UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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J.J., by and through his next friend, Sakeena Jackson; *et al.*, for themselves and all others similarly situated,

Plaintiffs, Case No. 17-CV-047-JDP

vs.

Jon E. Litscher, in his official capacity as Secretary of the Wisconsin Department of Corrections, *et al.*,

Madison, Wisconsin
June 23, 2017
9:05 a.m.

Defendants.

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STENOGRAPHIC TRANSCRIPT **EXCERPT** FROM
SECOND DAY OF MOTION HEARING
HELD BEFORE CHIEF JUDGE JAMES D. PETERSON

APPEARANCES:

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Also Present: Defendants Brian Gustke, Wendy Peterson, John Paquin

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(Called to order at 10:38 a.m.)

(E-X-C-E-R-P-T)

THE COURT: Okay. I'm not going to immediately grant the injunction that plaintiffs wanted, but let me just walk through the analysis here and I'll tell you where we land. Ultimately I'm going to give you some parameters within which I'm going to direct the parties to, in very short order, cooperate on developing the form of an injunction. And so here's the analysis:

Defendants -- I'm persuaded that the plaintiffs have

shown more than a reasonable chance of success on the merits that the conditions at Lincoln Hills violate the United States Constitution in several ways, particularly with respect to solitary confinement.

The first thing they have to do is show that there's harm. It's frankly not really disputed here. The defendants haven't challenged any of the evidence that's submitted by Mr. Schiraldi and Dr. Grassian, and confirmed by the Lowenstein study showing that punitive isolation is used only in minority states. And even where it's used, it's subject to strict limits on how long punitive segregation can be imposed. And even in those states in which it could be imposed for longer periods of time, it's subject to regular review.

Wisconsin is an extreme outlier in terms of its policy because it allows sentences to solitary confinement for up to 60 days. And in terms of actual practices, Lincoln Hills -- and I'll use the term *Lincoln Hills* to cover both Lincoln Hills and Copper Lake. I'll draw the distinction where it's appropriate -- but in terms of its practice, Lincoln Hills regularly sentences youths to terms in excess of the limits of every state.

The tabulation of the sentences that it imposed since the beginning of the year shows many sentences that are at the administrative maximum of 60 days or a handful of

those sentences. The actual time in custody is quite extensive. The first page begins with total days in restrictive housing of up to 69 days, up to 41 days. The next page is 41 days to 31 days. Final page is 31 days -- or the fourth page is 31 days to 27 days, 23 days at the bottom of the fifth page.

So there are many many sentences that are imposed -- and by the defendants' admission actually served -- in which people spend weeks or months in solitary confinement. And that's well well beyond the national norms even for states that permit the use of punitive solitary confinement.

And I'm just not going to use the euphemism *restrictive housing* here, because whatever you call it, the conditions of restrictive housing at Lincoln Hills, particularly in High Hall, amount to solitary confinement under conditions of extreme deprivation that are more severe than most adult prisons: the cells are prototypical isolation cells with solid doors; property is starkly restricted; out-time is severely constrained; and even during most out-time for the youths that are in High Hall, uses in mechanical restraint.

This is the most severe and damaging type of solitary confinement that is used in the American penal system. Ted Kaczynski has less restricted conditions of

confinement than the youths at Lincoln Hills.

Now, defendants do not meaningfully dispute that solitary confinement, particularly as practiced in the extreme form that's used at Lincoln Hills, is harmful to youths. Defendants acknowledge that it's their aspiration to reduce the use of solitary confinement. I find that the plaintiff has amply shown that the youths at Lincoln Hills are suffering acute, immediate, and lasting harm from the excessive use of solitary confinement.

I also make a similar finding with respect to the use of OC, or pepper spray. Although the use of potentially excessive force is usually evaluated on a case-by-case basis in cases that come before this court here, the evidence here shows a pattern of excessive use of pepper spray. And the defendants have acknowledged, and really don't challenge, that using pepper spray 20 times a month in a population where you have about, you know, maybe 20 youths in restrictive housing, where most of the use of pepper spray is concentrated, is clearly excessive. And I also look at the national context here and we find that 90% of the states don't use it at all. So the argument that it is a necessary tool for control of the juvenile institution just doesn't hold water in light of what's going on nationally.

So really what this case comes down to on the merits

here is what standard do I apply and whether the defendants are deliberately indifferent. I think if the Fourteenth Amendment standard applies to the use of excessive force, then I really don't have to look at the culpable state of mind; I really just evaluate whether the use of force or these conditions are reasonable. Ultimately I may get to that point. I don't think I have to do that now.

I do find that there is a right to rehabilitation and I think that the use of solitary confinement violates it. There's no question that while you're in solitary confinement, your programming is -- rehabilitative programming is disrupted, essentially just results in an outright denial of rehabilitative programming during your solitary confinement. Given the lengths of sentences that are imposed, that's a substantial destruction in and of itself. But the disruption also disrupts the sequencing of programming, which means that a youth who is trying to go through a sequence of programmings, and to achieve his or her release, finds that sequence disruptive, which can also ultimately extend the incarceration.

But the most significant disruption or interference with the right of rehabilitation is that the consequences of the extended solitary confinement itself engenders antisocial behavior and it aggravates mental illness that

just fundamentally interferes perhaps in a lifelong way with the rehabilitation of the youth.

Now, we have had a lot of discussion about the deliberate indifference standard here. And I'm convinced really that the plaintiffs are really likely right on this; that what we're talking about here is not the kind of maliciousness that I would have to find in a particular application of a use of excessive force in conditions of confinement cases and in cases which are dealing with the systemic use of force. The question really is there has to be kind of a culpable state of mind; it can't be negligence.

But if the defendants are aware of an ongoing risk of serious harm -- and I don't think the defendants here really deny that they are well aware of the consequences of solitary confinement, particularly for extended periods and particularly under the severe conditions that pertain at Lincoln Hills, that they know that the juveniles are suffering acute and potentially permanent harm when they serve these long sentences in solitary confinement -- and so it's not enough for them to have good intentions and want to do better.

The fact is they know that these conditions pertain and that youths are being harmed by them and yet it continues. And so the culpable state of mind here is

close to a kind of callousness that the system has.

And as I said, I think that the defendants here who testified, to some degree have good intentions. But I have to look more system-wide at all of the defendants and at the system. And it just happens to be the case that Mr. Gustke has no experience at all in juvenile corrections. And he has substantial experience in adult prisons, but he has no experience and received no training in managing security in a juvenile institution.

And Ms. Peterson has a few years of experience as an educational administrator in a juvenile facility, but all of her time has been spent at Lincoln Hills. She has no experience in a successful juvenile facility. And, in particular, she has no experience really dealing with the security issues, the restrictive housing, and mechanical restraints and the use of pepper spray that are really at issue in this suit.

So Ms. Peterson and Mr. Gustke are simply not in a position and don't have the skills and experience to turn around an institution that's failing like Lincoln Hills. Mr. Litscher did not testify, so I didn't really get the perspective of the management of the Department of Corrections. But the bottom line is very clear that the DOC and the defendants have really demonstrated a callous indifference to the acute and permanent harm that the

residents at Lincoln Hills are suffering.

So the question becomes, is there a need for the injunction. The defendants' main argument against the injunction -- other than the fact that it's vague, which I'm going to address by how I'm going to try to get to a remedy here -- is that the defendants are already accomplishing reform on their own. That was their main line of briefing, so I was expecting a very substantial showing of reform that was underway at Lincoln Hills when we got to the injunction hearing. That showing is willfully inadequate.

The only really substantial effort toward reform that has been demonstrated is that they're participating in the Performance-based Standards program, which is a data collection and evaluation system that, useful as it is, is simply not a method of reform. There is -- and even that system is just in the candidacy phase in which they're trying to comb out the data so that they can submit data and find out what's going wrong, and that's just not enough. That participation, by the way, didn't even start until the suit was filed.

There's also been a suggestion that Mr. Gustke said that they were contemplating the creation of a high-risk unit in which people who are at high risk of being hard to manage would be placed in an individual unit. Essentially

that would concentrate particularly difficult youths in one location, but there's no real showing here how that would even help or if it would help, and at this point it just appears to be an idea.

I did not have one single document presented to me by the defendants showing that there was actually a sustained reform underway. And in fact the sentences that have been imposed since January show that there is really zero effort being made to moderate the sentences for solitary confinement that are underway. So I have to say that the defendants have completely shown, or completely failed to show, that Lincoln Hills is in the process of reform that is driven in any meaningful way by the defendants themselves.

I appreciate the fact that they're participating in the Performance-based Standards program and that they have received some grants to have some consultants help them; all that is good. But it's so far short of showing that there's actual reform underway that I simply can't decide that it's appropriate to let Lincoln Hills reform itself. It hasn't made a meaningful effort in that direction and so an injunction really is needed here.

I also don't think that my injunction is going to derail any reform efforts underway. I certainly don't think that what I'm going to order is going to interfere

with the input from consultants or with the use of the Performance-based Standard system. None of those reform efforts are at all jeopardized by what I'm proposing here.

What I am going to ask is that the parties confer on the form of an injunction that I will enter. I want you to agree on it. If you can't agree, I'll resolve disputes. But both sides have expertise here that I don't to figure out how to reform.

And so what I'm going to do is I'm going to tell you that you have two weeks to submit a proposed form of injunction that you agree on, subject to the guidance that I'm about to provide to you, that makes suggestions on how the improvement should be guided. And that injunction itself may have a schedule that will provide for the phase-in of certain things like developing alternatives to the use of pepper spray.

And so it's appropriate I think to -- I think taking an incremental approach understates the urgency that I feel that this problem poses here. And so I don't want to call it an *incremental* approach, but I realize that certain of these transformations can't happen just overnight.

I do have a concern that if I just ordered that solitary -- punitive solitary confinement were unconstitutional and had to cease immediately, I don't

know what you would do with the people that are in solitary confinement now. I don't know what you would do in terms of alternatives to punishment for youths at Lincoln Hills. And so the bottom line is it's too abrupt a transformation for me to order immediately, even though there are cases, well-reasoned cases, that say that punitive solitary confinement is just itself a violation of the Eighth Amendment as applied to juveniles. So here is what I'm going to do:

I'm going to identify these items here that I think have been shown to me to be areas that require reform. I'm no expert in running a correctional institution, but to quote a recent Nobel laureate: "You don't have to be a weatherman to know what way the wind blows." And so these are the things that are wrong and need to be fixed:

First of all, *restrictive housing*. If solitary confinement is to be used for punishment, sentences have to be moderated to alleviate the acute harm to youths, presumably by shortening sentences to national norms. I don't know precisely what those national norms are, but I'm going to tell you it's in the neighborhood of about seven days, as far as I can tell. I think that's kind of the outer limits. I think some courts -- as I said, some courts say none at all. But seven days has to be something like an outer limit, five days is probably more

reasonable, but I'll leave the experts to draw the particular call.

Restrictive housing. Solitary confinement cannot be the routine placement for youths while they're on prehearing status. It may be that immediately after the violation is the time in which some form of separation or isolation is most important to be used. But at the moment, youths commonly spend a week in solitary awaiting their hearing, and so that has to stop. When you have somebody who hasn't been convicted of their violation you can keep them in isolation for safety purposes, but you can't routinely let them sit for a week before they get to their hearing.

While in restrictive housing, adequate out-time must be provided. Mr. Gustke indicated that the reasons for not providing the out-time that are supposed to be provided now are really staffing problems. There's no legitimate reason for having youths restricted to zero or less than an hour of out-time. And I think even the extraordinary restraint of having out-time limited to one day or one hour a day is questionable. So adequate out-time has to be provided. Standards as to whether that's one hour or four hours I leave to the parties to discuss.

Also, the conditions during out-time cannot be unduly

restricted by unnecessary use of mechanical restraints or prohibitions on social interactions. The evidence is a little bit unclear about whether there's a rule that you can't talk to anybody else while you're on your out-time, but obviously that is one of the reasons that makes the conditions, when you're on isolation, so alienating and antisocial. We want the youths at Lincoln Hills to be socialized, and many of them have problems in those ways. The idea that you would inhibit social interactions during out-times is highly counterproductive.

Also, adequate opportunity for exercise must be provided. I question whether an exercise facility that is the same size as the isolation cell, even with the addition of a yoga ball and a basketball, is an appropriate exercise facility. I don't think that that provides adequate exercise.

Also, restrictive housing must not unduly disrupt rehabilitative or educational programming. If a person is in restrictive housing, you have to do what you can to maintain their programming. It makes no sense whatsoever to take a person who's struggling with aggressive behavior and remove them from aggressive behavior treatment while they serve time in isolation. So the restrictive housing must provide for as-close-as-possible continuity of rehabilitative and educational programming while they're

serving their time in restrictive housing.

Also, in restrictive housing, property may be restricted for reasonable security reasons, but care should be taken to provide adequate stimulation to youths while they're in restrictive housing; at this point in allowing there to be an element of punitive restrictive housing, but it can't be so isolating and alienating that there's absolutely no stimulation involved.

The idea that one book is enough stimulation is frankly outlandish. I'm going to guess that many of the residents that are at Lincoln Hills have reading deficiencies, may not actually even be able to read the books that are available to them. The selection of books isn't enough. There has to be some form of stimulation available to the youths while they're serving time in restrictive housing to make it less alienating and harmful.

On *mechanical restraints*. I will not prohibit the use of mechanical restraints for safety purposes. But the use of mechanical restraints will require an individualized determination when they are used and you can't make a routine rule that all of those in High Hall have to be on mechanical restraints when they're participating in out-time.

If you have to use the belly belt and handcuffs,

there has to be an individualized determination that on that occasion that individual poses a risk to safety if they are not restrained.

Pepper spray. That's a hard one. As I said, the reason it's hard is that the institution does not now apparently have good alternatives to the use of pepper spray for the maintaining of discipline and order. I'm not persuaded that it's a necessary tool because so many institutions don't use it at all: 90%.

But nevertheless, I'm not at this point going to preclude its use. But if pepper spray is to be used, the conditions under which it can be used must be more narrowly defined and the reasons for excessive use of pepper spray have to be systemically evaluated and remediated at Lincoln Hills.

I was disappointed that Ms. Peterson couldn't really tell me why there was a drop in the use of pepper spray in the last couple of months. Maybe it's just a blip. But I'm really wondering exactly what it was that allowed for there to be significantly fewer uses of pepper spray in June of this year than there had been in the months previously. If it is stability in staffing, great. But there needs to be actually a really careful evaluation of what it was that got the use of pepper spray down in June so that those conditions can be facilitated.

There also will have to be an evaluation of what are appropriate alternatives to the use of pepper spray and then of course appropriate training on those techniques, because based on Mr. Schiraldi's testimony, they seem to be strategies of negotiation and appropriate kinds of isolation and counseling. Those do not seem to be things that I can order to be deployed immediately, because they seem to require some reasonably sophisticated counseling skills that should be well within the skills of someone who's employed as a youth counselor at Lincoln Hills.

So those are the parameters that I am ordering. As I said, the schedule is within two weeks I'd like to see an agreed-on form of injunction that I will approve. And if it can't be agreed on, you can submit alternative versions or versions that indicate for me what you agree on and what you don't.

I leave it to you to work out the time frame for which you're going to phase in those elements of the injunction that have to be phased in. I'll leave it to some judgment here in terms of what that should be. But as I said, I view the harm to the youths from the use of punitive solitary confinement to be acute, immediate, and enduring and so that is not something that is going to be done slowly. Some of them I think can be done almost instantaneously.

As I said, the use of mechanical restraints as the default rule for anybody that comes out of High Hall, I think that could be done tomorrow. I'm giving you two weeks to do the injunction, so it can be done immediately after I approve the form of the injunction.

Other questions? What else can I provide to you that's useful today?

MR. DUPUIS: Your Honor, one point of clarification: You mentioned adequate out-time. I just want to clarify that that is out-time in addition to the education and rehabilitative programming --

THE COURT: Yes.

MR. DUPUIS: -- that the one to four hours out-time is --

THE COURT: I don't know what the right number is. One hour is not enough out-time. But I leave it to the parties to negotiate on what an appropriate amount of out-time is in addition to the programming time. And it may be that you can contemplate that the way it's calculated is that there's a total amount of time out of the isolation cell. Whether it's meant in education or exercise or free time, maybe that doesn't matter. It's just that you have to -- 23 hours in an isolation cell for a juvenile is too much.

I've looked at some of the cases. You know, I kind

of call balls and strikes, if I'm taking John Roberts' metaphor here. And so the 23 hours in a cell is too much and I'm finding that that's a constitutional violation. The 20 hours with the four hours out, that also is a constitutional violation. Exactly how you structure a constitutional period of punitive solitary confinement is something I'm going to leave to the experts to develop.

MR. DUPUIS: I believe that's -- I mean, obviously, Your Honor, as we go through this process of trying to come up with a negotiated -- an order, I believe we may want to come back to you in the interim. Would that be --

THE COURT: I can get you on the phone relatively easily. We can talk through whatever issues. If we hit a stumbling block along the way, get me on the phone and we can hear from counsel pretty easily that way.

MR. HALL: I don't have anything, Your Honor. Thank you.

THE COURT: Okay. Anything else?

MR. DUPUIS: No. Thank you, Your Honor.

THE COURT: All right. Thank you all for your presentations. And good luck coming up with the agreed-upon injunction. Hopefully you won't leave much work for me.

MR. HALL: Thank you.

MR. DUPUIS: Actually, one other question, Your Honor: Are you planning to issue a written opinion laying out the reasoning?

THE COURT: I hadn't really planned on issuing what you would call a *written* opinion. I've given you my ruling. But if you would find it helpful, I can put in the bullet points that I have from my notes here relatively easily. If you'd like that, I'll do that.

MR. DUPUIS: I think that would be useful.

THE COURT: All right. I'll do that. It will set the parameters for what I've actually ordered you to do, so that seems appropriate. Okay.

MR. HALL: Thank you, Your Honor.

MR. DUPUIS: Thank you, Your Honor.

MS. GRAHAM: Thank you.

(Adjourned at 11 a.m.)

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I, CHERYL A. SEEMAN, Certified Realtime and Merit Reporter, in and for the State of Wisconsin, certify that the foregoing is a true and accurate record of the proceedings held on the 23rd day of June, 2017, before the Honorable James D. Peterson, Chief Judge of the Western District of Wisconsin, in my presence and reduced to writing in accordance with my stenographic notes made at said time and place.

Dated this 3rd day of July, 2017.

/s/

Cheryl A. Seeman, RMR, CRR
Federal Court Reporter