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.	**:**	
	:	**PLAINTIFFS' MOTION FOR**
HARVEY REED,	**:**	**SPECIFIC PERFORMANCE TO**
	:	**SECURE COMPLIANCE WITH**
Defendant.	**:**	**STIPULATION, CONSENT**
	:	**DECREE DOC 359 AND**
	:	**MOTION FOR REMEDY FOR**
		UNCONSTITUTIONAL
		CONDITIONS

Pursuant to the Consent Decree, Doc. 359, p. 6, and the Stipulation for Injunctive Relief (Doc. 108), Plaintiffs move for specific performance to secure compliance with the Consent Decree terms regarding mental health, see Doc. 359-1, §II C, and an order declaring conditions of confinement for youth who are or have been on the mental health caseload to be unconstitutional and an order requiring remedial measures. Plaintiffs request an expedited hearing on this motion pursuant to the schedule proposed below.

MEMORANDUM

I. INTRODUCTION

Defendant Reed is failing to provide adequate treatment to youth who are or have been on the mental health caseload. As a result many of those youth are experiencing excessive periods of seclusion which causes severe harm to those members of the class. Efforts to resolve this issue short of the filing of this motion have been unsuccessful. Because the harm is severe, plaintiffs seek an expedited scheduled of the resolution of this motion. Under the terms of the consent decree a motion to be adjudicated by the Monitor as special master under Fed. R. Civ.

Proc. 53 is the appropriate step to secure compliance with the decree. Plaintiffs request that the matter be resolved on the following schedule.

Action	**Date (2014)**	**Notes**
Plaintiffs serve written discovery requests including interrogatories and requests to produce	Feb 18	Attached to this motion. Should be considered filed as of this date.
Defendants respond to written discovery	Feb 28	
Parties identify experts	March 3	Need to provide name, vita and topic expert will cover in testimony
Plaintiffs' experts tour facilities	March 10-14	
Plaintiffs depose DYS staff	April 9 - 16	
Monitor Team Reports filed by Weisman, Glindmeyer, Dedel	April 16	We propose that the monitor expert team reports may be used by either side either with or without live testimony from the author
Plaintiffs serve request for Admission	April 17	
Defendant responds to Request for Admission	April 25	
Plaintiffs expert reports and Defendant expert reports served on opposing counsel	April 30	If defense counsel want to depose Plaintiff experts we can fit that into the schedule.
Plaintiff Deposition of Defendant Experts	May 5-7	
Plaintiffs Proposed Findings of Fact and Conclusions of Law	May 18	
Defendant's Response and Alternative Findings of Fact and Conclusions of law	May 25	
Hearing before Will Harrell as Special Master	June 2 - 5	
Post Hearing Briefs	June 13	
Ruling by Special Master Harrell	?	(Report and Recommendation)
Objections to Report and Recommendation Due	+ 21 days from report	

De Novo Review by District Court per FRCP 53		As set by the Court

Interrogatories and requests to produce are attached. Plaintiffs request that these discovery requests be considered served as of the filing of this motion.

The parties have been implementing an extensive Stipulation for more than five 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 are or have been on the mental health caseload and who remain in the existing four DYS facilities, a number of challenges still exist where the Stipulation requirements and/or the subsequent consent decree requirements (Doc. 359) have not yet been met in any substantial way, and a pattern of constitutional violations still exist.

II FACTS

The monitor reports filed with this Court document the lack of adequate treatment and the over use of seclusion for youth who are or have been on the mental health caseload. For example, Dr. Weisman has repeatedly noted deficiencies in the basic task of establishing individualized treatment plans:

> While some improvement is noted, treatment planning and ITPs continue to be a challenge for all facilities. Most plans do not to present goals or objectives in concrete, measurable terms….
>
> As has been discussed previously, a case formulation is the essential framework for the development of Individual Treatment Plans (ITP). There is no evidence in the ITPs reviewed that there is anything like an overarching formulation informing their development. As has been stated previously, treatment goals need to reflect real world concerns – issues that must be addressed in order for the youth to return to the community. Objectives should be designed to develop and measure skill acquisition. Plans need to be assessed in terms of their efficacy in helping the youth acquire the desired skills, and revised monthly – or more often – if it becomes clear that the ITP is not working. Articulating objectives as the completion of paper and pencil tasks or studying Skill Cards does not address the development of new replacement behaviors. These are rather, strategies being employed in the service of the development of new

> skills, they are not in and of themselves, evidence of skill acquisition. Similarly, discussing skills in counseling or making lists e.g., of risky situations is not in and of itself demonstration of skill acquisition – youth need to display the skills they have learned.

Report of Dr. Weisman, Doc. 388-2, p.3 - 4.

Because treatment is inadequate, Defendant Reed places youth who are or have been on the mental health caseload into seclusion for extensive periods of time. Dr. Weisman recently reported on "frequent flyers" or "youth that spent 10% or more of their time in seclusion since their incarceration." Doc. 388-2, p. 7.

> At CJCF, with a mental health caseload population of 78, 41 youth were identified as frequent flyers – or 53%. Only 13 youth in General Population were similarly identified (with a General Population of 44 youth, that's 30%). This means that mentally ill youth are disproportionately engaging in behaviors likely to result in their being secluded. In comparison, only two youth from CHJCF were identified as frequent flyers; with 81 youth on the mental health caseload, this represents 2.5% of the mental health population. IRJCF with a mental health caseload of 70 youth, 16 or 23% were identified as frequent flyers. Why the majority of youth on the mental health caseload at CJCF are engaging in frequent AOVs needs explanation. There are also notable differences between facilities in their likelihood of imposing seclusion. CHJCF had a total number of seclusion hours across all youth of 54.5. At CJCF the total number of seclusion hours for the frequent flyers was 7,470.15. At IRJCF the number was 6,177.17 seclusion hours for all youth.

Id.

Thus, youth with chronic aggressive behaviors spend significant periods of time in seclusion, which is deleterious to their mental health and to their continued engagement in the treatment programming which should be designed to eliminate these very behaviors. Defendant Reed has an obligation to provide adequate mental health treatment to address youth's assaultive behaviors and also to respond to such behaviors in a manner that reduces their likelihood in the future. He also has a duty not to impose excessive seclusion. Through discovery proposed with this motion Plaintiff will expand on the facts demonstrating the extent of this problem and propose relief that will effectively resolve the issue.

III. ARGUMENT

A. Conditions for youth who are or have been on the mental health caseload violate the stipulation and doc 359, as well as the 8th and 14th amendments to the United States Constitution

The Stipulation and consent decree are 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, Para. 10)

The present conditions for youth who are or have been on the mental health caseload unit are not only in clear violation of the Stipulation Agreement and consent decree, 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 for youth who are or have been on the mental health caseload violate the constitutional rights of the children who are in Defendant's custody.

B. The Conditions for Youth who are or have been on the Mental Health Caseload Violate the Due Process Clause of the Fourteenth Amendment Because They are Punitive; They Deny Rehabilitation to Youth and They are Overly Restrictive[1]

1. The conditions are punitive

[1] This opening memorandum sets out the 14th Amendment standard of review. Plaintiffs reserve the right to argue in the alternative under the Eighth Amendment when additional legal argument is made.

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 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 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 that extended isolation 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. Excessive isolation is inherently punitive in light of the safety needs of juvenile institutions.

2. The Defendant Does Not Provide Adequate Rehabilitative Treatment

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,[2] 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.

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

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[2] *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).

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.*

Further, treatment means reviewing files to see what has been done before and assessing its efficacy. Every meeting cannot be a do-over. See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1220 (N.D. Cal. 1995) (finding constitutional violation where "[n]otes of mental health examinations are often cursory" and "[e]ntries sometimes fail to account for prior diagnoses; mental health staff "just put[] in another diagnosis with no comment on the fact that there's a discrepancy here so that, you know, you see a person five times, he's got five diagnoses"); *See also Woodall v. Foti*, 648 F.2d 248, 272 (5th Cir. 1981) (plaintiff stated an Eighth Amendment claim for denial of psychiatric care when "he had been under a psychiatrist's care prior to his imprisonment, that he had been diagnosed as a pedophile and as a manic depressive with suicidal tendencies, that his crime was related to his illness, that he requires psychiatric treatment, that the prison psychiatrist had advised him that he needed psychiatric treatment which the prison could not provide, that the conditions of his confinement aggravated his medical needs, and that [the sheriff] had refused to provide him with the necessary treatment"). 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).

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.

C. Relief Requested

Plaintiffs seek an Order which finds the following:

1) The conditions for youth who are or have been on the mental health caseload violate the Stipulation and the consent decree;

2) The conditions for youth who are or have been on the mental health caseload are unconstitutional and in violation of the Stipulation and consent decree in that Defendant's treatment of the youth is punitive, fails to provide adequate treatment and programming, is overly restrictive, fails to create positive behavior management strategies, and fails to provide sufficient mental health programming;

3) The conditions for youth who are or have been on the mental health caseload are unconstitutional and in violation of the Stipulation and consent decree in that Defendant imposes excessive seclusion, including time youth spend in their cells;

Plaintiffs also seek an order that requires specific performance of the Stipulation and Consent Order and additional remedies for these violations as this court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2014, 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