

The parties hereby jointly move the Court for preliminary approval of their Class Action Settlement Agreement (“2017 Settlement”), a copy of which is attached hereto as Exhibit 1. The parties further ask the Court to grant approval of the proposed notice to the Class (Exhibit 8 to the 2017 Settlement), to direct provision of notice to the Class; and to schedule a Final Approval Hearing to consider final approval of the settlement.

BACKGROUND

I. Litigation History and Procedural Status

This action concerns conditions at the Montana State Prison (“MSP”). On December 30, 1993, Plaintiffs filed their Fifth Amended Complaint containing, among others, a claim under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.* Doc. 23 at 26-27. On January 14, 1994, the Court certified the case as a class action. Doc. 22. Following several months of negotiations, the parties entered into a Settlement Agreement (the “1994 Settlement”) resolving most of Plaintiffs’ claims. The Court approved and entered the 1994 Agreement under Rule 23(e) of the Federal Rules of Civil Procedure on November 29, 1994. Doc. 367.

Over the next ten years, the parties stipulated to the dismissal of various issues in the case on the basis of expert findings that Defendants were in substantial compliance with several of the provisions of the 1994 Settlement. The

sole remaining issue is Defendants' compliance with Section 9 of the 1994 Settlement (the "ADA Provision"), requiring Defendants to ensure that prisoners with disabilities are not excluded from housing, services, facilities or programs, and are integrated into the mainstream of the institution. 1994 Agreement, Section 9, Doc. 314 at 21.

On June 29, 2012, this Court entered the parties' Unopposed Stipulation Regarding ADA Expert Appointment designating Paul Bishop "as the parties' expert to assess Defendants' compliance with the ADA provision (Section 9) of the Settlement Agreement." Doc. 1477 at 1. The Court later appointed Raphael Frazier as the parties' joint ADA programmatic expert. Doc. 1480.

In April, 2013, Mr. Bishop and Mr. Frazier issued their report finding that MSP's programs, as well as the facility, did not substantially comply with the ADA Provision of the 1994 Agreement.

Based on that report, on June 24, 2013, Plaintiffs moved for specific performance. Doc. 1493. In their response, Defendants indicated that they were making changes to a number of the areas that the experts had identified. Doc. 1499 at 11-12; 19-25. In light of this, the parties believed it would be productive to conduct direct negotiations to attempt to narrow the issues before the Court; accordingly, on September 3, 2013, Plaintiffs filed an unopposed motion to stay the litigation. Doc. 1503. On September 9, 2013, this Court denied Plaintiffs'

motion for specific performance “subject to Plaintiffs’ right to renew the motion if the parties are unable to reach a negotiated resolution of all issues that remain in dispute.” Doc. 1504 at 1-2. The Court further ordered the parties to file a status report on or before November 12, 2013. *Id.* at 2.

Starting on November 12, 2013, the parties requested and this Court granted a series of stays while the parties continued to discuss resolution of the remaining issues in this case. Docs. 1505, 1507, 1510-13, 1519-20, 1525. By order dated August 11, 2016, the Court granted a further stay to February 12, 2017, but stated that the Court would not grant any further extensions. Doc. 1529.

On February 15, 2017, the parties filed a Status Report and Notification of Settlement, informing this Court that they had reached agreement on all remaining issues. Doc. 1533.

II. Legal Background

The ADA Provision of the 1994 Settlement requires:

Defendants shall ensure that inmates with disabilities are not excluded from participation in, or denied the benefits of housing, services, facilities and programs because of their disabilities. The Defendants shall develop and implement plans to integrate the disabled inmates into the mainstream of the institution.

1994 Settlement, Section 9; Doc. 314 at 21. This language closely tracks the language of Title II of the Americans with Disabilities Act (“ADA”), which prohibits public entities such as MSP from discriminating on the basis of disability:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The ADA defines “disability” to include “a physical or mental impairment that substantially limits one or more major life activities.” *Id.*

§ 12102(1)(A). “Major life activities” include both physical activities such as seeing, hearing, and walking, and mental activities such as learning, reading, thinking, and communicating. *Id.* § 12102(2)(A).

Department of Justice (“DOJ”) regulations implementing Title II further mandate that a “public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities,” 28 C.F.R. § 35.130(d), and that it make “reasonable accommodations” where necessary to avoid discrimination on the basis of disability, unless the entity can demonstrate that it would fundamentally alter the nature of the program, *id.* § 35.130(b)(7). These regulations also require that newly constructed and altered facilities be “readily accessible to and usable by persons with disabilities,” *id.* § 35.151(a) & (b); while existing, unaltered, facilities may not be required to be made accessible, the entity must operate each program so that, “when viewed in its entirety, [it] is readily accessible to and usable by individuals with disabilities,” *id.* § 35.150(a).

The accessibility of new construction and alterations is evaluated against the Department of Justice Standards for Accessible Design (“DOJ Standards”). 28 C.F.R. § 35.151(c). These standards, first promulgated in 1991 and revised in 2010, *see id.* § 35.104, provide detailed design guidelines for all elements of covered facilities, for example, reach ranges, restroom dimensions, table height, and paths of travel.

III. Negotiations and Settlement

Following the issuance of the expert reports, the parties began to meet regularly to discuss the remaining issues in dispute. During these meetings, they addressed the list of over 800 barriers identified by Mr. Bishop and a wide range of policies addressing issues identified by Mr. Frazier. The parties met regularly in Helena or at MSP, and communicated regularly by email and telephone, exchanging drafts and negotiating throughout the period from late 2013 to early 2017. Decl. of Amy F. Robertson in Supp. of Joint Mot. for Prelim. Approval of Class Action Settlement (“Robertson Decl.”) ¶ 3. Class counsel visited MSP on seven occasions between mid-2013 and late 2016 to survey the facility, speak with MSP and Montana Department of Corrections staff, review documents and meet with prisoners with disabilities to learn about their experiences. *Id.* ¶¶ 4, 6, 7, 8, 10, 14. On February 15, 2017, the parties reached agreement on all remaining issues. Doc. 1533.

A. Architectural Barriers

Mr. Bishop's report identified approximately 862 physical plant elements at MSP that were out of compliance with the DOJ Standards. Doc. 1494-1. Taking that document as a starting point for negotiations, Defendants reported to Plaintiffs that many of the features had already been brought into compliance. Class Counsel toured MSP in January, 2015, to confirm the measures Defendants had taken and survey the remaining barriers. Robertson Decl. ¶ 7. This survey provided the basis for ongoing negotiations -- during which Defendants continued to remove barriers -- and three ensuing joint site visits to confirm these remedies and discuss solutions. *Id.* The remaining barriers and agreed solutions are set forth in Exhibit 1 to the 2017 Settlement. *See id.* ¶ III(A)(1). Defendants also agreed to construct a ramp to the basketball court in the low side gym, and to ensure both that agreed access is maintained and that new facilities are constructed and alterations made in compliance with the 2010 DOJ Standards. *Id.* ¶ III(A)(2), (3), and (4).

B. Policies, Procedures, and Training

The experts' reports identified a number of areas in which Defendants' policies fell short of substantial compliance with Title II, including, for example, its overall ADA policy; as well as policies addressing training, admissions, reception and orientation, classification, searches, prisoner work assignments, and

communication with prisoners. Doc. 1489-1, Ex. A at 4-8. Starting in the fall of 2014, Plaintiffs proposed changes to specific policies addressing these and other issues identified by the experts.

The parties quickly reached agreement on a number of basic issues, for example, on accommodations for prisoners in work programs, searches, count, library services, hobby crafts, and religious programming. They continued to negotiate a number of more complex issues through early this year, resulting in new versions of over 30 policies, procedures, handbooks, and forms. 2017 Settlement ¶ III(B)(1), (2), and (6). Finally, the parties agreed that policies addressing classification, locked housing, discipline, pre-hearing confinement, and behavior management plans would be amended within sixty days of final approval, and negotiated a set of agreed-on principles that these policies would effectuate. *Id.* ¶ III(B)(4) and (5).

The 2017 Settlement also provides that Defendants will ensure that training for new employees and in-service training for existing employees is sufficient to permit them to implement the terms of the Settlement Agreement. *Id.* ¶ III(C).

C. Other Settlement Provisions

In addition to the provisions above addressing barriers, policies, and training, the 2017 Settlement calls for a two-year reporting and monitoring period, *id.* ¶ IV. It contains a three-step dispute resolution procedure, requiring the parties

to meet and confer and then to attempt mediation before a United States Magistrate Judge before seeking enforcement in this Court. *Id.* ¶ V. Under Paragraph VI, Defendants agree to pay Class Counsel’s reasonable attorneys’ fees and costs that have not previously been paid. Paragraph VIII describes the parties’ proposed notice procedure, pursuant to which notice -- a proposed form of which is Exhibit 8 to the agreement -- will be distributed to all current prisoners at MSP, made available to prisoners entering MSP during the notice period, and posted in conspicuous locations throughout the facility. The parties’ proposed notice procedures would permit class members to object within 60 days of the issuance of notice. *Id.* ¶ VII(A)(3)(a).

The 2017 Settlement releases all claims for injunctive relief, declaratory relief, and any attendant costs and attorneys’ fees arising under the ADA. *Id.* ¶ IX(B). Because the operative complaint did not state a claim for damages, the 2017 Settlement does not release such claims. *Id.* ¶ IX(C).

ARGUMENT

I. The Proposed Settlement Should Be Preliminarily Approved.

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement that would bind a certified class. Although there is a “strong judicial policy that favors settlements, particularly where complex class action litigation is concerned,” *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th Cir. 1998),

“[t]he purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights,” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008).

The factors for preliminary approval are whether the settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval.

Nen Thio v. Genji, LLC, 14 F. Supp. 3d 1324, 1333 (N.D. Cal. 2014) (internal quotation marks omitted), *quoted in Burton v. Trinity Universal Ins. Co.*, 14-242-M-DWM, 2015 WL 11090362, at *3 (D. Mont. Nov. 17, 2015); *see also* Federal Judicial Center, *Manual for Complex Litigation Third*, § 30.41 (1995).

A. The Settlement Negotiations were Serious, Informed and Non-Collusive.

The 2017 Settlement is the result of arm’s length negotiations over three years, involving numerous meetings, calls, and site visits as well as the exchange of countless drafts of policy and settlement documents. *See generally* Robertson Decl. The parties were, at all times, represented by competent and independent counsel. Plaintiffs were represented by attorneys from three civil rights organizations -- the ACLU National Prison Project, the ACLU of Montana, and the Civil Rights Education and Enforcement Center -- all of whom have extensive experience with prison, ADA, and class action litigation. Defendants were represented by the Chief Legal Counsel for the Department of Corrections, as well

as senior lawyers from Risk Management and Tort Defense division of the Montana Department of Administration. The extent of the negotiations that led to settlement supports preliminary approval. *See Burton*, 2015 WL 11090362, at *3.

B. The Settlement Has No Obvious Deficiencies and Falls Within the Range of Possible Approval.

Far from having “no obvious deficiencies,” the 2017 Settlement is a comprehensive and detailed resolution of the ADA Provision, including solutions for the barriers -- those not already remedied -- that were identified by the experts, negotiated language for over 30 new policies and procedures, established parameters and a deadline for the remaining policies at issue, and a process to enforce all of the remedies.

The question whether a settlement falls within the range of possible approval generally refers to the range of possible damages recovery, *cf. Burton*, 2015 WL 11090362, at *4, which is not at issue here. However, the settlement provides for a significant increase in access and accommodations for prisoners with disabilities, despite the fact that Defendants retained their fundamental alteration and undue burden defenses, *see* 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3).

C. The Settlement Does Not Grant Preferential Treatment to Anyone or Any Part of the Class.

Again, this factor is often analyzed in the context of damages cases, to ensure that no part of the class is receiving a disproportionate share of the fund.

Cf. Burton, 2015 WL 11090362, at *3. In this case, it is important to note that the 2017 Settlement addresses the needs of prisoners with various different disabilities, including mobility disabilities, deafness, blindness, and mental health and cognitive disabilities. No category of prisoner or accommodation was favored over another.

For these reasons, preliminary approval of the 2017 Settlement is appropriate.

II. Class Notice and the Notice Plan Meet the Requirements of Rule 23(e) and Due Process.

Under Federal Rule of Civil Procedure 23(e)(1), the court “must direct notice in a reasonable manner to all class members who would be bound by a propos[ed settlement].” “Rule 23(e) requires notice that describes ‘the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.’” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015) (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012) (internal quotation marks omitted)).

The proposed notice to be delivered to class members pursuant to the 2017 Settlement includes the information required by Rule 23 of the Federal Rules of Civil Procedure and satisfies the Ninth Circuit’s standard. 2017 Settlement, Ex. 8. It describes the history of the litigation, the earlier 1994 Settlement, the experts’ findings, and the fact that the parties negotiated from late 2013 to last month. It

identifies counsel for both parties and summarizes the terms of the settlement and scope of release. It explains where and how class members can obtain a copy of the settlement agreement, including by requesting a copy from the MSP Legal Services Office, or by reviewing it on a computer in one of the libraries at MSP. Finally, it provides the date, time, and location of the final fairness hearing, explains the procedure for filing objections, and notes that the Court will determine who may speak at the final approval hearing.

The notice states that Defendants have agreed to “[p]ay Class Counsel’s reasonable attorneys’ fees and costs, in an amount to be approved by the Court.” *Id.* The relevant provision of the 2017 Settlement provides that “[t]he parties shall attempt in good faith to resolve all claims for fees and expenses before seeking relief from the Court.” 2017 Settlement ¶ VI. Should the parties reach agreement on a negotiated amount of fees and costs, they will provide supplemental notice pursuant to Rule 23(e); should they be unable to reach agreement, Plaintiffs will file a fee petition pursuant to Rules 23(h)(1) and 54(d)(2), and notice will be provided pursuant to Rule 23(h)(1).

The proposed notice plan also satisfies Rule 23(e) and the requirements of due process. Pursuant to this plan, notice will be distributed to all current prisoners at MSP and provided to incoming prisoners as part of their orientation process. 2017 Settlement ¶ VIII(B)(1), (3). It will also be “posted throughout MSP in

conspicuous locations at all of the following locations: each housing unit, each library, each dining and common recreation area, the Work Reentry Center, and the Infirmary.” *Id.* ¶ VIII(B)(2). Copies of both the notice and the 2017 Settlement will be available in all MSP libraries and on the website of the Montana Department of Corrections, and will be made available to prisoners upon request to MSP or Class Counsel. *Id.* ¶ VIII(B)(4), (5), (7). The 2017 Settlement specifies that prisoners with disabilities may request accommodations as necessary to understand the notice and agreement. *Id.* ¶ VIII(B)(6).

In similar cases involving prisoners and detainees, courts have held that providing notice by postings in the detention facilities, postings on government websites, and dissemination through organizations that work with class members is sufficient when supplemented by hand delivery for certain subsets of the class, and that individual mailed notice to the entire class is not required. *See, e.g., VanHorn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988) (holding that flyers posted on the walls at correctional facility was sufficient notice); *Hall v. County of Fresno*, No. 1:11-cv-02047-LJO-BAM, 2015 WL 5916741, at *3, *8 (E.D. Cal. Oct. 7, 2015) (approving notice to prisoner class by posting notice in English and Spanish in all housing units and hand-delivering to prisoners in lockdown and restricted housing units). The parties here do both: notice will be provided individually to prisoners, and will be posted widely at MSP.

The parties propose that the deadline to issue the notice as described in the 2017 Settlement be ten business days after preliminary approval (the “Notice Deadline”), and that class members have 60 days to submit any objections to the settlement (the “Notice Period”). The parties further request that this Court set a Final Approval Hearing at least 21 days after the close of the Notice Period; the parties will file a motion for final approval, responding to any objections, no later than seven days before the Final Approval Hearing.

CONCLUSION

For the reasons above, the Parties respectfully request that this Court:

1. Grant preliminary approval to the 2017 Settlement;
2. Approve the proposed notice, Exhibit 8 to the 2017 Settlement, and proposed plan for dissemination of notice to the Class as outlined in Paragraph VIII of the 2017 Settlement;
3. Order that notice be disseminated no later than ten days after preliminary approval;
4. Order the following procedures for objections:
 - a. Any member of the Class may object to the proposed settlement agreement by filing, within 60 days after the Notice Deadline, written objections with the Clerk of the Court;

- b. Only such objecting Class Members shall have the right, if they seek it in their objection, to present objections orally at the Final Approval Hearing; and
- c. The Court shall determine whether it will hear from any objecting Class members at the Final Approval Hearing, and will enter an Order identifying all objecting Class Members it wants to hear from at the hearing.

5. Schedule a Final Approval Hearing for a date at least 21 days after the close of the Notice Period.

Respectfully submitted,

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