IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES NORMAN, PAULETTE PATTERSON, WANDA HILLIARD, JOANN MITCHELL, on their own behalf and on behalf of all others similarly situated,	)	
Plaintiffs,	)	No. 89 C 1624
	)	Judge William T. Hart
v.	)	Magistrate Judge Joan B. Gottschall
JESS MCDONALD, Director Illinois Department of Children and Family Services,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CONTINUED MONITORING AND/OR DECLARATORY AND INJUNCTIVE RELIEF

Defendant Jess McDonald, Director of the Illinois Department of Children and Family Services ("DCFS" or the "Department"), respectfully submits this memorandum in opposition to plaintiffs' motion for (1) continued monitoring and/or (2) declaratory and injunctive relief redressing substantial non-compliance with the Consent Decree and the Court Order of March 10, 1995, filed on February 7, 1996 ("Motion").

Preliminary Statement

DCFS takes its obligations under federal court orders very seriously. From the day the Consent Decree in this Court was entered, the Department has devoted substantial resources, both monetary and staff, to implementing this systemic reform Decree. These efforts have continued to this day, even in the face of a caseload that has grown from 20,000 to over

52,000 children. As a result of this work, among other things, over $3 million in cash assistance has been distributed to the plaintiff parents to help them keep or be reunited with their children, new Housing Assistance Programs have been established throughout the state, and improvements far beyond this Decree have been made in DCFS's response to domestic violence. These achievements are consistent with the Department's overall reforms to mount programs that will deflect children from entering State custody and return them safely home more quickly, goals that are consistent with the best interests of these abused and neglected children and with the State's need to efficiently manage scarce public resources by reducing the costs of caring for children in foster care.

Plaintiffs' Motion does not even include a passing reference to this record. The Motion would have this court believe that DCFS has "barely implemented" this Decree (Motion ¶ 3) -- a charge that is patently false. Indeed, while asking for the extension of court-ordered monitoring, plaintiffs ignore the record of the past five years of monitoring, which, as summarized below, sets forth DCFS's wide-ranging efforts, including achievements, obstacles and improvements to overcome obstacles. Perfect compliance has not been achieved, and, despite significant efforts, there are areas of the State that are in non-compliance with certain provisions of the Decree. However, DCFS continues to make improvements. Overall, the record is one of good faith, diligence, and continued energies directed toward implementing this Decree.

Plaintiffs' Motion also overlooks the fundamental legal reality that whatever federal statutory claims they may have had five years ago, those claims no longer exist following the Supreme Court decision in Suter v. Artist M., 503 U.S. 347 (1992). The plaintiff parents here also have no constitutional claims that support the State services and programs provided under the Decree. Accordingly, as mandated under the Seventh Circuit's rulings of the past

decade, this Court has no jurisdiction over this case, and not only should plaintiffs' Motion be denied, but this Decree should be vacated.

Moveover, even if this Court finds that it has jurisdiction, there are no legal bases to impose continued monitoring on DCFS. As this case was compromised and settled, there is no adjudication or admission of liability, and thus the Decree itself provides no authority for enjoining the State to perform obligations that exceed the four corners of that agreement. Instead, plaintiffs must prove by clear and convincing evidence that DCFS is guilty of contempt -- a standard which cannot be met where, as is the case here, defendant has been reasonably diligent and energetic in attempting to comply with the Decree, even though areas of non-compliance may exist. Plaintiffs' Motion as a matter of law is simply without merit, and must be denied in its entirety.[1]

Background

Procedural Background

In 1989, the plaintiff parents filed this class action against DCFS, challenging alleged DCFS policies and practices that resulted in plaintiffs' children being taken into or remaining in State custody because plaintiffs lacked housing or subsistence means, while DCFS failed to provide housing and subsistence services. See First Amended and Supplemental Complaint, filed November 3, 1989 (included in accompanying Appendix as Exhibit 1). A preliminary injunction hearing on the claims of three of the named plaintiffs was held before Magistrate-Judge Gottschall, following which this Court issued an opinion providing for

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[1] As set forth below, the Court can render this conclusion based upon an examination of the six Monitoring Reports already submitted by the Monitor. Having already invested substantial State resources in these Reports, there is no need to burden the Court and the parties with additional discovery and hearings, as requested by plaintiffs. Motion, at 18, ¶ D. If, however, plaintiffs proffer evidence beyond the Monitoring Reports, defendant respectfully requests the opportunity to do the same.

individual injunctive relief, pursuant to the Magistrate's Report and Recommendation. Norman v. Johnson, 739 F. Supp. 1182 (N.D. Ill. 1990). DCFS appealed this decision.

On March 28, 1991, this Court entered the Consent Decree settling this action (included in Appendix as Exhibit 2). The substantive sections of the Decree set forth general policies to be promulgated, including a requirement that DCFS will provide "reasonable efforts" to prevent the removal of children from their homes because of living circumstances and lack of subsistence (Decree ¶ 4(a)); begin operation of a cash assistance program and enter into an interagency agreement with the Illinois Department of Public Aid to increase the availability of welfare benefits (¶¶ 5-6); establish a new housing advocacy program (¶ 7); develop internal mechanisms to access other non-DCFS services (¶ 8); and issue other general policies and notices, and hold appeals (¶¶ 9-10). The balance of the Decree established procedures to implement the substantive portions of the Decree and to resolve disputes between the parties prior to court proceedings (¶¶ 11-23). These procedures included the appointment of a monitor "for a period of four years from July 1, 1991." (¶ 14).

Prior to the expiration of that period, the parties discussed and reached agreement on an Agreed Order providing for an extension of the Monitor's term, as well as four other obligations by DCFS. See Agreed Order (attached as Appendix A to plaintiffs' Motion). The original compromise reached by the parties provided for a two-year extension to monitoring; however, this Court on its own motion reduced the extension to one year, referring to the Seventh Circuit precedent cautioning against lengthy consent decrees.

During this past year, the Monitor issued a Sixth Monitoring Report in May 1995, and submitted two shorter reports on specific areas, pursuant to her own recommendations and with the agreement of the parties. See Statewide Review Housing Advocacy Programs, December 1994, submitted March 30, 1995 (an independent study of the Housing Advocacy

Program); Cook County Division of Child Protection Compliance Review, December 1994, submitted March 10, 1995 (examination of level of compliance of DCP). The Department continued implementation, including working with the Monitor on the recommendations in the Sixth Report and providing the Monitor with data (Agreed Order ¶ 2), appointing an ombudsperson (id. ¶ 3), working on developing a court plan (id. ¶ 4) and hiring a housing specialist (id. ¶ 5). On December 11, 1995, defendant provided plaintiffs' counsel and the Monitor with a formal written response to the Sixth Report ("Response"), even though one is not called for under the Decree. Decree ¶ 16 (Response included in Appendix as Exhibit 3; accompanying letter from N. Eisenhauer to L. Heybach and D. Redleaf, dated December 11, 1995, included as Exhibit 4). As noted in the Response, the Department disputed some of the Monitor's conclusions on non-compliance because, for example, the Monitor was attempting to measure Norman compliance by extrapolating data from the general DCFS population (even when Norman-specific surveys indicated high rates of compliance) (e.g., Response, 17-18, 8-10); or the Monitor imposed obligations beyond the terms of the Decree (id. at 24-25, 27-28, 39-46). Nonetheless, DCFS responded favorably to all but six of the 49 recommendations in the Sixth Report, and of these six, four recommendations were on issues that were not under this Decree.[2] Response, 1-2 (summarizing), 35, 38, 41 (individual responses). DCFS also set forth its implementation activities. Response, 3-6.

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[2] Thus, there are factual disputes as to the Monitor's findings of non-compliance. However, these need not be resolved in order to decide the Motion, because even assuming arguendo that the Monitor's findings of non-compliance are correct, these findings are not sufficient to justify the injunctive relief plaintiffs seek. All of the Monitor's reports have been previously filed with the Court. Defendant can provide the Court with additional copies upon request. For the Court's information, the Monitoring Reports are dated as follows: First Monitoring Report (March 1, 1992); Second Monitoring Report (September 28, 1992); Third Monitoring Report (March 17, 1993); Fourth Monitoring Report (August 23, 1993); Fifth Monitoring Report (March 15, 1994); and Sixth Monitoring Report (May 24, 1995).

From the outset, DCFS has worked diligently to implement the terms of the Decree, and to work with the Monitor and her assistant. As set forth below, this is consistently reflected in the monitoring reports submitted to the Court. In light of the Department's implementation efforts, and in view of the costs of monitoring (a total of $431,276 since 1991, with an annual cost of approximately $107,819), DCFS decided that further court-ordered monitoring beyond February 15, 1996 was not justifiable. See accompanying Affidavit of Mary Sue Morsch, ¶ ¶ 2-3. Accordingly, although DCFS was willing to work on continued implementation of services to reunite families and deflect children from entering State custody, DCFS was not willing to continue to invest limited time, personnel and resources into federal court-ordered monitoring.

Plaintiffs then filed this Motion asking this Court to impose monitoring on DCFS, although plaintiffs "do not here claim across-the-board non-compliance with the Decree. . . ." Motion at 1. Ironically, in moving to extend monitoring, plaintiffs overlook the product of the past five years of monitoring, and instead claim in sweeping, unsubstantiated generalizations that "several programs and procedures are barely implemented at all . . . [or] have not begun . . . ." (Motion ¶ 13). This assertion is patently untrue, as revealed in a review of all six of the Monitor's Reports.

Summary of Monitoring Reports

Briefly, the Monitor's Reports taken together demonstrate that the Department has worked continuously since the entry of the Decree to implement the Decree, even in the face of budget cuts, an increasing caseload, and changes in its administration.[3] Plaintiffs' implication

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[3] See, e.g., Second Rep., General Statement, at 1-3; Third Rep., General Statement, at 1-2.

(also attributed to the Monitor) that the Department focuses on implementation only "during monitoring activities" (Motion ¶ 24(a)) is baseless.[4]

As for DCFS's efforts overall, the Monitor stated as early as March 2, 1992, one year after the entry of the Norman Consent Decree, that DCFS

> has developed a program through the provisions of the Norman Consent Order which is on the 'cutting edge' of progressive child welfare practice. The DCFS staff involved have been exceptionally competent and committed individuals who have worked beyond what is normally expected in order to comply with this Order. . . . Many families have already benefitted from the programs developed from this Decree. Children have remained at home who might otherwise have been placed in foster care. Other children have returned home sooner to their parents because of these new programs. These efforts are to be applauded.

First Rep., Conclusion, at 21 (emphasis added). In the Second Report, the Monitor described the Decree as "a bench mark in terms of collaborative efforts between the child welfare community and the housing community." Second Rep., Conclusion, at 34. She went on to state her estimate that "1,167 children from 467 families have been either spared the trauma of separation from their families or have been reunited more quickly because of the Norman Consent Decree." Such laudatory comments can be found in every Monitoring Report, including the most recent Sixth Report.[5]

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[4] Plaintiffs also state that "[w]hen the Decree was entered almost five years ago, the parties anticipated that the programs and procedures it establishes would be fully operational by the end of 1991. They are not." Motion ¶ 13. The implication, of course, is that the Department has failed to live up to an expectation that even in hindsight remains reasonable. However, as the Monitor stated in her First Report, "since the inception of the implementation of the Consent Decree, it became clear that in order to produce high quality products and work staying within some of the designated time frames was not possible. Thus it was agreed upon by all parties that certain deadlines be extended. First Rep., Introduction, at 1.

[5] See, e.g., First Rep., 19, regarding the issue of referral services ("DCFS is in compliance with the development and distribution of a localized referral manual by July 1, 1991. The Department did a tremendous amount of work to produce a document of such magnitude in a limited amount of time and thus, should be commended for this effort."); (continued...)

These citations to the Monitor's laudatory comments are not to suggest that implementation of the Decree has been trouble-free, or even that there are no outstanding areas of concern or non-compliance. However, these comments show that, contrary to plaintiffs' implications, the Department has worked diligently and in good faith to implement the Decree, and has made concerted efforts to solve problems that have become apparent, and indeed could only have become apparent, during the course of its implementation efforts. This is simply not a record that evinces a pattern of willful violations of this Decree, nor certainly of any contumacious behavior by DCFS. The Monitor's Reports on several major areas is illustrative:

Reasonable Efforts.[6] The Decree requires the Department to make reasonable efforts to prevent removal and reunify families through the provision of certain services, unless such efforts would not eliminate the need for removal. Decree ¶ 4. By March 1, 1992, one year after the entry of the Decree, the Department had created the Cash Assistance Program and the Housing Assistance Program, negotiated interagency agreements with CHA and DPA,

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[5](...continued)
Second Rep., 18, discussing interagency agreement with CHA ("[The agreement] represents a benchmark in collaborative efforts between the housing and child welfare communities. DCFS should be applauded for its persistence in this effort."); Third Rep., 7, discussing Monitor's detailed analysis of Cook's North office and Department's Response ("The Department has shown a conscientious effort to be responsive to the recommendations of the Monitor's Report, [yet] North office must still be considered to be in non-compliance."); Fourth Rep., 35, discussing HAP ("[Low utilization] is particularly distressing in light of the good faith efforts that the Department is currently making to strengthen the relationship between DCFS and the HAP agencies.); Sixth Rep., 1, ("[DCFS] under the visionary leadership of Director Jess McDonald has embarked upon a massive strategy for change. . . . if the reform efforts are successful, all aspects of the Norman Consent Decree will have a greater chance to be implemented. The Monitors and the Plaintiffs' counsel have had input into the reform efforts to ensure inclusion of Norman Consent Decree programs and issues.").

[6] For sections of Monitoring Reports discussing reasonable efforts, see First Rep., 5-6; Second Rep., 14-15; Third Rep., 14-16; Fourth Rep., 23-24; Fifth Rep., 18-22; Sixth Rep., 35-40.

created a manual of referral services, trained workers, and promulgated a number of policies and procedures designed to facilitate the delivery of the new services. See First Rep., 6-21. Although the Monitor and the Department had also devised a monitoring plan to be used to evaluate the individual programs set up under the Decree, the parties had not come to an agreement on a form to be used to document the exertion of "reasonable efforts" in individual cases. First Rep., 2-3, 5-6. Instead, the parties agreed to delay creation of the form, and to work with the B.H. Reform Panel which was also considering the same issue. First Rep., 5-6. In every subsequent year, DCFS continued to provide hard services through Norman programs in an effort to prevent placement and reunify families. See First-Sixth Reports. The Department, plaintiffs' counsel, and the Monitor, in conjunction with the B.H. panel, also continued to work together to design an appropriate reporting form. Second Rep., 15; Third Rep., 16.

In every year of implementation, the Monitor, based on a random sample of cases, had determined that the Department's efforts to provide hard services had successfully prevented children from being placed in foster care due to poverty. See, e.g., Third Rep., 14. In 1993, the Department finalized the Comprehensive Social Assessment Form, which was approved by the Monitor after testing in a pilot project. Fourth Rep., 23; Fifth Rep., 19. By 1994, the Monitor had determined that the Department was in compliance with the Decree's reasonable efforts requirement, with the exception of Cook County where the Monitor questioned the impact of such efforts on reunification cases. See Sixth Rep., 39. The Department, in its Response to the Sixth Report took issue with the Monitor's finding of non-compliance, arguing, as the Monitor had conceded in earlier reports (Fourth Rep., 23) that there was no way to measure any direct correlation between the number of children actually returned home and the Department's "reasonable efforts," and that a survey of the Comprehensive Social Assessment

forms had revealed that the Department had made reasonable efforts in anywhere from 80-98% of the cases in Cook County. See Response, 12-18.

Cash Assistance Program.[7] The Decree's requirement that DCFS "begin operation of a cash assistance program" is a centerpiece of the Decree and has been in place since 1991, with a separate line item appropriation in the DCFS budget.[8] The Decree also requires the Department to maintain detailed records of the cash assistance grants made to Norman families. Decree ¶ 5(b). In the first year of operation of the program, the Department distributed cash assistance,[9] although admittedly, all parties hoped for greater utilization in the future. See Second Rep., 9, 13 (Department's efforts described as "commendable" and "in compliance" although utilization relatively low.).[10]

In the next six month period, the expenditures increased dramatically, with a 99% increase overall and a 157% increase in Cook County. Third Rep., 11-14 ("this is a dramatic increase and DCFS should be commended. . . . [However], efforts need to continue to be

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7 For Monitoring Report discussions of the Cash Assistance Program see First Rep., 7-8; Second Rep., 9-10, 13-14; Third Rep., 11-15; Fourth Rep., 22-23; Fifth Rep., 15-18; Sixth Rep., 29-35.

8 The appropriation for cash assistance and housing referral services increased in Fiscal year 1996 to $1,997,200. Response, 4.

9 Although the Decree directs the Department to provide cash assistance grants of up to $800, the Department, in the first year of implementation, raised the cap to $2,000 in certain circumstances. First Rep., 5.

10 In the spring of 1992, HAP agencies in Cook County ran out of cash for a brief period of time. Second Rep., 13. Although the Department rectified the problem, id., the problem continued to recur in every reporting period through November, 1995. Sixth Rep., 35, 51, 53. It has been determined that the shortages occur because of problems in the reporting and record keeping of the local agencies, who distribute cash assistance directly. See Third Rep., 5; Response, 33. These agencies receive substantial cash advances from DCFS so that checks to individuals can be distributed quickly. As the Monitor's Sixth Report and the Department's Response indicate, the problem is expected to be rectified by the new automated data systems. See Sixth Rep., 35; Response, 33.

strengthened, particularly in Cook County."). Since that increase, cash assistance outlays have consistently increased, culminating in the "largest cash expenditure to date" in 1994. Sixth Rep., 29. In fact, the Department has, since its inception, provided cash subsidies totaling $3.8 million to cash assistance agencies and HAP agencies throughout the State through the Cash Assistance Program. Response, 4. Of that amount, nearly $3 million has gone directly into the hands of Norman families.[11]

As for the Decree's reporting requirements, the Department initially provided the required information by way of manual logs. See, e.g., Third Rep., 14; Fifth Rep., 18. In 1994, the Department began serious efforts to design a fully automated state-of-the-art system for collecting cash assistance data; the system is expected to become operational in March 1996. See Sixth Rep., 34; Response, 16. The problem with the current system is that it under reports the Department's cash outlays. Fifth Rep., 18.

Housing Services.[12] It is undisputed that the housing program developed under the Decree, known as the Housing Assistance Program ("HAP"), is a great success. See Sixth Rep., 54 ("[T]he Housing Advocacy Program created by the Norman Consent Decree is a state of the art program addressing the housing needs of child welfare families. Over the course of the three years of implementation, many of the barriers impeding successful implementation have

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11 The Monitor has consistently found the Department to be in compliance with regard to the Cash Assistance Program, with the exception of Cook County where, the Monitor believes, expenditures do not match projected needs. See, e.g., Sixth Rep., 31. The Department, as indicated in its Response, does not agree that it is in non-compliance, as DCFS disputes the Monitor's speculation as to the "projected need"; however, DCFS is implementing the recommendations in an effort to increase utilization. See Response, 15 (describing new procedures for streamlining process).

12 For discussions of HAP see First Rep., 14-17; Second Rep., 23-30; Third Rep., 24-28, Fourth Rep., 34-37; Fifth Rep., 34-40; Sixth Rep., 51-55.

been addressed and corrected.").[13] The establishment of the HAP program is a story of cooperation, diligence, good faith and flexibility on the part of the Department and the Monitor and her assistant who played a major role in developing the program. See Second Rep., 23; Third Rep., 25.

Domestic Violence Program.[14] The Monitoring Reports also set forth a record of good faith and diligence as to DCFS's response to domestic violence, with activities that far exceed the requirements of the Decree. Sixth Rep., 59 ("The Department is in full compliance and should be applauded for its efforts."); Response, 39-45. The Department has gone above and beyond the requirements of the Decree, creating a Domestic Violence Task Force, the position of Domestic Violence Specialist, and training numerous staff on domestic violence issues. Currently, among other initiatives, the Department's General Counsel is exploring the possibility of developing a Domestic Violence Advocacy Program cooperation with the Juvenile Court of Cook County. Response, 44.

Response to Plaintiffs' Five "Critical Problems"

Plaintiffs' Motion makes no mention of any of the above accomplishments, nor any of the implementation activities listed in the Department's response. Response, 4-6. Plaintiffs focus solely on five "critical" problems they contend persist, including issues relating to 1) monitoring activities, 2) certification, 3) cash assistance, 4) screening and return home activity, and 5) utilization of public aid benefits. Each of these areas, with the exception of monitoring, was addressed in the Response, and plaintiffs have yet to substantively articulate any

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[13] The Monitor also continues, "[n]evertheless, there is still room for improvement," id., citing the difficulties with the delivery of cash assistance, as described above.

[14] For discussions of Domestic Violence Programs see First Rep., 4; Second Rep., 11-12; Third Rep., 29-31; Fourth Rep., 38-41; Fifth Rep., 43-44; Sixth Rep., 59-65.

disputes they may have with the substance of the implementation plans or other response set forth by the Department. Moreover, in each of these areas the record refutes plaintiffs' assertions.

(1) Monitoring Activities

Plaintiffs cite no evidence that the Department has practiced "delay and inaction" leading to an inability by the Monitor to "carry out her commitment." Motion ¶ 18. Indeed, the breadth and detail in the six Monitoring Reports themselves belie this contention. In these Reports, the Monitor has acknowledged the assistance DCFS has provided in assembling the necessary data, despite also pointing out admitted problems with data. See First Rep., 2-3, discussing development of data systems and monitoring activities; Second Rep., 3-4; Third Rep., 5-9; Fourth Rep., 8-9; Fifth Rep., 9; Sixth Rep., 18. Plaintiffs' complaints (indeed, their entire Motion) appear to be directed solely to imposing greater data collection costs and monitoring, without any regard to the actual provision of services -- which, of course, was the real focus of the Decree. DCFS's decision to oppose further monitoring is based in large measure on the reluctance to direct scarce resources from service delivery to simply monitoring and information-gathering.

For example, plaintiffs' assertions about data on cash assistance completely ignores the actual operation of the program. As noted in the Sixth Report, capturing aggregate and specific data on cash assistance has been difficult "since the inception" of the program, Sixth Rep., 34, but this can be attributed to the decentralized nature of the program itself (cash advances are given to local community agencies so that funds can be rapidly provided to clients) and the manual record-keeping used. See Norman Payment Authorization System General Design Document, 4-7, (included as Tab B of Ex. 3; see also Third Rep., 14.) With the Moni-

tor's assistance, building on this experience, DCFS has developed an automated system and is now completing this work. Sixth Rep., 34; Response, 15.

Plaintiffs also cite the requirement of "reasonable efforts" documentation. Motion ¶ 20. However, the Monitor has found the forms being used by DCFS for documentation to be sufficient, although concerns remain with worker training and follow-through on properly completing the forms. Fifth Rep., 19; Sixth Rep., 36. Such management issues are not unexpected in a system that includes over 3,000 staff and 160 private agencies, and are being addressed by DCFS in its overall management and training reforms. These issues, however, do not give rise to the level of contempt of court.[15]

Finally, plaintiffs cite defendant's voluntary, good-faith actions in informing plaintiffs' counsel (as well as plaintiffs' counsel in other cases) of plans that are being developed to restructure portions of the entire child welfare system. Motion ¶ 23. Plaintiffs' speculation that this would somehow negatively affect this Decree is unwarranted -- especially in view of the Department's manifest good faith intentions in sharing its initial plans long in advance of full development and implementation, and the Department's inclusion of the Monitor and her assistant (in their individual capacities, not as Norman monitors) in helping to design this restructuring. Id. ¶ 23 n. 2. It strains credulity that a defendant's efforts to openly keep plaintiffs informed should be twisted into a reason for imposing court-ordered monitoring.

(2) Norman Certification

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[15] Plaintiffs also list specific issues where they allege insufficient data collection, such as providing notice of appeal rights and risk assessment practices. Motion, ¶ 21. Again, plaintiffs' complaint is simply about data, and suggests that major investments in simply reporting and collecting data is required as distinct from actually doing the substantive work under the Decree, or providing the services. There is no suggestion from the plaintiff parents that they have not been receiving adequate notice, for example, to suggest that compliance with the substantive requirements of the Decree is problematic.

Plaintiffs' next complaint centers around the Department's efforts to certify Norman eligible families, which is a process not required by the Decree but instead devised, with input from the Monitor, to create systems and procedures for tracking Norman clients. Even the Monitor has questioned its continuation:

> [a] large data system developed to capture the information is questionable. It is bureaucratic; the certification process itself does not provide help to the family. Since the determination to access services has administrative safeguards, it seems consideration not to certify has merits. The Department can place the emphasis upon service delivery and the development of data collection to determine who receives the service, for what purpose (food, clothing, shelter, etc.), issues which are the purpose of the Norman program."

Sixth Rep., 28. Moreover, even the statistics identified by plaintiffs show that the Department is correctly certifying Norman families in 76 to 83 percent of the cases. Motion ¶ 25. Again, this does not support a finding of contempt.

(3) Timely Cash Assistance

As the Monitor's Reports reveal, the Department has consistently increased its outlays of cash assistance every year, culminating with record distributions in the last fiscal year. Second Rep., 9; Third Rep., 11-14, Fourth Rep., 5-6; Fifth Rep., 16; Sixth Rep., 29. The problem of cash shortages experienced by local HAP agencies is being addressed, as noted above. The agencies do not always notify DCFS sufficiently in advance when their cash advances are low, and thus there is a time lag between depletion and the next cash advance from the Department. This situation has been promptly resolved every time it has occurred, and should be alleviated by the automated cash assistance system. See Sixth Rep., 34-35; Response, 33.

(4) Screening and Return Home Activity

Plaintiffs complain about defendant's activities with regard to the Decree's requirement, found at ¶ 9(f), that the defendant promulgate rules, policies, and procedures as

appropriate, "in cases where court action is necessary to return children home or to further reunification." Decree ¶ 9(f). The subsection further provides that "it shall be the duty of the caseworker to initiate such court proceedings promptly." Id. Although the Department promulgated a rule within the first year of implementation (First Rep., 9), all of the parties eventually agreed that the rule was not having the desired effect. Second Rep., 16. In response, the Department and plaintiffs' counsel have attempted, over the last several years, to come to some sort of agreement as to an effective protocol or procedure. As the monitoring reports indicate, the fault for the lack of progress does not lie wholly with the Department. See, e.g., Sixth Rep., 40-41 (describing impact of Joseph Wallace case); Fifth Rep., 24 (describing problems with Cook County Juvenile Court); First Rep., 10 (describing impact of continuances that are "beyond the control and responsibility of DCFS").

Indeed, much of the difficulty stems from the fact that DCFS is not the party that petitions the Juvenile Court to return children home. Rather, it is the plaintiff parents here, through the attorneys at Juvenile Court (usually the Public Defender's office) who must do so. In an effort to try and resolve this issue, defendant and plaintiffs agreed in the Agreed Order that DCFS would submit a plan to plaintiffs' counsel and the monitor. Agreed Order ¶ 4. This plan has not been completed, although DCFS is continuing to work on it, including recently meeting with plaintiffs' counsel. The work has been complicated, however, by changes and vacancies in the legal staff for the Department, the Cook County Juvenile Court, and the Cook County Public Defender's Office (neither the current DCFS General Counsel nor the current chief of the DCFS Juvenile Court unit were at the Department when the Agreed Order was negotiated), as well as the pressures of Juvenile Court and the necessity of working with the Cook County Public Defender's office. Nonetheless, DCFS is still attempting to develop a plan that will work. This does not require monitoring, however, to complete.

(5) Public Aid

Plaintiffs' own Motion admits that DCFS has complied with the Decree, "including developing liaisons within DCFS to work with DPA, developing a streamlined process for DCFS to access benefits for eligible clients and training DCFS workers on utilization of DPA resources." Motion ¶ 29; compare Decree ¶ 6. The Monitoring Reports support this conclusion. See First Rep., 12-13; Second Rep., 20-21; Third Rep., 22-23; Fourth Rep., 31-32; Fifth Rep., 30-32; Sixth Rep., 46-48. The Decree does not require DCFS to guarantee a certain level of utilization of the dwindling welfare benefits available in this State. Plaintiffs' assertion in this regard is simply not grounded in any requirement of this Decree.

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In sum, plaintiffs have overlooked the monitoring record here and have misread the Decree. Not only does the record fail to support plaintiffs' Motion, but the picture that emerges is of an agency that has worked diligently and invested time, staff and resources to fulfilling the obligation under this Decree. Full compliance is still being worked on in some areas, but given the Department's overall diligence, it is not legally sound, justifiable or fair for this Court to respond to these efforts by enjoining the Department and imposing what amounts to contempt sanctions.

Argument

I. THERE IS NO LONGER A "SUBSTANTIAL CLAIM UNDER FEDERAL LAW" TO SUPPORT THE CONTINUED ENFORCEMENT OF THIS DECREE

The Seventh Circuit has held that "entry and continued enforcement of a consent decree regulating the operation of a governmental body depend on the existence of a substantial claim under federal law. Unless there is such a claim, the consent decree is no more than a contract, whose enforcement cannot be supported by the diversity jurisdiction and that has in

court no more force than it would have outside of court." Evans v. City of Chicago, 10 F.3d 474, 480 (7th Cir. 1993) (en banc) cert. denied, 114 S. Ct. 1831 (1994) (citing League of United Latin American Citizens v. Clements, 999 F.2d 831, 847 (5th Cir. 1993)) (en banc). This is especially true where, as here, the decree "requires continuing supervision by the district court," and implicates the principles of federalism by "entangl[ing] an arm of the federal government in the administration of another sovereign . . ." Evans, 10 F.3d at 477; see also Rizzo v. Goode, 423 U.S. 362, 380 (1976) (reversing injunction against city officials because of the application of "principles of federalism"). Thus,

> the court must ensure that there is a substantial federal claim, not only when the decree is entered but also when it is enforced, and that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the officeholder.

Evans, 10 F.3d at 479 (discussing "a series of decisions in this circuit" over the past decade supporting this holding).

Accordingly, the court must engage in its own inquiry as to the "propriety or scope of an injunction," and may refuse to enter injunctive relief, even where "the injunction is contained in a proposed consent decree." ACORN v. Edgar, 56 F.3d 791, 797 (7th Cir. 1995). See Kasper v. Bd. of Election Comm'rs, 814 F.2d 332 (7th Cir. 1987) (refusing to enter consent decree that would propel court into regulating local elections). As set forth below, this inquiry makes clear that there is no longer a "substantial claim" under federal statutory or constitutional law. Thus, there is no federal jurisdiction even to support the continuation of this Consent Decree, let alone the relief plaintiffs seek in their Motion.

A. Plaintiffs No Longer Have Any Federal Statutory Claims

The gravamen of plaintiffs' action was that the federal Adoption Assistance and Child Welfare Act of 1980 ("AAA"), 42 U.S.C. §§ 620-26 (Title IV-B of the Social Security

Act), 670-79a (Title IV-E), provided the plaintiff parents with privately enforceable rights to cash, housing and other subsistence assistance, and to other "reasonable efforts" to prevent the removal of children from plaintiffs and to provide for family reunification. See Norman v. Johnson, 739 F. Supp. 1182, 1184 (N.D. Ill. 1990) (Hart, J.) (quoting plaintiffs' complaint). Defendant argued at the time that the AAA did not provide such individual rights, either under 42 U.S.C. § 1983 or as an implied right of action. Similar arguments had already been made on this same question in other cases against DCFS in this district. See B.H. v. Johnson, 715 F. Supp. 1357, 1403-04 (N.D. Ill. 1989) (Grady, J.) (no right to "reasonable efforts" or substantive services under AAA); Aristotle P. v. Johnson, 721 F. Supp. 1002, 1011 (N.D. Ill. 1989) (Williams, J.) (same); Artist M. v. Johnson, 726 F. Supp. 690, 696-97 (N.D. Ill. 1989) (Shadur, J.) (right to "reasonable efforts" does exist), rev'd sub nom. Suter v. Artist M., 503 U.S. 347 (1992).

This Court and the Magistrate considered this debate at length. Norman, 739 F. Supp. at 1185-87, 1203-09. The Court examined not only the "reasonable efforts" clause set forth under 42 U.S.C. § 671(a)(15), but also the related provisions under Titles IV-B and IV-E regarding coordination of services, case plans and a case review system. See 42 U.S.C. §§ 622, 627, 671(a)(4), (16), 675(l); Norman, 739 F. Supp. at 1203-05 (setting forth provisions). The Court rejected Judge Grady's ruling in B.H. that "Congress intended Title IV-B to be an expression of goals and guiding principles" (B.H., 715 F. Supp. at 1401); the "reasonable efforts" clause did not create an individual right (id.); and an individual federal right to case plans and a case review system did not give rise to "sweeping rights" to services. Id. at 1402. See Norman, 739 F. Supp. at 1185-86. Instead this Court agreed with Judge Shadur's ruling in Artist M. that the "reasonable efforts" clause did create an individually enforceable federal right

which entitled the plaintiff parents to "preventive and reunification services." Id. at 1207 (Magistrate's Report and Recommendation); see id. at 1187.

Since the date of the Court's opinion in 1990, and the entry of this Consent Decree in 1991, the Supreme Court reversed Judge Shadur's opinion in Artist M. The Court held that the "reasonable efforts" clause lacks any statutory guidance as to how such efforts are to be measured, and thus fails to establish an individually enforceable federal right. Suter, 503 U.S. at 359-60. Thus, the linchpin of the purported federal claims asserted by plaintiffs no longer exists.

Plaintiffs likely will point to the other provisions of Titles IV-B and IV-E previously construed by this Court for support that a substantial federal claim still remains in this case. However, it is plain from both the Magistrate's Report and Recommendation and this Court's opinion that the ruling on the "reasonable efforts" clause -- namely that there was a federal right to require the State to make "reasonable efforts" to "prevent or eliminate the need for removal of the child from his home, and . . . to make it possible for the child to return to his home . . ." (42 U.S.C. § 617(a)(15)) -- formed the basis for this Court's holding that the statutory provisions regarding coordination, case plan and a case review system created rights to substantive services, as distinct from merely procedural or monitoring activities. See Norman, 739 F. Supp. at 1185-87 (construing only the "reasonable efforts" clause), 1188 (finding rights for parents in AAA because statute "provides for the continued unification or reunification of a family . . ."), 1207 n.6 (Magistrate's Report and Recommendation rejecting Judge Grady's ruling limiting the rights created by the case plan and case review provisions, because monitoring is of no use "without efforts aimed at family unification or permanent placement . . .").

Moreover, under the reasoning in Suter, the specific statutory provisions cited by plaintiffs to coordination of services, case plans and case reviews are themselves not sufficiently

well-defined to create the individually enforceable rights plaintiffs seek. Unlike the plaintiff class of children in B.H., the parents here did not seek to enforce the mere procedures to have case plans developed and case reviews held. B.H., 715 F. Supp. at 1402. Rather, plaintiffs cited these provisions in order to assert rights to cash assistance, housing and other services. See First Am. Compl. at 28-29 (prayer for relief). In response to DCFS's argument that the AAA was too "vague and amorphous" to create such federal rights, the Magistrate wrote that "[w]hat difficulty there is inheres rather in the lack of any clear definition of what is specifically required. 'Coordination' is required, but it is not clear from the statute exactly what coordination entails. 'Reasonable efforts' are required, but 'reasonable efforts' are nowhere defined." Id. at 1207. See Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444, 448 (1989) (among other things, in order to create enforceable rights, statute must not be "'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.'") (quoting Wright v. Roanoke Redevelopment Housing Auth., 479 U.S. 418, 431-32 (1987)); see also Pennhurst State Sch. & Hosp. v. Haldeman, 451 U.S. 1, 17 (1981) (federal spending statutes must "unambiguously" impose conditions on States in order to create enforceable rights).[16]

This lack of definition, which permeates all of the provisions cited by plaintiffs, is fatal. As the Supreme Court ruled in Suter:

> No further statutory guidance is found as to how "reasonable efforts" are to be measured. This directive is not the only one which Congress has given to the States, and it is a directive whose meaning will obviously vary with the circumstances of each individual case. How the State was to comply with this directive,

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[16] Section 1320a-10 of the Social Security Act explicitly does not alter this analysis or limit the effect of the Suter opinion insofar as it applies the precedent of Pennhurst and its progeny. See 42 U.S.C. § 1320a-10. This section only limited any argument, as stated in footnote 10 of Suter, that could be made that a statutory provision would not create a federal right simply because it was included as an item in a State plan required by the Social Security Act. Id.

and with the other provisions of the Act, was, within broad limits, left up to the State.

Suter, 503 U.S. at 360. Likewise, as the Magistrate noted, no statutory guidance is found as to "coordination" or the return home services to be provided in the case plan or reviewed at the case review; indeed, as in Suter, the meaning of these requirements "will obviously vary with the circumstances of each individual case."[17] Id. Accordingly, the individual federal rights under the AAA previously asserted by plaintiffs simply do not now exist.

Plaintiffs apparently contend that defendant is somehow barred from raising Suter now because the ruling was not raised when it was issued in 1992. Tr. of 2/12/96 Hearing at 9-10 (included in Appendix as Exhibit 6).[18] However, plaintiffs misunderstand the nature of the obligation inherent in the exercise of federal court authority that plaintiffs seek to invoke in their Motion. As the Seventh Circuit has held repeatedly, this Court must independently satisfy itself that there are substantial federal grounds for the continued enforcement of this Decree. See Evans, 10 F.3d at 478; Kasper, 814 F.2d at 338 ("A judge has obligations to other litigants, who may depend on the availability of [the court], and to members of the public whose interests may not be represented by the litigants."). Even if the parties were in agreement as to the issuance of an injunction, the Court "has the power to refuse even when both parties are pressing it to approve . . ." ACORN, 56 F.3d at 797. See also Firefighters Local Union No.

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17 The individual injunction proceedings in this case underscore this point. See Norman, 739 F. Supp. at 1207-08 (finding that Gina Johnson's case plan complied with federal law while Wanda Hilliard's and Joan Mitchell's did not).

18 Plaintiffs' counsel also incorrectly suggested at the hearing on this Motion that the pendency of the Artist M. case was acknowledged in this Decree. Id. No such acknowledgment is contained in the Decree. Contrast B.H. v. Suter, No. 88 C 5599, Consent Decree at 4 (N.D. Ill. Dec. 20, 1991) (acknowledging Artist M. appeal) (relevant sections included in Appendix as Exhibit 5). Indeed, when this Consent Decree was entered by the Court on March 28, 1991, certiorari had not yet been granted in Artist M. See Suter v. Artist M., 500 U.S. 915 (1991) (granting certiorari).

1784 v. Stotts, 467 U.S. 561, 576 n.9 (1984) (the court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree") (quoting Railway Employees v. Wright, 364 U.S. 642, 651 (1961)).

Moreover, the parties here are not in agreement as to the issuance of further injunctive orders by this Court. Thus, unlike even the precedent cited by the Seventh Circuit, this Court does not even have an agreement between the parties to serve as a basis for the exercise of federal jurisdiction over the State. The fact that the State never previously brought the Suter decision to this Court is irrelevant.[19]

B. The Constitutional Claims Asserted In The Complaint Are Without Merit

Plaintiffs' complaint also invokes the First and Fourteenth Amendments of the Constitution. Compl. ¶¶ 44(a), 45(b). Defendant challenged the legal sufficiency of the claims before the Magistrate, although these constitutional issues were never reached as the Magistrate found that plaintiffs had stated statutory claims under the AAA.

Plaintiffs have simply not asserted cognizable constitutional claims. Plaintiffs' assertion apparently is that DCFS has infringed upon their fundamental family rights by taking or keeping custody of their children without providing for cash assistance, housing or other services that would avoid this infringement. However, as the Supreme Court and Seventh Circuit have repeatedly explained, the Bill of Rights acts to limit the power of government, and "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not

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[19] To the extent that plaintiffs' argument is based on laches, they clearly cannot make the requisite two-prong showing of both unreasonable delay and prejudice to plaintiffs. See, e.g., Smith v. City of Chicago, 769 F.2d 408, 410 (7th Cir. 1985) ("Laches may be invoked only when unreasonable delay and prejudice of the other party coincide.") Indeed, instead of any prejudice to plaintiffs, any supposed delay in raising Artist M. inured to plaintiffs' benefit as they continued to receive the benefit of the Decree.

deprive the individual." DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196 (1989) (no right to protective services for abused and neglected children); see also Harris v. McRae, 448 U.S. 297, 317-18 (1980); Archie v. City of Racine, 847 F.2d 1211, 1220 (7th Cir. 1987), cert. denied, 489 U.S. 1065 (1989) (Due Process Clause "says that a state shall not 'deprive' residents of life, liberty, or property, save with due process. It does not require the state to furnish residents with property they lack . . ."). Thus, plaintiffs cannot sustain claims challenging DCFS's alleged policies and practices of "taking and retaining custody of children from impoverished parents and legal guardians because of their inability to obtain cash, food, shelter or other subsistence, while failing to assist the parents and children to meet [ ] these needs . . ." First Am. Compl. ¶ 1. See Donald v. Polk County, 836 F.2d 376, 383-84 (7th Cir. 1988) ("Because the right to receive social services is not a constitutionally protected right," parents in abuse case could not state claim to social services to avoid losing custody of children).

Notably, this case is not a challenge to the process by which plaintiffs were alleged to be abusive or neglectful toward their children. Nowhere do plaintiffs assert that in the absence of the provision of the affirmative services they seek, that their children were not at some risk of harm warranting intervention by DCFS. See, e.g., First Am. Compl. ¶ 32 (asserting challenges to DCFS policies of removing children "without determining whether provision of the family's subsistence needs would enable the child to remain safely at home, and without providing or arranging for provision of such subsistence. . .") (emphasis added). Regardless, such a challenge would be similarly unavailing. It is well established that "the family itself is not beyond regulation in the public interest," Prince v. Massachusetts, 321 U.S. 158, 166 (1944), and the Constitution is not violated when custody of a child is taken first and due process hearings are provided later. See, e.g., Lossman v. Pekarske, 707 F.2d 288, 291

(7th Cir. 1983) ("When a child's safety is threatened, that is justification enough for action first and hearing afterward."); see also Donald, 836 F.2d at 380. Plaintiffs' complaint describes the procedural steps in the Illinois child welfare and juvenile court systems and nowhere asserts that these procedures were insufficient to protect plaintiffs' procedural due process rights. First Am. Compl. ¶¶ 12-16.

Finally, plaintiffs' claims cannot be grounded in the substantive due process rights afforded children in State custody. First, the existence of an affirmative obligation on the State to provide for such rights is based on "the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." DeShaney, 489 U.S. at 199-200 (citing Youngberg v. Romeo, 457 U.S. 307, 317 (1982)). The plaintiff parents here are not in State custody. Second, even if plaintiffs were in custody, the constitutional obligations that are then imposed only reach the "basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety . . ." Id.; see also K.H. ex rel. Murphy v. Morgan, 914 F.2d 846, 856 (7th Cir. 1990); B.H., 715 F. Supp. at 1394-96. These rights do not include the social services, cash assistance and housing that plaintiffs seek in this action. See B.H., 715 F. Supp. at 1396-98 (children in custody do not have constitutional rights to "training necessary to reunite them with their families, to ensure parental and sibling visitation, stable placement . . . and an adequate number of follow-up case workers.").

II. THIS COURT CANNOT IMPOSE OBLIGATIONS BEYOND THE TERMS OF THE DECREE AS THERE HAS BEEN NO ADJUDICATION OR ADMISSION OF A VIOLATION OF FEDERAL LAW

It is well established that "[a] district court may not . . . circumvent the express terms of a defendant party's consent in the absence of an adjudication or admitted violation of

law. In the absence of an adjudication or admission of [a violation of law], the district court authority to impose additional obligations on a defendant is constrained by the terms of agreement entered by the parties to the consent decree." Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1153 (6th Cir. 1992) cert. denied, 113 S. Ct. 2998 (1993). See also Fox v. Department of Housing & Urban Dev., 680 F.2d 315, 323 (3d Cir. 1982) ("To impose additional duties under the decree . . . is to disregard the basic rights of litigants who waive their right to litigate defense by consenting to have a decree entered against them. The conditions upon which rights are waived must be respected.").

In addition, it is well settled that the starting point in interpreting a consent decree is the decree's plain language. South v. Rowe, 759 F.2d 610, 613 (7th Cir. 1985). As the Supreme Court has stated, the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it" or by "what might have been written had the plaintiff established his factual claims and legal theories in litigation." Firefighters Local v. Stotts, 467 U.S. 579 at 574, (quoting United States v. Armour & Co, 402 U.S. 673, 681-82 (1971)); see also Alliance to End Repression, 742 F.2d at 1012. Accordingly, in Stotts, the Supreme Court rejected an attempt to use an equal employment opportunity consent decree to enjoin impending layoffs and demotions, and overturned the court of appeals ruling that such an injunction "did no more than enforce the terms of the consent decree" because under the decree "the City was under a general obligation to use its best efforts to increase the proportion of blacks on the force. . ." Stotts, 467 U.S. at 574. An injunction to carry out the purpose of a decree is not valid unless "the express terms of the decree contemplated that such an injunction would be entered." Id. at 575. Cf. Missouri v.

Jenkins, 115 S. Ct. 2038, 2054 (1995) (reversing lower court remedial orders that exceeded constitutional violations at issue in the case).[20]

Here, it is clear there has been no adjudication or admission as to any violations of federal law. See Decree ¶ 2 ("By agreeing to this Consent Order neither party makes any express or implied admission of fact or law for any purpose.").[21] Plaintiffs' Motion seeks an extension of monitoring because "plaintiffs have not received the monitoring they are entitled to receive under the Decree." Motion ¶ 30(a). This is apparently based on plaintiffs' claim that the "Decree calls for monitoring for a three and a half year period after implementation." Id. ¶ 22. However, the Decree does not base the term of the monitor's appointment on an interval after implementation has been reached. The Decree states that:

> The court shall appoint an impartial monitor who shall receive reports from defendant and make recommendations concerning the implementation of this Consent Order for a period of four years from July 1, 1991.

Decree ¶ 14. See also Agreed Order ¶ 1 (extending term to February 15, 1996 "with the same duties and authority as currently embodied in the Consent Order. . .").

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20 This case does not involve a judgment order following a finding that federal law has been violated, as was the case in Youakim v. McDonald, 71 F.3d 1274 (7th Cir. 1995), cited in plaintiffs' Motion. Motion ¶ 30(b)(c). Moreover, Youakim involved a challenge to the implementation of recently-enacted state law that the plaintiffs contended conflicted with the judgment order. Here, there are no challenges to any actions by defendant that plaintiffs contend are violative of the Decree. They merely complain that the Decree has not been fully implemented. As set forth below, this argument cannot be used to circumvent the necessity of meeting the contempt standard before imposing sanctions on DCFS.

21 The preliminary injunction proceedings in 1989-90 addressed only the specific individual plaintiffs, and did not reach the merits of any broader systemic claims by plaintiffs as addressed under the Consent Decree. Norman, 739 F. Supp. at 1191.

Plaintiffs try to rewrite these provisions by pointing to the interval between the various due dates in the Decree and the four year monitor's term in paragraph 14.[22] Motion ¶ 16. However, the Decree does not link that Monitor's term to "full implementation of the Decree." Id. Contrast B.H. Decree ¶ 74 (monitoring continues until compliance has been maintained for a period of five years) (Exhibit 5). Nor does the Decree "create[ ] a central role for the monitor," "made part and parcel of the implementation methodology the parties developed and the Court approved." Motion ¶ 15. The Decree simply provides for a set term under which an impartial monitor will collect data, report on implementation and make recommendations for improvements. Once the monitor's term expires, the Decree does not provide any other basis for extending that term.[23] The fact that plaintiffs' interpretation "might satisfy the purposes of one of the parties . . ." provides no legal grounds for expanding the terms of the existing Decree. Stotts, 467 U.S. at 574.[24]

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22 To the extent plaintiffs' argument is with any delays in implementation of the Decree beyond the July 1 and December 31, 1991 deadlines in the Decree, the parties and Monitor have known since the First Monitoring Report that these deadlines were overly ambitious. First Rep., 1; supra at n.4. Plaintiffs, however, have not previously contested this finding, nor have they availed themselves of any of the remedial measures contained in the Decree to challenge these acknowledged delays. If laches exists in this case, it is most likely plaintiffs who should be barred from asserting these arguments, rather than defendant.

23 Plaintiffs' reliance on the fact that DCFS agreed last year to resolve the parties' dispute by asking this Court for an extension of the Monitor's time to 1997 is unavailing. Motion ¶ 10. Obviously, any prior settlement offers or agreements by the parties cannot now be used to prove liability on the disputed claims. Fed. R. Evid. 408.

24 To the extent plaintiffs are seeking a modification for the Decree, they similarly have failed to establish any grounds for such modification. See Stotts, 467 U.S. at 576 (analyzing and rejecting argument that district court had "inherent authority to modify the decree when an economic crisis unexpectedly required layoffs"). Modification of this Decree must meet the standards set forth by the Supreme Court in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992). Under Rufo, modification of an institutional reform decree such as this one may be made where the movant establishes "a significant

(continued...)

III. THE MONITORING REPORTS MAKE CLEAR THAT PLAINTIFFS CANNOT MEET THEIR BURDEN OF PROVING CONTEMPT

Pursuant to the Seventh Circuit holding in South, the appropriate remedy for the alleged violations of the Consent Decree asserted by plaintiffs is a civil or criminal contempt action, South, 759 F.2d at 614. Plaintiffs, however, eschew any attempt to show contempt, with good reason. See Motion at 1 ("Plaintiffs do not here claim across-the-board non-compliance with the Decree but raise specific non-compliance issues of significance to the Decree as a whole."). The record in this case -- as set forth by the court-appointed monitor -- simply does not support a finding that this Department has acted in contempt of the Consent Decree.

DCFS "was required, at the very least, to make a good faith effort to comply with the district court's order." American Fletcher Mortgage Co. v. Bass, 688 F.2d 513, 517 (7th Cir. 1982). Civil contempt requires a showing that the Department was not "'reasonably diligent and energetic in attempting to accomplish what was ordered.'" Stotler & Co. v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989) (quoting American Fletcher, 688 F.2d at 517)). However, to prevail, plaintiffs must prove by clear and convincing evidence that DCFS is in contempt. Id.; see also Goluba v. School Dist. of Ripon, 45 F.3d 1035, 1037 (7th Cir. 1995).

As set forth above, for the past five years, DCFS has been "reasonably diligent and energetic" in attempting to accomplish the multiple requirements of this Decree. Indeed, the monitoring reports praise the Department for its innovations and response, and acknowledge the

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[24](...continued)
change either in factual conditions or in law." Id. at 384. The only changes in law since 1991 do not favor plaintiffs' request (supra, Section I), and the only factual conditions cited by plaintiffs are purported violations of the Decree. However, the Seventh Circuit has held that violations of a decree do not justify modification, as "[a] violation of a consent decree is not extraordinary or unforeseeable. Rather than rewrite the decree, the appropriate remedy is a civil or criminal contempt action." South, 759 F.2d at 614.

sustained efforts of its staff. Supra at 6-7; see also Third Rep., 25 (discussion of HAP program); First Rep., 21 ("DCFS staff involved [in implementation] have been exceptionally competent and committed individuals who have worked beyond what is normally expected in order to comply with this Order.") There have been areas of non-compliance, unanticipated problems and the need for changes in implementation strategies, although in some areas, DCFS has questioned the Monitor's findings of non-compliance. Id. However, even where compliance has fallen short, the Department's response has been to attempt to resolve any problems. Supra at 5, 10-12, 15. Moreover, it must be noted that these efforts were mounted during a time when DCFS experienced unprecedented and accelerated growth in its caseload; from 1991, the year this decree was entered, to 1994, the number of children in Illinois in DCFS custody grew by over 86 percent, from 20,965 to 39,154. See B.H. v. Ryder, 856 F. Supp. 1285, 1291 (N.D. Ill. 1994); see also Second Rep., 2. By December 1995, the number of children in custody had grown to 52,990. Response, 3 n.5.

Plaintiffs' Motion overlooks these overall efforts and focuses on five specific areas. Plaintiffs' assertions as to the five "critical problems" they contend "persist" (Motion ¶ 14) are inaccurate, as set forth above. Supra at 12-17. Moreover, even in those areas where DCFS has not yet fully complied with the Decree, this failure alone cannot support a finding of contempt. Where a defendant has engaged in diligent efforts leading to "substantial," if not complete, compliance with a consent decree, contempt of court does not exist. See Langton v. Johnston, 928 F.2d 1206, 1220-22 (1st Cir. 1991) (upholding district court ruling refusing to find state officials in contempt of court where compliance with decree governing state treatment facility was "short of perfect compliance"); United States v. Commonwealth of Massachusetts, 890 F.2d 507, 510 (1st Cir. 1989) (district did not err in finding that non-compliance with staffing ratios in consent decree did not constitute contempt). Cf. Howard Johnson Co.,

Inc. v. Khimani, 892 F.2d 1512, 1516 (11th Cir. 1990) ("Conduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made as part of a good faith effort at compliance."). Thus, assuming arguendo that all of the Monitor's assertions of non-compliance are correct, the relief plaintiffs seek cannot be imposed as contempt sanctions, as plaintiffs cannot sustain their burden of proving that DCFS is in contempt.

IV. BY THE TERMS OF THE DECREE AND AGREED ORDER, AS WELL AS FOR THE FOREGOING REASONS, THERE IS NO BASIS FOR SUBMISSION OF A SEVENTH MONITORING REPORT

For all of the foregoing reasons, including that there is no longer any federal jurisdiction for the continued enforcement of this Decree, there is no basis for the submission of a Seventh Monitoring Report. Neither the Decree nor the Agreed Order provide for a final report, or a "final assessment as to the future consideration of implementation of the Decree, including the issue of continued monitoring" as argued by plaintiffs. Motion ¶ 24(d). Instead, the specific provisions of the Decree provide for DCFS to submit information to the Monitor "on a semi-annual basis beginning January 1, 1992 and concluding on July 1, 1995 . . ." Decree ¶ 15 (emphasis added). "Within 60 days after receipt of the semi-annual information described under Paragraph 15, the monitor shall submit to the parties and the court a report regarding compliance with the terms of this Order . . ." Id. ¶ 16.

These terms were not altered by the Agreed Order entered last year. Paragraph 6 of the Agreed Order provided that "[t]he monitor is excused from the filing of the semi-annual report due September 1994 and will resume reporting for the next semi-annual period." This next report was the Sixth Monitoring Report, due in early 1995, which was submitted by the monitor. Nor does paragraph 1 of the Agreed Order alter the provisions of paragraphs 15-16 of the Decree, as this provision simply extends the term of the monitor to February 15, 1996 "with

the same duties and authorities as currently embodied in the Consent Order. . ." Agreed Order ¶ 1 (emphasis added).

Plaintiffs argue that monitoring must nonetheless be extended because defendant did not provide a written response to the Sixth Monitoring Report until December 11, 1995, which "allowed little or no time for the monitor in the function of facilitating a compliance plan." Motion ¶ 24(d). As an initial matter, the Decree does not require the submission of a written response, although in the past DCFS has voluntarily prepared such a response in order to facilitate discussions with plaintiffs' counsel. Nor does the Decree set forth time frames for any response by DCFS; the Decree simply states that any recommendation contained in a report by the Monitor "shall be considered by defendant in developing a plan to comply with the terms of this Order, which plan shall be negotiated with plaintiffs' counsel, with the assistance of the monitor." Decree ¶ 16.

The timing of DCFS's written response to the Sixth Monitoring Report (Exhibit 3) was occasioned by staffing changes at both DCFS and counsel for the Department, as well as the press of other litigation demands on the Department and counsel (including the emergency preliminary injunction proceedings and subsequent expedited appeals in Youakim v. McDonald, which also involved plaintiffs' counsel). However, as defendant's counsel has previously noted in writing to plaintiffs' counsel, the delay in the written response is not indicative of DCFS's efforts to implement and comply with the recommendations of the Sixth Monitoring Report. See Dec. 11, 1995 Ltr. from N. Eisenhauer (Exhibit 4). Rather, as set forth in the Response, DCFS was already implementing the vast majority of the recommendations in the Report, and only

disagreed with two recommendations that were within the scope of this Decree.[25] Dec. 11, 1995 Ltr.; Response, 1. This work was taking place with the active participation of the Monitor and her assistant. See e.g., Dec. 11, 1995 Ltr. at 2-3 (regarding meetings with Monitor); Response, 1 n.1. Moreover, to this date, despite repeated requests from defendant's counsel, plaintiffs have yet to articulate any disagreements with the compliance plans and efforts outlined in the Response to the Sixth Report. Notwithstanding plaintiffs' wishful interpretation of the Decree and Agreed Order, the four corners of these documents do not provide a basis for this Court to enjoin DCFS to incur the expense of a Seventh Monitoring Report.[26]

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25 There were four additional recommendations that DCFS disagreed with, but these concerned issues not within the scope of this Consent Decree. See Response, 1-2 (summarizing), 35, 38, 41 (individual responses).

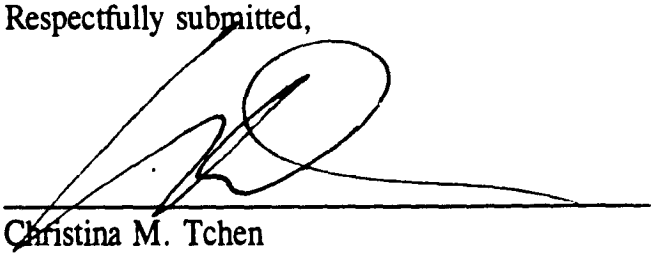
26 Plaintiffs likely will contend that without the Seventh Monitoring Report, the extension of the Monitor's term contemplated by the Agreed Order was meaningless. To the contrary, during the past year, the Monitor has worked on special Norman reports, pursuant to her own recommendations and the agreement of the parties, and she has continued to work with DCFS in implementation, as well as to review compliance data submitted by DCFS.

Conclusion

For the foregoing reasons, this Court should deny plaintiffs' Motion in its entirety and should vacate the Consent Decree.

Dated: Chicago, Illinois
February 26, 1996

Respectfully submitted,



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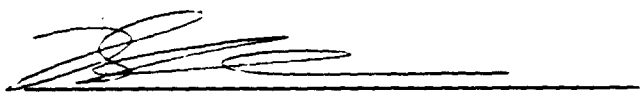
CERTIFICATE OF SERVICE

I, Nancy S. Eisenhauer, hereby certify that I caused true and correct copies of the foregoing DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CONTINUED MONITORING AND/OR DECLARATORY AND INJUNCTIVE RELIEF to be served upon:

Laurene M. Heybach
Diane Redleaf
John Bouman
Legal Assistance Foundation of Chicago
343 South Dearborn Street, Suite #700
Chicago, Illinois 60604

by hand delivery on the 26th day of February, 1996.



Nancy S. Eisenhauer