

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Eric L., et al.,
Individually and on Behalf of
All Others Similarly Situated,
Plaintiffs

v.

Civil No. 91-376-M

Commissioner of the New Hampshire
Department of Health and Human Services;
and Director of the New Hampshire
Division of Child & Youth Services,
Defendants

O R D E R

Even though the parties have had considerable time to resolve this long-standing dispute, it is apparent that the burden of yet additional legal effort and expense cannot be avoided, and the parties remain intent on pressing onward. By now the DCYF's claimed implementation of an aggressive plan to bring it into full compliance with the outstanding consent decree may have borne fruit, and circumstances may be such that no relief is necessary. And, given changes in applicable law, as well as the factual circumstances, perhaps substantial alterations in the decree, to include termination, may be in order.

Having consulted with the parties, see Fed. R. Civ. P. 53, the court hereby appoints, with his consent, David A. Garfunkel, Esq., of Concord, to serve as a Special Master, at a reduced fee not to exceed \$225.00 per hour. Those fees shall be payable in the first instance by the State, on a schedule to be agreed upon with the Special Master, or, failing agreement, as set by the court. The plaintiff class says it is indigent; counsel to the class, however, remain exposed to paying fees if circumstances warrant.

The Special Master shall meet with the parties' counsel and representatives as he deems appropriate; survey the compliance landscape; and make findings of fact, and recommendations, with regard to noncompliance with the consent decree, if any substantial noncompliance exists, and with regard to effective remedies. The Special Master shall also investigate and consider the effect of any changed factual circumstances or changes in applicable law, and shall assess the relevance of the consent decree's requirements to the current situation. He shall report his conclusions and recommendations to the court. The Special Master shall specifically determine, and make a recommendation regarding, whether under currently prevailing circumstances the consent decree ought to be vacated, modified, or extended in its current form. The Special Master shall also make findings and

recommendations as to whether fees and costs should be assessed relative to the enforcement effort undertaken by plaintiffs, and with respect to allocation of fees and costs associated with the Special Master's work.

The Special Master shall allow such discovery as he deems reasonably necessary and shall hold such hearings, and require such briefing, as he may deem useful, keeping in mind that the parties have limited resources.

The Special Master shall proceed with all reasonable diligence. He shall not communicate ex parte with the court about the merits of matters he is considering. He may, however, communicate with the court regarding procedure and schedules, preferably with counsel in attendance, and he may communicate with a party separately if the opposing party consents in advance. The record of the Special Master's activities shall consist of the pleadings filed, letters, memoranda and exhibits filed, hearing transcripts, and orders - all of which shall be preserved for the court's review.

The Special Master's findings, orders, and recommendations shall be reviewed by the court upon completion of the assigned tasks, in accordance with Fed. R. Civ. P. 53(g).

Perhaps, as this process unfolds, the parties will discover a more convenient and less burdensome means of resolving their latest disputes. If not, the court anticipates reviewing the completed Special Master's report and recommendations within a reasonable time, preferably before June 1, 2005.

SO ORDERED.

Steven J. McAuliffe
United States District Judge

September 14, 2004

cc: Ronald K. Lospennato, Esq.
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