Nos. 13-1546, 13-1604, & 13-1610

United States Court of Appeals
For the First Circuit

JEFFREY M. HEALEY; **EDWARD GIVEN**
Plaintiffs - Appellees/Cross-Appellants

JOEL PENTLARGE
Plaintiff

v.

LUIS S. SPENCER, in his official capacity as Commissioner of Correction; **MASSACHUSETTS DEPARTMENT OF CORRECTION**; **MICHAEL CORSINI**, in his official capacity as the Superintendent of the Massachusetts Treatment Center,
Defendants - Appellants/Cross-Appellees

NATAYLIA PUSHKINA; DEBORAH O'DONNELL
Defendants

ON APPEAL FROM A JUDGMENT OF
THE DISTRICT COURT OF MASSACHUSETTS

BRIEF OF THE APPELLANTS/CROSS-APPELLEES

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Dated: August 5, 2013

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JURISDICTIONAL STATEMENT

The District Court has subject matter jurisdiction over claims arising under the United States Constitution. 28 U.S.C. § 1331; 42 U.S.C. § 1983. This Court has jurisdiction over this appeal from a final judgment of the District Court. 28 U.S.C. § 1291. Appellants (defendants below) appeal from the Final Judgment and Order of the District Court, issued on March 29, 2013. A. 163-164.[1] The notice of appeal was filed in the District Court on April 26, 2013. GV. 117-118.

ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred in ruling that an Amended Management Plan for the Massachusetts Treatment Center for Sexually Dangerous Persons (AMP or plan), submitted by the appellant Department of Correction as evidence in earlier consent decree litigation, is an enforceable court order, where it was never entered as such in the earlier case.

II. Whether the District Court erred in ordering injunctive relief aimed at enforcing the plan, in the absence of a federal constitutional violation.

III. Whether the District Court erred in ruling that the plan filed in previous litigation is a court order, when treating the plan as enforceable is unwarranted, unnecessary and unworkable.

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[1] Citation format is as follows: to the addendum: "A. __;" to the exhibit volumes: "E. __;" to the transcript volumes: "T. __;" to the Appendix General Volume: "GV. __."

STATEMENT OF THE CASE

These consolidated cases are not class actions. A. 49. Plaintiffs Jeffrey Healey and Edward Given are civilly committed as sexually dangerous persons (SDPs) to the Massachusetts Treatment Center (MTC). A. 48. Each plaintiff filed a lawsuit challenging various aspects of his MTC commitment. GV. 75-95, 96-114. Separate counsel represented each plaintiff on his individual claims. GV. 94-95, 114.

a. Healey's Claims

In 2001, Healey filed a *pro se* complaint, challenging the conditions of his confinement and the adequacy of sex offender treatment at the MTC. A. 50; GV. 6. The District Court soon appointed counsel who filed an amended complaint and eventually a second amended complaint. GV. 8, 10, 25. Healey sought only injunctive and declaratory relief, along with attorneys' fees, against the Commissioner of Correction and the MTC Superintendent. GV. 96-114.

b. Given's Claims

In 2005, Healey's suit was consolidated with a suit brought in 2004 by Joel Pentlarge, then committed as an SDP, who was challenging the conditions of his confinement and the adequacy of sex offender treatment at the MTC. See A. 50-51; GV. 14, 62, 71, 75-95. Pentlarge was adjudicated to be no longer an SDP and released from the MTC in 2006, rendering his claims for

injunctive relief moot. A. 51; GV. 15, 16. Pentlarge was allowed to join Given as a plaintiff. GV. 15, 16. Pentlarge and Given filed separate motions seeking class certification, both of which were denied. GV. 15-16. Shortly before the July 2011 trial, Pentlarge dismissed his remaining claims for money damages, ending his involvement in the case. A. 51. Just before trial, Pentlarge's attorneys entered their appearances for Given, who had been representing himself *pro se*. GV. 3. Given then dismissed his claims for money damages, leaving only his claims for injunctive relief and attorneys' fees against the Commissioner of Correction, the MTC Superintendent and the DOC. A. 51.

c. The Trials

The District Court conducted two trials. In July 2011, Judge Gertner presided over the first trial which lasted ten days and included a view of the MTC. A. 51. The parties entered mediation, which ultimately failed. A. 51. While mediation was ongoing, Judge Gertner – with the parties' agreement – retired without deciding the case. A. 51; T. 1492. The case was eventually reassigned to Chief Justice Saris who presided over a second trial, lasting six days and including a view of the MTC, in January 2012. A. 52.

d. The Decision and Order

After trial, the District Court issued the Memorandum and Order and Final Judgment and Order, both dated March 29, 2013. A. 48-164.[2] The District Court entered judgment for the defendants on all of Healey's claims except it ruled that the defendants had (1) violated the plan in two respects: (a): by failing to provide adequate pharmacological evaluation and treatment;[3] and (b) failing to provide a functioning Community Access Program (CAP) (which the Court's decision stated was also a violation of M.G.L. c. 123A);[4] and (2) violated Healey's substantive due process rights by failing to provide adequate pharmacological evaluation and treatment. A. 160-161, 163-164.

On Given's claims, the District Court ruled for the defendants on all claims except for ruling that the defendants had violated Given's substantive due process rights by failing

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[2] This appeal does not present any issue with respect to attorneys' fees because the District Court has deferred this issue until after appeal. See GV. 57.

[3] The District Court uses the terms "pharmacological" and "psychopharmacological" interchangeably to describe this treatment. See, e.g., A. 83, 161.

[4] The Commissioner of Correction must "maintain . . . a treatment program . . . at a correctional institution for the care, custody, treatment and rehabilitation" of SDPs. M.G.L. c. 123A, § 2. The Community Access Program is "a program established pursuant to section six A that provides for a person's reintegration into the community." M.G.L. c. 123A, § 1. *See* M.G.L. c. 123A, § 6A (CAP shall be administered pursuant to rules and regulations promulgated by DOC).

to provide adequate pharmacological evaluation and treatment. A. 160-161, 163-164.

The District Court ordered that the defendants must have each plaintiff evaluated for pharmacological treatment by a qualified psychiatrist and, if appropriate, provide each plaintiff with such treatment. A. 161, 164. The defendants do not appeal this constitutionally based aspect of the Court's order, but do appeal the Court's declaration that their not having previously had Healey evaluated for pharmacological treatment was a violation of the plan. A. 163.

With respect to the CAP, the District Court specifically declined to order relief for either plaintiff. A. 158. Because the plaintiffs failed to prove that the CAP is constitutionally required, the Court declined to order injunctive relief for Given, who had raised only a constitutional claim with respect to the CAP and the Community Transition House (CTH), a related program at the MTC.[5] A. 158. And, with respect to Healey, while the Court found a violation of the plan and state statute with respect to the CAP, the Court nevertheless ruled that Healey was not entitled to injunctive relief, because his ineligibility for

[5] The CTH is a house within the MTC's secure perimeter that serves as a lower security housing unit for SDPs who have progressed in their treatment. See A. 98; E. 19. Placement in the CTH is usually the first step to placement in the CAP. See A. 92.

the CTH and the CAP was due to his "persistent behavioral problems," rather than any violation of the plan. A. 158.

Despite finding that neither plaintiff was entitled to injunctive relief with respect to the CAP, the District Court ordered an injunction requiring the defendants to meet the requirements of the plan "in all material respects" (without specifying what those were) and imposed several specific requirements about the CTH and the CAP. A. 159. In apparent recognition of the plan's nature as a statement of aspirational goals, the Court's decision explained that the defendants' obligation to comply with the plan was "subject to the operational discretion to adjust to changing conditions and evolving standards of treatment and security," A. 159, but this language was somehow omitted from the final judgment. A.163-164.

The defendants appealed and each plaintiff cross appealed. GV. 57-58. This Court consolidated all appeals.

STATEMENT OF THE FACTS

Each plaintiff is a multiply convicted pedophile who repeatedly and violently sexually abused children in the community. A. 172-174; E. 1846-1849, 1924-1935. Each has been adjudicated as an SDP. A. 172-174. Each has been found to remain sexually dangerous on numerous occasions. A. 173-175. Each has completed serving his criminal sentence. A. 173-174. Neither has any period of community supervision such as probation or parole

remaining to be served if he were to be released from his SDP commitment. E. 3380-3433; T. 1883.

SUMMARY OF THE ARGUMENT

I. The District Court erred by relying on dicta in the opinion terminating earlier consent decree litigation to conclude that the Amended Management Plan filed during that earlier litigation is enforceable as a court order, because the plan was submitted as evidence and the prior judge did not identify the plan as a court order, amend the existing consent decrees to incorporate the plan's terms, retain jurisdiction over the matter, sign the plan as a court order, or enter the plan on the docket. (pp. 10-20).

II. Even if the plan were a court order – which it is not – the District Court erred by interpreting the plan to require the defendants to meet a standard higher than that imposed by the Federal Constitution, where there is no evidence that the plan is a consent decree (which, in the absence of any applicable federal statute, would be the only proper basis for holding the defendants to standards higher than the Constitution). The District Court also erred by imposing injunctive relief to correct a purported violation of the plan, despite specifically finding that the alleged lack of compliance violated no federal constitutional right. (pp. 20-22)

III. The District Court's treatment of the plan as a consent decree or court order is unwarranted on the record here, unnecessary to protect SDPs' federal constitutional rights, and unworkable given the plan's express provision that the MTC's operation would continue to evolve to meet changing conditions. (pp. 22-24). If allowed to stand, the District Court's grant of injunctive relief – untethered to either one of the plaintiffs and untethered to any constitutional violation - confers representational standing to an SDP to seek enforcement of the plan even though his individual rights have not been violated. The District Court's grant of injunctive relief violates settled principles of federalism and impermissibly intrudes into a state facility's operation. (pp. 24-27)

IV. The District Court's ruling that the plan requires pharmacological evaluation and treatment must be vacated because the plan does not even mention such treatment, despite that its use was known and discontinued during the consent decree litigation. The ruling is unnecessary, as an SDP may always challenge the constitutional adequacy of the treatment provided to him by means of an action pursuant to 42 U.S.C. § 1983. The District Court's findings that such treatment may increase participation in the CAP and provide a mechanism for supervision in the community are clearly erroneous and misapprehend state law governing release of SDPs from commitment. (pp. 27-32).

ARGUMENT

I. STANDARD OF REVIEW

To succeed on a request for a permanent injunction, the District Court must find that: 1) the plaintiffs prevail on the merits; 2) the plaintiffs would suffer an immediate and irreparable harm without injunctive relief; 3) the harm to plaintiffs would outweigh the harm the defendants would suffer from the imposition of the injunction; and 4) the public interest would not be adversely affected by the injunction. *See Asociacion de Educacion Privada de Puerto Rico, Inc. v. Garcia-Padilla*, 490 F.3d 1, 8 (1st Cir. 2007).

A court may only grant a permanent injunction when the plaintiff has met certain preconditions. The plaintiff must establish standing, *i.e.*, that he "`has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Lopez v. Garriga*, 917 F.2d 63, 67 (1st Cir. 1990), *quoting City of Los Angeles v. Lyons*, 461 U.S. 95, 1010-102 (1983). A plaintiff "must show his own rights are in jeopardy in order to secure injunctive relief." *Lopez,* 917 F.2d at 68 n. 5, *citing Warth v. Seldin*, 422 U.S. 490, 499 (1975) (generally, party "must assert his own legal rights and

interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

This Court reviews a grant of permanent injunctive relief for abuse of discretion. *Asociacion de Educacion Privada,* 490 F.3d at 8. Questions of law are reviewed *de novo,* while findings of fact are reviewed for clear error. *Id*.

II. THE AMP IS NOT AN ENFORCEABLE COURT ORDER.

The AMP is not a court order. The District Court erred first by calling it one and then by ordering relief under the AMP that exceeds federal constitutional requirements and is untethered to either of the individual plaintiffs. A brief review of the consent decree litigation – to which this Court is no stranger[6] - makes this indisputable point.

The Treatment Center was the subject of several lawsuits brought by SDPs beginning in 1972 and continuing for twenty-seven years. *See, e.g., King v. Greenblatt,* 53 F.Supp.2d 117 (D. Mass. 1999) (*"King IV"*). The District Court entered certain consent decrees that remained in effect until June 1999, at which time the District Court (Mazzone, J.) terminated them. *Id.*

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[6] *See, e.g., King v. Greenblatt* ("*King I*"), 52 F.3d 1 (1st Cir.), *cert. denied*, 516 U.S. 863 (1995); *King v. Greenblatt ("King II"),* 127 F.3d 190 (1st Cir. 1997); *King v. Greenblatt*, 149 F.3d 9 (1st Cir. 1998) *("King III*"); *In re Pearson*, 990 F.2d 653 (1st Cir. 1993); *Pearson v. Fair*, 935 F.2d 401 (1st Cir. 1991); *Langton v. Johnston*, 928 F.2d 1206 (1st Cir. 1991); *Williams v. Lesiak*, 822 F.2d 1223 (1st Cir. 1987); *Pearson v. Fair*, 808 F.2d 163 (1st Cir. 1986).

at 139. At the time the consent decrees were entered, M.G.L. c. 123A required that the Department of Mental Health (DMH) have responsibility for patient care while DOC would provide custodial personnel. *King I,* 52 F.3d at 2 n. 1, 5.

In 1993, the Massachusetts legislature amended M.G.L. c. 123A to vest sole control of the MTC in DOC. *See, e.g., King IV*, 53 F.Supp.2d at 121. This legislative provision conflicted with the consent decrees. *King I,* 52 F.3d at 3. In due course, the Commonwealth[7] sought to modify the consent decrees to effectuate the new statutory structure. *Id.* Judge Mazzone reopened the *Williams* case and consolidated it with the *King* case. *King IV,* 53 F.Supp.2d at 121. He also "invited DOC to provide specific details in the form of a plan of how it proposed to operate the facility." *Id.* at 121-122. The original management plan was filed in 1994 (1994 Plan). *Id*. at 122. Eventually, Judge Mazzone directed DOC to file an amended management plan, which DOC did in November 1996. *Id*.

Conceptually, the AMP was a blueprint setting out DOC's "goals" for its operation of the MTC under then-existing circumstances. E. 7. *See King IV,* 53 F.Supp.2d at 121-122. The AMP - by its text and context - contemplated that DOC would continue to change the MTC's operation: the "field of sex

[7] The District Court sometimes referred to the various defendants in the consent decree litigation collectively as the Commonwealth. *See, e.g., King IV*, 53 F.Supp.2d at 119, 139.

offender treatment in the Commonwealth is not static"; "a pragmatic and flexible philosophy is the key to managing" the MTC in "a changing environment" so that SDPs and inmates may "receive meaningful treatment in a safe and secure setting"; and "by assessing and refining the elements" of the AMP, "the policies and practices that emerge will be better still." E. 51. See, e.g., E. 6 (indicating that the AMP sets out DOC's "ongoing plans" for the Treatment Center's administration); E. 8 (identifying the clinical treatment program, educational and vocational treatment that are "currently provided").

SDPs thus could not reasonably expect that the MTC's operation and the programs available there would remain forever fixed. The MTC administrators must be able to amend the facility's operation from time to time to deal with changing conditions and evolving standards of practice in both treatment and security. Judge Mazzone and DOC recognized this fundamental principle.

In fact, Judge Mazzone was aware that the MTC's operations were evolving even after the AMP was filed. For example, Judge Mazzone noted that DOC had recently instituted a new work assignment policy, which required SDPs to participate in therapy in order to hold institutional jobs. *King IV*, 53 F.Supp.2d at 130-131. The idea of tying jobs to treatment compliance had been contemplated in the AMP, but there is no indication that DOC

sought Judge Mazzone's approval before implementing the new policy, even though the consent decree litigation was then ongoing. *Id*. at 131.

The Commonwealth moved to vacate or terminate the consent decrees. Judge Mazzone denied this motion without prejudice to renew in one year, during which time he oversaw DOC's operation of the MTC. *King IV*, 53 F.Supp.2d at 122-123. After an evidentiary hearing in March 1999, Judge Mazzone terminated the consent decrees and ordered the *King* and *Williams* cases to be closed in June 1999. *Id.* at 139.

In so doing, Judge Mazzone recognized that the proper inquiry – indeed, the only inquiry - is whether the underlying *constitutional* violations had been remedied, and that "there is little or no likelihood that the original *constitutional* violation will return when the decree is lifted." *King IV*, 53 F.Supp.2d at 125 (emphasis added) (citations omitted). He also recognized the fundamental principle that "[i]n institutional reform litigation, injunctions should not operate inviolate in perpetuity." *King IV*, 53 F.Supp.2d at 136, *citing, e.g., Rufo v. Inmates of the Suffolk Cty. Jail*, 502 U.S. 367, 387-393 (1992); *Pearson*, 990 F.2d at 658.

Judge Mazzone terminated the consent decrees; he did not enter the AMP as a court order. *King IV*, 53 F.Supp.2d at 139. He merely stated that: "I believe the [AMP] is an *enforceable*

operating document that recognizes the improvements made as a result of the consent decrees over the years and acknowledges DOC's responsibilities to manage the [MTC] accordingly." *King IV*, 53 F.Supp.2d at 137 (emphasis added); *see id.* at 122 (referring to the AMP as the "governing document" for the MTC), *id.* at 135 (same). As experience had undoubtedly taught, Judge Mazzone recognized that SDPs would continue to complain about the "circumstances of their existence" at the MTC. *Id.*

Judge Mazzone said that his decision in *King IV* "does not preclude them from challenging events on the basis of *constitutional or other protected rights.*" *Id.* (emphasis added). While noting that SDPs "may bring an action to enforce the terms of the existing [AMP]," he was merely acknowledging that SDPs could initiate new litigation to "show that post-termination conditions actually do violate their *federally protected rights*" and that "any new allegations of *unconstitutional* conditions or treatment will be addressed in separate proceedings." *Id*. (emphasis added; internal quotations and citation omitted). In dicta, Judge Mazzone also acknowledged that there might be issues arising out of the administration of the AMP in the future if DOC becomes "indifferent to its responsibilities" under M.G.L. c. 123A and the AMP to keep SDPs separate and apart from inmates. "If ignored, the [AMP] will simply replace the consent decrees as the basis of future

complaints and the parties will be destined for a future generation of litigation." *Id*. at 136.

Judge Mazzone's dicta did not make the AMP a court order then, and cannot serve as the basis for converting the AMP into a court order now. Judge Mazzone simply reminded DOC to be mindful of the legal parameters for managing SDPs within a secure setting that also houses inmates under sentence; he did not create new rights or causes of action. As important as what Judge Mazzone said is what Judge Mazzone did not say and did not do, namely:

(1) identify the AMP as a court order; instead, referring to the AMP simply as an "enforceable operating document" – which begs the question – enforceable as what?;[8]

(2) amend the consent decrees to incorporate any specific provision of the AMP;

(3) retain jurisdiction over any issues arising out of the MTC's operation or implementation of the AMP;

(4) sign the AMP as a court order; or

(5) enter the AMP as a court order on the *King* docket.

See King IV, 53 F.Supp.2d at 139; see T. 2595-2597. *Contrast Ricci v. Okin*, 823 F.Supp. 984 (D. Mass. 1993) (district court

[8] The District Court granted the defendants' motion for summary judgment on Healey's claim that the AMP is enforceable as a "quasi-settlement agreement." GV. 43 (# 346).

retained jurisdiction over case if conditions specified in disengagement order were met). And, of course, the Commonwealth had no way to appeal the dicta about the AMP's enforceability, since the Commonwealth had prevailed in getting the consent decrees completely terminated without any AMP-enforceability order taking their place.

All of this demonstrates that the AMP – like its predecessor (the 1994 Plan) - was only evidence in the consent decree litigation and never an order. *See King III*, 149 F.3d at 15 (stating that as Judge Mazzone "realized, the 'proposed modifications' are not the host of provisions in the 138-page [1994] Plan, which simply sets forth ways in which DOC aspires to fulfill the requirements of the Original Decree."). Nothing makes this point so clearly as the words of the District Court during the closing arguments at trial in these consolidated cases:

> I know that Judge Dein and Judge Gertner adopted it [the AMP], found that. It's very unusual. It's not an order. It's not a consent decree. It's not a contract. It's just a unique beast. And so I'm not sure, for example, that it carries contempt. . . .[W]hy didn't he [Judge Mazzone] put it in an order. . . . He knows how to put it in an order. I'm just saying I don't know what it is.

T. 2595-2596. See also T. 2546, 2587, 2597 ("I'm just not sure it was a court order.").

In Healey's case, however, the District Court has retrospectively converted Judge Mazzone's dicta about the AMP into a court order. Magistrate Judge Dein stated that "the District Court effectively incorporated the [AMP] into its order allowing the termination of the consent decrees." A. 43. Since neither Judge Gertner nor Chief Judge Saris wrote separately on this point, Magistrate Judge Dein's analysis is at issue. A. 5 (Gertner, J. adopting report and recommendation by electronic order); A. 80-81 (Chief Judge Saris stating that the earlier interlocutory ruling is the "law of the case.").[9]

Magistrate Judge Dein stated that"[b]ecause the District Court incorporated the Plan into its ruling on the motion to terminate the consent decrees, the [AMP] remains enforceable." See A. 43, 80. Magistrate Judge Dein relied on the doctrine of ancillary jurisdiction discussed in *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994). See A. 43. *Kokkonen,* however, does not support this outcome; *Kokkonen* supports the defendants' position that the AMP is not enforceable as a court order.

In *Kokkonen*, the Supreme Court once again reminded federal courts of the circumscribed parameters of their authority: "Federal courts are courts of limited jurisdiction. They possess

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[9] The defendants pressed their objection to this interlocutory ruling. A. 81.

only that power authorized by Constitution and statute, . . . which is not to be expanded by judicial decree. . . .” *Kokkonen,* 511 U.S. at 377 (citations omitted). The District Court in *Kokkonen*, despite its awareness and approval of settlement terms, was held to lack jurisdiction over an action to enforce a settlement agreement which had not been made a part of the dismissal order whether by retention of jurisdiction to enforce the agreement or by incorporating the terms of the settlement agreement in the dismissal order. *Id.* at 380-381. Judge Mazzone did neither here.

Judge Mazzone’s ambiguous dicta about the AMP as an “enforceable operating document” stands in sharp contrast to instances where a district court has retained jurisdiction and incorporated specific terms in an order. For example, in *Ricci v. Okin*, the district judge - with the parties’ agreement - vacated and dissolved certain consent decrees and entered a final order (called the “disengagement order”) which replaced all prior consent decrees and court orders. 823 F.Supp. 984 (D. Mass. 1993). The disengagement order (1) set forth the parties’ obligations and the prerequisites to enforce the disengagement order in federal court; and (2) terminated the federal court’s jurisdiction over the cases. *Ricci v. Patrick*, 544 F.3d 8, 13-14 (1st Cir. 2008). When the District Court reopened the cases and issued injunctive relief against the Commonwealth defendants,

this Court reversed, finding that none of the prerequisites set forth in the disengagement order for reopening the case had been met. *Id*. at 20.

This Court also rejected claims that the District Court could reopen the cases on the grounds of "ancillary jurisdiction" or the court's "inherent authority" to enforce its own orders. *Ricci*, 544 F.3d at 21. Relying on *Kokkonen*, this Court stated that ancillary jurisdiction can be used for "two limited purposes": (1) permitting a single court to dispose of claims that are in "varying respects and degrees" factually interdependent, and (2) enabling a court to function successfully by managing its proceedings, vindicating its authority and effectuating its decrees. *Ricci, 544* F.3d at 22, *citing Kokkonen*, 511 U.S. at 379-80. Neither ancillary jurisdiction nor the court's inherent authority sustained federal jurisdiction in *Kokkonen* or *Ricci. Id*. "*Kokkonen* thus stands for the proposition "`that district courts enjoy no free-ranging "ancillary jurisdiction" to enforce consent decrees, but are instead constrained by the terms of the decree and related order.'" *Ricci*, 544 F.3d at 22 (citation omitted).

Because Judge Mazzone neither retained jurisdiction to enforce the AMP nor incorporated the AMP's terms in his order unconditionally terminating the consent decrees and closing the

litigation, 53 F.Supp.2d at 139, the District Court's ruling that the AMP is a court order must be reversed.

III. THE DISTRICT COURT LACKS AUTHORITY TO ORDER INJUNCTIVE RELIEF IN THE ABSENCE OF A FEDERAL CONSTITUTIONAL VIOLATION.

Even if the AMP were a court order – which it is not – the District Court's ruling still violates settled principles of federalism because, as the Court itself recognized, the AMP "imposes higher standards than required by the Constitution." A. 80. In essence, the District Court is treating the AMP as a consent decree – a treatment which finds no support in *King IV* or any other source.

A federal court lacks the authority to impose a standard higher than the Constitution on a state agency in the absence of the state's consent. *See Rufo,* 502 U.S. at 389 (federal courts "may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated"); *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985) (district judge may consider state standards but may require only those changes to bring conditions above federal constitutional minima).

Neither the consent decree plaintiffs nor the defendants consented to entry of the AMP as a court order. Indeed, as the *King* decisions make clear, the consent decree plaintiffs – of

which Healey was one[10] - vigorously opposed the modification and later termination of the consent decrees and objected to many components of the AMP. *See, e.g., King II*, 127 F.3d at 193-194; *King IV*, 53 F.Supp.2d at 124. Likewise, the *King* decisions provide no evidence that DOC agreed to the entry of the AMP as a court order. DOC, rather, submitted the 1994 Plan and then the AMP to show how it would meet the requirements of the then-ongoing consent decrees and to show that the decrees should be vacated or terminated. *See King III*, 149 F.3d at 15 (noting that Judge Mazzone realized that 1994 Plan's provisions were not themselves modifications to the consent decrees but were ways in which DOC "aspires" to meet requirements of consent decree).

If the AMP is a court order, then it may only be construed as requiring the defendants to meet federal constitutional requirements. This means that the injunctive relief with respect to the CTH and the CAP cannot stand. The District Court correctly found that the plaintiffs failed to prove that the CAP violated their substantive due process rights under the Fourteenth Amendment. A. 113-114, 158.

While the District Court noted that the CAP is required by state statute, a federal court cannot order injunctive relief against a state agency for a violation of state law. *See*

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[10] Healey was a member of the "Class of 48+1", A. 57, for whom Judge Mazzone appointed counsel. *King IV,* 53 F.Supp.2d at 121.

Quintero de Quintero v. Aponte-Rogue, 974 F.2d 226, 230 (1st Cir. 1992), *citing Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."); *Guillemard-Ginorio v. Contreras-Gomez,* 585 F.3d 508, 529-530 (1st Cir. 2009).[11]

IV. TREATING THE AMP AS ANY KIND OF ORDER IS UNWARRANTED, UNNECESSARY AND UNWORKABLE.

The District Court's treatment of the AMP as an ersatz consent decree or a court order creates more problems than it solves. The termination of the consent decrees and closing of the *King* and *Williams* cases ended the federal courts' nearly three-decade-long entrenchment in the MTC's daily operation. The present ruling threatens once again to entangle the federal courts in the minutiae of the MTC's operation.

As Healey's case shows, treatment of the AMP as a "court order" also unnecessarily mires the federal courts in a pitched

[11] In its memorandum, the District Court ordered that declaratory judgment be entered that the defendants had violated state statute with respect to the CAP, see A. 161, but this language is not included in the final judgment and order. A. 163-164.

battle about the past, rather than evaluating the present treatment program in light of current federal constitutional standards. A court order is not susceptible to change by the parties who are subject to the order. As both Judge Mazzone and Chief Judge Saris recognized, however, the AMP expressly provided that the MTC's operation would continue to evolve. *See King IV*, 53 F.Supp.2d at 130-131; A. 59. Indeed, over the seventeen years since the AMP was written, various of its specific provisions have become outdated.

For example, developments in research and accepted practices for treating sex offenders led to amendment of various aspects of the sex offender treatment program. See A. 72, 73-74; T. 1005, 1205-1207. As a result, certain classes and programs, such as drama therapy - offered when the AMP was written seventeen years ago - are no longer considered effective in reducing sex offense recidivism and thus are no longer offered. A. 72. Course offerings today reflect current research and accepted practices designed to reduce sex offender recidivism. T. 1213-1214. The District Court found that "the current sex offender treatment is in accordance with best professional judgment and does not violate the [AMP] or the Constitution." A. 118. Healey, however, laments the termination of certain programs – even though he offered no evidence to show that such programs remain appropriate today.

Worse yet, under Healey's view, the AMP must remain frozen in time as to those components he favors, while remaining open to challenge as to those components he does not like and which were already decided in *King* (*e.g.*, application of security regulations, discipline, property restrictions, etc.). A case in point is Healey's claim that the defendants have violated the AMP by not providing pharmacological treatment, a form of treatment that had been discontinued while the consent decree litigation was in full bloom and was not even mentioned in the AMP submitted in support of DOC's efforts to vacate or terminate the consent decrees. A. 70-71; E. 1-340. Healey's convoluted and contradictory approach – the classic "have his cake and eat it too" philosophy – cannot prevail.

The ruling is also unnecessary because an SDP may, wholly apart from the AMP, challenge the circumstances of his commitment to the MTC. Such challenges – if brought in federal court under 42 U.S.C. § 1983 – must be evaluated in light of federal constitutional requirements, taking into account states' wide latitude in developing treatment regimens. *See Kansas v. Hendricks,* 521 U.S. 346, 368 n. 4 (1997).

Treatment of the AMP as a court order is also unworkable. If the District Court's decision stands, it apparently construes the AMP as conferring representational standing on an SDP - like Healey here - to seek enforcement of the AMP even when his own

individual rights are not being violated by the defendants' alleged lack of compliance with the AMP. The District Court allowed Healey to obtain a generalized AMP enforcement order despite its specific and correct finding that Healey's failure to be placed in the CTH and the CAP was due to his own bad behavior: "Although the DOC may have contributed to Healey's injury by not providing him pharmacological treatment, his ineligibility for the CTH and community access program is due to his persistent behavioral problems, not due to the Treatment Center's failure to provide clear benchmarks and prerequisites." A. 158. The Court further ruled that neither Healey nor Given (who only made a constitutional claim about the CAP) was entitled to injunctive relief with respect to the CAP. A. 158. These findings should have ended the case with respect to the CTH and the CAP.

Inexplicably, however, the District Court then ordered the defendants to take certain actions, on the ground that "the failure to provide a functioning [CAP] violates the [AMP] and the statute." A. 159;[12] see A. 161. Tethered to neither of the plaintiffs nor the Federal Constitution, this injunctive relief

[12] While the District Court stated that the "lack of clear benchmarks and high barriers to entry have unreasonably hindered residents' access to the CTH and the [CAP]," A. 159, there was no basis for this finding. There was no evidence that any person suitable for the CTH or the CAP had ever been rejected. This Court has already upheld the CAP policy appended to the AMP. *See King III,* 149 F.3d at 16; *King IV*, 53 F.Supp.2d at 135-136.

constitutes an abuse of discretion and cannot stand. To the extent that this free-floating relief represents the District Court's views as to how to improve the CAP and the CTH, mere disagreement with the manner in which the MTC is operated does not permit a federal court to substitute its views for those of the state officials responsible for the facility's operation. *Bell v. Wolfish*, 441 U.S. 520, 554 (1979). The Supreme Court has recognized that judges are "human" and have a "natural tendency to believe that their individual solutions" are "better and more workable" than those of the officials with the actual authority to run the facility. *Bell*, 441 U.S. at 562. At the same time, the Supreme Court has cautioned that "the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of 'judgment calls' that meet constitutional and statutory standards are confided to officials outside of the Judicial Branch of Government." *Bell*, 441 U.S. at 562.

These principles apply with even greater force when a federal court is asked to insert itself into the operation of a state facility. *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (federal courts "must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'")

(citation omitted); *see O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) ("proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers"). The relief ordered as to the CTH and the CAP violates these settled principles of federal law. The injunctive relief as to the CAP and CTH must be vacated.

V. THE AMP DOES NOT REQUIRE PROVISION OF PHARMACOLOGICAL EVALUATION AND TREATMENT, WHICH WAS KNOWN AND DISCONTINUED DURING THE CONSENT DECREE LITIGATION.

The District Court erred in ruling that the defendants violated the AMP by failing to provide adequate pharmacological evaluation and treatment to Healey. It is undisputed that the AMP does not even mention pharmacological evaluation and treatment. E. 1-340. The AMP, under the heading of "Program Goals and Summary," states that the "**goals** of the [DOC] in formulating this document are the following: 1. Protection of the public safety by offering sex offenders at the Treatment Center and in the prisons the best current treatment methodology . . . ." E. 7 (emphasis added). Seizing upon this aspirational language, the District Court "conclude[d] that defendants' failure to evaluate Healey and Given for pharmacological treatment using professionally acceptable standards violates the

[AMP] because plaintiffs are not being provided 'the best current treatment methodology.'" A. 91-92.[13]

This ruling is wrong for two reasons.

First, pharmacological treatment, as the District Court itself noted, was offered while the MTC remained under DMH's control between 1992 and 1995 during the consent decree litigation. See A. 70-71. This form of treatment was discontinued during the consent decree litigation. Healey himself claimed that he sought such treatment in the mid-1990s - during the course of the consent decree litigation to which Healey was a party - and was informed that such treatment was not available. A. 88; T. 1712-1714. The AMP set forth in precise detail the forms of sex offender treatment that were available to SDPs, yet nowhere mentioned this known and previously available form of treatment. E. 1-340. See E. 3358-3363.

Even if the AMP is a court order, the ruling that the AMP *sub silentio* requires provision of this treatment is wrong and unfair to all concerned. If pharmacological evaluation and treatment drift unseen in the AMP, what other unstated obligations lurk there? What, then, does the requirement that the defendants must comply with the AMP "in all material respects" mean? See A. 161. This ruling violates bedrock

[13] Given made no claim of a violation of the AMP, and the Order only finds a constitutional violation as to Given on the issue of pharmacological treatment. See A. 164.

principles governing construction of consent decrees and orders. *See United States v. Armour*, 402 U.S. 673, 682 (1971) ("the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purpose of one of the parties to it."); *Hawkins v. Department of Health and Human Servs.,* 665 F.3d 25, 31 (1st Cir. 2012) (to prove civil contempt for violation of court order, the moving party must prove, among other things, that "'the order was clear and unambiguous,'") (citation omitted); *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991) ("any ambiguities or uncertainties in such a court order must be read in a light favorable to the person charged with contempt"). Upholding the importation of terms will result in litigation about the AMP's meaning, unnecessarily burdening the court and the parties while delaying resolution of the question of whether a particular plaintiff has proven a violation of his own federally protected rights.

Second, even under the consent decrees, which imposed a higher standard than the Constitution, this Court held that the "the defendants were not obligated to provide every conceivable kind of treatment that might have a beneficial effect." *Langton*, 928 F.2d at 1216. This analysis applies with greater force to the AMP, which is not a consent decree or a court order

and which identified the provision of treatment representing "the best current treatment methodology" as a *goal*.

In addition to being wrong, the ruling that the AMP requires such treatment is unnecessary to protect the individual plaintiffs' rights. Each plaintiff brought a § 1983 claim challenging the adequacy of the treatment available to him. Section 1983 provides an adequate and proper vehicle for such claims. It is therefore unnecessary to import phantom provisions into the AMP.

This is especially so where, as here, it is clear that the District Court has not confined itself to the individual plaintiffs before it and has instead imposed its views as to how the MTC's operation might be improved. The District Court believed that the "provision of adequate psychopharmacological treatment may well result in more residents being eligible for acceptance into the [CTH] and [CAP], as required by the [AMP] and state statute. . . . If so, residents may be monitored when released during the [CAP] to ensure they continue to take the drugs." A. 91. Such speculation – however well-intended - is unsupported by the evidence, misapprehends state law, and thus cannot stand.

First, there was no evidence (1) as to how many other SDPs may even be suitable for or desirous of taking such drugs;[14] or (2) that such treatment will improve any SDP's – including Healey's and Given's - chances at being accepted into either the CTH or the CAP.[15] These findings constitute clear error.

Second, this analysis misapprehends state law. SDPs simply are not "released during the [CAP]," and *a fortiori* the CAP is not a means to monitor whether SDPs might continue to take medications when "released in the community." Barring a court reversing or vacating the original commitment order, the only way to secure release from an SDP commitment is via the M.G.L. c. 123A, § 9 discharge process. *See, e.g.,* M.G.L. c. 123A, § 14(d) (if adjudicated to be an SDP, person "shall be committed to the treatment center. . . for an indeterminate period of a minimum of one day and a maximum of such person's natural life

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[14] These drugs are used for the treatment of deviant urges and cravings associated with paraphilias. A. 85. There was no evidence that all SDPs suffer from paraphilias. See A. 85. The SDP statute does not require proof of a paraphilia as a prerequisite to commitment. *See, e.g.,* M.G.L. c. 123A, § 1 (defining SDP). Such treatment is not appropriate for all sexual abusers. E. 3358; T. 827. Indeed, as the plaintiffs' own expert testified, not all sex offenders with paraphilic disorders such treatment. T. 790.

[15] For example, there was no evidence that such treatment is intended to or would address Healey's general impulsivity or sexual acting out inside the MTC. According to the plaintiffs' own expert, the purpose of this treatment is to suppress the deviant sexual arousal but to maintain some sexual arousal and drive if the patient is clinically appropriate. T. 775-776. Pharmacological treatment, then, is not a panacea.

until discharged pursuant to the provisions of section 9"). An SDP cannot be released from his civil commitment through the CAP. An SDP participating in the CAP cannot even live in the community while retaining the SDP label, but instead "shall continue to reside within the secure confines of MCI-Bridgewater and be under daily evaluation by treatment center personnel to determine if he presents a danger to the community." M.G.L. c. 123A, § 6A. Persons who have been released from their SDP commitments will not be on the CAP and will not be supervised by MTC personnel. *See* M.G.L. c. 123A, §§ 6A, 9. See A. 90-91 (Chief Judge Saris acknowledging that the release process in the Massachusetts SDP statute "does not provide for any supervised release where probation or parole officers can monitor pharmacological treatment after a resident is released from custody.").

The District Court's ruminations about such treatment demonstrate the perils of judicial intrusion into the details of the MTC's operation, contrary to the Supreme Court's teaching in *Bell*. The ruling that the defendants have violated the AMP by failing to provide adequate pharmacological evaluation and treatment was erroneous and must be vacated.

CONCLUSION

For these reasons, this Court should reverse the Order that the AMP is an enforceable order and vacate all declaratory and injunctive relief based on purported violations of the AMP.

RESPECTFULLY SUBMITTED,

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I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

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Dated: August 5, 2013

ADDENDUM

APPEAL,LEAD

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:01−cv−11099−PBS

Jeffrey Healey, Edward Given v. Dept of Corrections
Assigned to: Chief Judge Patti B. Saris
Demand: $0
Case in other court: USCA, 13−01546
USCA, 13−01604
USCA, 13−01610
Cause: 28:1983 Civil Rights

Date Filed: 06/15/2001
Date Terminated: 03/29/2013
Jury Demand: Both
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

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ADR Panel member
TERMINATED: 10/18/2011

Mediator

Judith G. Dein
TERMINATED: 10/18/2011

Date Filed	#	Page	Docket Text
10/28/2009	275	7	Ch. Magistrate Judge Judith G. Dein: ORDER entered. REPORT AND RECOMMENDATIONS re 217 Plaintiff Jeffrey Healey's Renewed Motion For Partial Summary Judgment. Recommendation: that the Motion be denied. Objections to RRdue by 11/12/2009. (Dambrosio, Jolyne) (Entered: 10/28/2009)
11/24/2009		46	

			Judge Nancy Gertner: Electronic ORDER entered adopting Report and Recommendations re 275 Report and Recommendations denying defendants motion for partial summary judgment (#217). (Gertner, Nancy) (Entered: 11/24/2009)
11/24/2009		47	Judge Nancy Gertner: Electronic ORDER entered denying 217 Motion for Partial Summary Judgment as per Magistrate Dein's Report and Recommendation. (Gertner, Nancy) (Entered: 11/24/2009)
12/15/2011	382	165	PRETRIAL MEMORANDUM by Edward Given, Jeffrey M. Healey. (Gardner, Joshua) (Entered: 12/15/2011)
03/29/2013	438	48	Chief Judge Patti B. Saris: MEMORANDUM AND ORDER entered. (Anderson, Jennifer) (Entered: 04/01/2013)
03/29/2013	439	163	Chief Judge Patti B. Saris: FINAL JUDGMENT AND ORDER ENTERED. (Anderson, Jennifer) (Entered: 04/01/2013)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JEFFREY M. HEALEY, Plaintiff, v. ROBERT MURPHY, et al., Defendants.	)	CIVIL ACTION NO. 01-11099-NG
and JOEL PENTLARGE and EDWARD GIVEN, Plaintiffs, v. ROBERT MURPHY, et al., Defendants.	)	CIVIL ACTION NO. 04-30177-NG

REPORT AND RECOMMENDATION ON PLAINTIFF JEFFREY HEALEY'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

October 28, 2009

DEIN, U.S.M.J.

I. INTRODUCTION

The plaintiffs in this consolidated action, Jeffrey M. Healey ("Healey"), Joel Pentlarge ("Pentlarge") and Edward Given ("Given"), were civilly committed to the Nemansket Correctional Center in Bridgewater, Massachusetts (the "Treatment Center") as sexually dangerous persons pursuant to Mass. Gen. Laws ch. 123A ("Chapter 123A").

Pentlarge was released from the Treatment Center in January 2006, but Healey and Given continue to be detained there. The plaintiffs have brought civil rights claims, pursuant to 42 U.S.C. § 1983, against the Massachusetts Department of Correction ("DOC"), its Commissioner, and the Superintendent of the Treatment Center, challenging the conditions of confinement and the adequacy of the sex offender treatment program provided at the Treatment Center. In addition, Healey has asserted claims against the defendants for failure to comply with the provisions of the Massachusetts Treatment Center Amended Management Plan ("Plan") governing operation of the Treatment Center. Each of the plaintiffs claims, in essence, that his rights have been violated because the conditions of confinement and treatment for persons who have been civilly committed to the Treatment Center under Chapter 123A are punitive and characteristic of a correctional facility rather than a treatment center for the rehabilitation of civilly committed sex offenders.

On September 17, 2007, Healey filed a motion for summary judgment by which he was seeking summary judgment on his claims that the defendants have failed to comply with their obligations under the Plan. On October 17, 2007, this court allowed the defendants' motion to strike Healey's summary judgment motion without prejudice to renewal following the resolution of a motion to dismiss the claims asserted by Pentlarge and Given. The motion to dismiss was finally resolved in March 2008.

Presently before the court is the "Plaintiff Jeffrey Healey's Renewed Motion for Partial Summary Judgment" (Docket No. 217), by which Healey has renewed his request

for summary judgment on this claims that the defendants have failed to comply with the requirements of the Plan. Specifically, Healey is seeking a ruling in his favor on Counts I and II of his Second Amended Complaint (Docket No. 191). In Count I, Healey claims that the Plan is a binding and enforceable court order, and that the DOC has violated that order by materially deviating from the terms of the Plan. In Count II, Healey claims that the Plan is an enforceable agreement, and that the DOC's failure to abide by the terms of the Plan constitutes a breach of that agreement. Thus, by his motion, Healey is seeking a ruling that the DOC's Plan is binding and enforceable, and that the defendants are in violation of its terms. In addition, Healey requests relief in the form of "an order providing for oversight of the DOC's compliance with the Plan, by, for example, appointing a special master and requiring monthly reports[.]"

As detailed below, this court finds, based on the decision of the District Court in the case of King v. Greenblatt, 53 F. Supp. 2d 117 (D. Mass. 1999) ("King IV"), that the amended Plan constitutes an enforceable court order. However, this court also finds that there are numerous disputed issues of material fact that preclude a determination, on summary judgment, that the DOC is operating the Treatment Center in violation of the terms of the Plan. Accordingly, and for all of the reasons set forth herein, this court recommends to the District Judge to whom this case is assigned that Healey's motion for partial summary judgment be DENIED.

II. STATEMENT OF FACTS[1]

The following facts are undisputed unless otherwise indicated.

The Parties[2]

Plaintiff Healey was originally committed to the Treatment Center on February 24, 1966. (PF ¶ 1; DR ¶ 1). He has remained civilly committed there as a sexually dangerous person ("SDP"), pursuant to Chapter 123A, since his criminal sentences expired in 1997. (See id.).

The DOC has had exclusive control over the care, treatment, rehabilitation and custody of civilly committed SDPs at the Treatment Center since 1994, when the Massachusetts Legislature enacted a statute transferring jurisdiction over the Center from the Department of Mental Health ("DMH") to the DOC. See King v. Greenblatt, 149

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[1] The facts are derived from the following materials: (1) "Plaintiff Jeffrey Healey's Statement of Undisputed Material Facts in Support of His Renewed Motion for Partial Summary Judgment" (Docket No. 220) ("PF"); (2) the exhibits contained in the Appendix of Exhibits filed in support of Healey's motion for partial summary judgment (Docket Nos. 224-29) ("Pl. Ex. __"); (3) the "Statement of Disputed Facts in Opposition to Plaintiff Jeffrey Healey's Renewed Motion for Partial Summary Judgment" (Docket No. 260) ("DR"); (4) the exhibits attached to the Appendix of Exhibits filed by the defendants in opposition to the plaintiff's motion for partial summary judgment (Docket No. 261) ("Def. Ex. __"); (5) the February 2, 2009 Affidavit of Jeffrey Healey (Docket No. 222) ("Healey Aff."); and (6) the January 17, 2009 Affidavit of William G. Stevens ("Stevens Aff."). This court has not considered any facts that have been stricken pursuant to this court's separate Memorandum of Decision and Order on Defendants' Motion to Strike issued on this date. Furthermore, any facts that are derived from statements contained in paragraphs 18 or 22 of Healey's Affidavit, or in paragraph 9 of Stevens' Affidavit, have only been considered to the extent described in this court's rulings regarding the defendants' motion to strike those paragraphs.

[2] The facts described herein concern only the parties to the pending motion. Because neither Pentlarge nor Given has joined in the motion or asserted claims for violations of the Plan, details relevant to those parties have not been included.

F.3d 9, 11-12 (1st Cir. 1998) ("King III"); King v. Greenblatt, 127 F.3d 190, 193 (1st Cir. 1997) ("King II"). Defendant Harold W. Clarke is currently the Commissioner of the DOC, and defendant Robert F. Murphy, Jr. is currently the Superintendent of the Treatment Center. (PF ¶ 2). Healey has named each of the individual defendants only in his official capacity. (2nd Am. Compl. (Docket No. 191) ¶¶ 3-4).

The Consent Decree Litigation

There is a long history of litigation brought by civilly committed SDPs concerning allegedly unconstitutional conditions and practices at the Treatment Center. See King IV, 53 F. Supp. 2d at 118-19. This court previously summarized some of that litigation in its November 14, 2007 Report and Recommendation on Defendants' Motion to Dismiss the Second Amended Complaint and in its November 25, 2008 Report and Recommendation on Plaintiffs' Motions for Class Certification. Because certain aspects the King litigation are directly relevant to the issues raised by the present motion for partial summary judgment, it is summarized again here as follows.

In 1972, individuals who were then civilly committed to the Treatment Center brought two separate actions in the District Court asserting constitutional challenges to the conditions of confinement and adequacy of treatment at the facility. King II, 127 F.3d at 191. In 1974, after finding that conditions at the Center were unconstitutional, the District Court entered three different consent decrees, which continued to govern operations at the Treatment Center for the next 25 years. See id.; King IV, 53 F. Supp. 2d at 119.

At the time the consent decrees were entered, conditions at the Treatment Center were, in the words of the District Court, "deplorable." King IV, 53 F. Supp. 2d at 119. For instance, but without limitation, residents were housed in cramped, poorly furnished cells that had been built in 1895 and contained no sinks or toilets. Id. Their water supply, which came from the highly polluted and inadequately treated Taunton River, failed to meet safe drinking water standards at various times during the period from 1972 to 1974, and was repeatedly disrupted due to the Center's antiquated plumbing system, which dated back to 1888. Id. Moreover, both the Center's sewerage system and its heating and ventilation equipment were outmoded and inadequate. The sewerage system had not been worked on since 1934, and problems with the heating system left some cells without heat for periods of up to several days. Id.

In addition to the dismal physical conditions, there were very few services, programs or recreational opportunities available to Treatment Center residents. For example, but without limitation, there was only one licensed doctor and no nurses at the facility. Id. Vocational facilities were very limited, and there were no library facilities, educational, work-release or community access programs, exercise facilities or outdoor recreation areas. Id. Additionally, all residents were housed under maximum security conditions and afforded little movement. Id. These were only some of the circumstances that the consent decrees were intended to remedy. Id.

Originally, the consent decrees provided that the Treatment Center would be treated as a DMH facility and that, consistent with the provisions of Chapter 123A which

were in effect at the time, DMH would have primary responsibility over residents and treatment, while DOC would have responsibility for custodial personnel. Id. at 119-20 & n.5. The consent decrees also provided that civilly-committed residents would be entitled to "the least restrictive conditions necessary to achieve the purpose of commitment," and that DMH and DOC would act jointly to "improve physical conditions," "implement a meaningful work program," and have "a system of differing security for different categories of patients . . . to permit less restrictive conditions for those patients not requiring maximum security." Id. at 120 (quoting consent decrees; punctuation in original). Additionally, under one of the consent decrees, the defendants were required to "submit a plan to offer therapeutic, educational, vocational, and avocational programs at the Treatment Center and a provision for a day or other short-term release to allow residents to participate in approved programs outside of the facility." Id.

The consent decrees led to dramatic improvements in the physical conditions at the Treatment Center, as well as in the availability of treatment, programming and work opportunities. See id. at 120. Nevertheless, they also led to a "stream of litigation" that arose mainly from the tensions caused by the shared control over the facility by DMH and DOC. Id.

In 1993, the Massachusetts Legislature enacted legislation which amended Chapter 123A to shift complete control over the Treatment Center to the DOC and to add "custody" to the statutory goals of "care, treatment, and rehabilitation" of civilly-committed SDPs. Id. at 121. These developments triggered efforts to modify the consent decrees in

order to conform to the statutory amendment. Id. However, before the District Court would allow the consent decrees to be modified, it urged the DOC to provide details, in the form of a plan, describing how it proposed to operate the Treatment Center in order to provide treatment in compliance with the consent decrees. Id. at 121-22.

Development of the Management Plan

The DOC accepted the Court's invitation, and developed a plan for the management and administration of the Treatment Center. Id. at 122. The original plan, which consisted of 136 pages, "set forth in great detail the policies and procedures DOC would follow in operating the Center." Id. On September 26, 1994, DOC filed the plan with the Court for approval. Id. Rather than approving the plan, the District Court, on July 31, 1995, stayed implementation of the plan's central components and directed the parties to attempt to reach agreement on those matters. Id. Subsequently, the parties engaged in discussions with the help of a Special Master, but their efforts to achieve consensus were unsuccessful. Id.

Eventually, in 1996, the District Court reviewed the plan, determined that it would meet the goals of treatment, security and the protection of residents' rights, and allowed the Commonwealth's motion to modify the consent decrees. Id. Nevertheless, the Court directed DOC to submit an amended management plan that would address certain concerns that had been raised by the parties. Id. Consistent with that order, DOC filed an amended Plan with the Court on November 29, 1996. Id. According to the District Court in King IV, "[i]t is that Plan, together with the policies and procedures

implemented under that Plan, which are the governing documents for the Treatment Center." Id. At issue in the instant matter is whether the Plan is an enforceable document and whether the DOC is complying with the terms of the Plan.

Termination of the Consent Decrees

Although the District Court allowed the Commonwealth's motion to modify, it denied without prejudice to renew in one year the Commonwealth's contemporaneous motion to vacate the consent decrees. Id. In the interim, the Court wanted to evaluate and monitor DOC's implementation of the amended Plan in order to determine whether it was committed to its stated goals of providing effective treatment in a secure setting, and whether, consistent with the modified consent decrees, it was administering the Plan so as to insure "that patients [were] subject to the least restrictive conditions necessary to achieve the purposes of commitment." Id. at 122-24.

The consent decree litigation finally came to a close in 1999, when the District Court granted the Commonwealth's motion to terminate the consent decrees. Id. at 139. In connection with its decision to allow the motion, the District Court considered, among other things, testimony from representatives of Justice Resource Institute ("JRI"), the entity that had been administering the treatment program at the Center since 1992, testimony from various DOC officials, testimony from the plaintiffs' expert, and "most vital[ly,]" testimony from the residents themselves, including their complaints regarding conditions and other circumstances of confinement at the Treatment Center. See id. at 126-35. The Court concluded that the complaints from residents, taken as a whole, did

not impair or affect treatment so as to render it ineffective and in violation of Chapter 123A or the consent decrees, and it determined that under all the circumstances then existing at the Treatment Center, the available treatment was effective and provided under the least restrictive conditions. Id. at 135. In reaching these conclusions, the District Court relied upon the testimony of the various witnesses, its oversight over the years while the consent decrees remained in place, visits to the Center, "and most importantly, the Plan as the governing document of the Treatment Center." Id.

The Court also concluded that "[a]t this point . . . the Commonwealth has sustained its burden of demonstrating that the underlying conditions that existed when the decrees were entered have been remedied and that the Commonwealth has complied with the decrees in good faith since they were entered." Id. at 136. However, the District Court emphasized that its decision to terminate the consent decrees would not foreclose the possibility of litigation in the future. Significantly, the Court stated:

> I believe the Management Plan is an enforceable operating document that recognizes the improvements made as a result of the consent decrees over the years and acknowledges DOC's responsibilities to manage the Treatment Center accordingly.
>
> I recognize that residents will continue to voice their complaints about the circumstances of their existence at the Treatment Center. This decision does not preclude them from challenging events on the basis of constitutional or other protected rights. In the first place, residents may bring an action to enforce the terms of the existing Plan. Moreover, ... plaintiffs remain free to initiate a new round of proceedings designed to show that post-termination conditions actually do violate their federally protected rights.

Id. at 137 (internal quotations and citation omitted). By his present motion, Healey is seeking to enforce the terms of the existing Plan.

General Components of the Plan

The Plan, as amended in 1996, provides detailed policies and procedures for DOC's administration of the Treatment Center and the integration of the Treatment Center program with DOC's prison sex offender treatment program. (See Pl. Ex. X at 3). As set forth in the Plan, the DOC, in formulating the document, intended to achieve the following goals:

> 1. Protection of the public safety by offering sex offenders at the Treatment Center and in the prisons the best current treatment methodology;
>
> 2. Integration of treatment services in the Treatment Center with those of correctional systems to ensure the best utilization of all available resources, and to enure [sic] that the Center will retain its vitality as a treatment institution;
>
> 3. Development of a management structure to integrate correctional and clinical administration to promote coordination and cooperation between correctional and clinical staff at all levels of operation; and
>
> 4. Development of uniform sets of policies and procedures and well-defined regulations applicable to civilly committed residents, designed to provide a safe and secure environment for treatment.

(Id. at 4).

To that end, the Plan focuses on seven main areas of program administration. (Id.). They include: (1) management and staffing; (2) clinical treatment program; (3) educational and vocational treatment; (4) behavior management; (5) resident management

and operations; (6) community access program; and (7) integration of the Treatment Center with the prison program for sex offenders. (Id.).

The elements of each of these Plan components are described in detail in the body of the Plan. For example, but without limitation, with respect to educational and vocational treatment, the Plan provides generally that "[e]ducational and vocational training are an integral part of the treatment program" and that "[t]he purpose of the program is to promote individual academic, personal and vocational skills, utilizing both traditional and innovative educational and vocational techniques." (Id. at 23). It further provides that "[i]t is the intention of the [DOC] to maintain the current programming," and it goes on to list the specific educational courses, vocational programs, recreational opportunities and employment programs that JRI was offering at the time the Plan was developed. (See id. at 24-28). Similarly, with respect to resident management and operations, the Plan contains specific policies regarding a privilege system, the retention of personal property, the handling of residents' funds, visitation, incoming and outgoing mail, use of telephones, implementation of resident counts, and a system for making complaints, filing grievances and conducting investigations. (See id. at 34-43 and Appendixes cited therein).

Despite its level of detail and specificity, the Plan contemplates a certain amount of operational discretion. As noted in the Plan's conclusion, "[t]he field of sex offender treatment in the Commonwealth is not static." (Id. at 48). It further provides in relevant part:

> It is clear that a pragmatic and flexible philosophy is the key to managing this unique facility in a changing environment, so that residents and inmates may receive meaningful treatment in a safe and secure setting. The amended plan herein described offers significant improvements over the original plan offered two years ago. It is the [DOC's] intent that by assessing and refining the elements of the plan as they are implemented over the next year, the policies and practices that emerge will be better still.

(Id.).

Alleged Violations of the Plan

While acknowledging the fact that the Plan contemplates a certain amount of management discretion,[3] Healey claims that since the District Court terminated the consent decrees in June 1999, the defendants have failed to comply with many of the Plan's fundamental components. As an initial matter, he claims that neither DOC nor Forensic Health Services ("FHS"), the vendor that replaced JRI in 2002 as the treatment provider at the Treatment Center, even consider the Plan in managing the civilly-committed resident population at the facility. Moreover, for purposes of his summary judgment motion, Healey contends that since the completion of the consent decree litigation, the DOC has abandoned the Plan by failing to implement three essential components of the Plan, including (1) a meaningful treatment and rehabilitation program;

[3] At oral argument, counsel for Healey agreed that the Plan contemplates a certain amount of management discretion, but he argued that what Healey's claims are about, and what the factual record substantiates, is DOC's complete and utter disregard of the Plan and its lack of commitment to operate the Treatment Center in accordance with the policies and practices set forth in the Plan.

(2) a balanced behavior management system; and (3) an accessible pre-transition program and community access program. (See Pl. Mem. (Docket No. 219) at 7-9).

The defendants dispute nearly all of the facts on which Healey relies to support his position. Without detailing all of the relevant evidence presented by the parties, the following illustrates that there are genuine issues of disputed fact that preclude a determination on summary judgment that, notwithstanding DOC's discretion to refine and amend the Plan, the defendants nevertheless have abandoned their commitment to the fundamental policies and practices established by the Plan and are operating the Treatment Center in violation of the Plan's essential components.

Key Individuals' Knowledge of the Plan

Healey claims that since the completion of the consent decree litigation, there has been widespread ignorance of the Plan among top ranking officials at the DOC. The evidence presented on summary judgment establishes that while individuals who have held the highest office at DOC have had little if any knowledge of the Plan, the DOC official having direct responsibility for operations at the Treatment Center is familiar with the substance of the Plan and claims to have been guided by it.

Michael Maloney served as the Commissioner of the DOC from August 1997 until March 2004. (PF ¶ 4). Although Commissioner Maloney saw the Plan at some point, it is undisputed that he never read through it. (PF ¶ 36; DR ¶ 36). Additionally, Commissioner Maloney testified that the DOC was not obligated to operate the Treatment Center under the least restrictive conditions necessary to achieve the purposes of

commitment, but rather was "obligated to operate the facility with the level of restrictions necessary to manage the population that exists within that facility." (Pl. Ex. D at 67-68).

Similarly, Kathleen M. Dennehy, who became Commissioner of the DOC in March 2004, was unfamiliar with the contents of the Plan. (PF ¶ 3; DR ¶ 3). According to Commissioner Dennehy, she was aware of the Plan's existence and had skimmed through it, but she had never read it. (Def. Ex. 8 at 44-45). Furthermore, Commissioner Dennehy was familiar only in "general terms" with the day-to-day application of DOC's policies and procedures governing the operation of the Treatment Center. (DR ¶ 38).

In contrast to DOC's former Commissioners, Superintendent Murphy is familiar with the contents of the Plan. Superintendent Murphy is the chief operating officer of the Treatment Center. (DR ¶ 112). In that capacity, he is responsible for both the day-to-day and overall operations at the facility. (Id.). During the course of the consent decree litigation, Superintendent Murphy testified that when he considered a policy or procedure change at the Treatment Center, he turned to the Plan and was guided by it. King IV, 53 F. Supp. 2d at 136. Thus, the record establishes that there are disputed facts regarding DOC's knowledge of the Plan and the willingness of DOC officials to adhere to its requirements.

In support of his claim that relevant Treatment Center personnel have abandoned any commitment to the Plan, Healey also relies on evidence regarding ignorance of the Plan by the Center's current treatment provider, FHS. In 2002, DOC elected to put the contract for sex offender treatment services out to bid. (PF ¶ 50; DR ¶ 50). FHS was

awarded the contract, thereby replacing JRI as the administrator of the sex offender treatment program at the Treatment Center. (See PF ¶ 53; DR ¶ 53). The record indicates that employees who have worked for FHS at the Treatment Center are unfamiliar with the Plan. Nevertheless, disputed issues of fact remain as to whether the treatment program administered by FHS at the Center is inconsistent with the Plan's requirements.

When DOC put the contract for treatment services out to bid, it issued a Request for Response. (PF ¶ 51; DR 51). Therein, DOC did not specifically mention its obligations under the Plan. (Id.). Furthermore, it did not provide applicants with instructions regarding compliance with the Plan. (PF ¶ 52).

After FHS became the treatment provider, Dr. Nancy Connolly became the program director at the Treatment Center. (Pl. Ex. F at 31-32). It is undisputed that Dr. Connolly had no understanding as to what constraints, if any, governed DOC's operation of the Treatment Center. (PF ¶ 54; DR ¶ 54). It is also undisputed that Dr. Connolly never read the Plan. (PF ¶ 55; DR ¶ 55). Nor does she believe that anyone else at FHS is familiar with the contents of the Plan. (PF ¶ 57; DR ¶ 57). Indeed, Debra O'Donnell, who was employed by FHS as the Director of Rehabilitative Services at the Treatment Center, testified that she was unfamiliar with the Plan. (See PF ¶ 56; DR ¶ 56).

Despite the FHS employees' apparent lack of knowledge regarding the Plan, a reasonable factfinder could conclude that the critical elements of the Plan's treatment requirements were incorporated into the DOC's Request for Response, and ultimately

into the program established by FHS at the Treatment Center. In its Request for Response, DOC listed the requirements for the sex offender treatment program to be provided at its facilities, including the Treatment Center. (See Pl. Ex. K at 9-23). For example, but without limitation, DOC stated that the contractor's program description would need to include, at a minimum, therapies and activities in eleven different areas, including cognitive restructuring, identification of the sex assault cycle, identification and modification of deviant sex arousal, relapse prevention planning, accountability and responsibility, drug and alcohol abuse treatment, anger management and stress management, understanding human sexuality, social skills training, adult life skills training, and release planning and transition into the community. (Id. at 11-12). DOC also described the requirements for such matters as measuring the progress of each SDP's treatment, implementation of procedures designed to motivate SDPs who refuse to participate in treatment, the provision of specific educational and vocational classes for residents at the Treatment Center, and the provision of library services at the Treatment Center. (See id. at 13-19). According to Michael Henry, Psy.D., who was DOC's Director of Forensic Psychological Services and participated in drafting the Request for Response, the components of the sex offender treatment program detailed in the Request for Response reflected the standard of care in clinical practice and state of the art sex offender treatment. (DR ¶ 117; Def. Ex. 18 ¶ 7). Thus, the record supports an inference that through its Request for Response, DOC was seeking vendors who could provide the best available treatment methodology, consistent with the goals set forth in the Plan.

Additionally, the record indicates that pursuant to its initial contract with DOC, FHS was required to provide certain specified services, including an academic education, certain vocational programs, a librarian and a food services management program. (DR ¶126). Therefore, although DOC did not provide FHS with a copy of the Plan, when viewed in the defendants' favor, the evidence could support a conclusion that DOC incorporated the Plan's requirements into its Request for Response and ultimately into its contract with FHS.

Meaningfulness of the Treatment Program

As noted above, Healey claims that the DOC abandoned the Plan by failing to implement a meaningful treatment program. The evidence presented on summary judgment demonstrates the existence of disputed facts regarding this issue.

In support of his claim, Healey relies on evidence from Dr. Barbara Schwartz. Dr. Schwartz worked for JRI as the Clinical Director of the Treatment Center beginning in 1992, when DMH was still in charge of treatment, until June 2002, when JRI was replaced by FHS. (See PF ¶ 5; DR ¶¶ 5, 42). The record establishes that by late 2001, Dr. Schwartz had become highly critical of what she believed was DOC's lack of commitment to and interference with JRI's treatment program. In a letter to her supervisor dated November 11, 2001, Dr. Schwartz wrote in relevant part,

> I have decided that I can no longer tolerate the way that DOC has been treating us. I would never have come to Massachusetts if I had felt that my job was to keep people in prison. My life's work has been to rehabilitate sex offenders, not incarcerate them ....

* * *

> As a person suffering from a degenerative neurological disease that is aggrevated [sic] by stress, I feel that I can no longer subject myself to the stress of watching DOC destroy my life's work.
>
> Therefore I am submitting my resignation as the Clinical Director of the Massachusetts Treatment Center to be effective February 2, 2002.

(Pl. Ex. I).

Although Dr. Schwartz agreed to remain in her position until DOC entered into a new contract for the provision of sex offender treatment services, she remained critical of DOC until her departure from the Treatment Center in 2002. (See Pl. Ex. G at 20). Thus, in a letter dated June 21, 2002, Dr. Schwartz stated in relevant part:

> I do not think that the "place" has improved. Obviously conditions of confinement have deteriorated markedly...
>
> Your third question is "In your opinion has the C.A.B., J.R.I. and D.O.C. abided by and fulfilled their part of the agreement outlined in the "Master Plan" submitted to and ordered by the Courts?"... JRI was ordered to continue offering the program described to the court and to maintain control of the treatment program. We have been unable to do that due to interference from the [DOC] who have consistently undermined the program and requested that staff engage in unethical conduct that has threatened our professional licenses. When we have resisted efforts to maintain [sic] professional integrity, we have been openly referred to as "a f------ pain".

(Pl. Ex. J).

Dr. Schwartz later testified that when she had written that "conditions of confinement have deteriorated markedly" she had been referring to

> the access of the civils to things like visiting, having access to the educational programs, having access to the vocational programs, the

> number of psychoeducational courses that they could take, the amount of exercise time that they would have in the yard, those kinds of issues. There were, for example, a number of conditions of confinement agreed to in the master plan, that they could have certain materials in their cells. That had been cut back. Just access to treatment and access to all the different kinds of things that people have access to in prison.

(Pl. Ex. G at 73-74). Additionally, Dr. Schwartz stated that in her opinion, DOC had not complied with its commitments to the Court, and that reductions to SDP programs caused by the arrival of inmates at the Treatment Center had resulted in "a general pattern of the program being gutted[.]" (Id. at 11, 25).

The evidence from Dr. Schwartz is contradicted by the testimony of Tim Sinn, a longtime employee of JRI and a former unit director at the Treatment Center. (See DR ¶ 47). Mr. Sinn testified that between 1999 and the time he left the Treatment Center in 2002, the sex offender treatment program continued to employ the best treatment methodology and there was no change in the treatment being offered. (Def. Ex. 10 at 39). He further testified that during that time period, he observed the same level of cooperation between the clinical and correctional staff that had existed during the time period from 1992 to 1999. (Id. at 46). According to Mr. Sinn, throughout his employment at the Treatment Center, the core sex offender treatment continued to improve, and it was only the community access program that suffered a decline. (Id. at 87).

In further support of his claim that DOC has undermined the treatment program established by the Plan, Healey points to evidence showing that since FHS assumed responsibility for the program, there has been significant turnover of clinical staff, which

interferes with the continuity of treatment for SDPs. (See PF ¶ 71; Stevens Aff. ¶ 6). However, the defendants have presented evidence showing that the problem of treatment staff turnover is not unique to FHS. (DR ¶ 71). According to Mr. Sinn, during the time JRI administered the sex offender treatment program, it experienced turnover in the clinical staff. (Def. Ex. 10 at 18-20, 122). Moreover, the problem of staff turnover at JRI often lead to delays in JRI's ability to fulfill the requirements of its contract with DOC. (See id. at 18-19).

Healey also asserts that FHS employees who have remained at the Treatment Center lack the qualifications necessary to implement a treatment program. (PF ¶ 71). For example, Healey points to undisputed evidence that the Program Director, who is the person responsible for the entire FHS treatment program, is only a licensed mental health counselor. (Id.). However, the record also establishes that Gregory Canfield, who served as JRI's program director from 1992 to 1997, held no clinical licenses, and that Mark Sperre, who held that position under JRI from mid-2000 to June 2002, was not a mental health clinician. (DR ¶ 71). Moreover, in Massachusetts, clinicians are not required to obtain any specific licenses in order to provide sex offender treatment. (DR ¶ 125). Therefore, the evidence presented on summary judgment does not support the conclusion that the Center's current treatment program is administered by unqualified individuals.

Healey contends that the defendants have undermined the treatment program established by the Plan by allowing FHS to alter the procedures regarding periodic

reviews of treatment for SDPs. The Plan describes the method by which JRI accomplished period reviews of residents' treatment progress as follows:

> A vital component in the treatment of sex offenders is the establishment of a clear, behavioral-based set of goals which serve as the guide to all subsequent therapy. JRI has defined these goals in their Treatment Goals Summary ... These are uniform goals for all sex offenders. At the beginning of treatment the sex offender's baseline on those goals is established. Every six months thereafter the participant is given a Goal Attainment Scale which evaluates his performance on each relevant goal and sets new goals for the next six months. His progress is mathematically computed and the score he receives along with other measures of treatment progress determines the offender's level of privilege. Every six month [sic] the offender also meets with the Biannual Review of Treatment ("BART") Board comprised of the Program Director, the Clinical Director, and representatives from Rehabilitation and Health Services. This meeting serves as a quality assurance venue during which each resident's progress through the whole program (medical, clinical, vocational and educational departments) is reviewed. The resident and his therapist present their progress in the treatment process. A written overview of therapeutic accomplishments is presented. Additional information about the individual's specific treatment needs is also obtained from voluntary psychological testing.

(Pl. Ex. X at 13-14).

It is undisputed that after FHS assumed responsibility for the treatment program, DOC stopped inviting residents to their bi-annual reviews of treatment and providing them with bi-annual goal attainment progress reports. (PF ¶ 63). However, it is also undisputed that FHS has continued to maintain a system to monitor residents' treatment progress, and that its system is similar to the one that had been in place under JRI.

Pursuant to the review system established by FHS, individual sex offender treatment plans are prepared annually and are reviewed and updated as needed. (DR ¶ 62). Instead of a BART Board, FHS relies on a treatment review panel consisting of the Clinical Director, the Program Director and a senior clinician. (Id.). The panel reviews each resident's treatment plan periodically, typically six months after the resident's most recent annual treatment review. (Id.). In addition, the treatment team prepares the annual review for each resident. (Id.). The annual review process addresses the resident's participation in treatment and progress in meeting treatment goals. (Id.). It also includes recommendations for the upcoming year. (Id.). Each resident's treatment progress is tracked on his treatment plan and also on an achievement matrix. (Id.). The achievement matrix identifies specific goals within each of the areas of clinical focus. (Id.). Accordingly, although the FHS review process is not identical to the process that had been established under JRI, there is evidence showing that, like the system created by JRI, it includes means for monitoring the progress of a resident's treatment in light of specific treatment goals.

Healey further asserts that since FHS assumed responsibility for the treatment program, DOC has failed to provide the same number and variety of psycho-educational, vocational and educational classes that are called for under the Plan. The defendants have offered evidence to show that FHS' decisions regarding the number and type of classes to offer are reasonable, and that changes implemented by FHS do not undermine the purpose of the psycho-educational program established by the Plan.

With respect to psycho-educational classes, the Plan provides that such classes "teach basic knowledge of issues related to sex offender treatment. While there are innumerable topics which can be covered, the classes offered in the therapeutic community will be prescriptive in nature and more advanced than the introductory courses given in the pretreatment segment." (Pl. Ex. X at 15). The Plan then lists nineteen different classes that were offered at the time the Plan was developed. (See id.). Of the classes listed, four are no longer available. (PF ¶ 67).

Currently, decisions as to which psycho-educational classes to offer are made by the FHS clinical team, which includes the Clinical Director and the Program Director. (DR ¶ 127). The team meets quarterly to consider which classes should be offered for the upcoming quarter based on such factors as the demand for particular courses and when the courses were last offered. (Id.). According to FHS' present Director of Adult Treatment Services, Dr. Nicholas Petrou, "the psycho-education classes offered by FHS are consistent with accepted practice in the field of sex offender treatment and sufficient to meet the goals of the sex offender treatment program, in conjunction with the other components of FHS's program." (Def. Ex. 5 ¶ 5). When viewed in the light most favorable to the defendants, this evidence supports a conclusion that the psycho-educational course offerings continue to meet the fundamental educational goals set forth in the Plan, and that any changes implemented by FHS do not alter the effectiveness of the treatment program.

Healey has presented evidence showing that during FHS' 2008 psycho-educational class year, a number of the classes offered were limited to certain segments of the Treatment Center population and a significant number of classes were cancelled. (See PF ¶ 68; Stevens Aff. ¶¶ 7-8). According to Superintendent Murphy, the Treatment Center experienced staffing shortages during a portion of 2008, and he tried to arrange staffing in order to limit the impact of the shortage on classes. (DR ¶ 68; Def. Ex. 4 ¶ 11). Notwithstanding his efforts, Superintendent Murphy had to close certain programming during that time. (Id.). There is nothing in the present record to indicate whether similar problems have occurred at other relevant times. Accordingly, a reasonable factfinder could conclude that the circumstances that lead to the problems experienced in 2008 are not indicative of the defendants' lack of commitment to the educational components of the treatment program.

In addition to psycho-educational courses, the Plan also lists the educational and vocational courses that were offered by JRI as part of its educational and rehabilitation program. (See Pl. Ex. X at 24-26). FHS continues to offer educational and vocational programs at the Treatment Center. These programs include courses in the areas of general equivalency diploma ("GED"), adult basic education, pre-GED, special education, English as a second language, life skills, computers and the building trades. (DR ¶¶ 144, 146).

Nevertheless, Healey claims that since FHS assumed responsibility for the treatment program, there have been considerably fewer avocational and educational classes

available. (PF ¶ 77; Healey Aff. ¶ 7). For example, according to Healey, the Treatment Center no longer offers art or drama therapy courses, a horticulture program, a sewing program or an electronics program. (Id.).

According to the record, FHS continues to offer an art program. (See Pl. Ex. S). Furthermore, based on Healey's own testimony, the electronics program was discontinued when the treatment program was still under the jurisdiction of DMH, and the sewing program ended in 1994 or 1995, when the consent decrees were still in effect. (DR ¶ 77). The evidence does establish that FHS is responsible for discontinuing courses in drama therapy. (DR ¶ 133). However, according to Dr. Petrou, drama therapy is not an essential component of a sex offender treatment program under current best practices standards. (Id.). Therefore, the record reveals that there are numerous disputed issues of fact regarding the question whether DOC has failed to implement a meaningful treatment program at the Treatment Center.

Implementation of the Behavior Management System

Healey contends that the defendants have abandoned an essential aspect of the Plan by manipulating the disciplinary policy in order to impose unfair and arbitrary punishment. The record illustrates that there are disputed facts as to this issue as well.

At the time DOC developed the Plan, it was in the process of implementing a new disciplinary policy for the Treatment Center. (See Pl. Ex. X at 29). In King IV, the District Court briefly described the policy as follows:

> According to the policy, there is a code of offenses divided into four categories of severity with corresponding sanctions, which extend from an unwritten warning up to a thirty-day placement in the [Minimum Privilege Unit]. A staff member who observes a resident committing an offense completes an Observation of Behavior Report (OBR). The OBR is then reviewed at the resident's hearing before the Behavior Review Committee (BRC). The BRC is a three-member board consisting of one security staff member, one clinician, and one JRI staff member, who are all appointed by the Superintendent. The BRC's responsibility is to review alleged offenses and determine any sanctions. In addition, the Superintendent is authorized to impose sequestration while a resident is awaiting a hearing and while investigation of an offense is pending where the resident has threatened, attempted, or inflicted serious harm to others. At the hearing, residents are allowed to present evidence and call and cross-examine witnesses.

53 F. Supp. 2d at 127-28.

Healey contends that the defendants "have utterly corrupted the 'OBR' procedure so that it is [sic] now functions not as a treatment tool, but as nothing more than a mechanism for DOC to impose arbitrary and unpredictable punishment." (Pl. Mem. at 19). For example, but without limitation, Healey asserts that the DOC has improperly stacked the BRC panels with security personnel in contravention of the Plan, and that the DOC has used the B-17 offense, which was intended to be reserved for major infractions, as a catch-all charge to include even minor infractions. As described below, the record reveals the existence of factual disputes regarding these issues.

Pursuant to the Plan, "[t]he B.R.C. shall consist of three persons appointed by the Superintendent; one security staff member, one clinician and one program staff member." (Pl. Ex. X at App. 6, p. 5). According to Healey, the BRC panels that he has appeared

before have consistently been comprised of two security staff members and only one clinician. (PF ¶ 83; Healey Aff. ¶ 22). Although Healey has complained to the BRC and the Superintendent about the composition of the BRC, he claims that the problem has persisted. (PF ¶ 84; Healey Aff. ¶ 22).

The defendants deny that any of the BRC panels that Healey has appeared before have consisted of two security staff members, and they have pointed to evidence showing that since the disciplinary policy was put in place, the BRC has consistently been comprised of one clinician, one security staff member and one correction program officer. (DR ¶ 83). According to Superintendent Murphy, correction program officers are not members of DOC's security staff, but rather operate under the supervision of the Director of Treatment. (Def. Ex. 4 ¶ 13). This is confirmed by charts depicting the organizational structure of the Treatment Center that are attached to the Plan. (See Pl. Ex. X at App. 3 pp. 3-4).

With respect to DOC's use of the B-17 offense, the record confirms that it is considered a high level offense. According to the Plan, the B-17 offense represents "[c]onduct which disrupts or interferes with the security or orderly running of the institution." (Pl. Ex. X at App. 6 p. 13). It is listed as a "High Category" offense, along with such conduct as assaulting another person, including spitting, introducing illegal or unauthorized drugs, intoxicants or alcohol into the institution, possession of an unauthorized tool and manufacturing a facsimile of a weapon. (Pl. Ex. X at App. 6 pp. 12-13).

The plaintiff has presented evidence indicating that DOC has used the B-17 offense to cover less severe offenses. In particular, Dr. Schwartz, who was responsible for drafting the disciplinary policy, testified that she observed that the B-17 offense was being added on to a number of different infractions on what appeared to be a routine basis, and that this practice violated the intent of the disciplinary policy by adding a much higher infraction than was warranted. (See Pl. Ex. G at 12). Dr. Schwartz also testified that she had raised this issue with Treatment Center administrators. (Id.).

Nevertheless, the defendants have presented facts that create a dispute as to whether the B-17 offense has been used improperly with respect to the plaintiff. According to Healey, Treatment Center staff charged him with the B-17 offense in December 2006 and again in January 2007. (PF ¶¶ 89, 90, 92; DR ¶ 89). During the first incident, it is undisputed that Healey was charged after he was found in an unauthorized location after movement had ended. (See PF ¶ 90; DR ¶ 90). Healey suggests that this was due to the fact that he was suffering from a hernia, but the defendants have presented evidence that it was because he was speaking to maintenance workers in the corridor. (See id.).

DOC regulations provide that "[i]nformal handling of minor behavioral infractions is encouraged where appropriate[,]" and describe such minor infractions to include being "outside the unit without permission[.]" 103 C.M.R. § 431.07(2). They also list "[b]eing in an unauthorized location" as a "Low Category" offense. 103 C.M.R. § 431.11(1)(D). Nevertheless, the defendants have presented evidence that Healey had been warned on

numerous occasions by two separate DOC staff members that he must conduct his business within proper movement times. (DR ¶ 90). They have also presented facts showing that at the time of the incident, approximately 75 to 80 inmates were entering the area on their way to the inmate dining room or the health services unit, and that DOC had to suspend these operations while Healey was secured in an approved area. (Id.). A reasonable factfinder viewing this evidence in the light most favorable to the defendants could find that under the circumstances, Healey was charged appropriately.

During the second incident, which occurred in January 2007, Healey was charged with the B-17 offense for possessing two butane lighters. (PF ¶ 92, DR ¶ 92). Healey apparently hid the lighters under a heating unit in his room. (DR ¶ 95). It is undisputed that under the applicable DOC regulations, the offense of "smoking where prohibited" is listed as a low category offense. (PF ¶ 92; DR ¶ 92). Healey argues that because smoking is a low category offense, his possession of lighters cannot constitute a more serious offense. (See Pl. Mem. at 21). However, there is evidence showing that at the time of the incident, smoking was prohibited and SDPs were not permitted to possess lighters at the Treatment Center. (DR ¶ 95). According to a witness for the defendants, the fact that Healey had the lighters suggested that they had been smuggled into the facility as contraband. (Id.). Moreover, the Director of Security at the Treatment Center concluded that Healey's placement of butane lighters under a heating unit in January created a risk of fire. (Id.). Thus, there are disputed facts as to whether the decision to charge Healey with a B-17 offense was proper.

Accessibility of Pre-Transition and Community Access Programs

The Plan describes in significant detail a pre-transition program, which provides for a resident's transfer to a Transition House at the Treatment Center, and a community access program ("CAP") established for the purpose of providing residents with access to the community and preparing them for eventual release. (See Pl. Ex. X at 16-18, 44 & App. 16 thereto). Healey contends that the DOC has violated the terms of the Plan because it has no functioning CAP and it only began to accept residents into the Transition House in November 2008. Once again, the record presented on summary judgment illustrates that there are disputed facts regarding these issues, and that a determination as to whether the defendants have abandoned the Plan by failing to implement an accessible pre-transition program and CAP requires further development of the record and a resolution of disputed facts.

The Plan provides in relevant part that "[t]he purpose of the Pre-Transition Program (PTP) is to allow residents of the Massachusetts Treatment Center who are ready for a less restrictive environment to transfer their residence to the Transition House. This would . . . allow them to begin learning to live in a less structured and regimented environment." (Pl. Ex. X at 16). Furthermore, under the Plan, an SDP is eligible to apply for the program when he is not deemed a security risk by the Director of Security, has completed a substantial percentage of his treatment goals, as determined by the Clinical Director in consultation with the resident's treatment team, and the resident has obtained approval of his treatment team and primary treatment group. (Id.). Residents

accepted into the program are transferred to the Transition House, where they participate in treatment and rehabilitation pursuant to an individualized Transition Plan. (See Pl. Ex. X at 16-17 & App. 16, p. 13).

It is undisputed that after FHS assumed responsibility for the treatment program, DOC closed the Transition House and moved the residents living there back into the main facility. (PF ¶ 101). Furthermore, for a period of five years beginning in 2003, the Transition House was closed. (Id.). DOC did not begin to accept applications for the Transition House again until October 2008, about a month before it was reopened. (Id.).

The defendants have presented facts showing that DOC closed the Transition House after a resident escaped from there in October 2003, and that following the escape, significant modifications had to be made to the facility in order to make it more secure. (DR ¶ 101). Although the defendants have not submitted any evidence explaining why it took five years to reopen the Transition House, the facts that have been presented could support a determination that the temporary closure was justified.

Since the Transition House was reopened, five residents have obtained approval to reside there, and two of those residents were ultimately released from the Treatment Center. (DR ¶ 142). Furthermore, additional residents are in the process of being reviewed for placement in the Transition House. (Id.). In November 2008, Healey submitted an application to transfer to the Transition House, but it was denied by his current treatment team. (DR ¶ 102). According to Kim Lyman, a therapist and FHS' current Program Director at the Treatment Center, Healey was not an appropriate

candidate for placement in the Transition House due to his lack of commitment to treatment and his ongoing inability to manage his behavior at the Center. (Def. Ex. 13 ¶¶ 1, 6). Given these circumstances, this court cannot conclude, as a matter of law, that the DOC has abandoned its obligations under the Plan with respect to the pre-transition program.

It is undisputed that since FHS assumed responsibility for the treatment program, no Treatment Center residents have been accepted into the CAP. (PF ¶ 106; DR ¶ 106). The defendants dispute that the lack of participation in the CAP constitutes evidence that DOC has acted in violation of the Plan. (See DR ¶ 106). According to the defendants, the reason for the lack of participation is that "[n]o resident has proceeded to the point in the application process to have an application for the CAP approved by FHS." (See id.).

As the DOC acknowledged in the Plan, "[t]he purpose of [the CAP] is to meet the legally required need to provide community access for Residents of the Massachusetts Treatment Center. The need to prepare Center Residents for their eventual community release is required by state law and federal consent decrees . . . ." (Pl. Ex. X at App. 16, p. 3). In King IV the District Court stated that

> [a] review of the CAP reveals that it is cumbersome and that it requires a maintained effort on a resident's part to complete each phase of the program. That being said, there is nothing in the record which specifically explains what, if any, 'roadblocks' exist which hinder residents' participation in the CAP or otherwise demonstrate that the program is not accessible to them.

53 F. Supp. 2d at 135.

Similarly, in the instant matter, Healey has not presented any facts showing that DOC's conduct has interfered with residents' efforts to participate in the CAP. Nor has he presented any evidence showing that DOC and FHS have failed to take any steps to encourage greater participation in the program. Accordingly, this court concludes that the record with respect to the CAP, including the reasons for the lack of participation in the program, is not sufficiently developed to warrant a conclusion that the DOC has failed to fulfill its obligations under the Plan.

III. ANALYSIS

A. Standard of Review on Summary Judgment

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A dispute is 'genuine' if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party." Sanchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996) (quotations and citations omitted). A material fact is one which has "the potential to affect the outcome of the suit under the applicable law." Id. (quotations and citations omitted).

The moving party bears the initial burden of establishing that there is no genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). If that burden is met, the opposing party can avoid summary judgment only by providing properly supported evidence of disputed material

facts that would require trial. See id. at 324, 106 S. Ct. at 2553. "[T]he nonmoving party 'may not rest upon mere allegation or denials of his pleading,'" but must set forth specific facts showing that there is a genuine issue for trial. LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986)). The court must view the record in the light most favorable to the non-moving party and indulge all reasonable inferences in that party's favor. See O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993). "If, after viewing the record in the non-moving party's favor, the Court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate." Walsh v. Town of Lakeville, 431 F. Supp. 2d 134, 143 (D. Mass. 2006).

B. Enforceability of the Plan

Healey contends that "[t]he Plan is enforceable either as a court order, or a quasi-settlement agreement incorporated into a court order, because the Court unequivocally incorporated the Plan and retained jurisdiction to adjudicate non-compliance with the Plan" in King IV. (Pl. Mem. at 12) (footnote omitted). Although this court finds that the Plan cannot be construed as a settlement agreement, this court does agrees that, pursuant to the District Court's ruling in King IV, the Plan constitutes an enforceable court order.

As detailed above, DOC developed the Plan, at the urging of the District Court in the King litigation, in order to describe how it proposed to operate the Treatment Center in compliance with the then-existing consent decrees. King IV, 53 F. Supp. 2d at 121-22.

Healey has not presented any facts to suggest that the parties to the King litigation negotiated the terms of the original plan or that the Plan, as amended, was the result of an agreement between them. Although the parties engaged in settlement negotiations, at the Court's direction, in an attempt to reach agreement regarding the central components of the Plan, it is undisputed that "those efforts were unavailing." Id. at 122. See also King III, 149 F. 3d at 14 (describing how settlement discussions concerning DOC's administration of the Treatment Center under the Plan "generally resulted in an impasse"). "A district court does not have the power to impose a settlement agreement when there was never a meeting of the minds." Wang Labs., Inc. v. Applied Computer Sciences, Inc., 958 F. 2d 355, 359 (Fed. Cir. 1992). Because there is nothing in the record to indicate that the Plan constituted an agreement between the parties to the King litigation, it cannot be construed as a settlement agreement.[4]

The record does support Healey's position that the Plan constitutes a court order. In its decision allowing the Commonwealth's motion to terminate the consent decrees in the King litigation, the District Court specifically relied on the existence of the Plan, and its continuing enforceability as "the governing document of the Treatment Center." King IV, 53 F. Supp. 2d at 135. Significantly, the Court stated that the Plan "is an enforceable operating document that recognizes the improvements made as a result of the consent

[4] Healey has not explained what he means by his argument that the Plan is enforceable as a "quasi" settlement agreement. In any event, because there is no evidence that the parties to the King litigation ever came to a meeting of the minds regarding the key components of the Plan, it cannot be deemed an agreement.

decrees over the years and acknowledges DOC's responsibilities to manage the Treatment Center accordingly." Id. at 137. Moreover, the Court acknowledged that Treatment Center residents would continue to challenge the circumstances of their confinement there, and it stated that "residents may bring an action to enforce the terms of the existing Plan." Id. Accordingly, the District Court effectively incorporated the Plan into its order allowing the termination of the consent decrees.

Federal courts retain jurisdiction to enforce their own orders. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380-81, 114 S. Ct. 1673, 1677, 128 L. Ed. 2d 391 (1994) (had district court incorporated terms of settlement agreement into order of dismissal, ancillary jurisdiction to enforce the agreement would exist); United States v. Mourad, 289 F. 3d 174, 180 (1st Cir. 2002) (court would have retained jurisdiction to enforce its order even if case had been closed), cert. denied, 537 U.S. 933, 123 S. Ct. 337, 154 L. Ed. 2d 232 (2002). Because the District Court incorporated the Plan into its ruling on the motion to terminate the consent decrees, the Plan remains enforceable.[5]

The defendants argue that the Plan should not be construed as a court order because "[a] court order is not susceptible to change by the parties who are subject to the order" and the Plan, by its terms, contemplated future changes in DOC's administration of the Treatment Center. (Def. Mem. (Docket No. 259) at 3). While it is undisputed that

[5] Because this court finds that the Plan constitutes an enforceable court order, it is unnecessary to address Healey's alternative argument that judicial estoppel precludes DOC from arguing that it is not bound by the Plan.

the Plan provides DOC with a certain amount of discretion in its administration of the Treatment Center, this does not render the Plan unenforceable.

In the Plan, DOC acknowledges that the field of sex offender treatment in Massachusetts continues to evolve, and that "a pragmatic and flexible philosophy is the key to managing this unique facility in a changing environment, so that residents and inmates may receive meaningful treatment in a safe and secure setting." (Pl. Ex. X at 48). It further provides that "[i]t is the Department's intent that by assessing and refining the elements of the plan as they are implemented over the next year, the policies and practices that emerge will be better still." (Id.). Thus, by its terms, the Plan authorizes DOC to refine the elements of the Plan in order to achieve its stated goals and improve upon existing policies. However, there is nothing in the Plan, or in the Court's decision in King IV, to suggest that DOC is free to ignore the policies and practices established therein. Nor is there any reason that the Plan cannot be enforced against DOC, as Healey is attempting to do in this case, in order to ensure that the DOC does not ignore the essential features of the Plan so as to abandon its commitment to its stated goal of providing meaningful treatment in a safe and secure setting.

C. Alleged Non-Compliance with the Plan

Healey argues that he is entitled to summary judgment because the undisputed evidence demonstrates that the DOC has failed to comply with many components of the Plan, and in particular, to ensure that there is a meaningful treatment and rehabilitation program, a balanced behavior system, and accessible pre-transition and community access

programs at the Treatment Center. As this court has described in detail above, the record contains numerous disputed issues of fact regarding these issues. Accordingly, this court concludes that the question whether DOC is operating the Treatment Center in violation of the Plan must be left to a jury.

IV. CONCLUSION

For all of the reasons set forth herein, this court recommends to the District Judge to whom this case is assigned that "Plaintiff Jeffrey Healey's Renewed Motion for Partial Summary Judgment" (Docket No. 217) be DENIED.[6]

/ s / Judith Gail Dein
Judith Gail Dein
United States Magistrate Judge

[6] The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72 any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this Rule shall preclude further appellate review. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271, 275 (1st Cir. 1988); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 604-605 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also Thomas v. Arn, 474 U.S. 140, 153-54, 106 S. Ct. 466, 474, 88 L. Ed. 2d 435 (1985). Accord Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 3-4 (1st Cir. 1999); Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 (1st Cir. 1994); Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 4 (1st Cir. 1998).

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Docket Text:
Judge Nancy Gertner: Electronic ORDER entered adopting Report and Recommendations re [275] Report and Recommendations denying defendants motion for partial summary judgment (#217). (Gertner, Nancy)

1:01−cv−11099 Notice has been electronically mailed to:

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1:01−cv−11099 Notice will not be electronically mailed to:

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Case Name:	Healey v. Maloney, et al
Case Number:	1:01−cv−11099
Filer:	
Document Number:	No document attached

Docket Text:
Judge Nancy Gertner: Electronic ORDER entered denying [217] Motion for Partial Summary Judgment as per Magistrate Dein's Report and Recommendation. (Gertner, Nancy)

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JEFFREY M. HEALEY, Plaintiff, v. ROBERT MURPHY, et al., Defendants. and EDWARD GIVEN, Plaintiff, v. ROBERT MURPHY, et al., Defendants.	)	CIVIL ACTION NO. 01-11099-PBS CIVIL ACTION NO. 04-30177-PBS

MEMORANDUM AND ORDER

March 29, 2013

SARIS, C.U.S.D.J.

I. INTRODUCTION

Plaintiffs Jeffrey Healey and Edward Given, who were civilly committed as sexually dangerous persons after completing their criminal sentences, bring this action pursuant to 42 U.S.C. § 1983 challenging the sex offender treatment program and their conditions of confinement at the Nemansket Correctional Center in Bridgewater, Massachusetts (the "Treatment Center"). They seek equitable relief (not monetary damages) against the Massachusetts Department of Correction ("DOC"), its Commissioner Luis Spencer,[1]

[1] Luis Spencer became acting Commissioner in January 2011 and Commissioner on April 27, 2011. Michael Corsini became the

and the Superintendent of the Treatment Center, Michael Corsini. In addition, Healey has asserted claims against the defendants for failure to comply with the provisions of the Treatment Center's Amended Management Plan ("the Plan") adopted as a result of the consent decree litigation before Judge David Mazzone, which ended in 1999. This is not a class action.

Plaintiffs contend that the DOC defendants have failed to implement any meaningful treatment program and complain about many aspects of their conditions of confinement, which they claim are unnecessarily punitive and unrelated to the purposes of the Treatment Center. Among many other things, they argue that they have not been provided with psychopharmacological treatment for deviant sexual impulses, and that the DOC has not implemented the community access program, mandated both by state statute and the Plan.

The DOC defendants contend plaintiffs' conditions of confinement are not excessively restrictive and that the sex offender treatment program complies with the Plan, which provides them a degree of operational discretion. Emphasizing the need to provide a secure institution, they point out that residents at the Treatment Center include murderers and other violent sex offenders, and emphasize that only two percent of the sex offenders eligible for commitment are eventually found to be

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Treatment Center Superintendent in March 2010.

dangerous and committed to the Treatment Center. Defendants maintain that the plaintiffs' failure to progress in sex offender treatment is the result of their own actions, such as the failure to attend treatment programs, the failure to comply with treatment recommendations, and the refusal to conform their behavior to the rules and regulations of the Treatment Center. While not opposing the request for a psychopharmacological evaluation, defendants do oppose an injunction because they say they have offered the treatment and are developing a protocol.

After consideration of the evidence, the view of the Treatment Center on January 12, 2012, and the arguments advanced by counsel, I make the following findings of fact and conclusions of law. In particular, I find (1) the DOC defendants violated the Plan and the Constitution by failing to provide plaintiffs with a psychological evaluation for possible pharmacological treatment using professionally reasonable standards, and (2) that defendants violated the Plan and state law by failing to provide a functioning community access program. I find in favor of the DOC defendants on all other issues.

II. PROCEDURAL BACKGROUND

In 2001, plaintiff Jeffrey Healey filed his complaint challenging the conditions of confinement and the adequacy of sex offender treatment at the Treatment Center. In 2004, Healey's lawsuit was consolidated with a similar action filed by

plaintiffs Edward Given and Joel Pentlarge, a former resident committed at the Treatment Center, who was released in January 2006 after being adjudicated as not sexually dangerous. Pentlarge was dismissed from the lawsuit in June 2011 after he and Given agreed to waive their claims for monetary damages, leaving only claims for declaratory and injunctive relief.

Retired Judge Nancy Gertner presided over this case until she left the bench in August 2011. She conducted a view of the Treatment Center, and held a 10-day bench trial in July 2011. However, she never issued an opinion, as the parties remained in settlement negotiations when she retired. The settlement broke down, she retired, and the case was randomly assigned to me.

In December 2011, I certified, pursuant to Fed. R. Civ. P. 63, that I was familiar with the record and determined that the case may be completed without prejudice to the parties. See Fed. R. Civ. P. 63; Riley v. Nat'l Lumber Co., 584 F.3d 27, 32 (1st Cir. 2009)("[T]he successor judge in a nonjury trial may proceed with a matter if he (1) certifies that he is familiar with the case and determines that the case may proceed without prejudice to the parties, and (2) if requested by a party, recalls any witness whose testimony is material and disputed."). I chose to recall the two plaintiffs and Pentlarge to assess their credibility, and the defendants chose to recall certain witnesses and present new testimony to address changes at the Treatment

Center that had taken place since the first trial. In January 2012, I conducted a view of the Treatment Center and held a six-day bench trial. Defendants submitted certain statistical information after the trial which had been requested by plaintiffs.[2]

After the resolution of multiple dispositive motions over the past decade, the following claims remain:

As to Healey: (1) Defendants have violated the Plan as an enforceable court order (Count I); (2) Withholding psychological care violates his Eighth Amendment rights (Count III); (3) Failure to provide adequate treatment violates his Fourteenth Amendment substantive due process rights and breaches defendants' duties under Mass. Gen. Laws ch. 123A, § 2 (Count IV); and (4) Forcing him to exercise in the wire "cage" while he is under disciplinary segregation violates his Fourteenth Amendment substantive due process rights (Count V).

As to Given: (1) Conditions at the Treatment Center fail to provide the "least restrictive alternative" in violation of his due process rights (Count I); (2) The Treatment Center's telephone system violates his First Amendment and substantive due process rights (Count II); (3) The waiver of confidentiality to obtain sex offender treatment violates his Fifth Amendment rights

[2] While the relevancy of the documents is disputed, neither party asked to present additional testimony or oral argument about the data.

(Count III); (4) Failure to provide adequate treatment violates his Fourteenth Amendment substantive due process rights (Count IV); and (5) Failure to provide accommodations that meet the minimum standards for human habitation violates his Fourteenth Amendment substantive due process rights (Count V).

III. STATUTORY AND LITIGATION BACKGROUND

A. The Statutory Scheme - Chapter 123A

The Massachusetts Sexually Dangerous Persons Law was passed in 1947. See Mass. Gen. Laws ch. 123A, § 1 et seq. The initial law was premised on the assumption that sex offending is caused by a severe mental illness which can be treated if the offender is given a one-day to life commitment sentence at a mental health institution to participate in an intensive treatment regimen. See King v. Greenblatt, 53 F. Supp. 2d 117, 118 (D. Mass. 1999)("King IV"). The statute was amended in 1954 to provide for the establishment of the Treatment Center, which opened three years later. See id. at 118.

Mass. Gen. Laws ch. 123A, § 9 provides for a periodic review of a civilly-committed resident's sexual dangerousness in the form of a trial. Pursuant to § 9, residents may file petitions with the court annually requesting release from the Treatment Center. Upon a jury determination that an individual is no longer sexually dangerous, he is returned to a correctional institution to complete his criminal sentence, or, if he has not

received a criminal sentence, or has completed it, he is released to the public. See id. at 118 n.2.

B. The *King* Litigation and Consent Decrees

There is a forty-year long history of litigation brought by civilly committed residents concerning allegedly unconstitutional conditions and practices at the Treatment Center.

In 1972, residents at the Treatment Center brought two separate actions in district court asserting constitutional challenges to the conditions of confinement and adequacy of treatment at the facility. See King v. Greenblatt, 127 F.3d 190, 191 (1st Cir. 1997) ("King II"). In 1974, after finding that conditions at the Center were unconstitutional, the court entered three different consent decrees, which continued to govern operations at the Treatment Center for the next 25 years.

At the time the consent decrees were entered, conditions at the Treatment Center were, in the words of the Judge Mazzone, "deplorable." King IV, 53 F. Supp. 2d at 119. Residents were housed in cramped, poorly furnished cells that had been built in 1895 and contained no sinks or toilets. Id. Residents were forced to defecate and urinate in small chamber pots and emptied their human waste daily into a service sink at the end of their floor. Id. Their water supply, which came from the highly polluted Taunton River, failed to meet safe drinking water standards. Id. The sewage system had not been worked on since

1934, and problems with the heating system left some cells without heat for several days. Id.

In addition to the dismal physical conditions, there were very few services, programs, or recreational opportunities available to residents. The facility had only one licensed doctor and no nurses. Id. There was no library, educational classes, exercise facilities, or community access programs. Id. All residents were housed under maximum security conditions and afforded little movement. Id.

Originally, the consent decrees provided that the Treatment Center would be treated as a Department of Mental Health ("DMH") facility. DMH would have primary responsibility over residents and treatment, while DOC would have responsibility for custodial personnel. Id. at 119-20 & n.5. Under the consent decrees, residents would be entitled to "the least restrictive conditions necessary to achieve the purpose of commitment." DMH and DOC would act jointly to "improve physical conditions," "implement a meaningful work program," and have "a system of differing security for different categories of patients . . . to permit less restrictive conditions for those patients not requiring maximum security." Id. at 120 (quoting consent decrees; punctuation in original). Additionally, the defendants were required to "submit a plan to offer therapeutic, educational, vocational, and avocational programs at the Treatment Center and

a provision for a day or other short-term release to allow residents to participate in approved programs outside of the facility." Id. While the consent decrees led to significant improvements in the physical conditions, as well as in the availability of treatment, programming, and work opportunities at the Treatment Center, they also led to a "stream of litigation" that arose mainly from the tension created by the "dual management of a hybrid facility whose purpose was to provide effective treatment, for which DMH was responsible, in a secure setting for which DOC was responsible." Id.

C. The Abolition of Civil Commitments

By the end of the 1980s, the focus of treatment for sex offenders shifted. A review panel authorized by the Massachusetts Legislature in 1988 "concluded that the mental health approach to sex offender treatment was no longer effective because sexual violence is primarily a form of anti-social behavior which can be controlled, but not 'cured.'" Id. at 121. The panel recommended that civil commitments be abolished and that the DOC develop a voluntary program for treatment of sex offenders. Id. Consistent with these recommendations, civil commitments were abolished in 1990, and were not reinstated until nine years later. In the interim, the King litigation continued with respect to persons civilly committed under the old law.

In 1994, the Massachusetts Legislature enacted legislation

which amended Chapter 123A to shift complete control over the Treatment Center to the DOC and to add "custody" to the previous statutory goals of "care, treatment, and rehabilitation" of civilly-committed residents. King II, 127 F.3d at 193; King IV, 53 F. Supp. 2d at 121. These developments triggered efforts to modify the consent decrees to conform to the statutory changes. Id. Also in 1994, as part of the King litigation, Judge Mazzone appointed counsel for a group of residents calling themselves the "Class of 48 + 1", who had submitted a letter to the court alleging additional violations at the Treatment Center. Id. Plaintiff Jeffrey Healey was one of the Class of 48 + 1. Stipulated Facts ("SF") ¶ 9.

Before the court would allow the consent decrees to be modified, it urged the DOC to provide a detailed plan to describe how it planned to operate the Treatment Center. King IV, 53 F. Supp. 2d at 121-22. The DOC developed a plan for the management and administration of the Treatment Center. Id. at 122. The original plan, which consisted of 136 pages, "set forth in great detail the policies and procedures DOC would follow in operating the Center." Id.

During the period when the DOC was developing the plan, a new facility was constructed on the grounds of the Treatment Center in order to house 300 state inmates who were participating in the DOC's sex offender treatment program. Id. In connection

with this development, the DOC submitted a plan on how it would accommodate the influx of inmates and maintain its statutory obligations to keep civilly-committed residents separate and apart from prisoners. Id. Judge Mazzone noted that the presence of the inmate population at the facility remained "the greatest challenge to DOC's management of the Center." Id.

D. The Amended Management Plan

On September 26, 1994, the DOC filed its proposed management plan with the court for approval. Rather than approving the plan, the court, on July 31, 1995, stayed implementation of the plan's central components and directed the parties to attempt to reach agreement on matters where they disagreed. Id. Subsequently, the parties engaged in discussions with the help of a Special Master, but their efforts to achieve consensus were unsuccessful. Id.

Eventually, in 1996, the court reviewed the plan, determined that it would meet the goals of treatment, security, and the protection of residents' rights, and allowed DOC's motion to modify the consent decrees. Id. Nevertheless, the court directed DOC to submit an amended management plan that would address certain concerns that had been raised by the parties. Id. Consistent with that order, DOC filed the Amended Management Plan with the court on November 29, 1996. Id. According to King IV, "[i]t is that Plan, together with the policies and procedures

implemented under that Plan, which are the governing documents for the Treatment Center." Id.

The Amended Management Plan provides detailed policies and procedures for DOC's administration of the Treatment Center and the integration of the Treatment Center program with DOC's prison sex offender treatment program. Ex. 1 at 4. The Plan focuses on seven main areas of program administration. They include: (1) management and staffing; (2) clinical treatment; (3) educational and vocational treatment; (4) behavior management; (5) resident management and operations; (6) the community access program; and (7) integration of the Treatment Center with the prison program for sex offenders. They will be discussed in more detail to the extent they are directly relevant to plaintiffs' claims.

Despite its level of detail and specificity, the Plan contemplates a certain amount of operational discretion. As noted in the Plan's conclusion, "[t]he field of sex offender treatment in the Commonwealth is not static." Id. at 48. It further provides in relevant part:

> It is clear that a pragmatic and flexible philosophy is the key to managing this unique facility in a changing environment, so that residents and inmates may receive meaningful treatment in a safe and secure setting. The amended plan herein described offers significant improvements over the original plan offered two years ago. It is the [DOC's] intent that by assessing and refining the elements of the plan as they are implemented over the next year, the policies and practices that emerge will be better still.

Id. Consistent with the consent decree, the Plan requires that residents "be maintained in the 'least restrictive conditions' of confinement." Id. at 6. It also requires the DOC to provide residents with "the best current treatment methodology." Id. at 4.

E. Termination of the Consent Decrees

Although the court allowed DOC's motion to modify, it denied, without prejudice to renew in one year, its contemporaneous motion to vacate the consent decrees. King IV, 53 F. Supp. 2d at 122. In the interim, the court wanted to evaluate and monitor the implementation of the Plan in order to determine whether DOC was committed to its stated goals of providing effective treatment in a secure setting, and whether, consistent with the modified consent decrees, it was administering the Plan so as to insure "that patients [were] subject to the least restrictive conditions necessary to achieve the purposes of commitment." Id. at 124.

The consent decree litigation finally came to a close in 1999, when the court granted DOC's motion to terminate the consent decrees. Id. at 139. The court determined that under all the circumstances then existing at the Treatment Center, the available treatment was effective and provided under the least restrictive conditions. Id. at 135. Nevertheless, the court emphasized that its decision "does not preclude [residents] from

challenging events on the basis of constitutional or other protected rights" and that residents "may bring an action to enforce the terms of the Plan" or "to initiate a new round of proceedings designed to show that post-termination conditions actually do violate their federally protected rights." Id. at 137 (internal quotations and citation omitted).

F. Reinstating Civil Commitments

In September 1999, just months after the King litigation was completed, Chapter 123A was amended again. See St. 1999, ch. 74, §§ 3-8. Significantly, the 1999 amendments reinstated civil commitments. See Commonwealth v. Bruno, 432 Mass. 489, 491 (2000). They also established a new definition of sexually dangerous persons, as well as new procedures for adjudicating persons as sexually dangerous. Id. at 494. Thus, after a period of almost ten years during which there were "no new 'sexually dangerous person' classifications and no new commitments permitted," the population at the Treatment Center began to increase. Id. at 494.

Consistent with earlier versions of Chapter 123A, the amended statute's "dual goals" remained: "namely to protect the public from sexually dangerous persons, and to provide them treatment, and rehabilitation." Id. at 500. The statute continued to be deemed "nonpunitive and therefore civil" as opposed to criminal. Id. (internal quotations omitted). It

provided for commitment of a period of one-day to life of persons who have been found either to be "likely to engage in sexual offenses if not confined to a secure facility," or to have "a general lack of power to control . . . sexual impulses . . . and . . . likely to attack or otherwise inflict injury." Mass. Gen. Laws ch. 123A, § 1. Thus, the Legislature determined that "because such persons are likely to commit future harm, confined commitment appears to be the only viable form of commitment." Bruno, 432 Mass. at 502. Nevertheless, the Legislature's intention in enacting Chapter 123A remained "remedial." Id. at 500.

Although the Treatment Center houses both state prison inmates participating in sex-offender treatment and civilly committed residents, in 2001 the Massachusetts Superior Court ruled that residents at the Treatment Center must be kept "separate and apart" from prisoners "at all times" in accordance with state law. Durfee v. Maloney, Nos. CIV. A. 98-2523B, CIV. A. 98-3082B, 2001 WL 810385, at *15 (Mass. Super. Ct. July 16, 2001). Since then, in addition to being housed in different units, state inmates and residents have not been permitted to intermingle anywhere throughout the facility or to participate together in any programs or services.

The DOC continues to operate the Treatment Center pursuant to Chapter 123A, § 2. SF ¶ 16. Thus, it has had exclusive

control over the care, custody, treatment and rehabilitation of civilly committed residents at the Treatment Center since 1994, when jurisdiction over the Center was transferred from DMH to DOC.

As of October 5, 2011, 254 sexually dangerous persons were civilly committed to the custody of DOC. Eight-one were committed under the pre-1990 version of Chapter 123A. Some were also serving first-degree life sentences. Residents stay at the Treatment Center an average of 14.5 years, with the length ranging from one year to more than 40 years. Ex. 642.

G. The Release Process

In 2009, the Massachusetts Supreme Judicial Court altered the way in which residents may be discharged from the Treatment Center. The court held that if two Qualified Examiners[3] opine that a resident is no longer sexually dangerous, his section 9 petition must be granted, and the resident is entitled to be released from the Treatment Center without a trial. See In re Johnstone, 453 Mass. 544, 545 (2009); id. at 553 ("If neither of the qualified examiners is of the opinion that the petitioner is currently a sexually dangerous person, the Commonwealth cannot .

[3] A Qualified Examiner is "a [licensed] physician . . . who is either certified in psychiatry by the American Board of Psychiatry and Neurology or eligible to be so certified, or a [licensed] psychologist; provided, however, that the examiner has had two years of experience with diagnosis or treatment of sexually aggressive offenders and is designated by the commissioner of correction." Mass. Gen. Laws ch. 123A, § 1.

. . meet its burden of proof at trial.").

Residents are evaluated every year by the Community Access Board ("CAB"). The CAB is statutorily mandated to conduct an annual review of each resident's treatment plan and vote on whether or not the CAB believes that the resident remains sexually dangerous. (Tomich, I-7, 131); Mass. Gen. Laws ch. 123A, § 6A. The CAB is comprised of five members: three psychologists employed by the DOC and two employed by the treatment provider. (Tomich, I-7, 132-33).

The CAB itself does not have authority to release a resident from custody, as residents can only be released through the section 9 judicial process. Prior to the Johnstone decision, if the CAB, along with two Qualified Examiners, all voted unanimously that a resident was not sexually dangerous, the DOC would inform a court presiding over a section 9 petition that it could not make a prima facie case that the petitioner remain sexually dangerous, and the petitioner would be released from the Treatment Center. During this time, very few residents were released. See Ex. 334 at 6. From 2002 to 2011, the CAB conducted 1,837 annual reviews. Out of this total, the CAB unanimously voted that a resident was not sexually dangerous 17 times. Ex. 642.

Furthermore, while the CAB cannot file a section 9 petition on behalf of a resident, the Commonwealth can. However, the only

time CAB Chairperson Niklos Tomich, Psy.D., recalls the Commonwealth exercising this option was when a resident was so infirm he needed medical attention not available at the Treatment Center. (Tomich, II-5, 140). Tomich is Director of Forensic Services and has been Chair of the CAB since July 2009.

From April 2009, the time Johnstone was decided, until March 2012, 24 residents were released after two Qualified Examiners opined that they no longer remained sexually dangerous. Doc. No. 423 (Summary of Community Access Board Reports). In 14 of those cases, the CAB had disagreed with the Qualified Examiners and voted that those residents remained sexually dangerous. Id. That is, in 58 percent of cases, the CAB opined that residents should continue to be confined at the Treatment Center when two Qualified Examiners believed they could be released safely into the community.

IV. FACTUAL FINDINGS

A. The Plaintiffs

1. Healey

Plaintiff Jeffrey Healey has been confined to the Treatment Center for nearly all of his adult life. On February 24, 1966, when Healey was 17 years old, he was convicted of one count of indecent assault and battery on a child under 14 years of age, and one count of assault and battery by means of a dangerous weapon. In lieu of a criminal sentence, he was civilly committed

to the Treatment Center for a period of one-day to life. SF ¶ 2. Ten years later, in August 1976, he was released into the community. In December 1977, after he was arrested for sexually abusing a boy, Healey was returned to the Treatment Center. Id. ¶ 3. Healey was subsequently convicted of one count of carnal abuse on a child under 14, and two counts of indecent assault and battery on a child under the age of 14. Id. ¶ 4. Healey completed his criminal sentences on March 15, 1997, but has remained civilly committed at the Treatment Center since that time. Id. ¶ 6.

Since 1968, Healey has filed many unsuccessful section 9 petitions for discharge from the Treatment Center. See SF ¶ 7. Healey currently suffers from asthma, a heart condition, and diabetes, and has been diagnosed with pedophilia, bipolar disorder, and depression. He has borderline intellectual functioning with an IQ of 78.

2. Given

Plaintiff Edward Given has been confined at the Treatment Center since November 2000. See SF ¶¶ 12-13. In 1983, Given was convicted of indecent assault and battery on a child under the age of 14, and sentenced to one year in a house of correction, with probation and conditions. In 1991, Given was convicted of raping a child under the age of 16, indecent assault and battery on a child under the age of 14, indecent assault and battery on a

mentally retarded person, and unnatural rape of a child under the age of 16. Id. ¶ 11. He received a sentence of 9 to 12 years at MCI-Cedar Junction. Id.

Given completed his criminal sentence on November 13, 2000, and was temporarily committed to the Treatment Center pending the District Attorney's petition to commit him pursuant to Chapter 123A. Id. ¶¶ 12-13. On July 12, 2001, Given was civilly committed to the Treatment Center. Id. ¶ 14. Since that time, Given has filed three separate section 9 petitions. On each occasion, a jury found that Given remained sexually dangerous. Id. ¶ 15. Given has been diagnosed with pedophilia, bipolar disorder, and depression.

3. Treatment Provided to Plaintiffs

Both plaintiffs have received sex offender treatment at the Treatment Center, which primarily has consisted of cognitive behavioral therapy group sessions. They have also taken numerous psychoeducational classes. They participated in community-building activities when they were available prior to 2002, including Family Day, holiday parties, and barbeques. Healey was also involved in the whist, bridge, and stamp clubs, before they were terminated. Healey has also taken part in specialty groups, such as anger management, behavioral therapy, and drama therapy.

Over the years they have been civilly committed, both plaintiffs have skipped group therapy meetings and

psychoeducational classes for a variety of reasons. Healey stopped participating in treatment at times because he felt cognitive behavioral therapy was not working, he felt he did not need treatment anymore, and his lawyer advised him to drop out of treatment. (Healey, II-2, 31-34). Healey has also disrupted treatment activities on occasion, including screaming at therapists during primary group sessions and unit meetings. (Orlandi, I-10, 70). Given, at times, has chosen not to participate in treatment so he could work on his legal cases and attend his Treatment Center job. (Given, II-2, 141; I-4, 57).

B. The Providers of Treatment

1. Justice Resource Institute

From 1992 to June 2002, mental health and sex offender treatment at the Treatment Center was provided by the Justice Resource Institute ("JRI"), first pursuant to a contract with the Department of Mental Health and subsequently through contracts with the DOC. SF ¶ 23. In late 2001, the relationship between the DOC and JRI deteriorated. Dr. Barbara Schwartz, JRI's clinical director at the Treatment Center since 1992, had become highly critical of what she believed was DOC's lack of commitment to JRI's treatment program. In a letter to her supervisor dated November 11, 2001, Dr. Schwartz wrote: "I can no longer tolerate the way that DOC has been treating us. I would never have come to Massachusetts if I had felt that my job was to keep people in

prison. My life's work has been to rehabilitate sex offenders, not incarcerate them . . ."

When JRI managed sex offender treatment at the Treatment Center, it instituted a relapse prevention model focusing on the following treatment modalities: cognitive behavioral therapy, behavioral therapy, psychoeducational classes, experiential therapy, and community-building activities. (Schwartz, I-2). Cognitive behavioral therapy is a form of talk therapy where therapists help residents identify mental distortions they may have, and then assist in changing their behaviors. (Saleh, I-6). Cognitive behavioral therapy consisted of primary groups and speciality groups. Primary groups of approximately 10 residents and two therapists met twice per week for one and a half hours. Speciality groups were created on an as-needed basis to assist residents with specific issues, such as alcohol or sex addiction. (Schwartz, I-2).

Behavioral therapy attempted to correct maladaptive behaviors through the use of interventions. One example is olfactory aversion therapy, where residents have to break open and smell a noxious ammonia capsule whenever they have deviant sexual thoughts. (Saleh, I-6). Under JRI, the Treatment Center offered approximately 15 to 20 classes in a 12-week period, on a variety of issues related to sex offender treatment from anger management to human sexuality.

Experiential therapy, including art, music, and drama, expanded upon what the residents learn from cognitive behavioral therapy, and was often utilized within primary groups.

Community-building activities were designed to help residents develop appropriate social skills and allow them to interact with each other, their families, and treatment staff in a social setting. These activities included monthly unit parties; holiday parties for Christmas and New Year's Day; barbeques on Memorial Day, the 4th of July, and Labor Day; recreational clubs such as whist, bridge, and stamp collecting; and Family Day, where residents would come together in the visiting room and socialize with family members and treatment staff. (Schwartz, I-2; Healey, I-3). In the final years of JRI's tenure at the Treatment Center, the number of community-building activities decreased, and the activities themselves became increasingly restrictive. For example, residents were no longer allowed to order food from outside the Center during social events. (Schwartz, I-2).

Between 1992 and 1995, JRI had contracts to provide both sex offender therapy and medical services at the Treatment Center. During this time, psychiatrists prescribed eligible residents certain drugs (i.e., SSRIs)[4] to address intrusive deviant sexual

[4] SSRIs, or selective serotonin reuptake inhibitors, are anti-depressants used to decrease an individual's paraphilic symptoms.

fantasies and obsessive-compulsive focus on deviant sexual activities. (Schwartz, I-2, 62-63). In 1995, JRI turned over maintenance of the Treatment Center's medical services to Correctional Medical Services ("CMS"). CMS continued to provide psychopharmacological treatment, until it was terminated sometime during the tenure of then-Superintendent Robert Murphy. (Schwartz, I-2). JRI staff spoke with Superintendent Murphy about the possibility of providing anti-androgen therapy[5] at the Treatment Center, but he told them that JRI's contract did not have a pharmacological component, and the Treatment Center had no psychiatrist on staff to prescribe anti-androgens. (Murphy, I-4).

2. The New Treatment Provider, FHS

In 2002, JRI and DOC parted ways, and DOC awarded a new contract to Forensic Health Services, Inc. ("FHS") for comprehensive assessment, treatment and release preparation services to sex offenders. SF ¶ 26. FHS has operated the Treatment Center's sex offender treatment program since then. In 2008, FHS was acquired by MHM Correctional Services, Inc. ("MHM"). Id. ¶ 27. Its current contract with DOC runs from July 1, 2011 to June 30, 2014, with three two-year renewal options. Id. ¶ 29. MHM was also awarded DOC's contract to provide

[5] Anti-androgens, also known as hormonal therapy or chemical castration, decrease a man's testosterone level to help him control his deviant sexual urges.

comprehensive mental health services to its facilities, including the Treatment Center. Its latest contract runs from July 1, 2007 to June 30, 2012, with additional renewal options. Id. ¶¶ 30-31.

When FHS took over the treatment program from JRI in 2002, it continued to follow a relapse prevention model, using cognitive behavioral therapy through primary and specialty groups, behavioral therapy, and psychoeducational classes. Community-building activities, for the most part, ceased to exist soon after FHS took charge. Family Day, holiday parties, barbeques, unit parties, and many recreational clubs were all terminated. (Healey, I-3; Given, I-4). The number of psychoeducational classes was also reduced significantly from those offered by JRI. (Healey, II-1); Ex. 569 at 2 (list comparing psychoeducational class offerings by JRI and FHS). Furthermore, certain experiential therapies like drama therapy were phased out because FHS staff believe that they had not been shown to reduce recidivism among sex offenders. (Peltzman, II-3).

After Judge Mazzone lifted the consent decrees in June 1999, the conditions at the Treatment Center became harsher. (Healey, I-3, 42-43; Schwartz, I-2, 55; Given, I-4, 21). One reason for the more restrictive conditions has been the DOC's response to the Durfee v. Maloney decision in 2001, ruling that civilly committed residents and criminal inmates must be kept "separate

and apart . . . at all times." The DOC ended up cutting each group's time within the common facilities in half, including visitation time and access to classes, the library, gym, and exercise yard. See Ex. 322 at 15; Ex. 323 at 14; (Pentlarge, I-2, 115-16). Plaintiffs have made challenges to a variety of their changed conditions of confinement in this litigation.

3. The new "good lives" model of sex offender treatment

FHS's latest contract with the Treatment Center began in July 2011. Under this new contract, it has changed its sex offender treatment from a "relapse prevention" model of cognitive behavioral therapy to a "good lives" model, delivered in the context of a therapeutic community, a living arrangement in which a group of individuals are housed together for therapeutic purposes. (Peltzman, II-2). Based on the literature of Dr. W.L. Marshall, a leading academic in the field of sex offender treatment, the "good lives" model moves away from identifying areas that a sex offender should avoid and areas of weaknesses to identifying their strengths and skills that will help them make progress in treatment. (Peltzman, II-2).

The "good lives" model is based on three principles: risk, needs, and responsivity. First, treatment providers determine the level of risk of each resident. This includes both a resident's static risk (that is, the risk that cannot change), and dynamic risk, risk that can change. To assess dynamic risk

in residents at the Treatment Center, FHS staff use the STABLE-2007 list of 13 dynamic risk factors. Second, based on the level of risk, treatment providers identify the individual treatment needs for each resident. Third, to determine "responsivity," treatment providers analyze the individual treatment needs based on the strengths and weaknesses of each resident, including learning styles, disabilities, and academic background. (Peltzman, II-2).

FHS developed the sex offender treatment program, including the content of psychoeducational courses, based on considerable research in the field. (Peltzman, II-3, 52, 117; I-10, 41; I-9, 85-86). Both CAB Chairperson Niklos Tomich, Psy.D., and FHS Director of Assessments Brooke Peltzman, Psy.D., were part of the committee that created and implemented the new "good lives" model of treatment. Tomich has more than 20 years of experience treating sex offenders, was appointed to Massachusetts' Sex Offender Registry Board, and is a member of several professional organizations including the Association for the Treatment of Sexual Abusers ("ATSA"). (Tomich, I-7, 130, 142). Peltzman is a licensed clinical psychologist, who began working with sex offenders in 2004. She is a member of ATSA and has been employed by the Treatment Center since 2007. (Peltzman, II-2, 190, 194). When developing the new model of treatment, Tomich and Peltzman evaluated other state and federal programs, consulted ATSA

professional standards, and spoke with experts in the field of sex offender assessment programming, risk, and treatment of sex offenders with special needs. (Peltzman, II-2, 193-96, 210, 212-16, 226; Tomich, II-5, 150).

In order to provide this new type of sex offender treatment, in November 2011, FHS staff began a process of assessing all residents at the Treatment Center. FHS staff divided the housing units into three categories: Therapeutic Communities, Assessment Treatment Preparation Units ("ATPU"), and units for residents who refuse treatment. Residents who were motivated and ready to embrace the new model were directly placed in Therapeutic Communities units. Residents who required a more detailed evaluation to determine whether they were prepared for the new model were placed in ATPU units. (Peltzman, II-2). By January 2012, only 11 out of 96 residents in the ATPU units had complete evaluations. (Peltzman, II-3, 37).

Healey was placed in an ATPU unit; Given was placed in a Therapeutic Communities unit.

Under the new "good lives" model, the Treatment Center is utilizing a similar model for treatment as before: primary groups, specialty groups, and psychoeducational classes. It is unclear whether courses taken under the old model will be taken into consideration when considering a resident's progress. Psychoeducational classes have been retooled to focus on how

residents can address the 13 dynamic risk factors of the STABLE-2007 list. Many social and community activities, which were discarded when FHS first took over sex offender treatment, are being reinstated. In fact, Treatment Center staff asked residents to create lists of what activities and social gatherings they would like to see, and 77 percent of their requests were approved. (Peltzman, II-3, 55). Treatment Center staff is also working to create more incentives and privileges for residents who engage in treatment. Currently, the housing units for residents who take part in treatment have their own refrigerator, microwave, washer and dryer, while the units for residents who refuse treatment do not. (Corsini, II-1, View).

V. LEGAL STANDARDS

A. Legal Standards Under the Constitution

Plaintiffs Healey and Given seek a permanent injunction and declaratory judgment to address numerous alleged violations of the Amended Management Plan and U.S. Constitution regarding their conditions of confinement at the Treatment Center.

The Supreme Court has held that constitutional challenges to the conditions of civilly committed sexually dangerous persons are governed by the Due Process Clause of the Fourteenth Amendment.[6] Seling v. Young, 531 U.S. 250, 265 (2001)(discussing

[6] Healey also asserts an Eighth Amendment claim but the First Circuit has held that "protection of civilly committed persons rests on due process concepts rather than the Eighth Amendment."

Washington state civil commitment statute for sexually violent predators). "[D]ue process requires that the conditions and duration of confinement under the [commitment statute] bear some reasonable relation to the purpose for which persons are committed." Id.; see Battista v. Clarke, 645 F.3d 449, 452-53 (1st Cir. 2011)(applying due process analysis to claim of civilly committed sex offender). Civilly detained persons "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Youngberg v. Romeo, 457 U.S. 307, 324 (1982); cf. Block v. Rutherford, 468 U.S. 576, 583 (1984) (in a case involving pretrial detainees, holding "dispositive inquiry is whether the challenged condition, practice, or policy constitutes punishment.").

The Supreme Court has recognized that "potentially indefinite" incapacitation of the dangerously mentally ill may be a legitimate purpose of a civil commitment law where individuals have untreatable conditions. Kansas v. Hendricks, 521 U.S. 346, 364-65 (1997)(emphasizing, though, that annual review proceedings

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Battista v. Clarke, 645 F.3d 449, 452 (1st Cir. 2011). Therefore, the court will analyze his claim under the 14th Amendment, and dismiss his Eighth Amendment claim. See, e.g., Fournier v. Corzine, 2007 U.S. Dist. LEXIS 54110, *4-5 n.2 (D.N.J. July 26, 2007)("Because Plaintiffs are civilly committed persons and not convicted prisoners, the Eighth Amendment is not applicable to them. Therefore, all claims asserting an Eighth Amendment violation will be dismissed accordingly.").

provide a procedural safeguard to ensure that commitment is only "potentially indefinite"). However, "the confinement's duration [must be] linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." Id. at 363.

When analyzing whether DOC policies at the Treatment Center violate the Constitution, the Supreme Court recognizes that "prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 539, 548 (1979). The First Circuit has noted that "an unsafe environment would be one in which the ability to deliver effective therapeutic services would be drastically reduced." Langton v. Johnston, 928 F.2d 1206, 1220 n.17 (1st Cir. 1991); see also id. at 1216 ("Because every patient [at the Treatment Center] is a convicted sex offender, and a majority of them have some kind of mental deficiency, the [DOC faces] legitimate security concerns"); Cameron v. Tomes, 990 F.2d 14, 21 (1st Cir. 1993)("In matters of security, as opposed to administrative convenience, the administrators' discretion is at its zenith . . ").

"States enjoy wide latitude in developing treatment regimens." Hendricks, 521 U.S. at 368. However, "a treatment

program that amounts to no treatment at all or departs substantially from generally acceptable standards of treatment cannot be reasonable related to the State's asserted interest in providing [residents] with treatment and rehabilitation." Healey v. Murphy, 2007 U.S. Dist. LEXIS 100060, at *57 (D. Mass. Nov. 14, 2007). In assessing a challenge to inadequate treatment by a civilly committed sex offender, the courts must determine "whether the defendant failed to exercise a reasonable professional judgment." Battista, 645 F.3d at 452. While decisions made by professionals are presumptively valid, liability may be imposed when a decision involves a substantial departure from accepted professional judgment, practice, or standards. See Youngberg, 457 U.S. at 323; see also Allen v. Illinois, 478 U.S. 364, 373 (1986)(stating that if "the confinement of [civilly committed sex offenders] imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care," petitioner could have valid claim challenging conditions of confinement); West v. Schwebke, 333 F.3d 745, 748 (7th Cir. 2003) (due process requires that treatment decisions be based on professional judgment); Fournier v. Corzine, 2007 U.S. Dist. LEXIS 54110, at *31-32 (D.N.J. 2007)("The Fourteenth Amendment Due Process Clause requires state officials to provide civilly committed persons, such as [persons committed pursuant to sexually dangerous persons

statutes], with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined.").

Under Chapter 123A, residents are committed to the Treatment Center for the purpose of "care, custody, treatment and rehabilitation." Mass. Gen. Laws ch. 123A, § 2. Therefore, to prevail on their constitutional claims, plaintiffs must prove that the conditions at the Center are not reasonably related to the care, custody, treatment and rehabilitation of the residents.

B. The Plan

Healey also alleges that the DOC defendants have violated the Amended Management Plan. (Healey, Count I). The Plan imposes higher standards than required by the Constitution. See Langton, 928 F.2d at 1217-18 ("Least restrictive conditions of confinement" standard found in the Plan sets "a higher standard than the Constitution."). In earlier proceedings, Judge Gertner determined that the Plan constitutes an enforceable court order. See Doc. No. 275 at 37 ("Because the District Court incorporated the Plan into its ruling on the motion to terminate the consent decrees, the Plan remains enforceable.")(Gertner, J., adopting report and recommendation of Dein, J.); see also id. at 36-37 ("[T]he Plan 'is an enforceable operating document [and] residents may bring an action to enforce the terms of the existing Plan.'")(quoting King IV, 53 F. Supp. 2d at 137).

Although defendants press their objection to this prior ruling, this is the law of the case.

While Judge Mazzone referred to the Plan as the "governing document[] for the Treatment Center," King IV, 53 F. Supp. 2d at 122, the Plan provides for a certain amount of operational discretion to take into account the changing environment of sex offender treatment in Massachusetts. See Ex. 1 at 48. Defendants request the Court take into account this flexibility when determining whether they have violated specific provisions of the Plan. Specifically, they request the Court consider two events at the Treatment Center that have significantly affected operation since the 1996 Plan was adopted: the reinstatement of civil commitments in September 1999 and the Massachusetts Superior Court's ruling in 2001 which entered a declaratory judgment that the state statute required residents and criminal inmates at the Treatment Center be held "separate and apart" at all times (although the court declined to issue an injunction). See Durfee v. Maloney, 2001 WL 810385, at *15.

These events have resulted in an increase in population of residents and a decrease in time and space in which they can participate in activities. For example, because they can no longer share common facilities--such as the dining hall, library, gym, and classrooms–-with criminal inmates, the time residents are able to use these facilities has essentially been cut in

half. Moreover, while only 177 residents were housed at the Treatment Center when the consent decrees were terminated in June 1999, see King IV, 53 F. Supp. 2d at 125, as of October 2011, the Treatment Center housed 245 residents and 81 individuals pending resolution of their commitment petitions. Defendants contend that the Plan was premised on the assumption that the resident population would gradually decline as they are released pursuant to section 9 proceedings or die because new civil commitments had been abolished in 1990. Id. at 122, 125.

Plaintiffs counter that the DOC must follow the Plan regardless of these changes. They argue that it was the DOC's own decision to respond to the "separate and apart" policy by keeping criminal inmates at the Treatment Center and divide the residents' time in common facilities in half. They contend that the DOC could have sought funding to build another prison for criminal inmates, built addition facilities at the Treatment Center, or moved criminal inmates to other prisons that offer sex offender treatment, such as Norfolk and Gardner. See (Maloney, I-5, 140-42; Murphy, I-5, 15-16); Ex. 592, at 46-47.

VI. THE CLAIMS

A. Pharmacological Treatment

Plaintiffs contend that defendants have failed to provide adequate pharmacological treatment in violation of their Fourteenth Amendment due process rights. Healey also claims the

failure to provide pharmacological treatment violates the Plan. The Plan requires the Treatment Center to provide "the best current treatment methodology." Ex. 1 at 4.

Unlike its predecessor sex offender treatment provider, JRI, FHS has never provided psychopharmacological treatment, whether SSRIs or anti-androgens, to treat paraphilic disorders. FHS's contract to provide sex offender treatment at the Center does not contain a pharmacological component, and FHS does not have a psychiatrist on staff or anyone else qualified to prescribe drug therapies. (Lyman, I-8). FHS staff consists primarily of psychologists, therapists, and social workers.

The Treatment Center's contracts with MHM, covering mental health services, and the University of Massachusetts Medical School ("UMass Medical"), covering medical services, do contain a pharmacological component. Specifically, the contracts state: "The contractor shall work cooperatively with the sex offender vendor [FHS] and the Community Access Board . . . to evaluate referrals for . . . psychopharmacological treatments for deviant sexual behavior. All referrals shall be responded to with a detailed written report." Ex. 7-A (Sec. 8.3.18). Information regarding pharmacological treatment has not been made available to residents, no resident has been evaluated to receive drug therapies, and MHM and UMass Medical have not prescribed any at the Treatment Center. (Corsini, I-5; Spencer, I-6; Murphy, I-4).

Moreover, no one at FHS has made a referral to MHM or UMass Medical to evaluate a resident for pharmacological treatment, and no FHS staff member is even qualified to make such a referral. (Lyman I-8; Spencer, I-6).

In January 2012, just days before the second trial commenced in this case, DOC and MHM staff met for the first time to develop protocols to provide pharmacological treatment to residents at the Treatment Center. Lawrence Weiner, Assistant Deputy Commissioner of Clinical Services for the DOC, consulted with Niklos Tomich, Chairperson of the Community Access Board, Joe Andrade, Director of Clinical Programs for MHM, and Robert Deiner, Psychiatric Director for MHM, to create the protocols. (Weiner, II-6). At trial, DOC and MHM staff testified that they planned to institute the protocols as soon as possible, and hoped to fully roll out the new pharmacological treatment program by the end of February 2012. Treatment Center staff also said they plan to inform residents of the protocols through postings in housing units and speaking to residents directly at community meetings. (Weiner, II-6). However, at oral argument on March 1, 2012, DOC counsel informed the court that the protocols had not been finalized. The court has received no supplementation with respect to the protocols.

The plaintiffs rely on expert testimony from Dr. Fabian Saleh in support of their request for pharmacological treatment

when treating sex offenders. Dr. Saleh, founding director of the Sexual Behaviors Clinic in Worcester, Massachusetts where he treats paraphilic sex offenders, testified that both plaintiffs are candidates for pharmacological treatment. In his view, pharmacological treatment is an accepted practice for psychiatrists to consider together with talk therapy when treating their patients' paraphilic disorders. Patients who suffer from paraphilic disorders have a history of recurrent deviant sexual thoughts, fantasies, or behaviors, causing distress or impairment. (Saleh, I-6, 86, 94-95); Ex. 615 at 46; Ex. 620. Psychiatrists prescribe anti-depressants like Selective Serotonin Reuptake Inhibitors (SSRIs), anti-androgens, and other testosterone-lowering hormone drug therapies to treat some sex offenders "who present with intense sexual urges or cravings for paraphilic activity." (Saleh, I-6, 132). However, the drugs might not work for all patients and can have undesirable side effects. See Ex. 634 at 1. The drugs are especially appropriate for patients who are not receptive or amenable to talk therapy. (Saleh, I-6, 80).

Dr. Saleh's salient point is that the treatment regime offered by the Treatment Center is inconsistent with the requirements of the Plan because it does not reflect the best current treatment methodology in that it does not include a pharmacological component for treatment of paraphilia. It is a

standard best practice for psychiatrists to evaluate each patient individually to determine whether pharmacological treatment would help. According to Saleh, "the success rate is rather high" for treating sex offenders with anti-androgen drug therapy "[i]f you look at success as being [the reduction of] recidivism rates." (Saleh, I-6, 82-83). Because the Treatment Center has not provided any pharmacological treatment to residents, Saleh rendered the opinion that it has not provided sex offender treatment to Given and Healey using the best current methodology (Saleh, I-6).

The DOC has not introduced any expert testimony or literature rebutting Saleh's expert opinion. Indeed, it states it does not oppose having plaintiffs evaluated by a psychiatrist for pharmacological treatment; during trial it actually offered to have plaintiffs evaluated. Defendants recognize the importance of drug therapy in treating paraphilic disorders. Although the provisions have never been utilized, as stated earlier, the Treatment Center's own contracts with mental health and medical services provide for referrals for "psychopharmacological treatments for deviant sexual behavior." Ex. 7-A (Sec. 8.3.18).

Although these drugs are not approved by the Food and Drug

Administration ("FDA") to treat sexual deviancies,[7] the Sex Offender Committee of the American Academy of Psychiatry and the Law ("AAPL") and the Association for the Treatment of Sexual Abusers ("ATSA") both recommend pharmacological drug interventions for some sex offenders as a best practice for psychiatrists when treating their patients' paraphilic disorders. Ex. 615 at 46; Ex. 619; (Saleh, I-6, 86).

This form of drug therapy is a treatment option utilized by the Federal Bureau of Prison's ("BOP") Sex Offender Treatment Program at FCI Butner, North Carolina. Ex. 634 at 1. The BOP established protocols for providing pharmacological treatment to sex offenders in October 2005, after it found that "[p]harmacotherapy of sexual offenders has been shown to be at least partially effective in reducing relapse in some men diagnosed with paraphilias." Id.; see also United States Sentencing Commission, Federal Child Pornography Offenses 280-81 (2012)(stating that professional treatment for sex offenders may include prescribing SSRIs and anti-androgenic medication). The federal protocols establish an eight-step process when administering drug therapy: (1) patient selection, (2) evaluation, (3) medication selection, (4) informed consent, (5)

[7] Although drug companies are prohibited from marketing drugs for "off-label" uses not approved by the FDA, doctors are allowed to prescribe drugs off-label. See In re Neurontin Mktg. & Sale Practices Litig., 244 F.R.D. 89, 92 (D. Mass. 2007).

Central Office approval, (6) institution of treatment, (7) monitoring during treatment, and (8) release planning. Id. at 2. As part of the evaluation process, all individuals must undergo a thorough psychiatric evaluation, and a psychiatrist determines whether an individual is eligible for pharmacological treatment. Id. at 3-4.

Both Healey and Given testified they have made requests to their treatment providers and DOC staff to be evaluated for pharmacological treatment. Healey testified he made a request to his psychiatrist Dr. Bauermeister in the mid-1990s (Healey, II-1, 140). Although Healey has not generally been a credible reporter of events, his therapist Angela Orlandi confirmed that Healey also discussed pharmacological treatment with her in October 2010. (Orlandi, I-10, 71). In December 2011, Healey wrote a letter to Mental Health Director Tiana Bennett asking to be evaluated for pharmacological therapy. Ex. 604.

Given says he made a request for drug therapy to then-clinical director Dr. Rodrigues around 2004. (Given, I-4, 75-78). He also made requests to his therapist Iris Hailey and the current clinical director Noi Prete in 2011. (Given, II-2, 124-25). Treatment Center staff never referred their requests to medical staff, and instead informed Healey and Given that pharmacological treatment was not available. (Orlandi, I-10, 73-74; Healey, II-1, I-3; Given, II-2, 125). Indeed, since FHS has

taken control of treatment, no resident has been evaluated to determine whether he would be an appropriate candidate for drug therapy. (Murphy, I-4, 121; Corsini, I-5, 158).

Both plaintiffs want pharmacological treatment to help them address their pedophilia. Dr. Saleh interviewed them both briefly at the Treatment Center and reviewed their records. (Saleh, I-6, 63). Healey wants to be evaluated for drug therapies because he has been doing cognitive behavioral therapy for 48 years, and it hasn't worked. (Healey, II-1). Dr. Saleh opined that it is useless to continue providing only cognitive behavioral therapy when it has failed for such a long time. (Saleh, I-6). Saleh states that Healey's multiple mental illnesses––Attention Deficit Hyperactivity Disorder, limited cognition, Schizoaffective disorder, bipolar disorder, depression, and Klinefelter's syndrome––are a main reason why cognitive behavioral therapy has failed, and why pharmacological treatment is needed.[8] (Saleh, I-6, 68-69). Based on the court's observations of Healey at trial and hearing his testimony, I agree that he has significant cognitive limitations and continuing sexual deviant thoughts.

Regarding Given, Saleh testified that his diagnosis of

[8] Defendants claim that Healey lacks standing to challenge the lack of pharmacological treatment. However, Healey has standing because he is seeking drug therapy which Dr. Saleh says he is suitable for.

pedophilia suggests the need for pharmacotherapy because cognitive behavioral therapy treatment has been ineffective for ten years. (Saleh, I-6). Saleh adds that even though Given may sometimes deny having sexual deviant thoughts, he would still recommend Given for pharmacological treatment. Saleh looks at "the totality of the data," and "if the data at [his] disposition suggests that the person presents with a paraphilic disorder, that they have offended in the context of the paraphilic disorder, they may not be symptomatic at this point in time for a number of different reasons, [he] still may make [a] recommendation" for pharmacotherapy. (Saleh, I-6, 142:13-19).

Certain DOC and FHS staff have expressed reservations about providing medication to treat residents' paraphilic disorders. Their main concern appears to be that residents may take the drug therapies to reduce their sexual deviant behavior while detained at the Treatment Center, leading to release into the community under the section 9 process. At that point, when they are released from the Treatment Center, defendants worry residents may stop taking the medication, causing them to relapse and commit new sexual offenses against children. (Corsini, II-3; Tomich, II-4). This concern is understandable because the state's civil commitment release process for residents does not provide for any supervised release where probation or parole officers can monitor pharmacological treatment after a resident

is released from custody. Compare Mass. Gen. Laws ch. 123A, with 18 U.S.C. § 3583(k) & U.S.S.G. § 5D1.2(b)(recommending lifetime term of supervised release for all individuals convicted of federal sex offenses); see also United States Sentencing Commission, Federal Child Pornography Offenses 283 (2012)("It is widely accepted among treatment providers that prison treatment will be more effective if it is followed by community-based containment services, including supervision, treatment, and polygraph testing")(internal quotations omitted). As will be seen below, the section 9 process has been the sole means of releasing residents into the community because no residents have been released under the supervision of the community access program. Defendants argue that there is no need to use pharmacological treatment to control behavior while the person is within the secure confines of the Treatment Center. This argument misses the point. The provision of adequate psychopharmacological treatment may well result in more residents being eligible for acceptance into the Community Transition House and community access program, as required by the Plan and state statute. See infra pp. 46-48. If so, residents may be monitored when released during the community access program to ensure they continue to take the drugs.

The Court concludes that defendants' failure to evaluate Healey and Given for pharmacological treatment using

professionally acceptable standards violates the Plan because plaintiffs are not being provided "the best current treatment methodology." Ex. 1 at 4. Defendants also violate the Due Process Clause of the Fourteenth Amendment because they have failed to exercise a reasonable professional judgment by not providing psychological evaluations to determine whether drug therapy is appropriate.

B. The Community Access Program and Community Transition House

1. The Community Access Program

Plaintiffs argue that defendants have violated the Constitution, the Plan and state law by failing to provide a functioning community access program. They also contend that the Treatment Center has not provided adequate access to the Community Transition House ("CTH"), a lower-security housing area which is the first step in achieving acceptance into the community access program.

The civil commitment statute expressly requires the establishment of a community access program "that provides for a person's reintegration into the community." Mass. Gen. Laws ch. 123A § 1; see id. § 6A. In the King litigation, the district court stated that "[a] community access program is indispensable in a treatment program." King IV, 53 F. Supp. 2d at 132. At the time of the consent decree litigation, both the First Circuit and the district court determined that the community access program

was acceptable. At that time, however, residents raised concerns that there were only 12 men in the CTH and participants in the program had shrunk from 56 in 1988 to two in 1997. See King, 149 F.3d 9, 16 (1st Cir. 1998). The First Circuit stated that "at this juncture . . . [t]his does not . . . point to any obvious constitutional failure. Further adjudication will have to await events." Id. at 17. Judge Mazzone added that the community access program "needs attention in such a way as to encourage and facilitate greater participation in the program so that residents receive the benefit of the program before being released to the public." King IV, 53 F. Supp. 2d at 135-36. Since 1998, the program has had zero participants.

a. The Plan[9]

The Amended Management Plan requires a "system of differing levels of security and privileges in order that residents can be

[9] Although Judge Mazzone's order held that the Plan was the Treatment Center's governing document, since 1999, DOC has considered another policy, titled "Transition Program," to be the operating document for purposes of the community access program. (Murphy, I-4, 86-88); Ex. 325, App. 20; Ex. 27A. This Transition Program was submitted to the Massachusetts Legislature in December 1999 in response to Mass. Gen. Laws ch. 123A § 16, which states that "[t]he treatment center shall submit on or before December 12, 1999 its plan for the administration and management of the treatment center to [the legislature]." While the two policies are similar, the Transition Program is 30 pages shorter than the policy in the Amended Management Plan and does not include the detailed description of available programs and reintegration release activities. Compare Ex. 1, App. 16 at 17-35, with Ex. 27A. The Court considers the Amended Management Plan to be the legally operative document.

maintained in the 'least restrictive conditions' of confinement." Ex. 1 at 6. It establishes a three-level privilege system "to differentiate among levels of programmatic involvement and reward success in meeting program treatment and behavioral goals." Id. at 34. As the final step of the system of differing levels of privilege, the Plan calls for "a properly structured community access program [to] serve as the final source of data collection for those ultimately making discharge recommendations." Id. at 44. Thus, "the community access program must be multi-level, with independent evaluations and assessment at each and every stage of progress . . . to serve the treatment needs of residents and to provide for the safety of the community." Id. Once accepted, residents can participate in a variety of release activities in the community, including therapeutic services, vocational and education classes, employment opportunities, health services, religious services, legal visits, and purchasing items/services necessary for participation in education or employment programs (getting hair cuts, shopping for clothes, purchasing a car, getting a driver's license, etc.). Id. App. 16 at 22-27. To be eligible for the community access program, a resident has to be subject to a civil commitment only with no remaining criminal sentences pending in any jurisdiction. Id. App. 16 at 5.

To apply, an eligible resident files an application with his

treatment team. The Unit Director then assigns the resident to a Transition Group of staff and group members, who help him develop his own Transition Plan. Id. App. 16 at 7. The Transition Plan must address the following five areas: (1) vocation or education, (2) community support, (3) outpatient treatment, (4) family access, and (5) relapse prevention. Id. App. 16 at 5-7. After completing the Transition Plan, the resident presents it first to his primary group for feedback, and then to his treatment team for approval. Id. App. 16 at 7-8. If the application is denied by the treatment team, the resident may modify it or appeal the decision to the program administrative team. Id. App. 16 at 8. If the treatment team approves the application, it is forwarded to a classification review committee, and if approved by them, is forwarded to the CAB. Id. App. 16 at 8-9. If approved by the CAB, the application is sent to the Superintendent, along with a report signed by the CAB explaining its decision. The Superintendent issues a written decision, and forwards it to the Assistant Deputy Commissioner of the Bridgewater Complex for final approval. Id. App. 16 at 9-10. According to the Plan, the entire process should take less than seven months in total. Id. App. 16 at 11.

Under the Plan, the resident begins his community access program once he is transferred to the CTH. Id. App. 16 at 13. Residents apply separately to the CTH. CTH applications are

presented to the Biannual Review of Treatment ("BART") Board--comprising of the Program Director, Clinical Director, and representatives of Rehabilitation and Health Services--for approval, and then forwarded to the Superintendent for final approval. Id. at 16; see also infra pp. 53-54. The house has two security levels, minimum security and pre-release. Eligibility to move to pre-release status is based on completing required programming, assessment from CTH staff, and absence of any major incident reports.

The community access program has four phases: (I) orientation: minimum security, (II) transition: pre-release, (III) integration: pre-release, and (IV) reintegration: pre-release. Id. App. 16 at 14-17. Phase I should last for at least six months, and consists of the regular programming for residents of the transition house. After the first two months of Phase I, residents are permitted to leave the Treatment Center and participate in release activities. Id. App. 16 at 14. In Phase II, lasting at least three months, residents are allowed more time away from the CTH, with longer releases and more variety of activities, including work assignments outside of the Treatment Center. Id. App. 16 at 15. In Phase III, lasting at least another three months, the resident will have completed all in-house programming and may be employed full-time outside of the Treatment Center, or in an education or vocational program. Id.

App. 16 at 16. Finally, in Phase IV, also lasting at least three months, the resident executes his plan for permanent reintegration into the community, including outpatient therapy, living accommodations, employment, and transportation. Id. App. 16 at 17.

b. DOC's Implementation of the Plan

Former DOC Commissioner Kathleen Dennehy recognized that the DOC is required to provide a community access program at the Treatment Center and considered it an integral part of the Plan. (Dennehy, Ex. 585, at 67, 71). Current Commissioner Luis Spencer adds that the program is "important to the rehabilitation process." (Spencer, I-6, 50).

When JRI was providing sex offender treatment from 1992 to 2002, the community access program was functional for a short time. As part of the program, a few residents were permitted to leave the facility to go on shopping trips and attend alcohol and sexual treatment programs. (Schwartz, I-2, 57); Connolly, Ex. 584 at 118; Ex. 553 at 3-4. However, near the end of JRI's tenure, residents who were applying for the program stopped being approved. (Schwartz, I-2, 58-59). By 1997, only two residents were participating in the program; one was released in February 1998 and the other was suspended from the program in February 1997 after Treatment Center staff received information that a previously unknown victim reported that the resident had sexually

assaulted the victim as a child. Ex. 553 at 4. Since then, no resident has participated in the program. Exs. 553, 554; (Lyman II-5, 7-8).

When FHS took charge of sex offender treatment in 2002, its contract with the DOC confirmed that FHS would develop a program to meet the legally-required need to provide community access to residents. However, the community access program has been nonexistent since FHS took over. No one has participated in the program, and the CAB has not received a single application to review. Ex. 343 at 5-6; (Tomich, I-7, 146). Within the past year, three residents have begun the process of completing applications to the community access program, but Treatment Center staff acknowledge that they likely will be released before their applications are approved. (Lyman, I-8, 77; II-5, 48-50). In January 2009, then-Superintendent Murphy issued a memo to the DOC confirming that while the community access program "will remain in effect at this time . . . [it] is currently being reviewed and significant language changes are anticipated." Ex. 27A at 1. However, to date, no changes have been made to the policy. (Murphy, I-4, 106; Corsini, II-4, 123).

2. The Community Transition House (CTH)

The CTH is a lower-security housing area for residents who have progressed in their treatment. The goal of the placement is to help transition them into a residential environment closer to

eventual release into the community. In contrast to the Treatment Center, which feels and looks like a stark, sterile, medium-security prison, inside, the CTH feels and looks like a residential house. However, outside, it is surrounded by a barbed-wire fence and is confined within the Treatment Center's border security fence.

Residents are eligible for the CTH if they "are not deemed a security risk by the Director of Security" and "have completed a substantial percentage of their treatment goals, as determined by the Clinical Director in consultation with the residents' treatment teams." Ex. 1 at 16.

Residents in the CTH have more privileges than those within the facility. The common room contains a flat-screen television, a stereo system, and bookshelves with therapeutic and entertainment books. The CTH also has a computer lab, consisting of three computers for word processing and a printer. CTH residents have access to a vegetable and flower garden and gym equipment in the basement. They have the option of eating meals within the facility or at the house, where the kitchen includes a refrigerator, freezer, electric stove, microwave, and toaster. In addition to ordering food from the staff canteen, they can purchase various items, including food and clothes, from outside the facility.

Residents must continue to undergo sex offender treatment

while residing at the CTH, which includes special intensive programming at the CTH itself in addition to continued participation in treatment at the facility. Security staff is also present at the CTH at all times, and all CTH windows have metal bars on them. Residents at the CTH may be moved back into the facility for failing to continue treatment or for security or behavioral infractions.

In order to get into the CTH, a resident must first complete an application and submit it to his treatment team. See Ex. 613 (CTH application). If approved by the treatment team, the application then must be approved in stages by the Treatment Review Panel and DOC administrators, including final approval by the Superintendent. (Peltzman, II-4, 40-41; Lyman, I-8, 86). There is no formalized appeals process if a resident is denied for placement in the CTH at any step in the process. (Peltzman, II-4, 40-41).

The CTH was officially closed for five years from October 2003 until November 2008 following the escape of a resident. SF ¶ 32. During this time, the DOC made no effort to seek out alternative living arrangements for residents who were qualified to live in the CTH. (Murphy, I-5). The CTH was closed again for three weeks in 2010 because the DOC did not allocate enough money in its budget to maintain the CTH at the end of the fiscal year. (Luongo, I-10, 96).

From November 2008 through the January 2012 trial, only ten men out of approximately 44 eligible residents who applied were accepted to live in the CTH. (Lyman, II-5, 7-8). Moreover, at least three times the Superintendent has denied placement in the CTH, overruling both the resident's treatment team and the Treatment Review Panel. No reason was indicated for these denials. See Ex. 612 at 1-2; (Corsini, II-4, 80-82).

When I visited the Treatment Center in January 2012, only three men were living at the CTH. Regarding the seven others accepted in the CTH, one resident had been returned to the main facility after assaulting an officer, and the other six had been released into the community through the section 9 process. (Lyman, II-5, 9). While the CTH has capacity for 12 residents, it has never had more than five at one time residing in the house. (Lyman, II-4). Yet, FHS staff recognize that if the sex offender program were running "optimally," the CTH would be at full capacity. (Peltzman, II-3, 129). The Plan contemplated an ideal capacity of 18 residents, a goal that has never come close to being realized.

Why has the CTH been so underutilized? FHS staff attribute the CTH's low occupancy rate to two factors. Some residents choose not to apply because they do not want to leave their friends inside the main facility, while others do not want to commit to CTH's intensive treatment program. (Lyman, II-4, 144-

45). Plaintiffs argue that they and other residents do want to reside in the CTH, but the lack of clear prerequisites and a cumbersome application process make it extremely difficult to gain acceptance into the CTH. (Given, II-2, 122).

Defendants have presented no evidence of guidelines outlining what courses residents must complete or any other benchmarks that would make them suitable for the CTH. The most recent evaluations FHS staff have been conducting under the new "good lives" model do not assess whether a resident would be suitable for the CTH. (Peltzman, II-2, 223-24). The only listed reasons that would make residents automatically ineligible for the CTH is if they had a pending criminal sentence or immigration detainer,[10] or if they had received discipline within the past year.

Both plaintiffs have applied to live in the CTH. Given applied in 2008. Although Given was not told of any prerequisites when applying to the CTH, his application was denied by his treatment team because he had not completed his "deviant cycle," a program under the former relapse prevention model. The "deviant cycle" was a time-intensive program where a resident writes about and discusses with his primary group his

[10] An immigration detainer is issued to a state or local prison by U.S. Immigration and Customs Enforcement when the agency is seeking custody of an individual in that facility for purposes of instituting removal proceedings.

recurring patterns of behavior that make him prone to inappropriate and criminal behavior. (Given, I-4, 50-51; II-2, 108). Before completing the assignment, a resident must present his "deviant cycle" to his primary group and treatment team multiple times and make changes based on their feedback. (Given, II-2, 111). Given recently finished his "deviant cycle" task, but, as of the January 2012 trial, had not yet reapplied to the CTH because he had not received the new application form. (Given, II-2, 109, 113).

With the changes under the "good lives" model, completion of the "deviant cycle" is no longer a requirement for the CTH. (Lyman, II-4, 141); (Peltzman, II-3, 122-24). Under the "good lives" model, it is unclear what benchmarks have to be met to get into the CTH. (Id.)

Healey has applied to the CTH many times. In 1996, when JRI managed the sex offender program, Healey lived in the CTH for about one year. (Healey, I-3, 55). He was ordered back to the main facility after he threw a television out of a window. More recently, Healey applied to the CTH in 2009. He was initially approved by his treatment team, but the approval was rescinded about one month later due to behavioral issues. (Orlandi, I-10; Ex. 612). Healey last applied in 2010, and his application was denied. (Healey, I-3, 54, 98-99); (Lyman, I-8, 84).

3. Barriers to Entry into the Community Access Program

One reason why residents have not applied to and have not been admitted in the community access program is that it is easier to be released from the Treatment Center entirely through the section 9 process than be admitted in the community access program. (Tomich, I-7, 148). Some residents have been granted release through the section 9 process while in the process of completing their applications to the program. (Tomich, I-7, 148-49). None of the approximately 50 residents who were adjudicated under the section 9 process to be no longer sexually dangerous from 2008 to June 2011 participated in the community access program while awaiting discharge from the Treatment Center. See Ex. 554 at 2. Therefore, although the community access program is the final step in treatment envisioned by state statute and the Plan, not a single individual has ever successfully completed the sex offender treatment program. As a result, sex offenders are leaving the Treatment Center without any program to help them transition back into society and without any effective supervision to protect society once they are released, contrary to the intent of the Plan and statute.[11]

[11] The federal government and many states have statutes that provide for supervised release for sex offenders after being released from civil commitment. See, e.g., 18 U.S.C. § 3583(k) & U.S.S.G. § 5D1.2(b) (recommending lifetime term of supervised release for all individuals convicted of federal sex offenses); Wisc. Stat. 980.08(4)(cg) (when granting conditional release, permitting court to consider "what arrangements are available to ensure that the person has access to and will participate in necessary treatment, including pharmacological treatment"); Ill.

A major reason why it is so difficult to gain admission into the community access program is the lengthy and difficult application process. A resident begins working on his community access program application only once he has been accepted into the CTH. As seen above, the application process to get into the CTH is itself cumbersome and entry is difficult to achieve because standards for applying are unclear. The process takes a long time, and success is unlikely. Moreover, because the CTH was closed for five years and on subsequent occasions for budget issues, the pipeline to the community access program via the CTH dried to a trickle.

Moreover, once in the CTH, another application process is required. The application requires residents to outline what they would like to do when outside of the facility and where they would like to attend classes or learn a skill or trade. They must also identify an outside treatment provider to attend sex offender therapy. (Lyman, II-5, 20). This process can take up to a year. The three residents who were working on their applications in July 2011 were still working on them during the January 2012, and, at that time, Treatment Center staff expected they needed an additional two and a half months before the

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Comp. Stat. Ann. Ch. 725, § 207/40(b)(5)(F) (stating that released civil committee shall "attend and fully participate in assessment, treatment, and behavior monitoring including, but not limited to, medical psychological or psychiatric treatment specific to sexual offending . . . .").

applications would be approved. (Lyman, II-5, 48). The applications must receive approval at multiple levels, including from the treatment team, treatment provider, CAB, and ultimately, the Superintendent, who has final approval authority. Once they receive the applications, both the CAB and Superintendent have 30 days to review them and respond. (Lyman, II-5, 48).

The last time the CAB received any applications was in 2001. At that time, the CAB received two applications. It denied one and deferred action on the other because the applicant had not secured approval from the treatment provider's reviewing board before he submitted the application to the CAB. See Ex. 343 at 5-6. Neither resident reapplied, and both were found no longer sexually dangerous and released within two years. Id. At trial, CAB Chairperson Niklos Tomich received feedback that residents prefer to seek release through the section 9 process and agreed the application process for the community access program was "tedious" and more difficult for residents than simply waiting to be released through the section 9 process. (Tomich, II-5, 146).

Although DOC and FHS staff recognize the problem of not having a functioning community access program, they have done very little to address the issue. DOC Commissioner Spencer has not enacted any policies or procedures to reinvigorate the program. (Spencer, I-6, 50, 53-54). The DOC has not allocated any staff or funds to supervise residents who may eventually gain

admission to the program, and Superintendent Corsini admitted that the Treatment Center may not even have the resources necessary to implement a community access program. (Corsini, II-4, 121-22; Murphy, I-4, 92). Residents are not provided any written information regarding the program at all. (Peltzman, II-3, 131). Although FHS agreed in its 2002 contract with the DOC to develop a viable community access program, at the January 2012 trial, Director of Assessment Brooke Peltzman conceded that "we're still in the stage of encouraging residents to apply." (Peltzman, II-3, 131); see (Lyman, II-5, 19).

FHS Program Director Kim Lyman was not aware that the Plan permits any treatment staff member to submit a community access program application on a resident's behalf to the Treatment Team for review. (Lyman, I-8, 85); see Ex. 1, App. 16, at 5. However, since FHS took over sex offender treatment, it does not appear that any treatment staff member has ever submitted an application on behalf of a resident. Why have defendants made no serious efforts to implement a community access program? Superintendent Corsini, who has the ultimate say regarding who is accepted into the community access program, admitted he fears that residents placed in the program would reoffend in the community. (Corsini, II-4, 120). The section 9 process shifts this burden from his shoulders to the courts.

4. Standing

As a threshold matter, the DOC contends that Healey and Given do not have standing to challenge inadequacies with the Community Transition House and community access program because they are ineligible to participate. With respect to Healey, they claim his own bad conduct strips him of eligibility. With respect to Given, they claim he has not met the program's requirements. To satisfy the standing requirement under Article III of the Constitution, a plaintiff must assert (1) an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the above injury and a defendant's conduct; and (3) a likelihood that judicial relief will redress the above injury. Libertad v. Welch, 53 F.3d 428, 436 (1st Cir. 1995) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61 (1992)).

Causation requires injury that is "fairly traceable to the challenged action." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013)(internal quotations omitted); see Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 346 (2d Cir. 2009)("[F]or purposes of satisfying Article III's causation requirement, we are concerned with something less than the concept of proximate cause.") (internal citation omitted). The causal chain can be broken where a plaintiff's self-inflicted injury results from his "unreasonable decision . . . to bring about a harm that he knew to be avoidable." St. Pierre v. Dyer, 208 F.3d 394, 403 (2d Cir.

2000); see Clapper, 133 S. Ct. at 1152 (holding plaintiffs do not have standing because their "self-inflicted injuries are not fairly traceable" to allegedly unlawful conduct). However, "[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own injury. . . . Standing is defeated only if it is concluded that the injury is so completely due to the plaintiff's own fault as to break the causal chain." 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3531.5, at 361-62 (3d ed. 2008); see also Gulf States Reorganization Group, Inc. v. Nucor Corp., 466 F.3d 961, 965 (11th Cir. 2006)("[T]he mere fact that the [plaintiff's] own decisions played a role in its [injury] does not obviate the causal connection between the defendants' conduct and the plaintiff's injury.").

Defendants argue that Healey and Given do not have standing because they are not eligible for participation in the CTH and community access program due to their behavior and limited participation in treatment. In effect, the DOC is arguing that there is no causal connection between their injury and the DOC's conduct because plaintiffs' failure to gain admission to the CTH and community access program is entirely their own doing.

Under defendants' rationale, no resident would have standing to challenge the defunct community access program, because, to date, no one has met the program's stringent criteria and been

admitted into the program. Plaintiffs contend that the high barriers to enter the CTH and community access program make it practically impossible for them to meet the criteria to participate in these programs that are supposed to be provided to them under both the Amended Management Plan and Massachusetts law. Cf. Khodara Envtl., Inc. v. Blakey, 376 F.3d 187, 194 (3d Cir. 2004)(stating that defendant conceptualized injury too narrowly and finding that causation prong of standing "plainly satisfied" when injury defined more broadly).

The standing issue for the Court to resolve is whether plaintiffs' inability to gain admission to the CTH and community access program is "so completely due to the plaintiff[s'] own fault" or if it can be "fairly traceable" to inadequate sex offender treatment and high barriers to entry.

Given has presented sufficient evidence to have standing. His CTH application in 2008 was denied, at least in part, due to a lack of clear benchmarks, as he was only told after-the-fact that he needed to complete the "deviant cycle," which delayed his admissions process four years. Once he completed that program, a new treatment model was created, which does not have clear benchmarks for applying to the CTH nor explains how residents would receive credit for their past work. Although Given has never applied to the community access program, his application would have been futile because he has not gained entry into the

CTH. See Nyquist v. Mauclet, 432 U.S. 1, 6 n.7 (1977)(finding standing to challenge student loan application requirements even though plaintiff had not applied for a loan, because he expressed interest in applying and defendant conceded his application would be rejected); Bach v. Pataki, 408 F.3d 75, 82–83 (2d Cir. 2005)(finding standing to challenge statute restricting issuance of a concealed-weapon permit even though plaintiff failed to apply for a permit, because his application would have been futile).

Defendants' argument has greater merit with respect to Healey. Healy has had consistently problematic behavior in the institution, and when he gained admission in the CTH, he was thrown out for bad behavior. However, Healey argues that if he had received appropriate pharmacological treatment and better talk therapy over his 48 years at the Treatment Center, he would have become eligible if the barriers to entry were not so high. Based on Dr. Saleh's uncontroverted expert testimony regarding the futility of Healey's past treatment, the Court finds Healey has standing as well. See Dyer, 208 F.3d at 402 ("'So long as the defendants have engaged in conduct that may have contributed to causing the injury, it would be better to recognize standing . . . .'") (quoting 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3531.5, at 461 (2d ed. 1984)); cf. Becker v. FEC, 230 F.3d 381, 388 (1st Cir. 2000)(finding that

plaintiff had standing after rejecting defendant's claim that his injury was "self-imposed").

Whether the alleged problems with the CTH and community access program have more to do with the plaintiffs' inadequacies or problems with treatment and admission criteria "is a matter more properly viewed as going to the merits rather than to standing." Dyer, 208 F.3d at 403.

5. The Claims

Based on the record, I find that plaintiffs have proven that there is no functioning community access program at the Treatment Center in contravention of the statute and the Plan. The evidence is straightforward. There have been no participants since 1998. As of the time of trial, no staff or budget was allocated to the program. The application process is long, complicated and tedious with near certainty of failure. One of the first barriers to entry is the difficulty in gaining access to the CTH, which, in January 2012, had only three members. The CTH was closed for five years in clear contravention of the Plan, and has been closed more recently due to budgetary constraints. As mentioned, placement in the CTH is the necessary first step to gain access to the community placement program so closing the CTH dooms the community access program. The application process to get into the CTH is itself cumbersome.

Plaintiffs also contend the failure to provide a functioning

community access program is a due process violation. The DOC admits that the community access program is a critical part of the rehabilitation process, and has never argued that the elimination of the program was related to the statutory purposes of civil confinement: care, custody, treatment or rehabilitation. Rather, DOC insists that its application process is reasonable, and that residents are not applying because they would rather stay in the main facility with their friends. While this explanation might be true for some residents, I find it's more likely that the DOC has made the application process so opaque, difficult and daunting, with such a likelihood of failure, so that residents with a chance of success simply choose the section 9 route.

At the same time, the plaintiffs have not explained why a functioning community access program is constitutionally required. They point out that, as of 2008, 16 of 21 states that have enacted civil commitment laws for sexually dangerous persons have provisions in their statutes that permit community access prior to release. Ex. 618 at 21. However, they cite no caselaw and have submitted no expert testimony or professional standards stating that civilly committed sex offenders must have a community access program. Nor have they explained why a meaningful treatment program using the "good lives" model of therapy, see infra pp. 70-71, combined with the section 9 release

process is not constitutionally sufficient. Accordingly, I conclude that plaintiffs have not met their burden that the de facto elimination of the community access program violates the Due Process Clause.

C. Treatment

Plaintiffs challenge the adequacy of the sex offender treatment provided by the Treatment Center. Healey and Given voice concerns regarding the experience of FHS staff, the lack of continuity of care, the timing and availability of psychoeducational classes, and the overall effectiveness of sex offender treatment.

First, they contend that FHS staff is not qualified to provide meaningful sex offender treatment. FHS's 2002 contract states that unit therapists must be license-eligible clinicians with a master's degree in social work, psychology, or counseling, and have experience in sex offender treatment or a related area. See Ex. 4 at 135. FHS's 2011 contract adds that therapists should have a minimum of two years experience in the treatment and/or assessment of sexually aggressive persons. See Ex. 5 at DOC*266. However, only 11 out of 29 FHS staff members have some kind of mental health license. Ex. 570. At least two members of Healey's treatment team have only bachelor's degrees. See Exs. 46, 51. And, FHS admits that not all of its therapists had experience in treating sex offenders prior to being hired by FHS.

(Lyman, I-8, 52). Moreover, the FHS contracts require the program director to be a licensed clinician with a doctorate in psychology. See Ex. 4 at 137; Ex. 5C at 13. However, current Program Director Kim Lyman only has a master's degree in counseling psychology and had no experience in treating adult male sex offenders before starting to work at the Treatment Center in 2005 as a unit therapist. (Lyman, I-8, 68). While plaintiffs have proven violations of the contract, contractual violations, without more, are not violations of the Plan or Constitution.

Plaintiffs further contend the lack of continuity of care at the Treatment Center frustrates their ability to advance in treatment. While Peltzman acknowledges that continuity of care between a therapist and a resident is an important factor in treatment, Healey and Given each have had 19 different people on their treatment teams since 2003-2004. (Peltzman, I-9, 85; I-10, 36-37; Exs. 42-51; Exs. 98-104). There also appears to be an uneven continuum of care due to changes in treatment providers and treatment models. For example, when FHS took over from JRI, Healey was forced to retake psychoeducational courses that were substantively similar to courses he had already passed. (Lyman, II-5, 30-31). Moreover, FHS staff confirmed that residents who have passed courses under the old "relapse prevention" model will have to start over with courses offered in the recently

implemented "good lives" model. (Lyman, II-5, 26-28). It is unclear how much credit residents get for courses taken earlier. (Given, II-2).

Plaintiffs also have numerous complaints regarding the timing and availability of psychoeducational classes and group therapy. For example, Given's primary group and scheduled psychoeducational classes often conflict with other work, educational, and recreational activities. At times, he had to choose between performing his job or attending primary group therapy. (Given, I-4, 30-31, 57). When a resident misses more than two classes per quarter, he fails the class, and must repeat it in its entirety. (Given, I-4, 31-32). Classes and group therapy are sometimes interrupted or cancelled because of staffing shortages, drills, and emergencies. (Given, I-4, 34-35; Murphy, I-5, 7-8). Sometimes when a resident passes a prerequisite course and is clinically ready for the next course, the next course may not be available for several terms. For example, after completing the Understanding Pathways to Offending I course, Given has had to wait at least three months to take Pathways to Offending II, delaying his ability to progress in treatment. (Peltzman, II-4, 30-34). Healey has attempted to gain admission to Pathways to Offending I, a required course to get into the Therapeutic Communities housing units, but has been denied admission in fall 2011 and winter 2012. (Healey, II-1,

123-24). Again, while these problems are undoubtedly frustrating, plaintiffs have failed to demonstrate they rise to the level of a constitutional deprivation of treatment or violation of the Plan.

Plaintiffs also challenge the efficacy of the sex offender program.[12] In between the two trials, in November 2011, FHS began implementing a "good lives" model of therapy delivered in the context of therapeutic communities. According to the Plan, sex offender treatment should be provided "in the context of a therapeutic community" offering primary group, specialty group,

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[12] It is difficult to assess the overall quality of the sex offender treatment program because of the paucity of data. (Peltzman, II-3, 54, 110-113; II-4, 21-22). Plaintiffs' expert Stan Stojkovic, a professor of criminal justice at the University of Wisconsin-Milwaukee with an expertise on prison administration, testified that to assess the effectiveness of a sex offender treatment program, a correctional facility should keep records documenting resource allocations, the number of people matriculating in the program, what phases of the program they are in, and what kind of outcomes the facility has that can demonstrate success of the program. (Stojkovic, I-7, 61). However, the Treatment Center does not collect data on these issues. (Id.)

In 2004, the DOC began developing a research tool to assess the quality of FHS' program and recidivism. However, to date, neither the DOC nor FHS has performed any study on the efficacy of the treatment program. (Murphy, I-4, 107; Connolly, Ex. 584, at 109; Tomich, I-8, 35; Peltzman, II-3, 109). The DOC does not track the average length of commitment before release, the average length of time residents are in treatment, the average number of successful section 9 petitioners per year, the average length of stay for residents in the CTH, the average number of residents in the CTH per year, or the number of participants in community access program. (Luongo, II-5, 115-18, 123). Remarkably, it does not even track recidivism rates upon release. (Peltzman, II-3, 113).

behavioral treatment, experiential therapy, psychoeducational classes, and community-building activities. Ex. 1 at 13-14; see also id. at 14 (Community-building activities "have a crucial therapeutic value which cannot be underestimated."). Although the old "relapse prevention" model of treatment was not offered in the context of a therapeutic community, the current model of treatment is consistent with the Plan.

Plaintiffs complain that the defendants abolished many of the community activities and classes after the consent decree ended, and the environment became more punitive. While true, some community-building activities have since been reinstated, and 77 percent of requests by residents have been approved. While Family Day has not been reinstated, DOC officials have expressed security concerns about allowing residents to socialize with each others' family members.

In sum, FHS staff have sufficiently demonstrated their commitment to instituting therapeutic communities within the "good lives" model of therapy, which is at the cutting edge of cognitive behavioral therapy for sex offenders. Accordingly, the court finds that the current sex offender treatment is in accordance with best professional judgment and does not violate the Plan or the Constitution.

D. Confidentiality of Treatment

Given challenges the limits on confidentiality in therapy

treatment as a violation of his Fifth Amendment privilege against self-incrimination (Given, Count III). Specifically, he alleges that residents are required to waive all rights to confidentiality as a condition of receiving treatment at the Treatment Center, and they are compelled to disclose past uncharged offenses as part of their treatment regimen.

At the Treatment Center, residents who participate in treatment are required to sign an informed consent form each year.[13] It allows treatment records to be reviewed by "any member of the treatment team and by anyone else with legal authority to view the file (including attorneys, Qualified Examiners, Sex Offender Review Board, Board of Probation, Board of Parole, and others with such legal authority)." Ex. 623. FHS's current contract adds that the DOC "maintains full and immediate access to all offender records," Ex. 5 at 59-60, and that FHS will make the records available to the Superintendent, DOC administrative staff conducting program audits, DOC attorneys, CAB members, Qualified Examiners, District Attorneys' offices, and "other persons legally entitled to review such records." Ex. 5 at 60. FHS staff confirmed at trial that if FHS receives a request from a District Attorney's office, it would turn over a resident's treatment records for section 9

[13] The informed consent form was amended in October 2011, in ways that are not material to this litigation.

proceedings. (Lyman, I-8, 55). However, there is no evidence that treatment records have ever been turned over to the District Attorney's office for new prosecutions, as opposed to section 9 proceedings.

Both Healey and Given say that the lack of confidentiality has made them distrustful of their therapists. Given is concerned that what he tells his therapists will be used at section 9 trials against him. (Given, II-2, 105). Healey says he has sometimes refused to participate in group therapy due to concerns that his therapists' notes are being shared with others. See Ex. 48 at 4. Joel Pentlarge, a former resident at the Treatment Center, and William Canavan, a current resident, both testified that they refused treatment because of fears what they tell therapists would be provided to the District Attorney's office. (Pentlarge, II-2, 160-61); (Canavan, II-3, 6-7). FHS staff recognize the Treatment Center's confidentiality policies have negatively affected the patient-therapist relationship, including the fact that therapists may be called by the Commonwealth to testify against a resident at his section 9 proceeding. (Lyman, I-8, 67); (Connolly, Ex. 584 at 98-100).

One policy that has especially troubled residents regards the disclosure of uncharged sexual misconduct. Under the old "relapse prevention" model of therapy, FHS therapists would encourage residents to disclose criminal sexual conduct for which

they had not been charged by prosecutors. Exs. 118; 98 at 3. Admissions of uncharged conduct were considered progress towards completing the treatment plan and were part of the Achievement Matrix. (Peltzman, II-3, 64-65, 143-44). Therapists would record detailed notes of what residents said in group therapy sessions, and include lengthy quotations in their files. (Orlandi, I-10, 76-77).

Under the "good lives" model of therapy, this policy has changed. Residents do not need to provide specific details of previous criminal sexual activity, and therapists no longer provide detailed notes regarding uncharged conduct in their files. (Peltzman, II-4, 35).

"A program that provides treatment *if and only if* committed individuals relinquish their Fifth Amendment rights is . . . unconstitutional in that it imposes a cost – the loss of constitutionally guaranteed treatment – on the assertion of the right against self-incrimination." Pentlarge v. Murphy, 541 F. Supp. 2d 421, 427 (D. Mass. 2008)(emphasis in original). However, Given's Fifth Amendment claim fails because he has not proven that, to take part in treatment, he is compelled to waive his Fifth Amendment rights, as opposed to his right to confidentiality.[14] See McKune v. Lile, 536 U.S. 24, 35 (2002)

[14] Healey also suggests that the way in which treatment records are kept and disseminated somehow violates the Plan or 14th Amendment. However, the Plan contains no requirement

(holding mandatory sex offender treatment program's waiver of confidentiality does not violate Fifth Amendment because the program "does not compel prisoners to incriminate themselves in violation of the Constitution"); Ainsworth v. Stanley, 317 F.3d 1, 6 (1st Cir. 2002)(holding nonmandatory sex offender treatment program's waiver of confidentiality does not "compel incriminating speech in violation of the Fifth Amendment").

It is true that under the previous relapse prevention model of therapy, residents were encouraged to disclose uncharged sexual misconduct, which was considered progress as part of the Achievement Matrix. Exs. 118; 98 at 3. (Peltzman, II-3, 64-65, 143-44); (Lyman, I-8, 64). However, encouragement is not compulsion, and Given was never prevented from participating in treatment for failing to provide details about uncharged conduct. Furthermore, under the "good lives" model, residents are no longer urged to disclosed uncharged conduct to advance in treatment. (Peltzman, II-4, 35).

While the lack of confidentiality undoubtedly affects residents' relationships with their therapists,[15] and the

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regarding treatment records. Furthermore, FHS keeps records in accordance with ATSA recommendations and the American Psychological Association, and there is no evidence that residents' records have been improperly accessed.

[15] Given relies on the expert testimony of Dr. Saleh that psychiatrists, psychologists and other professionals engaged in the treatment of sex offenders generally believe that confidentiality is essential to effective treatment. (Saleh, I-

effectiveness of treatment, it is reasonably related to the statutory purpose of evaluation so residents can be evaluated by the CAB and Qualified Examiners regarding their level of sexual deviancy and the need for continued commitment. See Mass. Gen. L. ch. 123A, § 6A (mandating that the CAB "shall have access to all records of the person being evaluated"); Id. § 9 (mandating that the Qualified Examiners "shall have access to all records of the person being examined," that "[e]vidence of the person's . . . psychiatric and psychological records . . . shall be admissible" in section 9 proceedings).

Furthermore, although Treatment Center staff will turn over residents' records to district attorneys' offices to help prepare for section 9 proceedings, there is no evidence that records or confidential information about uncharged conduct have ever been turned over to district attorneys for new prosecutions. There is also no evidence that any admission of uncharged conduct by a resident has led to criminal prosecution or that refusal to disclose uncharged conduct has led to termination of treatment.

6, 105-06). The lack of confidentiality can affect a patient's relationship with his therapist if the patient knows that the therapist may share his private thoughts with others. (Id. at 105, 107). The patient is also more likely to withhold information from his therapist. (Id.) For these reasons, the American Counseling Association Code of Ethics, the American Psychological Association Ethical Principles of Psychologists and Code of Conduct, and the National Association of Social Workers' Code of Ethics only permit disclosure of treatment communications when required by law.

See McKune, 536 U.S. at 34 ("[N]o inmate has ever been charged or prosecuted for any offense based on information disclosed during treatment."); United States v. Puccio, 812 F. Supp. 2d 105, 108 n.2 (D. Mass. 2011) (To implicate the Fifth Amendment, the "risk of prosecution [must be] real 'and not a mere imaginary, remote or speculative possibility . . . .'")(quoting In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983)).

E. Behavior Management System

Healey contends that defendants have violated the Plan's policies regarding the behavioral management system in three areas: (1) pre-hearing placement in the Minimum Privileges Unit ("MPU"), (2) misuse of the B-17 offense, and (3) the makeup of the Behavioral Review Committee.

Under the Plan, residents who violate rules and engage in inappropriate behavior may be issued Observation of Behavior Reports ("OBRs") by staff. The Plan lists approximately 60 different offenses under four distinct categories (A-D), with "A" offenses being the most serious and "D" offenses being the least serious. Ex. 1, App. 6 at 11-14. "B" offenses are "High Category" offenses, including assaulting other persons, introducing illegal drugs into the institution, bribing staff members, and counterfeiting documents. Id. App. 6 at 12. The harshest sanctions, including placement in the MPU, are reserved for residents who have committed "A" and "B" level offenses. Id.

App. 6 at 14-15. The B-17 offense is for "[c]onduct which disrupts or interferes with the security or orderly running of the institution." Id. App. 6. at 13.

Healey has received OBRs citing B-17 offenses for yelling obscenities, throwing food, possessing a cigarette lighter, and kicking the door to the MPU. Exs. 79A, 85, 86, 322; (Healey, II-2, 14-16, 18-19). He was sentenced to time in the MPU for many of these offenses.

Given received an OBR for improper use of mail for sending a letter complaining about the DOC's policy regarding payment of print shop employees. (Given, I-4, 51-52). Superintendent Corsini subsequently had the OBR dismissed, finding it unwarranted.[16] (Corsini, I-6, 30-31). Given has never spent time in the MPU.

1. MPU Policy

The MPU is a highly restrictive unit containing 12 cells where residents are restricted to their cell 23 hours a day. MPU residents eat their meals in their cells and are allowed out of their cells one hour a day for exercise and showers. Residents

[16] On two occasions Given received books in the mail which were treated as contraband and taken from him. The first time the book was a nonfiction book Given thought could help him in therapy. The treatment staff thought it was inappropriate, and Given allowed it to be destroyed rather than receiving and reading it. The second time he received a book as a gift that had an inappropriate scene. (Given, II-2, 135). Given did not receive an OBR on either occasion.

confined to the MPU do not have contact with other residents. According to the Plan, "[i]n all instances, the matter of MPU placement, review and discharge is based upon security assessments subject to clear criteria set forth in the [MPU] policy." Ex. 1 at 30.

A resident can be placed in the MPU pending an investigation or hearing on an OBR when the resident is: (1) charged with a category A offense (Greatest Severity) or (2) charged with a B offense (High Severity) "but only where . . . the resident's behavior creates an emergency situation where, (a) the resident has attempted or did serious harm to others, or (b) the resident's conduct clearly demonstrates a serious and imminent threat that he will harm, or attempt to harm others." Ex. 1 App. 7 at 4-5. The Plan adds that "[f]or each resident sent to the [MPU] pending an investigation [or hearing on an OBR for B offenses], an incident report shall be written documenting the need for placement in that unit." Id. For residents sent to the MPU pending a hearing on an OBR, the incident report "shall indicate what behavior was observed, by whom, the basis for the belief that the resident poses an imminent threat of serious harm to himself or others, and the name of the individual who recommended placement. This report will be delivered promptly to the resident within 48 hours of the initial placement." Id. at 4.

Around 2003, the DOC stopped following the MPU policy in the Plan and residents became subject to the same policy used for criminal inmates. (Murphy, I-5, 33-34; Smith, I-9, 45-46); Exs. 13, 14. Under this new policy, the DOC had greater discretion when placing residents in the MPU and did not need to provide written documentation explaining the need for the placement. For example, residents have been placed in the MPU for refusing to accept a housing assignment change, including being double-bunked, and have been confined in the MPU as long as six months pending a hearing. (Luongo, I-10, 111-12; Smith, I-9, 40-41).

Healey has been placed in the MPU multiple times pending an investigation or hearing on an OBR. For example, in February 2005, Healey was placed in the MPU pending a hearing on an OBR citing B-17 and D-2 offenses. The written Notice of Placement in MPU states that Healey's confinement in the MPU was for "disruptive behavior." Ex. 561. It does not indicate what specific behavior was observed or the basis for the belief that Healey posed an imminent threat of serious harm to himself or others. In January 2007, Healey was placed in the MPU pending an investigation related to two cigarette lighters found in his possession. The written Notice of Placement in MPU did not identify any basis for Healey's confinement in the MPU. See Ex. 559. Director of Security Steven Fairley testified that the lighters posed a security threat because they can start fires and

can be used to aid in other inappropriate activities. (Fairley, I-9, 56). In January 2011, Healey was again placed in the MPU pending an OBR hearing for B and C level offenses. There is no Notice of Placement in MPU for this incident or any other written documentation identifying any basis for suggesting Healey's behavior created an ongoing security risk or an emergency situation. See Ex. 580 at 1-2.

Soon after the July 2011 trial in this case,[17] DOC modified the MPU policy to add back in the procedural safeguards stated in the Amended Management Plan. Under the current policy, placement in the MPU pending an investigation or hearing on an OBR may only occur "when the Superintendent or his designee has determined that the continued presence of the Resident in the general population would pose a serious threat to life, property, self or others or the security or orderly running of the institution . . ." Ex. 611.

As such, while the Treatment Center was in violation of the Plan with respect to the procedural safeguards for the MPU, defendants seemed to have fixed the problem.

2. The B-17 Offense

The Plan calls for a disciplinary system with "clearly

[17] While the new policy appears to be signed January 4, 2011, this is most likely a typo. Superintendent Corsini testified that the policy is new since the summer of 2011, and its effective date most likely is January 4, 2012. See Ex. 611; (Corsini, II-4, 69-70).

defined rules and clearly defined repercussions for rule breaking" that is "viewed as more equitable by Residents, officers and therapists." Ex. 1 at 29-30. Healey contends that the DOC violates the Plan by charging residents with B-17 offenses for conduct that is not deserving of such a serious charge. The B-17 offense broadly covers any conduct "which disrupts or interferes with the security or orderly running of the institution." Id. App. 6. at 13. The B-17 offense itself is listed in the Plan. Healey contends it has been inappropriately applied to less serious charges such as yelling obscenities.

Healey has received over 200 OBRs, including many B-17 offenses. Some of his B-17 offenses have later been dismissed. Given has provided evidence that he was charged with a B-17 offense for improper use of mails. While this does appear to be a misuse of the B-17 offense, plaintiffs have not demonstrated a substantial violation of the Plan because Given's charge was later dismissed. While there may be occasions where the B-17 offense is too broadly used, the appeal process provides adequate due process protections. Accordingly, plaintiffs have failed to prove a material violation of the Plan with respect to charging decisions.

3. Behavioral Review Committee

Under the Plan, the Behavioral Review Committee ("BRC") must consist of "three persons appointed by the Superintendent; one

security staff member, one clinician and one program staff member." Ex. 1, App. 6 at 5. The parties dispute whether the "program staff member" means a treatment staff member or a DOC officer. The ambiguity arises from the district court's description in King: "The BRC is a three-member board consisting of one security staff member, one clinician, and one JRI staff member." King IV, 53 F. Supp. 2d at 127. Today, the BRC is always comprised of two DOC officials and only one FHS staff member. Defendants argue that the Plan allows for two DOC members (the security staff member and the program staff member) and one treatment staff member (the clinician). They contend that the "program staff member" refers to DOC's correction program officer listed in Appendix 3 to the Plan. See Ex. 1 App. 3 at 3. Dr. Schwartz testified that even when JRI provided treatment at the facility, the BRC consistently consisted of one JRI staff person, one correction officer, and one program correction officer. (Schwartz, I-2, 90). Although an ambiguity does exist in the Plan, based on Dr. Schwartz's testimony and longstanding DOC practice, Healey has not proven that the Plan requires two treatment staff members and only one DOC member.

F. Differing Levels of Security & Privileges

Healey argues that the Treatment Center is violating the Plan's requirement to provide "differing levels of security and privileges in order that residents can be maintained in the

'least restrictive conditions' of confinement." Ex. 1 at 6.

The DOC operates the Treatment Center as a Level 4 medium security correctional facility. (Corsini, I-6, 29-30); (Luongo, I-10, 117). In the main facility, all residents are classified at the same security level regardless of their age, offenses, years in treatment, or psychological diagnosis. (Luongo, I-10, 123-25); (Corsini, I-6, 6, 10). The only time the DOC evaluates residents' risk levels is when determining their job placements or eligibility for being double-bunked. (Luongo, II-5, 95, 115).

With limited exceptions, residents are all subject to the same movement and property policies. Regarding the movement policy, all residents in the main facility are subject to controlled movement, where they must sign out from their housing units before moving to another part of the facility and have a short period of time to move from one place to another. (Luongo, I-10, 122-23). Regarding the property policy, residents are subject to the same property rules as Level 4 prison inmates, with the exception of residents confined under the pre-1990 civil commitment statute, who may retain certain property if it was on their property log on Feb. 3, 1997. (Murphy, I-4, 125-26); Ex. 18, 103 CMR 403; Ex. 19.

As Professor Stojkovic testified, and Superintendent Corsini admitted, for the vast majority of residents, the Treatment Center operates like a medium security prison designed primarily

to keep people safe and secure. (Stojkovic, I-7, 30, 32; Corsini, II-4). Corsini has increased security measures at the Treatment Center, which has led to a nearly 75 percent decrease in reports of sexual misconduct. He has also adopted tougher mail, property and visiting regulations to reduce the amount of drugs and pornography coming into the institution.

Although Healey requests the Court to order additional changes to the movement and property policies inside the main facility based on an individualized assessment of each resident's risk level, nowhere does the Plan call for these changes, and the Court refrains from micromanaging what specific movement and property policies are best for security and control at the Treatment Center.

Regarding differing levels of privileges, Healey argues that before the "good lives" model of therapy, the tiered privilege system at the Treatment Center was so limited as to violate the Plan's requirement for a meaningful privilege system intended to incentivize residents to advance in treatment. As discussed earlier, plaintiffs proved that the DOC did violate, and continues to violate the Plan in failing to provide enhanced privileges in a community access program and CTH. However, beginning in November 2011, the Treatment Center has worked with residents to develop a more robust privilege policy in other respects, with the DOC approving 77 percent of initial privileges

requested by residents. These privileges included spiritual clubs, peer aides for psychoeducational classes, Residents of the Month, and game night. (Peltzman, II-3, 55, 59). The privileges rejected by the DOC included having outside visitors in the recreation yard and ordering food from outside institutions. (Peltzman, II-3, 140; Tomich, II-5, 167).

Under the new model, privileges are only available to residents participating in treatment. Residents who refuse treatment are not permitted any privileges, and Superintendent Corsini removed the few privileges they had, including the laundry machines, microwave, and refrigerator in their housing unit. (Corsini, II-4, 104-05). Corsini takes the position that he has the ultimate discretion to remove whatever privilege he deems appropriate "given the correctional environment in which [he is] working." (Id. at 101). This stance is incorrect to the extent his motives are punitive. However, based on this record, deprivations of privileges have been reasonably related to the custody and security of residents. One privilege available in the Plan is the ability of residents to visit each other's rooms, or "room visits." While room visits were allowed in 1999, then-Superintendent Murphy ended the privilege around 2002 because of sexual assaults among residents and other security issues, such as strong arming, assaults, substance abuse, and escape planning. (Murphy, I-5, 28-29, 68, 82); see Ex. 2 at 36. Corsini firmly

reaffirmed that he would never allow room visits as long as he runs the Treatment Center. (Corsini, II-4, 124). Demonstrating serious security concerns, DOC has proven that these measures are within its discretion allowed under the Plan. Because this new privilege system is in accordance with the Plan, and any restrictions on privileges are reasonably related to security concerns, injunctive relief is not warranted.

G. Plaintiffs' Conditions of Confinement

The plaintiffs allege many of their conditions of confinement violate the Plan and the Fourteenth Amendment. Given alleges that the conditions fail to provide the "least restrictive alternative" (Given, Count I) and fail to provide accommodations that meet the minimum standards for human habitation in violation of his due process rights. (Given, Count V). In addition to Healey's claims under the Plan, he also alleges that forcing him to exercise in the wire cage while detained in the MPU violates his due process rights. (Healey, Count V). Plaintiffs also challenge the following conditions: the visitation policy, property regulations, limiting library access, availability of vocational and educational programs, double-bunking and cell size, window-viewing restrictions, toilet access in the exercise yard, and restraints and strip searches.[18]

[18] Plaintiffs also had claims challenging the use of toilet timers and shower timers, food quality, and clean water supply, but Judge Gertner dismissed those claims during the first trial.

The Court previously ruled that "[a]lthough these conditions may not state a due process claim when considered individually, [they could] when taken together." Healey v. Murphy, 2007 U.S. Dist. LEXIS 100060, at *34 (D. Mass. Nov. 14, 2007). As mentioned above, conditions of confinement for residents violate due process if they are punitive or otherwise unrelated to care, custody, treatment and rehabilitation, the statutory purposes for civil commitment under Chapter 123A. See Seling, 531 U.S. at 265. Although Given's claim and the consent decree litigation referred to a "least restrictive conditions of confinement" standard, that standard sets "a higher standard than the Constitution." Langton v. Johnston, 928 F.2d 1206, 1217-18 (1st Cir. 1991); see also Allison v. Snyder, 332 F.3d 1076, 1078 (7th Cir. 2003) (plaintiffs lacked any federal authority for their proposition that Constitution entitles civil detainees to least restrictive environment).

Plaintiffs have demonstrated a decline in some of their living conditions since the DOC took over control of the Treatment Center, and certain conditions are more restrictive than those at some other prison facilities across Massachusetts. However, this disparity in and of itself is not dispositive as to whether the conditions violate the Fourteenth Amendment. Cf. Hubbard v. Taylor, 538 F.3d 229, 236 (3rd Cir. 2008)("[N]owhere [has] the Supreme Court suggest[ed] that if [pretrial] detainees

are treated differently or worse than convicted inmates, they are . . . being 'punished' in violation of the Due Process Clause."). Defendants emphasize that the Treatment Center has achieved 100 percent compliance with all mandatory standards of the American Correctional Association ("ACA") since the termination of the consent decree litigation, and that there is no evidence that any of the physical conditions pose a risk to human safety or health. After a review of the record, the Court concludes that whether analyzed individually or combined together, none of the challenged physical conditions of confinement reach the level of a Constitutional violation. Specific challenged conditions are addressed separately below.

1. Restrictions in Library Hours and Visitation Privileges

At the time the Plan was implemented, residents had access to the library five days a week plus one evening session. Because of the Durfee opinion, library access at the Treatment Center has been approximately cut in half. Residents only have access to it for part of the day on Monday, Tuesday, Wednesday, and Friday for a total of approximately 16 hours. (Given, I-4, 11-12, 20); Ex. 586 at 70-71. Today, residents receive around half as much library time as inmates at other DOC prison facilities. Ex. 591 at 32-34.

Visitation privileges are also more restrictive now than what they were during the Plan's implementation. Visitation

hours have been approximately cut in half after the Durfee decision. On occasion, summer hours have been further restricted, and Treatment Center officials have placed limitations on the number of visitors allowed to visit in a given day. (Healey, II-1, 160). More recently, Superintendent Corsini added a new restriction, which prohibits residents and inmates from wearing black dress pants in the visitation room, in order for security officials to differentiate between them and their visitors. (Corsini, II-4, 113).

The Plan does not specify how many library hours are required. Detainees "have a constitutionally-protected right of meaningful access to the courts . . . [and] correctional authorities must 'assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.'" Boivin v. Black, 225 F.3d 36, 42 (1st Cir. 2000)(quoting Bounds v. Smith, 430 U.S. 817, 828 (1977)). To state a constitutional violation, a detainee must "demonstrate that the alleged shortcomings in the library . . . hindered his efforts to pursue a legal claim." Lewis v. Casey, 518 U.S. 343, 351 (1996); see also Shell v. Brun, 585 F. Supp. 2d 465, 468 (W.D.N.Y. 2008)("Prison officials may place reasonable restrictions on inmates' use of facility law libraries, as long as those restrictions do not interfere with inmates' access to the

courts."); Shango v. Jurich, 965 F.2d 289, 292-93 (7th Cir. 1992) (holding that closing of prisoner law library on nights, weekends, and holidays, and at other times due to lockdown, construction, or shortage of guards or librarians, does not violate Constitution absent evidence of any detriment or prejudice suffered by prisoner in any litigation); Walker v. Mintzes, 771 F.2d 920, 931 (6th Cir. 1985) (Constitution does not mandate "any specific amount of library time which prisoners must be provided; rather, access need only be reasonable and adequate.").

The Plan gives the superintendent discretion to modify visitation hours. Civil detainees have no constitutional right to contact visits. See Block v. Rutherford, 468 U.S. 576, 589 (1984)("[T]he Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility."); Carter v. Blake, 2006 U.S. Dist. LEXIS 55058, at *4-6 (E.D. Mo. Aug. 8, 2006)(dismissing claim that civilly committed sex offender has constitutional right to contact visits with family and friends); Rainwater v. McGinniss, 2012 U.S. Dist. LEXIS 113963, at *37-38 (E.D. Cal. Aug. 10, 2012)(same).

The reduction in visiting and library hours, and other restrictions to the visitation policy, do not violate the Plan or

the Constitution. These changes have largely occurred in response to the Durfee opinion's mandate to keep prison inmates and residents separate and apart at all times. Therefore, these restrictions are reasonably related to maintaining care and custody of the residents. Furthermore, plaintiffs have not proven that the reduction in library hours hindered their efforts to pursue a legal claim.

2. Property Regulations

For the most part, residents at the Treatment Center are subject to the same property rules as inmates at Level 4 medium security prisons, with two main exceptions. See Ex. 18. First, residents committed prior to February 3, 1997, like Healey, may retain certain property, including memory typewriters and personal computers, that had been listed on their property logs. Ex. 19. Second, residents committed after that date, like Given, are not entitled to any additional property except that Superintendent Corsini recently approved electric razors for residents who have a medical condition that makes it difficult for them to hold a regular razor. (Corsini, II-4, 68, 103).

The Treatment Center's strict property regulations do not violate plaintiffs' due process rights because DOC staff credibly testified they are necessary to reduce the amount of contraband coming into the facility, including drugs and pornography. (Smith, I-9, 18). The regulations are thus reasonably related to

the care and custody of residents, and the court defers to the DOC's reasonable professional judgment on this issue.

3. Vocational and Educational Programming

Educational and vocational opportunities have declined since the Amended Management Plan became the Treatment Center's governing document in 1999. While JRI and FHS previously had been in charge of developing educational and vocational opportunities at the Treatment Center, between 2007 and 2008, DOC assumed responsibility for the academic and vocational programs. Ex. 575, ¶ 3. At present, the DOC does not offer some of the programs specifically identified in the Plan, including sewing, electronics, and an extensive culinary arts program. (Healey, II-1, 144-46).

The vocational programs currently offered are the computer program, building trades program, and a limited culinary arts course. Ex. 576, ¶¶ 3, 5-7; Ex. 578. The computer program includes classes on various Microsoft applications such as Word, Access, Excel, and Powerpoint. Ex. 576, ¶ 6. The building trades program includes components on safety, hand tools, power tools, drafting and blueprints. This program also includes instructions on basic construction trades such as how to construct floors, walls, stairs, roofing and framing doors and windows. Ex. 576, ¶ 7. The culinary arts program, called "SERV Safe," is limited to teaching the basics of handling food and

keeping food at the right temperature. (Lyman, II-5, 31). No certificate programs are offered at the Treatment Center. (Healey, I-3, 68; Given, I-4, 14).

Educational opportunities offered at the Treatment Center include programs in the areas of general equivalency diploma (GED), adult basic education (for students in the fourth to sixth grade levels), pre-GED (for students in the sixth to eighth grade levels), special education, English as a Second Language, music, art, and life skills. Ex. 576, ¶ 4. The life skills class includes material on basic re-entry skills, such as resume writing, searching for a job and preparing for interviews, banking issues and current events. Ex. 576, ¶ 4. However, no college-level courses are available at the Treatment Center.

Residents also have a variety of employment opportunities, including as janitors, barber shop workers, canteen workers, environmental health and safety officer aides, grounds workers, gym workers, intensive treatment program unit tutors, kitchen servers, laundry workers, learning center aides, library aides, maintenance department workers, photographers, property workers, recycling workers, and staff grill workers. Ex. 577, ¶ 2. The Treatment Center also offers a program by Massachusetts Correctional Industries, a division of DOC, which employs residents in a print shop to silk-screen clothing, signs, and stickers, and to make license plates for the Registry of Motor

Vehicles. Ex. 579, ¶¶ 1-2.

Healey cannot participate in the building trades program because he experiences hand tremors and cannot safely handle certain equipment. (Healey, II-1, 146-47). Healey has applied for and been rejected from the print shop, but was enrolled in the SERV Safe class.[19] Given worked in the print shop until April 2011, when he was fired for writing a letter complaining about DOC's policy not to pay print shop employees on snow days. (Given, I-4, 51-52). While Superintendent Corsini permitted Given to reapply for his job at the print shop, Given has not been reinstated. (Id.; Corsini, I-6, 31).

The reduction in vocational and educational programs at the Treatment Center does not violate the Constitution or the Plan. These reductions have primarily occurred because of the Durfee opinion's separate and apart policy, which, as stated above, is reasonably related to residents' care and custody. Furthermore, while the Plan intended that the DOC "maintain the current [educational and vocational] programming" offered at that time, see Ex. 1 at 23, the Court does not interpret the Plan as

[19] Defendants claim that Healey lacks standing to challenge the availability of jobs at the Treatment Center. At summary judgment, Judge Gertner ruled that Healey has standing to pursue these claims. See Healey v. Murphy, 2011 WL 2693688, at *4 (D. Mass. July 8, 2011). After trial, the Court agrees that Healey has standing to pursue these claims based on his testimony that he would seek participation in certain vocational and educational opportunities if they were available today.

requiring the Treatment Center to provide all vocational and educational programs listed in it forever. What the Plan requires is vocational and educational programs that "promote individual academic, personal and vocational skills, utilizing both traditional and innovative educational and vocational techniques." Id. While the offerings are more limited than before, the current programming meets this requirement.

4. Double-Bunking and Cell Size

No residents were double-bunked when Judge Mazzone lifted the consent decrees in June 1999. (Murphy, I-5, 23). Because the Massachusetts legislature had abolished civil confinement in 1990, the Plan was premised on the assumption that the resident population at the Treatment Center would gradually decline as residents were released pursuant to section 9 proceedings or died. Ex. 1 at 46; (Murphy, I-5, 19). Therefore, the Plan did not contemplate double-bunking for residents. However, the Plan does state that "[i]f [double-bunking] were to become desirable at some time in the future, the Department of Correction will follow the protocols described in the original plan." Ex. 1 at 46. The original 1994 plan states that double-bunking can offer "a therapeutic advantage over single room housing by providing residents the opportunity to develop essential relationship and social skills. Double bunking is used successfully in sex offender treatment programs in other states . . ." Ex. 2 at 135.

The 1994 plan states that if double-bunking becomes necessary, the security staff will conduct assessments for each resident to gauge their escape risk and history, enemy situations, aggression, and compliance, and the clinical treatment teams will conduct assessments to gauge compatibility for double-bunking, medical issues, religious beliefs, and requests from residents themselves. Id. at 135-36.

In September 1999, Massachusetts restarted civil confinement, and the resident population has continued to grow ever since from 171 in December 1999 to 245 by October 2011. See Ex. 632 at 2; Ex. 325 at 5. To accommodate this growth, the DOC started double-bunking in December 2003. Ex. 330 at 10; Ex. 584 at 55. As of February 2012, over 100 residents were double-bunked. While double-bunking of residents is consistent with the 1994 plan, the Treatment Center's current housing arrangement violates both American Correctional Association ("ACA") standards and Massachusetts Department of Public Health ("DPH") regulations. ACA Standard #4-4129 requires that the number of inmates not exceed the facility's rated bed capacity. Ex. 38A at 19-21. While the Treatment Center's population is higher than its rated capacity of 216, the DOC was granted a waiver from this standard in 2008. Ex. 38A at 1; 38B at 2-3. DPH regulations recommend that "[e]ach cell or sleeping area in an existing facility should contain at least 60 square feet of floor space

for each occupant, calculated on the basis of total habitable room area, which does not include areas where floor-to-ceiling height is less than eight feet." 105 CMR 451.320. In part because of double-bunking, the Treatment Center does not comply with this regulation and has been cited by the DPH multiple times for failing to adhere to it. See Ex. 571. The DOC has taken the position that it does not need to provide at least 60 square feet of floor space for each resident because this regulation is a recommended, not a required, standard. (Murphy, I-5, 49, 51-52); Ex. 564.

Many residents have been resistant to double-bunking. Former Superintendent Murphy received letters from residents, including Pentlarge, objecting to their double-bunking assignments. (Murphy, I-5, 46-49); Ex. 563; Ex. 564. Given has been double-bunked since April 2004. (Given, I-4, 18-19). He has complained to his therapists and housing officers multiple times about his double-bunking assignment, and at times, says he has been unable to sleep because of his roommate. See Ex. 356. Treatment Center staff have not granted Given's request for a single room, and a housing officer told him that he would not live long enough to see a single cell. (Given, I-4, 62-63, 80). Healey is in a single cell because of his behavioral issues.

The First Circuit has already held that double-bunking of residents at the Treatment Center "is not a per se violation of

due process." Cote v. Maloney, 152 Fed. Appx. 6, 7 (1st Cir. 2005)(unpublished). This is also not one of those "rare cases" where double-bunking "amount[s] to an unlawful practice when combined with other adverse conditions." Id. Although the Treatment Center's current housing arrangement violates ACA standards and DPH regulations because of double-bunking and small cell sizes, these standards are only advisory, and Given has not proven that the Treatment Center is so overcrowded as to violate due process. Cf. Brown v. Plata, 131 S. Ct. 1910, 1923 (2011)(upholding the district court's finding of the unconstitutionality of overcrowding of prison where it had "overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve.").

5. Toilet Access in the Exercise Yard

Until early January 2012, no restroom facilities existed in the recreation yard. Residents who needed to use the restroom were required either to urinate and defecate in the yard or end their exercise time early, because it was practically impossible to access restrooms inside the Treatment Center and return to the yard within the recreation time period. (Pentlarge, I-3, 13; Given, I-3, 128-29). Despite years of complaints, the DOC installed two port-o-potties in the yard only days before the

second trial began in this case. (Corsini, II-4, 71).

In Judge Mazzone's ruling terminating the consent decrees in 1999, he indicated that "[f]unds are being sought from capital planning funds to install toilet facilities accessible to the yard to attempt to address the residents' complaint about the lack of toilet facilities in the yard." King IV, 53 F. Supp. 2d at 134. It took until January 2012 to finally install two port-o-potties in the yard. In 1999, the court did not address the issue because it found no evidence that the lack of toilet facilities "force[d] an individual to defecate or urinate while in the yard." Id. However, in this case, residents testified men were forced to defecate and urinate in the yard or forced to return to the main facility and give up their exercise time. (Pentlarge, I-3, 13; Given, I-3, 128-29). As this Court previously stated, due process requires that residents not be "'denied adequate opportunities for exercise without legitimate governmental objective.'" Healey v. Murphy, 2011 WL 2693688, at *3 (D. Mass. July 8, 2011)(quoting Pierce v. County of Orange, 526 F.3d 1190, 1211-12 (9th Cir. 2008)). Making residents choose between their constitutionally protected right to exercise and their basic human needs is not reasonably related to any of the statutory goals. Furthermore, the Treatment Center has not provided a legitimate government objective for not having toilet facilities in the yard. That said, the issue has been flushed

out because the Treatment Center has installed toilets in the yard as a result of this litigation.

6. Restraints and Strip Searches

Residents are subjected to strip searches every time after they return from court, doctor's appointments, evaluations by Qualified Examiners, and after visits, including professional and attorney's visits. (Healey, II-1, 165-67; Corsini, II-1, 93-94). The strip search includes removing all clothes, an orifice check, lifting their scrotum, brushing fingers through their hair, opening their mouth, and bending them over and spreading their butt cheeks. (Given, II-2, 131). This policy is harsher than what Given experienced when detained at NCI-Gardner, a medium security prison facility in Massachusetts. There, he was not strip searched after professional visits. Residents are also put into shackles, cuffs, and leg irons whenever they go outside the perimeter of the Treatment Center building. Both plaintiffs experienced this type of restraint when attending their court hearings. (Healey, II-1, 164-66). Defendants contend that the strip search policy is necessary to stem the flow of contraband into the facility, including pornography, cigarettes, lighters, and certain medication.

Assessing any strip search under the Fourth Amendment requires "a balancing of the need for the particular search against the invasion of personal rights that the search entails."

Wood v. Hancock County Sheriff's Dep't, 354 F.3d 57, 67 (1st Cir. 2003)(internal quotations omitted). In Wood, the First Circuit found a strip search after a contact visit with an attorney to be constitutional, holding that "except in atypical circumstances, a blanket policy of strip searching inmates after contact visits is constitutional." Id. at 69; see also Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012)(upholding blanket policy of strip searching all arrestees admitted into general prison population without reasonable suspicion inquiry).

Plaintiffs contend that the strip search policies at the Treatment Center are excessive and demeaning to residents. Defendants have presented sufficient evidence that these policies are reasonably related to the goals of care and custody, in particular stemming the flow of contraband into the facility. In this case, balancing residents' privacy rights with the Treatment Center's security interests, the use of strip searches and restraints are not so excessive as to violate residents' due process rights. See Wood, 354 F.3d at 67-69; see also Marchant v. Murphy, No. 05-12446-RGS, Doc. 67 at 40-44 (D. Mass. June 17, 2009)(denying claim by civilly committed sex offender at the Treatment Center that strip search policy, including strip searches after attorney visits, violated the Constitution).

7. Window-viewing Restrictions

Residents are not permitted to look out of windows which

look onto the main corridor of the Treatment Center. Under these windows are stenciling which reads "No standing or sitting in this area." (View, II-1, 15). According to Superintendent Corsini, the reasons for this restriction are the need to prevent residents from staring at staff, particularly female staff, in the main corridor and the need to limit communication with residents exercising in the wire cage right outside. (Id. at 15-16). With respect to the first rationale, a resident would have to be eagle-eyed to get much of a view of anybody walking down the hall in the opposite building. Moreover, the windows do not appear to be open, making meaningful communication with those in the cage unlikely. Still, in light of the fact that the residents can look out of other windows, which provide natural light, this restriction is not so overly restrictive as to be punitive.

8. The Cage

According to the Plan, residents in the MPU "shall receive a minimum of one (1) hour a day, five (5) days per week, of exercise outside their cell, unless security considerations dictate otherwise. Normal exercise periods will be located in the . . . yard." Ex. 1, App. 7 at 10-11. The Plan adds that no more than four Phase II (the less restrictive MPU phase) residents can exercise in the yard together, and Phase I residents must exercise alone. Id. at 11.

Today, MPU residents are permitted to exercise one hour per day, five days per week in a small outdoor wire cage built in 2000. Ex. 324-43; (Healey, I-3, 82-83, 85; Murphy, I-5, 111-12; Luongo, II-5, 109). They are not permitted to use the indoor gym. (Luongo, II-5, 111). The DOC constructed the wire cage to comply with a non-mandatory ACA standard requesting that prisoners in segregated units have access to covered/enclosed exercise areas for use in inclement weather. (Murphy, I-5, 111-12). The ACA states that "use of outdoor areas is preferred, but covered/enclosed areas must be available for use in inclement weather." § 3-4147, ACA 1998 Correctional Standards Supplement.

Due process requires that residents not be "'denied adequate opportunities for exercise without legitimate governmental objective.'" Healey v. Murphy, 2011 WL 2693688, at *3 (D. Mass. July 8, 2011)(quoting Pierce v. County of Orange, 526 F.3d 1190, 1211-12 (9th Cir. 2008). "Determining what constitutes adequate exercise requires consideration of 'the physical characteristics of the cell and [facility] and the average length of stay of the inmates.'" Pierce, 526 F.3d at 1212 (quoting Housley v. Dodson, 41 F.3d 597, 599 (10th Cir. 1994)); see also Housley, 41 F.3d at 599 ("[N]o precise standards have been set forth delineating what constitutes constitutionally sufficient opportunities for exercise . . ."). "Legitimate nonpunitive governmental objectives include maintaining security and order and operating

the [detention facility] in a manageable fashion." Pierce, 526 F.3d at 1205 (internal quotations omitted).

This Court previously stated that "the question whether use of the wire cage deprived Healey of substantive due process [depends on] facts concerning, inter alia, the average length of Healey's confinements in the MPU, the number of hours he has spent in a cell, the dimensions of the wire cage, and the justification, if any, for the lack of access to the yard." Healey, 2011 WL 2693688, at *3. The longest time Healey spent in the MPU was nine days.

Since the 10' x 18' x 12' cage was built in 2000, Healey has exercised in it only two to three times and found it degrading and humiliating. (Healey, I-3, 84; II-2, 22-23). The cage was initially constructed with a temporary roof in 2000. The temporary roof blew off in a windstorm a few years ago, and a permanent roof was not put on until November 2011. In the interim, the only option for MPU residents to exercise outside of their cell remained the uncovered cage, even in inclement weather. (Luongo, II-5, 110-11).

Based on these facts, use of the wire cage for residents in short-term segregation, without more, does not violate Healey's due process rights because of the short duration of his

confinement in MPU.[20] The cage permits residents to perform the most basic exercises and is reasonably related to the care and custody of residents detained in the MPU for disciplinary reasons. During the years the cage had no roof, severely limiting the ability of MPU residents to exercise during inclement weather, residents were denied adequate opportunities for exercise. However, just before the second trial, a permanent roof was built for the cage, so the cage does not currently violate the Constitution. An injunction is unnecessary. Cf. Gholson v. Murry, 953 F. Supp. 709, 723 (E.D. Va. 1997) (holding that 8' X 20' enclosed exercise area not small enough to violate Constitution absent "evidence suggesting that [inmates] cannot adequately exercise within the area provided.").

H. Telephone Policy

Because some residents were using the telephone system for inappropriate and criminal activities, the Plan established a telephone policy at the Treatment Center where residents are provided a Personal Identification Number ("PIN") to use to place

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[20] The Court takes no position on the constitutionality of the cage for longer terms of confinement. At least one resident has been confined in the MPU as long as six months. While defendants balk at calling the enclosed exercise area a "cage," that is precisely what it looks like. Although DOC staff created a fitness manual designed for MPU residents, the manual contained – perhaps as a practical joke – Canadian helicopter signaling instructions. Exs. 621, 631. The peculiar addition of helicopter instructions to a fitness manual raises doubts that the DOC is committed to ensuring MPU residents receive adequate exercise.

calls. Residents are allowed to select ten personal and five legal phone numbers to call using their PIN. Ex. 1 at 41. The Plan permits the DOC to record all non-legal phone calls. Id. The telephone policy continues to be used at the Treatment Center.

Given alleges that the Treatment Center's telephone system, which permits the DOC to monitor all non-legal calls, violates his First Amendment and substantive due process rights (Given, Count II). Regarding the First Amendment, "persons incarcerated in penal institutions retain their First Amendment rights to communicate with family and friends, and . . . there is no legitimate governmental purpose to be attained by not allowing reasonable access to the telephone, and . . . such use is protected by the First Amendment." Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994) (quotations and citations omitted). This right is not unlimited, but rather is subject to reasonable security limitations. See id. Regarding due process, "if a restriction or condition is not reasonably related to a legitimate goal -- if it is arbitrary or purposeless -- a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees . . . ." Bell v. Wolfish, 441 U.S. 520, 539 (1979).

Given contends that he should not be subjected to monitoring of his phone calls because he has never been suspected of using

the phones for any improper purpose. DOC officials admit that the phone settings can be adjusted on an individual basis to only monitor certain calls of particular residents. (Barthel, I-8, 124). DOC counters that the blanket monitoring policy is necessary to ensure criminal and other inappropriate activities do not occur over the phone. (Corsini, I-6, 20-21). For example, through phone monitoring, DOC officials learned of threats being made by residents, including one instance when a resident attempted to coerce an individual to lie during court testimony. (Smith, I-9, 28-30). The telephone policy does not violate Given's First Amendment or due process rights because DOC has proven that the monitoring policy is reasonably related to security at the Treatment Center. Furthermore, Given has offered no evidence that the telephone policy hinders his ability to keep in contact with family and friends.

VII. THE REMEDY

Plaintiffs seek injunctive relief and a declaratory judgment. Permanent injunctive relief is appropriate when a plaintiff has demonstrated: "(1) that [he] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of the hardships between the parties, a remedy in equity is warranted; and (4) that the public interest will not be disserved by a permanent injunction." Esso

Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 148 (1st Cir. 2008) (citing eBay Inc. v. MercExchange, 547 U.S. 388, 390 (2006)). In order to moot a request for permanent injunctive relief, the defendant must meet the "'heavy burden' of showing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Brown v. Colegio De Abogados De P.R., 613 F.3d 44, 49 (1st Cir. 2010)(quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)). "The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, empowers a federal court to grant declaratory relief in a case of actual controversy." Ernst & Young v. Depositors Econ. Protection Corp., 45 F.3d 530, 534 (1st Cir. 1995).

A. Pharmacological Treatment

Defendants contend that the Court should not grant an injunction as a remedy for plaintiffs' pharmacological treatment claims because they have agreed to evaluate Healey and Given for drug therapies, and draft protocols are in the works to serve as a basis for their evaluations. In other words, defendants seem to claim the issue is moot. In response, plaintiffs argue that by not evaluating Healey and Given for pharmacological treatment using professionally acceptable standards for so many years after the treatment was requested, the DOC has not provided them access to mental health treatment that gives them the opportunity to improve the mental condition for which they were confined.

In the court's view, an injunction is warranted and in the public interest because plaintiffs have proven that the DOC is not committed to providing a meaningful pharmacological component to the sex offender treatment program. DOC staff testified that its pharmacological program would be instituted by February 2012, yet, to the best of the court's knowledge, the protocols have not been finalized as of the writing of this opinion. Although the case has been pending for over ten years, and the mental health contract provides for such services, none has been voluntarily provided to date to any committed sex offender at the Treatment Center. I conclude that the DOC will not provide the evaluation and, if applicable, treatment without a court order, and that plaintiffs will suffer irreparable harm by not getting adequate treatment. See e.g., Battista, 645 F.3d at 455. Accordingly, I hold that the DOC defendants must evaluate Healey and Given forthwith for pharmacological treatment using professionally acceptable standards, and if appropriate under these standards, provide them such treatment. The Court also orders that declaratory judgment be entered in favor of Healey and Given that the Treatment Center's failure to provide adequate psychopharmacological evaluations violates the Amended Management Plan and their Fourteenth Amendment substantive due process rights (Healey, Counts I & IV; Given, Count IV).

B. Community Access Program

Defendants contend the court should not grant an injunction with respect to the community access program claims. In their view, plaintiffs are not eligible for the program, and consequently, have not suffered irreparable harm.

The Court declines to order injunctive relief for Healey because he has not demonstrated he has suffered irreparable harm. Healey has filed multiple applications to the community access program. See Exs. 63-66 (Healey Achievement Matrices 2005-2008); (Peltzman, II-4, 8-9). However, his applications were futile because he had not been admitted into the CTH when he applied and was not eligible for the CTH either. Although the DOC may have contributed to Healey's injury by not providing him pharmacological treatment, his ineligibility for the CTH and community access program is due to his persistent behavioral problems, not to the Treatment Center's failure to provide clear benchmarks and prerequisites.

With respect to Given, the analysis is complicated because he only asserts a constitutional claim. The court found that defendants violated the Plan and the state statute in not having a functioning community access program, but Given has not stated a claim under the Plan or state statute. Because plaintiffs have not met their burden of proving that the de facto elimination of the community access program violates the Constitution, the Court declines to order an injunction for Given.

C. The Amended Management Plan

Finally, the Court orders the DOC to follow the Amended Management Plan in all material respects, including keeping the Community Transition House open, subject to the operational discretion to adjust to changing conditions and evolving standards of treatment and security. An order requiring the DOC to follow the Amended Management Plan is necessary and in the public interest because of the evidence of ongoing violations.

Most significantly, the Court has found that the failure to provide a functioning community access program violates the Amended Management Plan and state statute. The lack of clear benchmarks and high barriers to entry have unreasonably hindered residents' access to the CTH and the community access program. To correct this violation, the DOC must provide clear, written benchmarks regarding which courses residents must pass under the new "good lives" model to gain admission to the CTH and community access program, how credit is given for old courses under the model, a written statement outlining the process, and an anticipated timeline for evaluating applications for the CTH and community access program, which is consistent with the timeline in the Amended Management Plan. The DOC must also provide timely written reasons for any rejection from the CTH or community access program. Without a continuing court order, the DOC will fail to meet the requirements of the Plan and state statute.

As added proof of the need for an order, this litigation to enforce the Amended Management Plan prompted the DOC to begin to make improvements, including but not limited to (1) reinstatement of social and community activities, which had been eliminated; (2) initiating a process for the development of pharmacological protocols to treat and evaluate residents; (3) changes to the practice of encouraging residents to disclose uncharged conduct as part of treatment; (4) reinstatement of the procedural safeguards provided in the Amended Management Plan for the MPU; (5) provision of toilets in the outdoor exercise area; and (6) placing a roof on the wire exercise cage. As stated in the opinion, some of these problems constituted violations of the Plan. However, the Court rejects the broad sweeping relief sought by plaintiffs on the ground this is not a class action, and plaintiffs have not demonstrated standing or grounds for much of the requested relief.

D. Other Claims

The Court orders that judgment be entered in favor of the DOC defendants on Healey's claims that withholding psychological care violates his Eighth Amendment rights (Healey, Count III) and forcing him to exercise in the wire cage violates his due process rights (Healey, Count V). The Court also orders judgment be entered in favor of the DOC defendants on Given's claims that conditions at the Treatment Center violate his due process rights

(Given, Count I), the Treatment Center's telephone system violates his First Amendment and due process rights (Given, Count II), the waiver of confidentiality to obtain sex offender treatment violates his Fifth Amendment rights (Given, Count III), and the Treatment Center's accommodations fail to meet the minimum standards for human habitation. (Given, Count V).

VIII. ORDER

The Court orders the following:

(1) The DOC defendants must meet the requirements of the Amended Management Plan in all material respects as stated in the opinion, including instituting a functioning community access program.

(2) The DOC defendants must have Healey and Given evaluated by a qualified psychiatrist and, if appropriate, provide them pharmacological treatment.

(3) Declaratory judgment be entered that the Treatment Center's failure to provide adequate psychopharmacological evaluations violates the Amended Management Plan and the Due Process Clause of the Fourteenth Amendment.

(4) Declaratory judgment be entered that the Treatment Center's failure to provide a functioning community access program violates the Amended Management Plan and state statute.

(5) Dismissal of the following claims: Healey Counts III and V, and Given Counts I, II, III, and V.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JEFFREY M. HEALEY, Plaintiff, v. ROBERT MURPHY, et al., Defendants. and EDWARD GIVEN, Plaintiff, v. ROBERT MURPHY, et al., Defendants.	)	CIVIL ACTION NO. 01-11099-PBS CIVIL ACTION NO. 04-30177-PBS

FINAL JUDGMENT AND ORDER

March 29, 2013

SARIS, C.U.S.D.J.

To the extent stated in the Memorandum and Order issued this date, it is hereby **ORDERED, ADJUDGED AND DECREED**, as follows:

1. Final declaratory judgment is entered in favor of Healey on Count I (violation of the Amended Management Plan) with respect to the Treatment Center's failure to provide a functioning community access program and failure to provide adequate psychopharmacological evaluation and treatment. Final declaratory judgment is also entered in favor of Healey on Count IV (violation of the Due Process Clause) with respect only to the claim of failure to provide adequate psychopharmacological evaluation and treatment.

2. Final declaratory judgment is entered in favor of Given on Count IV with respect only to the claim of failure to provide adequate psychopharmacological evaluation and treatment.

3. Final judgment is entered in favor of the defendants on all other counts.

As provided in the Memorandum and Order, the Court **ORDERS** the following injunctive relief:

1. The DOC defendants must meet the requirements of the Amended Management Plan in all material respects.

2. The DOC defendants must have Healey and Given evaluated by a qualified psychiatrist and, if appropriate, provide them pharmacological treatment.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JEFFREY M. HEALEY, Plaintiff, v. ROBERT MURPHY, and HAROLD W. CLARKE, Defendants. and JOEL PENTLARGE, and EDWARD GIVEN, Plaintiffs, v. ROBERT MURPHY, HAROLD W. CLARKE, and the MASSACHUSETTS DEPARTMENT OF CORRECTION, Defendants.	)	CIVIL ACTION NO. 01-11099-PBS Consolidated with CIVIL ACTION NO. 04-30177-PBS

PRE-TRIAL MEMORANDUM

Plaintiffs, Jeffrey Healey and Edward Given, and defendants, the Department of Correction ("DOC") and in their official capacities the Superintendent of the Massachusetts Treatment Center together with the Commissioner of the DOC submit the following Pre-Trial Memorandum. The Pretrial Conference is scheduled for December 21, 2011. Trial is currently scheduled to begin on January 12, 2012.

I. The names, addresses and telephone numbers of trial counsel

For Mr. Healey:

John A. Houlihan of Edwards Wildman Palmer LLP will be lead trial counsel. He will be assisted by Joshua W. Gardner, Hilary B. Dudley and Megan J. Freismuth all of Edwards Wildman Palmer LLP.

Address: Edwards Wildman Palmer LLP
111 Huntington Ave.
Boston, MA 02199
Telephone: (617) 239-0100

For Mr. Given

John Swomley and Eric Tennen[1] of Swomley & Tennen, LLP will be co-counsel, along with Harry Miles of Green, Miles, Lipton & Fitzgibbon.

Address: Swomley & Tennen, LLP
227 Lewis Wharf
Boston, MA 02110
Telephone: (617) 227-9443

Address: Green, Miles, Lipton & Fitzgibbon
77 Pleasant St.
P.O. Box 210
Northampton, MA 01061
Telephone: (413) 586-8218

For the Defendants

Mary P. Murray will serve as lead counsel, assisted by Brendan J. Frigault.

Address: Department of Correction Legal Division
Massachusetts Treatment Center
30 Administration Road
Bridgewater, MA 02324
508/279-8184 (Ms. Murray)

[1] The Court's electronic document only lists Mr. Miles as Mr. Given's attorney. Mr. Tennen's Notice of Appearance filed on June 17, 2011 (Docket No. 332) states that he was entering an appearance on behalf of both Joel Pentlarge and Edward Given. Mr. Swomley also represents Mr. Given in this lawsuit.

508-279-8185 (Mr. Frigault)

II. Whether the case is to be tried with or without jury

Only declaratory and injunctive relief claims remain to be tried in both cases. Therefore, no claims will be tried by a jury.

III. A concise summary of the positions asserted by the plaintiffs with respect to both liability and damages

Plaintiff Healey

Plaintiff Healey challenges the excessively restrictive conditions of confinement and the inadequate treatment provided at the Massachusetts Treatment Center ("MTC"). Count I of his Second Amended Complaint seek to enforce the DOC's Amended Management Plan (the "Plan") as an enforceable Court Order. This Court already has ruled that, "based on the decision of the District Court in the case of *King v. Greenblatt*, 53 F. Supp. 2d 117 (D. Mass. 1999) ("King IV"), [] the amended Plan constitutes an enforceable court order." Docket No. 275 at pp. 3, 36-38 (Oct. 28, 2009 Report and Recommendation on Plaintiff Jeffrey Healey's Renewed Motion for Partial Summary Judgment, adopted by the Court on Nov. 24, 2009). Plaintiff Healey contends that the DOC has violated the Plan, by among other things: 1) failing to provide a "system of differing levels of security and privileges," including "a properly structured community access program," "in order that residents can be maintained in the 'least restrictive conditions' of confinement;" 2) failing "to provide treatment to sex offenders by the best available methodology" and the "best current treatment methodology;" 3) failing to provide an evolving and comprehensive sex offender treatment program that includes not just cognitive behavioral therapy and psycho-educational classes, but also appropriate pharmachological treatment options, including but not limited to serotonin reuptake

inhibitors and testosterone lowering medications; 4) failing to provide social and community-building activities in a therapeutic community; 5) failing to provide a meaningful range of educational, recreational and vocational programs; 6) failing to maintain a behavior management system based on "clearly defined rules and clearly defined repercussions for rule breaking;" 7) failing to maintain a functioning pre-transition and community access program; and 8) failing to provide a "program in its totality [that is] designed to provide the sex offender with the tools and resources that may assist him in returning to the community as a productive citizen."

Counts III and IV of Plaintiff Healey's Second Amended Complaint seek to enforce state law and the United States Constitution. Specifically, Plaintiff Healey contends that the Defendants violated the Mass. Gen. Laws ch. 123A and the Fifth and Fourteenth Amendments by failing to provide adequate sex offender treatment. In Count V, Plaintiff Healey also contends that Defendants' use of the wire cage in the minimum privilege unit violates the Fourteenth Amendment.

Healey seeks injunctive relief requiring the DOC to implement a comprehensive sex offender treatment approach utilizing the current best practices under the least restrictive methods of confinement consistent with its statutory mandate to provide the civilly committed residents of the MTC with care treatment and rehabilitation as pursuant to its obligations under the Plan and the Constitution. Healey also seeks attorney fees.

Plaintiff Given

Plaintiff Given also challenges the excessively restrictive conditions of confinement and the inadequate treatment provided at the MTC.

In counts I, II, and V, Given challenges the various conditions of confinement as not being reasonably related to the purpose for which he is committed and thus in violation of his Constitutional Rights under the XIV Amendment of the U.S. Constitution. Count I challenges the day-to-day conditions of confinement in that they collectively create an anti-therapeutic environment and hinder the process of treatment, rehabilitation, and release. The conditions include, but are not limited to, the following: overcrowding, double bunking, cell size, sanitary conditions, access to toilets and showers, restrictive policies (e.g. visits, property, telephone access, mail, library), limited educational and vocational programming, no functioning community access program, and a lack of a resident classification system. Count II independently challenges the existing restrictions on telephone use as a violation of Given's Constitutional rights under the First Amendment of the U.S. Constitution. In Count IV Given challenges the physical conditions of confinement as denying Given the minimal measure of necessities required for civilized living. Counts III and IV challenge the adequacy of the treatment offered at the MTC. Count III specifically challenges the limits on confidentiality as a violation of Given's Constitutional Rights under the Fifth Amendment of the U.S. Constitution. Count IV challenges the adequacy of the therapeutic regimen available to Given as being wholly inadequate and not reasonably related to the purposes of his confinement: treatment, rehabilitation, and release.

Given seeks injunctive relief requiring the DOC to modify the conditions of his confinement, make improvements to the physical facility, and implement a comprehensive sex offender treatment approach utilizing the current best practices, all pursuant to its obligations under the Constitution. Given also seeks attorneys fees.

Defendants

As to Plaintiff Jeffrey Healey:

1. The DOC Defendants dispute Healey's claim that they have violated the Amended Management Plan (AMP).

2. The DOC Defendants dispute Healey's claim that the conditions of his confinement are excessively restrictive or that the sex offender treatment program is deficient. The DOC Defendants dispute Healey's contention that the Observation of Behavior Report regulations have not been followed in proceedings involving Healey.

3. The DOC Defendants have objected to this Court's ruling that the AMP is an enforceable court order. See Documents 275, 276.

4. The DOC Defendants dispute that the use of the enclosed exercise area violates Healey's rights.

5. The DOC Defendants dispute that Healey's rights, if any, arising under state law have been violated. The DOC Defendants dispute that Healey's rights arising under the United States Constitution have been violated.

6. The DOC Defendants state that, because Healey's rights have not been violated, Healey is not entitled to declaratory or injunctive relief or attorneys' fees.

As to Plaintiff Edward Given:

1. The DOC Defendants dispute Given's contention that the conditions of his confinement are "excessively restrictive" and that the conditions of his confinement are not reasonably related to the purpose of his civil commitment as a sexually dangerous person. The DOC Defendants anticipate that the evidence will show that the United States District Court and the First Circuit Court of Appeals approved the application of

many DOC regulations and policies (to which Given now objects) to SDPs in the *King v. Greenblatt* litigation.

2. The DOC Defendants dispute Given's contention that Given is required to incriminate himself in violation of the Fifth Amendment to the United States Constitution as a prerequisite to participating in the sex offender treatment program. The DOC Defendants dispute Given's claim that the conditions of the treatment program otherwise violate his rights.

3. The DOC Defendants dispute Given's contention that the conditions of his confinement violate his rights.

4. The DOC Defendants dispute Given's characterization of the purposes of SDP commitment. See Document 337 (Given describing the purposes of his confinement as "treatment, rehabilitation, and release"). "General Laws c. 123A is a comprehensive legislative program designed to identify and treat sexually dangerous persons. The statute was enacted with the dual aims of protecting the public against future antisocial behavior by the offender, and of doing all that can be done to rehabilitate him." *Commonwealth v. Barboza*, 387 Mass. 105, 111 (1981), *cert. denied,* 459 U.S. 1020 (1982) (citations omitted). SDP commitment is indefinite because "there is no certainty of cure, and the outcome in any particular case cannot be predicted." *Commonwealth v. Major,* 354 Mass. 666, 668 (1968). Further, SDP commitment is constitutional even if the SDP is untreatable. *Kansas v. Hendricks*, 521 U.S. 346, 365-366 (1977)("under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law"); *Commonwealth v. Nieves,* 446 Mass. 583, 594

(2006)(SDP commitment is permissible "even where no effective treatment exists to remedy the defendant's infirmity").

5. The DOC Defendants state that, because Given's rights have not been violated, Given is not entitled to injunctive relief or attorneys' fees.

As to both Healey and Given:

The DOC Defendants maintain that the Plaintiffs' failure to progress in treatment is the result of their own actions and omissions, including but not limited to the failure to attend the sex offender treatment programs, the failure to comply with treatment recommendations and, particularly with respect to Healey, the refusal to conform his behavior to the rules and regulations of the Treatment Center.

IV. Stipulated Facts

A. PARTIES

Jeffrey Healey

1. Plaintiff Jeffrey Healey is currently civilly committed as a sexually dangerous person ("SDP") to the Massachusetts Treatment Center ("Treatment Center" or "MTC").

2. On February 24, 1966, Mr. Healey was convicted of 1 count of indecent assault and battery on a child under 14 and 1 count of assault and battery by means of a dangerous weapon. Mr. Healey was civilly committed as a SDP to the MTC in lieu of a criminal sentence.

3. In August 1976, Mr. Healey was placed on a gradual release program by the court. This program was terminated in December 1977 when Mr. Healey was arrested for sexually abusing a boy and returned to the MTC.

4. In 1979, Mr. Healey was convicted of 1 count of carnal abuse on a child under 14 and sentenced to 15-20 years imprisonment at MCI-Walpole (now MCI-Cedar Junction) to be served at MCI-Bridgewater. In 1980, Mr. Healey was also convicted of 2 counts of indecent assault and battery on a child under the age of 14 (second offense) and sentenced to 12-18 years at MCI-Walpole (now MCI-Cedar Junction) to be served at MCI-Bridgewater concurrently with the other sentence.

5. In April 1978, Mr. Healey was officially recommitted to the MTC as a SDP.

6. Mr. Healey completed his criminal sentences on March 15, 1997.

7. Mr. Healey has had Section 9 trials, including the following: In December 1968, the Middlesex Superior Court, Spring, J., denied Mr. Healey's petition for discharge. In October 1974, Mr. Healey was found to remain a SDP. In 1996, the Middlesex Superior Court, Neel, J., found that Mr. Healey remained sexually dangerous. Mr. Healey's last Section 9 trial was in November, 2005. Mr. Healey did not prosecute his appeal from the jury's verdict that he remains a SDP and his appeal was dismissed by the Appeals Court. Mr. Healey filed another Section 9 petition in 2006 which was scheduled for trial in 2008 but was postponed at Mr. Healey's request until 2009. Mr. Healey, who was represented by counsel, voluntarily withdrew this petition for discharge. Mr. Healey filed another Section 9 petition on May 20, 2010. His Section 9 trial is scheduled for June 17, 2013.

8. Mr. Healey's birth name was Charles Arthur Healey, III. He changed his name to Jeffrey Matthew Healey on December 6, 1983.

9. In the *King v. Greenblatt,* Civ. A. Nos. 72-788, 72-571 (D. Mass.) litigation, the Court, Mazzone, J., treated a letter received in 1992 from forty-eight residents, including Mr. Healey, as a pro se complaint and granted those residents, who named themselves the Class of 48 + 1, the status of intervenor plaintiffs.

Edward Given

10. Plaintiff Edward Given is currently civilly committed as a SDP to the MTC.

11. Mr. Given was convicted of indecent assault and battery on a child under the age of 14 in 1983 and given a suspended sentence of 1 year in a house of correction, with probation and conditions. In 1991, he was convicted of rape of a child under the age of 16, indecent assault and battery on a child under the age of 14 (4 counts), indecent assault and battery on a mentally retarded person (2 counts), and rape of a child under the age of 16, unnatural. He was given a sentence of 9 – 12 years at MCI-Cedar Junction.

12. Mr. Given completed serving his criminal sentences on November 13, 2000.

13. In November 2000, Mr. Given was temporarily committed to the MTC pending the District Attorney's petition to commit him as a SDP pursuant to Mass. Gen. Laws ch. 123A.

14. On July 12, 2001, Mr. Given was civilly committed as a SDP to the MTC pursuant to Mass. Gen. Laws ch. 123A.

15. Mr. Given had Section 9 trials in 2004, 2007 and 2010. At each trial, the jury returned a verdict that Mr. Given remains sexually dangerous.

DOC Defendants

16. The MTC is operated by the DOC pursuant to Mass. Gen. Laws c. 123A, § 2.

17. Michael Corsini is the current Superintendent of the MTC.

18. Luis Spencer is the current Commissioner of the DOC.

19. Robert F. Murphy, Jr. was the Superintendent of the MTC from November 1997 to March 15, 2010.

20. Harold W. Clarke was the Commissioner of the DOC from November 2007 to November 2010.

21. Kathleen M. Dennehy was the Commissioner of the DOC from March 2004 to April 2007.

22. Michael Maloney was the Commissioner of the DOC from August 1997 until March 2004.

B. MENTAL HEALTH AND SEX OFFENDER TREATMENT

23. Justice Resource Institute ("JRI") provided sex offender treatment to SDPs at the MTC between 1992 and June 30, 2002, first pursuant to a contract with the Department of Mental Health and then pursuant to contracts with DOC.

24. By letter dated October 31, 2001, DOC notified JRI that DOC would not exercise its final option to renew its contract with JRI and would put the contract out to bid.

25. In 2002, DOC issued a request for responses (RFR# 03-6052-M03) for comprehensive assessment, treatment, and release preparation services to identified sex offenders within various DOC facilities.

26. The DOC awarded the contract pursuant to RFR# 03-6052-M03 to Forensic Health Services, Inc. ("FHS"). The initial duration of the contract was July 1, 2002 to June 30, 2005, with three options to renew for up to two years. The DOC exercised all three options to renew.

27. In 2008, FHS was acquired by MHM Correctional Services, Inc. ("MHM").

28. On March 15, 2011, the DOC issued a request for responses (RFR# 12-DOC-6052) for assessment, treatment, and release preparation services to identified sex offenders within various Department facilities.

29. On May 26, 2011, the sex offender treatment services contract pursuant to RFR# 12-DOC-6052 was awarded to MHM. The initial duration is July 1, 2011 to June 30, 2014, with three options to renew for up to two years each.

30. On December 15, 2006, the DOC issued a request for responses (RFR# 08-9004-R21) for comprehensive health services to the Massachusetts prison population for both prison medical services and comprehensive Bridgewater State Hospital and prison mental health services. The DOC awarded the University of Massachusetts Medical School the contract for medical and dental services. The DOC awarded MHM the contract for mental health services.

31. The MHM mental health services contract started July 1, 2007. The DOC exercised its options to renew. The anticipated end date is June 30, 2012, with additional options to renew.

C. OTHER FACTS

32. The Community Transition House was officially closed from October 2003 until November 2008 following the escape of a SDP.

33. No SDPs have been accepted into the Community Access Program since 1999.

34. The Plaintiffs are limited to a list of 5 attorneys and 10 other persons to whom phone calls may be made.

35. There is no toilet in the exercise yard.

36. There is a mechanism that controls the number of times the toilets in the cells can be flushed in a half-hour period. The toilet can be flushed twice in a half-hour period. There is a manual override available to be implemented by the staff.

37. Outgoing mail is stamped to indicate that it is being sent from a correctional facility.

38. The Massachusetts Department of Correction awarded the contract for furnishing, installing and maintaining a Secure Inmate Calling System for use in its correctional institutions pursuant to RFR# 1000-Phone2006 to Global Tel*Link Corporation of Mobile, AL. This contract had an initial duration of four years with three options to renew, up to one year each option. The start date for this contract was March 3, 2006. The DOC last renewed the contract on September 9, 2010.

V. Contested issues of fact

Plaintiffs' Position: Plaintiffs contend that the overall conditions of confinement, including the availability of treatment options, educational, vocational, social and recreational opportunities, the physical infrastructure, and the general living conditions,

do not comport with Constitutional requirements, the Amended Management Plan for the Administration of the MTC, and state law.

Defendants' Position:

The Defendants dispute Mr. Healey's claims that the Defendants have violated the Amended Management Plan, withheld psychological care, failed to provide adequate sex offender treatment or violated his rights by use of the enclosed exercise area. The Defendants dispute Mr. Given's allegations that his rights have been violated as a result of the conditions of his confinement at the Massachusetts Treatment Center and the sex offender treatment program. The Defendants also dispute Mr. Given's claims that the telephone system violates his constitutional rights, that his Fifth Amendment rights have been violated, and that the physical conditions of his confinement deprive him of substantive due process.

VI. Any jurisdictional questions

Defendants contend that Plaintiffs lack standing to litigate on behalf of any other SDP. The Defendants have also raised specific standing issues in connection with Healey's claims. *See* Document 317.

The Plaintiffs contend that the Defendants should not be permitted to raise standing issues for at least the third time. This Court previously ruled that Mr. Healey has adequate standing to proceed to trial. In their Motion for Summary Judgment, the Defendants moved on standing grounds to dismiss Mr. Healey's claims only as to work, woodshop, and educational programs. (Dkt. 317, 6/01/2011). This Court rejected Defendants' arguments, ruling that because Mr. Healey "is not seeking specific work, woodshop or educational opportunities, but instead is seeking an order compelling

specific performance of the Plan as a whole, which aims to provide "a meaningful array of educational and vocation training, which 'are an integral part of the treatment program'", he "raised a genuine issue of fact with respect to this issue, and his claims will not be dismissed before trial due to an alleged lack of standing." (Dkt. 346, 7/8/2011). This rationale is entirely applicable to all of Plaintiffs' claims. Indeed, in their Reply to Healey's Renewed Motion for Summary Judgment (Dkt. 259, 5/8/2009), the Defendants conceded that, "Clearly, Healey may bring an action to challenge the adequacy of the sex offender treatment offered to him." As civilly committed residents at the MTC, both Healey and Given face a real and immediate injury because the program in which they participate lacks key components of a treatment regimen that offers them a reasonable prospect of gaining their release. Therefore, Plaintiffs lack the opportunity to take part in the type of treatment program mandated by both the Constitution and the Management Plan. Similarly, the overall conditions of the Plaintiffs' confinement are neither the least restrictive conditions consistent with the purposes confinement as required by the Management Plan nor reasonably related to the care, custody, treatment and rehabilitation of a civilly committed residents as required by M.G.L. ch. 123A §2 and the Constitution. Plaintiffs have a "personal stake in the outcome," and their injury is neither "conjectural" or "hypothetical." City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983). Plaintiffs are entitled to progress through a treatment regime that includes the components mandated by the Constitution and the Management Plan and to do so while living under conditions that are the least restrictive conditions consistent with the purposes of confinement.

VII. Issues of law, including evidentiary questions

Plaintiffs previously filed: 1) a motion to appoint former Judge Gertner as a special master to decide both cases based on the record established before her during the July 2011 trial of these cases; 2) a motion in limine to limit testimony at any retrial to the same witnesses who testified and the same issues that were addressed during the July 2011 trial; and 3) a motion in limine for an award of funds sufficient to cover the expenses associated with the recall of their two expert witnesses at whatever retrial this Court determines to be necessary or in the alternative, an order directing the Defendants to pay all costs associated with the recall of the Plaintiffs' expert witnesses at the retrial demanded by the Defendants. All three of these motions remain outstanding.

Defendants previously filed: 1) a renewed motion in limine to exclude the testimony of Stan Stojkovic, Ph.D.; and 2) a renewed motion in limine to exclude the testimony of Fabian Saleh, M.D. Both of these motions also remain outstanding.

VIII. Any requested amendments to the pleadings

The Parties agree that the DOC Defendants should be substituted pursuant to Fed. R. Civ. P. 25(d) in both cases as follows: Defendant Robert Murphy should be replaced with Michael Corsini, his successor as Superintendent of the MTC and Defendant Harold Clarke should be replaced with Luis Spencer, his successor as Commissioner of the DOC.

IX. Any additional matters to aid in the disposition of the action

A. View. All parties agree that a view would aid the Court by providing a context for the evidence regarding the conditions of confinement. Accordingly, both

parties urge this Court to exercise its power to take a view of the MTC. *See, e.g., Clemente v. Carnicon-Puerto Rico Mgmt. Assocs., L.C.*, 52 F.3d 383, 385-86 (1st Cir. 1995), *questioned on other grounds by United States v. Gray*, 199 F.3d 547 (1st Cir. 1999); 4 John Henry Wigmore, *Wigmore on Evidence* § 1164 (Chadbourne rev. 1972) ("[I]t is proper that the trial court should have the discretion to grant or to refuse a view according to the requirements of the case in hand.").

B. Habeas Corpus Ad Testificandum. The Plaintiffs request that the Court issue writs of habeas corpus ad testificandum for Edward Given and Jeffrey Healey so that they may appear as parties throughout the trial.

C. Testimony of Stan Stojkovic, Ph.D. The Plaintiffs have designated Stan Stojkovic, Ph.D., as a proposed expert. The Defendants have moved to exclude Dr. Stojkovic. See Document 373. Dr. Stojkovic resides in Wisconsin. If the Court permits Dr. Stojkovic to testify, the parties have agreed that such testimony may be provided by means of a video conference, subject to the Court's approval.

D. Entry of Separate and Final Judgment**.** Because all claims for monetary damages have been dismissed and Defendants Michael T. Maloney, Kathleen Dennehy, Harold W. Clarke and Robert Murphy are no longer in the positions that gave rise to the claims against them in their official capacities for injunctive relief, the Defendants request that the Court enter separate and final judgment in favor of each of these Defendants.

E. Motion to Impound Trial Exhibits. The parties filed a joint motion to seal/impound agreed upon trial exhibits on July 11, 2011 (document 352). No ruling

appears on the docket. The parties request that the Court allow this motion as to all trial exhibits, including any additional exhibits offered at the trial scheduled for January 2012.

X. The probable length of trial

At the November 23, 2011 status conference the Court indicated that it would decide the scope of the retrial, including the extent to which the parties may rely on the transcript of the July 2011 trial, recall witnesses who testified during the July 2011 trial or call new witnesses, and the scope of inquiry that will be permitted during the retail. Obviously, all of these factors will affect the length of the retrial.

XI. Voir dire procedures

Jury voir dire will not be necessary because there are no issues triable by a jury.

XII. Names and Addresses of Witnesses who shall testify at trial

A. **Plaintiffs' Witness List**

In the event that the Court requires live testimony, Plaintiffs intend to call the witnesses listed below. The Court has not ruled on the manner in which the trial will proceed. Accordingly, Plaintiffs reserve the right to modify this list to add or subtract witnesses as may be appropriate, and to identify trial transcript testimony from the first trial.

Plaintiffs object to Defendants' list. Defendants identify 129 potential witnesses. If, after the trial structure has been decided, Defendants are allowed to call witnesses beyond those they called in the first trial, Defendants should be required to submit a narrowed list.

Name	Purpose (factual/ medical/ expert)	Address	Qualifications
Jeffrey Healey	Fact	MTC 30 Administration Road Bridgewater, MA 02324	
Edward Given	Fact	MTC 30 Administration Road Bridgewater, MA 02324	
Joel Pentlarge	Fact	15 Barbara Street, Jamaica Plain, MA 02130	
Fabian M. Saleh, M.D.	Expert	MGH, WACC-812 15 Parkman Street Boston, MA 02114	Director, Sexual Behaviors Clinic; Staff at MGH and UMass Memorial Medical Center; author of books, chapters, reviews and articles on sex offender treatment and management, paraphilic disorders, psychiatric comorbidity, sexual deviancy, biological treatment of sex offenders; full Qualifications in CV.
Stan Stojkovic, Ph.D.	Expert	1095 Enderis Hall 2400 East Hartford Ave. Milwaukee, Wisconsin 53201	Dean and Professor, Helen Bader School of Social Welfare, University of Wisconsin; Ph.D. with focus on Criminal Justice; author of books, book chapters, articles and review essays and conference presenter on Corrections, Corrections Management and Administration, Managing Special

			Populations; Chairperson on Sexually Violent Persons Transitional Facility Advisory Committee; full Qualifications listed in CV
Robert Murphy	Fact	DOC	
Michael Corsini	Fact	30 Administration Road Bridgewater, MA 02324	
Michael Maloney	Fact	DOC	
Luis Spencer	Fact	50 Maple Street, Suite 3 Milford, MA 01757	
Barbara Schwartz	Fact	85 Forbes Lane Windham, ME 04062	
Kim Lyman (Current FHS Program Director)	Fact	MTC 30 Administration Road Bridgewater, MA 02324	
Niklos Tomich	Fact	FHS	

By agreement of the Parties, the testimony of the following witnesses will be submitted through the designated, portions of their deposition testimony:

Michael Maloney
Nancy Connolly
Kathleen Dennehy
Debra O'Donnell
James Bender
James Karr
Christopher Mitchell
Carolyn Vicari
Veronica Madden
Pamela MacEachern

Plaintiffs reserve the right to call any rebuttal witnesses as may be necessary.

B. **Defendants' Witness List**

The Defendants' witness list has previously been filed with the Court. See Document 337-2. The Defendants rely on this witness list, except that the Defendants do not intend to call Gilberto Sanchez as a witness. The Defendants reserve the right to

modify this list to add or subtract witnesses as may be appropriate after the Court rules on the manner in which the trial will proceed.

XIII. A list of proposed exhibits

On December 7, 2011, the parties submitted an Exhibit List, Designations of Deposition Testimony, and Witness Lists, as required by the Court's November 15, 2011 Order for Pretrial Conference. Document 376. The Exhibit List consisted of the final exhibit list from the July 2011 trial (Document 356). The parties reserve the objections made at the July 2011 trial with respect to particular exhibits. The parties reserve the right to move to strike any exhibit which was admitted, if appropriate based on rulings by this Court as to the manner in which the trial will proceed. The parties reserve the right to offer additional exhibits, as appropriate, based on the manner in which the trial proceeds.

XIV. Preliminary Jury Instructions

No jury instructions are necessary because there are no issues triable by a jury.

Date: December 15, 2011

JEFFREY M. HEALEY,
By his attorneys,

/s/ Joshua W. Gardner
John A. Houlihan (BBO No. 542038)
Joshua W. Gardner (BBO No. 657347)
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Certificate of Service

I, Joshua W. Gardner, certify that this document was filed electronically on the 15th day of December, 2011 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing.

/s/ Joshua W. Gardner

United States Court of Appeals
For the First Circuit

No. 13-1546

JEFFREY M. HEALEY; EDWARD GIVEN

Plaintiffs - Appellees/Cross-Appellants

JOEL PENTLARGE

Plaintiff

v.

LUIS S. SPENCER, in his official capacity as Commissioner of Correction; MASSACHUSETTS DEPARTMENT OF CORRECTION; MICHAEL CORSINI, in his official capacity as the Superintendent of the Massachusetts Treatment Center,

Defendants - Appellants/Cross-Appellees

NATAYLIA PUSHKINA; DEBORAH O'DONNELL

Defendants

No. 13-1604

JEFFREY M. HEALEY; EDWARD GIVEN

Plaintiffs - Appellees/Cross-Appellants

JOEL PENTLARGE

Plaintiff

v.

LUIS S. SPENCER, in his official capacity as Commissioner of Correction; MASSACHUSETTS DEPARTMENT OF CORRECTION; MICHAEL CORSINI, in his official capacity as the Superintendent of the Massachusetts Treatment Center,

Defendants - Appellants/Cross-Appellees

NATAYLIA PUSHKINA; DEBORAH O'DONNELL

Defendants

No. 13-1610

JEFFREY M. HEALEY; EDWARD GIVEN

Plaintiffs - Appellees/Cross-Appellants

JOEL PENTLARGE

Plaintiff

v.

LUIS S. SPENCER, in his official capacity as Commissioner of Correction; MASSACHUSETTS DEPARTMENT OF CORRECTION; MICHAEL CORSINI, in his official capacity as the Superintendent of the Massachusetts Treatment Center,

Defendants - Appellants/Cross-Appellees

NATAYLIA PUSHKINA; DEBORAH O'DONNELL

Defendants

APPELLEE'S BRIEFING NOTICE

Issued: August 5, 2013

Appellee's brief must be filed by **September 9, 2013**.

The deadline for filing appellant's reply brief will run from service of appellee's brief in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0. Parties are advised that extensions of time are not normally allowed without timely motion for good cause shown.

Presently, it appears that this case may be ready for argument or submission at the coming **December, 2013** session.

The First Circuit Rulebook, which contains the Federal Rules of Appellate Procedure, First Circuit Local Rules and First Circuit Internal Operating Procedures, is available on the court's website at www.ca1.uscourts.gov. Please note that the court's website also contains tips on filing briefs, including a checklist of what your brief must contain.

Failure to file a brief in compliance with the federal and local rules will result in the issuance of an order directing the party to file a conforming brief and could result in the

appellee not being heard at oral argument. See 1st Cir. R. 3 and 45.

Margaret Carter, Clerk

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FOR THE FIRST CIRCUIT
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