

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al.,)	
)	
Plaintiffs,)	
)	Case No. 4:92-CV-110
v.)	
)	HONORABLE RICHARD A. ENSLEN
PATRICIA CARUSO, et al.,)	
)	
Defendants.)	
_____)	

BRIEF IN SUPPORT OF PLAINTIFFS’ MOTION FOR FURTHER RELIEF

I. INTRODUCTION

On October 29, 2002, the Court issued its Findings of Fact as well as an Order and Injunction. That order contemplated that, following the appointment of an Associate Monitor for Medical Care, the Associate Monitor would review Plaintiffs’ remedial proposals, in consultation with the parties. Findings of Fact, Oct. 29, 2002 (“2002 Findings”) at 264 ¶ 1440. Through no fault of the Associate Monitor, Robert Cohen, M.D., that review never took place. Instead, the Associate Monitor, based on his documentation of continuing life-threatening medical deficiencies in the Third Report of the Associate Monitor, developed his own set of recommendations to address those problems. Third Report of the Associate Monitor, Sept. 12, 2005 (Dkt. No. 1892). The Plaintiffs thereafter filed a motion for a preliminary injunction, based in large part on the Third Report, and the Court following a hearing granted that motion. Preliminary Injunction, Oct. 19, 2005 (Dkt. No. 1916). The Injunction required Defendants to develop a plan to accomplish Dr. Cohen’s recommendations for changes. *Id.* Defendants

subsequently filed their proposed plan for compliance, which the Court significantly modified prior to approval. Order, Jan.12, 2006 (Dkt. No. 1952); Defs.' Health Care Plan Submitted Pursuant to the Court's Preliminary Injunction of Oct.19, 2005, as Amended by the Jan. 12, 2006 Court Order, Jan. 23, 2006 (Dkt. No. 1954) ("Defs.' Plan").

Since the approval of Defendants' Plan, many of its provisions have proven insufficiently rigorous to prevent continued denials of necessary medical care to the Plaintiff class. Dr. Cohen has reported on some of these failures, including the failure of the medication distribution system, the staffing deficiencies, and the continued deficiencies in the care of prisoners confined in the segregation unit. *See* Letter from Cohen to Court, June 1, 2006 (Dkt. No. 2035); Letter from Cohen to Court, Aug. 14, 2006 (Dkt. No. 2088). In addition, Dr. Cohen recently provided some additional recommendations to the parties for comment. These recommendations include items necessary to assure a constitutional level of health care. Attach. 1, Memo. from Cohen to Govorchin, Sept. 4, 2006. Certain recommendations that specifically address the failure to provide appropriate mental health care staffing and services, the need for appropriate restrictions on the use of in-cell restraints, and the need for appropriate coordination between medical and mental health services are incorporated into Plaintiffs' Motion to Reopen Judgment Regarding Mental Health Issues and Issue a Preliminary Injunction, which is being filed simultaneously with this motion.

Plaintiffs also urge the Court to require additional modifications of the current Defendants' Plan. Some of Plaintiffs' proposals are directly related to strengthening current provisions of Defendants' Plan that have not eliminated specific known failures. Plaintiffs offer other proposals in this motion, such as the proposals that address the constitutional failures

regarding the care of persons with disabilities, that involve issues on which the Court previously found a constitutional violation but has never entered a specific order granting injunctive relief. *See* 2002 Findings at 190 ¶ 1031.

Finally, this motion also renews Plaintiffs' request that the Court grant injunctive relief regarding protecting prisoners from heat injury. This is another area where the Court has previously found a constitutional violation. 2002 Findings at 236 ¶ 1270; Findings of Fact and Conclusions of Law, Feb. 18, 2000 at 58 ¶ 338. The Court also ordered a remedy for this constitutional violation,¹ but it subsequently vacated that remedial order for technical reasons² and the 2002 order, in the form Plaintiffs propose in this motion, should again be issued.

II. PLAINTIFFS' PROPOSALS FOR ADDITIONAL RELIEF

A. Proposals Related to Medical Care

Plaintiffs request an order requiring Defendants to increase the permanent medical staffing at JMF so that minimum daily coverage consists of three physicians and one physician's assistant or nurse practitioner, along with 40 hours of nephrologist or Board-certified internist coverage of the dialysis unit every week. Plaintiffs also ask that the Court establish a specific date by which that coverage must be provided, and further order that if Defendants do not fully comply by that date, Defendants must adopt Dr. Cohen's proposed remedy of offering all full-time MSP staff traditional benefits (health and disability insurance, including optional family coverage; malpractice insurance; and one week of continuing medical education, with tuition and

¹ 2002 Findings at 265 ¶ 1442.

² Order, June 6, 2003 (Dkt. No. 1712). The Court did order limited interim relief. Order, June 19, 2003 (Dkt. No. 1715); *see also* Order, July 2, 2003 (Dkt. No. 1721).

expenses paid). Attach. 1 at 2-3. In addition to Dr. Cohen's staffing proposals, Plaintiffs ask that Defendants be required to maintain two MSPs (with full SERAPIS access and training) as floaters and that the Court order that Defendants assure that both MDOC and CMS medical care supervisory positions remain filled. If there is a vacancy, Defendants should be required to report the vacancy promptly, to take steps to fill the position expeditiously, and, when recruiting leadership staff, attempt to hire persons with a graduate degree in organizational development or the equivalent, as well as significant organizational experience. Further, Defendants should be required to devise a workable plan to assure completion of the Chronic Care Clinics ("CCC") database, flowsheets and other CCC enrollment forms in RGC.

Plaintiffs also ask that Defendants develop and implement a scheduling committee to determine how to increase productivity without overscheduling providers and allow efficient use of staffing resources. The scheduling committee, or some related committee, should explore how to coordinate nursing and physician services more seamlessly in the CCC process, and also how to implement a primary physician system in a meaningful fashion. The results of this planning by Defendants should be submitted to the Court on a periodic basis.

Defendants should be required to reduce by 20% the total number of excess days that patients wait for ordered specialty care. In order to make this possible, Defendants should be required to make provisions for back-up vendors for specialty referrals when the standard source of specialty consultations is not available. An appropriate staff member should be assigned full-time, until the problem abates, to reducing the prevalence of inappropriately delayed specialty consultations. Additional on-site specialty consultations should be made available in endocrinology and physical medicine. In consultation with a physical medicine specialist,

Defendants should establish criteria for patients who would benefit from a multi-disciplinary individual treatment plan to address problems of prisoners with complex chronic medical conditions, including disabilities.

Plaintiffs also ask that the Court adopt a modified version of Dr. Cohen's proposal (*see* Attach. 1 at 3), that Defendants be ordered to implement the SERAPIS system throughout the *Hadix* facilities, including DLW. Plaintiffs request that Defendants inform the Court immediately whether they can implement SERAPIS by the end of 2006. If Defendants cannot do so, then Defendants should be ordered to submit a proposal by November 30, 2006 for expedited installation of an electronic medical records system that can be implemented in all segments of the *Hadix* facilities. In the interim, Defendants should include the Special Accommodations lists as part of the standard Patient Overview printed from SERAPIS; assure that no one starts work in an ambulatory clinic without proficiency in SERAPIS; and provide that floating staff have access to the health care records of the patients they see.

Plaintiffs further request that Defendants be required to address the current deficiencies of the kite system by enforcing the requirement that prisoners receive a written response to their kites, and that basic information regarding medical kites be recorded in the patient's medical record. The HUM supervisor should regularly review information regarding access to health care disclosed by the Help-Line process, kite logs, and the Urgent/Emergent logs to identify patterns of problems. All prisoners, including prisoners in C-Unit and DLW, should be afforded access to the kite system.

Recent events have made it absolutely clear that conditions in the *Hadix* facilities are currently so unsafe that it is critical that Dr. Cohen's proposal for establishment of an Office of

the Independent Medical Monitor at Jackson be implemented, and that the proposed Office be provided with sufficient facilities, staff and administrative support to assure that there is compliance with the Court's orders. *Id.* In addition, the proposed office should be charged with appropriate monitoring of the sanitation in the dialysis unit and DLW, as well as a focused, one-time, review of the work of the Pain Committee to assure that appropriate pain relief is available to all prisoners. Plaintiffs also ask that Dr. Cohen be tasked with preparing a specific proposal defining the numbers and professional qualifications of the necessary staff and submit the proposal to the parties. In the event that there is any disagreement on this proposal, the Court should resolve it.

Finally, Plaintiffs ask that Defendants be ordered to report certain critical events, in categories to be fully developed by the Associate Monitor. These categories should include all unexpected deaths, but also significant failures of the medical system, such as the pharmacy collapse in the spring. Staff did not tell Dr. Cohen during his May inspection of the catastrophic failure of the pharmacy system, so that he had to learn from prisoners about the problem, and staff had no real plan to address the resulting crisis. These facts demonstrate why a vigorous reporting requirement is necessary.

B. Proposals Related to Disabilities

Because of the critical shortage of beds for prisoners who need licensed providers for personal care assistance and other supports in their activities of daily living, Plaintiffs ask that Defendants be ordered to submit a plan to increase the capacity for housing such prisoners by a minimum of 150 air conditioned beds.

Plaintiffs also ask that appropriate policies be developed making certain that custody does

not interfere with necessary accommodations for the disabled. Such policies must include a requirement that medical decisions, such as special diets, housing placement, and other accommodations are not overridden by custody. In addition, both custody and health care must be provided with appropriate training, including where appropriate joint training, on disabilities issues, such as issues involving the assignment of prisoner assistants. Defendants should also develop an appropriate mechanism for communications between health care and custody regarding disabilities issues.

Plaintiffs also ask that Defendants be required to establish a clear policy for appeal for prisoners who disagree with a decision to remove an assistive device that has been provided to the prisoner for over one year. That procedure should explicitly not require use of the regular prison grievance system in order for a prisoner to exhaust for federal court access purposes, although a prisoner should be permitted to choose to exhaust the regular grievance system.

In addition, Plaintiffs ask that Defendants be ordered to develop a plan to reduce the delays in repairs of assistive devices, as well as the delay between the time that an MSP orders a special accommodation and the time that the assistive device is ordered from the vendor. In order to minimize repair time for wheelchairs, the plan will include provisions for preventive maintenance and periodic inspection by qualified technicians. The plan must also include a requirement that each ambulatory clinic maintain an accommodation list that includes all ordered accommodations and pending accommodation repairs, as well as a requirement that staff check the accommodation list on a regular basis to assure the prompt receipt of ordered accommodations. The plan should further provide that, absent unusual circumstances, accommodations that do not require a special order will be provided to the prisoner within one

week. In addition, the plan should require that special diet accommodations, including snacks, will be provided within two days of the order by the MSP.

Because of the special vulnerability of prisoners who require prisoner assistants, Plaintiffs ask that Defendants designate an occupational therapist, registered nurse, or physician's assistant to develop, coordinate and monitor the program for prisoner assistants. The program must address selection, training, matching of assistants, and supervision.

The current institutional transfer system also requires changes. Plaintiffs ask that the Court order that all prisoners who have urgent accommodation needs, such as special diets or snack bags, be seen by an MSP within two days of arrival at the receiving facility. In addition, Defendants need to conduct a systems analysis and establish a self-correcting audit of the transfer process, to reduce the number and duration of delays that patients enrolled in CCCs experience in the transfer process before they see an MSP.

In order to address deficiencies in the functioning of the CCCs, Plaintiffs ask that the Court order Defendants to develop categories of prisoners who require an accommodations review at every CCC visit, regardless of the CCC to which the prisoners are assigned. Such assessments should include a functional assessment and a review of accommodations, including the "degree of control." The Functional Assessment and Special Accommodations forms should also be revised to include an assessment of the capacity to climb and descend stairs, to travel to required activities in the housing unit and yard within an expected time frame, and in appropriate cases an assessment of the tasks for which an assistant is required.

There is a serious need for a comprehensive review of the availability of appropriate accommodations in housing for prisoners with disabilities. Defendants should be required to

develop an appropriate plan to address such issues, including elevator details for all JMF prisoners who have ground level and bottom bunk accommodations; accessible telephones indoors for prisoners with mobility disabilities and TTY communications for deaf prisoners; automatic door openers and handrails at appropriate places in C-Unit; and the availability of sufficient housing for persons with disabilities in Level I or II to assure that such prisoners are not required to transfer to Level IV housing in order to receive appropriate housing accommodations.

Further, prisoners who are at risk of heat-related illnesses should not be allowed to waive placement on base or the first tier.

Because of the harm caused when decubitus ulcers are allowed to develop, Plaintiffs request that Defendants create a surveillance, prevention and treatment program to prevent skin breakdown and to treat decubitus ulcers and other skin breakdowns if they occur. The program must include daily documentation of treatment in the progress notes, not less than weekly medical review and evaluation by an MSP, and provision for appropriate alternatives to use of a wheelchair if the wheelchair exacerbates the skin breakdown. The program must also include in-service training when it is introduced, and regular auditing.

A particularly critical need is the need for Defendants to perform a thorough review of transportation issues involving prisoners with mobility disabilities and chronic illnesses. In particular, Defendants need to take appropriate action to assure that such prisoners are not injured in transport, or denied necessary food or medicine during the transport process. This review and the resulting corrective measures should address measures to assure that such prisoners are not injured during the loading and unloading process, as well as during the actual transport.

Defendants should also require that transportation staff involved in the transport of prisoners with disabilities have appropriate specialized training.

C. Proposals Related to Prevention of Heat Injury

It is apparent that the only workable remedy to prevent continued heat injury is to provide air-conditioned housing during periods of high heat for prisoners at high risk of heat injury. This proposed remedy is consistent with the remedy announced by the Court in the 2002 Findings, which required that prisoners at high risk of heat injury not be housed in any area where the heat index exceeded 90°. 2002 Findings at 265 ¶ 1442. This remedy will require either permanent or temporary air conditioning of sufficient housing for such prisoners, and Plaintiffs have provided Defendants with information regarding air conditioning options. Because of the intrinsic lack of air movement in the JMF segregation cells,³ as long as Defendants intend to use that unit to confine any prisoners at high risk, Plaintiffs believe that it must become an air conditioned unit.

Plaintiffs further request that Defendants be required to submit a plan, developed by professional engineers, to accomplish this requirement, and also request that Plaintiffs have an opportunity to review the plan before it is presented in final form to the Court. In addition, Plaintiffs urge the Court to order that the first unit to be provided with enough air conditioned housing during periods of high heat be JMF, in view of the particular environmental hazards there. Plaintiffs also request that the Court order a modification of Defendants' heat alert policy so that it clearly requires that all "at risk" prisoners are to be followed by medical staff during

³ Plaintiffs learned from Defendants following the recent death in the segregation unit that ventilation in the segregation unit cells had been further impaired because Defendants had recently taken steps to seal the area under the solid doors. Although they also claim that they have taken other steps to maintain some air flow, conditions in the unit remain unsafe for prisoners at high risk of heat and cannot be made safe without some form of air conditioning.

periods of high heat, and that medical staff are to monitor for, and report, dangerous complications of heat such as asthma attacks, cardiac events, and seizures, as well as heat exhaustion and heat stroke.

Finally, Plaintiffs reluctantly ask that Plaintiffs' request for further relief on the heat issue be considered at the hearing that the Court intends to schedule following the hearing to commence on October 11, 2006. The medical and mental health issues that Plaintiffs intend to present evidence on at the October hearing will, Plaintiffs expect, occupy the entire hearing; given the season, these issues must take precedence over the equally lethal dangers of failing to protect prisoners from the risk of heat injury.

III. THE LEGAL BASIS FOR PLAINTIFFS' REQUESTS

At the forthcoming hearings, Plaintiffs expect to present persuasive evidence of the need for all of the proposed relief identified in Section II, *supra*. For all of the issues upon which Plaintiffs will present evidence, the legal standard is the same. When prison officials fail to meet their obligation to provide for a basic human need as a result of their "deliberate indifference," they violate the Eighth Amendment's ban on cruel and unusual punishments. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). These basic human needs include medical care, adequate shelter and reasonable safety:

The [Eighth] Amendment also imposes duties on these officials, who must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates.

Farmer v. Brennan, 511 U.S. 825, 832 (1994) (citations and internal quotation marks omitted); *see also DeShaney v. Winnebago Co. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1994) (similar list

of “basic human needs”).

The requests for relief Plaintiffs present in this motion thus all involve basic human needs. In particular, the requests for relief to prevent harm to prisoners with disabilities obviously implicate the right to adequate medical care, but they also implicate the right to reasonable safety, and some of the requests also implicate the right to adequate shelter. *See Weeks v. Chaboudy*, 984 F.2d 185, 187-88 (6th Cir. 1993) (denial of wheelchair to paralyzed prisoner constituted deliberate indifference to serious medical needs; qualified immunity not available). Similarly, the requests for measures to protect against heat injury implicate the rights to adequate medical care, adequate shelter, and the right to reasonable safety. *See, e.g., Gates v. Cook*, 376 F.3d 323, 340 (5th Cir. 2004) (affirming trial court finding of Eighth Amendment violation from exposure of prisoners to high temperatures; “this condition presents a substantial risk of serious harm to the inmates”).

Farmer sets forth detailed guidelines for determining if prison conditions of confinement violate the Eighth Amendment prohibition on cruel and unusual punishment. The Eighth Amendment “deliberate indifference” standard has both an objective and subjective component. Thus, in order to be found liable under the Eighth Amendment, a defendant must know of and disregard an excessive risk to prisoner health or safety. *Farmer*, 511 U.S. at 837. Further, once prison officials know of a substantial risk to prisoner health or safety, they have a duty to respond reasonably to that risk. *Id.* at 844.

Because this is an injunctive case, Plaintiffs’ proof of the subjective proof of the subjective component regarding Defendants’ actual knowledge is simple and straight-forward:

In this case, we are concerned with future conduct to correct

prison conditions. If these conditions are found to be objectively unconstitutional, then that finding would also satisfy the subjective prong because the same information that would lead to the court's conclusion was available to the prison officials.

Hadix v. Johnson, 367 F.3d 513, 526 (6th Cir. 2004) (citing *Farmer*).

In support of each of their requests for relief, Plaintiffs will at trial present evidence of a substantial risk of serious harm, and a failure of prison officials to respond reasonably to that risk. Indeed, in many if not most instances, Plaintiffs will present evidence that, not only was there a substantial risk of serious harm, but also that the known risk materialized and caused death, serious injury, or unnecessary suffering to one or more class members.

It is also significant that, as explained above, the Court has previously found a violation of the Plaintiffs' constitutional rights. *See* 2002 Findings at 79 ¶ 371 (access to health care); 111 ¶ 566 (treatment of patients with chronic diseases); 148 ¶ 789 (physician supervision); 157 ¶ 867 (maintenance of the health care record); 190 ¶ 1031 (health care and health-related accommodations for prisoners with disabilities); 236 ¶ 1270 (protection from heat-related illnesses). Under these circumstances, the legal burden is on Defendants to come forward with evidence that they have cured the existing constitutional violations. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1449 (9th Cir. 1989) (earlier court order regarding conditions at the jail created a common law presumption that such conditions continued); *see also Qui v. Ashcroft*, 329 F.3d 140, 148 (2d Cir. 2003) (applying presumption that a given condition continues to exist); *NAACP, Jacksonville Branch v. Duvall Co. Sch.*, 273 F.3d 960, 988-89 (11th Cir. 2001) (same). Finally, Plaintiffs will also present evidence at trial that their proposals for relief meet the restrictions of the Prison Litigation Reform Act (18 U.S.C. § 3626(a)(1)). Given this proof,

Plaintiffs will be entitled to the relief that they seek.

CONCLUSION

For the above reasons, Plaintiffs request that the relief they seek be granted.

Respectfully submitted,

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