ORIGINAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES HORTON, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BOB WILLIAMS, et al.,

Defendants.

Docket No. C94-5428 RJB

Tacoma, Washington
December 5, 1994
9:30 a.m.

VOLUME I
TRANSCRIPT OF MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE.

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THE COURT: This is Cause No. 94-5428, Horton and others versus Williams and others, and it comes on today for oral argument on plaintiffs' motion for a preliminary injunction.

If you will make your appearances.

For the plaintiff.

MS. ARTHUR: Your Honor, I'm Pat Arthur, for the plaintiff, and with me is Bob Stalker.

THE COURT: Okay.

For the defense.

MS. MURPHY: Your Honor, I'm Carol Murphy, Assistant Attorney General, representing the state defendants in this action. With me is Richard McCartan, my cocounsel, and Bob Williams, superintendent of Green Hill School.

THE COURT: A couple of preliminary questions.

Well, one preliminary question.

Now that the state has adopted a new policy effective 1 October, does that make the question here really whether that policy meets constitutional muster, or do we go behind that to the situation as it used to be?

I guess that's my only question. You can address that as part of the argument, if you wish, Ms. Arthur, and also Ms. Murphy.

So the floor is yours, Ms. Arthur.

MS. ARTHUR: Thank you, Your Honor.

The new policy, we believe, does not meet constitutional muster. I also don't think that that's the only question either, however. I believe that the practices of the defendants before the new policy was implemented is something that the court needs to address and look at in order to understand the degree to which they have abused and misused pepper gas inappropriately and in violation of the youths' constitutional rights in the past. But more importantly, in addressing your question, and also on practice, I think the court needs to look at the practices since the policy. Not only is the question whether the policy meets constitutional muster important, which we believe it doesn't, but I think it is very relevant for the court to look at the practices since the time the policy was implemented.

In that regard, if I may, Your Honor, I would like to approach the bench and offer incident reports that I received on Friday, which were produced by the defendants, and these incident reports and major incident reviews look at the five incidents that have occurred of pepper gas use since the new policy. Actually these new pepper gas sprayings occurred since November 13th, and there were five, Your Honor, in 23 days since November 13th.

If I may, I would like to introduce them to supplement the record.

THE COURT: Hand them up to the clerk.

Do you have objection to these, counsel?

MS. MURPHY: Your Honor, we do. We were given copies of these documents just before this proceeding started this morning. However, we're not prepared to respond to the specific statements made in them at this time.

THE COURT: I thought they were your records?

MS. MURPHY: They are one of several records kept by the institution, that's correct. However, I have not had time to review these with my client and am not prepared to base argument on these documents at this time.

THE COURT: Have you had a chance to read them?

MS. MURPHY: No, Your Honor. As you know, the documents in this motion alone are extremely voluminous.

THE COURT: I know. I've been reading them all weekend.

MS. MURPHY: Right. I'm sure you have. I have not had an opportunity at all to look at the documents that plaintiff is attempting to introduce this morning.

THE COURT: Well, the answer to that, I think, is that this is an appropriate exhibit if it comes from the defendants' records. You will have an opportunity to read them before you have to comment on them this morning. After you have read them and have had a chance to discuss them with your client, if there's something unfair about the court considering them, I will hear that.

Go ahead, Ms. Arthur.

MS. ARTHUR: If I may just comment on a couple of things about the instances that have occurred in the last 23 days before I look at the policy, before I address the question about the new policy.

There were five sprayings since the new policy. Two occurred just on the 27th of November. If the court would look and counsel would look at page 7 of 36 in the packet that I just prepared, this is an atypical example of someone who was sprayed. Out of the five juveniles who were sprayed, four were sprayed for banging in their cells. Four were locked in their cells posing no threat of injury to anyone by their behavior. The only behavior that they were engaged in was banging in a locked cell.

Mr. Iniquez, who is discussed in this major incident review at page 7 of 36, was one such individual who was sprayed for banging in his cell. I want to point the court's attention to this incident in particular. If you look at the bottom of that page, it indicates that after he was sprayed, he hit his head on the exit door. Staff were escorting him to the shower. Again, one of the things that our experts have indicated, not only does the pepper spray itself cause excruciating pain to these juveniles and debilitating, incapacitating pain for a period of time, but it also, because they're temporarily blinded after the spraying, it causes them to be unable to walk

safely, and as we've noted in our papers, that's one of the harms that these juveniles are subjected to, and, in fact, in one of these instances that just happened recently the juvenile was injured.

All the other incidents -- there were four, as I say, who were banging on their cells. The other juvenile was sprayed for refusing to go to his room, even though he was not presenting any kind of threatening or violent behavior. There was no threat of injury to individuals.

In our opinion, Your Honor, as we have set forth in our submissions, it is constitutionally impermissible for the state to inflict this kind of unnecessary pain on juveniles who do not pose an immediate threat of injury. As evidenced even by the examples of use of spray after the new policy, they continue to use pepper spray when kids do not exhibit immediate threat of injury. Juveniles who are locked in their cells, threatening harm to no one, are merely banging on their cell -- and causing disruption, for sure. In our opinion, Your Honor, there are less intrusive means of addressing that behavior. The juvenile could be moved, the juvenile could be counseled, a team trained in crisis intervention techniques could come and address the situation.

The defendants, however, believe they only have two alternatives. One is to spray the juvenile with pepper spray; two is to take them to the ground or physically fight him to

stop him from the behavior, the problem behavior.

Looking at the policy, Your Honor, I don't believe the policy cuts constitutional muster. We believe that under the due process clause, which is the applicable constitutional principle that applies here, juveniles -- unnecessary pain cannot be inflicted on juveniles, and juveniles have a right to be free from unnecessary restraint. In this case the restraint is chemical, but it is a restraint, a painful one, nonetheless.

THE COURT: Are the standards really different for juveniles than they are in an adult institution in this regard?

MS. ARTHUR: Yes, Your Honor, I believe they are. The Ninth Circuit has held in Gary H. v. Hegstrom that though the eighth amendment principles are incorporated as a constitutional minimum into the fourteenth amendment, the fourteenth amendment does provide greater protection. In the Milonas v. Williams case, which is a Tenth Circuit case from 1982, the case that dealt with the Provo Canyon in Utah facility where the issue was the hair holds of the juveniles, in that case I believe that the due process clause relied upon there by the court provided greater protection than an eighth amendment analysis would for a prisoner in an adult facility. Remember, juveniles have not been convicted of crimes and therefore do have greater protection under the fourteenth amendment.

THE COURT: I understand that. Isn't that really a

distinction without a difference as applied to grading?

MS. ARTHUR: I don't think so, Your Honor, in terms of the constitution.

THE COURT: You can analyze these things until you are blue in the face, but what we are really dealing with here is, isn't it, a prison setting with people convicted of committing criminal acts, even though technically they're called something else?

MS. ARTHUR: That's true, Your Honor, but the constitution has held that when a juvenile has not been convicted of a crime -- which is true at Green Hill, even though there's no doubt about it, it looks like a prison, it feels like a prison, there is very little treatment that actually goes on there for juveniles -- the courts have held that for constitutional purposes, if you have not been convicted of a crime, that you are entitled to the broader protections of the due process clause, which includes in this context a right to be free from physical restraints. And at least minimally the eighth amendment would afford the right to be free from the infliction of unnecessary pain, and that's what we think happens here.

THE COURT: Let me ask you a couple of other questions along that line.

Isn't that essentially the same standard that adult prisoners enjoy?

MS. ARTHUR: No, Your Honor, it's not. I think that there's a greater protection under the due process clause, and --

THE COURT: As a practical matter, how does it apply? What's the greater protection?

MS. ARTHUR: The protection is -- I think that there is a different standard under the eighth amendment. I think under the eighth amendment, in order to show that the infliction of pain was unconstitutional, you would not only have to show that it was punitive, which we do in this case, but you would have to show an intent element, a subjective element, which that standard has not been applied in the context of juvenile cases. So the standard is, I believe, different.

But, Your Honor, even under an eighth amendment standard, even with the application of a subjective element that would apply in an eighth amendment analysis, I believe that the plaintiffs would prevail in these circumstances. I believe that the infliction of the pain on these youths at Green Hill School would still be unconstitutional, and that's because these defendants are knowingly, knowingly using pepper gas, which they know causes pain, to coerce these juveniles to comply with institutional rules. They are doing it in the name of the security of the institution, but it is unnecessary. There are other less painful, less intrusive ways of dealing

with the behavior.

One of our experts said 74 percent of the instances that he reviewed, when he looked at the 27 tapes of instances that he reviewed, in 74 percent there was absolutely no problem at all with the kid, that the juvenile was exhibiting. They were quiet, they were calm, there was no danger whatsoever of injury to the juvenile.

So I think the eighth amendment is a different standard, but even if we were looking at the eighth amendment, because it is a knowing infliction of unnecessary pain -- and the policy, going back to the policy, Your Honor, the policy permits it, and that itself, I think, would satisfied an eighth amendment standard, although I think it is a different standard.

THE COURT: You think the policy is appropriate insofar as it allows the use of pepper spray when there is an immediate danger to self, others, or property?

MS. ARTHUR: Almost. Almost, it's okay. The problem with that is that it allows -- it allows threat to property, whereas the cases Michenfelder and Spain, even in the adult context, say it has to be substantial property of value -- of substantial valuable property. So there's a problem with that.

The other thing I have to say with regard to that is that the policy on its face, if it were to just permit pepper spray in that circumstance, where there is immediate threat of injury to self or others or substantial valuable property, I think

would be appropriate, but that's where it's very important for the court to look at the history of what has been going on for the last three years at Green Hill School. And I think, as we proposed in our proposed preliminary injunction, which I submitted to court and opposing counsel this morning, I think that they have so demonstrated at Green Hill School their inability to use pepper gas only in narrowly described -- in those narrowly described circumstances, that there needs to be a plan of -- a new policy that limits it just to those narrowly defined circumstances, and a plan to implement that policy in a way that staff can understand it.

Your Honor, in the depositions that we took of three people before filing this motion, three staff members responsible for implementing the policy at Green Hill School, two didn't even know which policy was in effect at the time that they were providing testimony. They were actually operating on the policy that had been superseded a year or so before. The staff there are incapable and have demonstrated their inability to limit their use of pepper spray to only the emergency kind of circumstances that the constitution would permit.

And for this reason, Your Honor, we have presented a somewhat unusual proposal in terms of the injunction that we are seeking. We are asking you to enjoin them from using it period, because they are not able to at this point use it

within the confines of the constitutional rights of the juveniles, but afford them an opportunity, because it is proper for them to devise a policy that would meet the constitutional limits that apply, and to develop a plan that will help train their staff to abide by that policy that limits the use of pepper gas only to very narrow emergency circumstances.

If I might --

THE COURT: Do you think that standard, the appropriate standard, is set out in Spain? Do you think that's the test?

MS. ARTHUR: I think the Spain standard is an eighth amendment standard, Your Honor, and I think the appropriate standard is the Milonas v. Williams, which is a due process juvenile case, which is a Tenth Circuit case.

THE COURT: What was the standard in Milonas?

MS. ARTHUR: Milonas says that it violates the fourteenth amendment to inflict unnecessary pain unless there's violence -- a threat of violence. It doesn't talk about property, and it's not all that clear, Your Honor. But my reading of Milonas is that it would be inappropriate to use any kind of force. In that case, it was simply -- I think it was called Indian hair holds or something. It was they used hair holds on juveniles to manage them when they were disruptive or difficult. In that case, the court said unless there's a threat of violence, that kind of -- that kind of punishment is

what is prescribed, that kind of force is not permissible. And it doesn't talk about the --

THE COURT: I'm under the impression that the state agrees that pepper spray may not be used for punishment purposes.

MS. ARTHUR: Indeed, Your Honor. Not only do they believe that that's the legal standard, but their declarations that they have submitted in fact support our position. If you recall the declaration of Craig Apperson and Dr. Dubey, the two mental health people whose declarations were submitted in support of the defendants' papers, those two individuals -- who, by the way, it never indicates in their declaration and their joint declaration that they looked at one videotape or reviewed one incident report of any actual use of pepper spray, and there's been over a hundred, over a hundred incidents. So I think what they say in terms of what the practice is at Green Hill Schools needs to be scrutinized because they didn't, as far as the papers reveal, review any incident of the use of pepper spray.

But regardless of that, they start out their declaration by saying, to use pepper spray as punishment would be inappropriate. In their professional judgment, it is inappropriate, which is the position that our experts take, which is the position that we maintain as well. The question is, is banging on -- is a juvenile locked in a cell banging on

the door necessary? Is that punishment? We believe because it is not necessary and there are other less painful intrusive ways with dealing with that circumstance, it is punishment.

If I may say one other thing about the policy as it is written -- I'm not sure if this is necessary -- but on page 3 of the current policy, I think this is where the problem with this policy --

THE COURT: Wait a minute. Wait a minute. I don't see on your copy of the policy --

MS. ARTHUR: It's on the top of the page.

THE COURT: It's -- okay. So it's --

MS. ARTHUR: It's "Green Hill School Policy/Procedure #4."

THE COURT: Okay. All right.

MS. ARTHUR: The page number is on the top of the page. The third paragraph down is what I want to talk about in that, where it starts "Aerosol may be used when a resident fails to comply with" --

THE COURT: Now, wait a minute. Wait a minute. We're not in the same place.

MS. ARTHUR: We're not at the same policy. Are you looking -- are you looking at the Green Hill School Policy/ Procedure #4?

THE COURT: Yes. But up at the top, the page stamp is 004, in what you gave me.

MS. ARTHUR: Your Honor, I actually took this copy --

THE COURT: I think it's the third page.

MS. ARTHUR: I think it is, too. I took this copy out of the defendants' submissions.

THE COURT: So it's the paragraph beginning "Aerosol may be used"?

MS. ARTHUR: That's correct, Your Honor.

THE COURT: Okay.

MS. ARTHUR: That, I think, is the key paragraph and one of the key problems with this policy. It clearly permits, under that paragraph, aerosol restraints to be used whenever a juvenile fails with a staff directive and other physical restraint measures to gain compliance without the use of aerosol likely would result in bodily injury to the resident, staff, or others.

Let me tell you what's wrong with that paragraph before I go on to the next.

The problem with that paragraph, Your Honor, is that, as we see from the submissions of Mr. Williams and other staff people, and also the depositions we took of the staff members, the staff at Green Hill School interpret that whenever a juvenile violates a rule -- if they don't stop banging their cell, for example -- that the only alternative that they have is to fight that juvenile, therefore risking injury, or to spray him. And that's the construct that they've created to

suggest that bodily injury would result if they don't use pepper spray. Therefore, any time a juvenile breaks a rule, they can justify using pepper spray because the staff would have to take them down.

Now, what that does is, number one, it defines the constitutionality of the use of pepper spray in terms not of the juvenile's behavior. It doesn't define in terms of whether the juvenile himself is presenting a danger or is exhibiting conduct that is violent, but rather it defines the need for pepper spray in terms of the guard's behavior. It suggests that if the guard would have to fight the juvenile, and therefore it's the guard's behavior that is going to cause the risk of injury, that therefore, whenever there's a rule violation, we can use pepper spray. And that's exactly how they interpret it. That's why they can broadly -- that's why the staff broadly used pepper spray in any instance when a juvenile has failed to comply with the rule.

And going on to the second paragraph, Your Honor, the second clearly is inappropriate because it allows the resident to be sprayed who fails to follow staff directive and engages in disruptive behavior which creates a serious disturbance and threatens institutional security by inciting serious misbehavior by other residents. There is no suggestion in that portion of the policy that there even needs to be a threat of physical or emergency of a physical harm.

That's the key of, I think, what's wrong with this policy, Your Honor.

So in answer to your question, I think the policy is constitutionally infirm. I think their practices as they have existed prior to the implementation, and even after the implementation, of the policy inflict unnecessary pain on these juveniles, cause them to be subject to restraint, unlawful chemical restraint, in violation of the Constitution.

That answers your question about the policy, I think, Your Honor.

THE COURT: Let me -- I have so many papers here I can't find what I'm looking for.

Here it is.

I don't want to blind side you all with a different approach, so let me suggest it and see if you have comments on it.

Under the law, the juvenile officers -- whatever you call them -- in an institution have a right to use reasonable force to gain compliance with lawful objectives. Right?

MS. MURPHY: Yes, that's right.

THE COURT: Reasonable force is ordinarily defined in some way as what is necessary under the same or similar circumstances. There are some other things about that, that if you are in a lawful place, you need not retreat and you don't have to wait for actual force if there is a threatened use of

force. You can consider that and respond with the force that is reasonable under the circumstances. The reasonable person test, the reasonably prudent person test.

Under that -- and the same thing is true if it's self-defense, you can use reasonable force under the circumstances to defend yourself or others. All of the use of force by officers and, for that matter, by other people is governed by the reasonable person standard.

Does that apply here? And if so, is that one of the things we are looking at, is the reasonableness of the use of this particular force in these particular circumstances?

MS. ARTHUR: I would like an opportunity to think about it more, Your Honor, and brief it, if you think it is necessary, but I have an initial response to it as well.

My instinct about it is that a reasonable force standard is not one that has been applied under the due process analyses of other courts in analyzing whether force has been constitutional in an institutional setting. And I think that the reason that it may not be appropriate, it's not comparable to a situation where you get someone who is defending themselves, for example, and I don't think it's comparable to a situation of a police officer on the street responding to an individual, because these are juveniles who have been taken into the custody of the state, and as a result of that unique relationship between the state and the juvenile, which is by

law clear, creates or gives rise to certain constitutional rights that the juvenile has in that circumstance that may not make that analysis appropriate.

I don't know --

THE COURT: Let's aim at it from a different direction. Part of this case are section 1983 claims.

MS. ARTHUR: Uh-huh.

THE COURT: Isn't that the standard that would be applied on claims for money damages?

MS. MURPHY: There are no claims --

THE COURT: Section 4 standard.

MS. MURPHY: There are no claims for money damages in this case, but again, I don't believe that that would be the standard with regard to this circumstance where you have juveniles who are detained by the state, presumably for purposes of providing treatment -- or at least the fiction is legally that's what is to occur. And there are unique -- because of that unique circumstance, there are different standards. I think that that would apply on the damages issue as well.

THE COURT: Let's just take a for instance, that some young man is banging on the bars creating a disturbance. Staff determines that it is threatening institutional security -- whatever that means -- so they zap the guy with spray and he's injured by this, in whatever way, and he sues the state and the

officer for money damages because they used more force than is reasonably necessary under the circumstances.

Aren't you right into an excessive force analysis?

MS. ARTHUR: It is an excessive force analysis in some of the fourteenth amendment cases, to the extent that the cases say -- and I think Youngberg v. Romero says this -- that an action becomes punitive if it's excessive. It gets you back into the reasonableness standard in that way.

So I think certainly reasonableness, the reasonableness of the actions is a very important critical factor that the court needs to analyze. I would look at it a little differently as it -- because I think it comes into play, that analysis comes into play on the question of whether or not the infliction of pain or the use of force is excessive or reasonable under the circumstances, because if it's not, it's punitive.

THE COURT: Okay.

Thank you, Ms. Arthur.

Ms. Murphy, let's take a minute to read this exhibit. If you need more time, why, let me know.

MS. MURPHY: Your Honor, I'm prepared to start at this point, if that's okay with you.

THE COURT: Pardon me?

MS. MURPHY: I'm prepared to start at this point, if that's okay with you.

THE COURT: I'm not. Let me finish this.

Okay, Ms. Murphy.

MS. MURPHY: Thank you for that opportunity, Your Honor.

I would just like to start by talking about the population, briefly, at Green Hill.

Of all juvenile offenders in the State of Washington, those housed at Green Hill are older, mostly repeat offenders, and the majority have committed violent crimes. Most have been found by the court to have committed offenses equivalent to felonies in adult courts.

Some residents come to Green Hill from other institutions, juvenile institutions, in the state when they become too difficult to handle at other juvenile institutions. Despite this challenging population, and contrary to the picture that's painted by the plaintiffs, pepper spray is actually used very seldom. In over the last four years, it's used about 106 times.

THE COURT: What's the population there generally?

MS. MURPHY: The population is between 170 and 190 over the last calendar year, with a staff of approximately 200. This is a challenging institution, at best. The residents only come there after showing that they do not behave in regular society.

As I said, pepper spray is not used routinely. In fact, over the last four years, only 105 times. That's an average of

about two a month.

Now, interestingly enough, that statistic has gone up since this lawsuit has been instituted. But only about 94 -- excuse me -- 94 percent of the residents at Green Hill have not been sprayed with pepper spray, so it's not a common occurrence.

The plaintiffs have said that Green Hill looks and feels like a prison, and maybe that's true because of the population and the residents there. However, the staff at Green Hill have an even more challenging responsibility than prison officials because in addition to having to maintain an orderly institution, the safety and the security of residents there, as well as staff, the administrators there also have a responsibility to send these residents to school every morning, to engage them in programming, and this applies no matter what type of disciplinary sanction applies to the resident. So it's even more difficult than a prison setting because the administrators do not have all the tools available in a prison setting, rather, because of the fourteenth amendment standard, the burden on administrators is much higher on maintaining a safe and secure institution as well as maintaining the programming and education, and that requires that the residents get a decent sleep at night so that they can get up at 6:30 in the morning and go to school.

The plaintiffs are asking this court to ban pepper spray

from Green Hill School. This is an outrageous request and not done by any court in this country. The plaintiffs have submitted to us only this morning their actual request for relief. However, that order is extremely far-reaching and clearly beyond the constitutional minimum.

There are no pepper spray uses at issue before us today. This is a request for injunctive relief, and the only consideration is what is going to happen in the future.

The plaintiffs face a difficult burden in this stage. They must show the likelihood of prevailing on the merits of this case as well as a significant risk of irreparable injury. Because plaintiffs' submissions have shown neither, they are not entitled to injunctive relief.

In order to prevail on the merits of their fourteenth amendment claim, as was mentioned earlier, the standard is that the plaintiffs must show that the current pepper spray policy is not reasonably related to legitimate government objectives, and also that the use of pepper spray constitutes punishment. And as was alluded to earlier, that's the difference between the eighth amendment standard and the fourteenth amendment standard. The standards come from the Gary H. case and the Youngberg case, and it's very similar to the eighth amendment standard which applies to the prison setting, which is that a reasonably related government objective will justify infringements on a person's liberty.

The plaintiffs' submissions show that pepper spray is not used in the institution as punishment, and I will get to that later. The cases in this area speak to taser guns, tear gas, and other substances that were known by the court to cause harm at the time that the court decided those cases. Despite that, those courts did not completely ban those substances from the institution, whether it be a juvenile institution or a prison. Those cases found that the substances may only be used in specifically subscribed circumstances, and that's exactly what we have here.

Another distinction between the case -- the published cases that we have regarding taser guns, tear gas, and other substances is that what is at issue here is pepper gas, which has not been shown to cause any long-term effects whatsoever. That's a major difference that --

THE COURT: But it causes short-term pain.

MS. MURPHY: Short-term discomfort, that's correct. The defendants do not dispute that.

THE COURT: You choose to use "discomfort" rather than "pain"?

MS. MURPHY: It's been described various ways, Your Honor. But our experts agree that it does cause burning of the eyes and difficulty in breathing, all short term. And no long-term effects have been shown to result from the use of pepper spray.

Once again, this is a distinction between the other published cases regarding chemical restraints.

Since the pepper spray policy was first utilized -- since pepper spray was first utilized at Green Hill in 1990, staff has continually been updating their training and improving their policy. The latest of those is represented in the current policy that went into effect on October 1st of 1994.

Once again, that is the issue before this court, is the current policy. The officials at Green Hill should be given at least the opportunity to correct any alleged improprieties in the use of pepper spray, and staff have done that. They have taken the opportunity to draft a policy which specifically subscribes the points at which pepper spray may be used. It may only be used when the superintendent has authorized it under the specific criteria mentioned in the policy. And the policy also mentions specific factors.

Unlike the picture that the plaintiff would like to paint regarding the institution, the restraint policy and pepper spray are but one tool used by staff when difficult situations arise. As shown in the defendants' submissions in this motion, Green Hill School manages staff behavior through extensive positive reinforcement, including mental health services and other positive reinforcement techniques. Good behavior is rewarded with privileges, and that is the basis for behavior modification at Green Hill School.

In terms of their recent sprays and the submissions by the plaintiffs today, it is inappropriate to at this point second-guess those uses. It is appropriate to look and consider whether the pepper spray was used in accordance with the policy, and it is clear that it was.

Plaintiffs summarily state that residents who were involved in these incidents posed no threat or risk of injury. However, several staff members found that there was a risk or a threat of injury, and that's reflected in the reports. It's easy with a cold record after the fact and outside the institution to look at these documents and say these people did not present a risk of harm. However, officials at Green Hill at the time dealing with a situation which was escalated to the point of having to restrain a resident decided to deal with the situation in that way. And I think that this court cannot find that that was a clearly unreasonable response to the situation.

In addition, plaintiffs fail to point out that the use of pepper spray has been averted in two out of three times for which it has been authorized. The use of pepper spray has been authorized by the superintendent approximately 330 times since the pepper spray use went into effect at Green Hill School. However, it's only been used a little over a hundred times. This demonstrates the de-escalation techniques utilized by staff at Green Hill. Unlike plaintiffs' contention that staff at Green Hill utilized pepper spray in any difficult situation,

that simply is not the case. In fact, staff de-escalate the situation in the majority of the cases.

Appropriate use of pepper spray has been shown to significantly reduce injuries to staff and residents. As the record indicates, the number of injuries in the year prior to the implementation of the pepper spray policy is equal, approximately, to the number of all injuries since then, in the four years since then. Therefore, this record clearly indicates that there's been a decrease in injuries both to staff and to residents, and in fact that is the reason for the policy.

Decreasing physical combat also decreases potential exposure to blood form pathogens, including HIV, and that's shown in the submissions of the state defendants.

Green Hill School staff psychologist and contract psychiatrists agree that the use of pepper spray results in a better treatment environment by removing the risk of injury and discouraging assaultive behavior.

THE COURT: Do you think the use of pepper spray is combat?

MS. MURPHY: It's not physical combat. It is a chemical restraint, so in that context, I suppose it does restrain the person. That is the intent of the chemical. However, it is intended to avoid combat, and that is physical confrontation. And as the staff psychologist at Green Hill, as

well as a psychiatrist stated, that avoiding that physical confrontation, that actual hand-to-hand combat, reduces injuries as well as increasing the rehabilitative efforts at Green Hill School.

Now, the plaintiffs' experts would claim that pepper spray, and in fact any combative behavior whatsoever, would be contrary to rehabilitative efforts. Perhaps that's true, but plaintiffs offer no alternatives. Absolutely none. No alternatives offered when a resident is completely out of control. And as I stated before, Green Hill School administrators have a difficult job. They have to control these residents, and not allow the residents to control the institution. The plaintiffs' experts offer absolutely no alternative rather than counseling, and counseling is already utilized by Green Hill staff. In fact, it's required to be utilized by Green Hill staff to de-escalate any situation. As our statistics show, counseling has been utilized successfully to de-escalate those situations where pepper spray has been authorized. Pepper spray is only used when all other methods of negotiation have proved unsuccessful. That's not contested.

Staff at Green Hill School who are familiar with the environment and the population believe that pepper spray is an essential tool to minimize staff injuries and retain control over unruly inmates. Although plaintiffs' experts somehow believe that counseling will stop a resident who is unruly,

that simply is not the case. In fact, accepted principles of juvenile rehabilitation state that certain combative techniques are appropriate, and the pepper spray policy at Green Hill is specifically intended to avoid combative type of behavior.

THE COURT: Don't you think it is combative behavior on the part of staff when they use it? You want to talk about it as restraint, but --

MS. MURPHY: That's right.

THE COURT: -- it's really a weapon, isn't it?

MS. MURPHY: Excuse me?

THE COURT: It's really a weapon, isn't it?

MS. MURPHY: It could be termed as a weapon, and some courts have seen it that way. However --

THE COURT: It's the only restraint listed in your policy that is usable for combat or that inflicts pain by its nature.

MS. MURPHY: It would be the state's position that physical confrontation automatically inflicts pain, and it is the purpose of the pepper spray policy to avoid that injury because there is no long-term effects whatsoever of pepper spray. So unlike any other method --

THE COURT: Why don't you -- just as a for instance: How about electric shock, a cattle prod that is toned down for human use. Anything wrong with that?

MS. MURPHY: Let's talk about the cases that have

decided issues like that, and there have been cases dealing -- that's exactly what a taser gun is. A taser gun is a low-level shock applied to a resident. The cases that have dealt with taser guns have not shown that taser guns need to be banned from institutions. None of them have shown that.

THE COURT: Their use has to be --

MS. MURPHY: Limited, exactly.

THE COURT: To what extent?

MS. MURPHY: The state would agree that even the use of pepper spray should be limited, even though it is different from the use of a taser gun in that there is no long-term effect whatsoever. Taser guns, as well as tear gas, if used in high concentrations, can be lethal. This is not true of pepper spray. There is no lethal amount.

THE COURT: Do you think it would be constitutionally permissible to use a taser that is toned down so that it will not create long-term harm, and to use it in the same way as pepper spray is used?

MS. MURPHY: In fact the cases have shown that taser guns can be used appropriately, and as long as --

THE COURT: I guess what I'm asking you is, what is appropriately?

MS. MURPHY: The cases state that when there is a threat of harm that it is appropriate use to engage in the use of chemical restraints, as well as taser guns.

THE COURT: We're not talking about that necessarily here, a threat of harm, are we?

MS. MURPHY: I believe that we are, Your Honor. I believe that we are. And in order to show that, why don't I go through what the new policy is and the significant test that is listed on the new policy.

The new policy specifies the reasons for, the warnings prior to use, and requires that the superintendent authorize each use. The current policy test is that pepper spray may only be used when a resident fails to comply with a staff directive and one of the two following applies.

a. the use of other physical restraint measures to gain compliance without use of pepper spray likely would result in bodily injury to the resident, staff, or others. Clearly, that means that without the use of pepper spray, there is a threat of physical bodily harm to resident, staff, or others if it is not used.

THE COURT: By whom?

MS. MURPHY: Excuse me?

THE COURT: Threat by whom?

MS. MURPHY: A threat by the resident.

The resident's failure to comply with the directive --

THE COURT: It doesn't really say that it has to be a threat of violence by the resident, though.

MS. MURPHY: No. What has to happen is that the

resident fails to comply with a directive, and staff, in enforcing compliance with the directive, if having to use physical restraint measures in order to do that, would result in injury.

So the appropriate instance in this case would be when a resident is out in a common area and creating a disturbance, not complying with a staff directive, and the only alternative that the staff has is to physically engage the resident in order to make them comply with the directive.

Now, plaintiffs claim that the state defendants misstate their choices at this point. However, all of the choices are in the resident's court. The resident is the one that chooses to disobey the order, and the resident is the one that chooses after ten minutes of being warned that they would rather be sprayed with pepper spray than comply with the order. The staff has already issued possible decisions to the resident. "Do you want to comply with the order?" Counseling to the resident.

THE COURT: Let's take some for instances here.

Suppose the staff says, you know, for a ridiculous example, part your hair on the left instead of on the right, and the guy says no. So they talk to him about that for ten minutes and warn him and everything else, and he says, "No, I'm not going to part my hair on the other side," and in order to get compliance, they are going to have to take him down and

part his hair themselves. Would that give them grounds to use pepper spray?

MS. MURPHY: No, Your Honor, and that is completely distinguished with what we have before this court today. The plaintiffs do not dispute whatsoever that the orders and the directives that have been issued by staff and disobeyed by the residents in each of these instances have been reasonable orders. There is no question as to that.

THE COURT: The point of my question is that, unless I missed it, "staff directive," as used in the policy, is not defined.

MS. MURPHY: Correct, and I think there is an assumption that it would be a legitimate staff directive, and there has been no showing whatsoever that staff have abused that.

The law is clear in that first instance that the use of other physical restraint measures would likely result in bodily injury. The Spain and Michenfelder cases indicate that that standard is met in this policy.

The second reason it can be used is under (b), and I don't know if you're following along with the policy here.

THE COURT: Yes. I've got it.

MS. MURPHY: "The resident is engaging in disruptive behavior in his room which creates a serious disturbance and threatens institutional security by inciting serious

misbehavior by other residents." So once again, we do have threatening behavior. We have threatening behavior in each instance that pepper spray is used.

THE COURT: There is no threatening behavior in the second one. It is disruptive.

MS. MURPHY: And threatens institutional security.

THE COURT: But the resident doesn't have to threaten institutional security

MS. MURPHY: No.

THE COURT: The situation has to threaten institutional security.

MS. MURPHY: Exactly.

THE COURT: By inciting serious misbehavior by other residents. So you have a situation where one resident may be creating a fuss in his room and the staff may be worried that others will join in, in some way, and so they can conclude, well, he's, by this noise, he's inciting others. And what is institutional security?

MS. MURPHY: Your Honor, in each of the instances that it has been used under the new policy, inciting serious misbehavior in other residents is not just a likelihood that it will happen, but actually other residents banging and continuing with that same sort of behavior. So it's not just a likelihood that it will incite other residents.

THE COURT: We're talking about your policy.

MS. MURPHY: That's correct.

THE COURT: The policy says "by inciting serious misbehavior."

MS. MURPHY: Inciting, not threatening to incite. So the behavior of the resident has to actually incite others.

THE COURT: I don't think that's what this says.

MS. MURPHY: At any rate, the --

THE COURT: I think to get it to mean what you just suggested the word would be "incites" serious misbehavior. In other words, the act of inciting doesn't require that you incite anyone actually. It refers to an attempt or actions that may incite.

One thing that troubles me about this, Ms. Murphy, is what is institutional security?

MS. MURPHY: It's true that it's not a well-defined term, and it's not a well-defined term in the law, either. As this court is well aware, that's a term that's used fairly frequently in the prison context, in the state of the law regarding prison policies. There is no clear-cut standard on exactly what institutional security is. There are many policies in prisons and juvenile institutions which are there for the purpose of institutional security. However, it's the purview of the court to look at the policies and only find them to be unconstitutional if they are clearly unreasonable in light of the standard. And the standard is reasonably related

to legitimate government objectives.

As I indicated to you before, Green Hill administrators have not only an objective to keep residents safe from harm, but also to -- the rehabilitative efforts of the school are very important as well. The school administrators are required to allow an environment whereby the students can get up in the morning and go to school, and many of these instances that we're speaking of that have occurred recently occur at all hours of the night and involve several residents.

Now, when you're looking at alternatives, let's look at what the administrators at Green Hill School are left with. They're left with the possibility of removing that student in order to allow the other residents to be quiet and calm down; allowing that resident to go on, uncontrolled banging, yelling, screaming, inciting others to do the same, and the whole unit doesn't sleep that night, and could cause a real disturbance in their cell, causing a staff member or several staff members to have to go in and restrain them. These are the types of things that happen when a situation like that is allowed to escalate.

Green Hill School administrators dealing with the population that they have, with the experience that they have, have determined that the pepper spray policy and the restraint policy in effect is an effective way of responding to the legitimate objectives that they have before them. Unless this court, the plaintiffs, or somebody else comes back with a

better alternative, that's what the Green Hill officials have decided to do. And there is no better alternative given by the plaintiffs in that situation.

The plaintiffs' experts are also opposed to isolation cells. So what are we left with? Are there no tools that Green Hill administrators can use in order to control that behavior? Is it supposed to go on unchecked?

THE COURT: Do the adult prisons in this state have a pepper spray policy?

MS. MURPHY: Yes, they do, Your Honor. Every institution does.

THE COURT: What is the criteria for use in the adult setting?

MS. MURPHY: In the adult setting, it's -- obviously this is not in the record. However, in the adult setting it's a little bit different, and the reason for that is in the adult setting, the IMUs, or intensive management units, are completely segregated, isolation cells in which the inmates reside there for 23 hours a day at least. So that is an option in the prison system. That is not an option in the juvenile rehabilitation system. So the standard is different. But in the case of an inmate in the correctional facility who refuses to obey a staff order and must be physically restrained in order to comply with that order, pepper spray is appropriate. And, in fact, the correctional officers have been used in past

to train Green Hill staff, and the training is definitely adequate, although the standard used at Green Hill is very different than the correctional standard, as I said, because of the alternatives available in the prison setting, and those alternatives are simply not available in the juvenile setting.

All of this, of course, is not in the record in this case.

THE COURT: I understand.

MS. MURPHY: Besides listing those two specific instances, in accordance with the Michenfelder and Spain case, the policy requires staff to attempt to gain compliance.

THE COURT: Wait a minute. Wait a minute. Spain doesn't say anything about institutional security, does it?

MS. MURPHY: No, Your Honor. I was talking about the standard with regard to responding to legitimate governmental objectives.

The staff policy requires staff to gain compliance through verbal instruction and negotiation which shall continue up to the time that pepper spray is used, and in fact that has been done in every single instance, and plaintiffs do not claim that it hasn't been used. Up until the time pepper spray is used, the resident has always been given an opportunity to comply with the staff directive.

Now, this --

THE COURT: If it's used because somebody is making noise in his room or cell, at the time it's used, there is

almost always at that moment compliance, is there not?

MS. MURPHY: Usually, yes. For a very short period of time. But, Your Honor, to say that is to say that if a resident, when, after refusing the instruction and after given a ten-minute warning period still refuses the instruction, holds up their hands in front of their face, does that mean that they are complying with the order and therefore should not be sprayed?

Once again, these are difficult decisions, and it's extremely difficult to look at a cold record in this courtroom rather than at the institution where staff are dealing with these issues and say, "No, that situation is over; that situation has de-escalated and that resident will comply," when in fact the actions of the resident indicate that they will not comply. And that ten-minute waiting period is very important because the resident is given every opportunity to comply with the instruction.

Now, it often happens, and it is in the submissions and affidavits of the defendants, that a resident will play a game with the staff.

THE COURT: Sure.

MS. MURPHY: And that's a difficult situation, as well. We have attempted to interpret the policy and to draft a policy.

THE COURT: I think it's fair to say that many of

these young men are manipulative.

MS. MURPHY: I think that would be fair to say, Your Honor.

The plaintiffs claim that the application of this policy is broadly interpreted by staff. However, that is contrary to the statistics shown that conflict is resolved prior to use of pepper spray. Once again, in only one out of three cases that it's been approved is it actually used.

THE COURT: I want to ask you to wind up here. We're way over time, Ms. Murphy.

MS. MURPHY: Okay.

Let me just get briefly to the weighing of the alternatives and the risk of irreparable injury.

Staff at Green Hill are required every day to deal with almost intolerable decisions. These decisions are in regard to controlling inmate behavior when they are, by definition, out of control. Juvenile rehabilitation is not a perfect science. How staff should respond to serious misconduct is not an easily answered question. It's a difficult question, but it can be answered by stating the law. Unless it's shown to be unreasonable, we must rely on the professionals in the executive branch of government charged with the duty of overseeing such matters.

Pepper spray is not tantamount to punishment. The simple reason why the use of pepper spray at Green Hill is not

punishment is because it is not used based upon what the resident has done, but rather what the resident will do if action is not taken. And this distinguishes the Green Hill case from the corporal punishment cases cited by the plaintiffs.

Green Hill School officials have made a judgment based on the ever present risk of harm. There is a risk of harm whenever a resident is out of control. The only question is how severe, how long, how many people it will involve. The risk of irreparable injury with pepper spray is no more than a risk of irreparable injury suffered by staff and residents when physical force must be used to control a resident. Banning pepper spray will not decrease the risk of harm. In fact, the risk of harm will be increased, and that's shown by the record.

The state defendants respectfully request that this motion be denied at this time.

THE COURT: Thank you.

We're going to take ten, and I will give you an opportunity for brief rebuttal, Ms. Arthur.

MS. ARTHUR: Thank you, Your Honor.

THE COURT: We will reconvene at 11:00 o'clock.

(Recess.)

THE COURT: Ms. Arthur.

MS. ARTHUR: Thank you, Your Honor.

MS. ARTHUR: I will be brief, Your Honor. I would

just like to make two points in response to what the state has said. I could say a lot, but I will refrain from taking up the court's time, but I do want to respond to two things.

First of all, the state claims that they used pepper spray infrequently at Green Hill School and it's not used very much and it's only used in rare circumstances. The record just does not support that. That's only the record on this preliminary showing. Of course, we would be able to show more on trial on the merits.

In the last 23 days, in the last couple of weeks, at the Green Hill School they have used pepper spray on five different juveniles. It's not used at the other juvenile institutions in this state like it is at Green Hill, even though juveniles at Maple Lane are very similar to the juveniles who are confined to Green Hill School.

I thought it was intriguing that Your Honor asked about the prisons because in the institutions, in the adult institutions, we receive very few complaints about its use there. And I also think that adults who are confined in intensive management units in the prison are as capable of banging on doors, for example, as juveniles at Green Hill School. But in comparison to the other juvenile facilities in the state where the same problems exist, it's just used exorbitantly much at Green Hill School.

Besides that point, I also wanted to respond to the point

that the defendants made that there are no alternatives; we have presented no alternatives. I think part of the problem here is that the defendants see that only two alternatives exist when a student is misbehaving or a resident at the institution is misbehaving. They only see the alternative of fighting or physically confronting the juvenile or spraying them.

We have suggested in the papers that we have given the court that there are other alternatives. They could move the juvenile who is banging to another cell. In fact, that's what they did in Joshua Howell's situation, one of the juveniles who was sprayed since the implementation of the new policy, and continued to bang after he was sprayed. They ultimately just moved him to a different unit. They could, at the time of the incident, bring in people who are trained in crisis counseling. That does not happen now, Your Honor. Even though there's counselors -- quote -- counselors available at Green Hill School, people with mental health training are not available at night when these incidents are happening. The only people who are in to address the circumstances are the security staff, and those are the people who actually ultimately end up downing the protective gear to spray the juveniles with pepper spray.

Our experts have suggested that there is training available beyond what is given currently to staff at Green Hill School so that a crisis team could be trained to intervene in

these kind of circumstances, physically, if necessary, in a manner that would not cause harm, and preferably through counseling and de-escalation techniques. That does not happen right now at the time of the crisis.

One of the juveniles who was sprayed, the man who had cut on himself and sprayed ketchup out the window and was acting very bizarrely during the course of the day that he was sprayed, there was never a mental health person who saw him during that incident. None of these juveniles are seen by people who are truly trained, even though there may be counselors available during the day for the youth to talk to about their release plans or other things like that.

So those are the two points I would like to make, Your Honor.

We urge you to grant our motion for preliminary injunction, and thank you for taking the time to hear us today.

THE COURT: On a question that is not part of this case, but I am curious about. I have been reading in the past about closing Green Hill. What is the status of that?

MS. MURPHY: Green Hill is not scheduled to be closed.

THE COURT: There was a lot of talk about that at one point.

MS. MURPHY: Right. There are currently efforts underway to rebuild portions of the institution, in fact.

THE COURT: I get the impression from this case and the additional exhibit filed this morning that this -- and I guess, also, I must say, from just general knowledge, that this problem is exacerbated by the facility. The problem of control at Green Hill is exacerbated because it is an outdated facility. In reading Exhibit 1 this morning, what I read was an indication of a facility that is out of control or not in the kind of control one would hope for. Those events happen in juvenile and adult institutions, but it seems like, for whatever reason, they're happening more than one would hope. That doesn't tell us a lot in regard to this issue, perhaps, but that's my impression from what I read, you know. For whatever reason, there is not the appropriate level of control there that there should be.

I've got to do some more work on this before I rule. People like to know where their judge is coming from sometimes. You should -- well, maybe you should or shouldn't know. I was going to say you should know, but maybe you shouldn't know. It's a matter of public record, I guess. I have worked in a juvenile facility, the King County detention facility, years ago. The population was somewhat different. I worked in the junior unit, which was basically junior high age, and the senior unit, which was senior high age, and in the security unit at that facility on and off for a year or so while I was in law school. As a superior court judge for 17 years, I was a

juvenile court judge and responsible with the other judges for our facility, building a new facility in Kitsap County, which is now obsolete and they are talking about building a new one. I sent a lot of kids into the state facility at Green Hill, as well as other state facilities, in years past. I have spent quite a bit of time in years past around adult institutions here and in other states.

That experience may be just enough personal experience in the juvenile system to make me dangerous because it was a long time in the past, but I have had some personal experience with big, strong male juveniles acting out in an institutional setting. You can't always talk sense to them, although sometimes you can. Some staff in those situations are much quicker to anger than other staff, much quicker to react. Some staff can take it when the inmates or residents or students -- whatever you want to call them -- curse you personally and the like; others react inappropriately to such things. There is a great difference in the way that individuals handle the kinds of situations that are described, particularly in Exhibit 1 that was filed this morning. Those differences make it all the more important to have a policy that is workable, as well as a policy that meets constitutional requirements.

Those are all preliminary comments that don't really have much to do with the specifics of this case.

I don't want to get into decision making here, but I can

tell you this much: I think the question in this case is really the state's policy as it now exists. What has gone on before, the history that's gone on before, is of some value in determining the legal questions to be resolved that surround the present policy. What's happened there is of some interest, perhaps, and tells us some things, but the real question in my mind is the question of whether the current policy is appropriate.

I will address that. I don't want to spend a long time on this. I think it should be resolved immediately.

What do I have tomorrow morning at 9:00 o'clock or so, Jean?

THE CLERK: A plea.

THE COURT: I think I will be able to give you an oral ruling tomorrow at 9:30. That will give me the rest of today to do what I have to do, and that should be ample time. I've read, I think, everything that you have filed. I just have to think it through and consider it. If you want to come back tomorrow at 9:30, I will resolve this issue.

MS. MURPHY: Thank you, Your Honor.

MS. ARTHUR: Thank you, Your Honor.

(Above hearing recessed at 11:15 a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Julaine V. Ryen
JULAINE V. RYEN

12-27-94
Date

ORIGINAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES HORTON, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BOB WILLIAMS, et al.,

Defendants.

Docket No. C94-5428 RJB

Tacoma, Washington
December 6, 1994
9:30 a.m.

VOLUME II
TRANSCRIPT OF MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE.

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Proceedings recorded by mechanical stenography, transcript produced by Reporter on computer.

THE COURT: This is Horton versus Williams, 94-5428, and comes on this morning for a ruling on the motion for preliminary injunction regarding pepper spray. This is going to take me some time to explain the legal reasons for my ruling, and so I hope you will bear with me. In some ways it would be better to delay this to write an oral opinion -- I mean to write a written opinion, but I would prefer to lay the matter to rest at this stage and not delay it. I think I can cover the necessary issues orally and accurately.

First, I think this question has resolved itself into the issue of the propriety, the constitutional propriety of the 1 October 1994 policy for Green Hill School in regard to the use of pepper spray, or, as the policy is called, the use of physical restraint and restraint devices. The subject part of the policy is under number 4 and indicates in two paragraphs what the current policy is for the use of pepper spray, and it reads as follows:

"The use of physical restraint and/or restraint devices, excluding aerosol, is appropriate when a resident fails to comply with a staff directive and presents an immediate danger to self, others, property, or the security of the institution, and other means of control or attempts at verbal de-escalation have been unsuccessful."

Then a separate paragraph for the use of aerosol, that "Aerosol may be used when a resident fails to comply with a

staff directive and:

"a. the use of other physical restraint measures to gain compliance, without the use of aerosol, likely would result in bodily injury to the resident, staff, or others; or

"b. the resident is engaging in disruptive behavior in his room which creates a serious disturbance and threatens institutional security by inciting serious misbehavior by other residents."

It is my conclusion that that policy is constitutionally over broad and therefore not permissible. However, that's not to say that the motion should be granted as made or granted in all respects prohibiting the use of pepper spray.

Now, let me wander through legal analysis that leads me to that conclusion and also that will lead to a specific ruling as to the propriety of the use of pepper spray.

First, I think we need to have some understanding of some terms that are used and kind of thrown around here. This pepper spray is referred to in the policy as a restraint. It is the only restraint referred to in the state's policy that is also a weapon. A weapon is "an instrument of offensive or defensive combat"; it is "something to fight with"; and it is something that is "used in destroying, defeating, or physically injuring an enemy," according to the dictionary. So, arguably, pepper spray can be a restraint device because it does effectively disable people and thereby restrains them. But it

is also a weapon, unlike such things as handcuffs, leg cuffs, waist chains, soft cuffs, plexiglass shields, and mattresses with hand holds referred to in the policy. This pepper spray alone of the restraint devices indicated is a weapon as well as a restraint device.

The definition of weapon includes the word combat, and a combat is "a fight, encounter, or contest between individuals," of course.

We also are dealing here with a concept of punishment, and whether the use of this pepper spray under the current policy is or can be used for punishment. Again, according to the dictionary, to punish is "to impose a penalty (as of pain, suffering, shame, strict restraint, or loss) upon for some fault, offense, or violation." It can also mean, to punish, it can be "to deal with roughly or harshly."

We have a question here, as we will see, as to whether the use of this pepper spray under the current policy is and can be used as punishment as opposed to something that is necessary for restraint. Restraint means, according to the dictionary, restraint is "a means, force, or agency that restrains, checks free activity, or otherwise controls." We see from this analysis that, I think, clearly pepper spray is both a weapon and a restraint.

The question of security has also come up and I have looked at that. Because the policy speaks to institutional

security, and a problem with that term is that it is a somewhat general term that does not have a very specific meaning. Again, under the dictionary, security is "the quality or state of being secure: as (a) freedom from danger," but it also includes "freedom from fear, anxiety, or care," and "freedom from uncertainty or doubt." In other words, security does not necessarily just mean security from specific dangers, but can also be read much more broadly than that.

Now, that's sort of a glossary of terms that are in issue here.

I should make some specific findings, and there are not very many that need to be made here. But pepper spray is a substance that, when applied, causes substantial pain to the skin and eyes and respiratory system that can make it difficult to breathe for a short period and that causes tearing and momentary blindness and substantial pain that essentially incapacitates the person against whom it is used. It is not known to be dangerous in the long term or to cause serious injuries, although it appears to me from what has been submitted that there is a potential for long-term injury, particularly to specifically susceptible individuals, that has not been clearly determined by the scientific community. But as we know it and understand it, it is short-term painful and incapacitating. It is long-term not dangerous.

We know, also, from the record in this case, that this

substance has been used at Green Hill in ways to gain and keep control over individuals that amounts to pain compliance methods and that it has been used in emergency, dangerous situations, and it has also been used in nondangerous situations in order to gain compliance or control over students. It has been used, as Exhibit 1 shows us, in that way under part (b) of the policy when there is no likelihood of bodily injury to anyone and no likelihood of serious or substantial injury to valuable property.

One thing that the record in this case tells us is that pepper spray, if not controlled, is a weapon that can be used for punishment and can be used, as some of the cases say, sadistically and maliciously by staff inappropriately, and it is therefore of critical importance to be sure that its use is limited to proper constitutional uses under the law and not for purposes that are beyond what is constitutionally permissible. So there is a factual framework for the court to examine into this issue and to determine whether the policy now in effect is constitutionally permissible and appropriate.

With that, we turn to the constitutional underpinnings of this issue, and we know that this is, as applied to juveniles in a juvenile institution in this state, a fourteenth amendment due process issue. But we also know that the due process clause implicitly incorporates the eighth amendment prohibition against cruel and unusual punishment as a constitutional

minimum. We know that from the Gary H. v. Hegstrom case in 831 F.2d 1430, and also, for that matter, from the Youngberg case, from the Supreme Court, found at 457 U.S. 307. We know from those cases that the due process standard is more protective of unconvicted juveniles. They're theoretically not convicted of criminal acts, although they are found to have committed acts that would be criminal if they were adults. But the due process is more protective of those individuals than the cruel and unusual punishment standard. We understand that these individuals are not only prisoners, but are wards of the juvenile court and state and are entitled to more protection than convicted adult criminals. But it's my view in this analysis that the cruel and unusual punishment standard, because it does apply through the due process clause here, gives us a good foundation in law to analyze what is and is not permissible under the circumstances here.

It's important to note here that both parties to this case have agreed that pepper spray is not constitutionally appropriate or permissible when used as punishment, and we will discuss here the question of what is punishment and what is not, I suppose. But that is also sort of a baseline that we start with in this analysis, is that pepper spray is not to be used as punishment and that both parties agree to that, I think.

Youngberg also stands for the proposition that before the

court can involve itself in orders that change what the state is doing in some way, the court must identify some constitutional predicate for the imposition of a duty on the state. That is an important concept, and it seems to me that the constitutional predicate that we are here discussing is the eighth amendment as applied here through the fourteenth.

Youngberg also stands for the proposition that the court must give deference to appropriate state professionals, and I'm going to talk some more about that, but that is a very important concept here because there is a presumption of correctness in the decisions made by state officials.

We know, also, from Youngberg, however, that juveniles are entitled to be free from undue restraint. They have a liberty interest in being free from undue restraints, and it's the job of the court, as well as the staff at Green Hill, to balance the liberty of the individual and the demands of an organized society. In other words, those liberty interests have to be balanced against state interests.

The bottom line of -- well, I should say a little bit more about Youngberg, which also stands for the proposition in speaking to the issue of deference. Youngberg stands for the proposition that decisions of an appropriate professional are entitled to a presumption of correctness and validity, and they should be overturned only if the professional's decision is "such a substantial departure from accepted professional

judgment, practice, or standards" as to show that the person responsible did not base the decision on such a judgment.

I think that's a quote.

What that means, however, is not that professionals at Green Hill have the last word, but that they should have the professional last word, provided that it is a responsible last word. But if their decision violates the constitution, then the presumption of correctness and validity in their decisions is certainly rebuttable.

The final rule of the Youngberg case, as I read it, is this: The court should uphold those restrictions on liberty that are reasonably related to legitimate government objectives and not tantamount to punishment.

I next want to turn our attention to two cases that I think are available that give us the most guidance in the eighth amendment questions presented here, again through the fourteenth, and that are factually related. The first of those is Spain v. Procunier, 600 F.2d 189, a 1979 Ninth Circuit case involving tear gas; and Michenfelder v. Sumner, 860 F.2d 328, also a Ninth Circuit case, 1988, involving taser guns, or whatever you -- tasers. Those cases, in my view, have to be read together.

Spain was written by a judge, now Justice Kennedy, and does, I think, an excellent job of putting this deference to appropriate state professionals' decisions in the correct

context. And I'm going to quote from page 193.

"The federal courts should use great restraint before issuing orders based on the finding that the state has followed unlawful procedures in discharging the unenviable task of keeping dangerous men in safe custody under humane conditions. This said, it must also be remembered that enforcement of the eighth amendment is not always consistent with allowing complete deference to all administrative determinations by prison officials. Whatever rights one may lose at the prison gates . . . the full protections of the eighth amendment most certainly remain in force. The whole point of the amendment is to protect persons convicted of crimes. Eighth amendment protections are not forfeited by one's prior acts. Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary. The ultimate duty of the federal court to order that conditions of state confinement be altered where necessary to eliminate cruel and unusual punishments is well established. . . . In this regard we recognize that an equatable decree should not go further than necessary to eliminate the particular

constitutional violation which prompted judicial intervention in the first instance."

One should not paraphrase another judge's language, but I think that quotation fairly explains the tensions that exist between the presumption of correctness of professionals' opinions and constitutional decisions made on the basis of the eighth amendment.

It is clear from Spain that the danger presented by a substance is an important consideration, and in Spain, as I read it, the tear gas used there was available for use in not dangerous quantities. I have been in tear gas chambers in the Army, and the tear gas that I have been exposed to is very similar to what I have heard pepper spray described as. I think Spain gives us a benchmark when, in that decision, Judge Kennedy said that "Therefore . . . we think [tear gas] use can be justified in situations which are reasonably likely to result in injury to persons or a substantial amount of valuable property. . ." It seems to me that that is the benchmark minimum standard for use of pepper spray in the institution at Green Hill. The policy here that is in issue goes beyond that limit.

There are some other things that we learn from the explanation of the Spain case that is found in Michenfelder. Also I would refer to Kolender, in 461 U.S. 352, which speaks of the necessity for a credible threat of specific injury.

Michenfelder, in discussing this problem, only tasers as opposed to tear gas or pepper spray -- again in an adult prison setting discussing eighth amendment issues -- indicated at page 335, that the legitimate intended result of a shooting, that is with a taser, is incapacitation of a dangerous person, not the infliction of pain.

I think that directly applies to the Spain minimum standard and to this case. The legitimate -- and this means to me the only legitimate -- intended result of the use of such a substance is incapacitation of a dangerous person, and certainly not the infliction of pain.

Now, there's another very important concept in Michenfelder that applies here, and at page 335, again, the court in Michenfelder -- I didn't look to see who wrote this.

Judge Fletcher from Seattle.

She said this:

> "In Spain v. Procunier . . . in which we found that limited use of a demonstrably dangerous and painful substance, tear gas, did not violate the eighth amendment when used to contain disturbances that threatened an equal or greater harm. . . . Implicit in the court's holding is the requirement that the instrumentality not be used for punishment and be used in furtherance of a legitimate prison interest only when absolutely necessary."

She further said that "The infliction of pain and the danger of serious bodily harm may be necessary if there is a threat of an equal or greater harm to others. . ."

She went on to say, at page 336, again referring to taser guns, but I think it applies here:

> "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.' . . . 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.'"

Clearly, what that means to me is that the use of pepper spray is not unconstitutional. The inappropriate use of pepper spray is.

That case, Michenfelder, turns us directly to the common law of the use of force and when it is and when it is not appropriate, because Michenfelder clearly indicates that in determining whether use is proper, there must be a balancing between the harm and pain and danger of its use with the threat of an equal or greater harm to others. So, in other words, the harm that you are trying to prevent must be equal or greater than the force used to prevent that harm.

We don't have to go very far to find the standards for the

use of reasonable force. An easy way to get into the law is to look at pattern jury instructions, model jury instructions. In this state, Washington Pattern Jury Instructions, criminal, 17.01, .02, and .04 and .05 all speak to this issue. The Ninth Circuit Model Jury Instruction 605 in the criminal set speaks to it. In the civil area, Ninth Circuit Model Jury Instruction 11.01.02 speaks to this issue.

The guiding standard for the use of force, as applied to law enforcement officers, is that they have the right to use -- or, for that matter, correction officers -- such force as is reasonably necessary under the circumstances to make a lawful arrest or, for that matter, to enforce the rules of the institution here, but they cannot use excessive force. Excessive force is measured by the force a reasonable and prudent officer would use under the circumstances.

All I'm saying is that the balancing test found in Michenfelder is the same test that we use in matters of self-defense in criminal law, that we use in matters relating to the use of force in civil cases, as well as in criminal cases, and it is a balancing test where one has to balance the danger and harm and pain of the use of force against a threat of equal or greater harm. That concept is entirely missing from the policy here.

I mentioned the civil law that we find in excessive force civil cases under section 1983. There is a fairly recent case,

Hudson v. McMillian -- the cite I have is 117 L.Ed.2d 156, a 1992 case written by Justice O'Connor -- that speaks to this question of what is punishment in a prison setting and what is proper control. She indicates that the test is whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

The problem with that test is rather obvious to me, and it is that there is sort of a sliding scale between a good faith effort to maintain or restore discipline, on the one hand, and malicious and sadistic efforts to cause harm on the other. The point of that comment, I guess, is that Hudson does not really give us a bright line test, as it purports to do for civil liability, for the use of force, but it clearly indicates, as the parties agreed here, that the use of force for punishment is not appropriate.

Now, where does that get us when we apply those rules of law that I just enumerated that I think are a base line to the policy here in issue? Where it gets us is that the policy in part (a) is not sufficiently clear or definitive for when it's proper to use aerosol spray, and the policy in part (b) is, in my view, clearly outside of what is permissible under the Spain and Michenfelder standards, as well as Youngberg.

I will try and bring this to a conclusion, but what is difficult here is formulating a policy that will really address this issue of controlling residents in a fair and effective way

and, at the same time, in a constitutional way which will limit the use to those circumstances -- that have to be determined on a case-by-case basis -- where there is, in fact, a reasonable likelihood that there will be an injury to persons or injury to a substantial amount of valuable property. How does one limit the use to avoid the use of it for punishment but to make it available for necessary emergency, self-defense, or law enforcement type purposes? It's difficult to do. It certainly is difficult for the management at Green Hill. But what is inherent in this, in the law, as I see it, and the prohibition against cruel and unusual punishment is that it is not appropriate to routinely use pain to gain compliance with staff directives.

Before I conclude on that issue, let me address for a minute the requirements for a preliminary injunction.

To obtain a preliminary injunction, a party must show either a likelihood of success on the merits and the possibility of irreparable injury or the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor. Those are points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.

First, it's my opinion that the infliction of pain and injury, even though it may be limited in duration, on Green Hill students from the use of pepper spray is an example of

irreparable harm. The fact that one can get money damages if it's done inappropriately will not make the students whole. In my judgment, if the policy is allowed to stand in its present form, the facts presented here show a strong threat of the kind of irreparable injury that the court should properly address.

Second, I am satisfied from the showing that there is a strong likelihood of partial success on the merits of this for the plaintiffs, on this issue, for the reasons that I have just enumerated. Therefore, I think a partial injunction is appropriate.

Before I conclude this, let me address one specific situation. I think each situation, as the case law indicates, has to rise or fall on the circumstances presented. When a student is making a disturbance in his room and is threatened with the use of pepper spray and after a period of time continues to make noise, but then the pepper spray is used while the student is not making noise but in a defensive posture, it seems to me that we are over the line into punishment at that point. All that we're doing at that point is using pain and injury and disability to get that person to comply with a staff directive, and that is beyond the appropriate use of pepper spray as defined for tear gas in the Spain case. It may be that those same circumstances in some situations will present a likelihood of a real credible threat indicating a likelihood of injury. It may be that because of

what the student has done in his room that that situation may also be likely to result in an injury to a substantial amount of valuable property, but not in every case. When the pepper spray is simply used to gain compliance with a staff directive, because a staff member or members, including the superintendent, feels that there is some unspecified threat to institutional security -- whatever that means -- that simply is not an appropriate standard.

It is my judgment that this injunction requested should be granted in part and denied in part, for the reasons I have indicated, as follows:

Pepper spray may only be used on students at Green Hill School in situations which are reasonably likely to result in injury to persons or injury to a substantial amount of valuable property. That is the basic standard out of Spain that I think clearly is a minimum standard to apply here. Use beyond that, it seems to me, is clearly outside the limits of the constitution and therefore the court should not defer to the judgment of staff or professional staff in allowing the current standards to continue.

Now, implicit in this ruling are some things that are, I think, most important:

One, there must be a credible threat of a specific injury.

Two, the only legitimate intended result of a pepper spray use is the incapacitation of a dangerous person and not the

infliction of pain. A dangerous person, of course, is one that is showing a likelihood that he will cause injury, as I have indicated.

Third, pepper spray should not be used for punishment and shall be used only in furtherance of a legitimate institutional interest, which in this situation means the incapacitation of a dangerous person. It's not appropriate to use that pepper spray except when its necessary to incapacitate someone who presents a danger.

Fourth, pepper spray should only be used when absolutely necessary, which means that it should be used only if there is a threat of equal or greater harm to others, or to a substantial amount of valuable property, than the pain and danger of harm that the use of pepper spray presents. In other words, there is the same balancing test required that Judge Fletcher spoke to in Michenfelder and that the law of excessive force requires in any use of force by law enforcement.

It's my judgment that the defendant should be enjoined from any use of pepper spray on students at Green Hill School except as may be consistent with the order that I have here verbalized, that I also have written out in the form of an order.

It is important in these things to make as narrow a ruling as is possible and not to go beyond what is required. This ruling reflects my belief that pepper spray has its proper use

in this setting, but it is limited in proper use, as I have indicated. I think it would be a bad mistake to enjoin its use entirely because it is a tool or a weapon in the arsenal that should be available to security staff for use in appropriate circumstances, and it is a far better tool to use in appropriate circumstances than other means of gaining compliance to appropriate staff directives where some force is required.

Also, I have not taken the invitation of the plaintiffs to require the state to redraft their policies and to bring those policies back to court for further approval. There are many safeguards written into the policy as it now exists involving cleanup, showers, medical care, and so forth. I see no need to address those things. If policies are not followed, there can be harm done, but I should, and here do, only address that portion of the existing policy that in my view does not pass constitutional muster. So I have not, in other words, attempted to rewrite policy, but by this order am only limiting that portion of the policy that I think is not consistent with the federal constitution.

I have prepared an Order Granting in Part and Denying in Part Motion for Preliminary Injunction Re Pepper Spray, and it more succinctly than I have stated here says what I mean.

I see one error in it that I am changing, and I will give you copies of this.

What clearly remains is case-by-case decisions that must be made by institution staff and professionals within the limits that I have indicated here.

I clearly have not tried to designate specific factual circumstances in which it is proper or not proper to use pepper spray, but hopefully this ruling will give sufficient guidance so that the future uses of pepper spray, if any, will be within the confines of the eighth amendment and the fourteenth amendment.

I have just made some copies so you can see that, and I will file the order at this time.

That's all.

(Above hearing concluded at 10:30 a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Julaine V. Ryen
JULAINE V. RYEN

12-27-94
Date