UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al.,	)	
	)	
Plaintiffs,	)	
	)	**Case No. 4:92-CV-110**
v.	)	
	)	**HONORABLE RICHARD A. ENSLEN**
PATRICIA CARUSO, et al.,	)	
	)	
Defendants.	)	
	)	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO REOPEN JUDGMENT REGARDING MENTAL HEALTH ISSUES AND ISSUE A PRELIMINARY INJUNCTION

I. INTRODUCTION

On August 14, 2006, the Associate Monitor for Medical Issues, Robert Cohen, M.D., informed the Court of his findings from a recent inspection of the *Hadix* facilities. Dr. Cohen reported on the death of a 21-year old man, who had a long history of mental illness. This prisoner died shortly after being released following four days in full restraints, and no physician examined him during the entire period that he was in restraints. Although mental health staff knew that he was actively psychotic and being held in four-point restraints, no psychiatrist was consulted at any point. Indeed, Dr. Cohen reported that not a single patient at JMF had seen a psychiatrist in the six weeks preceding the prisoner's death.

The death of this prisoner, and the appalling lack of response from either mental health or medical staff that made it possible, illustrate that the constitutional violations with regard to the medical care of the class cannot be fully eliminated without addressing the basic mental health

needs of the class. Precisely because it is now clear that the medical needs of the *Hadix* class cannot be met without attention to the assurance of a constitutional level of mental health care for the class, Plaintiffs ask that the Court take the appropriate action under Fed. R. Civ. P. 60(b) to relieve Plaintiffs of the previous order of the Court dismissing Plaintiffs' mental health claims.

Plaintiffs further request that the Court, following hearing, issue a preliminary injunction eliminating the use of in-cell mechanical restraints outside of medical settings except for limited time periods in emergencies; requiring medical and psychiatric evaluation of restrained prisoners; assuring that prisoners have appropriate access to psychiatrists and other critical mental health staff; assuring daily rounds by psychologists in the segregation unit; establishing a weekly conference involving mental health and medical care staff regarding prisoners in the segregation unit with mental health needs; and requiring Defendants to develop protocols for the use of restraints and for coordination of medical and mental health services. Plaintiffs also request that this motion be considered at the forthcoming October 11 hearing, and that the Court further issue a discovery and hearing schedule, with the goal of determining whether additional or different relief is appropriate with regard to the remaining mental health care claims.

II. FACTUAL BACKGROUND

Additional information supplied to Dr. Cohen following his initial report indicated that, only after this death on August 6, did the responsible authorities act to make any psychiatric access available to prisoners at JMF, despite the fact that it contains a unit used for prisoners in segregation and observation status and that it contains a total population of approximately 1400. During the period in which there was no on-site psychiatric coverage, no patients were seen by psychiatrists. If the need was classified as urgent, case managers (social workers) were to initiate

transfers to other facilities; patients requiring "routine" evaluations by a psychiatrist simply did not receive them. When psychiatric medications required renewal, an offsite psychiatrist phoned in an order. Attach. 1, Memo. from Rushbrook to Calley, Aug. 15, 2006.

Because of this situation, the prisoner was left to die an agonizing death. The medical records supplied to Plaintiffs do not contain a single set of vital signs during the week that the prisoner died. The logs for the segregation unit repeatedly document psychotic behavior and refusals of food and water by the prisoner. While Plaintiffs have yet to receive autopsy reports, it seems entirely plausible from the information currently available that a lack of water contributed to the prisoner's death. There is no evidence that any medical or mental health staff member took any steps to interrupt what amounted to a death by torture. Because the events are so horrendous Plaintiffs reproduce in full (aside from names) the timeline prepared by staff based on a videotape of the last few hours of the prisoner's life:

Sunday, August 6, 2006

1:49 p.m.	Lt. in to explain the procedure for taking off TOBR [top of bed] restraints.
1:51	Lt. out. . . Officer in cell to unlock restraints. [Second] officer in the doorway.[1]
1:53	TOBR restraints completely off. . . .belly chains still on prisoner.
1:58	[Three officers] in cell to take off TOBR restraints.
1:59	Officers out of cell. . . . [The prisoner] moving to get off bed and he falls to the floor.
2:01	[Three officers] enter cell. . . [They] s[e]t prisoner on the floor.
2:02	Officers s[e]t prisoner on the bed.
2:03	Officers out of the cell. . . Lt. remains in cell to talk to prisoner.
2:04	Lt. out of cell.
2:06	Prisoner staggers from bed to sit on the toilet. . . appears to be attempting to drink water.
2:12	Prisoner falls on the floor in a sitting position. . .struggling to get up.
2:14	Prisoner falls on his back in a lying position.

[1] All of the ellipses in this summary are in the original. No substantive descriptions of events are omitted in this reproduction of the memorandum.

2:26 Prisoner trying to raise himself off the floor.
2:32 Prisoner [lies] back down.
2:57 RN, [two officers] enter cell.
2:58 Prisoner is laid on his back on the bottom section of his bed with legs hanging over edge of bed.
2:59 RN does a blood pressure check on prisoner's left arm.[2]
3:00 RN does a blood pressure check on prisoner's right arm.
3:02 Blood pressure checks done. . . RN checks prisoner's pulse on left wrist.
3:04 All staff out of cell.
3:47 Faint movement seen by prisoner.
3:50 Faint movement seen by prisoner.
3:53 Faint movement seen by prisoner.
3:58 [a masters-level psychologist, erroneously identified in the memorandum as a doctor] seen leaving the area near prisoner's cell.
3:58 RN and Officer enter prisoner's cell.
3:59 RN exits. . . Officer takes out CPR breathing device. . . RN reenters cell with AED [a device designed to deliver shocks to a person in cardiac arrest]. . . CPR is started by [two officers].
4:00 Officer enters prisoner's cell and assists with CPR . . . Sergeant enters cell.
4:12 DLW staff enter prisoner's cell.
4:16 Gurney is brought to prisoner's cell.
4:17 Prisoner placed on gurney . . . CPR still in progress.
4:18 Prisoner out of cell.

Memo. from Murchison to Becker, Aug. 9, 2006.

Dr. Cohen summarized the circumstances as follows:

> My preliminary findings suggest that [the prisoner's] death was predictable and preventable. Actively psychotic patients with cardiac conditions placed in four point restraint are at significant risk of death. The temperature humidity index in the segregation unit during the week prior to [the prisoner's] death had reached 106. [The prisoner] had multiple medical conditions, including hypertension, hypothyroidism, and manic-depressive illness which placed him at risk of severe heat related illness. He was taking six different medications. Several of these drugs are known to seriously impair heat regulation. Most importantly, [the prisoner] was kept in four point restraints for four days without physician care. During this period, he was noted to be

[2] The vital signs are not recorded in the medical record given to Plaintiffs or in any other document provided to them.

> agitated, disoriented, psychotic, and was urinating on his bed. Despite th[ese] emergency psychiatric symptoms, he was not seen by a psychiatrist, because no psychiatrist was working at JMF. The death of [the prisoner], a twenty one year old man, was a terrible unnecessary tragedy.

Letter from Cohen to Court, Aug. 14, 2006 at 2.

Plaintiffs' expert Jerry Walden, M.D., also points out that all categories of staff–physicians, nursing, mental health supervisors who allowed JMF to operate without any psychiatric coverage, JMF mental health staff, and custody–contributed to the death by ignoring obvious signs of danger. Further, Dr. Walden points out in detail the obvious dangers posed by the combination of heat alert-level temperatures, the failures of MDOC to provide psychiatric coverage for the facility, the failures of medical care and mental health staff to coordinate, the failures of either psychiatric staff or medical staff to monitor the prisoner's complex medication regimen that left him extremely vulnerable during a heat alert period, particularly in boxcar cells of the segregation unit. *See* Attach. 2, Walden Decl., Sept. 6, 2006.

It is shocking that responsible Department of Corrections staff would allow JMF to remain without any on-site psychiatric coverage for over a month until this tragedy; this, like the May pharmacy implosion, was a disaster waiting to happen. Second, while Defendants have chosen to blame one staff member who failed to transfer the prisoner from JMF to another facility, it is apparent that any number of staff, including the nurses and the mental health staff assigned to the segregation unit, failed to take affirmative action to intervene. There were apparently no reliable systems to facilitate medical-mental health coordination for vulnerable prisoners, no systems to assure that basic mental health services were not interrupted, and no communications to custody staff so that policy would have prohibited the use of restraints in this

manner.

III. RELIEF UNDER RULE 60(b)(6)

A. The Need for Relief

On January 8, 2001, the Court terminated the mental health provisions of the Consent Decree pursuant to 18 U.S.C. § 3626(b)(2). Opinion and Order, Jan. 8, 2001 (Dkt. Nos. 1435, 1436). Plaintiffs do not challenge the correctness of the Court's ruling in 2001. Given that the Prison Litigation Reform Act ("PLRA") required a "current and ongoing" constitutional violation to sustain the challenged injunctive relief in the face of Defendants' challenge, the Court's finding that no current violation existed required termination then. *See* 18 U.S.C. § 3626(b)(3).

The correctness of the Court's previous ruling does not, however, govern current events. As the Court also said:

> If in the future the Defendants should fail in these respects, it is as certain as the next day that untreated mental illness will again ravage Michigan's prisoners. Should this happen, let it be known as an indictment of those leaders who could remain so indifferent to dire human suffering as to forsake proven remedies engineered through painstaking work and professional diligence, which are ready at hand.

Opinion at 5.

The day the Court feared is now at hand, but the Court's previous order does not leave the Court helpless to address the resurgent constitutional violations. The Federal Rules of Procedure provide an appropriate procedure for reopening judgments resulting from PLRA termination motions, just as they do for other equitable judgments that require revision.

B. The Availability of Reopening Relief

In *Kokkonen v. Guardian Life Insurance Co.,* 511 U.S. 375 (1994), the Supreme Court

held that, absent some independent basis for federal jurisdiction, a federal court cannot enforce a settlement agreement *unless* the agreement has been incorporated into a court order or the court had explicitly retained jurisdiction to enforce the settlement. *Id*. at 380-81. *Kokkonen* affirmatively states that when a settlement agreement has been incorporated into a court order, the court has jurisdiction to grant relief by reopening the judgment if the agreement is breached:

> The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal–either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.

Id. at 381.

C. Rule 60(b)(6) Relief

The reasoning of *Kokkonen* necessarily envisions that, if a court incorporated a settlement agreement into an order and then dismissed the case, enforcement of the settlement would require reopening of the case and thus recourse to Rule 60(b). Ordinarily motions to modify final injunctive relief are filed pursuant to Rule 60(b)(5), which allows relief if "it is no longer equitable that the judgment should have prospective application." Once an injunction has been terminated, however, it no longer has prospective application, so this section cannot be used to restore a previously terminated injunction. *Dowell v. Bd. of Educ. of Okla. Pub. Sch.,* 8 F.3d 1501, 1509 (10th Cir. 1993) (rejecting application of Rule 60(b)(5) to application to restore relief; noting that Rule 60(b)(6) applied); *Lee v. Talledega Co. Bd. of Educ.,* 963 F.2d 1426, 1433 (11th Cir. 1992) (holding that an order that implicitly dissolved an injunction was not an order with

prospective application, so Rule 60(b)(5) was inapplicable); *Twelve John Does v. District of Columbia,* 841 F.2d 1133 (D.C. Cir. 1988) ("[I]t is difficult to see how an unconditional dismissal could ever have prospective application within the meaning of Rule 60(b)(5).").

Because Rule 60(b)(5) is inapplicable, Plaintiffs bring this motion under Rule 60(b)(6), which is the catch-all clause allowing alteration of a judgment based on "any other reason justifying relief from the operation of a judgment." Not surprisingly, the first requirement that Plaintiffs must meet to demonstrate entitlement to relief under this subsection is a showing that relief is unavailable under any other subsection of the rule. *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 863 & n.11 (1988) (stating that Rule 60(b)(6) grants federal courts authority to provide relief only when relief is not available under any other provision of Rule 60(b)). Because relief is not available under Rule 60(b)(5), for the reasons noted above, this demonstration is easy.[3]

D. Plaintiffs' Showing of "Extraordinary Circumstances"

The other requirement for relief under Rule 60(b)(6) is a showing of "extraordinary circumstances" justifying relief from the judgment. *See Liljeberg,* 486 U.S. at 863-64. Plaintiffs

[3] The remaining subsections of Rule 60(b) provide for relief in the following circumstances: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; and (4) the judgment is void. Whether the return of unconstitutional conditions is a surprise or involved misrepresentations by Defendants at the time of the previous order is irrelevant because the predictability of a return of such conditions would not have affected termination; as noted above, all that was material was whether there were then-existing constitutional violations. Nor is the second subsection applicable, because this subsection is designed to provide relief if it is likely that the judgment would have been different based on evidence that existed at the time of trial. *See, e.g., United States v. McGaughey,* 977 F.2d 1067, 1075 (7th Cir. 1999) (stating requirement that evidence existed at the time of trial as one element of the test for relief under Rule 60(b)(2)). Because Plaintiffs concede that the constitutional violation returned only after the dismissal of injunctive relief, this subsection is not applicable. Finally, Plaintiffs make no argument that the previous judgment was fraudulent or void.

have shown the required "extraordinary circumstances" sufficient to justify reopening the Order of January 8, 2001. First, Defendants' failures of constitutional dimension to live up to their commitments to the Court at the time that relief was dismissed have had lethal results. Second, unless the Court reopens the mental health issues, the efforts to cure the constitutional violation regarding medical care will be severely compromised.

The recent death illustrates the unbreakable link between the medical care issues and mental health care. This prisoner died from untreated physical conditions, but the failure of the mental health staff to address his mental health needs in the segregation unit set the stage for his death. There are many other potential interactions between medical care and mental health care, including medication issues (such as the failure of the pharmacy system to deliver ordered psychotropic medications because of SERAPIS problems); medical side effects of psychotropic medications; potential interactions between psychotropic medications and other medications prescribed to a prisoner; heat injury risks posed by psychotropic medications; and access to health care issues, ranging from restrictions on medications because of cost to ineffective communications between patients and their providers. Plaintiffs expect to present evidence on all these issues.

Mentally ill patients are concentrated in the segregation unit. Further, coordination between medical care and mental health care is hindered because medical care is a CMS function, while mental health care is provided by state employees. Accordingly, implementing and monitoring medical orders directly affecting mental health in the absence of orders that directly address the mental health deficiencies will be significantly less efficacious. Further, given what has been discovered essentially by accident by Dr. Cohen, it is apparent that there are

likely to be additional systemic constitutional violations regarding mental health care that are not yet in focus.

Indeed, a number of circuits, including the Sixth Circuit, have found "extraordinary circumstances" under Rule 60(b)(6) justifying reopening a judgment when a settlement agreement has been subsequently violated. *See Aro Corp. v. Allied Witan Co.,* 531 F.2d 1368, 1371 (6th Cir. 1976) (district court, using Rule 60(b)(6), correctly exercised its jurisdiction in vacating an order of dismissal based on party's attempted repudiation of a settlement).[4] Particularly well-reasoned is the First Circuit's decision in *United States v. Baus,* 834 F.2d 1114 (1st Cir. 1987), in which that court reversed a district court's refusal to grant relief and held that the defendants were entitled to a hearing on their allegations that the United States had breached a stipulated judgment. The court characterized as "well-accepted" the principle that material breach of a settlement agreement incorporated into a court judgment entitles the non-breaching party to relief under Rule 60(b)(6) and it emphasized that, absent such relief, "[m]aterial breach of such a solemn obligation presents an extraordinary situation of permitting a party to benefit from a judgment the terms of which it has deliberately disregarded." *Id.* at 1124; *see also Keeling v. Sheet Metal Workers Int'l Ass'n, Local Union,* 162 937 F.2d 408, 410 (9th Cir. 1991) (affirming a district court's grant of relief under Rule 60(b)(6) because consistent non-compliance with the terms of a settlement agreement, which had the effect of frustrating the purpose of the agreement, constituted an "exceptional circumstance"); *Vincent v. Reynolds Mem.*

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[4] *Dicta* in *Aro Corp.* are inconsistent with the later holding in *Kokkonen* that a federal court cannot enforce an unincorporated settlement absent some independent source of federal jurisdiction. This distinction is irrelevant here, since the previous order at issue, the Consent Decree, was incorporated as a court order.

Hosp., Inc., 728 F.2d 250, 251 (4th Cir. 1978) (reversing refusal of district court to vacate dismissal of case based on party'ssettlement; in light of fact that state court had subsequently determined that terms of settlementagreement violated state public policy, Rule 60(b)(6) relief should have been granted to allow the moving party to reopen litigation and pursue new judgment); *cf. Sawka v. Healtheast, Inc.*, 989 F.3d 138, 140-41 (3d Cir. 1993) (suggesting that if settlement agreement had been incorporated into record, that might have constituted an "extraordinary circumstance" under Rule 60(b)(6) justifying reopening when non-moving party violated settlement).

E. The Mental Health Issues Cannot Be Fully Considered at the October Hearing.

Of note, Plaintiffs are not requesting a reinstatement of the Consent Decree mental health provisions. Rather, Plaintiffs seek a reinstatement of their original claims that mental health care deficiencies constitute a constitutional violation. While the evidence of a constitutional violation justifies vacatur of the termination order, Plaintiffs at this time do not claim that the constitutional violation regarding mental health is necessarily coextensive with the relief provided in the mental health sections of the Consent Decree. Accordingly, the appropriate relief, respectful of the limitations imposed by the PLRA, is to vacate the 2001 Order but to enter affirmative relief only to the extent that Plaintiffs prove a new current and ongoing constitutional violation.

While Plaintiffs will request relief at the October hearing related to the mixed medical/mental health issues for which additional discovery to document the violations is unnecessary, it is probable that the mental health issues uncovered by Dr. Cohen are not the only ones of constitutional dimension. Thus, while Plaintiffs ask that the Court vacate its previous

dismissal order and reopen the mental health issues entirely, Plaintiffs request that only the relief requested in the following section be considered at the forthcoming hearing. Plaintiffs further request that, following the forthcoming hearing, the Court establish a discovery and potential hearing schedule to consider whether other or additional relief on the mental health claims is appropriate.

Allowing Plaintiffs an opportunity to explore the mental health issues through discovery is certainly appropriate in light of what the record already shows. The fact that Defendants could allow JMF with its large segregation unit and approximately 1400 prisoners to operate for a prolonged period of time without any on-site psychiatric coverage demonstrates a system that is unable to operate responsibly on its own. Given this fact, a fair opportunity to conduct discovery is absolutely necessary before these claims can be resolved by trial.

IV. THE NEED FOR A PRELIMINARY INJUNCTION.

Plaintiffs seek a preliminary injunction incorporating the major recommendations of Dr. Cohen to the parties regarding mental health:

A. Appropriate Protocols and Policies Regarding Use of In-Cell Mechanical Restraints

The single factor most responsible for the death of this prisoner was the decision to use mechanical restraints outside of a medical setting. Because of this decision, this prisoner, at known high risk for heat injury and cardiac events, could obtain water only by cooperating with staff. Given that he was "floridly psychotic" at the time, according to mental health staff, it is not surprising that he did not cooperate with staff. As a result, he was almost entirely deprived of water during a period in which a heat alert was just ending. As Dr. Walden summarizes, the segregation log documents six refusals and one acceptance of water on August 3, and eleven

refusals with no acceptances of water on August 4. Attach. 2 at 4. Presumably because the water refusals were noted in the custody log and not in medical progress notes, no one–physicians, nurses, mental health staff or custody–acted to address his obvious needs resulting from the interaction of his medical and psychiatric needs. The relevant MDOC policy allows a shift commander to place a prisoner in restraints initially, with approval from a duty administrative officer if the restraints are used for longer than two hours. If the restraints are used for more than 24 hours, the Regional Prison Administrator must approve. While health care staff is supposed to check the prisoner's condition during health care rounds, nothing specifically defines how often rounds are required or what a health care "check" includes in this circumstance. Restraints can be used before any medical review. Further, medical staff is "consulted to ensure there is no known medical reason" precluding the use of restrains only when the use of top-of bed restraints is contemplated, despite the policy's recognition that restraints can interfere with breathing and circulation. Attach. 3, PD 04.05.112 (1/13/03).

If the restraints had been applied in a medical setting, vital signs and fluid intake and output, among other things, would presumably have been regularly monitored and the prisoner's deteriorating mental status would have led to intervention. Because such monitoring is critical, it is clearly too dangerous to allow such restraints outside of a medical setting.

Further, nothing in Defendants' current policy requires either medical or psychiatric evaluations; the undefined requirement of medical "checks" is clearly too vague to provide basic protections for restrained prisoners, who intrinsically are more likely to be suffering from significant mental illness and who are also put at serious medical risks by the very nature of these physical restraints. If the prisoner who died had received either a full evaluation by either a

psychiatrist or another physician, it is unlikely that death would have ensued.

It is significant that there is no applicable protocol for the use of restraints in a medical setting. Because of this lack of defined policy, as noted above, staff in all the various occupational categories were ineffective in addressing the obvious risks to the prisoner. It is absolutely critical that Defendants do now what they should have accomplished long ago: develop appropriate policies and protocols to assure that the decision to use in-cell mechanical restraints on a prisoner does not once again become a decision to sentence the prisoner to death.

B. Necessary Psychiatric and Psychological Staffing

The stage was set for this disaster by the fact that Defendants did nothing to assure on-site psychiatric and psychological services for all of JMF during the prolonged absence of the psychiatrist assigned to JMF. This decision is shocking and is likely to have inflicted grave harm on many prisoners, not just the prisoner who died. It is literally inconceivable to Plaintiffs that Defendants could have made a conscious decision to operate a facility of this size, with its large population of prisoners with mental health needs, without any provision for availability of on-site psychiatric services. According to Defendants' responses regarding the August death, during the period of time that JMF lacked any on-site psychiatric services, the only mechanism for ordering or renewing psychotropic medications was through telephone orders conveyed through the outpatient team's registered nurse; there were no provisions for an actual psychiatric evaluation of the prisoner to determine if new orders or changes in existing orders were necessary. Prisoners who required emergency psychiatric evaluation were evaluated by non-physicians assigned to the outpatient mental health team. Fourteen prisoners assigned to segregation who had been scheduled for psychiatric evaluations did not receive them; Defendants supplied no information

on how many other JMF prisoners were awaiting previously scheduled psychiatric evaluations. Attach. 1 at unnumbered 2.

Further, even after the death of the prisoner, and Dr. Cohen's exploration of the circumstances subsequent to his notification of the death by Plaintiffs' counsel, Defendants did not restore full psychiatric coverage to JMF; it is unclear whether such coverage exists today. Rather than full-time psychiatric coverage, Defendants cut psychiatric services at RGC, forcing RGC and JMF to share one psychiatrist. Accordingly, in order to assure that all *Hadix* facilities are provided with uninterrupted basic psychiatric and psychological services, Plaintiffs ask that the Court issue a preliminary injunction requiring that a critical level of psychiatric and psychological staff coverage be designated and thereafter maintained by Defendants.[5] Certainly in JMF that minimum coverage clearly includes a full-time psychiatrist and sufficient psychologist staff to conduct daily rounds in administrative segregation while fulfilling the psychologists' other duties in the facility.

C. Daily Psychologist Rounds in the Segregation Unit

Given the concentration of prisoners with mental health problems in the segregation unit, and the barriers to health care that this unit presents, Dr. Cohen recommends daily psychologist rounds. These rounds need to be focused, with the psychologist reviewing the segregation log as well as the prisoners' medical and mental health records. The segregation logs of the prisoner who died are many times more informative about his heartbreaking suffering prior to his death than his medical records, which are almost blank for that period. It is apparent that without close

[5] Plaintiffs expect that this level of coverage will be adjusted following the discovery and additional hearing that Plaintiffs request in Section III.E, *supra.*

supervision of the segregation units prisoners with mental illness cannot be protected from severe harm, and this requirement is designed to provide some minimal protections for such prisoners, as well as some provision for those additional prisoners whose mental status deteriorates in the highly stressful atmosphere of the segregation unit.

D. Coordination of Medical and Mental Health Staff

Once again, the complete lack of communication or apparent sense of responsibility characterizing medical and mental health care staff involved in the care of the prisoner who died illustrates why a protocol for coordination of medical and mental staff coordination is critical. This protocol should involve, not just the coordination of psychiatrists with other physicians, but coordination among nurses, social workers, physician's assistants, and psychologists.

As Dr. Walden states:

> Why did the medical team defer completely to psychiatry? Dr. Fatu acted as if this man wasn't in his care. Why didn't psych ask for medical care? The failures are huge and the system may ignore them because the finger points to the other one in each case.
>
> ***
>
> For psychiatry or mental health this was their patient also. Although social workers and psychologists are obviously not physicians, they had grad school training and ought to have recognized the danger. The man was "floridly psychotic" on day one. Is their training to do nothing? Where was the transfer to DWH if nowhere else? Where was the monitoring? Who doesn't draw blood tests when their patient is on 3-4 psychiatric meds and is decompensating? Do they not know the risks of these meds? Has no one looked at any drug references or called pharmacy to ask if there are risks like dehydration or arrhythmia?

Attach. 2 at 5-6.

V. THE APPLICABLE LEGAL STANDARDS

A. The Eighth Amendment Standard

"Deliberate indifference to serious medical needs" violates the Eighth Amendment. *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). Thus, the Eighth Amendment "deliberate indifference" standard applicable to prison conditions has both an objective and subjective component. *Farmer v. Brennan,* 511 U.S. 825, 834 (1994). In order to be found liable under the Eighth Amendment, a defendant must know of and disregard an excessive risk to prisoner health or safety. *Id.* at 837. Because this is an injunctive case, Plaintiffs' proof of the subjective component regarding Defendants' actual knowledge is simple and straight-forward:

> In this case, we are concerned with future conduct to correct prison conditions. If these conditions are found to be objectively unconstitutional, then that finding would also satisfy the subjective prong because the same information that would lead to the court's conclusion was available to the prison officials.

Hadix v. Johnson, 367 F.3d 513, 526 (6th Cir. 2004).

Deliberate indifference to serious psychological needs violates the Eighth Amendment. *Clark-Murphy v. Foreback,* 439 F.3d 280, 292 (6th Cir. 2006) (holding that there is a clearly established right to psychological treatment under the Eighth Amendment; quoting with approval from *Gleason v. Kemp,* 891 F.2d 829, 834 (11th Cir. 1990), that "every reported decision handed down after *Estelle* . . . recognized that deliberate indifference to an inmate's need for mental health care is actionable on eighth amendment grounds").

Clark-Murphy also involved a death from dehydration during a heat wave. The decedent was an MDOC prisoner confined at the Bellamy Creek Correctional Facility who was exhibiting

signs of mental illness. The case eerily resembles the current death. During a heat alert period, Jeffrey Clark collapsed outside while waiting to go to the messhall. He was transported to an observation cell. Once in the cell, he began barking like a dog and screaming. As in the case of the *Hadix* prisoner, staff filled out a psychiatric referral form. Staff was also told that Mr. Clark was not drinking water and he was later observed drinking from the toilet. A psychologist diagnosed Mr. Clark with psychosis. During at least much of this period, the water to Mr. Clark's cell was turned off, and Mr. Clark urinated on the floor. On the fourth day that Mr. Clark was in observation status, the psychologist noted that Mr. Clark was virtually non-responsive but did not intervene to assist him. Other staff noted deterioration in Mr. Clark's condition, and that he was lying naked on his bed. At approximately 1:00 a.m. on the following day he was discovered in *rigor mortis* in his cell. The autopsy determined that he had died of dehydration. *Id.* at 283-85.

Accordingly, it is readily apparent that the use of in-cell restraints on prisoners intrinsically entails serious risks that are known to Defendants and require Defendants to act reasonably. In order to assure that Defendants will begin to act reasonably in response to these serious risks, Defendants must be required to cease confining prisoners in in-cell restraints, other than for brief emergency periods, outside of medical settings. *Cf. Hope v. Pelzer,* 536 U.S.730 (2002):

> Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.

Id. at 738 (footnote omitted) (affirming judgment that use of hitching post as punishment for disruptive behavior violated the Eighth Amendment; reversing court of appeal's grant of qualified immunity to defendants).

The requirement for appropriate psychiatric and psychological staffing to assure that necessary mental health care staffing is available is similarly required under settled law. *See, e.g., Waldrop v. Evans,* 871 F.2d 1030, 1036 (11th Cir. 1989) (non-psychiatrist was not qualified to evaluate significance of prisoner's suicide gesture); *Cabrales v. County of Los Angeles,* 864 F.2d 1454, 1461 (9th Cir. 1988), *vacated by* 490 U.S. 1087 (1989), *reinstated* 886 F.2d 235 (9th Cir. 1989) (affirming finding of deliberate indifference where medical understaffing directly contributed to decedent's suicide); *Wellman v. Faulkner,* 715 F.2d 269, 272-73 (7th Cir. 1983) ("a psychiatrist is needed to supervise long term maintenance" on psychotropic medication); *Ramos v. Lamm,* 639 F.2d 559, 577-78 (10th Cir. 1980) (lack of on-site coverage by psychiatrist or Ph.D.-level psychologist to provide daily care and counseling to prisoners was "grossly inadequate").

In addition, housing seriously mentally ill prisoners in segregation is extremely dangerous, so the Eighth Amendment requires that such prisoners be screened to assure that they are not left in conditions that exacerbate their illness and cause unnecessary suffering. *See, e.g., Jones'El v. Berge,* 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (holding that "supermax" prison was not appropriate for seriously mentally ill prisoners and ordering screening to remove all such prisoners from facility); *Ruiz v. Johnson,* 37 F. Supp. 2d. 855, 913-15 (S.D. Tex. 1999) (finding that, for mentally ill prisoners the severe and psychologically harmful deprivations of administrative segregation units constitute cruel and unusual punishment), *rev'd on other*

grounds, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand,* 154 F. Supp. 2d 975 (S.D. Tex. 2001) ; *Coleman v. Wilson,* 912 F. Supp.1282, 1320-21 (E.D. Cal. 1995) (requiring screening because the placement of mentally ill prisoners in segregation without mental health evaluation and without access to necessary mental health care causes further mental health deterioration and violates the Eight Amendment). In order to assure that prisoners do not decompensate in segregation, Defendants should be required to implement Dr. Cohen's recommendation of daily psychologist rounds in administrative segregation.

Finally, it is apparent that the medical and mental health staff at the *Hadix* facilities are not performing with minimal competence in the absence of coordination of the two services that is now lacking. A review of the events that led to the prisoner's death make it obvious that he was at extraordinary risk of dying from dehydration or some related cause. The failure of coordination between medical and mental health care, along with the lack of developed protocols assigning monitoring responsibilities to both disciplines, resulted in the virtual certainty that this prisoner would die. *Cf. LeMarbe v. Wisneski,* 266 F.3d 429, 439 (6th Cir. 2001) (finding that plaintiff was entitled to pursue claim of deliberate indifference against a surgeon in view of affidavit from a specialist that "anyone with a medical education and most lay people" would have known that the particular surgical condition at issue (the presence of five liters of bile fluid in the patient's abdomen, indicating a bile leak that needed treatment) posed a substantial risk of serious harm if not addressed). It is apparent that the treatment that this prisoner was exposed to essentially amounted to prolonged torture resulting in death, and obvious structural defects in health services that allowed this torture to exist must be repaired.

B. The Preliminary Injunction Standard

The standards for issuance of a preliminary injunction are well-established. *See, e.g., Leary v. Daeschner,* 228 F.3d 729 (6th Cir. 2000):

> When deciding whether to issue a preliminary injunction, the district court considers four factors:
>
> (1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

Id. at 738. The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits, and the traditional preliminary injunction standard applies to mandatory as well as prohibitory preliminary injunctions. *United Food v. Southwest Ohio Reg'l Transit,* 163 F.3d 341, 348 (6th Cir. 1998).

For the reasons given above, Plaintiffs have demonstrated a strong likelihood of success on the merits. The continuing risks of additional unnecessary deaths and continued suffering described above also demonstrate the irreparable injury to the plaintiff class if the requested relief is not granted. Whatever cost may be occasioned to Defendants by requiring them to develop and implement practices conforming to their constitutional obligations should not weigh significantly in the balance, because Defendants should already be complying with these obligations under the Constitution. The public interest is also served by promoted by saving lives and avoiding unnecessary suffering. Indeed, as argued above, the public safety will be generally promoted by requiring Defendants to comply with their affirmative obligation to provide necessary health care, as such compliance will remove a potentially explosive cause of

unrest among prisoners.

Finally, the proposed relief is consistent with the requirements of PLRA because this relief is narrowly drawn, extends no further than necessary to correct the probable violation of Plaintiffs' constitutional rights under the Eighth Amendment, and is the least intrusive means necessary to correct the probable violation of those rights because it is limited to those matters identified by the Associate Monitor as minimally necessary to address immediate health and safety risks.

VI. THE LACK OF A NEED FOR THE POSTING OF SECURITY

The Court has discretion to determine that Plaintiffs need not provide security in order to secure the issuance of a preliminary injunction. *Roth v. Bank of the Commonwealth,* 583 F.2d 527, 539 (6th Cir. 1978). Because the great majority of the members of the class are indigent, it would have the effect of denying access to the courts to require a bond in these circumstances.

CONCLUSION

For the above reasons, Plaintiffs ask that the Court vacate its order of January 8, 2001 and reopen the mental health issues in this case; that it issue the requested preliminary injunction; and that it establish a discovery and hearing schedule regarding the remaining mental health claims.

Respectfully submitted,

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