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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 MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION RE: PEPPER SPRAY ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Plaintiffs seek preliminary relief to protect the juveniles incarcerated at Green Hill School (GHS) from the punitive use of aerosol oleoresin capsicum, an extract of cayenne pepper plants.[1] Staff at GHS routinely inflict unnecessary pain on youth by spraying them with pepper spray to punish them for violating institutional rules or to coerce compliance with staff directives. We ask this Court to preliminarily enjoin the harmful and punitive use

[1]/ Aerosol oleoresin capsicum is referred to herein as "pepper spray".

of pepper spray on youth at GHS by the state defendants.[2]

II. STATEMENT OF FACTS

Pepper spray causes a burning sensation of the skin, loss of upper body control, paralysis of the larynx which may render the victim temporarily unable to speak, and inflammation and irritation of the respiratory tract, which results in coughing, gagging, and gasping for breath. It is harmful to youth with chronic lung disease such as asthma, and it may present a risk of nerve damage, risk of loss of protective reflexes, risk of laryngospasm and suffocation, and risk of skin blistering to any exposed youth. Cohen Declaration, Ex. 2.

Juveniles who are exposed to pepper spray feel severe pain. For example, one youth "felt like I was burning from the inside out" and "like something was eating through my skin." Jolly Declaration, Ex. 9. Another youth stated that "it felt like the wind had been knocked out of me" and "like bleach had been sprayed on my eyes." Burns Declaration, Ex. 11. See also, Plush Declaration, Ex. 14 ("[w]hen I breathed it felt like sharp knives cutting into my lungs."); Bakke Declaration, Ex. 10; Horton Declaration, Ex. 12; Rodgers Declaration, Ex. 15; Moore Declaration, Ex. 13.

Moreover, the effects of pepper spray are not limited to the intended targets. Although staff may intend the spray for only one youth, it adheres to bedding, walls, and floors, and eventually enters the ventilation system causing discomfort and pain to others. Gardner Declaration, Ex. 16.

In addition to these physical effects, the use of pepper spray on confined youth can have significant detrimental psychological affects. It can produce a heightened sense of

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[2]/ This motion is brought only against defendants Soliz, Sidorowicz and Williams, who have responsibilities for the operation of GHS. They are referred to herein as the state defendants.

anxiety, alienation, and frustration, and encourages rebellion and resistance. Milan Declaration and Report, Ex. 1. By legitimizing and reinforcing aggressive and violent behavior, the use of pepper spray at GHS directly contributes to a culture of violence within the institution. DeMuro Declaration and Report, Ex. 3. As one resident of GHS describes this phenomenon:

> When GHS staff started using pepper spray, they told us they would only use it when we were a threat to security, a threat to staff, or an escape risk. Then some of us were surprised at how they used the spray all the time for things like breaking rules by cussing, or talking when we were not supposed to. Plus, kids would usually be calm and quiet by the time security guards arrived to spray them. We would tell staff and security that they were more violent than us.
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> The use of pepper spray made things worse at GHS. Staff used to come and talk to us. But once security was allowed to use spray, some staff got an attitude and would threaten to have us sprayed for anything. It seemed like it depended on their mood or the kind of day that they were having. It also gave residents at GHS an attitude. It makes you mad when they threaten to use, and do use pepper gas spray.

Plush Declaration, Ex. 14.

The Juvenile Rehabilitation Administration first authorized staff at GHS to use pepper spray on youth in approximately October of 1990. Eberle Deposition, p. 18, line 16 - p. 19, line 1, Ex. 18.[3] Most all incidents of pepper spray use at GHS authorized by these policies

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[3]/ Plaintiffs do not have a copy of defendants' 1990 pepper spray policy, if one exists. On February 15, 1991, defendants implemented GHS Policy #28 governing aerosol restraint use at GHS. Ex. 4. The Administrative Policy of the Division of Juvenile Rehabilitation (DJR) governing the use of physical restraints in all DJR facilities, including the use of aerosol propellant agents, was implemented on May 1, 1991. DJR Bulletin #2, Ex. 5. The GHS policy #28 implemented on February 15, 1991, was superseded by GHS Policy #4 effective May 1, 1993. Ex. 6. This policy was revised, and the revised GHS Policy #4, which is the current policy at GHS, became effective October 1, 1994. Ex. 7.

After the pepper spray policy was implemented at GHS, security staff were never provided with information about how to interpret or apply the policies. In fact, out of three security staff recently deposed in this case, two thought the 1991 policy was still currently in effect, even though it had been replaced by a new policy in 1993. (The 1994 policy was

(continued...)

have been to punish youth for failing to follow staff directives, or to coerce future compliance with staff orders, not to control an emergency or dangerous situation.[4] Indeed, the GHS policies expressly permits the punitive use of pepper spray as permission to spray may be given even in "non-emergency situations".[5]

Security staff at GHS, who are the only staff permitted to use pepper spray once the superintendent has given approval, concede that it is often used to make a resident comply with staff directives. Beaver Deposition, p. 86, lines 20-23; p. 89, lines 1-3, Ex. 17. Sometimes youth are not even afforded an opportunity to comply with the staff directive before they are sprayed (Beaver Deposition, p. 89, lines 4-21, Ex. 17), and are sprayed during or even after compliance (Eberle Deposition, p. 84, line 2 - p. 87, line 5, Ex. 18). Staff are instructed to spray youth "right in the face" whenever they use pepper spray to enforce institutional rules. Rondo Deposition p. 64, lines 4-8, Ex. 19.

Paul DeMuro, one of plaintiffs' consultants with 25 years of experience in the

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[3](...continued)
implemented after these depositions were taken.) Compare, Rondo Deposition, p. 20, line 25 - p. 21, line 2, Ex. 19, to Eberle Deposition, p. 19, lines 12-22, Ex. 18. All of the above-referenced policies permit the punitive use of pepper spray.

[4]/ Plaintiffs' experts, who reviewed these policies and the videotapes of twenty-five incidents involving the use of pepper spray at GHS between January 17, 1991, and December 25, 1993, conclude that pepper spray is almost always used to punish youth for failing to comply with staff orders. See, Declarations and accompanying Reports of Dr. Michael Milan, Dr. Michael Cohen, and Paul DeMuro, attached respectively as Exhibits 1, 2, and 3.

[5]/ GHS policy defines a non-emergency situation as: "Instances in which a resident's behavior presents a potential threat of injury to himself or others, destruction of property, or threatens the security of the institution; however, there is time to summon additional staff and attempt to resolve the problem ..." (emphasis added). Whenever a juvenile fails to follow a staff directive, staff believe that the threat of physical injury exists because, it is believed, absent the use of pepper spray, the juvenile must be physically moved or restrained and injury could therefore ensue. Beaver Deposition, p. 85, line 3 - p. 86, line 10, Ex. 17. Thus, the policy's criteria are met virtually any time a juvenile violates institutional rules or refuses to follow a staff directive.

operation and management of juvenile institutions, observes that staff at GHS use pepper spray as a sort of "aerosol cattle prod" to facilitate movement within the disciplinary units. DeMuro Declaration and Report, Ex. 3.[6] At least one staff person who has worked in the disciplinary units at GHS believes that pepper spray was introduced there "as a way to maintain [staff] power, to coerce juveniles to follow staff orders, and to punish youth who did not obey." Gardner Declaration, Ex. 16.

Examples of inappropriate and punitive uses of pepper spray at GHS abound. Staff use pepper spray on juveniles who are restrained in handcuffs and/or leg shackles. Bakke Declaration, Ex. 10, Eberle Deposition, p. 34, lines 1-5, Ex. 18.[7] GHS staff have sprayed youth who were lying or sitting down, who were locked in their cell, or who otherwise pose no threat to the safety of staff or other youth. Eberle Deposition, p. 34,

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6/ GHS has two disciplinary units, Fir and Poplar, which defendants euphemistically call "behavior management units." See, Answer filed by the state defendants at 5. Fir and Poplar were reopened in June of 1990 as "lock up" units to punish youth for misconduct and to confine those who present an escape risk. Gardner Declaration, Ex. 16. Most incidents involving the use of pepper spray at GHS occur in Fir or Poplar. Typically, youth are sprayed for acting out when they are angry for being locked in their room or for receiving a punishment they believe to be unjust. Youth are most often sprayed for refusing to leave a cell, banging on locked doors, or yelling or cursing at staff. See, Declarations of GHS residents Burns, Plush, Bakke, and Moore, attached as Exs. 11, 14, 10, 13 respectively; see also, DeMuro Declaration and Report, Ex. 3.

As Mr. DeMuro observes:

> When youth spend a great deal of time locked into their rooms, they become bored and often become even more oppositional -- thus the "game" of banging on the locked doors or stopping up their toilets to flood the floor. These behaviors are engaged in to elicit a response from the staff. In the absence of positive attention, negative attention is perceived by some youth to be better (at least from the point of view of combating boredom) than no attention at all.

DeMuro Report, p. 2, Ex. 3.

7/ One resident was sprayed while in handcuffs by supervisory personnel responsible in his supervisory capacity for overseeing the use of pepper spray at GHS. Bakke Declaration, Ex. 10; Eberle Deposition, p. 39, lines 9-12 and p. 40, lines 2-3, Ex. 18; Beaver Deposition, p. 6, lines 21-22, Ex. 16.

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lines 1-9, Ex. 18; Rondo Deposition, p. 25, lines 12-19, p. 73, line 15 - p. 76, line 1; p. 101, lines 4-9; and p. 105, lines 1-5, Ex. 19 (juvenile sprayed for saying "fuck you"); Eberle Deposition, p. 36, lines 18-25 and p. 37, line 8 - p. 38, line 7, Ex. 18 (resident sprayed in the face from less than a foot away while in handcuffs lying on his bed).

Defendant Williams, the superintendent at GHS who is charged with the responsibility of authorizing staff use of pepper spray, has pre-approved the use of pepper spray on juveniles even in advance of any incident or altercation involving the youth. Beaver Deposition, p. 116, line 12 - p. 117, line 10, Ex. 14; Eberle Deposition, p. 53, line 20 - p. 55, line 6, Ex. 18.[8] The "spray program" allows security staff to spray specified youth whenever they yell, curse, or otherwise create a disturbance. Id. There is no written documentation - other than in entries made in security logs - indicating which youth are on the "spray program." Beaver Deposition, p. 119, line 21 - p. 120, line 25, Ex. 17. Youth are only verbally advised if they are placed on the "spray program" and security staff do not know the duration of the "spray program" approved by the superintendent. Id; see also, Horton Declaration, Ex. 12 (resident orally advised he was placed on the "spray program").

Defendant Williams has also authorized staff to "personalize" cans of pepper spray by placing the names of certain youth on cans, which are then used to threaten or coerce that individual. Gardner Declaration, Ex. 16; Eberle Deposition, p. 70, lines 15-18, Ex. 18; Plush Declaration, Ex. 14. Furthermore, a security staff at GHS was once reprimanded by defendant Williams for not spraying a juvenile who was calm and did not present any kind of threat to staff, other youth, or the security of the institution. Rondo Deposition, p. 73, line 5

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[8]/ This practice is called placing someone on the "spray program." GHS' new aerosol restraint policy, which went into effect after the filing of this lawsuit, purports to limit this practice. Ex. 7, p. 2.

- p. 76, line 1 and p. 76, line 12 - p. 78, line 7, Ex. 19. Defendant Williams has even joked about the use of pepper spray solely to inflict pain. See, Gardner Declaration, p. 4, Ex. 16 (Superintendent Williams joked about pain a resident with acne would experience if sprayed in face). Such cruel and punitive uses of pepper spray against youth at GHS is completely outside the bounds of professional judgment. Cohen, DeMuro and Milan Declarations, Exs. 1-3.

The aerosol restraint policy at GHS requires staff to get permission from the superintendent -- or his designee -- immediately prior to using pepper spray.[9] Ex. 7, p. 2. The authorizing personnel does not need to be present to personally observe the situation prior to granting approval. Id. Once permission is received, staff must put on gas masks and protective clothing, prepare a script to be read before a video camera, and prepare to videotape the incident, before a juvenile may be sprayed.[10] This may take as long as thirty or more minutes. Horton Declaration, Ex. 12; Rondo Deposition, p. 36, lines 13-21, Ex. 19. By this time, residents are most often calm but are sprayed anyway. Milan Declaration, Ex. 1; DeMuro Declaration, Ex. 3.

Staff often do not attempt less intrusive measures to address the problem behaviors of youth before spraying them with pepper spray. Gardner Declaration, Ex. 16. Staff are not adequately trained in alternative intervention techniques. Id. As one security personnel notes, staff primarily receive only on-the-job training to learn how to defuse volatile situations to avoid the use of pepper spray. Beaver Deposition, p. 132, line 25 - p. 133, line

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9/ The "spray program" practice is an exception to this general requirement.

10/ In practice, staff do not always videotape the incident as required by policy. Beaver Deposition, p. 93, lines 4-7, Ex. 17.

14, Ex. 17.[11]

Although GHS policy requires staff to prepare written incident reports concerning every pepper spray incident, this often does not occur. Beaver Deposition, p. 92, lines 12-19, Ex. 17. Supervisory reviews of the use of pepper spray by staff are not usually performed and no formal method exists to review the appropriateness of uses. Beaver Deposition, p. 65, line 2 - p. 68, line 14, Ex. 17. Thus, staff abuses go unchecked.

Staff at GHS maintain an inventory of both "5%" and "10%" levels of concentration of pepper spray, but the higher concentration is currently used in most circumstances. Eberle Deposition, p. 62, line 9 - p. 63, line 2, Ex. 18. Staff spray youth with the 10% concentration level because it is more debilitating and may result in a greater degree of pain than the 5% spray. Eberle Deposition, p. 65, lines 14-23, Ex. 18. No written procedures or guidelines exist to determine which concentration level should be used on youth. Eberle Deposition, p. 63, lines 6-8, Ex. 18; see also, GHS Policy #4, Ex. 7.

Youth are not adequately checked by health personnel either before or after they are sprayed to determine the health risks or impact of pepper spray. Cohen Declaration, Ex. 2. Despite the health risks, youth with respiratory problems are sprayed with pepper spray. Moore Declaration, Ex. 13; Burns Declaration, Ex. 11. Some youth are not checked at all

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[11]/ When the Fir and Poplar disciplinary units were reopened in 1990, the line staff hired to work in the units were inexperienced. Other than a brief orientation in other units, the defendants did not provide these inexperienced staff with training in crisis prevention, de-escalation techniques, or other training relevant to the causes and prevention of the inappropriate behavior typical of the youth they were supervising. Gardner Declaration, p. 3, Ex. 16. Instead, staff were "just thrown into [the] cottage with youth who had extremely difficult behavioral problems." Id. The most training some staff may receive in these techniques is one day of "Crisis Prevention Intervention" training, approximately five hours a year of "pepper spray" training, and some portion of a five day training at the Juvenile Justice Academy that relates to "de-escalation" techniques. Rondo Deposition, p. 13, line 1 - p. 17, line 22, Ex. 19.

by a nurse or other medical personnel after being sprayed. Bakke Declaration, Ex. 10. Youth who are examined by a nurse are often given perfunctory exams. Cohen Declaration, Ex. 2. Youth are sprayed even when medical staff are not on-site at GHS. Rondo Deposition, p. 92, line 7 - p. 93, line 24, Ex. 19. Youth risk injury from walking downstairs to showers after being temporarily blinded by pepper spray. Cohen Declaration, Ex. 2. Youth are sometimes not allowed to shower immediately after being sprayed. Burns Declaration, Ex. 11 (one hour passed before being permitted to shower); Bakke Declaration, Ex. 10 (one and one half-hour before shower). Parents are not informed about the use of pepper spray by staff at GHS, even when they specifically request to be advised about problems involving their children. Declaration of Pam McCauley, Ex. 8; Beaver Deposition, p. 57, lines 1-13, Ex. 17.

Mental health treatment and intervention prior to or during pepper spray incidents involving behaviorally disabled youth is virtually non-existent at GHS. For example, one disturbed juvenile who was cutting on his arm, spreading feces all over his body, and squirting catsup out of the vent in his cell door, was sprayed with pepper gas instead of being seen by a mental health professional. Beaver Deposition, p. 100, line 22 - p. 113, line 5, Ex. 17; DeMuro Declaration and Report, Ex. 3.

Since October of 1990 staff have sprayed youth at GHS at least 110 times with pepper spray. Defendant Williams or his designee has authorized staff to use the spray at least 330 times in the same time frame. Moreover, staff have sought permission to use pepper spray at least two to three times more often than it was granted, making the threat and use of pepper spray at GHS a regular and pervasive part of institutional life. Eberle Deposition, p.

109, lines 8-14, Ex. 18.[12]

III. LEGAL ARGUMENT

A. Defendants' Use Of Pepper Spray Violates Plaintiffs' Right To Personal Security And Freedom From Bodily Restraint.

Spraying youth with a painful and debilitating chemical agent under color of state law invokes constitutionally protected liberty interests in safety and freedom from restraint.[13] Under our Constitution, an individual's interest in safety and freedom from restraint is the essence of liberty. In addition to the procedural fairness which must precede governmental deprivation of liberty, the Due Process Clause "protects individuals against governmental acts that are prohibited 'regardless of the fairness of the procedures used to implement them.'" Kelch v. Director, Nevada Dept. of Prisons, 10 F.3d 684 (9th Cir. 1993), quoting Daniels v. Williams, 474 U.S. 327 (1986).

The right to personal security and freedom from restraint constitutes "an historic liberty interest" protected substantively by the Due Process Clause. Ingraham v. Wright, 430 U.S. 651, 673 (1977). Indeed, the Court has placed such liberty interests at the "core of the liberty protected by the Due Process Clause from arbitrary governmental action." Youngberg v. Romeo, 457 U.S. 307, 316 (1982) quoting Greenholtz v. Nebraska Penal Inmates, 442 U.S. 7 (1979) (Powell, J. concurring in part and dissenting in part). The

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[12]/ By contrast, pepper spray has never been used at Naselle Youth Camp or Mission Creek Youth Camp and is rarely used at Maple Lane School and Echo Glen Children's Center other institutions operated by the Juvenile Rehabilitation Administration. Defendants' Response To Plaintiffs' First Requests For Production, Ex. 20. This is true even though residents at these institutions present similar behavioral and management problems as residents at GHS, and policies at these facilities permit the use of pepper spray. See also, Gardner Declaration, Ex. 16.

[13]/ Defendants acknowledge that pepper spray is a form of restraint. GHS Policy #28, for example, refers to pepper spray as "aerosol restraint." Ex. 4.

Court has also recognized that these liberty interests survive criminal conviction, incarceration, and involuntary commitment to an institution. Youngberg, 457 U.S. at 315 (right not extinguished by lawful confinement, even for penal purposes). See also, Vitek v. Jones, 445 U.S. 480, 491-94 (1980)(Fourteenth Amendment liberty interests unaffected by commitment).

Moreover, the state assumes the constitutional duty to provide for the basic human needs of those who, by the affirmative exercise of the state's power, are deprived of their liberty and therefore rendered unable to care for themselves. Dorothy J. v. Little Rock School Dist., 7 F.3d 729 (8th Cir. 1993). When the State takes individuals into its custody and holds them there against their will, the Constitution imposes a corresponding duty to assume some responsibility for their safety and general well-being. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 199-200 (1989), citing Youngberg at 314-325 (state must provide involuntarily committed mental patients with services necessary to insure their reasonable safety). This "special relationship" between the state and incarcerated youths gives rise to plaintiffs' right to be protected from harm. Id.

These rights are not absolute, however. Plaintiffs' rights to personal security and freedom from restraint must be balanced against the state's interest in maintaining order and security in its institutions. Youngberg, 475 U.S. at 320.

The balancing test which the United States Supreme Court has adopted is not a difficult one for the state to pass. The Constitution only requires that the courts make certain that state defendants exercise professional judgment. Youngberg, 475 U.S. at 321. Thus, if defendants can show that their actions fall within the parameters of sound professional judgment, the court may give their decisions presumptive validity. If, however, the court finds that the defendants have acted outside the scope of minimally accepted standards of

professional practice, it must find that the defendants have violated plaintiffs' right to personal security and freedom from restraint. As shown below, the defendants in this case do not act within the scope of sound professional judgment when they authorize the use of pepper spray to punish youth or to insure compliance with institutional rules.

The state defendants provided plaintiffs' counsel with videotapes of twenty-five incidents in which staff at GHS sprayed youth with pepper spray between January 17, 1991 and December 25, 1993.[14] Plaintiffs' counsel then provided these videotapes, together with incident reports and other documentation prepared by GHS contemporaneously with the incidents, to three nationally recognized juvenile justice experts. After reviewing these tapes and documents, each of these experts concluded that the use of pepper spray at GHS is unnecessary, punitive, and outside the scope of minimally accepted professional standards.

One of plaintiffs' experts, Paul DeMuro, has managed a large, secure institution for delinquent youth as well as a large, urban juvenile detention center. He also served as Assistant Commissioner of the Massachusetts Department of Youth Services and as Director of the Pennsylvania Department of Children and Youth, and he was appointed a federal court monitor to oversee operations in juvenile institutions in Florida and Oklahoma.

Mr. DeMuro concludes that staff at GHS use pepper spray to punish youth who pose no immediate threat to staff or other youth. He also concludes that the "spray program," which requires staff to spray youths for minor misbehavior even though they are calm and composed, is outside the scope of minimally acceptable professional standards. He further notes that any use of restraints for the purpose of punishing youth is outside the scope of accepted professional judgment because of the potential for injury and because it perpetuates

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[14]/ These were not all of the incidents which occurred during that period, only those which plaintiffs' counsel obtained releases from the sprayed youth.

a culture of violence within the institution. According to Mr. DeMuro, sound professional judgement does not permit institutional staff to inflict pain to punish youth or force compliant behavior. DeMuro Declaration and Report, Ex. 3.

Another of plaintiffs' experts, Dr. Michael Cohen, is Medical Director for the New York State Division for Youth. As such, he is the chief medical officer for all secure institutions in New York State for youths aged 16 and under. Dr. Cohen is a Board certified pediatrician with extensive experience involving institutionalized youth in several states.

Dr. Cohen identified several indicators that cause him to conclude that the use of pepper spray at GHS is outside the scope of accepted professional practice. For example, he observes that after staff spray youth, they sometimes leave them in their cells for extended periods before allowing them to shower, and there is no procedure to insure that youth are permitted to clean themselves promptly. Indeed, youth have been forced to remain in their cells for several hours before being allowed to shower, and periods of 20 to 50 minutes are not at all uncommon. Cohen Declaration and Report, Ex. 2.

Dr. Cohen further notes that youths who are sprayed in the disciplinary units must be led up and down several flights of stairs to the gym in order to shower because the showers in the unit have only warm water which exacerbates the pain from the spray. These youths, who have been temporarily blinded by the spray, are at particular risk of injury due to falls, and the videotapes show that some youth have fallen while negotiating these stairs. Dr. Cohen also observes that staff sometimes spray youth at night or at other times when nursing staff are not on-site to respond to emergencies, and that physical examinations by health personnel after youth are sprayed are so cursory that health care staff sometimes do not even touch the youths.

Dr. Cohen concludes that each of these factors is a strong indication that policies and

practices at GHS regarding the use of pepper spray are not governed by sound professional judgment. Cohen Declaration, Ex. 2. Taken together, they demonstrate a complete lack of care for the safety and well-being of the youth in the facility.[15]

Plaintiffs' third expert, Dr. Michael Milan, has studied, written about, consulted on, and taught behavioral management practices in secure institutions for nearly twenty years. He has had experience with behavior management practices in institutions in a dozen states, including a number of secure juvenile institutions. Like Dr. Cohen and Mr. DeMuro, he also concludes that the use of pepper spray at GHS is outside the bounds of accepted professional judgment because it is punitive and unnecessary. Milan Declaration and Report, Ex. 1.

Dr. Milan determined that the most common use of pepper spray depicted on the videotapes he viewed was to punish youth who were making noise, typically yelling and banging while confined in their cells. He notes, however, that of the twenty videotaped incidents in which youth were sprayed while locked in their cells, seven involved youth who were quiet and composed at the time they were sprayed. Staff sprayed other youths while they were locked in their cells simply because they were noisy or agitated. The second most frequent use of pepper spray was to coerce youths into an action in which they refused to engage, typically to return to their cells after being released to use the bathroom.

Dr. Milan states that only two or three of the videotaped incidents which he viewed could be construed as posing a possible threat of imminent danger to staff. Even in these incidents, he concludes that it is probable that adequate precautions would have prevented the

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[15]/ As this Court is well aware, institutional policies that permit harmful practices have been held unconstitutional under Eighth Amendment standards. See, Jordan v. Gardner, 986 F.2d 1521, 1529 (9th Cir. 1993)(prison policy permitting harmful cross-gender searches violates the Eighth Amendment).

situation in the first place, and that the use of alternative and less invasive procedures, such as crisis counseling, would have obviated the need for any use of force. Milan Declaration and Report, Ex. 1.

In Dr. Milan's opinion, using pepper spray as punishment is outside the scope of sound professional judgment because it is generally recognized as ineffective over the long term in coercing desired behavior, and the consequences to the youth, staff and institutional milieu are fundamentally destructive. Id.

Plaintiffs' experts, whose combined experiences with populations in secure institutions exceed sixty years and involve approximately half the states, each conclude that defendants' policies and practices involving the use of pepper spray at GHS do not comport with accepted standards of professional judgment. Accordingly, defendants' use of pepper spray to punish youth and to force compliance with institutional rules violate plaintiffs' due process rights to be free from unlawful restraint.

B. Defendants Have Violated Plaintiffs' Rights To Be Free From Corporal Punishment.

The use of debilitating chemical agents for the purpose of causing pain is clearly a form of corporal punishment. McCargo v. Mister, 462 F.Supp. 813 (D.Md. 1978); Battle v. Anderson, 376 F.Supp. 402 (E.D.Okla. 1974). The Supreme Court recognized the perils of corporal punishment as a behavior management tool in Landman v. Royster: "Undoubtedly it is effective, but it is painful, and its abuse is difficult to forestall." 333 F.Supp. 621, 649 (E.D.Va. 1971). Justice Blackmun, then sitting on the Eighth Circuit, summarized the reasons for the constitutional prohibition against corporal punishment:

> [It] generates hate toward the keepers who punish and toward the system that permits it. It is degrading to the punisher and the punished alike. It frustrates correctional and rehabilitative goals.

Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968)

As far back as 1910, the U.S. Supreme Court condemned, on Eighth Amendment grounds, the unnecessary and wanton infliction of pain on a prisoner. Weems v. United States, 217 U.S. 349 (1910). Since that time, the Court has recognized that the Eighth Amendment draws its meaning from "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86 (1958). These principles apply even more protectively to juveniles. As the First Circuit has noted, "it would not be unreasonable to assume that society's conscience might be shocked by the conditions of confinement imposed on a juvenile when it would be unwilling to label the same treatment, given to an adult, cruel and unusual." Santana v. Collazo, 714 F.2d 1172, 1179 (1st Cir. 1983).

In this circuit, the constitutionality of punishments as they are applied in juvenile correctional institutions is governed by the due process clause of the Fourteenth Amendment, not the Eighth Amendment. Gary H. v. Hegstrom, 831 F.2d 1430, 1431-32 (9th Cir. 1987). Although the Fourteenth Amendment implicitly incorporates Eighth Amendment standards as constitutional minima, it is more protective than the Eighth Amendment and prohibits punishments without due process, whether or not they are cruel and unusual. Bell v. Wolfish, 441 U.S. 520 535, n.16 (1979). Thus, the inquiry here is whether or not the use of pepper spray at GHS amounts to punishment.

To determine whether a practice is punitive, a court must examine the government's interest in maintaining the practice, and determine whether the practice is reasonably related to that interest. Gary H., 831 F.2d at 1437, (Ferguson concurring), citing Hamm v. DeKalb, 774 F.2d 1567, 1573 (11th Cir. 1985). Infliction of pain and suffering is always a form of punishment unless an alternative purpose can be ascribed to it. Although the defendants in this case have legitimate interests stemming from their need to manage the facility and

prevent injury to residents and staff, Bell v. Wolfish, 441 U.S. at 540, the use of pepper spray is not reasonably related to these interests because it is likely to cause more injuries than it prevents. It is dangerous for the youth who are exposed to it, and it promotes a culture within the institution which increases the likelihood of further violent confrontations with resulting injuries. DeMuro Declaration and Report, Ex. 3; Milan Declaration and Report, Ex. 1.

Even if the infliction of pain is in response to a legitimate penological objective, it is prohibited if it is excessive. Bell v. Wolfish, 441 U.S. at 540. See also Gary H., 831 F.2d at 1437 (Ferguson, concurring) (use of force not justified when officials exaggerated response to otherwise legitimate penological objective). Where youths are shackled, or lying or sitting down, or otherwise pose no threat to the safety of others, corporally punishing them by spraying them in the face with a debilitating chemical agent is clearly excessive. DeMuro Declaration and Report, Ex. 3.

Courts have applied these principles to invalidate a number of punitive practices in both adult and juvenile institutions. For example, in Stewart v. Rhodes, 473 F.Supp. 1185 at 1193 (S.D.Ohio 1979), the court recognized a limited need to use restraints under medical supervision for mentally unstable or violent prisoners. The court concluded, however, that "the use of restraints as punishment for 'acting-out' or misbehaving is simply too extreme a response. ... The court is simply unable to believe that there is not a more moderate and constitutionally acceptable method of maintaining discipline and order." Id. at 1193. And in Hicky v. Reeder, a case very similar to the one now before this Court, the Eighth Circuit condemned the use of a stun gun to force an adult prisoner to comply with a directive to sweep out his cell. 12 F.3d 754 (8th Cir. 1994).

Courts have consistently condemned the use of corporal punishment on children in

institutions, on both Eighth and Fourteenth Amendment grounds. Thus, in Nelson v. Heyne the court found that beatings administered with a thick wooden paddle to boys at a juvenile correctional facility were disproportionate to their offenses and violated the Eighth Amendment. 355 F.Supp. 451 (N.D. Ind. 1972), aff'd. 491 F.2d 352 (7th Cir.), cert. denied, 417 U.S. 979 (1974). Similarly, in Morales v. Turman, the court found that physical beatings and the use of tear gas violated the Eighth Amendment. 364 F.Supp. 166, 173, (E.D. Tex. 1973), 383 F.Supp. 53 (E.D. Tex. 1974), reversed on other grounds, 535 F.2d 864 (5th Cir. 1976), rev'd and remanded, 430 U.S. 322 (1977), remanded and reh'g, 562 F.2d 993 (5th Cir. 1977).

In Milones v. Williams the court upheld a lower court injunction barring the use of excessive force by staff at a private juvenile institution. 691 F.2d 931 (10th Cir. 1982), cert. denied 460 U.S. 1096 (1983). Although written procedures forbade the use of excessive or inappropriate force, actual practices at the institution disregarded the prohibition. The evidence in Milones, very much like the evidence presented here, showed that force was used "as punishment rather than simply for immediate control, was used as a threat, and on occasion resulted in the very physical injuries it was supposed to prevent." Id. at 942. The Tenth Circuit agreed with the lower court's observation that use of the term "out-of-control" had afforded institutional staff unbridled discretion in subjecting children to unreasonably harsh treatment. The court of appeals upheld the finding that the practices violated Fourteenth Amendment Due Process guarantees. Id.

In H.C. by Hewitt v. Jarrard, 786 F.2d 1080 (11th Cir. 1986), the court addressed the use of tie-down restraints as a punitive measure on a youth in a juvenile institution. The plaintiff in that case was confined in isolation and restrained after he laughed and protested the punishment of another youth. The Eleventh Circuit held that the restraint violated the

Due Process Clause because it was intended as punishment. Id. at 1086.

A number of courts have condemned the use of chemical agents in adult prisons and juvenile institutions as violative of the Eighth or Fourteenth Amendment or both. See, e.g. Greear v. Loving, 538 F.2d 578, 579-80 (4th Cir. 1976); Morris v. Travisono, 528 F.2d 856, 858 (1st Cir. 1976); Patterson v. MacDougall, 506 F.2d 1, 3 n.2 (5th Cir. 1975); McCargo v. Mister, 462 F.Supp. 813, 818-19 (D.Maryland 1978); LeGrande v. Redman, 423 F.Supp. 524, 526-28 (D.Del. 1976); Battle v. Anderson, 376 F.Supp. 402, 423, 433-34 (E.D.Okla. 1974); Morales v. Turman, 364 F.Supp. at 173-4; Soto v. Cady, 566 F.Supp. 773 (E.D. Wis. 1983).

These cases generally hold that the use of chemical agents must be strictly limited to circumstances presenting the utmost degree of danger and loss of control and cannot be used to silence inmates from shouting, cursing, or refusing to follow staff orders. Morales, 364 F.Supp. at 173-4; McCargo, 462 F.Supp. at 818-19; Battle, 376 F.Supp. at 433; Soto, 566 F.Supp. at 776.

Punishment generally involves the infliction of pain after reflection and evaluation which is intended as retribution for past conduct or to deter future conduct. This is to be distinguished from emergency measures taken without benefit of reflection. Ort v. White, 813 F.2d 318, reh'g. en banc denied, 818 F.2d 652, cert. denied, 112 S.Ct. 3002 (1992). While due process considerations are minimal in emergencies, they protect youth when officials continue to apply force after the necessity for the coercive action has ceased. Ort, 813 F.2d at 327; William v. Burton, 943 F.2d 1572, 1576.

Pepper spray is rarely, if ever, used at GHS in situations where immediate coercive measures are required to control a juvenile who truly presents an immediate threat of harm. DeMuro Declaration and Report, Ex. 3; Milan Declaration and Report, Ex. 1. Rather, the

policy governing the use of the spray virtually guarantees that it will only be used after reflection. Because staff must get approval for its use, don protective clothing and gas masks, then prepare and read a script into the video camera, a procedure which can take anywhere from several minutes to half an hour or more, there is almost always a "cooling off" period during which the juvenile has calmed down. Spraying youth under these circumstances amounts to nothing more than punishment for past acts and, under the authority cited above, is constitutionally impermissible.

IV. PLAINTIFFS HAVE MET THE STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

In Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981), a prison case, the court said:

> A court issuing a preliminary injunction must consider the probable outcome of the case and the balance of hardships to the parties. To obtain a preliminary injunction a party must show either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor.

642 F.2d at 1132 (citations omitted). In Arcamuzi v. Continental Airlines, 819 F.2d 935, 937 (9th Cir. 1987), the preliminary injunction standard was elaborated upon:

> In this circuit, preliminary injunctive relief is available to a party who demonstrates either (1) a combination of probable success and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardship tips in its favor. Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374, 1376 (9th Cir. 1985). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." Id. If the plaintiff shows no chance of success on the merits, however, the injunction should not issue. Benda [v. Grand Lodge], 584, F.2d [308] at 315 [9th Cir. 1978]. As an "irreducible minimum," the moving party must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation. Id.; Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982). Under any formulation of the test, the moving party must demonstrate a significant threat of irreparable injury. Oakland Tribune, 762 F.2d at 1376.

See also National Center for Immigrants' Rights, Inc. v. INS, 743 F.2d 1365, 1369 (9th Cir. 1984) (standards represent a continuum, not two separate tests, and "the greater the relative

hardship to the moving party, the less probability of success must be shown.")

Plaintiffs are entitled to preliminary relief under these standards.

A. Probable Success On The Merits

As shown in Section III A. and B. above, and based on plaintiffs' factual showing in support of preliminary relief, the probability that plaintiffs will succeed on the merits of their claim that defendants' punitive use of aerosol restraint violates due process is great. Given the likelihood of success, and considering the balance of hardship to the parties, analyzed below, plaintiffs are entitled to a preliminary injunction on this claim.

B. Balance Of Hardships

As plaintiffs and their experts have shown, each time a juvenile is sprayed with pepper spray they experience significant pain and risk physical and psychological harm. Moreover, youths who are not even the intended victims of the pepper spray, but are in the vicinity when it is used, are subjected to harm and pain.

In contrast, the state defendants will suffer no harm if they are preliminarily enjoined from using the spray because there are alternative, less invasive ways to respond to uncooperative youths to ensure their compliance with staff directives without relying upon chemical agents. As Dr. Milan notes:

> The undesirable effects of this punishment are many. It causes severe pain and discomfort to the youths who are sprayed, but has little value in deterring their inappropriate conduct. In fact, the spray may well exacerbate behavioral problems within the facility by providing a vehicle for youths to demonstrate their toughness and defiance of staff in order to enhance their reputations among their peers. It also poisons the environment within the facility and undermines efforts at rehabilitative treatment.

Milan Declaration and Report, Ex. 1.

Moreover, Dr. Milan states that in the few instances shown on the videotapes which might have been dangerous, "alternative and less invasive procedures would have obviated

the need for the spray." Id. Mr. DeMuro concurs:

> In a properly run and managed facility, staff would receive the proper training and support to resolve most of these minor incidents without resorting to overt escalation that involved the use of pepper gas.

DeMuro Declaration and Report, Ex. 3.

Thus, defendants will suffer no harm if this Court preliminarily enjoins the use of pepper spray at GHS since there are other less drastic and professionally acceptable methods available to maintain order and respond to the inappropriate behavior of incarcerated youth. Balanced against the harm plaintiffs will suffer, and in light of the significant likelihood that plaintiffs will succeed on the merits of this claim, preliminary relief is appropriate.

V. CONCLUSION

For all the reasons set forth above, plaintiffs respectfully ask this Court to preliminarily enjoin defendants from using pepper spray at GHS.

Respectfully submitted this 27th day of October, 1994.

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