UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1688

DAVID BREWSTER, ET AL.,
Plaintiffs, Appellees,

v.

MICHAEL S. DUKAKIS, ET AL.,
Defendants, Appellants.

Before
Campbell, Bownes and Breyer,
Circuit Judges.

MEMORANDUM AND ORDER

Entered November 16, 1981

This matter came on to be heard upon appellants' motion for stay of preliminary injunction pending appeal. The stay is hereby granted with respect to paragraphs 1-9 only of the injunction, and the appeal placed on the January list for argument.

The injunction in issue directs defendant officials, pursuant to a 1978 consent decree, to disregard the budgetary constraints which they believe (and the district court nowhere denies) are necessary if defendants are to live within the means presently appropriated by the state legislature for the mental health programs here in question. In its decision, the district court seemingly justifies these commands upon the grounds that (1) the legislature is under a legal duty to fund the consent decree, and (2) that the court is constitutionally empowered to enforce that duty. In a case such as this, where the existence of a constitutional violation has never been adjudicated and where the legislature is neither a party nor has agreed to fund the consent decree, we are compelled to entertain serious doubts as to the correctness of the district court's premise that the legislature is under any such absolute, judicially enforceable duty. See New York State Association for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980).

Moreover, if these doubts should prove well founded, and the injunction should meanwhile remain in full effect, irreparable harm could ensue not only to defendants, who may be compelled to act in derogation of valid state laws, but to the recipients of mental health services, whose programs might altogether cease when existing funding runs out. We accordingly believe that appellants have made a sufficient showing of probable success, irreparable harm and a claim upon the public interest, to warrant issuance of a stay at this time pending resolution of the appeal. Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958). In reaching this conclusion we take into account the deference properly owed by federal courts to a state's management and control over its financial affairs. Welsh v. Likins, 550 F.2d 1122, 1131-32 (8th Cir. 1975). Given the considerable uncertainty of the law, the officials of Massachusetts should not be subject to these judicial commands pending final determination of the appeal.

We recognize that as the district court did not cite the Carey case, supra, it may not have had the issues therein brought to its attention. We also note possible confusion over the extent to which the court's order is actually meant to apply to the legislature and to require defendants to violate state budgetary restrictions. Because of these factors, and because time may be of the essence to secure for the plaintiffs the maximum level of assistance to which they are entitled, we provide that prior to our January sitting the district court is free to reconsider and to modify its injunction notwithstanding the pendancy of this appeal, provided we are given timely advance notice of such action which might, of course, moot this appeal.

While this court reserved the right to decide the merits following the briefing and argument permitted on the motion for stay, we now believe that opportunity for further argument and briefing of the merits should be provided, hence, as noted, the case has been placed on the January list. If either party wishes to file briefs in addition to those already submitted, they may do so on or before December 14, 1981.

So ordered.

By the Court,

DANA H. GALLUP, CLERK

By /s/ Francis P. Scigliano
Chief Deputy Clerk

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[illegible]
[illegible] CLERK.
Francis P. Scigliano
[illegible] Clerk.

[Cert. c., Hon. Frank H. Freedman; Clerk, U.S.D.C., Mass.; cc: Messrs. Mohl, Fleischner and Ponsor and Ms. Burnes.]