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United States District Court, E.D. Louisiana.

GARY W., et al.
v.
The STATE of Louisiana, et al.

Civ. A. No. 74–2412. | Jan. 19, 1993.

Opinion

ORDER AND REASONS

McNAMARA, District Judge.

***1** Before the Court is the motion of defendant, the State of Louisiana, through the Department of Health & Hospitals and the Department of Social Services, ("the State") for relief from judgment. Plaintiffs have filed an opposition. After considering the briefs and exhibits filed by the parties, the applicable law, the extensive record and the arguments presented by counsel, the Court issues the following Order and Reasons.[1]

I. THE STATE'S MOTION

The State has filed a motion for relief from judgment pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure. The basis of the motion is fourfold: (1) the orders under which the case presently operates exceed the "*quid pro quo* " remedy set forth in the *Principal Order;* (2) the judgment has been satisfied; (3) it is no longer equitable that the judgment should have prospective application; and (4) the class members and the action are moot.

Plaintiffs oppose the motion, contending that no justifiable legal or factual basis exists for granting the motion. Plaintiffs argue that: the orders *subsequent* to the *Principal Order* define the State's obligations to the class; the remaining class members require continued judicial protection due to the seriousness of their disabilities; the State has not met the burden required to have the injunction dissolved; the State has not met the standards for modification of the subsequent consent decrees; and the motion must be denied in the absence of an evidentiary hearing.

II. HISTORY OF THE CASE

A. *The Complaint*

Plaintiffs initiated this litigation in September 1974 by filing a complaint which alleged that Louisiana officials, by placing certain children in various Texas institutions, had denied them the care and treatment due them under the Constitution and applicable federal statutes. Judge Rubin certified the matter as a class action in December, 1975, pursuant to Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure. He defined the class as:

> [a]ll Louisiana residents under twenty-one years of age who are placed or housed in a Texas child-caring institution at the instigation, on the order, or with funding, in whole or in any part, of the state Defendants.

The characteristics shared by the plaintiffs were that "all are children from Louisiana; all are in Texas institutions; and the State of Louisiana has played some part in the placement." *Gary W. v. State of Louisiana,* 437 F.Supp. 1209, 1213 (E.D.La.1976) ("*Principal Order* ").[2]

The United States became plaintiff-intervenor after filing a complaint in April, 1975. The United States asked the Court to direct defendants to remedy constitutional deficiencies, thereby requiring the State to provide appropriate care and treatment to all affected children in its care or under its control.

B. *The "Principal Order"*

1. The Right

Following a lengthy trial in March, 1976, Judge Rubin concluded that class members possessed a constitutional right to adequate care and treatment which had been violated by their placement in Texas institutions. He defined the parameters of that right as encompassing

> ***2** [a] program of treatment that affords the individual a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capacities permit with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency.

Principal Order at 1219. In light of the evidence as to the abuse, neglect, unnecessary restraint and restriction of class members in the Texas institutions, Judge Rubin held that the defendants had not met this standard of care for the class and had violated their Fourteenth Amendment rights. *Principal Order* at 1216–23.

2. The Remedy

As a result of his findings, Judge Rubin ordered the situation remedied on a class member-specific basis: "Each child must receive proper care wherever that child is placed. What is proper must be determined separately for each child based on that child's personal attributes and needs." *Principal Order* at 1219.

3. The Requirements for Dismissal

In addition to setting forth the duties and requirements of the State in order to comply with the *Principal Order,* Judge Rubin also provided for the dismissal of class members after certain conditions had been met:

> The terms of these standards shall cease to apply to a child only upon:
>
> (a) the child's successful completion of all treatment as determined by the LSU [Louisiana State University] evaluation team or a status review team, pursuant to sections 2.1 and 2.4, supra, respectively;
>
> (b) the child's release from LHHRA care or custody solely as a consequence of his having attained the statutorily established age at which participation in the DFS, EDA [sic] or any successor programs must terminate (except that in this circumstance section 6.3 [sic] shall continue to apply)[3]; or
>
> (c) the child is returned to the care or custody of his parents or legal guardian; or
>
> (d) the child is removed from an out-of-state institution to an institution meeting the requirements of the child's treatment plan, either public of private, in the state of Louisiana.

Principal Order at 1231, paragraph 5.5 of Remedial Order.

4. The Philosophy

In devising his remedy, Judge Rubin summarized his philosophy as follows:

> In general, the Court has tried to avoid ordering the parties to comply with an order that would have the infinite detail of a set of engineering specifications. It has attempted to write guidelines that would prevent child abuse and assure good treatment for children without writing an order that would require infinite precautions against spectral perils and without enmeshing treatment personnel in a bureaucracy.

Principal Order at 1223.

C. *Deviation from Judge Rubin's Intentions*

Approximately six months after the issuance of the Principal Order, Judge Rubin was appointed to the Fifth Circuit Court of Appeals. Shortly thereafter, the litigation took on new dimensions. In due course, approximately twenty-six additional orders/memoranda of agreement resulted in exactly the sort of quagmire Judge Rubin had sought to avoid. The following is a sampling of the way this litigation was transformed from a court-guided situation under a workable order into a micromanaged and infinitely detailed affair.

1. The Special Master

***3** First, shortly after the case was reassigned because of Judge Rubin's departure from the district court, plaintiffs moved for the appointment of a Special Master and a panel of experts to develop a comprehensive implementation plan.[4] The Court ordered the appointment of a Special Master but denied the second request.[5] The Special Master was to function as an officer of the Court, a fact-finder, a monitor, and a hearing officer and would serve until the last child was dismissed from the case. *See* Supplemental Order of September 6, 1978.

2. *Full* Compliance Ordered

Next, the Court placed the issue of compliance directly in the hands of the Special Master.[6] The Court was concerned with "the glaring contrast between the large amount of state resources invested in this case and the

small amount of actual compliance with the *Principal Order* that has occurred to date." Compliance was defined as *full* implementation of all SRC-indicated (Special Review Committee)[7] services except guardianship, advocacy, and legal services, and would be determined on an individual basis by the Special Master.

3. Elaboration on the Principal Order's Requirements

On September 20, 1984, the parties entered into an Order Regarding the Dismissal of Certain Class Members from the Class. The purpose of the order was to establish a formal procedure for resolution and termination of the litigation in relation to six specific groups of class members. The Order specified the activities defendants had to complete to implement paragraph 5.5 of the *Principal Order,* which established the methods of dismissal of class members. Importantly, the Order did *not* state that it was supplanting paragraph 5.5.

On November 2, 1984, the Court issued an Order Governing Procedures for Responding to Special Master's Compliance Findings, which set forth the basic outline for compliance determination by the Special Master and the conditions under which the "compliance clock" could be stopped or started by the Special Master. The Order used the *full* compliance standard the Court adopted in its March, 1984 Order.

In June, 1985, the parties submitted a joint motion and memorandum regarding compliance standards, with the parties representing to the Court that "agreement to these Standards removes the possibility of any further delays due to disagreements about what Standards the Special Master will apply in determining compliance for each class member." The Standards Order was approved by the Court on June 4, 1985.

4. *Substantial* Compliance Ordered

On October 23, 1986, the Court amended its Order of November 2, 1984 by changing the standard against which defendants' progress would be measured from *full* to *substantial* compliance. By that point in time, all but nine members of the class had been placed in their residential placements.[8] In deciding to shift from full to substantial compliance, the Court noted its concern that full compliance did not allow the Court and the parties the flexibility to deal with the issues involved in the litigation.

***4** Significantly, the Court noted:

> *That circumstances have changed considerably from the incipiency of this litigation cannot be doubted.* Initially, 684 citizens of Louisiana were unconstitutionally institutionalized in Texas facilities. Now, all Gary W. class members, except nine, are deinstitutionalized into the least restrictive environment *... The dangers posed by massive institutionalization of 684 citizens in violation of their constitutional rights have now "become attenuated to a shadow.*" *Swift,* 52 S.Ct. at 464. *The Court* has personally toured numerous facilities for Gary W. class members and *is satisfied that the class members are in the "least restrictive setting" within the meaning of Judge Rubin's Order of July 26, 1976.* (Emphasis added).

5. Semi–Annual Reports

Notwithstanding that the Court found (1) that "the dangers posed by massive institutionalization ... have now 'become attenuated to a shadow' " and (2) that the class members had been placed in the "least restrictive setting", Defendants were ordered for the first time to provide semi-annual reports for the three year *following* dismissal of a class member. The reports were to detail the quality and quantity of the services actually provided. Any discharged class member would be reinstated if there was a significant decrease in the quality or quantity of services provided or if a class member were reinstitutionalized.[9]

6. Independent Monitoring and Magistrate Management

In June of 1987, the Court issued an Order establishing an independent monitoring unit to review defendants' compliance efforts. The unit was to be involved in the preparation of narrative and statistical reports for the Court and parties. The reports were to focus on "class members' progress towards substantial compliance and the State's progress towards developing the capacity to self-monitor." Thus, the litigation not only failed to aim toward termination, as it should have following the placement of class members in their least restrictive setting, the monitoring obligation tripled, grew more complex, and took on a life of its own.[10] A United States Magistrate was designated as the individual in charge of determining dismissal eligibility.

7. Abuse and Neglect Policy and Audit Reports

The Magistrate held an evidentiary hearing in January of

1988. The Magistrate's Findings and Recommendations highlighted areas of concern involving the health, safety and quality of services for specific class members. As a result of these Findings and Recommendations, the parties reached a consensus on an abuse and neglect policy which was issued by the Magistrate as Amended Findings and which were adopted by the Court. The Court also ordered the parties to complete a minimum of 150 detailed program audits of class members and "to move with all deliberate speed towards the development of an *adequate process* for the final resolution of all *Gary W.* matters." *Order,* dated March 1, 1988 (emphasis added).

8. The "2.4" Process: Semi–Annual Review

***5** Instead of an "adequate process", the procedure for remedying the original wrongs grew even more complex. In August 1988, the Court approved a Memorandum of Agreement: 2.4 Policies and Procedures. The 2.4 process as contained in the original order required that each child's treatment plan be reviewed semi-annually by professionals not affiliated with the treating institutions with the participation by the child's parents and case worker. *Principal Order* at 1226–27, paragraph 2.4.

The Memorandum approved in August 1988 directed that when a class member's interdisciplinary team identified "a significant change in the service needs of the individual," defendants "shall ensure the preparation of comprehensive psychological, social, educational and medical diagnosis and evaluation." The Memorandum also required the development of a revised plan of services to replace the class member's existing Special Review Committee or Community Review Team plan of services.[11] As a result, if defendants failed to revise the plan, compliance time would not be awarded, *even if the class member had received appropriate services.*

9. Supplemental Relief

In October of 1989, the Court held a hearing on the motion of plaintiffs for supplemental relief. Although all class members had been placed in their residential placements, the Court found that the State was unable to ensure the quality of those placements, including the support services necessary to keep the class members there and to protect them from harm. The Court granted plaintiffs' Motion for Supplementary Relief and appointed administrative personnel to carry out certain aspects of the Court's prior Orders.

D. ***The Result***

The infinite detail which resulted from the numerous modifications to the Principal Order highlighted above did not dispose of the conflict. To assess what had been achieved, the Court directed the parties to provide comprehensive individualized summary information on each active class member.[12] With its Report, the State provided a brief overview which stated in part:

> With each subsequent change in court appointed monitors/administrators, the *interpretations* and applicable conditions given to the standards agreed upon in 1985 [June 4, 1985 Standards Order] drift farther and farther from the constitutional yardstick of 1976, the Court's Standards Order of 1985, and the Court's admonition of 1986 that "form should no longer be elevated over substance." Each monitor/administrator has brought to the task his or her professional orientation, background and experience which is an inevitable human condition. However, the professional judgment which grafts on expectations of "state of the art" or "best practice" as compliance expectations in service provision prerequisite to meeting constitutional norms of adequate treatment has brought this case back to the pre–1986 strict compliance period.

***6** State's Report at 12.[13]

E. ***Additional Protections in the Law Since the Principal Order***[14]

Since the issuance of the Principal Order, numerous changes in federal and state law have expanded greatly the protections afforded the mentally and physically challenged. The Supreme Court noted in *City of Cleburne, Texas v. Cleburne Living Center,* 105 S.Ct. 3249, 3256 (1985), that "the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates ... that lawmakers have been addressing their difficulties in a manner that belies a continuing apathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[15]

1. Consolidated Omnibus Budget Reconciliation Act of 1981

Title XIX of the Social Security Act[16] has been in place since 1965, almost ten years before the Principal Order. However, recent Congressional changes to the Social Security Act have expanded the Medicaid coverage for community-based services.[17] Subsequent amendments have expanded the coverage even further.

2. Amendments to the Rehabilitation Act of 1973[18]

In 1986, Congress amended the Rehabilitation Act of 1973. The purpose of the Act is now to "develop and implement ... comprehensive and coordinated programs of vocational rehabilitation and independent living, for individuals with handicaps in order to maximize their employability, independence, and integration into the workplace and the community." 29 U.S.C. § 701. Among the services included in the program are counseling (psychological, psychotherapeutic, etc.), housing, including modifications to accommodate individuals, job placement, transportation, attendant care, physical rehabilitation, therapeutic treatment, prostheses, including other appliances and devices, health maintenance, recreational, child development, and preventative measures. 29 U.S.C. § 796(A).

3. Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act assures that children with disabilities have available to them "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs...." 20 U.S.C. § 1400(c).

4. Developmental Disabilities Assistance and Bill of Rights Act

In 1990, Congress passed legislation which sought:

> (1) to provide assistance to States and public and private nonprofit agencies and organizations to assure that all persons with developmental disabilities receive the services and other assistance and opportunities necessary to enable such persons to achieve their maximum potential through increased independence, productivity, and integration into the community;[19]

> (5) to promote the inclusion of all persons with developmental disabilities, including persons with the most severe disabilities;
>
> (6) to promote the interdependent activity of all persons with developmental disabilities, including persons with the most severe disabilities;

***7** 42 U.S.C. § 6023.

5. Protection and Advocacy for Mentally Ill Individuals Act of 1986

This Act provides states with allotments to help establish advocacy systems for the mentally ill. It seeks to protect and advocate the rights of these individuals through enforcement of the Constitution and federal and state laws. It also provides for the investigation of reported or suspected incidents of abuse and neglect. *See* 42 U.S.C. § 10801, et seq.

6. Act 975

In 1992, the Louisiana legislature created the Division of Quality of Care within the Department of Health and Hospitals ("DHH") Office of the Secretary. The purpose of the Division is to enhance monitoring and investigation of Client Rights and Protection in the "natural systems" of DHH, and to carry out the requirements of Adult Protective Services, as required by Act 975.[20]

Under this Act, at the termination of this litigation, Gary W. class members would be subsumed into the larger population of disabled adults (in Title XIX facilities, state-funded community living arrangements or living independently in the community) upon their dismissal from the class or termination of this litigation, and their protection would be equal in all respects to those of the larger population. The standards and protections applicable to them, therefore, would be available in the natural systems of the agency, applicable to the general population and equal to the standards of care by which the performance of providers is currently judged for persons who are not members of the Gary W. class.[21]

7. *Del A. v. Roemer*

If this court were to grant the State's Motion for Relief from Judgment, the remaining class members would become associated with Louisiana's Foster Care System.[22] This court has already held that that system provides the quid pro quo of constitutionally required services to those entrusted to the State's custody. *See Del A. v. Roemer,*

777 F.Supp. 1297 (E.D.La.1991). Therefore, were this court to grant the State's motion, the class members would still receive the basic remedy ordered by Judge Rubin.

F. *Summary*

It can readily be seen by a brief review of this case that "[t]he original intent of Judge Rubin's [Principal] Order ... has been lost in the maze of detail." *See* Opinion of October 22, 1986. This Court has become embroiled in the micromanagement of a set of Orders that far exceed the "infinite detail of a set of engineering specifications," enmeshing the Court in a bureaucracy of the delivery of social services. Moreover, class members receive treatment that far exceeds that which is available to similarly situated non-class members and exceeds that which is constitutionally required. *See Youngberg v. Romeo,* 102 S.Ct. 2542 (1982) (discussed *infra* at pp. 21–23) and *Del.A.,* 777 F.Supp 1297. One form of unequal treatment has been replaced with another.

III. THE EVOLUTION OF THE CASE LAW

***8** The *Principal Order* was concerned solely with persons under the age of twenty-one; in other words, children. At issue was the fact that the State of Louisiana sent 685 children in its custody to Texas for care and services that should have been available in Louisiana.[23]

Judge Rubin found disparate treatment between those housed in Louisiana and Texas facilities:

> Children placed in Texas institutions are permitted to return home for visits at Christmas and during the summer school vacation period. Because of their own major physical and other problems, some children never return home for such visits. Others have no real home to return to. Even in cases where the child has parents interested in his welfare, it is difficult for the parent to visit the child at other times. Most of the institutions are a considerable distance from their homes. Working parents may lack funds and time to make visits ... Nor are the children placed in Texas institutions visited by their case workers. The Texas institutions are licensed by the State of Texas; Louisiana authorities make no regular visits to or inspections of Texas institutions.
>
> There is much closer contact between LHHRA and the facilities in Louisiana. It has full licensing reports and studies on each institution. Many of its case workers and the institutional counselors have visited these institutions, and none of the children are placed without a preplacement interview of the child and his family.

Principal Order at 1214.

A. *Applied by Judge Rubin: Quid pro quo*

Judge Rubin recognized that the involuntary institutional confinement of any person, adult or child, entails a "massive curtailment of liberty." *Id.* at 1216 (*quoting Humphrey v. Cady,* 92 S.Ct. 1048 (1972)). The Due Process Clause permits this kind of interference with the liberty of a human being only if it can be justified by some permissible governmental interest. *Id.* (*citing Wyatt v. Aderholt,* 503 F.2d 1305, 1312 (5th Cir.1974)). If an individual, adult or child, healthy or ill, is confined by the government for some reason other than his commission of a criminal offense, the state must provide some benefit to the individual in return for the deprivation of his liberty. Thus,

> [W]hen the three central limitations on the government's power to detain—that the detention be in retribution for a specific offense, that it be limited to a fixed term, and that it be permitted after a proceeding where fundamental procedural safeguards are observed—are absent, there must be a *quid pro quo* extended by the government to justify confinement.

Id. at 1216 (*citing Donaldson v. O'Connor,* 493 F.2d 507, 522 (5th Cir.1974), *vacated and remanded,* 95 S.Ct. 2486 (1975)).

That *quid pro quo* is care or treatment of the kind required to achieve the purpose of confinement. Thus where hospitalization for illness is imposed, treatment for that illness is required. If this requirement is not met, hospitalization is "equivalent to placement in 'a penitentiary where one could be held indefinitely for no convicted offense.' " *Principal Order* at 1216.

***9** Judge Rubin realized, however, that the constitutional right to some *quid pro quo* did not imply a right to the *best* treatment available, any more than the right to counsel means the right to the nation's foremost trial lawyer. Logic, economics, and the scarcity of human resources make it impossible to supply the finest to everyone. The *quid pro quo* the state must provide is treatment based on expert advice reasonably designed to achieve the purposes of state action. Thus,

> [T]he plaintiffs here do not seek to *guarantee* that all patients will receive all the treatment they need or that may be appropriate to them.

> They only seek to ensure that conditions in the state institutions will be such that the patients confined there will have a *chance* to receive adequate treatment.

Id. at 1218, (*quoting Wyatt,* 503 F.2d at 1317)) (emphasis in original).

B. *Since the Principal Order*

Since the *Principal Order,* the Supreme Court has decided *Youngberg v. Romeo,* 102 S.Ct. 2542 (1982), in which the Court clarified the standards to be applied in cases of this type.[24] *Youngberg* impliedly rejected the broad legal standard applied by the *Principal Order* of a "right to treatment that affords a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capacities permit." *Principal Order* at 1219.[25] Further, in *Lelsz v. Kavanagh,* 807 F.2d 1243, 1251 (5th Cir.), *cert. dismissed,* 483 U.S. 1057 (1987), the court specifically rejected the least restrictive standard referred to in the Principal Order and later applied in subsequent orders.

As a general matter, the state has no constitutional duty to provide substantive services to its residents. *Youngberg,* 102 S.Ct. at 2459. When, however, persons are committed to state institutions, then the state assumes the duty to provide certain services and care. *Id.* The Supreme Court held that mentally retarded persons committed to state institutions have liberty interests under the Due Process Clause of the Fourteenth Amendment. These liberty interests include safety, freedom from bodily restraint and "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 2459–60.

Freedom from bodily restraint includes the right to be free from confinement in an institution where such confinement is shown on a factual basis to be unnecessary. *Youngberg,* 102 S.Ct. at 2460–61. Furthermore, the liberty interest in personal safety and freedom from restraint includes a right to training reasonably necessary to insure the person's safety and to facilitate his ability to function free from bodily restraints. *Id.* The training required by the Due Process Clause includes training which enables a person to maintain minimum self-care skills such as feeding, bathing, dressing, self control and toilet training. *Association for Retarded Citizens v. Olson,* 561 F.Supp. 473 (D.N.D.1982), *aff'd in part and remanded in part,* 713 F.2d 1384 (8th Cir.1983).[26]

***10** The training to which plaintiffs are constitutionally entitled is that which is reasonable in light of their liberty interests balanced against the relevant state interests. *Youngberg,* 102 S.Ct. at 2461. In determining what is reasonable training, the Court must give deference to the judgment of qualified professionals. *Id.* at 2461.

IV. THE CLASS

All of the remaining class members in the present litigation are now adults. They have all aged out of the ECA and DFS programs and have joined the ranks of the general population. Pursuant to paragraph 5.5 of the *Principal Order,* the standards set out by Judge Rubin ceased to apply to each and every active member of the class once he or she reached the age of majority.

In other words, there is no longer a "special relationship" between the class members and the State, except for that created by this lawsuit. A special relationship must exist for the government to have a duty to offer assistance. *Griffith v. Johnston,* 899 F.2d 1427, 1439 (5th Cir.1990); *DeShaney v. Winnebago County Department of Social Services,* 109 S.Ct. 998, 1005 (1989).

In *Griffith,* a number of adoptive children and their adoptive parents filed a civil rights action claiming that the Texas Department of Human Services violated their constitutional right to due process and equal protection. Citing *DeShaney,* the court stated:

> The State does not become the permanent guarantor of an individual's safety having once offered him shelter.

> Any 'liberty interest' that the children might have asserted under the 'special relationship' doctrine while in State custody lapsed when the parents officially adopted the children. Thus appellants' complaint has not advanced a constitutionally protected liberty interest.

Griffith, 899 F.2d at 1440.

In the instant litigation, any constitutional right the class members had to Gary W. services while in state custody ceased when the members aged out of the State EDA and FDS programs, as per paragraph 5.5 of the *Principal Order.* Also, as reflected in attachment 3 to the State's motion entitled "Extraordinary Service Costs Analysis," the class members are receiving services above and beyond services available to those in the natural system. These extraordinary services cost the State $6,782,279 annually and do not include the administrative costs, which totalled $3,615,000 for the fiscal year of 1990–91.

In the Court's view, a dual system of services has emerged as the result of this litigation, wherein the

general population is not receiving those services available to the class members. It was never the intent of the *Principal Order* for the class members to be treated *better* than those similarly situated, but only that they be treated the same.

V. Satisfaction of the Principal Order

Based on the record before it, the Court finds that there has been overall constitutional compliance by the State with the *Principal Order* which addressed particular constitutional violations to particular individuals within a particular group.

***11** The authority of the federal court is invoked at the outset to remedy particular constitutional violations. *Freeman v. Pitts,* 112 S.Ct. 1430, 1445 (1992). In construing the remedial authority of the district courts, the Supreme Court has been guided by the principles that "judicial powers may be exercised only on the basis of a constitutional violation" and that "the nature of the violation determines the scope of the remedy." *Id.* (*quoting Swann v. Charlotte–Mecklenburg Bd. of Educ.,* 91 S.Ct. 1267, 1276 (1971)). A remedy is justified only insofar as it advances the ultimate objective of alleviating the initial constitutional violation. *Id.*

Certain concerns found in many class actions, such as school desegregation cases, are not present in the instant litigation. In those cases, the system as a whole was challenged; the class was fluid in that the class members left the system and others entered it as time passed. In other words, the class was infinite and defined by the system into and out of which the individuals were moving.

In this case, however, there was a definable, finite and non-fluid group of individuals that made up the class: all citizens of Louisiana under the age of twenty-one in the custody of the State who were placed or housed in a Texas child caring institution on the order, or with the funding, in whole or in part of the State. *Principal Order* at 1212–13. The entire "system" of the care of children in Louisiana custody and care was not challenged through this litigation. Indeed, *Del A.* teaches that the Louisiana *system* passes constitutional muster.[27]

VI. Dissolution of Consent Decrees

The courts have recognized that consent decrees can and should be modified in response to changed circumstances. *Roberts v. St. Regis Paper Co.,* 653 F.2d 166, 172 (5th Cir. Unit B 1981).

> 'A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.... The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.' *United States v. Swift & Co.,* 286 U.S. 106, 114, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932) (Cardozo, J.). 'Familiar equity procedures assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted.' *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.,* 312 U.S. 287, 298, 61 S.Ct. 552, 557, 85 L.Ed. 836 (1941) (Frankfurter, J.).

New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 967 (2d Cir.), *cert. denied,* 464 U.S. 915 (1983).

The upsurge in institutional reform litigation since *Brown v. Board of Educ.,* 74 S.Ct. 686 (1954), has made the ability of a district court to modify a decree in response to changed circumstances all the more important. *Rufo v. Inmates of Suffolk County Jail,* 112 S.Ct. 748, 758 (1992). Because such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased. *Id.* The experience of the district and circuit courts in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation. *Id.* The Courts of Appeals have also observed that the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Id.* at 758–59 (*quoting Heath v. De Courcy,* 888 F.2d 1105, 1109 (6th Cir.1989)).

***12** A party seeking modification, or in this case, dissolution of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision, or dissolution, of the decree. A party may meet this initial burden by showing either a significant change in factual conditions or in the law. *Id.* at 760.

The Court finds that the State has met its burden. Today, there are no members of the class housed in a Texas institution through placement by the State or with the financial support of the State. All members of the class have reached the legal age of majority. Many live independently in the community and lead productive lives. Others are being cared for by and live with relatives, while others live in community homes and are being cared for by the staff.

The Court recognizes that there are still some class

members so severely disabled as to require institutional care which is being provided by the State. Also, some members of the class are presently in state custody in penal institutions for violations of state criminal laws.

The Court finds that the State has eliminated all vestiges of *de jure* discrimination that existed at the time this litigation was instituted. There is no danger that the discrimination will recur.

VII. Mootness

Where a defendant's voluntary cessation of allegedly illegal conduct is claimed to moot a case, the defendant bears the "heavy" burden to demonstrate not only that the conflict giving rise to the claim is not ongoing, but also that the effects of any illegality have been completely and irrevocably eradicated and that there is no reasonable expectation that a violation will recur. *Del A. v. Roemer,* 777 F.Supp. 1297, 1322 (E.D.La.1991); *County of Los Angeles v. Davis,* 99 S.Ct. 1379, 1383 (1979).

If a dispute has been resolved or if it has disappeared because of changed circumstances, including the passage of time, it is considered moot. *American Medical Ass'n v. Bowen,* 857 F.2d 267, 270 (5th Cir.1988). For example, in *Savidge v. Fincannon,* 836 F.2d 898 (5th Cir.1988), plaintiffs moved for injunctive relief to obtain transfer for a mentally retarded child from a state school to a community-based residence. The court found that once the transfer occurred, the motion became moot and removed the court's authority to adjudicate. Further, there was no reasonable expectation that the child would be unconstitutionally returned to the state school. *Id.* at 904 and n. 20.

As a general rule, voluntary cessation of alleged illegal conduct will not make a case moot. *Davis,* 440 U.S. at 631, 99 S.Ct. at 1383. However, if

> (1) it can be said with assurance that "there is no reasonable expectation ..." that the alleged violation will recur, and
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation,

the case becomes moot. *Id.*

The Court finds that this case is now moot. The constitutional violation was the State's placement of the Louisiana class members in Texas institutions without adequate care. Once these children were returned from Texas, placed in appropriate facilities or the community, and provided those services available to other individuals in the State's custody and care, the constitutional violation ceased. The State has never again placed children in its care in any Texas facility. Furthermore, Louisiana now has enough facilities to house all children placed in its care for whatever reason. Thus, there is no reasonable expectation that the alleged violation will recur, and interim relief or events have completely eradicated the effects of the violation. Simply put, the passage of time and changed circumstances have resolved the dispute.

VII. CONCLUSION

***13** The Court specifically finds that an evidentiary hearing is not necessary before determining the present motion. The Court has given the parties ample opportunity to brief the issues and heard their arguments in open court. Considering the voluminous record, further evidence would not be beneficial nor helpful to the Court. For example, the reports prepared by each side detail the treatment and care of the remaining class members. Also, the Plaintiffs' Report contains a section entitled "Response to State Report". The Plaintiffs' responses were duly noted and considered.

Based on changed circumstances, both in the law and in the facts of this case, the Court finds plaintiffs' arguments in opposition to the present motion are without merit and that the State is entitled to relief from the judgment. This result is further warranted in light of the financial burden imposed on the State. While financial constraints may not be used to justify the creation or perpetuation of constitutional violations, they are a legitimate concern of governmental defendants in institutional reform litigation and therefore are properly considered by the court. *Rufo,* 502 U.S. at 764. Accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that the motion of defendants, the State of Louisiana, through the Department of Health & Hospitals and the Department of Social Services, for relief from judgment is hereby GRANTED; the Defendants are hereby relieved from the obligations and application of any and all orders, memoranda, consent decrees, judgments, etc. in this matter.

Footnotes

1 This case was originally assigned to the late Alvin Rubin, who was then a district judge on this court. In July 1992, the case was re-assigned to the undersigned judge.

2 The "Principal Order" consists of three separate orders. The first order, dated July 26, 1976, was in effect Findings of Fact and Conclusions of Law on the merits. The second order, dated October 28, 1976, was Supplemental Reasons for the July 26 findings. The third order, dated December 2, 1976, was a detailed Remedial Order.

3 "LHHRA" stands for the Louisiana Health and Human Resources Administration. "DFS" stands for the Division of Family Services, which had the temporary custody of children who had been abandoned, adjudged neglected or delinquent by juvenile courts, surrendered into DFS custody, or whose parents had contracted for services with the DFS. "ECA" stands for the Exceptional Children's Act Program which provides funds to pay wholly for, or to assist parents in paying for, the care of children placed in institutions. Both the DFS and ECA were state agencies in the LHHRA.

4 For an extensive history of this case once it was reassigned, *see* Findings of Fact and Conclusions of Law dated February 15, 1990.

5 The Fifth Circuit affirmed that decision. *See Gary W. v. State of Louisiana,* 601 F.2d 240 (5th Cir.1979).

6 *See* Amended Order dated March 21, 1984.

7 The Special Review Committee (SRC) is a team of three professionals (one selected by Plaintiffs, one by Defendants, and one mutually agreed upon) who reviewed and approved or modified the plan of service developed by the State for each class member residing in a State-funded residential placement.

8 By October of 1989 all class members had been placed. *See infra* at p. 12.

9 The same method of measuring compliance for active class members was instituted to monitor dismissed class members. Therefore, the length of compliance was arbitrarily extended from eighteen months to fifty-four months.

10 Some examples of the minutiae which has burdened this Court and the monitoring process over the years and which has oftentimes prevented the accrual of compliance time include:
(1) whether a case manager's notes reflect a high quality of case management skills (*See* Document # 5706);
(2) the lack of data on the medical treatment provided to a class member who is so independent that she schedules her own appointments as needed (*See* Document # 5798);
(3) whether a postponement of services signed by a class member is valid because it is not also signed by the Special Master's Representative (*See* Document # 5706);
(4) non-recognition of a class member's postponement of services, although all standards are within substantial compliance (*See* Document # 5706);
(5) whether compliance time should not be awarded where the class member received a high quality of care in his living environment, but personnel there lacked CPR certification (*See* Document # 5706); and
(6) whether compliance time should not be awarded because the class member's day program did not meet the definition of "day development training", although the program was well suited to the individual's medical fragility and the individual appeared well adjusted, relaxed and happy in the program (*See* Document # 5807).

11 The class members are broken into two groups. The first group lives in the community, living on their own, with or without supervision, or with a parent or guardian. They are referred to as "CRT" class members. "CRT" stands for community review team, which approved these class members' service plans. The other group of class members reside in privately run residential homes funded by the state and are referred to as "SRC" class members. "SRC" stands for special review committee, which approved these class members' service plans. Only 8 SRC class members are in state run facilities. As the result of the severity of their disabilities, privately owned facilities refused to take them.

12 *See* Minute Entry dated September 5, 1991.

13 According to the State's Report, the total annual costs of this litigation break down as follows:

A.	Services	$13,800,000	for 323 class members
B.	State Service Delivery Staff	2,165,000	
C.	State Gary W. Project Office	450,000	
D.	Special Administrator and Plaintiff Fees	1,000,000	
	$17,415,000	**	annually of which approximately $5,000,000 is federal funds.

> Since the submission of the reports by the parties, a number of class members have been dismissed or are in the process of being dismissed for various reasons. The number of active class members at the time of the hearing on the State's motion to dismiss totaled 201 with another 40 class members awaiting dismissal. The parties agree that the remaining class members, for the most part, have marked mental retardation and/or physical disabilities.

** FN** This figure did not include state service delivery staff operating costs for travel, rent, supplies, equipment, etc.

14 Exhibit 2, attached to the State's Motion for Relief from Judgment, contains a paragraph by paragraph comparison of the Principal Order and the provisions of Title XIX.

15 Plaintiff–Intervenor, the United States, recognized this legislative response and moved for voluntary dismissal of its cause of action. It noted "that significant relief has been granted to Gary W. class members." The government further explained that since the inception of the litigation, Congress in 1980 enacted legislation which is now the exclusive means by which the Department of Justice is authorized to litigate on behalf of institutionalized persons. *See* The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, et seq. In its motion, the government also observed:

> The instant litigation has, over the years, resulted in a plethora of requirements which, in some instances, may exceed the kinds of relief authorized under CRIPA. Generally, the United States is satisfied that the services provided *Gary W.* class members over the years have met the constitutional requirements contemplated by the CRIPA legislation. Further participation in this litigation by the United States does not appear to serve any useful purpose.

16 Title XIX authorizes federal grants to States for medical assistance to, among others, low income persons who are disabled. Innumerable federal regulations govern the qualifications of individuals, the disbursement of funds, and the treatment programs. This court finds that Title XIX, and the accompanying regulations, are at least as comprehensive, protective, and effective as the Principal Order.

17 Medicaid is the vehicle by which medical and related medical support services are provided to class members.

18 Notably, both the Rehabilitation Act and the Individuals with Disabilities Education Act (see section B below) require individualized plans to be specifically tailored to the needs of each handicapped individual. 29 U.S.C. § 721(A)(9) and 20 U.S.C. § 1477. This requirement approximates Judge Rubin's order that the remedy for each child be fashioned "based on that child's personal attributes and needs." *See Principal Order* at 1219.

19 Note the similarity between the purposes of this Act and the Principal Order's definition of the right to adequate care and treatment. *See Principal Order* at 1219.

20 As explained in attachment 3 to the State's motion, the term "natural system" describes services that are available to individuals with developmental disabilities within Louisiana who are not part of the Gary W. class action suit. These services can be broken down into residential services and day program services.

21 The Act also provides that at the termination of this litigation, the funds currently authorized for the administration of the Gary W. project will be transferred to the new Division.

22 *See supra* subsection 6.

23 The Gary W. class members, however, are no longer children. Moreover, the litigation did not challenge the *system* for the provision of services to physically and/or mentally handicapped persons *in Louisiana,* whether children or adults.

24 While *Youngberg* was concerned with only involuntarily committed mentally retarded adults, its precepts have been applied by this court and the parties in this case. *See e.g.,* Findings of Fact and Conclusions of Law dated February 15, 1990 at 62–63.

25 Rather, *Youngberg* held only that an individual under state care had constitutionally protected interests in "conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and *such training as may be required by those interests." Youngberg,* 102 S.Ct. at 2462 (emphasis added).

26 Some cases also look to the Equal Protection Clause of the Fourteenth Amendment, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. Thus, all persons similarly situated must be treated alike, and any legislation or practice of the State which classifies some persons differently than others must be rationally related to a legitimate state interest. *Cleburne v. Cleburne Living Center, Inc.,* 105 S.Ct. 3249 (1985); *Schweiker v. Wilson,* 101 S.Ct. 1074 (1981).

27 *See supra* at pp. 17–18.