IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN B., *et al.*,	
***Plaintiffs*,**	
v.	
M.D. GOETZ, JR., Commissioner, Tennessee Department of Finance and Administration, *et al.*,	**No. 3-98-0168**
	Judge Haynes
Defendants.	

DEFENDANTS' MOTION TO RECONSIDER

Pursuant to Rule 8(b)(3) of the Local Rules of the United States District Court for the Middle District of Tennessee, Defendants respectfully move the Court to reconsider in part its Order of February 14, 2006 (Doc. No. 601) ("Feb. 14 Order"), and to reconsider and withdraw in its entirety the Court's Order of February 15, 2006 (Doc. No. 602) ("Feb. 15 Order"), for the reasons set forth below.

1. In the Feb. 14 Order, the Court relieved Dr. Carter of his duties as Special Master, but appointed him "as a technical advisor for this non-traditional litigation under the inherent authority of this Court." Feb. 14 Order at 2. In addition, the Court extended this appointment to the former Special Master's experts "who prepared or contributed to the proposed remedial plan submitted by the Special Master." *Id.* The State certainly supports relieving Dr. Carter of his duties as Special Master, and therefore does not seek reconsideration of that portion of the Feb. 14 Order. However, for the reasons set forth below, the State must object to the appointment of

Dr. Carter and his experts as either a technical advisor or as an expert witness in this case. The State further objects to any order that it be required to compensate Dr. Carter or his experts.[1]

2. First, for the reasons previously articulated by the State, *see, e.g.*, Doc. Nos. 475, 476, 560, and 561), Dr. Carter and his colleagues may not serve as court-appointed officials – regardless of whether they are denominated Special Masters, technical advisors, or experts – unless and until the State is permitted to take full discovery into the *ex parte* communications which have occurred between the Special Master's office and the Court. Judge Nixon's withdrawal does not moot this issue because, as the State has consistently maintained, these *ex parte* communications could very well require the disqualification of Dr. Carter and his colleagues. The need for this discovery is especially acute where the apparent subject of the communications, the State's compliance status and the need for the proposed remedial plan, are the very topics on which the former Special Master and his experts have now been appointed as technical advisors to advise the Court about. Notwithstanding these concerns, the Feb. 14 Order expressly prohibits such discovery.

3. Second, while the Court's order states that Dr. Carter and his experts will be "technical advisors," it also provides that they will testify at the June 19 hearing in support of their proposed remedial plan (which was attached to the vacated Order of October 22, 2004, Doc. No. 465). But it is settled that "[t]he role of the technical adviser is to give advice or other assistance to the judge, not to testify.… In contrast, an expert who is appointed to testify is an 'expert witness' and is subject to the requirements of [FED. R. EVID.] 706." C. Wright, *et al*., FED. PRACTICE & PROCEDURE § 6303, at 459-60 (1997) (citing cases). However, it is the law of

[1] Although the issue was not addressed in the Feb. 14 Order, the Court indicated at the February 10, 2006 Hearing that it would require the State to continue paying the former Special Master's fees.

this case that the roles previously assumed by the former Special Master and his experts are incompatible with service as experts pursuant to Rule 706. *See* Order dated July 14, 2004 (Doc. No. 433).

4. The State also objects to, and seeks reconsideration of, the Court's Feb. 14 Order to the extent it reinstates the vacated Order of October 22, 2004 (Doc. No. 465), or purports to consider the remedial plan proposed by the former Special Master and his experts. In addition to the objections set forth in the State's November 18, 2004, Initial Objections to Proposed Remedial Plan for Further Relief (Doc. No. 474), which we incorporate by reference and re-assert here, the State objects to Court's Feb. 14 Order to the extent it bars discovery into the *ex parte* communications relating to the development of the proposed plan by the former Special Master and his experts.

5. The State also objects to, and seeks reconsideration of, the Court's Feb. 14 Order to the extent it placed the burden of production on the State with respect to its efforts to comply with the Consent Decree and this Court's orders. Plaintiffs, not the State, bear "the burden of establishing by clear and convincing evidences that the [State Defendants] 'violated a definite and specific order of the court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the court's order.' " *Rolex Watch U.S.A. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996) (quoting *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 591 (6th Cir. 1987)) (second alteration in original).

6. In the Feb. 15 Order, the Court stated that it intended to appoint one or more monitors with "the principal responsibilities of monitoring the Defendants' compliance with the Consent Decree in designated areas; identifying issues and the reasons therefore, to direct the parties' and the Court's inquiry; and filing any reports that the monitors deem necessary." Feb.

15 Order at 2. The Court explained that the "monitors will serve in a quasi-judicial capacity pursuant to an appointment Order of this Court under the inherent power of the Court to appoint persons to assist the Court in the performance of its judicial duties." *Id*. at 3. The Court stated that it found the appointments necessary "to assist the Court on the Defendants' non-compliance with the Consent Decree and Orders of this Court." *Id*. (citing Findings of Fact and Conclusions of Law, Dec. 20, 2001, Doc. No. 227 at 36-46, and Order dated Dec. 20, 2001, Doc. No. 228). In addition to citing the Court's 2001 findings, the Court also relied upon the Court's October 22, 2004 Order (Doc. No. 465) ("Oct. 22 Order"). *See id*. In short, the Court held that it had the inherent authority to appoint the monitors, and it stated that it was exercising this authority based on its belief that the Court has properly found the State to be in violation of the Consent Decree. For this same reason, the Court held that the State must bear the burden of compensating the monitors. *Id*. at 4 ("These monitors shall be compensated by the Defendants whom the Court has found to be not in compliance with the Consent Decree and the Orders of the Court.").

7. We respectfully submit that both the factual premise of the Feb. 15 Order – that the State is in violation of the Consent Decree – and the Order's legal premise – that the Court has inherent authority to appoint the monitors – are in error. As to the first, we respectfully submit that the record does not contain a valid finding that the State has not complied with the Consent Decree. As to the second, we respectfully submit that the Court lacks authority, absent a valid finding of noncompliance or the State's consent, to impose additional relief beyond that specified in the Consent Decree. In particular, the Court may not appoint new monitors, nor may it require the State to compensate them.

8. Absent any valid adjudicated violation of federal law or a finding of contempt, there is no legal basis for the Court to order further relief to which the parties have not agreed.

"A federal district court may not use its power of enforcing consent decrees to enlarge or diminish the duties on which the parties have agreed and which the court has approved." *Johnson v. Robinson*, 987 F.2d 1043, 1049 (4th Cir. 1993); *see also United States v. Western Elec. Co.*, 894 F.2d 430, 435 (D.C. Cir. 1990).

9. While the Court's 2001 opinion (Doc. No. 227) purported to find prior violations of federal EPSDT law, no claim under federal EPSDT law, as opposed to the Consent Decree, was presented to the Court in 2001, and Defendants had no opportunity to address this issue. In any event, any such findings have grown stale over the ensuing five years. *See Wyatt v. Sawyer*, 80 F. Supp. 2d 1275, 1279 (M.D. Ala. 1999) ("The plaintiffs overlook that the ultimate issue is whether the defendants are currently in contempt, that is, in 1999, and not merely whether they were in contempt two years ago, in 1997, or earlier."). Accordingly, no independent violation of federal law, stale or otherwise, has been identified in this case that could possibly support any relief beyond that agreed to by the parties in the Consent Decree.

10. In addition, further relief could not be predicated, even in theory, upon any violations of underlying EPSDT law because recent jurisprudence from the Supreme Court makes clear that the Medicaid statute in this context does not confer a right that is privately enforceable by beneficiaries. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 278, 283, 290 (2002).

11. Nor have Defendants been held in contempt for any violation of the Consent Decree. *See John B. v. Menke*, 176 F. Supp. 2d 786, 806, 813 (M.D. Tenn. 2001), Doc. No. 227. As noted above, Plaintiffs bear the "the burden of establishing by clear and convincing evidences that the [State Defendants] 'violated a definite and specific order of the court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the court's

order,' " *Rolex Watch*, 74 F.3d at 720 (citation omitted), and they have not even attempted to carry that burden.

12. The Court's Feb. 15 Order relies upon statements made in the Court's 2001 opinion and statements made in the Court's October 22, 2004 Order (Doc. 465). Neither order provides a basis for finding that the State is not in compliance with the Consent Decree. Even if the 2001 opinion could be fairly read to identify specific violations of the Consent Decree (as opposed to a conclusion that managed care makes compliance with EPSDT requirements "virtually impossible"), it is five years out of date and could not possibly justify the imposition of further relief today. As for the Court's October 22, 2004, Order (Doc. No. 465), it was vacated by the Court, *see* Doc. No. 558 at 2, after the State objected that it was based almost entirely on *ex parte* communications by the Special Master and Experts to the Court, as to which the State never received notice or opportunity to respond. The only other evidence identified in the October 22 Order were snippets of deposition testimony that merely reflect the witnesses' conclusions that the State's failure to achieve the screening percentage targets established in the Consent Decree "was due to factors beyond the control of the defendants or their agents," Consent Decree ¶ 51 (Doc. No. 12), and thus not a violation of the Consent Decree that could warrant further relief. As noted above, the State objects to reinstatement of the vacated October 22 Order.

13. Even assuming that monitors are appropriate and necessary, and that the State may properly be required to pay for them, there is no basis upon which to conclude that five monitors are needed as proposed in the Feb. 15 Order. The appointment of five monitors would improperly increase the expense borne by the State – an ultimately the public – for no discernible benefit. *See Reed*, 607 F.2d at 747. For the same reason, Plaintiffs' suggestion that the Court

appoint a single monitor who could in turn retain (at State expense) the others as "experts" should be rejected.

14. Finally, if a monitor or monitors are appointed, they should not be permitted to engage the former Special Master (and his experts) as an expert or consult with the former Special Master (and his experts) in order that the new monitors form their own independent opinions regarding this litigation and in order that the new monitors not become entangled in the continuing questions about the *ex parte* communications of the former Special Master and his experts.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court reconsider in part its Order of February 14, 2006 and reconsider and vacate its Order of February 15, 2006.

February 27, 2006 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the following by electronic transmission, on this 27th day of February, 2006.

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