

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

S.H., et al.,	:	Case No. 2:04 cv 1206
	:	
Plaintiffs,	:	JUDGE ALGENON L. MARBLEY
	:	
vs.	:	
	:	
HARVEY REED,	:	
	:	
Defendant.	:	
	:	
	:	

**PLAINTIFFS' MOTION FOR SPECIFIC PERFORMANCE TO SECURE
COMPLIANCE WITH STIPULATION TERMS REGARDING OPERATION OF
PROGRESS UNITS AND RELATED MATTERS**

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Pursuant to Paragraphs 256 and 258 of the Stipulation for Injunctive Relief (Doc. 108), Plaintiffs move for specific performance to secure compliance with Stipulation terms regarding youth confined on the PROGRESS units at the Scioto Juvenile Correctional Facility operated by Defendant Harvey Reed, Director Department of Youth Services (DYS). Specifically, DYS has failed to substantially comply with the terms of the Stipulation including but not limited to Paragraphs 55, 56, 74-76, 85-88, and 189. These paragraphs relate to the provision of Behavior Management, Structured Programming, special management plans and the use of isolation, special management units, mental health, and education. Further, DYS has failed to substantially comply with the provisions of this Court's Order of March 28, 2011 regarding the provision of educational services to youth in seclusion. Plaintiffs seek an order finding that the policies and practices utilized on the PROGRESS units violate the Stipulation paragraphs noted above, as well as specific provisions contained within the Court's March 28, 2011 Order regarding education of these youth. Plaintiffs also seek an order holding the conditions of confinement on the Progress Units to be unconstitutional. Finally, consistent with the Prison Litigation Reform Act, Plaintiffs seek a remedy limited to the constitutional violations described in this motion.

MEMORANDUM

I. INTRODUCTION

Defendant Reed is locking youth for extended periods of time - up to 24 hours per day - in special management units causing severe harm to members of the class. This must stop. This is not a new issue. Plaintiffs have opposed the overuse of seclusion generally and the special management units in particular since the case was first filed many years ago. As set out in detail below the Defendant has failed to establish conditions of confinement that meet minimal

constitutional standards and has completely failed to follow the relevant Stipulation paragraphs . This motion is therefore necessary. Plaintiffs seek a court order that will set out a specific remedy tailored to the unconstitutional conditions. Given the long history of failure by DYS in remedying this problem, Plaintiffs suggest that a receiver for the PROGRESS units be considered as part of the remedial order.

The parties have been implementing an extensive Stipulation for more than four years. Many of the reforms agreed to in the Stipulation have resulted in a substantial overall reduction in the population of youth now housed at DYS, as well as other changes to the system of care which are positive. But for those youth who remain in the existing four DYS facilities, a number of challenges still exist where the Stipulation requirements have not yet been met in any substantial way, and a pattern of constitutional violations still exist.

Expert reports, including the original Fact Finding Report by Fred Cohen, have documented problems with the overuse of seclusion extensively and with consistent regard to the inherent harm of this practice to the wellbeing of youth. Plaintiffs previously raised concerns with this Court about the overuse and dependence by DYS on isolation practices as a means of behavior management, especially in the context of youth being denied educational services. (Doc. 208). The Court's Order of March 28, 2011 addressed education services to youth in seclusion with a requirement that all youth, even those secluded, were entitled to a full school day. (Order, Doc 249).

Nowhere is the use of seclusion more acutely and dramatically seen than on the Special Management Units at the Scioto Juvenile Correctional Facility which were created between

September –November of 2011.¹ Youth in these units are confined in their cells, especially on Phase I, for up to 24 hours per day, often without appropriate education, recreation, therapeutic services and leisure time activities. The amount of time youth spend in their cells has only recently been documented, and yet it is not tracked by DYS policies as “seclusion.”

Plaintiffs began a dispute resolution process on July 27, 2012 after numerous expert reports were filed detailing the deficiencies in the operation of the units, and after several attempts were made informally to bring about a satisfactory resolution. (See Attachment A, Letter of July 27, 2012). At the request of DYS, Plaintiffs agreed to withdraw the dispute and on 9/8/2012, a temporary agreement was reached between the parties to implement a number of immediate “quality of life” measures to benefit the youth on these units, and allow DYS additional time to remediate the concerns identified in the dispute letter. The agreement allowed for a resolution session to be held between the parties and including the monitor by September 21, and gave Plaintiffs the option of refiling the dispute process by September 28, 2012 if no resolution was reached. The parties also agreed that should Plaintiffs’ refile, the 30 day resolution period would be considered satisfied. On October 1, 2012, Plaintiffs refiled the Dispute letter regarding Paragraphs 56, 75-76, 85, 86-88, 189 of the Stipulation, and various provisions of the March 28, 2011 Court Order regarding education. (Attachment B, Letter of October 1, 2012).

Pursuant to Stipulation paragraph 256, Plaintiffs’ requirements attempt to resolve the matter have been met, and the additional twenty (20) business days for resolution have passed. Having reached no suitable agreement with DYS that meets the Stipulation requirements and

¹ As this Court will remember, in November of 2011, DRC staff was brought into DYS resulting in the unnecessary and improper use of pepper spray against multiple youth being brought from Circleville, and some at Scioto, and a second SMU was created. In addition to the Cedar Unit, Sycamore began to operate as one of the PROGRESS units.

constitutional standards, Plaintiffs now ask for the Court's intervention to enforce compliance with paragraphs 56, 75-76, 85-88 and 189, as well as various provisions of the March 28, 2011 Court Order regarding education for the youth confined on the PROGRESS units or in danger of being sent to these units. The violation of these paragraphs work together to create an environment that is inhumane, damaging, and contrary to best practice, accepted professionals standards, and constitutional principles prohibiting punishment.

II. FACTS²

1. There are two special management units referred to as PROGRESS units (Program with Real Opportunities for Growth, Responsibility, Education, Safety and Success) at Scioto Juvenile Correctional Facility, Cedar and Sycamore, and a separate unit for on Buckeye for transitioning youth;
2. These units have at times separated out youth by phase, while at other times, phases have been mixed on the same unit.
3. Youth sent to a PROGRESS unit are placed on Phase I, and must advance to Phase II, and then to the Transition unit before being placed back on general population. Youth movement between phases is arbitrary and unreasonable. DYS does not provide a system that allows youth to learn the skills to advance. There is no tracking system within DYS for management and oversight of this lack of progress.³

Youth do not understand what is expected and are not provided with adequate means

² Unless otherwise noted the basis for these facts are the declarations of the youth in the units and the youth files, log sheets and other documents provided by DYS. Additional record cites to these facts will be set out in context in the memo below and in the attachments.

³ Plaintiffs have provided a chart of Youth Phase Movement as Attachment K for a number of youth with whom interviews and declarations have been obtained as an example. DYS has never provided data to the Plaintiffs as requested; this information, while not entirely accurate, is constructed from youth files, declarations, and period rosters obtained from DYS prior to visits.

of achieving behavioral goals to advance. As a result, many youth spend many months, and in some cases years, on these units.

4. Youth on Phase I may spend as much as 24 hours per day in their cells. They are not permitted out of their cell without being in restraints, including for school. School is permitted as long as they are not in “seclusion” but it is not consistently provided, or on some days, school is limited in duration from the required 5.5 hours. Phase One youth do not receive outdoor recreation, and are frequently denied any recreation and/or leisure time activities because there are too many youth on Phase I for staff to supervise. Youth on Phase I often refuse recreation in the only available area, a cell with a “rec cage” equipped with a ball and dip bar. Youth report that the room is dirty and the equipment, limited as it is, is unsanitary, so they do not use it. Youth on Phase I may participate in a group, however, these are not always routinely scheduled. Unless there is a specific activity noted, youth on Phase I are always in their cells.
5. Youth on Phase I are frequently denied even the minimal services described above when they are accused of committing an Act of Violence subject to IRAV. DYS policies to handle Individualized Response to Acts of Violence do not permit a youth on a PROGRESS unit out of his cell prior to an intervention hearing. These occur usually in 3 days, and often the youth gets another 5 days of disciplinary seclusion thereafter. Youth on IRAV seclusion do not get school, unless it is worksheets under the door, and are not permitted recreation or other services. The continued deterioration of these youth while in isolation exacerbates their conditions and the increases the likelihood of more violence.

6. Youth on Phase II are permitted out of their rooms for more time, and are not in soft restraints. Phase II youth may go to school but at times do not receive a full school day. Youth report that the teachers are not helpful and that IEP's are not followed. For these youth, they often spend significant time in their cells especially on weekends. Youth on Phase II go to the gym and at times outdoors. Youth on Phase II, however, frequently return to Phase I.
7. Youth on Phase I are not permitted to keep legal papers, pictures, letters or other documents in their cells because it is considered a security risk. They are permitted to see these items one hour a day only, and only on request.
8. Youth in the PROGRESS units do not receive appropriate mental health care or other structured programming. There is little opportunity for positive reinforcement or rewards to promote pro-social behaviors. Phase demotions "sentence" them to more deprivation for weeks without opportunities for daily improvement and opportunities. The strength based management system is not supported by regular and immediate acknowledgement of good behavior, and is not implemented by staff who see their role as providing direct supervision and active engagement with the youth. Mental health and behavioral health staff work in a vacuum without active engagement in day to day problem solving and skill building with other staff.
9. Youth in the unit are subjected to punishment and not treatment. Youth are subject to frequent strip searches and searches of their cells. Many staff interactions are negative and demoralizing to the youth. The units focus on security and control, with little regard for treatment and therapeutic relationship building.

10. The youth admitted to the PROGRESS units are almost always suffering from mental health issues, histories of trauma, and/or cognitive delays which have a significant effect on behaviors. Youth are frequently labeled with “conduct disorders” with the inference they are merely choosing to act out. Underlying mental health issues are therefore often ignored or insufficiently addressed. Excessive seclusion has caused these youth to deteriorate, become more violent, and at times, graduate to the adult prison system from the PROGRESS units.⁴
11. Record keeping and other means of quality assurance are seriously lacking and do not accurately account for in-room time and other activities.⁵

III. BACKGROUND AND HISTORY

A) The History of Special Managements Units shows a Pattern and Practice of Non-compliance with the Stipulation, Unnecessary Seclusion and Constitutional Deprivations.

The problem of excessive isolation has long been identified as one of DYS’ most difficult challenges. A recent report released by the Correctional Institution Inspection Committee (CIIC) stated that for 2011, a staggering 228,923 hours of seclusion time⁶ were reported by DYS, as detailed in eight separate categories. The majority of that time, according to the CIIC report, is for seclusion prior to a disciplinary hearing.⁷ (See Attachment D, CIIC DYS Seclusion Hours

⁴ See Attachment C, Declaration of Dr. Stuart Grassian.

⁵ Plaintiffs have acquired logs and other records to piece together such information as best possible, however, the inconsistencies and problems with record keeping are noted in the analysis. It is worth noting, however, that youth substantially affirm the information about in-room time and activities and services in their Declarations and Affidavit.

⁶ Note that the Stipulation uses the terms isolation and seclusion interchangeable. By definition, this refers to the “placement of a youth alone in a room from which the youth’s access is blocked. The term isolation does not apply to locking a youth in a room during normal sleeping hours.” (Stipulation, ¶¶ N and AA).

⁷ See DYS Seclusion Hours, Correctional Institution Inspection Committee (July 17, 2011). Pre-hearing seclusion totals 124,869 hours, or 54% of the total hours youth spend in seclusion.

Report). The report, based upon data from the Ohio Department of Youth Services, reports zero (0) seclusion hours for youth at Scioto and at Ohio River Valley in the Special Management Units in 2011.⁸ This is clearly wrong since youth in the unit rarely leave their cells.

While secluded, youth are often denied treatment, programming, education and recreation services. While youth housed on Special Management Units (SMU) are subject to “seclusion” hours which are tracked for certain conduct, the vast majority of time youth spend in their cells on these units is not reported as seclusion, and is not contained in monthly AMS data⁹ generated by DYS. This has been the problem all along – excessive in cell time in the SMU - underreported by the Defendant. A history of the problems identified by the expert team and two monitors since 2007 is provided in more detail in this section of the memorandum.

1) Fred Cohen’s Original Report Noted Undue Reliance Upon Seclusion and Restraint as a Method of Behavior Control.

The use of “questionable isolation/seclusion practices” throughout ODYS was cause for serious concern dating back to Fred Cohen’s original Final Fact-Finding Report: *S.H. v. Stickrath*. (Attachment R, Cohen Final Fact Finding Report, p. 24). Cohen stated that, “ODYS’s current practice of isolating youth in these special units by whatever name the practice is given is *unconstitutional on its face*. Extended room isolation or in cells resembling those in use at Ohio’s Supermax (OSP) is a practice that should immediately cease.” (Cohen Report, p. 21) (emphasis added). Cohen noted significant problems with current practices, including limited or nonexistent access to adequate treatment and education. Education was often limited to providing youth with worksheets slid underneath a locked door. (Cohen Report, p. 108).

⁸ Figure is taken from the last page of the CIIC report for Scioto JCF as part of yearly totals.

⁹ AMS refers to the ODYS Activity Management System which tracks monthly data by facility for seclusion hours, physical responses incidents, youth staff assaults, youth on youth assaults, and youth fights.

Cohen also discovered that while placed in isolation, suicidal youth who were previously receiving mental health care were rarely visited by the necessary mental health professionals. (Cohen Report, p. 30). He noted that while a “treatment team” met weekly, it was without the youth or a psychiatrist and functioned more as a unilateral classification-program committee. (Cohen Report, p. 21). Established plans for youth often lacked meaningful opportunities to increase recovery and/or to work towards defined goals related to a youth’s behavior. (Cohen Report, p. 31). This notion, Cohen noted, resulted in the further hindrance of rehabilitation and treatment for youth placed in seclusion.

The practices employed in such units, often mislabeled as “intensive program units” and housed at Marion Juvenile Correctional Facility and Ohio River Valley Correctional Facility, were of such concern to Cohen that he called for immediate action in addressing them:

“The unit itself made an indelible impression with me as bringing to bear the worst that adult corrections has — the supermax/secure segregation unit — to juveniles who have been sent to DYS for treatment and rehabilitation. This use of prolonged isolation under stark conditions, whether in the name of treatment, management, or punishment must be dealt with in the resolution of this litigation. The current practices simply cannot be sustained.” (Cohen Report, p. 21.)

In response, when the Stipulation was negotiated and agreed upon by the parties in May of 2008, excessive use of isolation was addressed at several levels, but was identified as one of the implementation priorities. Paragraph 29 of the Stipulation notes the parties’ agreement that “use of force, *isolation practices*, the absence of acceptable mental health care and other appropriate programming, overcrowding, and the deficiencies in education as such that class members are at risk physically, psychologically, and educationally.” (Doc 108)(emphasis added). The Stipulation established a general bar for the care and treatment of youth in DYS facilities in Paragraph 10:

10. DYS shall provide youth in its charge with a safe and humane environment. DYS shall provide youth individual care, treatment, and rehabilitative services in the least restrictive setting consistent with the youth's needs, documented security concerns, and generally accepted professional standards of care. In no event will the level of care in such areas such as safe environment, mental health, special education, programming or any other requirement encompassed in this Stipulation fall below the level described or required in this Stipulation, and the State aspires to consistently exceed these levels.

(Doc 108, ¶10) The Stipulation thus contemplated a range of system-wide programming aimed at improving the conditions of confinement for all youth under DYS' care and custody.

2) Problems with Special Management Units were Evident at Ohio River Valley and Warranted a Special Inquiry by the Monitoring Team in Early Remedial Stages.

The closure of the Marion Juvenile Correctional Facility in 2008 created a ripple effect within other institutions and shuffled both youth and staff to other facilities. In late 2008, Monitor Fred Cohen dispatched several Monitoring Team members to Ohio River Valley as a result of the increased institutional violence there, and because of concerns raised by Plaintiffs' counsel regarding the failure of DYS to provide educational services to youth in the Special Management Units. Changes in personnel at the Central Office level as well as institutional level were made in an attempt to gain better control of the facility. Other changes followed in operations, there were interviews and investigations with staff and youth, numerous staff members were placed on administrative leave, and additional personnel investigations resulted in the removal of 23 employees. (Attachment E, ORV Grant Unit Review, March 2009).

The special review conducted by team members Ava Crow, Steve Martin, Dr. Cheryl Wills, David Roush and Orlando Martinez called into question the very purpose of the Grant Unit, the predecessor to the PROGRESS units at Scioto:

“Is Grant Unit a short term, high intensity, and safe insulation of violent and dangerous youth from the general population? If so, is the isolation a temporary respite while ORV implements programs, treatments, or sanctions? The data, which will be discussed next, suggest a level of safety and stability in Grant Unit that makes it an attractive place for youth. This conundrum requires more thought and discussion. Nonetheless, it does warrant a careful consideration of Cohen’s four operational elements of a special management unit whether Grant Unit is used as a therapeutic or a sanction option. Cohen maintains that there must be urgency in the application, a limited duration, a concern for oversight, and medical monitoring (Cohen, 2006).

Cohen’s concern applies here, that special management units or institutional strategies to isolate dangerous youth from vulnerable youth more often reflect a “get-rid-of-the-person” rather than an attempt to “get-rid-of-the-problem.” The danger in this insulation/isolation approach is that these units have the ability to make juvenile offenders far worse.” (Attachment E, ORV Grant Unit Review, March 2009, pg. 2).

The team noted that until there was a consensus from Central Office about the mission, “the default purpose seems to be the control and reduction of dangerous behaviors so that the youth can sequentially participate in the Grant Unit programs (education, recreation, free time activities, and group) free from aggressive behaviors and then return to the general population.” (Attachment E, ORV Grant Unit Review, March 2009, pg. 2). But a unit focused on control rarely lifts the youth to the level of conduct that earns release.

Among the many problems noted were concerns about the admissions screening tools and subjective admission criteria, the prisonlike atmosphere on the units, lack of behavioral management strategies, excessive in-cell time, limited activity and recreation, and extensive idle time. Plaintiffs’ counsel Gerhardstein noted during the visit, “The unit appeared [to Gerhardstein] to have no joy and little hope among the residents. He referenced having seen more positive spirits in “J Block” at the Southern Ohio Correctional Facility.” Staff continue to use the deficits-based, adult corrections terminology of “terroristic threat” and “Security Threat Group” (STG) to classify incidents and describe individual youth.” (Attachment E, ORV Report, page 19).

3) The Operation of Special Management Units have Remained a High Priority Concern by the Monitoring Team for Non-compliance in Multiple Areas.

Youth admitted to special management units represent some of the most mentally ill and violent youth in the DYS system. Many are alleged to be gang involved and they have frequently been aggressive in assaults on staff and other youth, some very serious. They are also youth who frequently get caught in a downward spiral during their time at DYS. While the units have struggled to comport with various aspects of the Stipulation concerning treatment, structured programming, crisis management, and education, it is the extensive time in seclusion, and the failed policies and practices around this issue which causes greatest concern. Indeed, were the other aspect of the Stipulation successfully implemented, there would be little reliance upon the need for continued seclusion as it exists. The history of problems has been prevalent over the course of the monitoring process.

The Second Annual Report of the Monitor, filed by Fred Cohen, noted that policies regarding seclusion had not been completed, in part because of the inability to determine whether youth placed in a special management unit were considered to be in seclusion. The notion that youth in special management units were not considered to be held in “isolation” was a concept that was embraced by DYS early on. Isolation is defined by the Stipulation as “placement of a youth alone in a room from which the youth’s ability to exit is blocked. The term isolation does not apply to locking a youth in a room during normal hours of sleep.” (Doc. 108, pg. 5) Conveniently, by DYS policy, the majority of time youth on special management units spend in their cells, which is extensive, is not reported.

Cohen noted that:

Currently, DYS considers such youth to be in an administrative/management confinement status rather than seclusion (they do include as seclusion hours the time an SMU youth is excluded from any out-of-room programming), but such a

practice has not been incorporated into any approved policies and procedures as required by the Stipulation. (Doc.187, Second Annual Report, Pg. 17)

Cohen set a clear expectation for the third year of monitoring that there must be increased integration of treatment and rehabilitation planning, further reduction in violence and the use of force, as well as all forms of seclusion. (Doc.187, p. 144). As discussed in Part B below in more detail, he expressed grave concerns that the methods employed by DYS to reduce violence through Consistent Response to Acts of Violence (CRAV) and subsequently Individual Response to Acts of Violence (IRAV) may not constitute the least restrictive means of dealing with behaviors as required by Paragraph 76 of the Stipulation. (Doc.187, pg.19)

The implementation of CRAV, and subsequently IRAV, had dramatic effects on youth in special management units as well as throughout other DYS facilities. In November of 2009, Plaintiffs began raising concerns through a dispute process with these practices, in particular the automatic and required imposition of school suspension for youth who were placed in seclusion, as well as school expulsions in some cases. As an example, education expert Ava Crow noted in her Fall, 2009 monitoring report for Ohio River Valley that 1010 days of school were lost for 185 students (an average of 5 days each) during July 15 – October 21, 2009, the vast majority of which did not involve school related conduct. On October 12, 2009, the date of her visit, 10 SMU students on the Grant Unit were expelled for the term, and 6 of 9 students on McKinley were expelled. None of these youth were receiving services. (Doc. 208, pp. 6-7).

Plaintiffs painstakingly worked to address educational deficits with DYS and the monitor for nearly a year before filing a Motion for Specific Performance to Secure Compliance with Stipulation on Education and Related Matters with this court on 8/3/10 (Doc. 208). As Counsel noted at that time, DYS was attempting to defend a policy of NOT educating youth who were

being held in seclusion. Plaintiffs argued at that time that these policies violated not only the Stipulation, but Ohio law and the Individuals with Disabilities Education Act.

The Motion for Specific Performance was ultimately resolved in an Order by this Court on March 28, 2011. (Order, Doc. 249). In that Order, the Court made clear and all youth in DYS custody were entitled to a full school day, including youth being held in seclusion. The Court also noted that any emergency delays in providing educational services to youth be approved by the superintendent and shared with the monitor and class counsel. Additionally, the Court allowed alternative education to be provided to youth secluded under IRAV, but required that this be provided no later than 48 hours and that that time frame was an “outside bound.” (Doc. 249, p. 6). Teachers were required to be available to students in alternative education settings for a full school days and utilized in a manner to “actively engage them (students) in the learning process.” Students were to be visited at least 4 times per day.¹⁰

The Order allows for temporary suspension of students under limited circumstances, however, that suspension continues only for the remainder of the school day. For any student temporarily suspended more than twice per week, a record of the suspension including the reasons therefore was required to be submitted to the Monitor and Class Counsel. (Order, Doc. 249, pg. 12). These provisions put into place a plan to ensure that youth who were being held in seclusion, including those youth on special management units, received education services, and that any denial of services was highly scrutinized.

¹⁰ In a subsequent meeting and agreement reached, it was determined that DYS would provide these 4 contacts as direct instruction for ½ hour segments to youth.

The Third Annual Report of the Monitor, filed by Will Harrell on 12/30/2011, determined that one of the priority issues for 2012 was to find alternative placements and funding for youth with serious mental illness. Specifically, he noted:

Find alternative placements and funding for youth with serious mental illnesses (Paragraphs 76, 88 & 98). Monitoring team member Steve Martin found extraordinary levels of seclusion and punitive sanctions for a small number of youth at Indian River with mental health designations.²⁸ In the Special Inquiry Report, the Monitor found that the Sycamore Unit, which housed twelve youth with mental illnesses and cognitive disabilities, was operating in practice as an intensive seclusion unit rather than an intensive treatment and programming unit.²⁹ Stipulation 88 requires that DYS strive to prevent deterioration or exacerbation of mental health symptoms and needless isolation for behaviors caused by mental health issues. The monitoring team's new mental health experts report that DYS facilities are responsible for some of the most acutely mentally ill youth in the state, who in other jurisdictions would be transferred to more appropriate psychiatric treatment facilities. The repeated placement of youth with mental illnesses in seclusion also impacts the decisions of the Release Authority to retain youth beyond their minimum sentence expiration dates. We recommend emergency measures in the short term to transfer these youth to psychiatric treatment facilities and to obtain funds for their care.³⁰ Longer-term solutions are being explored by the Director and the Interagency Task Force on Mental Health and Juvenile Justice. The monitoring team and counsel for both parties will also explore judicial solutions to this problem under the Stipulation. Addressing these concerns will be a priority for the monitoring team in 2012.

Monitor Will Harrell also expressed concern, based upon reports from several member of the monitoring team, that youth were being held in seclusion without services being properly provided to them. This practice was identified as a priority for 2012 as well. He noted:

Investigate the extent of health, mental health, and education services provided through the seclusion room door (Paragraphs 91, 124 & 185). Various members of the monitoring team have expressed concerns regarding youth being provided with health care, mental health care, and education through a seclusion room door instead of in more appropriate clinical or educational settings. Assessing the extent of these practices, and identifying appropriate alternatives, will be a priority for the monitoring team in 2012.

(Third Annual Report, Doc. 299 , pg. 39.)

The use of seclusion and intervention time, particularly for youth with mental health disorders, was again identified as problematic and listed as a priority. He notes:

Investigate the application of seclusion time and Intervention Hearing time, particularly for youth with mental health disorders (Paragraphs 237 & 238). Monitoring team member Steve Martin found over 4000 days of intervention hearing time imposed in disciplinary hearings at Indian River in a single month, as well as very substantial blocks of seclusion time.⁶³ At Scioto, Martin found substantial numbers of seclusion hours, and identified a small number of youth who accounted for a majority of those hours.⁶⁴ Various monitoring team members have expressed the concern that youth with serious mental health disorders receive a disproportionate number of seclusion hours and intervention hearing days, exacerbating their mental health issues and lengthening their stays in DYS custody, at great cost to the State.⁶⁵ In the upcoming year, monitoring team members Steve Martin, Vince Nathan, Daphne Glindmeyer, and Andrea Weisman will collaboratively monitor compliance with Stipulation paragraphs 237 and 238, and attempt to identify clear recommendations for reducing the use of these severe sanctions, particularly for youth with mental health disorders.

(Third Annual Report, Doc. 299, pg. 40).

When the monitoring team revisited Scioto in January of 2012, it was clear these problems were far from being resolved. (Doc.321, Scioto Juvenile Correctional Facility, Preliminary Draft Report). Will Harrell expressed concerns generally about the lack of structured programming at Scioto, but noted in particular that this was problematic on the PROGRESS units. He found Paragraph 56 in non-compliance. (Doc.321, SJCF 4/10/12 Report, pgs. 18 – 19) He notes:

High Priority Concern: Staff shortages have caused lockdowns throughout the facility, and programs and recreation have been cancelled on at least one day each weekend in recent months.¹¹ During the monitoring visit, many structured activities occurred as scheduled with a large majority of youth actively participating. On the PROGRESS Units, however, monitoring team members observed 73% of youth confined to their rooms during scheduled, structured activity.¹² Additionally, CBT groups were conducted on the PROGRESS Units with youth secured in their rooms, yelling across the unit through their cuff ports. This manner of conducting any group, particularly one focused on trauma

¹¹ Orlando Martinez & David Roush, Scioto site visit report (Jan. 2012), p. 17.

¹² Id., at pp. 15-16.

concerns is counter-therapeutic, and should stop immediately. Meaningful ways of engaging like-Phase youth in face-to-face group counseling sessions must be initiated.¹³

There is a significant lack of programming and activities for graduates. Additionally, youth and staff have legitimate complaints related to implementation of SBBMS, and the content and implementation of CBT.¹⁴ (See Orlando Martinez and David Roush's expert report at pp. 16-17 for a more detailed discussion of this topic.)

Recommendation 1: Discontinue the practice of conducting CBT groups with youth secured in their rooms, and quickly institute meaningful face-to-face group counseling sessions.

Recommendation 2: Central office should survey administrative staff at each facility to determine the nature and extent of implementation problems with structured programs. Training curricula and materials should provide more guidance for implementing structured programs.

Recommendation 3: Scioto administration should expand the amount of programming available to graduates, including expanded opportunities for mentoring, vocational training, work and college coursework.

Recommendation 4: (See the recommendations under Stipulation paragraphs 48, 66, and 90 regarding staffing; and under paragraphs 55, and 74-75 regarding the PROGRESS Units.)

Harrell also noted significant noncompliance with requirements for behavioral management that is consistent and fair under Paragraph 55 of the Stipulation. The intent of this paragraph is that interventions are designed to support youths' social adjustment, and encourage an increase in positive behaviors, while decreasing negative and self-destructive behaviors. He raises particular concern regarding this provision as it applied to the PROGRESS units. He noted:

Roughly three-quarters of the youth on the PROGRESS Units during the *S.H.* visit were on the mental health caseload, but the structure and implementation of these maximum security housing units does not adequately address what are likely the mental health issues underlying youths' acting-out behaviors. Youth engaging in Acts of Violence on the PROGRESS Units (discussed further under Stipulation paragraph 76) appear to have been assessed entirely in terms of their behavior, without consideration of underlying mental health disorders. Repeated

¹³ Andrea Weisman & Daphne Glindmeyer, Scioto site visit report (Jan. 2012), p. 17.

¹⁴ Orlando Martinez & David Roush, Scioto site visit report (Jan. 2012), pp. 16-17.

aggression and violence by certain youth – particularly youth on the PROGRESS Units – requires evaluation to determine if the behavior was caused in whole or in part by untreated mental health disorders, and to determine the need for mental health or psychiatric intervention, stabilization, and individualized behavioral supports.....

Given the percentage of youth on the PROGRESS Units with mental health disorders, the PROGRESS Units, for all intents and purposes, should be considered auxiliary mental health units for youth with co-occurring behavioral disorders. The critical, and currently missing, step to improve behavior management is for mental health and psychiatric staff to help the IDT develop a formulation to understand why the youth engages in disruptive or assaultive behaviors. Only with this clinical understanding of what is occurring will it be possible to identify appropriate treatment/behavioral interventions.¹⁵ DYS should also pull MBM data (AOV, seclusion, progress on phases, etc., aggregated by youth, by shift, by day of the week, by mental health designation, etc.) to provide for more focused corrective action plans with youth and quality improvement for the PROGRESS Unit program.¹⁶

With concerning frequency, both staff and youth complained that rules were inconsistently applied between shifts and between individual Youth Specialists. Clearly all units, but the PROGRESS Units especially, require that staff apply consistent rules and consequences for violating those rules. Unevenly applied or shifting rules on the unit may exacerbate behavioral challenges and contribute to the level of tension and acting-out behaviors among youth.¹⁷

Not surprisingly, Monitor Harrell also found Paragraphs 74-75 in non-compliance. These paragraphs deal with crisis management generally. Much of his discussion in the Scioto Report is focused on problems within the PROGRESS units. He notes:

High Priority Concern: Youth who commit repeated violent acts within DYS facilities or who seriously compromise the safety and security of a facility are placed on one of the PROGRESS Units at Scioto. The first PROGRESS Unit was created to replace and revise the SMU at ORV, and the second PROGRESS Unit was created to remove gang leaders from the general population during DYS tactical Operation Safety First. The purpose of the PROGRESS Units is to segregate youth who are causing violent disruptions and to provide intensive treatment and programming to improve behavior and critical thinking skills.

¹⁵ Doc.321, Andrea Weisman & Daphne Glindmeyer, Scioto site visit report (Jan. 2012), pp. 16-17.

¹⁶ Id., at 17.

¹⁷ Id. at p. 17.

These units have not yet accomplish this purpose.¹⁸ Staff are inconsistent and ill-equipped to provide custody and treatment for violent youth with serious mental health disorders; the environment on the PROGRESS Units does not help stabilize behavior; treatment and services provided to youth are profoundly inadequate; and the degree of seclusion and restraints is excessive and ineffective, given the lack of services.¹⁹

Finally, Monitor Harrell addresses seclusion, isolation and crisis management in paragraph 76, again noting the deficiencies in this area as a high priority concern. He indicated that:

High Priority Concern: The monthly average disciplinary seclusion hours for male youth at Scioto increased from 2,317 in June-August to 6,063 in September-November.²⁰ The majority of these hours were Pre-Hearing seclusion for Acts of Violence (AOV). Many of these Pre-Hearing seclusion hours involve a relatively small number of youth, often those on the PROGRESS Units, who are held for the maximum 72 hours.²¹ Between October 2011 and January 2012, a series of AOVs occurred in which youth committed serious assaults on staff members. The youth involved have repeatedly engaged in assaultive behaviors at the facility and on the PROGRESS and Transition Units, and these relatively few youth have driven the high levels of seclusion. (See Steve Martin's expert report at pp. 6-8 for an extended discussion on AOVs and seclusion.) Facility officials have not been successful in managing them in a fashion to contain or minimize their opportunities to commit further AOVs.²²

During the December 21st conference call regarding the Monitor's Special Inquiry into DYS Tactical Operation Safety First, the parties and Monitor agreed that DYS would review unit logs on the PROGRESS Units to ensure accurate use of codes to account for the number of hours youth spent in their rooms.²³ As of the Jan. 17-19 site visit, documentation in unit logs had not improved.²⁴

¹⁸ Id., at p. 31; see also Steve Martin, Scioto site visit report (Jan. 2012), at pp. 6-7 ("During the months October 2011 through January 2012, a series of AOVs occurred in which youth committed serious assaults on staff. These assaults were committed by youth who have repeatedly been involved in assaultive behaviors at the facility and on the Progress and/or Transition Units. While these chronically assaultive youth are few in number, facility officials have not been successful in managing them in a fashion to contain or minimize their opportunities to commit further AOVs.")

¹⁹ Orlando Martinez & David Roush, Scioto site visit report (Jan. 2012), pp. 30-32.

²⁰ Steve Martin, Scioto site visit report (Jan. 2012), p. 3.

²¹ Id., at p. 6.

²² Id., at pp. 6-8.

²³ Minutes from Dec. 21, 2011 conference call re: the Monitor's Special Inquiry Report on DYS tactical "Operation Safety First," at p. 6 (circulated to parties Jan. 6, 2012).

²⁴ Orlando Martinez & David Roush, Scioto site visit (Jan. 2012), pp. 23-24.

4) Establishment of the PROGRESS units at Scioto Juvenile Correctional Facility Raised Significant Concerns by Plaintiffs and members of the Monitoring Team that History Would Repeat Itself.

The closure of Ohio River Valley Correctional Facility in August of 2011 triggered concerns by Plaintiffs' counsel that a new special management unit would be created under the same guise as those at ORV. The expert team sent its comments and questions to DYS on June 28, 2011 when notice about the creation of these new units was received. (Attachment G, Memo to Terry Schuster, June 28, 2011). The team asked questions about the purpose of the units, whether it would be staffed and designed to meet the behavioral needs of youth with mental health and trauma related disorders, and how prior concerns would be addressed about youth being unable to transition off the unit successfully because of "un-assessed and untreated disorders which affect their ability to function, follow directions and progress through the program's phases." The memo noted that if the purpose of the new PROGRESS was treatment and/or crisis stabilization, it "should be strength based and not re-traumatize youth who have experiences significant traumas in their lives." Having a specially trained staff who could meet the special behavioral health needs of the population was also established in the memo as an expectation. DYS indicated it would provide "intense treatment services to address the behaviors which resulted in his placement on the Unit." (Attachment G, Schuster Memo, p. 1). It also stated that staffing would include 2 social workers, a part time psychologist, a part time psychiatric nurse, and a part time occupational therapist.

The monitoring team raised questions at that time about the continued use of phases, noting that the focus on phases would detail/distract both staff and youth from stabilizing a youth's behavior therapeutically and moving them quickly back to general population. The team raised the concern that phases might not be appropriate for all youth and would delay the process

of returning to the youth's education and regular unit. (Attachment G, Schuster Memo, p. 2). DYS responded that phases were necessary to give guidance to both staff and youth, and that a strength based system would be used which rewarded pro-social behaviors. Phases were described as a modification of the Strength Based Behavior Management System (SBBMS). (Attachment G, Schuster Memo, p. 3).

DYS initially proposed that these units would be necessary with the closing of ORV and used a subcommittee to evaluate and redesign the new units to be opened at Scioto. (Attachment H, Memo to Anthony Pierson from Shannon Komisarek, June 1, 2011). It described three phases including transition. It required that the youth's Individual Treatment Plan (ITP) be modified upon arrival as well as when a youth progressed from Phase I to Phase II. The memo indicated that to move between phases, "there is not a set time limit, but is dependent upon the youth's meeting his ITP goals." (Attachment H, Komisarek Memo, p. 2). DYS represented that educational services would be provided as it was at ORV, and that graduate youth would be provided with vocational services from a teacher who would work at CJCF and SJCF. Graduate youth were also to receive individualized services specific to their needs, such as life skills, vocational skills and daily living skills. (Attachment H, Komisarek Memo, p. 2).

The concerns expressed by the expert team in the Schuster Memo of June 28, 2011, also re-iterated by Plaintiffs' counsel, were well founded. They reflected concern for the fundamental problems in how these units have been designed and operated throughout the history of this case. Yet, in spite of the promises that these units would be different, the Third Annual Monitoring Report (Doc.299), the Scioto Juvenile Correctional Facility report from April, 2012 (Doc.321), and the attached youth affidavits (Attachment O) reflect a pattern and practice of extensive use of seclusion, lengthy stays and movement between phases, and lack of adequate programming,

lack of direct supervision by staff and lack of effective mental health assessments and interventions. The PROGRESS units operate with many of the same inherent problems as found in the initial Fact Finding Report issued by Fred Cohen in 2007 – in spite of the agreement reached that “use of force, isolation practices, the absence of acceptable mental health care and other appropriate programming, overcrowding, and the deficiencies in education as such that class members are at risk physically, psychologically, and educationally.” (Doc 108, ¶29).

B) The Implementation of CRAV and Subsequently IRAV Resulted in Unprecedented Rates of Seclusion within ODYS, Increased Reliance on the Use of Seclusion to Manage Behavior, and Interference with Educational Services.

Seclusion practices within the PROGRESS units cannot be fully understood without a discussion of how CRAV and IRAV have significantly led to an uptick in the use of reliance upon seclusion practices. Similarly, a resolution of problems on the PROGRESS units cannot be fully achieved without addressing how IRAV frustrates compliance with other areas of the Stipulation. In short, the tension between treatment needs and security needs is reflected nowhere as dramatically as with the current use of seclusion. And nowhere is this more obvious than at Scioto Juvenile Correctional Facility, Cedar and Sycamore Units.

On June 6, 2009 DYS implemented the Consistent Response to Acts of Violence (CRAV). CRAV was a zero tolerance policy describing six types of conduct and requiring seclusion of any youth who commits any of the described acts. The six CRAV acts were: Assault on Staff; Assault on Youth; Fighting; Obstructing/Interfering with Responsibilities of Staff; Inciting and/or Engaging in a Riot or Disturbance; and Sexual Contact with Staff. CRAV acts could occur anywhere in a juvenile facility both on school grounds and off school grounds. Youth accused of CRAV acts were immediately placed in seclusion and held there pending a

disciplinary hearing. If convicted of the CRAV act, the youth could be further secluded for the duration of a disciplinary sentence.

According to Cohen's Second Annual report,

For the three month period prior to June 2009, the monthly system-wide average for seclusion was 18,562 hours. The majority of these youth were placed in seclusion for less than four hours at a time. Before conducting comprehensive monitoring of whether and how much these regular/traditional seclusion hours could be reduced, DYS, through CRAV, created a program that resulted in increased seclusion hours that dwarfed regular seclusion hours, thus the monitoring focus shifted to the dynamics of the CRAV. In the three month period following implementation of CRAV, the monthly average for seclusion hours rose to 56,935. In July 2009, CJCF's total of 21,101 hours alone exceeded the system total of 16,238 hours for April 2009.

Cohen Second Annual Report (Doc. 187, p. 99).

In January of 2009, DYS AMS data reports a total of 7,368 seclusion hours, with a population of 1461. By contrast, with the implementation of CRAV in June of 2009, the number of seclusion hours reached a high of 66,023,²⁵ with gradual drops to 33,000 in April of 2010. *Id.*

In 2010, DYS changed its policies on CRAV, piloting IRAV ((Individualized Response to Acts of Violence). Under IRAV, seclusion is imposed following four acts of violence (AOV) rather than six. But seclusion remains as the only option for staff under IRAV. In his Second Annual Report, Monitor Cohen states, "IRAV (Individual Responses to Acts of Violence) will replace CRAV and reduce use of seclusion, but all the inherent pitfalls of CRAV apply to IRAV, if only to a lesser degree." *Id.*

IRAV policies, officially put into place on October 4, 2010 have been challenged by Plaintiffs since their inception as a violation of the Stipulation and the restrictions it placed on the use of seclusion. The "Seclusion Assessment" assigned points which, when scored,

²⁵ This number does not accurately reflect the total seclusion hours, however, since DYS does not include in it the number of hours that youth on the SMU units are secluded. The Monitor states in his Second Annual Report that these problems securing consistent data will be addressed in the coming monitoring year.

determines what action should be taken prior to a pending Intervention Hearing, including keeping the youth in seclusion until the hearing. (Attachment I, DYS Policy 303.02 and 303.02.A). Youth scoring 17 points or less can be removed from seclusion within 4-24 hours; youth scoring 18-26 points must serve 24 – 56 hours, and with points more than 27, or which rank high on specific point, must remain in seclusion until the hearing.²⁶

Youth who are in an SMU who commit an AOV are then likely to spend up to 72 hours (or whenever a hearing occurs) in “seclusion” without additional services such as regular school, recreation or leisure, and then warrant an additional 5 days of disciplinary seclusion time. Because these youth are often those with significant mental health issues, and may suffer deterioration in their condition while on the PROGRESS units, the cyclical nature of this practice exacerbates their circumstances.²⁷

Plaintiffs stressed to this Court the damage being done by IRAV through its Motion for Specific Performance regarding education issues, and asked that the court enjoin the use of IRAV and hold that these policies are not in compliance with the Stipulation. Then Monitor Fred Cohen recommended this Court deny this request because of “success” in reducing seclusion hours from January – August of 2010. In response, this Court deferred to the monitoring process but noted:

According to the Report, the use of IRAV reduced the total number of seclusion hours across all facilities by 55% from January 2010 to August 2010. Monitor Cohen encourages the Court to take note of this success and to find the Defendant’s efforts and the continuing monitoring of this issue to be consistent with the Stipulation. The Court agrees. While it shares many of the Plaintiff’s concerns about IRAV and the use of seclusion, the evidence now before the Court reveals a positive downward trend, and the Court believes that remaining

²⁶ Included in this list is assault on staff, youth is on an SMU, youth’s behavior while in seclusion includes returning to return to their room or committing another AOV.

²⁷ See Section II below for Dr. Stuart Grassian’s observations and findings regarding the effect seclusion has on youth in these units.

concerns about the policy are best addressed through the cooperative monitoring process.

(Order, Doc. 249, pg. 5).²⁸

Plaintiffs have been assured repeatedly that seclusion hours would continue to decrease with IRAY, and that violence would also be down as a result of this. Yet seclusion hours have continued to average more than 15,000 hours each month for the four remaining DYS facilities for calendar year 2012, even without the extraordinary levels of seclusion found on the PROGRESS unit.²⁹ (*See* Attachment J, Monitor Monthly Facility Report). Plaintiffs now ask the Court to revisit its consideration of this policy, and to examine the use of seclusionary practices generally as a violation of the Stipulation as well as constitutional protections afforded to the Plaintiff class. The PROGRESS unit cannot be reformed in its reliance upon isolation without addressing the policies which substantially contribute to it.

C. There Exists a Pattern of Ongoing Constitutional Violations on the PROGRESS units As well as Non-Compliance with the Stipulation.

Plaintiffs revisited concerns about the PROGRESS unit after a facility visit on April 4, 2012. Counsel conducted 18 youth interviews on that date and confirmed many of the same problems addressed as priorities in prior expert and monitoring reports. New concerns were also raised. Over the summer, Plaintiffs provided extensive comments back to DYS regarding

²⁸ It should also be noted that after this Motion was filed, and prior to the Order of March 28, 2011, Fred Cohen resigned under threat of being removed, and Monitor Will Harrell was appointed. (Doc. 243). Thus, the Court also noted in its Order that that necessity that benchmarks be established for reducing seclusion, as requested by Plaintiffs, was dissipated by the fact that a new monitor was in place to replace Cohen, with whom Counsel had disagreed with on “the appropriate level of seclusion.”

²⁹ The combined total of seclusion hours for the 4 facilities from January – September of 2012 is approximately 14,001 hours, or an average of 15,007 per month. This does not include the hours on the PROGRESS unit except in very limited circumstances. As noted in the 2011 CIIC report, the SMU units did not log any seclusion hours. Since Plaintiffs have not been given a breakdown of seclusion by types on a monthly basis, what is actually reported in 2012 for seclusion hours on the PROGRESS units cannot be accurately reported.

pending drafts to the Standard Operating Procedures, and noting the failure of DYS to address ongoing issues brought to their attention.

Since late June, Plaintiffs have conducted more than 115 interviews with youth in an attempt to get a clear picture of the conditions, and to keep abreast of DYS efforts to make the necessary changes. Youth have been cooperative and provided both written information and verbal accounts of the day to day activities on these units. Attachment O, an unredacted copy of which is filed separately with a Motion to Seal, contains the Affidavits and/or Declarations of six youth which have provided us with detailed information since June of this year, at which time Plaintiffs again expressed great concern about the wellbeing of these youth.³⁰ The sealed document contains a list of youth and the initials used for purposes of this Motion.

Plaintiffs also secured the expertise of Dr. Stuart Grassian, whose Declaration is found in Attachment C. Dr. Grassian is a Board Certified psychiatrist with extensive experience in evaluating mental health care afforded to adults and adolescents in prisons and juvenile facilities, and in particular, evaluating the psychiatric effects of isolated confinement.

Additional information and discovery was obtained and painstakingly reviewed by Plaintiffs to examine the extent to which youth were out of their cells and receiving services. This includes unit logs for Cedar and Sycamore Units, the units utilized for Phase I and Phase II youth.³¹ A chart was compiled from the information obtained from DYS to depict the amount of time youth are out of the cells. This chart is contained in Attachment N, along with a description

³⁰ It should be noted that Plaintiffs' counsel gave youth forms that could be used to log activities each day to keep information more accurately on how much time they were out of their cells in programming. Many youth reported that staff took these forms away from them; thus the information is reported to the best of their recollection.

³¹ Some youth are also on Buckeye, either as a transition unit, or during a period of time when construction on the roof was being completed.

of the process used in creating the document. Additional facts from these sources are discussed below.

The PROGRESS units are designed using seclusion as the norm, and programming as the exception. This is apparent in the DYS Standard Operating Procedures on Tracking Seclusion Hours, which do not include the amount of time youth on PROGRESS spend in their cells. (Attachment L, SOP 301.05.03). The irony is that youth are still identified as being placed in “seclusion” for an act of violence or other infraction, although this is devoid of real meaning. Out of cell time is so limited that the effect of being in “seclusion” is meaningless. Standard Operating Policies relative to the PROGRESS unit specify that if a youth is aggressive, violent or threatening during scheduled programming and cannot safely remain in the programming activities, they shall be placed in “seclusion.” Only then are hours tracked as seclusion hours for purposes of SOP 301.05.03. (Attachment M, Unit PROGRESS, SOP 303.01.07, C.5, p. 6).

But many youth on these units are also subject to IRAV, and always remain in their cells pre-hearing, and then frequently for an additional five days of disciplinary section time. As discussed above, DYS policies on IRAV do not permit a youth to be released from a cell prior to a hearing. Services during this time are even more minimal, as youth are often denied recreation, receive schoolwork through their door, and do not get other services.

Youth also report that they are placed in “security seclusion.” As one youth noted, “security seclusion is just a scheme to stay in our rooms longer. They don’t start pre-hearing seclusion time for an AV until it’s over. It can be as long as they want. I don’t know how to get off.” (Attachment O, p.19, Declaration of Q.R.).

Youth who are accused of committing an AOV are placed in pre-hearing seclusion and by IRAV policy, are not permitted out of their cell prior to a hearing. Hearings are often held

“through the door” without meaningful participation and engagement with the youth. As an example, one youth noted:

When you get an AoV, you are placed in seclusion for three days, maybe more, before a hearing. They don't do hearings right. They usually be through the door. It is days before a hearing and is sometimes more than seven days. The Youth Advocate has write me up for STG. Last time I lost it, the week of September 19th, I did not get recreation and meals were in my room. I only got out for shower. I got paper, but no help.

(Attachment O, pp.27-28, Declaration of C.D.). This practice was confirmed by Terry Schuster, Special Assistant to the Monitor, who indicated in his Report on Youth Advocate Program to the Court filed on 10/9/2012 that this process should be stopped and that youth should be given the opportunity to participate in hearings outside of their cell. (Doc. 327, p. 12).

Documents obtained from DYS in the form of unit logs have been summarized on a spreadsheet and essentially verify what youth have reported – that they spend an inordinate amount of time in their cell, and without necessary structured programming, treatment, education, recreation and leisure time activities. From the logs obtained from DYS, charts were compiled to show the amount of time youth spend in their cell. Time out of cell is only for purposes of education, group sessions, individual sessions, or recreation. Leisure time is documented, although almost non-existent for youth on Phase I. (See Attachment N, Chart of In-Cell Time).³²

Youth also verify that most of the time is spent in their cell. According to I.J., while at Scioto, “I mostly slept in my cell all day. I was in my cell from 9:30 a.m. on every day and I mainly slept. I got out to shower and for group. During the times when I was in my room, I had

³² The Charts are accompanied by a Declaration from Law Clerk Megan Busam, who compiled the data along with other clerks using logs provided by DYS from the period June 18 – July 18, 2012, and August 1 – October 13, 2012. The Declaration explains the difficulties in providing complete accuracy given the quality of documentation received from DYS. It is substantially verified, however, by youth statements also provided.

a set schedule that I followed. Most of it is sleeping. I had developed a routine for myself, and it bothered me when things were out of place or not done how they're supposed to." (Attachment O, p.3, Declaration of I.J.).

Recreation is limited on the PROGRESS unit. Youth on Phase I are not permitted outdoor recreation, and are permitted only to go into another cell which is a "rec cage" on unit. According to I.J. and others, "There is only a dip bar, basketball, and weight ball. I did not go to recreation because the recreation room is dirty. It did not get cleaned after others use it." (Attachment O, p.4, Declaration of I.J.).

There is a clear perception by some youth that staff is antagonistic and make it difficult to move through the phases. There is frustration by youth that once goals are completed, it takes too long to move between levels. (Attachment O, p.24, Declaration of C.D.).

Youth on Phase I on the PROGRESS units are also required to wear soft restraints any time they are out of their cell, including for phone calls and going to school. There is no individualized determination about the use of restraints. (Attachment M, SOP 303.01.07, p. 7). Youth Q.R. notes that "As Phase I's, we are always in gators. It makes me feel like an animal." (Attachment O, p.18, Declaration of Q.R.).

Grassian describes the conditions on PROGRESS units as harsh and punitive, and in some cases, worse than what he has seen in some of the harshest conditions of the federal prison system. He notes:

There is almost a kind of "newspeak" invoked. The youth on the PROGRESS units are housed in "rooms". But those "rooms" are barren concrete boxes, with solid steel doors and a cuff port, no different from the solitary confinement cells in adult prisons. All of the six youths whose charts I reviewed in this matter have been housed in Phase I in the Cedar Unit for extended periods of time. They are not let out of their cells except maybe for a narrow range of activities, groups, or classes, but mostly it is irrelevant – it seems that there are hardly ever enough staff present to allow youths out of their cells. So in the end, they spend day after

day, month after month, virtually continuously in what amounts to a solitary confinement cell. Indeed, in many ways their conditions are worse than that in solitary confinement in prison; they are not allowed reading material, writing or drawing material,³³ nor close circuit television³⁴ for educational programming. The stringencies are extravagantly harsh. Youth were even deprived of palatable food – provided instead with cold “bagged meals”, until defendants agreed to desist from this practice in response to a demand by plaintiff’s counsel.

Yet in the “newspeak” employed, being on Phase I is deemed not to be “seclusion”. Instead, it is deemed to be “Programming”. So that the huge number of hours of seclusion that have been charted in this case in fact represents only a small fraction of the time that youth spend in harsh conditions of solitary confinement. Whether they call it “seclusion” or “programming”, the result is the same. The youth is left day after day, week after week, month after month, in a barren empty cell with almost nothing to occupy his mind or body. The labeling comes to seem almost cynical.

(Attachment C, Grassian Declaration, p. 15).

Youth express signs of deterioration as a result of an inherently punitive environment and excessive time in isolation. For youth who have graduated or are otherwise not in school, this has been particularly harsh. As an example, Youth I.J. graduated, and did not get extra programming, so just spent the additional time in his cell while others were in school. He got upset with staff about this. (Attachment O, Declaration of I.J.) In his case, he spent most of the last 2 ½ years in seclusion. As he explains, “I hated being in my room. It made me mad. It made my anger issues way worse.” (*Id.*, p.5). In other cases, youth express anger, feeling crazy, and feeling there is no way to get their feelings out. “I have seen other kids get aggressive

³³ I understand that there have been problems with youths using paper to cover the window in their cells. The same problem does occur in adult prisons, but when prisoners are clear about the choice they make, they almost always desist from using their materials in such a fashion. It should be an individualized decision, a matter of discussing, not permanently depriving Phase I youth of these materials.

³⁴ It might be thought that it would be impossible to have a television monitor placed in such manner that it could not be tampered with or destroyed. The reality is, though, that it has been done even in the very harshest conditions of the federal prison system – the ADX in Florence, Colorado.

because they are in their room all the time. After being in my room so much, I realize I talk to myself now.” (Attachment O, p.19, Declaration of Q.R.).

Grassian notes that in each of the six files he reviewed, the deterioration was apparent and tragic. “I was provided six charts, and every one of them demonstrated the destructive impact of their confinement at ODYS. Youth arrive [at DYS] with severe psychiatric and cognitive burdens, but they arrive with some hope, some willingness to engage. Placing this exquisitely vulnerable group of youngsters in harsh conditions of solitary confinement basically dooms them. They become more violent, more out of control, more rigidly locked into their “evil side.” (Attachment C, Grassian Declaration, p. 32).

Youth are frequently denied psychological care and programming which can improve their condition. The psychological staff do room checks “through the door” and individualized sessions once a week, if they occur. According to C.D., he is supposed to see a psychologist once a week, “but she keeps making up an excuse. I would like to see her more. I would get less write-ups because I could vent about things.” (Attachment O, p.27, Declaration of C.D.)

The conditions on the PROGRESS units are not therapeutic in nature and do little to provide positive supports that can change behaviors. According to Grassian, DYS has justified placement on these units as opposed to the Life Skills or Mental Health Unit for youth “whose disruptive behaviors are a conscious choice” rather than those whose behaviors are related to their mental health diagnoses. In responding to Plaintiffs’ concerns about admissions to these units, DYS indicated the following:

The agency already thoroughly screens youth prior to placement on the PROGRESS Unit. Aaron Bauer reviews each application for placement, and Dr. Dachowski looks for contraindications for all youth on the mental health caseload. Youth who engage in violent behavior related to cognitive limitations or mental illnesses are sent to the Life Skills Unit or Mental Health Unit. (Laura Dolan, Aaron Bauer) Youth who are placed on PROGRESS have higher levels of aggression and manipulative behavior. The

application and screening process for PROGRESS is to distinguish between those whose disruptive behavior is a conscious choice and those whose behaviors are related to their mental health diagnoses.

Grassian notes that “if the file reviews above demonstrate anything, it demonstrates that there is no truth at all in this statement. Every one of the six youths had major psychiatric and/or cognitive disabilities.” (Attachment C, Grassian Declaration, p. 33). Of the charts examined by Grassian, most or all had diagnoses of Borderline Mental Retardation, ADHD, and some form of Bipolar Mood Disorder. “In short, from a diagnostic point of view, they were as vulnerable a population as one could imagine.” (*Id.*, p. 22)

Ultimately, it is because mental health has very little say in what happens in ODYS, and there is no will to look or think deeply. Charts are chaotic. Diagnoses come and go. Behavioral manifestations of psychiatric illness and of the erosive effects of solitary confinement are viewed as “conscious choices” and “thinking errors”, cognitive distortions that must be corrected. It is easier to just stop at the surface – to look only at behavior and to conceptualize it as under rational control. Although there truly are examples in the chart of caring, helpful clinical interactions, overall the charts reveal an attitude of cynicism – treatment plans that are just boilerplate, almost identical for each youth, chaotic charting that basically ensures that there will be no deeper examination of the underpinnings of behavior.

Attachment C, Grassian Declaration, p. 33.

Rather than developing a system of intensive interventions for youth on PROGRESS units, the paradigm has instead been one of control, discipline and security. Grassian notes that the central theme has been that youth as “willful, manipulative – waiting to see a weakness – and intentionally violent.” (Attachment C, Grassian Declaration, p. 6). Accordingly, discipline is imposed in a harsh and punitive manner to teach kids a lesson.

Youth Specialists within DYS do not appear to be well educated about the mental health issues of the youth in the PROGRESS units. Because behaviors can be unpredictable and potentially dangerous, staff now well trained in conceptualizing behaviors and their meaning

invariably exist in a state of constant tension. That tension leads to anger and contempt toward youth. (Attachment C, Grassian Declaration, p. 13).

IV. CONDITIONS FOR YOUTH ON THE PROGRESS UNITS VIOLATE THE STIPULATION, PRIOR ORDERS OF THIS COURT, AS WELL AS THE 8TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Stipulation is intended to create a system of care within DYS that provides youth with individual care, treatment and rehabilitative services in the least restrictive settings consistent with the needs of each youth and documented safety concerns. Inherent in this agreement is that DYS use generally accepted professional standards of care, and that in no event shall the level of care in areas such as safe environment, mental health, special education, programming or any other requirements fall below such level. (Doc. 108, ¶10).

The population of youth on the PROGRESS units or who become potential candidates for such are predominantly youth the mental health caseload, and disproportionately African American. Because special management units represented some of the most challenging youth, and the most harsh and punitive conditions, Paragraph 76 of the Stipulation requires that, as part of a plan to revise policies regarding seclusion, isolation and crisis management, DYS must “dramatically reduce and *eventually close* the intensive programming units as currently operated.” (Doc. 108)(Emphasis added). The very nature of these units, which rely upon isolation, have not only created circumstances which far exceed the limits established in Paragraph 76, they have deprived youth of structured programming (¶56), appropriate behavior strategies (¶55), full school days (¶189 and Court Order of 3/28/2011), and appropriate mental health services (¶¶ 85-88).

The present conditions in the PROGRESS unit are not only in clear violation of the Stipulation Agreement, but they also represent “current and ongoing” violations of the Federal

Constitution. 18 U.S.C. 3626(b). Although the Sixth Circuit has not determined what constitutional standard should apply when evaluating the conditions of confinement in juvenile correctional facilities, federal courts across the country have determined conditions to be unconstitutional under the Eighth Amendment, the Fourteenth Amendment, or a combination of the two. No matter what standard this Court chooses to employ, the conditions in the PROGRESS unit violate the constitutional rights of the children who are confined in it.

A. The Conditions in the PROGRESS Unit Violate the Due Process Clause of the Fourteenth Amendment Because They are Punitive; They Deny Rehabilitation to Youth and They are Overly Restrictive.

1. The conditions are punitive.

The juvenile court system was founded upon the ideas that children who break the law should be treated differently than adult criminals, and that children who break the law are capable of being rehabilitated. The Supreme Court of the United States has consistently held that the objectives of the juvenile court “are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.” *Kent v. United States*, 383 U.S. 541, 554 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). The Supreme Court of Ohio also recently noted that “[j]uvenile delinquency proceedings are civil rather than criminal in character,” *In re A.J.S.*, 120 Ohio St. 3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 26, and “[j]uvenile courts are unique and are tied to the goal of rehabilitation.” *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶54. Accordingly, juvenile delinquency proceedings are not criminal trials and children who are adjudicated delinquent have not been convicted of a crime.

In *Bell v. Wolfish*, the Supreme Court held that it is a violation of due process to detain a person who has not been convicted of a crime in conditions that amount to punishment. 441 U.S.

520, 535-536, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Conditions, including the use of isolation units, amount to punishment when facility officials show an expressed intent to punish, or the restriction is not reasonably related to a legitimate government objective. *Id.* If the conditions of confinement in an isolation unit are reasonably related to a legitimate government objective but are excessive in light of that objective, they are also punitive. *Id.* Although *Bell* dealt with criminal pretrial detainees, courts have applied the same standard to incarcerated juvenile delinquents. *See i.e. R.G. v. Koller*, 415 F.Supp. 2d 1129 (D. Haw. 2006).

In *R.G. v. Koller*, a district court determined that the long-term segregation of LGBT youth in a juvenile justice facility constituted punishment that violated the confined children's Due Process rights. *Koller* at 1155. This decision was largely based on expert testimony that "long-term segregation or isolation of youth is inherently punitive" and that "[p]rolonged isolation or seclusion is punitive in nature and can cause serious psychological consequences." *Id.* (Emphasis added). Other courts have also looked to similar expert testimony when finding the conditions of isolation units to be unconstitutional. *See i.e. Lollis v. N.Y. State Dep't of Soc. Servs.*, 322 F. Supp. 473, 480 (S.D.N.Y. 1970) (holding plaintiff's isolation was unconstitutional after considering extensive expert testimony stating that the extended use of isolation on children is "cruel and inhuman" and "counterproductive to the development of the child"). The *Koller* court concluded that, even if the defendants did not intend to punish children by placing them in isolation, the harmful effects of the use of isolation rendered the facility's practices "at best, an excessive, and therefore unconstitutional, response to legitimate safety needs of the institution." *Koller* at 1155-1156.

Accordingly, because the children confined in DYS facilities are civil, rather than criminal, detainees, they cannot be subjected to punitive conditions of confinement. Conditions

are punitive if 1) facility officials express an intent to punish; 2) the restrictions are not reasonably related to a legitimate government interest; or 3) the restrictions are reasonably related to a legitimate government interest, but are excessive in light of that objective. Long-term isolation is inherently punitive and is excessive in light of the safety needs of juvenile institutions.

2. The Defendant Does Not Provide Rehabilitative Treatment in the Progress Units.

Children in Ohio who are adjudicated delinquent in the juvenile justice system have a constitutional right to receive a disposition that provides them with rehabilitative treatment. This right to treatment is implicit in the Due Process Clause and has been recognized by federal courts across the country,³⁵ including a court in this District. *Miletic v. Natalucci-Persichetti*, S.D. Ohio No. C-3-89-299, 1992 WL 1258522 (Feb. 6, 1992) (“[T]his Court concludes that a juvenile who is committed to a correctional... institution, has a right to treatment under the Fourteenth Amendment”).

A child’s right to treatment stems from the unique nature of the juvenile justice system. Because the juvenile system is focused on rehabilitation rather than punishment, children are not afforded the same level of procedural protections provided to those who face criminal charges. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971). Rather, the due process standard for juvenile proceedings is simply “fundamental fairness.” *Id.* at 543; *In re C.S.*, 115 Ohio St. 3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 80.

³⁵ See *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972) aff’d, 491 F.2d 352 (7th Cir. 1974); *Pena v. New York State Div. for Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976); *Morgan v. Sproat*, 432 F.Supp. 1130 (S.D. Miss. 1977); *Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Alexander S. By & Through Bowers v. Boyd*, 876 F. Supp. 773 (D.S.C. 1995).

Fundamental fairness demands that children who are denied certain criminal procedural protections during their adjudicative proceedings because they are to be rehabilitated rather than punished actually receive the rehabilitative treatment that they have been promised. Otherwise, a child in juvenile court will receive “the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” *Kent*, 383 U.S. at 556. Because “it would be anomalous to find treatment and rehabilitation of an offender as relevant goals during pre-dispositional phases of the juvenile process but not as to the post-dispositional period,” children who are incarcerated by the juvenile court have a right to receive treatment during their incarceration. *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972) *aff’d*, 491 F.2d 352 (7th Cir. 1974). To detain a child “under a juvenile justice system absent provision for the rehabilitative treatment of such youth is a violation of due process right guaranteed under the Fourteenth Amendment.” *Pena v. New York State Div. for Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976).

Additionally, when the purpose of incarcerating children is treatment and rehabilitation, due process requires that the conditions and programs in the institution are reasonably related to treatment and rehabilitation. *Morgan v. Sproat*, 432 F.Supp. 1130, 1135 (S.D. Miss. 1977), *citing Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972) (holding due process required the nature and duration of mentally retarded man’s civil commitment to “bear some reasonable relation to the purpose for which the individual is committed”).

Ohio statutory law specifies that the overriding purposes for juvenile dispositions include “provid[ing] for the care, protection, and mental and physical development of children,” and “rehabilitat[ing] the offender.” O.R.C. 2152.01. Although the law also works to “protect the public interest and safety,” “hold the offender accountable for the offender’s actions,” and

“restore the victim,” none of these purposes are inconsistent with a child’s rehabilitation. *Id.* The statute also requires that all juvenile dispositions, including commitment to DYS, “shall be reasonably calculated to achieve the overriding purposes” and that “[t]hese purposes shall be achieved by a system of graduated sanctions and services.” *Id.* Additionally, the Supreme Court of Ohio has determined that “the decided emphasis [of the juvenile court] should be upon individual, corrective treatment.” *In re Agler*, 19 Ohio St. 2d 70, 72, 249 N.E.2d 808 (1969). *See also Miletic v. Natalucci-Persichetti*, S.D. Ohio No. C-3-89-299 (“The primary objective of the juvenile criminal justice system... is the rehabilitation, care and treatment of children”).

Consequently, courts have determined that holding children in juvenile justice facilities under conditions that do not amount to individualized rehabilitative treatment is a violation of their due process rights. *Morgan* at 1140. In enforcing this constitutional right to treatment, “courts have not attempted to define the particular treatment program which is appropriate for specific individuals, but instead have required certain fundamental conditions in an institution which will allow adequate treatment to take place.” *Id.* The first of these “fundamental conditions” is that “the institution’s entire program must be geared to meet the individual needs of each student.” *Id. citing Nelson*, 491 F.2d at 360. In *Nelson v. Heyne*, the court determined that, although the facility had adopted a differential treatment program for youth in isolation that required the development of Individualized Treatment Plans (ITPs), the program “appear[ed] to be more form than substance” and that “the implementation of the program [fell] far short of its goals.” *Nelson* at 460. In reaching this conclusion, the court looked to the following factors: the youth had only sporadic contact with treatment staff; the youth’s vocational, recreational, and educational activities were suspended while in the isolation until; the youth generally spent less than 20 minutes at a time with treatment staff when they met with them individually; each staff

member was responsible for treating about 30 youth; there was no specialized training required for the counselors who developed ITPs; there was no individual psychotherapy programs; and that “very little in the way of individualized treatment programs are even prepared, much less implemented.” *Id.* Accordingly, in order to provide the constitutionally-required level of treatment to isolated youth, a facility must create and *actually implement* an effective, individualized treatment program for each child.

The second fundamental condition of a constitutional treatment program is that “[t]he institution must employ sufficient numbers of qualified professional and support personnel to enable it to provide the individualized programs found to be appropriate for each student.” *Morgan*, 432 F.Supp. at 1141, *citing Martarella v. Kelley*, 349 F. Supp. 575, 601 (S.D.N.Y. 1972) supplemented, 359 F. Supp. 478 (S.D.N.Y. 1973). In *Morgan*, the court determined that a sufficient staff would include:

1. At least one full-time license psychologist or psychiatrist to coordinate and supervise the treatment program;
2. A sufficient number of qualified counselors to implement the treatment program and to provide individual and group counseling to the students (1:15-20 counselor/ student ratio);
3. A sufficient number of qualified “cottage parents” to supervise the daily cottage life; and
4. Sufficient outside consultant services to provide specialized psychological, psychiatric and medical services where needed. *Id.*

Finally, due process requires that the institution “provide an environment which is conducive to rehabilitation as well as sufficient programs, including education, vocational training, and recreation, to enable the students to obtain the necessary skills to return to society.” *Id. citing Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354, 1369-1370 (D.R.I. 1972). Courts have found that conditions of confinement in isolation units are unconstitutionally non-rehabilitative, and in some cases, actually “anti-rehabilitative.” *Affleck* at 1367. The isolation unit the *Affleck* court deemed “anti-rehabilitative” afforded the confined children no outdoor

exercise, an hour-and-a-half of education on weekdays, and generally only allowed the youth out of their rooms for daily shower and to get their meal trays, though their meals were eaten in their rooms. *Id.* The court also concluded that the conditions of confinement a similar unit in the same facility were “detrimental to rehabilitation.” *Id.* On this unit, the confined children were rarely allowed outside for exercise, provided with no vocational training or arts and crafts programming, provided with an hour of educational programming on weekdays, and spent their free time watching television, roaming the hall, playing cards or doing calisthenics. *Id.* Therefore, the conditions of an isolation unit must provide sufficient training and programming aimed at rehabilitating the child and preparing them to become productive members of society upon their release.

Therefore, children who are committed to DYS have constitutional right to receive individualized rehabilitative treatment that enhances their mental and physical development. The reasoning for this right is twofold. First, fundamental fairness requires that children who are afforded a lower level of procedural protections than criminal defendants at trial actually receive the rehabilitative treatment by which their decreased protection is justified. Secondly, children in DYS are entitled to programming that bears at least some reasonable relation to the purposes of their confinement, which is providing for their care, protection, mental and physical development, and rehabilitation. In order for conditions of confinement to constitute rehabilitative treatment, facilities must 1) create and implement effective individualized treatment programs for each child; 2) employ a sufficient staff to enable the facility to provide the individualized programs for each child; and 3) provide both an environment that is conducive to rehabilitation and sufficient programming to allow each child to obtain the necessary skills to return to society.

3. The conditions are unreasonably restrictive.

Juveniles who have not been convicted of crime have a constitutionally-protected interest in “freedom from unnecessary bodily restraint.” *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983). Unnecessary bodily restraint includes the use of isolation units such as the PROGRESS unit. *Id.* In *Youngberg v. Romeo*, the Supreme Court held that civilly committed persons had a liberty interest in, among other things, “reasonably nonrestrictive confinement conditions.” 457 U.S. 307, 321, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). Unreasonably restrictive conditions of confinement “unduly restrict the juveniles’ freedom of action and are not reasonably related to legitimate security or safety needs of the institution.” *Alexander S. By & Through Bowers v. Boyd*, 876 F. Supp. 773, 797 (D.S.C. 1995). However, this reasonableness test has not been interpreted to be the same standard as “the ordinary ‘rational relationship’ equal protection test,” which would not “give enough consideration to the liberty interests of these juveniles.” *Santana v. Collazo*, 793 F.2d 41, 45 (1st Cir. 1986). Rather, in order to prove that the facilities use of prolonged isolation is “reasonably related to justifiable institutional objectives,” the defendants must show that “whatever legitimate needs are served by extended isolation are unlikely to be achieved by resort to other less burdensome practices such as shorter periods of isolation and/or a system of incentives and deterrents based on the granting and deprivation of privileges.” *Id.* at 46.

Additionally, to determine whether conditions are unreasonably restrictive, a court must examine whether the people involved in the decision-making regarding the conditions of confinement exercised professional judgment. *Youngberg* at 321. Accordingly, “the level of restraint to be used for each juvenile should be based upon some rational professional judgment as to legitimate safety and security needs.” *Alexander S.* at 787. If the conditions amount to a

“substantial departure from accepted professional judgment, practice or standard,” then conditions of confinement are in violation of the detained children’s due process rights. *Youngberg* at 321. Expert testimony that a facilities use of isolation is “not within the range of acceptable professional practices” and “is not generally accepted and falls outside of professional standards” can render the use of an in isolation unit a violation of Due Process. *Koller*, 415 F. Supp. 2d at 1154-1155.

Two additional recent decisions by courts have condemned solitary confinement practices in juvenile facilities as being overly restrictive, void of programming and positive behavioral supports, and lacking in due process procedures. In *State of West Virginia v. Humpreys*, (Circuit Court, Kanawha Co. W. Va. No. 12-misc.-312 (Sept. 17, 2012) (Attachment P), the court recently entered an order addressing several conditions issues in West Virginia juvenile facilities, including the use of extended periods of isolation, routine random strip searches, lack of structured programming, and inadequate due process prior to imposition of sanctions³⁶. By agreement of the parties, youth are to be out of the room during all but sleeping hours, provided with an updated positive behavior management system, permitted an hour of large muscle recreation daily, outside with weather permitting, and provided with increased due process protections. Room confinement for disciplinary purposes is limited to 3 days.

In *C. B. v. Walnut Grove Correctional Authorities*, S.D. Miss.No. 3:10-cv-00663, (Feb. 2012) , the District Court entered an order requiring that the Walnut Grove Correctional Authorities discontinue the use of solitary confinement for youth 17 years and younger housed in a separate unit of this adult prison. (Attachment Q, Order). The order specified that youth must

³⁶ It should be noted that this Order was entered after an extensive fact finding report was submitted to the court by juvenile expert and well know Federal Monitor Paul Demuro. The Report described numerous conditions similar to those on the PROGRESS units and deprivations of services while youth are in seclusion.

never be subject to solitary confinement in their cells, defined as more than 20 hours at a time. During non-sleep hours, youth are required to be out of their cells, except for two limited purposes: 1) if the youth posed an immediate threat, but then for no longer than 24 hours; or 2) for disciplinary purposes, but then not to exceed 72 hours. Even in these instances where room confinement is permitted, youth cannot be denied educational services, recreation (including outdoor with weather permitted), family visits, access to phones, letters and the same meals as others. Unlike DYS, the population for this facility are youth who have been bound over and tried as adults, thus at the deeper end of the spectrum. Nonetheless, this Court recognized the dangers of using isolation and the constitutional violations inherent in its extended use with adolescent youth. (Id. at 9-12).

Children who are confined in DYS facilities cannot be subjected to conditions of confinement, including the use of extended isolation, which unduly restrict their freedom of action and are not reasonably related to a justifiable institutional objective. If the purpose facility officials purport the use of isolation to serve could be achieved through less restrictive practices, then its use is unreasonable. Finally, the facility officials must have exercised professional judgment in their determination that a use of isolation was appropriate. If the use of isolation is not within the range of generally accepted professional practices, it can be assumed that the officials did not, in fact, exercise their professional judgment. Dr. Grassian sets out what conditions are consistent with generally accepted professional judgment and the PROGRESS unit fails on all counts.

A. The conditions in the PROGRESS unit constitute cruel and unusual punishment in violation of the Eighth Amendment of the Federal Constitution.

In addition to finding due process violations in conditions of confinement in isolation units such as the PROGRESS unit, courts across the country have found them to be cruel and unusual

punishment.³⁷ Some courts have determined that, since juvenile offenders have not been “convicted” of a crime, the Eighth Amendment protection against cruel and usual punishment does not apply to juveniles. *See i.e. Alexander S.* at 796. Though the Supreme Court held in *Ingraham v. Wright* that the Eighth Amendment protection against cruel and unusual punishment only applies people who have been convicted of crimes, the Court specifically reserved the issue of whether Eighth Amendment applies to juvenile justice institutions. 430 U.S. 651, 669 n.37, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977). The *Ingraham* Court examined whether the Eighth Amendment protected children at a public school from being corporally punished by school teachers. *Id.* at 671. The Court came to this decision after comparing the circumstances of “[t]he prisoner and the schoolchild.” *Id.* at 669. When examining the reality of the confinement youth face in the PROGRESS unit, it is undeniable that their circumstances are nearly identical to the circumstances of the prisoner with a criminal conviction. Accordingly, some courts have concluded that “the fact that juveniles are *in theory* not punished, but merely confined for

³⁷ *See Pena v. New York State Division for Youth*, 419 F. Supp. 203, 207 (S.D.N.Y. 1976) (because youth have right to treatment, use of isolation is cruel and unusual punishment when it is punitive rather than therapeutic); *Lollis v. New York State Dep’t of Social Services*, 322 F. Supp. 473, 482-483 (S.D.N.Y. 1970) (isolation of fourteen-year-old in a small room without a mattress, books, or any other recreation for two weeks was cruel and unusual punishment); *Nelson v. Heyne*, 355 F. Supp. 451, 456 (N.D. Ind. 1972) (use of isolation cottages for extended periods of time with minimal contact with treatment staff and academic services was cruel and unusual); *Inmates of the Boys’ Training School v. Affleck*, 346 F. Supp. 1354, 1366-1367 (D.R.I. 1972) (systematic isolation in rooms with nothing but a toilet and a mattress was cruel and unusual punishment when youth were provided with no more than one and a half hours of education a day and no exercise); *Morales v. Turman*, 364 F. Supp. 166,174 (E.D. Tex. 1973), *overruled on other grounds by Morales v. Turman*, 353 F.2d 864 (5th Cir. 1976) (isolation of juveniles without any legislative or administrative limitation on the duration and intensity of the confinement was cruel and unusual punishment); *Morgan v. Sproat*, 432 F. Supp. 1130,1140 (S.D. 1977) (use of isolation for longer than twenty-four hours or for reasons other than protecting himself or others from an immediate physical threat constituted cruel and unusual punishment).

rehabilitative purposes, does not preclude operation of the 8th Amendment.” *Affleck*, 346 F. Supp. at 1366.

Conditions of confinement rise to the level of cruel and unusual punishment when they deny confined children a necessity of civilized life and State officials acted with deliberate indifference to the well-being of the confined children. *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991). If an official ‘knows of and disregards an excessive risk to inmate health or safety;’ is “aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,” and “draws the inference,” then he has acted with deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

The especially harmful effects of isolation on children should also be taken into consideration when determining whether conditions of confinement violate the Eighth Amendment. *See Affleck* at 1365-66 (Holding juvenile facility’s use of isolation was cruel and unusual punishment; “To confine a boy without exercise, always indoors, almost always in a small cell, with little in the way of education or reading materials, and virtually no visitors from the outside world is to rot away the health of his body, mind, and spirit”). In *Lollis v. N.Y. State Dep’t of Soc. Servs*, a district court determined that the two-week room confinement of a fourteen-year old girl with no recreation time or reading matter was a cruel and unusual punishment. *Lollis*, 332 F. Supp. at 482. The court reached its decision after considering expert testimony that “[y]oungsters are in general more vulnerable to emotional pressures than mature adults; isolation is a condition of extraordinarily severe psych stress; the resultant impact on the mental health of the individual exposed to such stress will always be serious, and can occasionally be disastrous.” *Id.* at 481. Similarly, in *Pena v. New York State Div. for Youth*, the

court held that placing youth in isolation for punitive reasons “despite the fact that such isolation caused clearly anti-therapeutic hostility and frustration” and failing to release children who were placed in isolation because they were posing a threat “as soon as their violent mood subside[d]” constituted cruel and unusual punishment. *Pena*, 419 F. Supp. at 210. The court also concluded that “[e]xcept in the most extreme circumstances, no boy should be held in isolation for more than six hours.” *Id.*

The use of isolation units in juvenile facilities constitutes cruel and unusual punishment when the conditions of the unit deny confined children a necessity of civilized life and facility officials acted with deliberate indifference to their well-being. If an official knows of and disregards an excessive risk to inmate health, then he or she has acted with deliberate indifference. DYS is monitored in every subject matter area of the Stipulation. It has been on notice throughout the course of this litigation about the problems on the PROGRESS unit, and has failed to follow the recommendations of the monitors and expert team in bringing about the appropriate changes. The psychological effects of isolation on children, combined with the lack of treatment, programming, and educational services available to youth in the PROGRESS unit constitutes cruel and unusual punishment.

V. RELIEF SOUGHT

DYS has had more than four years to bring conditions on these units into compliance with the Stipulation. Special management units, and the use of seclusion, have been a priority for both monitors, and the subject of numerous reports and meetings. Attempts by DYS to address the severe deprivations these youth suffer have not and will not be successful until the underlying problems with design and implementation barriers are addressed. When this Court approved the Stipulation it held – and the parties agreed that – that the “Stipulation satisfies the

requirements of 18 U.S.C.A. §3626(a)(1)(A)” and it retained jurisdiction to enforce its terms. Doc. 108, par 263. That means that this Court has already determined that the Stipulation extends no further than necessary to correct the violation of the federal rights of the plaintiffs; that it is narrowly drawn; and that it is the least intrusive remedy available to address the violations. Therefore, the Plaintiffs are free to simply insist that the Stipulation be followed since the problem described in this motion is a continuation of the problem already declared by this Court to violate the constitution when it approved the Stipulation. Nonetheless, because of the importance of the issues, the Plaintiffs have renewed the proof to reassure the court that the constitutional violation remains in place.

Plaintiffs seek an Order which finds the following:

1) The conditions on the PROGRSS Unit violate Stipulation Paragraphs 55, 56, 74-76, 85-88, and 189;

2) The conditions on the PROGRESS unit are unconstitutional and in violation of the Stipulation in that they are punitive, fail to provide adequate treatment and programming, are overly restrictive, fail to create positive behavior management strategies, and fail to address sufficient mental health programming;

3) The conditions on the PROGRESS unit are unconstitutional and in violation of the Stipulation as it relates to the use of excessive seclusion, including time youth spend in their cells and in restraints;

4) The conditions on the PROGRESS unit are in violation of the Court’s order of March 29, 2011 regarding the provision of full school days,

5) Placing DYS under partial Receivership for operation of the PROGRESS unit is necessary to remedy the violation of these constitutional rights. Such actions are necessary because;

a) there is grave and immediate harm to Plaintiffs on this unit as a result of the deprivations therefore and the damaging psychological effects;

b) other less extreme measures by the monitor and members of the expert team have been utilized and exhausted without sufficient results;

c) continued insistence of compliance with the Court's orders would lead to confrontation and delay by DYS:

d) there is a lack of leadership within DYS to adequately address the problems and ensure that the agency achieves compliance;

e) a receiver is more likely to provide a quick and efficient remedy which can bring the agency into compliance:

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2012 a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Alphonse A. Gerhardstein
Attorney for Plaintiffs