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

GAIL BATES, on her own behalf and DEBORAH SAUNDERS, on her own behalf; and on the behalf of others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 84 C 10054
GORDON JOHNSON, Director, Illinois Department of Children and Family Services,	)	Hon. Paul E. Plunkett
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Background

On November 20, 1984, Plaintiffs Gail Bates and Deborah Saunders filed a class action lawsuit against Gordon Johnson, Director of the Illinois Department of Children and Family Services ("DCFS"). Plaintiffs sued on behalf of all parents and guardians whose children are in the temporary custody of DCFS or under DCFS guardianship under a service plan which has the goal of returning the children to the custody of their parents. The complaint alleged that Defendant's adherence to a one hour per month visitation policy for class members and their children was in violation of the Social Security Act and applicable federal regulations, and the First, Ninth and Fourteenth Amendments of the United States Constitution. Plaintiffs also alleged that Defendant had failed to provide notice and a hearing prior to enforcement of administrative determinations affecting visitation

policies, thus violating the Social Security Act and the due process clause.

Defendant filed a motion to dismiss, but prior to a determination on the motion the parties entered into a consent decree. The Agreed Order entered by this court on June 5, 1986 stated that DCFS visitation policy "prior to the filing of this suit and at the time of this agreement" is as follows. "Parents and guardians of children under DCFS temporary custody, or under DCFS guardianship with a goal of return home, are expected and encouraged to visit their children weekly unless there is documentation to the contrary in the case/record." (Agreed Order, Para. 3(a)) In the event supervision of such visits is required, it can be done by relatives, foster parents, residential care providers, homemakers, volunteers or other service providers. (Id. at 3(d)) Visitation plans are to be established within three days of initial placement (or ten days for emergency placements), and visits are to begin within two weeks of DCFS's assumption of temporary custody or guardianship. (Id. at 3(f-g)) The visitation plan is to be included in the service plan for the child and family. (Id. at 3(h))

The terms of the decree provided that Defendant was also to make available to Plaintiffs' counsel statistical information regarding visitation plans and copies of final administrative decisions (Para. 5-6), provide notice to class members regarding the visitation policy and their appeal rights (Para. 8), and see to it that caseworkers were reminded periodically of the

published policies on visitations and appeals (Para. 9). The decree also provided that any class member aggrieved by a DCFS decision relating to her or his service plan could invoke a three step review and appeal process. (Para. 7)

The Order also contained the following provision regarding enforcement and modification of this policy:

> [D]efendant agrees to maintain and enforce the policy stated in paragraph 3 herein throughout Illinois, except that no provision herein precludes defendant from modifying this policy. If DCFS officially proposes a change of its policy as set forth in paragraph 3 herein at any time between the date this order is entered and the two year anniversary of such date, then prior to the time such regulation is officially adopted, DCFS will comply with the Illinois Administrative Procedure Act, . . . and, in addition, agrees to appear before this Court to discuss the nature and extent of the proposed changes. The entry of this Agreed Order will not prejudice the rights of plaintiffs and class members to reassert the claims made in the complaint herein in the event the DCFS policy set forth in paragraph 3 is changed or modified in accordance with the Illinois Administrative Procedure Act . . . .

(Agreed Order, Para. 4)

The decree was to remain in force for a two-year period. (Para. 13) Despite the fact that it bound Defendant only to follow policies which purportedly were already in effect at the time of the lawsuit's filing, Defendant wholly failed to live up to its obligations under the decree. On March 16, 1987, Plaintiffs filed a Motion for Contempt alleging that Defendant had violated the terms of the decree by failing to do the following:

1) notify class members of their visitation rights;
2) grant weekly visits to class members;
3) provide visits in the home;

4) provide transportation for class members who could not afford this cost;
5) ensure an appeal for adverse decisions affecting visitation;
6) notify or train caseworkers on plaintiffs' rights to visitation; and
9) establish visitation plans within 3 or 10 days of placement as required by the Order.

Motion for Contempt at 6-20. Defendant never filed a response to the motion or requested a hearing, and Plaintiffs then embarked on a long and frustrating series of attempts to obtain discovery from Defendant. Magistrate Rosemond issued numerous discovery orders, and on April 6, 1988 ordered Defendant to pay Plaintiffs $9,621.00 in attorney fees incurred in attempting to obtain discovery.

On September 14, 1988 (a year and a half after the filing of the Motion for Contempt and over two years after the entry of the decree),[1] Defendant stipulated that at the time of the filing of the Motion for Contempt it was not in compliance with the Agreed Order. On September 21, 1988, Defendant stipulated that it had not been in compliance with the Order at any time since its entry.[2] The stipulation also stated that the parties "are currently in negotiations so as to ensure compliance with the Agreed Order."

In February 1989, Defendant informed Plaintiffs that it

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[1]In light of the progress (or lack thereof) of the litigation following entry of the decree, the court extended its jurisdiction beyond the two years originally provided for.

[2]Plaintiff stipulated that there had, however, been some improvement in the providing of weekly visitation to class members.

would not agree to a new consent decree to resolve the contempt motion because of the possible impact of such a decree on other suits filed against Defendant in 1988. Thus, we are now faced with determining appropriate contempt sanctions to be assessed against a Defendant who entered into a consent decree over three years ago, but, as Defendant itself acknowledges, from the very outset has failed to live up to its agreement.

Discussion

Plaintiffs ask the court to enter an order establishing a six-year period during which Defendant must enforce a policy of weekly visitation. They have submitted a lengthy Proposed Order which spells out more specifically than the original decree the details of implementing such a policy and the attendant requirements such as notice to the class. Plaintiffs also seek the following sanctions:

> 1) the appointment of a special master to monitor Defendant's compliance with the decree and submit periodic reports to the court;
> 2) the imposition of various penalty payments for any future non-compliance;
> 3) reimbursement of Plaintiffs' attorney fees and costs incurred in bringing the contempt motion.

Defendant agrees that Plaintiffs are entitled to reasonable attorney fees incurred in bringing the contempt motion, but argues that the only additional sanction should be a revival of Plaintiffs' right to litigate the merits of this case. In vociferously opposing further sanctions, Defendant repeatedly insists that

> DCFS had the unilateral right to abandon its visitation policy and adopt a new rule, thus ending its principal

> obligation under the decree. If this occurred, the plaintiffs could elect to litigate their original claim.

Defendant further argues that compliance with Plaintiffs' Proposed Order is beyond DCFS' capability, and would interfere with DCFS' management of its limited resources and with its potential obligations under other pending litigation. Defendant argues, finally, that imposition of the Proposed Order would be an impermissible modification of the terms of the decree, and that Plaintiffs' claims are "not well-founded."

The court is extremely disturbed by the position Defendant has taken. Over three years ago, Defendant chose to forego its right to litigate the claims pending against it and instead to enter into a court-approved agreement providing that it would abide by what it claimed was already its official policy regarding parental visitation. During those three years, Defendant has done little to actually make that policy a reality. It has never, however, asked this court for a modification of the decree on grounds that changed circumstances prevented it from living up to its obligations. Instead, Defendant continually strung Plaintiffs along, apparently hoping to be the victor in a war of attrition.

The court finds it incredible that Defendant would now respond to a contempt motion by arguing that Plaintiffs' legal claims have thin support. Defendant settled those claims by entering into the decree, and cannot now be heard to complain that they lack merit. Defendant's argument that we should not tie

its hands because it faces litigation on other fronts is also wrong-headed; Defendant in effect bought off Plaintiffs' claims by agreeing to an order in 1986, and surely cannot escape its obligations to Plaintiffs simply because competing demands were later made by others. We are similarly unreceptive to Defendant's plea that "full compliance with plaintiffs' interpretation of the original Bates decree would have been impossible." (Johnson Aff. at 2) As earlier stated, Defendant never sought modification of the decree on these grounds. Neither did Defendant avail itself of the provision allowing it to propose and adopt changes to its professed policy in accord with the Illinois Administrative Procedure Act. We also point out that Defendant's argument is somewhat ironic, given that the decree stipulated that it simply bound Defendant to abide by its own existing policies.

The court can only conclude that Defendant entered into the decree in order to simply get Plaintiffs off its back, yet never seriously intended to live up to it. We do not take kindly to what we perceive to be three years of bad faith conduct, conduct which was in blatant contravention of a court order. We find Defendant's suggestion that the appropriate remedy is revival of Plaintiff's right to litigate to be ludicrous. Plaintiffs were promised two years of compliance with the decree, but have not received even so much as a minute of compliance. Revival of Plaintiffs' right to litigate was the stipulated remedy if Defendant chose to modify its policy in accord with the Illinois Administrative Procedure Act and after notifying this court of

the proposed changes; it is not the appropriate remedy for three years of bad faith noncompliance.

At the same time, the court is unwilling to impose the detailed order suggested by Plaintiffs. The court finds that the twin purposes of civil contempt sanctions -- to compensate plaintiffs for injury due to noncompliance and compel obedience to the court's order[3] -- can best be served by imposition of the following sanctions.

> 1) Defendant is to reimburse Plaintiffs for all reasonable attorney fees and costs incurred in all of Plaintiffs' efforts to implement the consent decree (including, e.g., negotiations).
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> 2) The original decree is to continue in force for a period of two years from the date of entry of this order.
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> 3) Defendant is to report to this court in 60 days. If Defendant is not in compliance with the decree at that time, the court shall impose further sanctions, which may include monetary penalties.
>
> 4) Defendant is to designate a liaison whom Plaintiffs may contact regarding any problems in securing Defendant's compliance with the decree.

If the parties disagree on the proper interpretation of the decree, such disputes are to be taken before Magistrate Rosemond. If Plaintiffs believe, however, that Defendant is not making a good faith effort to comply with the terms of the decree, they shall come before this court.

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[3] See Commodity Futures Trading Commission v. Premex, 655 F.2d 779, 785 (7th Cir. 1981).

ENTER:

Honorable Paul E. Plunkett
District Court Judge

Dated: June 29, 1989