Brewster v. Commw. of Mass.
MH-MA-001-005

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

DAVID BREWSTER, ET AL., Plaintiffs
v. CIVIL ACTION NO. 76-4423-F
MICHAEL S. DUKAKIS, ET AL., Defendants

MEMORANDUM

December 23, 1981

FREEDMAN, D.J.

I. INTRODUCTION

On December 7, 1978 the Court received a Consent Decree in the above-entitled matter, signed by representatives of the plaintiff class and by virtually all the senior executive officers of the Commonwealth of Massachusetts. In this Decree, the defendants bound themselves and their successors in office to establish "a comprehensive system of appropriate, less restrictive treatment, training, and support services" for mentally disabled persons in the western part of the Commonwealth of Massachusetts. Consent Decree, ¶ 3. The Decree's explicit goal is to replace, or virtually replace, Northampton State Hospital with this comprehensive system.

As in the past with other Decrees, the rosy atmosphere of cooperation and consensus existing when the Consent Decree was filed has grown murkier during the years of implementation. A previous opinion of this Court in the same case, at 520 F.Supp. 882 (D. Mass. 1981) gives the flavor of the difficulties encountered by the Court in overseeing the process of implementation.

The current round of hearings and memoranda is prompted by the defendants' massive reductions in mandated programming for mentally disabled class members. The defendants do not deny that the services being reduced or eliminated and the new programming being cancelled are required by the Consent Decree. They justify

the reductions, eliminations and cancellations--which amount in effect virtually to a dismantling of large components of the community mental health system--by pointing to the Legislature. The Legislature, according to the defendants, is to blame for these reductions because of its failure to appropriate adequate funds to support programming mandated by the Decree.

On August 4, 1981, the Court issued a temporary restraining order, and after hearing on September 9, 1981, the Court on September 15, 1981 issued a preliminary injunction barring the defendants from eliminating or reducing existing required programming, or cancelling plans for prospective programs required by the Decree. A final paragraph of the Court's injunction required the defendants to report in writing on their efforts to secure the additional funding which they claimed was necessary to comply with the Decree.

A Motion to Suspend Injunction Pending Appeal was filed before this Court and denied; this denial was subsequently appealed by the defendants to the United States Court of Appeals for the First Circuit and on November 16, 1981 the Court of Appeals stayed all the provisions of the injunction, except for the paragraph requiring the defendants to report on their efforts to secure funding. The Court of Appeals stated in its memorandum, however:

> We recognize that as the District Court did not cite the Carey case, supra [New York State Association for Retarded Children v. Carey, 631 F.2d 162 (2nd Cir. 1980)], 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.

In response to this language, this Court is today issuing

a revised preliminary injunction, along with this Memorandum, in order to eliminate any possible confusion as to the intent and target of its orders. In formulating the revised order, the Court has reviewed additional affidavits, depositions, and other discovery material submitted by the plaintiffs and defendants. In addition, the plaintiffs have filed a Motion to Revise the Injunction; the Court received oral argument on this motion on December 17, 1981.

The defendants have attempted to cast the current controversy as a dispute between this Court and the Legislature over appropriation of funds, inflating the issue to unmanagable constitutional proportions. It is apparent now that certain ambiguous language in this Court's Memorandum of September 15, 1981 has added to rather than decreased the confusion. In fact, as will be demonstrated below, it is the defendants who have failed to perform their obligations under the Decree and under existing authority. It is the defendants, and only the defendants, whose conduct is the target of the Court's orders. The Court well recognizes that the Legislature is not a defendant.

II. FACTUAL BACKGROUND

The 1982 fiscal year ("FY '82") in the Commonwealth of Massachusetts runs from July 1, 1981 through June 30, 1982. Overall planning within the Department of Mental Health ("DMH") for programming to operate during FY '82 obviously takes place many months prior to July 1, 1981. This planning is translated into a budget proposal which is passed up through the Executive Branch eventually to the Legislature.

Insofar as the programming required by the Consent Decree is concerned, with some minor exceptions, the proposed scope of services for FY '82--including old, expanded and new programming--was deemed sufficient by the Court and plaintiffs to satisfy generally all applicable provisions of the Decree. It is important to note, however, that neither the court-appointed

Monitor nor the plaintiffs are in a position to judge competently the reasonableness of the defendants' translation of programming into dollars. Putting this issue another way, the focus of the Court's attention is on the development of appropriate programming; the determination as to the amounts and source of funds for this programming is entirely within the discretion of the defendants, though they may keep the Court informed of their decisions. The overall budget request made by the defendants to the Legislature for FY '82 to support Consent Decree programming in the community was slightly in excess of 53 million dollars.

In July of 1981, the Court was informed through the Monitor of the fact that the Legislature had apprppriated approximately 5 million dollars less than the defendants' budget request. Later that month the plaintiffs filed their Motions for Temporary Restraining Order and Preliminary Injunction, alleging that the defendants' planned wholesale cancellations and reductions of programming, justifying these reductions and cancellations by pointing to the reduced appropriation. The planning for these reductions and cancellations was apparently underway, without any prior notification to the Court or motion to revise the Consent Decree. In fact, the Court was not even provided with a list of programs to be reduced or eliminated until just prior to the hearing on plaintiffs' motion for preliminary injunction, on September 9, 1981.

The destructive impact of these cuts is not disputed. Over 100 persons ready for community placement will be indefinitely retained at Northampton State Hospital. Current census is approximately 225. Court clinic programs, badly needed adolescent services, the only Hispanic residential program and a large segment of programming for the elderly will be eliminated. Substantial reductions are slated for service coordination, assessment, and individual service planning, throughout the Region.

In framing its preliminary injunction, the Court took

into consideration the foregoing facts and these additional considerations:

First, the defendants began the process of reducing and eliminating programming while a request for supplemental appropriation was still pending before the Legislature. This supplemental appropriation, if approved, would be more than adequate to replace the funding which defendants deemed necessary for all required services.

Second, the defendants began the reduction of programming, without at any point filing any motion pursuant to F.R.Civ.P. 60 (b)(6) to amend the Consent Decree. In other words, the defendants, faced with what they felt were barriers to implementation of the Decree, began independently choosing which provisions of the Decree would be complied with, which would be partially complied with, and which would be ignored.

Third, the defendants apparently assumed the reduction in appropriation warranted immediate proportionate reductions in programming. However, the DMH has been notoriously imprecise in its estimations of the amounts of money needed by it for Consent Decree programming. For example, the DMH reverted to the Commonwealth's general fund in FY '81 at least $11 million in funds requested and appropriated but unspent. It was not clear that the reductions in programming were fully justified by the decreased appropriation.

Fourth, the cancellations and program reductions would have gone into effect without the defendants attempting first to transfer funds which may have been available in other accounts within the Department of Mental Health or under the control of the Executive Office of Human Services. It is not clear to what extent these transfers are within the discretion of the defendants, or require Legislative approval. In any case, mechanisms exist to effect such transfers and they are not uncommon.

Finally, the Court recognized that the budgetary and

spending mechanisms in the Commonwealth are somewhat unclear, and subject to various informal pressures. Even the scope of the defendants' formal power to obtain access to funds is in dispute in regard to, for example, the defendants' power to shift monies from the institutional to the community account. Funding projections themselves have a will-of-the-wisp quality. For example, the additional amount of funds required to insure compliance with all provisions of the Consent Decree was estimated at the hearings in September before this Court as more than $5 million. By November 19, 1981, the projected shortfall was down to slightly more than $3 million.

In consideration of all these factors, the Court concluded on September 15, 1981, that the wisest course was to enjoin the defendants' proposed reductions, at least long enough to permit the Legislature to act on the supplemental budget request. The Court did not, therefore, enter into a thorough examination of the defendants' overall good faith in using all the means at their disposal to secure funding. Likewise, the Court did not comment upon the appropriateness of instituting programmatic reductions without first moving to revise the Consent Decree. Since the Legislature has chosen not to act, favorably or unfavorably, on the supplemental budget request, and since the defendants have proceeded to implement various programmatic reductions and cutbacks, it is now appropriate for the Court to examine carefully the defendants' efforts to secure what they conceive to be adequate funding to support Consent Decree programs.

III. THE OBLIGATIONS OF THE DEFENDANTS IN IMPLEMENTING THE CONSENT DECREE

The question before the Court on the facts described above is very simple: What are the responsibilities of defendants charged with the implementation of a consent decree, when an initial budget appropriation appears to be insufficient to support mandated

consent decree programming?[1]

The Court holds that the defendants have, minimally, two responsibilities under the terms of the Decree in this situation. First, before reducing any programming required by the Decree, defendants have an obligation to exhaust all efforts to obtain necessary funds. Second, when these efforts are exhausted, or when defendants conclude that failure to make revisions in the Consent Decree would create a risk of substantial harm to plaintiff class members, defendants have an obligation--prior to any reduction in programming that would violate the Consent Decree--to present the Court with an appropriate motion to revise the Consent Decree pursuant to F.R.Civ.P. 60(b)(6). Morris v. Travisono, 509 F.2d 1358, 1361 (1st Cir. 1975).

The defendants have failed to perform either of these obligations.

First, the defendants have not made best efforts to locate funds required to support the Consent Decree. The affidavits of Bruce Bullen and George Hertz make it clear that, at least prior to December 16, 1981, the Legislature was never informed that the funding shortage for Consent Decree programs was in fact approximately half of the amount originally projected by the defendants.[2] It is inconceivable that this change would have been irrelevant to the Legislature. Further, the defendants have not made efforts to effect the transfer of funds from

---

[1] Layered beneath this question is a second question, of far more profound constitutional significance: What are the powers of a district court in relation to a legislative body which, by its failure to appropriate adequate funds, renders it impossible for defendants to comply with a consent decree? As noted in Section IV, it is unnecessary to address this difficult question in order to resolve the issue before the Court.

[2] By letter of December 16, 1981, Governor King has apparently informed Chairman Michael C. Creedon, of the House Ways and Means Committee, for the first time of the decreased need for supplemental funds. This letter was first presented to the Court at oral argument on plaintiffs' Motion to Revise Preliminary Injunction on December 17, 1981.

existing accounts to cover Consent Decree Programs, despite the fact that a significant budget surplus is projected for the Commonwealth of Massachusetts during the current fiscal year. No effort has been made to access emergency funds available to the Governor. No efforts have been made to transfer funds from the Northampton State Hospital account to the community account to cover community programming.

In conclusion, the Court is not satisfied that the defendants have made their best efforts to obtain funding necessary for Consent Decree programs. In particular, the Court is not satisfied that the defendants have made all necessary efforts to shift funds already appropriated by the Legislature to Consent Decree accounts.[3] The defendants have, at a minimum, the obligation to make these efforts before dismantling the community mental health system required by the Decree.

In the event that the defendants are unsuccessful in effecting transfers or locating funds by taking actions within their own control, the defendants are ordered to return to this Court with an appropriately drafted motion to revise the Consent Decree with full justification for each requested revision.[4] These justifications will be specifically and carefully scrutinized. The Court of Appeals has recently suggested that one rationale for service cutbacks--"the state's bar to payment of funds without a current appropriation"--may be inadequate where the degree of resulting harm is severe. Coalition for Basic Human Needs v. King, 654 F.2d 838, 843 (1st Cir. 1981).

IV. THE COURT'S POWERS IN OVERSEEING IMPLEMENTATION OF THE CONSENT DECREE

It appears undisputed that the Court has at least the

---

[3] It is important to emphasize that this resolution of the defendants' funding problem would not require any new Legislative appropriation, only movement of funds already approved, a far less substantial intrusion on state government functions.

[4] It is now clear that additional or different cuts are now contemplated beyond those described at the hearing on September 9, 1981.

powers described above in relation to the Consent Decree: the power to require best efforts and the power to require an appropriate motion where these efforts are unavailing.

Additional powers of the Court appear to be less clear. The Court assumed in its opinion of September 15, 1981, and still assumes, that it retains in supervising the implementation of this Consent Decree all powers afforded a court after an adjudicated finding of unconstitutionality. Considerable authority exists for this position. In the case of United States v. Board of Education of Waterbury Connecticut, 560 F.2d 1103 (2nd Cir. 1977), the Court of Appeals stated:

> Had the case gone to trial, the school board might have proved that the school system was not intentionally segregated. However, the posture of this litigation now prevents such an inquiry since the Consent Order operates as a litigated finding of unconstitutional segregation.

Id., at 1104.

See also, Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981); United States v. Board of Ed of City of Chicago, 88 F.R.D. 769 (1981); Inmates of Boys' Training School v. Southworth, 76 F.R.D. 115 (D. R.I. 1977).

It is axiomatic that a Consent Decree ratified by a court, becomes an order carrying the same force and effect as any order entered after a contested trial. United States v. Swift, 286 U.S. 106, 114-15 (1932).

The defendants argue that exercise of the Court's broad remedial powers requires a prior finding of violation of constitutional rights, citing Milliken v. Bradley, 433 U.S. 267 (1974), Swann v. Charlott-Mechlenburg Board of Education, 402 U.S. 1 (1971), and other Supreme Court cases involving adjudicated findings of unconstitutionality. The Court of Appeals has suggested in its memorandum that the absence of an adjudicated finding of unconstitutionality may be a factor in determining the extent of the Court's remedial powers.[5]

---

[5]In this Court's opinion, such a limitation of a district

The plaintiffs have requested that this Court exercise its remedial powers by moving to close admissions at Northampton State Hospital. Since the Court has declined to do this, or exercise any other remedial option at this time, the question of the precise scope of the Court's powers does not arise.

V. THE DISTRICT COURT'S POWERS IN RELATION TO THE LEGISLATURE

Clearly, district courts retain the power to issue orders that have fiscal ramifications, at least where the exercise of these powers is based on an adjudicated finding of unconstitutionality. Milliken v. Bradley, supra at 289. It is not clear to what extent, if any, the Court's powers to issue orders having fiscal ramifications are limited by the absence of an explicit adjudication of violations of constitutional rights.

In any case, by now it should be absolutely clear that the Court has no intention of ordering the Legislature, directly or indirectly, to do anything. Any language in the Court's prior opinion that appeared to suggest the contrary is regrettable. In fact, the Court did not, on September 15, 1981, and does not now make any order applicable to the Legislature.

The Court was aware of the case of New York State Association for Retarded Children v. Carey, 631 F.2d 162 (2nd Cir. 1980), but did not cite it because of its view that the case is inapposite. That case involved an "express Legislative disapproval" of certain monies required for consent decree implementation. Such was not the case here. Significantly, the court affirmed in that decision the defendants' obligation to use all available discretionary efforts to obtain necessary funds. In addition, the Court in that decision did not examine the defendants' responsibility to file a

---

fn. 5 (cont'd)

court's powers would eliminate the Consent Decree as a means for resolution of cases where constitutional rights are involved. This disappearance would have serious ramifications for litigants and courts.

motion to revise--perhaps because the failure to fund related only to the ancillary Review Panel and not to programming at the heart of the Decree, as in the present case.

This case is much more in line with a prior decision, in the Carey line, at 596 F.2d 27 (2nd Cir. 1979). There, the Court of Appeals reviewed the district court's orders requiring the hiring of certain staff for the so-called Consumer Advisory Board (CAB). The Court stated:

> The State's second objection on appeal is that the district court's order is vague and unenforceable and lacks compliance with F.R.Civ. P. 65(d). See also, Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976). The State officials are concerned, they allege, because the district court has provided no guidance as to what specific actions they are to take after their request to the Legislature for appropriations and whether, if the request is unsuccessful, what further action would be sufficient. But at the same time the State points out that a number of options appear to be available to comply with the order, including requests to the supplemental budget under New York Constitution Article 7, Secs. 3 and 4. Moreover, the state claims that there are only three potential sources of funds available that it may use to fund CAB staff; budgets of the other twenty-one developmental centers in the State, funds already designated for programs for the developmentally disabled, or funds from the executive management budget.
>
> We do not think the order lacks specificity. It compels appellants to assure approval and funding for four full-time professional staff positions and one full-time secretarial position for the CAB. The order leaves it to the state officials themselves to determine the exact means by which to implement the order, appropriately wary of superseding state officials in the proper performance of their governmental functions. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977, rev'd on other grounds, sub nom.); Alabama v. Pugh, 438 U.S. 781 (1978).

New York Association for Retarded Children v. Carey, 596 F.2d 27, 38 (2nd Cir. 1979).

This Memorandum and Order stand only for the proposition that the defendants must make good faith efforts--meaning they must exhaust all available mechanisms--to secure adequate funding for the Decree before abandoning efforts to maintain and initiate a mandated services. Where this effort is not successful through no

fault of the defendants, they have an obligation to provide this Court with a detailed motion to revise the Consent Decree.

VI. CONCLUSION

Based on the foregoing, the Court concludes that the irreparable harm to the plaintiff class members, their likelihood of success on the merits and considerations of public interest all warrant reissuance of this Court's prior preliminary injunction, with the following revisions and additions:

Paragraph 2: October 1, 1981 will be revised to January 15, 1982.

Paragraphs 3, 4, 6, 7, 9, and 10: October 15, 1981 will be revised to February 1, 1982.

In addition, the Court will add the following paragraphs:

Paragraph 11: Undertake any and all actions within their discretion to obtain, by accessing funds under their discretionary control, by transferring funds under their discretion, by seeking approval from the Legislature of transfers of funds, by obtaining supplemental or deficiency appropriations, or by whatever mechanism may be available to the defendants sufficient funding to comply with all provisions of the Consent Decree. Submit, no later than January 15, 1982, a report to this Court on all actions taken pursuant to this paragraph and their effect.

Paragraph 12: Submit to this Court in the event that the actions under the foregoing paragraph are ineffective, a motion for relief from this Order accompanied by an appropriate motion under F.R.Civ.P. 60(b)(6) to revise this Consent Decree.

An appropriate Order shall issue.

Frank H. Freedman
United States District Judge