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United States District Court,
S.D. New York.

James BENJAMIN, et al., Plaintiffs,
v.
William J. FRASER, et al., Defendants.

No. 75 Civ. 3073(HB). | Dec. 16, 2002.

Jail inmates sued correction department, seeking determination that department was in contempt of court order requiring medical evaluations of inmates placed on heightened restraint status, and providing for appeals of restraint decisions. The District Court, Baer, Jr., J., held that: (1) department was in contempt, by failing to implement medical examination and appeals procedure requirements for one year; (2) department would be required to pay daily fines for violations, with funds to go into affected inmate's accounts; and (3) department would be required to remove restraints once every two hours, and not to handcuff inmates hands behind their backs during court appearances.

Order accordingly.

Invalidating and superseding, 2002 WL 31163801.

West Headnotes (5)

[1] **Injunction**
Criminal matters and proceedings; prisons

Correction department was in contempt of court, when it delayed for one year meaningful implementation of court order requiring that all inmates placed under heightened restraints be given initial medical examination, with monthly follow-ups.

Cases that cite this headnote

[2] **Injunction**
Criminal matters and proceedings; prisons

Correction department was in contempt of court, when it delayed for one year meaningful implementation of court ordered requirement that all detainees placed under heightened restraints be notified of right to appeal status, and that appeals from restraint decisions be decided on expedited basis.

Cases that cite this headnote

[3] **Injunction**
Fines and other monetary relief

Sanction for contempt of court order, requiring corrections department to provide for initial and follow-up medical evaluations of inmates placed on enhanced restraint status, was fines of $200 to $250 for each day's delay in implementing examination requirements, and in issuance of related reports, to be deposited in inmate's account.

Cases that cite this headnote

[4] **Injunction**
Fines and other monetary relief

Sanction for contempt of court order, requiring corrections department to provide for appeals of decision to place inmate on enhanced restraint status, was fines of $200 to $500 for each day's delay in meeting deadlines regarding notice of appellate right and rendition of appellate decision, to be deposited in inmate's account.

Cases that cite this headnote

[5] **Prisons**
Shackles or other restraints
Sentencing and Punishment
Physical restraints

In order to avoid violation of Eighth Amendment, corrections department would be required to free inmates of enhanced restraints once every two hours, and could not handcuff inmate's arms behind back during court

appearances. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

Opinion

AMENDED OPINION & ORDER

BAER, J.

***1** Plaintiffs, pre-trial detainees, move to hold defendants in contempt pursuant to Fed.R.Civ.P. ("FRCP") 70 based on defendants' alleged violation of this Court's August 10, 2000 order with respect to prisoners placed in red ID or other restraint status ("order") and for relief pursuant to FRCP 60(b) in the form of an order banning the practice of rear-cuffing red ID prisoners on trips to court and elsewhere outside the jails. A two-day hearing on plaintiffs' motions was held on May 28–29, 2002, and the matter finally became *sub judice* on July 11, 2002. For the reasons detailed more fully below, plaintiffs' contempt motion is granted in part and their motion for further relief is granted in part and denied in part.

BACKGROUND

Following this Court's decision in *Benjamin v. Kerik,* 102 F.Supp.2d 157 (S.D.N.Y.2000), an order with respect to the procedural safeguards necessary to protect the due process rights of prisoners in red ID and enhanced restraint status was entered on August 10, 2000 ("order"); the order included provisions that mandated medical reviews of detainees placed in red ID status, appeals of red ID determinations, and reports confirming compliance. By way of factual background, restraint status is reserved for individuals who have committed a violent act while in custody of the Department of Correction ("DOC" or the "department"), and aims to reduce violence within a prison. Handcuffs, leg arms, and waist belts are some of the restraints that the department utilizes. Red ID policy, on the other hand, was designed to avoid violence outside of the jails in places like courthouses. Inmates who have ever been found to possess a weapon of any kind, usually of their own making, while in the department's custody are assigned red ID status, a form of restraint status. Inmates who are so classified have their hands fitted with black tubes termed "security mitts" when they are moved anywhere outside the facility and are rear-cuffed, that is, shackled and cuffed with their hands behind their back. Red ID status bears no implication for an inmate's housing classification. In other words, Red ID status inmates may be housed in the general population. *Benjamin,* 102 F.Supp.2d at 168.

With respect to the appeals process, the order requires, *inter alia,* that "within 72 hours of placing an inmate in Red ID and/or enhanced restraint status, the Department of Correction (the 'Department') must afford said inmate a hearing in accordance with *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1972)," and too "the facility's deputy warden for security shall review appeals of [such] placements ... and render a written decision within seven days of receiving an appeal from an inmate." Further, the order also provides, *inter alia,* that "the Department shall provide a monthly medical review of the health of prisoners subject to RED ID status and restraint status." Finally, with respect to reporting requirements, the order directs defendants to draft procedures ensuring that the terms of the order were implemented and to report to the Court on a quarterly basis with respect to compliance with the terms of the order. On December 15, 2000, the Court approved defendants' proposed procedures—known as Directive 4518 ("directive")—by memo endorsement, and directed that they be "made effective as soon as conveniently possible but in no event later than December 31, 2000." With respect to medical reviews, the directive provides, *inter alia,* that the facility medical clinic must be notified of all new red ID or enhanced restraint placements within twenty-four hours of initial placement. Pl.Ex. 3 at 8. In addition, medical staff must review the records of all new placements and examine them physically, if necessary, to determine whether restraint is likely to have significant medical consequences. *Id.* Finally, medical staff must conduct a monthly medical review of each and every red ID and enhanced restraint status detainee to determine if he or she has a serious medical problem or condition that should preclude him or her from being restrained in a given manner. *Id.* With respect to appeals, the directive provides, *inter alia,* that "[t]he Deputy Warden of Security shall process all submitted written appeals of an inmate's Red ID and/or Enhanced Restraint Status ... He or she shall render a written decision ... within seven days from receiving the inmate's appeal." *Id.* at 7. Further, [i]f an inmate's appeal is denied, the Deputy Warden of Security shall advise the inmate, in writing, of the basis for his/her decision to deny the appeal...." *Id.*

***2** As noted, plaintiffs now move for a judgment of contempt claiming that defendants violated the order's provisions with respect to medical reviews, appeals of red ID determinations, and quarterly reports showing compliance. In addition, they move for relief pursuant to FRCP 60(b) in the form of an order banning altogether the practice of rear-cuffing red ID detainees on trips outside

the jails, e.g., to court. I discuss the factual background with respect to medical reviews, appeals of red ID determinations, and quarterly reporting of compliance separately.

A. Motion for Contempt

1. Medical Reviews

[1] From the outset, it should be noted that defendants candidly acknowledge that the DOC failed to comply with the provisions of my order. In their post-hearing papers, they write that "[d]efendants acknowledge that DOC's compliance with the August 10 Order was deficient throughout most of 2001." (Def. memorandum at 4). Testimony provided at the hearing only confirmed defendants' chronic noncompliance. With respect to medical reviews specifically, testimony revealed that none of the required reviews occurred until the end of 2001—approximately one full year following the effective date of the directive, December 15, 2000, and longer still from the date of my order, August 10, 2000. DX DBR at ¶ 14. Specifically, Correction Health Service ("CHS") records, which only started documenting medical reviews in September 2001,[1] reveal that the DOC failed to request any initial or monthly medical review of any sort in any jail for September and October 2001, and requested no initial or monthly review in a number of jails for November and December 2001. JX25.[2] Defendants' witness, Doctor Brown, medical director for CHS, testified on cross-examination at the hearing that the Otis Bantum Correctional Center ("OBCC") was the only facility that he was aware of in which medical reviews took place at any time prior to November 1, 2001.

> Q: So what I'm asking you is whether in fact routine monthly and initial placement reviews were taking place, to your knowledge, at any time prior to November 1, apart from OBCC?
>
> A: Just OBCC. Tr. at 449.

Indeed, Brown testified that the DOC started to conduct initial placement and monthly medical reviews at all jails only since the beginning of 2002. *Id.* Still, notwithstanding Brown's testimony to the contrary, evidence reveals that prisoners who were placed in red ID status as late as March 2002 had still not received the required medical reviews. JX20. In addition, although Brown claimed compliance with the order's medical review requirements, he candidly admitted that he does nothing to verify the data that he receives from the jails.

> Q: And you don't do anything to verify that in fact the data in those forms is correct, isn't that right?
>
> A: Correct, I have no reason to believe that it is not correct. Tr. at 450–51.

To be sure, Brown's faith in the absolute accuracy of the medical review forms is curious in light of the department's patent failure to follow the provisions of my order and its own directive, which was in fact placed throughout the jails. It is interesting to note that, while the detainees apparently read the directive—as they followed the appeals procedures as provided—the DOC failed to abide by its language.

***3** In mid-November 2001, defendants audited compliance with the directive and found significant noncompliance with respect to the medical review provisions. For instance, not one of the nine jails audited provided notice of initial placement to the medical clinics, and two of the jails failed to provide notice as to those prisoners who were entitled to a monthly review. DX 02A. Indeed, it was not until November 19, 2001, approximately one year after the effective date of the directive, that the Chief of Security circulated a memorandum informing facility commanders to follow the directive. Worse yet, in a status report submitted to the Court on January 7, 2002, defendants' counsel stated that

> [w]e have been informed by the Department of Correction ... that initial placement and monthly medical assessments were not conducted pursuant to the Red ID/Enhanced Restraint Directive for the third quarter ... [D]espite the issuance of institutional orders implementing the provisions of the Directive, facility security staff did not forward the names of inmates requiring initial placement assessments to the medical staff. Pl.Ex. 5.[3]

In other words, medical reviews of inmates placed in red ID status were not taking place because of a gap in the notification system: clinic staff were apparently never notified of those inmates who required either an initial or a monthly medical review. While defendants do not dispute the fact that the DOC's compliance with the August order was "deficient" with respect to the medical review provisions throughout most of 2001 (Def. memorandum at 4), they contend that compliance was only "partly" deficient given limited audited methodology—whatever that means. (*Id.* at n. 7). For instance, defendants maintain that their January 7, 2002 letter "misstated the extent of the problem." Specifically, they point to the fact that "[i]n AMKC, ... the required requests for initial and monthly medical reviews had been made to CHS regularly since January 2001, via the 'Notice of Initial Placement in Red ID Status' form and excerpts from the DOC database for weapons carriers respectively, ... but no record of transmitting those forms

was kept ." (*Id.*). However, while the deputy warden at AMKC may have *transmitted* notifications for initial and monthly medical reviews to clinic staff, it is undisputed that no records of those transmissions exist.

Audits conducted as recently as February 2002 reveal that the jails are still unable to document compliance with the medical review procedures of the DOC directive of December 15, 2000. DX 02C; Tr. at 324–25; DX 02D; Tr. at 331–34; DX 02E; Tr. at 335. Defendants' witness, George Ocasio, Bureau Chief of Custody Management, testified at the hearing that a January 2002 audit of the directive's medical review provisions revealed that "[n]one of the borough jails' clinic administrators claim to have had documentation" with respect to initial placement of detainees in red ID status.

> ***4** Q: The question was: Fewer than half of the Rikers Island jails were giving notice of the initial placement of new prisoners into red and enhanced restraint status, correct?
>
> A: Once again, this [defendant's exhibit O–2D, a copy of the January 2002 audit] shows that, based on the auditor's findings, it shows that fewer than half of the Rikers Island facilities weren't [*sic*] producing the notifications, but this is just verifying the source document that was supposed to be at the clinic.
>
> Q: So basically what you are saying is that they didn't have any documentation that would show they were following that aspect of the policy, correct?
>
> A: Exactly. This audit that was conducted in January was directed at the clinic administrators and interview [*sic*] with the clinic administrators themselves.
>
> Q: You found that none of the borough jails could demonstrate that they were following that aspect of Directive 4518, correct?
>
> A: None of the borough jails' clinic administrators claim to have had documentation. Tr. at 332–33.

Put another way, it appears that the left hand did not know what the right hand was doing or was supposed to be doing and that administrative deficiencies continue even now. Although defendants contend that they are now in "substantial if not complete compliance with the medical review provisions of the August 10 Order" (Def. reply memorandum at 1), the fact that they are unable to *document* their compliance is suspect—or at best uncertain. Indeed, the May 2002 data reveal that only seven of the fifteen witnesses in red ID status who testified at the hearing received a monthly medical review. DXA7A. It is worth noting that while this was prisoner testimony, it was undisputed. In addition, Brown testified at the hearing that until the CHS policy with respect to medical reviews was revised just recently in April 2002, "materials" describing the restraints imposed by red ID status were not distributed to the medical staff. Tr. at 440. Indeed, the department neglected to *train* members of the medical clinic with respect to red ID restraints until just recently, in late December 2001.[4] Even Brown, who helped to draft the first version of CHS's policy on medical review of red ID restraints in January 2001, testified that he had never even seen this Court's August 10, 2000 order prior to drafting the policy:

> Q: And you were involved in drafting CHS's policy on medical review of red ID restraints, correct?
>
> A: Yes.
>
> Q: And the first policy that was issued was issued in January of 2001, correct?
>
> A: Yes.
>
> Q: And prior to drafting the CHS policy issued in 2001, you were never provided with a copy of the court order in this case, isn't that right?
>
> A: No.
>
> Q: No, you were not?
>
> A: No, I was not.
>
> Q: And nor were you consulted by DOC prior to the drafting of Directive 4518 regarding red ID and enhanced restraint procedures, correct?
>
> A: Correct.
>
> ***5** Q: And in fact, at the time of your deposition, you were not familiar with Directive 4518, isn't that right?
>
> A: Yes. Tr. at 438.

To be sure, it comes as no surprise that the medical staff members were unfamiliar with the provisions of my order when those charged with running Rikers Island—e.g., Brown—only saw the December 15, 2000 directive for the very first time right before this contempt hearing, almost a year-and-a-half after it was promulgated.

In addition to the defendants' myriad problems with ensuring that the required medical reviews take place and with providing documentation that they have indeed taken place, the other major area of concern appears to involve the medical reviews themselves. Defendants contend that upon receipt of initial and monthly notifications, clinic physicians conduct medical reviews of the red ID inmates either by chart review or by physical examination when

medically warranted, and that this constitutes compliance with my order. However, plaintiffs' witness, Michael Puisis, a doctor of osteopathic medicine who has worked in correctional health care for seventeen years, testified that simply a chart review was insufficient and that an initial placement medical exam of the detainee him-or-herself is necessary because it will identify those individuals who have an underlying condition that might subject them to more serious harm once placed in enhanced restraints—for instance, more serious musculo-skeletal and neuro-vascular injuries, that is, conditions not necessarily reflected on the chart. Tr. at 19. Puisis adverted in particular to one inmate, Latrese Carr, whose medical chart alone did not indicate whether he should receive a medical modification of red ID restraints. According to Puisis, only "a complete neurological evaluation ... would be sufficient to identify whether he had neuropathy...." Tr. at 26. Puisis responded as follows to the following questions:

> Q: Could anyone determine by chart review of Mr. Carr's chart whether it's appropriate for him to receive a medical modification of red ID restraints?
>
> A: No.
>
> Q: Why is that?
>
> A: Mr. Carr did not have a complete neurological evaluation that would be sufficient to identify whether he had neuropathy and did not have a complete assessment of his shoulder and back. *Id.*

Puisis further testified that the cursory examinations performed on detainees who complained of severe pain once they were placed in red ID status were also insufficient. In evaluating the chart of one detainee, Lein Figueroa, Puisis stated that "the method of review of patients who have complaints is cursory and inadequate to evaluate these types of patients." Tr. at 29. Specifically, although Figueroa had previously undergone surgery on his wrist, the intake exam failed to identify this fact. As Puisis stated: "There's no explanation of why he had surgery. There is no examination, thorough examination, of his wrists, arms, or shoulders. And I think that's inadequate to make an assessment." Tr. at 30. Whether this is a problem of the hospital under contract with the city is a separate and important issue, but for now I focus only on the contempt question. While a physical examination may not be necessary on a monthly basis, it seems rather obvious that merely a chart review of initial placements is insufficient to determine whether detainees have an underlying medical condition such that the use of enhanced restraints—or any one particular kind of enhanced restraint—is contraindicated.

***6** Notwithstanding defendants' prior noncompliance, the record indicates that as of April 2002, defendants have undertaken measures to ensure present as well as future compliance with the medical review provisions of the order. Unfortunately, the city, while able to correct its errors, has in this and other instances failed to get it right from the beginning, or, in this case, anywhere near the beginning. It now appears that the DOC has at last produced the forms and a distribution chain so that there will be notification to the clinic of red ID inmates so as to precipitate an initial and monthly medical review. Exs. DO ¶¶ 12–16, O–3. The evidence presented at the hearing shows that the DOC is presently in compliance with the requisite procedures. Ex. A–7A.

Appeals

[2] Defendants' compliance with respect to the appeals provision of my order is equally disquieting. In mid-November 2001, the Inspectional Services and Compliance Division ("ISCD"), charged with auditing compliance by the DOC with court orders, audited four jails to determine whether they could document if red ID detainees had received a hearing within 72 hours of being placed in red ID and/or enhanced restraint status, as mandated by my order as well as by the directive, and found that they were unable to provide proof that such hearings occurred within the time frame or, for that matter, ever occurred at all. DX O2B. The directive provides that "[t]he Hearing Officer shall advise the inmate of such determination [of whether the detainee's placement in red ID and/or enhanced restraint status is appropriate] during the hearing and provide a written notice of determination within 72 hours of the conclusion of the hearing," and that "[t]he notice form shall advise the inmate that, within 21 calendar days of receiving such determination, he or she may appeal the determination in writing to the Deputy Warden of Security, who shall respond in writing to such appeal within 7 calendar days of the date the appeal is received." Consequently, if hearings were not taking place in accordance with the provisions of my order, then detainees were never even informed of their right to appeal red ID or enhanced restraint status placement. No follow-up was done to determine whether the hearings had in fact ever taken place or whether the DOC had lost the paperwork documenting that such hearings had taken place. Tr. at 310–11. Indeed, a right to appeal is meaningless if the detainee is unaware that such right exists.

ISCD also audited appeals, and found that several prisoners who did not have appeals on file asserted that they had filed appeals but that they failed to receive a response. Tr. at 311–16. Indeed, Brian Riordan, the deputy warden of Anna M. Kross Center ("AMKC"), testified at the hearing that AMKC did not begin using the correct appeals form until May 1, 2002—and that *in spite of* the fact that the DOC issued a revision to the directive in December 2001. Riordan responded as follows to the

following series of questions:

> ***7** Q: In December 2001, the department issued a revision to the directive, is that correct?
>
> A: Yes.
>
> Q: And that revision substituted the version of the appeals determination form the facilities were supposed to use, isn't that right?
>
> A: Yes.
>
> Q: And AMKC should have begun using that revised form in December 2001, isn't that correct?
>
> A: Yes, we should have.
>
> Q: And it was your responsibility to make sure that that revised form was used at AMKC, is that right?
>
> A: Yes, it was.
>
> Q: But AMKC didn't begin using that form in December 2001, did it?
>
> A: That's correct.
>
> Q: You didn't begin using that form until the day after your deposition in this case on May 1, 2002, isn't that right?
>
> A: That's correct. Tr. at 377.

Riordan further testified that the department was mistakenly using a form that lacked the language required by the December 15, 2000 directive, specifically, a form without a check box stating that "it has been determined after review of good-cause evidence." Tr. at 378. Even though AMKC appears to be using the correct form as of May 2002, such "eleventh-hour" attempts at compliance with my order fail to rescue defendants from contempt.

However, according to evidence presented at the hearing, in 2001 95% of the appeals that are documented were decided within seven days; for the first quarter of 2002, 93% of the appeals that are documented were decided within seven days. Exs. J–15, A15, DT11; DR11. In addition, although twelve inmates testified that they submitted appeals but received no response, defendants have no such records either in the DOC files or in the inmate's possession.[5] The DOC did decide 102 appeals through March 31, 2002. Although defendants contend that they are not responsible for the mysterious "lost" appeals, their inability to provide documentation—even where there was testimony that several appeals were filed—is not unlike their inability to document compliance with the medical review provisions of the order. In both instances, the difference between a failure to comply and a failure to provide documentation of compliance is tenuous at best. Indeed, as with tracking documentation with respect to medical reviews, a uniform system to track appeals remains elusive. DX DC at ¶ 19, Tr. at 274–75.

Reporting

With respect to the reporting of medical reviews, defendants failed to provide any data in the first two quarterly reports (2001) that were submitted to the Court. Furthermore, in the January 7, 2002 status report that was submitted to the Court, defendants candidly admitted that initial placement and monthly medical assessments were not conducted pursuant to the directive for the entire third quarter of 2001. Pl.Ex. 5. Defendants have included medical reviews in their reports for the first two quarters of 2002, J–16, and appear presently to be in compliance with that aspect of my order.

B. Motion for Further Relief

As noted *supra,* plaintiffs also move for further relief pursuant to FRCP 60(b) in the form of an order that would ban the practice of rear-cuffing red ID prisoners altogether during court appearances and other trips outside the jails. In a prior opinion, I took account of the fact that red ID and enhanced restraint status "have a severe and deleterious effect on pretrial detainees tantamount to punishment," *Benjamin v. Kerik,* 102 F.Supp.2d 157, 175 (S.D.N.Y.2000), and that, for this reason, additional safeguards are absolutely necessary to ensure that such restraints are not unnecessarily imposed—the very safeguards that constitute the basis of the August 10, 2000 order and that are at issue in plaintiffs' motion for contempt.

***8** The DOC adopted violence reduction measures—including, but not limited to, rear-cuffing—after the New York City jail system experienced severe violence in the mid–1990s.[6] For instance, fiscal year 1995 saw as many as 139 slashings or stabbings in a single month, with an annual total of 1,093 of inmate-on-inmate attacks. DC ¶ 3, C–2, BO–2 at 2–3. The average number of stabbings and slashings per month DOC-wide has decreased 95% from fiscal year 1995 to 2001 as a result of such measures. BO–2 at 2; DC ¶ 5. Presently, red ID inmates constitute only 4% of the total detainee population and are placed in such restraints only on trips outside the jails, e.g., to court, where supervision is necessary and apparently more difficult. DBO ¶ 10. DOC policy provides that "[a]ny inmate who uses or is found to be in possession of a weapon shall be identified by a red identification card (Red ID)." JX 01 at ¶ III.A. In other words, detainees need not in fact be convicted of the disciplinary charge in order to be placed in red ID

status—they need only be found in possession of a weapon. In fact, plaintiffs advert to the fact that some of the weapon offenses for which detainees were placed in red ID status occurred years ago in connection with a different offense altogether. PX74 at ¶ 43; Tr. at 206–07. Unless a judge orders that the cuffs remain on during a detainee's court appearance, the restraints are placed on detainees immediately prior to boarding the bus and removed temporarily upon arrival at the courthouse in order to be searched. DBO ¶¶ 2–3, 5; DC ¶ 23; Tr. at 287–89; BO–2 at 6; Tr. at 414.[7] Detainees remain rear-cuffed for the duration of their time in the holding pen, and, as one prisoner testified, are typically allotted approximately one break for the entire duration. Tr. at 223. However, the DOC has no set policy in place with respect to when, and how many breaks, should be provided. Tr. at 289. As Steven Conry, the DOC's Bureau Chief for Management and Planning, testified on cross-examination:

> Q: Now, you've been to the court pens only in connection with this litigation, correct?
>
> A: No, I've been in court over 19 and a half years in my career. I've been to the court pens many times.
>
> Q: Well, you've been to the court pens for the purpose of observing practices there, only in connection with this litigation, correct?
>
> A: Of red ID practices, yes.
>
> Q: And there are no set times and frequencies for giving prisoners breaks from the restraints, correct?
>
> A: There are points during the day which [*sic*] inmates will get breaks to use the bathroom whether or not the inmate asks for them. And that would be when he first arrives and is being searched, and then when he's going to and coming back from his court hearings, and also during the meal break.
>
> Q: But that's not set out anywhere. That's just practice as you understand it. Correct?
>
> A: That is—that is correct. That is practice.
>
> ***9** Q: There's nothing that sets out when they have to get breaks and when they don't get breaks, correct?
>
> A: That is correct. Tr. at 289.

At the hearing, Puisis testified that protracted restraint in the form of rear-cuffing is not only quite painful to most people but could also cause or aggravate serious medical conditions. PX73 at ¶¶ 23–28, 31. One detainee, Latrese Carr, testified that he typically feels numb after the restraints are removed:

> It's like feeling your fingers from being in the mitten so long and you feel your fingers and in your shoulders—like my shoulders, I don't know about everybody else's, but what it—that red ID thing has messed my shoulders right up in the bone. My arms go numb after a while. I have no pain—I mean, no feeling really in my shoulders. They just go numb. Tr. at 224.[8]

Furthermore, plaintiffs' expert testified that, insofar as transportation to and from court is concerned, restraints interfere with the detainees' balance and therefore increase the risk of injury from falls, PX73 at ¶ 25; Tr. at 187–88; DX DC at ¶ 30, as well as the risk of injuries resulting from sudden stops, lurches, and accidents. PX73 at ¶¶ 9, 25; PX74 at ¶ 24. For instance, Puisis testified that because detainees in restraints feel "like free weight[s], more or less like a bag of potatoes" when they are being transported on the bus, it is more than likely that they will fall and hit their face on the metal cage in the bus.

> You hit the cage. There's a front grating. There's a metal cage that's pretty thick gauge. It's not like chicken wire, but it's probably about a quarter inch metal caging. And I think you would fall up there and hit your face on it, frankly. That's my opinion. Tr. at 59.

Indeed, Carr confirmed Puisis' theory when he testified that

> [b]ecause you don't have no control of your body, because my arms is shackled to the back in mittens, shackled to my waist. So my arms is all the way in the back of me. I don't have no control over it. And the bus is turning, stopping short, I can't do nothing. The most I can do is brace my feet, and then I am in a cage so small, you know, and I'm tall so there is only so much room I can have. It is dangerous. And then it is frustrating because, as you holding your arms at an angle, they right in back of you. So it is just like your shoulders is raw. The least little thing that happens is going to affect you. I banged my head a few times and everything. It is a dangerous thing. Tr. at 221.

According to Puisis, it would be a "small improvement" if detainees were merely "front cuffed with a waist chain" while being transported in the bus to and from court. *Id.*

A number of detainee declarations submitted prior to the hearing, and received into evidence, confirmed plaintiffs' expert testimony with respect to the pain caused by rear-cuffing. For instance, Lance Stewartson, who had a previous arm injury and who was placed in red ID status in September 2000, stated in his declaration not only that rear-cuffing causes swollen hands and pain in his shoulder, wrist, and neck, but also that he is unable to prevent his face from "smashing against the cage" while being transported, rear-cuffed, on the bus. Stewartson Declaration.[9] Although defendants would argue otherwise, it is difficult *not* to note the punitive character of this involuntary act of "smashing against the cage" while rear-cuffed—to say nothing of the extreme pain to which these pre-trial detainees (those men and women who, while imprisoned, have not yet been convicted of a crime) are continuously subjected.

***10** Defendants do not share plaintiffs' view with respect to the potentially deleterious effects of rear-cuffing. For instance, one of defendants' expert witnesses, Dr. Parks, Medical Director at Prison Health Services Rikers Island, testified that the primary effect of prolonged or tight cuffing is numbness of hands that lasts about six weeks, Tr. at 488–89, and that he has never seen a permanent injury caused by rear-cuffing. DP ¶ 10. However, I agree with plaintiffs that Parks' relatively sanguine outlook with respect to the long-term effects of rear-cuffing should be tempered by the fact that Parks has never observed a prisoner in red ID restraints nor ever examined any prisoners in New York City who have complained about the effects of being placed in such restraints. Tr. at 486–87.

In addition to being handcuffed behind their back, the prisoners are immobilized by a waist chain, and further restricted by the "black box" in which their hands are placed and which holds the cuffs rigid. These prisoners are also fitted with security mitts that prevent any use whatsoever of the hands, and wear leg irons. According to plaintiffs' expert testimony, rear-cuffing is superfluous given the use of these additional security measures. Presumably systems outside New York also have disciplinary problems, but defendants' experts nevertheless conceded that—at least to their knowledge—no other jurisdiction in the United States uses New York's practice of multiple restraint measures *as well as* rear-cuffing during court transportation and holding. Tr. at 291–92; 416–18. Indeed, while I reserve judgment with respect to a possible Eighth Amendment violation, absent certain security concerns it is beyond peradventure that the cumulative effect of all these restraints might very well constitute cruel and unusual punishment.

At the present time, defendants have no policies in place that can establish which medical conditions contraindicate the use of restraints, Tr. at 459, or which ones call for a physical examination rather than simply a chart review. PX73 at ¶ 19; Tr. at 467. At the hearing, Brown responded in the affirmative to the following question posed by plaintiffs:

> Q: Neither CHS nor PHS has any guidelines about conditions which warrant modification of the red ID restraints, isn't that right?
>
> A: Yes. Tr. at 459.

As already noted, most medical reviews are conducted by chart review as opposed to an actual physical exam. CHS did not provide its approximately 165 physicians with any information about red ID restraints until last fall, and it was not until April 2002 that CHS provided its staff with a written description of the restraints. JX BR3.

DISCUSSION

I. Motion for Contempt

Under FRCP Rule 70, a party moving to hold another party in civil contempt must establish the following: (1) that the order that the contemnor failed to comply with is clear and unambiguous; (2) that proof of noncompliance is clear and convincing; and (3) that the contemnor has not diligently attempted to comply in a reasonable manner. *King v. Allied Vision, Ltd.,* 65 F.3d 1051, 1059 (2d Cir.1995); *N.A. Sales Co., Inc. v. Chapman Indus. Corp.,* 736 F.2d 854, 857 (2d Cir.1984). Intentional or willful disobedience need not be shown to establish civil contempt. *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1949); *Benjamin v. Sielaff,* 752 F.Supp. 140, 147 (S.D.N.Y.1990). However, "[i]t is a sufficient defense ... if a defendant ... has in good faith employed the utmost diligence in discharging his responsibilities." *Aspira of NY, Inc. v. Bd. of Educ. of City of NY,* 423 F.Supp. 647, 654 (S.D.N.Y.1976); *see also King v. Allied Vision Ltd.,* 65 F.3d 1051, 1060 (2d Cir.1995) ("Without a showing of bad faith, there is no basis in the decree upon which the district could find [the defendant] in contempt...."); *Powell v. Ward,* 643 F.2d 924, 931 (2d Cir.1981) (defendant cannot be held in contempt if it has "been reasonably diligent and energetic in attempting to accomplish what was ordered" (*quoting Aspira,* 423 F.Supp. at 654)). On the other hand, if the defendant cannot shoulder the "heavy burden of demonstrating inability to comply," the judge should then enter an order holding defendants in contempt. *Donovan v. Sovereign Sec., Ltd.,* 726 F.2d 55, 59–60 (2d Cir.1984).

***11** Upon a finding that a party is in civil contempt, a district court is vested with "broad discretion to fashion an appropriate coercive remedy ... based on the nature of the harm and the probable effect of alternative sanctions." *Equal Employment Opportunity Comm'n v. Local 28 of the Sheet Metal Workers Int'l Assoc.,* 247 F.3d 333, 336 (2d Cir.2001) (*quoting N.A. Sales Co., Inc.,* 736 F.2d at 857)). Two kinds of remedies or sanctions are available in civil contempt proceedings: (1) those that seek to compensate the victim for contempt; and (2) those that "seek[ ] to force prospective compliance with [the court's] own order." *Weitzman v. Stein,* 98 F.3d 717, 719 (2d Cir.1996). In shaping such a remedy, the court must consider the "character and magnitude of the harm threatened, and the probable effectiveness of any suggested sanction in bringing about the result desired." *Powell,* 643 F.2d at 934–35; *see also Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc.,* 673 F.2d 53, 57 (2d Cir.1981) (stating that in fashioning a coercive remedy, the court should take into account the magnitude of the harm, the seriousness of the burden on the contemnor, and the relative "willfulness" of the contempt). Remedies or sanctions that are meant to ensure future compliance may include, but are not limited to, monetary fines. *See Swift v. Blum,* 502 F.Supp. 1140 (S.D.N.Y.1980).

Here, while I find defendants in contempt, there is no element of willfulness before me, and the only interest that this Court has is its role, since the initial consent decree was signed, to do what it can to ensure humane treatment for detainees who, while incarcerated, are presumed innocent. Toward that end, this finding of contempt and the accompanying punishment look prospectively to ensure future compliance.

Defendants contend that because they are *now* in compliance with the medical review, appeals, and reporting provisions of the Court's order, they cannot be held in contempt. In support of this contention, defendants cite *Dunn v. N.Y.S. Department of Labor,* 47 F.3d 485 (2d Cir.1995), for the proposition that it is not an abuse of discretion for a district court to deny a motion for contempt in instances where a defendant has instituted successful measures to improve compliance. I disagree with defendants' reasoning for three reasons. First, defendants cannot escape a finding of contempt by "eleventh-hour" or last-ditch efforts to comply. Even if they were presently in compliance—which certainly does not appear to be the case—their efforts have proved to be too little, too late. *See Benjamin v. Sielaff,* 752 F.Supp. 140, 147 (S.D.N.Y.1990) (holding defendants in contempt for failing to cure violations when they first learned of them despite the fact that defendants were in compliance at the time the motion was filed). Second, defendants' reliance on *Dunn* is misguided. In that case, the Second Circuit based its reasoning partly on the fact that defendant, the New York State Department of Labor, was beset with factors not present here—i.e., "social problems" and "economic conditions"—over which it had little to no control and which therefore had to be considered "when determining whether the [defendant] has been reasonably diligent." 47 F.3d at 490. By contrast, in this case defendants have not demonstrated nor even alleged—that they are beset with similar problems that would prevent them from substantially complying with the terms of the order at issue here. Third, it is by no means clear from the factual record that defendants *are* presently in compliance with the order's provisions. For instance, plaintiffs point out that May 2002 data show no monthly medical review for eight of the fifteen witnesses who testified at the hearing and who are still in red ID status. Furthermore, as noted *supra,* the fact that defendants allegedly did comply with the medical review and appeals provisions of the order but cannot *document* compliance therewith, certainly does not absolve them of a failure to comply with the provisions of the order. I can only reiterate that a failure to provide documentation of compliance with this Court's order is tantamount to a failure to comply. Moreover, the record is replete with instances of the department's contumacious conduct, from its failure to ensure that the medical staff—who apparently remain untrained to this day—were notified of each inmate placed in red ID status, to its failure to ensure that those in command—such as Dr. Brown—adequately monitored compliance in the jails. In other words, I agree with plaintiffs that defendants' noncompliance is manifest at all levels: from Commissioner Fraser's failure to ensure that his subordinates were achieving compliance to the wardens' failure to comply directly. For these reasons, I find that defendants are not beyond the contempt powers of this Court and that a remedy to ensure prospective compliance is necessary.

***12** As a preliminary matter, any prospective relief that I grant with respect to red ID and/or enhanced restraint status must satisfy the requirements of the Prison Litigation Reform Act ("PLRA"). Specifically, under section 3626(a)(1) of the Act,

> [p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The 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. The court shall given substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

Those courts that have construed this obligation have found that it is not sufficient to simply state in conclusory fashion that the requirements of the remedial order satisfy the statute. Rather, district courts must make "particularized findings, on a provision-by-provision basis, that each requirement imposed by the [Order] satisfies the needs-narrowness-intrusiveness criteria, given the nature of the current and ongoing violation." *See Cason v.. Seckinger,* 231 F.3d 777, 785 (11th Cir.2000); *Ruiz v. United States,* 243 F.3d 941, 950–51 (5th Cir.2001); *Castillo v. Cameron County,* 238 F.3d 339, 354 (5th Cir.2001).

The Court imposes the following monetary sanctions and additional prospective relief:

Medical Review

[3] Defendants will be fined $200.00 each and every time they fail to provide an initial hands-on medical review within forty-eight hours of a prisoner being placed in red ID and/or enhanced restraint status and $250.00 for each succeeding twenty-four hours without such a review, the fine to be deposited in the prisoner's account. In accordance with the December 15, 2000 directive and to minimize fines, the DOC shall implement procedures to ensure that the deputy warden of security at each facility notifies the medical staff whenever a prisoner has been placed in red ID status. As per the directive, such notification must occur within twenty-four hours of completion of the notice of authorization for initial placement, and the hands-on medical review must occur within twenty-four hours of notification to the facility clinic—in other words, forty-eight hours after the prisoner is placed in red ID and/or enhanced restraint status. Following notification, the medical staff will conduct a physical examination of each such inmate to determine if he or she has an underlying medical condition or other medical problem that precludes him or her from being restrained in the manner set forth *supra.* In addition, because of defendants' ongoing problem with documenting compliance, defendants will also notify the Office of Compliance Consultants ("OCC") whenever a detainee is placed in red ID and/or enhanced restraint status. OCC, in turn, will ensure that each detainee receives an initial hands-on medical review within forty-eight hours of being placed in red ID and/or enhanced restraint status. Given that the total number of red ID detainees at any moment in time is approximately 560 (4% of approximately 14,000), I do not expect that individualized initial placement medical reviews will present an excessively burdensome undertaking—especially in light of the magnitude of the harm that restraints undoubtedly pose to detainees with underlying medical conditions.

***13** Defendants will be fined $200.00 each and every time the deputy warden of security at any facility fails to provide medical staff as well as OCC with a list of the names of all red ID and/or enhanced restraint prisoners during the first week of each calendar month following the initial hands-on physical, the fine to be deposited with the clerk of this court. At that time, the medical staff will conduct a chart review of all red ID and enhanced restraint status inmates to determine if there exists an underlying medical condition or other medical problem that should preclude the inmate from being restrained in that manner. This remedy is narrowly tailored to address only those inmates who are placed in red ID and/or enhanced restraint status and is the least intrusive means by which to address a possible unconstitutional risk of serious pain and injury. As I discuss in greater detail below, protracted rear-cuffing could in certain instances rise to the level of an Eighth Amendment violation under *Bell v. Wolfish,* and for this reason an initial hands-on medical review prior to placing an inmate in red ID and/or enhanced restraint status is both necessary and within the parameters of the PLRA. Indeed, Dr. Puisis' testimony made clear that a chart review alone will not identify those individuals who have an underlying condition that might render them more susceptible to serious harm once they are placed in red ID and/or enhanced restraint status. Tr. at 19. In addition, as I stated above, initial placement medical reviews represent a narrowly drawn form of relief insofar as they do not impose on defendants an excessively burdensome undertaking given the relatively manageable number of inmates in red ID and/or enhanced restraint status at any one time. These procedures will be effective from the date of this order.

Appeals

[4] Defendants will be fined $200.00 each time they fail to issue a written decision within seven days from receiving an inmate's appeal and/or are unable to provide documentation thereof, and $500.00 for each successive day of failed response, the fine to be deposited in the inmate's account. For clarification and so there will be no misunderstanding, as per the directive, the deputy warden of security at each facility is to render a written decision within seven days from receiving an inmate's appeal, and will deliver said decision to the inmate within twenty-four hours of its issuance, weekend and holidays excluded. In addition, because of documentation difficulties, provision will be made for detainees to provide OCC with a dated copy of every appeal filed with the deputy warden of security at each facility and defendants will furnish OCC with a copy of the dated written decision rendered by the

deputy warden of security within twenty-four hours of issuance. These procedures will be in effect within forty-eight hours from the date of this order.

II. Motion for Further Relief

[5] Modification of a court order is proper under Rule 60(b) when a party that has obtained an injunction demonstrates that the purposes of the decree have not been achieved or when "experience indicates that the decree is not properly adapted to accomplishing its purposes." *King–Seeley Thermos Co. v. Aladdin Indus., Inc.,* 418 F.2d 31, 35 (2d Cir.1971). Plaintiffs contend that, because it is clear that defendants have been unable to carry out the purposes of this Court's August 10, 2000 order, modification is proper. Further, plaintiffs argue that relief is supported by substantive law as well, and cite Supreme Court precedent for the proposition that

> ***14** [r]estrictions on pretrial detainees that implicate a liberty interest protected under the Due Process Clause may not "amount to punishment of the detainee." ... Absent a showing of an expressed intent to punish, the determination whether a condition is imposed for a legitimate purpose or for the purpose of punishment "generally will turn on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."

Benjamin v. Fraser, 264 F.3d 175, 188 (2d Cir.2001) (*quoting Bell v. Wolfish,* 441 U.S. 520, 534, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). In other words, "if a condition or restriction is arbitrary or purposeless, a court may permissibly infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Bell,* 441 U.S. at 521. Plaintiffs maintain that protracted rear-cuffing is excessive in relation to the purpose assigned to it—prevention of violence—because prevention may be achieved through other methods that are already being used, including the use of security mitts and leg irons.

In opposition to plaintiff's 60(b) motion, defendants argue that the DOC's use of rear cuffing is not unconstitutional but rather an accepted and valuable security measure. Specifically, defendants maintain that rear-cuffing passes constitutional muster under *Bell v. Wolfish* because it both serves a legitimate purpose and does not appear to be excessive in relation to that purpose. They point in particular to the declaration of Conry, who stated that inmate violence declined by 95% from 1995 to subsequent years. "In FY 1995, inmates committed as many as 139 acts per month of extreme violence—slashing and stabbing. In the present year to date, there have been an average of just over 2 such incidents per month." Conry Declaration. Moreover, counter to plaintiffs' contention to the contrary, defendants argue that cuffing violent inmates in the rear is more effective than using security mitts or leg irons. Last, as discussed *supra,* defendants deny that rear-cuffing has any serious adverse medical consequences for most inmates—that in spite of the overwhelming testimony to the contrary.

Plaintiffs disagree, and request the following relief with respect to rear-cuffing and the use of other enhanced restraints for protracted periods of time:

(1) An end to rear-cuffing, in light of the multiple other security measures used; and

(2) A direction that each prisoner in red ID/enhanced restraint status be relieved of the restraints at least every two hours for not less than ten minutes and provided an opportunity to move around, exercise his limbs, drink water, and use the toilet. More frequent requests to use the bathroom or drink water must be honored.

I am not entirely convinced that protracted rear-cuffing in the manner used by defendants passes constitutional muster under *Bell v. Wolfish.* However, because I am mindful of the department's security concerns—particularly when transporting detainees to and from court—I cannot say that the use of rear-cuffing during such periods of transport is "arbitrary and purposeless" punishment, thus I will not order defendants to stop rear-cuffing altogether. The matter will be revisited at plaintiffs' request sixty days from the date of my opinion and order, September 27, 2002. If such a request is made, both sides will provide me, within ten days thereafter, information, including but not limited to the space allotted to each prisoner and the security measures currently in place. That said, I do agree with plaintiffs that each prisoner in any enhanced restraint status including, but not limited to, rear-cuffing—must be given a break every two hours for not less than ten minutes, and that defendants must honor more frequent requests, within reason, to use the facilities or to drink water; a failure to do so constitutes a violation of the prisoners' Eighth Amendment right to be free from arbitrary and purposeless punishment. At the hearing, Puisis testified that protracted restraint in the form of rear-cuffing is not only painful to most prisoners in red ID status, but could also cause or exacerbate serious medical conditions. PX73 at ¶¶ 23–28, 31. The testimony of several detainees—including Carr, Stewartson, and Harris—confirmed Puisis' theory with respect to the pain caused by rear-cuffing. Tr. at 221; 224–25; Stewartson Declaration; Harris Declaration. Accordingly, I find that this 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. In addition, because the

need for heightened security is not as great in the courtroom as it is, say, on the bus, prisoners will no longer be rear-cuffed while in court. I find that this 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. This new procedure will begin on or before November 1, 2002.

CONCLUSION

***15** For the reasons detailed above, plaintiffs' motion for contempt is granted, and their motion for further relief is granted in part and denied in part.

IT IS SO ORDERED.

Footnotes

1 It therefore goes without saying that documentation of medical reviews does not even exist for the period from December 2000, when the directive was issued, to September 2001.

2 It should be noted that while the DOC might not have requested any initial or monthly medical reviews during this time, individual prisoners did request assistance and the record reveals that medical staff were sometimes responsive to such requests. For instance, CHS data reflect that medical staff conducted ten initial reviews in September and twenty-three initial reviews in October. In addition, there occurred five monthly reviews in October although none in September. JX 25; Tr. at 319.

3 The letter continues: "The Department also determined that the information regarding inmates requiring monthly assessments was not forwarded by clinic captains to medical staff in most facilities. In the facilities in which those lists were forwarded to the medical staff, the medical staff did not conduct the requisite examinations." Pl.Ex. 5.

4 On cross-examination, Brown responded to plaintiffs' series of questions with respect to training of medical staff members in the following way:

> Q: You never directed Dr. Parks to conduct any meetings or trainings with regard to describing the nature of red ID restraints to his staff?
> A: Correct, when the policy was issued in January, I did not do that.
> Q: Well, since that time, have you directed Dr. Parks to conduct any trainings about the nature of red ID restraints to his staff?
> A: I did not direct him, but I know that it was done.
> Q: And when was that done?
> A: I believe it was done in—it was in late December, I believe.
> Q: Of 2001?
> A: Yes.
> Q: So that would be a year after the policy had been in effect, correct?
> A: Right, yes.
> Q: And you didn't do any such training with your staff for the three jails that you supervise, correct?
> A: No, I just had verbal [*sic*], a conversation with them, but that was it. Tr. at 441.

5 *See, e.g.,* Tr. at 237 (testimony of David Everette, who stated that he never received a red ID hearing after he was transferred from VCBC to GRVC in February 4, 2002). Everette claims that he filed his first appeal in GRVC toward the end of February 2002 and followed the proper procedure for so doing—addressed it to Carlos Thompson, Deputy Warden of Security, and dropped it into the facility mailbox. However, he never received an acknowledgement of receipt of his appeal. Everette's red ID status was not revoked until March 22, 2002, following a total of three appeals. *Id.* at 238–44.

6 Rear-cuffing was adopted in March 1996 for high risk or weapon bearing inmates. Subsequently, the DOC also adopted the following measures: separate court pens; security mitts; waist chains; and "black boxes" covering the keyhole of the handcuffs.

7 Defendants' expert concluded that red ID inmates are generally not in restraints for a continuous period for more than two hours at a time. DBO ¶¶ 2–3, BO–2 at 7. However, this conclusion was not substantiated by the testimony of some of the prisoner witnesses. For instance, Latrese Carr testified that during one court visit he was provided with just one fifteen-minute break from his rear cuffs in an approximately seven-hour period. Tr. at 223.

8 He continued: "And this red ID affected me, like I said, I will probably be like that for the rest of my life. Some people you can rest and lay your head over like this. I can't do that. I would go numb again." Tr. at 224. In addition, with respect to the pain caused by rear-cuffing, Carr stated that "[t]here is not even words to describe what goes through—the pain that you are going through with that red ID." Tr. at 225.

9 *See also* George Harris Declaration (stating that he received a head injury when his head smashed into the cage on the bus while being transported rear-cuffed).