APPELLEE'S BRIEF

NO. 90

IN THE UNITED [illegible]
FOR THE [illegible]

[illegible] Plaintiff-Appellee

v.

STATE OF CONNECTICUT, WILLIAM [illegible]
Governor, State of Connecticut; DEPT. OF MENTAL RETARDATION;
BRIAN LENSINK, Commissioner, Dept. of Mental Retardation;
[illegible] Director, Southbury Training [illegible]

Defendants-Appellants

SOUTHBURY TRAINING SCHOOL Home and School [illegible]
of Southbury Training School and
[illegible] Foundation [illegible]

Movant

APPEAL FROM THE UNITED STATES DISTRICT [illegible]
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES [illegible]

ISABELLE KATZ [illegible]
Acting Assistant Att[illegible]

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-6218

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF CONNECTICUT, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS APPELLEE

SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction in this case pursuant to 42 U.S.C. 1997a and 28 U.S.C. 1331, 1343, 1345.

This Court, however, lacks appellate jurisdiction over this appeal. As discussed, at pp. 26-36, infra, the district court's order finding Connecticut in contempt and stating its intent to appoint a special master is not appealable, either as a final judgment under 28 U.S.C. 1291, or as an interlocutory order that grants or modifies an injunction under 28 U.S.C. 1292(a)(1). On October 30, 1996, the United States filed its motion to dismiss the appeal. On December 12, 1996, this Court denied the motion without prejudice, and permitted the United States to raise the issue before the panel assigned to review the case on the merits.

STATEMENT OF THE ISSUES

1. Whether this Court has appellate jurisdiction over a district court order that finds a defendant in civil contempt of its Remedial Orders, but only states its intent to appoint a special master to ensure compliance in the future.

2. Whether the district court abused its discretion in finding the State of Connecticut in civil contempt of the court's Remedial Orders.

3. Whether the district court abused its discretion in stating its intent to appoint a special master.

STATEMENT OF THE CASE

A. The Complaint And Remedial Orders.

On September 11, 1985, the United States filed a complaint against the State of Connecticut, its Governor, the Commissioner of the Department of Mental Retardation, and the Director of the Southbury Training School (Connecticut), pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 et seq. (J.A. 1).[1/] Southbury is an institution for persons with developmental disabilities in Connecticut. At the time of the hearing on contempt, Southbury housed 843 residents (J.A. 238 & n.1). The complaint alleged, inter alia, that Connecticut is failing to: (1) provide residents of Southbury with adequate medical care; (2) provide Southbury residents with training

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1/ "J.A. __" refers to the Joint Appendix. "R. __" refers to the docket number assigned a document filed in the district court. "Tr. __" refers to the transcript of the hearing. "Conn. Br. __" refers to Connecticut's brief. "Am. Br. __" refers to the brief of the Amicus Curiae, Martha Dwyer, et al.

necessary to prevent undue risks to their personal safety; (3) protect Southbury residents from unreasonable risks of harm caused by staff and other residents; and (4) ensure that medications are prescribed and administered to Southbury residents pursuant to the exercise of professional judgment by qualified professionals and not in lieu of training programs (J.A. 1-6).

The United States and Connecticut entered into a Consent Decree, which the district court approved on December 22, 1986 (R. 35). The Consent Decree sets forth several requirements with which Connecticut must comply in order to provide Southbury residents with the level of psychological services, medical care, and physical therapy that is secured and protected by the United States Constitution (J.A. 10-11). Pursuant to the terms of the Decree, Connecticut proposed an Implementation Plan in 1987, which provides the steps and procedures that Connecticut would take to comply with the mandates of the Decree (J.A. 31). The United States and Connecticut agreed to amendments to that plan and the district court approved the amended plan as an order of the court on July 22, 1988 (J.A. 27). The parties stipulated to two additional court orders on April 24, 1990, and December 9, 1991 (J.A. 147, 189). In its order finding Connecticut in civil contempt, the district court refers to the Decree, Implementation Plan, and stipulations as the "Remedial Orders" (J.A. 239 & n.4). The provisions of the Remedial Orders that are pertinent to the contempt motion are as follows.

1. The Consent Decree. Part I provides that "the purposes and objectives of this Consent Decree are to establish within the timelines set forth [in the Decree] * * * conditions at [Southbury] * * * to ensure that residents at [Southbury] are not being deprived of rights, privileges or immunities secured to them by the Constitution of the United States" (J.A. 11). Those rights, privileges and immunities include: "[t]raining programs professionally designed to reduce or eliminate unreasonable risks to personal safety or unreasonable use of restraints"; "[a]dequate medical care [for] all residents pursuant to the exercise of professional judgment by a qualified professional"; and "[r]estraints, seclusion procedures and behavior modifying medications, when appropriate, must be administered safely and pursuant to the exercise of professional judgment" (J.A. 12). Part I concludes by providing that the purposes and objectives "shall be achieved * * * by implementing the requirements set forth in Parts III and IV" and "by developing and implementing the plans described in Part V of [the] Consent Decree" (J.A. 13).

Part III of the Decree requires that Connecticut immediately correct certain conditions, e.g., provide a sufficient number of nurses and direct care workers (J.A. 15). Part IV requires certain ratios of professional staff to number of residents by certain deadlines (J.A. 17). Part V orders Connecticut to submit plans "for implementing th[e] Consent Decree." Such plans must include:

(a) Part V(3): "[P]rocedures to be utilized to provide regular, periodic professional evaluations of

each resident in order to identify those in need of training programs; and (b) to provide a sufficient number of training program hours to each resident" who needs such training (J.A. 18). A "[t]raining [p]rogram" is "[a] program of steps and activities, including behavior management and the teaching of basic self-care skills, determined by a qualified professional consistent with professional judgment to be necessary to protect a resident from unreasonable risks to personal safety and to facilitate his or her ability to function free from undue restraint" (J.A. 14).

(b) Part V(5): "Recordkeeping systems, policies, and procedures with respect to each patient's care, medical treatment, and required training that shall be utilized to maintain and make available in each resident's record such information as is professionally necessary to permit the exercise of professional judgment in that resident's care, medical treatment, and training" (J.A. 19). Professional judgment is "[a] decision by a qualified professional that is not such a substantial departure from accepted professional * * * standards as to demonstrate that the person responsible did not base the decision on such professional opinion, practice, or standards" (J.A. 15) (emphasis added).

(c) Part V(6): "[M]easures that will be undertaken to provide adequate medical care, including evaluation of residents with physical disabilities and the specific steps that will be undertaken to provide appropriate medical and physical therapy services to prevent contractures, physical degeneration, and inappropriate body growth and deformity" (J.A. 19) (emphasis added).

(d) Part V(8): "[P]olicies and procedures * * * to provide that restraints [and] behavior modifying medications * * * (a) are administered only pursuant to the judgment of a qualified professional; and (b) are not to be used as punishment, in lieu of training programs" (J.A. 20).

(e) Part V(9): "[P]rocedures that will be utilized to provide that residents shall be protected from unreasonable risks of bodily harm to their personal safety by the conduct of staff or other residents" (J.A. 20).

The Decree requires also that Connecticut submit quarterly compliance reports (J.A. 23).

2. The Implementation Plan. The Plan begins by stating that it was (J.A. 35):

> developed to assure that residents of the Southbury Training School are not deprived of rights, privileges, or immunities secured by the Constitution of the United States, including: appropriate training programs; freedom from unreasonable restraint; adequate medical care; and an environment that is safe and free from unreasonable risks of harm.

The Plan is organized into four areas: (1) staffing requirements to comply with Part III of the Decree; (2) program development and implementation to satisfy Part V(2)-(4); (3) comprehensive programs to meet Part V(5)-(8); and (4) safe conditions to comply with Part V(9) & (10) (J.A. 35). Appended to and incorporated within the Implementation Plan are policies that the Connecticut Department of Mental Retardation began implementing in May 1986. Those policies set forth the rights of the residents at Southbury, which explicitly include the general rights and privileges provided under the Constitution, as well as special rights such as: (a) "[a]ppropriate treatment, services, and habilitation"; (b) "[p]rograms that maximize each resident's developmental potential"; (c) "[f]reedom from physical or chemical restraint employed as a punishment or as a substitute for a habilitation program"; and (d) "[p]rompt, sufficient, and appropriate medical and dental treatment" (J.A. 107).

The Appendix also provides that each resident will have an Overall Plan of Services (OPS), which "shall encourage integration of the client into normalized settings" and "be developed in keeping with accepted principles in the field of

mental retardation" (J.A. 118). Connecticut's provision of OPS as set forth in the Appendix to the Implementation Plan is intended to comply with Part V(3) of the Consent Decree, which requires that Southbury residents receive adequate training programs (J.A. 35, 63).

Each OPS must include, inter alia: (1) a list of the resident's strengths and needs; (2) a list of prioritized goals; (3) "for each goal, behavioral objectives * * * that are objectively measurable; (4) for each objective, "a teaching strategy detailing what the staff will do to assist the client to accomplish new skills or behaviors"; and (5) evaluation procedures to determine whether the teaching strategies are assisting clients to accomplish objectives (J.A. 118).

The policy also requires an interdisciplinary team to develop and regularly review the OPS provided to each resident (J.A. 121). The team "will be convened whenever a significant change in [a resident's] situation warrants a revision of the OPS" (J.A. 123). Substantial changes in a resident's OPS require "formal agreement and documentation by the team" (J.A. 123).

All sections of the Plan were reviewed and approved by the Commissioner of the Connecticut Department of Mental Retardation and the Director of the Southbury Training School (J.A. 36).

3. The 1990 And 1991 Stipulations. These Stipulations, in pertinent part, require Connecticut to:

> (a) 1990 Stipulation 1(F): provide "appropriate physical therapy to each resident with physical handicaps for whom a program of physical therapy has been ordered by a qualified professional, and ensure

records of such treatment are made and entered in the resident's medical record" (J.A. 150).

(b) 1990 Stipulation 1(G): provide a "qualified physician [to] assess each resident with physical disabilities to determine whether a physical therapy program should be initiated or an existing physical therapy program modified to prevent contractures, physical degeneration, and inappropriate body growth and deformity. The physician shall refer those residents for whom such need is identified to a registered physical therapist" (J.A. 150).

(c) 1990 Stipulation 1(V): "implement the existing Plan of Implementation to assure that: (1) such training programs as are needed to protect residents from unreasonable risks to their personal safety and from unreasonable bodily restraints are consistently implemented; (2) recordkeeping systems are implemented with respect to each resident's course of training so as to ensure that sufficient relevant information regarding training is maintained * * * and (3) restraints * * * are not used * * * in lieu of a prescribed training program" (J.A. 155-156).

(d) 1990 Stipulation 1(W): "(1) develop, implement, and, thereafter, regularly evaluate, a system for observing and recording observations regarding client behavior relevant to training programs, and (2) develop and implement a system to verify that the data are reliable" (J.A. 156).

(e) 1991 Stipulation 1(A): establish a permanent committee of doctoral level psychology staff that, every 30 days, reviews the implementation of training programs for each "at risk" resident. "[A]t risk" residents are those who receive behavior modification medications, exhibit self-injurious or aggressive behavior, are subject to aversive programming, or are otherwise thought to be at risk (J.A. 189). "Where *** continuation of the training or treatment program is otherwise not justified, the matter shall be referred to the appropriate Interdisciplinary Team, which shall within 30 days from the referral, modify the existing [training] program in accordance with professional judgment of qualified professionals" (J.A. 190, 193).

(f) 1991 Stipulation 1(B): implement a Consolidated Behavior Review Plan that requires (J.A. 190), inter alia, an interdisciplinary team to review and update OPS to reflect client needs and status of training programs for "at risk" clients (J.A. 190-193).

B. The Evidence Of Connecticut's Contempt.

In support of its application for an order to show cause why Connecticut should not be held in contempt, the United States provided: (1) testimony and reports from its experts, Dr. Renee Wachtel, Dr. Alan Harchik, and Ms. Susan Harryman, experts in the areas of behavioral psychology, medicine, and physical therapy, respectively (J.A. 263, 321, 392); (2) reports from Connecticut's experts Dr. Fred Volkmar, expert in the area of child psychiatry, and Dr. James Walker, Dr. Henry Schneiderman, Ms. Rhea Sanford, and Ms. Karen Green McGowan; (3) selected Southbury mortality reviews; and (4) internal investigative reports (J.A. 734-791).

1. Medical Services. The United States presented evidence that Connecticut's inadequate medical treatment caused or contributed to the deaths of six Southbury residents. For example, in her November 1993 report, Dr. Wachtel discussed how internal reports of the September 1992 death of a Southbury resident named John T. showed "numerous omissions and commissions in the provisions of adequate medical and nursing care" (J.A. 505). One report found that: (1) the medical management of John T. from August 21 to September 1, 1992, was "plagued with medical flaws that may have contributed to precipitating [his] death" (J.A. 780); (2) "[u]pon return to [Southbury] in a debilitated but stable condition, John's evaluation by his [primary care physician] failed to assess and address important aspects of his medical condition" (J.A. 780); and (3) while on August 30, John T. had a "life threatening" level of Dilantin in his bloodstream,

the Southbury staff failed to assess the magnitude of the problem and transfer him to the local hospital where appropriate measures to reduce the amount of Dilantin could have been taken (J.A. 783). John T. lost consciousness in the evening of August 31, 1992, and died in the morning of September 1 (J.A. 784).

During the hearing, Dr. Wachtel testified about five other residents who died between May and July 1995 and might not have died had they received the adequate follow-up, monitoring, treatment, and protection from unreasonable risk of harm that the Remedial Orders require: (1) John E. (J.A. 280-281); (2) Vincent S. (J.A. 283-286); (3) Marilyn C. (J.A. 286); (4) Richard C. (J.A. 291-294); and (5) Jose M. (J.A. 295).

For example, Dr. Wachtel discussed serious inadequacies in Vincent S.'s treatment. The most serious was the physician's decision that Vincent S. receive a tracheostomy or a tube in the windpipe to correct his problems with aspiration (J.A. 284-285). The physician opted for a tracheostomy instead of inserting a feeding tube on the ground that "Mr. S. gets some satisfaction or joy from eating and I would not favor [a tube in the small intestine]" (J.A. 285). According to Dr. Wachtel, the tracheostomy required making a hole in his windpipe, which is "a much more medically invasive and much more medically at risk procedure than just putting a feeding tube in him" (J.A. 285). Vincent S. died of aspiration shortly after the tracheostomy. At a minimum, a second opinion should have been obtained, because less risky procedures are available. In Dr. Wachtel's opinion,

Vincent S. would have lived longer if he had not had that risky procedure (J.A. 286).

Jose M. was another resident who received delayed diagnosis and treatment from Southbury and died soon after being transferred to a hospital (J.A. 295-296). He became sick on May 19, 1995, with "fever, vomiting and * * * stools that had blood in them" (J.A. 295). He continued with those symptoms until the next day when a physician noted "harsh breath[ing] sounds," but didn't recommend a chest x-ray (J.A. 295). The next day a nurse indicated that a physician had seen him, but "there's no physician note" (J.A. 295). On May 22, he had sounds in his lungs that indicated pneumonia; he was given oxygen and transported to the hospital (J.A. 295). But there are no notes in his medical record about his vital signs or treatment that was performed, until he left for the hospital. He died on May 23 (J.A. 295).

Dr. Wachtel also presented evidence in her November 1993 report and in her testimony of additional examples in the treatment of Southbury residents that showed Connecticut's violation of several provisions of the Remedial Orders. In her report, Dr. Wachtel discussed three individuals who died while residents at Southbury and whose medical records were either inadequate or indicated inadequate treatment: (1) A.R.'s records were unclear as to whether any significant intervention had been made to prevent further pneumonia (J.A. 489); (2) J.D.'s records showed no follow-up after she had received a gastronomy (J.A.

491); E.S.'s records showed no consultations for appropriate specialties regarding her recurrent pneumonia (J.A. 493).

Further, Dr. Wachtel testified about 11 other Southbury residents who had not died, but whose records revealed serious lapses in medical care that in many cases caused residents long-term suffering (Tr. 36, 43, 51, 53, 55, 58, 60, 62, 63, 75, 81). For instance, Walter N. suffered from a skin disorder and injured himself by scratching so much that he had "two new open areas on the right side of his neck that go to the front and back of the open existing area" (J.A. 276). The resident was first seen by a dermatologist in May 1992 (J.A. 277). But the resident was not seen again by a dermatologist until more than three years later in July 1995 (J.A. 276-277). Dr. Wachtel found that adequate "reconsultation with a dermatologist would [have probably] provided for more effective management of his dry skin and itching and perhaps lessened his self-injury" (J.A. 277).

Dr. Wachtel determined that Connecticut was deficient in six categories that are relevant to the provision of medical care: (1) "delay in diagnosis and treatment"; (2) "inadequate diagnosis and treatment"; (3) "inadequate follow-up and monitoring"; (4) "inadequate records"; (5) "inadequate communication" between Southbury medical professionals and nearby acute care hospitals; and (6) inadequate protection of Southbury residents from harm (J.A. 269). In Dr. Wachtel's opinion, Connecticut's deficiencies in these areas were "deviations from accepted professional practice and current standards" (J.A. 270).

Dr. Wachtel further concluded that Connecticut failed to comply with, inter alia: (1) Part I(3) of the 1986 Consent Decree, which requires Connecticut to provide adequate medical care (J.A. 300); (2) Part V(4) of the 1986 Consent Decree, which requires Connecticut to provide the "procedures to be utilized to reasonably ensure there is consultation and communication of relevant information * * * regarding residents' care, training needs and priorities" (J.A. 301); (3) Part V(5) of the 1986 Consent Decree, which requires Connecticut to set forth record keeping procedures "as is professionally necessary to permit the exercise of professional judgment in that resident's care, medical treatment and training" (J.A. 301); and (4) the Implementation Plan's requirements that residents receive "prompt, sufficient and appropriate * * * treatment" (J.A. 305).

2. Psychological Services. In his report, Dr. Harchik stated that each resident's Overall Plan of Services (OPS) should include assessment, planning, teaching procedures, implementation, and monitoring of progress (J.A. 695). Those activities are critical for any training program that is "determined by a qualified professional consistent with professional judgment to be necessary to protect a resident from unreasonable risks to personal safety" (J.A. 695). Dr. Harchik found, however, that while professional standards require that regular, periodic assessments of resident maladaptive behavior be conducted, of the 21 OPS plans that he reviewed, none referred to any such assessments (J.A. 695). "[T]here was little relation

between the analyses and the treatment procedures" (J.A. 697). In many cases, "no progress was observed or regression was occurring and no further analysis was done" (J.A. 697).

Each OPS is supposed to provide instructions for teaching of alternative behaviors to replace problem behaviors and an individualized system of positive reinforcement (J.A. 697). Few of the OPS plans that Dr. Harchik reviewed, however, provided alternative skills to compete with behavior problems (J.A. 698). "More troubling is the lack of positive reinforcement in the behavior plans" (J.A. 698). "The way that positive reinforcement is (and is not) used at STS demonstrates that the psychology staff * * * ha[s] a total lack of understanding of positive reinforcement" (J.A. 698).

During the hearing, Dr. Harchik presented several examples of residents whose OPS either failed to include an appropriate behavior assessment or lacked a treatment plan to address that assessment. For instance, he discussed the September 1994 investigative report prepared by Thomas Harmon (J.A. 524-569), concerning the death of Stanley B. (J.A. 406-407). Southbury's staff was well aware that Stanley B. was a careless smoker who, whether he smoked cigarettes or a pipe, often burned holes in his clothing (J.A. 535). In 1989, Stanley B.'s OPS noted that he needed to learn how to smoke his pipe safely (J.A. 533). The goals of the instruction included teaching him how to pack his pipe and empty the tobacco when finished smoking (J.A. 536). The expected date for achieving this goal was March 1990 (J.A. 536).

In 1993, however, Stanley B.'s OPS did not provide any instruction to the staff regarding his smoking habits or his need for supervision while smoking (J.A. 533). His records do not provide any explanation why he was no longer being taught how to smoke safely (J.A. 537). On April 2, 1994, Stanley B.'s clothing caught fire while he was smoking. As a result, he suffered burns to half his body, and died later that evening (J.A. 526).

Dr. Harchik discussed several examples of residents who exhibited maladaptive behaviors, such as severe self-injurious behavior, including head-banging, intentional vomiting (J.A. 410-412), ingesting metallic objects (Tr. 359) and dangerous substances such as bleach (Tr. 353) or aggressive behavior towards other residents (J.A. 418). But Southbury had failed to develop appropriate behavior plans to correct such maladaptive behavior, thereby allowing such behavior to perpetuate (J.A. 410-419). For instance, Dr. Harchik described a resident named Mary Jane, who had sores, cuts, and injuries on the cheeks of her face because she was gouging herself (J.A. 418). He noticed that when Mary Jane walked past about 20-30 other residents, the residents cowered from her, probably because Mary Jane had been aggressive towards them (J.A. 419). Her behavior assessment indicates that she becomes aggressive from boredom (J.A. 419). But there was no systematic positive reinforcement program and there was nothing specific about what skills should be taught to Mary Jane to train her to no longer exhibit aggressive behavior (J.A. 420).

In Dr. Harchik's opinion, the failure of Connecticut to provide adequate behavior assessments and training programs in residents' OPS plans violated Part V(3) of the 1986 Consent Decree, which requires procedures to be utilized to provide regular, periodic professional evaluations of each resident to identify those in need of training programs and to ensure a sufficient number of training program hours (J.A. 18, 710). Dr. Harchik also found that because appropriate training programs are not being provided to residents, restraints and behavior modification medications are relied upon inappropriately. Therefore, the failure to provide sufficient OPS plans also caused Connecticut to violate Part V(8) of the 1986 Consent Decree, which prohibits Connecticut from using medications as punishment in lieu of training programs (J.A. 711).

Dr. Harchik further found that "at least half of the behavior programs that [he] reviewed clearly required modification because no progress was occurring or behaviors were worsening," but the Quality Assurance reviews performed prior to his report did not recommend modification of any existing behavior plans despite worsening maladaptive behaviors (J.A. 700). Dr. Harchik concluded that Connecticut's failure to modify behavior programs as needed to prevent injury violates Parts 1(A) & (B) of the 1991 Stipulation, which require Connecticut to review and update training programs for residents who exhibit self-injurious behavior, receive behavior modifying medications, or are otherwise considered to be "at risk" (J.A. 712-713).

In his report (J.A. 702-703), and also at the hearing, Dr. Harchik explained that Connecticut failed to provide Southbury's residents with sufficient engagement (J.A. 396). Engagement is active participation in a meaningful activity, e.g., putting together a puzzle or turning pages of a magazine (ibid.). It "is important because it can serve as a basis for learning new skills, [and] can provide alternatives to behavior problems" (J.A. 702). One does not expect all residents to be engaged all the time. At any given time, however, 80% of residents should be involved in meaningful activities (J.A. 398). During his last tour of Southbury before the hearing, Dr. Harchik made observations of 592 residents and found that only 44% of the residents were engaged (J.A. 399). Of those 592 residents, he found that only one was being taught a positive habilitative skill (ibid.). In November 1993, he made a similar examination of the Southbury residents' level of engagement and found that only 31% were engaged (J.A. 400). According to Dr. Harchik, Connecticut's failure to keep its residents engaged was a violation of Part V(3) of the 1986 Consent Decree, which requires Connecticut to provide adequate training programs (J.A. 18).

During the hearing, Dr. Harchik concluded that Connecticut is violating several additional Remedial Orders, inter alia: (1) Part I(1) of the 1986 Consent Decree, which requires that "'training programs be professionally designed to reduce or eliminate risks to personal safety or unreasonable use of restraints'" (J.A. 427); (2) Part 1(V) of the 1990 Stipulation,

which requires that Connecticut implement "such training programs as are needed to protect residents from unreasonable risks to their personal safety and from unreasonable bodily restraints" (J.A. 428); (3) Part 1(W) of the 1990 Stipulation, which requires Connecticut to: (a) "[d]evelop and implement and thereafter regularly evaluate a system for observing and recording observations regarding client behavior relevant to training programs; and (b) [d]evelop and implement a system to verify that [the] data are reliable" (J.A. 428-429); and (4) Part 1(A) of the 1991 Stipulation, which requires Connecticut to "'modify the existing [training] program in accordance with professional judgment * * * when continuation of the * * * program, is otherwise not justified'" (J.A. 429). Dr. Harchik testified also that Connecticut's provision of psychological and habilitative services is a "substantial departure from acceptable professional standards" (J.A. 430-431).

3. Physical Therapy Services.

Ms. Harryman toured Southbury in 1990, 1992, 1993, and 1995 (J.A. 324). After each of those tours she found that physical therapy services at Southbury "did not meet current professional standards and did not comply with court orders requiring adequate physical therapy services" (J.A. 325). Appropriate physical therapy is necessary to prevent those with developmental disabilities from acquiring inappropriate body growth, deformity, physical degeneration, and contractures (i.e., inability to bend a joint through a full range of motion) (J.A. 330).

Of the 73 Southbury residents whom Ms. Harryman visited, 64 needed services from a physical therapist (J.A. 337). Of those 64, only two received services from a licensed physical therapist (J.A. 337). Southbury Cottages 7A and 42 house the residents with the most significant motor disabilities (J.A. 337). Not one of the residents at those cottages, however, received the services of a physical therapist (J.A. 337). In one case, Dr. Harryman reviewed the record of Marilyn S., who had suffered a stroke on June 10, 1995 (J.A. 338). Her medical files showed that a physical therapist failed to assess her until July 17, 1995 (J.A. 339). Such a delay is a substantial deviation from the current acceptable professional standards (J.A. 339).

Those who are confined to wheelchairs should be assessed annually. Absent yearly assessments, physical degeneration will continue to occur and deformities will increase (J.A. 334). In her last tour of Southbury, Ms. Harryman found that 10 out of 57 residents who are confined to wheelchairs had not had an annual assessment (J.A. 333-334).

Ms. Harryman also testified that Connecticut's failure to provide adequate physical therapy services resulted in some residents' loss of range of motion -- the inability to move and bend a joint (J.A. 327), and loss of function -- the inability to perform a certain activity (J.A. 327). The results of the loss of an individual's range of motion can have devastating effects on a resident's quality of life. For instance, Ms. Harryman testified that if a resident loses the ability to sit in a chair,

the person is confined to a bed for the rest of his or her life (J.A. 349). One of the residents that Ms. Harryman visited was precariously close to losing her ability to sit in a chair, yet she was not receiving any physical therapy services (J.A. 348-349). Of the 73 residents that she examined, 14 had lost range of motion (J.A. 344). The records of the other residents whom she examined were so deficient that Ms. Harryman could not document if they had lost "range of motion" (J.A. 344).

Ms. Harryman also found that 20 of the 73 Southbury residents whom she visited had a documented loss of function (J.A. 349). Further, she found that Southbury could have made efforts to prevent the loss of function in 14 of those individuals (J.A. 350). Of those 14 instances in which a loss of function could have been prevented: four had lost the ability to roll over, which means that a person stays in one position while in bed, which can lead to osteoporosis and problems with skin integrity (J.A. 351); two had lost the ability to maintain their sitting position (J.A. 351); four had lost the ability to move from their wheelchairs (J.A. 351); and five had lost the skills enabling them to walk with a walker (J.A. 353). Ms. Harryman found that Connecticut's failure to maintain adequate records on loss of motion and loss of function of Southbury residents was a violation of current professional standards (J.A. 345, 355).

Ms. Harryman concluded that Connecticut was violating several requirements of the Remedial Orders that are relevant to the provision of physical therapy services (J.A. 355, 359-369),

including: (1) Section V(5) of the 1986 Consent Decree, which requires recordkeeping procedures "as is professionally necessary to permit the exercise of professional judgment [in] that resident's care and medical treatment and training" (J.A. 360); (2) Section V(6) of the 1986 Consent Decree, which requires Connecticut to provide adequate medical care "including evaluation of residents with physical disabilities and * * * medical and physical therapy services to prevent contractures, physical degeneration and inappropriate body growth and deformity" (J.A. 360-361); and (3) Appendix A, page 2 of the Revised Implementation Plan, which requires Connecticut to provide appropriate treatment services and habilitation (J.A. 365). In Dr. Harryman's view, the deficiencies in physical therapy services "were all substantial departures" from current professional accepted standards (J.A. 369).

C. The District Court's Order.

1. The court found clear and convincing evidence that Connecticut was in civil contempt of the court's Remedial Orders in its provision of psychological services, medical care, and physical therapy (J.A. 238-262). In explaining its findings of contempt, the court cited the specific requirements that Connecticut had violated and discussed much, though not all, of the evidence that supports its findings. The examples that the court cited in its order are from the written reports of the expert witnesses (J.A. 243-262). The court noted that "some of the most compelling evidence came from the [State's] own experts"

(J.A. 259 & n.35). The court explained that while Southbury's "quarterly reports reveal that it was in compliance with over 90% of the Remedial Orders' requirements," Connecticut was not "effectuating the Remedial Orders' desired results" (J.A. 259). The court further found that Southbury's "systemic flaws have caused many residents to suffer grave harm, and, in several instances, death" (J.A. 259).

In the area of psychological services, the court found that Connecticut had violated Part I(1) of the 1986 Decree, which requires training programs designed by qualified professionals to reduce or eliminate unreasonable risks to personal safety (J.A. 243). The court accepted Dr. Harchik's evidence, including: (1) behavior assessments in the OPS plans rarely generate useful information (J.A. 243); (2) the OPS plans do not provide residents with training programs that teach skills to prevent them from harming themselves (J.A. 244-245); (3) Southbury staff members exhibit a total lack of understanding of positive reinforcement (J.A. 247-248); and (4) Connecticut's failure to modify behavior plans violates the Remedial Orders (J.A. 249).

With regard to medical services, the court cited the requirement that Connecticut provide medical care that was "pursuant to the exercise of a qualified professional," found in Parts I(3) and (4); and to provide recordkeeping procedures to permit the exercise of professional judgment, found in Part V(5) (J.A. 250 & n.18). The court then found, inter alia, that a report about the death of resident John T. contained "appalling

examples of insufficient medical care," and systemic inadequacies that might be "sufficient alone to find Connecticut in contempt of the Decrees" (J.A. 252). Further, the court accepted the findings of one of Connecticut's experts that recordkeeping procedures are below professional standards and the "problem lists" were inaccurate and incomplete. The problem lists are a "crucial part of effective medical care," and are "utterly useless" if inaccurate (J.A. 252-253).

In the area of physical therapy, the court cited, inter alia, Part V(6) of the Consent Decree, which requires the provision of adequate medical care, including steps to be taken to provide physical therapy services to prevent contractures and deformities (J.A. 256 & n.30). The court then credited the evidence presented by Dr. Harryman and found that Southbury's failure to adequately assess its physical therapy services "placed the patients at risk of receiving ineffective, useless and detrimental therapy" (J.A. 258). Indeed, Southbury's "inadequate physical therapy services have caused several residents who, only a few years earlier, were ambulatory, to be permanently bed-ridden" (J.A. 258). The court also accepted Dr. Harryman's findings that Southbury's "grossly inadequate staffing was the primary cause of its poor physical therapy services" (J.A. 256). The court further found that Southbury was not adequately assessing its physical therapy services, nor did it provide guidelines for determining staff competence before allowing the staff to administer such services (J.A. 257).

2. Because of the complex nature of the case and the "delicate interests of Southbury's residents," the court announced its intent to appoint a special master (J A. 261). The court authorized the master to appoint, if necessary, a panel comprised of experts in the areas of psychological services, medical care, and physical therapy to assist in making recommendations (J.A. 259-262). The court specifically directed the master to (J.A. 262):

> (1) conduct an immediate and thorough review of all aspects of [Southbury's] care and treatment of residents covered by the Remedial Orders to determine the changes needed to meet the Orders' desired ends; (2) formulate specific methods to implement the required changes; and (3) work with the parties to effectuate those changes.

The parties have recommended their choices as to who should be appointed master. The court has not yet made its selection.

SUMMARY OF ARGUMENT

This appeal should be dismissed for lack of jurisdiction. It is well established that a finding of contempt, absent the imposition of sanctions, is not a final order. Also, it is widely recognized that an order appointing a special master is not appealable. It follows that the district court's order, finding Connecticut in civil contempt and merely stating its intent to appoint a special master to ensure Connecticut's compliance with the Remedial Orders, is not a final order under 28 U.S.C. 1291.

Nor is the court's order appealable under 28 U.S.C. 1292(a)(1) as an interlocutory order that has the effect of

granting or modifying an injunction. This Court should reject Connecticut's contention that the district court modified the Remedial Orders by "unilaterally" requiring the State to meet the Purposes and Objectives set forth in Part I of the Consent Decree. In its 1987 Implementation Plan, as well as in several portions of the Remedial Orders, Connecticut expressly agreed to the requirements found in the Purposes and Objectives in Part I of the Decree.

Assuming, arguendo, that this Court finds that it has jurisdiction to review the order, it should affirm the finding of civil contempt and the decision to appoint a special master. As Connecticut concedes, several provisions of the Remedial Orders contain specific requirements concerning psychological services, medical care, and physical therapy. Contrary to Connecticut's claim, however, the requirements that the district court found Connecticut had violated are contained within those provisions. Therefore, this Court should find that the orders are clear and unambiguous. Moreover, the evidence of Connecticut's contempt of those provisions is clear and convincing. Contrary to Connecticut's claim, the district court considered whether it had been reasonably diligent in attempting to comply with the Remedial Orders. The record of Connecticut's failure to provide adequate psychological services, medical care, and physical therapy services precludes a finding of reasonable diligence.

Finally, the district court's decision to refer the review of Southbury's operations to a special master, because of the

complex nature of the case and the "delicate interests of Southbury's residents," was a proper exercise of its broad remedial authority.

ARGUMENT

I

THIS COURT SHOULD DISMISS THE APPEAL FOR LACK OF JURISDICTION

A. The District Court's Order Is Not A Final, Appealable Order Under 28 U.S.C. 1291.

Section 1291 of Title 28 provides for appellate review of final decisions of district courts. "[A]s a general rule a district court's decision is appealable under this section only when the decision 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)); see also 15B Wright, Miller, & Cooper, Federal Practice & Procedure § 3916 at 349 (2d ed. 1992) ("[a]ppeal ordinarily should not be available as to any particular post-judgment proceeding before the trial court has reached its final disposition").

This Court has repeatedly held that a finding of contempt, absent the imposition of sanctions, is not a final order. In re Fugazy Express, Inc., 982 F.2d 769, 775 (2d Cir. 1992); Dove v. Atlantic Capital Corp., 963 F.2d 15, 17 (2d Cir. 1992); In re Irving, 600 F.2d 1027, 1031 n.1 (2d Cir.), cert. denied, 444 U.S.

866 (1979); Comptone Co. v. Rayex Corp., 251 F.2d 487, 488 (2d Cir. 1958).

For instance, in Comptone Co., 251 F.2d at 488, this Court held that an order finding a defendant in contempt and indicating an intent to enter an injunction pendente lite is not a final appealable order. The Comptone Court's rationale was that "no penalty has been imposed, and the contempt order remains merely a finding, without judgment thereon, subject to modification, prior to judgment." Ibid. And in Dove, which involved a finding of contempt and a stay of the imposition of sanctions, the Court reiterated the general rule that a finding of contempt without the imposition of sanctions is not final, and quoted the Comptone Court's rationale for that principle.[2/]

Moreover, it is well-settled that an order appointing a special master is not an appealable order. See Deckert v. Independence Shares Corp., 311 U.S. 282, 290-291 n.4 (1940); Grilli v. Metropolitan Life Ins. Co., 78 F.3d 1533, 1538 (11th Cir.), cert. denied, 117 S. Ct. 608 (1996); Rosette v. Rainbo Record Mfg. Corp., 546 F.2d 461, 462 (2d Cir. 1976); H. M. Kolbe Co. v. Armgus Textile Co., 315 F.2d 70, 75 (2d Cir. 1963); see

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[2/] We recognize that this Court has carved an exception to the general rule in cases in which an appellant is found in contempt of a discovery order. See, e.g., Dove, 963 F.2d at 18. That exception, however, is not applicable here. This case does not involve noncompliance with a discovery order; rather, the State is being held in contempt for noncompliance with a consent decree. Further, the concern in Dove, that the contemnor was being placed in the difficult position of having to choose between contempt and making a disclosure that may cause him harm, ibid., is not present here.

also 9A Wright & Miller, Federal Practice & Procedure § 2615 at 707 (2d ed. 1995) ("[a]n order of reference to a master under Rule 53 is interlocutory and not appealable given the final judgment rule").

It follows from these decisions that the court's order finding the defendants in contempt and announcing its intention to appoint a special master is not appealable as a final order under 28 U.S.C. 1291. In this case, the district court's order finding the defendants in contempt and merely stating its intent to appoint a master is analogous to a contempt finding and a stay of the imposition of sanctions. As was the case in Comptone Co., the court's order is not final as it is subject to modification, and will require further proceedings before Connecticut is ordered to take any action as a result of the finding of contempt. Indeed, it is inconceivable that the order could be deemed final, because the court has not yet even selected the master (J.A. 262). Moreover, the order contemplates that the special master will undertake a significant factual inquiry into Southbury's operations (J.A. 262). And even after the master makes recommendations, further litigation may take place, as Fed. R. Civ. P. 53(e) provides the parties with the opportunity to object to the special master's findings and recommendations. Furthermore, the special master's recommendations will not be final until the district court enters those recommendations as an order of the court. See Sick v. City of Buffalo, 574 F.2d 689, 694 (2d Cir. 1978) (absent review of court, mere findings and

recommendations of master are a nullity and nonappealable). Accordingly, an order finding the defendant in contempt and merely announcing an intent to appoint a special master is clearly not a final order.

Nor does the district court's order qualify as an appealable order under the Cohen collateral order doctrine. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Collateral orders must "'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431 (1985) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)); see generally Whalen v. County of Fulton, 19 F.3d 828, 830 (2d Cir. 1994), cert. denied, 115 S. Ct. 722 (1995). The court's order does not meet any of these criteria.

As discussed at p. 28, supra, the court's intent to appoint a special master does not conclusively determine what Connecticut must do to comply with its orders in the future. Also, the order is not separate from the merits of the action. Since the issue at this stage is Connecticut's compliance with the court's remedial orders, the finding of contempt and the reference to the special master are central to the resolution of the case. Further, the court's finding of contempt and its decision to appoint a special master can be reviewed once an injunctive or final order has been entered.

In response to the United States' motion to dismiss filed on October 30, 1996, Connecticut argued, inter alia, that cases such as United States v. International Brotherhood of Teamsters, 12 F.3d 360, 364 (2d Cir. 1993); United States v. Yonkers Bd. of Educ., 946 F.2d 180, 183 (2d Cir. 1991); and Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1034 & n.1 (9th Cir.), cert. denied, 474 U.S. 1032 (1985), support the principle that in complex litigation cases, an appellate court should take a more flexible approach in determining whether a district court order is final under 28 U.S.C. 1291. None of those cases, however, suggest that a flexible interpretation of 28 U.S.C. 1291 should be extended to orders that merely indicate a court's intent to appoint a special master.

Furthermore, contrary to Connecticut's assertion, United States v. O'Rourke, 943 F.2d 180 (2d Cir. 1991), is not analogous to this case. O'Rourke involved a finding of contempt as well as a final determination that the contemnor would pay "a fine of $1,000,000, plus an additional $10,000 per day from the date of entry of the order until compliance therewith." Id. at 185. In contrast to O'Rourke, here there has been no final determination concerning what the State must do to ensure that it complies with the Remedial Orders in the future.

This Court thus lacks jurisdiction under 28 U.S.C. 1291 to review the district court's order.

B. The District Court's Order Is Not An Appealable Interlocutory Order Under 28 U.S.C. 1292(a)(1).

An order may be appealed under 28 U.S.C. 1292(a)(1) as an interlocutory order that grants, modifies, or denies injunctive relief. In Carson v. American Brands, Inc., 450 U.S. 79, 83 (1981), the Supreme Court determined that the statute was intended as only a limited exception to the finality rule and, accordingly, articulated a three-part test to determine when interlocutory orders could be appealed. Such an order must: (1) have the practical effect of granting, modifying, or denying an injunction; (2) have "serious, perhaps irreparable, consequence[s]"; and (3) be one that can be effectively challenged only by immediate appeal. Id. at 84.

The district court's order finding the defendants in contempt and merely stating its intent to appoint a special master is not an injunction, express or effective, because it is purely procedural, relating only to the conduct of the litigation. See Gulfstream, 485 U.S. at 279 ("[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)") (citations omitted); see also Liddell v. State of Missouri, No. 96-2994 slip op. at 9 (8th Cir. Jan. 28, 1997) (Addendum) (court dismisses appeals from orders that relate to settlement procedures and case management). No order having the effect of granting or modifying an injunction will be entered until the district court acts upon the special master's recommendations.

This Court and other courts of appeals will sometimes review an order to determine if it results in a modification of a previous decree that has the effect of granting an injunction. Compare, e.g., EEOC v. Local 40, Int'l Ass'n of Bridge Workers, 76 F.3d 76, 79 (2d Cir. 1996) (appeal allowed as district court extended duration of consent decree that, by its terms, expired in 1983), with Wilder v. Bernstein, 49 F.3d 69, 72 (2d Cir. 1995) (appeal dismissed as court found that district court's directive that defendants "ensure that the protections of the consent decree are extended to children in kinship foster care" was already within scope of the consent decree's mandates).

In this case, Connecticut claims (Conn. Br. 9-10), that the district court "unilaterally [rewrote] the terms of the [Consent] Decree, and then [held] the defendants in contempt for failing to comply with those terms." Connecticut contends (ibid.) that in finding Connecticut had violated the "spirit" of the Remedial Orders, the district court erred by requiring compliance with the Purposes and Objectives provided in Section I of the Consent Decree.[3/] Connecticut argues that the Purposes and Objectives are not injunctive orders; they are only the goals of the Orders. According to Connecticut, the specific requirements with which it

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[3/] In its brief, Connecticut emphasizes (Conn. Br. 9) the district court's description of the State as complying with the "letter" of the Decree, but not its "spirit." The court used that language in describing only the provision of training programs in the area of psychological services (J.A. 243). It described Connecticut's "review" and "modify" procedures as meeting the "letter" of the Decree, but not "produc[ing] the results" intended by the Decree (J.A. 249).

is required to comply are clearly set forth in other portions of the Remedial Orders, such as Sections IV and V of the Consent Decree (id. at 10). Since, as Connecticut claims (id. at 12), the injunctions that the district court found Connecticut had violated are not set forth in such sections, the district court modified the Decree.

This Court should reject Connecticut's claim. In the Implementation Plan, which Connecticut was required to provide (J.A. 13), Connecticut expressly agreed to comply with the requirements set forth in the Purposes and Objectives in Part I of the Decree. Part I of the Decree provides that the Purpose of the Decree is to ensure that Southbury's residents are not being deprived of their constitutional rights, and describes those rights including: training programs developed by qualified professionals to eliminate unreasonable risks to personal safety; adequate medical care that is provided pursuant to the professional judgment of a qualified professional; and behavior modification medications that are administered pursuant to the professional judgment of a qualified professional (J.A. 12).

In the first section of the Plan entitled "Development of the Plan," Connecticut states that the Plan was developed to ensure that residents of the Southbury Training School are not deprived of rights, privileges or immunities secured by the Constitution, "including: appropriate training programs; freedom from unreasonable restraint; adequate medical care; and an environment that is safe and free from unreasonable risks of

harm" (J.A. 35). The very next section of the Plan provides that "[a]ll sections of the [Implementation Plan] were reviewed and approved by" the Commissioner for the Department of Mental Retardation and the Director of Southbury (J.A. 36).

Further, the Appendix to the Plan contains policies that the Department of Mental Retardation began implementing in May 1986, before entering into the Consent Decree in July 1986. Those policies are incorporated within the Plan and provide that persons with mental retardation "shall have the rights, benefits, and privileges guaranteed to all citizens by the Constitution and laws of the United States" (J.A. 107). The Appendix further enumerates "special rights" that are guaranteed by state and federal laws, which include: (1) appropriate treatment, services, and habilitation; (2) programs that maximize a resident's developmental potential; and (3) prompt, sufficient and appropriate medical treatment (J.A. 107).

Accordingly, as it developed its Plan, Connecticut was well aware that it was required to comply with the level of care set forth in the Purposes and Objectives portion of the Decree. For Connecticut to assert now, more than ten years after entering into the Decree, that it is not subject to the requirements in that section of the Decree is completely meritless. The State is also incorrect in asserting that the requirements in the Purposes and Objectives section of the Decree are not found in those portions of the Remedial Orders, such as Part V of the Consent Decree, which the State considers to provide the specific

requirements it must satisfy. In Argument II of this brief (at pp. 38-41, infra), we discuss those provisions in the Remedial Orders that contain the same requirements found in the Purposes and Objectives of the Decree. Therefore, this Court should rule that the district court did not modify Connecticut's obligations under the Remedial Orders.

This Court should also hold that the district court's intent to appoint a special master was not a modification of the Remedial Orders. In Thompson v. Enomoto, 815 F.2d 1323, 1326 (1987), the Ninth Circuit determined that an appointment of a special master is not a modification that had the effect of granting an injunction. Thompson is nearly identical to this case. It involved an action brought by inmates challenging the conditions at the California State Prison at San Quentin as unconstitutional. The parties eventually settled through a consent decree. Id. at 1324. Subsequently, the district court granted the inmates' request for the appointment of a special master to monitor compliance with the decree. The Thompson court found that the appointment did not have the effect of granting or modifying an injunction, since the consent decree implicitly contemplates appointment of a master because the district court retained authority to "'establish procedures' for its compliance." Id. at 1327.

In this case, the 1990 Stipulation also provides that the district court "shall retain jurisdiction for all purposes * * * until Defendants have fully and faithfully implemented all

provisions of the Consent Decree and plans" (J.A. 158). The court's intention to appoint a special master, in accordance with Fed. R. Civ. P. 53, was, therefore, well within the scope of the Decree's provisions. Cf. In re Pearson, 990 F.2d 653, 659 (1st Cir. 1993) (in denying petition for mandamus, court considers appointment of master as merely providing court with information to "ascertain the need for alteration of its ongoing activities under a consent decree").

The court's order also fails the remaining two parts of the Carson test. Since the special master has not yet been appointed and has not made any recommendations with regard to how Connecticut should comply with the court's remedial orders, Connecticut cannot show that the order has had any serious, irreparable consequences. Further, the correctness of the district court's orders appointing a special master can be reviewed on appeal from an injunctive order or final judgment in this case.

Accordingly, this Court also lacks jurisdiction of the order under 28 U.S.C. 1292(a)(1).

II

THE DISTRICT COURT CORRECTLY FOUND CONNECTICUT IN CIVIL CONTEMPT OF THE COURT'S REMEDIAL ORDERS

A. The Standard Of Review.

This Court reviews a district court's finding of civil contempt for abuse of discretion. EEOC v. Local 638, 81 F.3d 1162, 1171 (2d Cir.), cert. denied, 117 S. Ct. 333 (1996). Factual determinations are reviewed for clear error. Ibid. The

interpretation of violated orders are questions of law that are subject to de novo review. Ibid.

B. The Three-Part Test.

A district court has discretion to find a party in civil contempt of its orders if: (1) the orders are clear and unambiguous; (2) the moving party establishes noncompliance by clear and convincing evidence; and (3) the defendant has not exercised reasonable diligence in attempting to comply. EEOC v. Local 638, 81 F.3d at 1166.

A finding of willfulness is not necessary in order to hold a party in civil contempt. Such a finding is only required prior to holding a party in criminal contempt. Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd., 885 F.2d 1, 5 (2d Cir. 1989), cert. denied, 494 U.S. 1029 (1990).

C. The Orders That Connecticut Violated Are Clear And Unambiguous.

Connecticut's argument that the district court's contempt order fails to satisfy this part of the test is premised upon its contention that the district court modified the Decree by unilaterally requiring Connecticut to provide adequate training programs and medical care as provided in Part I of the Consent Decree entitled Purposes and Objectives (Conn Br. 16). As we discussed in Argument I infra, that contention is wrong, because in its Implementation Plan, Connecticut expressly agreed to adopt the requirements found in Part I of the Decree. Further, several provisions of the Consent Decree and the other Remedial Orders such as Part V of the Decree, which Connecticut concedes (Conn.

Br. 10 & n.4, 12) are clear and unambiguous, require Connecticut to provide the same requirements found in Part I of the Decree.

1. Part I(1) of the Consent Decree requires "training programs professionally designed to reduce or eliminate unreasonable risks" (J.A. 12). Part V(3) implements that requirement by ordering Connecticut to provide "regular, periodic professional evaluations" to identify those in need of training programs and "to provide a sufficient number of training program hours" (J.A. 18). Part 1(W) of the 1990 Stipulation orders Connecticut to "(1) develop and implement, and, thereafter, regularly evaluate, a system for observing and recording observations regarding client behavior relevant to training programs, and (2) develop and implement a system to verify that the data are reliable" (J.A. 156). Also, in its Appendix to the Implementation Plan, Connecticut agrees to provide programs that maximize a resident's development potential and provides rules for the development of an OPS for each resident to accomplish that requirement (J.A. 107, 118).

2. Part I(2) of the Decree calls for that degree of care "sufficient to protect all residents from unreasonable risks" caused by staff and other residents (J.A. 12). Part V(9) requires "procedures that will be utilized" to protect residents from "unreasonable risks" caused by "staff or other residents" (J.A. 20). Under Part I(V) of the 1990 Stipulation, Connecticut must implement the existing Plan of Implementation "to assure that sufficient such training programs as are needed to protect

residents from unreasonable risks to their personal safety and from unreasonable bodily restraints are consistently implemented" (J.A. 155-156).

3. Part I(3) of the Decree requires "adequate medical care" "pursuant to the exercise of professional judgment by a qualified professional" (J.A. 12). Part V(5) requires "recordkeeping systems" to "make available * * * information as is professionally necessary to permit the exercise of professional judgment in [a] resident's care, medical treatment, and training" (J.A. 19). Part V(6) requires "measures * * * to provide adequate medical care," including physical therapy services to prevent physical degeneration and deformity (J.A. 19). Part 1(F) of the 1990 Stipulation requires "appropriate physical therapy to each resident with physical handicaps for whom a program of physical therapy has been ordered by a qualified professional, and ensure records of such treatment are made and entered in the resident's medical record" (J.A. 150). Part 1(G) of the 1990 Stipulation requires (J.A. 150):

> a qualified physician [to] assess each resident with physical disabilities to determine whether a physical therapy program should be initiated or an existing physical therapy program modified to prevent contractures, physical degeneration, and inappropriate body growth and deformity. The physician shall refer those residents for whom such a need is identified to a registered physical therapist.

4. Parts I(4) and (5) of the Decree require Connecticut to provide behavior modifying medications "pursuant to the exercise of professional judgment by a qualified professional" (J.A. 12); Part V(7) requires Connecticut to provide procedures governing

the use of behavior modifying medications including "monitoring and review of whether the drugs prescribed for and administered to the resident are appropriate for the needs of that resident" (J.A. 19).

Review of the Remedial Orders demonstrates that the Orders were carefully drafted to ensure that Connecticut is explicitly required to provide the services in the manner guaranteed by the Constitution. Accordingly, Connecticut's reliance upon cases such as United States v. Armour & Co., 402 U.S. 673, 681-682 (1971), and Securities & Exchange Comm'n v. Levine, 881 F.2d 1165, 1179 (2d Cir. 1989) (quoting Armour & Co., supra), is meritless. The rule those cases articulate is that parties that enter into a consent decree can be held responsible only for complying with requirements specifically provided in the decree. Since consent decrees are agreements that represent compromises between the parties, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." Armour & Co., 402 U.S. at 681-682. That rule does not, however, support Connecticut's position in this case; instead it supports the district court's findings of contempt. The Purposes and Objectives of the parties are contained within Part I of the Decree, and Connecticut explicitly bound itself to those requirements. As this Court held in United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 44 F.3d 1091, 1098 (2d Cir. 1995) (emphasis added),

> [w]here a statement of purpose is contained in the decree itself, however, as the product of arm's-length negotiations, and that purpose may be discerned without reference to the extrinsic aims of the parties, Armour cannot be read to prohibit consideration of that purpose.

Therefore, this Court should reject Connecticut's claim and find the Remedial Orders clear and unambiguous.

D. Connecticut's Claim That There Was Not Clear And Convincing Evidence Of Its Violation Of The Remedial Orders Is Meritless.

Both Connecticut (Conn Br. 18-21) and the amicus curiae (Am. Br. 16-17) argue that the district court erred in finding that there was clear and convincing evidence that Connecticut failed to comply with the Remedial Orders, because, inter alia, the court also made findings that: (a) Connecticut had substantially complied with the Orders (J.A. 259); and (b) that Southbury's accident rate was the lowest of the other institutions in the Department of Mental Retardation's six regions (J.A. 247).

Those arguments are meritless, because they misconstrue the United States' contempt motion and the district court's findings as to Connecticut's noncompliance with the Remedial Orders in this case. The United States did not assert that Connecticut is in violation of all the requirements of the Remedial Orders. Instead, the United States presented uncontroverted evidence in the form of expert reports and testimony that Connecticut violated certain express provisions of the Remedial Orders, not all the provisions. The district court accepted that evidence, as well as the evidence that Connecticut's experts presented. Indeed, the court noted that "some of the most compelling

evidence came from [Connecticut]'s own experts" (J.A. 259 & n. 35). The evidence supporting the court's decision (see pp. 9-21, supra) can be summarized as follows:

1. With regard to Connecticut's failure to comply with the requirement that it provide adequate medical care that is pursuant to the exercise of professional judgment by a qualified professional, Dr. Wachtel reported that inadequate diagnosis and treatments contributed to the deaths of at least six Southbury residents, i.e., John T. (J.A. 505), John E. (J.A. 280-281), Vincent S. (J.A. 283), Marilyn C. (J.A. 287), Richard C. (J.A. 292-294), and Jose M. (J.A. 295). Dr. Wachtel further testified about other examples of serious lapses in medical care that resulted in long term suffering. In one case, a resident suffering from a skin disorder, which caused him to itch until he opened large wounds on his neck, was not seen by a dermatologist for three years (J.A. 276-277). Also, Dr. Wachtel and one of Connecticut's experts, Karen Green McGowan, reported that Connecticut's recordkeeping procedures are below professional standards and fail to satisfy the requirements under the Remedial Orders (J.A. 252-253, 301).

2. In the area of psychological services, Dr. Harchik's report and testimony showed that Connecticut fails to provide: (1) updated and useful behavior assessments (J.A. 243); (2) training programs that are targeted to improving behavior that is harmful to residents (J.A. 244-245); and (3) adequate positive reinforcement training that complies with professional standards

(J.A. 247-248). Further, Dr. Harchik discussed how the death of Stanley B. showed that Connecticut had failed to implement treatment procedures to address problems discovered during behavior assessments (J.A. 406-407). Additionally, Connecticut's own expert, Dr. Volkmar, stated in his report that "psychiatric services at [Southbury] appeared to be entirely focused on issues of medication," thereby violating the Remedial Orders' prohibition against use of medications in lieu of training programs (J.A. 250).

3. As to Connecticut's failure to provide appropriate physical therapy services as required by the Remedial Orders, Susan Harryman testified that several aspects of Southbury services were substantially below professional standards. For example, of the 73 Southbury residents she examined, 64 needed services from a physical therapist (J.A. 337). Of those 64, however, only two were being treated by a physical therapist (J.A. 337). Ms. Harryman further found 20 of those 73 residents had suffered loss of function (J.A. 349). She determined that Southbury could have prevented loss of function in 14 of those individuals (J.A. 350).

In order to successfully challenge the district court's fact findings of noncompliance, Connecticut must show that they are clearly erroneous. EEOC v. Local 638, 81 F.3d 1162, 1171 (2d Cir. 1996). At trial, however, Connecticut failed to present evidence that challenged the evidence upon which the district court relied. Indeed, under cross-examination by the United

States, each of Connecticut's witnesses testified that they could not contradict the evidence that the United States presented. Specifically, Dr. Martin Pollack, Southbury's Director of Psychology, was unable to contradict Dr. Harchik's report (J.A. 463-464). Dr. Ian Lawson, the Southbury Medical Director, was not "prepared to refute point-by-point" Dr. Wachtel's testimony (J.A. 471), and admitted that the care of John T. exemplified inadequate diagnosis and treatment (Tr. 599). Mr. Thomas Howley, Director of Southbury, could not refute the allegations presented by Dr. Harchik, Ms. Harryman, or Dr. Wachtel (J.A. 477). By failing to controvert the evidence upon which the district court relied, Connecticut falls far short of meeting its burden.

E. The Record Demonstrates That Connecticut Was Not Reasonably Diligent In Attempting To Comply With The Orders.

Connecticut's assertion that "[t]here was no discussion, no analysis and no finding" as to Connecticut's diligence is wrong (Conn. Br. 22). It is apparent from the district court's legal analysis and findings that the court thoroughly reviewed Connecticut's efforts to comply and was not persuaded that the State had been reasonably diligent.

First, in its discussion of the legal standard relevant to the finding of contempt, the district court stated that "[a] finding of contempt is appropriate when: * * * (3) the defendant has not exercised reasonable diligence in attempting to comply" (J.A. 241). In its ruling on contempt, the court found that Southbury's "quarterly reports reveal that it was in compliance

with over 90% of the Remedial Orders' requirements" (J.A. 259). It is equally apparent, however, from the district court's findings that it had concluded that Connecticut had not been reasonably diligent in attempting to comply with the Remedial Orders' requirements concerning the provision of psychological services, medical care, and physical therapy.

The district court's findings show that Connecticut's provision of psychological services, medical care and physical therapy were far below acceptable professional standards. For instance, in the area of psychological services, the court credited, inter alia, Dr. Harchik's testimony that he reviewed 21 behavior assessments, which are a required component of a resident's OPS (J.A. 243), and found that there "was little relation between the analyses and the treatment procedures" (J.A. 243). The court accepted also Dr. Harchik's testimony that Southbury staff members demonstrated a "'total lack of understanding of positive reinforcement'" (J.A. 248), which is one of the most effective and efficient procedures for dealing with maladaptive behavior (J.A. 247). Further, the court described how the percentage of Southbury residents who were engaged -- 31% -- was far below the professional standard of 80% (J.A. 248-249).

In the area of medical care, the court found, inter alia, that a report about the death of resident John T. "was plagued with appalling examples of insufficient medical care, and such systemic inadequacies [that] might be sufficient alone to find

[Connecticut] in contempt of the [Decrees]" (J.A. 252). The court accepted the finding of Connecticut's nursing expert, Ms. McGowan, that the "problem lists" were inaccurate and incomplete. The problem lists are a "crucial part to effective medical care," and are "utterly useless" if inaccurate (J.A. 253). Accordingly, the court accepted Ms. McGowan's conclusion that Southbury's recordkeeping procedures are below professional standards (J.A. 252-253).

The district court found that Southbury's "inadequate physical therapy services have caused several residents who, only a few years earlier, were ambulatory, to be permanently bed-ridden" (J.A. 258). Southbury was not adequately assessing its physical therapy services, nor did it provide guidelines for determining staff competence before allowing the staff to administer such services (J.A. 257).

Additionally, the evidence demonstrates that although the experts had notified Connecticut about its deficiencies, the State did not make a reasonably diligent attempt to follow the experts' recommendations as to the changes needed to comply with the Remedial Orders. For instance, in his November 1993 report on the status of Southbury's psychological services, Dr. Harchik recommended that behavior plans incorporate and include recent behavior assessments and positive reinforcement (J.A. 713), and those components are not in many of the plans he reviewed in 1995 (Tr. 376). He also recommended that "skill development and participation objectives are addressed and modified if no

progress is occurring" (J.A. 714). In his 1995 tour of Southbury, Dr. Harchik found "no indication" that Connecticut tried to implement that recommendation (Tr. 377).

In her report of February 1993, Dr. Wachtel reviewed the investigation of John T. and found that (J.A. 505):

> [a] letter to the Commissioner of Mental Retardation dated 12/02/92, notes numerous recommendations that are to be implemented immediately. There is little evidence, however, that most of these recommendations have been in fact implemented.

Ms. Harryman testified that in her June 1994 report, she made 18 specific recommendations to Southbury to improve its physical therapy services so that it meets currently accepted professional standards (J.A. 356, 520-522). Ms. Harryman testified that of those 18 recommendations, Southbury had only implemented one and partially implemented another (J.A. 356).

The district court's findings of Southbury's systemic flaws and the evidence of Connecticut's failure to implement the experts' recommendations admit of only one conclusion: that Connecticut has not been reasonably diligent in attempting to comply with the Remedial Orders.

III

THE DISTRICT COURT'S DECISION TO APPOINT A SPECIAL MASTER WAS A PROPER EXERCISE OF ITS REMEDIAL AUTHORITY

A. The Standard Of Review.

A district court's decision to appoint a special master is reviewed for abuse of discretion. United States v. Yonkers Bd. of Educ., 29 F.3d 40, 44 (2d Cir. 1994), cert. denied, 115 S. Ct. 2608 (1995).

B. The District Court's Decision To Appoint A Special Master Was Proper.

It is well established that a district court has the inherent power to appoint an agent to oversee the implementation of its consent decree. In re Peterson, 253 U.S. 300, 312 (1920). As this Court held in Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985):

> [A] court has an affirmative duty to protect the integrity of its decree. This duty arises where the performance of one party threatens to frustrate the purpose of the decree.

Although Fed. R. Civ. P. 53 permits the appointment of a special master only when exceptional conditions are present, a district court is entitled to deference in determining when those exceptional conditions exist. Moreover, as the district court noted (J.A. 261), "deference to the district court's exercise of discretion is heightened where, as here, the court has been overseeing a large, public institution for a long period of time" (J.A. 261, citing Hutto v. Finney, 437 U.S. 678, 688 (1978)). Under the circumstances in this case, this Court should not disturb the district court's determination that a special master is necessary.

The same district court judge has presided over this case since the United States filed its complaint in 1985. The court entered several orders to ensure that Connecticut provides Southbury residents with their constitutional right to adequate psychological services, medical care, and physical therapy services. It has now heard evidence detailing Southbury's

systemic deficiencies in the provision of psychological services, medical care, and physical therapy services that continue to be substantial departures from professional standards and "have caused many residents to suffer grave harm, and, in several instances, death" (J.A. 259).

Additionally, this case presents the type of "polycentric" problems that this Court, in New York State Ass'n For Retarded Children, Inc. v. Carey, 706 F.2d 956, 962 (2d Cir.), cert. denied, 464 U.S. 915 (1983), held warrants the appointment of a master:

> The monitoring of a Consent Judgment that mandates individualized care for thousands of class members and that entails balancing of the interests of parties with third-party employees, school authorities, and community groups is just the sort of "'polycentric problem that cannot easily be resolved through a traditional courtroom-bound adjudicative process.'"

Moreover, the district court could have imposed more intrusive remedies. See, e.g., Powell v. Ward, 643 F.2d 924, 931 (2d Cir.), cert. denied, 454 U.S. 832 (1981) (court ordered prison superintendent to pay $5,000 fine, plus $1,000 per day for continuing violations in addition to referring case to a special master). Therefore, this Court should hold that the district court did not abuse its authority by deciding to appoint a special master.

The amicus curiae's contentions (Am. Br. 14) that the appointment of the master is "an ambush" to permit the United States' "ultimate objective" to close Southbury is meritless. At trial, the United States did seek a reduction in population at

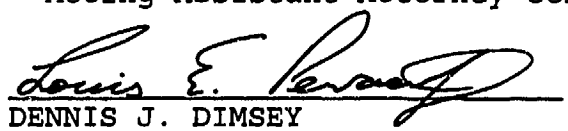
Southbury (J.A. 240). The district court, however, did not grant that request and the United States has not appealed from the order. The district court's order stating its intent to appoint the master does not instruct the master to consider closing Southbury. Therefore, this Court should reject this contention.

CONCLUSION

This Court should find that it lacks jurisdiction, under either 28 U.S.C. 1291 or 1292, to review the district court's order. In the event, however, that this Court finds it has jurisdiction to review the order, it should affirm the district court's finding that Connecticut is in civil contempt of its Remedial Orders and the decision to appoint a special master to ensure Connecticut's compliance with the orders in the future.

Respectfully submitted,

ISABELLE K. PINZLER
Acting Assistant Attorney General



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ADDENDUM

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-2994

Michael C. Liddell, a minor, by Minnie Liddell, his mother and next friend; Kendra Liddell, a minor, by Minnie Liddell, her mother and next friend; Minnie Liddell; Roderick D. LeGrand, a minor, by Lois LeGrand, his mother and next friend; Lois LeGrand; Clodis Yarber, a minor, by Samuel Yarber, his father and next friend; Samuel Yarber; Earline Caldwell; Lillie Caldwell; Gwendolyn Daniels; National Association for the Advancement of Colored People; United States of America;

Plaintiffs-Appellees;

City of St. Louis,

Plaintiff;

v.

The Board of Education of the City of St. Louis; Hattie R. Jackson, President, The Board of Education of the City of St. Louis; Rev. Earl E. Nance, Jr., a member of the Board of Education of the City of St. Louis; Renni B. Shuter, a member of the Board of Education of the City of St. Louis; Paula V. Smith, a member of the Board of Education of the City of St. Louis; Dr. Albert D. Bender, Sr., a member of the Board of Education of the City of St. Louis; Eddie G. Davis, a member of the Board of Education of the City of St. Louis; Dr. John P. Mahoney, a member of the Board of Education of

Appeals from the United States District Court for the Eastern District of Missouri.

the City of St. Louis; Marybeth McBryan, a member of the Board of Education of the City of St. Louis; Thomas M. Nolan, a member of the Board of Education of the City of St. Louis; William Purdy, a member of the Board of Education of the City of St. Louis; Robbyn G. Wahby, a member of the Board of Education of the City of St. Louis; Madye Henson Whithead, a member of the Board of Education of the City of St. Louis; Dr. Cleveland Hammonds, Jr., Superintendent of Schools for the City of St. Louis;

Defendants-Appellees;

Ronald Leggett, St. Louis Collector of Revenue;

Defendant;

State of Missouri; Mel Carnahan, Governor of the State of Missouri; Jeremiah W. (Jay) Nixon, Attorney General; Bob Holden, Treasurer; Richard A. Hanson, Commissioner of Administration; Robert E. Bartman, Commissioner of Education; Missouri State Board of Education, and its members; Thomas R. Davis; Gary M. Cunningham; Sharon M. Williams; Peter F. Herschend; Jacqueline D. Wellington; Betty E. Preston; Russell V. Thompson; Rice Pete Burns;

Defendants-Appellants;

Special School District of St. Louis County; Affton Board of Education; Bayless Board of Education; Brentwood Board of Education; Clayton Board of Education; Ferguson-Florissant Board of Education; Hancock Place Board of Education;

Hazelwood Board of Education; *
Jennings Board of Education; *
Kirkwood Board of Education; *
LaDue Board of Education; *
Lindbergh Board of Education; *
Maplewood-Richmond Heights *
Board of Education; Mehlville *
Board of Education; Normandy *
Board of Education; Parkway *
Board of Education; Pattonville *
Board of Education; Ritenour *
Board of Education; Riverview *
Gardens Board of Education; *
Rockwood Board of Education; *
University City Board of *
Education; Valley Park Board of *
Education; Webster Groves Board *
of Education; Wellston Board of *
Education; St. Louis County; *
Buzz Westfall, County Executive; James Baker, Director of *
Administration, St. Louis *
County, Missouri; Robert H. *
Peterson, Collector of St. *
Louis County "Contract *
Account," St. Louis County, *
Missouri; The St. Louis Career *
Education District; *
*
Defendants-Appellees; *
*
St. Louis Teachers' Union, *
Local 420, AFT, AFL-CIO. *
*
Intervenor Below-Appellee. *

No. 96-3630

Michael C. Liddell, a minor, *
by Minnie Liddell, his mother *
and next friend; Kendra *
Liddell, a minor, by Minnie *
Liddell, her mother and next *
friend; Minnie Liddell; *
Roderick D. LeGrand, a minor, *
by Lois LeGrand, his mother *
and next friend; Lois LeGrand; *
Clodis Yarber, a minor, by *
Samuel Yarber, his father and *

next friend; Samuel Yarber; Earline Caldwell; Lillie Caldwell; Gwendolyn Daniels; National Association for the Advancement of Colored People; United States of America;

Plaintiffs-Appellees;

City of St. Louis,

Plaintiff;

v.

The Board of Education of the City of St. Louis; Hattie R. Jackson, President, The Board of Education of the City of St. Louis; Rev. Earl E. Nance, Jr., a member of the Board of Education of the City of St. Louis; Renni B. Shuter, a member of the Board of Education of the City of St. Louis; Paula V. Smith, a member of the Board of Education of the City of St. Louis; Dr. Albert D. Bender, Sr., a member of the Board of Education of the City of St. Louis; Eddie G. Davis, a member of the Board of Education of the City of St. Louis; Dr. John P. Mahoney, a member of the Board of Education of the City of St. Louis; Marybeth McBryan, a member of the Board of Education of the City of St. Louis; Thomas M. Nolan, a member of the Board of Education of the City of St. Louis; William Purdy, a member of the Board of Education of the City of St. Louis; Robbyn G. Wahby, a member of the Board of Education of the City of St. Louis; Madye Henson Whithead, a member of the Board of Education of the City of St. Louis; Dr. Cleveland Hammonds, Jr.,

Superintendent of Schools for the City of St. Louis;

Defendants-Appellees;

Ronald Leggett, St. Louis Collector of Revenue;

Defendant;

State of Missouri; Mel Carnahan, Governor of the State of Missouri; Jeremiah W. (Jay) Nixon, Attorney General; Bob Holden, Treasurer; Richard A. Hanson, Commissioner of Administration; Robert E. Bartman, Commissioner of Education; Missouri State Board of Education, and its members; Thomas R. Davis; Gary M. Cunningham; Sharon M. Williams; Peter F. Herschend; Jacqueline D. Wellington; Betty E. Preston; Russell V. Thompson; Rice Pete Burns;

Defendants-Appellants;

Special School District of St. Louis County; Affton Board of Education; Bayless Board of Education; Brentwood Board of Education; Clayton Board of Education; Ferguson-Florissant Board of Education; Hancock Place Board of Education; Hazelwood Board of Education; Jennings Board of Education; Kirkwood Board of Education; LaDue Board of Education; Lindbergh Board of Education; Maplewood-Richmond Heights Board of Education; Mehlville Board of Education; Normandy Board of Education; Parkway Board of Education; Pattonville Board of Education; Ritenour Board of Education; Riverview Gardens Board of Education; Rockwood Board of Education; University City Board of

Education; Valley Park Board of Education; Webster Groves Board of Education; Wellston Board of Education; St. Louis County; Buzz Westfall, County Executive; James Baker, Director of Administration, St. Louis County, Missouri; Robert H. Peterson, Collector of St. Louis County "Contract Account," St. Louis County, Missouri; The St. Louis Career Education District;

Defendants-Appellees;

St. Louis Teachers' Union, Local 420, AFT, APL-CIO.

Intervenor Below-Appellee.

Submitted: January 13, 1997

Filed: January 28, 1997

Before MCMILLIAN, HEANEY, and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

In 1984, this court, sitting en banc, affirmed an order of the United States District Court for the Eastern District of Missouri approving a settlement agreement to integrate the St. Louis School District.[1] Since then, as elements of the plan have been implemented, over eighteen appeals have been before this court, usually on questions relating to the responsibility of the State of Missouri to fund various aspects of the plan.

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[1]Liddell v. Missouri, 731 F.2d 1294 (8th Cir. 1984).

In October 1991, the State moved the district court to declare the St. Louis School District unitary. This motion was resisted by the plaintiffs, the United States, and the St. Louis Board of Education. No response was filed by the State. In May 1992, the State filed a new motion requesting partial unitary status. Later that month, the district court held that the State's request was premature but permitted the State to answer certain discovery requests stating that the possibility existed that a declaration of unitary status might be appropriate in the future.

In November 1993, the State filed an amended motion for unitary status. It informed the court that it would be prepared to present its evidence in support of the motion within nine to twelve months. Most parties again responded that the motion was still premature. In October 1994, the State asked the district court to set a date for a hearing on its motion. In February 1995, the district court granted the State's request and scheduled a hearing for September of that year. The hearing was later rescheduled for March 1996 to accommodate the schedules of the twenty parties to the case.

In November 1996, the State filed a motion with the district court to terminate promptly an element of the desegregation program that permits black students residing in the St. Louis School District to voluntarily transfer to a suburban school, requires the State to fund such transfers, and also permits limited voluntary transfers of suburban students to the St. Louis School District. The motion was "conditional," as the State requested the court to consider the motion only if it did not enter an order finding that the St. Louis School District had achieved a unitary status. The motion provoked varied responses, including that the plaintiffs and the United States urged the court to appoint a settlement coordinator to attempt to resolve the litigation, and the City Board asked that the pending hearing on unitary status be postponed.

In February, the district court denied the State's conditional motion as having been improvidently filed and not ripe for adjudication. The court stated:

> The Court agrees with plaintiffs that the best resolution of this case would be an agreed-upon plan for ending Court supervision of the St. Louis Public Schools. The Court[,] however[,] is reluctant to continue the hearing. It may well be that the possibility for settlement will be greater following the hearing, at which time the appointment of a Settlement Coordinator would be appropriate and beneficial.

Liddell, G(1939)96, at 2 (E.D. Mo. Feb. 15, 1996). The State did not appeal the district court's order denying its motion.

The court held an evidentiary hearing on the State's unitary status motion from March 4 through March 26, 1996. The court has yet to decide that motion. Following the hearing, the court entered an order on April 23, 1996 stating that the preferred conclusion of the case would be an agreed-upon plan for ending court supervision of the St. Louis Public Schools. It determined that a serious settlement effort under the direction of the settlement coordinator, Dr. William H. Danforth, should be undertaken. It ordered the parties to participate in good faith in the negotiations. It stayed the post-hearing briefing schedule and ordered that all components of the settlement agreement then in force should continue in effect. Liddell, G(2062)96 (E.D. Mo. April 23, 1996).

The State then filed a motion to alter or amend the court's order appointing Dr. Danforth, arguing that the settlement director should not be authorized to make recommendations to the court as to the disposition of the case, that only twenty-five days should be allowed for negotiations, and raising several other objections.

On June 26, 1996, the court ruled that the negotiations would be confidential from the court and outside parties, that the

coordinator would not recommend to the court how the case should be resolved, and rejected the time limit for negotiations proposed by the State expressing confidence that the settlement coordinator would proceed with all due diligence. Liddell, G(2134)96 (E.D. Mo. June 26, 1996).

On July 24, 1996, the State appealed the two district court orders. The State also sought to stay the interdistrict components of the present desegregation remedy pending appeal of the order appointing the settlement coordinator. The State sought alternative remedies limiting its obligations under the desegregation plan. The district court denied the motions for the stay pending appeal on August 14, 1996. Liddell, G(2175)96 (E.D. Mo. Aug. 14, 1996). This court and Justice Thomas as circuit judge denied substantially similar motions for a stay pending appeal on August 23, 1996 and August 30, 1996, respectively. On October 1, 1996, the State appealed district court order G(2175)96 denying the State's motion for a stay pending appeal. All three appeals have been consolidated by this court.

We dismiss all three appeals. The appeals from orders G(2062)96 and G(2134)96 are interlocutory and relate to settlement procedures and case management. They cannot be characterized as appeals from orders denying an injunction. Thus, these appeals are not within the purview of 28 U.S.C. § 1292(a)(1). A district court, particularly in school desegregation cases, has broad discretion to control its docket and has the necessary flexibility to shape remedies that adjust public and private needs. Milliken v. Bradley, 433 U.S. 267, 288 (1977); Brown v. Board of Educ., 349 U.S. 294, 300 (1955).

With respect to district court order G(2175)96, the denial of a stay pending appeal is not an appealable order. The State argues that the district court erred because it effectively denied its motion for unitary status. We disagree. The district court has

yet to rule on the State's unitary status motion. The district court in this case has not refused to rule on the State's motion that the St. Louis School District be declared unitary. It has simply postponed post-hearing briefing and deferred final ruling on this matter. We cannot review a matter that has not been ruled on by the district court. We lack jurisdiction over the State's claim that the district court has erroneously denied its motion for unitary status.

For the foregoing reasons, we dismiss the State's appeals.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 1997, two copies of the Brief for the United States as Appellee were mailed first class, postage prepaid, to the following counsel:

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Appellant's Reply Brief