IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

B.H., et al.,	)	
	)	
Plaintiffs,	)	
	)	**No. 88 C 5599**
vs.	)	
	)	**Judge John F. Grady**
ERWIN McEWEN, Director of the Illinois Department of Children and Family Services,	)	
	)	
Defendant.	)	

PLAINTIFFS' EMERGENCY MOTION
TO ENFORCE CONSENT DECREE

Plaintiffs, by their attorneys, move that this Court enter an Order requiring Defendant to comply with the Consent Decree previously entered in this action. Defendant Erwin McEwen, the Director of the Illinois Department of Children and Family Services,[1] has acknowledged that DCFS is already taking actions that constitute direct and clear violations of the Consent Decree, and further (and more extensive) violations are in the offing. These actual and impending Decree violations threaten the health, safety and welfare of the Class herein, and the Class will suffer irreparable harm absent entry of an injunction enforcing the Decree. In support of this Motion, Plaintiffs state as follows:

1. This action was filed on or about June 29, 1988, as a proposed class action on behalf of all children who were or would be in the custody of the Illinois Department of Children and Family Services ("DCFS") and placed somewhere other than the home of their parents. The Complaint alleged, among other things, that Plaintiffs repeatedly were subjected to serious

[1] Director McEwen has been substituted as the Defendant herein pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

damage to their psychological and physical well-being because DCFS failed to provide them with safe and stable placements, shuffled many of them among multiple living arrangements, failed to provide them with appropriate mental health and other medical care, and engaged in other conduct violating the Plaintiffs' and Plaintiff Class members' rights under the Fourteenth Amendment to the United States Constitution.

2. When the state removes a child from his parents' custody in the name of protecting him, and assumes control of his life, the state has an obligation to make sure the child is safe and has food, clothing shelter, medical services, and reasonable care. "[I]n certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect tot particular individuals." *See DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 198 (1989) (relying on *Youngberg v. Romeo*, 457 U.S. 307 (1982)). This Court made this obligation clear in its frequently-cited decision denying the defendants' motion to dismiss in the early stages of this litigation. *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (1989).

3. This case was certified as a class action, and following extensive discovery, numerous pretrial proceedings, a detailed report from a Court-appointed panel of experts, and a hearing pursuant to Fed. R. Civ. P. 23(e), the parties entered into the Consent Decree as approved by this Court in December, 1991. Several modifications to the Consent Decree were approved by the Court, and the parties filed a Restated Consent Decree reflecting these modifications in 1997. *See* Restated Consent Decree, attached as Ex. A.

4. The Consent Decree addresses core deficiencies that the Court-appointed expert panel had identified in DCFS' performance of its basic mission, including the need for safe and stable placements, provision of adequate health and mental health care, education, staffing, accountability, and making reasonable efforts to find permanent homes for children.

5. The Consent Decree requires that DCFS protect children from foreseeable and unreasonable physical and psychological harm and provide them with at least minimally adequate food, shelter, clothing and health services, as well as mental health care adequate to address their serious psychological needs. *See* Ex. A, ¶ 4. To bring DCFS to this basic, ground-level of performance, DCFS is obligated under the Decree to provide the following core services:

- promptly identify medical, mental health and developmental needs and provide timely access to adequate services to meet those needs (*see* Ex. A at ¶¶ 7, 13);
- maintain children in the least restrictive appropriate setting pending reunification or another permanency outcome (*id.* at ¶ 34);
- ensure that all services specified in the case plan for each child be provided within the time necessary to accomplish their purpose (*id.* at ¶ 17); and
- develop sufficient foster homes, therapeutic or "specialized" foster homes, residential placements, and independent living programs to meet the placement needs of the children in care (*id.* at ¶ 39).

6. The Plaintiff Class now consists of approximately 16,000 children in substitute care (relative care, foster care, or institution / group homes). *See* May, 2009 Executive Statistical Summary, attached as Ex. B. That is nearly identical – within less than 2% – to the number of children in substitute care at this time last year. *Id.* As set forth below, however, DCFS is implementing massive program and service cuts in anticipation of a FY 2010 budget that will fund DCFS' operations at just 50% of FY 2009 levels. DCFS cannot provide Constitutionally adequate care to Plaintiffs under this plan.

The End of the Fiscal Year and the "Doomsday" Budget

7. The current Fiscal Year for Illinois state agencies, including DCFS, ends on June 30, 2009. Both houses of the Illinois legislature have passed a budget that state officials have described as a "doomsday" budget (the "Doomsday Budget"). Governor Patrick Quinn has not signed the Doomsday Budget, but he has not been presented with any alternative. Unless a new

budget is passed by midnight on June 30, 2009, the Doomsday Budget will become a reality. The Governor has publicly stated that the Doomsday Budget passed by the legislature will require massive cuts in funding for essential services provided to children by DCFS and private agencies. *See* Announcement, attached as Ex. C, at 4.

8. The Governor's Chief of Staff and Defendant have publicly admitted that the enormous cuts in DCFS funding contained in the Doomsday Budget, if passed, will result in extensive violations of the Consent Decree and risk serious harm to the children in DCFS custody. In a letter dated June 5, 2009 to the Director of the Governor's Office of Management and Budget, for example, a copy of which is attached hereto as Exhibit D, Defendant stated: "In a doomsday scenario with no restoration to the…reduction, DCFS would virtually shut down." *Id*. at 3. He further admitted that if the current budget is implemented "the Department would be in violation of the law and Consent Decrees regarding services to protected classes of Illinois citizens and would fail in its ability to reasonably insure the safety of the children and families we serve." *Id*. at 2.

9. The "massive cuts in fundamental state services" (Ex. C at 4) contained in the Doomsday Budget include the following clear and flagrant violations of B.H. Consent Decree:

- Cutting costs by increasing the caseloads of follow-up caseworkers responsible for assuring the safety and care of children in DCFS custody to 50:1, which is twice the size allowed under the B.H. Decree and three times the size promised to Plaintiffs and the Court in DCFS' August, 2004 Implementation Plan (*compare* Ex. A at ¶ 27(b) and Ex. E, 2004 Implementation Plan, at p. 3 *with* Ex. D, Attachment 1);

- Cutting costs by nearly doubling to 20:1 the current B.H.-permitted caseloads of investigative caseworkers, who are responsible for investigating allegations of child abuse and neglect and removing children from parents or caregivers if they are in danger (*compare* Ex. A at ¶ 26(a) *with* Ex. D at Attachment 1);

- Slashing by 50% payments to foster parents caring for members of the Plaintiff Class, in spite of the fact that Illinois foster parents already are reimbursed in the

bottom 25% of the nation,[2] which will result in violations of Paragraphs 34(a), 35 and 37 of the Consent Decree;

- Cutting approximately $46 million for critical services for youth with psychiatric and developmental disabilities (Ex. C at 4);

- Eliminating a huge volume of essential screenings, evaluations, services and supports for children, including:

  (i) eliminating all clinical assessments of the medical, psychiatric, developmental and placement needs of children entering the DCFS system;

  (ii) eliminating all counseling services for children in care;

  (iii) eliminating all psychological assessments;

  (iv) eliminating all System of Care services for foster care youth in crisis;

  (v) reducing by 50% payments to families that adopt or serve as guardians for children formerly in foster care;

  (vi) eliminating services to assist wards who are pregnant or parenting teens;

  (vii) eliminating adoption preservation services;

  (viii) cutting compensation to institutions and group homes by 18% through closures and rate reductions (these are facilities serving youth with "serious and chronic mental health problems, developmental disabilities and severe emotional distress");

  (ix) eliminating daycare for more than 5,000 children, many of whom are class members;

  (x) eliminating all foster care respite and support services; and

  (xi) closing the Youth Stabilization Center – a critical resource for runaway youth;

  all in violation of the Consent Decree (*compare* Ex. A at ¶¶ 4, 5, 7, 13, 14, 15, 16, 17, 28, 29, 34, 35, 36, 37, 41, 42, 43, 45, 46, 47, 52, 53 and 54 *with* Ex. D, Attachment 1);

[2] *See* Ex. C at 4; Exhibit D at 1 and Attachment 1.

- Canceling all University contracts and many professional contracts, including contracts with programs that provide such basic and essential services as background checks of individuals applying to be foster parents, clinical assistance regarding services to traumatized children and those requiring psychotropic medication, oversight of care and services at residential treatment centers and psychiatric hospitals, caseworker training, and maintenance of the database on service providers, resulting in violations of Paragraphs 28, 29, 34, 37 and 38 of the Consent Decree. See Ex. D, Attachment 1.

10. As Defendant himself cogently summarized, even if DCFS were to stop all services to wards, just the cost of feeding and housing wards and former wards by itself would exceed the budgeted amount for DCFS under the Doomsday Budget, and it would be a pointless exercise for DCFS even to attempt to develop a plan to actually serve the needs of wards beyond mere sustenance and shelter at that funding level. *See* Ex. D at p. 3. Defendant's conclusion is fully supported in the Report prepared by the Children and Family Research Center,[3] which lays out in detail the extensive threats to children's basic safety and well-being that would flow from the cuts represented in the Doomsday Budget. *See* June 26, 2009 Report, attached hereto as Ex. J.

Immediate Decree Violations

11. As of July 1, 2009, DCFS follow-up caseworker caseloads will increase to 50:1, with corresponding layoffs of caseworkers whose caseloads are eliminated. For these children, their caseworker will be dealing with a caseload two times the size permitted under the Decree. Caseloads that high endanger children. At a 50:1 ratio, which gives caseworkers approximately three hours to spend per child per month, the State cannot even ensure that caseworkers can perform such basic services as attending court hearings and making monthly safety checks on the children for whom they are responsible. Moreover, once the lay-offs of the affected caseworkers

[3] The Children and Family Research Center of the School of Social Work, University of Illinois at Urbana-Champaign, is the entity charged by the parties to the Decree with monitoring and reporting on DCFS' progress in improving outcomes for children under the Decree's initiatives.

occur, the resulting vacancies will take months to re-fill due to posting requirements and "bumping" rights afforded under applicable collective bargaining agreements.

12. As of July 1, 2009, investigative caseloads will be increased to 20:1, twice the level permitted under the B.H. Decree, and investigative caseworkers whose caseloads are eliminated by this change will be laid off. And again, once such lay-offs occur, the resulting vacancies will take months to re-fill due to posting requirements and "bumping" rights afforded under applicable collective bargaining agreements. These layoffs create an obvious and immediate threat to the safety and welfare of Illinois' children – indeed, it increases the risk of death due to delayed and rushed investigations of reported abuse and neglect. High caseloads for investigators in several DCFS offices within the last calendar year already have been associated with child deaths. *See* Correspondence from Inspector General, attached hereto as Ex. F. The Doomsday Budget will assure that this dangerous condition spreads statewide.

13. All therapeutic services provided to children through "System of Care" or "SOC" will be eliminated effective July 1, 2009, which directly violates ¶ 17 of the Decree. The services subject to this cut include emergency interventions to maintain the stability of placements that are about to disrupt and counseling services deemed necessary for children under DCFS' own assessments. Therapists have already begun terminating their services to affected children even though there has been no determination that ending the services is clinically or therapeutically appropriate. This wholesale deprivation of necessary services for vulnerable wards of the state, who already have been removed from their homes and are now faced with yet another disruption of a powerful emotional bond, is unconscionable and clearly causes immediate irreparable harm. *See* Ex. G hereto, Affidavit summarizing the plight of certain children whose therapy services will be cut off as of July 1, 2009; *see also Katie A. v. Los*

Angeles County, 481 F.3d 1150, 1157 (9th Cir. 2007) (district court properly found threat of immediate irreparable harm to children in foster care where evidence showed "plaintiffs' vulnerability, complex needs, and ongoing 'unmet mental health needs and the harms of unnecessary institutionalization'").[4]

14. Clinical assessments of children entering the system, which are required under Paragraphs 13-14 of the Decree, have already ceased. Such assessments are critical to identifying and providing placement where the ward will be safe and his or her needs can be met. Without the assessments, emotionally disturbed and potentially violent children entering care risk being placed in settings where they cannot be adequately cared for and monitored, thereby threatening their safety and the safety of others around them.

15. Foster parents are refusing to accept placement of additional children entering the system due to the State's announced plan to slash foster care reimbursement payments by 50%. DCFS' increasing inability to secure foster placements for incoming wards directly violates Paragraph 37 of the Decree and will harm children for whom foster care placement is appropriate by delaying or even preventing their placement in that setting. Moreover, foster parents' refusal to take new children entering the system has already resulted in DCFS housing children overnight in offices, a direct violation of Paragraph 35 of the Decree. To take an abused or neglected child who has just suffered the trauma of being removed from his parents' custody, and then place the child in a location that is not even equipped with the most basic amenities to allow the child to sleep, bathe, and eat, is both unsafe and harmful.

[4] Indeed, "neglect" sufficient to remove a child from the care of his or her custodial parent in the first place has been defined to include a failure to provide "the proper or necessary support, education as required by law, or medical or other remedial care recognized under State law as necessary for a minor's well-being, or other care necessary for his or her well-being, including adequate food, clothing, and shelter." 705 ILCS 405/2-3(1)(a) (West 2009).

16. Working foster parents who presently have custody of wards, and who cannot afford to replace the daycare services previously provided by DCFS, cannot continue caring for the children in their custody. The disruption of stable placements due to this loss of service seriously harms children and violates Paragraph 37 of the Decree. Moreover, DCFS has no plan in place for transitioning children who are victims of these disruptions to new, alternative placements that are safe and appropriate.

17. DCFS is proceeding with plans to reduce residential reimbursement rates by 18% or more, to reduce foster care reimbursement rates by 50%, and to terminate other programs and contracts altogether. However, DCFS has not done any analysis to determine which programs (if any) can remain in business at such reduced funding levels, or where the Department will be able to house the children presently cared for in programs that either are slated for termination or that ultimately will have to fold due to the inadequacy of DCFS' payments. There were insufficient safe and appropriate placements for children requiring intensive services such as residential care and specialized foster care *before* these cuts were contemplated. Further loss of these types of resources will eviscerate the provider network, and for many children, psychiatric hospitalization will be the only remaining placement available to them.

18. In the absence of a budget for FY 2010, and with FY 2009 ending just days from now, DCFS already sent notices to many providers announcing contract cancellations or non-renewals, as well as broad cuts in provider reimbursement levels. *See* Exemplar Notices, attached as Ex. H. The drastic cuts in foster care reimbursement rates and other service cuts contemplated under the Doomsday Budget have also been publicly announced to service providers, caseworkers and foster parents all over Illinois. While the Governor's staff and Defendant announced on Thursday, June 25, that some provider contracts would continue to be

supported at FY 2009 rates, the Decree violations discussed at Paras. 11-17 hereof are not affected by that temporary reprieve at all, and the Director has emphasized that the reprieve itself is no guarantee that any of the programs being asked to operate on that interim basis will have their contracts renewed. The haphazard, contradictory, and utterly confusing announcements, cancellations, reinstatements, and half-promises that have been issued by Defendant and the Governor in the last few weeks have resulted in widespread confusion and make it nearly impossible for providers or caregivers to operate in a responsible manner, plan for program closings, or properly engage in essential transition planning for wards they serve.

This Court's Power and Authority

19. The B.H. Consent Decree is an enforceable Order of this Court. *See Frew v. Hawkins*, 540 U.S. 431, 437-38 (2004); *U.S. v. Alshabkhoun*, 277 F.3d 930, 934 (7th Cir. 2002) ("A consent decree is a court order that embodies the terms agreed upon by the parties as a compromise to litigation."). The current fiscal crisis simply does not provide an excuse for the DCFS to violate the Consent Decree.[5]

20. As a unanimous United States Supreme Court has unequivocally stated, "Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced." *Frew*, 540 U.S. at 440; *see also Jones-El v. Berge*, 374 F.3d 541, 545 (7th Cir. 2004). Moreover, it is clear that "[a]gainst a state that violates a valid federal court decree the court has the power to issue any order necessary to enforce the decree, including an order to pay." *Wisconsin Hospital Ass'n. v. Reivitz*, 820 F. 2d 863, 868 (7th Cir. 1987).

[5] Plaintiffs have made a good faith effort to resolve the matters raised herein by agreement (*see* Plaintiffs' Correspondence of June 25, attached as Ex. I), but were informed by Defendant's counsel on Friday, June 26 that no settlement was possible.

21. For example, in *Juan F. v. Weicker*, 37 F.3d 874, 878-79 (2d Cir. 1994), the United States Court of Appeals for the Second Circuit upheld a trial court order issuing injunctive relief requiring a foster care agency's compliance with the existing terms of a consent decree in the face of impending budget cuts. The decree in *Weicker* required the defendant to achieve a reduction in caseworker caseloads by a given date. *Id.* at 877. When "steep" budget cuts of more than $8 million threatened the agency's ability to comply, the *Weicker* plaintiffs sought and obtained injunctive relief setting a timetable for caseworker hiring that would ensure compliance with the caseload reduction deadlines already set forth in the decree. *Id.* at 877-78. The Second Circuit held that the relief granted by the district court was fully within its discretionary authority. *Id.* at 879.

22. Similarly, in *Wilder v. Bernstein*, 153 F.R.D. 524, 533-34 (S.D.N.Y. 1994), the Court required New York's foster care agency to provide Consent Decree-required services to children in kinship care despite the fact that far more children had entered the State's care since the Consent Decree had been signed, and despite the fact that providing the required services posed a threat of "enormous expense." While acknowledging that the expenditure of money would be required to achieve compliance, the Court in *Wilder* nonetheless entered an order directing the agency in that case to "take all appropriate steps to ensure that the protections of the consent decree are extended to children in kinship foster care." *Id.* at 535. Courts have broad discretion in enforcing their orders. *See South Suburban Housing Ctr. v. Berry*, 186 F.3d 851, 854 (7th Cir. 1999) (recognizing that a district court has "broad discretion to fashion an award" for civil contempt sanctions in action to enforce consent decree pertaining to alleged unfair real estate practices); *Duran v. Elrod*, 713 F.2d 292, 297 (7th Cir. 1983) (stating district court has broad discretionary power in shaping remedy to enforce consent decree in jail conditions case).

23. In this case, there can be no dispute that DCFS is about to embark on sweeping violations of the B.H. Decree. It likewise is clear that the Department's impending non-compliance is due in large part to the State's budget crisis. But even under that circumstance, DCFS is not free under the law to abandon the Decree and dispense with compliance:

> "Having entered into the consent decree rather than bringing the dispute to trial, [Defendant] cannot now evade an integral portion of that decree . . ." Such a result would impugn the integrity of the court and allow the [Defendant] to avoid [its] bargained-for obligations – while retaining the benefits of concessions it obtained on other issues during the negotiations.

Wilder, 153 F.R.D. at 529 (quoting *Kozlowski v. Coughlin*, 871 F.2d 241, 245 (2d Cir. 1989)).

24. The Department has not moved to modify or terminate the Consent Decree. In any event, such a motion would not succeed, because the Department cannot demonstrate either that it has materially complied with the Decree or that it is able fully to satisfy its Constitutional obligations to the children in its custody through other means and measures. *See Horne, Suptdt., Arizona Public Instruction v. Flores*, No. 08-289, 557 U.S. __, 2009 WL 1789470 at *11 (June 25, 2009). The Department cannot be permitted to proceed on the path it has chosen, simply acting as if the B.H. Decree has no force or effect, and trampling Plaintiffs' Constitutional and other legal rights in the process.

25. Plaintiffs are aware of the budget crisis that the State of Illinois is facing. Plaintiffs also recognize that, even if it concludes that a violation of the Decree is imminent, this Court is obligated to carefully tailor the remedies it imposes. Here, however, the relief that Plaintiffs have requested is already embodied in the B.H. Consent Decree. In this circumstance, the Courts' authority and obligation are clear – the Decree should be enforced. The alternative would be to let Defendant simply ignore a binding Order of this Court. *See Frew*, 540 U.S. at 439 (where plaintiff sought only to enforce injunctive remedy already embodied in decree with State agency, the remedy requested sought no more than "the state officials themselves had

accepted when they asked the District Court to approve the decree" and neither the agreement itself nor the remedy violated the Eleventh Amendment).

26. Finally, unless DCFS intends simply to abandon its wards to the streets, this Court should be aware that the draconian program and service cuts that DCFS is implementing on July 1, 2009, may well have the effect of increasing the costs necessary for DCFS to provide for the children in its care. Children deprived of counseling and other therapeutic services they need in order to function in a traditional foster care setting will disrupt out of those placements and require more expensive, more restrictive placements as a result. Children deprived of counseling and other therapeutic services they need in order to function in a specialized foster care setting will disrupt out of those placements and require more expensive, more restrictive residential placements as a result. Children in residential placements deprived of psychiatric and other therapeutic services they need in order to function will disrupt out of those placements into the only remaining avenue available – extremely expensive and extremely restrictive psychiatric hospitalizations. The list of perverse consequences that are literally guaranteed to follow from the foregoing Decree violations goes on and on.

27. Wherefore, in light of the imminent Decree violations discussed above and the irreparable harm those violations will cause to the Plaintiff Class, Plaintiffs respectfully request that this Court enter the following injunctive and other relief[6] pursuant to Rule 65 of the Federal Rules of Civil Procedure:

[6] While one remedy for violation of a Consent Decree is a citation for contempt and the imposition of appropriate penalties, Plaintiffs are not requesting that relief in this Motion. Of the two forms of equitable orders available to enforce a consent decree – contempt judgment and a supplementary order – a supplementary order is "preferred as less condemnatory than a judgment of contempt." *Cook v. City of Chicago*, 192 F.3d 693, 695 (7th Cir. 1999); *see also Wisconsin Hosp. Ass'n v. Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987) ("Whether one calls such an order [to enforce the decree] one of civil contempt or, as we would prefer out of comity to

- Defendant shall comply with all provisions of the B.H. Decree and shall not proceed with cuts to programs or services (including without limitation foster parent reimbursement payments, contracts for placements, medical care, psychiatric services, counseling services, daycare services, and SOC services) that violate the Decree so long as the Decree remains in effect;
- Defendant shall not exceed the caseload ratios set forth in the Decree and subsequent Implementation Plans for investigative personnel, follow-up caseworkers, or supervisory staff, whether provided by DCFS or its contracted agencies;
- Defendant shall continue to provide fully adequate monitoring of service providers, including without limitation the monitoring of residential treatment centers and psychiatric hospitals as presently performed by the University of Illinois at Chicago;
- Defendant shall continue to perform all necessary clinical and social assessments for all children entering care and additionally as provided for in Department guidelines and procedures; and
- Award such other relief as the Court may deem just and proper.
- Nothing in this Order will prohibit Defendant from making cuts in expenditures that are *not* in violation of the B.H. Decree; provided, however, that Defendant shall submit a written description of any such planned cuts at least 10 days prior to the implementation of same for review by Plaintiffs. In the event of a dispute as to whether any planned cut violates the B.H. Decree, either party may submit the issue to the Court. If relief is sought in Court, the cuts shall not go into effect until the dispute is resolved.
- On or before July 1, 2009, Defendant shall publish this Order by e-mailing it to all placement and service providers and by posting the Order on its website.

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characterize it, an equitable supplement to the consent decree, it is within the power of the federal court to make.").

Dated: June 29, 2009

Respectfully submitted:

By: /s/ Heidi Dalenberg

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2009, a copy of **Plaintiffs' Emergency Motion to Enforce Consent Decree** was served on the individuals below via the court's CM/ECF electronic filing system and hand delivery.

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