UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LASHAWN JONES ET AL.	**CIVIL ACTION**
	No. 12-859
VERSUS	**c/w 12-138**
	REF: BOTH CASES
MARLIN GUSMAN ET AL.	**SECTION I**

ORDER APPROVING CONSENT JUDGMENT AND CERTIFYING SETTLEMENT CLASS

Before the Court is the joint motion[1] for approval of the proposed consent judgment[2] filed by plaintiffs, LaShawn Jones et al. ("Class Plaintiffs"), intervenor plaintiff, the United States of America ("United States") (collectively, "Plaintiffs"), and defendant, the Orleans Parish Sheriff ("Sheriff"). Also before the Court is the motion[3] for certification of a settlement class filed by Class Plaintiffs, which the United States and the Sheriff do not oppose. Third-party defendant, the City of New Orleans ("City"), opposes approval of the proposed consent judgment and certification of a settlement class.[4] For the following reasons, the motions are **GRANTED**.

[1]R. Doc. No. 101. Record citations are to Civil Action No. 12-859 unless otherwise noted.

[2]Consent Judgment. Record citations to "Consent Judgment" are to the document filed on this date, which incorporates the March 18, 2013 amendments discussed herein and grammatical and typographical corrections listed in a separate filing.

[3]R. Doc. No. 145.

[4]*E.g.*, R. Doc. No. 159.

FACTUAL BACKGROUND

which collectively house approximately 500-600 inmates in a dormitory setting.[12] Approximately 150 inmates may be present at the Intake Processing Center on a given day.[13] Approximately 115 inmates may be present at the Warren McDaniels Transitional Work Center, also referred to as the Broad Street work-release facility, on a given day.[14]

PROCEDURAL HISTORY

Although the conditions at OPP have long been the subject of litigation, this particular lawsuit is the product of investigations and complaints arising in the past five years.[15] In early 2008, the Sheriff requested technical assistance from the National Institute of Corrections, a fe pideral,

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OPP's "pervasive and long standing problems," which date back many years.[18] The October 2008 report discussed some of the deficiencies alleged in this case and proposed general solutions.[19]

In September 2009, the United States, through the Department of Justice ("DOJ"), conducted a site visit at OPP and issued a letter to the Sheriff, describing findings of unlawful conditions related to inmate violence, staff use of force,

Fourteenth Amendment rights. Class Representatives specifically alleged that defendants fail to provide constitutionally adequate medical care and mental health care.[23] Class Representatives further alleged that violent conditions of confinement subjected them to a substantial risk of serious physical injury, to which defendants were deliberately indifferent.[24] On the same day they filed their complaint, Class Representatives filed a motion for certification of a class of plaintiffs consisting of all current and future OPP inmates.[25] The April 2 complaint was consolidated with the January 18 complaint.[26] The Court refers to the if

States' overlapping concerns.[29] The Court granted the United States' unopposed motion.[30] In its complaint in intervention, the United States alleged that the Sheriff violates inmates' Eighth and Fourteenth Amendment rights by failing to protect inmates from harm, providing insufficient mental health and medical care, and subjecting inmates to unconstitutional environmental conditions.[31] The United States also alleged that the Sheriff violates Title VI by unlawfully discriminating against Latino inmates with limited English proficiency.[32]

On October 1, 2012, with leave of Court, the Sheriff filed two, substantively similar, third-party complaints against the City, one based on Class Plaintiffs' claims and one based on the United States' claims.[33] In each complaint, the Sheriff asserted that, "should judgment be rendered granting any prospective relief against third-party plaintiff," the C.001ntiff,

nonparty to the agreement.[35]

The consent judgment is a 49-page agreement[36] entered into by Class Plaintiffs, including

Within each subject and component, the substantive provisions are a mix of broad guidelines and specific benchmarks. For example, under "screening and assessment" for mental health issues, the consent judgment requires that the Orleans Parish Sheriff's Office ("OPSO") "[d]evelop and implement an appropriate screening instrument that identifies mental health needs, and ensures timely access to a mental health professional when presenting symptoms requiring such care."[40] In particular, the consent judgment requires that inmates "with urgent mental health needs" receive an assessment by a qualified mental health professional within 48 hours.[41]

With respect to oversight, the consent judgment provides that the parties to the agreement "will jointly select a Monitor to oversee implementation of the Agreement," with the Court resolving selection disputes.[42] Among other duties, the Monitor is responsible for providing the parties to the agreement, the City, and the Court with periodic reports on the Sheriff's compliance with the consent judgment.[43] The consent judgment provides that the Monitor will receive "full and complete" access to OPP facilities, records, staff, and inmates.[44]

Separate from the appointment of a Monitor, the consent judgment obligates OPSO to "hire and retain, or reassign a current OPSO employee for the duration of this Agreement, to serve as a

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[40]Consent Judgment, at 20.

[41]Consent Judgment, at 20-21.

[42]Consent Judgment, at 40-41. Monitor is defined to include "an individual and his or her team of professionals." Consent Judgment, at 3.

[43]Consent Judgment, at 42. The consent judgment also requires the Sheriff to provide periodic compliance reports to the Monitor, although the Monitor is "responsible for independently verifying representations from [the Sheriff] regarding progress toward compliance, and examining supporting documentation." Consent Judgment, at 42.

[44]Consent Judgment, at 41.

full-time OPSO Compliance Coordinator."[45] According to the consent judgment:

> At a minimum, the Compliance Coordinator will: coordinate OPSO's compliance and implementation activities; facilitate the provision of data, documents, materials, and access to OPSO's personnel to the Monitor, SPLC, DOJ, and the public, as needed; ensure that all documents and records are maintained as provided in this Agreement; and assist in assigning compliance tasks to OPSO personnel, as directed by the Sheriff or his or her designee.[46]

In addition, the Compliance Coordinator is responsible for collecting the information the Monitor requires from OPSO.[47]

As to funding, the consent judgment sets forth a process by which the Court will "determine the initial funding needed to ensure constitutional conditions of confinement at OPP, in accordance with the terms of this Agreement, and the source(s) responsible for providing that funding at an evidentiary hearing ('funding trial')" at which the parties to the agreement, as well as the City, shall have the right to participate.[48] After this time, the funding amount "may be adjusted" through a process by which the Monitor attempts to resolve disagreements between the Sheriff and the City.[49] If the Monitor is unable to do so within 45 days, the dispute is submitted to the Court.[50]

The Consent Judgment provides specific procedures with respect to enforcement. For example, "if the Monitor, SPLC, or DOJ determines that Defendant has not made material progress

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[45]Consent Judgment, at 39.

[46]Consent Judgment, at 39.

[47]Consent Judgment, at 39.

[48]Consent Judgment, at 38.

[49]Consent Judgment, at 38.

[50]Consent Judgment, at 38.

toward Substantial Compliance with a significant obligation under the Agreement, and such failure constitutes a violation of prisoners' constitutional rights, SPLC or DOJ may initiate contempt or enforcement proceedings against Defendant . . . ."[51] Before taking such action, however, "SPLC or DOJ shall give Defendant written notice of its intent to initiate such proceedings," the parties shall work in good faith to resolve the dispute, and "Defendant shall have 30 days from the date of such notice to cure the failure . . . ."[52] In the event of an emergency that poses "an immediate threat to the health or safety of any prisoner or staff member at OPP, however, DOJ or SPLC may omit the notice and cure requirements" and immediately pursue an enforcement proceeding.[53]

With respect to termination, the consent judgment provides that it "shall terminate when Defendant has achieved Substantial Compliance with each provision of the Agreement and has maintained Substantial Compliance with the Agreement for a period of two years."[54] As for severability, if any consent judgment provision "is declared invalid for any reason by a court of competent jurisdiction, said finding shall not affect the remaining provisions of the Agreement."[55]

After Class Plaintiffs, the United States, and the Sheriff filed their motion for approval of the consent judgment, briefing and conferences addressed the need for a fairness hearing.[56] Ultimately, it became clear that the City of New Orleans must also be given the opportunity to litigate the issue

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[51]Consent Judgment, at 43.

[52]Consent Judgment, at 43.

[53]Consent Judgment, at 43.

[54]Consent Judgment, at 43.

[55]Consent Judgment, at 44.

[56]*E.g.*, R. Doc. Nos. 113, 126.

of whether the proposed consent judgment exceeds minimum constitutional standards, arguably absolving the City of its funding obligation pursuant to state law and violating the Prison Litigation Reform Act's narrow tailoring requirement.[57] Accordingly, the City was given the opportunity to participate in the fairness hearing not just as an affected third party, but also as a party pursuant to its status as a third-party defendant.[58] In the interim, Class Plaintiffs filed an unopposed motion to certify a settlement class, which superseded the original, presumably opposed, motion for class certification.[59]

THE FAIRNESS HEARING

At a fairness hearing commencing on April 1, 2013, the Court considered whether the proposed consent judgment was consistent with constitutional and statutory law and jurisprudence such that it should be approved as between Class Plaintiffs, the United States, and the Sheriff.[60] The fairness hearing lasted four full days, and the parties introduced nearly 400 exhibits into evidence.[61] Plaintiffs called four current and

four experts: Jeffrey Schwartz, an expert in "security and operations" of jails and prisons;[63] Manuel Romero, an expert in "jail administration, with a particular emphasis on security, staffing, environmental conditions, food service and sanitation, fire conditions, and Limited English Proficiency ("LEP") services";[64] Dr. Bruce Gage, an expert in "correctional mental health care";[65] and Dr. Daphne Glindmeyer, an expert in "mental health and psychiatry, as well as juvenile mental health in corrections."[66] Plaintiffs also called the twin sister of an inmate who committed suicide at OPP while at the Intake Processing Center.[67] The City called Andrew Kopplin, the City's First Deputy Mayor and Chief Administrative Officer.[68] The Sheriff's only witness was Sheriff Marlin Gusman.[69]

The parties provided extensive briefing on the legal issues implicated by the pending motions prior to the hearing.[70] They also provided supplemental briefing after the hearing.[71] In addition to the evidence presented at the hearing, the Court considered approximately 150 public comments

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out of this case." R. Doc. No. 412, at 34.

[63]R. Doc. No. 405, at 66.

[64]R. Doc. No. 407, at 25.

[65]R. Doc. No. 408, at 82.

[66]R. Doc. No. 409, at 174-75.

[67]R. Doc. No. 410, at 57-58.

[68]R. Doc. No. 409, at 7.

[69]R. Doc. No. 411, at 6.

[70]*E.g.*, R. Doc. Nos. 399, 416, 427.

[71]*E.g.*, R. Doc. Nos. 149, 197, 226-374, 387.

submitted by both class members and non-class members.[72] The Court addresses the motion for approval of the consent judgment and the motion for certification of a settlement class in turn.

CONSENT JUDGMENT ANALYSIS

I. Standard of Law

Generally, before entering a consent judgment, also called a consent decree, courts must decide whether it "represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation." *Williams v. City of New Orleans*, 729 F.2d 1554, 1559 (5th Cir. 1984) (quoting *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981)). Courts must also ascertain that the settlement is fair and that it does not violate the Constitution, statutes, or jurisprudence. *Id.* (citing *City of Miami*, 664 F.2d at 441). "In assessing the propriety of giving judicial imprimatur to the consent decree, the court must also consider the nature of the litigation and the purposes to be served by the decree." *City of Miami*, 664 F.2d at 441.

If a consent judgment potentially affects third parties, courts must carefully scrutinize it to ensure that the effect "is neither unreasonable nor proscribed." *Williams*, 729 F.2d at 1560 (quoting *City of Miami*, 664 F.2d at 441). Courts must "safeguard the interests of those individuals who [are] affected by the decree but were not represented in the negotiations." *Id.*

Because the proposed consent judgment involves prospective relief with respect to prison conditions, an additional level of review app

(internal quotations and modification omitted) (quoting *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989)). Narrow tailoring does not require perfection. *See Fox*, 492 U.S. at 480 (Narrow tailoring requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.") (internal quotations omitted). The Court4.56 13.5 refBT1924 5912 170.82 596.88 Tm0 0 0 scn( )Tj924 59121 1 1 scn143.46 594.18 2

and must also draw the inference." *Id.* at 837. "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Gates v. Cook,* 376 F.3d 323, 333 (5th Cir. 2004); *see also Marsh v. Butler Cnty.*, 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc) ("Plaintiffs' allegations that the County received many reports of the conditions but took no remedial measures is sufficient to allege deliberate indifference to the substantial risk of serious harm faced by inmates in the Jail.").

Pretrial detainees and convicted prisoners "look to different constitutional provisions for their respective rights to basic needs such as medical care and safety." *Hare v. City of Corinth,* 74 F.3d 633, 639 (5th Cir. 1996) (en banc), *rev'd on other grounds*, 135 F.3d 320, 324 (5th Cir. 1998). However, "no constitutionally relevant difference exists between the rights of pretrial detainees and convicted prisoners to be secure in their basic human needs." *Id.* at 647. Plaintiffs rely on the Eighth Amendment standard for conditions of confinement.[77] Because "a pretrial detainee's due process rights are said to be 'at least as great as the Eighth Amendment protections available to a convicted prisoner,'" this standard sets the minimal constitutional protections afforded to all OPP inmates. *Id.* at 639 (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)); *see also Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir. 1986) ("Where dealing with the constitutionally rooted duty of

Court "has no occasion to consider" whether any individual deficiency would "violate the Constitution . . . if considered in isolation." 131 S. Ct. at 1925 n. 3. Rather, "Plaintiffs rely on systemwide deficiencies" that allegedly subject inmates to a "substantial risk of serious harm" and cause conditions in OPP "to fall below the evolving standard of decency that would mark the progress of a maturing society." *Id.*; *see also Gates v. Cook*, 376 F.3d at 333 (It is "important to note that the inmate need not show that death or serious illness has occurred.").

Specific examples of dysfunction at OPP are representative of systemic deficiencies. The Court's inquiry is not focused on whether any one of these examples demonstrates the violation of a constitutional right. *See Plata*, 131 S. Ct. at 1925 n. 3; *see also Alberti*, 790 F.2d at 1225 ("We need not determine whether any of these incidents individually constituted an Eighth Amendment violation, for the evidence established that the

Jeffrey Schwartz, an expert in security and operations of jails and prisons, has worked with more than 40 of the 50 state departments of corrections and toured hundreds of prisons and jails.[81] He concluded that, in over 35 years of working with and reviewing jails and prisons, "OPP is the worst jail I've ever seen," and "it is likely the worst large city jail in the United States."[82] Schwartz described an "extraordinary and horrific situation,"[83] in which OPP is "plagued" by "suicides and other in-custody deaths, rapes and other sexual assaults, stabbings, and severe beatings."[84]

In 2012, OPP had over 600 transports to local emergency rooms for physical injuries, of which far more than half were related to violence.[85] A similarly sized jail in the Memphis, Tennessee area had 7 emergency room transports related to violence in a comparable period of time.[86] OPP's alarming levels of violence are directly attributable to numerous policies and practices that are gravely deficient,[87] including policies and practices associated with staffing and supervision, contraband, classification, sexual assault, and training and accountability.

1. Staffing and Supervision

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[81]Schwartz founded a non-profit criminal justice training and consulting organization in 1972. Since that time, he has worked with law enforcement and correctional agencies in the United States and Canada. Pl. Ex. 372, at 1. Schwartz has evaluated and assessed approximately 300 prisons and jails. R. Doc. No. 405, at 61-62.

[82]R. Doc. No. 405, at 67-69; *see also* Pl. Ex. 372, at 5.

[83]Pl. Ex. 372, at 69.

[84]Pl. Ex. 372, at 11.

[85]R. Doc. No. 405, at 77.

[86]R. Doc. No. 405, at 78-77.

[87]Pl. Ex. 374, at 16-17.

Inadequate staffing is one of the most significant causes of the runaway violence at OPP.[88] Schwartz concluded that OPP facilities "are the most poorly staffed correctional facilities I have ever encountered."[89] Schwartz testified that while most correctional agencies might use the term "understaffed" to indicate that perhaps 10% more staff are needed, OPP's "realistic need" may be at least 75% or 100% more staff.[90] The Court questioned Schwartz as to how he reached these estimates, and he replied that, after looking at a master roster and schedules, he tried to determine "just roughly how many staff would it take just, not to fill all positions, but just to put a deputy every shift in every tier. And that was my very rough estimate."[91]

staff are not present to patrol living units and common areas or to perform escort or transport services.[96]

OPP does not maintain any policy or procedure with respect to minimum staffing levels where, for example, staff may be required to work overtime to ensure that inmates are at least minimally supervised.[97] Watch commanders may be forced to schedule a shift with insufficient officers, and merely "hope that nothing terrible happens."[98]

The absence of staff at security posts means that staff members may not physically enter housing units when doing routine security checks because OPP policy prohibits them from entering housing units alone.[99]

whenever they get ready to come upstairs and see what's going on."[103] The record is replete with examples of inmate-on-inmate violence that demonstrate the manner in which a lack of supervision permits such violence to flourish.

For instance, OPP records show that, on one particular evening, a deputy heard what he believed to be inmates fighting on a tier, as well as statements like "stick your finger in his butt and piss on him."[104] The deputy could not see what was going on, but he reported that he did not investigate because OPP policy prohibits staff members from venturing onto the tiers alone.[105] A sergeant arrived "later in the night," but there is no indication in the record that any OPP staff member attempted to intervene at the time of the "altercation."[106]

2. Contraband

Although the Court recognizes that possession of contraband in a correctional facility is not

disciplined.[116] The conduct in the video may have occurred several years ago, but the policies, practices, and culture that enabled the outrageous conduct remain relevant.[117]

3. Classification

The failure to classify a substantial number of inmates risks "intermingling of inmates convicted of aggravated violent crimes with those who are first offenders or convicted of nonviolent crimes." *Gates v. Collier*, 501 F.2d at 1308; *see Stokes v. Delcambre*, 710 F.2d 1120, 1124 (5th Cir. 1983) ("[F]ailure to control or separate prisoners who endanger the physical safety of other prisoners can constitute cruel and unusual punishment."). A functioning classification system ensures that inmates are housed in a manner that increases the safety of inmates and staff by, for example, identifying and separating inmates likely to be predators from inmates likely to be victims.[118] In conjunction with a lack of direct supervision, OPP's utterly ineffective classification system is a significant cause of the unprecedented levels of violence at OPP.[119]

On a sample date in December 2012, of the inmates who had proceeded past intake, approximately 35% had not been classified in any manner.[120] The unclassified inmates were

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[116]Romero testified that he would expect some staff involvement given the level of dysfunction. R. Doc. No. 407, at 39-40. Such involvement would not be without precedent. In one documented instance, a female staff member, who was engaged in a "romantic relationship" with an inmate, warned the inmate to conceal a cell phone because of an upcoming shakedown. The staff member also sent text messages to the same inmate on his cell phone both while she was on and off duty. The staff member subsequently resigned. Pl. Ex. 58.

[117]R. Doc. No. 407, at 35-36.

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Because OPP does not have an effective system for reclassification, inmates who have violently assaulted other inmates may remain classified as "nonpredators."[127] The risk related to such inaccurate information is compounded by the fact that an inmate's disciplinary record does not become part of his permanent record.[128] Rather, an inmate receives a new disciplinary folder for each OPP facility he stays in, and these folders do not follow the inmates during transfers.[129] Facilities do not always maintain an inmate's disciplinary record once he leaves, and determining whether the record was maintained requires a "time consuming search."[130] These practices indicate that staff cannot rely on either an inmate's classification or his disciplinary record when evaluating the inmate's risk of violence.[131] The absence of such information plainly increases the risk of harm to staff and to other inmates. Moreover, as discussed below, the classification process does not identify or consider an inmate's English proficiency.[132]

The importance of classification was illustrated by the following arc of one inmate's violent actions, which ultimately caused another inmate to suffer severe and permanent brain damage:

- In August 2011, E.L., a 20-year-old male inmate, was observed repeatedly striking a 50-year-old inmate in the face and back of the head in one of the Tents. The victim stated that

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[127]R. Doc. No. 405, at 83.

[128]Pl. Ex. 372, at 49.

[129]Pl. Ex. 372, at 49.

[130]Pl. Ex. 372, at 49.

[131]*See* R. Doc. No. 405, at 108 ("The same inmates who are a danger to other inmates are typically the most dangerous inmates for staff."); R. Doc. Nos. 228-29 (describing E.L.'s attacks on staff members). The Court is not familiar with E.L.'s classification status, as he was apparently not present at OPP on the date for which the classification census was sampled. *See* Pl. Ex. 380.

[132]*See* R. Doc. No. 407, at 109, 112.

his “two teeth knocked out in a physical altercation on my tier.”[137] On June 26, K.M. repor

absence of adequate staffing and supervisi

Calculating the incidence rate of sexual assault at OPP is difficult.[148] The grievance logs for July 20, 2012, through December 19, 2012, were missing entries.[149] In October, the only full month for which data is available, there were 30 grievances reporting sexual assault and no investigations.

average violence on the streets taken to the jailhouse."[163]

One night, after the lights were turned out at 10:30 p.m., E.S. was attacked by a group of 10-14 inmates.[164] They ripped off his clothes and attempted to tie him up with pieces of

back to the post.[173] At this point, four to six inmates began punching him repeatedly.[174] He was subsequently untied and repositioned to face the post.[175] The attackers threw hot water and possibly urine on E.S., and beat him so severely with a mop stick that the skin was ripped from his back and buttocks.[176] E.S. was still naked.[177] At some point during this phase of the attack, a guard performed a routine check, but he did not walk far enough down the hall to notice E.S., naked, bound, and beaten.[178] E.S. reported that he did not cry out because he was certain that he would be killed if he did so.[179]

In the final phase of the attack, the inmates fashioned "some type of thong, like a woman's thong" from strips of uniform fabric.[180] They forced E.S. to put it on and, E.S. testified, in an attempt to be "comical" or to "embarrass me or something in front of the dormitory . . . they made me dance. I don't even know how to dance. So I just basically was just moving my hands . . . If I would do anything crazy I knew they were going to kill me for sure. There's no doubt in my mind."[181] E.S.

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[173]R. Doc. No. 405, at 33-34.

[174]R. Doc. No. 405, at 34.

[175]R. Doc. No. 405, at 34.

[176]R. Doc. No. 405, at 34-35.

[177]R. Doc. No. 405, at 35.

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reported that “90% of the crowd had knives in their hands visible.”[182]

After the episode in which the attackers made E.S. dance, they made him shower.[183] They forced him to sit in a mop bucket and “pushed it to

inmates were going in and out of the area where A.A. was restrained.[190] A.A. identified five attackers using photographs of other inmates in the tier.[191] A.A. was transferred to a mental health hospital in Baton Rouge one week later, and the SOD investigation was closed.[192]

While the incident was referred to the office of the Orleans Parish District Attorney, that office determined that "based on the circumstances and statements given, we would not likely prosecute this case if an arrest was made."[193] Aside from this referral, th

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inmate requested a transfer, stating that he feared for his life.[203] The grievance was closed on March 1, when the inmate was discharged, but his transfer request and reports of assaults were never addressed.[204] In another instance, an inmate reported being beaten by deputies on October 25, 2011.[205] He described knots on his head related to the beating and a sick call request that was ignored.[206] The grievance sought medical attention, and the inmate specifically requested x-rays of his head.[207] Approximately three months later, the grievance was closed because the inmate left OPP.[208] His sick call request—and allegations of staff misconduct—were apparently never addressed.[209] OPP staff suggested that, with respect to inmate-on-inmate violence, there is only an investigation when an inmate requires stitches.[210]

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b. Use of Force & Investigations

OPP has deeply ingrained problems with respect to staff members' uncontrolled use of force on inmates.[213] OPP's inlo40.04 65p1jET1 1 1 scn335.76 649.98 12 3Tc1m0 0 0 s17.94 1 1 scn229.56 6771 scs

for a use of force "review board," there is no such board, despite the fact that the policy is more than a year old.[221]

One of the most egregious allegations of use of force suggested that an officer ordered "hits" on particular inmates, either by instructing a tier rep to arrange a hit or by placing the inmate in an area where known enemies made violence likely.[222] The same officer was later arrested after punching an inmate, who additionally reported that the officer had threatened to have the inmate assaulted.[223] *See Cantu v. Jones*, 293 F.3d 839, 845 (5th Cir. 2002) ("The jury found that the appellants essentially orchestrated the attack. This is in no way reasonable behavior for a prison official."). The same officer had previously been accused of punching a restrained inmate, but the investigator did not question any of the witnesses, including the officer, about whether it occurred.[224] Not surprisingly, given the absence of elicited evidence, the prior allegation had not been sustained.[225]

As noted above, SOD investigates use of force reports, *including* reports of force by SOD members.[226] In at least one documented instance, the same officer who used force on an inmate authored the report that determined such level of force was appropriate.[227] Training records suggest

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[221]R. Doc. No. 406, at 87.

[222]R. Doc. No. 405, at 101-02; Pl. Ex. 56.

[223]R. Doc. No. 405, at 101-02; Pl. Ex. 56.

[224]R. Doc. No. 405, at 102.

[225]R. Doc. No. 405, at 102.

[226]Pl. Ex. 372, at 40. Schwartz describes SOD as a tightly knit unit, which staff members perceive as elite. Pl. Ex. 372, at 40.

[227]R. Doc. No. 405, at 90-91; Pl. Ex. 275.

that SOD members do not receive any in depth or specialized training relative to investigations.[228] The training that OPSO staff members generally

to extort other inmates and also be a source of confrontation or violence."[235]

Given the fundamental flaws in OPP's classification system, predatory or aggressive inmates may become tier reps.[236] Testimony from D.R., an inmate sexually harassed and assaulted by a tier rep, illustrates that tier reps have the opportunity to assault other inmates and to discourage reporting of such assaults.[237] D.R. testified that his tier rep, C.C., would "sometimes, early in the morning, take the television from Cell 1 and turn it towards the shower and put the aerobics channel on so he could go into the shower and masturbate."[238] One morning, C.C. ordered D.R. to get in the shower.[239] C.C. followed him, carrying a shank,[240] and proceeded to sexually assault D.R.[241] D.R. waited for approximately one week to report the assault, because "I had to think of a way to get around the immediate sergeants or officers that were in the building" so that the report would not reach C.C. before D.R. could be transferred.[242]

his request to be transferred to another tier, although while on the "at risk" tier at Conchetta he suffered an additional physical assault.[243]

At Conchetta, D.R. attempted to break up a fight because of a concern that another inmate "was about to get really beat up."[244] Before he could reach the fight, "I felt someone strike me in the back of the head . . . . I balled up on the ground and I felt blows to my forehead, to my back, and to my legs."[245] After he reported the assault, D.R. cooperated by describing his attacker's physical appearance.[246] SOD staff initially brought an individual to D.R. in order to determine if D.R. could identify that individual as his attacker.[247]

together at the same time" and left alone together in a holding cell.[252] D.R. reported "I was just sitting there kind of on pins and needles, hoping that he didn't realize exactly what was going on."[253]

According to Romero, OPP has established an informal culture in which tier reps "make up for deficient staffing realities to help supplement facility order, which is a dangerous and reckless practice."[254] As Schwartz stated, the "use of tier reps is a corrupt practice," in which it is "inevitable that some of the tier reps will abuse their positions."[255] The risk of "arbitrary infliction" of "physical and economic injury" is present whenever an inmate has "unchecked authority" over other inmates. *Gates v. Collier*, 501 F.2d at 1307.

One especially troubling situation illustrates deficiencies associated with the use of tier reps, but also broader deficiencies related to staff accountability. OPP records show that a high-ranking male security officer regularly observed a female tier rep showering and escorted her to a private office after hours for "prolonged periods of time."[256] His actions were reported and confirmed by two staff members.[257] Inmates also witnessed the shower viewings, as well as the private office visits.[258] Inmate witnesses reported that the tier rep would frequently engage in physical altercations

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[252]R. Doc. No. 406, at 147.

[253]R. Doc. No. 406, at 147.

[254]Pl. Ex. 374, at 19.

[255]Pl. Ex. 372, at 44.

[256]Pl. Ex. 26.

[257]Pl. Ex. 26.

[258]Pl. Ex. 26.

with other inmates, but the tier rep was never included in the corresponding incident reports.[259] The inmate at issue reportedly said that the officer promised to transfer money into her account once she left OPP for a new facility.[260]

Despite the witnessed sexual misconduct, the officer was permitted to resign, and there was never an investigation because of "insufficient evidence, the lack of witnesses and the statements taken."[261] The extent to which other staff members, including those tasked with supervising the female inmates, knew of the conduct is unclear because of the lack of an investigation.[262] This is not the only documented instance of a staff member engaging in sexual conduct with an inmate.[263] The Court notes that, while not addressed in the sexual assault section of this opinion, sexual or romantic "relationships" between staff members and inmates are *never* acceptable and are, at best, implicitly coercive.

6. Conclusion

"It is well established that prison officials have a constitutional duty to protect prisoners from violence at the hands of their fellow inmates." *Longoria v. Texas*, 473 F.3d 586, 592 (5th Cir. 2006) (citing *Farmer*, 511 U.S. at 832-33). The proposed consent judgment addresses the proven deficiencies relative to inmates' safety and security. For example, it requires OPSO to ensure adequate staffing, regular security rounds, and direct supervisio4 46 inm

supervision.[264] It also requires the development of a classification system that takes into account factors including security needs, suicide risk, and risk of violence or self-harm.[265] The proposed consent judgment also requires that the classification system be updated to reflect an inmate's history at OPP.[266] These provisions directly address OPP's deficiencies with respect to inmate-on-inmate violence, including sexual assault.

With respect to training and accountability, the consent judgment provides that OPSO "shall develop, implement, and maintain comprehensive policies and procedures (in accordance with generally accepted correctional standards) relating to the use of force" and shall "develop and implement a single, uniform reporting system."[267] An "Early Intervention System" will document and track staff members involved in use of force incidents.[268] The consent judgment requires "timely and thorough investigation of alleged staff misconduct, sexual assaults, and physical assaults of prisoners resulting in serious injury."[269]

OPP inmates are subject to an epidemic of violence.[270] The operational and administrative dysfunction of OPP's accountability systems put staff members and quires that the iP's accouiTc-em265inma oper

in a jail facility that allow prisoners ready access to weapons, fail to provide an ability to lock down inmates, and fail to allow for surveillance of inmates pose a substantial risk of serious harm to inmates."). The Court concludes that with respect to safety and security, the proposed consent judgment "represents a reasonable factual and legal determination based on the facts of record." *Williams*, 729 F.2d at 1559. Considering the evidence presented, the Court further concludes that the consent judgment is narrowly drawn to remedy the violation of Plaintiffs' federal rights, is the least intrusive means of doing so, and extends no further than necessary. *See Plata*, 131 S. Ct. at 1939-40 (discussing § 3626(a)(1)).

B. Medical and Mental Health Care

During the course of the fairness hearing, the evidence, including credible witness testimony, exposed stark, sometimes shocking, deficiencies in OPP's medical and mental health care system. Inmates with mental health issues are housed in deplorable conditions.[271] Mental health units smell strongly of feces, urine, and rotting organic matter.[272] Several inmates

and access to care."[280]

In his report, Dr. Gage stated that in several cases, including instances of inmate suicide, an initial referral to psychiatry could have changed the outcome of the cases.[281] For example, M.H. committed suicide while still in the Intake Processing Center, notwithstanding that he had previously reported ingesting crack cocaine and he had recently been hospitalized for suicidality.[282] At intake, he was wandering around, and "gravitated toward the exit doors," but he was "herded back to the seats" by staff members.[283] Because he attempted to leave through an exit door, he was placed in an isolation cell.[284] In the isolation cell, he hung himself with his t-shirt.[285] Dr. Gage testified that M.H.'s death could have been prevented with proper mental health assessment and treatment.[286] When asked by the Court whether his testimony reflected a "medical certainty," Dr. Gage responded affirmatively, testifying that an assessment would have, at a minimum, prevented the isolation that facilitated M.H.'s suicide.[287]

T.W. provides a representative example with respect to the lack of intake screening and follow-up psychiatric services.[288] T.W. set her house on fire.[289] After she was treated for burns at

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[280]R. Doc. No. 408, at 83.

[281]Pl. Ex. 376, at 35.

[282]R. Doc. No. 410, at 58-60; *see also* Pl. Ex. 80-2.

[283]Pl. Ex. 80-2.

[284]Pl. Ex. 80-2.

[285]Pl. Ex. 80-2.

[286]R. Doc. No. 408, at 110.

[287]R. Doc. No. 408, at 110.

[288]Pl. Ex. 376, at 20; *see also* Pl. Ex. 74.

[289]Pl. Ex. 376, at 20; *see also* Pl. Ex. 74.

Baton Rouge General Hospital, she was sent to OPP on September 7, 2012.[290] At intake, she described depression that had occurred within the last year and three prior suicide attempts.[291] In addition, her hospital records indicated that she carried a diagnosis of bipolar disorder and that she was currently prescribed lithium and mirtazapine, an antidepressant.[292] At intake, T.W. was ordered pain medication and referred to psychiatry for "eval. for meds."[293] Despite this referral, T.W. was apparently not given any access to psychiatric care until November 15, 2012.[294] The events of that date are unclear.[295]

On November 16, 2012, T.W. received a psychiatric chronic care treatment plan from an OPP psychiatrist.[296] While the plan notes T.W. felt suicidal because she missed her children, the plan shows little awareness of her three previous suicide attempts, her prior diagnosis, or her prior psychotropic medications.[297] With respect to OPP's psychiatry services, T.W. received no diagnosis and no medications.[298] When Dr. Gage visited in December 2012, T.W. reported auditory hallucinations of "people out to get me," to whom she sometimes talked back.[299] She also spoke about "people being sent to hurt her."[300] Other inmates said that T.W. paces a lot, cries a lot, and

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[290]Pl. Ex. 376, at 20.

[291]Pl. Ex. 376, at 20.

[292]Pl. Ex. 376, at 20.

[293]Pl. Ex. 376, at 20.

[294]Pl. Ex. 376, at 20.

[295]Pl. Ex. 376, at 20; *see also* Pl. Ex. 74.

[296]Pl. Ex. 376, at 20.

[297]Pl. Ex. 376, at 20-21.

[298]Pl. Ex. 376, at 21.

[299]Pl. Ex. 376, at 21.

[300]Pl. Ex. 376, at 21.

"sleeps all day."[301] The record is devoid of evidence that T.W. received the mental health treatment that was obviously needed while she was at OPP.

2. Access to Care & Treatment

After Dr. Gage reviewed the records provided, "[t]here was not one example of a thorough psychiatric assessment by the OPP psychiatrist in any of the records and most were not even minimally adequate."[302] None of the records included an assessment of suicide risk, rather, "this portion of the assessment consisted in simply noting whether the person expressed suicidal ideation or not. The same was true of homicidal ideation and consideration of danger to others in general."[303] This is consistent with the testimony of an inmate that the extent of psychiatric exams is often limited to: "Are you suicidal or homicidal?"[304]

OPP has one full-time psychiatrist who works 40 hours per week.[305] Inmates may wait weeks or months for psychiatric appointments.[306] With respect to emergency care during the day, the psychiatrist is contacted and inmates are transferred to the mental health unit for suicide monitoring.[307] Accordingly, suicide tiers are the primary site of emergency services during the day.[308] After hours, the psychiatrist may sometimes be reached by telephone, but there is no mental

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[301]Pl. Ex. 376, at 21.

[302]Pl. Ex. 376, at 37.

[303]Pl. Ex. 376, at 37.

[304]Pl. Ex. 376, at 32; R. Doc. No. 408, at 169. T.W. also told Dr.

health provider actually on call or present at OPP facilities.[309] An inmate who needs mental health care after hours or on weekends will either be sent to the mental health unit for suicide watch or to the emergency room.[310] Inmates who harm themselves or who are suicidal are typically not seen until the next working day, while those with less serious, but still urgent, complaints—including suicidal ideation without a plan—are not seen for several days.[311]

The experiences of D.R. and R.S. illustrate compounding inadequacies in mental and medical health care. D.R. testified as to the abhorrent conditions experienced by H.T., an inmate whom D.R. testified "seemed partially handicapped and mentally handicapped also," based on the "things he would say," "the way he got around," and his inability to care for himself.[312] H.T. utilized a colostomy bag, and "[e]very morning his colostomy bag would come off and there would be feces all in his cell and all over his jumper."[313] H.T. would leave the soiled jumper on the ground, "[a]nd someone would have to go in [his cell] and get his jumper and bring it to the gate and set it down and help him clean himself and somehow reattach the bag."[314] Other inmates, not staff members, would assist H.T. by cleaning and reattaching his colostomy bag and carrying his soiled jumper to the gate, where staff members would retrieve it.[315] While this daily routine seems inconsistent with basic care, perhaps more disturbing is that H.T. had to rely on other inmates' compassion and willingness to provide untrained nursing care to ensure he had an unsoiled jumper and an attached

[309]Pl. Ex. 376, at 38.

[310]Pl. Ex. 376, at 38; R. Doc. No. 408, at 114.

[311]Pl. Ex. 376, at 39.

[312]R. Doc. No. 405-06.

[313]R. Doc. No. 406, at 408.

[314]R. Doc. No. 406, at 148.

[315]R. Doc. No. 406, at 148-150.

to inactivity, including pneumonia.[324] Records document that medical staff observed R.S. refusing

health in corrections,[334] is the medical director for Assertive Community Treatment, a program that provides in-home care to individuals with "chronic persistent severe mental illness."[335]

Dr. Glindmeyer conducted a site visit at the unit housing youth inmates.[336] The population of youth inmates at the time was approximately 24, and these inmates ranged from approximately 14 years old to 18 years old.[337] Just over half of the youth inmates were housed in protective custody because of issues including prior sexual assault.[338] Those in protective custody were confined for 23 hours per day.[339] Youth inmates and staff advised Dr. Glindmeyer to see a youth inmate who had symptoms including "bizarre behavior" and a history of suicidal ideation.[340] Although the inmate had been seen by a psychiatrist ten months earlier, he received no diagnosis for his apparent mood disorder and he was not receiving any medication or treatment.[341] Dr. Glindmeyer persuasively opined that his treatment or lack thereof was worsening his condition,[342] and his isolation was increasing his risk of suicide.[343]

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[334]R. Doc. No. 409, at 174-75.

[335]R. Doc. No. 409, at 174. For approximately the last nine years, she has also serat 1ros consent judgment compliance monitor with respect to mental health care in Mississippi's juvenile correctional facilities. Pl. Ex. 379, at 4-5. She has previously serve 1rothe Director of Psychiatry for Louisiana State University Health Science Center's Juvenile Corrections Program. Pl. Ex. 379, at 5.

[336]R. Doc. No. 409, at 213.

[337]R. Doc. No. 409, at 213.

[338]R. Doc. No. 410, at 7; *see also* Pl. Ex. 378, at 41-42.

[339]Pl. Ex. 378, at 42, 45; R. Doc. No. 410, at 11-12.

[340]R. Doc. No. 410, at 13-14.

[341]R. Doc. No. 410, at 14.

[342]R. Doc. No. 410, at 15.

[343]R. Doc. No. 410, at 15.

3. Medication

Even where records demonstrated that medications are provided by agencies such as hospitals, and even when that fact is documented through reputable sources of information in the record, psychotropic medications are frequently discontinued at OPP.[344]

At intake, psychotropic medications are stopped approximately 75-80% of the time, with some OPP treatment providers refusing to order them in any circumstance.[345] While there are legitimate concerns associated with the potential abuse of such medications, the wholesale discontinuation of all medications creates a risk that inmates will deteriorate psychiatrically, develop a discontinuation syndrome, or experience withdrawal, all of which can cause unnecessary pain and suffering.[346] Moreover, the abrupt discontinuation of psychotropic medication can increase the likelihood of suicide and assault and worsen inmates' long-term prognosis.[347]

a. Detoxification and Withdrawal

OPP inmates who require a detoxification protocol are not consistently identified or effectively treated. For example, C.F.'s intake questionnaire indicates that she was taking 2 milligrams of a benzodiazepine, Xanax, four times daily, an amount and frequency which Dr. Glindmeyer characterized as "a lot," pursuant to a prescription to treat her mental illness.[348] At intake, C.F. specifically identified the pharmacy that filled her prescriptions and the hospital where

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[344]R. Doc. No. 408, at 102.

[345]R. Doc. No. 408, at 101, 114-16.

[346]R. Doc. No. 408, at 101-02.

[347]R. Doc. No. 408, at 101-02; R. Doc. No. 408, at 102-03. As Schwartz noted, cessation of medication may be "logical if there was a reliable system for reassessing those inmates at a

Dr. Glindmeyer's visit.[359] She had received no medication, despite the fact that staff and inmates indicated she had been in this disturbing, "obviously acutely ill," state for days.[360] Dr. Glindmeyer persuasively attributed C.F.'s state to OPP's detoxification protocol.[361] *Gates v. Cook*, 376 F.3d at 343 (noting "testimony that prisoners seldom see medical staff and that monitoring of medication was sporadic, with prisoners potentially being prescribed the wrong medication or no medication for long periods of time, potentially leading to extremely dangerous physical side effects or psychotic breakdowns").[362]

b. Untreated Mental Illness

OPP does not provide appropriate treatment to mentally ill inmates, even when they pose a danger to themselves or others. For example, S.T.[363] entered OPP in November 2012, but he was subsequently routed to the emergency room several times in a seven-day period.[364] The behavior that led to these visits generally included "climbing on ceiling and pulling light fixtures, throwing tile, spreading feces on windows," and "swinging from light fixtures."[365] S.T. reported auditory hallucinations.[366] At one point, S.T. was found "naked in his cell, with abrasions and signs of

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[359]Pl. Ex. 378, at 22.

[360]Pl. Ex. 378, at 22. R. Doc. No. 409, at 191.

[361]R. Doc. No. 409, at 192.

[362]Dr. Gage's report suggests that he witnessed C.F. being removed for evaluation, but his subsequent review of her records showed no evidence of any such evaluation or hospitalization. Pl. Ex. 376, at 48.

[363]The initials of this inmate are actually T.S., but they are not used here so as to avoid conflation with the other T.S., who was attacked by E.L.

[364]Pl. Ex. 73.

[365]Pl. Ex. 73.

[366]Pl. Ex. 73.

trauma."[367] An emergency room physician noted that S.T. would be discharged and "can follow up with psychiatry in jail, as it certainly appears that he will require medication to decrease his disruptive behavior."[368] When Dr. Gage observed S.T. in December 2012, "[h]e was mute and hid himself under a blanket, refusing to speak to me."[369] Dr. Glindmeyer also observed S.T. on two occasions in December 2012.[370] "On the first observation, he declined to speak," and he was lying on a mattress on the floor, with a "flat affect, slow movements, and poor eye contact."[371] Staff members reported that he had a history of refusing to eat.[372] On the second observation, S.T. demonstrated psychomotor retardation, moving in slow motion.[373] He spoke softly and slowly, and his affect remained flat.[374] Despite S.T.'s persistently bizarre behavior, OPP records reflect that the only psychotropic medication OPP ever provided to S.T. was a single emergency dose of an antipsychotic medication.[375] In short, S.T. remained symptomatic and untreated.[376]

Another inmate, R.C., was transferred to the mental health unit on November 27, 2012, less than a week after arriving at OPP.[377] The record indicates this transfer may have been related to a prior history of schizophrenia and ongoing suicidal and homicidal ideation, which included

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[367]Pl. Ex. 73.

[368]Pl. Ex. 73.

[369]Pl. Ex. 376, at 19.

[370]Pl. Ex. 378, at 15.

[371]Pl. Ex. 378, at 15.

[372]Pl. Ex. 378, at 15.

[373]Pl. Ex. 378, at 15.

[374]Pl. Ex. 378, at 15.

[375]Pl. Ex. 376, at 19; Pl. Ex. 378, at 16.

[376]Pl. Ex. 376, at 19; Pl. Ex. 378, at 15-16.

[377]Pl. Ex. 91.

statements such as “I feel people are trying to kill me . . . I’ll hurt somebody [by] cutting their throat off.”[378] An OPP medical doctor, who was not part of the mental health care team, documented R.C. as “being extremely belligerent and bizarre, thinking that [the doctor] will harm him” and “soiled in stool.”[379] The doctor noted that R.C. had a history of psychiatric issues and “defer[red] to psych. for further management of psychosis, before dealing w/ medical issues.”[380] When Dr. Gage toured

largely attributable to dramatically insufficient staffing.[385] Dr. Glindmeyer concluded that OPP's mental health staffing is "woefully inadequate."[386] There is one psychiatrist and one social worker for approximately 2,500 inmates.[387] According to Dr. Gage, OPP needs at least one additional psychiatrist or psychiatric prescriber to meet minimum standards.[388] Nurses report that there is no time to provide any formal mental health treatment, and that they engage in minimal contact usually only in the context of mandatory evaluations.[389] Given the number of inmates and the number of nurses, it is impossible for the nurses to adequately evaluate and chart patients, administer medications, respond to emergencies, provide suicide monitoring, gather sick call information, and provide basic nursing services.[390]

The Court questioned Dr. Gage as to certain statements in his report characterizing the relationship between staff and inmates at OPP.

> THE COURT: You have a statement in your report which states, "There's a general pattern of reckless and callous disregard for the suffering and treatment needs of the mentally ill and chemically dependent in OPP." That's a very strong statement. Do you want to explain that at all?
>
> THE WITNESS: Well, I would stand by that. I guess that would be the first thing that I would say. I mean, I've seen a number of jails and I have not seen conditions as deplorable as I have seen in this jail, and I have not seen such absence of mental health services in the

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[385]Pl. Ex. 376, at 29.

[386]R. Doc. No. 409, at 196. Dr. Glindmeyer also testified that youth inmates seem to be controlled by another youth inmate, as opposed to by the deputies. This youth inmate was physically the largest inmate, and the other youth inmates appeared to wait for his acquiescence before responding to Dr. Glindmeyer's questions. R. Doc. No. 410, at 8-9.

[387]Pl. Ex. 376, at 29.

[388]R. Doc. No. 408, at 132.

[389]Pl. Ex. 376, at 42.

[390]Pl. Ex. 376, at 29.

> context of just abysmal physical environments and the kind of failure to monitor people and so on that I was speaking about. It was just more dramatic than I have ever seen in any other institution.[391]

While the Sheriff and City have suggested that an inmate population reduction may occur in just a few months, the evidence suggests that OPP has inadequate staffing to treat even a reduced population.[392]

5. Suicide Prevention

According to Dr. Gage, "[OPP] records and interviews with staff and inmates demonstrate a level of disregard and disrespect on the part of most staff towards the mentally and chemically dependent" that is made plain by the conditions on the residential mental health unit and "especially the approach to suicide monitoring."[393] The evidence supports this characterization.

Suicide assessments at OPP are cursory and repetitive. Psychiatric contact with inmates is extremely brief, generally lasting less than five minutes.[394] OPP policy requires that staff members monitor inmates on suicide watch at all times.[395] But the staffing deficiencies and physical structures of OPP facilities make it nearly impossible to conduct adequate assessments and to directly observe inmates on suicide watch.[396] Those written assessments that are actually completed are perfunctory, and some appear to have been filled out in advance.[397] OPP does not have any suicide proof cells, and records demonstrate that inmates on suicide watch have access to medications that can be used

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[391]R. Doc. No. 408, at 186-187.

[392]R. Doc. No. 408, at 187.

[393]Pl. Ex. 376, at 50.

[394]Pl. Ex. 376, at 45.

[395]R. Doc. No. 408, at 171.

[396]Pl. Ex. 376, at 45.

[397]Pl. Ex. 376, at 46.

to overdose.[398] Staff and inmates on the suicide watch unit could not recall the last time cells were searched for contraband, and there was no log of any such searches.[399]

On the suicide watch tier, records demonstrate that significant self-harm events were not listed as "sentinel events" that would trigger staff review.[400] These events included "head banging severe enough to require sutures," swallowing pills, chemicals, and pieces of tile, and "countless episodes of tying cloth around necks, sometimes anchored to objects."[401] Inmates who commit suicide are sometimes not discovered for quite some time.[402] *Compare Plata*, 131 S. Ct. at 1934 (noting that "prison staff did not even learn of [an inmate's death] for several hours").

OPP staff members' ignorance of cut-down tools is particularly alarming. A cut-down tool is a type of knife "made to cut through layers of something that has been fashioned as a rope," such as the "thick material that uniforms are made of."[403] Suicide is a leading cause of death in correctional settings,[404] and approximately 95% of suicides in jails and prisons are committed by hanging.[405] Cutting someone down without a cut-down tool may take more time, decreasing the chance of survival.[406] Virtually none of OPP's staff, including the staff members responsible for suicide watch, could locate cut-down tools when the experts visited.[407]

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[398]*See also* Pl. Ex. 378, at 23.

[399]Pl. Ex. 376, at 45-46.

[400]Pl. Ex. 376, at 47.

[401]Pl. Ex. 376, at 47.

[402]Pl. Ex. 376, at 30; *see e.g.*, Pl. Ex. 78; Pl. Ex. 81.

[403]R. Doc. No. 406, at 85.

[404]*E.g.*, R. Doc. No. 410, at 46.

[405]R. Doc. No. 406, at 85-86.

[406]R. Doc. No. 406, at 85-86.

[407]R. Doc. No. 406, at 86; R. Doc. No. 408, at 159.

6. Records

Dr. Gage testified, and the Court has observed firsthand in connection with its own review, that record keeping at OPP is very poor.[408]

necessary to address deficiencies. The evidence presented was largely targeted towards deficiencies in mental health care, although the evidence also shows deficiencies in non-mental health care treatment, in particular sick call requests, medication administration, and emergency room visits, that relate to the risk of suicide, violence, and contraband trade.[415] The evidence presented shows that a lack of treatment altogether, rather than inadequate treatment, contributes to severe deficiencies in medical and mental health care at OPP.[416]

The consent judgment directly addresses OPP's deficiencies with respect to medical and mental health care. For example, it requires that an inmate's risk of suicide or other self-harm be evaluated within eight hours of arriving at OPP and it prohibits placing inmates in isolation who have not been screened.[417] It requires that an inmate receive a mental health assessment no later than the next working day following an "adverse triggering event," such as a suicide attempt or self-injury.[418] It also requires that "psychotropic medications are administered in a clinically appropriate manner as to prevent misuse, overdose, theft, or violence related to the medication."[419]

"Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives inmates of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society." *Plata*, 131 S. Ct. at 1928. OPP's deficiencies with respect to medical and mental health care are widespread, and the deficiencies with respect to mental health care are particularly obvious and pervasive. Dr.

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[415]R. Doc. No. 410, at 52-53.

[416]Pl. Ex. 376, at 50.

[417]Consent Judgment, at 20.

[418]Consent Judgment, at 21.

[419]Consent Judgment, at 22, 30.

Gage testified that OPP's absence of mental health services is "dramatic" when compared to any other institution he has seen.[420] Considering the allegations of system-wide constitutional violations and the evidence presented of "complex and intractable" deficiencies, the Court concludes that the "scope of the remedy" presented in the

cells where inmates eat.[427] *Compare Gates v. Cook*, 376 F.3d at 341 ("[E]xposure to human waste 'evokes both the health concerns emphasized in *Farmer* and the more general standards of dignity embodied in the Eighth Amendment.'") (quoting *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001)). The acute psychiatric unit's showers have large amounts of black mold on the ceilings and walls.[428] Clouds of gnats have resulted in an increased incidence of skin problems.[429] Cells housing mentally ill inmates have feces spread on the walls.[430] Inmates, including inmates on the acute psychiatric unit, sometimes sleep on the floor or

the measures in the proposed consent judgment, and finds them narrowly drawn and no more intrusive than necessary to remedy the violation of inmates' constitutional rights.

D. Fire Safety

With respect to fire safety, Romero observed fire hazards, including electrical sockets that had been "burnt out, perhaps by inmates tampering with them . . . to ignite something."[434] Romero reported that staff members were unable to locate emergency exit keys in a timely manner, if at all.[435] A key control program is "foundational to jail security,"[436] but there is no reliable key control program at OPP.[437] According to Romero, "[s]taff and prisoners reported that emergency doors are frequently locked with shackles because during power outages, these doors pop open."[438] At the time of Romero's visit, the fire alarm system for the last three months at several facilities had consisted of a "fire watch," in which a person walked through units looking for fire hazards or signs of fire.[439] In September 2012, the Louisiana State Fire Marshal's office and the New Orleans Fire Department conducted a joint surprise inspection.[440] The OPP staff member assigned to the fire watch had, by 10:30 a.m., filled out the fire watch check log for the entire day.[441]

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[434]R. Doc. No. 407, at 102-03.

[435]Romero requested that staff members locate an emergency key for one of the housing units. Staff members located a key within about ten minutes, but it was the wrong key. A key located after an hour worked for one door but not for another. Ultimately, Romero concluded that the keys were kept in the warden's office, but the warden is only there during the day and the keys are not otherwise available to staff. Romero suspected the locks had been sabotaged by inmates. R. Doc. No. 407, at 104-07.

[436]Pl. Ex. 374, at 21.

[437]Pl. Ex. 372, at 21, 45.

[438]Pl. Ex. 374, at 46.

[439]R. Doc. No. 407, at 103-04.

[440]Pl. Ex. 62.

[441]Pl. Ex. 62. The staff member was suspended for 5 days.

The inability of staff to operate emergency exits is deeply worrisome and poses the type of problem that could result in a large-scale catastrophic fire event with many fatalities.[442] While the Sheriff's testimony suggested that improvements have been made in recent months, the proposed consent judgment will ensure that such improvements remain consistent.[443] For example, the consent judgment requires that fire equipment be maintained and inspected quarterly and that staff be trained in the use of emergency keys.[444] In conjunction with the presence of contraband, including lighters[445] and "stingers,"[446] the dysfunctional emergency exit system, and the inadequate supervision at OPP, fire related issues pose a risk to the security and safety of inmates and staff. The remedies in the proposed consent judgment with respect to fire safety are narrowly drawn to remedy the violation of the federal rights addressed herein, and they are no more intrusive than necessary to do so.

III. Statutory Rights

The United States alleges that OPP discriminates against Limited English Proficiency ("LEP")[447] inmates by failing to provide LEP inmates with meaningful access to OPP's intake, processing, housing, medical, and other services.[448]

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[442]*E.g.*, R. Doc. No. 405, at 137; *see also* Pl. Ex. 372, at 44-46.

[443]R. Doc. No. 441, at 87-88.

[444]Consent Judgment, at 34.

[445]R. Doc. No. 405, at 86.

[446]Stingers are constructed by cutting a live electrical wire with a shank and attaching a washer to the end of the wire. Inmates use stingers to heat up food. R. Doc. No. 406, at 101-02.

[447]Limited English Proficiency ("LEP") characterizes individuals who cannot speak, write, or understand the English language such that their ability to communicate is limited. R. Doc. No. 407, at 108.

[448]R. Doc. No. 70, at 12. While conditions at OPP appear obviously inconsistent with the Prison Rape Elimination Act ("PREA"), PREA is not one of Plaintiffs' underlying causes of action. *See, e.g.*, *Ball v. Beckworth*, No. 11-37, 2011 WL 4375806, at *4 (D. Mont. Aug. 31, 2011). Nonetheless, the parties appear to agree that the consent judgment should be tailored to remedy PREA violations.

Section 601 of Title VI of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *See also N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *United States v. Maricopa Cnty., Ariz.*, No. 12-00981, 2012 WL 6742314 (D. Ariz. Dec. 12, 2012). "[L]ongstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI." *Maricopa Cnty.*, 2012 WL 6742314, at *4.

A policy guidance document issued by DOJ states that an entity's obligation with respect to a particular service can be evaluated through an "individualized assessment that balances the following four factors: (1) [t]he number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs." Dep't of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 4145501, 41459 (June 18, 2002); *see also Maricopa Cnty.*, 2012 WL 6742314, at *4 ("DOJ coordinates government-wide compliance with Title VI and its interpretation

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Compare R. Doc. No. 416, at 48 (filing by Plaintiffs, asserting: "The proposed Consent Judgment's remedies regarding sexual abuse and sexual assault are the minimum necessary to correct OPP's PREA-related deficiencies."); R. Doc. No. 154, at 8 (suggesting that the consent judgment is not narrowly tailored to

of Title VI is entitled to special deference.") (citations omitted).

While OPP has LEP inmates,[449] OPP has virtually no services for LEP inmates.[450] This creates problems with respect to classification, medical treatment, and emergency situations.[451] *See* 67 Fed. Reg. at 41469-70. At intake, LEP inmates sign forms and other documents without knowing their contents.[452] Staff members informed Romero that they have a "catch phrase type book," but they were unable to locate it after searching for 20 minutes.[453] The number of LEP inmates is unknown because OPP does not keep a record, whether through intake classification or through some other process, of inmates that do not speak English.[454]

OPP also does not keep a record or otherwise identify staff members who are bilingual.[455] Romero was informed that only one staff member at intake speaks Spanish.[456] Accordingly, when that officer is not on duty, there is no one to communicate with Spanish-speaking inmates.[457] While other inmates may provide translation services in some circumstances, in "many circumstances" such an arrangement fails to comply with Title VI and its implementing regulations because of issues relative to confidentiality and physical safety. *See* 67 Fed. Reg. 4145501 at 41462 ("[O]ther inmates . . . are not competent to provide quality and accurate interpretations.").

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[449]R. Doc. No. 407, at 109.

[450]R. Doc. No. 407, at 112-13.

[451]R. Doc. No. 407, at 108-11.

[452]R. Doc. No. 407, at 110; *see also* R. Doc. No. 81-1, at 11 (English translation of declaration describing inability to obtain medical care because of language barrier).

[453]R. Doc. No. 407, at 111.

[454]R. Doc. No. 407, at 109, 112.

[455]R. Doc. No. 407, at 113.

[456]R. Doc. No. 407, at 113.

[457]R. Doc. No. 407, at 113.

The proposed consent judgment provides for language assistance policies and procedures that will ensure compliance with Title VI. It requires, for example, that OPP provide Spanish translations of vital documents, including sick call forms and inmate handbooks, and that an appropriate number of bilingual staff members be available for translation or interpretation.[458] There is little doubt that the proposed consent judgment's provisions addressing LEP inmates are narrowly drawn to remedy the violation of inmates' rights pursuant to Title VI, and the provisions are no more intrusive than necessary.[459]

IV. Objections to Approval

The City has raised several objections to the proposed consent judgment. "A party potentially

provisions that require the Sheriff to "continue to" take certain actions and, relatedly, contends that the consent judgment cannot be approved absent a plainly worded concession of liability on the part of the Sheriff.

A. Provision-by-Provision Approach

The City asserts that the Court must examine the proposed consent judgment "provision by provision," making particularized findings that a federal right has been violated and injunctive relief is narrowly drawn and necessary with respect to each and every provision. In support of this argument, the City cites cases addressing the termination of consent judgments.[460] But the Fifth Circuit has rejected such reliance on "provision-by-provision" cases as "misplaced" because the statutory subsection addressing termination of a consent decree, § 3626(b)(3), "on its face requires such written findings. Conversely, [§ 3626(a)(1)], which applies to the approval of prospective relief, does not."

hearing.

B. Effect on Third Parties

1. Funding Provision

The City argues that the proposed consent judgment's funding provision, Section V, has an impermissible effect on third parties. The City initially contended that Section V "impermissibly infringes on the City's rights as a non-party," by permitting "the Sheriff, the Plaintiff Inmates, and the Civil Rights Division [to] decide what is the appropriate level for funding for the Sheriff's office without affording the City an opportunity to be heard or a means to even have an evidentiary hearing."[462]

V. FUNDING

A. The Court shall determine the initial funding needed to ensure constitutional conditions of confinement at OPP, in accordance with the terms of this Agreement, and the source(s) responsible for providing that funding at an evidentiary hearing ("funding trial"). Defendant, third-party Defendant City of New Orleans ("City"), and Plaintiffs shall have the right to participate fully in the funding trial, including producing expert testimony and analysis regarding the cost of implementing this Agreement.

~~A.~~B. Defendant shall be responsible for implementation of this Agreement upon a definitive judgment with regard to ~~such~~ initial funding for this Agreement.

~~B.~~C. Once the funding is determined pursuant to Paragraph A, the funding amount thereafter may be adjusted on an annual basis to account for changes in the size of the prisoner population, inflation, or other operating costs. If ~~the Parties~~Defendant and the City are unable to agree upon such adjustments to the annual budget, the Monitor will intervene and resolve the dispute. If the Monitor cannot resolve the dispute within 45 days, the dispute will be submitted to the district judge for resolution. Defendant, the City, and Plaintiffs ~~The Parties~~ agree to work in good faith to determine available cost savings measures that may result from the ongoing implementation of this Agreement or otherwise.

~~C.~~D. Defendant will provide an annual budget for the expenditure of the funds for operation of OPP and an annual audited financial statement to the Monitor, the City, and ~~the Parties~~Plaintiffs. The Monitor will assist in conducting oversight to ensure that funds for implementing this Agreement are allocated to achieve compliance with this Agreement.

IX. MONITORING

F. Monitor Distribution of OPSO Documents, Reports, and Assessments: Within seven days of receipt, the Monitor shall distribute all OPSO assessments and reports to SPLC, ~~and~~ DOJ, and the City. The Monitor also shall provide any OPSO compliance-related documents within seven days to DOJ, ~~and~~ SPLC,

and the City upon request.[467]

The City specifically objects to the amendments because they "*require* the City to subject itself to the 'assistance' of the Monitor to set funding levels for the Sheriff's office."[468] But if the City does not want to participate in a process in which the Monitor resolves disputes, it need not do so. While the funding provision now expressly includes the City, the Sheriff, and the Plaintiffs in the funding decisionmaking process, this modification merely provides the City with "the right," rather than the obligation, "to participate" in the Monitor's dispute resolution. Ultimately, "[i]f the Monitor cannot resolve the dispute within 45 days, the dispute will be submitted to the district judge for resolution."[469] Nothing in the cited provision permits the Sheriff and Plaintiffs to impose any obligation upon the City without a hearing.

The City also

that will adversely affect public safety and the welfare of the citizens of New Orleans who are not inmates at OPP.[470]

First Deputy Mayor Andrew Kopplin testified relative to the effects that the proposed consent judgment could have on the City's budget. Because the cost of implementing the proposed consent judgment and the party responsible for paying any additional costs have not yet been determined, the Court permitted the City to offer testimony regarding the effect that a price tag of $22.5 million would have on the City's budget, should the City be required to pay such costs in full. Kopplin stated that the $22.5 million figure was based on a request from the Sheriff.[471]

It is important to emphasize that, at this stage of the proceedings, the Court does not know whether any additional revenue is needed to ensure that OPP inmates are afforded the full protections of the Constitution and Title VI. The Court has not yet heard argument on the City's state law funding obligation or heard evidence relative to the funds available to the Sheriff and the Sheriff's spending of any such funds. Determining whether the City has an additional funding obligation and the amount of any such obligation is impossible at this stage. Accordingly, the Court will assume, for the sake of argument, that the City could be obligated to spend an additional $22.5 million on implementation of the consent judgment.

Kopplin testified that either significant layoffs and furloughs or a drastic reduction in the number of police officers and fire department employees available to respond to public emergencies

conditions at OPP.[472] Such measures, Kopplin concluded "would put all of the citizens of the City at risk."[473]

The PLRA requires courts to "give substantial weight to any adverse impact on public safety" caused by the entry of a consent judgment. 18 U.S.C. § 3626(a)(1). Plaintiffs assert that legislative history and caselaw demonstrate that this requirement is oriented towards the more direct effects on public safety associated with prisoner release orders and population caps.[474] *See, e.g.*, *Plata*, 131 S. Ct. at 1941-42. The Court has considered the "difficult and sensitive" question of the proposed consent judgment's effect on public safety, especially insofar as it may indirectly lead to

violence, and the risk of a tragic fire is unacceptable.[478] Inmate escapes are not uncommon, and the prospect of armed inmates, whether outside or inside prison walls, is alarming.[479] The evidence shows that OPP itself presents a public safety crisis, which endangers inmates, staff, and the community at large.[480]

The Court concludes that, even were it to give substantial weight to the public safety issues outside OPP, ignore the public safety issues inside OPP, and assume that the consent judgment will cost the City an additional $22.5 million, the proposed consent judgment complies with the PLRA.

will require the City to increase taxes imposed against the citizens of the City of New Orleans."[481] Even assuming that the City will have to provide additional revenue in the future to implement the consent judgment, a finding that the Court does not make at this juncture, "[i]t is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement, nor will an allegedly contrary duty at state law." *Smith v. Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980) (internal citations omitted). "That it may be inconvenient or more expensive for the [local government] to run its prison in a constitutional fashion is neither a defense to this action or a ground for modification of the judgment rendered in this case." *Gates v. Collier*, 501 F.2d at 1322.

The City has had the opportunity to put forth evidence that the conditions at OPP meet constitutional muster or that the proposed consent judgment extends farther than constitutionally necessary. The City has not presented any evidence, including expert testimony, showing that conditions at OPP do not violate the Constitution or Title VI. The City has also not offered evidence with respect to an alternative, less costly or less intrusive, approach to remedying conditions at OPP.

conditions at OPP meet constitutional minimum requirements.[482]

The City's proposed finding of law that "[t]he Court may not approve a proposed consent decree that results in the raising of taxes" is disingenuous.[483] The City cites 18 U.S.C. § 3626(a)(1)(C), but that statute provides: "Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes." The Court has no intention of ordering the City, the Sheriff, or any other political entity, for that matter, to raise taxes or to construct yet another facility. To the extent our elected political leaders intend to house inmates at OPP facilities, however, these facilities must meet constitutional and statutory minimum requirements.

4. Negotiating History

The City argues that the parties have colluded in drafting a consent judgment that fails to recognize the Sheriff's revenue streams and that treats the City as "an unlimited bank account for the benefit of the inmates and the Sheriff."[484] The City appears to suggest that the Sheriff and Plaintiffs colluded by leaving the City out of the process while drafting a consent judgment that is broader and more expensive than necessary to remedy the conditions at OPP.[485]

The City describes as "unorthodox" the legislative landscape in which the City must finance

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[482]*See, e.g.*, R. Doc. No. 412, at 38.

[483]R. Doc. No. 153, at 6; R. Doc. No. 427, at 11.

[484]R. Doc. No. 151, at 14-15.

[485]In *Williams*, the Fifth Circuit observed that "the district court had to bear the full responsibility in this case to safeguard the interests of those individuals who were affected by the decree but were not represented in the negotiations." 729 F.2d at 1560. The Court has not interpreted *Williams* to indicate that the City's participation in negotiations excuses the Court from its "full responsibility" to safeguard the City's interests as a third party.

a jail which is run by the Sheriff.[486] The literature suggests that such arrangements are not uncommon. *E.g.*, Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 562-63 (2006). Whether or not common, however, this financial relationship could incentivize sheriffs to seek out broad, expensive consent judgments.[487] The Court has been vigilant about ensuring compliance with the PLRA, however, and the City has assisted through its vigorous adversarial participation in this process. Nonetheless, at this stage, the City has not identified ways in which the proposed consent judgment's objectives—namely, compliance with the Constitution—could be obtained for a lesser cost, and the expert testimony was persuasive that the remedies included in the consent judgment are the minimum necessary to remedy conditions at OPP.

The City also objects to the Plaintiffs' characterization of its role in negotiating the proposed consent judgment. Plaintiffs have asserted: "Since November 2011, the Sheriff and the City participated in negotiations to formulate a comprehensive remedy to [] unlawful conditions."[488] The City responds that it "did not participate in negotiations to formulate what is termed a comprehensive remedy for alleged unlawful conditions."[489] However, the record shows that attorneys for the City actively participated in the negotiations.

After the Sheriff filed his two third-party complaints, the Court was advised that all parties, including the City, were prepared to enter into an interim consent judgment, subject to a dispute over

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[486]R. Doc. No. 159, at 2.

[487]*See* Schlanger, 81 N.Y.U. L. Rev. at 562-63, 623 (noting "not so very hard fought" litigation

the cost and funding of the interim consent judgment's reforms.[490] An October 12 filing by Plaintiffs

the Court with the signed consent judgment, which would permit future development of the interim funding amount, and to discuss the appointment of a special master.[494] At the conference, notwithstanding numerous express assertions to the contrary by the City's counsel, the Mayor of the City of New Orleans announced that he was unwilling to sign any such agreement.[495] The Mayor

C. Louisiana Rev. Stat. Ann. § 15:738

The City argues that the proposed consent judgment is inconsistent with La. Rev. Stat. Ann. § 15:738, which provides:

> No incarcerated state prisoner, whether before trial, during trial or on appeal, or after final conviction, who is housed in any jail, prison, correctional facility, juvenile institution, temporary holding center, or detention facility within the state shall have a standard of living above that required by the constitutions of the United States and the state of Louisiana, as ordered or interpreted by the appropriate courts of last resort, or by the standards set by the American Correctional Association. It is the intention of this legislature that, to the extent permitted by law, no inmate shall have a standard of living better than the state poverty level. Citizens should not be worse off economically and living in conditions that are below those granted to inmates whose living standards are being paid for and subsidized by the hard-working and law-abiding people of the state of Louisiana.

At the fairness hearing and in its briefing, the City makes much of the fact that the proposed consent judgment would provide inmates with medical and mental health care to an extent that exceeds that provided to certain non-incarcerated citizens.[498]

No one disputes that La. Rev. Stat. § 15:738 does not negate constitutional minimum standards. Moreover, the parties are well aware that governments carry a special responsibility for those in their custody. "To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates may actually produce physical torture or a lingering death." *Plata*, 131 S. Ct. at 1928 (quotation omitted). The Court notes that the statute's reliance on American Correctional Association standards implicates a higher level of care in some

[498] *E.g.*, R. Doc. No. 412, at 53-54; R. Doc. No. 427, at 16.

situations than that required by the Constitution.[499]

The City argues, however, that in evaluating what the Constitution requires, the Court should take into account the unfortunate living conditions experienced by some impoverished non-incarcerated citizens of Louisiana.[500] While constitutional standards reflect "the evolving standards of decency that mark the progress of a maturing society," *Plata*, 131 S. Ct. at 1925 n. 3 (quoting *Farmer*, 511 U.S. at 834), the Court has never before heard it argued that constitutional standards vary depending on the poverty level existing in the state or community in which one lives. As counsel for Class Plaintiffs highlighted during closing statements, such an interpretation has the effect of affording lessened constitutional protections to citizens of Louisiana.[501] The law does not support this argument. A state's inability or unwillingness to provide certain services to its non-incarcerated citizens does not excuse it from the constitutional obligation to provide basic care to those in its custody.

D. Specific Provisions

Because the nature of the City's objections to the proposed consent judgment remained amorphous even as the fairness hearing was imminent, the Court ordered the City to clarify its position: "The City shall identify with particularity the provisions of the proposed consent decree that it is challenging."[502]

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[499]R. Doc. No. 407, at 32 ("In terms of the American Correctional Association, it does take it up to a little bit higher level because they have other things in those standards that go beyond the minimal required to operate a safe jail.").

[500]R. Doc. No. 412, at 54.

[501]R. Doc. No. 412, at 39-40.

[502]R. Doc. No. 126, at 3 (emphasis in original). In the same order, the Court ensured the City was on notice of its obligation to argue at the fairness hearing any state-law funding defenses related to the overbreadth of the proposed consent judgment or the constitutionality of the conditions at OPP.

In response, the City identified the funding provisions and fourteen substantive provisions

of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . The fact that many of these conditions have persisted for years despite MDOC's purported efforts leads us to likewise conclude that MDOC has not met the heavy burden of showing that its voluntary conduct has mooted any of the issues presented here." 376 F.3d at 337; *see also Gates v. Collier*, 501 F.2d at 1321 ("Changes made by defendants after suit is filed do not remove the necessity for injunctive relief, for practices may be reinstated as swiftly as they were suspended."). A defendant's assurance that it is "already on the path towards compliance is insufficient to moot the issue." *Gates v. Cook*, 376 F.3d at 343-42. According to Schwartz, "almost all of [the] problems given to OPSO in writing" in the 2008 National Institute of Corrections report "remain unmitigated today."[507]

The Court permitted the parties to add record citations to their proposed findings of fact and conclusions of law after the hearing.[508] The City did so, but it also attempted to "revise" its proposed findings of fact and conclusions of law to introduce arguments that were not raised when the City responded to the Court's order to "identify with particularity the provisions of the proposed consent decree that it is challenging."[509] In the same paragraph, the Court expressly stated that "[d]efenses related to the constitutionality of existing conditions or the overbreadth of the proposed consent decree that are not raised shall be deemed waived."[510] While not expressly invited, the Court welcomes the City's additional citations to legal authority.[511] The Court mentions only briefly those

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[507]Pl. Ex. 372, at 20.

[508]R. Doc. No. 391.

[509]R. Doc. No. 126, at 3; R. Doc. No. 395.

[510]R. Doc. No. 126, at 3.

[511]*See, e.g.*, R. Doc. No. 427, at 14.

arguments that were not raised until weeks after the hearing and that are, accordingly, waived.

For example, in its proposed conclusions of law, the City challenges as overbroad the provision stating that the consent judgment shall "terminate when the [Sheriff] has achieved substantial compliance with each provision of the Agreement and [has] maintained Substantial Compliance with the Agreement for a period of two years."[512] Because the City did not raise this argument until several weeks after the hearing, opposing counsel did not have an opportunity to address it. Nonetheless, in light of the evidence of longstanding deficiencies at OPP facilities arising from deep-rooted and systemic weaknesses, the Court finds the two-year provision narrowly drawn and otherwise compliant with the PLRA.

The City additionally raises a new challenge to

E. Admission of Liability

The City contends that "[u]nless [the Sheriff] admits to operating an unconstitutional facility, [] the decree is overly broad."[515] In particular, the City demands that the Sheriff provide a "plainly-worded and straightforward admission admission

tension with any attempt by defendants to continue to deny legal liability while agreeing to the entry of the relief

individuals, including individuals who died in OPP, implored the Court to enter an order approving the consent judgment,[522] describing as "shocking and offensive" the City's characterization of Plaintiffs' suit as seeking "steaks and cognac" for inmates.[523] The public comments also expressed the opinion that politicians, including the Sheriff of Orleans Parish and the Mayor of New Orleans, have failed and will continue to fail to take action absent court approval of the consent judgment.[524]

The consent judgment represents a reasonable factual and legal determination based on the extensive factual record. It is fair and consistent with the Constitution, statutes, including the PLRA, and jurisprudence. Its effect on third parties is not unreasonable or proscribed. Having concluded that the consent judgment is overwhelmingly supported by the evidence, including OPP records and persuasive trial testimony, the Court turns to the determination of whether the consent judgment is additionally a fair, adequate, and reasonable class settlement.

The terms of the proposed settlement, which is the same document as the consent judgment, have already been discussed.

I. Standard of Law

When determining whether to certify a settlement class, courts must determine whether the requirements for certification are met and whether the settlement is fair, adequate, and reasonable, especially insofar as it affects inmates who are not named plaintiffs in the lawsuit.

Rule 23(a) of the Federal Rules of Civil Psrtifkr the

Stukenberg v. Perry, 675 F.3d 832, 837 (5th Cir. 2012) (quoting *McManus v. Fleetwood Enters., Inc.*, 320 F.3d

complexity, expense, and likely duration of the litig

have the same essential characteristics of those of the putative class." *Id*

judgment were distributed to all inmates at OPP on a given date.[533] In addition, 50 copies of the notice were posted in common areas in the seven OPP facilities, indicating how inmates could obtain a full copy of the consent judgment.[534] An abbreviated notice also ran in *The Times-Picayune* on two different days and it was also poste

1089, 1111 (10th Cir. 2001) (no additional notice needed where amendment "merely expanded the rights of class members").

B. Fraud or Collusion

The consent judgment is the product of a protracted period of litigation between Class Plaintiffs, DOJ, the Sheriff, and the City.[539] The relief offered in the consent judgment demonstrates that SPLC has been unwavering in fulfilling its obligations to Class Plaintiffs. For these reasons, as well as those discussed above with respect to the City's participation in the process, the Court is satisfied that the consent judgment is not tainted by fraud or collusion.

C. Complexity, Expense, and Duration of Litigation

Class Plaintiffs observe that the expenses associated with this case are high because demonstrating deliberate indifference would require "significant statistical, anecdotal, and expert evidence."[540] While Class Plaintiffs further believe that they have obtained such evidence, they accurately acknowledge that a failure to settle the case would require a protracted motions practice and potential appeals that would delay the relief requested.[541] Such delays would prolong Class Plaintiffs' exposure to the safety risks at OPP, weighing in favor of settlement.

D. Stage of the Proceedings

With respect to the stage of the proceedings, including the depositions and expert reports completed, this case has progressed to a marked degree. Class counsel notes that four staff paralegal investigators, as well as multiple law clerks and interns, have spent "thousands of hours

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[539]*See* R. Doc. No. 138, at 8; R. Doc. No. 411, at 22-23.

[540]R. Doc. No. 138, at 9.

[541]R. Doc. No. 138, at 9.

documenting conditions in the jail by interviewing people housed there."[542] "There has not been a single point, in the last year and a half of this litigation, that Plaintiffs stopped doing client intake, responding to calls from the jail, and gathering evidence."[543]

The City asserts that an absence of evidence at the fairness hearing supporting class certification and settlement prohibits the Court from certifying the settlement class and approving the settlement.[544]

deciding whether to approve a class action settlement."[547] In light of the evidence presented at trial, neither the City's nor the Sheriff's financial condition defeats the class settlement. Moreover, the cases cited by the City are not persuasive in the context of a class action solely for injunctive relief.[548]

F. Opinions of Class Counsel, Class Representatives, and Absent Class Members

The opinions of class counsel strongly support entry of the proposed consent judgment.[549] The Court has received many comments from class members in support of the proposed consent judgment. Inmates' comments describe numerous deficiencies, including poor environmental conditions, inadequate staffing and absent staff members, classification and housing problems, illicit drug use, sexual assault and other violence, staff use of excessive force, and inadequate medical and mental health care, including inadequate suicide prevention.[550] Although many inmates wrote solely about the current conditions at OPP,[551] those inmates that commented on the proposed settlement were generally positive.[552] Some inmates objected to the lack of financial compensation,[553] but the proposed consent judgment does not limit the ability of inmates to bring claims for damages and the complaint never sought such damages.[554]

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[547]R. Doc. No. 427, at 8.

[548]*See Cody v. Hillard*, 88 F. Supp. 2d 1049, 1059 (D.S.D. 2000) ("This factor is not particularly important in the present case because the action is not for monetary damages.").

[549]*E.g.*, R. Doc. No. 138.

[550]*E.g.*, R. Doc. Nos. 227, 229, 269,270, 274, 275-76, 334, 353.

[551]*E.g.*, R. Doc. No. 235.

[552]*E.g.*, R. Doc. No. 227 (generally approving of proposed consent judgment, but noting concerns about noncompliance).

[553]*E.g.*, R. Doc. No. 228.

[554]R. Doc. No. 1, at 37.

One recurrent objection is that the proposed consent judgment does not go far enough because the Sheriff's compliance will be in appearance only, while the deficient conditions at OPP will persist or worsen.[555] Some class members assert that the Sheriff will present a facade of compliance during visits by experts or the Court, but not engage in substantive change.[556] These objectors ask for the Monitor to be "in house" or "on hand at all times within the jail" to ensure compliance.[557] One of the Class Representatives objects on the basis that the proposed consent judgment "reads like a Standard Policy []Book issued by the Fed. Bureau of Prisons, La. Dept. of Corrections, and American Correctional Association (ACA)," and fails to set forth "specific details" on correcting the underlying problems.[558]

The Fifth Circuit's "jurisprudence [] makes clear that a settlement can be approved despite opposition from class members, including named plaintiffs." *Ayers*, 358 F.3d at 373. The proposed consent judgment "gives OPP officials discretion in establishing the details of facility-specific policies designed to address constitutional infirmities," but it al

have permitted OPP to remain an indelible stain on the community, and it will ensure that OPP inmates are treated in a manner that does not offend contemporary notions of human decency. After carefully considering the tremendous amount of evidence, the parties' arguments, including the City's objections, and the law, the Court concludes that the consent judgment should be approved.

IT IS ORDERED that the motions are **GRANTED**.

New Orleans, Louisiana, June 6, 2013.

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE