UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LASHAWN A., by her next friend, Evelyn Moore, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 89-cv-1754 (TFH)**
ADRIAN M. FENTY, as Mayor of the District of Columbia, *et. al.*,	)	
Defendants.	)	

ORDER

For the reasons set forth in its April 5, 2010 Memorandum Opinion, this Court held Defendants in civil contempt for their failure to timely provide an adequate annual plan proposal developed in consultation with Plaintiffs, as required by paragraph 8 of the October 7, 2008 Stipulated Order. Order (April 5, 2010) [Dkt. No. 1025]. The Court further held Mayor Adrian Fenty, as the official responsible for the appointment of a CFSA Director, in civil contempt for noncompliance with paragraph 4 of the Stipulated Order, requiring Plaintiffs' inclusion in the selection process. Defendants reserved the right to seek an evidentiary hearing on remedies, and the Court invited briefing on appropriate remedies and held a remedy hearing on July 23, 2010.

I

Plaintiffs suggest that older youth transitioning out of foster care, particularly those with an "APPLA" designation, suffered from a deprivation of services due to the District's failure to take their planning obligations seriously. Plaintiffs propose that the Court order the District to undertake a competitive procurement process to engage, for two years, an organization that serves older youth

transitioning out of foster care.[1] Defendants argue that Plaintiffs' proposal is excessive, contending that "[t]he passage of time and the actions already required by the Court are sufficient to address defendants' contempt." Defendants further argue that Plaintiffs' proposed remedy is punitive, as opposed to compensatory or coercive, such that it would be an appropriate remedy only for *criminal* contempt, not civil contempt.

"[*S*]*ome* categories of sanctions—compensatory fines, coercive imprisonment, and per diem fines to coerce compliance with affirmative court orders—[are classified] as civil in nature." *Salazar v. D.C.*, 602 F.3d 431, 439 (D.C. Cir. 2010) (quoting *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 659, 308 (D.C. Cir. 1994) (approving as a civil sanction a per diem fine of $100 per day for failure to appear in court)). Yet, as Defendants point out, "an unconditional fine imposed after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance." *Salazar*, 602 F.3d at 440 (quoting *Evans v. Williams*, 206 F.3d 1292, 1295 (D.C. Cir. 2000). But, for all practical purposes, there is often no bright line between civil and criminal contempt sanctions, as "[m]ost contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's future obedience." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994); *Salazar*, 602 F.3d at 438.

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[1] Plaintiffs also propose that the Court order Defendants to implement a 2010-2011 "Strategy Plan" in the form proposed by the Court Monitor. While purportedly aimed at preventing the repetitive delays and lackadaisical approach that plagued the 2009 plan proposal, this proposed sanction is not specifically tied to any provision of the 2010-2011 proposals espoused by the Monitor but eschewed by Defendants. The Court accordingly rejects it. Additionally, while Plaintiffs set forth a persuasive argument that youth with an APPLA goal were most likely to have seen benefits from an adequate plan, relative to others in foster care, the Court finds that Plaintiffs have not shown that effects of the contemptuous conduct warrant, as a coercive or compensatory sanction, the specific injunction they propose.

Upon consideration of the parties' arguments, the Court rejects Defendants' claim that a contempt sanction is unnecessary.[2] *Cf. Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70, 79 (D.D.C. 2003) ("It is appropriate to use the contempt power to identify wrongdoing and to prevent the recurrence of contumacious behavior in the future."); *In re Fannie Mae Secs. Litig.* 552 F.3d 814, 822 (D.C. Cir. 2009) ("District judges must have authority to manage their dockets, especially during massive litigation such as this, and we owe deference to their decisions whether and how to enforce the deadlines they impose." (citation omitted)). The Court also rejects Defendants' argument, based on *Evans* and *National Labor Relations Board v. Blevins Popcorn*, 659 F.2d 1173 (D.C. Cir. 1981), that a "three-stage process" is required for civil sanctions concerning a failure to meet a clear, court-ordered deadline.[3] Here, after seeking additional time to comply with AIP requirements, Defendants failed to comply with the agreed-upon deadline of paragraph 8, such that members of the plaintiff class were unable to realize the intended benefit of the parties' bargain. The sanction imposed below is therefore tailored to be compensatory, not punitive, in nature. *See Pigford v. Veneman*, 307 F. Supp. 2d 51, 56 (D.D.C. 2004).

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[2] Notwithstanding Defendants' improved proposals, the Court is particularly skeptical of the argument that the "passage of time" warrants the leniency they seek here. The Court cannot countenance a tactic that amounts to running-out-the-clock, particularly in light of the longstanding pattern of obstinate conduct observed here. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (U.S. 1991) ("when a party shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order," civil sanctions in the form of attorney's fees may be imposed to police the judicial process).

[3] Under Defendants' interpretation, this Court may not order civil sanctions for a party's failure to comply with a deadline, other than a discovery deadline, unless the Court has already set forth an applicable schedule of fines or other penalties. According to Defendants, this is so even where the conduct may be enforceable via criminal contempt sanctions. In practical terms, this would mean that initial deadlines or filing deadlines need not be taken very seriously (at least not by a party insufficiently motivated by the prospect of paying attorneys' fees) since the Court will afford a recalcitrant party an opportunity to purge itself of contempt by complying with specified conditions, presumably including a new deadline.

With respect to the sanctions for Defendants' violation of paragraph 8 set forth below, the Court notes that: (1) the Stipulated Order contained no schedule of fines for noncompliance,[4] (2) Stipulated Order ¶ 8 imposed a deadline of January 15, 2009, which was informally extended to January 26, 2009, (3) although the District provided a brief, six-month proposal on that date, the District did not deliver a proposed annual plan until February 24, 2009, (4) a principle reason for the Court Monitor's dissatisfaction with Defendants' proposal was its lack of specific action steps and benchmarks concerning APPLA youth; (5) the District facilitates the transition of "emancipating" youth in part via a contractual arrangement with the Healthy Families/Thriving Communities Collaborative Council, which provides services (e.g., housing assistance) to youth in the system as well as those who aged-out of the system within the last two years, and (6) Defendants are already obligated to pay Plaintiffs' attorneys fees and costs, including those associated with the contempt motions and remedy briefings *sub judice* (as confirmed by Defendants' counsel during the July 23, 2010 Remedy Hearing).

II

Mayor Fenty's failure to comply with the simple requirements of paragraph 4 of the Stipulated Order are also difficult to remedy, as the result was Dr. Gerald's appointment, which may have occurred whether or not he included Plaintiffs in the selection process as required by the Order. While the Court may vacate Dr. Gerald's appointment or order a criminal contempt hearing to determine whether Mayor Fenty's contemptuous conduct was *willful*, it sees no reason to do so. Plaintiffs sensibly propose that the Court essentially replace the ignored consultation requirement with a new one, recurring every six months. The Court will not go quite so far as that, but it is

[4] Nor does the MFO limit the scope of remedies Plaintiffs' may seek. MFO § XX.F.3.

appropriate to compensate Plaintiffs for their missed opportunity to engage the Mayor by granting a new one, as stated below.

III

For the reasons set forth above and during the July 23, 2010 hearing, the Court hereby

ORDERS Defendants to set aside a sum equal to the amount Plaintiffs incurred in attorneys' fees and costs in litigating their Renewed Motion for Contempt, including for hearings, remedy briefing, and expenses associated with calculating or reporting fees and costs; the Court

FURTHER ORDERS Plaintiffs to provide, within thirty days, an estimate of attorneys' fees and costs associated with their Renewed Motion for Contempt, as described above; the Court

FURTHER ORDERS Defendants to set aside **$40,000**, or $100 per day per child who aged out of foster care without achieving permanency during the forty days where Defendants' plan proposal was late (January 15 to February 24);[5] the Court

FURTHER ORDERS, as a compensatory and coercive sanction, the funds set aside pursuant to this Order shall be promptly spent to enhance the District's initiative to facilitate the healthy and stable transition of older youth dependent upon child welfare system through its arrangement with the Healthy Families/Thriving Communities Collaborative Council (or via another program or contractual arrangement aimed at this objective, as so certified to the Court by

[5] The Court would forgive the nine days covered by its informal deadline extension if Defendants produced an adequate proposal on January 24, 2009, but elects not to do so in light of the vacuous proposal filed on that date. According to the CFSA annual report and CFSA FACES data, 176 children were emancipated (i.e., aged out) without achieving their permanency goal in 2009. Of these, 170 had an APPLA goal or no goal at all. More specifically, thirteen such children were emancipated in January 2009, followed by fifteen more in February 2009. Based on these data, the Court estimates that twenty children aged out of the system during the forty days the plaintiffs and the Court awaited Defendants' proposal, nineteen of whom had an APPLA goal. This figure is conservative in light of the fact that the population who may have benefitted from Defendants' plans but for their failure to timely commit to and implement them includes other youth as well. Its calculation assumes one child aged out on day one and a twentieth child aged out on day forty, with a constant rate of attrition.

the CFSA Director)[6] in addition to (i.e., separate and apart from) any amount allocated for that purpose for FY2011; the Court

FURTHER ORDERS Mayor Fenty, or his designee, to meet with Plaintiffs' counsel (or another agent of Plaintiffs') to discuss CFSA management and its implementation of the *LaShawn A.* reforms (i.e., the MFO) no later than November 22, 2010; the Court

FURTHER ORDERS Defendants to consult with Plaintiffs regarding the selection of a new CFSA Director should a new appointment be made during the pendency of this litigation.

SO ORDERED.

September 27, 2010

THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

[6] The CFSA Director might reasonably determine that the funds, in part, could be most effectively used to expand or bolster another initiative that helps older youth. For example, according to CFSA's 2009 Annual Report on the Grandparent Caregivers Program, 54% of the children served by that program in 2009 were aged thirteen or older, and seventy children remained on its waiting list at the end of the year.