For Opinion See 261 F.3d 1037

United States Court of Appeals,
Eleventh Circuit.
JOHN/Jane Does 1-13, Respondents/Plaintiffs/Appellees,
v.
Jeb BUSH, et al, Petitioners/Defendants/Appellants.
No. 99-14590-DD.
March 24, 2000.

From the U.S. District Court for the Southern District of Florida Case No. 92-589-CIV-Ferguson

Plaintiffs/Appellees' Answer Brief

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STATEMENT REGARDING ORAL ARGUMENT

The Plaintiffs/Appellants request oral argument. This case involves issues of great public significance. Oral Argument would provide the Court with the best opportunity to evaluate the respective positions of the parties.

CERTIFICATE OF TYPE SIZE AND STYLE

The brief cover is printed in 14 point Times New Roman.

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***1 STATEMENT OF THE CASE AND FACTS**

THE FINAL JUDGMENT AFFIRMED BY THE ELEVENTH CIRCUIT

In *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) this Court affirmed in its entirety the 1996 Final Judgment of the District Court, finding that State of Florida officials were failing to furnish medicaid assistance with "reasonable promptness" to eligible, developmentally disabled individuals, thus violating the Medicaid Act, 42 U.S.C. § 1396(a)(a)(8). This Court affirmed the District Court's injunction which enjoined Defendants from failing to provide assistance within a "reasonable" time period, not to exceed ninety (90) days. *Doe v. Chiles, supra*, at 711.

Plaintiff's class action complaint alleged that they were not 'receiving the therapies, training, and other active treatment to which they are entitled by virtue of [their] eligibility for a residential placement in an [ICF].' The Complaint further averred that most of the appellees had been waiting for 'over five years' for medicaid services and were 'languish[ing]' without the training and therapies they so desperately need." Appellants [state officials] do not contest the serious delays that have occurred. In fact, in their initial brief to this Court, they acknowledge that their practices "resulted in waiting periods of several years." *Doe v. Chiles, supra*, 136 F.3d at 711 (footnotes omitted)."

As this Court noted in its decision affirming the District Court's Final Judgment, "At oral argument on this issue, Defendants conceded that Florida's state [HCFA][FN1] approved plan does provide for placement in ICF/MR facilities. Further, Defendants have not disputed the facts alleging the [S]tate's failure to conform with the provisions set forth in that statute, which the Court construes as an admission of unreasonable delays in placing ***2** developmentally disabled persons into ICF/MR facilities." *Doe v. Chiles, supra* at 711-712 (quoting from the Summary Judgment entered by the District Court).

FN1. United States Department of Health and Human Services, Health Care Financing Agency.

THE VANISHING WAITING LIST

In 1991, shortly before the lawsuit was filed, the Defendant state officials determined that there was an immediate need for 792 new ICF/DD beds. D.E. 603, Transcript of May 26, 1999 Compliance Hearing at 19-20. As found by the District Court and admitted by the Defendants, the waiting list grew during the pendency of this lawsuit. Defendants obtained a stay of the Final Judgment as to class members by asserting to this Court that the cost of compliance was "astronomical". Defendants/Appellants' Motion for Stay.

The following year the Defendant state officials wrote that approximately 2000 individuals were in need of ICF/DD placements and there was an immediate need for placements for 600 eligible individuals who had requested such placements. This number was repeated by Defendants counsel at the November 4, 1998 hearing on Plaintiffs Motion for Civil Contempt. D.E. 559, at 49-50. After the November 4, 1998 hearing, counsel for the Defendant state officials explained that he had discussed the matter with his clients and reaffirmed to the Court that the figure of 2000 people total, with 600 who were in immediate need of ICF/DD placement, was accurate

as of November 4, 1998. D.E. 599, Transcript of November 4, 1998 Hearing at 49-50.

Defendants virtually begged for additional time to come into compliance after it was shown that they had taken no action to provide services with reasonable promptness to these 600 eligible individuals between the issuance of this Court's decision in February 1998 and the November 4, 1998 hearing. *Id.* at 59-60. The District Court again acceded to the Defendants' request for additional time and entered its November 10, 1998 order ***3** (D.E. 530) allowing Defendants until January 10, 1999 to submit evidence that they were in full compliance with the Final Judgment and Mandate of this Court as to the named Plaintiffs and the 600 eligible individuals already identified by the Defendants as being in immediate need and to also submit a plan for full compliance as to all class members.

Defendants now take the position that there were only 10 people eligible for and desirous of ICF/DD placements and that their plan of compliance was that those 10 people would be placed in ICF/DD facilities. See e.g., D.E. 602, Transcript of Compliance Hearing May 26, 1999 at 26-27. As established through the Defendant officials themselves at the May 1999 compliance hearing, the waiting list disappeared by virtue of a series of contemptuous acts by the Defendants, including but not limited to the Defendants' decision, to not offer placements to the majority of the 600 individuals that they had already identified as being eligible and who, if Defendants had complied with the law, would have already received placements in ICF/DD facilities under existing eligibility criteria. See, for example, D.E. 602, Transcript of compliance hearing of May 25, 1999 at 235-6.

As Defendant state officials admitted, if the Defendants had not been given the additional time they requested, all 600 of the individuals would have been offered placements as they all met the eligibility criteria in effect prior to the announcement of the January 1999 Plan of Compliance purported to eliminate that eligibility on a going forward basis only. The new criteria applied by the Defendants was not written down and if applied to those individuals fortunate enough to have received ICF/DD placements or other medicaid services for the developmentally disabled, would render a very, very significant percentage of those individuals no longer eligible for the medicaid services. D.E. 602, Transcript of Compliance Hearing May 25, 1999 at 115 (testimony of State of Florida ***4** Medicaid Director, Defendant Crayton.)

After allowing Defendants three full days to present testimony and documentation showing compliance with the Final Judgment and the Mandate of this Court (D.E. 601, 602, Transcript of Compliance Hearing of May 24-6), the District Court ultimately entered its Order on Contempt, finding the Defendants in civil contempt and imposing sanctions to encourage the Defendants to comply with the Final Judgment. The Defendants were even given an additional ten day opportunity from the date of the Order on Motion for Civil Contempt in which to submit a plan for compliance before the sanctions commenced. *Id.* Defendants have failed to establish compliance with the Final Judgment at any time and the District Court Judge was left with no alternative but to impose sanctions to enforce the Final Judgment affirmed by this Court.

CONTEMPT PROCEEDINGS

Plaintiffs' original Emergency Motion for Contempt and Memorandum of Law and Exhibits in Support thereof was filed on June 16, 1998. D.E. 491. Defendants repeatedly requested continuances, extensions of time and additional time to comply with the mandate of this Court. Defendants were ultimately allowed sixteen (16) months from this Court's February, 1998 decision affirming the Final Judgment before the District Court held them in contempt and imposed coercive sanctions.

Even after the Order on Contempt imposing coercive sanctions was issued in October of 1999, the District Court

gave Defendants an additional ten (10) day period to comply before the sanctions became effective. D.E. 589, Order on Motion for Civil Contempt, Appellants' Record Excerpts, Tab 7 at 15. Despite repeated opportunities to comply with the Final Judgment and the mandate of this Court, Defendants elected to not ***5** comply and have appealed the Order on Motion for Civil Contempt. Over two (2) years after the entry of this Court's mandate Defendants remain steadfast in their refusal to obey Federal law or the decisions of the District and Appellate Courts.

NOVEMBER 4, 1998 HEARING

The first hearing on the Motion for Civil Contempt was held on November 4, 1998. D.E. 599. At that hearing the Defendants advised the District Court that "we don't take issue" with the fact that individuals are not receiving services with reasonable promptness and explained that the problem was that funds had been held in abeyance by the legislature until October 21, 1998. D.E. 599, Transcript of November 4, 1998 hearing at 5-11. Defendants further advised the district court that the funds had been released in October of 1998 and that Forty Million Dollars ($40,000,000.00) was now available. Defendants further admitted and submitted the affidavit of Defendant Kimber confirming that the Defendants had a list of 600 people in immediate need of ICF/DD placements that had been identified and that serving these 600 developmentally disabled individuals would cost approximately Forty-Eight Million Dollars ($48,000,000.00). D.E. 599, Transcript of November 4, 1998 hearing, at 21-23. Defendants also admitted that even before the release of the Forty Million Dollars ($40,000,000.00) in October 1998, hundreds of millions of dollars of excess funds existed in other medicaid programs but claimed that the funds could not easily be transferred from one medicaid program to another. D.E. 599, Transcript of November 4, 1998 hearing, at 48-49, 54.

When seeking a stay of the Final Judgment, Defendants stated that they had determined that compliance with this Court's Final Judgment would cost the State between Seven Hundred Fifty Million ($750,000,000.00) and One Billion Dollars ***6** ($1,000,000,000.00) annually. However, by November 4, 1998 they had redone their calculations and determined that there were 2000 people in total, of which 600 were in immediate need of ICF/DD placements. D.E. 599, Transcript of November 4, 1998 hearing, at 49-50.

At the November 4 hearing, Defendants admitted that there are individuals within the class afforded relief by the Court in its Final Judgment that had not received services. When the Court asked why these individuals were not receiving covered services, Defendants stated that the funds had just been released and they could not have spent the money until now. D.E. 599, Transcript of November 4, 1998 hearing, at 51-53. Later in the hearing, the Court specifically asked Defendants' counsel again whether he disagreed with the fact that there are 600 people in need of ICF/DD services who are eligible. Defendants' counsel said this figure was correct, but again stated that the money had just become available October 21, 1998 to serve the individuals identified by the Defendants themselves. D.E. 599, Transcript of November 4, 1998 hearing, at 56-57. Defendants' counsel then suggested that within 72 hours he could submit a proposal for serving these 600 individuals who Defendants themselves had identified as being in immediate need of ICF/DD services. D.E. 599, Transcript of November 4, 1998 hearing, at 58.

In discussing contempt at the November 4, hearing, Defendants' counsel specifically stated that he disagreed with Plaintiffs' counsel and with the United States Court of Appeals for the Eleventh Circuit, to the extent that they believed that a lack of appropriations was not a defense to non-compliance with the Medicaid Act. D.E. 599, Transcript of November 4, 1998 hearing, at 59. See *Doe v. Chiles*, 136 F.3d 709, 722 ["'[i]nadequate state appropriations do not excuse non-compliance' with the Medicaid Act. ***7** *Alabama Nursing Home Ass'n v. Har-*

ris, 617 F.2d 388, 396 (5th Cir. 1980); see also Cook, 109 F.3d at 704"].

At the November 4, 1998 hearing, the District Court specifically asked counsel for the Defendants "Now, what do I do? You tell me the money is there. There are other monies that have been there before in excess of the budget ... what do I do to insure ... make it available to comply, at least as to the 600 for the immediate need?" Counsel for the Defendants responded, "I don't know. I would be loathe to suggest what remedy you ought to impose against my clients." D.E. 599, Transcript of November 4, 1998 hearing at 54.

Finally, at the end of the hearing, the Judge stated to counsel for the Defendants, "both you and I are in a hard place. We know we have to do something". Counsel for Defendants responded, "again I urge you to give us more time to ...." The Court asked "how much more time?" and Defendants' counsel stated:
"I would suggest 30 days knowing, though having been bitten before that 60 days is probably better. I just don't want to put my clients in a bind. It is a large operation we are a bureaucracy, both in the good and bad sense of that term. It does take time. There are a lot of people, a lot of considerations. Those decisions, even though this is a class action, these are ultimately individualized decisions that need to have more or less a remedy."

D.E. 599, Transcript of November 4, 1998 Hearing at 59-60.

NOVEMBER 10, 1998 MEMORANDUM FINDINGS AND ORDER ON MOTION TO SHOW CAUSE

Following the November 4, 1998 hearing, on November 10, 1998, the District Court entered its Memorandum Findings and Order on Motion to Show Cause. D.E. 530, Appellants' Records Excerpts, Tab 6. The District Court's findings were based upon ***8** "uncontroverted facts and, particularly, by admissions and sworn statements of the Defendants themselves, that the State Defendants have failed to comply with the Final Judgment of this Court and the mandate of the Court of Appeals." D.E. 530, Memorandum Findings at 1.

The District Court Judge specifically found that "individuals eligible for services under the ICF/DD program are still awaiting services. In fact the number of bed spaces for ICF/DD eligible persons was recently reduced in recent months without provisions for adequate alternative services." D.E. 530, Memorandum of Findings at 1. Addressing named Plaintiff, Evelyn Church (Jane Doe 6), the Court specifically found that "Mrs. Church is one of the original Plaintiffs and has been waiting for services for many years". D.E. 530, Memorandum of Findings at 1.[FN2] The court further noted that although a stay was denied as to named class members and although the Defendant Charles Kimber had written to Ms. Church 1 1/2 years before the hearing stating that he would soon be in contact with her regarding placement, "that promise was not kept" and the Defendants had failed to comply with the law. D.E. 530, Memorandum Findings at 2.

> FN2. Under the new, unlawful criteria Evelyn Church (Jane Doe 6) would not be eligible for services. D.E. 601, at 259-260. Jane Doe 6's plight is well documented in this Court's opinion. *Doe v. Chiles*, 136 F.3d at 712, n.7.

The District Court further found, based on the sworn testimony and admissions of State officials, that it was uncontroverted that the waiting list was larger today than it was in 1991 and that the waiting list was larger in August of 1998 than it was in July 1988. D.E. 530, Memorandum Findings at 2.

In the November 10, 1998 Memorandum Findings, the District Court Judge also ***9** found that:
"State officials have provided sworn testimony, also uncontroverted, that (1) in the past years the legislature appropriated hundreds of millions of dollars for Medicaid programs in excess of the amount actually expended into

those programs, (2) there are approximately 40 Medicaid programs and that none of these programs other than services for persons with developmental disabilities the waiting list exists or are services denied due to lack of funding, and (3) on October 21, 1998 funds in excess of $18,000,000 were released by state officials for delivery of services for ICF/DD eligible persons following completion of a study by a governors task force.

Memorandum Findings at 2.

Based on the foregoing and other evidence submitted by the parties, the District Court specifically found as follows:
1. The Defendants have failed to comply with the Final Judgment entered in this cause which was affirmed by the Court of Appeals over seven months ago;
2. The Defendants have the present ability to comply;
3. The conduct of the Defendants is in breach of a federal-state Contract for Medicaid services and unconstitutionally discriminates against Plaintiffs.

Memorandum Findings at 2.

The Defendants have not challenged any of the factual findings of the District Court. Moreover, the District Court's findings are based on sworn testimony and statements of the Florida State officials themselves.

Although Plaintiffs contended that the admissions of the Defendants at the November 4, 1998 hearing warranted the immediate imposition of contempt sanctions, the ***10** District Court Judge again acceded to the Defendants request for delay. Thus, in the November 10th Memorandum Findings, the District Court Judge ordered Defendants to comply and submit written plan of compliance. Memorandum Findings at 3.

Also set a compliance review hearing to be held one week after the February 12, 1999 deadline for compliance with the Final Judgment and advised that the Defendants shall be held in contempt of court upon failure to comply. D.E. 530, Memorandum Findings at 3.

ORDER ON MOTION FOR CONTEMPT

On October 7, 1999, eleven months after the Memorandum Findings were issued granting Defendants additional time to comply, and after a compliance hearing on May 24-26, 1999, the District Court finally entered its Order on Motion for Contempt. D.E. 587, Appellants Record Excerpts, Tab 7. As the District Court explained, in the six months following the November 1998 hearing, Defendants exhibited “a clear pattern of delay, causing continued denial of services in disregard of the Final Judgment. D.E. 587, Order on Motion for Contempt at 3.

The District Court found that even after issuance of the November 10 Memorandum Findings, the Defendants “again sought a number of continuances that were granted as they convinced the Court that they were seeking and expected to succeed in obtaining adequate appropriations to serve those developmentally disabled individuals eligible for services .... However, the Defendants did not fully comply with the November 10, 1998 order within the time periods allotted and have not fully complied at any time since.”

D.E. 587, Order on Motion for Contempt at 3-4. As Defendants admitted at the May 1999 ***11** Compliance Hearing, the legislature granted all appropriations requested by the Defendants and the legislature was not to blame for non-compliance. D.E. 601, May 24, 1999 Transcript at 96. Thereafter, as the Court explained in its Order on Contempt:

"what followed instead were orchestrated challenges to the Court's authority in pleadings, arguments and public announcements. The Defendants still have not complied with the more than one year old Eleventh Circuit Mandate nor the nearly four year old order of this Court. Since the commencement of this action seven years ago, the Defendants have requested over fifty continuances, most of which the Court has granted in accepting the Defendants' entreaties that obtaining adequate funding from the legislative branch of government was a glacial-like process. Notwithstanding the Court's leniency and grant of additional time, or probably because of it, the Defendants have pursued a policy of circumvention even after the political and economic currents became favorable for compliance. When this cause came on for hearing, it was immediately apparent that the Defendants were not genuinely attempting to resolve this matter as ordered. ... Moreover the plan ... falls far short of performance in accordance with this Court's order as affirmed by the Court of appeal."

D.E. 587, Order on Motion for Contempt at 4.

As the District Court further explained, based on the express admissions of the Defendants themselves, "at the May 24, 1999 compliance hearing, consistent with the deficient written plan, the Defendants still could not show compliance with this Court's orders but rather claimed that they were in the 'process of complying'. However, as disclosed by the evidence, between January 11, 1999 and May 24, 1999, few efforts were undertaken to actually comply according to the order." D.E. 587, Order on Motion for Contempt at 5.

The witnesses who testified at the Compliance Hearing were only those witnesses called by the Defendants themselves. D.E. 587, Order on Motion for Contempt at 5. Thus, ***12** all of the District Court's findings were based on the Defendants' own admissions. Not a single one of the findings in the Order on Motion for Contempt is challenged by the Defendants in this appeal as unsupported by the evidence. In finding non-compliance, the District Court specifically found as follows:

1. The Defendant State officials received all appropriations they requested from the legislature. However, as the Defendants admitted, Defendants only sought enough funding to reduce the waiting list by 53% and based on the amount requested, the legislature provided the Defendants with approximately 47% less funds than needed and "it may be inferred that there was never an intent to timely comply with the mandate of the Eleventh Circuit or this Court's order." The Defendants "internal memorandum dated April 26, 1999 makes it clear that staying within budget was given a priority over the delivery of services- evidence that non-compliance with the Eleventh Circuit's mandate or this Court's order was willful." D.E. 587, Order on Motion for Contempt at 6.

2. The Court found "more evidence that the Defendants' plan lacked sincerity," by the Defendants' last minute change in their
"eligibility standards for ICF/DD services so that a large number of persons who had been receiving ICF/DD services would no longer be eligible. This change was made without following formal rule making procedures and without publishing the changes so that the public could understand how eligible person would be affected. In fact, no public notice was given even after the changes had been made."

D.E. 587, Order on Motion for Contempt at 6-7.

As the District Court went on to find:
It is admitted by the Defendants that based on the level of needs as established by the FSTS a large number of persons ***13** now receiving ICF services will no longer be eligible. After all that has been said and written in several cases involving the developmentally disabled over the past three years, it is surprising to hear a state administrator say, as is said here, that he or she does not know whether an applicant's request for ICF services that

has been turned down because of a change in eligibility criteria was entitled to notice of the rule change. Such notice is statutorily mandated. *Cramer v. Chiles*, 33 F.Supp. 2d 1342, 1352 (S.D. Fla. 1999). See also, *Catanzano v. Dowling, et al.*, 847 F.Supp. 1070, 1085 (W.D.N.Y. 1994); *Parry v. Crawford*, 990 F.Supp. 1250, 1258 (D.Nev. 1998); 42 U.S.C. § 1396(a)(3); 42 C.F.R. §§ 431.206, 431.210, 431.220, 435.912, 435.919(a).

D.E. 597, Order on Motion for Contempt at 7-8.

3. The District Court also found that the Defendants' adoption of the FSTS as a "pre-screening" tool is contrary to Federal and State law which requires that
the initial certification of need for in-patient care be made by a physician and that the evaluation for admission to an ICF/DD or payment for the service be conducted by an interdisciplinary team, ... the consequent and obvious intent of adopting the experimental FSTS tool for assessing need has been to remove a large number of individuals from the list of those eligible for and receiving ICF/DD services. Circumvention of the final judgment entered in 1996, which ordered the services be provided to identify eligible individuals, is thus effectively accomplished."

D.E. 587, Order on Motion for Contempt at 8.

Moreover, "the District Court also found that FSTS was flawed as it did not:
"address many of the important factors considered by Medicaid when determining an individuals' need for continuous active treatment. Neither does the FSTS factor in the individuals' ability to understand or partake in expressive communication, to move about in either familiar or unfamiliar environment, to use appropriate sexual caution, or to exercise safety awareness. The Defendants admit that the FSTS does not ***14** consider all the factors listed in the Medicaid Code as bases for continuous active treatment. They contend that it is unlikely, while conceding to the possibility that an individual who qualifies for services under the Medicaid provisions could be excluded by the FSTS because the built-in criteria is faulty."

D.E. 587, Order on Motion for Contempt at 10.

The District Court's Order on the Motion for Contempt also found that the FSTS was "substantively faulty"
"because it relies on incomplete medical records, excludes the assessments made by the individual's health care provider, and fails to provide for independent review of an adverse determination. Further, the tool is inadequate because there is no evaluation or decision made by an interdisciplinary team as required by law. Instead, the final eligibility determination is made by a single reviewing physician who is employed by the Defendants. This single physician, who does not see the patients, is authorized to overrule eligibility determinations made by all treating physicians. D.E. 587, Order on Motion for Contempt at 11.

4. The District Court found that the Defendants had failed to comply because:
"eligible individuals offered community based services as an alternative to an intermediate care facility are not informed that, because of inadequate funding, acceptance of the offer does not ensure placement in the immediate future ... the offer is misleading and serves the obvious purpose of allowing the agency to postpone the delivery of services."

D.E. 587, Order on Motion for Contempt at 12.

5. The District Court further found that under the new policy, the Defendants did not consider an initial letter requesting ICF/DD services as a request, but merely as an inquiry:

***15** "the effect of their unreasonable interpretation, again, is to postpone service delivery. After the applicant has been determined eligible, the Defendants say they have another 90 days to make an ICF placement. The result is 180 days from the date of request to place instead of 90 days. There is no ambiguity in the Final Judgment. Any request from a developmentally disabled individuals or his/her guardian for ICF/DD services, in whatever form, starts the 90-day time period in which the Defendants are to evaluate the individual and provide or deny services. It has already been determined that a three month period is sufficient time for Defendants to complete the process for evaluation for the commencement of services."

D.E. 587, Order on Motion for Contempt at 12-13.

6. The District Court also found that the Defendants
"purposely offered placements to developmentally disabled individuals in areas of the State far away from their support systems of family and friends so that they can claim they made a placement offer knowing the offer will not be accepted because of the hardship that a remote placement will cause. A high raking official in the Defendants Department of Children and Families has admitted that such placements are occurring and that they are 'therapeutically inappropriate"'.

D.E. 587, Order on Motion for Contempt at 13.

PARTIES

Defendants, who are state officials, repeatedly seek to distance themselves from responsibility for compliance with Federal law, the Final Judgment and this Court's Mandate. All of the current State officials were in office at the time of the compliance hearing and either testified or had their position represented by counsel. Although admitting responsibility for the provision of services and failing to comply, Defendants seek to distance themselves from their predecessors. See e.g., Appellants' Brief at 2-3, 6-7, ***16** 9-11. However, as the Defendant State officials recognized in Defendants' Notice of Substitution of Parties in which **Defendants** notified the District Court of the substitution of Governor Bush as a party, (Appellants' Record Excerpts, Tab 9) "When the public officer is a party to an action in his official capacity and during his pendency dies, resigns or otherwise ceases to hold office the action does not abate and the officers' successor is automatically substituted as a party." Defendants' Notice of Substitution of Parties at 1, nt. 1.

During the course of this lawsuit, the identities of the Florida State officials sued in their individual capacity changed repeatedly as various officials resigned, were terminated, or were replaced by their successors. See e.g. Complaint (D.E. 1); Motion by all Defendants to Substitute Party Charles Kimber in Place of Richard LaPore (D.E. 370); Notice of Substitution of all Parties by all Defendants (D.E. 586). At no time during the proceedings before the District Court did Defendants suggest that the change in the Executive Branch officials which occurred well before the May 1999 compliance hearings in any way altered the Defendant State official's responsibility for compliance with Federal law, the 1996 Final Judgment, or the mandate of this Court. Indeed, the acts taken in direct defiance of the Final Judgment were taken by the current state officials and defended by these officials at the May 1999 compliance hearing. See e.g. D.E. 601, Transcript of May 24, 1999 hearing.

CLASS ACTION STATUS

Defendants were well aware that classwide relief was granted by the District Court in its 1996 Final Judgment. Indeed, upon entry of the Final Judgment by the District Court in 1996, the Defendants successfully obtained a stay of the Final Judgment as to the class ***17** members. The motion was denied by this Court solely as to the

one dozen named class members. At the November 4, 1998 hearing which resulted in the November 10, 1998 Memorandum of Findings (D.E. 530), Defendants' counsel specifically admitted that both the Defendants and their attorney

"have made public record statements that in order to comply with this court's Final Judgment it would cost the state somewhere between 750 [million] to a billion dollars annually. I think the accurate number now is the one that is being discussed currently which is possibly 2000 people total, but 600 who are in immediate need. I actually got, to use the vernacular, in the face of my client is that I want you to tell me exactly how many people you think need ICF services because that is the number we need to seek funding for. That is the number of people we need to provide the services to and we need to make the administrative and procedural accommodations ...".

D.E. 599, Transcript of November 4, 1998 hearing at 49. See also, *Id.* at 53, where Defendants' counsel specifically admitted that "there are individuals who are Plaintiffs in the lawsuit and who would certainly be within the class of individuals who are afforded the relief granted by the Court in its Final Judgment have not received services; and *Id.* at 60 where Defendants' counsel specifically states that "this is a class action ...".[FN3] In affirming ***18** the District Court's Final Judgment, this Court explained that the Defendants' violation did not affect only the individual Plaintiffs, but an entire class, stating that:

> FN3. Plaintiffs also refer this court to Defendants' Emergency Motion to Stay Final Judgment in which Defendants stated that the cost of serving the class within the 90 day deadline ordered in the Final Judgment would be "astronomical" as compliance with the Final Judgment would require appropriation of "sufficient funds to operate" ... "enough new ICF/DD facilities" ... "so that no ICF/DD eligible person waits longer than 90 days for placement." Indeed, in their plenary appeal of the Final Judgment in this case Defendants unsuccessfully requested this Court to reverse the Final Judgment with "directions to remand to fashion appropriate relief for Appellees as *individuals only*." Defendants Initial Brief in *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) at 10, (emphasis added.) This Court rejected Defendants' position, affirming the Final Judgment which Defendants repeatedly have acknowledged granted classwide relief, not only relief to the individual Plaintiffs. *Doe 1-13 v. Chiles, supra*, at 723.

"the record reveals that hundreds, perhaps even thousands of eligible developmentally disabled persons are not being provided ICF/DD services with anything resembling reasonable promptness. Consequently we reject the Appellants intention that 'there was no showing of systemwide injury."' *Doe v. Chiles*, at 722, nt. 23.

Remarkably, in direct contradiction to their written and oral statements to this Court and the District Court and admitted public statements, the Defendants now complain that they cannot be held in contempt of court for wholly ignoring the mandate of this Court and the Final Judgment and they now claim the order only affected a dozen named individuals. E.g. Appellants' Initial Brief at 24-28.

SUMMARY OF THE ARGUMENT

In 1992 this class action suit was filed to enjoin the practice of placing developmentally disabled medicaid eligible individuals seeking services on an indefinite waiting list. In 1996 the District Court entered its Final Judgment finding the state officials in violation of the "reasonable promptness" requirement of the Federal Medicaid Act. 42 U.S.C. § 1396(a)(a)(8). In February 1998 this Court affirmed the Final Judgment in its entirety. *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998). Nonetheless the waiting list continued to increase and state officials did nothing to comply with the Final Judgment.

In June 1998 Plaintiffs filed their Motion for Contempt and in November 1998 the District Court held a hearing.

At that hearing, the Defendants represented that they had more than adequate funds to meet the needs of the class members with appropriations ***19** released by the Florida legislature on October 21, 1998 in the approximate sum of $40,000,000.00. Defendants further stated that they had identified 600 specific individuals who had been waiting for services for over one year and had been determined by the State to be eligible and in immediate need of ICF/DD placements. State officials stated that the entire list of eligible individuals seeking such placements was approximately 2000 individuals but that only 600 were found by the State to be both eligible and in immediate need of these placements.

At the hearing, Defendants insisted that if given an additional 60 days they would come into compliance with the Final Judgment as affirmed by this Court. The District Court acceded to the Defendants' request and entered its November 10, 1998 Order finding the Defendants to be in violation of the Final Judgment, ordering the Defendants to come into compliance and to submit proof of their compliance by January 1999.

Based upon the uncontroverted evidence and admissions of the Defendants, they failed to come into compliance with the Order. Instead, Defendants submitted a notice to the Court in January 1999 advising that the vast majority of the 600 individuals who should have already received ICF/DD placements in accordance with the Final Judgment were no longer considered eligible by the State, that only 10 individuals met the new state criteria and desired ICF/DD placements and that those 10 individuals would be placed. As established by the state officials and the witnesses they called at the May 1999 Compliance Hearing the new criteria (Florida Status Tracking Survey) did not in fact measure eligibility for ICF/DD placements, and was a novel “work in progress” that was “cutting edge” and had not yet been validated. Defendants also admitted that all of the 600 individuals they had identified as eligible were eligible for ***20** those services until Defendants changed eligibility criteria during the 60 day additional period they requested at the November 4 contempt hearing. As admitted by the Defendant state officials, all of those people would have been admitted to ICF/DD facilities if a vacancy existed hours before the filing of the Notice of Compliance. Moreover, under the alleged new standard a very, very significant percentage of current developmentally disabled medicaid eligible individuals currently in ICF/DD would be rendered ineligible. However, the Defendants said that they would continue to provide services to those individuals who had been fortunate enough to not be victims of the waiting list forever in the future so as not to disrupt them. Thus, the individuals with developmental disabilities in Florida were irrationally divided into two classes, those who had not been the victim of the unlawful waiting list and would continue to receive services for life and those who were victims of the unlawful waiting list and now were being punished additionally by being excluded from these medicaid services for life.

In May 1999, the Defendants spent three full days presenting witnesses and documentation on the contempt issue. The court ultimately found the Defendants to be in contempt of court and ordered the minimal fine of $10,000.00 per day to commence if the Defendants were not in compliance with the Final Judgment within ten days and to continue on a daily basis until such time as the Defendants came into compliance with the Final Judgment. Defendants have presented no evidence of any further efforts to come into compliance with the Final Judgment and continue to save large sums of money every day that they incur a fine of only $10,000.00 while saving the costs of providing legally mandated services to mentally retarded citizens.

At no time has the District Court sought to interfere with the Defendants ability to ***21** design and operate its own Medicaid program. The District Court has merely sought to hold the Defendants to their legal obligation to provide medical assistance to mentally retarded medicaid eligible individuals with reasonable promptness as mandated by Federal statutes and the Final Judgment. The Defendants repeatedly advised the Court that they had adequate funds from the legislature and admitted that the Florida legislature had appropriated all sums that they

had requested for compliance with the decision. Thus, the State official Defendants are squarely responsible for the violation of the Final Judgment.

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY ORDERED DEFENDANTS TO COMPLY WITH THE FINAL JUDGMENT AND THIS COURT'S MANDATE BY ACTUALLY PROVIDING MEDICAID SERVICES WITH REASONABLE PROMPTNESS AS REQUIRED BY FEDERAL LAW

Defendants, wholly misconstrue the District Court's Order. Contrary to Defendants' assertion, neither the District Court's Final Judgment, this Court's affirmance of the Final Judgment, nor the District Court's Order on the Motion for Contempt, requires a "complete restructuring of the State's Medicaid Program for the developmentally disabled, or formulation of a "comprehensive plan", by Defendants. At the time the District Court entered its Final Judgment, Florida already had in place a structure for providing ICF/DD services, but was violating the Medicaid Act by relegating needy, eligible individuals to indefinite waiting lists for such services. The District Court's Order on the Motion for Contempt is nothing more than an attempt, using the only resources the court has available to it, it's contempt powers, to obtain compliance by Defendants with the law as embodied in the 1996 Final Judgment, and this Court's ***22** 1998 decision affirming that Judgment. *Doe v. Chiles, supra* at 723.

At no time during any of the proceedings before the District Court or this Court did Defendants express any confusion over the requirements of the Final Judgment, this Court's mandate, nor complain that compliance would require them to "restructure" the State's Medicaid system. Neither this Court nor the District Court has ever ordered the Defendants to restructure the State's Medicaid Program. Instead, the Final Judgment simply required Defendants to comply with the law by providing ICF/DD services to individuals Defendants had already found to be eligible, in consideration for the State's[FN4] receipt and acceptance of federal funds through its participation in the Medicaid Program. Neither this Court nor the District Court has ever ordered Defendants to formulate new laws or regulations regarding the eligibility criteria. Instead, it was Defendants, in what the District Court found was a transparent attempt to avoid actual compliance with the law, who unilaterally, and without prior notice, informed the court and the Plaintiffs every mentally disabled of the shift in the eligibility criteria, resulting in Defendants' claim that most of 600 individual Defendants had previously found were eligible and in immediate need did not meet the new standards and were therefore not entitled to receive services.

> FN4. It is, of course, well established law that although participation in the Medicaid programs is voluntary, participating states must comply with the provisions of the Medicaid Act. *Wilder v. Virginia Hosp. Ass'n.*, 496 U.S. 495, 110 S.Ct. 2510 (1990).

Defendants' argument in their brief that all that they are required to do to comply with the Final Judgment is to take the procedural step of amending the State Plan to include a specific waiting period, is frivolous, in light of well established law of which ***23** Defendants are aware, including this Court's decision affirming the Final Judgment of the District Court in this case. *Doe v. Chiles, supra* at 709-723. Defendants' statement in their brief that the Final Judgment "mandated only amendment of the Medicaid State Plan to include a specific and limited waiting period", and that they have complied with the Final Judgment because they amended the State Plan, coupled with their statement that "Defendants have no power to increase their budgets, as such a decision is an exclusively legislatively prerogative," (Defendants' brief at 30) demonstrates direct contumacy.

It is beyond cavil that State officials are required to do more than comply with the procedural requirements of the Medicaid Act, and in fact must comply in substance, not merely in form, with the provisions of the Medicaid

Act. *Wilder v. Virginia Hospital Association*, 496 U.S. 198, 110 S.Ct. 2510 (1990) [State Medicaid Plan requirements are judicially enforceable and the beneficiaries of the Medicaid Act have a private right of action to seek injunctive relief to enforce the procedural and substantive plan requirements.] Moreover, the Defendants' claim that they are not required to obey the law because of a shortage of appropriations, in addition to being false in light of Defendants' express admissions to the District Court that the necessary funds are available[FN5], also directly conflicts with the law. See, e.g. *Doe v. Chiles, supra* at 722" ["[I]nadequate state appropriations do not excuse 'non-compliance of Medicaid Act"']. See also *Alabama Nursing Association v. Harris*, 617 F.2d 388, 296 (5th Cir. 1980); *Jackson Memorial Regional Center v. Cook*, 109 F.3d 693 (11th Cir. 1997).

FN5. D.E. 599, Transcript of November 4, 1998 Hearing at 5-11, 48-54.

***24** Similarly, the Defendants' reliance on the Eleventh Amendment, an argument already made to this court in their appeal of the Final Judgment in this case, should be rejected again by this court. As this Court noted in its decision affirming the Final Judgment, the type of relief ordered by the District Court in the Final Judgment, which the District Court merely sought to enforce in its Order on the Motion for Contempt, is expressly authorized under the Ex Parte Young[FN6] doctrine, which "permits federal courts to enjoin state officials to conform their conduct to the requirements of federal law, even if there is an ancillary impact on the state treasury." See also, *Doe v. Chiles, supra* at 719; and citations therein to *Tallahassee Memorial Regional Medical Center v. Kirk*, 109 F.3d 693 (11th Cir. 1997); *Millken v. Bradley*, 423 U.S. 267, 289, 97th S. Ct. 2749, 2762 (1977).

FN6. 209 U.S. 123, 28 S.Ct. 441 (1908).

II. THE DISTRICT COURT HAD JURISDICTION TO ORDER CLASSWIDE RELIEF.

Defendants argue that the contempt order is flawed "in its attempt to enforce classwide relief", attempting by this argument to litigate issues which they either waived by failing to appeal, or which this Court already decided on appeal and which Defendants are therefore barred from relitigating.[FN7]

FN7. Indeed, in Defendants Brief in support of their appeal of the Final Judgment, they expressly asked this Court to remand the case to the District Court to fashion relief only to the individual Plaintiffs. Defendants Initial Brief at 10. This Court rejected Defendants' position and affirmed the Final Judgment granting classwide in its entirety, not only as to the named Plaintiffs. *Doe v. Chiles, supra* at 723.

The Final Judgment in this case ordered classwide relief. The Final Judgment ***25** expressly ordered the Defendants to establish within the State's Medicaid Plan "a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities." D.E. 449. The Final Judgment was entered only after the District Court advised the parties it had received the Magistrates' Report and Recommendation recommending that the Plaintiff class be certified, and after receiving no objections, oral or written, by Defendants. D.E. 458, Transcript of August 28, 1996 hearing.

Defendants in this case failed to object to the Magistrate's Report and Recommendation, and failed to take any measures such as asking the District Court to allow them time to object prior to its entry of the Final Judgment in this case and thereby waived continued litigation on this issue. *Loconte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), cert. den. 487 U.S. 958, 109 S.Ct. 397 (1988) [Magistrate's findings of fact, not objected to and thus, in effect become finding of District Court ...]; *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144 (11th Cir. 1993) [Challenges to Magistrate Judge's findings barred by failure to object]; *Lorentzen v. Anderson Pest Control*, 64 F.3d 327 (7th Cir. 1995) [failure to file objections with the District Court to Magistrate's Report

and Recommendation waives the right to appeal all issues addressed in recommendation, both factual and legal]; *Smith v. Frank*, 923 F.2d 139 (9th Cir. 1990) [failure to object to findings of fact and conclusions of law entered by Magistrate, waives opportunity to contest those matters on appeal.]; *Egert v. Conneticut Generalized Insurance Company*, 900 F.2d 1032 (7th Cir. 1990), [parties' failure to file written objections in District Court disputing Magistrate's conclusion, waives right to ***26** appeal that conclusion]; 32 American Jurisprudence, 2d Addition, Federal Court Section 201 (1995), ["only those specific objections to the Magistrate Judge's Report made the District Court will be preserved for appellate review."]

The Report and Recommendation, therefore, became the order of the District Court, which was ultimately affirmed in its entirety by this Court. *Doe v. Chiles, supra* at 723. Defendants never moved for rehearing or clarification of this Court's 1998 decision and never appealed the decision. Moreover, at all relevant times throughout this litigation, up through the appeal, all the parties, including Defendants, have treated this case as a class action. In its affirmance of the Final Judgment, this Court noted that the Defendants' violation of the Medicaid Act affected an entire class of individuals, and not merely the named Plaintiffs, stating that:
"the record reveals that hundreds, perhaps even thousands of eligible developmentally disabled persons are not being provided ICF/DD services with anything resembling reasonable promptness. Consequently, we reject the appellate's contention that 'there was no showing of system wide injury."' *Doe v. Chiles*, at 727, nt. 23.

The affirmance by this Court of the District Court's Final Judgment in its entirety is law of the case and/or has res judicata effect, thus precluding Defendants' attempts to revive the issue of class certification. See e.g. *Venn v. St. Paul Fire Marine Insurance Co.*, 99 F.3d 1058 (11th Cir. 1996), [both District Court and Appellate Courts are generally bound by a prior appellate decision in the same case].

III. THE TRIAL COURT PROPERLY HELD THE DEFENDANTS IN CONTEMPT SINCE DEFENDANTS DID NOT COMPLY WITH THE DISTRICT COURT'S FINAL JUDGMENT AS AFFIRMED BY THIS COURT.

The Final Judgment entered by the District Court on August 28, 1996, and ***27** affirmed in its entirety by this court in February 1998, was clear and unambiguous. The Final Judgment ordered in relevant part as follows:
The Defendants' shall, within sixty (60) days of the date of this Order, establish within the state's Medicaid plan a reasonable waiting list time, not to exceed ninety (90) days, for individuals who are eligible for placement in ICF/DD institutional care facilities.
D.E 449.

While Defendants now claim that they are allowed to redefine the criteria for eligibility, at no time prior to the entry or the Final Judgment in this case did the Defendants contest the fact that hundreds or thousands of developmentally disabled individuals on the ICF/DD waiting list in Florida had already been determined by the state Defendants to be eligible for such care. Indeed, this Court found in its affirmance of the Final Judgment that "Appellants admit that there are large number[s] of individuals waiting for ICF/DD services ..." and that "the record reveals that hundreds, perhaps even thousands, of **eligible** developmentally disabled persons are not being provided ICF/DD services with anything resembling reasonable promptness." *Doe v. Chiles, supra*, at 722, nt. 23. (emphasis added).

Moreover, while Defendants contend in this appeal that the District Court erred in finding Defendants in contempt for proposing a 180 day waiting list, in its affirmance of the Final Judgment, this Court found that the ninety (90) day waiting list imposed as a maximum by the trial court was reasonable. *Doe v. Chiles, supra*, at

718.

In the Order holding Defendants in contempt, the District Court properly found that Defendants' were in violation of the Final Judgment and this Court's mandate, *inter* ***28*** *alia*, because the Defendants' new criteria for determining eligibility for ICF/DD services (The Florida Status Tracking Survey of "FSTS") was an "insincere" attempt to circumvent the Final Judgment intended to retroactively render ineligible the number of disabled individuals Defendants were required to serve;[FN8] because the new criteria were inherently flawed;[FN9] and because Defendants "Plan of Compliance" resulted in a One Hundred Eighty (180) day period from the date of the request for ICF/DD placement, instead of the Ninety (90) days mandated by the Final Judgment and affirmed this Court. The District Court accurately summarized the nature of the Defendants so called "compliance" by stating, "as disclosed by the evidence, between January 11, 1999, and May 24, 1999, few efforts were undertaken to actually comply according to the Order. Instead, the more significant undertakings are geared to changing the rules and implementing new service plans including the FSTS to justify compliance under ***29** Defendants low-budget terms." D.E. 587, Order on Motion for Contempt at 4.(emphasis added).

> FN8. At the November 4, 1998 Hearing, Defendants expressly stated that at least 600 individuals had been identified as eligible and in need of immediate ICF/DD placements and begged for 60 days to comply based on the release of forty million dollars in additional funds on October 21, 1998 and the size of the bureaucracy. D.E. 599, November 4, 1998 transcript at 5-11, 21-23, 48-49. The District Court gave Defendants all the time they requested and more relying on their representations. D.E. 599 at 64. On the day Defendants were requested to report compliance, Defendants instead reported that they had orally changed the eligibility requirements and refused to offer ICF/DD placement to the vast majority of the 600 individuals whom the State officials had previously found eligible but had unlawfully placed on a waiting list for several years. D.E. 532. Remarkably, the State officials advised the Court that the list of 600 individuals had dwindled to about 10 people and that these 10 people would soon all receive placements. D.E. 602 Transcript of May 26, 1999 Compliance Hearing 26-7.
>
> FN9. The creator of the FSTS, Dr. Ray Foster, was called as a witness by the Defendant State officials at the May 1999 compliance hearing testified that (1) the FSTS did not measure eligibility for ICF/DD placement; (2) was novel and a work in progress; and (3) had not yet been validated. D.E. 601, Transcript of May 24, 1999 Compliance Hearing at 207, 210-11, 238-42, 248.

Finally, the District Court noted the Defendants' express acknowledgment that the Plan of Compliance "they presented, ten (10) months after issuance of the appellate court mandate, *is only an intent to comply*. Indeed, the compliance plan submitted by the Defendants is primarily about their plans for the future and points to no significant acts of completion." D.E. 587, Order on Motion for Contempt at 4 (emphasis added).

In addition to deficiencies in the FSTS, the court also found that the Plaintiffs had failed to comply and act in good faith, because eligible individuals to whom Defendants offered the possibility of community based services as an alternative to ICF/DD placements were not informed by Defendants that because of inadequate state funding, their acceptance of an offer of non-ICF/DD placement would not insure placement in the immediate future. D.E. 587, Motion on Order for Contempt at 12. As the District Court noted, "the offer is misleading and serves the obvious purpose of allowing the agency to postpone a delivery of services."

The District Court properly found that the Defendants' eleventh-hour change in the criteria to determine eligibility for ICF/DD services, embodied in the "Florida Status Tracking Survey", was illegal, and demonstrated De-

fendants' continued resistance to compliance with the Final Judgment (R.449 at 6). The District Court noted:
"The consequent and obvious intent of adopting the experimental FSTS tool for accessing need has been to remove a large number of individuals from the list of those eligible for and receiving ICF/DD services. Circumvention of the Final Judgment entered in 1996, which orders that services be provided to identify eligible individuals, is effectively accomplished." R.587 at 8.

***30** In addition, the District Court properly found the new eligibility criteria failed to comply with well established rule making law, requiring notice and the opportunity to be heard by affected parties, and was "deficient" because it violated federal and state law. Order on Contempt at 7-8.

Defendants do not dispute the District Court's factual findings.[FN10]

> FN10. In the Order of Contempt, the District Court found that the Defendants' adoption of the new criteria in the FSTS as a "pre-screening tool" was contrary to federal and state law requiring initial certification and need for inpatient care to be made by physician and subsequent evaluation of ICF/DD admission by an interdisciplinary team; that the FSTS was a "work in progress"; that it had never been used anywhere in the nation, as utilized in this case, and was not a ready tool for evaluation; and that even if the State sought accreditation of the FSTS, approval would not be obtained for at least two years. The court relief on the inability of Defendants' own expert witness to give an opinion on whether the FSTS was formulated "correctly, or accurately measures anything "and was an invalid instrument". D.E. 587, Order on Motion for Contempt at 7-10. Moreover, the District Court found that the FSTS does not address important factors considered by Medicaid to determine an individual's need for continuous active treatment, as the Defendants' criteria did not consider mentally disabled individual's ability to understand or partake in expressive communication, "move about in familiar or unfamiliar environments", use appropriate sexual caution, "or" exercise safety awareness. The Court noted:
> "the Defendants admit that the FSTS does not consider all of the factors listed in the Medicaid code as bases for continuous active treatment. They contend it is unlikely, while conceding to the possibility that an individual who qualifies for services under the Medicaid provisions could be excluded by the FSTS because the built-in criteria is faulty."
>
> D.E. 587, Order on Motion for Contempt at 8-10.

IV. THE DISTRICT COURT PROPERLY FOUND THAT THE DEFENDANTS' FORMULATION AND IMPLEMENTATION OF THE NEW ELIGIBILITY CRITERIA CONTAINED IN THE FSTS CONSTITUTED INVALID RULE MAKING WITHOUT NOTICE AND COMMENT

In its Order on Motion for Contempt, the District Court, relying on well ***31** established State and Federal law, found that the new criteria embodied in the FSTS were subject to notice and comment before taking effect. See, *Cleveland Clinic Florida Hospital v. AHCA*, 679 So.2d 123 (Fla. 1st DCA 1996) [new interpretation of statute by AHCA "represent[ed] a radical turnabout from its prior interpretation and practices and therefore should have been amended pursuant to "established rulemaking procedures"]; see, *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1982), on rehearing, 727 F.2d 957.[FN11] [Agency's "decision" "to reverse a long standing and uniform practice" constitutes rulemaking.]

> FN11. On rehearing, the 11th Circuit Court of Appeals, *en banc*, did not rule on the previous panel decision finding that the agency in that case, the Immigration and Naturalization Service, had engaged in rule making without complying with notice and comment, as the issue was moot, based on the govern-

ment's subsequent promulgation of regulations in compliance with notice and comment requirements.

An agency's characterization of a rule as either interpretive or legislative is not dispositive of a court's determination of whether a rule is subject to the notice "requirements of the administrative procedure act."][FN12] Indeed, any agency action which establishes a "new method for determining the obligations of regulated parties or distribution of funds is subject to notice and comment rulemaking." *Committee for Fairness v. Kemp*, 791 F.Supp. 888 (D. D.C. 1992). See also, *Balsam v. DHRS*, 452 so.2d 976 (Fla. 1st DCA 1984) ["Any agency statement is a rule if it 'purports ... to create ***32** certain rights and adversely affects others; or services ... to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law"']

FN12. Any exceptions to the notice and comment requirements of rulemaking are "limited" and apply only where "substantive rights" are not at stake, and such exceptions are to be "narrowly construed and reluctantly countenanced". *Sentera-General Hospital v. Sullivan*, 988 F.2d 479 (D.C. Cor. 1992).

"Notice and comment rulemaking is designed to facilitate the informed and reason decision making of governmental agencies, and to 'assure the legitimacy of administrative norms.'"[FN13]

FN13. Defendants' failure to promulgate their new eligibility criteria without notice and comment also violates Plaintiffs' procedural due process rights, as the new criteria results in the denial, without notice and an opportunity to be heard of Plaintiffs' entitlement to services. See *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976) [interest of individual in continued receipt of social security benefits is statutorily - created property, interest protected by due process clause.]

Committee for Fairness v. Kemp, 791 F.Supp. 888 (D.D.C. 1992).

Moreover, "generally, the greater the reach of the regulatory rule, the greater the need for public comment ..." *Direct Depositors of America, Inc. v. Office of Thrift Supervision*, 862 F.Supp. 586 (D.D.C. 1992). See also, *Associated Builders and Contractors, Inc. v. Reich*, 922 F.Supp. 676 (D.D.C. 1996) ["rules that effect change in existing law and policy, grant rights, impose obligations or produce other significant effects on private interests are legislative and, therefore, subject to notice and comment requirements ..."]; see also *Zhange v. Slattery*, 55 F.3d 732 (2nd Cir. 1995).

In the case at bar Defendants' new definition of what constitutes a medically necessary service constitutes illegal rulemaking (because of Defendants' failure to comply with notice and comment requirements) as the new criteria affects existing policies and procedures to a significant and substantial effect (denial of important services) to hundreds and thousands of individuals. As the District Court noted in the ***33** contempt order, "it is admitted by the Defendants that based on the level of needs as established by the FSTS a large number of person now receiving ICF/DD services will no longer be eligible." D.E. 587, Order on Motion for Contempt at 7. Indeed, Susan Dickerson, the designated representative for the Department of Children and Families, testified at the May 24 compliance hearing that the eligibility criteria implemented and enforced by the state defendants until approximately November, 1998, (or only a few days after this Court entered its November 10th order on Plaintiffs' Motion for Contempt), was that otherwise eligible individuals were eligible for ICF/DD placement if they had an I.Q. of 59 or lower; or an I.Q. of 60 to 69 with a secondary disability, or deficits in three major life areas with a secondary disability, or a primary disability such as cerebral palsy. D.E. 601, Transcript of May 24, 1999 Compliance Hearing at 244. Ms. Dickerson also testified that the "vast majority" of the 600 people whom the Defendants had previously identified were immediately in need of ICF/DD treatment were found to not meet the new criteria for ICF/DD placement, and that "every one" of those individuals were eligible prior to the change

by Defendants in the eligibility criteria. D.E. 601, Transcript of May 25, 1999 Compliance Hearing at 266. Despite their acknowledgment that the new criteria would deprive already eligible disabled individuals of ICF/DD placement, Defendants admitted they did not comply with notice and comment procedures. D.E. 601, Transcript of May 25, 1999 Compliance Hearing at 244.

As a result, and as the District Court found in its contempt order, the Defendants' actions in this case are analogous to the actions of the defendants in ***34***Committee for Fairness v. Kemp*, 791 F.Supp. 888 (D.D.C. 1992). In *Committee for Fairness*, the court found that the Secretary for Housing and Urban Development (HUD), improperly failed to comply with notice and comment procedures in enforcing a rule implementing a new method for calculating the operating subsidies of local public housing authority plaintiffs. The court found that because the new rules "involved major changes in the method for evaluating subsidies, they were legislative or substantive rules", and thus subject to notice and comment procedures. In the case at bar, the same of course is true. Indeed, under the new criteria, and by Defendants' own admissions, the majority of individuals now residing in ICF/DD facilities would no longer be eligible for ICF/DD services because the new criteria imposes new and arbitrarily restrictive methodology for the determination of entitlement to ICF services.

Moreover, and contrary to the Defendants argument asserted in their Brief, the trial court clearly had the authority to find that the Defendants new criteria were invalid as it failed to comply with Federal law. While Florida's participation in the Medicaid program is voluntary, as a participating State, it is obligated to comply with the Medicaid Act. *Wilder v. Virginia Hospital Association*, 496 U.S. 495, 110 S.Ct. 2510 (1990).

The State Defendants in this case do not have unbridled discretion in determining which of its needy, indigent, disabled citizens is eligible for Medicaid services, including optional services, on the basis of medical necessity. *Visser v. Taylor*, 756 F.Supp. 501 (D.Ken. 1990); *Ledt v. Fischer*, 638 F.Supp. 1288 (N.D. La. 1996). Moreover, "the standard that a state adopts determining the extent of medical assistance must be reasonable and consistent with the objective of Title XIX." ***35**42 U.S.C. § 1396(a)(17); *Visser v. Taylor*, 756 F.Supp. 501 (D.Ken. 1990). "The primary objective of Title XIX" is to provide medical assistance to needy individuals. *Visser, supra* at 506. See also, *Hunter v. Chiles*, 944 Supp. 914 (F.D. Fla. 1996)["the purpose of the Federal Medicaid Act is to enable each State to furnish ... rehabilitation and other services to help such families and individuals obtain or retain capacity for independence or self care ..." 42 U.S.C. § 1396(a)(2)].

To comport with the objective of existing needy individuals, courts uniformly hold that "Federal statutes and regulations providing for medically necessary treatment are to be liberally construed in favor of the intended beneficiary of the Medicaid program." *Visser v. Taylor supra*, at 507; *Athison v. Berger*, 404 F.Supp. 1137, 1149 (S.D. N.Y. 1975) aff.'d 538 F.2d 307 (2d Cir.) cert den., 429 U.S. 890, 97 S.Ct. 246 (1976).

Moreover, Defendants' conduct in changing the eligibility criteria for receiving ICF/DD services violates Federal law and standards contained in the Medicaid Act which requires that "a state must cover all medical procedures certified as medically necessary by a recipient's physician. *Meusberger v. Palmer*, 900 F.2d 1280 (8th Cir. 1990), citations to 42 CFR § 440.230; see also, *Weaver v. Reagen*, 886 F.2d 194 (8th Cir. 1989)[state cannot deny Medicaid coverage to patients who are eligible for medicaid when patient's physician certifies that requested treatment was medically necessary.]; See also, *Allen v. Mansour*, 681 F.Supp. 1232, 1239 (N.D. Mich. 1986) [State Department of Social Services patient selection criteria for funding of liver transplants, were arbitrary and unreasonable and violated Federal Medicaid standards as criteria were adopted without input from medical professional experts and was based ***36** on insufficient data]. Defendants in this case do not argue with the District Court's factual finding that (as admitted by Defendants). The new criteria are not based on the opinion of an eli-

gible individuals own physicians but on the opinion of the State's Doctor, who never even met or examined the in violation patient, in violation of federal law requirements.

Moreover, the Defendants' new interpretation of the medical necessity standard violates Plaintiffs' substantive due process and equal protection rights. The right to Medicaid benefits is a property interest. *Logan v. Zimmerman Co.*, 455 U.S. 422, 430 102 (S.Ct. III. 1985). ["The hallmark of property, the court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause"'. (Citations omitted.)]

In *Logan*, the Supreme Court struck down an Illinois statute that used arbitrary and random criteria to dismiss certain claims filed with the Illinois Fair Employment Practices Commission. The Court held that although the state was not required to create a statutory cause of action based on employment discrimination claims, and was free to eliminate the cause of action all together, the state could not arbitrarily deny access to the right it had created. *Logan*, 455 U.S. at 432-33, 102 S.Ct. at 1156. In *Logan*, the Supreme Court also struck down the Illinois statute on equal protection grounds.

Similarly, Florida has assumed the responsibility of providing ICF/DD services to a particular class of individuals - its Medicaid eligible, developmentally disabled citizens. Therefore, the Defendants are obligated, as a matter of law, and pursuant to ***37** the United States Constitution, to provide a rational system for allocating benefits i.e., ICF/DD placement, and cannot instead deny benefits arbitrarily or capriciously. Defendants' new policy and new construction of the medical necessity standard, directly results in the irrational treatment of developmentally disabled individuals with the same needs for ICF/DD treatment. Under the Defendants' new definition, individuals lucky enough to already be residing in ICF/DDs will not be subject to new requirements, and will receive ICF/DD services, even if they do not meet the new criteria, so long as they happen to currently reside in an ICF/DD facility. Other developmentally disabled individuals, still waiting for ICF/DD placement some of whom may have an even greater need than individuals who are currently residing in ICF/DDs, under Defendants' new definition of medical necessity, will be denied ICF/DD services, in a wholly arbitrary and irrational fashion. In this case, as in *Logan*, the state has "convert[ed] similarly situated claims into dissimilarly situated ones, and then used this distinction as a basis for its classification. This ... is the very essence of arbitrary state action." *Logan, supra* at 438, 1161. (Blackman, J., concurring)

Moreover, the new criteria, because it denies ICF/DD services to thousands of Florida's Medicaid eligible developmentally disabled citizens, while allowing several thousand identically or similarly situated Medicaid eligible, developmentally disabled citizens to receive ICF/DD services, also directly violates Plaintiffs' right to equal protection. See, *Hooper v. Bernalillo County Assessor*, 472 U.S. 611, 105 S.Ct. 2862 (1985).

Because Defendants' action directly violate federal not only state law, the District ***38** Court clearly was authorized to take action to obtain Defendants compliance with the Medicaid Act. See e.g. *Doe v. Chiles*, 136 F3d 709 (11th Cir. 1998); *Weaver v. Reagen*, 886 F.2d 194 (8th Cir. 1989); *Simpson v. Wilson*, 480 F.Supp. 97, (N.D.Vt. (1979); *Ledeti v. Fischer*, 638 F. Supp. 1288 (N.D. Ca. 1986).

V. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANTS ARE REQUIRED TO PROVIDE ICF/DD PLACEMENT TO CLASS MEMBERS WITHIN 90 DAYS OF A REQUEST, AND NOT 180 DAYS AS DEFENDANTS NOW ASSESS.

Defendants now claim that in addition to the 90 day period established by this court in its Final Judgment, and affirmed by this Court, they are entitled to an additional 90 days in which to provide ICF/DD placement, even for those individuals who have already been assessed and found to be qualified for ICF placements. Thus, under

the Defendants' version of their obligations under the Medicaid Act, developmentally disabled individuals will have to wait six months to receive ICF services, instead of the 90 days the District Court and this Court held complied with the "reasonable promptness" mandate of the Medicaid Act. The Defendants' position conflicts with both the letter, as well as the spirit, of the Medicaid Act.

First, as noted by this court, the Medicaid Act and the applicable regulations establish the outer limits of the "reasonable promptness provision" as 90 days, without exception for administrative delays. This Court of Appeals stated:
"Regulation § 435.930 requires that the state 'must' '[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures' and '[c]ontinue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible.' 42 CFR § 435.930(a)-(b) (1986).
***39** As also noted, 42 CFR § 435.911(a) sets forth the acceptable time limits for eligibility to determinations - 90 days for disability based applications and 45 days for all others. In our view, § 1396(a) - as further fleshed out by these regulations - creates a federal right to reasonable prompt assistance, that is, assistance provided without unreasonable delay.' *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) at 717."

Thus, this Court also equated the mandate that ICF/DD services be provided with 'reasonable promptness' with the specific time limits set forth in the regulations, including the single, one-time, 90 day limit for determining eligibility.

Other cases also make clear that once a positive eligibility determination is made, the relevant services must be provided immediately. No additional time is allowed for provision of services after eligibility has been established. See *Brown v. Luna*, 735 F.Supp 762 (N.D.Tenn. 1990) [In a case involving disability-based medical assistance provided under the Medicaid program, the court found that defendants had violated the reasonable promptness provision of the Act, 42 U.S.C. § 1396(a)(8), and the specific time limits governing eligibility determinations. Finding the defendants in contempt of its order, the court held that all applications pending more than 90 days without an eligibility decision shall be awarded interim Medicaid benefits ... and that interim benefits caused shall be delivered to the applicant by the 91st day."]; *Salazar v. District of Columbia*, 954 F.Supp 278 (D.D.C. 1996) [In Section 1983 action on behalf of a class of needy children and adults who applied for Medicaid in the District of Columbia, the court found for plaintiffs on their claims, including plaintiff's claim that defendant did not issue decisions "and provide Medicaid coverage" within 45 days after initial applications are submitted. (emphasis added) The court found violations based in part on numerous incidents where defendants ***40** had issued timely notices of approval, but did not provide plaintiffs with Medicaid cards until after the applicable time periods had lapsed.] See also, *Padron v. Feaver*, 180 FRD 448 (S.D. Fla. 1998) [Pursuant to "statutory requirements, once an application for Medicaid is filed, federal law mandates the state to render assistance with reasonable promptness and in a manner consistent with the best interest of the recipients." (emphasis added).]

Moreover, the Defendants' position violates Congress' stated policy underlying the "reasonable promptness" provision. As noted by the district court in *Sobky v. Smoley*, 855 F.Supp. 1123 (E.D. Cal. 1994),
"The Court's understanding of the purpose of the reasonable promptness provision is confirmed by the relevant Conference Committee report, which noted that **'[t]he requirement to furnish assistance' with 'reasonable promptness' will still permit the State sufficient time to make adequate investigations but will not permit them to establish waiting lists for individuals eligible for assistance**. Conf. C. Rep. R. No. 2271, 81st Cong., 2nd Sess. (1950)." (Emphasis added)

In enacting the reasonable promptness provision, and in specifically prohibiting waiting lists for services, Congress clearly intended that that period of time suffice for eligibility determinations, and for provision of services, without any further delay.

Defendants' argument in their Brief constitutes an unauthorized and untimely (by 4 years) motion for rehearing or for clarification. Both the Final Judgment and this Court's 1998 decision affirming the Final judgment are clear and unambiguous, as is the "reasonable promptness" language in the Medicaid Act. Defendants have 90 days to provide ICF/DD services. As found by the District Court, Defendants' position that they are entitled to six months is unsupported either by caselaw, the legislative history of the ***41** Medicaid Act, the explicit language of the Medicaid Act, and is therefore, patently illegal.

VI. THE DEFENDANTS WERE HELD IN CIVIL CONTEMPT AND DEFENDANTS' RECEIVED A FULL HEARING IN COMPLIANCE WITH ALL RELEVANT LEGAL REQUIREMENTS

"Civil contempt 'is the power of the Court to impose sanctions to coerce compliance with its orders." *Hicks v. Feiock*, 45 U.S. 624, 632, (108 S. Ct. 1423, 1429-30 (1998). "Both imprisonment and fines, when coercive or conditional, are legitimate civil contempt sanctions." *United States v. State of Tennessee, supra*, at 1301, (citations omitted).

When a sanction is punitive, "the contempt proceeding is criminal in nature; when a sanction is coercive or remedial, the contempt proceeding is civil in nature." *United States v. State of Tennessee, supra* at 1301, nt. 12 (citations omitted). (Civil contempt serves either or both of two purposes: to coerce the Defendant into compliance with the Court's order and to compensate the complainant for the loss it has sustained".) See also, *Local 28 v. Equal Employment Opportunity Commission*, 478 U.S. 421, 106 S. Ct. 3019 (1986); *McComb v. Jacksonville Paper Company*, 336 U.S. 187, 191, 69 S. Ct. 497, 500 (1949); *Penfield Company of California v. SCC*, 330 U.S. 585, 590, 67 S. Ct. 918, 921 (1947); *Nye v. The United States*, 313 U.S. 33, 42, 61 S. Ct. 810, 813 (1941); *McCone v. United States*, 307 U.S. 61, 64, 59 S. Ct. 685-687 (1939).

The District Court's Order on Motion for Contempt from which Defendants appeal in this case is expressly and unambiguously coercive and remedial - not punitive. The District Court entered the order because:
"the law requires that this three (3) year old judgment against the Defendants be finally enforced. Many of these Plaintiffs have been desperately awaiting services for over *42 seven (7) years. As found earlier in the lawsuit, no other class of medicare(sic)-eligible beneficiaries that are on the waiting list for service. Accordingly, it is ordered and adjudged that the Defendants are in contempt for willful non-compliance of the judgment of this Court to provide ... services to which the Plaintiffs are lawfully entitled. The Defendants are fined $10,000.00 a day, which shall begin 10 days after the date of this order, ***to continue until a comprehensive plan, which comports the letter and spirit of the judgment entered on August 28, 1996***, *is submitted, ready for implementation*." D.E. 587 (emphasis added)

Federal Courts have "inherent powers to assure the administration of justice." *United States v. State of Tennessee*, 925 F. Supp. 1291 (W.D. Tenn. 1995), at 1300, citations to *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812). As noted by the Appellate Court in *United States v. State of Tennessee, supra*, "the most prominent among these inherent powers is contempt sanctions, 'which a judge must have and exercise in protecting the authority and dignity of the court ...' *Id.* at 1300, citations to *Roadway Express v. Piper*, 447 U.S. 752, 764, 100 S. Ct. 2455, 2463 (1980).

Moreover, the prospective daily fine imposed in this case demonstrates the remedial intent of the contempt order

in the instant case. As the Supreme Court has noted, the imposition of "per diem" fines is a hallmark of a civil contempt sanction. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, at 828, 2558 ["a close analogy to coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged."] See also, *Carty v. Schneider*, 986 F.Supp. 933 (D.V.I. 1997) [coercive civil contempt sanctions are conditional sentences which should ***43** make contemnor to relieve himself from all sanctions with compliance, those penalties are usually either a jail sentence of indefinite duration, which the contemnor may avoid by agreeing to comply, or a fine triggered by future violations of the underlying order.] See also, *In Re: Kave*, 760 F.2d 343 (1st Cir. 1994) [in contrast to criminal contempt judgment, civil contempt judgment results in imprisonment or a conditional fine to induce the purging of contemptuous conduct.]; *Portland Feminist Women's Health Center v. Advocate for Life, Inc.*, 877 F.2d 787 (9th Cir. 1989) [contempt is remedial and thus civil if sanction is a fine payable to the Court and Defendants can avoid paying the fine by performing the act required by the Court's order.]

"[C]ivil Contempt Sanctions are those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required." *International Union, United Mineworkers of America v. Bagwell*, 512 U.S. 821, 827, 1143 S.Ct. 2552, 2557 (1994).[FN14] The contempt sanctions imposed in this case are remedial and therefore civil in nature, and thus, Defendants are not entitled to a jury trial ***44** or nor were Plaintiff's required to present proof beyond a reasonable doubt (although they did) of Defendants' violation of this Court's violation.

> FN14. Defendants reliance in their brief on *Bagwell, supra*, is misplaced. The Court in *Bagwell* specifically characterized prospective per diem fines such as those imposed by the District Court in this case, as in the nature of civil contempt. See *Bagwell* at 2558, 828. Plaintiffs in this case are also clearly able to purge themselves of the contempt sanctions simply by complying with the directive in the final judgment as the funds are available for providing ICF/DD services. D.E. 599, Transcript of November 4, 1998 Hearing at 5-11, 47-49. In *Bagwell*, unlike in this case, the Defendants were not given the opportunity to purge the contempt, and the majority of the fines imposed were retroactive, not prospective, conditional per diem fines.

Plaintiffs initial Motion for Contempt expressly and specifically sought imposition of the ***civil*** contempt sanctions see Plaintiffs' Emergency Motion for Civil Contempt and Memorandum of Law in Support thereof. D.E. 491. Plaintiffs' motion contained citations and analysis of caselaw regarding civil contempt sanctions, and notified the Defendants that Plaintiffs were seeking civil contempt sanctions "per diem fines, confinement, and a spending freeze on all medicaid funds not directed to person with developmental disabilities" ... [to] exert constant coercive pressure on Defendants to comply with the injunction. This coercive sanctions are ... remedial in nature and can be avoided through compliance." D.E. 491 at 6.

Thus, Defendants knew that Plaintiffs sought civil contempt enforcement, not a finding of criminal contempt. Defendants were given the opportunity to respond to Plaintiffs motion. At no time, either in their written filings with the District Court nor during the compliance hearings which took place over a number of days, did Defendants ever object to the procedure employed by the Court; seek more due process; ask for a jury trial; contend that they were entitled to criminal contempt protections; or raise any of the arguments they now raise in their brief for the first time.

Moreover, Defendants were afforded ample due process. Defendants were given the opportunity to present, and in fact presented, an array of witnesses, (D.E. 599, 601; 602, Transcripts of November 4, 1998 and May 24-26 hearings) and presented dozens of documents to the Court in support of their position. D.E. 531, 532, 534, 538, 539, 577, ***45** 580, 582, 585. See also D.E. 601 and 602, Transcript of May 24-25, 1999 Compliance Hearing.

Defendants now argue that the contempt was criminal in nature because they claim to not have the ability to purge the contempt, due to insufficient funding by the legislature. This argument is meritless. As this Court found in its decision affirming the August 1996 Final Judgment, and as is well established law, "'[I]nadequate state appropriations do not excuse non-compliance' with the Medicaid Act". *Doe v. Chiles*, 136 F.3d 722 (1998), *Alabama Nursing Home Ass'n v. Harris*, 617 F.2d 388, 396 (5th Cir. 1980); see also, *Wisconsin Hospital Association v. Reivitz*, 733 F.2d 1226, 1236 (7th Cir. 1984).[FN15] "If a state could avoid the requirements of the Medicaid [Act] simply by failing to provide sufficient funds to meet them, it could rewrite the congressionally imposed standards at will." *Alabama Nursing Home Association v. Califano*, 423 F.Supp. 1325, 1330 (M.D. Ala. 1977), rev'd and vacated in part on other grounds, sub non., 617 F.2d 388 (5th Cir. 1980).[FN16]

> FN15. Similar claims of insufficient funds on the part of Defendants held in contempt arise commonly in the context of prison litigation. Courts routinely dismiss such arguments. See e.g. *Rufo v. Inmates of Sussek County*, 502 U.S. 367, 292, 112 S.Ct. 748, 764 (1992) [insufficient financial means do not justify the continuous constitutional violations]; *Cardy v. Farrelly*, 957 F.Supp. 727, 745 (D.I. 1997); *Inmates of Allegheny County Jail v. Wech*, 699 F.Supp. 1178, 1146 (E.D. P.A. 1983) [lack of financing is not a defense in failure to provide minimum constitutional standards.]
>
> FN16. Defendants' claim that they were entitled to a finding of reasonable doubt is similarly meritless. Defendants, as noted by the Court in its order, expressly admitted to all of the factual grounds resulting in the District Court's imposition of civil contempt sanctions. Moreover, the District Court's orders were based solely on the testimony of the Defendants and witnesses they called at the hearing. The District Court based all its finding on the uncontested evidence submitted by the Defendant state officials.

Moreover, Defendants, by their own admission do have the ability to purge ***46** themselves of contempt by complying in full with the Final Judgment. As admitted by Defendants at the several day compliance hearing, Defendants have access to sufficient funding to provide the necessary services and despite this, have refused to do so. D.E. 601, May 24, 1999 Hearing, Transcript at 96. See also, D.E. 599, Transcript of November 4, 1998 Hearing at 4-11, 54.

VII. THE GOVERNOR IS A DEFENDANT PURSUANT TO ACTIONS TAKEN BY DEFENDANTS COUNSEL.

On June 21, 1999, Defendants, *sua sponte*, filed a Notice of Substitution of Parties, (D.E. 586) advising the Court of the substitution of Defendants' successors in office as to various official defendants in this case. Defendants Notice of Substitution of Party specifically substituted Governor Jeb Bush as a party Defendant, in the place of Lawton Chiles, his predecessor in office. D.E. 586 at 1. Defendants noted in their Notice of Substitution of Party "that when a public officer is a party to an action in his official capacity and during his pendency dies, resigns, or otherwise ceases to hold office the action does not abate and the officers successor is automatically substituted as a party." D.E. 586, at 1. Defendants' Notice of Substitution of Party was not entered in any limited capacity and did not reserve the right to contest jurisdiction over the successor party the District Court.

Moreover, Defendants have expressly recognized the status of the Governor as a Defendant in this case. See e.g.

D.E. 599, Transcript of November 4, 1998 Hearing at 3. See also, D.E. 599, Transcript of November 4, 1998 Hearing where Defendants' counsel acknowledged his clients, i.e. the Defendants', obligation “to effectuate” this ***47** Court's order and to do “whatever else is legally required”. Moreover, the actions the District Court found violated the Final Judgment in the Order on Motion for Contempt were performed by the current state officials, many of whom were present at the May 1999 compliance hearing to defend their actions. See e.g., D.E. 601, Transcript of May 24, 1999 Hearing.

CONCLUSION

For the foregoing reasons, the District Court's Order on Motion for Contempt should be affirmed.

JOHN/Jane Does 1-13, Respondents/Plaintiffs/Appellees, v. Jeb BUSH, et al, Petitioners/Defendants/Appellants. 2000 WL 33976370 (C.A.11) (Appellate Brief)

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