1992 WL 226316
United States District Court, E.D. California.

VALDIVIA
v.
CALIFORNIA DEPARTMENT OF HEALTH SERVICES.

No. CIV–S–90–1226–EJG PAN. | July 24, 1992.

Opinion

EDWARD J. GARCIA, District Judge.

***1** THE CLERK: Calling Civil Case 90–1226, Valdivia, Richard Valdivia, et al. and the California Association of Health Facilities, against the California Department of Health Services, et al.

THE COURT: Who's appearing on behalf of the plaintiffs in the class claims?

MS. EDELMAN: Your Honor, my name is Toby Edelman, I am representing the plaintiffs; and with me is Eugenie Mitchell and Kathleen Lammers.

MS. MITCHELL: Morning, your Honor.

MS. LAMMERS: Morning.

THE COURT: And for the interveners?

MR. WAXMAN: Mark Waxman and Robert Gerst.

THE COURT: Who is the second person?

MR. WAXMAN: Robert Gerst, G-e-r-s-t.

THE COURT: Okay. And for the State defendants?

MR. MANSFIELD: Darryl Mansfield, Dennis Eckhart and Mateo Munoz.

THE COURT: You can be seated.

MR. ECKHART: Thank you, your Honor.

THE COURT: This matter is on calendar on all parties' motions for summary judgment and additionally on plaintiffs' motion for a permanent injunction. Because of the voluminous material submitted on the several motions I am not going to today decide the interveners' motion. I am going to put that over, Mr. Waxman, so you can be thinking about a date.

I have a suggested date. I want to have counsel appear in open court rather than take it under submission and write on it; there are some questions I have on it. And I am going to suggest the date of August the 14th. That should give us sufficient time to decide the matter, I will decide it on that date and still give counsel sufficient time to prepare for the final pretrial conference three weeks later. My schedule is such that it will be difficult to schedule it on any other date but at least I want you to be thinking about the August 14 date.

As far as the plaintiffs' motion is concerned, we have done a considerable amount of work as you probably realize reviewing the materials that you have submitted consisting of about one hundred seventy pages of briefs and about another thousand pages of documentary exhibits and evidentiary objections. So that on plaintiffs' motion I really don't see what counsel could possibly add in oral argument that's not covered in your briefs.

I have noticed that in your briefs you continually respond to the last piece of paper the other party filed with supplemental paperwork. I fear that if I allow extended arguments on the matter this morning that's exactly what you will do this morning and I really don't want to hear it. I have extensive notes of analysis, my notes track the briefs.

In effect, the motions raise twelve separate issues and I am going to go through those twelve separate issues one at a time and I am prepared to rule.

The main problems that I had in going over the briefs and in deciding the motions that are before me really are in connection with whether or not where I am granting summary judgment or where it's clear that plaintiffs are correct and defendants are in non-compliance with the federal law or regulation, I am not sure whether or not a permanent injunction should be granted.

***2** In a couple of instances on a couple of issues I am going to deny the cross-motions for summary judgment simply because I find sufficient disputed issues that I want this matter to go to trial and I want these agency heads and department officials to appear before me and explain things.

In other instances where I am denying the motion for preliminary injunction I am doing it for the same reason. There are issues as to why the State is so late in

compliance, why it contends it's in compliance sometimes simply with an internal memo instead of a regulation or a state statute; and then their past conduct what I call reactionism, trying to bring itself within conformance with the federal law in response to litigation. All of those issues I am going to delay and hear at trial because I want the explanations from the government officials.

Also bearing on the issue of whether to grant permanent injunctions on some of these issues is the matter of enforcement. For example, my recall is that at least in one instance the Defendant State contends that there is a bill before the legislature currently pending that would put them in compliance with the particular issue or a portion of an issue.

My question to the defendants or the plaintiffs will be on that issue this morning that if legislation is required to bring the State into compliance on some particular issue how can I order the executive branch of government to make the legislative branch of government pass a law? How would I enforce such an issue? So in any event, generally speaking those are the problems that I faced.

In addition to that I am going to grant a permanent injunction as to a couple of issues this morning where enforcement problems do not appear to be insurmountable. In that connection I will discuss briefly plaintiffs suggestion of appointing a master in the case.

I don't have enough time to manage a State agency as large as this defendant is, maybe a master might. So with that Ms. Mitchell or Ms. Edelman is there anything you want to add in connection with your motions?

MS. EDELMAN: Your Honor, if you had any specific questions—I agree with you about the large amount of paper—if you have any specific questions as you went through your decision I would be happy to answer them.

I have one point I would like to make though, your Honor. I understand your concern about if legislation were necessary—

THE COURT: I will get to that. I will discuss that issue in connection with the issue where it's raised, okay?

MS. EDELMAN: Great, thank you.

THE COURT: And I have no other questions generally right now. I had some but I have decided to gloss over the question and not ask it.

MS. EDELMAN: Okay.

THE COURT: Is the master submitted then, Ms. Edelman?

MS. EDELMAN: Yes, it is, thank you, your Honor.

THE COURT: Mr. Mansfield or Mr. Eckhart?

MR. MANSFIELD: Submitted, your Honor.

THE COURT: Plaintiffs on the motion for the permanent injunction and/or summary judgment first move that we convert our preliminary injunction order of January 11, 1991, to a permanent injunction, requesting permanent injunctive relief as to the State's alleged non-compliance in those areas covered by the preliminary injunction order.

***3** In addition to that there are other issues raised on the motion that were not addressed in the preliminary injunction order. As I have indicated we have issued tracking the briefs twelve areas or issues raised on the motion. We covered six of those specific substantive areas at the preliminary injunction order and I am going to go over each of those this morning.

Two of them presented no problem because there was in effect no objection from the defendants. And I will address those two first.

The first one I would entitle, comprehensive resident assessments. Unless I am missing something in the voluminous paperwork the defendants offered no argument as to this paragraph of the proposed order although they address generally the issue in some of their general comments. This issue is concerned with compliance, with requirements regarding the content of the assessments and the frequency of timing of the assessments.

The Court now grants plaintiffs' motion for summary judgment as to the comprehensive resident assessments issue and calling your attention to paragraph 2–A of the third page of the proposed order for permanent injunction; 2–A is granted.

The State shall insure that the assessments addressed discharge potential special agreements or procedures, mental condition rehabilitation potential and drug therapy as required by the cited federal regulation. And the assessments shall be conducted promptly upon admission, promptly after a significant change in the resident's physical or mental condition, and in any event, at least once every twelve months as required by the statutes.

The second issue we have labeled, residents' rights. I

draw all counsels' attention to page 4 of the proposed order for permanent injunction, paragraph C, that's paragraph 2–C. I am going to analyze some of the issues in paragraph 2–C separately as separate issues.

However, for right now plaintiffs' motion for permanent injunction, summary judgment and declaratory relief is granted in accordance with paragraph 2–C of the proposed order in the following areas.

The State shall insure that facilities protect and promote residents' rights in the following areas: free choice, protection of resident funds, admissions practices and bed hold practices. I am going to handle only. I am going to handle separate issues on oral analysis residents' rights in connection with transfer and discharge and the use of physical and chemical restraints.

The third issue we have labeled, survey and certification of compliance. On this issue the cross-motions for summary judgment on the issue of whether or not the State is in compliance with paragraph 2–D of the preliminary injunction order, that is, whether they are in compliance at present, the cross-motions will be denied, as is plaintiffs' motion to make this paragraph of the permanent injunction order permanent.

The reason I am denying the cross-motions for summary judgment on this issue and the request to make the injunction permanent is that the evidence submitted by each side is in conflict raising disputed issues of material fact which defeat summary judgment.

***4** Under this issue the reform law requires each state to conduct unannounced standard surveys of nursing homes and then certify these facilities for compliance with law and the surveys must be based upon federally approved protocol.

Pursuant to our preliminary injunction order California has begun using the Federal Government's Procedures and Interpretive Guidelines as of March of 1991; thus the State is apparently in compliance now. However, plaintiffs offer evidence to show that the federal agency, the H.C.F.A. has given the State failing scores for various aspects of its surveyed activities; for instance, some of the surveys are not unannounced and the H.C.F.A. has found serious problems with the State's performance in conducting federal certification surveys and those problems continue.

On the other hand, as the defendants point out the H.C.F.A. has also given the State passing scores in many areas. And defendants explain why they have failed to conduct unannounced surveys in some instances.

Plaintiffs also submit evidence that the State is still in the process of developing the criteria by which it will evaluate survey consistency.

From all of this I conclude that the State is trying to comply, may be guilty of some foot dragging but at least has not done a perfect job. Those are the issues among others that I would set for trial which we'll further refine at the final pretrial conference.

The bottom line is that the success of the State in its attempts to comply with survey on certification of compliance is mixed as measured by the evaluations by the Federal Health Care Financing Administration.

The fourth issue is labeled, transfer and discharge appeals. In this regard the reform law requires states to have in place by October 1 of 1989, a transfer and discharge appeals process for residents which is described in the statute as a quote, fair mechanism, unquote for hearing appeals.

Plaintiffs contend that defendants have not developed a fair hearing process but have instead issued a memorandum in February of 1992 which adopts the States general complaint system and which does not provide for testimony or cross-examination components of a typical fair hearing process.

However, on April 24 of this year, the same date that plaintiffs filed these motions that are before the Court this morning, the State superseded that previous memo with a memo to district administrators adopting a new appeals process which does appear to be a fair hearing process. Of course, adoption of this new process is not timely and plaintiff is entitled to summary judgment on the issue of defendants' failure to timely provide for a fair appeals process.

As to the newly-adopted appeals process, plaintiff contends that it's not a quote, fair mechanism, unquote, because it does not provide for cross-examination or give residents the opportunity to question directly facility representatives. Plaintiffs cite the Supreme Court, Goldberg against Kelly case for the proposition that the residents are entitled to a due process appeals hearing which includes confrontation and cross-examination.

***5** However, I am not satisfied that that's true here where it is not a State action being challenged and where the statute itself does not define the term, quote, fair mechanism, unquote and where the federal government has not issued implementing regulations.

I now find that the defendant's belated adoption of the appeals process for transfers and discharges to be a fair mechanism under the circumstances. So that on the timeliness issue summary judgment is granted to plaintiffs. On whether or not the appeals process now in place is a fair mechanism and whether or not the State is now in compliance, defendants' motion for summary judgment is granted.

I am deferring the issue of plaintiffs' request for a permanent injunction on this issue because I am not sure what a judicial compliance mechanism would consist of or all that it would entail. And I am not sure on this issue if I made the injunction permanent anyway how the Court would force the State to comply and enforce.

The next issue is labeled, nurses aid training and competency programs. As of April 1992 when defendants put two nurses aides competency evaluation programs into effect and began testing pursuant thereto it appears the State is fully in compliance with the requirement of the reform law in this regard and defendants motion for summary judgment on this issue is granted.

Defendants are now in compliance; however, plaintiffs complain that nurses aides continued to work in the care homes who were not evaluated for competency in conformance with the reform law from 1989 to 1992.

Defendants reply that the federal regulatory agency and that is the Health Care Financing Administration allowed the State to use its own competency evaluation programs then in place until the federal agency issued its own regulations. In any event, as to these nurses aides evaluated and deemed competent prior to 1992, I am not sure what the plaintiffs would have the State do.

And that's one of the questions you might address now, Ms. Edelman. What relief would you seek for those nurses that are still working that weren't evaluated properly prior to April 1992?

MS. EDELMAN: Well your Honor, the State has begun the competency evaluation in April '92 and I think that they could—you could order the State to require that currently employed aides who have been deemed competent have to be evaluated now through a State process. Would obviously take a while but it could be done because they are still providing care.

THE COURT: I understand that.

MS. EDELMAN: So I think it would take time for that to occur but they could be evaluated to insure that they are competent to do what they are doing.

THE COURT: But why should I order that in the context of this case? The evaluation is required to be done annually in any event.

MS. EDELMAN: Not under the federal law. As long as a person has been determined to be competent then that person is on the nurse aide registry and is capable of being a nurse aide, unless she stops employment for twenty-four months then she would have to begin the aide training and competency evaluation training again. As long as she still works there until she or he stops working.

***6** THE COURT: You mean unless I order it in the context of this case those would not be reevaluated?

MS. EDELMAN: I don't believe so, not under federal law.

THE COURT: Mr. Eckhart?

MR. ECKHART: Your Honor, I believe Mr. Mansfield is trying to seek clarification from the department on that issue right now.

THE COURT: Mr. Munoz?

MR. MUNOZ: Same.

MR. ECKHART: Let me see if I can get him back in so we can get the answer.

THE COURT: Hold on just a minute because if you are correct I may grant you summary judgment on that issue. That seems like a simple process to enforce.

MS. EDELMAN: Now that the process is in place the competency evaluation, yes, your Honor.

MR. WAXMAN: Your Honor, I wonder if I might interject one comment as the Court moves forward on this issue in determining that it perhaps will need to take some action. I would like to talk with my client for a minute because obviously there will be some effect on facilities and day-to-day operations of the home the Court might want to consider as it fashions an appropriate type of relief in this area.

THE COURT: Well, I think you are going to find that's going to be true in a lot of areas in connection with your motion. I am not going to single this one out.

MR. WAXMAN: Okay, I understand.

THE COURT: Mr. Mansfield, I don't know if you walked

out before I put the question.

MR. MANSFIELD: I heard the question your Honor, I walked out to get the answer.

THE COURT: What's your answer?

MR. MANSFIELD: We talked to our enforcement coordinator, your Honor, and I was informed that under State rules and regulations that they are required to be reevaluated on an annual basis and recertified, so that as they come up they will be recertified and tested on an annual basis. So these who have not been and were determined will have to come up for recertification and will be tested at that time.

THE COURT: And would you be applying the federal standards in reevaluation?

MR. MANSFIELD: I presume so, your Honor. That's the testing that's been developed so that would be the test that's been utilized.

THE COURT: If I understand you are in compliance now and if you apply those standards and evaluations under State law then I think that would be sufficient.

Ms. Edelman?

MS. EDELMAN: I believe that would be, yes, your Honor.

THE COURT: Okay.

MR. MANSFIELD: Your Honor, it would only make sense they would use that test because they have spent an inordinate amount of money to have that test developed and meet the federal standards and would no longer make sense to use that old test.

THE COURT: So on that issue, the State now being in compliance, summary judgment is granted to the defendants on this issue, denied to plaintiffs; and the request for permanent injunction is denied on that issue.

MR. MANSFIELD: Thank you, your Honor.

THE COURT: The next issue is labeled, nurse aide registry. The reform law requires states to establish and maintain a registry of nurses aides who have completed a nurses aides' training and competency evaluation program, the law specifying in detail other information the registry must include, and requiring that the information on the registry be available to the public.

***7** As plaintiffs note, the State was not in conformance with these requirements as evidenced by the H.C.F.A. agency reported deficiencies issued in March of 1992.

Defendants submit evidence that they are now in compliance except for identifying nurses aides against whom adverse findings have been made.

Mr. Mansfield, has that deficiency been corrected; are you now or are you attempting to identify the nurses aides against whom adverse findings have been made and adding that to the registry?

MR. MANSFIELD: Your Honor, our client informs it has been corrected and they are now required to make a notation on the record of deficiencies and the adverse action taken against.

THE COURT: When was that action taken?

MR. MANSFIELD: Just after H.C.F.A. noticed the department it was not in compliance with that.

THE COURT: Sometime after March of or April after that year?

MR. MANSFIELD: I didn't, your Honor—

THE COURT: When did you file your objection in these actions?

MS. EDELMAN: April 24th, your Honor.

MR. MANSFIELD: It may have been in June, your Honor. We have been informed that it has, in fact, been taken care of.

THE COURT: If it was June, of course that makes it appear as if you reacted to the motions before the Court, which bears on issues of good faith.

MR. MANSFIELD: I can only offer to find out, your Honor, when the exact time was. Does the Court wish that?

THE COURT: No, not right now. Based on the oral representations now made by counsel in court the Court grants defendants' motion for summary judgment on this issue finding that it is now in compliance with the reform laws.

However, again I want to note that in connection with plaintiffs' motion for a permanent injunction on this issue and on other issues, this is another example of repeated non-compliance and then eventually compliance in

reaction to the lawsuit or motions.

In noting that, for the record this is one of the issues that I would like to have the responsible state agents explain; that is, the past non-compliance and then the reactive compliance I would like to have them explain under oath at trial under cross-examination.

The next issue is labeled, education programs. The reform law requires in this connection the states to conduct periodic education programs for care home staff on residents regarding rights of residents under current law on a regular basis and how they may enforce those rights. The State has no such program, at least as of the date of the Michael Roetrine (phonetic) deposition and apparently has no plans to do so.

However, defendants now state that definite steps have been taken and are being taken to implement a training program which is targeted to go into effect January of 1993. The reform law of course requires the education programs to be in place by October 1, 1990. Plaintiffs' motion for summary judgment on this issue is granted. And also plaintiffs' motion for a permanent injunction on this issue is also granted.

***8** However, in granting both the motion for summary judgment and making the injunction permanent on that issue that's not to say that the suggestion by plaintiffs that the State contract with an omsbudsman to do the training and education for residents is the proper route to take. I am more inclined to oversee compliance with the plan the State has now started and then enforce its compliance if its adequate.

The next issue is titled, complaint investigation. In this regard the reform law requires the State to maintain procedures and staff to investigate complaints provide for a timely review on investigation of neglect or abuse of residents and misappropriation of the personal property; emphasize the word timely.

Plaintiffs submit evidence of two such complaints which complainants allege were not timely handled nor satisfactorily investigated. Plaintiffs contend that these complaints are evidence that the State only immediately investigates high priority complaints and that other complaints are not timely investigated as required by the reform law.

However, it appears that State law sets forth the procedures for investigating such complaints including time complaints, and these state statutory procedures appear to comply with the reform law; therefore, summary judgment is granted defendants on this issue and denied plaintiffs' motion for permanent injunction on that issue.

The next, number nine, the next issue is labeled, notice of Medicaid rights. The reform law requires the state to prepare by April 1, 1992, a written notice of rights and obligations of residents of nursing facilities and the facilities are required to disseminate the notices to their residents.

Up to February of 1992 the evidence shows the State had not prepared the notice, apparently delegating the responsibility to the facilities themselves. However, in June of this year they finally got around to preparing the notice and mailed it out last week, over four years later.

As to the timeliness of compliance with this requirement plaintiffs are entitled to summary judgment, although standing alone I don't see what good that does plaintiffs since I also believe that defendants are now in compliance on this issue and are entitled to summary judgment on the issue of compliance.

And as for plaintiffs' motion to issue a permanent injunction I am inclined to deny it on the basis that the State is now in compliance.

I am going to ask Ms. Edelman a question in just a minute as to why you would want summary judgment on the timeliness issue.

Plaintiffs raise other issues regarding the notice, for example, that defendants refused to advise the facilities of their responsibilities of disseminating the notice to the residents and that the notice is not in plain English but is rather a verbatim transcription of federal regulations making it difficult for ordinary people to understand it.

These issues along with the belated preparation and issuance of the notice raises issues of lack of good faith on the part of defendants which will be relevant as the Court considers state compliance in other areas and whether and how the Court can enforce any permanent injunction it may issue in this case in other areas.

***9** Now Ms. Edelman, what good would it do to grant you summary judgment on this notice of Medicaid rights, at least on the timeliness issue?

MS. EDELMAN: Well your Honor, I think you are correct that the main point that it shows is the lack of good faith on the part of the State. We were concerned at the time we filed our motion, of course in April, there was no such notice so we were still arguing there was nothing.

And when we saw the notice and saw that it was simply a transcription of what the federal government had published back in September 1991 we felt that as a matter of law that was not in compliance with the reform laws requirement because the law requires the states to develop a notice; the law didn't say, states, copy the federal regulations and hand those out.

I don't think that as a matter of law that it is a useful document for residents. It doesn't give people information that tells them what to do, it says you have a right to appeal the transfer.

THE COURT: Well, I disagree with you that they are not technically in compliance.

MS. EDELMAN: Whether it's adequate; all right your Honor.

THE COURT: But you have answered my question. Obviously at the time you filed your motion there was no compliance whatsoever.

MS. EDELMAN: At all; yes, that's correct, your Honor.

THE COURT: All right.

MS. EDELMAN: Thank you.

THE COURT: So that the State now being in compliance, the State's motion for summary judgment is granted on that issue.

And we'll leave for another day these issues as to timeliness and why they waited for four years and then only in reaction to the motions before the Court.

The next issue, number ten, is labeled, physical and chemical restraints. The reform law gives residents the right to be free from physical or chemical restraints imposed for purposes of discipline or convenience and not required as treatment except when it is to insure the physical safety of the residents or other residents, and then only on a written doctor's order which must specify the duration and circumstances under which the restraint is to be used.

On May 27, 1992, and after plaintiffs filed these motions the State adopted new regulations that bring them into compliance with most of the requirements of the reform law on this issue.

The State regulation, however, still does not require that the doctor personally prescribe the restraint nor does it require the prescription to address the duration and circumstances of the use of the restraints.

And I am going to ask you, Mr. Mansfield, a question in connection with that later as to why you believe you are in compliance.

As to the former; that is, that the doctor personally prescribed the restraints, defendants argue and I am satisfied that federal regulations allow to delegate tasks to an assistant or nurse or nurse unless the regulation specifically provides that the doctor must perform the task personally, so it appears that the delegation is not improper.

***10** However, Mr. Mansfield, why do you believe that you are in conformance when apparently you are not in conformance with the requirement that the prescription address the duration and circumstances of the use of the restraints? You answered generally that you believe you are in compliance in your belief.

MR. MANSFIELD: That's true. I don't have a specific answer for that, I don't know. The answer generally is the argument before us is what were confirmed by our client. But in terms of any specific question I don't have any answer at this time.

THE COURT: Okay. The applicable regulation that we are talking about is Section 72319(b), and it hasn't changed; is that correct, Ms. Edelman?

MS. EDELMAN: The state regulation has not changed; yes, that's correct, your Honor.

THE COURT: I am inclined to grant the plaintiffs' motion for summary judgment then on this issue, Mr. Mansfield, following the principle, the Ninth Circuit case which counsel cites that requires complete compliance, not substantial compliance. Do you want to respond to that?

MR. MANSFIELD: Your Honor, I don't think there is much I can add to what I have already said. I would be willing, if the Court wishes, to try to provide supplemental information to give the Court further information on the point but at this point I don't have any additional information in terms of the complete compliance.

THE COURT: Any comment, Ms. Edelman?

MS. EDELMAN: Yes, I have a comment about the restraint issue, your Honor. First of all, these regulations were written, the State admits, in response to other litigation. So the only set of regulations the State

identifies and they came about as a result of another case.

THE COURT: I understand that.

MS. EDELMAN: Secondly, the consent regulations talk about the physician's responsibility, that's what these regulations are about, how the physician is required to get informed consent and the facility's sole responsibility under these regulations to make sure that the physician gave informed consent to the resident with respect to restraints and other medical treatment.

The federal nursing reform law has a much broader view of the responsibility of the facilities with respect to restraints. It says it is not only the physician's responsibility but also—

THE COURT: You are not helping.

MS. EDELMAN: I am sorry, your Honor.

THE COURT: What I really want you to address, if the State had complied with this last requirement that I am referring to, that is that the prescription address the duration and the circumstances of the use of the restraint, had they satisfactorily answered that question in court this morning I was prepared to grant them summary judgment on this issue.

However, case law seems to require that there be full compliance, not just substantial compliance and this is an important aspect of the rule.

MS. EDELMAN: Yes.

THE COURT: So what I am going to do is grant your motion for summary judgment on this issue. But noting that the State in all other respects is in compliance with the reform law except on the portion which or the requirement that the prescription address the duration and circumstances of the use of the restraints.

***11** You were beginning to argue the delegation aspect and I think that under the federal regulations the doctor can delegate the prescription to an assistant physician or to a nurse.

Because I don't understand why the government has not come into compliance on that last issue I am inclined, Mr. Mansfield, to make the injunction permanent because it looks like it would be easy to enforce it to require the State to do so unless legislation were required. Any comment?

MR. MANSFIELD: I have none, your Honor. Everything that the department has done is in the regulation.

THE COURT: Okay. That's right, it's a regulation, isn't it, so that you can conform. So that on that issue, that is that portion of that issue plaintiffs' motion for the permanent injunction is granted.

I will require and oversee the State's compliance with that and see that the prescription addresses the duration and the circumstances of the use of the restraints.

Once again, the State's delay in complying and then again only in response to litigation, in this instance, other litigation raises issues which fall into question the defendants good faith which in turn raises an issue of how the Court will monitor the State's continuing compliance and enforce its orders when necessary.

On a related issue defendants present evidence that since our preliminary injunction order defendants are now enforcing the regulation requiring that residents drug regimen be free of unnecessary drugs and that gradual dose reductions and behavioral intervention be utilized, so that defendants' motion for summary judgment on this related issue and also on the issue of physical and chemical restraints is granted and plaintiffs' motion for a permanent injunction is denied on those two issues.

The next issue is entitled, rehabilitation. Federal regulations—plaintiffs mistakenly refer to this issue as a statutory mandate but it's a federal regulation issue—provides that each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being.

Apparently on the evidence plaintiffs submit, defendants have done nothing to implement this regulation. However, since it's the facilities themselves that must provide the necessary services I question Ms. Edelman, how the defendants should have addressed this issue in compliance with the federal regulation.

Plaintiffs also argue that state law that limits ancillary therapy service as to a maximum of two per month per resident is in conflict with the federal regulation in limiting services to residents.

Defendants contend however that the two services per month limit does not apply to nursing home residents as a long-standing medical policy. On June 11 of this year after plaintiffs filed these motions, defendants issued a medical policy statement which reminds medical staff that the two per month limitation on services does not apply to nursing facility residents.

***12** However, as plaintiffs point out this is no more than an internal memo and in any event has not yet been communicated to the facilities.

Is that still true, Ms. Edelman, that that new policy memo hasn't been sent out to the facilities?

MS. EDELMAN: I believe it might have been sent out, your Honor, last week. It's sort of hard to keep track of what the government has done in the last couple of weeks. As far as we knew it hadn't been sent out but perhaps that's changed.

THE COURT: Mr. Mansfield, do you know off the top of your head?

MR. MANSFIELD: It has been sent out, your Honor.

THE COURT: It has been; okay.

Plaintiffs also submit evidence by way of declarations nursing facility residents are not getting needed therapy, which is not rebutted. On these rehabilitation issues plaintiffs' motion for summary judgment is granted.

As to plaintiffs' motion for a permanent injunction on this issue I am inclined to leave that for trial to hear further explanation from defendants for their failure to comply on this issue. And when they did take some steps towards compliance, why they were so late with their clarification of policy statement. And in any event, why they didn't earlier make the facilities aware of it.

MR. MUNOZ: Your Honor, if I may be heard with regard to the issue of the failure to rebut or the Court's impressions that the services that were not provided to the named plaintiffs were not rebutted. In fact, there was declarations and information attached to, I believe, the declaration of Tony which indicated that—

THE COURT: You responded with evidence from the facilities.

MR. MUNOZ: On behalf of these requests made by the physicians for these agreements, those patients which for which declarations were submitted to indicate that, in fact, there were services provided, to the extent that any requests for rehabilitative service that those requests were granted or that the individuals who were brought forward by plaintiffs had not, in fact, or physicians had not requested rehabilitative services, so—

THE COURT: I am aware of the evidence you submitted. I don't think it was responsive to the declarations.

MR. MUNOZ: Okay. Well, I just wanted to bring that point; thank you, your Honor.

THE COURT: I noted that you presented some evidence in rebuttal to that contention.

The twelfth and last issue is labeled, enforcement of the reform law as to Medicaid, required the states to establish by October 1 of 1989, various so-called intermediate sanctions for imposition on facilities that are in violation of the reform law, as well as criteria for the application of these penalties.

The available sanctions must include denial of payments, civil money penalties, appointments of a temporary management to oversee the facility, closure and appointment of a monitor.

It appears from the evidence that defendants are not in compliance with this requirement. The penalty scheme that the State has in place is deficient in several respects; for example, the State plan does not provide as a sanction for the appointment of a temporary manager or monitor and it does not provide when and how the several available sanctions are to be applied. And though the plan provides for sanctioning violations of state laws it does not appear to sanction violations of federal law; that is, the federal reform law. Plaintiffs' motion for summary judgment on the enforcement issue is granted.

***13** In defendants opposition one of the arguments they make is that currently pending before the California legislature is a bill that would authorize the use of the states civil money penalty system for federal violations.

Now the question I have then is that if state legislation is needed to effect compliance with the enforcement requirement how can this court order a state executive agency to make the necessary legislative changes?

Ms. Edelman, do you have any comment or answer on that issue?

MS. EDELMAN: Yes, your Honor. This was something that was troubling us, as well. We have all focused on the Health and Safety Code where the state licensing authority and it became apparent at a deposition—

THE COURT: Give me your bottom line. Are you saying that they could conform with the regulation instead of the statute?

MS. EDELMAN: Yes, they can; exactly your Honor, they can. We believe that the medical statute itself Section

14100.1 in the Health and Institutions Code (sic) gives the director the authority under—

THE COURT: In the what code?

MS. EDELMAN: Welfare and Institutions, I am sorry, your Honor.

THE COURT: Okay.

MS. EDELMAN: Gives the director the power and duty to conform state law to the requirements of federal law so we believe that the state would have authority because of this statutory provision to publish regulations and the federal reform law accepts and understands that the state could do this either by law or regulation.

THE COURT: Okay, you have answered—

MS. EDELMAN: So we believe that this section does give the authority.

THE COURT: Mr. Mansfield?

MR. MANSFIELD: Thank you, your Honor. Defendants do not believe that this is a correct position. They had drafted regulations and basically after an analysis it was determined that the regulations would not do what was needed.

And there is case law, California case law that basically indicates that the defendants have the statutory authority to enforce civil money penalties for violations of its own regulations but not for any other regulations that could include the federal regulations. It was determined that the blanket authority with the case law would put us in conflict and it was determined that the only way that the defendants could do this would be through a statutory change.

THE COURT: I don't recall that explanation in your paperwork when you mentioned this.

MR. MANSFIELD: It may not be, your Honor.

THE COURT: What I am inclined to do is to grant plaintiffs' motion for summary judgment on this issue; order you to comply.

If you cannot comply by regulation then you would insulate yourself from any contempt proceeding by convincing the Court that you could only respond by legislation which the agency has no control over other than introducing the legislation.

MR. MANSFIELD: Does the Court want a supplemental brief on that issue?

THE COURT: Not until they move for contempt.

MR. MANSFIELD: Anything else, your Honor?

***14** THE COURT: No. Because maybe if they agree with what you are saying they won't file a motion that they have no chance of winning, at least I hope.

So that plaintiffs' motion for summary judgment on the enforcement issue is granted.

To avoid the contempt motion which would just be another law and motion matter I am going to deny the motion for permanent injunction on this issue and hear on that issue at trial. Incidentally, in denying plaintiffs' motion for permanent injunction in the areas that I have mentioned in effect what I decided to do generally is grant plaintiffs relief on liability issues but deferring for trial in effect what are damage or remedial issues and we'll cover those at the final pretrial conference.

Now I have covered all of the issues there may be some requirement for clarification because of the complexity of the issues raised on the motions before me this morning. We'll prepare a summary order by issues, all twelve of them, at least clarifying the Court's rulings this morning. I am not inviting you to take pot shots later on but we'll see if it's clear enough in our written summary order.

Now I just want to spend just a couple of more minutes on this request for a special master since I have granted permanent injunction as to some issues which will require me, of course, to oversee and monitor compliance with the Court's order.

I am not familiar with the procedure for appointment of a special master as you suggest, Ms. Edelman and Ms. Mitchell. But the only question I have is who pays since there is no funds under the control of this court for payment of the master. I have appointed masters in other cases; for example, for discovery and found out that it costs tens of thousands of dollars for the work of these masters. I have also appointed land commissioners and land condemnations action and that costs tens of thousands of dollars.

And based upon the paperwork and the contentiousness in this case I suspect that if it continues before a master that master is going to bill for tens of thousands of dollars. So who pays, Ms. Mitchell or Ms. Edelman? Do you have clear law that says that defendants having been found in non-compliance have to pay for all of it?

MS. EDELMAN: Your Honor, frankly we have not fully researched that and I don't know the answer.

THE COURT: Do you know off the top of your head?

Do you want to respond to the suggestion for a master, Mr. Mansfield?

MR. MANSFIELD: I don't know the answer to the question either, your Honor.

THE COURT: Okay. I know that the court has no money.

MR. MANSFIELD: Nor does the state.

THE COURT: I tell you what, we'll discuss this issue further. It will come up either after trial or possibly at the final pretrial conference. I will tell you what my druthers are, that to the extent the parties must pay for this I would require both sides to pay maybe on a 50/50 basis that might discourage the use of the master if both sides have to pay for it.

***15** On the other hand, if the defendants were to pay for the entire cost of a master plaintiff could run up the costs on him. And as I say, there has been much contentiousness and paperwork on this file so we'll leave that for another day.

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THE COURT: If there is nothing else then thank you, counsel.

(Proceedings concluded.)