

Howard A. Belodoff, ISB # 2290
BELODOFF LAW OFFICE
1524 W. Hays St., Suite 2
Boise, Idaho 83702
(208) 331-3378

L. Charles Johnson, ISB # 2464
JOHNSON OLSON CHARTERED
P.O. Box 1725
Pocatello, Idaho 83204
(208) 232-7926

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JEFF D., et al.,	)	
	)	CASE NO. 80-4091
Plaintiffs,	)	
	)	RESPONSE TO DEFENDANT
vs.	)	REINKE'S BRIEF ON UNDISPUTED
	)	FACTS AND MOTION FOR RELIEF
DIRK KEMPTHORNE, et al.,	)	FROM JUDGMENT
	)	
Defendants.	)	
	)	

COME NOW the Plaintiffs, by and through their attorneys, Howard A. Belodoff and Charles Johnson, to hereby respond to the Department of Juvenile Corrections' ("DJC") Director Reinke's Brief on the Undisputed Facts and Motion for Relief from Recommendation 23, Docket No. 462.

RESPONSE TO DEFENDANT REINKE'S BRIEF ON UNDISPUTED FACTS AND MOTION FOR RELIEF FROM JUDGMENT - Page 1

The Plaintiffs would object to the DJC's argument for compliance based upon undisputed facts and their Motion for Relief to the extent the contentions are beyond the scope of the Case Management Order, Docket No. 453, that states "each party shall file an opening brief, supporting their position as to whether the defendant is or is not in compliance with the implementation plan as it relates to the **undisputed facts**," *Id.* at 2-3. Emphasis added. The Motion for Relief is premature and Plaintiffs would request further time to engage in discovery of the facts upon which DJC bases its argument.

Without waiving their objections, the Plaintiff will respond to each fo the DJC's contentions. The Plaintiffs' Response to each recommendation is based upon the 1998 Compliance Agreement and Order, Docket No. 305, the Order of September 28, 2000, Docket No. 341, and the Court Plan, Docket No. 354. It is imperative for the Court's analysis of the compliance issues that the Court consider each the actual language of these documents including the actual Recommendations, the Desire Results, the Plan's Forward and Introduction pages 1-8, the introductory paragraphs for each of the five separate section of the Plan and the Financial Statements and the Background/Framework for Implementation paragraphs preceding each Recommendation not only the Action Items that the Defendants created and inserted into the Plan at various time after the Plan was adapted by the Court to guide them. The Action Items were incorporated into the Plan merely to list some of the activities the Defendants needed to undertake for the first two years not be the final measure of compliance. See Plan at pp. 5-7. ("Much of the plan's action items for the first two years are devoted to gathering data, identifying measurement tools, outcomes, targets and essential information for the development of a more comprehensive plan that will result in the creation of an integrated system of care to serve

children with SED and their families... It will be necessary to revisit the plan and to further develop the actions and goals based on the learning of the first two years.”)

Recommendation No. 7. The Plaintiffs agree that the Director of DJC has been joined as a party. The question of whether any other party should be joined is in dispute, as is the remainder of this Recommendation.

Action Item 10C. DJC contends that because of similarities between Action Items 10C and 13B, the Court should find DJC in compliance with both. Action Item 10C concerns “integration of services by developing recommendations from the ‘school-as-a-base workgroup.’” Plan, at 20-22. Action Item 10C refers to Action Item 6 that concerns ICCMH’s implementation of the school-as-a-base workgroup recommendations regarding how local schools can be used for the identification of needs and delivery of services and supports to children and their families. Plan, at 17. Action Items 10C and 13B are not the same. DJC needs to be part of the process for developing and implementing the recommendations for school-based services, not just providing educational services in-house for children in their custody. The purpose of the Collaboration Recommendations required in the Court “Plan is to build an integrated system of care for children with SED that is coordinated across agencies and that expands capacity by maximizing the existing resources of each agency.” Plan, at 11. The Plan recognizes that collaboration is central to the goal of coordination across agencies so that expansion of capacity can occur by maximizing the existing resources. *See also*, Plan at 11 (“Changes which lead to increased collaboration among the relevant systems are more important to Idaho children and their families than any other recommendations contained in this report.”), citing 1999 Needs Assessment. DJC needs to participate in this process because a third of the children with SED who are committed to their custody are SED and eventually releases them back into their communities.

Many of these children were committed because of the lack of mental health services available to them in their communities. DJC's participation is necessary to divert these children from the justice system as well as to reintegrate them back to their communities and prevent recommitments.

Plaintiffs believe that in order to achieve collaboration, DJC may not withdraw from the process based upon a contention that it is doing their individual part for the 130 children in their custody. That defeats the very purpose of collaboration and compliance with the Court Plan. The Defendants themselves recognized this principle:

In sum, three factors limit the Defendants' ability to completely comply with the recommendations of the Needs Assessment: 1) limited resources and staff time in combination with competing governmental and program priorities, 2) the inability to command full participation of community partners, and 3) the possibility that the proposed strategies of building the new system are not effective due to factors unknown or quantified at this time. **The Defendants' agreement to pursue this plan is completely dependent on the availability of sufficient resources and staff to be able to implement their part of the agreement, and the sufficient participation and cooperation of the remaining entities in collaborating to develop a system of care for children with SED and their families.**

Plan, at 3. Emphasis added.

Action Item 11F. DJC contends that Action Item 11F is similar to Action Item 3E so the Court should determine DJC is in compliance with both. Recommendation 11F requires DJC to work with the Idaho Department of Health and Welfare ("DHW") and to develop a communication mechanism about local councils and accessing services. This is part of the Plan's Management Recommendation. Action Item 3E is part of the Collaboration Recommendations. The basic difference between the Action Items is that there be a coordinated communication plan about the system and all the partner agencies, rather than ad hoc communication with judges about the individual juveniles who appear before them. The ICCMH has developed a communication plan but the agencies do not comply with

it and it does not ensure the courts and other officials receive the information on the local councils or accessing services for their children.

Action Item 41E. DJC contends Action Item 41E is similar to Action Item 1B and both should be undisputed. Action Item 41E must be read in conjunction with the other Program Development Recommendations. Plan, at 53. These recommendations are not separate but serve different purposes. Recommendation 41 requires parent-run services and supports within the system of mental health services. Action Item 41E requires DJC to submit annual plans with the other stakeholders to “identify methods for including parents on training opportunities for staff and agencies.” Action Item 1B refers to the opportunity for parents to present information regarding SED issues, resource availability, family support services, and family involvement. Action Item 41 requires more than allowing individual parents to present information at staff meetings regarding their child or discussion by staff of children with SED. The Plan has to include parent-run trainings. The two recommendations are not similar.

Action Item 41J. It is not disputed that DJC provides the brochure from the IFF but the recommendation also requires DJC to obtain the parents’ consent and provide IFF with their name and contact information.

Action Item 48B. DJC contends that Action Item 48B is similar to Action Items 3E and 11F and should be undisputed. Action Item 48B requires a specific formalized plan that would include identification of who would receive and provide the information and, more importantly, the monitoring of the systems’ use of resources for accountability purposes. Action Items 3E and 11F do not meet or address the accountability requirements.

THE DJC’S MOTION FOR RELIEF FROM RECOMMENDATION 23 SHOULD BE DENIED.

The DJC has requested that the Court grant them relief from complying with Recommendation 23. Recommendation 23 is part of the Financing Recommendation of the Court Plan. *Id.* at 27-33.

The Plan states that:

It is widely recognized that the implementation of the plan is primarily dependent upon the existence of sufficient additional resources. There are three key resource areas discussed in the Needs Assessment: Medicaid/federal funding, the more efficient allocation of current resources, and new resources.

The stated purpose of Recommendation 23 was to more efficiently allocate current resources by stimulating the development of local diversion programming so that courts can commit fewer youth to DJC custody. This would allow for expansion of services for children with SED and their families. Plan, at 22. DJC argues that no transfers have occurred and wants to be relieved of these requirements. This request is premature at this time and the Plaintiffs object to the request as beyond the scope of the Court's instructions in the Case Management Order. The Plaintiffs would request the Court defer ruling on this request until the Plaintiffs can have discovery on the factual contentions DJC presents in support of its arguments. However, the Plaintiffs would contend this Motion is not well taken and should be denied at this time.

DJC presents four reasons for its Motion. First, DJC contends it was not a party until February 21, 2001, when the Court made Defendant Reinke a party. However, Defendant Reinke was on notice of the Plaintiffs' request to join the Director of the Department of Juvenile Corrections as a party. *See* Docket No. 324. The Court's Order denying the joinder of Defendant Reinke provided further notice that the Court would consider the request if proper service was made. Order, at 4. DJC admits they did not oppose joinder. Reinke Brief, at 4. DJC filed a Notice of Appearance on October 26, 2000. Docket No. 345. DJC fully participated in the development of the Court Plan that was filed

on February 9, 2001. It is far too late, five years after the fact, for DJC to complain about the Plan's Recommendations that they assisted in negotiating for purposes of submitting it to the Court to comply with the Order. Any question of lack of consent was waived by DJC when they agreed to the Plan.

The fact that DJC was not a party at the time the 1998 Compliance Order was entered is of no consequence since the Governor was a party to the agreement. The Governor, as Chief Executive Officer of the State, has authority to bind the State and all executive agencies that he administers, including the Department of Juvenile Corrections. *See Idaho Constitution, Article III, § 4, and Idaho Code §§ 67-2401, et seq.* The DJC is an executive department of state government and the director is appointed by the Governor. Idaho Code § 20-503(1) and (2).

Second, DJC contend that Recommendation 23 violates the separation of powers principles based upon *Office of Personnel Management v. Richmond*, 486 U.S. 414 (1990). DJC's contentions are without merit because that case is clearly distinguishable. The parties voluntarily entered the 1998 Compliance Agreement and agreed to the Court Plan to avoid contempt sanctions from being imposed and to remedy alleged constitutional and statutory violations. *See Jeff D. v. Kempthorne*, 365 F.3d 844 (9th Cir. 2004). In *Richmond*, the question presented was "whether erroneous oral and written advice given by a government employee to a benefit claimant may give rise to estoppel against the Government, and so entitled the claimant to a monetary payment not otherwise permitted by law." *Id.* at 415-416. The decision rested upon well established principles that estoppel may not be used against the Government. *Id.* at 419-420. The Supreme Court's opinion focused on the "particular type of claim at issue here" and that the claim "would be in direct contravention of the federal statute upon which his ultimate claim to the funds must rest." *Id.* at 424. These factors differentiate Recommendation 23 from the analysis of *Richmond*.

There is no contention that the Government could not settle the Plaintiffs' claim.¹ Further, Recommendation 23 is directed at resources already appropriated to the DJC. Idaho statutes allow state agencies to enter agreements for joint and cooperative action:

[T]o make the most efficient use of their powers by enabling them to cooperate to their mutual advantage and thereby provide services and facilities and perform functions in a manner that will best accord with geographic, economic, population, and other factors influencing the needs and development of the respective entities.

See also, Idaho Code §§ 67-2326 to 67-2333.

Idaho statutes allow the Defendants and their respective agencies to enter into joint exercises of power agreements for the provision of services or facilities that the office or agency has the constitutional or statutory power to control. Idaho Code § 67-2330. This includes use of funds to operate jointly and cooperatively by providing personnel or services within their legal power to furnish. Idaho Code § 67-2331. Public agencies may also enter into interagency contracts to perform any government service, activity, or undertaking that each agency is authorized to perform by law. Idaho Code § 67-2332. The Idaho Childrens Mental Health Services Act, Idaho Code §§ 16-2401 *et seq.*, and the Idaho Juvenile Corrections Act, Idaho Code §§ 20-501, *et seq.*, clearly authorize what is required by Recommendation 23. The Defendants have never attempted to comply with the requirements of Recommendation 23, therefore there is no basis for granting them relief from judgment. This is not a matter of financial constraint, but a lack of financial incentive because the Defendants choose not to "put their money where their mouth is." The circumstances have not changed since the Plan was submitted. "[F]ederal courts have repeatedly held that financial constraints do not allow

¹ The Court should be mindful that the Defendants' proposed the first settlement and required the Plaintiffs to waive their attorney's fees to obtain a remedy for the class. This was affirmed by the United States Supreme Court. *See Evans v. Jeff D.*, 475 U.S. 717 (1986).

states to deprive persons of their constitutional rights.” *Stone v. City and County of San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992). The Defendants have failed to carry their burden of establishing a modification of the Court Plan is warranted and they failed to tailor any requested modification to any changed circumstances.

A party must show that “a significant change in facts or law warrants the revision of the decree and that the proposed modification is suitably tailored to the changed circumstance.” *Id.* at 393. The party seeking modification of the consent decree bears the burden of establishing that the *Rufo* standard is met.

Jeff D. at 851, citing *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 384 (1992).

Third, the Defendants claim that the DJC budget has been reduced and that fewer juveniles are committed to DJC. Reinke Brief, at 6-7. The DJC’s contentions are not supported by the evidence it relies upon. There is no showing that the budgeted amounts were caused by a reduction in the juveniles with SED committed to DJC. The budget may have been reduced due to any number of factors, including budget holdbacks or economic downturns. A review of the actual budgets would be necessary to draw any conclusions for the reason. The total number of juveniles and the number with SED have actually increased the last two fiscal years. Reinke Brief, at 7. The percentage of juveniles committed to DJC has also increased. Even if you accept the DJC’s hypothesis that there has been a savings, all that means is the money that was no longer budgeted could have and should have been used to create additional services under Recommendation 23. Apparently, it was not used for this purpose but was diverted to other uses.

DJC’s argument that the reduction in the number of juveniles committed to DJC is proven by the total number of juveniles in the state’s population is flawed. First, the DJC data is inaccurate because it measures the age of the juvenile population from the 2000 Census in four categories: under

5, 5 to 9, 10 to 14, and 15 to 19. However, the data from the July 1, 2004 Census uses different categories: under 5, 5 to 13, 14 to 17, and 18-24. It is impossible to correlate the completely different sets of data with their argument.²

Fourth, the Defendants have failed to make the required showing for modifying Recommendation 23. DJC has not established that the circumstances in law or fact have changed significantly, that enforcement would violate the law, or that the requirements have become so onerous, unworkable, or detrimental to the public interest. *Jeff D.* at 854. As the Ninth Circuit noted in this case, concerns of federalism do not usurp the power of the federal courts to enforce the consent decree even if it may impose a substantial obligation on Idaho state officials. *Id.* at 854-55. The Court should deny DJC's Motion.

DATED this 10th day of February, 2006.

/s/ Howard A. Belodoff
Attorney for Plaintiff
hbelodoff@hotmail.com

² The data is irrelevant for the most part because a child under ten years old or older than 18 cannot be committed to DJC custody. *See* Idaho Code § 20-520(1)(r) and Idaho Code § 20-502(11).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person:

Jody Carpenter
Idaho Department of Health and Welfare
Division of Human Services
PO Box 83720
Boise ID 83720-0036

Nancy Bishop
Deputy Attorney General
Department of Juvenile Corrections
P.O. Box 83720
Boise, ID 83720-5100

Michael S. Gilmore
Deputy Attorney General
Statehouse, Room 210
Boise ID 83720-0010

Charles Johnson
Johnson Olson, Chtd.
P.O. Box 1725
Pocatello, ID 83201

/s/ Howard Belodoff