UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Patricia Welsch, et al,	)	
Plaintiffs,	)	MEMORANDUM ORDER
vs.	)	No. 4-72-Civ. 451
Vera Likins, et al,	)	
Defendants.	)	

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The procedural and factual aspects of this litigation to date are set forth in three prior Orders of this Court. Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); Memorandum Findings of Fact and Conclusions of Law, dated October 1, 1974; and Findings of Fact, Conclusions of Law and Order for Judgment, dated April 15, 1976. The October 1, 1974 Memorandum was accompanied by a detailed Order requiring specific changes at Cambridge State Hospital. After the filing of a supplemental complaint and a further evidentiary hearing, the April 15, 1976 Order modified the previous Order in many respects. Together, the two orders comprise the full equitable relief thus far granted to the plaintiffs.

At the time when the supplemental complaint was filed the plaintiffs moved for the convening of a three judge court for the purpose of considering their request for further injunctive relief in the form of a highly specific financing Order and/or in the form of an Order enjoining application of certain State fiscal and complement control laws. Although oral argument on that motion was heard on August 22, 1975, a ruling on the request was delayed by agreement of the parties, pending the outcome of the evidentiary hearing. For the reasons set forth herein, the Court has now concluded that: (1) it must deny the request for the convening of a three judge court; (2) acting as a single judge, it must deny the specific financing relief requested in the supplemental complaint; and (3) acting as a single judge, it has power to enjoin enforcement of the fiscal and complement control laws. Before entering an Order granting the latter relief, however, the Court will seek briefs and argument from counsel on the need to join additional parties, if any.

The supplemental complaint alleges that as a direct result of the operations of Cambridge State Hospital the State of Minnesota receives approximately

4.4 million dollars yearly in Federal Medicaid reimbursements under Title XIX of the Social Security Act. 42 U.S.C. §§ 1396, et seq. Plaintiffs assert that if these funds were spent at Cambridge State Hospital the Court's orders could be fully complied with, but that various State constitutional[1] and statutory[2] provisions prohibit the Commissioner of Public Welfare from expending the Medicaid funds; instead, they are deposited by law into the general fund of the State. The plaintiffs further allege that other statutory provisions[3] prohibit the Commissioner from employing certain staff at Cambridge State Hospital, as required by the Court orders. The crux of the allegations, insofar as the three judge court issue is concerned, is that:

> "The fiscal and complement control provisions . . . are unconstitutional as applied to limit the prerogatives of the Commissioner of Public Welfare to comply with constitutional standards determined by this Court to be necessary at Cambridge State Hospital."

A three judge court is requested to grant the following relief: (1) an Order requiring the defendants to deposit the Federal Medicaid reimbursement payments into a special account and to draw on that account to fulfill this Court's orders; (2) an Order enjoining compliance with and enforcement by defendants of the State fiscal or complement control provisions; and (3) an Order requiring defendants Brubacher and Christianson to facilitate the implementation of the action required of the Commissioner of Public Welfare. The defendants contend that a three judge court is not required and that, in any event, the relief sought is barred by the Eleventh Amendment.

I. THE REQUEST FOR CONVENING OF A THREE JUDGE COURT.

Section 2281 of Title 28 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The Supreme Court has noted that this is "an enactment technical in the strict sense of the term and to be applied as such." Phillips v. United States, 312 U.S. 246, 250-51 (1941). See also Boskey & Gressman, Recent Reforms in the Federal Judicial Structure--Three-Judge District Courts and Appellate Review, 67 F.R.D. 135, 141 (1975).

Upon the plaintiffs' application for the convening of such a court, the inquiry of this Court, while sitting as a single judge, is limited to determining:

> " . . . (1) [W]hether the constitutional question is substantial, (2) whether the complaint at least formally alleges a basis for equitable relief, and (3) whether the case otherwise comes within the requirements of the three-judge statute. . . ." Knight v. Minnesota Community College Faculty Association, 4-74-Civil 659 (D. Minn. December 22, 1975), at Slip Op. 3.

The standard for making an assessment of the first issue--the substantiality of the claim of unconstitutionality--was authoritatively set forth by the Supreme Court in Goosby v. Osser, 409 U.S. 512, 518 (1973):

> "Title 28 U.S.C. § 2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' Bailey v. Patterson, 369 U.S., at 33, 'wholly insubstantial,' id.; 'obviously frivolous,' Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910); and 'obviously without merit,' Ex parte Poresky, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' Ex parte Poresky, supra, at 32, quoting from Hannis Distilling Co. v. Baltimore, supra, 216 U.S. at 288; see also Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933); McGilvra v. Ross, 215 U.S. 70, 80 (1909) . . . ."

See also, Hagans v. Lavine, 415 U.S. 528, 538 (1974).

Without meaning to belittle counsel for the plaintiffs, who have labored long and hard in their search for a meaningful remedy in this action, the Court is convinced that the plaintiffs' claim that the fiscal and complement control statutes are unconstitutional as applied is "essentially fictitious" and "obviously without merit."

Both parties agree that the following passage from the Supreme Court's opinion in Ex parte Bransford, 310 U.S. 354, 361 (1940), states the governing rule under these circumstances:

> " . . . It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court . . . ."

See also Phillips v. United States, supra, at 253. The plaintiffs claim that the fiscal and complement control laws of the State are "unconstitutional as applied." The defendants claim that, at most, the "result obtained by the use" of those statutes may be unconstitutional in the wake of this Court's prior orders, but that the statutes themselves cannot be said to unconstitutional as applied.

This distinction has understandably been criticized by commentators as being essentially metaphysical and extremely difficult to apply in practice. See, e.g., Nielsen, Three-Judge Courts: A Comprehensive Study, 66 F.R.D. 495, 505 (1975); 66 F.R.D. 495, 505 (1975); Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 37-50 (1964). At the same time, however, the commentators do not deny that the distinction is vital if the three judge court statute is not to be invoked in every instance in which conduct by a State official is challenged. The distinction is vital because "[s]ome constitutional or statutory provision is the ultimate source of all actions by state officials." Phillips v. United States, supra, at 252.

In asserting that the fiscal and complement control provisions are "unconstitutional as applied" within the meaning of Bransford, the plaintiffs point out that those laws are a "proximate cause" of the defendants' inability to grant the relief required by the United States Constitution as interpreted by this Court. There is no doubt that the laws are a hindrance to the carrying out of the injunctive relief previously ordered by this Court. But the fiscal and complement control laws are no more the "cause" of noncompliance with the Court's orders than are State constitutional provisions granting appropriation power to the Legislature, or State statutory or constitutional provisions setting the tax rates as low as they currently happen to be. Cf. United States v. State of Missouri, 515 F.2d 1365, 1372 (8th Cir. 1975). The true "cause" of noncompliance in this case has not been these neutral and obviously constitutional laws; rather, it has been the Legislature's decision, in exercising its power over the purse, not to appropriate adequate funds to Cambridge.

A State constitutional provision giving the Governor power to call out the militia is not "unconstitutional as applied" where the Governor abuses that power. See Phillips v. United States, supra. Similarly, a State constitutional provision granting to the Legislature the exclusive power to control State appropriations is not "unconstitutional as applied" simply because the Legislature does not spend the State's revenues in the proper places. Nor is a State constitutional provision or statute setting a tax rate "unconstitutional as applied" simply because the revenues raised thereby are insufficient to provide constitutionally mandated care to the mentally retarded. One might as well claim that a law providing for appointment of judges by the Governor is "unconstitutional as applied" because a given Governor fails to appoint blacks or women to such posts. In all of these instances, it is the "result obtained by the use" of the law--not

the law itself--which is in reality attacked as unconstitutional.

The plaintiffs do not deny that the fiscal and complement control provisions are neutral, sensible and necessary enactments to assure the proper operation of the State government. This Court is of the opinion that the claim of unconstitutionality of those laws has been foreclosed by previous rulings of the Supreme Court, particularly Bransford and Phillips. As the Court stated in Phillips v. United States, supra, at 253:

> "On its face, [§ 2281] precludes a reading which would bring within its scope every suit to restrain conduct of a state official, whenever, in the ultimate reaches of litigation, some enactment may be said to authorize the questioned conduct . . . ."

Accordingly, the plaintiffs have failed to raise a non-insubstantial constitutional question sufficient to require the convening of a three judge court.

The Court is reinforced in this conclusion by existing precedents in which single judges have issued injunctions against enforcement of State statutes, notwithstanding the constitutionality of those statutes, in order to effectuate a remedial decree. See, e.g., United States v. Missouri, supra, at 1372 (enjoining State constitutional provision requiring referendum before increasing tax levy); Carter v. Gallagher, 452 F.2d 315, 328 (8th Cir. 1971)(en banc); cert. denied, 406 U.S. 950 (1972)("remedies to overcome the effects of past discrimination may suspend valid state laws [i.e., veterans' preference act]"); United States v. Greenwood Municipal School District, 406 F.2d 1086, 1094 (5th Cir.), cert. denied, 395 U.S. 907 (1969)("a state law is invalid to the extent that it frustrates the implementation of a constitutional mandate"); Coffey v. Braddy, 372 F. Supp. 116, 122 (M.D. Fla. 1971)(enjoining statutes prohibiting racial discrimination in hiring, in order to permit effectuation of remedial decree involving "reverse discrimination"). In none of those cases was it suggested that the offending State law was "unconstitutional as applied" or that a three judge court was required to enjoin its enforcement; rather, the law was swept away temporarily as an unacceptable hindrance to the Court's equitable decree.

The plaintiffs cite Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), for the contrary proposition that no State law of statewide significance can ever be enjoined by a single judge. That decision does contain a passage which seems directly applicable here:

> "In any event, as a jurisdictional matter dictated by federal statute, remedies of the type contemplated in the district court order . . . are required to be determined by a district court of three judges. Any federal decree that state lands be sold or legislative appropriations be reallocated or enjoined would involve state laws of statewide significance within the purview of 28 U.S.C.A. § 2281. The federal injunctive decree which might be entered in such circumstances is required to be that of a three-judge district court . . . ." Id. at 1310

However, that decision paints with too broad a brush and seems plainly mistaken about the requirements of § 2281. Section 2281 requires the convening of a three judge court only when a party seeks to enjoin the application of a State statute "upon the ground of the unconstitutionality of such statute." (Emphasis supplied). It does not require a three judge court where a State statute is enjoined on grounds other than its unconstitutionality. Moreover, if the latter situation were incapable of occurring--i.e., if a State statute could never be enjoined by a Federal court on any ground other than unconstitutionality--the quoted portion of § 2281 would be unnecessary surplus. Furthermore, the decisions in Missouri, Carter, Greenwood, and Coffey would be wrong. The Court thus reaches the conclusion that constitutional statutes can be enjoined by a single judge, and that § 2281 has no relevance to such relief.

Accordingly, this Court concludes that the obvious constitutionality of the fiscal and complementary control laws does not in and of itself preclude the Court, acting as a single judge, from issuing an equitable decree involving an injunction against their enforcement. We turn, therefore, to the State's contention that the two types of relief requested by the plaintiffs--the financing Order and the enjoining of fiscal and complement control laws--are barred by the Eleventh Amendment.

II. THE APPLICABILITY OF THE ELEVENTH AMENDMENT.

A. THE FINANCING ORDER:

The plaintiffs' request for a financing Order involving the Medicaid funds collides with the settled rule that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Edelman v. Jordan, 415 U.S. 651, 663 (1974). See also Louisiana v. Jumel, 107 U.S. 711, 727-28 (1883). It cannot be seriously disputed that the financing remedy sought here would be a remedy imposed against the State. As in Edelman, "[t]hese funds will obviously not be paid out of the pocket of" the named defendants. Edelman v. Jordan, supra, at 664. See also Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U.S. 454, 464 (1945).

It is true that in Griffin v. County School Board, 377 U.S. 218, 233 (1964), the Supreme Court sanctioned an anticipated order requiring county officials to levy taxes and raise funds to reopen and operate nondiscriminatory public schools. But the Court made clear in Edelman v. Jordan, supra, at 667 n.12, that the extraordinary financing order approved in Griffin was proper only because a county does not enjoy the same immunity under Amendment Eleven as does a State. See also

Lincoln County v. Luning, 133 U.S. 529 (1890); Note, Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy, 59 Geo. L.J. 393, 401-02 (1970). Griffin did not undermine the traditional rule whereby the judiciary refuses to interfere with legislative discretion when the relief sought "necessitates the release or transfer of treasury funds or a levy of taxes ab initio to raise funds." Id. at 414.

In this Court's view, the relief sought by the plaintiffs would be a direct assault on funds held in the public treasury. The fact that the plaintiffs seek to attach what is in effect an accounts receivable, rather than levying on an existing treasury account, does not blunt the applicability of the Eleventh Amendment. Accrued Medicaid earnings are as much an asset of the State as its capitol building or State park system. This Court has no greater power--absent State consent--to attach and reroute the Medicaid payments than it would have to order a judicial sale of the capitol building or public lands.

The plaintiffs do not allege that the State has consented to the awarding of such relief. Edelman established that State participation in a Federal program could not in itself be taken to signify "consent on the part of the State to be sued in the federal courts." Edelman v. Jordan, supra, at 673. See also Tribe, Intergovernmental Immunities in Litigating Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 690 (1976). The Court has been unable to find any theory pursuant to which the State may be said to have waived its sovereign immunity. Accordingly, the financing Order sought by the plaintiffs is barred by the Eleventh Amendment.

B. THE INJUNCTION AGAINST STATE FISCAL AND COMPLEMENT CONTROL LAWS.

It has long been settled that so long as the plaintiff fails to make "the gross pleading error of naming the state as a defendant, injunctive relief against a state officer is not prohibited." Id. at 686-87. See Ex parte Young, 209 U.S. 123 (1908). It matters not that:

> " . . . State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young . . . ." Edelman v. Jordan, supra, at 668.

See also Lewis v. Shulimson, No. 75-1735 (8th Cir. April 20, 1976) at Slip Op. 2. For this reason counsel for the defendants has conceded that the two previous equitable orders of the Court in this litigation are not barred by the Eleventh Amendment.

We have already seen in part I of this Memorandum that a single judge has power to enjoin the enforcement of a State statute or constitutional provision which "frustrates the implementation of a constitutional mandate." United States v. Greenwood Municipal School District, supra, at 1094. Accord United States v. State of Missouri, supra, at 1372; Carter v. Gallagher, supra, at 328; Coffey v. Braddy, supra, at 122. Like the clearly constitutional racial discrimination law involved in Coffey v. Braddy, supra, or the veterans' preference law involved in Carter v. Gallagher, supra, there can be no doubt that the statutes and constitutional provisions cited in footnotes 1, 2, and 3, supra, frustrate the implementation of this Court's orders. Indeed, one of those provisions, M.S.A. § 10.17, threatens the defendants with criminal prosecution should they comply with the Court Order by incurring indebtedness in excess of appropriations. The Court has concluded that these provisions can be enjoined notwithstanding Amendment Eleven, for such an injunction will not affirmatively "impose a liability which must be paid from public funds in the state treasury." Edelman v. Jordan, supra, at 663. At most, such an injunction will make it possible for the defendants to "shape their official conduct to the mandate of this Court's decrees," resulting in the "ancillary effect on the state treasury" long permissible under the rule of Ex parte Young. Id. at 668. Like the district court order upheld by the Eighth Circuit in United States v. State of Missouri, supra, at 1372, such an Order will not mandate the spending of specific funds in the public treasury, but will remove statutory and constitutional obstacles which prohibit such spending by the defendants.

A hypothetical example may help to place the sovereign immunity argument into perspective. It has been common in recent litigation for Federal courts to order State welfare departments to provide fair hearings to welfare recipients before terminating their benefits. Despite the obvious costs to the States of complying with such orders--for example, the hiring of hearing examiners--such injunctive relief falls within the classic exception to the Eleventh Amendment laid down in Ex parte Young. It is highly likely that a defendant in such a case could refuse to comply with the court order in reliance on fiscal and complement control laws not unlike those of the State of Minnesota. Under such circumstances, the Court would have the inherent power to enjoin the enforcement of the fiscal and complement control laws which impede compliance with the court order. Such an injunction would merely subject the State to the "ancillary" effect inherent in the original court order, and would also fall within

the classic exception to the Eleventh Amendment laid down in Ex parte Young. The injunction sought by plaintiffs here is similarly permitted by the Eleventh Amendment.

The defendants have expressed their belief that enforcement of the fiscal and complement control laws cannot be enjoined without the presence of additional parties not currently before the Court. The Court shares the defendants' concern in this regard. Accordingly, it will seek briefs and oral argument from counsel on the issue of whether additional parties must be joined as defendants. The briefing schedule and the date of oral argument shall be arranged by the Clerk of Court in consultation with counsel.

On August 22, 1975, this Court also heard oral argument on the defendants' motion to dismiss the supplemental complaint. Counsel for the State argued for dismissal on the ground that the pleading failed to seek any relief which would not violate Amendment Eleven. However, the supplemental complaint sought relief in addition to the financing Order found herein to be barred by the Eleventh Amendment; specifically, it sought further findings on changed conditions at Cambridge State Hospital, modifications of the previous Order, and injunctive relief against the fiscal and complement control laws. The first two types of relief were granted in the Order of April 15, 1976, and the Court provided there that it would retain jurisdiction in the matter. The third category of relief is not barred by the Eleventh Amendment and is still under consideration by the Court. Accordingly, the defendants' motion to dismiss the supplemental complaint must be denied.

IT IS ORDERED:

1. That plaintiffs' motion for the convening of a three judge court pursuant to 28 U.S.C. § 2281 be, and is hereby, denied.

2. That plaintiffs' request for an Order directing the seizure and transfer of Medicaid payments received by the State be, and is hereby, denied.

3. That plaintiffs' request for an Order enjoining various fiscal and complement control laws of the State of Minnesota shall be the subject of further briefs and oral argument by counsel, with the briefing schedule and oral argument date to be arranged by the Clerk of Court in consultation with counsel.

4. That the defendants' motion for an Order dismissing the supplemental complaint be, and is hereby, denied.

May 19, 1976.

/s/ Earl R. Larson

United States District Judge

FOOTNOTES

1. Plaintiffs cite Article XI, section 1, of the Minnesota State Constitution, providing that no money shall be paid out of the State treasury except pursuant to an appropriation by law.

2. Plaintiffs cite the following Minnesota statutory provisions: M.S.A. § 10.17, providing that no State official can incur indebtedness on behalf of the State in excess of appropriations made; M.S.A. §§ 16.16 and 16A.15, providing that the Commissioner of Administration and Commissioner of Finance, as the case may be, shall implement allotment and accounting systems designed to limit expenditures of State funds to the amount appropriated; M.S.A. § 16.32, providing that the Commissioner of Administration shall not approve any expenditure for improvement of State buildings beyond that authorized by appropriations; M.S.A. § 16A.57, providing that no State money shall be expended or applied by any State department or institution except pursuant to an appropriation and an allotment relating thereto and upon a warrant of the Commissioner of Finance; Minnesota Laws 1975, Chapter 434, § 17, which provides that Federal grants or aids shall be used to reduce appropriations made in said chapter; Minnesota Laws 1975, Chapter 434, § 14, which provides that all receipts of institutions under the control of the Commissioner of Public Welfare shall be deposited in the general fund; and Minnesota Laws 1975, Chapter 434, § 24, which provides that any funds received by the Commissioner of Public Welfare pursuant to an order of any court of law shall be placed in the general fund. These statutes are referred to herein as "fiscal control" laws.

3. Plaintiffs cite the following Minnesota statutory provisions: M.S.A. § 16.173, providing that, in any instance in which an appropriation for salaries discloses an approved complement, no State department head may employ persons in excess of that complement; and Minnesota Laws 1975, Chapter 434, § 12, which provides that an institution is limited in employment to the approved complement contained in that chapter. These statutes are referred to herein as "complement control" laws.