

FILED

JUL 24 1985

At 8:30.....M
ALLYN Z. LITE

Copied at the National Archives at Kansas City

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NEW JERSEY ASSOCIATION FOR	:	Civil Action
RETARDED CITIZENS, INC.,	:	No. 79-1632
et al.,	:	
Plaintiffs	:	
vs.	:	O P I N I O N
GEORGE ALBANESE, etc. et al.,	:	
Defendants	:	

BARRY, District Judge

This action was originally filed on behalf of nine plaintiffs, all of whom were individuals suffering mental retardation and residing at the New Jersey Neuropsychiatric Institute (now called the North Princeton Developmental Center, hereinafter NPDC). It was alleged that these individuals were receiving inadequate care and treatment and that they were not cared for in the environment least restrictive of their liberties. The suit was settled by consent order dated April 23, 1981 which did not determine liability, but which established programs for each of the nine plaintiffs. With regard to plaintiffs R.W. and A.L., the subjects of these motions, the consent order stated:

¶5. A.L., shall receive appropriate psychological and prevocational services at Woodbridge State School. He shall be placed in an appropriate community residence near his family with an appropriate day program and any necessary support services within two years of the date of this Consent Order.

¶7. R.W. shall remain in the Dodds Building at NPI and shall receive appropriate psychological and prevocational services there. He shall be placed in an appropriate community residence near his family, with an appropriate day program and any necessary support services, within two years of the date of this Consent Order.

In addition, three other aspects of the Order are pertinent to the motions presently before this court.

¶3. Defendants shall take all necessary action to secure full implementation of the following provisions of this Consent Order, including coordination with other State agencies and monitoring the performance of private agencies under any contract executed for the purposes of complying with this Consent Order.

¶13. Consistent with their obligations under paragraphs 4-12, supra, Defendants shall ensure that each placement or service described in said paragraphs is made or provided only if appropriate for the named individual at the time such placement is made or service delivered, recognizing the unique and changing needs and abilities of each individual.

¶18. The Court shall retain jurisdiction of this matter for two years from the date of this Consent Order, only for purposes of enforcing this Consent Order.

Because they believed that defendants had failed to comply with the consent order with respect to R.W., plaintiffs filed a motion for a finding of civil contempt returnable on January 16, 1984. A consent order was again entered into, and the court's jurisdiction was extended until April 23, 1985. Plaintiffs now move that this court amend ¶18 of the Consent Order to read: "This court shall retain jurisdiction of this matter for the purpose of enforcing this consent order."

Plaintiffs also ask this court to hold defendants in civil contempt of the Consent Order, as amended. Defendants have brought a cross-motion to relieve defendants from the Consent Order.

Plaintiffs argue that defendants have failed to comply with the Consent Order with respect to R.W. and A.L. R.W. was placed in a community setting on October 9, 1984, but was removed from there because of aggressive behavior on October 23 and 24. He presently resides in the Strecker Unit at NPDC, an institutional setting. Plaintiff A.L. has been moved during the period following the consent order from Woodbridge State School to the Edison Habilitation Center, an institutional facility housing approximately 75 persons. Defendants take the position that neither man is ready to be placed in the community, and that it cannot be predicted when they will be ready.

The factual issues in dispute in these motions appear to be first, A.L.'s immediate readiness to be placed in the community and second, whether defendants are providing plaintiffs with the program they need to be prepared in an expeditious manner to be placed in community settings, including R.W.'s readiness to now be placed in a less restrictive unit on the grounds of NPDC.

Both parties have submitted extensive affidavits concerning the adequacy of the efforts currently being undertaken on behalf of R.W. and A.L. An affidavit by Anthony Anzivino, Contract Administrator for the Program Development Unit of the Division of Mental Retardation (DMR), outlines generally the

efforts the state has made on behalf of all individuals in fulfillment of its responsibility to create and place those individuals in community settings.

Defendants have submitted affidavits of several individuals who are personally familiar with plaintiff R.W. and the care he is receiving. The affidavits and a report by DMR indicate that while a detailed plan was devised for R.W.'s placement in the community, the staff at the community home, and in particular the group home case manager, did not comply with R.W.'s treatment program. The report from DMR, which is essentially substantiated in affidavits by Gail Ullman and Carol Jones, indicates that there was insufficient staff support at the home, that the group home manager exhibited poor judgment in handling R.W.'s aggressive behavior and that he was reluctant to intervene, and that the staff did not adequately adhere to the program plan.

The report and affidavits also conclude that R.W. is not now ready to be placed in a community setting. An affidavit by Alan Carmy outlines the elements of R.W.'s current Individual Habilitation Plan (IHP), which includes medication and behavior modification to reduce R.W.'s aggressive behavior. There is also an affidavit from Ramesh Shah, Ph.D., which states that, although R.W.'s assaultive and property destructive behavior has decreased from nine or more times per month to only four times per month and he has been taken off psychotropic medications, for the "foreseeable future, wherever R.W. lives, he will need structured

daily routine and firm behavior management procedures" which require staff levels which the affiant does not believe presently exist in any of the small residential units at NPDC.

Affidavits from plaintiffs' experts state that the problems encountered in R.W.'s placement at the community home in October, 1984 were the result of programming mistakes both in the transition from NPDC to the home and at the home itself. Their central concern appears to be the consistency with which R.W.'s behavior modification program is maintained. Affidavits of Carolyn Thorwarth Bruey, Sandra Harris and Camillo DiDonato. While these affidavits do not challenge the good faith of the state employees who work with R.W., they do raise troubling issues concerning whether R.W. has been and is being programmed correctly.

R.W.'s mother has submitted two affidavits. In the first one she states that she believes that her son should be moved from the Strecker Unit where he presently resides to a less restrictive, more homelike setting on the grounds of NPDC and that at an appropriate time he should be moved to a group home or other appropriate community setting. The court here notes that R.W. resided in a less restrictive setting at NPDC before his move into the community, apparently successfully. Aff. of Harris. In R.W.'s mother's second affidavit, she states that she spoke with Robert Lowe, Director of NPDC, who informed her that he believed and had also been told by Dr. Shah, that R.W. was ready to leave the Strecker Unit. Although her statements are hearsay, defendants respond that Mr. Lowe stated that R.W. would be ready

to leave Strecker Unit "if another unit with sufficient staff and a sufficiently structured program existed to accomodate [R.W.'s] needs." This statement appears to be consistent with the opinion of Dr. Shah.

Defendants also submit four affidavits concerning the care and treatment of A.L. These affidavits describe the programming, supervision and training which is being provided to A.L. and the assessment of the affiants that A.L. is not yet ready, and they cannot predict when he will be ready, to be placed in the community. Affidavits of Marianne Tracey, Barbara Wardell, Pat Mucillo, and Mila Vergara. Plaintiffs have responded with an affidavit by Dr. Harris, which states her observation that defendants are not maintaining a systematic, consistent program to reduce inappropriate behavior. She asserts that A.L.'s current IHP does not include a provision for elimination or reduction of his inappropriate behavior, and suggests that an adequate IHP, if implemented, "will significantly increase the probability of placing him in an appropriate community residential setting ..." Aff. of Harris (June 20, 1985). Defendants responded that the Superintendent of the Edison Developmental Center, Mary Ann Tacey, "agrees that Dr. Harris' recommendations could improve [A.L.'s] program, if sufficient resources were available in the Division to pay for staff training and to hire consultants with the expertise these recommendations require." I note that the Consent Order does not contain any language limiting defendants' efforts on behalf of plaintiffs to amounts of money already available in any

particular Division's budget. Plaintiffs gave up their right to seek damages and injunctive relief in this court in return for the rights they gained under the Consent Order and, as in any contract, the court may not read in limitations where they are not expressly stated. Indeed, rather than including limiting language in the Consent Order, it provided that defendants shall take "all necessary actions," and this court will interpret defendants' duty in light of this provision. It goes without saying, of course, that at some point in time "all" must be construed in defendants' favor.

Plaintiffs, through their experts' affidavits, have challenged the adequacy of the efforts which defendants have been making to place R.W. and A.L. in community settings. The good faith of the defendants is not at issue here and I believe, based on my reading of the record, that defendants have sought to comply in good faith. However, their efforts at compliance may not have been successful, and plaintiffs' experts have pointed to possible flaws in the programming and implementation of that programming for plaintiffs.

Plaintiffs ask this court to hold defendants in civil contempt and to extend its jurisdiction over this action until R.W. and A.L. have received community placements. Plaintiffs are correct in their assertion that good faith is not a defense to a motion for civil contempt if the court determines that defendants are in violation of this court's orders. Fortin v. Commissioner of Mass. Dept. of Public Welfare, 692 F.2d 790, 796 (1st Cir. 1982); Steinert v. United States, 571 F.2d 1105, 1108 ((th Cir.

1978); Oil, Chemical & Atomic Workers International Union v. NLRB, 547 F.2d 575, 581 (D.C.Cir. 1977); Halderman v. Pennhurst State School and Hospital, 533 F.Supp. 631, 636 (E.D.Pa. 1981), aff'd 673 F.2d 628, cert. denied 104 S.Ct. 1315. It is also well established that this court may enforce a consent decree through its contempt power. Interdynamics Inc. v. Firma Wolf, 653 F.2d 93, 97 (3d Cir.), cert. denied sub. nom. Transtech Inc, v, Interdynamics, Inc., 454 U.S. 1092 (1981); Local 145, ILGWV, AFL-CIO v. Fashion Associates, Inc., 596 F.Supp. 77, 85 (D.N.J. 1984).

The record before me does not now enable me to find that defendants are in contempt of the Consent Order although it raises that possibility. In 1981, defendants agreed to "take all necessary actions to secure full implementation" of the provisions of the Consent Order. ¶3. Such actions will be, this court recognizes, subject to the possibility of human mistake, particularly where they involve many difficult decisions, often in dispute among experts in the field. However, under this Consent Order, defendants have had the duty to do everything possible to correct and overcome such mistakes. I cannot now determine whether this duty has been met.

I believe that the best resolution of this matter at the present time would be for this court to deny, without prejudice, plaintiffs' motion that defendants be held in contempt. I will, however, extend this court's jurisdiction until further order of this court. I order plaintiffs to have their experts consult and submit to defendants detailed

recommendations for a treatment plan appropriate under this Consent Order for both R.W. and A.L. within twenty days. Defendants are to review these submissions, i.e. one agreed upon submission for R.W. and one for A.L., and advise plaintiffs within twenty days of the areas in which they dispute plaintiffs' recommendations and those in which they agree with those recommendations. The parties will then attempt to resolve all areas of dispute. The parties shall report the results of their efforts to the court within sixty days of this date. I urge the parties to come to agreement, since such agreement would clearly be in the best interests of all concerned, most particularly plaintiffs. At that time, I will determine whether further extension of this court's jurisdiction is justified and, if a renewed motion to hold defendants in contempt is filed, whether such motion should be granted or denied.

The court will enter an appropriate order.


MARYANNE TRUMP BARRY,
U.S.D.J.

Dated: July 24th, 1985