STEPHEN L. PEVAR
American Civil Liberties Union
1888 Sherman Street, Suite 380
Denver, CO 80203
303/839-5752

MARGARET WINTER
DONNA LEE
ERIC BALABAN
National Prison Project
1875 Connecticut Avenue NW, Suite 410
Washington, DC 20009
202/234-4830

HOWARD BELODOFF
2402 W. Jefferson St.
Boise, Idaho 83702
208/331-3378

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

NOEL PUENTE GOMEZ, et al., Plaintiffs, vs. JAMES SPALDING, et al., Defendants.	Civ. No. 91-2099-S-LMB PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED REMEDIAL PLAN

Defendants have submitted a proposed Remedial Plan purportedly designed to rectify the constitutional injuries suffered by Plaintiffs Lee Hays, Bob Jones, and Wayne Olds. Plaintiffs object to Defendants' proposal on several grounds. Before addressing the specific shortcomings of the Plan, some general comments are in order.

1102

I. BACKGROUND

The Court is respectfully requested to consider the following principle in fashioning an appropriate Remedial Plan: "A defendant's history of noncompliance with prior court orders is a relevant factor in determining the necessary scope of an effective remedy." Toussaint v. McCarthy, 801 F.2d 1080, 1087 (9th Cir. 1986). See also Hutto v. Finney, 437 U.S. 678, 687 (1978); Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982).

Earlier in this litigation the Court issued one prohibitory injunction against IDOC, and IDOC ignored the Court's command for twenty months. In December 1993, the Court held "as a matter of law that Defendants' law library storage limitation is unconstitutional and must be removed from Defendants' policy and procedure manual." Order of Dec. 16, 1993, at 16. The Court reiterated that command in the "Order" portion of the opinion, again identifying the offending regulation and stating: "Defendants shall remove said regulation from their procedure manual." Id., at 18.

IDOC's policy manual is loose-leaf. Removing the offending regulation would have required merely re-writing a page, or handwriting-in a correction upon that page.[1] Yet IDOC did not remove the unconstitutional regulation until August 15, 1995, twenty months later, when it happened to adopt a new Access to

---

[1]Assistant Warden Deborah Shields, whose deposition was taken in this litigation on January 22, 1998, acknowledged during her deposition that "you can handwrite [changes] in until they get the new [policy manual] out." Dep. of Shields at 184, lines 7-8. (A copy of Ms. Shield's deposition was introduced into the record during the Sanctions hearing.)

Courts policy, Policy 02-405 (a copy of which was admitted into evidence during the Sanctions hearing as Plaintiffs' Exhibit 255). The Warden of ISCI, Joe Klauser, was asked about this protracted delay when he was deposed on October 23, 1997. The following testimony was adduced:

> Q. [By Mr. Pevar] Yes or no. Was the [storage limitation] policy removed?
>
> A. [By Warden Klauser] The policy is--
>
> Q. You were ordered, and the Court said, that the policy, quote, "must be removed from the defendant's policy and procedure manual." Was it removed?
>
> A. I don't write policy.
>
> Q. Was it removed or was it not removed? Yes or no. I mean, there is a yes or no answer to that.
>
> A. Was that statement removed from the policy [prior to] 1995? No, it was not.

Dep. of Klauser at 83 lines 9-19.[2]

Defendants exhibited a similar resistance to implementing the Court's March 16, 1999 Findings of Fact, Conclusions of Law, Memorandum Decision and Order (hereafter "FINDINGS"). As the Court found in its June 17, 1999 Order, "Defendants not only continue to trivialize Plaintiff Roman's retaliation claim *but also have given little regard to an Order of this Court* declaring that Plaintiff

---

[2]While questioning Warden Klauser during the retaliation trial, Plaintiffs' counsel sought to introduce the above evidence. The Court sustained an objection to that evidence, stating: "Well, should the plaintiff[s] prevail, then we can take that up, but I don't see that this is relevant to the issues of retaliation.... [However,] I'll be mighty unhappy if my order hasn't been complied with." Tr. Vol. 9, p. 12 ll. 15-17. Thus, it is now time to consider this evidence.

Roman was subjected to unlawful retaliation in the form of a retaliatory DOR." Order of June 17, 1999, at 6 (emphasis added).

Defendants have trivialized the constitutional rights at stake, and delayed and resisted implementing orders of this Court. This should be taken into account in determining an appropriate remedial plan that will provide Plaintiffs with the protections they deserve from further constitutional injury.

II. PLAINTIFFS' SPECIFIC OBJECTIONS

The Court has concluded that Plaintiffs Hays, Jones, and Olds were transferred in retaliation for exercising their First Amendment rights. Plaintiffs have two primary objections to the plan proposed by the Defendants to correct these violations of federal law and ensure that these men will not be unlawfully transferred again.

First, Defendants' proposal does *nothing* to eradicate the deficiencies that led to Plaintiffs' injuries. These deficiencies were carefully enumerated by the Court in its March 16, 1999 decision:

> Correctional officers, and especially a deputy warden, have the power to influence the transfer process by recommending that certain inmates be transferred. There is no institutional rule prohibiting correctional officers from approaching a transport coordinator and recommending that certain inmates be transferred. The more authority the correctional officer holds who attempts to influence the transport coordinator, the more likely it becomes that the request will be honored and the particular inmate transferred. At times, the decision to transfer or re-assign inmates is entirely subjective.

FINDINGS at 16. (Citations to trial transcript omitted.)

The Court reiterated these deficiencies in its June 17 Order. Quoting from its earlier ruling, the Court reminded the Defendants that the Court was:

> [C]oncerned about the injuries caused by retaliatory transfers resulting from the exercise of protected rights. The Court notes that IDOC officials testified at trial that they have not created a rule which prohibits individual officers from improperly asserting influence upon a transfer coordinator in order to include a burdensome and litigious inmate on the list of inmates that are to be transferred. Based upon the evidence presented at trial, the Court has concluded that the absence of a rule prohibiting retaliatory transfers has allowed such retaliation to occur.

Order of June 17, 1999, at 8, quoting FINDINGS at 33. Later in its decision, the Court emphasized these shortcomings when it explained why injunctive relief was being granted: "Important to the Court's consideration in this regard are the circumstances surrounding the determination that inmates had been subjected to unlawful retaliatory transfers as a result of Defendants' failure to create a rule prohibiting undue influence from being exerted by IDOC personnel in the creation of transfer lists...." Order of June 17, 1999, at 9 (emphasis added).

The proposed plan submitted by Defendants does not seek to remedy a single one of these deficiencies; indeed, they are not even mentioned. Defendants "have given little regard" to this portion of the Court's order, as well.

Rather than attack and eradicate the root of the problem, Defendants instead have made a cosmetic gesture: they have placed

a "red alert" on the prison records of these three men. This way, the argument goes, if these men *are* the victims of yet another effort by staff to unlawfully transfer them, some supervisor hopefully will intercede before the men are actually shipped out.

The bankruptcy of this approach is obvious. First, transfer decisions remain "entirely subjective" and are still as subject to unlawful influence as before. See FINDINGS, at 16. Moreover, the "red alert" system vests final decisionmaking authority in the same people who had it the last time illegal transfers were made. These are the same people who have trivialized Plaintiffs' rights and failed to implement earlier orders of the Court.

Defendants' proposed plan, in short, (1) ignores everything the Court said about the root causes of Defendants' unlawful transfers, and (2) it creates a "new" system that contains the same fundamental flaws that characterized the old one. Consequently, the proposal fails to ensure that the Plaintiffs will be afforded effective and meaningful relief.

Defendants' brief emphasizes the fact that, under the PLRA, a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary *to correct the violation of the Federal right,* and is the least intrusive means necessary *to correct the violation of the Federal right.*" 18 U.S.C. § 3626(a)(1) (emphasis added). However, as just explained, IDOC's plan does nothing to correct the violation of the Federal right. It does not even prohibit staff from unlawfully seeking to transfer these Plaintiffs for exercising

their First Amendment rights, despite this Court's repeated admonitions regarding that deficiency in IDOC's policies and practices.

Plaintiffs request that the Court direct the Defendants to demonstrate a legitimate penological reason why the plan recommended by the Plaintiffs and outlined below should not be implemented, given that Plaintiffs' plan--unlike IDOC's--(1) properly accounts for Defendants' past resistance, trivialization, and noncompliance, and (2) seeks to correct the Federal violations, as found by the Court. Plaintiffs propose that:

1. Defendants ("the State") will not cause Lee Hays, Bob Jones, or Wayne Olds to be transferred to another facility on less than two weeks written notice to Plaintiffs and their counsel.

2. If Plaintiffs notify the State that they object to the contemplated transfer and believe it to be retaliatory, the State will not transfer the Plaintiffs except in conformity with the procedures set forth below.

3. Plaintiffs will notify the Court that a dispute exists as to a contemplated transfer. The Court will select and appoint a Special Master to inquire into the matter.

4. The State will present to the Special Master, and serve on the Plaintiffs, a statement providing all their reasons for the contemplated transfer.

5. Plaintiffs may take reasonable discovery regarding the State's proffered reasons for the transfer, including, but not limited to, obtaining from the Defendants the identity of each

person who was involved in the decision to transfer, and taking depositions. The Special Master shall resolve any disputes as to the scope of discovery.

6. Plaintiffs may submit any relevant and material evidence to the Special Master that tends to show that the State's proffered reasons for the transfer are pretextual or that the State has a retaliatory motive for the transfer. The Special Master may, if he or she chooses, conduct an evidentiary hearing.

7. The State shall have the burden of showing by clear and convincing evidence that the transfer is motivated *solely* by legitimate penological concerns.

8. The Special Master will issue a written decision, which will be filed with the Court. The State may proceed with the transfer if and only if the Special Master finds that the State has met its burden of proof.

9. Either party may appeal the decision of the Master within ten (10) days to the Court, in the same manner that a Magistrate's recommendation is appealed to a District Court.

10. If the Special Master finds that the State has not met its burden of showing by clear and convincing evidence that the contemplated transfer was solely for legitimate penological reasons, the State shall pay the Plaintiffs' reasonable attorney's fees and expenses.

11. IDOC will institute a personnel rule that any correctional officer or other staff who is found by the Master, after due notice and a hearing, to have attempted to influence the

transfer any of these men in retaliation for exercising their First Amendment rights will be subject to disciplinary action, and this finding will be placed in his or her permanent personnel file.

Respectfully submitted this 27th day of July, 1999.

Stephen L. Pevar

STEPHEN L. PEVAR
MARGARET WINTER
DONNA LEE
ERIC BALABAN
HOWARD A. BELODOFF

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned attorney of record hereby certifies that a true and correct copy of the foregoing PLAINTIFFS' OBJECTION TO DEFENDANTS' PROPOSED REMEDIAL PLAN in the above-entitled matter was mailed postage prepaid on the 27th day of July, 1999 to:

Stephanie Altig
Office of the Attorney General
Department of Correction
1299 N. Orchard, Ste. 110
Boise, ID 83720-0018

Stephen L. Pevar

Stephen L. Pevar