RT 116:18-20; 83:4-7. If developmentally disabled prisoners who need help
17 reading and writing do not receive assistance from staff, they cannot file grievances,
18 complaints against staff members, or sick call slips to obtain medical or mental healthcare.
19 Id. at RT 117:5-22. The failure to provide such assistance violates the Clark Remedial
20 Plan (CRP). Salz at RT 119:10-11.

21 114. Defendants have failed to provide systemic support to developmentally
22 disabled prisoners who require assistance reading and writing. The Court's expert, Dr.
23 Peter Leone, testified that in "most cases" staff did not "respond to the . . . problems of
24 daily living" including the "inability of many of these inmates to read or to advocate for
25 themselves." Leone at RT 755:5-16; see also Leone Report (Tr. Ex. 1) at 3-4, 11-14
26 (detailing representative evidence that Leone relied on for this conclusion); Tr. Ex. 303
27 (DD2 prisoner complains "there is no-one to help with" reading or writing); Tr. Ex. 237
28 (DD prisoner frustrated because unable to speak to DDP officer); Tr. Ex. 265 (DD
prisoner complains that "the DDP are not helping" him).

115. Dr. Leone's conclusions and staff's failure to provide required

1 accommodations were borne out by other evidence in the case. The testimony of several
2 prison staff members demonstrated their ignorance of—or indifference to—their
3 obligation to provide reading and writing support. Gonzalez Dep. (Tr. Ex. 483) at 80:9-12
4 (ADA Coordinator at California Medical Facility [CMF] admitted he did nothing to
5 ensure “that staff was providing reading and writing assistance”), 55:23-56:20 (did
6 nothing to ensure the librarian was helping DD prisoners); Nies Dep. (Tr. Ex. 492) at
7 77:16-17, 77:24-78:15 (ADA Coordinator at Deuel Vocational Institution [DVI] testified
8 his staff expects DD prisoners to go to other prisoners first and “are trained to provide that
9 type of assistance [reading and writing sick call requests] if there’s no one else
10 available”); Mandeville Dep. (Tr. Ex. 485) at 109:25-110:11 (ADA Coordinator at CMF
11 concerned that “the services are not being provided as intended” because she has heard
12 that prisoners are going to other prisoners for assistance); Banks Dep. (Tr. Ex. 484) at
13 73:23-25 (DDP Officer at CMF admits that she does not “ever help with completing sick
14 call requests”).

15 116. Testimony from plaintiff class members also established defendants’ failure
16 to provide the reading and writing support needed to allow these prisoners to participate as
17 fully as non-disabled prisoners in prison programs, services, and activities. See
18 Davenport Dep. (Tr. Ex. 498) at 14:24-15:21, 23:16-24:5, 38:16-21 (request for assistance
19 with laundry slip repeatedly ignored), 18:25-19:9 (explained to staff he could not read
20 military time and was told to learn), 19:13-20:9 (requested assistance writing a grievance
21 against a staff member and was referred to that staff member and “[n]othing came of it” so
22 had to pay another prisoner to write grievance); Mendez Dep. (Tr. Ex. 480) at 13:21-25,
23 17:4-17 (asked for staff help with sick call slip and was told “you’ve got to find an inmate
24 to do it”), 21:25-22:4 (told to find a prisoner to help him read and write letters), 22:21-
25 23:2 (“quit asking” for help from DDP officer after trying three or four times without
26 success), 33:22-35:12 (had to rely on other prisoners to read his disciplinary write-ups to
27 him on three different occasions); Houseknecht at RT 1001:2-18 (needed help filling out
28

1 complicated prison forms, but nobody offered to help him read or write); Wright Dep. (Tr.
2 Ex. 496) at 77:6-25 (officers who deliver prison papers to him do not read them to him);
3 Smith at RT 512:20-23, 513:2-4, 9-17, 513:25-514:15 (needs help filling out forms such
4 as grievances, canteen slips, and sick call requests but living unit officers have “refused to
5 help [him] read and write”), 515:8-15 (DDP officer refused to help file a complaint
6 against another staff member), 519:24-520:10 (has asked DDP Counselor Rhodes “for
7 help many a times” but stopped because never receives help), 516:10-517:5 (has to pay
8 other prisoners \$5 to \$7 in food and cosmetics to help him read and write canteen slips,
9 sick call slips, and grievances because DDP officer “is never around”), 517:11-17 (has to
10 wait until he has money to obtain help). CDCR headquarters officials do not monitor
11 sufficiently to ensure compliance with defendants’ obligations. Salz at RT 142:9-11, 17-
12 20, 143:2-6, 9-13 (admits that he does not monitor—nor have personal knowledge of—
13 whether DD prisoners are receiving assistance with reading and writing); Wells at RT
14 555:8-12 (does not know whether all DD prisoners receive needed help reading and
15 writing).

16 **a. Because of Defendants’ Failure to Provide Required**
17 **Reading and Writing Help, Plaintiff Class Members Are**
18 **Forced to Pay for Such Services, Which Exposes Them to**
19 **Abuse**

19 119. Because developmentally disabled prisoners do not receive staff assistance
20 with reading and writing, they are forced to pay other prisoners for such services, which
21 exposes them to abuse and exploitation. See Subia at RT 248:14-249:2. Dr. Leone found
22 a widespread practice of prisoners using their canteen items, packages from home or parts
23 of their meals to pay for reading and writing support from other prisoners. Steven
24 Ramirez (#153) had to give up his lunch in order to get another prisoner to write for him.
25 Leone Report at 13. Trynon Jefferson (#78) gives other prisoners food and coffee for
26 helping him with his grievances. Id. at 12. Curtis Brumfield (#149) has had to pay his
27 cellmate with cookies for help writing documents. Id. at 13. Kuykendal Nairobi (#25)
28 pays other prisoners with lunch food to file a grievance. *Id.* at 14. Prisoner #42 has to pay

1 are “unlikely to know about or access such forms.” Id. at 32-33. They generally need
2 assistance reading, understanding, and completing these forms. Id.

3 122. To illustrate this problem, Dr. Leone pointed to the example of Mr.
4 Brumfield (#149), a diabetic, who “was afraid of losing his feet” because he was
5 concerned about the length of time between receiving his meal and receiving his insulin.
6 Leone at RT 770:12-15; 777:11-12; 777:17. “He hadn’t seen a Doctor in awhile.” Id. at
7 777:19. Mr. Brumfield is illiterate and “when he asks [officers] for help they tell him to
8 ask his bunky or his cellmate.” Id. at 777:7-9. But his cellmate told him, “I can’t do your
9 time and my time.” Id. at 777:9-10; see also Tr. Ex. 4 at 2 (DD prisoner who has ongoing
10 medical problems had medical procedure cancelled because he ate or drank water after
11 midnight the evening before his scheduled medical procedure; he did not know not to do
12 so); Leone at RT 752:10-753:9 (DD prisoner relied on cellmate to arrange appointment
13 with the eye doctor; “he wasn’t able to get assistance except through his cellmate, and so
14 his cellmate was writing his request to see medical staff”); see also Tr. Ex. 423 (DD
15 prisoner did not receive medical care for three-week-old injury because no assistance to
16 write request).

17
18 **c. Defendants’ Failure to Provide Required Reading and**
19 **Writing Help to Plaintiff Class Members Deprives Them**
20 **of Appropriate Access to Canteen Purchases**

21 124. Defendants’ failure to help developmentally disabled prisoner fill out
22 canteen forms forces “illiterate inmates to secure the help of others in order to complete
23 the process,” which puts them at “risk of exploitation and abuse by prisoners who take
24 advantage of the situation.” Cowardin Report at 22-23. Given their adaptive deficits,
25 developmentally disabled prisoners face many difficulties in successfully completing the
26 complicated canteen process, which requires a prisoner to fill out the appropriate form to
27 withdraw money from his account, read and identify what items to purchase on a pre-
28 printed form, calculate the total value of selected items and determine if it exceeds the
amount in his account, find the canteen, deliver the form to the appropriate person or in-

1 box, determine if he received all the items requested on the form, insure the correct
2 amount was deducted from his account, pick up the purchase, and transport it safely back
3 to his housing unit. Id. at 23.

4 125. Dr. Leone found that prisoners who cannot read or write are unable to
5 participate in canteen. Canteen problems were “widespread” in his prison tours, for all
6 DDP designations. Leone at RT 774:7-10. Some developmentally disabled prisoners
7 “have problems just filling out the request” for canteen. Id. at 771:16-19; see also Smith
8 at RT 516:10-517:5 (has to pay other prisoners from \$5 to \$7 in food and cosmetics to
9 help him read and write canteen slips, sick call slips, and grievances because the DDP
10 officer “is never around”); Blake Dep. (Tr. Ex. 497) at 81:10-83:19 (needs help filling out
11 canteen forms.) One plaintiff class member noted he was regularly pressured to surrender
12 canteen items without recourse. Leone Report at 3, n. 6 (Mr. Lopez (#37) was forced
13 regularly to give up his canteen; he does not know how to read or write or file a
14 grievance).

15 **d. Defendants’ Failure to Provide Required Reading and**
16 **Writing Help to Developmentally Disabled Prisoners**
17 **Denies Them Access to the Prison Grievance System and**
18 **the Courts**

19 126. Defendants’ failure to provide the support required to allow plaintiff class
20 members to pursue grievances prevents them from meeting the exhaustion requirement
21 necessary to achieve court redress. See 42 U.S.C. § 1997e(a). DDP staff is required to
22 provide assistance that includes “completing any forms or documents necessary to secure
23 any rights or benefits available to non-disabled inmates.” CRP at 8. More specifically,
24 developmentally disabled prisoners must have meaningful access to a law library. Cf.
25 Bounds v. Smith, 430 U.S. 817, 829 (1977). As envisioned by the Plan, this requirement
26 means that DDP staff at designated institutions must offer the following services: (1)
27 provision of forms and assistance in reading and “scribing” them; (2) identifying and
28 providing research materials; (3) making an electronic or prisoner reader available; and
(4) submission of forms/documentation to the court. CRP at 47. The form for initiating

1 grievances for prisoners is called Form 602.

2 127. Dr. Leone found that staff is not assisting prisoners with writing grievances.
3 “[S]ome inmates indicated they did not know how [to] file [a] 602 because they couldn’t
4 write. Some inmates indicated that they had their 602’s returned to them.” Leone at RT
5 819:12-17. On one occasion, a developmentally disabled prisoner’s form was returned
6 because he had not written it himself. Id. “[S]ome of them said . . . I file a 602 and I
7 never hear back about it, I don’t know what happens.” Id. at RT 830:15-17. Leroy
8 Hawkins (#133) was “told by [correctional officers] that it was not the job of the DD
9 [correctional officers] to write 602s (appeals) for inmates.” Leone Report at 12.

10 128. Dr. Leone also found that developmentally disabled prisoners are unable to
11 file grievances because prison staff members do not assist them with library services.
12 Leone at RT 819:18-22. For example, Mr. Dupont’s (#21) locker was broken into and he
13 lost most of his possessions. Leone Report at 9. The Victims Compensation and
14 Government Claims Board advised him that he could file suit for compensation; but
15 “when he tried to get assistance from” the Library Technical Assistant (LTA), she stated
16 “that she cannot help file lawsuits against the State.” Id. Similarly, Michael Bell (#83)
17 reported that the LTA “told him that she can’t write anything for him that goes out of the
18 institution.” Id. at 12; see also Tr. Ex. 4 at 3-4 (LTA Ibbotson “indicated that she was told
19 not to assist DD inmates with 602s” and the “lack of support for filing 602s was expressed
20 by several inmates who complained that they had no one to assist them if they did not
21 know an inmate who could help”), 2-3 (LTA said “she couldn’t help [him] with a 602
22 while he was in the ‘hole’”), 2 (Messrs. Wells, Mickiewicz, and West “reported that
23 officers were not available to help and that they relied on cellmates to read materials to
24 them . . . Several inmates who asked correctional officers or the library technician for
25 assistance reported being told to ask other inmates for help”).

26 129. Testimony from plaintiff class members corroborated Dr. Leone’s findings.
27 Daniel Mendez had to pay other prisoners to get help reading and writing grievances.
28

1 Mendez Dep. at 23:12-17; 24:19-21. It cost him \$40 to get a grievance written, which
2 was measured by the other prisoners by calculating the value of items from his packages
3 sent by his mother. Id. at 23:15-24. Twice he had to give up part of his package to pay
4 for grievances. Id. at 24:8-12. Brandon Petties filed a grievance for not getting enough
5 yard time—it was written by other prisoners. Petties Dep. at 49:15-50:1. The grievance
6 was denied and he was never told why. Id. at 50:6-25; see also Davenport Dep. at 19:13-
7 20:9 (officer refused to help Mr. Davenport write a grievance and he had to pay another
8 prisoner to write it); Smith at RT 515:8-15 (DDP officer refused to help him file a
9 grievance).

10 130. Prisoners who file grievances sometimes face retaliation from staff for doing
11 so. See Leone at RT 828:3-20 (prisoner faced same-day retaliation by an officer who had
12 given him a disciplinary write-up because the prisoner had filed a grievance appealing the
13 disciplinary write-up and it was granted), 828:21-829:24 (another incident of retaliation
14 against a prisoner who filed a grievance), 762:21-763:1 (prisoner filed a grievance against
15 an officer and his possessions were subsequently “lost”; officer told him “[t]hat will teach
16 you to file a 602”); Leone Report at 8-9.

17 **e. The Evidence Clearly Shows that Defendants Fail to**
18 **Provide Proactive Adaptive Support**

19 131. It is not disputed that defendants must be proactive in offering adaptive
20 support to plaintiff class members. As Dr. Salz testified, “[i]t’s essential for staff who are
21 responsible for addressing the needs of developmentally disabled prisoners to be
22 proactive.” Salz at RT 122:2-4; see also Cowardin Report at 35-36. In Dr. Salz’s words,
23 “[c]orrectional officers have to offer help” to developmentally disabled prisoners “and not
24 just respond to complaints” because “the other way would not be effective due to prison
25 culture. But we have to be teaching them that we need to change the culture so that
26 prisoners know that an officer will help. But they won’t know that unless the officer tells
27 them, ‘I will help you.’” Salz at RT 122:6-13.

28 132. However, the evidence reflects that defendants fail to proactively offer

1 adaptive support assistance. See, e.g., Pearson at RT 372:12-14 (DDP officer does not ask
2 DD prisoners if they need help with reading and writing, but waits for them to come to
3 her); Banks Dep. at 16:25-17:21 (DDP officer states that if DD prisoners need assistance
4 with writing forms, they would come to her; she has not had a prisoner come to her);
5 Clausing Dep. (Tr. Ex. 491) at 96:12-98:5 (DDP officer never approached by some DD
6 prisoners to ask for help reading and writing, and he will not go to them and ask them if
7 they need help reading and writing, even if prisoner’s Form 128C-2 indicates the prisoner
8 needs help), 101:16-106:9 (did not offer to write grievance for DD2 prisoner complaining
9 that his television was wrongfully taken by staff); Nies Dep. at 111:8-15 (ADA
10 Coordinator does not read or explain written orientation materials to DD prisoners).

11 **2. Defendants Systematically Fail to Provide Necessary Help with**
12 **Self-Care**

13 134. Many plaintiff class members need help to remember to perform basic self-
14 care activities such as eating and cleaning themselves. The evidence shows that these
15 needs are not being met.

16 **a. Without Proper Accommodations Some Plaintiff Class**
17 **Members Cannot Take Care of Themselves**

18 135. Dr. Leone found pervasive problems for plaintiff class members who were
19 unable to attend to their self-care needs without assistance. See, e.g., Leone at RT 775:25-
20 776:10 (Mr. Anthony Roque (#139) forgot his utensils and was forced to eat with his
21 hands because staff would not let him back in the housing unit to retrieve his utensils), id.
22 at 754:14-755:2 (several prisoners wore the same clothes for a long period of time because
23 they never received their clothes back or did not understand what to do to get clean
24 clothes).

25 136. In particular, class members are not receiving the assistance they require to
26 maintain their own personal hygiene. Dr. Leone found that “[s]everal inmates I
27 interviewed had not bathed in some time; others were disheveled and dirty and clearly
28 needed assistance in meeting their daily needs.” Leone Report (Tr. Ex. 1) at 9; see also id.

1 at 17 (Mr. Rice (#154) was filthy, smelled, and staff had noted that he had “extremely
2 poor personal hygiene”), 7 (Mr. Houseknecht (#109) had not showered in more than a
3 week); Tr. Ex. 4. at 2 (three prisoners reported that officers were not available to help and
4 they had difficulty showering on a regular basis), id. (“[s]everal other inmates had
5 significant hygiene issues that required attention”), id. (had not showered for three and a
6 half weeks and did not have a towel.); Leone at RT 752:21-753:4 (Mr. Bradley (#55)
7 smelled and had not showered recently; he was “pretty unkempt”); Tr. Ex. 444 (clinician
8 observes over a three-month period that DD2 prisoner had “poor grooming – very long
9 greasy hair and a shirt that is very dirty from his hair grease – over many weeks likely”);
10 Tr. Exs. 428–429, 432–434, 438–439 (clinician notes over a ten-month period the “poor
11 hygiene and grooming,” “unkempt” appearance and “body odor” of DD2 prisoner who
12 requires prompts and who “does not take showers as scheduled”); Tr. Ex. 243.

13 137. Dr. Leone also found that defendants fail to provide necessary prompting
14 and assistance to prisoners who require help with basic grooming. Tr. Ex. 4 at 2-3
15 (prisoner's fingernails extended well beyond the end of his fingers and were curved and
16 cracked; he had been in administrative segregation for roughly three months and had no
17 way to cut his nails); Leone Report at 14 (prisoner reported that he has to pay \$1 for a
18 haircut; his hair was long and unkempt but he was waiting for two soups so he could
19 afford to pay for a haircut).

20 138. Testimony from plaintiff class members bolsters Dr. Leone’s conclusions.
21 Smith at RT 526:6-8, 526:13-20 (needs reminders to take showers and his cellmate or
22 friends remind him because staff fails to do so; as often as three times a week he forgets to
23 shower at all because nobody reminds him), 526:22-527:7 (needs reminders to do laundry
24 but staff does not help him with this process; friend fills out his laundry slip); Davenport
25 Dep. (Tr. Ex. 498) at 108:17-109:1, 18:13-22 (forgets “to shower . . . a lot;” officers do
26 not prompt him to shower, his bunkie tells him when to shower), at 109:17-22 (forgets to
27 go to meals three times a week); Houseknecht at RT 1032:17-21, 1033:4-14 and Tr. Ex.
28

1 261 (took only two or three showers in the two months that he was in administrative
2 segregation and did not have a blanket for two months; CASE evaluation indicates that he
3 has difficulty reading and telling time and that his cellmate cleans the cell and tells him
4 what to do); Tr. Ex. 303 (DD prisoner thinks he submitted laundry slip but has not
5 received any clothing for five months); Mendez Dep. (Tr. Ex. 480) at 38:19-39:17
6 (sometimes forgets to take showers and his underarms smell; other prisoners told him to
7 take a birdbath but staff did not remind him to take showers), 40:6-41:3 (staff did not tell
8 him it was time to exchange laundry; had to pay another prisoner \$15-20 a month to help
9 him remember), 167:10-18 (staff at SATF and Wasco never reminded him to brush his
10 teeth), 41:1-3 (another prisoner helped him get orthopedic shoes): Blake Dep. (Tr. Ex.
11 497) at 52:4-53:12 (needs prompting to remember to take medications; failed to take
12 medicine because he forgot), 53:17-24,55:15-18 (at times, needs prompting to remember
13 to take showers and do his job); Wright Dep. (Tr. Ex. 496) at 37:20-25 (staff never ask
14 him if he needs help filling out laundry slips), 38:19-39:13 (other prisoners talk about his
15 laundry when he has not changed his shirt in a few weeks but DDP officers do not remind
16 him).

17
18 **b. Prisoners Who Cannot Keep Themselves Clean Are at Risk of Harm**

19 139. Because staff fails to provide the necessary adaptive services, plaintiff class
20 members are exposed to harm. Developmentally disabled prisoners who cannot attend to
21 their basic hygiene face negative consequences from other prisoners. Salz at RT 113:18-
22 114:8; see also id. at 113:1-5 (DD prisoner who needs prompting to complete self-care
23 could suffer “serious consequences” if not prompted).

24 140. Dr. Cowardin agreed, and explained further: “[i]n places such as prison,
25 where people are confined in close quarters such as small cells and overcrowded dorms,
26 proper hygiene can become a serious safety concern. Prisoners with poor hygiene,
27 regardless of the reason, can become the target of assault by others.” Cowardin Report at
28 29. Dr. Leone further elaborated: “inmates who don’t regularly bathe . . . become social

1 pariahs,” transmit disease, and “have all kinds of problems in a prison setting.” Leone at
2 RT 751:4-8. Prisoners who have trouble with self-care are identified as “potentially
3 vulnerable,” and some are harassed, and even attacked, for their vulnerability and
4 unacceptable hygiene habits. Leone at RT 751:4-10; Wright Dep. at 45:6-23 (had
5 conflicts with former bunkie about the mess around his bed), 38:10-18 (bunkie confronted
6 him about having dirty laundry and “smelling up the area”); Mendez Dep. at 39:5-10
7 (sometimes forgets to take showers and “inmates get mad” at him); Smith at RT 526:6-
8 527:7, 527:21-528:11 (needs prompts to shower and do laundry and was attacked and
9 beaten “for getting in the wrong shower”).

10
11 **c. Prison Staff Members Do Not Provide the Necessary Support**

12 141. Dr. Leone concluded that the serious deficits he saw and learned about were
13 a result of failures on the part of prison staff. Leone Report at 3 (“[a] number of inmates
14 were dirty and unkempt suggesting that [correctional officers] were not prompting them to
15 shower and change clothes regularly”). According to Dr. Leone, “the expectation is that
16 trained correctional staff are tuned into and are able to respond to the kind of problems of
17 daily living, the particular vulnerabilities, the inability of many of these inmates to read or
18 to advocate for themselves” but, in “most cases,” he did not find that staff was aware of
19 these kinds of issues. Leone at RT 755:3-16. One reason that staff does not accommodate
20 the needs of plaintiff class members is because “in many cases” developmentally disabled
21 prisoners are “intimidated by staff and [don’t] feel comfortable asking for assistance.” *Id.*
22 at RT 753:16-19.

23 142. The evidence supports Dr. Leone’s opinion. DDP officers do not monitor
24 developmentally disabled prisoners’ daily activities or maintain frequent contacts with
25 them. Banks Dep. (Tr. Ex. 484) at 32:20-35:12 (DDP Officer Banks at CMF: “I don’t do
26 nothing on a daily basis with the particular DD inmates”), 36:18-37:11 (does not prompt
27 DD prisoners to shower, clean cells, change clothes, or brush teeth), 72:8-12 (does not
28 prompt DD prisoners to attend meals), 72:13-15 (does not check if they are sending in

1 laundry), 72:16-18 (does not inspect cells to see if they are clean), 64:5-7 (does not
2 contact DD prisoners' work assignment supervisor), 83:13-16 (has never been told by a
3 supervisor that she does not have enough contact with DD prisoners); Tr. Ex. 406 and
4 Clausing Dep. (Tr. Ex. 491) at 120:18-128:13 (log documenting that a DD2 prisoner who
5 was incontinent was prompted to shower only once over the course of one month).

6 143. At least one DDP counselor, by her own admission, fails to ensure that the
7 required adaptive services are provided. DDP Counselor Brown at CMF cannot recall
8 helping developmentally disabled prisoners access health care and does not know what an
9 Interdisciplinary Support Team (IDST) is and has never been a member of an IDST, even
10 though Dr. Salz testified that the correctional counselor is a "mandatory member" of the
11 IDST.⁴ Brown Dep. (Tr. Ex. 481) at 72:1-8, 132:4-13; Salz at RT 96:5-7; see also Brown
12 Dep. at 34:17-35:6 (the only prompt she could remember giving was for prisoners to get
13 clothes washed), 27:4-16 (the only characteristics of DD prisoners she could think of were
14 cognitive issues).

15 144. ADA Coordinators admitted to supervision so lax that they cannot be
16 ensuring the reminders to perform basic self-care are provided. Nies Dep. (Tr. Ex. 492) at
17 99:21-100:4 (ADA Coordinator at DVI does not know whether housing officers speak to
18 DD prisoners on a daily basis); Gonzalez Dep. (Tr. Ex. 483) at 51:22-52:8 (ADA
19 Coordinator at CMF does not know whether prompting to use yard took place; did not
20 check to ensure); Ynson Dep. (Tr. Ex. 490) at 162:19-23 (does not know if there were any
21 mechanisms in place to monitor compliance with CRP while he was an ADA
22 Coordinator), 76:12-77:6 (ADA Coordinator at Lancaster believes "contact" is made if
23 staff checks on class member and sees that he is asleep or finds that he is not in his cell),
24 Prud'homme Dep. (Tr. Ex. 488) at 74:3-75:8; 79:11-16 (ADA Coordinator at SATF does
25 not have an opinion as to whether a DD2 prisoner who urinates and defecates on himself

26 ⁴ IDST is an interdisciplinary team of multiple staff members who "review and determine
27 program needs of DDP inmates" to "ensure the provision of adaptive support services necessary
28 for a DDP inmate to function at an acceptable level in the correctional environment." Tr. Ex. 476
at 24. The correctional officer must "participate in IDST" and "provide support services as
directed by IDST." Id. at 42.

1 should be prompted to shower, after reviewing evidence that an incontinent
2 developmentally disabled prisoner was prompted to shower only once in a month).

3 145. In sum, the Court agrees with Dr. Leone that plaintiff class members are not
4 afforded the required adaptive support necessary, and as a result, are at unreasonable risk
5 to their health and safety. Defendants clearly fail to monitor these prisoners and provide
6 the necessary reminders for basic self-care. Although some prisoners received support
7 and accommodations from staff, “the majority of these individuals are not receiving the
8 accommodation, protection and support envisioned by the Clark Remedial Plan.” Leone
9 at RT 786:11-17.

10 **3. Defendants Fail to Protect Plaintiff Class Members from Abuse.**

11 **a. Developmentally Disabled Prisoners Are More Vulnerable**
12 **to Abuse Because of their Disabilities**

13 146. Developmentally disabled prisoners’ deficits in communication, information
14 processing, and daily living skills, make them particularly susceptible to abuse. Leone at
15 RT 748:24-749:15; see also Salz at RT 103:3-16 (DD prisoners “easily influenced by
16 others”); Subia at RT 246:3-20 (“as a group DD prisoners are vulnerable,” and “would be
17 among the group of inmates that . . . are preyed upon by the more harsh and more
18 hardcore predatory type inmates”); Horne Dep. (Tr. Ex. 482) at 35:20-36:5 (DD prisoners
19 “at risk for victimization, being manipulated by other prisoners, or taken advantage of”);
20 Valdez Dep. (Tr. Ex. 493) at 95:20-23 (DD prisoners can be “particularly vulnerable as
21 compared to the entire prisoner population”); Cowardin at RT 625:3-13 (prisoners with
22 mental retardation tend to be “very naïve, gullible, easy to trick or use, easy to exploit”);
23 Cowardin at RT 632:7-634:2 (social isolation makes prisoners with autism vulnerable in
24 prison setting). Accordingly, all CDCR staff should be trained to understand the abuse
25 concerns unique to developmentally disabled prisoners. Wells at RT 193:18-194:2.

26 147. Because of their disabilities, plaintiff class members are subjected to verbal,
27 physical, and sexual abuse and property loss through theft, coercion, and manipulation.
28 While “some dedicated staff” work to ensure developmentally disabled prisoners’ safety,

1 far too many clearly do not. Leone Report at 19; see also Banks Dep. (Tr. Ex. 484) at
2 64:8-10 (admitting that she has not “provided services to a DD inmate because there was
3 concern for his safety”). Some employees actually perpetrate abuse on plaintiff class
4 members. Others are ignorant of the reality that disabled prisoners are more susceptible to
5 abuse than the average non-developmentally disabled prisoner. Gonzalez Dep. (Tr. Ex.
6 483) at 66:16-24; see also Banks Dep. at 82:6-9 (knows of no DD prisoners with abuse
7 concerns); Brown Dep. (Tr. Ex. 486) at 25:11-26:3 (only characteristic of DD she could
8 think of was reading and writing deficit). Given this reality, Dr. Leone’s conclusion that
9 “the system as a whole appeared indifferent to the needs of these inmates” comes as little
10 surprise. Leone Report at 19. Unless defendants ensure that dedicated employees are
11 monitoring developmentally disabled prisoners and minimizing their contact with
12 dangerous prisoners, developmentally disabled prisoners will continue to be abused,
13 exploited, and manipulated in the harsh, dangerous prison environment.

14 **b. Defendants Fail to Protect Plaintiff Class Members from**
15 **Abuse by Other Prisoners**

16 **(i) Plaintiff Class Members Are Forced to Pay for**
17 **Assistance from Other Prisoners**

18 148. If prison staff members do not provide developmentally disabled prisoners
19 with the reading and writing assistance that they need to avail themselves of prison
20 services, or protection from abuse, they have little choice but to seek help from their
21 fellow prisoners. This “help,” in most instances, does not come free. Blake Dep. (Tr. Ex.
22 497) at 73:12-21 (“golden rule” of prisons is that prisoners charge for help). In fact,
23 developmentally disabled prisoners can be “manipulated” into paying “inordinate[]
24 charge[s]” for help. Prud’homme Dep. (Tr. Ex. 488) at 193:23-194:3. Daniel Mendez,
25 for example, paid another prisoner \$40 in the form of eight jars of coffee to help him write
26 a grievance. Mendez Dep. (Tr. Ex. 480) at 44:20-24. Moreover, by asking other
27 prisoners to read and fill out their prison forms, prisoners requesting the help must often
28 disclose personal information, leaving themselves open to exploitation. Cowardin at RT

1 651:15-20; Cowardin Report at 24, 26-27; Salz at RT 118:7-11; Subia at RT 248:14-17.
2 Plaintiff class members have also had to pay other prisoners for protection. Smith at RT
3 516:18-22 (pays other prisoners to take him to canteen).

4
5 **(ii) Plaintiff Class Members Routinely Surrender their
Property to Other Prisoners**

6 149. Dr. Leone concluded that property loss was the most chronic problem facing
7 plaintiff class members. Leone at RT 805:9-13. His report documented approximately 24
8 incidents of reported property loss, and those were merely a representative sample of his
9 findings. *Id.* at 805:14-20; Leone Report at 6-9. A “large number” of prisoners, for
10 example, reported that they were forced or pressured to give up the items that they had
11 purchased from the prison canteen “literally between the time that they . . . g[o]t the stuff
12 [and] the time they g[o]t back to their unit.” Leone at RT 771:18-24. He noted many
13 examples in his report of prisoners who surrender their canteen to other prisoners. Leone
14 Report at 6-9. As corroborated by a corrections officer, Mr. Gibson had more than \$150
15 worth of canteen items stolen within a week’s time. *Id.* at 9. Mr. Estrella (#58) and Mr.
16 Thomas (#111) have their food taken by other prisoners. *Id.* at 7-8. Mr. Boyd (#54)
17 “lends” his possessions to other prisoners, but they “always leave [the institution] before
18 they pay him back.” *Id.* at 7; see also Tr. Ex. 443 (DD2 prisoner reports giving half of his
19 property away “all the time”); Tr. Ex. 244 (DD2 prisoner gives away property to avoid
20 abuse); Tr. Ex. 245 (staff observes DD2 prisoner being manipulated and intimidated and
21 having property stolen by other prisoners).

22 150. Testimony from prisoners corroborates Dr. Leone’s conclusion. See, e.g.,
23 Smith at RT 515:20-516:5; Davenport Dep. (Tr. Ex. 498) at 25:13-26:12, 30:17-32:11;
24 Wright Dep. (Tr. Ex. 496) at 90:19-91:16. Brandon Petties testified that other prisoners
25 stole items off the cart that developmentally disabled prisoners were using to transport
26 their canteen back to their living area. Petties Dep. (Tr. Ex. 495) at 30:3-25. He has also
27 had food stolen out of his cell while he was getting his medication. *Id.* at 28:1-9; see also
28 Mendez Dep. at 42:9-12 (radio and food stolen from his cell after staff search when he

1 was not present). Other prisoners have seen personal items such as electric razors,
2 coffeepots, hats, and sunglasses stolen from their fellow Clark class members. Davenport
3 Dep. at 134:3-14; Mendez Dep. at 46:3-14. Developmentally disabled prisoners are also
4 cheated out of their possessions in card games and dominos. Petties Dep. at 32:12-22,
5 33:10-15.

6 151. Defendants recognize that developmentally disabled prisoners are especially
7 susceptible to losing their property through theft, coercion, and manipulation. Salz at RT
8 75:11-16, 76:7-9, 84:5-12; Ynson Dep. (Tr. Ex. 490) at 34:3-25. One ADA Coordinator
9 asserted that corrections officers are “very good about” fulfilling their monitoring duties
10 and “very observant” when it comes to issues of property loss. Nies Dep. (Tr. Ex. 492) at
11 101:18-23, 102:4-5. The evidence, however, clearly demonstrates otherwise. Banks Dep.
12 at 62:7-63:12 (does not monitor the canteen activity of DD prisoners or inventory their
13 property); Horne Dep. at 164:10-25 (will only escort prisoners to and from canteen if a
14 problem is brought to his attention); Smith at RT 516:6-9 (officer told him he was a “big
15 boy[]” and could go to canteen himself); Blake Dep. at 32:6-10 (is never escorted to and
16 from canteen); Davenport Dep. at 27:18-28:5 (officers neglect to accompany DD
17 prisoners to and from canteen about once a month); Leone Report at 7 (officers laughed at
18 Mr. Houseknecht when he asked them to escort him to canteen).

19 152. Staff members do not monitor developmentally disabled prisoners even
20 when those prisoners’ propensity to be abused is documented. For example, Mr.
21 Houseknecht, who is 6 feet, 2 inches tall, weighed 175 pounds in June 2009, but by
22 November 2009, he weighed only 138-140 pounds. Houseknecht at RT 1031:7-22,
23 1032:7-8. He lost so much weight because his cellmate was stealing his food: “[A]fter a
24 certain point, I had to give him most of my food.” Id. at 1031:25-1032:6. Mr.
25 Houseknecht’s CASE evaluation, completed at R.J. Donovan in June 2009, indicates that
26 he has the potential for abuse and that his canteen and personal property should be
27 monitored to prevent loss to other prisoners. Tr. Ex. 261; see also Tr. Ex. 430 (staff report
28

1 that DD prisoner “gives away most of his canteen if not monitored).

2 153. Staff members also neglect to help class members who ask for their help in
3 recovering stolen property. See, e.g., Houseknecht at RT 1036:24-1037:4; Davenport
4 Dep. at 29:16-22; Mendez Dep. at 43:18-25; see also Leone Report at 7 (when prisoner’s
5 mother complained about stolen property to Pearl Serna, Clark counselor at California
6 Rehabilitation Center, Serna said “this is to be expected when you live among thieves”);
7 Wright Dep. 84:19-86:9 (asked for key lock because he cannot remember lock
8 combination and prisoners keep stealing his possessions; accommodation denied).

9 154. In this climate of indifference, developmentally disabled prisoners are
10 forced to surrender their items to whoever asks, cajoles, threatens, or strong-arms them, or
11 to protect their property with physical force. Those that choose the latter option risk
12 disciplinary violations that can lengthen their sentences. See, e.g., Davenport Dep. at
13 44:14-20 (received disciplinary write-up for fighting to keep his canteen); Leone Report at
14 10 (Prisoner #148 reported same).

15 **(iii) Plaintiff Class Members Are Subjected to Physical**
16 **and Sexual Assaults by Other Prisoners**

17 155. Dr. Leone concluded that many plaintiff class members had suffered
18 physical and sexual assaults, but that staff did not take seriously the risk of harm to the
19 developmentally disabled prisoners and did not provide them with adequate protection.
20 Leone at RT 750:11-19. The prisoners that he interviewed were “chronically threatened
21 and beaten up[,] often when they attempted to prevent their property from being taken.
22 Several prisoners reported that they had been raped or that another inmate had attempted
23 to rape them.” Leone Report at 4. After telling prison staff members that he was afraid of
24 being attacked, Mr. Thomas (#62) was assaulted on the yard. Id. at 10; Leone at RT
25 749:16-750:10. Prisoner #136, who had been raped by gang members in another prison
26 three years before, was choked by another prisoner who wanted sex. Leone Report at 10.
27 Prisoner #108 was raped twice while living at Lancaster. Id. In addition to these
28 documented incidents, Dr. Leone heard other, similar stories from Clark class members.

1 Leone at RT 750:17-19.

2 156. Prisoners' testimony and the documentary record are replete with reports of
3 physical and sexual abuse suffered by developmentally disabled prisoners. See, e.g.,
4 Houseknecht at RT 1017:21-1020:25 (cellmate punched him repeatedly and raped him),
5 id. at 1004:10-15 (cellmate tried to stab him in the eye), id. at 1008:15-1010:18 (cellmate
6 constantly slapped, punched and choked him), id. at 1035:13-1036:13 (another prisoner
7 engaged in "aggressive negotiation" by putting him in headlock to get canteen items);
8 Smith at RT 515:24-516:5 ("choked [] out" for his canteen), 527:21-528:11 (beaten up
9 for being a "slow learner," using the wrong shower), 528:14-23 (prisoners made him do
10 exercise as punishment for being in wrong area); Mendez Dep. at 46:15-48:21 (prisoners
11 rushed him on toilet because they thought he told officers about canteen theft); Petties
12 Dep. at 27:16-24 (other prisoner beat him after he would not give up his food); Tr. Ex.
13 424 (DD prisoner requests stay in crisis bed after cellmate "made [him] do things to him"
14 and kept him in the cell for 9-11 days); Tr. Exs. 233, 249, 253-54, 264, 343, 362, 366,
15 376, 380-81, 389, 392-393.

16
17 157. One developmentally disabled prisoner was issued a disciplinary write-up
18 due to his concerns for his safety. Tr. Ex. 101 (despite "realistic fears" for his safety noted
19 by the Mental Health clinician, DD prisoner found guilty of "Obstructing a Peace Officer
20 in the Performance of Their Duty" for refusing a cellmate).

21 **c. Staff Abuse Prevents Plaintiff Class Members from**
22 **Obtaining Meaningful Access to Prison Programs,**
23 **Services, and Activities**

24 155. It is important for corrections staff to build relationships with
25 developmentally disabled prisoners so that the prisoners ask staff members for assistance
26 and protection. Prud'homme Dep. at 197:15-19; Valdez Dep. at 104:18-105:3; see also
27 Salz at RT 122:10-11 ("[W]e need to change the culture so that inmates know that an
28 officer will help"). If prisoners fear, or feel demeaned by, custody staff, they are far less
likely to approach officers, counselors, or clinicians for help. Leone at RT 763:18-764:12,

1 801:24-802:6; see also Chapa Dep. (Tr. Ex. 489) at 139:5-24 (DD prisoners might not ask
2 for help if they are scared or reluctant to talk to staff). In some cases, staff abuse serves to
3 prevent prisoners from fulfilling their own needs. Smith at RT 523:6-12 (sometimes he
4 will not leave his cell to retrieve his medicine for fear of getting harassed by staff).
5 Moreover, when staff mocks developmentally disabled prisoners, “it’s indicative of the
6 indifference towards and understanding the consequences of ignoring or neglecting the
7 inmates’ needs.” Leone at RT 764:8-12.

8 **d. Defendants Systematically Fail to Address Abuse that**
9 **Prisoners and Staff Inflict on Plaintiff Class Members**

10 156. In the past two years, defendants have received multiple reports that
11 expressed concerns regarding the abuse of developmentally disabled prisoners, including
12 Dr. Leone’s February 2010 expert report (Tr. Ex. 1), Dr. Leone’s July 2008 Lancaster
13 report (Tr. Ex. 4), and the Prison Law Office’s November 2008 Lancaster monitoring
14 report (Tr. Ex. 1003). Salz at RT 139:6-139:11; Subia at RT 238:21-238:25; Wofford at
15 RT 403:14-407:12. However, defendants did little, if anything, to address the abuse
16 issues raised therein. Subia at RT 252:11-16 (no corrective action taken in response to
17 2010 Leone report); McDonald at RT 967:2-12 (has not taken action in response to 2010
18 Leone report; is not aware of any responsive action defendants have taken); Wells at RT
19 470:1-16 (neither directed staff to take corrective action, nor asked Subia to direct
20 Lancaster warden to take corrective action, in response to 2008 Leone report); Rhodes
21 Dep. (Tr. Ex. 487) at 85:24-86:2 (not aware of any changes to DDP at Lancaster as a
22 result of 2008 Leone report); Wofford at RT 420:6-10; 421:11-16 (did not investigate
23 incidents cited in Prison Law Office’s 2008 Lancaster report, and is not aware of any
24 corrective action being taken).

25 157. Furthermore, procedures designed to protect Clark class members are
26 routinely ignored. See, e.g., Wofford at RT 436:23-437:4 (interviewing potential
27 cellmates of DD prisoners would “reduce the risk of victimization” of DD prisoners by
28 their cellmates), 438:19-439:8 (CRP requires that correctional staff interview potential

1 cellmates of DD prisoners prior to housing them together), 438:19-439:8 (cellmates of DD
2 prisoners only interviewed “on occasion”); Gonzalez Dep. at 66:25-67:10 (would be
3 “tunnel vision” for DDP officers to monitor DD prisoners), 87:22-88:10 (DD prisoners
4 live within general population and not specialized DDP units); Banks Dep. at 64:8-10
5 (admitting that she has never “provided services to a DD prisoner because there was
6 concern for his safety”).

7 158. CDCR officials claim to be particularly concerned about incidents of staff
8 abuse and harassment of developmentally disabled prisoners. Subia at RT 253:9-13 (staff
9 harassment “really concerns me” and, of all the incidents documented in Dr. Leone’s 2010
10 report, “those are the ones that are most important to me”); Scaramozzino at RT 916:1-25
11 (conduct of Officer Jones is a “real issue[] that need[s] attention” and “not defensible”; if
12 CDCR does not review accusations, “we have a problem”). As of the evidentiary hearing,
13 however, nobody at CDCR had investigated, let alone taken action to rectify, the staff
14 abuse issues raised in Dr. Leone’s 2010 report. Subia at RT 253:14-16; Scaramozzino at
15 RT 915:11-12, 916:20-22, 917:5-8; McDonald at RT 967:2-12; see also Ynson Dep. at
16 161:7-10 (no reaction to Leone report). More broadly, although no witnesses refuted *any*
17 of the aforementioned allegations, no evidence suggests that a CDCR staff member has
18 been disciplined in a meaningful way for subjecting a developmentally disabled prisoner
19 to abuse. See Subia at RT 222:13-19, 222:25-223:4, 240:16-20 (expects that “significant”
20 or “serious” incidents would be brought to his attention, has been involved in the
21 “rectification” of “serious” incidents involving staff, but knows of no allegations of staff
22 abuse lodged by DD prisoners). While Defendants did belatedly endeavor to investigate
23 the Dr. Leone’s conclusions, it was only upon learning that this Court was concerned by
24 their failure to respond.

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4. Defendants Systemically Fail to Provide Accommodations Required to Assist Developmentally Disabled Prisoners in Conforming with CDCR Rules and Regulations

a. Defendants Fail to Provide Effective Communication in Proceedings that Implicate Plaintiff Class Members' Due Process Rights

(i) Required Accommodations

170. Defendants are legally obligated to ensure that plaintiff class members are afforded appropriate accommodations in disciplinary, classification, and administrative segregation hearings to allow them to understand the proceedings. *See supra* § I.C.1, 3. To meet these obligations, CDCR policy requires that all developmentally disabled prisoners “must be assigned” staff assistants in connection with such proceedings. Wells at RT 472:8-14; Salz at RT 141:22-142:8. This requirement, as embodied in the Clark Remedial Plan, imposes certain obligations on the staff assistant, including (1) informing the prisoner of his or her rights and ensuring that the prisoner understands the proceeding to the best of his or her ability; (2) helping the prisoner prepare for the hearing; (3) representing the prisoner’s position at the hearing; (4) ensuring that the prisoner’s position is understood; (5) ensuring the prisoner understands, to the best of his ability, the decision reached; (6) providing the hearing official with information related to the prisoner’s developmental disability and adaptive support services required; (7) being present at a disciplinary hearing and all interviews related to the hearing; and (8) not giving legal counsel or specifying the position the prisoner should take. CRP at 49-50.

171. To ensure understanding at due process hearings, the assigned staff and other participants in the hearing must affirmatively ask the developmentally disabled prisoner regarding his or her comprehension. Salz at RT 120:13-16, 121:1-4. A preferred method to accomplish this requirement is to ask the prisoner to repeat the information back in his or her own words. *See, e.g.*, Subia at RT 244:19-24; *see also* Cowardin at RT 629:2-630:1.

1 receiving required staff assistance. See Tr. Exs. 287-88, 306-07, 321, 331, 333, 335, 337-
2 39, 341, 350, 364-75, 377-82, 392, 393; Wells at RT 475:10-12, 483:7-17; see also Wells
3 at RT 483:7-484:17; Tr. Ex. 307 (illiterate DD prisoner not given staff assistant at
4 administrative segregation review); Tr. Exs. 306, 338, 373.

5 176. Evidence from staff at the prisons confirmed these problems. See, e.g.,
6 Mandeville Dep. (Tr. Ex. 485) at 159:5-10. Gene Nies, the former ADA Coordinator at
7 DVI, conceded that defendants “need to figure out a better mechanism to ensure that . . .
8 staff assistant should be assigned at the time of the [administrative segregation] hearing.”
9 Nies Dep. (Tr. Ex. 492) at 162:16-163:3. At SATF, ADA Coordinator Prud'homme
10 admitted he does not review 114D forms. Prud'homme Dep. (Tr. Ex. 488) at 142:10-11.
11 He also admitted that various exhibits he saw did not reflect that a staff assistant had been
12 provided during an administrative segregation hearing. Id. at 147:8-149:18, Tr. Exs. 339,
13 341. At Lancaster, Mr. Ynson admitted that when he was ADA Coordinator, he did not
14 know if staff assistants were provided during administrative segregation reviews with
15 prisoners, nor did he even know if it was required. Ynson Dep. (Tr. Ex. 490) at 123:25-
16 124:7.

17 177. As these failures suggest, defendants are not fulfilling their obligation to
18 ensure that plaintiff class members understand these critical proceedings. Even when staff
19 assistants are provided, there is no systemic effort to ensure the prisoners are receiving
20 meaningful support that provides them with a real understanding of the proceedings. See
21 Tr. Ex. 227 (defendants determined DD1 prisoner understood and agreed with a
22 classification committee’s decision, even though prisoner “became agitated and frustrated
23 and refused to acknowledge any statements or questions generated by the members”); Tr.
24 Ex. 232 (effective communication achieved at DD3 prisoner’s classification hearing by
25 having the staff assistant “speak[] loudly and repeat[] statements and/or questions”;
26 prisoner is unable to speak according to medical, but “appeared to understand by looking
27 at [the staff assistant] each time he was asked a question and [the staff assistant] repeating
28

1 the question in a loud clear voice within close proximity to [the inmate]. Once [the staff
2 assistant] repeated the question/statement, [the inmate] would return to looking at the
3 committee”); Banks Dep. (Tr. Ex. 484), 46:5-12 (DDP officer from CMF testified that as
4 a staff assistant, she writes down if the DD prisoner wants to call witnesses, but otherwise
5 “I walk away” if the prisoner does not have questions), 47:5-15 (when acting as a staff
6 assistant, she explains the hearing to the DD prisoners, but does not ask the prisoner
7 questions to make sure he is understanding because “if he doesn’t understand, he’ll tell
8 me”), 51:14-24 (believes the burden is on the DD prisoner to ask questions if he does not
9 understand), 49:15-20 (does not help DD prisoners with forms for disciplinary hearings
10 and could not recall if she had ever provided additional explanations); see also
11 Defendants’ Witness List for Case in Chief (Dkt # 366-1 at 6) (reflecting that Banks is
12 DDP officer).

13 178. Staff members are not well informed about their role as staff assistants and
14 oversight is inadequate. Brown Dep. (Tr. Ex. 486) at 76:8-15 (at CMF, DD counselor
15 could not recall receiving staff assistant training); Nies Dep. at 139:15-140:22, 140:24-
16 141:6 (same at DVI); Ynson Dep. at 121:24-122:17 (ADA Coordinator at Lancaster has
17 no personal knowledge of whether staff assistants are provided during disciplinary
18 hearings).

19 179. The same problems exist with respect to classification hearings. See
20 Prud’homme Dep. at 139:21-140:22, 198:15-199:1 (ADA coordinator at SATF admitted
21 he does not have personal knowledge that DD prisoners receive staff assistants in
22 classification hearings); Ynson Dep. at 114:21-24 (ADA coordinator at Lancaster in 2009
23 had no personal knowledge whether staff assistants were assigned during all classification
24 meetings).

25 180. As a result, plaintiff class members are not obtaining the adaptive supports
26 they require at such hearings. See, e.g., Leone at RT 756:3-6 (some DD prisoners had “no
27 idea” why they were in administrative segregation and when Leone asked them a series of
28

1 questions to verify this, “some of them just didn’t have an idea”); Blake Dep. (Tr. Ex.
2 497) at 69:25-70:17 (staff assistant failed to tell him what was going to happen at a
3 disciplinary hearing, failed to explain the charges and failed to explain potential
4 punishments), 147:6-14 (although he understood he was being punished for tattoo, he also
5 explained in deposition that he was talked into it by another prisoner “saying it’s cool, it’s
6 the right thing to do” and that no one had told him it was against the rules; there was no
7 evidence staff assistant explained this at the hearing or that punishment was assessed in
8 light of relevant issues relating to his disability); Tr. Ex. 269.

9
10 181. This evidence, taken together, establishes that defendants fail to provide the
11 required support to ensure that due process and effective communication are provided for
12 developmentally disabled prisoners at disciplinary, administrative segregation, and
13 classification hearings. See Leone at RT 792:1-793:12.

14 **b. Defendants Fail to Provide Effective Communication of**
15 **the Rules with which Developmentally Disabled Prisoners**
16 **Are Required to Comply**

17 182. Defendants have an obligation to ensure that their communications with
18 developmentally disabled prisoners are “as effective” as their communications with non-
19 developmentally disabled prisoners. See supra § I.D.3 To facilitate these
20 communications, the Clark Remedial Plan contemplates that staff will monitor
21 developmentally disabled prisoners and provide them with “direct instructions, prompting,
22 verbal counseling,” to assist them in complying with prison rules and regulations. CRP at
23 49. The Remedial Plan also requires that employees “must ensure the inmate understands
24 (to the best of his/her ability) the consequences of continued misconduct.” Id.

25 183. If misconduct continues, staff can invoke formal discipline, but in doing so,
26 “[t]he staff member observing the misconduct must take into consideration the severity of
27 the inmate’s disability and the inmate’s need for adaptive support services when
28 determining the method of discipline.” Id.; see also Wells at RT 493:2-13.

184. Contrary to this policy, many plaintiff class members receive disciplinary

1 write-ups for behavior “they should have been counseled about” or things that “easily
2 could have been prevented.” Leone at RT 765:16-766:2, 770:5-8 (“[i]f staff are aware
3 [who’s] DD on the unit, if they look at those chronos periodically, they should be able to
4 anticipate potential problems inmates might have and be able to do things to prevent [rules
5 violation reports] or 115’s”); see Tr. Ex. 101 (DD prisoner assessed 90 days of credit
6 forfeiture for “Obstructing a Peace Officer in the Performance of Duty” for refusing a
7 cellmate; clinician notes that the prisoner “reports realistic fears for his safety”); Tr. Ex.
8 103 (DD prisoner who “does not read, write, or understand English,” found guilty and
9 assessed 30 days of lost credits for “Disobeying Orders” for refusing to sign his Notice
10 and Conditions of Parole form); Tr. Ex. 409 (DD prisoner receives a 30 day loss of credit
11 and a 10 day loss of yard for “Disruptive Behavior” for refusing to return to his cell until
12 he spoke to a sergeant; clinician indicates that he was not “trying to be difficult; he just
13 had a fixed idea which he was trying to complete in a rigid manner (DD1)”). Other
14 disciplinary write-ups for plaintiff class members raise similar concerns. See, e.g., Tr.
15 Exs. 102, 127 (failure to provide a random urinalysis); Tr. Exs. 112, 116, 124, 136, 138,
16 142 (out of bounds); Tr. Exs. 106, 107, 114, 115, 118–21, 123, 128, (failure to report or
17 unexcused absence or refusing to work); Tr. Ex. 139 (failure to report to pill line); Tr. Exs.
18 104, 108, 110, 111, 117, 131, 132, 137, 140-41, 143, 144 (disobeying direct order); Tr.
19 Ex. 145 (refusing a cellmate); Tr. Exs. 126, 130, 133 (delaying a peace officer); Tr. Ex.
20 135 (refusal to stand for count); Tr. Exs. 100, 125 (failure to comply with cell cleaning
21 and other standards).

22 185. When a developmentally disabled prisoner is repeatedly written up for rules
23 violations attributable to his disability, defendants’ conduct is “absolutely not” in
24 compliance with the Clark Remedial Plan and the level of support provided to the
25 prisoners is “totally inadequate.” Leone at RT 768:9-11. Dr. Leone found repeated
26 examples of these violations of the Clark Remedial Plan where it was “hard” to
27 “understand” because staff could have intervened to avoid the disciplinary write-ups. Id.
28

1 at 768:19-769:10 (DD prisoner written up for “being in the wrong place at the wrong
2 time” when he tried to use the phone at the time he had been told in his previous unit to
3 use it); Tr. Ex. 11; see also Cowardin at RT 623:4-24:3 (discussing difficulties DD
4 prisoners can have when changing settings); Leone at RT 765:16-766:2; 769:11-23.

5 186. In disciplinary hearings, defendants fail to account for durability deficits
6 unique to developmentally disabled inmates, as noted in § I.F.1, *supra*. Defendants do not
7 recognize that a single prompt, or even a few, may be insufficient for a developmentally
8 disabled prisoner, and he or she may need constant daily reminders to participate in prison
9 activities, services, and program. See, e.g., Tr. Exs. 139 (DD prisoner found guilty of
10 failure to report to pill line when only informed via public address system, with no
11 reference to prompts, reminders, or warnings), 125 (DD prisoner found guilty of hanging
12 a sheet in his cell after only one group notification of rules regarding cell maintenance,
13 with no reference to prompts, reminders, or warnings).

14 **D. Defendants’ Current Remedial Efforts Are Insufficient**

15 187. Defendants have taken some steps towards addressing the unlawful
16 conditions suffered by the plaintiff class. These steps, including those taken in the areas
17 of staffing, housing, training and self-monitoring, have fallen gravely short of the
18 measures that must be taken to create conditions that satisfy the constitutional and
19 statutory mandates set forth above. See supra, § I.C.

20 **1. Staffing**

21 188. Defendants have designated some staff members specifically to work with
22 developmentally disabled prisoners. However, the staffing is not adequate to provide the
23 necessary accommodations to class members for a variety of reasons, including
24 defendants’ failure to screen staff members for their ability to work with a population that
25 requires special skills and strengths, their failure to operate a program that addresses the
26 disabled prisoners’ needs proactively, and their failure to allocate staff members
27 reasonably. Because of these staffing inadequacies, prisoners with developmental
28

1 disabilities continue to face discrimination, denial of access to programs and services,
2 denial of due process rights, and dangerous and unconstitutional living conditions. The
3 Court expert identified staffing as an issue that must be addressed before defendants can
4 provide adequate services. See Leone at RT 792:1-13.

5
6 189. Because there is no special hiring process for vetting DDP staff, the staff
7 members who are assigned to the DD program often lack the skills to provide services to
8 this population. Although Dr. Leone identified a few officers who appeared to understand
9 their responsibilities to the class members, others “regularly made fun of [the prisoners’]
10 inability to read or write, refused to assist them and failed to notify designated DD officers
11 or threatened them. A large number of prisoners said they feared retaliation from
12 correctional officers and tried to avoid specific officers.” Leone Report at 4. Not
13 surprisingly, DDP staff members often fail to develop a rapport with developmentally
14 disabled prisoners. Horne Dep. (Tr. Ex. 482) at 106:6-21. Rather than looking to staff
15 members for assistance, prisoners fear them. Leone Report at 3.

16 190. The current DDP staff also lacks basic knowledge about the group assigned
17 to the program. Some staff members hold the “erroneous belief that inmates who can read
18 and write are not developmentally disabled.” Leone Report at 6. Some inappropriately
19 question the disability status of certain class members. *Id.* Others are likely misled by
20 prisoners’ DD1 classifications to believe that the prisoner does not require assistance.
21 Cowardin at RT 655:13-656:4.

22 2. Housing

23 191. Defendants do not dispute their obligation to provide adequate and
24 reasonably safe shelter for the prisoners they incarcerate. Dkt # 361 at 15. Accordingly,
25 the Clark Remedial Plan requires that a DD prisoner “with a history of vulnerability will
26 not be housed in a cell or dorm/bay/section with an inmate with a history of sexual and/or
27 predatory behavior against ‘weaker individuals’.” CRP at 31. Acknowledging that
28 prisoners with developmental disabilities are “vulnerable” and are among the “group of

1 inmates that, of course, are preyed upon by the more harsh and more hardcore predatory
2 type inmates we have in the facility” (Subia at RT 246:18-20), defendants have taken
3 some steps to address some of the safety concerns of plaintiff class members. These
4 measures include creating some sheltered living units and allocating staff for
5 developmentally disabled prisoners who are clustered in general population living units.

6 192. However, housing currently available for prisoners with developmental
7 disabilities does not keep them safe nor does it ensure that they are provided with
8 necessary accommodations. Three hundred prisoners with developmental disabilities,
9 approximately 25% of the total DD population, do not live in the units specially
10 designated to house them. Salz at RT 74:23-75:1, 133:12-16. Despite this shortage of
11 appropriate housing, defendants have eliminated four designated prisons since the
12 inception of the Clark program. Salz at RT 154:6-13.

13 **a. Reception Centers**

14 197. Under the Clark Remedial Plan, prisoners with developmental disabilities
15 should be transferred to designated prisons on an expedited basis. CRP at 9. However,
16 prisoners with developmental disabilities remain in reception centers for excessively long
17 periods of time. Houseknecht at RT 999:13-22 (prisoner in R.J. Donovan reception
18 center for over 10 months); CRP at 14 (DD prisoner housed at reception center in DVI for
19 almost three months).

20 198. Some prisoners who remain in reception center housing for extended
21 periods are subject to extreme abuse. Phillip Houseknecht, classified as DD2, was
22 physically assaulted repeatedly during his lengthy reception center stay, first by a cellmate
23 at the California Institution for Men (Chino), and then by his cellmate at R.J. Donovan.
24 Houseknecht at RT 1004:1-15, 1004:24-1005:7, 1008:15-1010:15, 1012:21-1013:17,
25 1017:8-1019:17. The abuse that he suffered at R.J. Donovan escalated: his cellmate
26 sexually assaulted him and regularly forced him to give up his food, causing him to lose
27 over 30 pounds. Id. at 1020:9-25, 1031:10-1032:6.

1 Some developmentally disabled prisoners placed in administrative segregation had “no
2 idea” why they were there. Leone at RT 756:3-5.

3 203. Placement in administrative segregation has a harmful effect on prisoners
4 with developmental disabilities. Leone Report at 3. Prisoners with developmental
5 disabilities placed in administrative segregation may be locked down for 23 hours a day,
6 seven days a week, never receive support services from correctional officers, and have no
7 access to DDP staff. Id. at 3, 10; Houseknecht at RT 1034:5-1035:7 (prisoner did not see
8 DDP officer during his more than two months in administrative segregation and staff did
9 not offer to help him); see also Leone at RT 758:22-759:11 (Mr. Davis complained he
10 received no help in administrative segregation; CDCR response was that all staff are
11 trained to implement the Remedial Plan, so “anyone can help you,” which did not comport
12 with reality because non-designated staff members were not providing him needed
13 support). In other words, such prisoners do not have access to the accommodations to
14 which they are entitled.

15 204. In the absence of necessary support services, developmentally disabled
16 prisoners in administrative segregation can deteriorate. Leone at RT 756:9-13 (“[w]hen
17 you have a limited or compromised cognitive ability and you’re locked down for long
18 periods of time, the potential for you to decompensate or for your condition to deteriorate
19 in ways that make you less functional, I think, is pretty significant”). One
20 developmentally disabled prisoner, who was also mentally ill, deteriorated to the point
21 that he was smearing feces, developed scabs all over his body, and declined to leave his
22 cell. Id. at 756:16-757:16. Although a psych tech regularly checked on him, there was no
23 evidence that any DDP staff provided the assistance required to help him understand why
24 he was there or how to advocate for himself. Id. at 756:25-757:1, 757:13-17, 846:13-21
25 (no DD correctional staff at facility). Placing plaintiff class members in administrative
26 segregation without support violates the Clark Remedial Plan. Id. at RT 820:8-15.

27 **3. Training**

1 205. It is undisputed that defendants provide training to their staff regarding
2 developmentally disabled prisoners and the accommodations that they require. The
3 serious problems set forth herein show that the training “is either inadequate or . . . there is
4 insufficient attention paid by administrative staff to the safety and protection of inmates
5 with DD.” Leone Report at 4. The DD training is clearly not sufficient, which constitutes
6 a “serious issue.” Leone at RT 792:14-20; see also id. at 788:12-25; Leone Report at 4;
7 Cowardin at RT 654:25-655:3.

8 206. Not all staff members are properly trained. Salz at RT 131:21-132:2 (staff
9 has used improper training materials in the field); see also Subia at RT 231:11-16
10 (challenge to make sure staff members are properly trained); Prud’homme Dep. at
11 130:18-23, 131:13-16 (staff member responsible for training did not know whether
12 appropriate staff had received necessary training).

13 207. Some prison staff members assigned to work with developmentally disabled
14 prisoners lacked training on some of their duties under the Clark Remedial Plan. Pearson
15 at RT 369:8-17, 369:18-371:20, 371:21-372:7 (admitted no training on how to fill out
16 adaptive support activity logs, how to elicit abuse concerns from prisoners, or how to
17 communicate with DD prisoners); Brown Dep. at 82:20-25, 83:10-18, 112:25-113:7 (DDP
18 counselor recalls no training on being staff assistant, serving on classification committees,
19 or achieving effective communication with DD prisoners); Horne Dep. at 92:21-93:10
20 (DDP officer received no training on completing adaptive support logs).

21 208. Other prison staff members demonstrated a lack of adequate training on
22 critical Clark issues. Banks Dep. at 14:4-15:1, 15:24-16:1 (DDP officer is familiar with
23 parts of the CRP, but cannot identify which ones, and has never heard of prison’s
24 operational procedure implementing CRP); Chapa Dep. at 131:11-21 (Clark counselor
25 with nine years experience unaware of obligation to log adaptive support contacts until
26 very recently), 239:10-16 (not familiar with characteristics, symptoms of autism).

27 209. Simply providing training on the DD program, without overseeing and
28

1 analyzing the outcomes, is not adequate to implement the Clark Remedial Plan. Leone at
2 RT 789:6-22. Defendants have not evaluated the effectiveness of their training. E.g.,
3 Subia at RT 243:1-6 (has neither performed nor reviewed any analysis to determine
4 training’s effectiveness).

5 **4. Self-Monitoring**

6 212. The Court finds that defendants are not capable of systematically identifying
7 and correcting compliance problems with federal law and the Clark Remedial Plan.

8 213. The Court expert testified that defendants do not have the capacity or the
9 will to monitor themselves.⁶ Based on his experience working with prison systems where
10 court supervision came to an end, Dr. Leone believes that defendants are not in a position
11 to exit from Court supervision in Clark. Leone at RT 798:17-799:9. Further, Dr. Leone
12 testified that even if defendants could identify problems through an audit, it is doubtful
13 that they have the will and desire to remedy any issues they identify and provide adequate
14 accommodations to developmentally disabled prisoners. Id. at 845:10-14, 727:12-19.

15 **a. Defendants Cannot Identify and Correct Violations of**
16 **Federal Law and the Remedial Plan through their Own**
17 **Monitoring**

18 215. Given the size and complexity of CDCR as already noted, immediate
19 universal compliance with the Clark Remedial Plan is not possible. As a result, a system
20 to identify and correct problems is critical. Without such a system in place, defendants
21 cannot ensure that the requirements of federal law as embodied in the Clark Remedial
22 Plan will be institutionalized. Leone at RT 783:22-784:11; Wells at RT 453:20-454:12
23 (audits and establishing baseline are necessary to measure progress of compliance with

24 ⁶ Many of the remedial measures defendants have presented in this hearing came
25 about through court orders in other prison reform cases. The Office of Court Compliance
26 staff at the individual prisons who act as headquarters’ “eyes and ears” are a result of
27 court intervention in Armstrong. Wells at RT 445:25-446:3. The auditing tool and
28 accountability system defendants have committed to implement in this case were a result
of another Armstrong order. McDonald at RT 936:14-937:6, 962:18-20. The Bureau of
Independent Review, an essential part of defendants’ disciplinary system, was a result of a
court order in Madrid v. Terhune, No. 90-3094 TEH (N.D. Cal.), which “revamped” the
CDCR disciplinary system. McDonald at RT 963:10-14, 964:25-965:3, 965:9-11.

1 policies); Salz at RT 132:11-14 (headquarters oversight is crucial to make sure that
2 policies and procedures are actually being followed); see also § III.C, *infra*. Rather, one
3 would expect to see what the evidence actually demonstrates—a system characterized by
4 generalized indifference, with isolated examples of compliance from a few committed
5 individuals. Leone at RT 727:12-728:9.

6 216. A uniform, standardized audit tool to conduct annual compliance reviews is
7 required by the Clark Remedial Plan, first adopted by the parties in 2001 (Dkt # 194).
8 CRP at 62. The required audit tool should contain a standard set of inquiries that will, at a
9 minimum, monitor classification, grievances, disciplinary processes, prisoner
10 assignments, and provision of required services. Id. Before the implementation of
11 compliance reviews, plaintiffs’ counsel must have an opportunity to review the audit
12 instrument that CDCR has developed. Id.

13 217. Defendants do not have a standardized audit instrument currently in place.
14 Subia at RT 264:6-13⁷; McDonald at RT 951:23-952:4.

15 218. Approximately one and a half years ago, seven years after they were
16 required to start annual audits, defendants began to develop a draft audit tool. It remains
17 incomplete and is not ready for use. McDonald at RT 939:9-21, 951:23-952:7; 952:17-
18 954:9 (audit tool is incomplete and McDonald does not know details about tool).

19 219. In its current form, the draft audit tool is bereft of many important areas of
20 inquiry. Id. at 952:17-954:9, 953:5-23 (no questions in the tool for DD prisoners about
21 whether they are physically assaulted); 954:10-13 (no questions in the tool for DD
22 prisoners about whether they are sexually assaulted), 954:14-17 (no questions in the tool
23 for DD prisoners about whether staff members speak confidentially with them), 954:22-25
24 (no questions in the tool for DD prisoners about whether they must pay other prisoners for
25 help reading and writing prison forms), 956:3-10 (no questions in the tool for DD
26

27 ⁷ A single compliance review was conducted eight years ago. No evidence was
28 presented that it was conducted using a standardized audit instrument vetted by plaintiffs’
counsel, as required by the Remedial Plan. Wells at RT 456:20-22.

1 prisoners about whether they are verbally abused by staff members or other prisoners),
2 957:12-20 (no questions in the tool about whether DD prisoners receive prompts to
3 perform daily living functions). These deficits contrast markedly with the Court expert's
4 recommendations that an audit instrument query DD prisoners about their treatment.
5 Leone at RT 791:12-25.

6 220. Moreover, Ms. McDonald did not know if the tool in its current form
7 measures whether DD prisoners are being properly identified. McDonald at RT 957:21-
8 25. The audit tool also does not evaluate compliance efforts at the headquarters level.
9 McDonald at RT 952:8-13.

10 221. Defendants became aware of these and other significant omissions in the
11 tool only when raised while they were being cross-examined at trial. Id. at 976:15-977:3,
12 952:11-953:22, 954:1-955:2, 956:3-10, 957:12-25.

13 222. Although many shortcomings were apparent from defendants' own
14 testimony, the Court is unable to fully assess the adequacy of the tool because it lacks the
15 benefit of plaintiffs' counsel's expertise and input because defendants have not asked
16 plaintiffs' counsel to vet the draft tool. Wells at RT 205:21-206:16, 977:7-19. Input from
17 plaintiffs' counsel has been useful in this case in the past. Wells at RT 449:13-16; CRP at
18 62; Salz at RT 56:7-58:15 (to date, there has been "tremendous" cooperation between
19 plaintiffs' counsel and CDCR to improve the DDP, with great success).

20 223. At the time of the hearing, defendants claimed that the tool would be ready
21 for use in 30 days. McDonald at RT 933:16-18. Since the instrument is not finished,
22 however, and since defendants only recently learned of deficits from plaintiffs' counsel
23 during trial, the Court cannot find that it will do what it is intended to do—provide an
24 accurate measure of compliance. Wells at RT 977:20-978:24 (the decision about whether
25 and when to show the completed audit tool to plaintiffs' counsel must be made by the
26 Office of Court Compliance management team, the Office of Legal Affairs management
27 team, and the Division of Adult Institutions, and there has been no "in-depth" discussion
28

1 of the time frame for this).

2 224. In the absence of the required standardized audit process, defendants have
3 relied on informal communications regarding compliance at the prisons. The evidence
4 shows that these efforts have been piecemeal and fall short of what is required to identify
5 and correct violations of federal law and the Clark Remedial Plan. Wells at RT 455:15-
6 456:7.

7 225. Dr. Salz, the Chief Psychologist at CDCR who directs the mental health
8 component of the Clark remedial efforts, conducts limited reviews of discrete areas of the
9 Clark Remedial Plan: he checks only on the testing and identification of developmentally
10 disabled prisoners. Salz at RT 136:14-17. In the last two years, Dr. Salz conducted
11 reviews at only three prisons, spoke to a small percentage of developmentally disabled
12 prisoners, and did not speak to any custody staff. Salz at RT 135:18-20, 137:1-12,
13 136:14-20.

14 226. Dr. Salz does not routinely provide written reports about these visits to the
15 institutions. Salz at RT 135:23-136:1. Defendants presented no evidence of the results of
16 these reviews.

17 227. Correctional Counselor II Specialists⁸ in the prisons are charged with,
18 among other things, overseeing the Clark Remedial Plan at the local level. Wells at RT
19 170:17-171:9. One of their responsibilities is to work with the ADA Coordinators and
20 other prison staff to ensure that training is provided and that staff understands the Clark
21 Remedial Plan. *Id.* at 170:17-171:9, 179:7-180:7; Aref at RT 274:9-24. Correction
22 Counselor II Specialists are supposed to provide reports of non-compliance to
23 headquarters officials. Wells at RT 180:8-15.

24 228. These reports do not satisfy the audit and compliance review requirements
25

26 ⁸ As a result of a court order in another prison reform case in this Court, 26
27 Correctional Counselor II Specialist positions were added at some of the prisons in 2007.
28 Wells at RT 445:13-17; 445:25-446:3; Armstrong v. Schwarzenegger, Case No. C 94-
2307 CW, Injunction, January 18, 2007 (Armstrong Dkt #1045) (Authority App., Ex. 4),
at 5.

1 of the Clark Remedial Plan: the Correctional Counselor II Specialists do not use a
2 standardized tool that has been vetted by plaintiffs’ counsel and the reports are not formal
3 audits. Wells at RT 453:20-456:12, 454:24-455:9.

4 229. The Office of Court Compliance is charged with monitoring compliance
5 issues at individual prisons. Wells at RT 169:5-170:2. The Office also does not
6 effectively identify problems. Many serious issues that were discovered by the Court
7 expert and plaintiffs’ counsel were unknown to the Office of Court Compliance. See, e.g.,
8 Wells at RT 449:22-450:21 (facility captain at Office of Court Compliance not shown
9 Prison Law Office monitoring report from Lancaster [Tr. Ex. 1003], alleging that three
10 staff members had been calling DD prisoners “girls,” “fagots,” “boy” and yelling
11 needlessly at them⁹), 491:2-492:9 (facility captain at Office of Court Compliance never
12 shown administrative segregation forms indicating no staff assistant assigned to DD
13 prisoners and does not know whether any corrective or disciplinary actions were taken),
14 549:6-13 (facility captain at Office of Court Compliance never shown parole
15 documentation indicating that no effective communication provided to DD prisoners).

16 **b. Defendants Are Unable to Systematically Identify and**
17 **Correct Violations of Federal Law and the Clark Remedial**
18 **Plan Because They Do Not Have an Accountability Process**

19 230. Theoretically, prison staff can be disciplined for failing to follow the Clark
20 Remedial Plan. Salz at RT 176:14-177:13; Subia at RT 221:24-222:12; McDonald at RT
21 936:25-937:10 (disciplinary consequences of noncompliance with the CRP); McDonald at
22 RT 941:17-944:8 (formal staff disciplinary process); McDonald at RT 946:9-12
23 (describing how CDCR’s compliance with the disciplinary process is monitored).

24 231. Despite ample evidence of extensive violations of the Clark Remedial Plan
25 from Dr. Leone’s reports, from the documentary evidence, and from plaintiffs’ counsel’s
26 monitoring reports, not a single high-ranking defense witness was aware of any formal

27 ⁹ This testimony is of particular concern since at Lancaster, Correctional Counselor
28 II Specialists typically accompany plaintiffs’ counsel during the monitoring tours.
Wofford at RT 401:20-22.

1 disciplinary measures ever taken against a CDCR staff member for violating the Clark
2 Remedial Plan. Subia at RT 216:7-217:7 (Subia's job titles include employee relations
3 officer responsible for employee discipline), 240:21-241:12; McDonald at RT 962:14-17;
4 Wells at RT 492:4-17, 498:19-499:4.

5 232. The ADA Coordinator at Lancaster also testified that he had neither taken
6 any disciplinary action himself, nor knew of disciplinary action taken by other staff
7 members in response to allegations of verbal abuse by staff in the reports of the Court
8 expert and plaintiffs' counsel. Wofford at RT 427:12-14, 429:21-430:6.

9 233. Although aware of serious problems, not a single witness even promised to
10 hold any of the responsible staff accountable.

11 234. Defendants are capable of establishing a more far-reaching accountability
12 system tailored to Clark compliance. In another prisoner disability discrimination case
13 before this Court, a specific Court order requiring a system of accountability resulted in a
14 more comprehensive accountability process. Armstrong v. Schwarzenegger, Case No. C
15 94-2307 CW, Injunction, January 18, 2007 (Armstrong Dkt # 1045), at 7 (ordering
16 accountability system in Armstrong that tracks the record of each institution and the
17 conduct of individual staff members who are not complying with the requirements of the
18 Armstrong Remedial Plan and orders of the Court; ordering defendants to refer
19 individuals with repeated instances of non-compliance to the Office of Internal Affairs,
20 and for discipline, if appropriate); Wells at RT 549:16-550:9. In that case, because of the
21 accountability process, staff members have an extra incentive to abide by the Armstrong
22 Remedial Plan, and when they do not, headquarters officials are informed that there is a
23 problem. Wells at RT 550:13-551:17.

24 235. No such particularized accountability process exists in this case. Wells at
25 RT 550:2-11. At the hearing, defendants first expressed an intention to plaintiffs' counsel
26 to adopt measures to hold staff accountable. McDonald at RT 936:25-937:10. This
27 intention has not yet been realized. An executive-level defense witness was shown this
28

1 plan only in preparation for her testimony in the hearing (McDonald at RT 963:4-9), and it
2 has not been vetted by the Court expert or plaintiffs’ counsel.

3 236. In sum, the Court does not have any confidence that defendants are capable
4 of identifying and correcting systemic violations of the ADA, § 504, and the Fourteenth
5 and Eighth Amendments. It has not been able to do so in the past, and the Court does not
6 believe that it will be able to do so in the future.

7 **5. Retaliation**

8 237. To the extent that defendants have engaged in remedial efforts, those efforts
9 have been undermined by their own staff members, some of whom have harassed and
10 retaliated against prisoners who have spoken out in these proceedings about the lack of
11 protection and adaptive services for developmentally disabled prisoners.

12 238. Tryon Smith was deposed regarding problems that prisoners with
13 developmental disabilities face at Lancaster. Smith at RT 524:9-14. Custody officers
14 were in the room during the deposition. Id. at 524:15-19. Prison staff members called
15 him a “snitch” following the deposition. Id. at 525:2-9. Being called a snitch is
16 “probably the worst thing you could be called in prison.” Leone at RT 760:16-18, see also
17 Smith at RT 525:10-21 (being called “snitch” in prison means “you get hurt”). For
18 developmentally disabled prisoners, who already experience violence and exploitation
19 from other prisoners, such a label is all the more dangerous and alarming. Thus, Mr.
20 Smith expressed understandable concern about renewed retaliation when he testified
21 during the trial. Smith at RT 526:3-5.

22 239. The Court’s expert identified similar threats of retaliation. According to
23 Daniel Mendez (#138), staff members told him, “if you want no harassment, ease up on us
24 when the visitors com[e].” Leone Report at 18. Numerous other prisoners reported being
25 “directed to say positive things about the DD Program” to the Court’s expert. Id.; see also
26 Leone at RT 735:22-736:6 (one prisoner interviewed asked that his name not be used,
27 while others expressed fear of retaliation). Moreover, a large number of prisoners said
28

1 they feared retaliation from correctional officers and tried to avoid specific officers. Leone
2 Report at 3. Incidents of harassment were numerous and significant enough that Dr.
3 Leone found it necessary to recommend that CDCR “provide assurances that when
4 inmates’ names are identified [in conjunction with the expert report], there will be no
5 retaliation. CDCR staff at the level[s] of warden and associate warden needs to describe
6 how [it] will ensure that there will be no retaliation against inmates who talked to the
7 Court’s Expert.” Id. at 20.

8 **III. Defendants Have Failed to Meet their Burden of Proof**

9 257. As discussed in the Conclusions of Law, defendants bear the burden of
10 proof on their termination motion. They must demonstrate that there are no current or
11 ongoing violations of the statutory and constitutional rights of the plaintiff class that
12 warrant continuing relief. The Court finds that defendants have fallen short of meeting
13 this burden as to the majority of the existing prospective relief. Even if the burden were
14 on plaintiffs, the evidence set forth in the previous section demonstrates that
15 developmentally disabled prisoners are currently subject to systemic constitutional and
16 statutory violations in California prisons, and the evidence put forth by defendants fails to
17 rebut that case in any significant way.

18 258. Defendants’ evidence falls into four categories: (1) testimony from officials
19 from CDCR headquarters regarding their written policies, the implementation of those
20 policies, and staff training requirements; (2) testimony from individual prison staff
21 members regarding their personal actions in addressing the needs of some
22 developmentally disabled prisoners; (3) rebuttal expert testimony regarding Dr. Leone’s
23 report; and (4) documentary evidence. These categories are addressed in turn below.

24 **A. CDCR Officials**

25 **1. Terri McDonald and Richard Subia**

26 259. Two high-level custodial officials testified for defendants: Terri McDonald,
27 who is the Chief Deputy Secretary of Adult Operations and third in command of the
28

1 CDCR, and Richard Subia, who is the Deputy Director of the Division of Adult
2 Institutions. McDonald at RT 928:10-11; Subia at RT 215:22-216:3. These officials
3 testified that they are confident that CDCR follows the dictates of the Clark Remedial
4 Plan (CRP) (Subia at RT 220:7-221:1), with Ms. McDonald going so far as to state her
5 conviction that the state is “in substantial compliance” with its requirements, McDonald at
6 RT 939:24-25, 959:18-19. Although the sincerity of these witnesses is not in doubt, for
7 the reasons set forth below, the Court does not give credit to their conclusions.

8 260. These assertions cited above were not supported by any personal knowledge
9 of prison conditions for developmentally disabled prisoners. Neither Ms. McDonald nor
10 Mr. Subia had spoken to developmentally disabled prisoners or designated DDP staff
11 regarding issues facing developmentally disabled prisoners. McDonald at RT 950:3-6
12 (does not tour prisons to ask about substantive Clark matters), 16-18 (has never asked a
13 prisoner about a substantive Clark matter); Subia at RT 249:16-21 (in the last two years,
14 has not spoken to any DD prisoners or to correctional officers regarding the DDP). Nor
15 did these witnesses have sufficient knowledge from reliable secondary sources: neither
16 regularly reviews any reports regarding Clark compliance. McDonald at RT 949:13-23
17 (does not review Court experts’ or plaintiffs’ counsel’s monitoring reports); Subia at RT
18 239:12-18, 242:12-14 (has not received reports from the Court experts until Dr. Leone’s
19 2010 report), 268:9-12 (has not been on monitoring tours with plaintiffs’ counsel “within
20 the last couple of years”).

21 261. Further, Ms. McDonald has not talked to Office of Court Compliance staff
22 involved in Clark monitoring in the 14 months she has been Chief Deputy Secretary.
23 McDonald at RT 950:19-951:4. Mr. Subia testified that although he is aware that staff
24 members are supposed to document the services they provide to developmentally disabled
25 prisoners, in his current position he has not reviewed logs or seen evaluations of whether
26 logs are reliably documenting services. Subia at RT 242:12-25. He has neither performed
27 nor reviewed any analysis to determine if DDP training is effective. Id. at 243:1-6. He
28

1 has done no investigation or evaluation to determine whether developmentally disabled
2 prisoners receive staff assistants at disciplinary hearings. Id. at 245:6-9. Although he
3 acknowledged that, as a group, developmentally disabled prisoners are vulnerable to
4 exploitation and abuse, including sexual and physical assault, from other prisoners (id. at
5 246:3-4, 246:18-20, 247:8-20) and stated that protecting developmentally disabled
6 prisoners requires more supervision and oversight by staff than protecting non-disabled
7 prisoners does (id. at 247:21-24), he was not aware of any evaluation of whether CDCR's
8 staffing is adequate to protect developmentally disabled prisoners,¹⁰ id. at 247:25-248:2.

9
10 262. The central questions before the Court are whether defendants act in
11 accordance with their obligations under the law as embodied in their written policies and
12 procedures and the required training, and whether those policies and procedures and
13 training are adequate to safeguard the federal rights of the plaintiff class. Neither Ms.
14 McDonald nor Mr. Subia could shed any light on either point, since neither had any
15 personal knowledge to offer.¹¹

16 2. Dr. Donald Salz

17 263. Dr. Donald Salz, Chief Psychologist at CDCR Healthcare Services-Mental
18 Health, also testified about CDCR treatment of developmentally disabled prisoners and
19 compliance with the Clark Remedial Plan. Salz at RT 40:5-6. Dr. Salz is responsible for
20 clinical assessments of developmentally disabled prisoners and staff training in the DDP.
21 Id. at 42:4-9. Although not designated by defendants as an expert, he testified that in his
22 opinion, the DDP has changed prison culture in California for the better in the last 15
23 years. Id. at 104:24-106:6. According to Dr. Salz, people who have been promoted in the
24 prison system since the DDP training began “are people that get it, people that understand

25 ¹⁰ At least one factual error also undercut Mr. Subia's testimony. He claimed that
26 there are 12 prisons designated for DD prisoners when in fact there are only 10. Subia at
27 RT 220:5-6; Stipulated Fact 9.

28 ¹¹ Similarly, the draft audit tool, about which Ms. McDonald and Mr. Wells
testified about in great detail, demonstrates only that compliance with one Clark Remedial
Plan requirement has begun, many years late. It does not show that defendants are in
compliance with the rest of the Remedial Plan, that there are no statutory or constitutional
violations, or that they are capable of self-monitoring.

1 that Americans with [D]isabilities [A]ct is real law, needs to be followed, even inside a
2 prison and they get it and they promote it. They support it when we do[] our audits and
3 we brought up problems with them, they support it wholeheartedly.” Id. at 105:15-20.

4 264. However, Dr. Salz’s testimony lacked foundation because of his extremely
5 limited knowledge of current conditions. He has done only three audits in the past two
6 years (id. at 135:18-20) and has talked to no more than 20 developmentally disabled
7 prisoners in that time period, id. at 137:1-12. His areas of responsibility in the DDP are
8 limited to clinical assessments of prisoners and training. Id. at 42:4-9. His personal
9 knowledge does not extend outside of these areas: his audits addressed only the testing
10 and identification processes, and not custodial matters, and only “occasionally” included
11 conversations with correctional officers. Id. at 136:14-20. Thus, for example, he has no
12 personal knowledge of whether developmentally disabled prisoners are given help with
13 reading and writing. Id. at 142:9-11, 142:17-143:1, 143:9-13. He has no role with regards
14 to placement of developmentally disabled prisoners. Id. at 143:14-144:15. He has no
15 personal knowledge of whether staff assistants are assigned to developmentally disabled
16 prisoners who need them. Id. at 141:18-142:5. Dr. Salz’s opinions regarding general
17 compliance lack foundation.

18 265. Nor is Dr. Salz’s testimony on those topics about which he does have
19 personal knowledge—clinical assessments and training—particularly helpful. The Court’s
20 serious concerns regarding CDCR’s clinical assessments and Dr. Salz’s testimony on that
21 topic are set forth in § II.B, *supra*. Regarding training, there is no dispute that training is
22 helpful. The only questions are (a) whether the training is being provided as required, and
23 (b) whether the required training is adequate to ensure that the needs of the plaintiff class
24 are met. Dr. Salz’s testimony provided no evidence on either of those points: he has no
25 personal knowledge of whether staff is actually receiving the required training (id. at
26 145:12-15) and, in fact, admitted that staff members have used improper training materials
27 in the field. Id. at 131:21-23. Dr. Salz simply does not know whether the needs of the
28

1 plaintiff class are being met.

2 **3. Richard Wells**

3 266. The defense witness with the most knowledge on defendants’ remedial
4 efforts in this case was Richard Wells, a facility captain in the Office of Court
5 Compliance. The Office of Court Compliance, an arm of CDCR’s legal office, manages
6 compliance efforts for Clark as well as other class action lawsuits. Wells at RT 169:5-11.
7 The task of the Office is to monitor compliance, provide training, and ensure that the
8 mandates of the Clark Remedial Plan are met. Id. at 169:19-170:2.

9 267. Mr. Wells testified that staff is trained to protect canteen purchases of
10 developmentally disabled prisoners by escorting them to pick it up and/or inventorying
11 their property (id. at 192:17-193:1), to help them with showers and hygiene (id. at 195:15-
12 196:8), and to be aware of their vulnerability to abuse. Id. at 193:18-194:2. However, he
13 also testified that he did not know whether all staff members have received training (id. at
14 554:17-19) and that staff sometimes uses improper training materials. Id. at 554:1-4.
15 Thus, the questions regarding the adequacy of training, raised by Dr. Leone, and the
16 disputed matter of whether all staff receive the required training with the appropriate
17 materials were not resolved by his testimony.

18 268. Mr. Wells testified that the Office of Court Compliance has staff at the
19 prisons who are their “eyes and ears” on Clark compliance. Id. at 171:1-9. According to
20 Mr. Wells, these supervising correctional counselors (known as CCIIs) ensure compliance
21 with the Clark Remedial Plan, work with the ADA Coordinators and other staff to remedy
22 any problems, and provide information weekly to Mr. Wells and his staff. Id. at 179:7-
23 180:25. Significantly, however, Mr. Wells never directly stated that defendants were in
24 compliance with the Clark Remedial Plan, nor did he comment on Dr. Leone’s report or
25 refute any of his conclusions. His testimony avoided the critical question that the Court
26 must address—whether there are current violations of constitutional and statutory rights—
27 and instead focused on the infrastructure that defendants have established to comply with
28

1 the mandates of the Remedial Plan, including policies and procedures, training, and
2 staffing both at headquarters and at the institutions.

3 269. Whether that infrastructure is adequate to provide sufficient services to
4 plaintiff class members was not answered by Mr. Wells, since, like all of the other
5 headquarters officials who testified, he lacked sufficient information about problems with
6 Clark compliance. He did not know whether all developmentally disabled prisoners who
7 need help reading and writing actually receive it. Id. at 555:8-12. He did not recall
8 receiving or reviewing plaintiffs' counsel's 2008 report raising serious concerns about
9 compliance at Lancaster and did not recall anyone bringing problems set forth in that
10 report to his attention. Id. at 449:22-450:3, 451:3-5. Although he did review Dr. Leone's
11 2008 report, which raised serious concerns about compliance at Lancaster, he neither
12 directed staff to take corrective action, nor asked Mr. Subia to do the same. Id. at 469:24-
13 470:16.

14 270. Mr. Wells's testimony was further undercut by the documentation of Clark
15 Remedial Plan violations. He admitted that numerous recent administrative segregation
16 placement notices he was shown demonstrated Clark Remedial Plan violations through
17 the failure to provide developmentally disabled prisoners with staff assistants. Id. at
18 474:25-475:12; 476:10-20; 482:24-483:3; 484:6-17; 486:10-22; 487:21-24; see also Tr.
19 Exs. 306-07, 323, 331, 333, 335. He had never seen these documents before and admitted
20 that he did not know if any corrective or disciplinary actions had been taken against staff
21 whose violations were documented on the forms. Wells at RT 491:2-18, 22; 492:4-9. The
22 record contains many additional examples of similarly deficient notices. See Tr. Exs. 287,
23 288, 321, 337-39, 341, 350, 364-75, 377-82, 392-93.

24 271. Similarly, Mr. Wells was shown numerous forms notifying developmentally
25 disabled prisoners of their parole conditions that failed to document adequate
26 accommodations or assistance, as required by CDCR policy. Wells at RT 502:25-503:7,
27 503:19-24, 509:9-14, 509:20-22, 541:20-542:5, 543:5-10, 544:20-545:5, 545:18-546:3,
28

1 547:7-14; see also Tr. Exs. 27, 29, 30, 33, 95, 97, and 99. These forms thus documented
2 violations of CDCR rules. Wells at RT 503:3-7, 509:12-22, 542:1-6, 543:5-10, 544:19-
3 545:5, 545:24-546:11, 547:10-14. He had never before seen any of the non-compliant
4 conditions of parole forms. Id. at 549:6-7, 13. The record contains many additional
5 examples. See Tr. Exs. 23-26, 28, 31-32, 34-94, 96, 98.

6 272. Mr. Wells's testimony thus does not contradict the overwhelming evidence
7 of systemic Remedial Plan violations as discussed in § II, *supra*. Indeed, it is entirely
8 consistent with the picture painted in Dr. Leone's report: that defendants have made some
9 advances in their treatment of developmentally disabled prisoners, that they have good
10 policies and helpful training, and that some committed, well-intentioned staff members
11 provide some services to some prisoners, but that the efforts fall far short of meeting the
12 needs of a majority of plaintiff class members, many of whom are forgotten or ignored
13 and left without the help they need to function in the dangerous and difficult prison
14 environment.

15 **B. Staff at the Various Prisons**

16 273. Nine ADA Coordinators, four DDP counselors, and four DDP officers from
17 a total of six California prisons¹² testified live and by deposition for defendants.¹³ The
18 Court finds that the testimony from staff members at various prisons regarding their work
19 with individual class members is not adequate to demonstrate systemic compliance or to
20 counter plaintiffs' evidence showing systemic violations of federal law and the Clark
21 Remedial Plan.

22 274. As discussed in more detail below, the testimony of several ADA
23 Coordinators that their institutions are compliant with the requirements of the Clark
24

25 ¹² The six prisons -- R.J. Donovan, SATF, California Rehabilitation Center,
26 Lancaster, CMF, and Deuel Vocational Institution -- were all visited by the Court expert
before he drafted his report.

27 ¹³ The parties stipulated that the direct testimony of the prison staff witnesses who
28 appeared only by deposition would be substantially similar to the direct testimony of their
counterparts who appeared in person, and the Court has considered that stipulated
testimony in making these Findings. See RT 375:12-376:4.

1 Remedial Plan lacks foundation: they simply do not know enough about compliance
2 matters at their prisons. Other testifying staff members are not credible in describing their
3 prison's compliance performance because they are ignorant of the requirements of the
4 Remedial Plan and of the needs of developmentally disabled prisoners, are failing to
5 perform their work adequately, and have not received necessary required training.

6 275. After weeding out the testimony that lacks credibility or foundation, what
7 remains are isolated examples of some services provided to plaintiff class members. Such
8 isolated examples are entirely consistent with the findings of the Court expert.

9 **1. Some ADA Coordinators Lack Foundation to Testify about**
10 **Compliance in their Prisons**

11 276. ADA Coordinators are charged with ensuring compliance with the Clark
12 Remedial Plan at their prisons. CRP at 41; Prud'homme Dep. (Tr. Ex. 488) at 22:3-6,
13 28:18-21; Wells at RT 171:22-24. In the absence of a state-wide standardized
14 comprehensive system to measure compliance in the institutions, ADA Coordinators'
15 methods for ensuring compliance varied widely. Some did not speak to staff or
16 developmentally disabled prisoners or review documents. As a result, some ADA
17 Coordinators lacked foundation to testify about whether plaintiff class members at their
18 prisons are provided necessary accommodations.

19 **a. No Personal Knowledge**

20 277. In some cases, ADA Coordinators lacked personal knowledge about
21 whether their staff were following Remedial Plan requirements. Prud'homme Dep. at
22 114:8-24 (ADA Coordinator at SATF lacks personal knowledge whether all needs of DD
23 prisoners are being met), 198:15-199:1 (no personal knowledge whether staff assistants
24 always assigned to DD prisoners at classification proceedings), 62:4-19, 65:1-6, 65:21-
25 67:1 (same), 198:8-14 (no personal knowledge whether staff assistance provided to DD
26 prisoners during grievance process); Ynson Dep. at 55:13- 57:13 (ADA Coordinator at
27 Lancaster not personally aware if lesson plan for staff training includes instructions on
28 how to prompt DD prisoners), 61:5-16 (no personal knowledge as to whether staff at

1 Lancaster encourage DD prisoners to participate in beneficial programs and services),
2 121:24-122:19 (no personal knowledge whether staff assistants assigned at disciplinary
3 hearings, whether effective communication is achieved, or whether staff ensure DD
4 prisoners understand the nature and importance of disciplinary proceedings), 123:25-
5 124:3 (no personal knowledge whether staff assistants assigned to DD prisoners at
6 administrative segregation hearings), 135:15-18 (no personal knowledge whether staff is
7 assigned to facilitate DD prisoners' use of grievance system), 140:17-141:13 (no personal
8 knowledge whether DD prisoners receiving staff assistance filling out grievance forms
9 when they requested help from correctional counselors, housing staff, or DD staff, and not
10 aware if enough staff members are available to help DD prisoners with grievance forms),
11 146:12-16 (no personal knowledge whether Lancaster staff take specific measures to
12 protect DD prisoners from abuse by other prisoners), 147:16-21 (no personal knowledge
13 whether staff who provided orientation to DD prisoners were trained to communicate with
14 them), 151:2-4 (no personal knowledge whether DD prisoners notified of conditions of
15 parole before release), 114:21-24 (no personal knowledge that staff assistants assigned at
16 classification hearings except on four occasions), at 115:7-15 (no personal knowledge that
17 effective communication achieved during classification hearings while ADA
18 Coordinator), 119:20-120:3 (no personal knowledge that a staff assistant speaks to DD
19 prisoners who refuse to appear at classification committee hearings); Nies Dep. (Tr. Ex.
20 492) at 142:23-143:2, 141:4-6 (ADA Coordinator at Deuel Vocational Institution could
21 not verify whether DD prisoners were provided with required assistance in administrative
22 proceedings because he never attended a disciplinary hearing of a DD prisoner while
23 ADA Coordinator).

24 **b. No Foundation for Claiming Compliance**

25 278. Given the seriousness of the compliance problems presented to the Court
26 and the undisputed duty of staff to proactively offer help to plaintiff class members (see §
27 II.C.1.f), it is not sufficient for prison officials to opine that prisoners' needs are met
28

1 because the officials do not hear complaints. At least one ADA Coordinator's opinions
2 regarding compliance rested on just such faulty grounds. Prud'homme Dep. at 121:5-
3 122:10 (ADA Coordinator confident that staff explain conditions of parole in a way that
4 DD prisoners can understand because nobody has raised any problems with him), 108:3-
5 14 (believes that DD prisoners who need help reading and writing are receiving it because
6 he hears very few complaints, does not see that it's not being done and does not hear
7 about problems from his staff), 132:6-15 (bases his belief that staff provided adaptive
8 support services to DD prisoners as needed on "how well our DD population functions").

9
10 279. The questions before the Court are whether defendants implement their
11 written policies and the required trainings, and whether those policies and trainings
12 effectively protect the rights of plaintiff class members—not whether those policies and
13 trainings merely exist. But some ADA Coordinators' assertions that their prisons were in
14 compliance relied on only the existence of policies and trainings. Valdez Dep. (Tr. Ex.
15 493) at 128:21-130:1, 139:24-141:15 (former ADA Coordinator from R.J. Donovan could
16 not testify that he knew whether staff were sensitive to the needs of DD prisoners and alert
17 to possible abuse, only that staff were trained in these areas); Nies Dep. at 133:6-134:8
18 (ADA Coordinator from DVI could not testify that he knew whether staff were alert to
19 possible abuse, only that staff were trained in that area).¹⁴

20 280. Some ADA Coordinators do not know or investigate whether plaintiff class
21 members' rights are violated under the Remedial Plan and federal law. Nies Dep. at
22 94:12-14 (ADA Coordinator at DVI does not know how often counselors go into housing
23 units and no documentation of this), 33:10-11, 33:16, 18, 34:16-20, 34:22-36:22 (no
24 knowledge of what, how, and whether transfer of DD prisoners out of Reception Center
25 is expedited, as required by the Remedial Plan [CRP at 9-10] and the prison's Operational

26 ¹⁴ At the same time, some ADA Coordinators did not even know whether required
27 training was provided. Prud'homme Dep. at 131:13-16 (ADA Coordinator at SATF could
28 not say that every staff member received each required trainings); Nies Dep. at 139:20-22
(ADA Coordinator at DVI does not know whether all staff serving as staff assistants have
received appropriate training).

1 Procedure [Tr. Ex. 1024 at 12]; Gonzalez Dep. (Tr. Ex. 483) at RT 165:11-24 (former
2 ADA Coordinator at California Medical Facility [CMF] has never investigated whether
3 staff inform plaintiff class members about their parole conditions in a way that they can
4 understand or whether staff inform parole officers of class members' disabilities); Cowan
5 Dep. (Tr. Ex. 494) at 59:19-25 (ADA Coordinator at R.J. Donovan does not know how
6 counselors explained conditions of parole to DD prisoners).

7
8 281. Some ADA Coordinators had not reviewed adequate documentation to
9 claim compliance. Prud'homme Dep. at 132:6-133:8 (ADA Coordinator at SATF
10 believes that staff are providing adequate adaptive support but has only reviewed adaptive
11 support logs twice, one year before his deposition), 142:10-11 (does not review
12 documentation from administrative segregation hearings to determine whether staff
13 assistants assigned), 139:21-140:22 (does not audit documentation from classification
14 proceedings to ensure that assistant assigned); Ynson Dep. at 73:23-25 (did not review
15 adaptive support logs while ADA Coordinator); Gonzalez Dep. at 102:11-14, 113:2-5,
16 120:12-19, 108:1-25; 128:3-129:18 (former ADA Coordinator at CMF never reviewed
17 DD prisoners' documentation from disciplinary, classification or administrative
18 segregation placement proceedings to determine whether required assistance provided);
19 Cowan Dep. at 99:21-25 (ADA Coordinator at R.J. Donovan does not review
20 documentation to assess whether staff assistants assigned classification).

21 282. Some ADA Coordinators rarely spoke to DDP staff or developmentally
22 disabled prisoners, similarly limiting their ability to testify competently regarding
23 compliance. Gonzalez Dep. at 166:12-168:10, 171:7-11 (former ADA Coordinator at
24 CMF did not speak to staff about frequency of contacts with DD prisoners); Mandeville
25 Dep. (Tr. Ex. 485) at 14:22-15:21 (ADA Coordinator from CMF has only minimal direct
26 contact with DD prisoners).

27 283. Further evidence that these defense witnesses lacked foundation to testify
28 about Clark compliance comes from the testimony of DDP officers and counselors from

1 multiple institutions, who described minimal oversight by and interaction with ADA
2 Coordinators. Banks Dep. (Tr. Ex. 484) at 71:10-12 (DDP officer at CMF has no
3 interactions with ADA Coordinator); Pearson at RT 367:9-13 (DDP officer at California
4 Rehabilitation Center only saw ADA Coordinator in housing unit two or three times and
5 never saw him look through the locked box containing 128C-2s); Horne Dep. (Tr. Ex.
6 482) at 169:22-170:3 (DDP officer at Lancaster did not know who current ADA
7 Coordinator was); Rhodes Dep. (Tr. Ex. 487) at 108:19-23, 109:1-3 (DDP counselor at
8 Lancaster did not know who ADA Coordinator was or what his duties are); Clausing Dep.
9 (Tr. Ex. 491) at 40:23-41:21 (ADA Coordinator at SATF seen by DDP officer in housing
10 unit no more than six to seven times in last two years); Chapa Dep. (Tr. Ex. 489) at
11 214:25-215:5 (DDP counselor at SATF did not inform the ADA Coordinator about
12 grievance alleging that DD prisoners were being discriminated against, harassed, and
13 assaulted); Tr. Ex. 253.

14 **2. Some Prison Staff Are Ignorant of Requirements of the Clark**
15 **Remedial Plan and of Needs of Developmentally Disabled**
16 **Prisoners**

17 284. The testimony of other prison staff was not credible because they do not
18 know the requirements of the Remedial Plan and they do not understand the
19 characteristics and needs of developmentally disabled prisoners.

20 **a. Ignorance of Requirements of the Clark Remedial Plan**

21 285. Some ADA Coordinators, DDP officers, and DDP counselors did not know
22 the requirements of the Remedial Plan.

23 286. Defendants classify plaintiff class members as DD1, DD2, and DD3 based
24 on the nature and severity of the developmental disability, adaptive deficits, and adaptive
25 support services required. CRP at 3-4, 20-23; Salz at RT 75:5-21. However, at least one
26 ADA Coordinator was unaware of these designations or of their significance. Gonzalez
27 Dep. at 36:7-37:5 (former ADA Coordinator at CMF had no opinion about whether DD2s
28 have greater need for adaptive support than DD1s and whether DD3s have greater need

1 for adaptive support than DD2s).

2 287. DDP officers and counselors are required to document adaptive support
3 services, prompts, contacts, and issues relating to developmentally disabled prisoners.
4 CRP at 42. But at least one staff was unaware of this requirement. Chapa Dep. at 131:11-
5 21; 214:5-19 (DDP counselor at SATF for almost 11 years had never documented any
6 adaptive supports he provided to DD prisoners in housing unit log until ADA Coordinator
7 told him six months ago that he had do so because “the Prison Law Office was getting
8 picky”).

9 288. The Remedial Plan requires that an Interdisciplinary Support Team (IDST)
10 act as the classification committee for plaintiff class members at the *Clark* designated
11 prisons. CRP at 24-25. The IDSTs review the developmentally disabled prisoner’s
12 custody, classification, program, and adaptive support at varying intervals, depending on
13 the designation of that prisoner. Correctional officers are required to participate in and
14 provide support services at the IDST. CRP at 42. However, some prison staff members
15 showed a profound ignorance of these committees and their duties. Banks Dep. at 63:13-
16 64:3 (DDP officer does not know what IDST is); Gonzalez Dep. at 136:14-137:12 (former
17 ADA Coordinator at CMF not aware of required frequency of classification committee for
18 DD2s and DD3s).

19 289. Plaintiff class members are entitled to assistance so that, to the best of their
20 ability, they can understand and participate in administrative proceedings. CRP at 8. To
21 this end, defendants must assign staff assistants trained to communicate with
22 developmentally disabled prisoners in disciplinary, classification, and administrative
23 segregation placement hearings. Id. at 8, 49-50; see also Salz at RT 120:1-122:1
24 (communicating effectively with DD prisoners means making language more concrete and
25 having the prisoner repeat back the statement in his own words). However, some prison
26 staff members did not know or understand these requirements. Banks Dep. at 61:6-11,
27 61:25-62:5 (DDP officer at CMF believes that when serving as staff assistant for DD
28

1 that some prisoners have been wrongly designated by prison clinicians as developmentally
2 disabled due to the prisoners' appearance or skill sets in some areas. Chapa Dep. at
3 235:4-236:1 (DDP counselor at SATF believes that certain prisoners who carry
4 themselves a certain way and know some rules are not developmentally disabled); Horne
5 Dep. at 102:17-103:7 (DDP officer at Lancaster believes that DD prisoners who do not
6 routinely ask for assistance have the ability to function and solve problems).

7 **3. Prison Staff Violate their Remedial Plan Duties**

8 294. Other prison staff members were clearly failing to perform their work
9 adequately. Staff duties with regard to developmentally disabled prisoners are clearly
10 outlined in the Clark Remedial Plan. CRP at 41-45. Nevertheless, noncompliance with
11 many of these requirements was almost universal and some of these instances of
12 noncompliance were egregious.

13 295. DDP officers are required to maintain frequent contacts with and monitor
14 daily activities of developmentally disabled prisoners. CRP at 7-8, 42. But some staff
15 witnesses do not regularly check in with or monitor prisoners with developmental
16 disabilities and are poorly supervised in this area. Banks Dep. at 32:20-35:12, 83:13-16;
17 Gonzalez Dep. at 168:22-169:12, 171:7-11; see also Mandeville Dep. at 70:23-71:13,
18 118:14-119:2 (ADA Coordinator had no expectation about the appropriate frequency of
19 staff contact with DD prisoners).

20 296. Similarly, prison staff members fail to provide necessary reading and
21 writing assistance to plaintiff class members, do not remind plaintiff class members to
22 take care of basic life needs, fail to protect plaintiff class members from theft and abuse,
23 and fail to ensure that plaintiff class members understand prison due process proceedings.

24 297. It was undisputed that staff must be proactive in seeking out the needs and
25 concerns of plaintiff class members. § II.C.1.f. But some prison staff members do not
26 affirmatively provide assistance to prisoners with developmental disabilities. Banks Dep.
27 at 29:7-16 (officer does not know if there was ever a time when she provided services to
28

1 DD prisoners because of information in their 128C2); Brown Dep. (Tr. Ex. 486) at 32:9-
2 14 (DDP counselor at CMF would not volunteer help during open line); Chapa Dep. at
3 138:16-139:24 (DDP counselor at SATF believes some DD prisoners might be afraid to
4 talk to staff but does not determine which prisoners have never approached him to ask for
5 help); Horne Dep. at 102:17-103:7 (DDP officer at Lancaster does not ask DD prisoners
6 who do not routinely ask for assistance ask why they are not asking for help); Valdez Dep.
7 at 107:2-16 (officers at R.J. Donovan do not explain prison rules to DD prisoners unless
8 the prisoners ask them); Banks Dep. at 47:1-24.

9 298. The Clark Remedial Plan requires that all custody staff members receive
10 annual overview trainings that include information about, among other topics,
11 developmental disabilities, behaviors indicating developmental disabilities and types of
12 adaptive support services that must be provided by prison staff members to prisoners with
13 developmental disabilities. CRP at 59-61; Wells at RT 554:7, 554:13-14. In addition,
14 prison staff members serving as staff assistants, participating in disciplinary and
15 classification proceedings, and taking on other roles must be trained with the use of
16 specialized training modules. CRP at 61-62; Wells at RT 554:7-14, 161:16-162:8.

17 299. One reason why prison staff members' testimony reveals gaps in
18 compliance might be that some of these defense witnesses had never received – or cannot
19 recall receiving—part or all of the required training. Brown Dep. at 15:24-16:23, 76:8-15,
20 107:15-17 (counselor at CMF cannot recall getting staff assistant training and serves as a
21 staff assistant every few weeks), 136:8-21 (same counselor does not recall training before
22 becoming or during time as a Clark counselor, other than annual overview training),
23 112:25-113:7 (same counselor not trained on effective communication with DD
24 prisoners); Gonzalez Dep. 50:7-15 (former ADA Coordinator at CMF does not know how
25 long the Clark training is, or what it consists of), id. at 131:1-16 (ADA Coordinator did
26 not receive all of required training); Valdez Dep. at 133:3-12 (staff members at R.J.
27 Donovan did not receive overview Clark training from a clinician, as required by the CRP
28

1 [CRP at 61]); Ynson Dep. at 54:22-55:12 (ADA Coordinator at Lancaster did not receive
2 required annual refresher training in 2009).

3 300. Further, at least one prison official was not even aware of crucial training
4 requirements. Valdez Dep. at 135:23-137:15 (ADA Coordinator at RJD is not aware of
5 specific training required for staff assistants).

6 **4. Testimony from a Few Staff Members at Individual Prisons Does**
7 **Not Prove Systemic Compliance**

8 301. Some prison staff members testified credibly that they work to meet the
9 needs of developmentally disabled prisoners. See, e.g., Prud'homme Dep. at 88:19-90:7;
10 Serna at RT 347:15-348:12 (assists DD prisoners with reading and writing), 350:17-352:6
11 (accommodations at classification hearings). However, the attentiveness of a handful of
12 staff chosen to testify for the defense does not capture the experiences of plaintiff class
13 members in other institutions, or even in the same institution when the particular staff
14 person is not on duty. Such testimony, like that of Mr. Wells, is entirely consistent with
15 Dr. Leone's findings that the California prison system is characterized by indifference to
16 developmentally disabled prisoners, with sporadic examples of compliance from
17 particular staff.

18 **C. Defendants' Case in Rebuttal**

19 302. Defendants' case in rebuttal is no more persuasive than their case in chief.
20 Defendants did not rebut at the hearing a single fact that Dr. Leone relied on to support his
21 opinion that there exists a pattern of indifference to the basic needs of plaintiff class
22 members. Although some individual staff members from some of the same prisons Dr.
23 Leone visited testified that they provided assistance to developmentally disabled prisoners
24 at those institutions (see, e.g., Serna at RT 338:16-339:1, 341:14-342:2, 347:15-348:12;
25 Horne Dep. at 43:25-44:6; Brown Dep. at 33:14-16; Clausing Dep. at 87:10-25), this
26 testimony does not rebut his findings that *despite* the efforts of some helpful staff, many
27 prisoners' needs are not being met. See, e.g., Serna at RT 349:11- 350:4 (cannot always
28 assist every DD prisoner who requests assistance); Banks at 79:21-80:1 (only assists DD

1 prisoners with 602 forms). Not one prisoner interview, staff interview, or document relied
2 on by Dr. Leone was directly challenged by any of defendants' evidence at the hearing,
3 despite the fact that defendants had nearly three months to investigate the report before the
4 hearing.¹⁵

5 303. Defendants' sole rebuttal expert witness was Dr. James Scaramozzino.
6 Dr. Scaramozzino failed to provide any credible rebuttal testimony. By his own
7 admission he is not an expert in developmental disabilities or in statistics. Scaramozzino
8 at RT 858:7-9 (does not consider himself an expert in developmental disabilities), 858:10-
9 12 (does not consider himself an expert in statistics). He is not an expert in the main area
10 of Dr. Leone's testimony—the operation of CDCR's programs for developmentally
11 disabled prisoners—except in the narrow area of mental health. *Id.* at 858:13-16. Nor is
12 he an expert in determining whether policies and procedures for disabled individuals are
13 adequate to provide access to the program services and activities at the prison, except,
14 again, for mental health. *Id.* at 858:17-21. In fact, Dr. Scaramozzino only spends 10 % of
15 his time on Clark issues, and that work only includes the mental health components, such
16 as testing and referrals. *Id.* at 859:24-860:14. He thus cannot speak credibly to Dr.
17 Leone's methodology or findings, except in the narrow area of the mental health
18 component of the DDP.

19 304. Dr. Scaramozzino's testimony is also unreliable because he has extremely
20

21 ¹⁵ The Court does not credit defense counsel's assertions that defendants could not
22 investigate Dr. Leone's statements because they did not possess his key—the names and
23 numbers of the prisoners he discusses in his report. Subia at RT 251:9-252:2. Dr. Leone
24 provided the key shortly after he issued his report, on February 26, 2010. Tr. Ex. 479.
25 Dr. Leone placed no limitation on defense counsel's ability to share that information with
26 CDCR headquarters. Leone at RT 747:13-21; Tr. Ex. 2. Nothing prevented defendants at
27 that point, two and one half months before the hearing, from interviewing the staff and
28 reviewing the documents that Dr. Leone relied on.

25 The Court also gave defendants the opportunity to move to reopen the hearing to
26 allow them to investigate Dr. Leone's findings, if they could justify their delay in doing
27 so. RT 1067:2-1068:5. Defendants have submitted new evidence and ask this Court to
28 consider it. However, because Defendants have failed to explain why this evidence was
not developed in a timely manner, and because consideration of this evidence at this stage
would deprive Plaintiffs of the opportunity to cross-examine the relevant witnesses, this
Court declines to consider it. This is discussed more thoroughly below.

1 limited knowledge of any of the workings of the DDP. He cannot say whether the DDP is
2 an effective program. Id. at 919:8-15. He had not read the Clark Remedial Plan for at
3 least a few years before he prepared his report. Id. at 902:4-6. In forming his opinions for
4 this case, he did not tour any prisons, speak to any prison staff or developmentally
5 disabled prisoners, review any prisoner files, review Dr. Leone’s notes, or review any
6 documents other than Dr. Leone’s 2010 report. Id. at 902:14-903:4. Dr. Salz wrote
7 various factual statements which Dr. Scaramozzino added to his report, although he had
8 no independent knowledge of their accuracy, the very criticism that he leveled at Dr.
9 Leone. Id. at 903:18-904:12. He characterized the report as a “collaborative effort”
10 between himself, Dr. Salz, and another CDCR psychologist. Id. at 903:11-17.

11 305. In Dr. Scaramozzino’s opinion, Dr. Leone “focused all his attention on
12 individual prisoners and did not look at the total system,” such as interviews with staff
13 regarding CDCR’s processes to implement Clark and review progress. James
14 Scaramozzino Expert Report (Tr. Ex. 1195) at 1; see also Scaramozzino at RT 864:23-
15 865:2. According to Dr. Scaramozzino, Dr. Leone looked only at “one component of the
16 program, the prisoner’s opinions,” while ignoring the state’s “primary goal, which is: Do
17 I have the program in place to be able to attend to the issues?” Scaramozzino at RT
18 873:19-24. Dr. Scaramozzino misses the real question at issue in these proceedings: not
19 whether the state has a remedial plan, which is accepted by both parties, but whether the
20 state follows that plan. Dr. Scaramozzino offered no evidence on that point.

21 306. Dr. Scaramozzino’s criticisms of Dr. Leone’s work are deeply flawed—so
22 flawed that he actually retracted some of them in his testimony. He found fault with Dr.
23 Leone for failing to review documentation or interview staff members to verify the
24 accounts of specific prisoners. Scaramozzino Report at 2; Scaramozzino at RT 881:10-21.
25 He admitted that this criticism was incorrect, however. Dr. Leone had performed such
26 reviews and conducted interviews (as noted in § II.A, *supra*) and Dr. Scaramozzino
27 overlooked that statement in Dr. Leone’s report. Scaramozzino at RT 908:18-909:15.
28

1 307. Dr. Scaramozzino also criticized Dr. Leone for not standardizing his
2 interviews or clearly defining the relationship between DDP classifications and degree of
3 self-reported problems. Scaramozzino Report at 3-4. However, when he wrote his report
4 Dr. Scaramozzino did not know what questions Dr. Leone asked. Scaramozzino at RT
5 893:2-7. He only learned through listening to Dr. Leone’s testimony at the hearing that
6 Dr. Leone asked a specific set of open-ended questions. Id. at 893:7-11, 900:25-901:3.
7 Dr. Leone’s testimony answered his concerns in this area.¹⁶ Id. at 909:16-910:11. His
8 concerns about the relationship between DDP classifications and degree of problems was
9 also assuaged by Dr. Leone’s testimony. Id. at 911:3-15.

10 308. Dr. Scaramozzino also criticized Dr. Leone for making findings based on
11 evidence that developmentally disabled prisoners are subjected to abuse and exploitation.
12 In Dr. Scaramozzino’s opinion, one cannot draw any conclusions from abuse suffered by
13 developmentally prisoners without knowing whether non-developmentally disabled
14 prisoners are also subjected to such abuse. Scaramozzino Report at 4; see also
15 Scaramozzino at RT 865:20-24, 893:22-894:21. Dr. Scaramozzino again misses the point.
16 The question in this case is whether defendants have secured the federal rights of plaintiff
17 class members, not whether other prisoners also suffer problems that might rise to the
18 level of constitutional or statutory violations. Given that developmentally disabled
19 prisoners are more vulnerable to abuse, a comparison between the populations is like
20 comparing apples to oranges, a statement with which Dr. Scaramozzino agreed.
21 Scaramozzino at RT 913:5-12.

22 309. Defendants have thus failed to rebut Dr. Leone’s report.

23 **D. Documentary Evidence**

24 _____
25 ¹⁶ Dr. Scaramozzino provided no credible testimony as to why Dr. Leone’s
26 approach is wrong. The Court finds persuasive Dr. Leone’s testimony that his questions
27 were well designed to elicit useful information from the class members he interviewed.
28 Defendants’ witness, Dr. Salz, and plaintiffs’ expert, Dr. Cowardin, corroborated the
validity of his approach. Salz at RT 80:16-17 (effective communication with DD
prisoners requires the use of open-ended questions and more than no or yes answers);
Cowardin at RT 656:8-20 (indicating that Dr. Leone is a professional trained in how to
speak with individuals with disabilities).

1 310. Defendants’ documentary evidence does not cast doubt on plaintiffs’
2 evidence. For the most part, defendants’ trial exhibits are written policies and procedures
3 (Tr. Exs. 1023-28, 1030, 1032, 1049-51) and training materials (Tr. Exs. 1034-40, 1042-
4 48, 1052, 1054-61, 1063, 1066-70, 1072-81). As has been repeatedly stated, such
5 documents do not prove that the policies contained within are followed or that the training
6 is provided appropriately or is adequate to ensure that the rights of the plaintiff class are
7 respected.

8 311. The documentary evidence also includes plaintiffs’ counsel’s monitoring
9 reports covering 17 prisons, dated from early 2008 to the middle of 2009 (Tr. Exs. 1003-
10 10, 1012-19, 1021-22)¹⁷ and two of Dr. Leone’s reports from 2008 regarding Lancaster
11 and CMF. Tr. Exs. 1001-02.

12 312. These documents present a balanced picture of defendants’ compliance with
13 the Clark Remedial Plan. At certain tours and institutions, prisoners reportedly were
14 receiving adequate accommodations and protections. At other times, and sometimes at
15 the same prisons, such services were absent. For example, in June 2008, Dr. Leone found
16 that CMF was “doing a good job of meeting the needs of dually-diagnosed inmates with
17 DD on the EOP units.” Tr. Ex. 1002 at 4. In early 2010, however, Dr. Leone found
18 serious problems there: along with one other prison, CMF was “probably the most
19 dysfunctional kind of set of circumstances, the least amount of protection, most
20 victimization of the seven prisons that I visited.” Leone at RT 783:19-21. For example,
21 many prisoners “identified specific officers that they said made fun of them and other
22 inmates with disabilities, threatened them, refused to issue ducats to inmates who needed
23 to leave the unit for activities, filed false Rules Violation Reports against inmates that they

24
25 ¹⁷ Some of the reports written by plaintiffs’ counsel and offered by defendants are
26 of limited value because they concern prisons with very few class members. See, e.g., Tr.
27 Ex. 1005 at 1 (only nine DD prisoners housed at California Institution for Women at the
28 time the report was generated), Tr. Ex. 1010 at 1 (only two DD prisoners housed at High
Desert State Prison at the time the report was generated), Tr. Ex. 1013 at 1 (only seven
DD prisoners housed at Pelican Bay State Prison at the time the report was generated), Tr.
Ex. 1021 at 1 (only four DD prisoners housed at Valley State Prison for Women at the
time the report was generated).

1 did not like, and failed to provide support and/or assistance to them” Leone Report
2 at 15 (footnote omitted).

3 313. Dr. Leone explained the varied findings in these monitoring reports: “my
4 sense is that this Clark [R]emedial [P]lan is not institutionalized, that it’s heavily
5 depend[ent] on which correctional officers might be on a particular unit at any given time.
6 So I may have visited [in 2008] during a period of time when there was very competent
7 officers doing exactly what they’ve been trained to do.” Leone at RT 784:5-11; see also
8 Tr. Ex. 1006 (California Men’s Colony, March 2008) at 9 (backsliding in the disciplinary
9 review process: none of the disciplinary write-ups reviewed had a clinician review); Tr.
10 Ex. 1007 (CMF, October 2008) at 10 (40 % of the disciplinary write-ups reviewed lacked
11 a clinician review, which was a worse record than the previous year).

12 314. These reports are consistent with Dr. Leone’s opinions and conclusions on
13 defendants’ compliance. For example, plaintiffs’ counsel noted in a report that “at
14 multiple institutions, such as [California Men’s Colony], prisoners report that the reality is
15 that staff simply refuse to provide such assistance when asked.” Tr. Ex. 1006 at 5; see
16 also Tr. Ex. 1003 (Lancaster, November 2008) at 3-5 (many of the adaptive support
17 evaluations generated by clinicians at Lancaster were inadequate and incomplete and
18 some appeared to classify the prisoner inaccurately), 7 (DD prisoners reported that
19 housing unit staff did not help them as needed; they were afraid to ask staff for help for
20 fear of negative consequences; class members reported harassment by three specific
21 correctional officers, including being called “girl,” “fagot,” “boy,” and being yelled at);
22 Tr. Ex. 1004 (California Correctional Institution, October 2008) at 1 (institution
23 “continues to have problems with training, ensuring staff assistants are assigned for all
24 [administrative segregation lock-up notices] and, as of this year, CCI failed to ensure that
25 a clinician review all” disciplinary write-ups), id. (staff were unable to verify whether
26 staff had been trained in most of the required training modules over the past year, which
27 had also been noted in the previous year’s monitoring report); Tr. Ex. 1006 (California
28

1 Men’s Colony, March 2008) at 1 (DD prisoners reported that they were not being
2 adequately accommodated), 5 (DD prisoners reported that staff was too busy to help them
3 or outright refused to help them), 6 (DD prisoners were relying on other prisoners to help
4 them, and did not feel that they had any other choice, which “is an unacceptable
5 practice”), 9 (institution backsliding in the disciplinary review process: none of the
6 disciplinary write-ups reviewed had a clinician review); Tr. Ex. 1007 (California Medical
7 Facility, October 2008) at 2 (prison officials did not know whether they were providing
8 required DDP training), 6-7 (DD prisoners reported that they were not receiving
9 assistance from regular housing officers), 8 (DD prisoners reported that they did not have
10 staff assistants in classification and disciplinary hearings), 10 (40 % of the disciplinary
11 write-ups reviewed lacked a clinician review, which was a worse record than the previous
12 year); Tr. Ex. 1008 (Corcoran, March 2008) at 1 (“[d]eficiencies still remain with the
13 clinician review process and the assignment of Staff Assistants in the disciplinary process
14 and in [administrative segregation lock-up notices]”); Tr. Ex. 1009 (DVI, September
15 2008) at 3 (several disciplinary hearings for DD prisoners had no staff assistant or
16 clinician review of the disposition), 4 (according to staff, since there were so few
17 disciplinary write-ups for DD prisoners, the CRP requirements were forgotten),
18 id.(“[f]ailure to comply with the Clark Remedial Plan requirements in the disciplinary
19 process for DDP inmates has been a recurring problem at DVI”), id. (administrative
20 segregation lock-up notices with no staff assistants); Tr. Ex. 1012 (Mule Creek,
21 September 2008) at 1 (Mule Creek “still does not comply fully with remedial plan
22 requirements” on training; same problem has been found for three monitoring tours in a
23 row), 4 (none of the disciplinary write-ups reviewed for the tour had been reviewed by a
24 clinician; Chief Deputy Warden and associate warden stated that “this area of non-
25 compliance had been a problem during several monitoring tours”); Tr. Ex. 1018 (Sierra
26 Conservation Center, November 2008) at 1 (institution not providing some of the required
27 DDP training); Tr. Ex. 1021 (Valley State Prison for Women, March 2008) at 1 (Valley
28

1 State “has continually either neglected to do” certain required DDP training “or has failed
2 to be prepared to report on the training during monitoring tours”); Tr. Ex. 1022 (Wasco,
3 July 2008) at 4 (class members complained that they were not receiving reading and
4 writing help from staff, that staff told them to seek help from other prisoners, and that they
5 were uncomfortable asking staff for help because they thought they would say no and be
6 angry about being asked), *id.* (failure to assign staff assistants and clinician reviews for
7 disciplinary write-ups, which had also been a problem the previous year), 5 (failure to
8 assign staff assistants for administrative segregation lock-up notices), 6 (failure to provide
9 Regional Center referral letters for DD prisoners who were paroling).

10 **E. Defendants’ Sur-Response**

11 315. On August 6, 2010, Defendants submitted a Sur-Response to Plaintiffs’
12 Response to Defendants’ Proposed Findings of Fact and Conclusions of Law. This Sur-
13 Response asked that this Court take into evidence a report prepared by the Division of
14 Adult Institutions and filed on July 23, 2010. *See* Doc. 489.

15 316. Courts have discretion to reopen the record in certain circumstances.
16 Defendants propose the following list of considerations: whether “(1) the evidence sought
17 to be introduced is especially important and probative; (2) the moving party’s explanation
18 for failing to introduce the evidence earlier is *bona fide*; and (3) reopening will cause no
19 undue prejudice to the nonmoving party.” *Love v. Scribner*, 691 F. Supp. 2d 1215, 1235
20 (S.D. Cal. 2010) (quoting *Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F. 3d 742, 746 (1st
21 Cir. 1995)).

22 317. Defendants fail to pass their own test. First, the evidence sought to be
23 introduced is the report prepared by the Division of Adult Institutions. That report on its
24 own is inadmissible, and hence cannot be important or probative.¹⁸ First, it cannot be
25 admissible as an expert report as no effort has been made to qualify its authors as experts,
26 nor were they disclosed as experts. Second, it is clearly not an admissible business record

27 _____
28 ¹⁸ Defendants have not moved to reopen the hearing itself, but rather have simply submitted this report.

1 because it was prepared, if not in advance of litigation, at least in the midst of litigation.
2 Third, as explained in Plaintiffs' opposition, the Report itself does not reveal its
3 methodology, and hence it is impossible to determine whether its conclusions are valid.
4 See Doc. 493, at 5-6. Fourth, it is comprised largely of inadmissible hearsay.

5 318. Second, Defendants have failed to provide a bona fide reason that this
6 evidence could not have been presented at the hearing. As noted above, Dr. Leone
7 provided all necessary information to Defendants so that they could carry out an
8 investigation of Dr. Leone's conclusions. If Defendants had expressed any intent to
9 respond to Dr. Leone's conclusions, their counsel had in their possession the information
10 necessary for them to conduct such an investigation. However, Defendants failed to
11 conduct such an investigation until this Court indicated that it was concerned by
12 Defendants' failure to respond. The orderly presentation of evidence requires that parties
13 prepare in advance of the hearing to present all relevant evidence. A simple failure to
14 plan ahead is not a bona fide reason justifying reopening the evidence.

15 319. Third, and finally, Plaintiffs would be prejudiced by taking this Report into
16 evidence. They have not had the opportunity to depose or cross examine the individuals
17 who compiled the report, and hence have had no opportunity to explore the report's
18 weaknesses.

19 320. For these reasons, this Court declines to consider the late-submitted Report.
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1 **CONCLUSIONS OF LAW**

2 **I. Defendants' Termination Motion Is Granted in Part, and Denied in Part**

3 **A. Immediate Termination of the Entire Plan Is Unwarranted Because the**
4 **Majority of the Settlement Agreement Meets the PLRA's Needs-**
5 **Narrowness-Intrusiveness Requirement**

6 321. The Prison Litigation Report Act (PLRA) requires that court orders in
7 prisoner civil rights actions include findings that the relief is narrowly drawn, extends no
8 further than necessary to correct a violation of federal rights, and is the least intrusive
9 means of doing so. 18 U.S.C. § 3626(b)(2). This Court did not make those findings
10 explicitly at the time it ordered implementation of the Settlement Agreement & Order of
11 December 3, 2001 (Dkt # 194) (Settlement Agreement & Order). That omission,
12 however, does not necessitate termination of the whole host of prospective relief in this
13 case because the majority of the Settlement Agreement & Order does in fact meet the
14 PLRA standard. For the reasons that follow, Defendant's motion is GRANTED in part
15 and DENIED in part.

16 **1. The Required Findings Are Implicit in the Relief**

17 322. In Gilmore v. California, the Ninth Circuit discussed the PLRA's immediate
18 termination provision:

19 We do not read [Section 3626(b)(2)] to mean that explicit findings must
20 have been made, so long as the record, the court's decision ordering
21 prospective relief, and relevant caselaw fairly disclose that the relief
22 actually meets the § 3626(b)(2) narrow tailoring standard. . . . Our reading is
23 not a "disingenuous evasion," since Congress' objective was to limit relief
24 to the constitutional floor. If existing relief was so crafted according to the
25 record and relevant caselaw, the findings required by the statute are implicit
26 in the court's judgment.

27 Gilmore, 220 F.3d 987, 1007 n.25 (9th Cir. 2000) (citations omitted).

28 323. Here, the parties agreed that the Settlement Agreement & Order met the
PLRA's needs-narrowness-intrusiveness standard at the time it was entered. Settlement
Agreement & Order, ¶ 15. The Court fully approved of the Settlement Agreement &
Order, including the needs-narrowness-intrusiveness language as stipulated by the parties.
The relief was not overbroad and, indeed, defendants offered no evidence to the contrary.

1 Under the Ninth Circuit’s rule set forth in Gilmore, then, “the findings required by the
2 statute are implicit in the court’s judgment.” Gilmore, 220 F.3d at 1007 n.25.

3 **B. Complete Termination Is Unwarranted Because Current and Ongoing**
4 **Violations of Federal Constitutional and Statutory Rights Support the**
5 **Continuation of the Relief in this Case**

6 324. Under the PLRA, termination of prospective relief is not appropriate if the
7 court makes written findings, based on the record, that “prospective relief remains
8 necessary to correct a current and ongoing violation of the Federal right, extends no
9 further than necessary to correct the violation of the Federal right, and . . . is narrowly
10 drawn and the least intrusive means to correct the violation.” 18 U.S.C. § 3626(b)(3).
11 This Court has already ruled that defendants, as the party moving for termination, bear the
12 burden of proving that no such violations exist, and that ongoing relief must therefore
13 terminate. Order Regarding Burden of Proof, April 2, 2010 (Dkt. # 382); see also
14 Gilmore, 220 F.3d at 1007. Defendants have failed to show that there are no violations,
15 but have succeeded in showing that, as to certain portions of the Clark Plan, relief is no
16 longer warranted. Even if Plaintiffs were to bear the burden, they have met it as to the
17 majority of the Clark Plan, but have failed as to other portions. These are explained more
18 thoroughly below.

19 325. The Court heard six days of testimony and reviewed dozens of deposition
20 excerpts and over 700 exhibits. The evidence demonstrates overwhelmingly that plaintiff
21 class members continue to suffer current and ongoing violations of their federal rights and
22 that those violations are systemic and often egregious. As defendants have failed to carry
23 their burden to show the absence of current and ongoing federal rights violations, this
24 Court concludes that much of the prospective relief contained in the Settlement
25 Agreement & Order remains necessary, is sufficiently narrow, is minimally intrusive, and
26 therefore shall not be terminated. Even if the burden were on plaintiffs, the Court finds
27 that they have met that burden as to the portions of the Plan discussed below.

28 326. However, as indicated above, the evidence does not show that all of the

1 relief contained in the Clark Plan continues to satisfy the PLRA standard. Therefore, the
2 only portions that will remain in effect are those validated below.

3 **1. ADA and Section 504**

4 327. It is undisputed that the Clark class members are qualified individuals with
5 disabilities entitled to protection from discrimination under Title II of the ADA (ADA)
6 and under Section 504 of the Rehabilitation Act (§ 504). See 42 U.S.C. § 12132; 29
7 U.S.C. § 794. As such, Clark class members are entitled to “reasonable accommodations”
8 and “reasonable modifications” so that they can avail themselves of prison services and
9 participate in prison programs and activities. See 29 U.S.C. § 794; 28 C.F.R.
10 § 35.130(b)(7). Defendants have failed to fulfill their obligation to provide plaintiff class
11 members with the accommodations and program modifications that would enable them to
12 gain access to the prison programs, services, and activities afforded non-disabled
13 prisoners. As a result many class members are effectively excluded from many prison
14 programs, while others are forced to resort to a dangerous underground economy to buy
15 assistance and protection from other prisoners.

16 **a. Identification of Plaintiff Class Members**

17 328. Defendants are obligated, under the ADA and § 504 to properly identify
18 those prisoners requiring reasonable accommodations. See Armstrong v. Davis, 275 F.3d
19 849, 876 (9th Cir. 2001); CRP at 14-16. The evidence, however, including testimony
20 from two experts in developmental disabilities, shows that the proportion of the prison
21 population that defendants have identified as being developmentally disabled is
22 dramatically lower than what is found in the general public and what reliable research
23 predicts.

24 329. The evidence presented strongly supports the inference that defendants have
25 failed to identify and track many, if not the majority, of developmentally disabled
26 prisoners in the CDCR, but further information and analysis is required to draw a
27 definitive conclusion about the actual operation of CDCR’s identification process. The
28

1 Court therefore will order defendants either to validate the current screening process
2 through accepted scientific procedures or to adopt a process that has already been
3 validated. This issue is discussed further below. See infra III.C.2

4 330. In the meantime, however, the evidence presented at trial reflects that
5 Defendants are administering the tests dictated by the Clark Plan, and there is no reason to
6 believe that, as to this relief, a Court order remains necessary. As noted above, the
7 evidence suggests that the Clark Plan’s testing regimen is flawed, and some different
8 relief may be ordered in the future. A court order requiring inadequate relief that would
9 be provided regardless of court intervention does not meet the PLRA standard.

10 **b. Reading and Writing**

11 331. Developmentally disabled prisoners whose reading skills are limited or non-
12 existent are not provided assistance to ensure that they have an equal opportunity to
13 participate in prison programs and activities, and to ensure that communication of
14 information concerning services, activities and programs is “as effective” for them as for
15 people without disabilities, in violation of the ADA, § 504, and the Clark Remedial Plan.
16 See 28 C.F.R. § 35.160(a); see also Garcia v. Taylor, No. 07-474, 2009 WL 2496521, at
17 *11 (N.D. Fla. Aug. 11, 2009); Cruz v. Hauck, 627 F.2d 710, 720-21 (5th Cir. 1980); CRP
18 at 6, 42, 45-46. This failure includes the failure to provide class members with weak or
19 non-existent readings skills with notice of their conditions of parole in a manner that
20 reasonably accommodates their disability. Id. The Clark Plan provides for relief that
21 would address this problem, and the provisions providing that relief shall remain in effect.
22 See, e.g., CRP at 6, 42, 45-58. These provisions are necessary, sufficiently narrow, and
23 are minimally intrusive. Therefore, they satisfy the PLRA standard.

24 **c. Assistance in Disciplinary, Administrative, Parole, and**
25 **Classification Proceedings**

26 332. Clark class members do not receive “meaningful access” to disciplinary,
27 administrative, parole, and classification proceedings. Bonner v. Lewis, 857 F.2d 559,
28 562 (9th Cir. 1988). Defendants have failed to provide assistance to ensure that

1 communication in those proceedings is equally effective, thus violating plaintiff class
2 members' rights under the ADA and § 504. 28 C.F.R. § 35.160(a). The Clark Plan
3 provisions requiring this assistance shall therefore remain in force. See, e.g., CRP 21-24,
4 49-58. These provisions are necessary, sufficiently narrow, and are minimally intrusive.
5 Therefore, they satisfy the PLRA standard.

6 **d. Grievance Procedures**

7 333. Defendants have failed to maintain a grievance process that is “readily
8 available to all . . . inmates.” 28 C.F.R. § 40.3; Alexander v. Choate, 469 U.S. 287, 301
9 (1985); see also Bradley v. Hall, 64 F.3d 1276, 1279-80 (9th Cir. 1995). In addition,
10 defendants have not provided class members with a “prompt and equitable” grievance
11 system for disability-related complaints. 28 C.F.R. § 35.107(b). These failures violate
12 plaintiff class members' rights under the ADA, § 504 and the Clark Remedial Plan. CRP
13 at 45. These provisions will remain in effect, as they are necessary, sufficiently narrow,
14 and are minimally intrusive. Therefore, they satisfy the PLRA standard.

15 **e. Assistance with Self-Care and Daily Living Activities**

16 334. Daily living activities, including the use of showers, the exchange of
17 laundry, and the receipt of medication, constitute “services, programs, or activities” under
18 the ADA and § 504. See, e.g., Phipps v. Sherriff of Cook County, 681 F. Supp. 2d 899,
19 916 (N.D. Ill. 2009) (“showering, toileting, and lavatory use . . . regarded as programs
20 and/or services under the ADA”); see also Chase, 508 F. Supp. 2d at 502 (“Title II’s
21 accommodation requirement applies to almost every interaction between inmates and
22 prison officials”). Therefore, the ADA and § 504 entitle plaintiff class members to
23 reasonable accommodations, in the form of prompts or reminders from staff, to facilitate
24 their use of these services.

25 335. Defendants' failure to ensure plaintiff class members' access to these
26 services through the use of prompts or reminders to bathe, obtain clean laundry and
27 engage in other activities of self-care violates plaintiff class members' rights under the
28

1 ADA, § 504, and the Clark Remedial Plan. See, e.g., CRP at 6, 8, 21-25, 42. These
2 provisions are necessary, sufficiently narrow, and are minimally intrusive. Therefore,
3 they satisfy the PLRA standard.

4 **f. Staff Training**

5 336. This Court further concludes that the record reflects that staff training is
6 essential to the provision of necessary services. The record further reflects that the
7 training mandated by the Clark Plan is not being followed. Therefore, that portion of the
8 Plan remains necessary in order to remedy the violations of Plaintiffs' rights. See CRP at
9 59-62. These provisions are necessary, sufficiently narrow, and are minimally intrusive.
10 Therefore, they satisfy the PLRA standard. As noted below, this Court further concludes
11 that the training envisioned by the Clark Plan is apparently insufficient on its own to meet
12 the constitutional and statutory minimal levels of care. Therefore, training will be the
13 subject of a further remedial order.

14 **2. Eighth Amendment**

15 337. There is undeniably evidence in the record concerning constitutionally
16 questionable conditions of confinement. The record demonstrates that the deprivations
17 suffered are serious, but this Court cannot conclude that Defendants have been
18 deliberately indifferent to the class members' suffering. The evidence reflects that while
19 policies are in place and some individuals within CDCR strive to fulfill their duties, they
20 have been woefully unable to do so. This does not constitute deliberate indifference in a
21 way that justifies class-wide prospective relief under the PLRA. In any event, much of
22 the relief sought by Plaintiffs under the Eighth Amendment is justified based upon other
23 statutory guarantees.

24 **3. Fourteenth Amendment**

25 338. Plaintiffs argue that Defendants' conduct violates the Fourteenth
26 Amendment. So far as this Court can discern, however, the relief requested under the
27 heading of Due Process is alternatively available under the ADA and § 504. See
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1 Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001) (“The ADA and Rehabilitation Act
2 . . . require more than compliance with due process requirements: they require that a
3 disabled individual be provided with ‘meaningful access’” (emphasis added)).
4 Therefore, because this Court has separately ordered that the relief in question be provided
5 under the ADA and § 504, and in order to avoid deciding an unnecessary constitutional
6 issue, this Court declines to reach the issue of the Fourteenth Amendment. See Harvey v.
7 Brewer, 605 F.3d 1067, 1078 (9th Cir. 2010) (O’Connor, J., sitting by designation) (“The
8 canon of constitutional avoidance . . . provid[es] that a court will not pass upon a
9 constitutional question if there is some other ground upon which the case may be disposed
10”).

11 **C. PLRA Exhaustion Requirements Are Not Applicable**

12 339. Defendants’ termination motion is not saved by plaintiffs’ failure to
13 demonstrate that they have exhausted their administrative remedies regarding the current
14 and ongoing violations of federal law found herein.

15 340. The original complaint in Clark v. California was filed before the enactment
16 of the PLRA, and as such, the PLRA exhaustion requirement found at 42 U.S.C. §
17 1997e(a) does not apply. Clark v. California, No. 96-1486, 1998 WL 242688 at *2-3
18 (N.D. Cal. May 11, 1998) (PLRA does not apply because plaintiffs filed their original
19 complaint on April 22, 1996, four days before the PLRA amendments went into effect,
20 and amended complaint relates back to the date of the initial filing.); see also Bishop v.
21 Lewis, 155 F.3d 1094, 1095-96 (9th Cir. 1998).

22 341. Likewise, neither the instant motion to terminate filed by defendants nor
23 plaintiffs’ motion for enforcement triggers the exhaustion requirement. The PLRA only
24 requires exhaustion when a new “action” is brought and a post-PLRA motion in a case
25 filed before the PLRA went into effect is not subject to the 1997a(a) requirement. See
26 Coleman v. Schwarzenegger, No. 90-0520, 2008 WL 4813371 at *2 n.2 (E.D. Cal. Nov.
27 3, 2008) (“[t]he exhaustion requirement of the PLRA does not apply to motions that
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1 exclusively [sought] the enforcement of the terms of’ the consent decree” (internal
2 quotations omitted)). Clearly, neither of the motions before the Court constitutes a new
3 action, and thus the PLRA exhaustion requirements are irrelevant.

4 **II. Defendants’ Motion under Federal Rule of Civil Procedure 60(b)(5) Is Denied**

5 342. Defendants move to dismiss the Settlement Agreement & Order pursuant to
6 Federal Rule of Civil Procedure 60(b)(5). Under this rule, modification of an injunction is
7 considered equitable when there has been a significant change in relevant law or factual
8 circumstances. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383-84 (1992).
9 Modification may be warranted when changed factual conditions make compliance with
10 the order substantially more onerous, when an order proves to be unworkable because of
11 unforeseen obstacles, or when enforcement of the order without modification would be
12 detrimental to the public interest. Id. at 384-85. If the moving party demonstrates that the
13 modification is warranted, the court must then consider whether the modification is
14 appropriately tailored to the changed circumstance. Id. at 383.

15 343. Defendants have offered no change in law or fact that provides a credible
16 basis for the dismissal of the entire Settlement Agreement. In fact, the evidence points in
17 exactly the opposite direction: as set forth in the Findings of Fact, current and ongoing
18 violations of the federal rights of the plaintiff class warrant ongoing Court supervision, not
19 a dismissal of relief. In the absence of legal or factual support, defendants are not entitled
20 to dismissal of relief simply because ongoing Court supervision is annoying them.

21 **III. Further Remedial Orders Are Necessary to Remedy the Current and Ongoing**
22 **Violations of the Federal Rights of Plaintiff Class Members**

23 344. Based on the evidence set forth in the Findings of Fact, the Court concludes
24 that further relief is necessary to secure the rights of the plaintiff class. The Remedial
25 Plan, while universally acknowledged to be a worthy effort, has proven, as implemented,
26 inadequate to ensure defendants’ full compliance with the ADA, § 504, and the
27 Fourteenth Amendment with regard to plaintiff class members. The Court finds that the
28 systemic nature of the violations demands systemic remedies as set forth below, and

1 Plaintiffs’ motion for further remedial orders is therefore GRANTED IN PART. To the
2 extent that motion requests relief that is not herein ordered, such further relief is DENIED.

3 **A. The Court Has the Power to Issue Further Remedial Orders**

4 345. The Settlement Agreement and Order in this case grants the Court
5 “jurisdiction to enforce the terms of this agreement” and “the power to enforce the
6 agreement through specific performance and all other remedies permitted by law.”
7 Settlement Agreement and Order, Dec. 3, 2001 (Docket # 194), ¶ 5.

8 346. The terms of the Settlement Agreement that the Court has the power to
9 enforce include defendants’ duties to identify developmentally disabled prisoners; to
10 properly classify, house and protect them; and to ensure non-discrimination against them,
11 including meaningful access to CDCR forms and processes, such as sick call, grievances,
12 and disciplinary and classification proceedings. *Id.* at ¶ 4 (defendants shall fully
13 implement Clark Remedial Plan); CRP at 1, 8.

14 347. Under the Prison Litigation Reform Act (PLRA), the Court may not issue a
15 remedial order unless it is “narrowly drawn, extends no further than necessary to correct
16 the violation of the Federal right, and is the least intrusive means necessary to correct the
17 violation of the Federal right.” 18 U.S.C. § 3626(a)(1)(A). Based on the findings set
18 forth above, the Court finds that the relief ordered herein meets this needs-narrowness-
19 intrusiveness standard.

20 348. While the PLRA requires remedies that are narrowly tailored and the least
21 intrusive to remedy the rights violations, “it is also the duty and responsibility of this
22 Court to ensure that constitutional rights are fully vindicated.” *Madrid v. Gomez*, 889 F.
23 Supp. 1146, 1282 (N.D. Cal. 1995). “Therefore, a federal court may order relief that the
24 Constitution would not of its own force initially require if such relief is necessary to
25 remedy a constitutional violation,” and in fashioning such relief, may take into account a
26 history of noncompliance with prior orders. *Toussaint v. McCarthy*, 801 F.2d 1080, 1087
27 (9th Cir. 1986), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472
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1 (1995); see also Plata v. Schwarzenegger, 603 F.3d 1088, 1098 (9th Cir. 2010)
2 (appointment of receiver approved where defendants failed to prove that lesser remedies
3 could have addressed constitutional violations).

4 **B. Further Remedial Orders Are Necessary Because Defendants Cannot**
5 **Remedy their Violations**

6 349. The Court concludes that denying defendants' termination motion in part
7 without additional action would be insufficient to remedy defendants' violations of federal
8 law. This conclusion is based on four sets of facts. First, defendants have demonstrated
9 an ignorance of conditions for developmentally disabled prisoners and an inability to
10 recognize the gravity of and to remedy the problems that have been identified by the
11 Court expert and others. Further orders are therefore necessary. Second, defendants have
12 demonstrated an inability to take remedial steps absent court intervention. Third, the
13 Court has already ordered defendants to comply with the Remedial Plan, in the 2001
14 Settlement Agreement & Order, but the evidence reflects that Defendants have failed to
15 do so even nine years later. Fourth, the Remedial Plan in its current form does not go far
16 enough to ensure compliance with the ADA and § 504. Further remedial orders are
17 required to correct these violations.

18 **C. Further Remedial Orders Are Required**

19 350. In determining the appropriate remedy, the Court must balance the
20 deference due the State in the administration of its prison system, the Court's duty to
21 ensure that the rights of the plaintiff class are safeguarded, and the limitations of the
22 PLRA. The Court will therefore allow defendants the opportunity to develop amendments
23 to the Remedial Plan to remedy the current and ongoing violations.

24 **1. Staff Training**

25 351. The evidence demonstrated that some staff, even after presumably receiving
26 the required training, failed to provide necessary assistance and failed to make necessary
27 inquiries. See generally Findings of Fact § II.C. The current training regimen is clearly
28 inadequate to prepare staff members to adequately preserve Plaintiffs' rights. The training

1 provided in CDCR must be improved through consultation with experts and plaintiffs'
2 counsel. Defendants object that this Court has no power to order any kind of training
3 regimen. They are incorrect. See *Armstrong v. Davis*, 275 F.3d 849, 875-76 (9th Cir.
4 2001).

5 352. The Court further concludes that prisoners with developmental disabilities
6 in restrictive lock-up units such administrative segregation, Secure Housing Units, and the
7 like, need special attention to their needs so their conditions do not deteriorate, as
8 currently happens. Leone at RT 755:21-757:2; Leone Report at 10, 17. Defendants are
9 obligated to ensure that prisoners held in such a manner continue to receive the required
10 accommodations regarding self care, access to medical services, and other required
11 services.

12 **2. Identification and Classification**

13 353. As noted in the Findings of Fact § II.B, *supra*, the Court is not confident that
14 defendants are properly identifying plaintiff class members through their implementation
15 of the Remedial Plan's testing procedures. As a consequence, it appears likely that a class
16 of individuals is not being provided with the services to which it is legally entitled.
17 Defendants must either (a) validate the current identification process or (b) develop a new
18 validated system for testing and identifying class members.

19 354. The Court is also concerned that the classification of prisoners as DD1,
20 DD2, and DD3 does not provide adequate guidance about the needs of specific prisoners.
21 Some staff labored under misconceptions regarding what assistance was necessary for
22 what designation—for example, that DD1 prisoners need no help at all. See, e.g.,
23 Scaramozzino at RT 868:19-21. These misconceptions are particularly problematic given
24 two characteristics of the developmentally disabled population. First, all people
25 designated as developmentally disabled have very significant deficits requiring a great
26 deal of help. Cowardin at RT 620:23-25, 630:4-631:18; Expert Report of Nancy
27 Cowardin, Ph.D (Tr. Ex. 5) (Cowardin Report), at 17-18. Second, no person is entirely
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1 DD1 or DD2 or DD3. People have varying abilities in different areas. Cowardin at RT
2 620:23-25, 621:7-20, 626:15-25; Cowardin Report at 17-18. Thus, a developmentally
3 disabled person might have good grooming and self-care skills, but be extremely
4 vulnerable to exploitation by others. Another developmentally disabled person might be
5 able to read but not to advocate for him or herself in due process proceedings. Defendants
6 must develop and use more specific forms for identifying the specific deficits and needs of
7 individual members of the plaintiff class.

8 355. In consultation with the Court experts and plaintiffs' counsel, defendants
9 shall develop and use more specific forms for identifying the specific deficits and needs of
10 individual members of the plaintiff class.

11 **3. Self-Monitoring**

12 356. Defendants do not perform the self-audits required by the Remedial Plan.
13 Wells at RT 455:6-22, 456:8-10; CRP at 62. The need for such audits is manifest in the
14 ignorance of the testifying officials regarding severe systemic compliance problems at the
15 prisons. Although officials testified as to their intentions to do so, the Court will set
16 specific dates to ensure compliance.

17 357. Defendants must consult with the Court experts and with plaintiffs' counsel,
18 who have expertise in this area essential to the process, regarding the adequacy of their
19 audit tool.

20 **D. Determining the Proper Remedy**

21 358. Defendants are therefore ORDERED to prepare a plan to address these three
22 independent areas requiring further relief. This Plan shall consist of specific amendments
23 to the current Remedial Plan that will remedy the above-noted legal deficiencies.

24 359. Defendants shall submit their plan, including a draft of the audit tool, to the
25 Court's experts and to the Prison Law office, by November 15, 2011. The experts and
26 parties shall meet and confer, as necessary. If any disputes remain, the Court experts shall
27 resolve them. If either party disagrees with the Court expert's resolution, or if the Court
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1 experts are unable to agree, either party may bring the dispute to the Court for resolution
2 by way of a noticed motion.

3 **E. Miscellaneous**

4 360. Pursuant to Federal Rule of Evidence 706(b) and the Settlement Agreement
5 and Order of December 3, 2001, defendants shall pay the Court expert for his work in
6 connection with the termination and enforcement motions in this case.

7 361. The automatic stay of prospective relief entered pursuant to 18 U.S.C. §
8 3626(e)(2) is hereby vacated.

9 **IT IS SO ORDERED.**

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12 August __ , 2010

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14 The Honorable Charles R. Breyer
15 United States District Judge
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