

The Honorable Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.B., by and through her next friend Cassie Cordell Trueblood, <i>et al.</i>	No. 14-cv-01178-MJP
Plaintiffs,	PLAINTIFFS' MOTION FOR CIVIL CONTEMPT
v.	NOTE ON MOTION CALENDAR: May 27, 2016
Washington State Department of Social and Health Services, <i>et al.</i> ,	Oral Argument Requested
Defendants.	

I. INTRODUCTION

Plaintiffs respectfully move this Court to find Defendants in contempt of this Court's injunction requiring Defendants to provide class members timely competency restoration services.¹ *See* Dkt. 131; 186. After failing to meet the initial deadline for compliance on January 2, 2016, and the modified, interim deadlines for reducing wait times for competency restoration services, Defendants are not on track to meet this Court's amended compliance deadline of May 27, 2016. If Defendants fail to show cause why they have violated these Orders, Plaintiffs

¹ On May 7, 2016, the Ninth Circuit vacated the portion of this Court's Order requiring Defendants to provide competency evaluations within seven days of receiving a court order. *Trueblood (A.B.) v. Dep't of Social and Health Servs.*, No. 15-35462 (9th Cir. May 6, 2016) While the scope of the injunction regarding the timely provision of competency evaluations is on remand, Plaintiffs seek to enforce only of the portions of this Court's injunction requiring Defendants' to provide timely competency restoration services. Dkt. 131 at 22.

request that this Court to find Defendants in contempt and order Defendants to implement five recommendations from the Court Monitor, Dr. Danna Mauch, which are designed to ensure the timely provision of restoration services consistent with this Court's Orders: (1) establish aggressive benchmarks suggested by the Court Monitor to open the existing hospital beds at Western State Hospital ("WSH") on a timeline suggested by the Court Monitor; (2) diversify the clinician pool to staff competency restoration units; (3) engage in labor negotiations at the state hospitals to ensure sufficient staffing to open additional beds; (4) implement statewide diversion programming; and (5) implement a robust triage protocol.²

II. BACKGROUND

For years, even though courts, class members, and state policy makers have expressed dire concern, Defendants have failed to provide timely competency services to class members, willfully ignored state court orders, and generally refused to take necessary and appropriate action to stop subjecting class members to prolonged incarceration in city and county jails. Now, after a full trial, and more than a year to comply with this Court's directive to stop violating class members' constitutional rights, Defendants effectively refuse to comply with this Court's orders. Instead, Defendants have repeatedly failed to meet compliance deadlines; disregarded the Court Monitor's recommendations, which were provided to assist Defendants in meeting their compliance obligations; and chosen to adhere to internal policies that have already proven ineffectual. Dkt. 131 at 21-22; Dkt. 186 at 8. This pattern of dysfunction is what brought Defendants before the Court in the first place.

As previously recognized, and affirmed by the Ninth Circuit, Defendants' persistent delays in providing competency restoration services to class members violates their constitutional rights. *See* Dkt. 104; *Trueblood v. Dep't of Social and Health Servs.*, No. 15-35462 (9th Cir. May 6, 2016). In its April 2, 2015 Order, this Court unambiguously ordered

² Should the Court, at its discretion, consider monetary sanctions to be appropriate, Plaintiffs urge that such sanctions be directed towards the exploration and development of meaningful state-wide diversion programming.

1 Defendants to cease violating Plaintiffs' constitutional rights by reducing wait times as soon as
 2 practicable, but no later than January 2, 2016. Dkt. 131 at 22. However, Defendants have
 3 consistently failed to do so.

4 Despite months of evidence indicating that Defendants were unlikely to meet the Court's
 5 initial compliance deadline of January 2, 2016, Defendants waited until December 30, 2015 to
 6 request an extension. Dkt. 174. Following their eleventh-hour request to modify the Court's
 7 injunction, Defendants, as ordered by the Court, conferred with Plaintiffs and were willing to
 8 stipulate to what they identified as an achievable set of interim deadlines designed to lay the path
 9 toward their full compliance including: 1) reducing wait times for admission for competency
 10 restoration to within twenty-six (26) days by April 1, 2016; and 2) reducing wait times for
 11 admission for competency restoration services to within thirteen (13) days by May 1, 2016. Dkt.
 12 185-1 at 5. This Court subsequently ordered Defendants to meet these benchmarks (Dkt. 186 at
 13 18); and to ensure that Defendants made reasonable progress towards compliance with the
 14 extended May 27, 2016 deadline, the Court ordered Defendants to implement a triage system to
 15 sort class members waiting for restoration services by acuity of their mental illnesses. Dkt. 186
 16 at 12-13.³ Defendants' own reports demonstrate that they have consistently failed to meet the
 17 interim deadlines and have demonstrated that they are unlikely to be in full compliance by May
 18 27, 2016. *See* Dkt. 236-2 at 1-3. Indeed, Carla Reyes, the Assistant Secretary for the Behavioral
 19 Health Administration of the Department of Social and Health Services ("DSHS"), submitted a
 20 declaration on May 9, 2016, indicating that as of May 1, 2016, Defendants have not met their
 21 interim deadlines and the May 27th deadline. *See* Dkt. 236 (hereinafter "Reyes Declaration").
 22 Defendants provide data regarding competency restorations that were completed in April 2016

23 ³ The Court set the following interim deadlines regarding the triage system: (1) March 1, 2016 to produce a triage
 plan for review and comment; (2) March 15, 2016 to implement the triage plan; and (3) April 15, 2016 to begin
 monthly reporting regarding the efficacy of the triage plan. Dkt. 186 at 12-13.

and court-ordered competency restorations that Defendants have not yet initiated. In each of these categories Defendants are far from meeting the interim deadlines set by this Court.

Days Class Members Waited	Completed Restoration Admissions in April ⁴	Incomplete Restoration Admissions in April ⁵
60 or more days	5.3%	1.3%
50 to 59 days	21.1%	0%
40 to 49 days	23.7%	10.1%
30 to 39 days	13.2%	21.5%
27-29 days	0.9%	25.3%
Total greater than 26 days:	64%	35.4%

Dkt. 236-2 at 61-82.⁶

III. ARGUMENT

A. This Court Has the Authority to Hold Defendants in Contempt and to Order Defendants to Take Remedial Steps to Comply with This Court's Orders

It is well-established that a district court has the inherent power to hold a party in civil contempt in order to enforce compliance with an order of the court or to compensate for losses or damages. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). *See also United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947). Civil contempt is defined as “a party’s

⁴ Using the data contained in pages 61 through 82 of Reyes Declaration Ex. A-2 (Dkt. No. 236-2), Plaintiffs count 114 class members with completed competency restoration admissions in April. This figure differs slightly from the total in the Reyes Declaration (Dkt. No. 236), which counts 111 class members with completed competency restoration admissions in April. The figures and percentages in this Motion are based on Plaintiffs’ count of 114 class members.

⁵ Using the data contained in pages 61 through 82 of Reyes Declaration Ex. A-2 (Dkt. No. 236-2), Plaintiffs count 79 class members with incomplete competency restoration admissions in April. This figure differs slightly from the total in the Reyes Declaration (Dkt. No. 236), which counts 77 class members with completed competency restoration admissions in April. The figures and percentages in this Motion are based on Plaintiffs’ count of 79 class members.

disobedience to a specific and definite court order by failure to take all reasonable steps within the party's power to comply." *Inst. of Cetacean Research v. Sea Shepherd Conservation Society*, 774 F.3d 935, 945 (9th Cir. 2014) (citing *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993)). Courts may impose civil contempt sanctions for the purpose of coercing a defendant to comply with its order. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994) ("[C]ivil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard.").

This Court has "wide latitude" in determining whether a party is in contempt of its orders. *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984). As such, it is up to the court to determine whether an entity is in contempt, and that decision is subject to abuse of discretion review. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). A history of noncompliance and "the failure to comply despite the pendency of [a] contempt motion" are factors a court may consider when determining whether a defendant failed to take all reasonable steps. *Stone v. City and County of San Francisco*, 968 F.2d 850, 857 (9th Cir. 1992).

Here, the Court has issued two orders requiring Defendants to reduce the wait times for competency services. *See* Dkt.131 at 22; Dkt. 186 at 18. Defendants' repeated failure to comply with this Court's unambiguous Orders—despite receiving an extension of nearly six months and increased guidance as to how to meet the compliance deadline—gives this Court broad remedial authority to determine the equitable method to enforce its orders.

B. Defendants Are in Contempt for Failing to Provide Timely Competency Services

The moving party has the burden of proving contempt by clear and convincing evidence. *In re Dual-Deck*, 10 F.3d at 695. Once this burden is met, it "then shifts to the contemnors to demonstrate why they were unable to comply." *FTC*, 179 F.3d at 1239. Here, a review of Defendants' own data over the past year reveals they are not on a trajectory to meet the May 27th

compliance deadline. Dkt. 236-2; Cooper Decl. Ex. A. The table below is extrapolated from data provided by Defendants and reveals there is no hope of achieving compliance by May 27, 2016.

Percent of Restoration Admissions Completed Within 7 Days:

Date	% Complete Within 7 Days of Order	Date	% Complete Within 7 Days of Order
April 2015	26%	Oct. 2015	20%
May 2015	24%	Nov. 2015	21%
June 2015	20%	Dec. 2015	15%
July 2015	26%	Jan. 2016	23%
Aug. 2015	25%	Feb. 2016	12%
Sept. 2015	29%	March 2016	24%
		April 2016	10%

Dkt. 236-2 at 3.

Defendants failed to meet the Court's April 1, 2016 benchmark to reduce wait times for hospital admission for competency restoration to less than twenty-six (26) days. *See* Dkt. 186 at 18. Further, Defendants concede that of class members admitted for restoration in March, 56.1% waited longer than 26 days for admission; and of class members still waiting for restoration services on April 1, 2016, 41.7% had already waited longer than 26 days. Dkt. 236-1 at 86-115.

Defendants also failed to meet the Court's May 1, 2016 benchmark to reduce wait times for admission for restoration services to less than thirteen (13) days for both hospitals. This is evidenced by the declaration submitted by Ms. Reyes on May 9, 2016 which indicates that as of May 1, 2016 sixty-five percent (65%) of class members who received restoration services in April had waited longer than 26 days. And as of May 1, 2016 class members currently waiting for restoration services thirty-six percent (36%) of them have already waited longer than twenty-six (26) days and are likely to wait much longer. Dkt. 236 at 5.⁷ Further, notably, ESH does not

⁷ Despite being ordered to provide clear data, *see* Dkt. 211, Defendants' submissions regarding compliance make it incredibly difficult to determine the precise impact of their remedial actions. For example, the above numbers are for incomplete court orders for restoration services and class members' actual wait times may be much longer than what these numbers indicate.

1 admit any class member into its facility within seven days for restoration services. Dkt. 236-2 at
 2 2. And although WSH does admit some class members for restoration services within seven
 3 days, it has not made significant progress towards admitting all class members for restoration
 4 services within seven days. *Id.* at 1.⁸

5 Thus, it is clear that Defendants have failed to comply with this Court's interim
 6 benchmarks and have failed to produce any data suggesting they will be able to substantially
 7 comply with this Court's order directing them to provide competency restoration services to
 8 class members court ordered to receive those services within seven (7) days, or transport them to
 a state hospital.

9 **C. Contempt Is Appropriate Due to Defendants' Failure to Take Reasonable Steps to**
 10 **Achieve Compliance**

11 Not only is it clear that Defendants will not be able to meet the Court's May 27, 2016
 12 deadline, but the persistent and lengthy wait times currently experienced by class members could
 13 have been remedied months ago had Defendants taken reasonable actions as recommended by
 14 the Court Monitor. Because Defendants have not followed the Court Monitor's recommendations
 15 which were intended to assist Defendants comply with this Court's order, contempt sanctions are
 ripe and appropriate.

16 **1. Establish benchmarks to open beds at the state hospitals.**

17 Defendants have not taken all reasonable steps to open beds at the state hospital to
 18 achieve compliance. Defendants admit that "additional inpatient forensic hospital bed capacity
 19 must be developed or made available" to ensure the timely receipt of competency restoration
 20 treatment. Cooper Decl. Ex. A at 13. Defendants made this case with the legislature and obtained
 21 \$26.86 million dollars to open those additional beds. *Id.* at 14. Defendants further acknowledge

22 ⁸ At trial, WSH provided restoration services to class members within seven days of issuance of a court order to
 23 twenty-four percent of class members ordered to receive these services. Dkt. 236-2 at 1. As of April, 2016, WSH
 only provides restoration services within seven days to thirteen percent of class members ordered to receive these
 services. *Id.*

1 their original plan to “add 90 beds and expand State Hospital bed capacity to meet Court ordered
2 compliance date[s].” *Id.* at 37.

3 The Court Monitor’s August 2015 and January 2016 reports echoed Defendants’ own
4 analysis and recommended that Defendants secure an adequate number of inpatient treatment
5 beds and noted that the failure to implement steps to yield additional beds “requires additional
6 emergency executive and regulatory action.” Dkt. 171 at 6; Dkt. 180 at 6. The Monitor went on
7 to state that “declining performance in time to admission for inpatient competency services at
8 ESH is tied to lack of bed availability.” Dkt. 180 at 214. She recommended Defendants focus on
“getting back on track with commitments at ESH and WSH.” *Id.* at 30.

9 Defendants identified the “major hurdle” of “[d]ifficulties in bringing on sufficient
10 staffing” and “recent CMS survey results” as the reasons why WSH bed expansion was
11 postponed. *Id.* This Court acknowledged the issue with CMS compliance and modified its Order,
12 directing Defendants to “[p]lan for recruiting and staffing 30 beds at WSH after compliance with
13 CMS’s terms of participation is achieved in March.” Dkt. 186 at 13. The Court Monitor found
14 “no apparent reason” to halt bed expansion at WSH until July 2017 and instead recommended
15 Defendants include in their Long Term Plan “an aggressive schedule for staff recruitment and
16 opening of the WSH thirty bed Unit.” Cooper Decl. Ex. B at 5, 7. DSHS rejected the Court
17 Monitor’s recommendation and instead declared that, because of CMS compliance issues and a
18 previous decision by former DSHS Secretary Kevin Quigley, “bed expansion will not be
19 implemented at Western State Hospital.” *Id.* at 5.⁹ Defendants’ refusal even to plan to open these
20 beds reflects its failure to consider all reasonable steps to come into compliance. Consistent with
21 this Court’s Order and the Court Monitor’s recommendations, Plaintiffs urge this Court to order
Defendants to meet aggressive benchmarks to open the existing hospital beds that must be

22 ⁹ The Court Monitor also recommended Defendants create “a more detailed plan for the opening of other beds at
23 WSH and ESH to limit the amount of time Class Members will be confined to non-hospital alternatives.” Cooper
Decl. Ex. B at 5-6. Defendants’ response to this recommendation appears only to refute the characterization of the
alternative facilities as “a correctional center.” *Id.* at 6.

1 implemented immediately upon CMS compliance.

2 **2. Diversify the pool of clinicians providing competency services.**

3 The Court Monitor recommended that Defendants diversify and broaden the pool of
4 clinicians who are able to staff restoration units at the state hospitals to address Defendants'
5 asserted difficulties recruiting sufficient staff to reduce wait times for competency restoration
6 services. On August 18, 2015, the Court Monitor noted Defendants' failure to secure sufficient
7 staffing and recommended both contracting with qualified providers and diversifying the pool of
8 clinicians who can provide competency services, including incorporating doctors of medicine,
9 doctors of osteopathic medicine, advanced registered nurse practitioners, and licensed social
10 workers. Dkt. 171 at 32-33. Defendants have rejected this recommendation and refused to
11 diversify the pool of clinicians they rely upon to provide competency services. This refusal
12 results in understaffing and applicant pools that are too small to appropriately staff the state
13 hospitals in a manner that would allow them to provide timely competency services. As this
14 Court found, Defendants "failed to hire and retain sufficient staff." Dkt. 186 at 5. Consistent with
15 this Court's Order and the Monitor's recommendations, this Court should require Defendants to
16 diversify the pool of clinicians available to provide competency restoration services.

17 **3. Initiate meaningful labor negotiations.**

18 Defendants have repeatedly cited the hospital labor unions as a barrier to securing
19 sufficient staff to provide timely competency services. The Court Monitor recommended
20 continuing to work with labor organizations on job requirements, establishing new positions,
21 expanding the pool of clinicians providing competency services, and collaborating with counties
22 to increase county participation in competency evaluations. Dkt. 180 at 8-10. As discussed
23 above, Defendants also failed to complete the labor discussions necessary to open additional
beds at WSH. Cooper Decl. Ex. A at 37. This refusal has undermined their ability to comply with
this Court's Order to both provide timely evaluations and have sufficient bed capacity to provide

1 timely admission for restoration services. Defendants should be ordered to initiate and complete
2 the labor negotiations necessary to open beds.

3 **4. Implement diversion programming.**

4 In January 2016, both the Court and the Court Monitor recommended that Defendants
5 implement a broad-based statewide diversion program to reduce the number of class members
6 waiting in jail for competency services. Dkt. 180 at 41. A robust diversion program would
7 positively impact class members awaiting competency restoration services who are identified as
8 likely to be incompetent and unrestorable. On February 8, 2016, the Court found that Defendants
9 “failed to take any meaningful steps towards establishing diversion systems with other
10 stakeholders,” and ordered Defendants to remove “barriers to the expenditure of the \$4.8 million
11 in currently allocated diversion funds.” Dkt. 186 at 5, 14. Although Defendants have chosen a
12 handful of pilot programs, Defendants are currently only implementing very limited (and only
13 partially funded) diversion programs that provide no relief or diversion services in most counties
14 in the State. Further, Defendants concede that they lost some of the state funded dollars for
15 diversion due to underspending. Dkt. 234 at 6 n.1. Defendants should be required to engage with
16 federal officials and consider demonstration projects to use the full amount of money
17 appropriated for diversion services.

18 **5. Implement a robust triage protocol.**

19 The Court and the Court Monitor recommended that Defendants implement a robust
20 triage protocol. *See* Dkt. 180 at 33; Dkt. 186 at 5. Despite having months to comply, Defendants
21 have again refused to do so. Although ordered to present the Court with a triage protocol
22 intended to enable Defendants to identify and immediately provide services to class members
23 most in need of them, Dkt. 186 at 11, Defendants instead presented the Court with a plan that
functions just as its current program does: a first-come-first-serve model except where, *via* an ad-
hoc program, an advocate manages to catch the attention of a DSHS employee and convince that
employee that their client needs immediate services. Cooper Decl. Ex. C at 2-6; Cooper Decl.

Ex. D. Defendants’ asserted “triage system” does not require DSHS to do anything more than it already does, which has proven to be harmful to class members’ rights and the most vulnerable members of the class with severe mental illness in particular. Instead, Defendants’ asserted “triage system” places the burden of identifying class members in urgent need of immediate services on criminal defense attorneys and jail administrators—none of whom are medical providers. *Id.* Further, while Defendants have indicated that they intend to hire personnel to implement the triage system, they have not indicated whether the triage protocol implemented by the new employees will be an improvement from the current protocol.

In order to ensure that class members timely receive the competency restoration services they need, this Court should order Defendants to implement a robust triage protocol. Plaintiffs ask that the Court Monitor review Defendants’ current forensic mental health system, review existing triage protocols in other states, and recommend three (3) triage protocols for Defendants to choose from; and this Court should then order Defendants to choose one of the three triage protocols and implement the chosen protocol universally across the state by a date certain.

E. The Court Has Broad Authority to Fashion a Remedy for Defendants’ Contempt

Federal courts have broad remedial powers to address noncompliance. *Stone*, 968 F.2d at 861-62 (affirming court’s power to authorize sheriff to override state law). *See also, e.g., Brown v. Plata*, 563 U.S. 493 (2011) (imposing prison population limit); *Nat’l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536 (9th Cir. 1987) (affirming appointment of a Special Master). When the least intrusive measures fail to rectify the problems, more intrusive measures are justifiable. *Stone*, 968 F.2d at 861 (citing *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978)).

Here, the Court found that “for years, Defendants have failed to timely provide competency services pursuant to state law and have almost never provided court-ordered competency services within seven days.” Dkt. 131 at 8. In addition, Defendants have now failed for more than a year to even come close to complying with this Court’s Orders. The Court is justified in its use of its broad powers to compel Defendants to comply with the Court’s orders.

As such, Plaintiffs respectfully move this Court to order Defendants show cause why they should not be held in contempt of court. If they fail to do so, Plaintiffs request this Court to order Defendants to implement recommendations that both the Court Monitor and the Court itself have repeatedly made to Defendants—recommendations designed to help Defendants break a cycle of dysfunction that violated class members’ constitutional rights for too long. Each of these recommendations is well-grounded in the expertise of the Court Monitor, Dr. Danna Mauch, who is incredibly experienced in the operation of state mental health systems. Over the past year, Defendants have demonstrated that they are unable to cease the constitutional violations on their own. Contempt sanctions are necessary to compel Defendants to cease violating the constitutional rights of class members. Finally, should the Court find it appropriate, it may also enforce its order by imposing monetary sanctions and establishing a fund whose monies would be used to fund supplemental diversion programming.

IV. CONCLUSION

For the reasons set forth above Plaintiffs move this Court to find that Defendants have failed to substantially comply with this Court’s order to provide class members competency restoration services within seven (7) days of a court order, or transport class members to a state psychiatric hospital while they wait for such services, and, as such, Defendants are in contempt of this Court’s injunction.

Dated this 10th day of May, 2016.

Respectfully submitted,

/s/ La Rond Baker

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 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)
- Sarah Jane Coats (sarahc@atg.wa.gov)
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DATED: May 10, 2016, at Seattle, Washington

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