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5, 2008 for the submission of this first report, and the Court approved that request.

The DYS contract permitted the expert to employ James Holzhauer as an assistant. Mr. Holzhauer earned his Bachelor of Science degree *cum laude* (2007) and his Master of Arts degree (2008) in criminal justice from the University of Toledo. Mr. Holzhauer has maintained a spreadsheet of information obtained from follow-up requests to youth asking for appointments with a Legal Assistance Program (LAP) attorney and from data Legal Assistance Program (LAP) attorneys have included in their monthly activity reports. He accompanied the expert on visits to DYS institutions, attended meetings with DYS administrators and staff, conferences with counsel for the parties, and meetings with Monitor Cohen. He contributed substantially to this report. For the sake of simplicity all references to “I” or “we” throughout this report include the expert, Mr. Holzhauer, or both of us.

II. Methodology

In order to prepare this report I began by developing a monitoring plan, which I shared with counsel. At a meeting on June 18, 2008 at the DYS Training Academy attended by counsel for the plaintiff class, counsel for the DYS, and several DYS staff, as well as by LAP attorneys (Marc Mezibov, Stacy Hinnners, Sharon Hicks, and Brian Zets), those present approved the monitoring plan (with agreed-upon changes). (Exhibit A.) On June 25, 2008, I had an opportunity to meet with DYS

Director Thomas Stickrath and members of his executive staff and to explain my role as an expert to DYS superintendents who were meeting in Columbus, Ohio.

Pursuant to the final monitoring plan, I developed a follow-up questionnaire to send to youth who requested appointments with LAP attorneys. (Exhibit B.) The purpose of the questionnaire, which I shall discuss in another section of this report, was to obtain information about how youth made their requests to see LAP attorneys, the kinds of issues youth wished to discuss with LAP attorneys, and the youth's reactions to those meetings. The questionnaire also elicited information about the extent, if any, to which youth made use of the DYS grievance system with respect to issues they wished to raise with LAP attorneys.

On July 30, 2008, I participated in a videoconference with institutional superintendents, grievance officers, unit managers, unit management administrators, and deputies for direct services. Central Office staff and counsel also attended that videoconference.

On August 5 through 8, 2008, I visited the superintendents, grievance officers, and other supervisory staff at Indian River Juvenile Correctional Facility (Indian River), Cuyahoga Hills Juvenile Correctional Facility (Cuyahoga Hills), Mohican Juvenile Correctional Facility (Mohican), Ohio River Valley Juvenile Correctional Facility (ORV), Circleville Juvenile Correctional Facility (Circleville), Scioto Juvenile Correctional Facility (Scioto), and the Freedom Center adjoining the

Scioto institution (Freedom Center).² In addition to familiarizing myself with the physical plants of these facilities, I attempted to answer questions regarding the scope and requirements of the *J.P.* order, as well as my role as expert. I stressed the importance of the DYS grievance system and unit management staff in addressing problems that otherwise were likely to result in unnecessary meetings with LAP attorneys. These visits also gave me an opportunity to determine whether required information regarding the LAP had been posted in housing units in these facilities. At Scioto, I observed an orientation session for incoming male youth. I was particularly interested in learning about the extent to which youth learned about the grievance system, other DYS problem-solving mechanisms, and the LAP.

I had additional meetings with LAP attorneys, Sara Vollmer (a DYS Legal Division attorney), and Monitor Cohen. I also participated in telephone conferences with LAP attorneys, Director Stickrath, his counsel, plaintiffs' counsel, and Monitor Cohen.

On September 25, 2008, I visited Marion Juvenile Correctional Facility, which was not part of the August tour I have described. I also met with Director Stickrath, Kelly Castle, Esq., and other central office staff (including Jennifer Fears, the Chief Inspector of the DYS grievance

² The only person I was able to meet at ORV was the Deputy for Direct Services. The Superintendent, grievance officer, and Unit Management Administrator were not available.

system) concerning the operation of the DYS grievance system and the nexus between the grievance system and the LAP.

During this entire period I entered the responses to follow-up questionnaires returned by youth who had sought appointments with LAP attorneys. I also reviewed monthly reports by LAP attorneys and added information from those reports to the tracking spreadsheet I maintained. In order to evaluate the operation of the LAP I reviewed a number of files maintained by the Mezibov firm or by Sharon Hicks, the two LAP providers. In addition, an important part of the preparation of this report involved an extraction and analysis of the information recorded on the tracking spreadsheet maintained in my office, as well as correspondence and other documents relevant to the operation of the LAP.

III. Data Obtained from Legal Assistance Program Attorneys' Monthly Reports and Follow-up Surveys by Youth

I created a tracking spreadsheet to compile data collected during the execution of my responsibilities as expert. This spreadsheet tracks information included in reports that the LAP attorneys send to me each month, as well as responses to a follow-up questionnaire I send to youth in DYS institutions who asked to speak with LAP attorneys. A.

A. Legal Assistance Program Providers' Monthly Reports

On or about the beginning of each month I receive a report from the LAP attorneys detailing work done in the previous month.³ I separated data from these reports into the following categories: youth's first and last name; youth's DYS identification number; the name of the facility from which the request to see a LAP attorney was made; the youth's current facility; the matter number that corresponds to the youth's file (for the Mezibov firm only); the date the youth made his request at the institutional level to speak with a LAP representative; the date LAP staff received the request; the date of the first consultation the youth had with a LAP attorney; the date of the visit by a LAP attorney;⁴ the category of the incident the youth discussed with the LAP attorney; the current status of the matter; and, if applicable, the date the LAP provider closed the file and basis for closure. For example, a hypothetical youth who was transferred to a different facility after

³ When the DYS contracted with me on May 28, 2008, the LAP providers were Sharon Hicks, Esq. and attorneys employed by the law firm of Wiles, Boyle, Burkholder & Bringardner, Co. LPA (the Wiles Firm). On July 1, 2008, the Law Office of Marc Mezibov (the Mezibov firm) replaced the Wiles Firm and became the second LAP provider until September 21, 2008, when Ms. Hicks resigned to accept a position in the Federal Public Defender's office. Since that time, the Mezibov firm has been the only LAP provider. The attorneys in these firms who have been directly responsible for coordinating LAP-related activities have been Brian Zets, Esq. of the Wiles firm and Stacy Hinnners, Esq. of the Mezibov firm. Other attorneys and staff of those firms assisted these two individuals.

⁴ The date of the first consultation the youth had with a LAP attorney and the date of the visit by a LAP attorney are often the same date. In some instances, however, the youth's first contact with the provider may have occurred by telephone before a face-to-face meeting with the attorney.

submitting an initial request to speak with a LAP attorney may have the following entries in the spreadsheet:

Last Name	First Name	DYS #	Request Facility	Current Facility	Matter Number	Date of Request	Date Request Received	Date of first consult.	Date of Visit	Cat. Of Incident	Status	Date Closed
Doe	John	111-111	Marion	Ohio River Valley	1108-0000	10/20, 2008	10/31, 2008	11/03, 2008	11/03, 2008	Criminal Appeal	Closed-Non-LAP Criminal	11/10, 2008

The earliest reports I received from Sharon Hicks varied from this format. I received reports on the months of May and June from Ms. Hicks that included the following categories: youth’s first and last name; DYS identification number; date of birth; length of incarceration ordered by the adjudicating judge; release date; date of the youth’s request for a meeting with a LAP attorney; date the request was stamped at the institution; date the LAP provider received the request; and the date of the attorney’s visit with the youth. Though some of this information is certainly useful for a LAP attorney⁵, it was of limited value in connection with my monitoring duties. I therefore asked Ms. Hicks and the Mezibov firm to collaborate in the development of a new format for the monthly reports, and I provided several suggestions with respect to information I believed would be useful in monitoring the operation of the LAP. The categories noted in the table above are the final result of this collaboration.⁶

⁵ For example, the youth’s date of birth would be useful in determining whether a parent or guardian’s signature was necessary on a medical records release form

⁶ The new format for the monthly reports initially included a column entitled “Disposition” as well. This term was intended to represent the final disposition of a
[Footnote continued on next page]

One section of the attorneys' reports has been particularly useful for the purpose of understanding the extent of the LAP's involvement with a given youth. Upon its addition as a LAP provider the Mezibov firm began assigning a matter number to each complaint a youth raised with one of its attorneys, even though several complaints may have surfaced during a single interview. In addition to better organizing case files, the implementation of this system greatly assisted my ability to monitor the work done by the LAP by allowing me to identify each complaint individually as well as the actions taken by the LAP attorneys in response to each complaint (matter number).

The use of a matter number for each file also represents one of the key distinctions that had existed between the organization and maintenance of files by Ms. Hicks and the Mezibov firm. Prior to agreeing to open separate matter files, Ms. Hicks had not adopted a similar system of identification; rather, each youth's complaints, however numerous and unrelated, were filed in a single file bearing the youth's name. Thus, one file for John Doe might include five separate and different complaints or matters. I shall discuss below the impact of this filing approach on the monitoring process.

matter, while the "Status" column would represent the status of a matter at the end of each month. It soon became evident that these columns could be effectively combined without interfering with my ability to monitor an individual matter.

Once I received each month's report from the LAP provider, I entered the information from the report into the tracking spreadsheet.⁷ This process allowed me to extract specific information about the rate of usage of the LAP. Between May of 2008 and November 6, 2008, LAP attorneys met with a total of 764 youth.⁸ Of this number, nearly 70 percent were located at Indian River, Marion, or Ohio River Valley.⁹ The three institutions with the next highest numbers of youth who met with a LAP attorney (Scioto, Cuyahoga Hills, and Circleville) represented only 23 percent of the total number of youth.¹⁰ In fact these three institutions totaled fewer than half of the number of youth LAP counsel saw at Ohio River Valley alone. The remaining three institutions (Mohican, Paint Creek Youth Center, and Freedom Center) totaled just over seven percent of the total number of youth who met with a LAP attorney.¹¹

⁷ Each youth received a separate entry on the spreadsheet for each matter the youth discussed with a LAP attorney.

⁸ Youth without a valid calendar day in the "date of visit" column, as well as youth who spoke with a LAP attorney about multiple matters in one month were excluded from the following calculations: the calculation of the number of youth seen by LAP attorneys per institution, the calculation of the number of youth seen by LAP attorneys per month, and the calculation of the number of youth seen by each LAP provider. Youth with multiple matters listed in a particular month were excluded beginning with the second matter per month. Youth who met with a LAP attorney during more than one month were not excluded from these calculations.

⁹ Between May 5, 2008 and November 6, 2008, LAP attorneys saw 142 youth at IRJCF, 109 youth at MaJCF, and 281 youth at ORVJCF.

¹⁰ Between May 1, 2008 and November 6, 2008, LAP attorneys saw 65 youth at SJCF, 60 youth at CHJCF, and 52 youth at CJCF.

¹¹ Between May 1, 2008 and November 6, 2008, LAP attorneys met with 30 youth at MoJCF, 20 youth at Paint Creek, and 5 youth at Freedom Center.

I also was able to determine the number of youth LAP lawyers saw each month. The outliers represented by the months of July and August can be attributed to the “start-up process” of the Mezibov firm in those two months.

Month	May	June	July	August	September	October	November (as of 11/06/08)
# of youth	151	140	16	213	117	95	32

Between May 1, 2008 and September 19, 2008, Ms. Hicks made 32 visits to DYS institutions and met with a total of 395 youth. Between August 5, 2008 and November 3, 2008, the Mezibov firm made 13 visits to DYS institutions¹² and met with a total of 363 youth.¹³

One of the simpler measurements of whether the LAP is functioning effectively consists of determining whether youth meet with a LAP attorney without undue delay. Between May 1, 2008 and November 6, 2008, the average time elapsed between the date on which a youth submitted a LAP request form and the date on which the youth met with a LAP attorney was approximately 22 days.¹⁴ In evaluating this finding

¹² In the month of August, LAP attorneys from the Mezibov firm made two visits to ORVJCF due to the high volume of youth requests.

¹³ The Mezibov firm met with an additional 6 youth from Paint Creek via teleconference on November 6.

¹⁴ I used a total of 620 entries from the LAP provider monthly reports to determine the average number of days elapsed. I excluded entries from the monthly reports that did not have a valid calendar date in the Date of Request or Date of Visit columns. A youth who did not have a valid date in the Date of Request column typically had one of the following entries in that column: “Attorney Add-on” (used to represent those youth with whom a LAP attorney first requested to meet while visiting an institution) or “unknown,” (which includes entries made by LAP attorneys such as “NA” or “no form”). Youth who did not have a valid date in the Date of Visit column had refused to meet with a LAP

[Footnote continued on next page]

the reader should keep in mind that the contracts with LAP providers require that an attorney visit each assigned institution every 30 days (in the case of Sharon Hicks) or every 45 days (in the case of the Mezibov firm).

B. Responses to Follow-up Questionnaire

In a continuation of a practice originally undertaken by plaintiffs' counsel, I designed a follow-up questionnaire to be sent to each youth, with few exceptions, who requested to meet with a LAP attorney during the course of each month. [Exhibit B above.] I sent follow-up questionnaires to each youth because I anticipated that the response rate would be relatively low. Youth received one follow-up questionnaire for each attorney visit. If a youth had multiple matters in one month, the column for "Survey Sent" was marked "Survey Mailed" (SM), beginning with the second matter number recorded in each month; this denoted that the youth had been sent a follow-up survey in connection with another matter. I did not send a follow-up survey to youth who contacted a LAP provider with an emergency request for assistance unless a LAP attorney saw the youth during the next visit to the youth's facility. Absent such a meeting the "Survey Sent" column was left blank. If a youth obtained a parole or was otherwise released from DYS custody

attorney, had been released prior to the LAP attorney's visit, or had transferred to another facility after submitting a request form.

before being seen by a LAP attorney, the “Survey Sent” column was marked “Not Applicable” (NA).

The follow-up survey included a brief introductory paragraph explaining the Court’s approval of the monitor’s employment of an expert in the *J.P.* case, as well as the addition to the LAP of a new provider of legal services. The follow-up form contained identifying questions (e.g. youth’s name and DYS identification number), as well as inquiries about how the youth became aware of the LAP, how the youth made a request to see a LAP attorney, and information about the last visit the youth had with a LAP representative. The survey also contained a question about the type(s) of complaint(s) the youth presented to the LAP attorney and a series of questions designed to provide insight into the extent of overlap between youth’s use of the LAP and their use of the grievance system.

The current version of the follow-up questionnaire has been in use since late July and represents superficial, rather than substantive, changes from the original version. These changes included the addition of the answer category “c. letter” to Question Three of the follow-up survey, which asks the youth how they submitted their request to meet with a LAP attorney; the addition of a question asking youth whether they have received a response to a filed grievance; and the addition of a “NA” response category in Questions 7.A, 8.A, and 9.A.

A number of youth returned the follow-up surveys with requests for direct assistance from the expert. In these instances I sent the youth

a letter explaining that I am prohibited from providing legal services to youth. I encouraged the youth to continue to use both formal and informal mechanisms within DYS, as well as the LAP, to address his or her concerns.

I sent follow-up questionnaires to youth beginning with those who met with a LAP attorney in May 2008. On July 9, 2008, I sent follow-up surveys to all youth who had met with a LAP attorney in May, and on July 17, to all youth who had met with a LAP attorney in June. I sent follow-up forms to youth who met with a LAP attorney after July 1 at the end of the month the LAP attorney saw the youth.

As of November 6, 2008, I had mailed 832 follow-up questionnaires to youth in DYS institutions; of those, youth returned 223 (approximately 27%), and institutional staff marked 20 “Return to Sender.” When I received the returned questionnaire, I entered the youth’s responses into the tracking spreadsheet and linked the questionnaire response to the corresponding meeting with the LAP attorney.¹⁵ I then extrapolated data from the spreadsheet to provide a summary of youth responses as well as insight into the extent of youth’s understanding of the purpose and mission of the LAP.

¹⁵ Each youth who submits a Request for Attorney form to the LAP is included in the monthly report submitted to the expert by the LAP providers. Once I had entered this information in the tracking spreadsheet, I made an entry on the same row in the spreadsheet denoting that I had sent the youth a follow-up survey, as well as the date on which I mailed the survey. If the youth returned the survey, I entered the responses in this row of the spreadsheet as well.

The returned surveys from youth quickly highlighted a significant problem. The 50 youth who met with a LAP attorney in May and returned the follow-up survey returned their questionnaires an average of approximately 64 days after the visit, while the 48 youth who met with a LAP attorney in June and returned the follow-up questionnaire returned the surveys an average of 45 days after the visit.¹⁶

Most youth did not recall the date they met with the LAP attorney and identified many problem areas that they had not discussed with the LAP attorney during the related visit. Rather, they simply checked off all the complaints they had at the time they completed the survey. As a result, the returned surveys failed to produce a significant identifiable relationship between the issues the youth had discussed with a LAP attorney and the problem areas they reported to me in the follow-up survey. These data nonetheless were useful in that they indicated that many of the youth's concerns fell within the scope of the DYS grievance system rather than that of the LAP.

In an attempt to gain a more accurate sense of the problem(s) the youth raised with a LAP representative, I requested that the LAP

¹⁶ The average time elapsed between the date of visit to the facility and the date on which the youth returned the survey was calculated by first determining the length of time between those two dates, and then totaling and averaging the length of time between the two dates for all returned surveys. I took survey return dates from the postmark on the return envelope from the youth. In some instances, the return envelope was not postmarked by the United States Postal Service, and in these cases I was unable to determine a return date. I did not include the 22 surveys without a documented date of return in my calculation of the average time elapsed.

attorneys provide me with a list of youth seen at each facility within 48 hours of the facility visit, and I promptly mailed surveys to these youth. Youth who met with a LAP attorney since July 1, 2008 have returned the follow-up surveys an average of 28 days after meeting with a LAP attorney.

While this change did not have the anticipated effect on youth's ability to recall dates of visits, it did produce a significant impact on the number of issues that youth reported discussing with the LAP attorney. Youth who met with a LAP attorney in May marked an average of 3.4 responses to Question 5 on the follow-up survey, which asked youth to indicate the issues they raised with the LAP attorney. Youth seen in June marked an average of 4.5 responses to Question 5. Youth seen after July 1, however, marked an average of only 2.75 responses to Question 5, a decrease of nearly 30 percent from the combined average number of responses to Question 5 from youth seen in May and June.

This decline is significant because Question 5 on the follow-up survey was designed to provide insight into the types of issues youth were, and are, bringing to the attention of the LAP attorneys. The response categories presented for Question 5, though not comprehensive, provide a mix of issues that are more likely or less likely to entail potential federal litigation. The higher number of responses to Question 5 documented in surveys corresponding to May and June visits, which likely were exacerbated by the extended delay between the youth's visit

with the LAP attorney and the date the youth received my follow-up survey, made it difficult to determine the actual number of complaints.

Question 5 on the follow-up questionnaire asks the youth to mark the category or categories that best describe the problem about which the youth most recently spoke with the LAP attorney; the question contains a total of 17 different response categories. Youth who returned the follow-up questionnaire marked a total of 778 responses to Question 5 on the survey.¹⁷ Of the total number of categories marked on Question 5, approximately 53% fall into categories that are either outside of the LAP's jurisdiction (*e.g.*, judicial release, problem with release date) or unlikely to produce a complaint that would meet the criteria of a colorable, let alone viable, federal lawsuit (*e.g.*, living conditions; food service; missed recreation; mail delivery; lost, destroyed, or stolen property). More than 35% of the 223 returned follow-up questionnaires included complaints in each of the following categories: living conditions, judicial release, and problem with release date.

There were other complaints, however, that reflected concerns much more likely to lend themselves to federal litigation. Nearly one-third of respondents to the follow-up survey indicated that they had spoken with a LAP attorney about use of force by staff; these complaints accounted for nearly 10% of the total number of categories marked in

¹⁷ Of the 223 returned follow-up surveys, six youth did not provide a response to Question Five.

responses to Question Five. Moreover, 26% and 22% of respondents replied that they had spoken with a LAP attorney about possible failure to protect issues (threats or physical attacks by other youth, respectively), while just fewer than 20% indicated that their complaint involved mental health, medical, or dental treatment. A total of 24 youth communicated allegations of sexual assault either by staff or by other youth.¹⁸

In view of the number of categories marked in response to Question Five, as well as the types of categories youth marked, I sought to determine the level of overlap between the type of incident reported by the youth and the category of incident as noted in the LAP provider monthly reports.¹⁹ There were several criteria for including a returned follow-up questionnaire in the determination of whether an overlap existed. The first criterion was a returned follow-up survey with a documented response to Question Five; of the 223 returned follow-up surveys, 6 youth did not respond in any manner to Question Five. The second was a relevant entry in the category of incident column from the LAP provider monthly report. This requirement eliminated follow-up survey responses from 106 youth who had met with a LAP attorney

¹⁸ Thirteen youth alleged that other youth sexually assaulted them, while 11 youth stated a staff member had sexually assaulted them.

¹⁹ I use the term “overlap” to reflect instances in which the entry in the Category of Incident column of the LAP monthly report is checked in the youth’s returned follow-up survey (occasionally along with other responses).

during the months of May and June,²⁰ as well as follow-up survey responses from 33 youth for whom the entry in the category of incident column did not permit a comparison.²¹

Of the remaining 78 returned follow-up surveys, 29 were returned by youth to whom LAP attorneys assigned multiple matter numbers. This produced a sample size of 107 entries from LAP providers' monthly reports comparable to data from the returned follow-up surveys to determine the existence of an overlap between the two sources.²²

This comparison revealed an overlap between youth responses to Question Five on the follow-up survey and the entry based on a LAP attorney's interview in the Category of Incident column in 50 percent of the instances in the sample (54 of the 107). The instances that did not include an overlap between the two sources did not demonstrate any

²⁰ Monthly reports compiled by the LAP prior to July 1, 2008 did not include a category of incident column. This column was added to the monthly reports at my request beginning with the month of July; for reasons of privilege the category of incident column has been included only on monthly reports LAP providers sent to me as opposed to those they send to DYS Central Office personnel.

²¹ These entries were the result of the occasionally uncertain early stages of establishing consistency in monthly reports during the time period when there were two LAP providers: Sharon Hicks and the Mezibov firm (July 1, 2008 through September 21, 2008.) The types of entries that were deemed inadequate for the purpose of this comparison include "Non-LAP" and "Other." These and similar entries did not draw a close enough distinction to correlate with a youth's response to the follow-up questionnaire, and I therefore removed them from the sample.

²² Because youth with multiple matters in one month were only sent one follow-up survey, I added the number of entries for a youth with multiple matters in a given month in the LAP provider monthly report to the number of returned follow-up surveys that could be matched to an appropriate entry in the Category of Incident column. I made this addition on the assumption that youth who spoke with a LAP attorney about multiple matters in one month was likely to mark each of those matters on the follow-up survey.

significant trends; youth responses to Question Five did not consistently indicate more significant complaints than were recorded by the LAP provider's monthly report.

In the follow-up questionnaire I also asked youth to provide me with certain information regarding their most recent meeting with a LAP attorney; I included these questions to help in monitoring the work of the LAP attorneys as well as to more accurately connect the returned follow-up survey to the appropriate date of visit by the LAP provider. I asked youth to disclose the date they made their request, the date they met with a LAP attorney, and the name of the LAP attorney with whom they met. Most youth, however, were not able to provide this information accurately. Forty percent of the responding youth accurately identified the LAP attorney with whom they met during their most recent visit. Only three percent of youth were able to accurately recall the date on which they made their request, while only five percent were able to accurately recall the date they met with a LAP attorney²³.

While a number of these unhelpful results no doubt are attributable to the time elapsed between LAP visits and the youth's receipt of the follow-up questionnaire (particularly in the case of youth who met with a LAP attorney in May and June), the extent of inaccuracy in youth's ability to recall this information has demonstrated that these

²³ I counted responses reflecting a date within two calendar days of the actual date for each of these questions as an accurate answer.

questions themselves are not particularly useful to the monitoring process. As a result, I shall make a number of changes to the follow-up questionnaire, including the removal of several questions and, in the near future, solicit suggestions from counsel as to potential improvements in the questionnaire.

I also asked youth a series of questions regarding their use of the grievance system in connection with the complaint they brought to the LAP provider. Fifty-eight percent of youth who returned the follow-up questionnaire indicated that they had filed a grievance concerning the matter about which the youth complained to a LAP attorney. Thirteen percent of youth indicated that they were satisfied with the grievance coordinator's response to their grievance, and only 22 percent reported they had appealed their grievance to the institution's superintendent. Fewer than eighteen percent appealed their grievance to the DYS Chief Inspector.²⁴ These numbers raise an important question about the extent which youth exhaust the grievance process before meeting with LAP attorneys, as exhaustion of this administrative remedy requires the uses of all steps available to youth. This underscores the importance of the provision of assistance to youth in pursuing the various levels of the

²⁴ Of the 223 youth who returned the follow-up questionnaire, 6 youth did not respond to Question Six, which asks whether the youth filed a grievance about the matter. 40 youth did not respond when asked if they were satisfied with the grievance coordinator's response, while 61 did not respond when asked if they had appealed their grievance to the superintendent, and 67 did not respond when asked if they had appealed to the Chief Inspector.

DYS's grievance system in order to achieve exhaustion, a matter that I discuss again below. The numbers also indicate that youth are not willing to rely on the grievance system to address even those less serious problems that have little potential to result in federal litigation.

In order to gain insight into the manner in which youth viewed their interactions with the LAP attorneys, I asked youth to rate their experience with the LAP and to comment on any difficulties they may have had in contacting the LAP. Twelve percent of the youth who returned the follow-up survey indicated that they had received the help they needed from the LAP and did not need further assistance. Nearly 40 percent of youth reported they were still working with the LAP, while 39 percent stated they were not satisfied with the LAP and still needed help. Sixteen percent of respondents marked "other."²⁵

Youth's comments in response to the question about difficulty experienced in contacting the LAP were not as easily analyzed and classified. Responses varied in their relevance to the question, as some responses concerned only the type of problem about which the youth spoke with the LAP attorney. Most youth indicated that they had no difficulty contacting the LAP, though a number of youth reported difficulty calling the LAP offices by telephone. These responses related nearly exclusively to youth at Ohio River Valley, Indian River, and Marion

²⁵ Nearly all of the youth who selected the "other" answer category also selected another answer category. Sixteen youth did not respond to this question.

during the month of July. During this time period the Mezibov firm was in the process of establishing an 800-number telephone line through which youth could contact LAP attorneys without cost, and the difficulties encountered in this effort caused delays in communication.

A number of youth also reported delays related to the timeliness of their interviews by LAP counsel. Some of these delays clearly were related to the Mezibov firm's necessary start-up process in July, though most arose because visits to an institution are only scheduled once every 45 days, creating the possibility that a youth may have to wait a number of weeks after making a request before meeting with a LAP attorney.

IV. Staffing of the Legal Assistance Program

In his report of April 22, 2008, Monitor Cohen made several recommendations regarding the staffing and operation of the LAP. At that time, Sharon Hicks was the only LAP attorney, and her offices were in the DYS training academy in Delaware, Ohio. Ms. Hicks' staff included a paralegal and a secretary. This office was responsible for implementing the LAP in all eight DYS institutions and the Paint Creek Youth Center in Bainbridge, Ohio.

Monitor Cohen recommended the employment of an investigative attorney to address a substantial backlog he found during his review of cases that might warrant additional investigation and action. He recommended that DYS retain this attorney for this purpose for a period of six months with the possibility of an extension.

In addition, Monitor Cohen recommended that the DYS employ, in addition to Ms. Hicks, two additional attorneys to assist in providing services to DYS youth in facilities throughout Ohio. Monitor Cohen also recommended additional office space (to which staff would have access in the evening and on weekends), at least one additional full-time secretary to support the LAP attorneys, and additional telephone lines and equipment.

In response to these recommendations the defendants reported to the Court that they had contracted with the Columbus, Ohio law firm of Wiles, Boyle, Burkholder & Bringardner, Co. LPA (the Wiles firm) for the period commencing on May 13 and ending June 30, 2008. According to a later report from the Wiles firm, as many as four attorneys participated in legal activities related to the *J.P.* case. These lawyers in the Wiles firm were intended to satisfy Monitor Cohen's recommendations regarding the employment of an investigative attorney to review the backlog files and two additional lawyers to provide direct support to Sharon Hicks in meeting the needs of individual youth. This anticipated role, however, was not fully realized when another bidder, the Mezibov firm, received the award of the LAP contract for services from July 1, 2008 through June 30, 2009, and the DYS's contract with the Wiles firm ended. Nonetheless, the current allocation of professional staff by the Mezibov

firm, in my opinion, constitutes compliance with the Court's order regarding the necessary number of LAP attorneys.²⁶

Moreover, it is my conclusion that the employment of the Wiles firm and the subsequent award of a contract to the Mezibov firm, both of which have the necessary space, equipment and support staff for a functioning law firm, satisfied the other recommendations the Monitor made regarding office space, equipment, etc.

V. Obstacles Affecting the Efficient Operation of the Legal Assistance Program

The LAP providers have encountered a number of difficulties during their efforts to function efficiently. This section of my report will address the most significant of those difficulties.

A. Cases Outside the Scope of the Legal Assistance Program

The DYS operates a grievance system for its incarcerated youth. Any deficiencies in that system fall within the scope of the *S.H.* litigation, and it is my understanding that counsel in that case intend to address whatever problems they identify. There is a close connection, however, between the operation of the grievance system and the efficient

²⁶ In order to employ an attorney in a meaningful sense, however, the DYS must compensate the provider in a reasonable and timely fashion. This has not been the case in connection with payments to the Mezibov firm. DYS counsel in the Attorney General's office are taking the position that time spent by the firm's lawyers providing assistance to youth in understanding and exhausting the grievance system is not compensable. Because of the generally low literacy level of DYS youth and the DYS policy that the youth himself or herself must "write" the grievance, this assistance may include dictating and spelling out words to be included in the grievance. This matter remains unresolved as this report is being prepared and threatens the stability of the LAP.

functioning of the LAP. This is true because many issues youth have raised in meetings with LAP counsel (and reported to me in follow-up surveys regarding those meetings) involve matters that do not rise to the level of potential federal litigation but that an effective grievance system should address. LAP attorneys close these cases as “grievance only” without further action.

The monthly reports reflected on the spreadsheet include 220 LAP matters that Mezibov attorneys have closed with no recommendation for further action.²⁷ Of this number, 63, or approximately 29%, were denominated “grievance only.” This connotes that counsel have concluded that these matters, while they raised issues warranting the filing of a grievance, did not rise to the level of potential litigation. In addition, the Mezibov firm closed 26 cases that were resolved without the LAP’s intervention. This suggests that informal complaint mechanisms, including the involvement of unit staff such as social workers and unit managers, as well as grievance coordinators, resolved youth’s concerns or complaints without resort to consideration of litigation in approximately 13% of the Mezibov firm’s closed cases.²⁸ Given the rich

²⁷ I met with Sharon Hicks and reviewed a sample of 21 closed files on September 19, 2008. In many instances, the reasons for closure were not apparent. By the date of our meeting Ms. Hicks had forwarded all her open files to the Mezibov firm for further action. Thus, unless otherwise noted in the text, this report’s findings are based exclusively on files maintained by the Mezibov firm.

²⁸ The *S.H.* Stipulation of Settlement contains provisions relating to the DYS grievance system. For this reason, I shall not include in this report what I perceive to be the signal weaknesses in that system as it presently operates. Because exhaustion of the

[Footnote continued on next page]

level of staffing of the unit management system throughout DYS facilities, this percentage should be considerably higher.²⁹ It is important to note, however, that the Mezibov firm maintains a large number of open files at this time, many of which may revert to “grievance only” status after attorneys complete their investigations.

Moreover, the monthly reports reflect that Mezibov attorneys closed 48 matters because the youth’s concern related to judicial release. Judicial release is a term describing discretionary early release from incarceration by the adjudicating judge. The written explanation of the LAP prepared by LAP providers specifically informs youth that issues relating to judicial release are not within the purview of LAP’s jurisdiction. Nonetheless, approximately 22% of the Mezibov firm’s closed matters involved only judicial release issues.

Another category of closures is denominated “criminal matters.” These matters generally raise issues relating to the youth’s appeal of his sentence. This category of issues too is specifically excluded from the

grievance system is a prerequisite under the Prison Litigation Reform Act for filing a federal lawsuit, however, the improvement of the grievance system is a matter of central importance to the success of the LAP and, thus, compliance with the requirements of *J.P. v. Taft*. Closely related, advising and providing assistance to youth, who must exhaust the grievance system before filing suit a federal lawsuit, is a critical part of the LAP attorneys’ professional obligation.

²⁹ Virtually every housing unit in DYS facilities includes a unit manager and two licensed social workers. In addition, each institution employs a unit management administrator. This is the richest allocation of staff to sustain unit management I have seen anywhere in the United States, and this laudable administrative model should be highly effective in solving problems that in other systems would likely become grievances in the first instance.

scope of LAP's jurisdiction. The Mezibov firm closed 24, or approximately 11%, of the closed matters because they related solely to such criminal issues.

The grievance information supplied to youth (specifically, DYS Form 304.03.A), informs youth that actions by the Institutional Discipline Committee (IDC) cannot be the subject of grievances.³⁰ Although this category of problems is not excluded on the face of the Request for LAP Attorney form, LAP lawyers have uniformly treated such matters as being outside the scope of the LAP. Counsel for both parties have been aware of this *de facto* exclusion and have expressed no objection to this practice. The Mezibov firm has closed 31 cases, or 14% of all closed cases, because they involve complaints about the IDC process.

All of these matters consumed LAP resources that could have been better spent on cases involving potential litigation. I reviewed a random but not scientific sample of 27 files containing activity logs reflecting the precise time spent by attorneys from the Mezibov firm on each of these matters. Thirteen of these files dealt with non-LAP matters and reflect that an average of 0.43 hours were spent speaking with the client (by telephone or in person), opening a file, writing a close-out letter to the client, and closing the file in cases in one of the categories I have

³⁰ This is a common exclusion in correctional institutions in the United States, as a discipline system generally has its own appeals procedure, ending with an appeal to the central office.

discussed above. A total of 192 matters, an astonishing 92% of all closed matters, should never have resulted in a request to speak with a LAP attorney, but should have been resolved by the grievance system or some other mechanism. These 192 matters comprise 48% of all LAP matters that the Mezibov firm has opened or inherited from Sharon Hicks. This level of misuse of LAP resources, in my opinion, must be reduced as promptly as possible to the lowest feasible level in order to make those otherwise wasted resources available for the purpose for which they were intended.

B. Other Factors

Other factors have contributed further to the inefficient use of the valuable time of LAP attorneys. The current requirements are that the Mezibov firm visit every DYS facility at least every 45 days and that a LAP attorney conduct an in-person interview with all youth requesting a meeting. This has been a particularly wasteful process in the cases of those youth (more than a few) who make repetitive and frequent requests to see an attorney. Better education of youth about the purposes and limits of the LAP and greater reliance on other institutional complaint resolution capabilities offer the only prospect for ameliorating this problem.

Experience has shown that telephonic communication often is equally effective, and the same – in my opinion – would be true of

videoconference meetings between LAP staff and youth.³¹ Reliance on long-distance forms of communication – an approach that I believe all counsel will support – would save many hours of time spent traveling and conducting in-person interviews with numerous youth.³²

A substantial saving of attorney hours could be realized if LAP staff could conduct most, if not all, initial interviews by telephone or videoconference. Face-to-face interviews should occur only if exceptional circumstances arise requiring an in-person meeting. Private telephone conferences occur now without complaint by youth, institutional officials, or LAP counsel. All DYS facilities have videoconferencing capability, and my own experience in using this medium for meetings with DYS staff has been successful. The monetary savings such a change would produce for the LAP would be substantial and, just as important, would make the continued use of a single LAP provider feasible.

In this connection, I note that the use of multiple LAP providers (Sharon Hicks and the Mezibov firm) was problematic. In order to avoid unnecessary travel by attorneys, each provider assumed responsibility for particular institutions. When a youth with a pending LAP complaint transferred to a facility covered by another provider, the original provider

³¹ This is a matter that LAP counsel, plaintiffs' counsel, and the DYS have been discussing since Sharon Hicks' resignation on September 21, 2008, at which time the Mezibov firm became and continues to be the only LAP provider for all DYS facilities.

³² Anyone experienced in conducting interviews with incarcerated persons knows that problems of movement and occasional lack of cooperation by prisoners or staff make the process a time-consuming one.

had to transfer the file to the lawyer then responsible for the youth's case. This transfer often resulted in delays of as long as two months before the second attorney contacted or saw the youth.

At least as problematic from an internal or external monitoring perspective has been the effort to obtain uniformity of administrative and clerical practices related to the program. For example, while lawyers from the Mezibov firm have opened a file for each of multiple matters a youth may present, Ms. Hicks did not do so. As a result, monitoring the progress in her cases has been inordinately difficult. It also has been difficult on occasion for disparate LAP counsel to agree on terminology for file closings and other important record-keeping functions. Contract requirements were different for the two providers (e.g., frequency of visits to institutions), and the dual timekeeping and billing systems were altogether different.

Not surprisingly, yet another obstacle to the LAP's efficiency has been DYS youth themselves. On some (fortunately relatively few) occasions, youth have telephoned the LAP providers to express a string of obscenities and/or threats. In addition, there have been a few occasions on which it appears that a large number of youth in the same housing unit have amused themselves by making a series of repetitive, non-stop telephone calls raising the same complaints with staff from the Mezibov firm. This phenomenon peaked during the summer of 2008, and it

appears that LAP counsel from the Mezibov firm and DYS staff have been successful in bringing the problem of prank calls under control.

In summary, the success of the LAP depends on the ability of the DYS, with the assistance of all counsel, to address the time-consuming inefficiencies I have described above. This, in my opinion, is a matter of critical importance to the success – indeed, perhaps to the very future existence – of the LAP

VI. Department of Youth Services Compliance Issues

In addition to meeting the requirements that Monitor Cohen recommended, other action and cooperation on the part of the DYS are essential to permit the LAP to succeed. These obligations include the following:

- using both oral presentations (including videos) and written materials, orient incoming youth at Scioto and at their institutions of assignment concerning the availability of the LAP and how to access the program; this orientation should address as well the need for exhaustion of administrative remedies and the operation of the DYS grievance system.
- ensuring the widespread posting of notices relating to the LAP, including information from the expert and from LAP providers;
- ensuring that forms for requests to see LAP attorneys are available to youth at all times;
- permitting communication between youth and LAP providers by mail, telephone, and videoconference;
- providing LAP attorneys with access to DYS facilities and to youth who have asked to be interviewed and/or whom LAP attorneys have asked to see;

- providing appropriate space for confidential meetings between youth and LAP attorneys;
- refraining from interfering with the ability of LAP attorneys to consult with youth;
- ensuring that youth seeking assistance from LAP providers suffer no form of retaliation;
- responding promptly and adequately to reports by LAP attorneys of allegations that appear to constitute emergencies requiring immediate attention;
- responding in a timely fashion to requests by LAP providers for information and documents concerning individual youth; and
- completing internal investigations of incidents reported to LAP attorneys in a timely fashion so as to facilitate necessary additional investigation by those lawyers.

The orientation process is of great importance to the efficient operation of the LAP. While touring Scioto in August I had the opportunity to observe an orientation session for male youth. The youth received a booklet of written orientation materials as well as a verbal presentation on a variety of aspects of the DYS and the DYS institutions. This session did not, however, include any discussion of the responsibilities or limitations of the LAP.³³ The need for youth to exhaust administrative remedies before filing a lawsuit alleging §1983 violations received only the briefest of attention, leaving youth to obtain

³³ DYS Standard Operating Procedure 304.01.03 at page 3 states, “during orientation, reception staff shall explain the right of access to courts and describe the legal assistance program to youth.”

this information from other sources without an authoritative written means to verify its accuracy.

The Youth Handbook given to youth during orientation contains only two references to the LAP. The first reference is a flyer, which is also posted in each housing unit. This flyer presents four options for youth who “have a complaint about the institution” or about treatment during the youth’s “stay with DYS.”³⁴ One of these options is to contact an attorney through the LAP. In itself, this statement is misleading in its implication regarding the breadth of the LAP, as there is no instruction for youth concerning the categories of complaints with which the LAP may (or may not) provide assistance. The second reference is a copy of a request for attorney form for the LAP³⁵. While the form presents a list of possible complaint types with which a LAP attorney may assist youth, the handbook does not provide any explanation of LAP services or a complete list of issues excluded from LAP’s jurisdiction.

At the time of this visit to Scioto, the orientation session included a quiz given to youth to test their level of comprehension of the orientation session. This quiz included a single reference to the LAP, asking youth to provide the name of the LAP attorney who would respond to a request for LAP made from Scioto. This question, rather than reinforcing crucial

³⁴ SJCF Male Reception Handbook, page 25

³⁵ SJCF Male Reception Handbook, page 27

details about the LAP, merely provided youth with identifying information about a single attorney. This attorney (who, at that time, was Sharon Hicks) was presented as the face of the LAP, when in fact the program had three attorneys from the Mezibov firm in addition to Ms. Hicks to respond to youth's requests for LAP assistance. This development required (and continues to require) that the orientation session and quiz be updated to reflect information in this respect³⁶. It also is critical for youth to learn during orientation what services they may (and may not) receive from the LAP.

DYS institutional staff failed even to comply completely with the straightforward and simple requirements that a notice about the LAP be posted and that LAP request forms be made available to youth.³⁷ In my discussions with the LAP providers, however, I have learned of only a few sporadic instances in which youth have alleged that a staff member has placed limitations on access to the LAP and no instances in which youth have suffered retaliation for seeking the assistance of a LAP attorney. Additionally, during these discussions, LAP attorneys reported no difficulties in receiving responses from DYS staff to emergency requests

³⁶ This is particularly important since all male youth are transferred to other facilities shortly after they complete the orientation and diagnostic process at Scioto.

³⁷ During my visits to DYS institutions between August 5, 2008 and August 8, 2008, I observed that some institutions had incomplete or incorrect postings, while others had only a limited supply of request forms available to youth. The same was true during a later visit to Marion Juvenile Correctional Institution on September 25, 2008.

for LAP assistance³⁸ while encountering only minor problems involving access to youth who had requested to meet with a LAP attorney.³⁹

There have been numerous instances, however, in which DYS central office staff have not fulfilled their obligation to respond to requests by LAP attorneys for documents and records required for an evaluation of a youth's claim; closely related is the failure of DYS staff to complete and transmit internal investigations of incidents to LAP attorneys in a timely fashion. Though there exist circumstances in which an investigative report and other records will be unavailable, such as a pending criminal matter concerning the incident, most of these records are accessible under the Public Records Act. DYS Standard Operating Procedure 304.01.03 states, "The Division of Legal Services shall provide the contract legal counsel with the requested documents within 14 days of receipt of the request [and] if...the records are unavailable due to a pending investigation, the Division of Legal Services shall immediately notify the contract legal counsel."⁴⁰

³⁸ I shall discuss emergency requests for LAP assistance in greater detail below.

³⁹ An initial point of contention between the Mezibov firm and some institutional staff involved youth who, on the day the LAP attorneys visited a facility, refused to meet for an interview. The Mezibov firm developed a form for youth to sign if they decided they did not want to speak with a LAP attorney after submitting a request form. The LAP attorney includes this form in the relevant youth's matter file to document that an attempt was made to meet with the youth. This policy does not apply to youth whom the LAP attorney and institutional staff agree presents a safety risk at the time of the LAP attorney's visit. In this instance, the LAP attorney will send a follow-up letter to the youth explaining the reason the meeting did not occur and advising the youth that he or she may submit a request form to meet with a LAP attorney at a later date.

⁴⁰ DYS S.O.P 304.01.03 page 6

DYS staff and the Mezibov firm have been collaborating on the development of procedures to allow DYS Legal Services to identify and provide the necessary documents more quickly. The Mezibov firm and DYS counsel reached an agreement reiterating the 14-day response requirement noted above. *Stacy Hinnners email to Vincent Nathan and James Holzhauer*. October 29, 2008. The Mezibov firm has adopted a form detailing the specific incident with respect to which information and records are being requested. The LAP providers created this form at the request of the Division of Legal Services, which communicated to the LAP attorneys that many youth have been involved in more than one incident during their stay with DYS and that the provision of more detailed search parameters by the LAP attorneys would allow for quicker responses to these requests. Additionally, DYS and the LAP staff have agreed that a LAP attorney will forward a compiled list of outstanding requests on a regular basis to DYS so that both entities may have a centralized list of outstanding requests.

I earnestly hope that these efforts will result in a prompt solution to the problems surrounding the timely transmission of records by DYS staff to Mezibov firm staff concerning outstanding complaints that require prompt review and analysis by LAP counsel. As late as October of this year Ms. Hinnners informed me that the DYS Central Office's "failure to provide us with documents when requested" was the primary matter on her agenda for discussion with DYS counsel. *Stacy Hinnners*

email to James Holzhauer and Vincent Nathan. October 23, 2008. In that same email, Ms. Hinnners informed me that “(s)ince July, we have received exactly 5 requests back from Central Office – all of which were incomplete. We have requested more than 50 investigations, grievances, etc. Often we receive no response whatsoever.” *Id.*

An example involving a youth at Marion demonstrates Ms. Hinnners’ concerns. On October 8, 2008, Emma Seta, an attorney from the Mezibov firm working with the LAP, submitted a request via email for documents and records for a youth who had been subject to significant institutional restrictions for an extended period of time. On October 10, 2008, Sara Vollmer responded via email, stating the requested documents would be forwarded to Ms. Seta. On October 29, having not received the requested documents, Ms. Seta submitted another request. After receiving no response to this email, Ms. Seta sent emails on October 30 and November 4 to inquire why there had been no response to the requests. Ms. Seta had not received any response to her inquiries as of November 25, other than a statement from DYS that the medical authorization forms submitted with the initial request on October 8 were now expired. *Emma Seta email to James Holzhauer, November 25, 2008.*⁴¹

⁴¹ An email from Anna Butcher, a legal assistant with the Mezibov firm, to Sara Vollmer in the Legal Services Department of the DYS provides another example of the problem Ms. Hinnners discussed: “The safety plan for this youth was requested from you by Greg Price on 7/30/08. After another attack, a medical authorization was sent to you along with a request for records also by Greg Price on 8/25/08. To date, we have

[Footnote continued on next page]

VII. Activities of Legal Assistance Program Providers

The terms of Ms. Hicks' contract required that she visit each facility every 30 days to meet with youth who had submitted requests to speak with a LAP attorney. The Mezibov firm's contract requires that the LAP attorneys from that firm visit each facility every 45 days. Both providers have met these requirements regarding facility visits.

On September 22, 2008, the Mezibov firm assumed responsibility temporarily for requests from youth in the facilities that were formerly Ms. Hicks' responsibility.⁴² DYS and the Mezibov firm agreed that the firm would take on these institutions until the DYS could issue an RFP, initially defined as the time period between September 22, 2008 and October 31, 2008. *Stacy Hinnners email to James Holzhauer and Vincent Nathan*, September 12, 2008. I requested, however, that DYS refrain from issuing an RFP until after this report had been submitted to the Court; DYS counsel agreed to this postponement.

The Mezibov firm reached an agreement with the DYS that visits to these institutions would not be mandated. Rather, LAP attorneys would receive request for LAP assistance forms on a rolling basis from each institution. Upon receipt of a request form, a LAP attorney would contact

not received any information requested. The incident reports and medical records requested were for all incidents involving this youth being assaulted by other youths. Please provide a status for the requested information." The information to which Ms. Butcher refers clearly is relevant to the youth's potential §1983 claim of failure to protect.

⁴² These institutions include Cuyahoga Hills, Mohican, Circleville, Scioto, Freedom Center, and Paint Creek Youth Center.

the relevant facility and schedule a telephone conference with the youth who submitted the request. If the youth is too difficult to understand by telephone, or if the youth is uncomfortable sharing information over the telephone, a LAP attorney will arrange an in-person visit with the youth. *Stacy Hinnners email to James Holzhauer and Vincent Nathan, October 27, 2008.* LAP attorneys also may schedule follow-up visits with a youth who has a potential §1983 complaint. LAP attorneys continue to visit the three institutions for which the Mezibov firm was initially responsible every forty-five days.

The LAP attorneys from the Mezibov firm have indicated that this process of responding to youth requests with a telephone conversation has been more efficient in several ways, thus confirming my opinion regarding the feasibility of telephonic communication with youth. LAP attorneys are able to speak with youth much sooner than they would be able to when relying strictly on facility visits; in some instances, a LAP attorney is able to assist a youth on the same day the youth submits a request form. Another benefit of conducting the initial interview with youth over the telephone is that a LAP attorney may submit a request for information to DYS before meeting with the youth, allowing the LAP attorney to begin investigating the youth's complaint more quickly. *Id.*

Additionally, conducting an initial interview with youth by telephone reduces some of the costs associated with facility visits. LAP attorneys would be able to visit facilities less frequently while continuing

to provide youth with assistance and access to the courts. A LAP attorney would need to spend less time interviewing youth at a facility as well. Institutions would be able to reduce the amount of resources dedicated to moving youth from the housing unit to the designated LAP meeting area. While not every matter can be addressed in this manner, increased use of telephone conversations and videoconferences for initial interviews with youth would produce a much-needed benefit to the task of managing the costs associated with the operation of the LAP.

Between July 1, 2008 and September 21, 2008, there were occasions in which it was necessary for one LAP services provider to transfer a youth's complaint to the other LAP provider. File transfers were performed when a youth was transferred from a facility with one LAP provider to a facility with the other LAP provider.⁴³ In this brief timeframe neither Ms. Hicks nor LAP attorneys from the Mezibov firm communicated any difficulties in the infrequent instances in which a file transfer was required.

The LAP providers have generally been prompt with their submission of monthly reports to me. The Mezibov firm, however, has delivered several monthly reports after the deadline for submission. Additionally, despite several requests, I have not received a report on youth seen at Cuyahoga Hills in the month of August from Ms. Hicks.

⁴³ In addition, there was one instance in which a youth's file was transferred from the Mezibov firm to Ms. Hicks because the Mezibov firm had previously represented the youth as a private client.

VIII. Emergency Requests to the Legal Assistance Program

On August 18, 2008, I participated in a meeting with Sharon Hicks, Stacy Hinnens, and Sara Vollmer during which we addressed situations that arise when a youth contacts a LAP attorney with a concern that the LAP attorney deems to be an emergency situation. During this meeting those in attendance clarified an earlier decision made on June 18, 2008 in a meeting of counsel, LAP attorneys, and DYS staff at the DYS Training Academy. The initial agreement stated that LAP attorneys, upon learning of an apparent emergency facing a youth that requires immediate attention, were to contact the Superintendent or, in the Superintendent's absence, the Administrative Duty Officer at the relevant facility. At the subsequent August 18 meeting, the LAP providers agreed to contact Sara Vollmer, as a representative of the DYS Central Office, during normal business hours with any situation the providers deemed to be an emergency. If a LAP attorney were contacted by youth outside of normal business hours, the attorney would contact the Administrative Duty Officer. This procedure was adopted to reduce the perception that LAP attorneys were giving instruction on facility management to institutional staff.

On October 28, 2008 DYS and the Mezibov firm agreed to an updated emergency protocol. An emergency request was defined as "a youth communication that relates facts which, if true, pose an imminent risk of harm," including, but not limited to, "a threat from a staff member

or fellow youth which causes the youth to believe his safety is at imminent risk or a denial of medical treatment for a serious or potentially serious health issue.”⁴⁴ This protocol affirmed the previous procedure for notifying DYS of emergency requests for LAP assistance both during and outside of normal business hours. The Mezibov firm also indicated that telephone communications with DYS Legal Division would be confirmed by email with copies to Eric Holloway, Sara Vollmer, and me.⁴⁵

I have documented a total of 25 separate instances between July 1, 2008 and October 31, 2008 in which a youth has contacted a LAP attorney and presented a situation that the LAP attorney has determined to present an emergency. Most of these contacts included a statement by the youth that he or she feared for his or her safety.⁴⁶ Some of these concerns were related to prior incidents involving assaults by other youth, though most of these requests for assistance were based only on the youth’s concern that an assault was imminent. Other concerns communicated by youth through requests for emergency assistance from the LAP included denial of medical treatment and an allegation of physical abuse by a staff member.

⁴⁴ Attachment to an email from Stacy Hinnners to Vincent Nathan and James Holzhauer on October 28, 2008, page 1.

⁴⁵ *Id.* at page 1.

⁴⁶ In 17 of the 25 emergency requests for LAP assistance, youth communicated an immediate concern for their safety.

The DYS Central Office has consistently communicated these emergency requests to administrators at the relevant institutions. While I have not received notification of a resolution to the youth's complaint in all cases, LAP attorneys have not informed me of any instances in which the institution or the DYS did not properly address the complaint. Though these emergency requests for LAP assistance represent a relative few of the total number of LAP contacts by youth, these requests continue to require immediate attention by LAP attorneys and the DYS.

IX. Review of the Backlog Files

A. History of the Backlog Files

In his report of April 22, 2008, Monitor Fred Cohen made a specific observation and recommendation regarding what I shall refer to as backlog files throughout the remainder of this report:

The previously presented case file analysis suggests there likely exists unpursued, yet colorable, claims for damages cognizable in a Sec. 1983 action, although, again, no one can be certain how many. Certainly my report of January 1, 2008 has similar cases scattered throughout the text. Thus, I believe that ODYS should be required to retain investigative counsel experienced in civil rights litigation to review the backlog of such cases.

Report at 12. In May 2008 the Department of Youth Services (DYS) contracted with the Wiles law to conduct a review of all backlog cases referred to in Monitor Cohen's report. Brian Zets, Esq., a member of that firm, coordinated the review of these cases.

Mr. Zets provided the DYS with a list of “all the youths that make up the backlog.” *Brian Zets email to Sara Vollmer*, June 11, 2008. That list contained a total of 244 names. Ms. Vollmer responded to this email with notations of the status and/or location of each of these youth.

On July 2, 2008, DYS requested that the Wiles firm forward all of the backlog files, which the firm had reviewed, through the DYS central office to Ms. Hicks, and the firm made delivery to the DYS central office in early to mid July. Ms. Hicks received these files from central office personnel by July 17, 2008 and reviewed some or all of these files before placing them in boxes marked “open” or “closed.” The Wiles firm had identified some of the files placed in “closed” boxes by Ms. Hicks as “open.” On July 21, 2008 the Wiles firm submitted a brief report of its activities with respect to the backlog files. By that time, the Mezibov firm had assumed responsibility for making a final review of the backlog files and for dealing with all colorable claims in those files. At my request Stacy Hinnners took physical possession of the backlog files from Ms Hicks on September 9, 2008, expedited her review of these files, and prepared reports that she later submitted to counsel for the DYS and to me.

Ms. Hinnners reviewed each of the approximately 250 files she received from Ms. Hicks. Based on her review of 384 matters, Ms. Hinnners identified 97 matters she believed required further

investigation.⁴⁷ Of these 97 files, 33 were opened “under investigation,” 1 was opened “under investigation ASAP,” and 63 were “reopened/under investigation.” All 63 “reopened/under investigation files” had been recommended for closing by the Wiles firm or Ms. Hicks.

Ms. Hinnners identified 60 matters that she regarded as being “notable” backlog matters. These cases included 48 cases Ms. Hinnners identified for “reopened/under investigation” status and 12 cases reflecting the expiration of the statute of limitations.⁴⁸

B. Distribution of the Backlog Files

The 384 backlog files represented seven juvenile correctional institutions: Cuyahoga Hills, Circleville, Indian River, Marion, Mohican Ohio River Valley, and Scioto.⁴⁹ None originated from Paint Creek or Freedom Center. The breakdown was as follows:⁵⁰

⁴⁷ As has been noted above, all files initially opened by Ms. Hicks or the Wiles firm were organized by the name of the youth/complainant. During the course of her review Ms. Hinnners reorganized these files by “matter.” A single youth often was the source of multiple matters, thus increasing dramatically the number of backlog files.

⁴⁸ The reader can obtain a more detailed understanding of the chronology and numbers I have discussed in this section of my report by reviewing Appendix B, an October 13, 2008 Memorandum from Ms. Hinnners to counsel for the defendants on the subject of the LAP backlog. See Exhibit C.

⁴⁹ The reader should keep in mind that each of these files addressed a single matter as discussed above. A single inmate may have been responsible for more than one matter.

⁵⁰ The Mezibov firm developed the various categories of issues identified in this breakdown. As I shall discuss below, the Mezibov firm has done an admirably professional job of developing and implementing a coherent system for filing and identifying matters raised by DYS youth. It would be helpful to all concerned, however, if those persons entering data in the firm’s records would use a uniform nomenclature to describe facilities, matter type, and status.

- Cuyahoga Hills accounted for 34 of the backlog files. The issues raised in these files were criminal appeals (4), denial of medical care (4), excessive force (5), failure to protect (3), the Institutional Discipline Committee (IDC) (2), judicial release (13), and matrix time calculations (3).⁵¹
- Indian River accounted for 79 of the backlog files. The issues raised in these files were criminal appeals (3), criminal defense (1), denial of or insufficient medical care (3), denial of programming (1), detention credit (2), excessive force (14), failure to protect (9), IDC (1), judicial release (27), living conditions (4), negligence (1), staff harassment [3], unknown [1], and release (9).
- Circleville accounted for 20 of the backlog files. The issues raised in these files were criminal defense (1), denial of medical care (1), detention credit (1), discipline/Security Threat Group (2), excessive force (2), failure to protect (5), judicial release (2), living conditions (3), and staff harassment (3).
- Marion accounted for 61 of the backlog files. The issues raised in these files were criminal appeals (2), denial of medical care (5), denial of programming (3), disciplinary restriction (1), discipline/special management unit (1), excessive force (5), failure

⁵¹ According to Sara Vollmer the “matrix” is used to set every youth’s presumptive release date from DYS. It considers the felony level of the youth’s offense and the Level of Service Inventory (LSI) completed for all youth at reception. The LSI helps DYS determine if a youth is low risk, moderate risk, high risk, or very high risk.

- to protect (8), IDC (3), judicial release (20), living conditions (6), matrix time (2), release (3), religious discrimination (1), and staff sexual abuse (1).
- Mohican accounted for 31 of the backlog files. The issues raised in these files were matrix (2), denial of medical care (4), excessive force (2), failure to protect (3), IDC (2), release (1), racial discrimination (1), living conditions (1), judicial release (14), and staff harassment (1).
 - Ohio River Valley accounted for 118 of the backlog files. The issues raised in these files were unknown (1),⁵² staff harassment (7), restrictions (2), release (6), living conditions (20), judicial release (8), IDC (3), failure to protect (7), excessive force (48), discrimination (2), detention credit (1), denial of medical care (6), criminal appeal (2), criminal (3), and child custody (2).
 - Scioto accounted for 41 of the backlog files. The issues raised in these files were staff sexual harassment (1),⁵³ staff harassment (1), privacy violation (1), matrix (3), judicial release (8), insufficient medical care (1), IDC (3), failure to protect (6), excessive force (12), denial of medical care (4), and denial of education (1).

⁵² This matter had been referred to a private attorney for litigation and was marked “closed.”

⁵³ The complaining youth is a female.

As of October 31, 2008, the date of the Mezibov firm's report regarding the backlog matters discussed above, the status of those cases was as follows: closed/grievance only (43), closed/insufficient merit (44), closed/non LAP (132), closed/preempted by SH (27), *pro se* complaint (1), closed/referred to attorney (10), closed/refused (4), closed/resolved (11), closed/ resolved/no grievance (3), closed/resolved by grievance (2), closed/statute of limitations issue (10), open/under investigation (33), open/ under investigation ASAP (1), and reopen/under investigation (63).

Thus, as demonstrated by the closed/non LAP files, a substantial number of these backlog matters were outside the scope of the Legal Assistance Program. As an earlier portion of this report demonstrates, the same is true of cases that are currently non-backlog matters.

C. Problems in the Handling of the Backlog Files

First, as Monitor Cohen noted in his report, the entire problem of the backlog cases, which resulted primarily from the understaffing of the LAP, should never have arisen. Second, my examination of the files that reached Ms. Hinnens for final review disclosed a number of serious problems in the manner in which prior LAP providers, Sharon Hicks and the Wiles firm, reviewed those files.

1. Statute of Limitations Issues

The statute of limitations issues that arose in at least 12 cases are profoundly troubling because of the likelihood in some of those cases that counsel's oversight in this regard may have prevented youth from

filing a potentially meritorious federal claim. In addition, these omissions also indicate a failure to check statute of limitations issues routinely in all file reviews. I shall cite several of these instances as examples.

In the file for youth 211013, the Mezibov firm noted correctly that complete medical files would be needed to determine when the statute of limitations ran on this claim. This fact notwithstanding, there is no reference to potential statute of limitations problems in the file the Mezibov firm received from Ms. Hicks. As noted earlier, the Mezibov firm obtained that file from Ms. Hicks on September 10, 2008; this was two days after the statute of limitations expired on this claim.

In the file of youth 206713 the Wiles firm noted that the “claim was weak” but failed to note that SOL had expired in 2007.⁵⁴ That firm received this file sometime between mid-May and June 1, 2008.

The Wiles firm’s file review for youth 203620 identified a possible excessive force claim that arose in 2006. There was no notation in the file, however, that the statute of limitations would expire on September 1, 2008, a few days before the Mezibov firm obtained the backlog files from Ms. Hicks.

The file for youth 206006 reflected that a use of force occurred on August 19, 2006, when the youth was 18. The Wiles firm, in their file

⁵⁴ Staff of the Wiles firm completed a file review form in virtually all the backlog cases I reviewed.

review, failed to note that the statute of limitations expired on August 19, 2008. The Mezibov firm did not receive this file until early September 2008.

Similarly, in the case of youth 210919 the juvenile became 18 years old on October 12, 2005. The youth's claim arose from an incident that occurred on October 21, 2005, and the Wiles firm described this claim as "meritorious." The reviewer failed to note that the statute of limitations had expired on October 21, 2007.

In the file of youth 210616 the Wiles firm identified a possible failure to protect claim and noted the approaching expiration of the statute of limitations, but there is no documented follow-up in this case. Nonetheless, either the Wiles firm or Ms. Hicks placed the file in the "closed files" box. Mezibov firm staff interviewed the youth, found insufficient merit, and closed the file after the youth failed to return a second telephone call from the firm.

In another case involving a claim of excessive force by staff, that involving youth 209609, the June 30, 2008 review form fails to note that the statute of limitations expired on September 13, 2007. Rather, the reviewer questioned whether the youth suffered an injury sufficient to support a §1983 claim.

The review form prepared on June 9, 2008 by the Wiles firm in the file for youth 211133 concludes as follows: "Interview needed – was she allowed to press charges with the OSHP?" The incident (the physical

assault of a pregnant youth by another juvenile) occurred on May 24, 2006, and the statute of limitations expired on May 24, 2008. There is no reference to the statute of limitations in the file.

The review form in the file for youth 206186, another excessive force claim, was completed on June 30, 2008. It failed to note that the statute of limitations for this claim had expired on November 24, 2007.

The backlog file for youth 210176 reflected that the statute of limitations expired in April 2008, before Ms. Hicks transferred the files to the Wiles firm. The Wiles firm attorney made no reference to this fact in the notes of the review of the file, suggesting -- as do other files -- that checks of statutes of limitations were not made and recorded as a mandatory step in the review process of all files.

More remarkable than failing to note the date the statute of limitations expired or was set to expire is the failure to understand that the statute does not begin to run until a youth reaches the age of 18. Yet, in a case involving youth number 209364, the Wiles firm's file indicated that the statute of limitations had expired in 2006. In fact, the statute will not expire until May 20, 2011.

Another backlog file reflecting the same lack of understanding is the file for youth 210347, which deals with a claim of excessive force by staff on August 12, 2005. The review form dated June 6, 2008 indicates that the statute of limitations on this case expired on November 14, 2007 (two years after the date the youth filed her grievance). In fact, the

statute of limitations began to run on March 12, 2006, the youth's 18th birthday, and, thus, expired on March 12, 2008.

These cases reflect a serious oversight of statute of limitations concerns during the Wiles firm's and Sharon Hicks' review of backlog cases. While it is clear that the affected youth did not receive adequate assistance in preserving (or pursuing) colorable federal claims, it is not possible for me to identify the extent to which such claims actually were barred. This is true because the statute of limitations is tolled during the time the youth is pursuing his or her administrative remedies. *Brown v. Morgan*, 209 F.3d 595 (6th Cir. 2000).⁵⁵

A conclusive determination of the preclusive effect in the cases I have discussed would require individual evaluations of the interplay between the statute of limitations and the extent of the youth's use of the DYS grievance system.⁵⁶ This, in turn, would necessitate a careful assessment of the youth's age at the time of the incident, the date on which the youth began to pursue his complaint through the grievance system, the scope of the youth's grievance, the youth's involvement in

⁵⁵ Stacy Hinnners of the Mezibov firm brought this Sixth Circuit case to my attention and to that of *J.P.* counsel. Because of the pressures of time I imposed on her to complete her report, she could not consider the impact of tolling in the backlog cases she reviewed.

⁵⁶ The Prison Litigation Reform Act of 1995, §42 U.S.C.1997e(a), provides as follows: "No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (47 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

each of the three levels of the DYS grievance system, and the date on which DYS personnel took action that completed the exhaustion process.

Even more difficult would be an evaluation of the application of the grievance system and the facts in each youth's individual case to determine whether colorable arguments exist for waiver, estoppel, or equitable tolling of the statute of limitations.⁵⁷ The application of these equitable doctrines could permit the youth's action to proceed despite the expiration of the statute of limitations as a matter of law.

Such an analysis for the purpose of inclusion in this report is not feasible, though I shall recommend that the Mezibov firm evaluate these cases for these purposes. Based on the evidence set forth above, however, it is clear that the actions of former LAP counsel, Sharon Hicks and the Wiles firm, amounted to a recurring failure to protect these youth from an unacceptable risk that a meritorious claim will be denied for reasons unrelated to its substantive merits.

2. Other Issues Identified in the Backlog Files

During my meeting with Stacy Hinnners on October 9, 2008 and October 10, 2008, I reviewed additional backlog files that either Ms. Hicks or the Wiles firm closed and that Ms. Hinnners reopened for further

⁵⁷ *Brown v. Morgan* conforms to the United States Supreme Court's holding that exhaustion is not jurisdictional, thus permitting courts to apply doctrines of waiver, estoppel, and equitable tolling to excuse the failure to exhaust. *Woodford v. Ngo*, 548 U.S. at 101, cited in John Boston, *The Prison Litigation Act*, September 4, 2008 (unpublished tract prepared for the Second Circuit Staff Attorneys' Training). Mr. Boston, who is the Executive Director of the New York City Legal Aid's Prisoners' Rights Project, has informed me that he will provide copies of this copyrighted tract to any interested person. Mr. Boston's email address is jboston@legal-aid.org.

investigation. In doing so, I was mindful that it is not within the scope of my charge to second guess legal opinions as to which professionals could reasonably disagree. In a number of instances the initial decision to close a file, as well as the subsequent decision to reopen it, was within this area of reasonable professional judgment, and I shall not comment on these cases.

In other instances, however, I concluded that that the LAP provider closing the file, either Sharon Hicks in her notes or the Wiles firm on its review form, overlooked or failed to mention facts in the file that clearly warranted additional investigation. I shall mention only a few of these cases that appear to have cried out for further investigation before being closed.

The most obvious deficiencies appeared in files in which Ms. Hicks or the Wiles firm recommended further investigation, though none occurred and the file was closed. I shall discuss only a few cases in order to provide the reader with insight into the standards I used for these reviews.

In BL035⁵⁸ the review form reflects an allegation that a Juvenile Correctional Officer raped a youth. The form contains the following notation: “F/U (follow up) with grievance and investigation re alleged rape.” The file was marked closed when it reached the Mezibov firm.

⁵⁸ The Mezibov firm used this form of designation (BL000) to identify backlog cases that it reopened.

In BL078-082 a youth made a number of complaints with respect to which she filed grievances, which she claimed were not investigated. Her allegations included sexual harassment and physical (non-sexual) assault. The review form concluded, "If released, send her a potential claim letter. Will need to investigate further re her numerous complaints." The file was closed when it reached the Mezibov firm.

The review form in BL016 listed serious physical injuries (chipped tooth, bruised jaw, and bruised ear drum" and reflected that the "youth blacked out and awoke naked on the floor." By the time of the review the youth had been paroled, and the reviewing Wiles firm lawyer recommended, "Send 'potential claim' letter to last known address." The file was closed with no further information when it reached the Mezibov firm.

The Wiles firm, while reviewing BL046, noted a substantial injury from a fight or use of force, a lengthy lockdown for disciplinary charges for which the youth was found not guilty, crude threats to "fuck youth up" by a Juvenile Correctional Officer, and an assault by a Juvenile Correctional Officer. There was no indication one way or the other on the review form as to the need for further action, and the case arrived at the Mezibov firm in a box of closed files.

The Wiles firm reviewer marked on the review form in BL034 "follow up with investigation materials. Follow up with youth." Again,

with no further information, the file arrived at the Mezibov firm in a box of closed files.

The review form in BL069 contained the following notation: “possible meritorious claim, as a DYS report concluded excessive force [with minimal injury]. The force involved included “pushing the youth in the face four times.” There is no indication one way or another regarding the need for follow-up, and the file was marked closed.

Notes by Ms. Hicks in BL018 include, “assaulted by staff in ISS room.” The review form ignores this allegation and notes only that the file concerned judicial release. The form was marked for no follow up and the file was closed.

The review form in BL007 reflects an allegation, among others, that the youth “alleges staff paid youth to beat him.” The reviewer describes this as a “weak claim,” citing the fact that the “youth is unstable and has attempted suicide.” The file was closed when it reached the Mezibov firm.

BL033 reflects a claim that a youth with an IQ below 70 suffered a fractured jaw from being kicked by other youth. The Wiles reviewer recommended closing the file despite this allegation of failure to protect in a facility that is richly staffed with juvenile correctional officers.

In BL067 Ms. Hicks stated that the youth claimed to have had his nose broken by staff on two occasions. Another allegation was that a named Juvenile Correctional Officer “spits in (the youth’s) face and

threatens him with broken bones and beatings.” Hicks requested an investigation, incident report, video pictures, medical records, and the youth’s grievance. Although there is no file review form, notes from someone other than Ms. Hicks reflect serious allegations of physical abuse by staff, a broken nose, and two broken wrists. The file was closed when it reached the Mezibov firm.

X. Review of Random Non-Backlog Files

On October 9-10, 2008, I reviewed 24 LAP files currently maintained by the Mezibov firm. I chose this sample by selecting approximately every 10th available file among the files the firm opened between July and August 2008. The purpose of this review was to identify open files that raised matters outside the scope of the LAP, as well as closed files in which the Mezibov firm staff might have overlooked an obvious need to investigate further. Again, it was not my purpose to second guess the Mezibov attorneys with respect to files as to which professionals could have a legitimate difference of opinion.

The following table attempts to summarize the nature of the complaint in the random files I reviewed, as well as the action taken by Mezibov lawyers. In some instances I shall remark on details that appear to be worthy of mention.

FILE NUMBER	SUBJECT OF FILE	STATUS OF FILE	COMMENT
0708-0001	use of force	open/under investigation	incident and HIPAA reports obtained and reviewed; will prepare <i>pro se</i> complaint for youth and motion for appointment of counsel if youth requests.

FILE NUMBER	SUBJECT OF FILE	STATUS OF FILE	COMMENT
0708-0011	discipline/matrix	closed-preempted by SH	attorney notified youth of SH action and class counsel; Mezibov counsel also contacted SH class counsel about matrix issue
0708-0021	failure to protect/physical abuse	open	outstanding document request; Mezibov firm asked for safety report of central office on 7/30/08 – not received as of 11/03/08
0708-0032	failure to protect/physical abuse	open	
0708-0041	failure to protect	open	telephone call from youth; treated as emergency case; attorney contacted duty officer at facility
0708-0051	judicial release	closed/non-LAP	includes closure letter to youth
0808-0062	sexual abuse by staff	open	two matters concern same youth; not separated; JCO looking in showers, inappropriate touching and comments; comes into rooms; youth contacted Sharon Hicks but received no answer
0808-0071	judicial release	closed/non-LAP	file includes follow up letter to youth
0808-0081	judicial release	closed/non-LAP	includes file closure letter with Ohio Public Defender contact information
0808-0091	judicial release	closed/non-LAP	youth notified that LAP cannot assist him; file contained closure letter to another youth
0808-0101	IDC time	closed/preempted by S.H.	youth notified that LAP cannot assist and referred to class counsel in SH
0808-0111	complaint of sexual abuse on the part of juvenile correctional officer	open/under investigation	youth was one of five who made the same complaint against a specific juvenile correctional officer
0808-0121	Unknown	LAP attorney told that youth did not wish to meet; file kept open for 30 days following the date of visit; follow-up letter sent to youth	This was the original procedure LAP attorneys used to deal with a refusal. Subsequently, LAP lawyers asked for youth to be brought to the interview room to repeat refusal, or LAP lawyer obtained went to housing unit and obtained confirmation.
0808-0131	Discipline – other (falsification by JCO)	Closed- Resolved	met with youth at ORV; youth signed release form because JCO was transferred to another unit.

FILE NUMBER	SUBJECT OF FILE	STATUS OF FILE	COMMENT
0808-0141	request for sexual offender programming	closed-non LAP	before preparing and closing file, LAP counsel referred youth to grievance process
0808-0151	staff misconduct	closed/resolved	
0808-0161	detention credit	Closed	referred to Sharon Hicks
0808-0171	Medical	Closed	youth refused services
0808-0181	failure to protect	Open	allegedly was defending himself in a riot
0808-0191	lockdown status	Closed	grievance only
0808-0201	criminal representation	closed/non- LAP	advised youth by phone that LAP did not provide criminal representation; closure letter with information re public defender
0808-0211	excessive force	Open	no action on file since 09/23/08, date of initial interview
0808-0222	STG designation	closed/resolved	
0808-0231	Matrix	closed/preempted by SH	follow-up letter sent to youth

I find nothing exceptional about the Mezibov firm's decisions to close cases, and I am impressed by the care they take to send follow-up and closure letters to youth after the files are closed. I also find it noteworthy that the LAP provider is referring cases to *S.H.* counsel when the relief the youth is seeking is related to youth's rights as class members in that case. In reviewing these cases, I have concluded that *S.H.* counsel can better help the youth, whether through contempt proceedings or informal negotiations with DYS counsel in that case.

Matter number 0808-0211, cited above, may be noteworthy for the delay by LAP counsel in any follow-up since September 23, 2008, the date the Mezibov firm opened its file. Matter number 0808-0062, also cited above, suggests a possible deviation by LAP counsel from the normal practice of opening a separate file for each matter relating to a particular youth. These are isolated deficiencies, however, that do not

disturb my conclusion that the Mezibov firm, given the obstacles it has faced, is meeting its obligations to assist youth in gaining access to courts.

This conclusion notwithstanding, the monthly reports by LAP providers between July 1, 2008 and October 31, 2008 disclose no referrals by any provider to private lawyers for legal action on behalf of the youth. When I interviewed Sharon Hicks on September 19, 2008, however, she informed me that she had referred one matter to outside counsel on the date of that interview. This, perhaps, is the strongest argument for addressing the causes of the inefficient operation of the LAP discussed throughout this report.

XI. Conclusion and Recommendations

A. Conclusion

The period covered by this report has been one of near-continuous change. There has been considerable turnover in LAP providers, including the employment of the Wiles firm for less than two months, the issuance of a one-year contract (July 1, 2008 to June 30, 2009) to the Mezibov firm, and the subsequent decision by Sharon Hicks to accept new employment. The next step in this process will be the determination of the scope of the current provider's future role and, I hope, efforts by DYS to avoid splitting the responsibility for the provision of legal assistance to DYS youth by maintaining a unitary provider. Attempts to achieve uniform practices between the Mezibov firm and Sharon Hicks

also were time-consuming and less than fully successful. The intrusion of the backlog cases created burdens for all these providers, and the start-up activities of the Mezibov firm consumed the month of July, thus delaying contacts with youth at Indian River, Ohio River Valley, and Marion.

The May 28, 2008 contract between DYS and me to monitor the operation of the Legal Assistance Program and to work with Monitor Cohen introduced yet a new actor into the litigation who was unfamiliar with the operation of the DYS, the history of the *J.P.* litigation, the DYS staff, and counsel for the parties. My efforts to develop and gain agreement on a monitoring plan, to familiarize myself with the DYS facilities and staff, to conduct initial meetings with Director Stickrath and his central office staff, to meet with counsel for the parties, and to develop a follow-up survey to send to youth who met with LAP providers consumed approximately a month.

I issued my first follow-up surveys to youth in early July and met with central office staff, institutional staff, and counsel throughout the course of the monitoring period covered by this report. Thereafter, I continued to meet with other participants in the litigation to work out problems arising in several areas. Of particular concern to me was the threatened overwhelming of LAP providers by youth raising issues outside the program's jurisdiction and/or problems that internal DYS mechanisms such as unit management and the grievance system should

have been able to address. The changes in providers that occurred complicated my monitoring efforts, as did difficulties and misunderstandings that arose from time to time between the Mezibov firm and counsel for the defendants. Lack of cooperation and efficiency by the DYS (for example, the timely meeting of LAP counsel's requests for information and resolution of issues regarding the proper scope of LAP attorneys' provision of assistance in connection with youth's exhaustion of the DYS grievance system) and the coordination of the demands of the *S.H.* litigation with the *J.P.* litigation are other important matters that required attention.

During this entire period, however, DYS staff and counsel for the parties cooperated with me and met my requests for assistance in implementing effective monitoring mechanisms and approaches. They displayed patience and a willingness to help whenever I called on them.

As this report is being written, the operation of the LAP has fallen into a more or less regular pattern. Issues requiring clarification continue to arise, however, and the expert's own efforts, as reflected in this report, require some degree of adjustment. Above all, efforts are needed to improve the program's efficiency without compromising its quality. It is none too soon, in my opinion, for the parties and counsel to be giving careful thought to the ultimate configuration of the most effective and cost-efficient program that can be implemented to assist

DYS youth in gaining access to courts to assert their constitutional and other federal rights.

B. Recommendations

Based on the foregoing report, I make the following recommendations to better implement the Legal Assistance Program to provide mandated access to courts to youth in the *J.P.* litigation.

1. DYS officials should improve facility management and the use of informal complaint resolution mechanisms such as unit management staff and grievance coordinators to resolve youth's problems that otherwise will increase the burden on LAP providers.
2. DYS officials should improve the quality and quantity of all forms of orientation and education that incoming and other youth receive on the LAP, including the exclusions of IDC matters, judicial release, matrix-related issues, and criminal matters. This will require additional information in the DYS Youth Handbook.
3. Counsel should permit LAP providers to make initial and follow-up contacts with youth at all DYS facilities by telephone, videoconference, or face-to-face visits, as LAP counsel deem necessary.
4. DYS should attempt to contract with a single provider to assume responsibility for the LAP in all DYS facilities and Paint Creek. The provider must include at least three attorneys with adequate training and experience in civil rights and conditions of confinement issues, as well as fact and duration issues.
5. The current provider should resolve all youth's complaints in the backlog files as promptly as possible and report these resolutions to the expert as promptly as feasible.

This effort should include a careful analysis of all claims that may be barred by the expiration of the statute of limitations, including consideration of reliance on the doctrines of waiver, equitable estoppel, and equitable tolling.

6. DYS officials must ensure compliance with all obligations listed on pages 31 and 32 of this report and provide one or more affidavits of such compliance to the expert on a monthly basis. LAP counsel should be responsible for reporting to the expert any instances of noncompliance that come to their attention.

7. DYS officials should maintain a complete log of all requests for information by LAP attorneys, indicating the date of the receipt of the request and the date of compliance with the request. LAP counsel should verify the completeness and accuracy of this log on a monthly basis.

8. DYS officials should require any LAP provider to maintain separate files on discrete matters raised by youth.

9. DYS officials should maintain a log of all LAP referrals of emergency complaints to central office or institutional personnel. LAP counsel should share each such referral with plaintiffs' counsel at the time it is made. The log should reflect the date DYS officials received the complaint, the person receiving the complaint, a brief summary of the complaint, and the action taken by DYS to address the alleged emergency.

These logs should be shared with the expert and with plaintiffs' counsel on a monthly basis.

Respectfully submitted,

/s/ *Vincent M. Nathan*

Vincent M. Nathan

EXPERT'S EXHIBITS

EXPERT'S EXHIBIT A

J.P. v. Taft

Monitoring Plan

Revised June 23, 2008

This plan describes the process, scope and reporting requirements for monitoring the Legal Assistance Program. This plan includes the compliance requirements for the Legal Assistance Program as detailed in the Consent Decree, and details specific outcomes and documentation required for monitoring. Further, the plan defines the scope of the monitoring, and its relationship with *S.H. v. Stickrath*. Finally, this agreement sets forth the reporting requirements of the expert, and meetings between the expert and the parties. The document concludes with a brief and not necessarily complete summary of the methods the expert may use to accomplish his monitoring responsibilities.

I. Compliance Requirements from the Consent Decree

Two provisions within the Decree detail the reporting and review process:

A. Uniform Sign-up and Tracking: DYS shall ensure a simple system for the youth to request counsel, which also allows DYS to collect and track data on youth requests for legal services and track the number of cases opened, number of hours spent on the provision of certain services by the Contracting Attorney, and other pertinent information.

B. Periodic Review: DYS shall provide for a review every six months of staffing and make appropriate adjustments annually based upon the demand for services to ensure adequate staffing continues. Chief Counsel for DYS and Plaintiffs' counsel will periodically monitor the program, and Plaintiffs' counsel will have access to all the monthly reports prepared by the Contracting Attorney and the Ohio Public Defender. Plaintiffs' counsel will be sent copies of the monthly reports on the 15th of each month. Chief Counsel for DYS will meet with Plaintiffs' counsel every six months to discuss the reports, upon reasonable request to do so.

II. Proposed Outcomes for Attorney Representation through LAP

The expert will monitor four specific outcomes to ensure compliance procedurally with the Consent Decree and the services to which youth are entitled. For each of the four outcomes, the expert will require the indicated documentation:

A) Outcomes to monitor

- 1) Youth must have adequate notice of the right of access to the courts.

Documentation needed to indicate compliance:

- During their orientation at Scioto, youth must be informed about the Legal Assistance Program. (LAP must provide such documentation as to orientation it provides, and the times, dates and youth who complete orientation.)
 - Verification of conspicuous and continuous postings in each DYS facility in areas accessible to residents on every ward/unit of the description of the Legal Services Program and how to make contact with its attorneys. (DYS must provide documentation from each facility verifying that the corrected signage is still posted in areas as required.)
- 2) Youth must have access to a simple signup procedure to request counsel

Documentation needed to show compliance:

- Uniform monthly signup forms for each facility.

(Monthly reports from LAP attorneys should document the date that each youth signed up to see an attorney, and when the youth was seen.)
- Legal Service Program attorney's phone number and address must be available to youth from notice posted, as well as how to contact the attorney in the event of an emergency. (This information must be included on the notices posted in units.)

3) Youth requests to see an attorney must be handled in a timely manner by the attorney and/or the attorney's assistant.

Documentation needed to show compliance:

- Emergency requests (by phone or as indicated on the Request form) should be handled promptly and documented on monthly reports of attorney and/or assistant
- Monthly reports by attorney and assistant must document names and dates of meetings with youth who have completed request forms or otherwise indicated their desire to meet with attorney (i.e. phone contacts)

4) Youth consulting with attorney must be able to access the court with claims that meet the requirements of Rule 11 of the Federal Rules of Civil Procedure. For this purpose, youth will be provided with representation by a LAP attorney or a LAP referral attorney.

Documentation needed to show compliance:

Two types of information are necessary for the expert to monitor actions taken on cases: 1) that which is contained in attorney case files kept on youth who have requested legal assistance, and 2) monthly statistical information which provides data on case openings, closures and dispositions.

- Attorneys must maintain a database which will track information by date, facility and types of claims, actions taken and case disposition, which will be available in the form of a monthly report to the expert. This will be developed with the assistance of the expert.
- Standardized case tracking forms must be developed and utilized by LAP attorneys in all cases, and must include the youth's request to see an LAP attorney, intake information, youth contacts, attorney referral information, and other actions taken by the attorney up through the disposition of the case. The tracking form will be developed by the expert as necessary for the monitoring process, with input from the parties.
- Attorney monthly reports containing information on the number of cases referred to private lawyers for representation, or if a referral could not be made, documentation of preparation and filing of complaint in court for the youth, and copies of such complaints filed.

III. Contact with Youth/Other Quality Control Measures for Substantive Compliance with Consent Decree

While it is not the job of the expert to second guess all substantive decisions made by the attorneys as to whether a case is meritorious, the following provisions will assist the expert to help evaluate substantive decisions made on cases.

- Each month, the expert will send a survey form to a sample of clients who have had contact with the legal service program providers to determine if they were provided with notice of and information about the legal services program, that they were able to sign up to request legal assistance in a timely manner, whether in an emergency situation they were able to access the attorney and/or the attorney's assistant and whether the youth believes that appropriate action was taken on his or her behalf by the legal service provider. Phone calls may also be made in some cases in lieu of a form.
- In mailing these forms, the expert will provide a postage embossed self-addressed return envelope for the youth. Forms that warrant follow up may include information from youth who do not feel appropriate action was taken, those who were unable to obtain access to the attorney in a timely manner, or similar complaints from the youth.

- Follow up contact will be made as appropriate with youth to clarify their concerns. In situations where a youth appears to have a valid claim for detention credit and/or relief regarding conditions of confinement which have not been addressed by the legal service provider, as reported by the youth, the expert may contact LAP attorneys for clarification on what actions are being taken and to ensure that youth with meritorious claims were provided with access to the courts.
- In addition to individual contact with youth in DYS facilities, the expert will do a periodic file review of LAP attorney files on youth for quality control. This will be done at least twice each year, or otherwise as determined by the expert.
- The Consent Decree requires that attorneys for the LAP “shall have adequate training and experience in civil rights and conditions of confinement issues, as well as fact and duration issues.” The expert will obtain information on this subject from file reviews and discussions with LAP attorneys.

IV. Scope of Remedy

A. LAP attorneys shall assist youth in the class to access all appropriate means for solving the problems identified by the youth, including securing counsel for independent lawsuits or providing necessary pleadings. Other nonexclusive assistance to youth with problems may include calling or writing to DYS’s Chief Counsel (or designee) to discuss and perhaps resolve such issues. Such nonexclusive assistance may include accessing existing formal grievance and administrative dispute resolution as well as informal dispute resolution opportunities.

B. If civil measures via a claim filed under 42 U.S.C. §1983 must be taken to remedy or prevent irreparable harm to the youth to assure that the youth receives adequate, effective, and meaningful court access, it will be the duty of LAP to provide assistance either by providing representation directly, providing representation via a referral process, or by providing a youth with an appropriate complaint and motion to appoint counsel for the youth to file in an appropriate court of competent jurisdiction. All civil claims filed for either damages, injunctive or other relief under 42 U.S.C. §1983 shall be conveyed by the LAP attorneys to class counsel as identified in *S.H. v. Stickrath*.

V. Reporting to Parties by Expert:

The expert will provide a report on program outcomes, other quality control measures and other compliance issues as described at least every six months, and will provide a copy of such to the parties. The parties will meet with the expert at least every six months to review these reports and to discuss the adequacy of LAP staffing. Either party may contact the expert between meetings to discuss concerns with the LAP.

VI. Monitoring Actions by Expert

The expert may use any means of obtaining compliance-related information so long as the method is (1) relevant to an issue of compliance and (2) reasonable.⁵⁹ Among other things, the expert will need to meet (face-to-face or telephonically) and to correspond separately or together with counsel, institutional and central office staff and administrators, and youth. In addition, the expert will need unrestricted access to all DYS facilities and Paint Creek (and to all youth held in these facilities) upon 24 hours' notice. Correspondence with youth may include questionnaires accompanied by self-addressed, stamp-embossed envelopes for responses to those questionnaires.

The expert also will need unrestricted access to unexpurgated files and other information maintained by LAP counsel or other employees and to all DYS reports regarding the LAP that stipulations and orders in this case require. The expert also will need access to all records of youths that are necessary for the expert to monitor adequately the status of the LAP.

⁵⁹ DYS staff will provide relevant information requested by the expert as soon as possible, but in any case within 14 calendar days following the expert's request. If the expert designates the request as an "emergency request," DYS staff will provide the information within three business days. The expert will be available to discuss in advance with DYS staff or counsel any problems that may make these deadlines impracticable in a specific instance.

EXPERT'S EXHIBIT B

**YOUTH FOLLOW -UP FORM
LEGAL ASSISTANCE PROGRAM**

My name is Vincent Nathan, and I teach criminal justice at The University of Toledo in Toledo, Ohio. In July 2008, United States District Judge Algenon Marbley approved my appointment to monitor the DYS' Legal Access Program (LAP). The judge is overseeing compliance with his orders in a lawsuit known as *J.P. v. Taft*, which requires the DYS to ensure that you and other youth in the DYS have access to lawyers if your constitutional rights are violated by conditions or practices within a DYS facility. My job is to report periodically to Judge Marbley on whether the LAP is accomplishing this goal. In the past, this program was known as the Legal Services Program, and the only attorney working for that program was Sharon Hicks. Now there are four lawyers who will be working for the LAP. By sending you this form, I am asking for your help in providing me with information I need to oversee the operation of the LAP. I am sending this form to all youth who have asked to see a LAP attorney to discuss a problem. Thank you for your help.

PLEASE MAIL THIS FORM BACK IN THE STAMPED, SELF-ADDRESSED ENVELOPE I HAVE INCLUDED WITH THIS FORM (PLEASE WRITE YOUR RETURN ADDRESS ON THE ENVELOPE AS WELL).

Your name _____ DYS# _____

- 1) DYS facility where you are now _____
- 2) How did you learn about LAP? (check all that apply)
 - a) Orientation at Scioto
 - b) Notice about the program was posted in my housing unit
 - c) Other _____
- 3) How did you make this request? a) by written request form or b) by phone
 c) letter
- 4)
 - a) Date you made your request _____
 - b) Date a LAP lawyer saw you _____
 - c) What is the name of the LAP lawyer who saw you? _____

Please describe any difficulty you had signing up or calling to see a LAP attorney.

[Please turn this form over in order to complete it.]

5) Mark the category or categories that best describe the problem you most recently spoke with a LAP attorney about:

- a) living conditions b) food service c) missed recreation
- d) staff use of force e) threats by other youth f) mail delivery
- g) attack by other youth h) sexual assault by other youth
- i) sexual assault by staff j) lost, destroyed, or stolen property
- k) detention credit l) judicial release m) problem with release date
- n) mental health, medical, or dental treatment o) improper use of restraints
- p) placement in isolation q) other (please explain) **You also may use this**

space to provide more information about the category or categories you have marked above in this question: _____

- 6) Did you file a grievance about the problem you asked to speak with a LAP attorney about? Yes No
 - 7) Did you receive a response from the Grievance Coordinator? Yes No
 - a) Were you satisfied by the response from the Grievance Coordinator? Yes No
 - 8) Did you appeal to the Superintendent? Yes No
 - a) If yes, did you get a response? Yes No Does not apply
 - 9) Did you appeal to the DYS Central Office Chief Inspector? Yes No
 - a) If yes, did you get a response? Yes No Does not apply
 - 10) How would you rate your experience with the Legal Assistance Program?
 - a) I received the help I needed and do not need anything else.
 - b) I am still working with the Legal Assistance Program on my problem.
 - c) I am not satisfied with the Legal Assistance Program and still need help.
 - d) Other: Please explain _____
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