IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

THE UNITED STATES OF AMERICA

Plaintiff

vs.

THE COMMONWEALTH OF PUERTO RICO;

The Honorable PEDRO J. ROSSELLO, Governor of the Commonwealth of Puerto Rico, in his official capacity;

THE JUVENILE INSTITUTIONS ADMINISTRATION;

ZORAIDA BUXO, Secretary of the Department of Corrections and Rehabilitation, in her official capacity;

MIGUEL RIVERA, Director, Juvenile Institutions Administration, in his official capacity;

DR. CARMEN FELICIANO VDA. DE MELECIO, Secretary of Health, Department of Health, in her official capacity;

DR. NESTOR GALARZA, Director, Anti-Addiction Services Department, in his official capacity;

VICTOR FAJARDO, Secretary, Department of Education, in his official capacity;

PEDRO PIERLUISI, Secretary, Justice Department of the Commonwealth of Puerto Rico, in his official capacity;

CARMEN RODRIGUEZ, Secretary, Department of Social Services, in her official capacity;

DANIEL VAZQUEZ TORRES, Director Humacao Detention Center, in his official capacity;

EDGARD ORTIZ ALBINO, Director, Mayagüez Industrial School, in his official capacity;

NORMA CRUZ, Director, Ponce Central Training School, in her official capacity;

CIVIL 94-2080CCC

FRANCISCA APONTE, Director, Ponce Victoria Street Training Center, in her official capacity;

PAULITO DIAZ DE GARCIA, Director, Ponce Detention Center for Girls and Ponce Industrial School for Girls and Boys, in her official capacity;

JULIO CUALIO BONET, Director, Guaynabo Training School, in his official capacity; and

LYDIA LASALLE, Acting Director, Central Metropolitan Training School of Bayamón, in her official capacity;

Defendants

O R D E R

Having considered the Motion Under the Prison Litigation Reform Act to Terminate Particular Prospective Relief Provisions filed by the Commonwealth defendants (**docket entry 901**), the United States' Opposition (docket entry 904), the Monitor's Expert Report for the PLRA Hearing (docket entry 917-1), the United States' Motion in Response to Monitor's Report for the PLRA Hearing (docket entry 918), and the Commonwealth defendants' Motion in Opposition to the United States' Motion (docket entry 923), the Court RULES as follows:

Paragraphs 49 and 89 of the Settlement Agreement

Paragraphs 49 and 89 are terminated without opposition by the United States as informed in its Motion in Response to Monitor's July 6, 2010 Expert Reports for PLRA Hearing (docket entry 918),

Paragraph 70 of the Settlement Agreement

Paragraph 70 of the Settlement Agreement provides: "Defendant shall complete the AIMS instrument at least once every six (6) months for each juvenile taking psychotropic medications.'

In its PLRA termination motion of this provision the Commonwealth defendants aver (docket entry 901, at page 9) that the Monitor's compliance ratings for paragraph 70 of the Settlement Agreement have been consistent reporting "Y" in all six areas of compliance for all four quarters of the year 2009. This is corroborated by the Monitor's PLRA Report (docket entry 917) filed on July 6, 2010 specifically at docket entry 917-1, page 5, which contains the following observation: "Since becoming the Associate Monitor I have repeatedly observed compliance on this provision." The July 6, 2010 PLRA Monitor's Report suggested that the consistency of completion of AIMS testing had deteriorated in the recent past and provided information of non-compliance with ¶ 70 as to 3 of 4 youth who were on anti-psychotic medications. This appears at docket entry 917-1, page 5, where the Monitor reports the following data:

> A review of youth taking antipsychotic medication was conducted on June 9 and 10, 2010. Only seven juveniles were being treated with antipsychotic medications at the time of the review. Four of the seven youth had AIMS completed at 6 month intervals following initiation of antipsychotic medications in compliance with the Paragraph 70.
>
> However, three youths were prescribed antipsychotic medications and did not have AIMS completed in accordance with the six month follow-up period. One youth at Puertas had no AIMS screening between May 2009 and May 2010. Another youth at Puertas developed abnormal movements and his medication was discontinued on 3/10/10. There has been no AIMS follow-up of this youth since discontinuation. Another youth at Salinas has been treated since November 2009 with antipsychotic medications. There was one AIMS in his record dated November 23, 2009 but none since.

The Monitor recommended a modification of ¶ 70 "to require that the AIMS procedure be done on only those youth receiving antipshycotic medications, as other classes of drugs are not known to produce tardive dyskinesia" and further stated that "[a]dministering AIMS to all youth on psychotropic medications, as opposed to only those on antipsychotic medication, is not a narrowly tailored remedy as it represents a waste of valuable and limited psychiatry time and an inappropriate use of the test.' Id., at p. 6.

The Commonwealth's opposition to the United States' Response to the Monitor's July 6, 2010 PLRA Report (docket entry 923) was filed on August 13, 2010. It is there

stated that after the Monitor's Report it had discussed with the doctor in charge of administering medication the Monitor's findings that three juveniles who had been prescribed antipsychotic medications did not have the AIMS test completed. The following information provided at pages 2 and 3 of docket entry 923 was later backed up by document 927-1 filed on August 24, 2010 which is a Case Analysis and Compliance Report on Paragraph 70 signed by Dr. Jorge L. Suria-Colón of the AIJ:

> As to the three alleged cases of non-compliance: one of the youth had in fact had the AIMS test administered within the required time period, but the evidence that the test had been done had ben misplaced; as to the second one that did not have the AIMS test done, the test was not required because the minor had been receiving antipsychotic medication for less than six months; and as to the third youth which was claimed to be in non-compliance within the sample, such youth was not receiving antipsychotic medications anymore and the doctor had stopped administering the medication to this minor before the six-month threshold in which the AIMS test is required.

Dr. Suria's report (docket entry 927-1) contains a list of the seven juveniles who were administered medications at different times from February 27 through June 30, 2010. As to the third juvenile on the list, "Luis B.", his comments are that the AIMS test was done but misplaced; regarding juveniles "Jervesh A." and "Michael H.", Dr. Suria's comment is that the test was not required. As to "Jervesh's" case, further specific information regarding his case and the fact that the test was not required is provided by Dr. Suria at page 2 of that report. Dr. Suria reported at page 1 of docket entry 927-1 that "over the past eight years there has been no reports of TD" referring to tardive dyskinesia, the condition detected by using the AIMS test.

The United States' discussion at docket entry 918 filed on July 6, 2010 following the submission of the Monitor's PLRA Report is limited to the non-compliance with paragraph 70 reported by the Monitor which has been satisfactorily explained by the Commonwealth defendants. The Case Analysis on Compliance dated August 24, 2010 (docket entry 927-1) prepared by Dr. Suria who administered the medication to the juveniles reflects that the non-compliance claim as to these three youths did not occur. This coupled with the

consistent compliance ratings on ¶ 70 reported by the Monitor throughout 2009 and again in the First Quarterly Report 2010 filed on May 17, 2010 (docket entry 902-2, p. 11), his remark at page 5 of the Report filed on July 6, 2010 (docket entry 917-1) that the Associate Monitor has repeatedly observed compliance with such provision, and the observation at page 6 of that Report that administering AIMs to all youth on psychotropic medications, as opposed to only those on anti-psychotic medications, is not a narrowly tailored remedy, compels the conclusion that the United States has not met its burden of proving that the prospective relief provided in paragraph 7 should be continued due to an ongoing violation by the institution of the juveniles' right to medical treatment.

Paragraph 88 of the Settlement Agreement

Paragraph 88 of the Settlement Agreement provides as follows:

> If the juvenile has not been previously identified as having an educational disability, but indications of such disability exist, an adequate evaluation must be performed within the time limits prescribed by federal law. The Commonwealth shall use only professionally accepted tests to complete the evaluation. The evaluation shall include a complete psychological battery and intellectual achievement tests. A copy of this evaluation shall be kept in the juvenile's record at the facility

The Commonwealth defendants support their request for termination of ¶ 88 in light of their record of full compliance for the past four quarters of the year 2009 in which the Monitor reports "yes" in the five areas of policy compliance, staffing compliance, resource compliance, documentation compliance and general compliance and marked training compliance as inapplicable to this particular provision. Docket entry 901, at pp. 9-10. This compliance ratings have been corroborated by the Court. The information provided by the Commonwealth defendants in their opposition to the United States' response to the Monitor's July 6, 2010 PLRA Report (docket entry 923), at page 4, note 2, in the sense that every Monitor Quarterly report and its corresponding compliance ratings from the third quarter of 2007 (docket entry 754) through the first quarter of 2010 (docket entry 903-2, at page 21) has shown full compliance as to paragraph 88 has not been disputed by the United

States. In the First Q 2010 mentioned, the Monitor commented: "[r]eview of IEPs during past site visits indicate that timeliness associated with initial assessments following initial referral were being met" and that "[t]ests used to assess students are professionally accepted and appropriate ... files are kept in students' files in each facility."

The Monitor's PLRA Report filed July 6, 2010 (docket entry 917-1) at page 7 acknowledges that "defendants have taken steps to comply with [Paragraph 88]." Although the Monitor reported full compliance with Paragraph 88 throughout the year 2007 and first quarter of 2010 filed on May 17, 2010, when he prepared the Report for purposes of the PLRA termination issue raised by docket entry 901, his consultants conducted what they described as a "review of randomly selected files" which "showed that in some instances youth who had not been previously identified, were referred by teachers and other staff for initial evaluations." There is no mention of how many student files were reviewed nor in how many instances those randomly selected files reflected that the teachers' recommendations "were not always followed." There is no data provided either as to how many youth who were recommended as eligible for special education services by educational evaluators and clinical psychologists were not provided the same. This July 6, 2010 PLRA Report on ¶ 88 engages in a discussion of perceived shortcomings in the hiring of AIJ teachers, such as having to be reappointed each year or having no health benefits during the summer session, which allegedly makes them second-class status educators. The Monitor's PLRA Report ends with a conclusory statement that this so called deficit as well as a second one consisting in the failure of the Department of Education to fill the position of Special Education Coordinator are the cause of "[t]he failure of the Commonwealth to achieve compliance with this provision."

The United States also relies on Exhibit A, appended report of Dr. Kelly Dedel, in support of its position that paragraph 88 remains necessary and appropriate under the PLRA. The references to the Dedel Report are found at pages 8 through 10 of docket

entry 918. The argument that the Commonwealth, in contrast to the several support teams mentioned in the Dedel Report, "does not employ support teams or a comparably thorough, team-oriented process, resulting in demonstrable lapses at every phase of the Child Find process," is a flawed argument. The "Child Find" process refers to the requirements of IDEA, 20 U.S.C. § 1400 et seq., that minors in need of special education be identified and evaluated. Certainly, ¶ 88 of the Settlement Agreement refers to the evaluation of juveniles not previously identified as having an educational disability but manifesting indications of the existence of such disability. Paragraph 88 requires that the Commonwealth use only professionally accepted tests to conduct such evaluation and that the same include a "complete psychological battery and intellectual achievement test." Dr. Dedel's Report at page 5 refers to steps in the process of identifying an existing disability and to the screening measures used to gather information to identify youths with previously unrecognized disabilities. The Report states that "most jurisdictions identify a number of criteria that trigger a referral to a committee of teachers in the general education program commonly called the ... teachers' support team" which, once the student is referred, "convenes to determine whether additional support in the general education program could remediate the identified deficits." The Dedel Report also states that "[i]f the additional support is not sufficient to support student progress, the team [referring to the teachers' support team] refers the student for additional psychological testing to determine whether he or she has a qualifying disability." The Dedel Report also refers to other teams who she considers are part of the process, to wit: an eligibility team which reviews test data to determine whether the student requires special education services (page 6 of the Dedel Report) and which Dr. Dedel found was not a part of the AIJ screening process.

To find non-compliance by Commonwealth defendants with ¶ 88 for not employing support teams referenced in the Dedel Report one must rewrite the terms of this provision of the Settlement Agreement. There is nothing in its language that incorporates the use of

support teams in the evaluation process. Nor can one reasonably infer such requirement from its text. As Dr. Dedel points out, there are jurisdictions where such a committee of teachers' support teams and/or eligibility teams are a part of the process to identify learning disabilities in children who had not been previously identified as having them but, as the Commonwealth defendants correctly state in their opposition filed on August 13, 2010 (docket entry 923), paragraph 88 clearly states that "the Commonwealth shall use only professionally accepted tests to complete the evaluation." The Commonwealth points out at pages 4 and 5 that "AIJ evaluates each youth that comes to its care with IQ tests that are standardized for the Puerto Rican population and achievement tests standardized for the Puerto Rican population to determine the placement of the youth with regard to a traditional grade school" and "AIJ is complying with the IDEA and the Child Find process because by administering this battery of tests at the admission stage it is identifying and evaluating ... those who may need special education services." The Dedel Report acknowledges that upon entry students are asked whether they have ever failed a grade in school and "all students also take a diagnostic test in the core academic subjects of Spanish, Math, English, Science and Social Studies" and that "[t]hese assessment data were available in all of the general education student files requested for review," It also states that "[s]ome students were also administered an achievement test (the Woodcock-Muñoz) and a test of cognitive functioning (i.e., an intelligence test; a Spanish version of the Wechsler Intelligence Scale for Children)." In other words, the professionally accepted tests that ¶ 88 requires the Commonwealth to use in the evaluation process are being conducted. The fact that the support teams utilized in other jurisdictions and adopted by Dr. Dedel in her Report (docket entry 918-1) is not the approach used by the Commonwealth in the evaluation process of ¶ 88 is not evidence of non-compliance. What Dr. Dedel describes in her Report regarding the testing done as part of the evaluation process reflects compliance with what ¶ 88 is all about. Accordingly, the court finds that the United States has not met its burden

of proving that three is an ongoing, current non-compliance with ¶ 88 and, therefore, GRANTS the request for termination of such prospective relief.

Paragraph 92 of the Settlement Agreement

The Commonwealth defendants also seek to terminate Paragraph 92, which provides:

> All juveniles 18 years old or older shall be permitted to participate in the development of the Individual Education Plan (IEP). Juveniles under age 18 have a right to have a parent present during the development of the IEP. If a parent is unwilling or unable to attend, Defendants shall appoint surrogate parent trained in the relevant provisions of federal and state law to participate in the development of the IEP. Appointed surrogate parents may not be employees of any public agency involved in the education or care of the juvenile. All juveniles, parents, and surrogate parents shall be informed that they have the right to challenge the IEP.

The Commonwealth defendants claimed in their termination motion (docket entry 901) that the Monitor's Compliance Ratings for S.A. 92 for the four quarters reported during the year 2009 showed full compliance with such provision in the five areas of Policy Compliance, Staffing Compliance, Resource Compliance, Documentation Compliance and General Compliance, with the Training Compliance category marked as inapplicable to ¶ 92.

The United States argues that the IEP is at the core of the IDEA and is the basic mechanism for providing a free appropriate public education to a disabled child. It points to Dr. Dedel's Report and the Monitor's special education consultant findings on substantial variability in compliance with ¶ 92 across facilities. At page 12 of its Response it notes that "the Defendants have, to their credit, achieved good rates of parent participation at CTS Villalba and CTS Bayamón through meaningful efforts to involve parents." However, Dr. Dedel's reports according to the Response "only 14% parent participation in IEP meetings at Humacao and at Ponce Girls only 25% parent participation." The United States refers to both the Monitor's and Dr. Dedel's reports as noting that the child social worker at times participated in the meeting but his/her role was not clearly delineated. Regarding student participation, the United States points to Dr. Dedel's findings of a very low rate of

student participation at IEP meetings at Ponce Girls (18% overall; 25% of those under age 18 and none of the students over age 18), and Bayamón CTS had student participation of 76% for those under age 18 and 67% of those over age 18.

Dr. Dedel''s Report (docket entry 918-1) filed July 6, 2010 mentions that during the week of June 21 through June 24 she visited 5 AIJ facilities: Humacao CTS, Ponce Girls, Villalba CTS, Bayamón CD and Bayamón CTS. She acknowledges that parent participation in IEP meetings is not required in order to comply with the IDEA. Table 2 in the Appendix to her Report shows that "across all five facilities the proportion of students and parents attending IEP meetings was 73% and 65% respectfully." P. 10 of the Report. She reported 100% student participation at Humacao, but only 14% parent participation; 18% student participation and 25% parent participation at Ponce Girls and 74% student participation and 94% parent participation at Bayamón CTS , the three facilities which she identified at page 10 of her Report as confronting participation problems.

The Commonwealth defendants' opposition (docket entry 923) provides a valid explanation regarding the variability in compliance amongst the facilities. At page 7 of the opposition, the Commonwealth defendants state that "the family structure and social background of level II youth are generally and quite often better off than that for youths at Level Iv or V, which generally makes family members of Level II more involved and more willing to participate in the rehabilitation process than are the family members of youths classified at higher levels.' They aver that such variability is not under their control and teat they use social workers as surrogate parents when the parent or guardian cannot attend. Regarding percentages of participation, the Commonwealth defendants correctly aver that paragraph 92 does not require a particular participation level of any specific percent and what it does requires is that the AIJ allow youths 18 years or older to participate in the development of the IEP and also requires the agency to appoint a surrogate parent when

a parent of a juvenile under age 18 who has a right to have the parent present is unwilling or unable to attend.

There is no evidence that the Commonwealth defendants have violated paragraph 92 by not allowing juveniles 18 or older to participate in the development of the IEP or that the Agency has in any way obstructed the right of a juvenile under age 18 to have his/her parent present at that stage. Nor is there any evidence that defendants have failed to appoint surrogate parents when needed. These are the only requirements of ¶ 92, and, having concluded that there is no evidence of ongoing current violations of these provisions, the Court finds that the United States has not met its burden of proof and, therefore, terminates ¶ 92 as a prospective relief of the Settlement Agreement.

In sum, having considered defendants Motion Under the Prison Litigation Reform Act to Terminate Particular Prospective Relief Provisions (**docket entry 901**), specifically ¶¶ 49, 70, 88, 89 and 92 of the Settlement Agreement, of which the United States have conceded the termination of ¶¶ 49 and 89, and opposed the termination of ¶¶ 70, 88 and 92 in its opposition found in docket entry 918 and the Commonwealth defendants' Opposition to the United States Response (docket entry 923), the Court GRANTS the defendants' PLRA Motion to Terminate ¶¶ 49, 70, 88, 89 and 92 as prospective relief provisions of the Settlement Agreement in its entirety.

SO ORDERED.

At San Juan, Puerto Rico, on September 29, 2011.

S/CARMEN CONSUELO CEREZO
United States District Judge