

The Honorable Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

<p>A.B., by and through her next friend Cassie Cordell Trueblood, <i>et al.</i></p> <p>Plaintiffs,</p> <p>v.</p> <p>Washington State Department of Social and Health Services, <i>et al.</i>,</p> <p>Defendants.</p>	<p>No. 14-cv-01178-MJP</p> <p>PLAINTIFFS’ REPLY IN SUPPORT OF MOTIONS FOR CIVIL CONTEMPT, DKT. NOS. 240 & 254</p> <p>Noted for Hearing: June 20-21, 2016</p>
--	--

I. INTRODUCTION

Plaintiffs move this Court to hold Defendants in contempt due to their failure to comply with this Court’s injunctions and stop violating class members’ constitutional rights. Although Defendants claim to have taken substantial steps towards compliance it is clear that they have failed to take reasonable steps necessary to actually comply. Instead of implementing suggestions from the Court Monitor and proven tactics for operating a forensic mental health system, Defendants opted to create two experimental corrections based restoration centers even though it was clear that doing so would delay relief to class members and potentially fail to provide treatment in a therapeutic setting. As Defendants’ non-compliance continues and class members are subjected to prolonged delays the continued harms resulting from Defendants’ repeated missteps and inaction mandate the need for this Court’s intervention. Dkt. 131 at 19; *see*

1 also Dkt. 260-4 at 11-30 (Test. of Dr. Terry Kupers). Indeed, because Defendants have failed to
2 remedy the delays, two class members have died waiting in jail for competency services. Dkt.
3 180 at 19.

4 II. BACKGROUND

5 The need for timely compliance and provision of competency services is clear from
6 Defendants' well-documented history of failing to prioritize services to class members.
7 Defendants are well aware of their extensive delays in providing competency services, and admit
8 that they have failed to timely provide competency services to class members, and have
9 maintained long waitlists for at least the past fifteen years and since this Court issued its
injunction in 2015. Dkts. 271-5, 271-6, 271-7, 271-8; 57-1; 57-2 at 42.

10 More recently, from 2012 to 2014, the legislature attempted to ensure that class members
11 were not subjected to unconscionably long delays in jail by reviewing DSHS's forensic mental
12 health system; directing DSHS to hire consultants to reduce delays; and requiring DSHS to
13 submit quarterly reports regarding compliance with the seven (7) day statutorily-created target.
Wash. Rev. Code § 10.77.068 (2012) (amended 2015).

14 And yet Defendants remain out of compliance even after this case was fully tried, this
15 court issued an injunction, and Defendants received a last minute five-month extension
16 predicated on timeframes they claimed were sufficiently lenient to allow them to provide timely
17 competency services. Given Defendants' long history of failing to fix this serious problem on
18 their own, increased court oversight is both necessary and appropriate to ensure Defendants take
19 all reasonable steps to reduce wait times for competency services.

20 III. ARGUMENT

21 A. Defendants' Argument that Progress Equals Substantial Compliance Fails

22 Substantial compliance with a court order is a defense to an action for civil contempt;
23 however, the violating party must take "all reasonable steps" to comply with the court order.

General Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986). Defendants invite

1 this Court to find them not in contempt simply because they have taken steps towards
 2 compliance regardless of whether those steps were reasonable or even likely to result in timely
 3 compliance. This is not the legal standard. Nor would such a standard be reasonable here, where
 4 Defendants have for years assured various oversight entities that they are taking action, writing
 5 reports, and moving towards providing timely competency services and respecting the
 6 constitutional rights of vulnerable class members – but have consistently failed to do so.
 7 Defendants’ arguments that their actions are sufficient to stave off a finding of contempt fails for
 8 the following three reasons.

9 **1. Defendants failed to comply with this Court’s Orders.**

10 Defendants argue that they have made substantial progress based on several illusory
 11 statements. *See* Dkt. 264 at 2. Defendants claim that they have “recently opened 96 beds” with
 12 fifty-four of those beds being located in the new alternative restoration sites. Dkt. 264 at 3-4.¹
 13 Further, Defendants tout the two corrections-based restoration centers as panaceas to the
 14 underlying issues. However, both sites have limited operations due to Defendants’ failure to
 15 ensure these experimental facilities are safe and the majority of these beds are not in use. *See*
 16 Dkts. 216; 263; *see also* 266 at ¶ 6. Defendants also claim that they have maximized hospital
 17 beds for class members by opening 15 beds on at WSH. *See* Dkt. 264 at 2. Yet, Defendants
 18 have failed to fully maximize the 30-bed unit on S4 claiming they first had to build a multi-
 19 million dollar fence before transferring patients, despite this same population being housed on
 20 this exact unit in the past. Dkt. 182-5 at 11-12.

21 The most telling fact revealing Defendants’ lack of substantial progress is the number of
 22 class members waiting in jail for inpatient evaluation and restoration services. Based on
 23 Defendants’ own data, by the compliance date of May 27, 2016, over seventy-six (76) percent of

¹ Defendants also assert that Plaintiffs have made “no attempt to explain why these beds at WSH are needed in addition to the 96 new beds already opened.” Dkt. 264 at 10. These beds are needed to admit the significant portion of class members who wait longer than seven (7) days for in-hospital competency services.

1 class members with completed referrals in May, 2016, waited in jail for over seven (7) days
 2 for both inpatient evaluation and restoration in violation of this Court's order. Dkt. 266 at 6.
 3 While there have been some improvements since trial, they are ultimately insufficient to
 4 demonstrate substantial compliance with this Court's orders.

5 **2. Defendants failed to take all reasonable steps.**

6 Defendants' argument that they have taken all reasonable steps to comply with this
 7 Court's orders is also suspect. Dkt. 264 at 7. It would be more accurate to say that Defendants
 8 have taken the actions they wanted to take even when experts have advised them that: (1) there
 9 were other proven ways to come into compliance; and (2) there were flaws in the steps
 10 Defendants planned to take. Dkt. 171 at 28-29; Dkt. 180 at 6-23, 27-42; Dkt. 241-2 at 5-8; Dkt.
 245-1.

11 Notably, Defendants did not address nor adopt several of the Court Monitor's key
 12 recommendations to aid in compliance, including maximizing capacity at the state hospital,
 13 diversifying staff, and engaging in labor negotiations. Dkt. 171 at 6-10; 245-1.^{2, 3, 4} Defendants
 14 appear to distinguish these recommendations based on how longstanding they are, but the Court
 15 Monitor has consistently repeated these recommendations in her reports and in her feedback to
 the Defendants' revised Long Term Plan. Dkt. 241-2 at 5, 7.

18 ² Defendants also raise alarm regarding opening beds at the state hospitals, claiming such a move would place class
 19 members and hospital staff at risk. Dkt. 264 at 10. But the Court Monitor did not recommend opening the beds
 immediately; she instead reasonably recommended that Defendants create a more expedited plan to open the beds.
 Dkt. 230-2 at 7. The Court Monitor also pointed out Defendants' time line for opening the beds by July 2017 was
 20 arbitrarily based solely on end date of the Maple Lane contract. *Id.*

21 ³ Defendants also attempt to limit the Court Monitor's recommendations regarding diversifying staff to only
 applying to in jail evaluation. Dkt. 264 at 10. This is a false distinction. The Court Monitor never limited this
 recommendation to the provision of in jail evaluation. Dkt. 171 at 33 (referencing certification of nurse practitioners
 and social workers "to meet demand for timely competency evaluations **and** to staff competency restoration
 22 services." (emphasis added)).

23 ⁴ Defendants claim they have contracted for staff at WSH but clarify that such contracts are only available on the
 Not Guilty by Reason of Insanity wards, **not** wards that impact class members. Dkt. 268 ¶ 4. It is unclear why labor
 negotiations did not include contracting for all forensic units, especially in light of existing vacancies that contribute
 to WSH's inability to open additional beds. Dkt. 264 at 2.

1 In January 2016, Defendants acknowledged that they failed to comply but argued their
 2 failure to implement the Court Monitor's recommendations was not the cause. Dkt. 183 at 4.
 3 Their rejection of virtually all the Monitor's recommendations combined now with their failure
 4 to meet deadlines indicates that they did not take "reasonable steps" towards compliance.⁵

5 **3. Defendants failed to comply with the Court's modified order.**

6 Defendants have failed to take "each and every" action required to comply with this
 7 Court's Order. Dkt. 264 at 3. First, Defendants failed to meet a single benchmark reducing the
 8 wait times for competency services, including the final deadline of May 27, 2016. Dkt. 186 at
 9 17-18; Dkt. 241-1 at 46-86; Dkt. 219-1 at 22-27; Dkt. 266 ¶ 9. Second, Defendants failed to
 10 implement a robust triage protocol as recommended by both this Court and its Monitor. *See* Dkt.
 11 180 at 33; Dkt. 186 at 5. Instead, Defendants unilaterally chose to place the burden onto third
 12 parties including prosecutors and defense counsel. Dkt. 241-3 at 2-6; Dkt. 241-4.⁶ Third,
 13 Defendants failed to secure the full \$4.8 million of diversion funds and then lost funds due to
 14 failure to spend them, limiting their ability to explore the full spectrum of diversion options. Dkt.
 15 186 at 14; Dkt. 234 at 5; Dkt. 267 ¶ 8. Finally, Defendants failed to comply with this Court's
 16 orders when it opened corrections based restoration centers without adequately ensuring that the
 17 alternative locations were safe or as therapeutic as the state hospitals. *See* Dkt. 186 at 13; Dkt.
 18 131 at 22; *see* Dkt. 245-1.

17 **B. The Sanctions Plaintiffs Request Are Appropriate and Necessary**

18 "[A] history of noncompliance with prior orders can justify greater court involvement
 19 than is ordinarily permitted," including detailed subsequent orders. *Sharp v. Weston*, 233 F.3d
 20 1166, 1173 (9th Cir. 2000). In this case, the remedies sought by Plaintiffs are justified not merely

21 _____
 22 ⁵ Defendants' decision to open the alternative restoration sites with serious architectural safety risks to patients even
 though Plaintiffs and the Court Monitor repeatedly informed them that doing so would put class members' safety at
 risk cannot be deemed a "reasonable step" towards compliance. Dkt. 216; Dkt. 263.

23 ⁶ This inappropriately places the burden on third parties who lack knowledge of the entire backlog and are in no
 position to determine which class member(s) should be prioritized for admission. *See* Carroll Decl.

1 as responses to contempt but also by the Court’s continuing power to enforce its injunction in
2 light of Defendants’ ongoing noncompliance and their own statements regarding when they
3 would be in compliance. Defendants’ long-term plan and monthly reports all promised to be in
4 compliance by January 2016. Then in January, Defendants stated that would be in compliance by
5 May 27, 2016. Dkt. 183 at 6. Defendants met neither date. Defendants have failed to achieve
6 compliance despite their stated promises of reform and instead argue that the Court should wait
7 ten or more years before holding them in contempt. This Court should reject Defendants’
8 invitation to sanction their on-going constitutional violations in the hopes that, in defiance of all
9 evidence to the contrary, Defendants will soon come into compliance.

10 **IV. CONCLUSION**

11 For the foregoing reasons this Court should find Defendants in contempt and issue
12 sanctions accordingly.

13 Dated this 10th day of June, 2016.

14 Respectfully submitted,

15 /s/ La Rond Baker
16 La Rond Baker, WSBA No. 43610
17 Emily Chiang, WSBA No. 50517
18 Margaret Chen, WSBA No. 46156
19 ACLU of Washington Foundation
20 900 Fifth Avenue, Suite 630
21 Seattle, Washington 98164
22 (206) 624-2184
23 echiang@aclu-wa.org
lbaker@aclu-wa.org
mchen@aclu-wa.org

/s/ Emily Cooper
David R. Carlson, WSBA No. 35767
Emily Cooper, WSBA No. 34406
Anna Guy, WSBA No. 48154
Disability Rights Washington
315 Fifth Avenue South, Suite 850

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

Seattle, WA 98104
(206) 324-1521
davidc@dr-wa.org
emilyc@dr-wa.org
annag@dr-wa.org

/S/Christopher Carney
Christopher Carney, WSBA No. 30325
Sean Gillespie, WSBA No. 35365
Kenan Isitt, WSBA No. 35317
Carney Gillespie Isitt PLLP
315 5th Avenue South, Suite 860
Seattle, Washington 98104
(206) 445-0212
Christopher.Carney@cgilaw.com

Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CERTIFICATE OF SERVICE

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

DATED: June 10, 2016, at Seattle, Washington

/s/La Rond Baker

La Rond Baker, WSBA No. 43610