UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY, *et al.*,

Plaintiffs,

v.

MARK SELING, *et al.*,

Defendants.

No. C91-0664L

No. C94-0121L

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REGARDING OCTOBER 20-21, 2003, HEARING

I. BACKGROUND

This matter comes before the Court on a regularly scheduled compliance hearing. Pending before the Court are a number of related motions, including pro se plaintiffs' request for additional sanctions[1] and a site visit, plaintiff Petersen's request for individual injunctive relief, and defendants' renewed request to purge the contempt finding, lift the sanctions, and find substantial compliance with most of the injunction requirements. The factual and legal background of this litigation has been set forth in prior orders and will not be repeated here. Briefly stated, the case involves the conditions of care at the Special Commitment Center ("SCC") at McNeil Island, Washington. Plaintiffs are SCC residents who were civilly

[1] Pro se plaintiffs' "Motion to Submit Declarations in Support of Joint Pro Se Brief for Sanctions and Further Injunctive Relief" is GRANTED.

committed as "sexually violent predators." Defendants are the superintendent and clinical director of the institution in their official capacities as representatives of the State of Washington.

In 1994, United States District Judge William L. Dwyer issued an injunction against defendants that required defendants to provide constitutionally adequate mental health treatment to SCC residents. In November 1999, Judge Dwyer held defendants in contempt for failing to take all reasonable steps within their power to comply with the injunction. Contempt sanctions have been accruing since that time. The Court has periodically reviewed defendants' compliance efforts and has outlined the steps defendants must take before the injunction will be dissolved.

In February and April 2003, United States District Judge Barbara J. Rothstein noted the significant progress defendants had made in many areas and identified five remaining steps defendants had to take to be in substantial compliance with the injunction:

(i) develop and fund less restrictive alternative ("LRA") facilities in locations other than McNeil Island;

(ii) develop and fund additional LRA space soon enough to ensure that there will be sufficient available capacity so that residents can apply for LRA status and receive prompt placement if they are qualified;

(iii) continue progress on the development of vocational training programs and apply for funding where there is a perceived need;

(iv) continue progress in the special needs program and apply for funding where there is a perceived need; and

(v) correct the deficiencies identified by the Inspection of Care Team in the SCC's charting of residents' treatment and progress plans so as to provide SCC residents with a clear roadmap to release.

To evaluate defendants' efforts to comply with these requirements, the Court held a two-day hearing on October 20 and 21, 2003. The parties provided the Court with pre-hearing memoranda and proposed findings of fact and conclusions of law. Having considered the various motions filed by the parties, the pre-hearing memoranda submitted, and the testimony and exhibits offered by the parties at the compliance hearing, the Court finds as follows:

II. FINDINGS OF FACT

A. Adequate Off-Island Less Restrictive Alternative Facilities

1. Defendants have made progress toward injunction compliance with regards to LRAs. The permanent LRA facility on McNeil Island has been completed and is now occupied. Approximately one month before the October hearing, the Department of Social and Health Services ("DSHS") selected a potential site on Spokane Street in Seattle, King County, for an off-island secure community transition facility ("SCTF").

2. There appear to be a number of potential problems that may prevent or delay the development of an SCTF on Spokane Street. Even if all steps necessary to develop the site occur with virtually no delay, the off-island LRA will not be available for occupancy until at least December 2004 or January 2005.

3. Judicial oversight remains necessary to ensure that defendants develop and fund off-island LRAs in a timely manner and with enough capacity to ensure that the treatment SCC provides is constitutionally adequate.[2] The Court will also monitor how the LRA protocol is administered over time to determine if the Department of Corrections unduly interferes with the professional judgment of SCC staff regarding treatment.

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[2] For the reasons stated in Judge Rothstein's order of April 25, 2003, pages 4-5, defendants must ensure that there is capacity available for those residents who need an LRA to obtain minimum professional treatment standards. The terms of the injunction do not require defendants to generate space for residents who are granted a court-ordered LRA over SCC's objection.

B. Vocational Programming

4. Under the direction of SCC Vocational Program Manager Tom Stepanek, SCC has continued to improve and develop the vocational and educational opportunities available to SCC and SCTF residents. For example, funding has been sought for future vocational staffing needs, certain resident assignments have been consolidated to provide more meaningful work experiences, work assignments are distributed more equitably than in the past, and resident job performances are integrated into the resident's clinical program.

5. Mr. Stepanek has also worked to ensure that vocational training opportunities and job activities are tailored to meet the unique needs of all SCC and SCTF residents, including those in the Special Needs Program. Through its on-going contract with Pierce College, SCC has developed a certification program and alternative testing methods designed to allow residents who otherwise may have been excluded from employment because of a disability to obtain jobs consistent with their abilities.

6. Although media and public attention have frustrated SCTF residents' efforts to hold jobs in the community, these difficulties are related to the residents' offense history and public notification requirements and do not indicate that the vocational services provided are inadequate.

C. Special Needs Programming

7. "Special Needs" residents – those residents who have developmental disabilities, major psychiatric disorders, or brain injuries – constitute a significant and growing portion of the SCC population.

8. Since the last hearing, SCC has requested and apparently obtained most of the additional funding necessary to effectively administer the Special Needs program. The "Measures of Change," which are used to rate objectively a resident's progress toward meeting treatment goals, have been fully implemented and the Special Needs group continues to produce

goal-oriented records that make it easier to identify resident progress and problems.

9. Since the last hearing, a number of Special Needs residents have advanced treatment phases. One of those residents is approaching promotion to Phase 5, the final phase before transfer to the transitional facility. The resources available at the McNeil Island SCTF are sufficient for higher functioning developmentally disabled individuals, including the resident who is approaching Phase 5. SCC recognizes the need and must continue to develop the resources necessary to allow Special Needs residents to move to the SCTF when and if they qualify.

10. The treatment provided to Special Needs residents meets professional standards and provides residents with the opportunity to improve the conditions for which they are confined and work toward eventual release.

D. Progress Notes and Treatment Plans

11. The charting of a resident's treatment plan and quality of the related progress notes are critical because they directly impact the SCC's constitutional obligation to provide residents with a road map to release.

12. The SCC has developed and implemented a plan to address the deficiencies identified by the Inspection of Care ("IOC") Team regarding charting. The plan calls for regular supervisory review of therapists' chart notes to ensure that the notes are goal-based and completed in a timely fashion. Residential staff is also required to meet monthly with their supervisors to review progress note content and an electronic database is being developed which should substantially improve the consistency and quality of progress notes and treatment plans insofar as it demands goal- or problem-based entries and increases accountability.

13. The IOC Team's July 2003 interim report noted that SCC has continued to progress in important areas such as the quality of treatment offered, the quality of treatment plans, and goal-oriented charting.

F. Miscellaneous

14. Construction of a new secure treatment facility was nearing completion at the time of the hearing and is now open. The 27-acre stand-alone facility is state of the art and includes medical and dental clinics, substantially improved living, treatment, and visiting facilities, and expanded recreational, educational, and vocational opportunities. The new facility addresses many of the concerns raised by the Court in its previous orders. The "open campus" concept allows residents greater freedom to move about the facility than they have experienced in the past, and, for the first time, the SCC operates in a facility removed from Department of Corrections influence.

15. Almost $80,000,000 has been appropriated for the SCC construction projects on McNeil Island, including the newly-opened facility. The legislature has also appropriated an operating budget for the SCC of approximately $60,000,000.

16. According to the IOC Team, all areas of the SCC's program meet or exceed minimum standards. Where the IOC Team expressed concern or identified a continuing need for improvement, the SCC has been responsive and is taking steps to address those areas.

17. The SCC continues to strive to ensure that the grievance system is administered fairly, to identify and remedy underlying problems that may give rise to grievances, and to ensure that grievances are handled effectively and efficiently. Though some residents remain dissatisfied with the grievance process, there is no evidence of any systemic flaw or other reason to reconsider the Court's earlier finding that defendants have satisfied the requirements of the injunction in this regard.

18. Despite concern on the part of some residents, there is no evidence that the Department of Corrections has exceeded its statutory role or in any way impeded the SCC's ability to provide constitutionally adequate treatment to its residents.

III. CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

2. The Ninth Circuit has affirmed this Court's order directing defendants to take specific steps to comply with the injunction and has confirmed that defendants have a duty to provide plaintiffs with "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000) (citing Youngberg v. Romeo, 457 U.S. 307, 321-22 (1982)).

3. The Due Process Clause of the Fourteenth Amendment requires state officials to provide civilly committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released. Ohlinger v. Watson, 652 F.2d 775, 778 (9th Cir. 1980). Where decisions regarding the treatment program are made by qualified professionals in the exercise of their professional discretion, those decisions are presumptively valid. Liability for failing to provide constitutionally adequate treatment "may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." Youngberg, 457 U.S. at 323.

4. With one exception, the Court finds that defendants' activities during the past year generally involved the selection of alternatives based on their impact on treatment and that those decisions fall well within professional standards. Under the direction of qualified and experienced professionals, the SCC has continued to improve and develop the vocational and educational opportunities available to residents, provides treatment to Special Needs residents that offers an opportunity to improve the conditions for which they are confined, and has developed and implemented a plan to address deficiencies related to progress notes and treatment plans. Defendants have substantially complied with the requirements of the injunction

with regards to vocational programming, Special Needs programming, and charting requirements

5. The one area where defendants' activities do not accurately reflect professional judgment involves the development and funding of an off-island LRA. Circumstances outside the control of the SCC professionals have delayed the development of an off-island SCTF despite the acknowledged need for such a facility to guarantee minimum professional treatment for those residents who qualify.

6. Case law emphasizes certain highly restrictive rules of law that caution courts not to impose injunctions against the state unless necessary and, even then, to make the injunction as narrow as possible so as not to insert the court into whatever non-judicial area is at issue. See, e.g., Toussaint v. McCarthy, 801 F.2d 1080, 1086-87 (9th Cir. 1986) (citing Milliken v. Bradley, 433 U.S. 267, 280 (1977)). Although the Court has (and has exercised) broad powers to remedy the failure to provide constitutionally adequate treatment in this case, we are now reaching the tipping point where the injunction should be narrowed to address the one remaining area where defendants have been unable to achieve sufficient progress to ensure that the treatment the SCC is providing meets constitutional standards.

> Once properly imposed, federal court remedial decrees affecting state programs should be modified or dissolved as necessary to ensure that they do not unduly burden or restrict the constitutional prerogatives of a state. See Board of Educ. of Oklahoma City v. Dowell, 498 U.S. 237, 245-49 (1991). In particular, federal court remedial decrees should be terminated altogether once a court finds that constitutional requirements are being met and that defendants are unlikely to "return to [their] former ways." Id., 498 U.S. at 247-49. Compliance with previous court orders, as well as good faith efforts by defendants, are obviously relevant in deciding whether to modify or dissolve a federal court remedial decree. Id. Federal court remedial decrees that affect state agencies and functions "are not intended to operate in perpetuity," thereby subjecting a state to its own

particularized set of constitutional requirements. Id. Federal supervision is intended as a temporary measure to remedy past violations. Id.

> Indeed, emphasizing the importance of minimizing federal court supervision of state programs, the Supreme Court of the United States recently held that federal court decrees can be terminated in stages. Freeman v. Pitts, 503 U.S. 467, [489] (1992). In ordering partial withdrawal, a court should consider whether there has been full compliance as to factors withdrawn from supervision; whether retention of judicial control is necessary to achieve compliance as to other factors; and whether defendants have demonstrated a good faith commitment to fulfilling the decree. Id.

Grubbs v. Bradley, 821 F. Supp. 496, 503 (1996). Defendants have worked long and hard to meet the constitutional requirements identified by this Court and the Court is satisfied that the time has come to return control of what is essentially an executive function to the state. Although the Court will continue to monitor defendants' efforts to develop and fund off-island LRAs and the administration of the LRA protocol, the remainder of the injunction is hereby dissolved.

7. As discussed above, defendants have made great strides in their mostly successful effort to comply with the injunction. Although their continuing failure to develop an off-island LRA warrants continuing injunctive relief, contempt sanctions, which were imposed primarily to coerce compliance with the Court's order, are no longer warranted because defendants have taken or are attempting to take "all reasonable steps within their power to insure compliance . . . ." Stone v. City and County of San Francisco, 968 F.2d 850, 856 (9th Cir. 1992). The contempt of Court found in November 1999 has now been purged and the Court, having considered the long history of this matter and the record as a whole, finds that the accrued sanctions need not be paid.

IV. ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. The injunction in the above-captioned matter is hereby narrowed to the one area where defendants have not substantially complied, namely the development and funding of off-island LRAs and the administration of the LRA protocol.

2. Defendants have substantially complied with all other aspects of the injunction.

3. No further injunctive relief is necessary or appropriate at this point in time.

4. Defendants are no longer in contempt of court and the contempt sanctions that have accrued need not be paid.

5. Provided there is no significant "backsliding," the Court will dissolve the injunction when defendants have completed or substantially completed construction of an off-island SCTF such that its ultimate readiness for occupancy is assured.

6. The next injunction compliance hearing is scheduled for 9:00 a.m. on Thursday, October 21, 2004. The parties shall file and serve pre-hearing memoranda no later than 4:30 p.m. on October 14, 2004.

7. Defendants shall continue to file and serve monthly reports regarding the status of the off-island SCTF and the administration of the LRA protocol.

8. The Court takes plaintiffs' unopposed request for a site visit under advisement.

DATED this 10th day of June, 2004.

Robert S. Lasnik
United States District Judge