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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

MARGARET FARRELL, Plaintiff, v. MATTHEW CATE, Defendant.	Case No. RG 03079344 **PLAINTIFFS' MOTION TO ENFORCE COURT-ORDERED REMEDIAL PLANS AND TO ISSUE ORDER TO SHOW CAUSE AS TO WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT OF COURT** Date: July 7, 2011 Time: 1:30 p.m. Place: Department 15 The Hon. Jon S. Tigar Action Filed: January 16, 2003

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I. Introduction and Procedural Background

Plaintiff filed the present action on January 16, 2003, alleging, among other things, that youth in state juvenile facilities were subjected to illegal conditions of confinement in segregation; inadequate access to education; and drastically inadequate exercise opportunities, physical facilities, and programming and rehabilitation. Following negotiations and mediation, the parties agreed to a Consent Decree that was signed by the Court on November 19, 2004.

The Consent Decree requires the Division of Juvenile Justice (DJJ) of the California Department of Corrections and Rehabilitation[1] (CDCR) to develop plans to bring the agency into compliance with constitutional and statutory standards, including remediation of the conditions described above. Accordingly, in 2005 and 2006 DJJ filed remedial plans in education, medical and mental health care, safety and welfare, disabilities, and sexual behavior treatment, and the Court ordered defendant to implement them.

DJJ proved unable to follow its own plans, however. By the middle of 2007, the Court

> recognized a recurring pattern: that notwithstanding the manifest good intentions of some of the senior managers both within the headquarters of the. . . DJJ. . . and within the individual institutions themselves, the DJJ seemed unable to meet the deadlines imposed by the six remedial plans, or even to explain why it was unable to meet these deadlines.

(Order, October 27, 2008 [2008 Order], at 1-2.) In November 2007, the Court ordered defendant to show cause why "the court should not appoint a Receiver to administer and operate the Division of Juvenile Justice. . . ." (Order to Show Cause Re: Appointment of Receiver and Compliance with Consent Decree and Remedial Plans, November 28, 2007, at 1.)

Following a ten-day evidentiary hearing in the summer of 2008, the Court made extensive factual findings regarding DJJ's failures: "after nearly four years of reform, many of the conditions in DJJ that gave rise to the Consent Decree remain the same and DJJ is in gross violation of this Court's orders." (2008 Order at 4, adopting and incorporating by reference

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[1]At the time the lawsuit and Consent Decree were filed, the state juvenile justice body was called the California Youth Authority (CYA) of the California Department of Corrections. Following an agency-wide reorganization in 2005, the DJJ became the successor agency to the CYA. For convenience, "DJJ" is used in place of "CYA" throughout this motion.

pages 5-30 of Plaintiff's Second Corrected Proposed Findings of Fact and Conclusions of Law Re: Appointment of a Receiver or Other Relief [2008 Findings].) Specifically, the Court found that youth were not receiving the minimum education requirements set forth in state statute and the Education Remedial Plan (2008 Findings at 21-24) and youth spent excessive amounts of time in isolation (*id.* at 9-10). The Court did not appoint a receiver to effectuate the promised reforms or to secure compliance with its orders in light of DJJ's claimed recent expansion of planning and management capabilities and its new leadership's professed commitment to reform. (2008 Order at 11-13.) The Court noted that Matthew Cate, the new Secretary of CDCR and defendant in this case, had in his prior capacity as the Inspector General demonstrated his commitment to DJJ's reform by issuing a 2007 report that found that "[t]he state's largest youth correctional facility. . . still keeps large numbers of wards isolated for all but two hours a day [and] fails to provide them with mandated counseling and education. . . ." (2008 Order at 13 [citation omitted].) That report, the Court pointed out,

> shows the lengths the DJJ still must go to implement the reforms required by the remedial plans. It also, however, demonstrates Secretary Cate's preexisting awareness of the *need* for these reforms and his willingness to confront CDCR's leadership with its failures of execution.

(*Id.*) (Emphasis in the original.)

Now, two and one half years later, DJJ continues to deprive youth in its care of fundamental rights guaranteed them by state law and this Court's orders, as described below. DJJ has been given numerous chances and extended periods of time to meet basic legal requirements. Its continuing failures warrant further relief.

II. DJJ Has Failed to Comply with Court-Ordered Remedies

A. DJJ continues to deprive youth of required education

The Consent Decree requires defendant to come into compliance with legal mandates by "develop[ing] and implement[ing] detailed remedial plans," each with a "schedule for implementation." (Consent Decree, November 19, 2004, at 5.) Pursuant to that directive, defendant filed the Education Remedial Plan on March 1, 2005 (Defendants' Notice of Filing of California Youth Authority's Education Remedial Plan, March 1, 2005 [Education Plan]), and

the Court ordered defendant to implement it. (Order, March 17, 2005.)

The Education Plan was designed to cure chronic, serious violations: in 2003, the Court's education experts had found that DJJ systematically failed to provide all youth access to a full 240-minute instructional day, particularly for youth in the restricted program units and for special education students, who were regularly deprived of necessary services. (Education Plan at 26, 28, 30, 40.) Accordingly, the Education Plan requires defendant to provide the legally mandated 240 minutes per school day to all eligible students, and special education to those who qualify for it. (Education Plan at 3, 27, 31; *see also* Education Code § 46141.) It does so in part through requiring additional regular and special education teachers and adequate classroom space. (Education Plan at 5-6, 30.)

Since the adoption of the Education Plan, the Court's education experts have documented consistent, ongoing violations for youth in restricted programs and for special education youth in general population. (*See, e.g.,* Appendix G to Second Report of Special Master, June 2006, at 6 ["[i]nstructional programs for both regular and special education students in the restricted settings are inadequate. Additional staff and instructional space must be identified and provided in order to provide equal educational access to these students"], 7-8 ["[t]eacher vacancies at many sites resulted in reductions and limitations on class offerings. . . . Most special education students whether served in the main school program or on the residential units do not receive 240 minutes of instruction daily"]; Appendix D to Fourth Report of Special Master, July 27, 2007, at 7, 8 [same]; Appendix A to Eighth Report of Special Master, February 17, 2009, at 6, 8, 9 [same].) The experts identified the provision of "a 240-minute school day for all eligible students" and "a full and meaningful school day for restricted units" as two of their highest priorities for the education experts in Fiscal Year 2008-09. (Experts' Priorities for Fiscal Year 2008-2009, Appendix A to Ninth Report of Special Master, June 12, 2009, at 1.)

The Court in 2008 found that "[y]outh in DJJ still do not attend school the legally required 240 minutes per day, as required by the Plan" and that special education in DJJ overall is "inadequate." (2008 Findings at 21, 24.)

The Court's findings and the experts' reports did not spur compliance, however, and the problems persist to this day. Presently, special education youth in the high schools at three DJJ institutions "do not receive the full continuum of segments and services that are required in their Individual Educational Programs." (Letter from Nancy Campbell to Sara Norman, May 20, 2011, attached as Exhibit A to Declaration of Sara Norman in Support of Plaintiff's Motion to Enforce Court-ordered Remedial Plans and Order to Show Cause on Contempt, [Campbell Letter] at 1.) The reason for this failure is the lack of credentialed teachers. (*Id.* at 1-2.) DJJ staff perceive the current hiring freeze in state government as a barrier to achieving the necessary staffing. (*Id.* at 2.)

At Ventura Youth Correctional Facility, special and regular education youth in restricted programs are deprived of 240 minutes per day of school because of deficits in staffing and space. (Campbell Letter at 2-4; *see also* Office of Audits and Court Compliance's Review of the Office of Special Master's Identified Concerns, March 25, 2011 [OACC Review], attached as Exhibit B to Norman Decl., at 7.) Staffing problems are severe: Ventura has a stunning 62% vacancy rate for teachers. (Campbell Letter at 2.) The principal perceives his only solution is to use substitutes for 19 of the 20 vacant positions. (*Id.*) Substitute teachers are an inadequate remedy, however, since they are more likely to quit due to the challenges of the job and in any event, many have only 30-day emergency permits and must quickly be replaced. (*Id.*) As a result, substitutes are often not available: in February 2011, nearly 12% of all Ventura's classes were cancelled, nearly all due to the unavailability of substitutes. (Norman Decl., ¶ 4.) Perhaps the most detrimental result of DJJ's reliance on substitute teachers is that it operates as a barrier to true system reform: short-term employees in key treatment positions are unable to contribute meaningfully to the interdisciplinary model that is essential for DJJ reforms. (Campbell Letter at 2.) The opportunities for bonding with youth, modeling for them, and developing a stable treatment environment with consistent behavioral messages are simply not there. (*Id.*)

Ventura lacks classrooms as well as teachers. At nearly maximum capacity, the institution does not have enough instructional space for youth whose behavior histories keep

them from attending classes in the main school complex. (*Id.* at 3.) As a result, these youth have been taught in closets, showers, store rooms, and kitchen and dining spaces, or simply denied school. (*Id.*) Such stopgap measures are inappropriate and inadequate: they "do not allow for efficient use of staff " or "effective teaching strategies." (*Id.*)

The staffing solution for both special and general education teachers is within defendant's reach. He has neither hired staff using the inherent authority of his office nor obtained an exemption to the hiring freeze. Such an exemption allowed the principal to hire three more teachers in December 2010 (*id.* at 2); however, DJJ has requested but not yet obtained an exemption to the hiring freeze for the remaining vacant teacher positions. (Norman Decl., ¶ 5.) An exemption would allow Ventura easily to fill the positions, either from CDCR lay-off lists or from any qualified substitute teachers. (Campbell Letter at 2.)

DJJ claimed to have a solution for the classroom space deficit as well: modular units purchased through the Department of General Services. (Sixteenth Report of Special Master, November 19, 2010, at 16.) DJJ had funding for such modular units, but lost access to the money. (*Id.* at 16 n.27.) Years later, under pressure from the Court and plaintiff, DJJ purchased several more modular units, but recently informed plaintiff that they will not be ready until June 2012. (Campbell Letter at 3 n.8.) The youth currently deprived of school, or receiving instruction in showers and closets, cannot wait another year.

B. DJJ continues to house youth in isolation and to deprive them of required programming

The confinement of youth to their cells for 20 or more hours each day is a dangerous and injurious practice, found by this Court to be "universally condemned as harmful to youth and staff (Krisberg at RT 426:12-16, 430:26-431:13 [isolation of youth exacerbates mental condition and leads to escalation of assaultive behavior])." (2008 Findings at 9.) The Court found that such isolation is illegal and that treatment and rehabilitation are required by law, and ordered defendant to take specific remedial steps to address the violations. Defendant has failed to do so.

(1) The Court has ordered defendant to remedy the practice of isolation

The Consent Decree requires defendant to come into compliance with legal mandates by

"develop[ing] and implement[ing] detailed remedial plans," each with a "schedule for implementation." (Consent Decree, November 19, 2004, at 5.) Pursuant to that directive, defendant filed the Safety & Welfare Remedial Plan on July 10, 2006, and a schedule for implementation on October 31, 2006. The Court ordered defendant to implement the plan. (Order Directing DJJ to Implement the Safety and Welfare Remedial Plan, July 31, 2006.)

The Safety & Welfare Remedial Plan requires the conversion of restricted program units to Behavioral Treatment Programs (BTP) that will "maximize out of room time and . . . ensure structured activity based on evidence-based principles for 40 to 70 percent of waking hours. . . ." (Safety & Welfare Remedial Plan, Exhibit A to Defendant's Notice of Filing DJJ's Safety and Welfare Remedial Plan, July 10, 2006 [Safety & Welfare Plan], at 57.) The BTPs were to be fully implemented at all facilities by September 2008. (Exhibit B to Notice of Filing DJJ's Safety & Welfare Standards and Criteria, October 31, 2006 [Safety & Welfare Schedule], at item 6.5.) Youth housed in the general population or "core" units must be "constructively active during most of their waking hours"; this requirement was to be phased in at all institutions from 2006-09. (Safety & Welfare Plan at 44-45; Safety & Welfare Schedule at item 6.2c.) Thus, DJJ must ensure that BTP youth have maximum possible out-of-cell time, of which 40-70% of waking hours must be spent on structured, evidence-based activities, and youth in the core units must be engaged in constructive activities at least eight hours daily.

In 2008, the Court recognized that DJJ was incapable of meeting many of the deadlines set in the remedial plans, and provided defendant the opportunity to request deadline modifications. (2008 Order at 15-16). As a result, the Court set a new deadline for all of these items – at defendants' request – of March 31, 2009. (Order, February 20, 2009, at 2.)

(2) Defendant knows of the Court's orders but has failed to comply

Defendant has full knowledge of the Court orders: both the Safety & Welfare Plan and the reset deadlines were Court orders adopting his own filings. See *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1231 (knowledge of attorney is imputed to client.) He has nonetheless failed to comply. In October 2008, the Court found that

> youth are still housed in "oppressive and punitive" restricted program units . . . . Youth in these units remain in their cells 20 to 21 hours a day, with only one hour of school. . . . Outdoor recreation "is still limited to barren cage-like structures with virtually no recreational equipment. . . ."
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> Despite the fact that the use of these housing units has been universally condemned as harmful to youth and staff (Krisberg at RT 426:12-16, 430:26-431:13 [isolation of youth exacerbates mental condition and leads to escalation of assaultive behavior]), DJJ has not taken even the most basic steps toward implementing the replacement required by the remedial plan – the Behavior Treatment Program (BTP)). . . . Because they are designed to replace punitive segregation with rehabilitative treatment, Behavioral Treatment Programs are one of the foundations of defendant's plan to reform. . . .
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> Defendant has failed to ensure constructive out-of-cell time through the development of a program service day for the BTPs, which was due in headquarters on December 15, 2006; at Stark on January 1, 2007; at Preston on July 1, 2007; and at one additional facility on January 1, 2008.

(2008 Findings at 9-10 [citations omitted].)

The egregious practice continues today. Youth in DJJ are regularly confined to their rooms for 23 hours per day for extended periods of time. At Ventura in early 2011, youth in restricted programs received, on average, only 40 to 78 minutes a day out of their cells. (OACC Review at 5-6.) This isolation affected hundreds of youth: in January alone, 184 youth were on Temporary Detention (TD) or Temporary Intervention Plan (TIP) status, receiving an average of just 40 minutes per day out of their cells. (*Id.* at 5, 6.) Additional youth were on Program Change Protocol (PCP) status, receiving no school, no visits, no phone calls, and no time at all out of their cells; they are held in total isolation for as long as 20 days. (*Id.* at 5-7.) A log entry in another housing unit forbade staff to "program" four youth out of their cells. (*Id.* at 6.)

The violations are found at all DJJ institutions: between January 16, 2011, and April 30, 2011, at least 249 incidents of youth being held in their cells for more than 21 hours per day were documented at the five institutions. (Campbell Letter at 4.) The number of incidents of deprivation of Court-ordered programming is likely far higher, however, for several reasons. First, the above number refers only to youth who are confined to their cells more than 21 hours per day, and not youth confined to their cells for 18, 19, or 20 hours per day – slightly less injurious, perhaps, but still in violation of the Court's orders regarding required programming.

Second, it says nothing about the quality of the out-of-cell time.[2] The number of youth deprived of the Court-ordered structured, evidence-based activity for 40-70% of waking hours (in the BTPs) or constructive activity for at least eight hours (in the core units) is unknown, but can be presumed to be significantly higher. Third, the above number refers only to youth formally considered to be on TD or TIP placement, and does not account for youth in BTP units or youth held in isolation due to lockdowns or other reasons. (*Id.*) Fourth, there are doubts as to the reliability of the data; the Special Master uncovered one incident in which staff logged one hour of out-of-cell time in a 24-hour period that did not occur; the youth had in fact remained in his cell for a full 24 hours. (*Id.*) More investigation is necessary to determine whether youth are getting even the grossly inadequate out-of-cell time DJJ staff say they are.

It must be recognized that DJJ has since 2004 significantly reduced the number of youth housed in isolation and the duration of such confinement. (*See, e.g.,* App. A to Fifth Report of Special Master, October 23, 2007, at 18-19.) However, a significant number of youth nonetheless continue to be harmed by excessive confinement every day, nearly seven years after the issuance of the Consent Decree and more than two years after DJJ was required to complete its remedies in this area.

(3) Defendant has the ability to comply with the Court's order

In 2008, DJJ argued strenuously that it was capable of instituting the reforms required in the Court-ordered remedial plans: "With the experience DJJ has acquired over the past three years, and the consultants DJJ has retained to assist in planning and project management, DJJ is poised to accomplish the work that remains to be done. . . ." (Defendant's Response to Order to Show Cause Re: Appointment of Receiver and Compliance with Consent Decree and Remedial Plans, March 19, 2008, at 1; *see also id.* at 35 ["DJJ's accomplishments to date, even if they took longer than originally envisioned, do not show a lack of desire, commitment, and ability"], 40

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[2]Given that some Ventura youth on restricted programs are forced to "recreate" in a shower or converted laundry room (Campbell Letter at 5; OACC Review at 8), it appears that at least some of the out-of-cell time is not "constructive" or evidence-based.

["no one knows better than DJJ's management team, its staff, and its consultants, what needs to be done and how to do it"].) The Court summarized DJJ's arguments at the 2008 hearing: according to defendant, "the principal reason the State had failed to accomplish more of the reforms required by the Consent Decree was its lack of project management personnel and planning, and that the State had now addressed these deficits by promoting experienced personnel and hiring qualified consultants." (2008 Order at 3.) Given these representations, defendant cannot now argue that he does not have the capability to comply with the Court's orders to provide minimum out-of-cell programming time for youth in restricted programs as well as general population.

(4) Defendant's chronic violations of the Court's orders harm the youth in his care

DJJ's failures in this area are chronic and extremely damaging to the youth in his care. More than 10 years ago, California's independent Inspector General found that the "[t]he potential adverse impact of the 23 and 1 program upon the wards' physical and psychological well being is profound." (Office of the Inspector General [OIG], 23-and-1 Program Review, December 2000[3] [OIG 23-and-1 Review] at 7.) The OIG's report did not compel any significant changes: three years later, in 2003, the Court's safety & welfare expert found that "youth [in restricted program units] generally were confined to their cells for 23 hours/day, with one hour of 'recreation' in small fenced areas devoid of equipment." (First Report of Special Master, April 5, 2006, at 35.) He spoke eloquently of the damage caused by this practice:

> [m]ost psychologists and mental health professionals would argue that this severe isolation is antithetical to sound treatment practices. . . . The enforced isolation of troubled wards and minimal meaningful social interactions with . . . staff can only plausibly lead to their psychological deterioration.

(General Corrections Review of the California Youth Authority, December 23, 2003, Exhibit E to Declaration of Sara Norman In Support of Plaintiff's Response to Order to Show Cause Re: Appointment of Receiver and Compliance with Consent Decree and Remedial Plans, February

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[3]Found at http://www.oig.ca.gov/media/reports/BOA/reviews/23%20and%201%20Program,%20California%20Youth%20Authority%20Facilities,%20Review.pdf.

11, 2008, at 58.)

In August 2004, then-defendant Walter Allen, at his legislative confirmation hearing, declared that the practice of 23 and 1 had ended. (Office of the Inspector General, Special Review into the Death of a Ward on August 31, 2005, at the N.A. Chaderjian Youth Correctional Facility, December 2005[4] [OIG Special Review] at 14.) This was not true. Recognizing that the practice continued, defendant made an ineffectual attempt to end it:

> [i]n November 2004, defendant provided the Special Master, Consent Decree expert Krisberg and plaintiff's counsel with a report of the DJJ survey of seven other state systems and an interim plan for reducing length of stay and introducing services/programs in [restricted program] units. . . . The report set a goal of eight hours/day of structured program for all youth in SMP units, including four hours of education, two hours of recreation and two hours of treatment services. It did not include any indication of how that goal might be achieved.

(First Report of Special Master, April 5, 2006, at 35.) That plan was never implemented.

In January 2005, DJJ agreed to a Court order requiring it to "implement clear policies and procedures to ensure that wards on the [restricted program units] are provided access to educational, treatment, and other services outside their cells on a daily basis" by February 15, 2005. (Stipulation Regarding California Youth Authority Remedial Efforts, January 31, 2005 at 3-5; Order, December 13, 2005). In the same month, the OIG[5] issued a stinging rebuke to DJJ's ongoing practice of segregation: "[s]imply put, the long-term isolation of young people entrusted to the State is both ineffective and dehumanizing. The practice of 23-and-1 confinement should cease as soon as possible." (OIG, Accountability Audit, January 2005[6], at 7.)

DJJ failed to comply with either the Court order or the OIG recommendation, with tragic results: in August 2005, a youth "confined to his room for nearly 24 hours a day for eight weeks"

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[4]Found at http://www.oig. ca.gov/media/reports/BOA/reviews/N.%20A.%20 Chaderjian%20Youth%20Correctional%20Facility,%20Special%20Review%20into%20the%20 Death%20of%20a%20Ward%20on%20August%2031,%202005.pdf.

[5]The Inspector General who authored this report as well as the OIG Special Review, Matthew Cate, is the current head of CDCR and the defendant in this case.

[6]Found at http://www.oig.ca.gov/media/reports/BOA/audits/2000-2003%20Review%20of %20Audits%20of%20the%20California%20Youth%20Authority.pdf.

committed suicide. (OIG Special Review at 1.) This event prompted another unequivocal message from the OIG:

> In January 2005, the Office of the Inspector General recommended that the [DJJ] end the practice of confining wards 23 hours a day. Nonetheless, the [DJJ] continues to use this method to maintain order. This special review demonstrates again the dangers of the practice. The Office of the Inspector General again recommends that the Department of Corrections and Rehabilitation immediately end the practice of isolating wards in their rooms over extended periods of time.

(OIG Special Review at 2.)

DJJ did not immediately end the practice. Instead, it developed plans to bring youth out of their cells for at least three hours each day. (First Report of Special Master, April 5, 2006, at 36.) Twenty-one hours of in-cell time each day still constitutes dangerous isolation, however, and is still antithetical to reform. (*See, e.g.,* 2008 Findings at 9.)

The violations continue to this day, as noted above. Defendant's awareness of the need for reform, and this Court's direct orders to effectuate specific blueprints for reform, have repeatedly proved unavailing in this critical area. Youth continue to suffer the dangerous effects of forced isolation and DJJ continues to deny them legally mandated treatment and rehabilitation.

III. The Serious Nature of the Violations and DJJ's History of Non-Compliance Warrant Further Relief

A. The Court has the power to issue additional orders to secure compliance

The Consent Decree grants the Court the power "to enforce the terms of this Decree" and "to order compliance with any of the remedial plans or specific performance with the terms of this Decree as permitted by law." (Consent Decree, November 19, 2004, at 19.) The Court has previously held that it "has broad equitable power to fashion a remedy to address the persistent violations at DJJ." (2008 Order at 7; *see also Times-Mirror Co. v. Superior Court* (1935) 3 Cal.2d 309, 331; *Hirshfield v. Schwartz* (2001) 91 Cal. App.4th 749, 770-71; 13 Witkin, Summary of California Law (10th ed. 2005) Ch. XIX Equity, § 3, at 284 - 285.) Specifically, "[t]he jurisdiction of a court of equity to enforce its decrees is coextensive with its jurisdiction to determine the rights of the parties, and it has power to enforce its decrees as a necessary incident to its jurisdiction." (2008 Order at 7-8, citing *Ecker Bros. v. Jones* (1960) 186 Cal. App.2d 775,

786 [citations omitted].)

B. The Court should issue an injunction to remedy the education violations

In 2005, the Court ordered DJJ to comply with its clear legal duty to provide mandated special education services to youth who require them and 240 minutes of school each day to all eligible students. (Education Plan at 3, 27, 31; Order Directing DJJ to Implement the Education Plan, March 17, 2005.) In 2008, the Court found DJJ out of compliance with these orders and warned that further relief might be necessary should defendant fail to cure the violations. (2008 Order at 10-13.) DJJ has not done so. Further relief is therefore warranted to enforce the Education Remedial Plan.

The education deficits can be corrected with increased staffing and classroom space, as discussed above. Defendant should therefore be ordered to provide these resources. Defendant has the authority to hire the teachers necessary to bring the CDCR into compliance with statutory education requirements and this Court's orders enforcing those requirements. The California Legislature has given him this authority expressly: "The secretary shall be the appointing authority for all civil service positions of employment in the department." (Welf. & Inst. Code § 1712(a).) In addition, defendant is the "Chief Executive Officer" of CDCR, responsible for "the supervision, management and control of the state prisons." (Gov. Code § 12838.7(a); Penal Code § 5054.) These statutory powers enable him to take the steps necessary to comply with the law.

The Governor's Executive Order of February 15, 2011,[7] imposing a hiring freeze cannot divest defendant of his statutory powers conferred by the Legislature. Such an order is a directive that defendant would be expected to follow, given that he is appointed by and serves at the pleasure of the Governor. (*See* Gov. Code § 12838(a).) However, he nonetheless retains the power to hire employees. In *Professional Engineers in Cal. Gov't v. Schwarzenegger* (2010) 50 Cal.4th 989, the California Supreme Court rejected the Governor's contention that he had the constitutional authority to unilaterally furlough state employees by Executive Order. (50 Cal.4th

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[7]Found at http://gov.ca.gov/news.php?id=16908.

at 1039-1041.) The court did find a budgetary statute on which the Governor could rely, but absent such authority, he could not override the statutory scheme governing state employment. (See *id.*; Cal. Const. Art. 3, § 3 ["[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution"); *cf. Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53 ["executive branch, in expending public funds, may not disregard legislatively prescribed directives . . . pertaining to the use of such funds"].) Thus, while the Governor in the instant case can direct defendant not to hire a new employee without first obtaining an exemption through the Governor's office, the Governor's directive cannot deprive defendant of the legislatively granted power to make civil service appointments.

Accordingly, defendant can hire a sufficient number of teachers to meet CDCR's legal obligations consistent with the hiring freeze by obtaining exemptions through the Governor's office or he can hire them pursuant to his statutory authority. Either way, he has the power to comply with Education Code § 46141 and this Court's orders.

C. Defendant should be held in contempt for willful violation of the Court's orders regarding isolation

Defendant is in contempt of the Court's orders contained in the Safety & Welfare Remedial Plan to provide youth in BTPs at least 40-70% of waking hours and youth in core units at least eight hours per day of structured, constructive activities.

"Disobedience of any lawful judgment, order, or process of the court" constitutes contempt of the authority of the court. (Code of Civil Procedure § 1209(a)(5).) A finding of contempt rests on four factual predicates: "(1) the making of the order; (2) knowledge of the order; (3) ability of the respondent to render compliance; (4) willful disobedience of the order." (*Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1736, quoting *In re Liu* (1969) 273 Cal.App.2d 135, 140–141 [internal citations omitted].) The Court's duty is to enforce "[t]he precise court orders as written. . . not any amplification of those orders by history of the litigation or documents incorporated by reference." (*Id.* at 1737.)

All four elements are present here. First, the Court has ordered defendant clearly and

specifically to "maximize out of room time and . . . ensure structured activity based on evidence-based principles for 40 to 70 percent of waking hours" for youth in BTPs and to ensure that youth housed in the general population are "constructively active during most of their waking hours." (Safety & Welfare Remedial Plan 44-45, 57; Consent Decree at 5 [requiring defendant to develop remedial plans to effectuate its mandates]; Order Directing DJJ to Implement the Safety and Welfare Remedial Plan, July 31, 2006.) The Court set a deadline of March 31, 2009, for compliance with these mandates. (Order, February 20, 2009.)

Second, defendant unarguably had knowledge of these orders, since he is the one who submitted them to the Court to be issued. (Order Directing DJJ to Implement the Safety and Welfare Remedial Plan, July 31, 2006; Order, February 20, 2009.)

Third, defendant has the ability to comply with these orders. (*See* Section II.B.3 above.) He cannot credibly claim an inability to comply due to inadequate resources, since his budget for many years has been extraordinarily high, amounting to well over $200,000 per youth annually. (*See, e.g.,* Legislative Analysts' Office, 2009-10 Budget Analysis Series: Criminal Justice Realignment, January 27, 2009.[8]) The Legislature has appropriated sufficient funds to defendant to operate DJJ; it is defendant's responsibility to do so in accordance with the law, including this Court's orders. (*See, e.g., Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1744 [given that sheriff was provided with adequate funds to operate detention facility, he must do so in accordance with consent decree setting limits on population].)

Defendant also cannot argue that he lacks the ability to follow the deadlines set for compliance. In 2008, the Court held a 10-day hearing primarily concerned with defendant's failure to comply with Court-ordered deadlines for the various remedial plans. (2008 Order at 2.) Defendant argued strenuously that the deadlines were not reasonable, but that he at that point – in 2008 – possessed the planning and management capabilities to set appropriate deadlines. (*Id.* at 3.) The Court accordingly gave him the opportunity to propose an alternative time frame for compliance. (*Id.* at 15-16.) He did so, and the Court accepted his proposal and reset the

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[8]Found at http://www.lao.ca.gov/2009/crim/Realignment_012709/Realignment_012709.aspx.

deadlines at issue here to March 31, 2009. (Order, February 20, 2009, at 2.) Two and one half years later, defendant has failed to achieve compliance, but has never requested or sought to justify an additional extension.

Fourth, defendant has willfully violated the Court's orders. He submitted the Safety & Welfare Plan himself and set the deadlines for implementation, proclaiming his ability to comply; he has now missed those deadlines by more than two years, and remains unarguably in violation of the original orders. He is responsible for the violations, and must be held accountable for the insult to the authority of the Court.

Contempt is a drastic remedy, and should not be applied lightly. In this case, it is appropriate. Defendant is fully aware of the seriousness of the problem and the damage being done every day to individual youth: as the Inspector General, more than six years ago, he sternly recommended that the practice at issue "immediately end." (OIG Special Review at 2.). Less intrusive methods have not worked: the Court's scrutiny through case management conferences and tours, the Special Master's reports, and the Court experts' assistance all have been applied to the situation for years to no avail.

The Court should therefore issue an order to show cause as to why defendant should not be held in contempt of court and ordered to pay $1,000 for each instance of contempt, pursuant to Code of Civil Procedure § 1218(a). The Court should consider applying any fines for contempt to ameliorate the unlawful conditions suffered by youth in DJJ.

III. CONCLUSION

For the reasons set forth above, the Court should issue the Proposed Order filed herewith.

Dated: May 25, 2011

Respectfully submitted,

PRISON LAW OFFICE

By 

SARA NORMAN
Attorneys for Plaintiff

DECLARATION OF SERVICE BY MAIL

Case Name: In re Farrell v. Cate
Alameda County Superior Court No. RG 03079344

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause: my business address is Prison Law Office, 1917 Fifth Street, Berkeley, California, 94710

On May 25, 2011, I served the attached:

1. **PLAINTIFFS' MOTION TO ENFORCE COURT-ORDERED REMEDIAL PLANS AND TO ISSUE ORDER TO SHOW CAUSE AS TO WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT OF COURT**

2. **DECLARATION OF SARA NORMAN IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE COURT-ORDERED REMEDIAL PLANS AND TO ISSUE ORDER TO SHOW CAUSE ON CONTEMPT**

3. **[PROPOSED] ORDER TO ENFORCE COURT-ORDERED REMEDIAL PLANS AND TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT OF COURT**

in said cause, by Electronic Mail, addressed as follows:

Van Kamberian, DAG
Van.Kamberian@doj.ca.gov

William C. Kwong, DAG
William.Kwong@doj.ca.gov

Nancy M. Campbell, Special Master
nancy@nmcampbell.com

Julie Bole
Julie.Bole@cdcr.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Berkeley, California on May 25, 2011.

Ashley Fewell