THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES HORTON, et al., on behalf of themselves and all others similarly situated, Plaintiffs, vs. BOB WILLIAMS, et al., Defendants.	No. C94-5428 RJB PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM OPPOSING MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

There appears to be no disagreement between plaintiffs and the State defendants concerning the legal framework to be applied to determine whether defendants should be preliminarily enjoined from using pepper spray on youth incarcerated at Green Hill School (GHS). The parties agree upon the controlling preliminary injunction standard and upon the critical issues which must be resolved under the applicable Fourteenth Amendment analysis: (1) whether defendants' use of pepper spray is punitive, and (2) whether defendants' use of pepper spray is reasonably related to the state's interests in maintaining institutional security

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and staff safety. Applying this analytical framework, defendants fail to rebut plaintiffs' showing that pepper spray is used at GHS to punish youth, that defendants' use of pepper spray is not reasonably related to the purpose that defendants maintain it serves, and that there exists more moderate and constitutionally acceptable methods of maintaining discipline and order at GHS. Most importantly, defendants fail to refute plaintiffs' showing that, under the standards governing the issuance of preliminary injunctions, the balance of hardships here tip in plaintiffs' favor and that a serious question exists about the constitutionality of defendants' pepper spray policies and practices, thus making the issuance of a preliminary injunction appropriate.

For the reasons previously set forth in plaintiffs' Memorandum In Support of their Motion for a Preliminary Injunction, and based also on the showing below, plaintiffs respectfully ask this Court to enjoin defendants' use of pepper spray at GHS.

II. ARGUMENT

A. Defendants Use Of Pepper Spray Is Punitive.

Defendants assert that staff at GHS do not use pepper spray to punish youth. Rather, defendants claim, pepper spray is used to maintain institutional security and for the purpose of reducing injuries to staff and residents. See Williams Declaration, defendants' Attachment 1, pp. 4-6; defendants' Memorandum Opposing Motion For Preliminary Injunction (hereafter defendants' Memorandum) at pp. 5-10. The essence of defendants' argument is that the use of pepper spray is constitutional because "spraying has a security objective (i.e., preventing injury), and therefore is not punishment." Defendants' Memorandum at 10. Defendants' argument is unpersuasive for at least the following reasons.

Under defendants' reasoning, pain inflicted upon incarcerated youth could never

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constitute unconstitutional "punishment" so long as the state asserted a security purpose for it. This rationale would permit state officials to inflict pain or use physical force on incarcerated youth for any reason and in any manner whenever youth violate institutional rules provided it is done in the name of "institutional security." Indeed, defendants repeatedly assert that it would always be a breach of institutional security if juveniles were not forced either by "physical engagement" or through the use of pepper spray to follow staff directives. Apperson and Dubey Declaration, defendants' Attachment 2 at 4; Williams Declaration, defendants' Attachment 1, at 6. As defendant Williams claims:

> [Whenever a juvenile refuses to go to his room], staff must require him to go. Otherwise, staff loses control, and the residents are the ones in charge. Residents must know for certain there are consequences for misobeying directives. Thus, [the juvenile] may go to his room voluntarily, or be forced to go with the assistance of staff either by physical apprehension or by the use of pepper spray.

Id.[1]

Defendants' attempt to shield their pepper spray practices from constitutional scrutiny by chanting the mantra of institutional security should be rejected. Courts may not permit a pain-inflicting measure simply because it has a security objective:

> ... none of the Eighth Amendment cases decided by the Supreme Court, this circuit, or any other court of appeals has upheld a pain-inflicting measure simply because prison officials implemented the policy to "address" a legitimate government interest.

Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993).[2]

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[1]/ Staff at GHS operate under this same overly-broad definition of what constitutes a breach of institutional order sufficient to warrant the use of pepper spray. See, footnote 5 at p. 4 of Plaintiffs' Memorandum In Support Of Preliminary Injunction and the record references therein.

[2]/ In their submissions defendants seriously minimize the degree of pain inflicted on juveniles when they are sprayed with oleoresin capsicum. While there is a dispute between (continued...)

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Defendants' rationale that the infliction of pain can never constitute punishment provided it serves the purpose of maintaining institutional order simply does not square with the relevant legal authority. Defendants' reliance on Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979) and Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988) to support this broad position is misplaced. First, as defendants' recognize, both Spain and Michenfelder are adult prison cases decided under the Eighth Amendment and, as such, are distinguishable from the Fourteenth Amendment juvenile cases relied upon by plaintiffs. Secondly, both the Spain and Michenfelder decisions recognize that the use of substances such as tear gas and taser guns may violate the Eighth Amendment. Spain, 600 F.2d at 196; Michenfelder, 860 F.2d at 336. Both of these cases strongly suggest that it may indeed violate the Eighth Amendment to use such painful substances for punishment or to permit their use in less than "narrowly defined circumstances" when there is not an immediate threat of injury or substantial property damage. As explained by the Court in Spain:

> We think it makes little sense to say that use of tear gas can never be a violation of the eighth amendment. In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Court stated the eighth amendment prohibits those punishments which "are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,'" id. at 102, 97 S.Ct. at 290 (quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958)), or which "'involve the unnecessary and wanton infliction of pain,'" 429 U.S. at 103, 97 S.Ct. at 290 (quoting Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). We agree with the trial court that use of potentially dangerous quantities of the substance is justified only under narrowly defined circumstances, but we further conclude that use of nondangerous quantities of the substance in order to prevent a perceived future danger does not violate 'evolving standards of decency' or constitute an 'unnecessary and wanton infliction of pain.'

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[2](...continued)
the parties about the long-lasting effects of pepper spray, it unquestionably causes excruciating pain at least for a period of time. It results in gagging, coughing, gasping for breath, loss of upper body control, paralysis of the larynx, inflammation of the respiratory tract and extreme burning of the skin.

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> Therefore, where there are safeguards to insure that tear gas is not used in dangerous quantities we think its use can be justified in situations which are reasonably likely to result in injury to persons or a substantial amount of valuable property, and that use of potentially dangerous quantities is appropriately reserved for the circumstances narrowly defined by the district court in its opinion.

Spain, 600 F.2d at 196 (emphasis added).

Contrary to the facts presented to the Court in Spain, in this case there are not sufficient controls or safeguards on the use of pepper spray at GHS to insure that it is used only in narrowly defined emergency situations. Indeed, plaintiffs have made a significant showing in support of their preliminary injunction -- and will further show at trial on the merits -- that GHS staff use pepper spray in unnecessary and unwarranted situations when there is not an immediate threat of injury to persons or to a substantial amount of valuable property.

Likewise, the Court in Michenfelder reiterated the constitutional limitations which must be placed on the use of taser guns on adult prisoners, and recognized that the use of such devices may violate the Eighth Amendment when there exists a pattern of unwarranted use "as a matter of practice":

> A finding that the taser gun is not per se unconstitutional would not validate its unrestricted use. "[T]he appropriateness of the use must be determined by the facts and circumstances of the case." Soto v. Dickey, 744 F.2d [1260, (7th Cir. 1984)] at 1270. A legitimate prison policy of carrying tasers to enforce discipline and security would not warrant their use when unnecessary or "for the sole purpose of punishment or the infliction of pain." Id. at 1270. Overall, the evidence does not establish "unwarranted use of this painful and dangerous [device] as a matter of practice." See Spain v. Procunier, 600 F.2d at 195.

Michenfelder, 860 F.2d at 336. By contrast in this case, plaintiffs have presented ample

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evidence of defendants' continuing practice of unwarranted uses of pepper spray.[3]

Defendants attempt to bolster the importance of Spain and Michenfelder in their analysis by claiming that the juvenile corporal punishment and restraint cases cited by plaintiffs are distinguishable since, defendants maintain, they do not involve situations where a legitimate security objective was advanced in support of the restraint or punishment inflicted. Defendants, however, misread these cases, just as they have misplaced reliance on Spain and Michenfelder. The purpose of the beatings and tear gas used by institutional staff in Morales v. Thurman, 364 F. Supp. 166 (E.D. Tex. 1973), was obviously to punish youth and maintain institutional order. The purpose advanced by correctional officials for the hair holds used at Provo Canyon School, at issue in Milonas v. Williams, 691 F.2d 931, 942 (10th Cir. 1982), was to manage belligerent students (in other words, to maintain institutional order). Defendants are simply mistaken in their perception that the relevant juvenile corporal punishment cases cited by plaintiffs are different from this case because no security objective was advanced in support of the challenged practice.

Finally, defendants fail to recognize that the infliction of pain, even if for the

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[3]/ The overwhelming amount of evidence before this Court in support of plaintiffs' Motion for Preliminary Injunction shows that staff at GHS use pepper spray to punish youth and, in most instances, when there is no imminent threat of injury or substantial property damage. Plaintiffs' independent experts, having reviewed approximately 25 instances when staff used pepper spray on juveniles at GHS, all conclude that it is used for punitive reasons and not to control an imminently dangerous situation. By contrast, defendants' expert, Richard Lipsey, reviewed only four instances of pepper spray use, all of which were presumably hand-selected by defendants for Dr. Lipsey's review. In their Declarations, neither Defendant Williams nor other GHS staff indicate that they have personally reviewed the examples of pepper spraying relied upon by plaintiffs to show a pattern of unwarranted and punitive use, nor do they even attempt to specifically refute why the use of pepper spray in those circumstances was appropriate. These declarants simply draw the conclusion that pepper spray is not used to punish and used only when warranted. These self-serving and unsupported conclusions should weigh lightly in the balance of evidence being considered by this Court.

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legitimate goal of maintaining institutional order, is unconstitutional if it is excessive or not reasonably related to the purpose it purports to serve. As shown in the following section, the use of pepper spray on youth at GHS does not, in fact, serve its intended purpose.

B. Defendants' Use Of Pepper Spray Is Not Reasonably Related To Its Purported Purpose.

Defendants maintain pepper spray is necessary to force juveniles to comply with staff orders because it results in fewer physical injuries to staff than if physical force were used by staff to exert their control.[4] As evidenced by the most recent use of pepper spray on juveniles at GHS, as well as by the other incidents previously discussed by plaintiffs in their opening submissions, staff, in fact, do not use pepper spray as an alternative to "physically engaging" a resident. Rather, pepper spray is used after a juvenile has been either forcibly subdued or voluntarily calmed down. For example, in the incident which occurred on November 13, 1994, involving Joshua Howell, Kevin Moore and Brian Emmons (described at pp. 19-22 of the Williams Declaration), staff "physically engaged" the juveniles who were acting out and only used pepper spray after the use of physical force when the juveniles were locked in their cells. Williams Declaration, Defendants' Attachment 1 at 19-21; Howell Declaration, attached. Staff ultimately used pepper spray not to avoid a physical "take down" situation but to force one of the juveniles, Joshua Howell, to stop banging on his cell door.

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[4]/ Defendants continuously maintain that whenever a juvenile refuses to follow a staff order, such as one directing a juvenile to stop banging on his cell at night or to move to another location, the only two alternatives staff have to deal with the situation is to spray the juvenile with pepper spray or to "physically engage" (fight) the juvenile to force compliance. Williams Declaration, Attachment 1; Defendants' Memorandum at 4. These are not the only alternatives. Staff could exercise other disciplinary measures such as good time loss or privilege reductions, they could provide intensive crisis intervention counseling to de-escalate a volatile situation, or have the juvenile seen by mental health professionals. The possibilities are not only limited to the use of force.

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The use of pepper spray on Joshua was not necessary to avert the imminent threat of injury or to stop the destruction of property of significant value; he was confined alone in a locked room. Spraying Joshua did not serve the state's purported purpose of avoiding physical confrontations between staff and non-compliant youth because a "physical engagement" between Joshua and staff had already occurred before he was sprayed. Spraying Joshua did not even help to stop his banging because after he had been subjected to pepper spray he continued banging in his cell. Howell Declaration, attached.

While the state has a legitimate objective in maintaining institutional order, it can and must, consistent with the due process clause of the United States Constitution, be served by less intrusive means than the unnecessary infliction of pain. In Joshua's case, there were other means to address his behavior. Joshua could have been provided intensive crisis-counseling by qualified professionals well trained in intervention techniques and/or removed from his cell and taken to another location where he would not bother other youth by his banging.[5] Staff might also have sanctioned his behavior with other disciplinary measures such as good-time loss or limitation of privileges, thus providing a deterrent to such conduct in the future. In sum, the use of pepper spray in Joshua's case, as in many other instances at GHS, was neither necessary nor did it serve defendants' purported purpose of avoiding a situation in which staff "physically engage" youth.

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[5]/ Joshua was, in fact, moved to another cell later the same night he was sprayed. Joshua was moved to a suicide cell in another unit because, after he was sprayed, he threatened to "cut on himself". Howell Declaration, attached as Exhibit 1. Thus, defendants' assertion that staff do not have the option of moving youth to another location when they are disruptive in their cells at night in IMU is not true. See, Williams Declaration, Attachment 1, at 24.

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C. Defendants' New Policy Does Not Provide Sufficient Safeguards To Prevent The Unwarranted Use Of Pepper Spray That Plaintiffs Have Shown Frequently Occurs At GHS.

Plaintiffs seek to preliminarily enjoin defendants' use of pepper spray because, as the evidence shows, staff at GHS have so repeatedly used it in unwarranted situations and to punish youth for not complying with staff orders that a broad restraint on the practice is justified, at least until defendants are able to establish that they have developed sufficient safeguards to insure that pepper spray will be used only in circumstances when there exists an imminent threat of physical injury and when no other less restrictive means exist to address the youth's dangerous behavior. The policy promulgated by defendants after this litigation was filed (Attachment B. to defendants' Memorandum), does not provide sufficient safeguards to insure that pepper spray will only be used in these narrowly defined circumstances.[6]

GHS Policy #4, effective October 1, 1994, permits the use of pepper spray in non-emergency situations. It also maintains the superintendent's authority to approve the use of pepper spray even though defendant Williams has repeatedly approved the use of pepper spray in many inappropriate and unnecessary circumstances in the past. The policy does not insure the use of alternative intervention techniques; it does not prohibit the use of pepper

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[6]/ Defendants maintain that whatever problems existed in the past with respect to the use of pepper spray have now been cured by the promulgation of a new policy. However, as plaintiffs show above, defendants' new policy does not insure that the unwarranted use of pepper spray at GHS will not continue in the future.

Furthermore, defendants' request that this policy should be accorded absolute deference should be rejected. When, as here, it is shown that defendants exaggerate their response to security considerations, deference to their expert judgment should not be accorded. Tribble v. Gardner, 860 F.2d 321, 327 n.9 (9th Cir. 1988), cert. denied, 490 U.S. 1075 (1989) ("In view of the substantial evidence that ... defendants have exaggerated their response to purported security considerations, we do not defer to their expert judgment in these matters.").

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spray to coerce compliance with institutional rules (in fact it permits its use for this purpose), and it does not limit the circumstances when pepper spray may be used to ones where there exists an imminent danger of serious injury to persons or a substantial amount of valuable property. Thus, defendants' new policy does not adequately define the extremely narrow emergency circumstances when pepper spray may be appropriately used by staff at GHS, and it does not provide sufficient safeguards to prevent future abuses like those that have been widespread in the past. Since defendants' new policy does not eliminate the danger of unwarranted uses of pepper spray it should not defeat plaintiffs' request for a preliminary injunction.

III. CONCLUSION

Plaintiffs respectfully ask this Court to preliminarily enjoin defendants from authorizing the use of pepper spray on juveniles at GHS.

Respectfully submitted this 23rd day of November, 1994.

EVERGREEN LEGAL SERVICES
Institutional Legal Services Project
101 Yesler Way, Suite 301
Seattle, WA 98104
(206) 464-0838

PATRICIA J. ARTHUR, WSBA #13769
ROBERT A. STALKER, JR., WSBA #13650

NATIONAL CENTER FOR YOUTH LAW
114 Sansome Street, Suite 900
San Francisco, CA 94117
(415) 543-3307

DAVID LAMBERT