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

Plaintiffs' motion for temporary restraining order seeks to protect class members from irreparable harm due to Defendants failure to ensure all four of Maple Lane's stairways are safe for class members' use. While Defendants have mitigated many of the risks to one stairway, they have failed to remediate all outstanding risks. Cooper Decl. Ex. A at 1 ("The risk remains that a patient could be pushed or jump down the concrete stairwell."). Despite failing to mitigate the jumping, falling, and hanging risks to the other three stairways, Defendants have placed class members on the second tier associated with those stairways. *Id.* at 7 ("Two patients are residing on an upper tier, Wing D, without the necessary safety improvements seen in Wing A.").

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315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

II. BACKGROUND

On May 27, 2016, the Court directed Plaintiffs submit a reply in support of their motion for a temporary restraining order. Dkt. 255. The Court also requested Plaintiffs provide "information regarding the current state of the construction of barriers around the staircases at Maple Lane." *Id.* As directed, Plaintiffs solicited input from the Court Monitor and her experts, Drs. Debra Pinals and Andrew Phillips, "regarding the sufficiency of the construction efforts" to protect class members from the falling, jumping, and hanging risks created by the stairwells. *Id.* On June 1, 2016, the Court Monitor's expert, Dr. Andrew Phillips, reviewed the construction efforts on all four stairways, consulted with the Court Monitor and Dr. Pinals, and issued a brief report. Cooper Decl. Ex. A. Below are photographs of Stairway A and Stairway D, respectively.

Id. at 5, 7. Defendants have mitigated many but not all of the risks presented by Stairway A. *Id.* at 2. The report notes the concrete stairwell "could lead to a more serious injury than would occur with carpeting" and recommends Defendants "eliminate an unnecessary risk" by carpeting the stairs. *Id.* None of the hanging risks have been mitigated on Stairway B, C, or D though class members have been placed on Tier D. *Id.* Defendants reported they planned to renovate all stairways by June 10th though it is unclear if carpeting will be included in the renovations. *Id.*

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Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

III. ARGUMENT

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

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 . . .").

1. Defendants' Failure to Address Outstanding Risks Violate This Court's Orders.

Plaintiffs seek enforcement of this Court's orders increasing the Court Monitor's supervision and authority to ensure restoration services be provided "without sacrificing the therapeutic environment of the state hospitals." Dkt. 186 at 9; Dkt. 131 at 22. Consistent with this Court's orders, the Court Monitor and her experts have reviewed Maple Lane and, as early as October 2015, issued recommendations to assist Defendants in developing Maple Lane in a manner that does not sacrifice the therapeutic environment. *See* Dkt. 145-3. Defendants, however, have consistently ignored concerns that were raised. *See* Dkt. 254 at 7-11.

Admittedly Defendants did cease some of the more egregious practices that drew concern from the Court Monitor, Plaintiffs, and the Court including: (1) strip searching class members when they arrived at Maple Lane even though that is not the practice at the state hospitals or the Yakima Competency Restoration Center; (2) video recording class members changing into

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Seattle, Washington 98104
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clothing providing by Maple Lane; (3) interfering with class members' sleep by leaving the overhead, fluorescent lights on all night long; (4) failing to ensure the seclusion and restraint rooms were safe and therapeutic including ensuring continuous observation; and (5) opening the facility without adequate planning regarding how the facility would obtain class members' medications. *See* Cooper Dkt 245-1. However, Defendants have failed to fully mitigate one of the most concerning attributes of the Maple Lane facility, the four open, concrete and metal stairways. *Id.* The risks posed to class members due to these stairways has consistently been determined to be a physical fault in the facility that creates a serious risk of injury or death for class members. *See* Dkt. 245-3 to 6; Dkt. 180 at 29; Cooper Decl. B.

The Court Monitor and Plaintiffs have all expressed concern regarding Defendants' failure to remedy the risk of falling, hanging, or jumping that the open, concrete and metal stairways create. Indeed, unlike the single floor wards at the state hospitals or any other known mental health treatment facility in Washington State, Dr. Pinals warned that Maple Lane's two tier structures are commonly used in jails or prisons and are especially dangerous to class members at risk of suicide. Dkt. 245-4 at 18. Defendants had six months to fully mitigate this risk but failed to heed the repeated warnings. Dkt. 245-3 to 5 and Dkt. 180 at 29.

Instead, Defendants seek discretion to place vulnerable class members on second tiers with existing staircases that present jumping, falling, and hanging risks. *See* Cooper Decl. Ex. A at 2, 7. Defendants also unilaterally decided to forgo bed expansion at the state hospitals, contradicting this Court's orders, Dkt. 131 at 22 and Dkt. 186 at 13, and chose to hastily open unproven restoration treatment programs in a jail and former juvenile prison, both whose physical structures were designed to punish those convicted of crimes rather than treat those whose mental illness. Further, at Maple Lane, Defendants contracted with a provider who has no

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experience providing restoration treatment services in Washington State but who does have a notoriously bad history of providing health services to inmates and prisoners. Dkt. 245-3.

Defendants attempt to refute the current risks at Maple Lane by stating that the Court Monitor and her experts have "not provided statements asserting that a serious and immediate risk of harm to class members exists." Dkt. 248 at 15. This argument seems to focus on a minor semantics distinction and ignores the multiple reports and statements issued by the Court Monitor and her experts regarding the jumping, falling, and hanging risks posed by the four stairways. Dkt. 245-3 to 6; Dkt. 180 at 29; Cooper Decl. Ex. B (Court Monitor's May 22, 2016 report, raises concerns regarding Defendants lack of plans to mitigate the existing risks associated with the open stairways and states class members could "easily fall or push another patient down the metal staircase had not yet been worked out."). Further, at the Court's direction, Plaintiffs solicited input from the Court Monitor and her expert who found on June 1, 2016, the falling or pushing risks still exist for all four stairways and Stairways B, C, and D still present ligature risks. Cooper Decl. Ex. A at 2, 7. These outstanding risks only underline the need for emergency judicial enforcement to protect the class from irreparable harm.

2. The Risks of Irreparable Harm Are Not Speculative

Similar to the Yakima TRO, Defendants argue that Plaintiffs must present evidence of a particular class member being irreparably harmed "not mere allegations of risk exist." Dkt. 248 at 17-19; Dkt. 201 at 19. This again misunderstands applicable law and shows a callous indifference to class members. This legal argument also appears to dismiss the Court Monitor and her experts' repeated and long-standing concerns regarding the particular risks associated with Maple Lane's four open stairways. Dkt. 245-3 at 18 ("The two tier model is one that is used often in jails and prisons, but can be dangerous especially for individuals with thoughts of

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suicide."); Dkt. 235-5 at 9 ("After discussion there were recommendations about using Plexiglas to block off areas that might be risk areas for jumping points that could result in self-harm. Other suicide mitigation strategies need to be examined such as support railings, handles, and the like, which should be reviewed and removed."); Cooper Decl. Ex. B. **(**Class members could "easily fall or push another patient down the metal staircase had not yet been worked out."); *Id.* at Ex. A ("The risk remains that a patient could be pushed or jump down the concrete stairwell.").

Suicide risks to class members are not speculative. Class members have committed suicide or died while being housed in facilities that are inappropriate for their needs and whose design presents risks of self-harm or jumping, falling, and hanging risks. *See* Dkt. 46 at 2. Defendants own actions reveal that suicide is a substantial risk to class members at Maple Lane. Ten separate times in their response brief, Defendants reference either staff training regarding suicide risk or the screening and monitoring of class members to mitigate the risk of class members committing suicide at Maple Lane. Dkt. 248 at 1, 4, 6, 7-9. This is consistent with their statements to the Court Monitor and her expert that such risks will be addressed prior to opening Maple Lane. *See* Dkt. 248-6 ("These suicide mitigation efforts are reflected in the remodeling plan."); Dkt. 194-12 at ("[L]igature concerns, etc., are all part of this careful ongoing planning[.]"). Despite these acknowledged risks, Defendants have still placed class members on Maple Lane's second tier without mitigating the known and serious risks presented by the tier's stairway "without the necessary safety improvements" addressing the multiple ligature risks. *See* Cooper Decl. Ex. A at 2, 7.

Defendants' argument that these same risks present to class members at the therapeutic environment of state hospitals is a false distinction. Dkt. 248 at 9-10. Not a single residential ward at the state hospitals is two-tiered and the stairs in the Treatment Recovery Center ("TRC")

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do not pose the same serious risk of falling, hanging, or jumping as they are not open and are not accessed as frequently as the four open stairways at Maple Lane. Further, despite Defendants' assertions, not all class members at Western State Hospital have access to the TRC. For example, hospital policy makes clear that a class member who "engages in other behavior(s)) raising immediate safety or security concerns" are not allowed to have access to the TRC nor are class members who have recently been admitted. Cooper Decl. Ex. C. Plaintiffs respectfully ask this Court to decline to wait for a particular class member to be irreparably harmed before taking emergency action to mitigate the known and substantial risks posted to class members by the four stairways at Maple Lane.

3. A TRO Requiring the Court Monitor's Approval is Proper

Defendants maintain that Plaintiffs' request for a TRO to enforce this Court's orders is improper. *See* Dkt. 248 at 20-21; Dkt. 201 at 2. Here, Defendants appear to argue that the TRO cannot be longer than fourteen days even if class members are still at risk after the fourteen (14) days have passed. Defendants present this argument while citing to legal authority that expressly allows an extension for good cause. Dkt. 248 at 20 citing to FRCP 65(b)(2).

Plaintiffs seek temporary judicial relief to prevent Defendants from allowing class members to have access to the second tier of Maple Lane until the risks to class members can be fixed. According to Defendants' statements, this remediation is to take place by June 10, 2016, or well within fourteen (14) days of this reply. *See* Cooper Decl. Ex. A at 1. The Court Monitor and her experts also recommend that the remediation include carpeting all four stairways, an "inexpensive" solution to "eliminate an unnecessary risk." *Id.* at 1. Plaintiffs seek this relief for fourteen (14) days or until Maple Lane's four stairways meet both this Court's order and the Court Monitor's approval. This request is procedurally proper given Defendants remediation

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plan, their history of ignoring the Court Monitor and her expert recommendations, and the need to temporarily prevent irreparable harm.

However, if Defendants fail to timely remediate the outstanding risks and this Court finds that a TRO can only stand for fourteen (14) days irrespective of good cause to grant an extension, Plaintiffs ask this Court to use its authority to convert this motion for a temporary restraining order to a permanent injunction and schedule a full evidentiary hearing within twenty-eight (28) days.

B. This Court Maintains Jurisdiction to Determine Whether the Treatment Provided by Defendants Adheres to the Constitutional Standard

Similar to the Yakima TRO, Defendants claim that *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) is the standard by which this Court should determine whether the four stairways at Maple Lane meet the constitutional standard that protects class members' rights. Dkt. 248 at 15-17; Dkt. 201 at 15-17. Defendants have again ignored longstanding Ninth Circuit precedence applying *Youngberg* and holding that a person 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).

Here, the factual and legal authority is similar to the Ninth Circuit's ruling in *Sharp*. There, the court explained that although *Youngberg* governs a defendant obligation to provide care consistent with clinical judgment, it does not provide an escape hatch by which defendants can avoid judicial scrutiny simply because they have determined that their offerings meet the constitutional standard. *Sharp*, 233 F.3d at 1171. Indeed, this would be absurd, because "accepting such an argument would transfer the safeguarding of constitutional rights from courts

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315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

to mental health professionals." *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). When reviewing the adequacy of mental health program in *Sharp*, the Ninth Circuit affirmed the trial court's finding that implemented program was not afforded deference where a "neutral special master" (who was appointed by the court for the specific purpose of ensuring the program was consistent with professional standards) called into question the legitimacy of the program. *Sharp*, 233 F.3d at 1172. Based on the foregoing concerns, the *Sharp* district court rejected the defendants' 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.*

Here, again, the facts and procedural posture are similar to *Sharp*. First, Dr. Mauch is the neutral Court Monitor tasked by this Court to ensure compliance with its orders including ensuring that alternative restoration programs like Maple Lane do not sacrifice the therapeutic environment of the state hospitals. Dkt. 186 at 9; Dkt. 131 at 22.

Second, Defendants have already made program decisions at Maple Lane that either fell below the professional standards for treatment or were not made using professional judgment. For example, Defendants and its contractors not only strip searched class members admitted to Maple Lane but they also opened this program without ensuring privacy during admission and in using the bathroom, access to timely medications, a safe seclusion and restraint room, a plan for addressing emergencies on the second tier, and kept the lights on in sleeping areas during the night. Dkt. 245-1; *see also* Cooper Decl. Ex. A. Plaintiffs were able to work with the Attorney

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315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

General's Office to address these risks. Dkt. 245-1. However, Defendants failed to fully mitigate the jumping, falling, and hanging risks of all four of the open, concrete and metal stairways. *Id.*

Even if this Court finds that the *Youngberg* standard should apply, Defendants' decision to hastily open Maple Lane and place class members on the second tier without addressing all four stairway's risks to class members is not entitled to deference because this decision, similar to the other decisions at Maple Lane, does not adhere to nor comply with professional judgment standards. Therefore, a TRO must issue to protect class members. Although Defendants proffer self-serving assertions that their program comports with constitutional and professional standards, this Court retains the authority carefully scrutinize Maple Lane to ensure that class members are provided the safety and care they are entitled to under this Court's order and the Constitution. For eight months, the Court Monitor and her experts have provided detailed concerns regarding the four stairways at Maple Lane. *Supra* at 5-7. The experts' most recent report clearly states these risks persist. Cooper Dec. Ex. A at 2, 7. Ultimately, it is this Court, not Defendants, that has the authority to determine whether allowing class members access to the second tier of Maple Lane given the outstanding risks presented by the stairways complies with both its order and the Constitution.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs request that the Court issue their proposed Temporary Restraining Order and Preliminary Injunction, preventing Defendants from allowing class members to have access to the second tier of Maple Lane until the risks of all four stairways have been fully mitigated and the Defendants have secured the approval of the Court Monitor.

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

DATED this 3rd day of June, 2016.

Respectfully submitted,

/s/Emily Cooper
DISABILITY RIGHTS WASHINGTON
David R. Carlson, WSBA No. 35767
Emily Cooper, WSBA No. 34406
Disability Rights Washington
315 Fifth Avenue South, Suite 850
Seattle, WA 98104
(206) 324-1521
davidc@dr-wa.org
emilyc@dr-wa.org

/s/ La Rond Baker
La Rond Baker, WSBA No. 43610
Margaret Chen, WSBA No. 46156
Emily Chiang, WSBA No. 50517
ACLU of Washington Foundation
900 Fifth Avenue, Suite 630
Seattle, Washington 98164
(206) 624-2184
lbaker@aclu-wa.org
mchen@aclu-wa.org
emilyc@aclu-wa.org

/s/Christopher Carney
Christopher Carney, WSBA No. 30325
315 5th Avenue South, Suite 860
Seattle, Washington 98104
(206) 445-0212
Christopher.Carney@cgilaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 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)
- Amber Lea Leaders (amberl1@atg.wa.gov)

DATED: June 3, 2016, at Seattle, Washington.

/s/ La Rond Baker
La Rond Baker

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729