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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

JEFF D., et al., Plaintiffs, vs. DIRK KEMPTHORNE, et al., Defendants.	CASE NO. 80-4091 PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MEMORANDUM ON DEFENDANTS' COMPLIANCE AND UPON UNDISPUTED FACTS

COME NOW the Plaintiffs, by and through their attorneys, Howard A. Belodoff and Charles Johnson, to hereby file Plaintiffs' Reply Memorandum to Defendants' Response to Plaintiffs' Memorandum on Defendants' Compliance and Upon Undisputed Facts. Docket No. 470. The

Plaintiffs feel it is necessary to address many of the allegations made against them by Defendants' counsel on behalf of Defendants' Kempthorne and Kurtz, hereinafter "DHW." These allegations were not relevant to the task assigned to the parties in the Case Management Order, Docket No. 453, but were obviously made to portray Plaintiffs' counsel in a negative light to deflect from their own actions and their failure to comply with the Court's Orders and Consent Decrees entered in this case.

DISCOVERY DOCUMENTS

The Defendants have mischaracterized the events regarding the discovery the Plaintiffs previously served on the Defendants. The Defendants prohibited access to any of the documents Plaintiffs requested in their Requests for Production of Documents that were served on June 16, 2004, because they insisted upon a confidentiality agreement that would have required the prior disclosure to DHW of the name of any class member they wanted to contact so they could contact them first. Plaintiffs objected to this not only because there was no basis for such a condition, but also because who Plaintiffs' counsel contacted in the course of work was privileged work product and would reveal the mental impressions of counsel. Plaintiffs were also concerned that the DHW would be able to intimidate families into not talking with Plaintiffs' counsel and would provide them with misinformation to discourage them from speaking with counsel. Plaintiffs' counsel has contacted hundreds of parents over the years that have been referred to him regarding the DHW's failure to provide their children with mental health services. In not one case has there been any objection to talking with Plaintiffs' counsel. Plaintiffs' counsel would have given the option to the parent of talking with him and explained the reasons for the contact them. This could have been done without the Defendants knowing who the Plaintiffs wanted to contact or having the Defendants communicating with the Plaintiff class over matters directly related to the lawsuit. In the past the

Plaintiffs had reviewed numerous documents provided by the Defendants with the necessity of such an agreement. On September 28, 2004, Plaintiffs' counsel, in response to Defendants' concerns transmitted a proposed revised Confidentiality Agreement to the Defendants that would have protected any confidential information that was in the files from improper disclosure. The Defendants did not respond to Plaintiffs' proposed revisions and Defendants continued to deny access to all the discovery documents unless Plaintiffs agreed to their conditions.

At the August 23, 2004, hearing the Court heard the parties' arguments regarding the appointment of a court expert. On August 26, 2004, the Court issued an Order to Show Cause Why the Court Should Not Appoint Expert Witness, Docket No.434. On September 10, 2004, the Court held a hearing on the Order to Show Cause. The Plaintiffs recall the Court at the September 10th hearing, but it could have been at the earlier August 23rd hearing, instructing the parties to suspend discovery pending the decision on whether a court expert would be appointed. The Plaintiffs' understanding that discovery was suspended until the Court reached its decision on the expert is supported by the fact the Defendants did not, in compliance with Local Rule 37.1, contact counsel to resolve any discovery dispute.

On September 10, 2004 the Court held a hearing on the appointment of an expert. In compliance with the instructions the parties attempted to but failed to agree on an expert. The parties subsequently submitted the names of possible experts to the Court. Docket Nos. 442-443. On July 27, 2005, the Court issued its Order, Docket No. 451, denying the appointment of a special master. The Court also scheduled a informal status conference for August 22, 2005. During the status conference the Court indicated that Plaintiffs' counsel should have access to the documents but they would be reorganized by the fifty Recommendations and that Plaintiffs' counsel would be able to

contact the class. Immediately after this meeting, the parties agreed to draft a new confidentiality agreement that allowed access and did not require the Plaintiffs to seek the permission of Defendants to contact members of the class and their families. See Confidentiality Agreement, Docket No. 456.[1] The Plaintiffs did not delay the review of the discovery documents but were prohibited access to them by DHW during the period when the Court considered whether to appoint an expert.

REVIEW OF COMPLIANCE DOCUMENTS

The Defendants make several charges regarding the Plaintiffs' review of the DHW's documents that are completely unfounded. Response at pp. 5-9. The Plaintiffs began their review of the documents after being notified by DHW on November 1, 2005. On November 1st, Plaintiffs' counsel emailed DHW's counsel to set up a procedure for reviewing the documents the following week. See Exhibit 12. In the response to the email, DHW's counsel wrote that she would not be available until November 14th. *Id*. DHW's counsel's email indicated that the documents had not been fully reorganized and that other documents would be added. *Id*. The agreed upon procedure was for Plaintiffs to mark the documents to be copied and it would take a week for them to be copied and bate stamped. *Id*.

[1]The Defendants' assertion that Plaintiffs did not review any of the discovery documents when it represented to the Court the status of Defendants' compliance and failure to comply with the Court's Order is pure fabrication. Defendants' Response, p. 5. Plaintiffs' counsel reviewed thousands of pages of documents and made requests to the Defendants to review any documents upon which the Defendants contended established their compliance. The Plaintiffs used the list of documents that the Defendants provided to request copies of the relevant documents and to identify documents that were already in their possession to determine the need for an expert. See Exhibit 11, In Support of Plaintiffs Reply Memorandum,, Document List and Index for Request for Production. These same documents comprise the bulk of DHW's compliance documents.

Plaintiffs' counsel decided to begin his review of documents with counsel for Defendant Reinke, hereinafter DJC, because DHW indicated they had not fully reorganized their documents. During these meetings, counsels for DJC were present so that each Recommendations could be discussed and DJC documents were provided to Plaintiffs. Plaintiffs' counsel was able to obtain copies of the documents at the meetings and could take them to be read and reviewed at a later time. If Plaintiffs had questions, DJC would offer and did obtain additional information or further documentation to resolve the issue. After several meetings at DJC, the parties were able to agree on many compliance issues and this is reflected in the Joint Statement of Stipulated Facts, Docket No. 459. It is completely disingenuous for DHW to contend that Plaintiffs' counsel was not engaged in a review of compliance.

On November 8, 2005, Plaintiffs' started their review of DHW's documents. The documents were contained in boxes labeled by each Recommendation and each box contained files labeled with a corresponding Action Item number. However, the numerous documents in each file were not numbered and were not sequentially sorted so that they corresponded to lists provided to the Plaintiffs. In many cases it was difficult to determine from the description what document was being referred to from the list so Plaintiffs were unable to indicate whether it should be copied. Plaintiffs made these problems known to the support staff and requested that the files be organized and numbered to correspond to the list because Plaintiffs' counsel was spending most of his time trying to determine what documents corresponded to the list. In addition, many of the documents related only to years 2001 to 2003 but did not include updated information as of 2005. This made most of the documentation worthless for establishing compliance over the last two most recent years. Plaintiffs requested that the current documentation be provided to them. This has not been done.

For example, the documentation for Recommendation 40 regarding a committee to recommend improvements to psychiatric services for children was minutes from a single meeting dated December 14, 2001. See Exhibit 13. Most of the files, while containing thousands of pages of documents, were irrelevant or minimally relevant or did not address the corresponding Recommendation. Plaintiffs counsel's review was completely frustrated by the DHW's massive and disorganized amount of duplicative, undated, and irrelevant documents. Plaintiffs' counsel informed the DHW staff of these problems. Since DHW's counsel was not available until November 14th the problems could be not addressed until she returned. Unfortunately Plaintiffs' counsel had to be out of state on other previously scheduled business and did not return until November 21, 2005. Plaintiffs' counsel did contact Defendants' counsel, Mr. Carlson, on November 14th in route regarding the document issues and made arrangements to speak with him. On November 16th counsel telephoned Mr. Carlson to explain the problem but was unable to resolve the issues. On November 21st, counsel scheduled a meeting at DHW that all five Defendants' counsel could attend to discuss the problems. At the November 22nd meeting the Plaintiffs were informed that nothing further would be done to organize the documents and Plaintiffs would have to continue without any additional assistance. Despite the difficulties created by DHW, Plaintiffs' counsel, by the December 12, 2005 status hearing had completed the review of 45 out of 50 Recommendations, more than enough to start the copying.[2] However, not a single box had been removed from the room to be

[2]The Defendants assert that between November 22 and November 30, Plaintiffs' counsel spent minimal time reviewing DHW documents. The Plaintiffs would note that November 24 and 25 was Thanksgiving when DHW office was closed for the holiday. Being that Plaintiffs' counsel also has other pending matters and he does not have the attorney staff of the Idaho Attorney Generals Office, it is not possible for him to devote every minutes to this case. On November 28, 2005, Plaintiffs' had to argue motions for summary judgment in *Idaho Aids*

copied and bate stamped. DHW subsequently informed Plaintiffs' counsel that instead of copying the documents they were all going to be scanned and put on disk. However this was not done and delivered to Plaintiffs' counsel until January 20, 2006.

DHW's offers no explanation for the delay in providing the copies so they seek to shift the blame onto Plaintiffs' counsel. The Defendants' contention the delay was caused by Plaintiff because they reviewed the boxes out of numerical sequence is ridiculous because that was not a requirement of the scanning process. The documents were not scanned sequentially but used the number of each Recommendation as the first reference. The Plaintiff wanted to be able to review the documents quickly for copying purposes believing what they were told that copying would take a week. Plaintiffs' counsel reasonably wanted copies of the documents to work with in their offices rather than at the small table provided at DHW's offices at the times they chose to make them available. The documents could and should have been scanned as they were reviewed rather than more than a month after the status conference. Obviously, the Defendants merely wanted to delay

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Foundation v. IHFA, et al., CIV 04-155-S-BLW. Plaintiffs' counsel disagrees with the DHW's timekeeping. For example, on November 30th, counsel spent two hours at DHW reviewing documents. In addition to the time spent at DHW, Defendants fail to account for Plaintiffs' counsel time at DJC with counsel. Plaintiffs' counsel could not rely only upon documents that DHW provided to determine the status of compliance but also sought to obtain information and documents from other sources. Plaintiffs' counsel also spent an entire day attending a strategic planning meeting of the ICCMH that was not attended by Defendants' counsel or representatives of DHW who sit on the ICCMH. Perhaps if they had, they would have determined the true status of their compliance. Plaintiffs' counsel also spend a large part of the day at the Juvenile Justice/ Children's Mental Health Collaboration Work Group meeting to obtain more information and documentation on compliance issues. In addition, Plaintiffs' counsel consulted with advocacy groups and parents of children with SED to gather information on compliance issues. Some of this information and documentation was provided to the Court. See Response to Defendants Statement of Undisputed Facts and Exhibits 4-10, and Declaration of Parent of "EW." See Docket Nos. 472-479.

Plaintiffs' review until the last possible moment and prevent them having copies on a timely basis.

DHW's "claim" that their documents cannot be used to prove that the Defendants are not in compliance may in some instances be technically true because they admit their failure to comply with the Court's Orders, Consent Decrees and the Court Plan, and many do not address the requirements of the Recommendations. There also remains important documentation that the Defendants have not provided to the Court and the Plaintiffs. Where are the budget requests for funding to increase the mental healths services that were required by the 1998 Compliance Agreement and Order, the Recommendations, the Court's Order and the Court Plan? The Defendants have hired a total of eight Wrap Around Specialists. These eight, who can only carry a caseload of ten, have to serve over 18,000 children with SED who need services. Parents of children with SED have to wait up to four (4) months to have their application for services acted upon. The ICCMH has identified the failures of the Defendants' compliance on a single page. See Docket No. 473 p. 1. DHW's own Mental Health Plan for Adults and Children for FY 2005 that was submitted to the federal government as part of the Idaho Community Mental Health Block Grant Application, FFY 2005, also proves the Defendants' non-compliance and contradicts many of DHW's claims of compliance. See Docket No. 464 p. 2-6. The Court does not need to waste its time reading thousands of pages of documents concerning meetings at which nothing of any substance is decided and recommendations to improve mental health services are not made or completely ignored to determine the compliance issues. In all of these voluminous documents, the Court will not find a single case file of an actual child and family who desperately needed services but were denied because of inadequate funding and staff to provide them. The truth as to the Defendants' compliance is not buried in the documents the Defendants have heaped upon the Court but remains hidden away in the homes of parents too afraid

to leave their child alone or to be alone with them or the state and private psychiatric hospitals, county detention centers and juvenile corrections facilities after they are committed to receive services. The Court will learn the truth after it has the opportunity to hear from the parents of these children, their advocates, educators, judicial and county detention officials, and mental health providers.

THE 1998 COMPLIANCE AGREEMENT

The Defendants' Response once again raises the arguments that is solely up to their discretion as to how they chose to achieve compliance and the Court has to allow them free reign over those decisions. This argument was soundly rejected by the Court in its September 28, 2000, Memorandum Decision, hereinafter Order. Docket No. 341, citing *Jeff D. v. Andrus*, 899 F.2d 753,759-60 (9th Cir. 1989)(Addressing the proper analysis for interpreting consent decrees). This Court made it clear that "until the State complies with its promises to the plaintiffs and the orders of this Court, the Court will hold the State to its promises and actively oversee this matter." *Id.* at 17. The Court's Order was affirmed by the Ninth Circuit in *Jeff D. v. Kempthorne*, 365 F.3d 844 (9th Cir. 2004). The Defendant's rhetoric does not include any reference to the language of the 1998 Compliance Agreement and Order, Docket No. 305, that governs the Defendants' compliance with the fifty Recommendations. DHW is back to its old trick of rewriting and reinterpreting the consent decrees. See Order at 7. ("The defendants claim that they were required to *consider* the needs assessment, but that they were not required to implement all the recommendations contained therein.").[3]

[3]The Plaintiffs will not more fully address the Defendants arguments based upon their reading on *Gates v. Shinn*, 98 F.3d 463 (9th Cir. 1996) because it is premature at this stage of the

DISCOVERY LIMITATIONS

The Defendants' seek to require the Plaintiffs to have their permission to conduct further discovery by requiring disclosure of why they want a document, what action item it relates to, and why it is relevant before they allow Plaintiffs access to the document. Response at 13-14. The Defendants' request to limit discovery of relevant documents should be denied because it serves no purpose other than for harassment, is intended to prevent the Plaintiffs from ascertaining the truth about the Defendants' compliance, and invades the thinking process of counsel. In contrast to the DJC, the DHW has not been open about providing documents that Plaintiffs request. Plaintiffs' counsel has only requested documents relevant to compliance. Some of the requested documents were referenced in documents that were already provided to the Plaintiffs or relate to current activities. DHW's request to control discovery is absurd because it wants the Plaintiffs to tell them about the contents of a document without them having previously seen it. A party's discovery is not limited by an opposing party's view of relevancy or subject to their prior permission. The standard for relevancy pursuant to Rule 26 (b) (1) is broad and liberally construed in favor of disclosure. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Access to relevant facts serves the

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proceeding and because the Court Order previously addressed the same arguments. However, it is clear that the circumstances and consent decree considered in *Gates* are distinguishable from the present case. In *Gates* the provision at issue merely required "appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated." *Id.* at 467. The Court held that for a contempt order to stand the decree must be specific. *Id.* This Court's Order has already determined that the 1998 Compliance Order required the implementation of all fifty Recommendations and that it is specific enough to be is enforceable.

integrity and fairness of the judicial process by promoting the search for truth. See *Shoen v. Shoen*, 5 F.3d 1289,1292 (9th Cir. 1993).[4]

An example of the Defendants' baseless objections are Plaintiffs' requests for the Defendants' budget requests and minutes of discussions by Defendant Kurtz and his staff about new funding for services and the need for and adequacy of mental health services. The DHW's contention that the request for the internal program managers meetings minutes concerning mental health services is burdensome is without merit. The program managers are the statewide direct line supervisors of children's mental health services. It is obvious that they would discuss the adequacy and the ability of DHW to provide services. Plaintiffs do not know if they meet monthly or quarterly but they do meet to discuss these issues and there are minutes of these meetings. How burdensome can it be to find out where these minutes are kept and request copies? Similarly, the budget documents can easily be produced and are extremely relevant because as the Defendants have always recognized ,without new resources, compliance would not happen. The referrals by county detention officers to DHW for mental health services and assessments is highly relevant because, as the evidence already establishes, over 30% of the juveniles committed to DJC, approximately 130 children, are SED, 25-27 percent of the approximately 4200 juveniles on county probation and 32-37 percent of the nearly two hundred juveniles in county detention centers have a mental health

[4]The Defendants' claim with regard to a document referenced in Action Item 11G that counsel did not state why it was relevant is false. This document concerned school based mental health services that was clearly relevant to Recommendations 6 and 13. Plaintiffs' counsel identified these Recommendation for Defendants' counsel for an unstated reason.

diagnosis of SED. Docket No. 473 p.4.[5] The Court should reject DHW's latest efforts to prevent the Plaintiffs from ascertaining the truth.

The Defendants' contention regarding their compliance with Recommendations 25 and 44 provides an opportunity to the Court to review DHW's failure to comply with the Court's Orders. Response at 17. Recommendation 25 requires the "solid establishment of capacity" of the core services so that children with SED can remain in their homes whenever possible. Docket No. 465 p. 40. Recommendation 44 requires "The Cabinet Council [ICCMH] and its individual member agencies should select targets or numeric outcomes for each action on the implementation plan to be developed following submission of this report. (Priority 1)." The **"Desired Result"** for Recommendations 25 and 44 respectfully states:

> *Through implementation of the Needs Assessment recommendations related to core services, children with SED and their families will have increased access to mental health services. Core services will be established in each region, quality of services will be evaluated, and outcomes will be defined and measured.*
>
> *Relevant actions in the plan will have baseline and numeric targets or outcomes on which to measure progress over time. Targets or outcomes will be developed regionally, based on the outcomes set forth by the ICCMH in recommendation 43 and regionally set priorities. Staffing needs will be determined from the tracking information.*

The DHW contends they are in compliance with the Recommendations based upon their documents and the Plaintiffs have refused to stipulate to this as fact. If the Court merely looks at the documentation relied upon by DHW, it will understand why Plaintiffs dispute their compliance. The Service Delivery Goals are divided by DHW's seven regions and provide the "Actual" services

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[5]The Defendants reliance upon *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) is misplaced because the Court affirmed the district court after finding the denial of discovery was made only after an in camera review and a determination that the documents were only minimally relevant and because the plaintiffs suffered no prejudice.

provided in FY 2002- FY 2005 and the "Goal" for FY 2004 and 2005 allegedly set by each region for each of the core mental health services, although there is no documentation of when or what method was used to determine capacity or future targets or the facts used to set them. See DHW-25D-00085-00091. *Cf.* Exhibit 14, Mental Health Plan at p. 60. ("The Children's Mental Health program does not have the ability to report on the Core Performance Indicators at this time, nor to make projections regarding the FY 2004 data.") DHW's statistics by themselves do not comply with the Recommendations. The documents establish that in every region the services have not been available and services have declined not increased. For example, in Region III, DHW-25-00087, for almost every service less children were actually provided services than in previous years and if there was an increase it was very small. In Region IV, DHW-25-00088, Day Treatment services have not been available to children despite this Region having the most Youth with SED.[6] In comparison, Region II, DHW 25-D-000, with the lowest number of children with SED, a far higher number receive Day Treatment services. In addition, in direct conflict with the Recommendation, the Service Delivery numbers establish that out of home residential treatment and inpatient services are increasingly being used to take children out of their homes in order for them to obtain treatment. For example, in Region III, DHW-25-00087, the "Goal" for Residential Treatment in FY 2005 was 9 but the "Actual" number of children who had to be removed from their homes were 72, an increase from

[6]DHW's population figures in the Service Delivery Goals are misleading because they are based upon outdated 2000 census data and uses a prevalence rate of 4.4%, less than the lowest nationally recognized rate, in an attempt to reduce their obligation to provide services to children with SED. In the Mental Health State Plan for FY 2005, DHW states "the State of Idaho continues to use nationally obtained prevalence estimates." *Id.* at 47-`50. See Exhibit 14. In fact Idaho has determined that the number of children ages 9 to 17 who require services is far higher. *Id.* at 50.

62 in FY 2004. This clearly demonstrates that the "Goal" is nothing more than wishful thinking unrelated to the reality of the lack of community based services. Plaintiff has requested that DHW provide the documentation that the quality of services were evaluated and that outcomes were defined and how they were measured. There is no documentation in Recommendation 44 on whether the ICCMH selected the numeric targets and outcomes for each Recommendation requiring increased services in order to measure progress over time and address inadequate staffing. It is clear from the documentation provided that DHW has not complied with these Recommendations because there is a complete failure to analyze the service data and use it to increase services to children.[7] The technical nature of DHW's arguments establishes that the Court should reconsider the appointment of an expert witness. The money is readily available from the budget of the ICCMH because half way through FY 2006 their entire operating budget has gone unspent. See Exhibit 15, ($15,881 spent from a budget of $127,900.)

The Defendants' contentions that the Court indicated at the December 12, 2005 conference that it was going to determine disputed compliance issues, based solely upon DHW's documents, differs completely with Plaintiffs' recollection nor is it reflected in the Case Management Order. DHW clearly does not want the Court to hear from families or examine documents they have refused to disclose. DHW cannot rely upon their representations based upon inadmissible, self serving,

[7]DHW's reliance on figures showing increasing Medicaid expenditures as evidence of their compliance fails to disclose that these expenditures include services provided to all children not just children with SED, that many children and families are not eligible for Medicaid, and some core services are not covered by Medicaid. See Exhibit 14, Mental Health Plan at p. 52. ("One caveat is that the information system cannot ascertain which of those youth served through Medicaid funding in the private provider clinic setting have conditions serious enough to be considered a serious emotional disorder.")

unsubstantiated and heresay evidence to deprive the Plaintiffs of their right to discovery and their day in court so they can present evidence. DHW argues that "Defendants never gave up their discretion or their obligation to carry out the social policies of this State. While Plaintiffs may not like where the system is today, this is the system they bargained for. **Defendants never agreed to serve all children with SED in the State**, nor could they do so." Response at 21. Emphasis added. It appears that DHW believes that, after five more years of delay, the Court will have forgotten its prior ruling on their responsibility to all children with SED. It time for the Court to strongly remind DHW what it agreed to and what this Court and the Ninth Circuit Court affirmed: "The 1998 Consent Decree apparently sought to act upon the recommendations of the 1998 compliance review and to reach a compromise regarding the definition of the class **by extending the services provided by the State to all SED youth, not merely those in the plaintiff class.** The context of the agreement, coming as it did after the 1998 compliance review, thus supports the Court's interpretation suggested by the plaintiffs and adopted by the Court." Order at p.10. Emphasis added. DHW's admission that it is once again limiting the members of the class who can receive services violates the Court's Order. The Plaintiff request the Court immediately order DHW to provide services to all children with SED no less than what the Defendants agreed to in the Consent Decree.

DATED this 23rd day of February, 2006.

Respectfully submitted,

/s/ Howard A. Belodoff
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd 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:

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