IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO: 2:08-cv-475
	)	JUDGE ALGENON L. MARBLEY
THE STATE OF OHIO, *et al.*,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiff, the United States, moves the Court for a temporary restraining order against Defendants, the State of Ohio, et al. (the "State"), and requests a hearing. The grounds for this motion are set forth in the attached Memorandum of Points and Authorities.

The United States notified the State on March 12, 2014, that it planned to file this motion.

Respectfully Submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION FOR A TEMPORARY RESTRAINING ORDER

The State has systematically violated the substantive due process rights of boys with mental health disorders at four of its juvenile correctional facilities (the "Facilities")[1], and this Court must act immediately to protect these boys from mounting and irreparable harm. The State punishes the boys with seclusion (i.e., solitary confinement) for days on end, often also depriving them of education, exercise, programming and crucial mental health care. When the State returns them to the general population, the State often does not adjust their mental health care treatment to address the harm from seclusion or the misconduct that led to seclusion in the first place. Even when the boys are not secluded, the State deprives them of appropriate mental health care, instead providing cut-and-paste treatment plans that bear little relationship to the mental health needs of a particular boy.

Seclusion has become the State's modus operandi for handling boys with mental illness. In the second half of 2013, the State imposed almost 60,000 hours of seclusion on boys at the Facilities. Ten boys at Circleville and Indian River spent over 1,000 hours in seclusion over a six month period, and another 17 boys spent over 500 hours in seclusion. At least ten boys at Scioto spent over 10 percent of their time in custody in seclusion from April to September 2013.

Those statistics are disturbing, but the youth at the Facilities are not statistics. They are troubled boys coping with mental health disorders who are suffering real, irreparable harm from tremendous time in seclusion. A few examples from just six months of the State's records:

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[1] The Facilities are Cuyahoga Juvenile Correctional Facility, Circleville Juvenile Correctional Facility, Indian River Juvenile Correctional Facility and Scioto Juvenile Correctional Facility.

- K.R. (218520) at Circleville is taking significant psychiatric medications. He bangs his head frequently, and he had fresh head injuries during a recent visit.[2] Yet K.R. spent 1,964 hours in seclusion over six months. His longest episode of seclusion was about 19 days. Eleven times, he was secluded for five or more days at a time. Three times, he received a five-day penalty of extra seclusion during a time when he was already serving seven days in seclusion. While secluded, he was on "Suicide Watch," had "Suicide [Ideation]," and displayed "Self Injurious Behavior."

- A.E. (217241) at Circleville spent 1,504 hours in seclusion over six months. At one point, he was given 21 consecutive days in seclusion, with five of those days tacked on while he was already in seclusion.

- J.H. (218144) at Circleville spent 1,146 hours in seclusion over six months. In September 2013, he received 120 hours of seclusion, and then an additional 179 hours that same day, for over 12 days of seclusion. On November 17, 2013, he received 143 hours of seclusion; the next day the State tacked on 108 more.

- N.H. (217322) at Indian River spent 90 hours in seclusion, followed by an additional 120 hours. A week later, he received 92.5 hours. The day after that, the State imposed another 144 hours. One observation during his seclusion was "Self Injurious Behavior."

- M.L. (218660) at Cuyahoga spent 164.58 hours in seclusion over three months, culminating in "Suicidal Ideation."

- N.O. (218428) at Indian River spent 752 hours in seclusion. During 158 hours of seclusion, he demonstrated "Self Injurious Behavior." Another 81 hours yielded a notation of "Suicide Watch"; two days later, he received 91.5 hours of seclusion and another notation of "Suicide Watch."

- J.S. (218396) at Circleville spent 1,585 hours in seclusion. "Self Injurious Behavior" marred his last 48 hours of seclusion.[3]

The State has had every opportunity to address the rampant use of seclusion on boys with mental health disorders, but it has made little or no improvement and may actually be losing

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[2] *See* Email from Alphonse Gerhardstein to Thomas Anger (Jan. 11, 2014) (Attach. A).

[3] Monitor Dr. Dedel found additional instances of lengthy seclusion at Scioto from April through September 2013. C.C. spent 16 consecutive days in seclusion with only one 24-hour period in the general population. T.B. spent eight consecutive days in seclusion. Fifth Compliance Report at 29-30, *U.S. v. Ohio*, ECF No. 127.

ground. Indeed, the State does not view seclusion at the Facilities as a problem at all. At one point, counsel for the State brushed aside a boy's seclusion of 142 hours in a single month as "not alarming."[4] When the State was advised that K.R. (1,964 seclusion hours in six months) was in immediate and extreme distress, the State's lawyers responded with a demand for the resignation of the subject matter expert who tried to look into K.R.'s situation at the monitor's request.[5] One thing is certain: The State will continue the excessive seclusion of boys with mental health disorders unless this Court steps in.

The United States requests an immediate temporary restraining order to stop the seclusion of boys with mental health disorders and to avoid the irreparable harm these boys are suffering and will continue to suffer absent Court protection. Specifically, the United States seeks a temporary restraining order as follows:

> I. This Court, as an interim response to the State's infliction of unlawful and irreparable harm on boys through its seclusion and mental health practices, should immediately issue a temporary restraining order that the State:
>
> > A. Stop secluding any boy with an identified mental health disorder for more than 24 hours without providing him, outside of his confinement area and during normal facility programming times, at least four hours of programming, exercise, education, or combinations thereof;
> >
> > B. Stop imposing more than three consecutive days of seclusion in any form (e.g., prehearing seclusion and intervention seclusion) on any boy with an identified mental health disorder;
> >
> > C. Stop imposing more than three days of seclusion in any form within a 30-day period on any boy with an identified mental health disorder without first:
> >
> > 1. Conducting a comprehensive mental health treatment review of the boy that

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[4] *See* Email from Dustin Calhoun to Silvia Dominguez and Benjamin Tayloe (Dec. 4, 2013) (Attach. B).

[5] *See* Email from Will Harrell to Alphonse Gerhardstein (Jan. 15, 2014) (Attach. C).

includes the treatment team meeting and reviewing the boy's mental health treatment plan to consider and address potential problems with the plan and its implementation;

2. Obtaining the prior written approval of the Deputy Director of the Department of Youth Services ("DYS") responsible for Facility programming; and

3. Providing written notice to the United States and monitor within 24 hours of a youth exceeding three days of seclusion within a single month, describing the amount of seclusion, reason for seclusion, treatment provided in response to seclusion, whether the youth's behavior intervention plan was modified or created, and alternatives to seclusion that were rejected.

D. Provide monthly to the monitor an AMS printout of monthly seclusion hours for boys at the Facilities; and

E. Refrain from substituting restraints for seclusion.

II. The Court should hold an expedited hearing to determine the United States' entitlement to a preliminary injunction.

III. The Court should set an expedited schedule for discovery and further briefing in preparation for a hearing on a permanent injunction. At the permanent injunction hearing, the Court should determine the circumstances and limitations governing the use of seclusion (or restraints as a substitute for seclusion) on boys with mental health disorders at the Facilities, particularly given that the proposed temporary restraining order's terms do not extend far enough to address the extent of the State's violations;

IV. Such other and further relief as the Court deems necessary to prevent the boys with mental health disorders at the Facilities from suffering additional irreparable harm.[6]

BACKGROUND

A. ***U.S. v. Ohio*.**

Following an investigation of the Scioto Juvenile Correctional Facility ("Scioto") in Delaware, Ohio, the United States found "significant constitutional deficiencies regarding use of

[6] The United States seeks a temporary restraining order permitting the State to use up to three days of seclusion as an interim measure only, until the State implements reasonable programmatic changes enabling it to constrain further its seclusion use and comply with constitutional standards. The United States will delineate those programmatic changes in a subsequent request for relief, after conducting discovery with its experts.

physical force, grievance investigation and processing, and use of seclusion." *See* Letter from Wan J. Kim, Assistant Att'y Gen., Ohio Att'y Gen., to Ted Strickland, Governor, State of Ohio, "Investigation of the Scioto Juvenile Correctional Facility, Delaware, Ohio" (May 9, 2007) (on file with author). Thereafter, on May 16, 2008, the United States filed suit against the State (including the Governor, DYS, and various officials associated with DYS), alleging among other things that the State engaged in a pattern or practice of failing adequately to protect boys from undue risk of harm by failing to "protect[] from the unwarranted use of seclusion" and failing to provide adequate mental health care and rehabilitative treatment to boys through "the provision of adequate screening and assessments . . . adequate treatment planning . . . and adequate psychological services." Compl., ¶¶ 22, 24, *U.S. v. Ohio*, ECF No. 2.

On June 28, 2008, the United States and the State entered into a Consent Order to resolve the identified violations of federal rights. *U.S. v. Ohio*, ECF No. 8. Three years later, the United States and the State negotiated an Amended Stipulation for Injunctive Relief, reflecting that progress had occurred in certain areas but violations related to seclusion and mental health care continued. *U.S. v. Ohio*, ECF No. 85. In January 2012, this Court issued as its order a proposed stipulation between the United States and the State intended to resolve the State's use of excessive seclusion on Scioto youth housed on special management units. *U.S. v. Ohio*, ECF No. 109 (the "Progress Unit Consent Order").

Less than six months after the Progress Unit Consent Order was filed, it became apparent the State was forcing Progress Unit boys to wear restraints for an average of 12-14 hours per day. Essentially, the boys in the Progress Unit who had been subjected to prolonged periods of seclusion were now being forced to wear restraints virtually every waking moment. Only after an exchange of letters and the threat of litigation did the State, on August 22, 2013, announce

that it would discontinue use of programmatic restraints. *See* Letter from Thomas Anger, Ohio Asst. Att'y Gen., to Benjamin Tayloe (Aug. 22, 2013) (Attach. D).

1. <u>The Monitor's Discovery of Excessive Seclusion at Scioto.</u>

On November 8, 2013, Dr. Kelly Dedel, the monitor, investigated the accumulation of seclusion hours among some Scioto boys. She found the State had secluded ten boys for over 10 percent of their time in custody and that one boy spent almost 40 percent of his time in seclusion:

Youth	Days in Custody during Monitoring Period (max 184)	Days in Seclusion during Monitoring Period	% days spent in Seclusion
O.J.	74	28.54	38.57%
B.D.	184	49.56	26.93%
A.F.	184	43.83	23.82%
T.R.	184	35.36	19.21%
D.H.	184	33.59	18.25%
J.A.	141	24.56	17.42%
T.H.	109	16.27	14.92%
M.G.	137	17.55	12.81%
R.B.	184	23.24	12.63%
K.A.	184	20.57	11.18%
D.S.	184	17.62	9.6%

See Memorandum from Kelly Dedel, Lead Monitor, *U.S. v. Ohio*, to Tom Anger, Ohio Asst. Att'y Gen., "Results of Seclusion Analysis" (Nov. 8, 2013) (Attach. E) ("Seclusion Report").

Faced with this evidence of seclusion, Dr. Dedel expressed her "serious concerns." She invited the State to consider "how to mitigate these risks for the youth who have chronic, aggressive misconduct." She urged the State to participate in a "problem-solving discussion." She proposed that the State consult the mental health subject matter expert for recommendations. *Id*. at 1-2.

All of this fell upon deaf ears. The State has not identified any policy change or other course of action to mitigate the harm of seclusion for the boys named in the Seclusion Report or any other boys at the Facilities. On the contrary, counsel for the State cited the November seclusion hours for B.D. (142.3 hours) and A.F. (80.93 hours) and stated, "As you can see, the seclusion hours are not alarming for these youth." Attach. B.

2. <u>The Closure of Scioto and the PLRA Motion.</u>

On November 21, 2013, the State announced its intent to close Scioto on May 3, 2014. Citing the declining population there, the Director of Ohio DYS wrote, "As of [November 20, 2013], there were 38 youth at [Scioto] (20 males and 18 females who reside separately). *Male youth will be gradually reassigned to the remaining facilities* according to their security, educational and programming needs." *See* Letter from Harvey Reed, DYS Director, to Stakeholders (Nov. 21, 2013) (Attach. F) (emphasis added).

On December 18, 2013, the State filed a motion under the Prison Litigation Reform Act, 18 U.S.C. § 3626(b) ("PLRA"), to terminate *U.S. v. Ohio.* The next day, December 19, 2013, the United States filed a preliminary opposition. Also that day, the Court held a joint status conference with counsel in this case and *S.H. v. Reed*, No. 2:04-cv-01206 (filed Dec. 20, 2004) and set a joint settlement conference for January 29, 2014. The State withdrew its PLRA motion without prejudice to renew its motion should the parties fail to settle, and the United States withdrew its PLRA opposition without prejudice.[7]

[7] The State's PLRA motion and United States' response triggered the consent order's dispute resolution process, which culminated in a court-ordered mediation on January 29, 2014. The dispute resolution period ended on February 27, 2014, meaning the parties are free to submit this dispute to the Court.

True to its word, the State gradually assigned the Scioto boys to other Facilities. The United States has learned that there are at least six boys who were once at Scioto and are now elsewhere in DYS custody. Discovery has been limited, which prevents the United States from learning the extent to which former Scioto boys are still experiencing high levels of seclusion. The United States expects that updated discovery and records for boys not on the mental health caseload will reveal that boys at the Facilities are still experiencing excessive seclusion.

B. Excessive Seclusion Is Harming Boys with Mental Health Disorders.

On January 14, 2014, the State provided data revealing the depth of the seclusion problem. In the second half of 2013, the State imposed almost 60,000 seclusion hours on boys on the mental health caseload at the Facilities:

Prehearing And Intervention Seclusion Hours	**July 2013**	**Aug 2013**	**Sept 2013**	**Oct 2013**	**Nov 2013**	**Dec 2013**	**Totals**
Cuyahoga	434.45	624.37	1,027.85	1,433.47	864.97	629.34	5,324.26
	102.05	47.88	16.10	143.78			
Scioto	277.92	528.14	108.75	403.52	232.44	286.83	3,999.52
	336.00	984.17	72.00	457.75	240.00	72.00	
Indian River	2,025.13	1,938.72	2,091.99	1,908.29	1,475.24	1,763.57	20,235.07
	1,657.33	3,072.00	2,105.60	997.20	384.00	816.00	
Circleville	930.38	1,319.01	1,444.17	2,775.69	3,048.87	850.71	30,306.16
	2,256.17	2,448.00	1,752.00	4,919.33	6,420.10	2,141.73	
Total	**8,019.43**	**10,962.29**	**8,618.46**	**13,039.03**	**12,665.62**	**6,560.18**	**59,865.01**

That may be only the tip of the iceberg. The State did not provide records covering the first six months of 2013, any part of 2014, or any boys who are not on the mental health caseload – about half of the population at the Facilities. Even this limited data the State provided shows that seclusion remains unchecked at the Facilities.

As poor as the State's track record has been, its overreliance on seclusion is getting worse, not better. In June 2013, Dr. Dedel found that Scioto boys who committed an act of violence received seclusion as a sanction 72 percent of the time. *See* Fourth Compliance Report at 25, *U.S. v. Ohio*, ECF No. 114. By September 2013, that number had grown to approximately 90 percent, which is a "significant increase." *See U.S. v. Ohio*, ECF No. 127 at 27.

None of this should come as a surprise to the State. Dr. Andrea Weisman, a subject matter expert in the *S.H.* case, found that the DYS head psychologist, Dr. Hamming, noted that "half of the kids are in seclusion (on Buckeye) a good majority of the time." *See* Report by Andrea Weisman, *S.H.* "Compliance with Consent Order Provisions Regarding Mental Health," at 6 (Dec. 16, 2013) ("Weisman Report I") (Attach. G). Dr. Weisman further explained that Dr. Hamming's note "raises concern that the youth who have transitioned out of the Progress Unit are still being managed with long stays in seclusion, by way of the IRAV and sanction seclusion processes rather than by way of a maximum security unit." *Id.* at 6.

Three facts are beyond dispute: The State secludes boys with mental health disorders at the Facilities a tremendous amount, the State knows it, and the State won't address it. If these boys are to be protected from the irreparable harm of excessive and repeated seclusion, it is up to this Court to protect them.

C. <u>Boys with Mental Health Disorders Suffer Tremendous Harm from Seclusion.</u>

The harm from seclusion falls disproportionately on boys with mental illness – the very boys least able to cope with repeated and extended isolation. Dr. Weisman found that the State places mentally ill boys into seclusion more often than general population boys, and "mentally ill youth are disproportionately engaging in behaviors likely to result in their being secluded." *See*

"Compliance with Consent Order Provisions Regarding Mental Health," *S.H. v. Reed*, ECF No. 388-2.

The State's excessive reliance on seclusion is rooted in the deficiencies in its mental health care treatment. Dr. Weisman explained, "It is clear to me that *the deficiencies in behavioral health care* led to the high rates of seclusion for youth at Scioto, and that the same deficiencies exist at the other three DYS facilities." *See* Weisman Report I at 6 (emphasis added). Dr. Dedel also warned that seclusion suppresses a boy's negative behavior during the time that he is behind a locked door but denies him access to the very treatment programs needed to change his behavior. *See U.S. v. Ohio*, ECF No. 127 at 29.

Indeed, the State does not modify boys' treatment plans or adjust their mental health treatment following misconduct, so the cycle of violence leading to seclusion continues. When a boy with a mental health disorder is placed in seclusion, "it is incumbent on the practitioners to modify the [Integrated Treatment Plan] to extinguish the behavior." *See* Weisman Report I at 5. If there is no corresponding modification of the treatment plan, Dr. Weisman predicted that the "seclusion will just *exacerbate the behavioral problems DYS is seeking to extinguish*." *See* Weisman Report I at 5 (emphasis added).

D. The State Can Operate the Facilities Safely and Securely Without the Use of Excessive Seclusion or Restraints.

The State can operate a safe, secure facility without resorting to seclusion. Dr. Dedel has conducted reviews of approximately 60 juvenile correctional facilities. She has repeatedly informed the parties that, in her experience, juvenile facilities routinely maintain control over youth while using minimal levels of seclusion, levels significantly below those that the State uses. Separately, Paul DeMuro, the former Pennsylvania Commissioner of Children and Youth

and a nationally recognized expert on the operations of juvenile justice facilities, opines that it is possible to maintain security and deliver effective programming while using minimal levels of seclusion. In fact, Mr. DeMuro confirms that high rates of seclusion, such as those used by the State, impede the delivery of effective programming and worsen the very behaviors that seclusion targets. *See* Decl. of Paul DeMuro at ¶¶ 4-6 (Attach. H).

DYS' disciplinary policies contribute to the seclusion problem at the Facilities. Dr. Dedel noted, "DYS' continued use of disciplinary seclusion remains outside the norm. The Monitor's experience in the field suggests that most jurisdictions limit the length of stay in seclusion to 72 hours, compared to the 120 hours permitted by DYS policy." *U.S. v. Ohio*, ECF No. 127 at 31. In the most recent monitoring period, 27 percent of instances of intervention seclusion at Scioto were for the maximum 120 hours. *Id*. at 29. That is five straight days of isolation, depriving the boys of mental health care treatment the entire time.

Seclusion at the Facilities must be addressed for the best possible reason: It is hurting these boys. "Solitary confinement can cause serious psychological, physical, and developmental harm, resulting in persistent mental health problems or, worse, suicide. . . . These risks are magnified for children with disabilities or histories of trauma and abuse." ACLU, "Alone & Afraid: Children Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities" (Nov. 2013). "[D]ue to their 'developmental vulnerability,' adolescents are particularly at risk of adverse reactions from prolonged isolation and solitary confinement." American Academy of Child & Adolescent Psychiatry, "Policy Statements: Solitary Confinement of Juvenile Offenders" (April 2012).[8]

[8] *See also* Lindsay Hayes, Office of Juvenile Justice and Delinquency Prevention, Juvenile

Dr. Dedel agrees that seclusion of youth in correctional facilities should be a thing of the past. She noted, "Recent publications by the ACLU/Human Rights Watch, the United Nations' General Assembly, and other scholars suggest an evolving standard around the practice. Indeed, the upcoming revision of the Juvenile Detention Alternative Initiatives' standards will prohibit the practice of disciplinary seclusion." *See U.S. v. Ohio*, ECF No. 127 at 31.

ARGUMENT

Fed. R. Civ. P. 65 allows issuance of a temporary restraining order if there is notice to the adverse party and an opportunity for a hearing. *Certified Restoration Dry Cleaning Network v. Tenke Corp.*, 511 F.3d 535, 552 (6th Cir. 2007) (reversing denial of preliminary injunction for failure to hold a hearing). Issuance of injunctive relief is a matter for the trial court's discretion. *Galper v. U.S. Shoe Corp.*, 815 F. Supp. 1037, 1043 (E.D. Mich. 1993) (granting preliminary injunction prohibiting plaintiff's eviction from her place of business).

A. <u>This Court Should Grant a Temporary Restraining Order to Prevent the Excessive Seclusion of Boys with Mental Health Disorders.</u>

Granting a temporary restraining order involves an evaluation of four factors:

(1) Whether the movant has a strong likelihood of success on the merits;
(2) Whether the movant would suffer irreparable injury without the injunction;
(3) Whether the issuance of the injunction would cause substantial harm to others; and
(4) Whether the public interest would be served by issuance of the injunction.

Suicide in Confinement: A National Survey at 3 (2009) ("Although little research has been conducted regarding youth suicide in custody, the information that is available suggests a high prevalence of self-injurious behavior in juvenile correctional facilities. . . . The study found that almost 22 percent of confined youth seriously considered suicide, 20 percent made a plan, 16 percent made at least one attempt, and 8 percent were injured in a suicide attempt during the previous 12 months.").

Welch v. Brown, No. 13-1476, 2014 WL 25641 (6th Cir. 2014) (granting preliminary injunction preventing city from changing terms of retirees' benefits package) (citations omitted).

These considerations are "factors to be balanced, not prerequisites that must be met." *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir.1994) (affirming issuance of injunction prohibiting prison officials from using trust fund proceeds to fund a new phone system). The district court need not make specific findings regarding each of the four factors if fewer factors are dispositive of the issue. *See Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 400 (6th Cir. 1997) ("A preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.").

In this case, the balancing of these factors weighs heavily in favor of enjoining the State's continued use of excessive seclusion at the Facilities on boys with mental health disorders.

1. <u>The United States Has Demonstrated a Likelihood of Success on the Merits.</u>

To show a likelihood of success on the merits, it is enough that the movant raises "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Brandeis Mach. & Supply Corp. v. Barber-Greene Co.*, 503 F.2d 503, 505 (6th Cir. 1974) (preliminary injunction granted against illegal tying arrangement) (quotation omitted).

The United States can demonstrate likelihood of success on the merits. Excessive seclusion of juveniles is inherently punitive and violates the Fourteenth and Eighth Amendments to the Constitution. Courts have held that the "use of isolation [on children] was not within the range of acceptable professional practices and constitutes punishment in violation of the plaintiffs' Due Process rights." *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155 (D. Haw. 2006)

(relying on expert testimony that "[p]rolonged isolation or seclusion . . . can cause serious psychological consequences"). Numerous courts have recognized the harm to juveniles from isolation and have found it violates Due Process. *See generally H.C. v. Jarrard*, 786 F.2d 1080, 1088 (11th Cir. 1986) ("Juveniles are even more susceptible to mental anguish than adult convicts."); *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983) (experts' testimony on lack of therapeutic and disciplinary benefits from isolation sufficient to warrant remand for further factual findings); *Feliciano v. Barcelo*, 497 F. Supp. 14, 35 (D.P.R. 1979) ("Solitary confinement of young adults is unconstitutional."); *Lollis v. N.Y. State Dep't of Soc. Servs.*, 322 F. Supp. 473, 480 (S.D.N.Y. 1970) (concluding that the extended use of isolation on children is "cruel and inhuman," and "counterproductive to the development of the child").

The United States has established that boys with mental health disorders at the Facilities are secluded for weeks at a time, even when they demonstrate suicidal ideation or actions. Despite the concerted efforts of monitoring teams of subject matter experts for many years, the State continues to impose seclusion on boys with mental health disorders as a matter of course. The State does not deny the extent to which it secludes boys at the Facilities; when confronted with over 100 hours of seclusion in a single month, it dismissed that as "not alarming." Attach. B. Even as evidence mounted that boys with mental health disorders were suffering, the State turned its resources and attention toward terminating this case under the PLRA rather than addressing the problems at the Facilities. There can be no factual dispute that the State is handing out thousands of seclusion hours and that is hurting boys at the Facilities.

Based on the undisputed evidence of the State's relentless use of seclusion on boys with mental health disorders, the United States has demonstrated a likelihood of success sufficient to justify a temporary restraining order.

2. The Boys at the Facilities Will Suffer Irreparable Injury Without a Temporary Restraining Order.

The United States can demonstrate irreparable harm to boys with mental health disorders at the Facilities. "Irreparable harm" means that the plaintiff is unlikely to be made whole by an award of damages at the end of the trial. *Farnam v. Walker*, 593 F. Supp. 2d 1000, 1012 (C.D. Ill. 2009) (granting preliminary injunction requiring prison to provide medical care for inmate).

Here, a monetary award would be cold comfort for the tremendous mental and physical harm the boys at the Facilities are suffering. They have endured days and even weeks of seclusion at the Facilities, to the point where some boys threaten suicide or are driven to hurt themselves. Their Fourteenth Amendment and Eighth Amendment rights have been impaired, and money damages cannot possibly fix that. These boys should not have to suffer needlessly while the United States, the *United States v. Ohio* and *S.H.* monitors, and the monitors' subject matter experts try to persuade the State to change its ways. *See, e.g.*, *Farnam*, 593 F. Supp. 2d at 1013 ("[M]oney hardly seems an adequate remedy for . . . significant pain and suffering.").

To substantiate a claim that irreparable injury is likely to occur, a movant "must provide some evidence that the harm has occurred in the past and is likely to occur again." *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (finding irreparable harm in state's refusal to allow access to sites for dumping of radioactive waste). Here, the State's own records prove excessive seclusion has occurred in the past. Moreover, the State's own words prove excessive seclusion will occur in the future. When Dr. Dedel discovered that some Scioto boys had been secluded for at least 10 percent of their time in custody, the State dismissed her findings as "not alarming." Attach. B. When the monitor sought help for one boy who showed extreme distress, visible injuries, and suicidal

behavior during numerous episodes of seclusion, the State sought the resignation of the subject matter expert who investigated. The State's active resistance to efforts to reduce the suffering of secluded boys with mental health disorders shows irreparable harm will continue unless this Court steps in.

3. A Temporary Restraining Order Would Not Cause Substantial Harm to Others.

To determine whether the temporary restraining order would cause harm to others, the Court should balance the hardships by comparing relevant harms to plaintiff and defendant. *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994) (vacating denial of preliminary injunction where district court failed to balance relative harms).

Here, the harm to the boys with mental health disorders is significant and immediate. They are isolated for long periods, they are denied exercise outside of their rooms, and they often cannot receive essential programming, education and mental health care. At least one boy (K.R.) has hurt himself, and several more displayed suicidal tendencies. Isolation of juveniles greatly increases the risk of suicide or self-harm. Dr. Dedel warned, "The risk of self-harm increases when youth are isolated. Approximately ½ of the suicides that occur in juvenile correctional facilities occur among youth who are in disciplinary seclusion." *See* Seclusion Report at 1.

In contrast, the potential harm to the State from the proposed relief is minimal and speculative if there is any harm at all.[9] As expert DeMuro explained, it is possible to run a safe

[9] Reducing seclusion may actually yield cost savings for the State. A recent study found, "[s]ubstantial savings can result from effectively changing the organizational culture to reduce and prevent the use of restraint and seclusion." Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, The Business Case for Preventing and Reducing Restraint and Seclusion Use, at 4 (2011).

and secure facility without the State's current overreliance on seclusion. DeMuro Decl. at ¶¶ 4-6, Attach. H. Under the proposed temporary restraining order, the State would retain authority and discretion to run the Facilities consistent with this Court's order. For instance, the State could use seclusion as a temporary cool-down device or to restore order for a short time after an episode of chaos. What the State could not do is continue to use lengthy and repeated seclusion as its default, one-size-fits-all method for handling disciplinary issues. *See Farnam*, 593 F. Supp. 2d at 1016 (in Eighth Amendment challenge alleging deliberate indifference to serious medical needs, potential harm from erroneously granting a preliminary injunction was slight compared to the potential harm from erroneously denying it); s*ee also Beerheide v. Zavaras*, 997 F. Supp. 1405, 1411 (D. Colo. 1998) (balance of harms favored prisoners requesting kosher diet despite prison's objection based on cost and security concerns).

When the overwhelming harm to the boys at the Facilities from excessive seclusion is weighed against the possible inconvenience to the State of temporarily changing its seclusion practices pending a final determination of what those practices should be, the balance of hardships weighs heavily in favor of the United States.

4. A Temporary Restraining Order to Prevent the Excessive Seclusion of Boys with Mental Health Disorders Would Serve the Public Interest.

The Court should evaluate whether "the public interest that would be served by the granting of a preliminary injunction outweighs any public interest that would be served by denying it." *United Food & Commercial Workers Union v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 363 (6th Cir. 1998) (public had an interest in free expression of ideas in bus ads, and transit authority failed to prove impact on safe and efficient transportation supporting advertising

ban); *see Galper*, 815 F. Supp. at 1044 (preventing plaintiff's eviction from her office served the public interest because eviction "would disrupt the service she provides to [5,000] patients").

Protecting the constitutional rights of juveniles is in the public interest. The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, explicitly grants the Attorney General the authority to bring suit against any governmental entity that has engaged in a pattern or practice of depriving juveniles of their rights secured by the Constitution or federal statute. In addition, the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, authorizes the United States to investigate and remedy unconstitutional conditions in juvenile facilities. 42 U.S.C. § 1997a(a). The existence and enforcement of these federal statutes demonstrates a substantial and compelling public interest in protecting the rights of boys with mental health disorders from the harm of excessive seclusion.

Further, a national enforcement priority of the United States is preventing the use of unlawful seclusion on persons in custody who have significant mental health needs. In the past ten months alone, the United States has issued investigative findings and statements of interest in pursuit of this priority.[10] The compelling public interest, combined with the United States'

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[10] For example, on May 31, 2013, and February 24, 2014, the United States issued findings that the manner in which the Pennsylvania Department of Corrections used prolonged isolation on inmates with serious mental illness subjected those inmates to a risk of serious harm and violated the Eighth Amendment of the U.S. Constitution and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-34. On February 13, 2014, the United States filed a Statement of Interest in *G.F. v Contra Costa County*, No. 3:13-cv-03667-MEJ (N.D. Cal.), arguing that a juvenile detention facility is obligated under the ADA, 42 U.S.C. § 12101, to provide reasonable programming modifications enabling youth with disabilities to avoid imposition of seclusion due to their disability-related behaviors and to receive education and related programming while in seclusion. On August 9, 2013, the United States filed a Statement of Interest in *Coleman v. Brown*, No. 2:90-cv-0520 (E.D. Cal.), reaffirming, in a case challenging California's use of prolonged isolation on prisoners with serious mental illness, the United States' broad interest in preventing the unlawful use of solitary confinement. *See* Special

showing of irreparable harm, likelihood of success on the merits, and balancing of harms, justifies a temporary restraining order.

B. The Temporary Restraining Order Satisfies the PLRA.

The Prison Litigation Reform Act ("PLRA") bears on the scope of the prospective relief this Court can order. It states:

> **Preliminary injunctive relief.** . . . *Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.* The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief.

18 U.S.C.A. § 3626(a)(2) (emphasis added).

As described in the Proposed Order, the United States seeks a temporary restraining order to enjoin the State from imposing excessive amounts of seclusion on boys with mental health disorders. This targeted relief complies with the PLRA requirements because:

- It extends no further than necessary to correct the harm because it allows the State to use seclusion in a controlled fashion where necessary while preserving boys' access to essential education, exercise, programming and mental health care;
- It is narrowly tailored because it encompasses only boys at the Facilities with mental health disorders, as they are the ones who suffer the most from excessive seclusion; and
- It is the least restrictive means necessary because it vests in the State discretion to decide when seclusion is unavoidable and what offenses will result in seclusion.

The United States' requested relief is an appropriate exercise of the Court's equitable powers, so the Court should issue a temporary restraining order and set an expedited hearing on issuance of a preliminary injunction, followed by expedited discovery and a hearing on the

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Litigation Section, Civil Rights Division, United States Department of Justice, cases and statements of interest, at http://www.justice.gov/crt/about/spl/findsettle.php.

United States' request for a permanent injunction.

CONCLUSION

The United States has established that the State is excessively secluding boys with mental health disorders, that boys are suffering irreparable harm, and that the State has not changed its practices. This Court should act now and grant an immediate temporary restraining order, a preliminary injunction hearing and, after expedited discovery and briefing, a hearing on the issuance of a permanent injunction to protect the constitutional and federal rights of these boys.

DATE: March 12, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this date, March 12, 2014, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will simultaneously serve notice of such filing to counsel of record and the Court Monitor to their registered electronic mail addresses.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF OHIO, *et al.*, Defendants.	)	CIVIL ACTION NO: 2:08-cv-475 JUDGE ALGENON L. MARBLEY

[PROPOSED] ORDER
GRANTING UNITED STATES' MOTION FOR TEMPORARY RESTRAINING ORDER, SETTING A PRELIMINARY INJUNCTION HEARING, AND GRANTING EXPEDITED DISCOVERY FOR A PERMANENT INJUNCTION HEARING

Upon consideration of the parties' submissions and the applicable law, the Court hereby grants the United States' Motion for a Temporary Restraining Order and sets a schedule for the United States' request for a Preliminary and Permanent Injunction as follows:

I. This Court, as an interim response to the State's infliction of unlawful and irreparable harm on boys through its seclusion and mental health practices, hereby issues a temporary restraining order that the State:

A. Stop secluding any boy with an identified mental health disorder for more than 24 hours without providing him, outside of his confinement area and during normal facility programming times, at least four hours of programming, exercise, education, or combinations thereof;

B. Stop imposing more than three consecutive days of seclusion in any form (e.g., prehearing seclusion and intervention seclusion) on any boy with an identified mental health disorder; and

C. Stop imposing more than three days of seclusion in any form within a 30-day period on any boy with an identified mental health disorder without first:

1. Conducting a comprehensive mental health treatment review of the boy that includes the treatment team meeting and reviewing the boy's mental health treatment plan to consider and address potential problems with the plan and its implementation;

2. Obtaining the prior written approval of the Deputy Director of DYS responsible for Facility programming; and

3. Providing written notice to the United States and monitor within 24 hours of a youth exceeding three days of seclusion within a single month, describing the amount of seclusion, reason for seclusion, treatment provided in response to seclusion, whether the youth's behavior intervention plan was modified or created, and alternatives to seclusion that were rejected.

D. Provide monthly to the monitor an AMS printout of monthly seclusion hours for boys at the Facilities; and

E. Refrain from substituting restraints for seclusion.

II. The Court will hold an expedited hearing to determine the United States' entitlement to a preliminary injunction.

III. The Court hereby sets an expedited schedule for discovery and further briefing in preparation for a hearing on a permanent injunction. At the permanent injunction hearing, the Court will determine the circumstances and limitations governing the use of seclusion (or restraints as a substitute for seclusion) on boys with mental health disorders at the Facilities, particularly given that the proposed temporary restraining order's terms do not extend far enough to address the extent of the State's violations.

The Court hereby adopts the following schedule for expedited discovery:

Hearing on TRO Motion	March 21, 2014
Hearing on Motion to Supplement	March 21, 2014
Parties Serve Requests for Production of Documents and Interrogatories	March 24, 2014
Parties Identify Experts	March 25, 2014
Parties File Briefs on Issuance of Preliminary Injunction	March 28, 2014
Hearing on Issuance of Preliminary Injunction	April 2, 2014
Responses to Requests for Production of Documents and Interrogatories	April 4, 2014
Plaintiff's Experts Tour Facilities	April 6-11, 2014
Monitor Team Reports Filed by Dedel and Glindmeyer	April 21, 2014
Plaintiff Deposes DYS Staff	April 28, 2014
Parties Serve Requests for Admission	April 28, 2014
Parties Respond to Requests for Admission	May 5, 2014
Parties' Serve Expert Reports	May 5, 2014

Depositions of Experts	May 12-16, 2014
Pre-Hearing Briefs for Permanent Injunction	May 27, 2014
Hearing to Determine Permanent Injunction	June 7, 2014

It is so ordered.

Signed this ____ day of _____, 2014

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HONORABLE ALGENON MARBLEY
UNITED STATES DISTRICT JUDGE