UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA Plaintiff,	)	
vs.	)	**Case No. 06-CV-673-GKF-FHM**
STATE OF OKLAHOMA; et al. Defendants.	)	

DEFENDANTS' OBJECTION TO PLAINTIFF'S MOTION TO ENFORCE CONSENT DECREE, MOTION TO MODIFY AND BRIEF IN SUPPORT

Defendants, State of Oklahoma and the Office of Juvenile Affairs, object to Plaintiff's Motion to Enforce Consent Decree, Motion to Modify Consent Decree and Incorporated Memorandum of Law. [Dkt. 260 & 261]. In support of their objection, Defendants show the Court as follows:

STATEMENT OF THE CASE

In 2004, Plaintiff notified the State of Oklahoma of its intent to investigate the conditions of confinement at the L.E. Rader Center (Rader) located in Sand Springs, Oklahoma. See Consent Decree at ¶ 1& 2. [Dkt. 258]. In 2005, Plaintiff issued a finding letter alleging that certain conditions ***at Rader*** violated the constitutional rights of juveniles confined ***at Rader.*** See Consent Decree at ¶ 3. [Dkt. 258]. In 2006, Plaintiff filed this action, concerning the conditions of confinement ***at Rader.*** See Consent Decree at ¶ 1. [Dkt. 258]; see also Amended Complaint at ¶ 1, 5, 15 & 17. [Dkt. 65]. After extensive litigation, Plaintiff, the State of Oklahoma and the Office of Juvenile Affairs, entered into a three (3) year consent decree, which is to end September 9, 2011. See Consent Decree at ¶ 114. [Dkt. 258]. In doing so, the parties agreed that the Consent Decree was governed by the Prison Litigation Reform Act, 18 U.S.C. §3626, and that for purposes of the Consent Decree and to settle this matter, it complied in all respects with the provisions of the PLRA. See Consent Decree at ¶ 7. [Dkt. 258]. Specifically, the parties to the Consent Decree stipulated that the Consent Decree was

"narrowly drawn and extends no further than necessary." See Consent Decree at ¶ 10. [Dkt. 258].

Despite many disingenuous statements made by Plaintiff, it concedes that there are no youth currently residing at Rader and that the facility is being closed. [Dkt. 260 at ¶ 20]. Rather than conceding this effectively ends this litigation, Plaintiff seeks to dramatically expand the Consent Decree in time and scope into parameters never contemplated by the parties and certainly not permitted by the PLRA. The State of Oklahoma and the Office of Juvenile Affairs (collectively referred to as OJA)[1] object. OJA requests this Court deny Plaintiff's request. Defendants anticipate filing a motion to dismiss for many of the same reasons set forth herein.

RESPONSE TO PLAINTIFF'S FACTUAL AND PROCEDURAL BACKGROUND

1. OJA admits that Plaintiff filed this action against all Defendants regarding the treatment of the youth confined ***at Rader***. At all times relevant to this action and before, OJA has operated two (2) other institutions: Central Oklahoma Juvenile Center (COJC) located in Tecumseh, Oklahoma and Southwest Oklahoma Juvenile Center (SWOJC) in Manitou, Oklahoma. Both of these institutions precede the existence of Plaintiff's 2004 investigation.[2] (See Plaintiff's Exhibit B).

2. OJA admits that OJA entered into a three (3) year consent decree, which is to end September 9, 2011. The parties agreed "[under no circumstances will this Consent Decree be extended beyond

[1] The only named Defendants to the Consent Decree are the State of Oklahoma and the Office of Juvenile Affairs. See Consent Decree at ¶ 6. [Dkt. 258].

[2] In light of the shortened time frame for response, OJA was not able to provide affidavits regarding the length of operations of these two (2) facilities. However, it appears the legal existence of COJC has been statutorily recognized since 1968. 10A O.S. § 2-7-606. SWOJC was authorized in 1995. 10 O.S. § 2-7-608B. There are other facts asserted in OJA's response that are also not supported by admissible evidence. If this Court is inclined to conduct a hearing on Plaintiff's motion, OJA recognizes its obligation to present proper evidence to support these contentions.

the three (3) year period unless by agreement of the parties and the Court that some portion of the Consent Decree needs to be extended for compliance." See Consent Decree at ¶ 114. The parties to the Consent Decree also stipulated the applicability of the PLRA. A reality, Plaintiff does not address and clearly, would rather this Court disregard. See Consent Decree at ¶ 7. [Dkt. 258]

3. Plaintiff misstates the terms of the Consent Decree. The Consent Decree provided for substantive remedial measures in three areas: Protection from Harm (¶ 35 - 60); Mental Health Care, Including Prevention of Suicide and Self-Harm[3] (¶ 61 - 82); and Special Education[4] (¶ 83 - 92). [Dkt. 258]. Investigations and Quality Assurance are not a substantive remedial measure. They are simply tools to be used by OJA and Plaintiff to track and document progress and compliance. Investigations and Quality Assurance (¶ 93 - 101). [Dkt. 258].

4. OJA admits the wording of the Consent Decree, however, OJA has not replaced Rader. As Plaintiff repeatedly points out, Rader was OJA's only maximum secure facility. See Plaintiff's Motion at ¶ 11, 20, p. 12, 15. [Dkt. 260]. For a variety of reasons, including the closure of Rader, OJA has transferred youth from Rader to several different placements, including its two other institutions COJC located in Tecumseh, Oklahoma and SWOJC in Manitou, Oklahoma. Throughout its history, OJA has transferred youth between its institutions. This is not a new practice. This is not an uncommon occurrence and and has occurred throughout the Consent Decree. Plaintiff is aware of this practice. These institutions do not replace Rader. OJA had three institutions. Now it has two. (See Affidavit of Elizabeth Stewart attached as Exhibit 1). This action has never focused on the terms

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[3] While not at issue at this time, OJA is pleased to advise the Court, that throughout its forty year history, no youth at Rader committed suicide.

[4] Plaintiff fails to advise the Court that OJA has been in substantial compliance with the Special Education Provision since July 2010.

and conditions of COJC or SWOJC. The closure of Rader does not justify expansion of this case into other judicial districts and other institutions which were in existence, which Plaintiff did not deem necessary to investigate or include in this action.

5. As is evidenced in Exhibits J through L to Plaintiff's Motion, throughout the term of this Consent Decree, OJA has fully cooperated in making Rader, its staff, the youth at Rader, its policies and any other documents related to the Consent Decree available to Plaintiff and their experts. However, Plaintiff has failed to uphold its end of the agreement, and now claims an emergency regarding certain facts it has been well aware of for a significant period of time. For example, in February of 2010, OJA wrote to Plaintiff advising that it was very possible that Rader would be closed and asked Plaintiff to provide its view of the applicability of the Consent Decree in the event that youth at Rader were transferred to OJA's current facilities. (See February 1, 2010 Letter from Dorothy Brown to Laura Coon attached as Exhibit 2). Rather than candidly engaging in a discussion of the issue and perhaps engaging in the good faith negotiations anticipated by the Consent Decree, [Dkt. 258 at ¶ 112], Plaintiff claimed to need more facts to express even a preliminary view on the matter and indicated any recommendations they made would be subject to "review and approval by the appropriate decisionmakers (sic) within the Department of Justice." (See February 4, 2010 Letter from Laura Coon to Dorothy Brown attached as Exhibit 3). During the July 2010 site visit, OJA advised Plaintiff that Rader would be closing in the next two (2) years. (See Report of Debra K. Deprado attached as Plaintiff's Exhibit K at p. 4) [Dkt. # 260-11, at p. 7]. Plaintiff made no further inquiries into this decision or the transition process until Spring 2011.

6. OJA agrees that the parties had agreed on a site visit for February 2011 that was cancelled due to weather. Pursuant to Plaintiff's request, OJA had provided Plaintiff and their experts with substantial documentation to prepare for the site visit. Even though Plaintiff was well aware of OJA's

plans to close Rader, it not only failed to reschedule the site visit, but declined to provide expert reports or a compliance report, as envisioned by the Consent Decree. [Dkt. 258, ¶¶ 98 - 109]. (See Plaintiff's Exhibit A at p. 25) [Dkt. 260-1].

7. While OJA does not doubt that Plaintiff's did read the public announcement regarding the closure of Rader, as set forth above, Plaintiff knew of OJA's plan to close Rader well before this date. The public announcement was made April 14, 2011. OJA is quite aware that Plaintiff monitors the newspapers for any word of Rader and OJA. Even if the Court is inclined to accept Plaintiff's implication that this was the date it first became aware of OJA's decision to close Rader, it still had months to come to Rader and discuss OJA's plans regarding the closure and transition of youth from Rader to its other facilities.

8. Plaintiff misstates the purpose of this communication. In the communication OJA is simply advising Plaintiff that OJA has "publically announced the closure of Rader." (Plaintiff's Exhibit A at p. 8) [Dkt. 260-1].

9. Plaintiff overstates its April 19, 2011 inquiry. In her email, Plaintiff's attorney simply asks that OJA "keep us posted on transition plans, especially where the youth are headed. We should talk at some point soon." This was not the primary purpose of the email. The primary purpose of the email was to attempt to schedule a conference call scheduled for May 2 or 3, 2011, and confirm the site visit for the week of June 27, 2011. (Plaintiff's Exhibit A at p. 11) [Dkt. 260-1].

10. OJA admits that it engaged in a conference call with Plaintiff and its mental health expert on May 3, 2011 regarding the expert's review of documents OJA had produced in anticipation of the February 2011 site visit and OJA's progress towards bringing Rader into compliance with the Consent Decree. Plaintiff has attached no evidence to document concerns it expressed during this conversation regarding transfers of the Rader youth to adult facilities. In fact, Plaintiff has no

evidence that OJA has transferred Rader youth to any adult facilities or has plans to transfer any such youth to adult facilities as a part of its plan to close Rader. This is because no such evidence exist.

11. OJA does not dispute said legislation was enacted this year by the Oklahoma Leglislature, which expands legal placement options of certain youth in its custody. However, as Plaintiff acknowledged in their June 8, 2011 letter to OJA, on June 2, 2011 and thereafter, OJA repeatedly assured Plaintiff OJA has no plans to place Rader youth in "collocated adult facilities pursuant to recently enacted legislation." (See Plaintiff's Exhibit A at p. 20 & 23.) [Dkt. 260-1].

The fact that there is legislation that allows OJA to place youth in collocated adult facilities has no bearing on this case. Plaintiff has no evidence and has been repeatedly assured that there are no plans to place youth who have been at Rader in these types of facilities (if one is even created).[5] This case is about the constitutional rights of youth at Rader, not what OJA might or might not do with other youth in its care at some point in the future. On a side note, Plaintiff provides no authority that the "collocated facility" envisioned in the new legislation is per se unconstitutional and suggests that this case is now a challenge of that statute.

12/13. On May 23, 2011, Plaintiff made its first written request to OJA for the "plan you submitted board regarding what will happen to youth upon Rader's closure." Even though Plaintiff was aware Rader would be closing since at least July 2010, and OJA had questioned Plaintiff regarding its position on transfers in February 2010, Plaintiff made no prior written request for documents regarding OJA's plans regarding the transfer of youth who were currently housed at Rader until May

[5] While most of the information provided by Plaintiff is not relevant to the matters before the Court, OJA does object to Plaintiff's use of newspaper articles for evidence to support their motion. The newspaper articles attached by Plaintiff to its motion(s) are hearsay under F.R.Civ.P. 801 & 802 and not admissible to prove the facts asserted therein. *Miles v. Ramsey*, 31 F.Supp.2d 869 (D.Colo. 1998); *Abruzzi Foods, Inc. V. Pasta & Cheese, Inc.*, 986 F.2d 605 (1st Cir. 1993); *In re Columbia Sec. Litig.*, 155 F.R.D. 466 (S.D.N.Y. 1984).

23, 2011.

14. On June 2, 2011, OJA provided the draft Transition Plan and explained to Plaintiff that it had not been presented to the board for approval. In providing the plan, OJA assured there was no plan to place Rader youth in a collocated secure facility and told Plaintiff "when you come for your site visit we will be happy to discuss any questions you have regarding the transition of Rader youth upon the closure of Rader." (See Plaintiff's Exhibit A at p. 18) [Dkt. 260-1]. A copy of the Transition Plan is attached for the Court's review, attached as Exhibit 4.

15/16. On June 8, 2011, rather than focusing on Rader's closure or the end of the Consent Decree, Plaintiff began its effort to access OJA's other facilities and clearly articulated its decision it no longer felt that it would be a good use of its resources to visit Rader. On June 9, 2011 and thereafter, OJA urged Plaintiff to follow through with the site visit scheduled for the week of June 27, 2011 and pointed out to Plaintiff, it had not been on site since July 2010. Despite OJA's sincere requests that Plaintiff and its experts come for the site visit planned for the week of June 27, 2011, Plaintiff elected not to come for a site visit. (See Plaintiff's Exhibit A at pp. 25-26). [Dkt. 260-1].

17. OJA disputes it did not respond to Plaintiff's decision not to conduct its site visit of Rader. As set forth above, OJA encouraged Plaintiff to come to Rader, review Rader/OJA documents and discuss its concerns regarding transition and the closure of Rader.

18. Consistent with the terms of the Consent Decree and regardless of Plaintiff's decision not to conduct a site visit, on July 22, 2011, OJA timely provided all documents requested to Plaintiff which were within the parameters of the Consent Decree. OJA also requested an expedited review so that this matter could be resolved within the time frame of the Consent Decree. Also at that time, OJA provided another copy of the transition plan and specified where in the plan OJA addresses Plaintiff's concerns regarding youth's treatment needs. (See Plaintiff's Exhibit A at p. 33-35) [Dkt. 260-1].

19/23/24. OJA does not dispute that it has declined Plaintiff's "request" for information regarding its other facilities (COJC and SWOJC) under the terms of the Consent Decree. The Consent Decree applies to Rader. It does not apply to OJA's other facilities. As previously discussed, both facilities had been in operation prior to Plaintiff's investigation and resulting litigation. There is no Rader replacement facility.

20. Regardless of the admissibility of Plaintiff's evidence, OJA does not dispute that there are no youth at Rader and have not been since before August 1, 2011. (See Affidavit of Elizabeth Stewart, Exhibit 1)

21/22/23/25/26. Unless otherwise directed by the Court, OJA will not address Plaintiff's allegations regarding circumstances and situations related to COJC and SWOJC. Plaintiff's allegations are based upon hearsay and are not the subject of this litigation or the Consent Decree. 24. OJA does not dispute that is has not requested technical assistance regarding its other facilities. There is no requirement under the Consent Decree for OJA to seek technical assistance from Plaintiff or Plaintiff's experts at all, much less on matters other than Rader. [Dkt. 258, ¶¶101 & 106].

ARGUMENTS AND AUTHORITIES

Introduction

When OJA entered into this Consent Decree, it gave itself three (3) years to either fix Rader or close it. The decision to close Rader has been a long and thoughtful process. Over the past three years and after devoting extensive time and resources, it has become obvious that reaching compliance with all aspects of the Consent Decree is not possible. Even Plaintiff's experts agree:

> As discussed in previous reports, Rader's physical plant has many flaws, which do not lend themselves to renovations to adequately meet juveniles' needs for treatment and safety. Costs of renovation would be prohibitive. OJA recognizes those limitations and has chosen to close Rader rather that (sic) attempt to renovate the facility. (See Report of Anne M. Nelson at p. 29, Plaintiff's Exhibit J) [Dkt. 260-10, p. 32].

This decision did not come quickly, so that OJA could simply avoid the Consent Decree. The timing of the closing of Rader, coincides with specified end of the Consent Decree. It cannot be said OJA closed Rader to avoid this decree. However, rather than applauding the decision to close a facility which its experts agree cannot be fixed, Plaintiff asks this Court to "enforce" and "modify" the decree so that it can gain access to other records and facilities beyond Rader. Plaintiff attempts to create an "emergency" situation which simply does not exist. Plaintiff has been well aware of OJA's plan for months, if not years. It has not visited Rader for more than a year. It declined OJA's repeated requests to come for a final site visit. It has not provided a compliance review since September 2010. It ignored OJA's assurance that documents regarding each youth's transition would be made available at Rader at the site visit. In fact, Plaintiff did not even request the individualized transition plans for the youth at Rader, which were being conducted during June 2011. Plaintiff was so anxious to extend its reach beyond the parameters of the Consent Decree, it chose not to spend its resources on the task at hand, and now at the eleventh hour claims there is an emergency because OJA refuses to provide information regarding facilities other than Rader.

PROPOSITION I
Plaintiff's Reliance on David C. v. Leavitt is Misplaced

Plaintiff relies on *David C. v. Leavitt*, 242 F.3d 1206, (10th Cir. 2001) to support its motion. However, the facts upon which Plaintiff relies in this case are completely distinguishable from those in *Leavitt*. In *Leavitt*, the State of Utah settled a class action with a 48-month consent decree. *Leavitt,* 242 F.3d at 1208. Plaintiffs filed a motion to enforce the settlement agreement alleging Utah was either unable or unwilling to fulfill the obligations under the agreement based upon monitoring reports, each of which found Utah in non-compliance with a majority of the provisions of the agreement. Plaintiffs also alleged that Utah was engaged in a bad faith attempt to try to outlast the four-year term of the consent decree. *Id.* The district court found Utah in non-compliance with the

consent decree and ordered a new corrective action plan. *Id.* ***Two months later***, Plaintiffs filed a motion to extend the term of the settlement agreement that was then due to expire in three months. *Id.* at 1209. Ultimately, the court granted the motion and Utah appealed claiming that the court's modification power is circumscribed and cannot be exercised to substantially alter an unambiguous provision that is material to the parties agreement, specifically a clear termination date. On appeal, the Tenth Circuit found that:

> …a court's equitable power to modify its own order in the face of changed circumstances is an inherent judicial power that cannot be limited simply because an agreement by the parties purports to do so.

Id. at 1211. Having found that the district court had the equitable power to modify the termination provision of the consent decree, the Court concluded that Utah's significant non-compliance with the terms of the settlement agreement constituted "a changed circumstance that supports equitable modification." *Id.* at 1212. Accordingly, even where modification of a clear termination date is sought pursuant to the court's equitable powers, the facts must show significant non-compliance with the provisions of a consent decree.

Contrary to the facts in *Leavitt*, no such changed circumstance, based upon "significant non-compliance" or any alleged bad faith, is found in this case. Indeed, ***no*** non-compliance finding is made by DOJ experts in this case. (See Plaintiff's Exhibit's J - L) [Dkt. 260-10, 11 & 12]. The facts alleged by Plaintiff based upon its experts' findings in this case do not come close to supporting a claim of changed circumstance, such that the court has any reason to invoke its equitable powers to extend the termination date. In fact, absent those structural issues which all parties concede cannot realistically be fixed at Rader (and which played a significant factor in the decision to close Rader), OJA made remarkable progress on the Consent Degree. OJA has maintained substantial compliance with the Special Education section of the Consent Decree for well over a year which should have

resulted in an early dismissal of that section of the Consent Decree, not an extension as sought by Plaintiff. Plaintiff's experts have found OJA to be in substantial compliance with the vast majority of the substantive provisions regarding Protection From Harm section of the Consent Decree. While the experts found that some provisions were no longer applicable, there were no findings of non-compliance by Plaintiff's experts in the area of Protection from Harm. In almost every instance where Plaintiff's experts did not find substantial compliance, partial compliance was found. (See Plaintiff's Exhibits J & L) [Dkt. 260-10 & 12]. With regard to the Mental Health section of the Consent Decree, no findings of actual non-compliance are noted and six areas are fully compliant. (See Plaintiff's Exhibit K) [Dkt. 260-11]. Importantly, to this date, Plaintiff has issued no compliance report addressing its experts' findings, as had been the DOJ practice throughout the duration of the Consent Decree (at least until September 2010). Therefore, even if Rader were still open, the facts and experts' reports actually support an outright dismissal of the case and a termination of the Consent Decree by its terms.

PROPOSITION II
The Prison Litigation Reform Act Precludes the Extension of the Consent Decree as Requested by Plaintiff under the Circumstances Set Forth in Plaintiff's Motion

The Consent Decree entered into by the parties provides that it complies in all respects with the Prison Litigation Reform Act, 18 U.S.C. § 3626(a). [Dkt. 258 at ¶ 7]. Specifically, the Consent Decree provides that all prospective relief in the Consent Decree is narrowly drawn and extends no further than necessary. [Dkt. 258 at ¶ 10]. However, despite these stipulations, Plaintiff makes no mention of the requirements of the PLRA in its motion to modify and extend the Consent Decree.

The PLRA specifically mandates the following:

> (1) Prospective relief.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends

> no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1). In addition, the PLRA provides for the following with respect to termination of prospective relief:

> (b)(1) Termination of prospective relief.—(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener—
>
> > (i) 2 years after the date the court granted or approved the prospective relief;
> > (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
> >
> > (iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

Id. at (b)(1). Further, the PLRA provides for immediate termination of prospective relief in the following circumstances:

> (2) Immediate termination of prospective relief.—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.
>
> (3) Limitation.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

Id. at (b)(2) and (3). Hence, even where the court has inherent equitable powers to extend the termination date of a consent decree where significant non-compliance is found, it cannot be so extended unless the court also finds under the PLRA that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means

necessary to correct the violation of the Federal right. Moreover, a court may continue the relief only if it supportably finds that there are ongoing constitutional violations. *Morales Feliciano v. Rullan*, 378 F.3d 42, 52 (1st Cir. 2004).

The PLRA mandates the termination of consent decrees altogether unless the district court makes the specific findings that are necessary to keep a particular decree alive. *Id.* at 54. Therefore, in addition to finding ongoing constitutional violations, the findings must include a finding that ordered relief satisfies the statutory narrowness-need-intrusiveness criteria. *Id.* A "current and ongoing" violation as required under the PLRA to extend a consent decree means a presently existing violation, not a potential, or even likely, future violation. *Cason v. Seckinger*, 231 F.3d 777, 783 (11th Cir. 2000).

In this case, Plaintiff alleges no current and ongoing violations of any Federal rights to support its motion , but rather bases its motion on speculation, newspaper articles, and unnamed sources' fears of what might occur at facilities other than Rader. By its terms, the Consent Decree terminates on September 9, 2011. It may not be extended under the PLRA without a finding by this Court of current and ongoing violations of a Federal right and the narrowness-need-intrusiveness criteria. No evidence has been submitted by the Plaintiff to support such a violation and no such violation is claimed or can be claimed - Rader is closed. With no constitutional violation claimed or supported by evidence, the requisite PLRA findings cannot be made by this Court. Accordingly, Plaintiff's request for an extension of the termination date of the Consent Decree must be denied.

PROPOSITION III
Rader Has Not Been Replaced

There is no case law the parties can point to regarding the term "replace" in the context of this case. However, Courts have had to grapple with the issue of "replacement" versus "elimination" in the employment law arena for years and have established an analysis that is appropriate in this

situation. In many instances, an employee claiming to be wronged under an employment law, might be arguing that he was terminated and"replaced" by a person not in his protected class. *Miller v. Eby Realty Group LLC,* 396 F.3d 1105 (10th Cir. 2005); *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 133, 142, 120 S.Ct. 2097, 147 L.Ed.2w 105 (2000). In response, an employer might argue, the employee was not replaced but in fact, his position was eliminated. *Miller,* 530 F.3d at 112. When pressed to determine whether a position has been eliminated (as opposed to replaced) the Court considers whether the job remained a single, distinct position. *Id.* "The test for position elimination is not whether the responsibilities were still performed, but rather whether the responsibilities still constituted a single, distinct position." *Furr v. Seagate Technology, Inc.,* 82 F.3d 980 (10th Cir. 1996). "To reassign the responsibilities of a position to a number of other individuals is to eliminate the position." *Hare v. Denver Merchandise Mart, Inc.,* 255 Fed.Appx. 298, 2007 WL 3230907 (10th Cir. 2007). These same principles apply in this instance.

The undisputed evidence establishes that Rader has not been replaced. Rader has been closed. No new facility has been opened to replace it. The youth that were housed at Rader and who still require a secure facility have now been transferred to OJA's other facilities, which have been in existence for years. Other youth have been transferred to less secure environments. There is no "one" place the final residents of Rader were sent. Hence, Rader has been eliminated and its responsibilities distributed throughout OJA. None of institutions are located in the Northern District of Oklahoma and certainly none are subject to the Consent Decree.

CONCLUSION

Clearly, Plaintiff does not know when to call it a day. While OJA cannot and will not represent to the Court that it was able to substantially comply with all terms of the Consent Decree, during the course of the decree and while it was operational Rader come into compliance with most

provisions of the Consent Decree. Now, the Consent Decree has ended. Rader has been closed. It is time for this case to be dismissed, not expanded to jurisdictions beyond this Court.

If Plaintiff has concerns regarding conditions of confinement at COJC or SWOJC, it claims it has the authority to take specific actions under 42 U.S.C. §14141 and 42 U.S.C. §1997a & a-1. Plaintiff's implication that expansion of the Consent Decree in this matter is their only avenue to address their purported concerns regarding OJA's other facilities is simply false. As set forth in the Consent Decree, Plaintiff utilized its authority under these statutes to investigate and litigate this action regarding ***Rader***. [Dkt. 258 at ¶¶1 - 3]. Plaintiff has the same purported authority to take the same steps, if deemed necessary, against OJA's other facilities, but this is not the case and this Consent Decree is not the vehicle to take such action. To do so, would simply allow Plaintiff to impose the terms of an expired Consent Decree on facilities which are not a part of the decree. There is absolutely no basis for this Court to make findings that Plaintiff's proposed enforcement or modifications are narrowly drawn and extend no further than necessary, and OJA will not so stipulate. [Dkt. 258 at ¶10]. This case should be dismissed. There is no justification to extend the Consent Decree and there is nothing to enforce. For these reasons, OJA objects to Plaintiff's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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