THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.B., by and through her next friend CASSIE CORDELL TRUEBLOOD, *et al.* Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *et al.*, Defendants.	No. 14-cv-01178-MJP PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Defendants are on the brink of confining class members in a poorly-disguised jail that is unsafe and non-therapeutic. Class members would be placed in danger of irreparable harm to their physical safety by Defendants' failure to comply with this Court's orders. Defendants' claims that they are exercising "professional judgment" do not insulate their actions from scrutiny by this Court, which has full authority to issue a TRO to prevent serious injury to the class.

II. BACKGROUND

Plaintiffs brought this motion for temporary restraining order to prevent class members from being assigned to an unsafe facility that violates this Court's orders. *See* Dkt. 193.

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On February 8, 2016, this Court issued a modified order, Dkt. 186 at 9, "increasing the Court's supervision and the authority of the Court Monitor" to ensure compliance with the Court's original order that restoration services be provided within seven days in a therapeutic environment. Dkt. 131 at 22.[1] In the modified order, this Court also ordered the Court Monitor "to increase oversight of DSHS efforts to achieve compliance and of its facilities, particularly the alternative restoration facilities run by private contractors in Yakima and Maple Lane." Dkt. 186 at 23.

The Monitor instructed two expert consultants, Dr. Debra Pinals and Andrew Phillips, to review the alternative restoration facilities programs, staffing, and physical environments. *See* Cooper Decl. Ex. A. In the Consultant Report dated March 20, 2016, these experts concluded that although YCRC has been modified, a number of outstanding changes are still required to ensure resident safety. They further specifically noted that "[w]hether these refinements could be safely made while residents are already arriving raises concern." *Id.* at 8.

Defendants concede that the improvements to "the safety and anti-ligature features" at YCRC are not yet complete. Dkt. 205 at 8. Rather than waiting for completion of what it recognizes must be done, DSHS has instead begun to assign class members to the YCRC. Doing so creates an unacceptable—and wholly preventable—risk of irreparable harm. Contrary to

[1] After reading her reports in this matter, observing her testify at trial, and reviewing her credentials, the Defendants stipulated to the appointment of Dr. Danna Mauch as Court Monitor in this matter. Dkt. 141; Dkt. 142-1. The Court Order appointed Dr. Mauch as the monitor for this matter, Dkt. 144, to act as "an agent of the Court, to oversee Defendants' implementation of the injunction's requirements." Dkt. 131 at 23. Dr. Mauch subsequently contracted with consultants Dr. Debra Pinals and Andrew Phillips to assist with assessing implementation and oversight of Defendants' corrections-based restoration programs. Cooper Decl. Ex. A. Dr. Pinals has worked as a practicing forensic psychiatrist, public mental health and forensic systems administrator, and program services researcher and forensic services author. *Id.* at 1. Andrew Phillips has worked as an executive director, public systems administrator, and served as the Chief Executive Officer of Western State Hospital. Cooper Decl. Ex. D. The parties in the matter have reviewed the curricula vitae of both consultants. Cooper Decl. Ex. A at 1.

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Defendants' assertions, it is within the proper scope of this Court's authority to enforce its own orders and put a temporary halt to YCRC admission.

III. ARGUMENT

A. A TRO is Necessary to Ensure Compliance with the Court's Injunction.

Defendants' contention that a "TRO is procedurally improper following entry of a final judgment and permanent injunction in this case" is unsupported by the case law and, indeed, they cite no cases in support of this proposition. Dkt. 201 at 2. Plaintiffs seek this temporary and emergency action until a full evidentiary hearing can be held to determine whether YCRC meets this Court's order. A TRO is the classic procedural vehicle by which to request this relief: class members' very lives are at risk and emergency action is required to prevent irreparable harm.

Where, as here, Defendant's contemptuous violation of a permanent injunction will cause a plaintiff irreparable harm, federal courts routinely enter TROs to enforce their injunctions. *See Bd. of Supervisors of the Louisiana State Univ. v. Smack Apparel Co.*, 574 F. Supp.2d 601, 603-604 (E.D. La. 2008) (noting that a TRO was granted to enforce permanent injunction entered two years earlier); *ClearOne Commc'ns, Inc. v. Chiang*, 670 F. Supp.2d 1248, 1253 (D. Utah 2009) (issuing a TRO that "is an expansion of the content and spirit of the [original] Permanent Injunction."); *F.T.C. v. Neiswonger*, 494 F. Supp.2d 1067, 1084 (E.D. Mo. 2007) *aff'd*, 580 F.3d 769 (8th Cir. 2009) (noting that the "TRO . . . enjoined Reed, as a contempt defendant in this case . . .").

Alternatively, this Court may consider Plaintiffs' motion as an emergency motion for contempt in light of the likelihood of harm to class members. *See Petties v. D.C.*, 897 F. Supp. 626, 629-630 (D.D.C. 1995) (holding an emergency hearing to show cause as to why a public

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school district should not be held in contempt for failing to comply with orders requiring payments to private entities providing services to disabled school children).

1. Defendants Should be Temporarily Enjoined From Transferring Class Members to YCRC Given the Risk of Irreparable Harm

A TRO is both appropriate and necessary. By their nature, TROs are designed to provide temporary emergency relief to parties at risk of irreparable harm. Here, Plaintiffs seek only a temporary halt to the imminent transfer of class members to YCRC until a full evidentiary, preliminary injunction hearing may be held. A TRO would preserve the status quo in the meantime by ensuring class members receive restoration services only in the state psychiatric hospitals—where they have received such services for decades and where any safety concerns with the physical plan and staff are subject to rigorous oversight and enforcement by both CMS and the Joint Commission. *See* Dkt. 180 at 37. Plaintiffs meet the standard of showing both likelihood of success on the merits and likelihood of irreparable harm.

First, Plaintiffs will likely succeed on the merits given the plain language of this Court's April 2, 2016 Order, which states on its face that Defendants must provide restoration services "without sacrificing the therapeutic environment of a psychiatric hospital." Dkt. 131 at 22. As recently as January 25, 2016, the Defendants testified to this Court regarding their efforts to ensure that alternative locations like YCRC will comply with this part of the Court's order. *See* Cooper Decl. Ex. B at 58:10-13. Defendants have also long been on notice regarding Plaintiffs, the Court Monitor, and her expert concerns with DSHS's use of alternative facilities such as YCRC. DSHS Assistant Secretary Reyes conceded that DSHS has been on notice since at least July 2015. Cooper Decl. Ex. B at 58:10-13.[2] And Defendants themselves also concede the need

[2] Referencing Dkt. 194 at D and E.

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to address the known safety risks at YCRC: "We're putting barriers in those, like, staircases so patients can't jump off of them, or potentially use them as a ligature hanging point. So we're putting in barriers into those points so that patients can't have access to those fixtures." Cooper Decl. Ex. B at 124:4-8; *see also* Dkt. 201 at 4.

Nonetheless, the Court's YCRC tour conducted on March 2, 2016, revealed that these known safety risks have yet to be addressed, posing a risk of irreparable harm to class members. As detailed by the Consultant Report dated March 2016, Cooper Decl. Ex. A, Defendants have failed to sufficiently alter the facility; develop its policies, procedures, and programming; and train its staff to administer competency restoration services to make YCRC safe for class members:

- **Ligature Risks:** "The industrial metal stairway between the floors [of YCRC] has a hand railing and a partial Plexiglas shield. As discussed in prior visits, the opening in the railing and the handrail are safety risks as is the stairway." *Id.* at 3. "Stairwell and banisters continue to present jump, fall, and hanging risks." *Id.* at 9. "Bathrooms continue to have ligature risks on shower doors; Vents not reviewed/approved to ensure minimized ligature risk." *Id.* at 10. These same risks extend to the seclusion and restraint room. *Id.* at 6; *see also* Dkt. 205 at 8.

- **Seclusion and Restraint:** "It is well established that restraint and seclusion, although a last resort intervention needed in extreme cases, is also fraught with complications and potential for risks, including injury to staff and patient as well as the risk of abuse of power and control. Thus these policies reflect a critical piece of information as to how a program might handle extreme circumstances and would reflect a view toward the philosophy of a program…The written [YCRC] policy itself, however, contained several references and provisions that Comprehensive staff said they were unaware or needed to be amended." *Id.* at 6.

- **Staffing:** "With the exception of the psychologist, the staff lacked experience working in a correctional setting or a psychiatric inpatient facility. None of the staff had competency restoration experience. In a forensic inpatient setting, inexperienced staff is mentored by knowledgeable staff. Some clinical staff with restoration experience would be helpful. It is not ideal to launch an acute treatment program with virtually all the staff learning on the job. In addition, clinical leadership from Comprehensive, although experienced in mental health services, has no experience with restoration services, other than observing a few groups at WSH." *Id.* at 5. Further, "There was limited information about the staff schedules available to us, but given the matrix it appears unlikely that the program will

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have sufficient staff on duty during evening, nights, and weekends to effectuate ongoing treatment and manage behavioral health emergencies directly while attending to 23 other residents." *Id.* at 6-7; *see also* Cooper Decl. Ex. C.

- **Forced Medication:** "There are no clear plans for where to administer injectable medications or where to have private conversations regarding medications or health issues." *Id.* at 4. "When asked about *Sell* proceedings, none [of the staff] had heard of this or were aware of how medication over a patient's objection was handled in at least inpatient restoration contexts as opposed to civil treatment contexts. It remains to be seen how the Court might interpret *Sell* orders (for maintenance of medications or for initiation of medications) for persons admitted to a residential program." *Id.* at 5.

It is clear that this litany of deficiencies poses an unacceptable risk to class members. And that class members should not be referred to this facility until and unless these deficiencies have been addressed is underscored by the experts' report, which observes that "[w]hether these refinements could be safely made while residents are already arriving raises concern." *Id.* at 8. Defendants characterize their disregard for these outstanding risks as an exercise of professional judgment wholly insulated from judicial review. Dkt. 201 at 15-18. This position ignores this Court's authority both to determine the limits of professional deference and to enforce its own orders. *See* Dkt. 186 at 9-10.

Second, Plaintiffs have also demonstrated sufficient likelihood of irreparable harm to class members if the requested TRO is not granted. Defendants seem to argue that Plaintiffs must present evidence of a particular class member who will be harmed if assigned to YCRC. Dkt. 201 at 19. This proposition both misunderstands applicable law and shows a callous indifference to class members. YCRC poses a significant and real risk to class members because it is simply not designed to house people with significant mental illness—and has not been renovated to do so. Its very structure creates "jump, fall, and hanging risks." Cooper Decl. Ex. A at 9. The threat of potential injury or death is not speculative: class members have committed suicide or died while housed in similar facilities. *See* Dkt. 46 at 2.

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In fact, misuse of the YCRC facility as it currently stands is precisely what this Court has sought to prevent in recognition of the fact that "jails are inherently punitive and not therapeutic institutions." Dkt. 104 at 8. This Court has already determined that the failure to timely provide needed services in a therapeutic, non-punitive environment "violates the Due Process Clause of the Fourteenth Amendment." *Id.* at 9. Irreparable harm to the mental health or physical safety of class members is inevitable if DSHS does not make the needed changes to the YCRC facility. *See supra* at 5-6; *see also* Kupers V.2 110:13-114:21. This Court should decline Defendants' invitation to wait until a class member actually dies or is severely injured to act.

2. The Relief Plaintiffs Seek Is Necessary to Ensure Compliance with this Court's Orders.

The federal court's inherent authority to enforce its own orders is well established. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). And this authority extends to all stages of litigation to ensure the court's ability to manage its proceedings, vindicate its authority, and effectuate its orders. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 34 (1991) (power to compel payment of opposing party's attorney's fees as sanction for misconduct); *United States v. Hudson*, 11 U.S. 32, 34 (1812) (contempt power to maintain order during proceedings).

Here, like the Plaintiffs in *Petties*, Plaintiffs seek an emergency action to ensure compliance with this Court's Order. 897 F. Supp. at 631. Plaintiffs respectfully request a halt on transfers to YCRC to prevent irreparable harm associated with unaddressed safety risks at YCRC until a hearing can be scheduled and all witnesses can be called to testify. *See supra at* 5-6.

Defendants misconstrue both the relief Plaintiffs seek and the basis upon which such relief is sought, claiming the requested TRO is about "the adequacy of the settings in which the Department provides restoration treatment." Dkt. 201 at 10. This is incorrect. Plaintiffs do not seek to litigate the constitutionality of all hypothetical future corrections-based restoration

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programming. Plaintiffs seek only to enjoin the use of *this* corrections-based restoration program *as it exists today* because the program violates this Court's order and creates an improper risk of irreparable harm to class members.

Defendants claim that because all facilities have some ligature risks and faulty design aspects, they should not be enjoined from assigning class members to a facility that our mutually agreed upon experts have indicated has architectural design flaws that create the risk of falling, jumping, and hanging. Dkt. 201 at 19. Under Defendants' logic, no injunction should ever issue regardless of the likelihood of injury to class members because there will always be some unresolved risk, regardless of whether ways to minimize that risk have been identified. This position is absurd—and troubling coming from the state agency charged with protecting and serving some of the most vulnerable in our community. Here, the risks to class members have been identified with great clarity and can and should be addressed before the facility is put into active use. And this Court has the full authority to effectuate its order by requiring Defendants to do so.

B. This Court Has Authority to Determine Whether YCRC Is In Compliance With This Court's Orders.

Defendants claim that *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982), is the standard by which this Court should determine whether Plaintiffs have met their burden of proof to show that Defendants should be held in contempt for assigning class members to YCRC. Defendants argue that the applicable standard is not contempt, but rather whether YCRC meets the constitutional standard that protects class members' rights. Dkt. 201 at 15-17. This argument misconstrues Plaintiffs' request. Plaintiffs' motion for a TRO seeks a judicial determination of whether Defendants' failure to comply with this Courts' orders creates a risk of serious injury to class members. It does not seek a determination of whether YCRC's services are constitutional. And

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even assuming that Defendants are correct that *Youngberg* applies in this context, a TRO should still be issued based on Ninth Circuit jurisprudence.

Defendants ignore longstanding Ninth Circuit precedent applying *Youngberg* and holding that a people who are civilly committed "must be provided with mental health treatment that gives them 'a realistic opportunity to be cured or improve the mental condition for which they are confined.'" *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003) (quoting *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir.1980)). *See also Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000). Under this standard, courts within the Ninth Circuit have maintained their authority to determine whether the applicable treatment provided by the defendant meets the constitutional threshold. *Sharp*, 233 F.3d at 1171.

The Ninth Circuit has explained that although *Youngberg* governs a defendant's obligation to provide care consistent with clinical judgment, it does not provide an escape hatch by which defendants can avoid judicial scrutiny simply because their providers have determined that their offerings meet the constitutional standard. *Id.* Such an outcome would be absurd. State agencies are not the arbiter of constitutional standards, courts are: "accepting such an argument would transfer the safeguarding of constitutional rights from courts to mental health professionals." *Id.* Although Defendants may prefer to place constitutional review of required mental health treatment "above judicial scrutiny," doing so would make constitutional standards dependent "on who happened to be in charge of a particular program." *Id; see also Thomas S. by Brooks v. Flaherty*, 902 F.2d 250, 252 (4th Cir. 1990) (holding that under *Youngberg*, clinical decisions are presumptively valid but not conclusive, because the court has the authority to determine if there has been a substantial deviation from accepted standards).

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It is also clear that deference is not required where a "neutral special master" (appointed by the court for the specific purpose of ensuring the program was consistent with professional standards) is reviewing the adequacy of proffered mental health programming and the implementation of policies and practices that are not clinical. *Sharp*, 233 F.3d at 1172. For example, the district court in *Sharp* rejected the defendants' mental health providers' claims of compliance and, instead, found that defendants "had made decisions about the program that fell well below professional standards for treatment…or that certain decisions were not entitled to deference because they were not made [using] professional judgment." *Id.*

The Ninth Circuit affirmed, holding that "[b]ased on the numerous inadequacies noted by the district court, we find no error in the court's conclusion that, taken as a whole, [the facility] still does not provide the type of treatment program that is constitutionally—one that gives residents a realistic opportunity to be cured or improve the mental condition for which they were confined." *Id. See Ohlinger*, 652 F.2d at 779; *see also U.S. ex rel. Stachulak v. Coughlin*, 520 F.2d 931, 936 (7th Cir.1975) (recognizing that "[a]ll too often the 'promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits") (quoting *Cross v. Harris*, 418 F.2d 1095, 1107 (1969)).

Here, the facts are similar to *Sharp*. DSHS stipulated to the use of Dr. Mauch as this Court's neutral monitor, both she and other neutral consulting experts have raised concerns, and Defendants' own administrators have admitted that there are serious shortcomings with the facility. Dkt. 141; *see also* Cooper Decl. Ex. A at 3, 6, 9, and 10; Cooper Decl. Ex. B at 124:4-8 ("We're putting barriers in those, like, staircases so patients can't jump off of them, or potentially use them as a ligature hanging point. So we're putting in barriers into those points so that patients can't have access to those fixtures."). Further, Defendants have conceded that admissions

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criteria for YCRC, the process this motion seeks to temporarily halt, is not a clinical decision but instead an administrative one. Dkt. 203, Ex. K ("DSHS Competency Restoration Admissions Coordinator, along with the forensic admission coordinators from each WSH and ESH" will do the screening.). *See also* Dkt. 194 Ex. J ("There would also be a new full time staff person allocated at the Central Office level, who would be the Admissions Coordinator. This person would not be a nurse but would be able to do a 'daily huddle' to go over each referral.").

Even if this Court finds that the *Youngberg* standard should apply, this Court owes little deference to Defendants. Despite Defendants self-serving assertions that their program comports with professional and constitutional standards, it is this Court, and not the state's providers, that has the authority to determine whether admission and treatment at YCRC complies with its order and the Constitution. In making that determination, this Court should rely on the parties' mutually agreed upon experts and the Court Monitor. For six months, they have provided detailed concerns regarding the physical environment, staffing, admissions criteria, and programming at YCRC. *See e.g.* Dkt. 170; Dkt. 181; Cooper Decl. Ex. A. These reports make clear that there are serious concerns about whether YCRC comports with standard professional practice, that clinical decisions are being offloaded to administrators with no medical background, and that the facility poses a great risk to class members. The Court does not need to wait for the other shoe to drop to issue a TRO.

C. A Bond is Inappropriate When the Motion Seeks to Protect Vulnerable Class Members From Irreparable Harm

Citing solely to *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir 1999), Defendants ask this Court to impose upon Plaintiffs "a security in the amount of at least $84,615.38 to temporarily halt admissions to YCRC." Dkt. 201 at 22. This would be an extraordinary measure and effectively penalize Plaintiffs for requesting this Court enforce its Order and to protect them

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from imminent harm. Defendants claim that they will sustain economic injury if enjoined from placing class members in a facility where experts have documented serious concern. However, the human cost that this motion seeks to limit must be of primary concern.

"The district court has discretion to dispense with the security require, or to request mere nominal security, where requiring security would effectively deny access to judicial review." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2004). Imposing Defendants' requested bond on class members who are in a most precarious situation would deny them access to review and protection form this Court. In such cases bond should be denied. *Id. See, e.g., Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975). Further, Plaintiffs should not have to pay to be protected from Defendants' decision to ignore concerns raised by experts regarding safety and adequacy of YCRC and their ill-conceived attempt to create a therapeutic environment in a "windowless warehouse." Cooper Decl. Ex. B at Y. Plaintiffs respectfully request that bond be denied.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs request that the Court issue their proposed Temporary Restraining Order and Preliminary Injunction, preventing Defendants from transferring class members to the unsafe, non-therapeutic environment at YCRC until a full evidentiary hearing may be held.

DATED this 24th day of March, 2016.

/s/Anita Khandelwal

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- Nicholas A Williamson (NicholasW1@atg.wa.gov)
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