122

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LEO McCOY and WILLIAM McCOY, Plaintiffs,	CIVIL NO. N-85-465 (JAC)
v.	
MICHAEL BELMONT, *et al.*, Defendants.	June 10, 1993

MEMORANDUM IN SUPPORT OF
MOTION FOR CONTEMPT AND ENFORCEMENT

This action on behalf of two severely handicapped residents of the Southbury Training School (STS), operated through the defendants by the Connecticut Department of Mental Retardation, was filed in 1985 and resolved by Consent Decree on March 10, 1992. In the 14 months since entry of the decree, essentially nothing has been done to comply with the decree or to end the inadequate and harmful conditions and treatment to which the plaintiffs, Leo McCoy, Jr. and William McCoy, have been and continue to be subjected. Plaintiffs therefore ask that the defendants be held in civil contempt and that certain specific measures be ordered to ensure the plaintiffs' well-being and the proper implementation of the Decree.

I. DEFENDANTS HAVE FAILED TO COMPLY WITH THE REQUIREMENTS OF THE DECREE.

According to the Consent Decree (McCoy Declaration, Ex. 1), Leo McCoy, Jr. and William McCoy are to be provided with "consistent care from appropriately trained staff" in an appropriate living environment (paragraph 1). Programs and services for the plaintiffs are to meet Federal standards for intermediate care facilities (paragraph 4), including active treatment provided in accordance with individual plans of care, 42 C.F.R. 483.440, and are to be provided by sufficient numbers of staff "trained to administer services

adequately, skillfully, safely, and humanely" (paragraph 5). The plaintiffs are to be given balanced, nutritious meals (paragraph 6), which must be fed to them in a safe and consistent manner. Leo Jr. and William McCoy are also entitled to a modicum of adequate programming, including appropriate day activities (paragraph 7) and special attention to their particular individual needs -- especially Leo Jr.'s ambulation and health problems and William's eating difficulties (paragraph 10). And of course, the plaintiffs are entitled to adequate medical care (paragraph 14).

Most of the basic entitlements set forth in the Consent Decree -- adequate food, decent living environment, proper medical care, safety, and at least a maintenance level of programming -- are available to all residents of State mental retardation facilities as a matter of constitutional right. *Youngberg v. Romeo*, 457 U.S. 307 (1982). Leo Jr. and William McCoy's entitlement is more specific and more immediate because of the existence of their own Consent Decree and because of the history of injury and deprivation that the decree is intended to remediate. Yet as the declarations of Esther McCoy, the plaintiffs' mother, and Sister Barbara Eirich, their expert consultant, indicate, almost nothing has been done by the defendants in the past 14 months to provide the plaintiffs with adequate care and treatment or to end the neglectful and injurious practices of the past.

Under the Consent Decree, a new and separate residence was supposed to be developed for Leo Jr. and William McCoy in a former staff home across the street from the Southbury Training School campus no later than September 1, 1992. Care and services were to be provided by a specially trained "core staff" whose members were to be approved by Leo Jr.'s and William's parents (paragraphs 2-3). Eight months after the deadline, the new residence is still not ready for occupancy and the core staff is still incomplete (McCoy Declaration, para. 6-7, 9). Some small portion of this delay may be due to Leo Jr.'s and William's parents; but though they may not always have been immediately available or

agreeable, they have also been sent on their share of fools' errands that seemed designed to cause further delay (McCoy Declaration, para. 8).

Without question, however, the primary problem has been the defendants' inability or unwillingness to honor the requirement for parental approval of core staff for the plaintiffs' new home, because of apparent conflict between this requirement and the State's collective bargaining agreements (McCoy Declaration, para. 9-10). Whatever the scope of this problem, it was or should have been known to the defendants when the Consent Decree was being negotiated, and thus it cannot now be relied upon as a justification for noncompliance. See *Shillitani v. United States*, 384 U.S. 365, 371 (1966); *United States v. Wendy*, 575 F.2d 1025, 1030-1031 (2d. Cir. 1978). The defendants' resulting method of staff selection has limited the choices available to Mr. and Mrs. McCoy, and effectively made it impossible for them to reject applicants who have attained a certain level of seniority. Thus several core staff positions, including that of the lead worker, remain unfilled to this day (McCoy Declaration, para. 9).

Meanwhile, Leo Jr.'s and William's entitlements and needs have gone and continue to go unmet, placing them at serious risk of harm. To some extent, the defendants have identified the services plaintiffs require in their overall plans of service and daily activity schedules (McCoy Declaration, para. 28 and Ex. 9; Eirich Declaration, Ex. 2); but these plans are not being implemented and the needed services are not being provided. As a result, both plaintiffs are as much at risk today as they were before the decree was entered (McCoy Declaration, para. 4; Eirich Declaration, p. 2-3). According to Sister Barbara Eirich, who has been in constant contact with the plaintiffs since entry of the decree and who has worked with the plaintiffs for eight years, "[t]here is overwhelming evidence of an inability for Southbury Training School to provide the most basic life preserving services" -- an incapacity which places Leo Jr. and William McCoy "at extreme risk of very serious health problems" (Eirich Declaration, Ex. 2, p. 1, 4).

Leo McCoy, Jr.'s most significant need is for ambulation and other physical activity which will help to preserve his limited walking and toileting skills and to reduce the risk of serious cardiac complications. Yet there is no ambulation program for Leo Jr., no plan for therapeutic positioning, and no apparent training for staff in this important area (McCoy Declaration, para. 22-24 and Ex. 5-6; Eirich Declaration, Ex. 2, p. 2). Even assignment of a physical therapist to Leo Jr. has not been a priority for the defendants (McCoy Declaration, Ex. 6). When STS finally contracted with an outside therapist in March, 1993, it allocated only two hours per week for this therapist to work with both Leo Jr. and William, develop programs for them, and train staff in the proper techniques. This level of service cannot possibly be sufficient and leaves Leo Jr., especially, at serious physical risk (McCoy Declaration, para. 23; Eirich Declaration, Ex. 2, p. 2-3).

For William McCoy, the issue of life and death relates to his feeding program. As everyone recognizes, he cannot feed himself and must be fed slowly, with very small portions, while in a proper upright position -- all according to a plan in which participating staff are fully trained. If not -- as happened in June, 1992, and again, with nearly fatal results, in January of 1993 -- he will aspirate his food or drink, *i.e.*, ingest it in his lungs, and develop aspiration pneumonia (McCoy Declaration, para. 2, 15, 35-40). Yet there has not been a systematic plan at STS for addressing William McCoy's eating difficulties and related problems (Eirich Declaration, Ex. 2, p. 3-4). He is still fed improperly on many occasions by staff who have not been adequately trained (McCoy Declaration, para. 15, 35-40), and now the latest attempt to take an organized approach to this vital area has been derailed by the apparent abdication of the responsible therapist (*id*, para. 40). William's risk of contracting pneumonia is probably greater than ever (Eirich Declaration, Ex. 2, p. 3).

In addition these specific failures to keep the plaintiffs physically safe and well and to meet their most basic physical, medical, and nutritional needs, the defendants have continued to deny Leo Jr. and William McCoy more than a few minutes a day of

therapeutic or stimulating activity (McCoy Declaration, para. 24-26). The hiring and entry on duty of some of the required "core" staff has not affected the plaintiffs' isolation and inactivity, because meaningful programs have not been written and the staff have not been properly trained. Using time with Leo Jr. and William to catch up on one's light reading continues to be a substitute for interaction and stimulation (*id*, para. 10, 25-26).

Finally, Leo Jr. in particular has been subjected to continued battering whose cause is seldom if ever determined but which is frequently blamed on his parents. These episodes include a back broken in three places and systematically inflicted injuries to Leo Jr.'s arm, as well as other less serious but troubling incidents and lapses in care or supervision (McCoy Declaration, para. 13-14, 16-21, 31-32, 34, 41-44). Even at this basic level, the defendants have been unable to protect Leo Jr. and William from harm.

II. THE DEFENDANTS SHOULD BE HELD IN CIVIL CONTEMPT AND SUBJECTED TO ORDERS FOR ENFORCEMENT.

The above described failure by the defendants to take any meaningful action to implement major portions of a 14-month-old Consent Decree, whether willful or not, deserves to be recognized and condemned for the contumacious behavior it is. *McCamb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); *NLRB v. Local 282, Intl. Brotherhood of Teamsters*, 428 F.2d 994 (2d Cir. 1970); *NAACP, Jefferson County Branch v. Brock*, 619 F.Supp. 846 (D.D.C. 1985); *Halderman v. Pennhurst State School and Hospital*, 533 F.Supp. 631 (E.D. Pa. 1981), *aff'd* 673 F. 2d 628 (3d Cir. 1982), *cert. den.* 465 U.S. 1038 (1984). This court has inherent power to enforce its order, the Consent Decree, through civil contempt sanctions, *Shillitani v. United States, supra*, at 370 (1966); *NAACP, Jefferson County Branch v. Brock, supra*, at 549, and such coercive sanctions may include fines or imprisonment. *Penfield Co. of California v. SEC*, 330 U.S. 585 (1947); *Firemen's Fund Insurance Co. v. Myers*, 439 F.2d 834 (3d Cir. 1971).

Plaintiffs do not seek any enrichment of themselves by this motion, since the defendants are already responsible for providing them with all required services; but plaintiffs believe that their suggested initial and continuing fines of $10,000 per day per plaintiff (Pl. Motion, p. 2-3) are justified by whatever measure of damages may apply, *e.g.*, *Quinter v. Volkswagen of America*, 676 F.2d 969, 975 (3d Cir. 1982), and that they are sufficiently coercive to capture the defendants' attention. Plaintiffs also ask for orders specifically addressing the defendants' most obvious failures, *i.e.*, provision of services called for in the plaintiff's plans and activity schedules; ambulation and physical therapy services for Leo McCoy, Jr., and a proper feeding program for William; and timely development of the residential alternative to which plaintiffs are entitled (Pl. Motion, p. 2-3).

Given the clear possibility that STS may never be able to comply with these requirements, plaintiff suggests that the defendants be given the option of proposing an alternative provider of services. Plaintiffs also seek appointment of a qualified independent professional who can spend up to six hours per day ensuring that the plaintiffs are being protected and the Court's orders are being implemented. The requested relief, taken all together, is reasonably calculated to ensure vindication of plaintiffs' entitlements under the Consent Decree while protecting them from further deprivation and reducing their level of risk.

CONCLUSION

For the reasons set forth above, plaintiffs request that the defendant State officials responsible for operation of STS be held in civil contempt for failing to implement the Consent Decree and for continuing the unconstitutional acts and practices the decree was

designed to redress. Plaintiffs further request that the Court grant them the specific relief set forth in their motion for contempt, enforcement, and further relief (p. 2-3), as well as such other remedies or enforcement measures which may be reasonable and appropriate.

Respectfully submitted,

Dated: June 10, 1993

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the following in accordance with Rule 5(b), F.R.Civ.P., this 10th day of June, 1993:

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