IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

J.P., and all others similarly situated, *et al.,*	:	
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Plaintiffs,	:	**Case No. C2-04-692**
	:	
v.	:	**JUDGE ALGENON MARBLEY**
	:	
Bob Taft, *et al.*,	:	**Magistrate Judge King**
	:	
Defendants.	:	

OPINION AND ORDER

I. INTRODUCTION

This matter comes before the Court on the Defendants' Motion to Alter or Amend this Court's July 21, 2006 Order. For the reasons set forth herein, Defendants' Motion is **DENIED**.

II. STATEMENT OF FACTS[1]

A. Background

Defendant, Ohio Department of Youth Services ("ODYS") serves as that "legal custodian for [Ohio] juvenile offenders, age 10-21 who have been adjudicated delinquent as a result of committing felony violations." Pl.'s Ex. A. ODYS operates by fund or contract institutions including but not limited to: Circleville Juvenile Correctional facility, Mohican Juvenile Correctional facility, Cuyahoga Hills Juvenile Correctional Facility, Scioto Juvenile Correctional Facility, Ohio River Valley Juvenile Correctional Facility, Indian River Juvenile Correctional

[1]The "Statement of Facts" is adopted in relevant part from this Court's Order and Opinion denying Defendants' Third Motion for Summary Judgment issued on July 21, 2006.

Facility, Freedom Center, and the Marion Juvenile Correctional Facility. *See* Pls.' Ex. A.[2] ODYS also has six parole offices, and contracts with a private sector provider for services. *See id*. "At any given time, [Ohio] DYS has approximately 1,800 youth[3] in its custody in the correctional facilities [listed above]." *Id*.

In 1992, the Sixth Circuit Court of Appeals ruled that because juvenile offenders cannot make effective use of legal materials by themselves, they require the assistance of lawyers to allow them meaningful access to the courts. *See John L. Adams*, 969 F.2d 228, 233 (6th Cir. 1992).[4] Nonetheless, this right to assistance of counsel has been narrowly interpreted to mean

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[2]These institutions are state facilities created by the Ohio General Assembly under the management and control of either ODYS or a private entity with which ODYS contracted for institutional care and custody of felony delinquents. Second Amended Complaint ¶ 19. In addition to maintaining these facilities, ODYS supervises committed juveniles housed in institutions or community corrections facilities throughout the state of Ohio. *Id*.

[3]Juveniles who are adjudicated delinquent for committing acts that if committed by an adult would constitute felonies, may be committed to ODYS for an indefinite period of time up to and until that juvenile reaches the age of 21. Second Amended Complaint ¶ 21. Juveniles who have been adjudicated felony delinquents are eligible for placement at community corrections facilities. *Id*. ¶ 22. A felony delinquent is a juvenile at least 12 years of age and less than 18 years of age, who has been adjudicated a delinquent juvenile for committing an act that if committed by an adult would be a felony offense, or an adult between the ages of 18 and 21 who is in the legal custody of ODYS, and has committed an act while in custody that would constitute a felony if committed by an adult. *Id*. Juveniles committed to ODYS range in age from 12 to 21 years. *Id*. ¶ 23. Placement in an institution or community corrections facility can range from several months to several years and averages approximately 10½ months per stay. *Id*. The average age of admission in Ohio is 15.9 years. *Id*.

[4]In *John L.*, plaintiffs, incarcerated juveniles who were or would soon be confined in secure institutions operated by Tennessee Department of Youth Development ("TDYD") brought a class action alleging denial of right of access to the courts. *See* 969 F.2d at 228. The district court granted summary judgment to the plaintiffs and ordered the state to submit a proposed remedial plan to provide plaintiffs with an appropriate remedy. *Id*. at 229. After giving plaintiffs an opportunity to weigh in on the proposed remedial plan, the judge fashioned it into a "remedial order."

Under the terms of the approved remedial order, the TDYD would create four separate contracts to have private attorneys provide part-time legal assistance to juveniles at the four

that juvenile offenders are not entitled to legal assistance on "general civil matters arising solely under state law." *Id*. Moreover, the right to assistance of counsel is limited to "the preparation and the filing of the complaint." *See Knop v. Johnson*, 977 F.2d 996, 1005-07 (6th Cir. 1992); *see also, Bee v. Utah State Prison*, 823 F.2d 397 (10th Cir. 1987); *Nordgren v. Milliken*, 762 F.2d 851, 855 (10th Cir. 1985); *Ward v. Kort*, 762 F.2d 856 (10th Cir. 1985).

B. Procedural History

1. The Initial Lawsuit

In July 2004, four youth (J.P., S.J., H.H. and D.B.) filed a proposed class action suit in federal court. Plaintiffs alleged that the Defendants violated the First, Sixth, and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Ohio Constitution by denying access to the courts to juveniles committed to ODYS as juvenile delinquents or serious juvenile offenders. *See id*.; *J.P., et al.*, 2005 WL 2405993, at *1. Plaintiffs sought declaratory and injunctive relief, asking the Court to declare Defendants' actions unconstitutional and to require Defendants to provide them with access to attorneys. *See id*.

On January 7, 2005, Defendants filed their First Motion for Summary Judgment, arguing

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secure Tennessee institutions. *Id*. Further, the function of these contract attorneys would be to speak with juveniles who requested to talk with an attorney, to perform the factual and legal research necessary to comply with Rule 11, and either to advise a juvenile that he or she does not have a meritorious claim or to prepare for appointment of counsel. *Id*. Finally, though use of the grievance procedures established at each institution was not required, attorneys were instructed to "urge use" of those procedures to solve any and all claims." *Id*.

The Sixth Circuit affirmed the district court's decision granting summary judgment to plaintiffs, but reversed the district court's remedial order to the extent that it required the State to provide assistance to juvenile detainees for Section 1983 claims unrelated to their detention and civil matters involving purely state law. *Id*. at 237.

that the four Plaintiffs named in the Complaint had failed to exhaust their administrative remedies and, therefore, lacked standing to challenge Defendants' legal assistance program. Plaintiffs responded to Defendants' motion.

Taking Plaintiffs' pending claims into account, Defendants made extensive changes to the ODYS legal assistance program,[5] and, on January 12, 2005, they filed their Second Motion for Summary Judgment, arguing that the four Plaintiffs named in the initial Complaint lacked standing to sue.[6] Shortly thereafter, on March 7, 2005, Plaintiffs filed their first Amended

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[5]The interim changes are as follows:

> ODYS entered into a contract with attorney Larry Matthews in September 2004, approximately one year ago[, September 2004,] to provide legal assistance to youth with regard to conditions of confinement. Mr. Mathews travels to each institution on a bi-weekly basis to talk to the inmates about issues related to conditions of their confinement. Since September, Mr. Mathews has conducted an orientation at each facility with youth and staff and has met with youth individually and in groups to discuss legal issues and to assist them in filing or resolving grievances. In addition, ODYS has hired at least one other contract attorney, Sharon Hicks [("Hicks")] . . . Further, ODYS has hired a youth advocate to act on behalf of the youths to ensure that their grievances are processed and addressed at all levels. Finally, ODYS has also hired a Compliance Officer to oversee the implementation of the legal assistance program and all new initiatives directed at improving conditions of confinement.

See J.P. v. Taft, 2005 WL 2405993, at *14 (S.D. Ohio Sept. 29, 2005) (internal citations omitted).

[6]According to the Defendants, the Plaintiffs lacked standing because they,

> . . . failed to demonstrate that they have suffered any litigation – related injury as a result of the [D]efendants' actions. *Lewis v. Casey,* 518 U.S. 343 (1996); *Pilgrim v. Littlefield,* 92 F.3d 413 (6th Cir. 1996). No violation of the right of access to the courts occurs in the absence of injury. This means that, without evidence that the [D]efendants prevented the [P]laintiffs from filing suit on their underlying claims or rendered their access to the courts ineffective or meaningless, [P]laintiffs have not shown that their right of access to the courts has been violated. *Christopher v. Harbury*, 536 U.S. 403 (2002); *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997).

Defs.' Second Motion for Summary Judgment at 2.

Complaint, adding M.M. and T.M. as named plaintiffs.[7] Plaintiffs also served Defendants with a written discovery request in an effort to "probe the content, scope, and operation of [the Defendants'] new program." *See* Pls.' Motion at 5; Pls.' Ex. A. Plaintiffs requested that Defendants produce the contract between ODYS and program attorneys, Larry Mathews ("Mathews") and Sharon Hicks ("Hicks"), so that Plaintiffs could "assess the scope of [the attorneys'] duties," as well as a description of any and all legal services the new ODYS legal services program was to provide in order to determine whether it, in fact, met the requirements of the law. Pls.' Motion at 5. In response, Defendants filed a motion to stay all discovery, which this Court subsequently granted. *Id*.

Defendants filed their Third Motion for Summary Judgment on August 1, 2005 in which they reiterated their previous assertions and insisted that M.M. and T.M., the two additional named plaintiffs, lacked standing. *See* Pls.' Motion at 5-6; Defs.' Third Motion for Summary Judgment. In response, Plaintiffs, once again, sought to "engage in discovery designed to uncover the content, scope, and operation of Defendants' new legal assistance program, and served Defendants with a *second* request for production of documents along with a first set of interrogatories." *See* Pls.' Motion at 6; Pls' Reply to Defs.' Response to Pls.' Motion for Extension of Time. In making their discovery request, Plaintiffs sought both an extension to the period of discovery set in the Court's preliminary pretrial order and an extension of time to respond to Defendants' Third Motion for Summary Judgment. *See* Pls.' Motion at 6; Pls.' Motion to Extend Discovery; Pls' Motion for Extension.

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[7]The first Amended Complaint [Doc. No. 40] was terminated on March 8, 2005 and later replaced by Plaintiffs' Second Amended Complaint [Doc. No. 77].

On February 7, 2005, the Court held a telephonic hearing and ruled, *inter alia*, that Plaintiffs could not engage in any discovery regarding Defendants' new legal assistance program, issuing a protective order to that effect. *See* Pls.' Motion at 1. The Court held that before any such discovery could occur, the parties and the Court needed to address the issues of jurisdiction, standing, and the exhaustion of administrative remedies present in Defendants' various motions for summary judgment. *Id*.

2. The Second Amended Complaint

With the Court's permission, Plaintiffs filed their seconded amended complaint on May 18, 2005. *See* Pls.' Second Amended Complaint; *see supra* note 7. Shortly thereafter, Defendants filed a motion requesting disqualification of Plaintiffs' Attorney, Kim Brooks Tandy for causing herself to become a material witness in the case. *See* Defs.' Motion to Disqualify Plaintiffs' Counsel.

On September 29, 2005, this Court granted Defendants' Second Motion for Summary Judgment based on the Court's lack of subject matter jurisdiction to entertain Plaintiffs' claims. *See J.P.*, 2005 WL 2405993, at *19.[8] In so holding, the Court also denied as moot Defendants' First Motion for Summary Judgment,[9] and Defendants' Motion to Disqualify Kim Brooks Tandy

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[8]This Court found the claims of Plaintiffs J.P., S.J., and D.B. to be moot, explaining, "[a]fter this case was filed, however, Defendants did in fact provide counsel to each of the three Plaintiffs named in the original Complaint (citations omitted). Thus, Defendants voluntarily ceased their allegedly unconstitutional actions, i.e., preventing meaningful access to the courts by denying Plaintiffs access to legal counsel." *See J.P.*, 2005 WL 2405993, at *12.

[9]Defendants' First Motion for Summary Judgment asserted that the Court could not hear the named Plaintiffs' claims because they had failed to exhaust their administrative remedies before filing suit [Doc. No. 25]. The Court, finding the issue moot after dealing with the jurisdictional issues in Defendants' Second Motion for Summary Judgment, did not reach the merits of the exhaustion issue. *See J.P.*, 2005 WL 2405993, at *19.

as Plaintiffs' Counsel. *Id*. Finally, the Court also dismissed, without prejudice, Plaintiffs' Motion for Class Certification, noting that Plaintiffs may have an opportunity to re-file the motion following the Court's resolution of the Defendants' Third Motion for Summary Judgment. *Id*.

On March 15, 2006 the Court denied both Plaintiffs' Motion to Table the Court's Preliminary Pretrial Order, and Plaintiffs' Rule 59 Motion to Alter or Amend the Court's September 29, 2005 Opinion and Order. Also, on April 21, 2006, the Court granted Defendant Taft's Motion to Dismiss, dismissing all counts brought against Governor Taft, leaving Defendant Stickrath and Defendant ODYS as the sole defendants. *See supra* note 1.

3. Facts Regarding T.M.

On March 17, 2006, the parties engaged in a telephonic status conference before the Court. During the status conference, the Court re-opened discovery limited to the claims of T.M., the sole remaining plaintiff in this case.[10]

a. T.M.'s Assault Allegations

The following facts regarding T.M. are adopted, in relevant part, from the Court's previous opinion in this case. *See J.P.*, 2005 WL 2405993, at *4-5. At the time the Plaintiffs' filed their Second Amended Complaint, Plaintiff T.M. was an eighteen-year-old youth who had

[10]Plaintiff H.H. voluntarily dismissed her claim without prejudice on July 7, 2005 [Doc. No. 87]. When the Court granted Defendants' Second Motion for Summary Judgment on September 29, 2005, all remaining named Plaintiffs were dismissed except M.M. and T.M., the two named Plaintiffs added when Plaintiffs filed their Second Amended Complaint [Doc. No. 106]. On September 12, 2005, however, Defendants filed their first supplemental memorandum in support of their Third Motion for Summary Judgment apprising the Court that M.M., through attorney Hicks, had filed a *pro se* excessive force claim in the Northern District of Ohio (case number 3:05-cv-07362). Therefore, M.M.'s claim was dismissed as moot, leaving T.M. as the only Plaintiff in this matter.

been in ODYS custody for approximately two years. *See id*. at *5. After a brief stay at the reception center in Scioto, Ohio, T.M. was permanently assigned to Marion Juvenile Correctional Facility ("MJCF") for the duration of his commitment. *See* Second Amended Complaint ¶ 11. While at MJCF, T.M. was placed in a number of different units, but he was housed in Building 5 for the majority of his confinement. *Id*.

On October 14, 2004, T.M. and other inmates in Unit 5B, engaged in a small uprising, banging on their doors in order to get permission to use the bathroom. *See J.P.*, 2005 WL 2405993, at *5.[11] During the incident, a Juvenile Corrections Officer ("JCO") entered T.M.'s room and restrained him, "choking him out" until T.M. was rendered unconscious. *Id*. T.M. also sustained an eye injury when the JCO hit him in the eye. *Id*. Additionally, T.M. claims that after being assaulted, he received inadequate medical care for his injuries. *Id*.[12] When T.M. was

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[11]An investigative report regarding this incident revealed that Unit 5B guards "repeatedly den[ied] bathroom breaks as a form of discipline." *See* Defs.' Ex. B, Report of the Investigation of the 5B "Star" Housing Unit Incident, at 6. Further, the report stated that,

> [a]lthough it is believed that some youth may intermittently elect to urinate in milk cartons and latex gloves, it is acknowledged by virtually all interviewed staff and youth, that youth behavior determines whether or not youth are permitted restroom breaks. Staff would require youth to "remain quiet" for period of time until awarding restroom access.

Id.

[12]At midnight on October 14, 2004, T.M. was seen at the infirmary complaining of difficulty breathing and problems with his throat. *See* Defs.' Supp. Memo at 2. A medical assessment was performed and treatment was rendered. *Id*. When T.M. felt better, the medical staff decided to monitor him through the night, and he was sent off-site for care. *Id*.

On October 14, 2004, at 3:00 p.m., T.M. was seen by medical staff in unit 2D. Defs.' Supp. Memo at 2. He stated that he was "okay" except for a sore throat, and staff observed that his left eye was stolen. He was sent to the infirmary where staff took photos of his left eye. *Id*. at 2-3. He was also given ice and Motrin for his eye and throat discomfort. *Id*. at 3.

Though the issue was not raised in any of the parties' prior papers, in Plaintiffs' Opposition Motion, they assert that T.M.'s denial of court access claim is also based upon his

released from the infirmary on October 15, 2004, he was transferred to Unit 2D in Building 2 and never returned to Building 5. *See* Defs.' Ex. A-1, Youth Injury & Assessment Form (10/15/2004); Defs.' Ex. A-3, Interdisciplinary Progress Notes (10/18/2004); Ex. A, Decl. of Jeffrey Rollins (5/4/2006); Ex. E, Aff. of Doneta Riegsecker (describing the movement for T.M. from the date of the incident to the date he was released from DYS).[13] Unlike youth in Building 5, youth in Unit 2D of Building 2 have a toilet and sink in their rooms; thus, they do not have to depend on ODYS staff to gain access to bathroom facilities. *See* Defs.' Ex. D, Aff. Norm Hills (6/1/2006).

On October 16, 2004, two days after the incident, T.M. filed an ODYS administrative grievance for assault in which he explained his injuries and indicated that he wanted the matter to be resolved "in court." *See J.P.*, 2005 WL 2405993, at *5. T.M.'s grievance included a written statement describing the assault by the JCO and asserting that youth were being forced to urinate in their rooms into rubber gloves rather than being allowed to use the bathroom. *Id*. T.M.'s grievance included no language asserting that he had been denied access to adequate medical care, and no specific allegations about unconstitutional conditions of confinement. *Id*.

The ODYS grievance committee subsequently found merit to T.M.'s complaint and indicated to him that "appropriate actions [would] be taken." *See* T.M. Dep., Pls.' Ex. B, at 2. The Superintendent agreed with the committee's finding. *Id*. Nonetheless, because T.M. was

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allegations of inadequate medical care, and his assertions of unconstitutional conditions of confinement. *See* Pls.' Opp. at 4, 11, 12, 13, 34, 35, 36, 38. T.M. claims to have filed written grievances about these claims; however, there is no evidence that any such grievances exist.

[13]During oral argument, Defendants' counsel noted that, after the October 14, 2004 incident, *all* of the inmates from Unit 5B were transferred elsewhere.

never apprised of any action taken in regards to his grievance, he appealed the Superintendent's decision to the Chief Inspector on December 15, 2004. Second Amended Complaint ¶ 11. On January 4, 2005, after having reviewed T.M.'s grievance, the Chief Inspector informed T.M. that he concurred with the committee's determinations and its decision to grant the grievance. *Id*. Further, the Chief Inspector informed T.M. that disciplinary action had been taken against the offending employees. *See* T.M. Dep., Pls.' Ex. B., at 2. Both Plaintiffs and Defendants are in agreement that T.M. exhausted a full round of the grievance process in pursuing his assault claim. *See* Pls.' Opp. at 16; Defs.' Third Motion for Summary Judgment at 9.

The record reveals that in the course of his stay at MCJF, T.M. filed a total of eight administrative grievances: (1) on October 15, 2004, T.M. claimed he was physically assaulted in Unit 5B;[14] (2) on October 16, 2004, T.M. claimed he was placed in Unit 2D without his personal hygiene items; (3) on October 16, 2004, T.M. objected to placement in Unit 2D and sought an explanation for the placement; (4) T.M. objected to placement and retention in Unit 2D; (5) on November 24, 2004, T.M. claimed he was locked in a restroom in Unit 2D; (6) on November 24, 2004, T.M. objected to participation in the GED program; (7) on November 24, 2004, T.M. claimed his positive behavior warranted his removal from Unit 2D; (8) on December 11, 2004, T.M. claimed showers in Unit 2D were cold and complained that worms were coming out of the drain. *See* Decl. Jeffrey L. Rollins, Human Services Program Administrator for MJCF at 1-2. None of these grievances relates to denial-of-access, and T.M. failed to attach his alleged recorded grievance to his complaint. T.M. asserts that his copies of each of the above grievances

[14]As noted above, the parties do not dispute that T.M. fully exhausted his assault grievance.

as well as any other "legal papers" that he had regarding his case were confiscated by ODYS guards, labeled "gang literature," and not returned to him upon his release. *See* Defs.' Ex. 5, T.M. Aff. ¶ 20.

b. T.M.'s Pursuit of Legal Relief

As noted above, in filing his assault grievance on October 16, 2004, T.M. indicated that he wanted his assault charge to be resolved "in court." *See* Second Amended Complaint ¶ 11. Thus, in the latter part of October, 2004, T.M. sought representation through ODYS' Legal Assistance Program. *See id*. Pursuant to T.M.'s request, on November 1, 2004, T.M. met with contract attorney Mathews[15] who informed T.M. that he would find him an attorney to provide him with legal assistance. *Id*.

Initially, Mathews identified six attorneys who handled ODYS cases – Jillian Davis, John Lawson, David Doughten, Lisa Meeks, Mike Benza, and Benson Wolman – and sent a referral to those six individuals regarding T.M. *See* Pls.' Opp. at 6; *see* Mathews Dep. at 96.

Mathews re-visited T.M. on December 13, 2004, and provided him with a copy of a letter which stated in relevant part:

> This letter is to update you on the status of the matter we previously discussed. After our conversation, I prepared a summary of the incident based upon what you told me and other information I had obtained from DYS. On November 27, I sent letters to six attorneys asking them to review the information and consider representing you in this matter.
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> So far, I have not received a response from any of them, but I plan to follow up with them the week of December 20th if I have not received a response.
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> When I hear from the attorneys I will let you know.

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[15]*See supra* note 5 (noting that in revamping its legal services, ODYS hired contract attorney, Mathews, to provide legal assistance to inmates).

Defs.' Ex. D.

Shortly thereafter, Mathews, accompanied by Attorney Jillian Davis ("Davis"), met with T.M. to discuss his case. *See* Pls.' Ex. 2, Mathews Dep. at 32-35. Davis expressed an interest in taking T.M.'s case, and informed T.M. that she would look into the matter. *See* Defs.' Ex. 5, T.M. Aff. ¶¶ 8-10. Davis did not follow up with Mathews regarding T.M., and when Mathews spoke to her "a couple times" on the phone regarding her interest in taking on T.M. as a client, she told him that she was still contemplating it. Pls.' Ex. 2, Mathews Dep. at 34. Finally, on March 16, 2005, Davis informed Mathews by letter that she had just accepted a new position, and, as a result, would be unable to take on additional cases, including that of T.M. *See* Pls.' Ex. 4, Letter from Jillian Davis to Larry Mathews.

On March 29, 2005, after Mathews informed T.M. that Davis would not take his case, Hicks asserts that she sent T.M. a letter indicating that Cleveland attorney, Matthew Brownfield ("Brownfield") was willing to look over T.M.'s case. T.M. never responded, and he now claims that he never received the letter. *See* Pls.' Opp. at 22.

Though the details of what occurred regarding T.M.'s assault claim between December 2004 and March 2005 are in dispute,[16] both sides agree that during that time period, neither Mathews nor Hicks, was able to find an attorney willing to represent T.M. *See* Pls.' Opp. at 7-

[16]Defendants contend that despite their best efforts to make contact with him, T.M. continually refused to meet with Mathews and Hicks regarding his claims. Plaintiffs, however, argue that Mathews and Hicks never spoke directly with T.M., and that any testimony by others that T.M. had either refused meetings or opted not to pursue legal relief is inadmissible hearsay. *See* Pls.' Opp. at 12 ("Controverted Facts").

11; Defs.' Supp. Memo at 5-10.[17]

On June 1, 2005, ODYS released T.M. from institutional status and placed him under parole supervision. Defs.' Ex. B. Following T.M.'s release on parole, neither Mathews nor Hicks ever heard from T.M. by letter or telephone call. Defs.' Supp. Memo at 11. On January 11, 2006, the Mahoning County Court of Common Pleas, Juvenile Court Division, entered an

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[17]In Plaintiffs' Opposition, Plaintiffs write, ". . . T.M. was so in need of legal assistance while incarcerated at [MCJF] that his mother attempted to have her private attorney [Michael Rich] visit him at the facility." *See* Pls.' Opp. at 11. In his April 11, 2006 deposition testimony, T.M. also asserts that he was denied the right to seek legal assistance from a private attorney:

> Q: Who was the attorney you tried to bring into this?
> A: Mike Rich. That's my mom's private attorney.
> Q: Okay. Did you write to him?
> A: No, I didn't write to him, 'cause we was requesting him. My mom talked to Mike Rich about it, and he said he'll come talk to me. My mom called up to the institution and talked to Norm Hills. Norm Hills said they got their own lawyers, and from that I never heard – I ain't heard from them yet.

See T.M. Dep. at 49.

In his affidavit, however, attorney, Michael Rich, asserts that he was *never* contacted by T.M.'s mother, and/or by T.M. himself. The affidavit states:

> 3. In 2003, I was appointed as counsel for [T.M.] by the Mahoning County Juvenile Court and represented him during his juvenile adjudication for burglary under Case No. 03 JA 544. . . .
>
> 5. At no time was I ever contacted by any individual, including [T.M.] and his mother, Valerie Watkins, concerning an alleged assault of [T.M.] by a [JCO] while confined at the [MCJF]. Nor did I speak to Ms. Watkins and agree to talk to [T.M.] about the assault.
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> 6. I have not represented or advised [T.M.] or his mother, Valerie Watkins, in any civil matter.

See Defs.' Ex. F, Aff. Michael Rich. Based on this conflicting testimony, and because T.M.'s assertion that his mom talked to Mike Rich is hearsay, the Court considers T.M.'s assertions that he was denied access to *private* counsel, as well as contract attorneys to be untenable.

Order terminating T.M. from parole. *Id*.

4. Recent Occurrences

On April 11, 2006, following the Court's decision to re-open discovery as to T.M., the parties deposed T.M. Further, on April 19, 2006, the parties deposed DYS contract attorneys Mathews and Hicks. Following the depositions, Hicks contacted T.M. and informed him that Cleveland attorney, David Doughten ("Doughten"), had agreed to represent him in filing a formal legal complaint for his assault charge. T.M. agreed to be represented, and, accordingly, Hicks referred T.M.'s case to Doughten, who subsequently filed suit on T.M.'s behalf in Federal District Court in Toledo, Ohio; the suit seeks damages for T.M.'s October 14, 2006 assault by a Unit 5B JCO (case number 3:06-cv-1127).

In late April, Defendants, citing new information gained in the depositions of T.M., Mathews, and Hicks, requested leave to file a third supplemental memorandum[18] in support of their Third Motion for Summary Judgment and brought a motion to alter or amend the Court's briefing schedule. The Court granted both of Defendants' requests. The issues are now fully briefed, and the Court conducted oral argument on June 8, 2006.

This Court issued its initial Opinion and Order denying Defendants' Third Motion for Summary Judgment on July 7, 2006 [Doc. No. 147]. On July 21, 2006, in response to motions by both parties, the Court issued an amended opinion and order omitting footnote 25. [Doc. No.

[18]Defendants had previously filed two supplemental memoranda in support of their Third Motion for Summary Judgment, the first on September 12, 2005 [Doc. No. 100], and the second on November 4, 2005 [Doc. No. 114].

147].[19] On July 25, 2006, Defendants filed the timely motion to alter or amend the July 21 Opinion currently at issue. [Doc. No. 149]. This matter has been fully briefed and is now ripe for decision.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 59 allows parties to move for a court to alter or amend a previously issued judgment. *See* FED. R. CIV. P. 59(e).[20] A court may alter or amend its judgment for one of three reasons: (1) because of an intervening change of controlling law; (2) because evidence not previously available has become available; or (3) because such action is necessary to correct a clear error of law or prevent a manifest injustice. *See Petition of U.S. Steel Corp.,* 479 F.2d 489, 494 (6th Cir. 1973). Rule 59(e) may not be used to simply re-argue issues previously addressed by the Court. *See Sault Ste. Marie Tribe of Chippewa Indians v. Engler,* 146 F.3d 367, 374 (6th Cir.1998).

IV. ANALYSIS

Defendants argue that the Court must reconsider its previous judgment to prevent manifest injustice, correct clear errors of law, and reconsider jurisdictional issues that it previously overlooked. The Court will consider each of Defendants' arguments seriatim.

A. Standing

As a threshold matter, Defendants assert that the Court erred in finding that T.M. had

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[19]The Court will hereinafter refer to its July 21, 2006 Opinion and Order as "July 21 Opinion."

[20]Rule 59(e) of the Federal Rules of Civil Procedure reads, "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." *See* FED. R. CIV. P. 59(e).

standing to file his forward-looking denial-of-access claim because he did not suffer an "actual injury." *See* Defs.' Motion at 3-4. According to Defendants, in order to establish an actual injury, T.M. must present evidence that he was prejudiced by being unable to file a complaint on his underlying assault claim for over 1½ years from when the assault occurred. *Id*. at 5. Defendants assert, however, that T.M. failed to show actual prejudice because the evidence presented suggests no more than a "theoretical sense of harm." *Id*. Further, they note that because as of May 2005, T.M. retained counsel, filed a claim in a Toledo, Ohio federal court, and successfully settled that claim, he suffered no actual injury that would confer standing upon him. *Id*.

The Court finds Defendants' contentions to be without merit. This Court devoted approximately nine pages of its July 21 Opinion to the issue of standing. *See J.P. v. Taft*, 2006 WL 2037375, at *7-16 (S.D. Ohio July 21, 2006). The Court found that because the parties disputed the details of T.M.'s discussions with Mathews in regards to his assault claim, there is a genuine issue of material fact as to whether Defendants' failure to provide him with an attorney soon after his assault caused T.M. an actual injury sufficient to survive Defendants' Third Motion for Summary Judgment. *See id*., at *9-10. Defendants' Motion, rather than raising new evidence, simply refers back to Defendants' previously submitted argument that T.M. suffered no actual injury at the hands of Defendants. This Court has already heard and rejected that argument, and it finds the argument no more tenable in Defendants' current Motion.

B. Subject Matter Jurisdiction

Defendants also assert that the Court erred in failing to consider the issue of subject matter jurisdiction, and, by extension, in failing to find that it lacks subject matter jurisdiction

over T.M.'s claims. According to Defendants, T.M.'s claims that he was denied substantive due process fail to show that Defendants' "deliberately indifferent" actions "shock[ed] the conscience," and, therefore, do not allow this Court jurisdiction over T.M.'s claims. Defendants assert that there is no evidence suggesting that Mathews' failure to secure successfully a private attorney for T.M. was a "deliberate effort" to intentionally interfere with T.M.'s ability to file his underlying physical assault claim. *See* Defs.' Motion at 8.

Though Defendants attempt to convert the issue of whether they intentionally denied T.M. access to the courts into a question of subject matter jurisdiction, which can be raised for the first time in a Rule 59 motion, the question of Defendants' intent is *not* a jurisdictional issue. Resolution of the issue of whether a defendant's failure to provide access to the courts was either intentional or negligent goes to the merits of the case, not to the court's jurisdiction, and there is no case law to the contrary to support Defendants' argument.[21]

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[21]In their Motion, Defendants cite precedent to argue that Defendants' intent is a jurisdictional issue. The cases cited, however, do not support Defendants' assertion. For instance, Defendants assert that *Sims v. Landrum* establishes that a plaintiff's argument that a defendant's unintentional *negligence* harmed him does not constitute a valid due process claim under 42 U.S.C. § 1983. *See* 170 Fed. Appx. 954, 956 (6th Cir. 2006). Quoting *Sims*, Defendants write,

> Prisoners have a First and Fourteenth Amendment right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 354 (1996). In assessing whether a State has violated that right, we ask whether the claimant has demonstrated an "actual injury," *see Harbin-Bey v. Rutter*, 420 F.3d 571, 578 (6th Cir. 2005), and, if so, whether the claimant has alleged that more than mere negligence by the state actor caused the injury, *see Gibbs v. Hopkins*, 10 F.3d 373, 379 (6th Cir. 1993) ("These actions, if proven, and if intentional, support the claim that prison officials are attempting to deny prisoners effective access to the courts.").

See Def.'s Motion at 7 (citing *Sims*, 170 Fed. Appx. at 956). Despite Defendants efforts to categorize *Sims* as a jurisdictional case, the *Sims* court dismissed the case for the plaintiff's failure to state a claim upon which relief can be granted. *Id*. at 957 (dismissing plaintiff's claims

A motion under Rule 59(e) is not an opportunity to re-argue a case, and parties should not use them to raise arguments which could, and should, have been made before judgment issued. *See Sault Ste. Marie Tribe of Chippewa v. Engler*, 146 F.3d 367 (6th Cir. 1998) (citing *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) ("Rule 59(e) motions are aimed at *re*consideration, not initial consideration. Thus parties should not use them to raise arguments which could, and should, have been made before judgment issued.")). Because Defendants did not raise their argument regarding whether T.M. established intent earlier in this litigation, and because this Court finds that, despite Defendants' arguments to the contrary, the issue of intent is not jurisdictional, the Court rejects Defendants' second argument as untimely.

C. Voluntary Cessation

Defendants also claim that the Court "overlooked" their arguments that the voluntary cessation doctrine is inapplicable to T.M.'s claims. Defendants assert that because T.M. was released from ODYS and discharged from parole, and because T.M. retained Doughten to represent him in asserting (and subsequently settling) his underlying assault claim, he has received the relief he sought. Accordingly, they argue that the Court should have found his case moot. The Court did not overlook Defendants' arguments in earlier pleadings. In fact, the Court devoted approximately eight pages of its July 21 Opinion to a discussion of mootness, specifically to whether Defendants had established that they had voluntarily ceased their allegedly unconstitutional behavior. *See J.P.*, 2006 WL 2037375, at *16-24. After a lengthy

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for failure to state a claim on which relief can be granted and noting that "in the absence of any allegation that [defendant] intentionally slowed the processing of [plaintiff's] mail . . ." could not support a conclusion that defendant's behavior constituted "anything more than regrettable, but non-cognizable negligence.").

analysis, the Court concluded that there is a question of material fact as to: (1) whether "there is no reasonable expectation' that the alleged violation[s] will recur"; and (2) whether the Defendants' interim relief or events "completely and irrevocably eradicated the effects of the alleged violation." *See J.P.*, 2006 WL 2037375, at *19 (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (establishing that a defendant bears a heavy burden to show that it has completely eradicated its previous allegedly unconstitutional conduct)). Defendants have cited no new precedent[22] and raised no new factual assertions to cause the Court to reconsider its thorough analysis.

D. Exhaustion of Available Administrative Remedies

Defendants claim that the Court erred in finding that T.M. exhausted his available administrative remedies, and note that the recent Supreme Court decision in *Woodford v. Ngo*, 126 S.Ct. 2378 (June 22, 2006), impliedly overturned *Thomas v. Woolum*, 337 F.3d 720, 727, 733 (6th Cir. 2003), upon which this Court relied heavily in finding that T.M. had exhausted his

[22]The only new case cited by Defendants in its Motion is *DeFunis v. Odegaard*. *See* 416 U.S. 312 (1974) (finding that because petitioner's case was moot, the Court could not consider the substantive constitutional issues tendered by the parties). *DeFunis*, a 1974 case, is not new authority. In *DeFunis*, after he was rejected from the University of Washington law school, plaintiff, DeFunis, sought an injunction challenging the constitutionality of the school's affirmative action program and ordering him admitted to the law school. *See* 416 U.S. at 314-15. The state court ordered him admitted to the law school, but on appeal, the state supreme court held that the admissions policy did not violate the constitution. *Id*. By the time DeFunis' case got to the Supreme Court, he was about to complete his law school studies. *Id*. at 318. Accordingly, the Court found that his case was moot, and it no longer had jurisdiction to consider the substantive constitutional issues raised by the parties. *Id*. at 320. Defendants assert that as in *DeFunis* where the impending litigation would no longer affect plaintiff's law school status, in this case, where T.M. is no longer under ODYS care, and has already received the relief he sought, his case is moot, divesting the Court of jurisdiction. The Court, however, considered *DeFunis* in the discussion of mootness set forth in the July 21 Opinion, and Defendants' discussion of that case in its Motion fails to give the Court pause to reconsider its previous conclusion. *See J.P.*, 2006 WL 2037375, at *16 & n. 22.

available administrative remedies. Because *Woodford* is new authority, which had not been decided at the time of oral argument on Defendants' Third Motion for Summary Judgment, the Court did not consider this decision in drafting the July 21 Opinion. It will now, however, give the decision its due consideration.

Woodford v. Ngo resolved the circuit court split on the issue of what constitutes "exhaustion of remedies" under the PLRA, 42 U.S.C. § 1997e(a). *See* 126 S.Ct. at 2384.[23] After engaging in a thorough analysis of both administrative an *habeas* exhaustion requirements, the Court adopted the position of the Third, Seventh, Tenth and Eleventh Circuits, strictly interpreting the PLRA to find that proper exhaustion of administrative remedies is necessary. *Id*. at 2382. The Court reasoned that this interpretation complied with Congress' decision to enact the PLRA, in relevant part, to reduce frivolous prisoner claims. *Id*. at 2388. Further, the Court found that requiring proper exhaustion would better serve prisoner plaintiffs, explaining:

> The benefits of the exhaustion system can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules. A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless

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[23]Before *Woodford*, both the Ninth and the Sixth Circuit's held that substantial compliance with the PLRA's exhaustion requirements, including procedural defects, could constitute "exhaustion." *See Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003) (establishing that in cases where a plaintiff's efforts to comply with the prisons' exhaustion requirements fulfilled "the letter and the spirit" of the PLRA, the PLRA's exhaustion requirement was satisfied); *Ngo v. Woodford*, 403 F.3d 620, 629-30 (9th Cir. 2005) (adopting *Thomas v. Woolum* in the Ninth Circuit). On the other hand, the Third, Seventh, Tenth and Eleventh Circuits found that strict compliance with the exhaustion procedures was required in order for a prisoner-plaintiff to satisfy the PLRA's exhaustion requirements. *See Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004)("To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require . . . ."); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002) (same); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1185-86 (10th Cir. 2004) (same); *Johnson v. Meadows*, 418 F.3d 1152, 1159 (11th Cir. 2005) (same).

> noncompliance carries a sanction, and respondent's interpretation of the PLRA noncompliance carries no significant sanction. For example, a prisoner wishing to bypass available administrative remedies could simply file a late grievance without providing any reason for failing to file on time.

See id. at 2388.

The Court recognizes that the Supreme Court's ruling in *Woodford* adopts a more rigid interpretation of the PLRA's exhaustion requirements than that adopted by the Sixth Circuit in *Thomas v. Woolum*. *See* 337 F.3d at 757. Even so, as noted by the *Woodford* dissenters, "[t]he [*Woodford*] majority leaves open the question whether a prisoner's failure to comply properly with procedural requirements that *do not provide a 'meaningful opportunity for prisoners to raise meritorious grievances' would bar the later filing of a suit in federal court*." *See* 126 S.Ct. at 2403 (Stevens, J., Souter, J., and Ginsburg, J., dissenting) (emphasis added). This Court finds that T.M.'s case fits within the confines of this "open question."

As the Court noted in its July 21 Opinion, T.M.'s case presents a unique factual scenario which has yet to be considered by *any* other federal court,

> Does a juvenile inmate who puts prison administrators on notice that he wishes to have an administratively exhausted claim resolved "in court," exhaust his remedies for a denial-of-access claim when it is undisputed that at the time he grieved, the prison had no mechanism to provide its juvenile inmates with attorney access, and, therefore, access to the courts?

See J.P., 2006 WL 2037375, at *26. Given that this Court found that Defendants had not affirmatively established that they had voluntarily ceased their allegedly unconstitutional behavior, the facts suggest that at the time T.M. sought to grieve his assault claim, ODYS did not have meaningful policies or procedures in place that would allow him to do so. Accordingly, this Court's ruling as to T.M.'s exhaustion stands. Despite *Woodford*'s strict stance on exhaustion, the Court maintains that T.M.'s filing of a grievance requesting that his claim be

resolved "in court" put Defendants on notice sufficient to exhaust his remedies available under the PLRA.

E. Lifting of the Stay of Discovery

Lastly, Defendants assert that the Court erred in lifting its previously issued stay of discovery to allow Plaintiffs the opportunity to pursue an investigation into Defendants' recent efforts to reform the ODYS legal access program. Defendants assert that the Court's decision was based upon the allegedly erroneous conclusions set forth above, and, accordingly, must be overturned along with those conclusions. Because the Court has found each of Defendants' assertions to be without merit, its decision to lift the stay on discovery stands.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendants' Motion to Alter or Amend this Court's July 21, 2006 Order and Opinion denying their Third Motion for Summary Judgment.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: October 10, 2006