IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

JOHN B., by his next friend, L.A.; JULIAN C., by his next friend, S.C.; JASMINE A., by her next friend, J.A. ZACHARY B.; BONNIE B., by her next friend, J.B.; BINTA B., by her next friend, S.A.; JACOB F., by his next friend, C.F.; CATHERINE and BRANSON G., by their next friend, L.G.; LAKALE J., by his next friend, S.K.; AIDEN and NAKIA L., by their next friend, S.L.; PRINCETON M., by his next friend, P.M.; LADONTAY P., by his next friend J.P.; JACKIE and SAVANNAH R., by their next friend, L.R.; SARAI and AMBER R., by their next friend, T.R.; ALBREONA T., by her next friend, D.E.; and GUNNAR U., by his next friend, M.U., Plaintiffs, v. MARK EMKES, Commissioner, Tennessee Department of Finance and Administration, *et al*. Defendants.	)	No. 3-98-0168 Judge Wiseman

AGREED PRETRIAL ORDER

Pursuant to Paragraph 8 of the March 31, 2011 Case Management Order (Doc. No. 1464), the parties have drafted this Agreed Pretrial Order in anticipation of the bench trial to begin October 31, 2011, on the Motion to Vacate All Injunctive Relief, Terminate the Decree

and Dismiss the Case (Doc. No. 1465). The Court approves the terms of the Order and will therefore enter it as submitted.

A. Short summary of Plaintiffs' theory

1. The defendant state officials ("the State"), as the movants and the parties invoking the terms of Paragraph 113 of the Consent Decree for Medicaid-Based Early and Periodic Screening, Diagnosis and Treatment ["EPSDT"] Services (the "Consent Decree"), have the burden of proof. That burden requires the State to prove by a preponderance of the evidence that it has "reached an Adjusted Periodic Screening Percentage ('APSP') and a Dental Screening Percentage ('DSP') of 80% and [is] in current, substantial compliance with the [the Consent Decree's remaining] requirements." (Doc. No. 12 at 54.)

2. The State cannot carry its burden, because it cannot prove that it has reached an Adjusted Periodic Screening Percentage ('APSP') and a Dental Screening Percentage ('DSP') of 80%, and because the State cannot prove that it is in substantial compliance with the requirements of the Consent Decree. To prove that it is in substantial compliance, the State must establish:

    a) that it has corrected the systemic deficiencies of record that were adjudicated in *John B. v. Menke,* 176 F. Supp. 2d 786, 790 (M.D. Tenn.) and confirmed in subsequent judicial admissions by the State;

    b) that the State has in place a surveillance system that informs it accurately and fully if other systemic problems arise, so that it can be confident that there are not now other problems in addition to those that were proven in the past; and

c) that a "durable remedy" has been implemented. *Horne v. Flores,* 557 U.S.___, 129 S. Ct. 2579, 2595 (2009). This may be accomplished by showing that the objectives of the order or decree have been "attained," *Frew v. Hawkins,* 540 U.S. 431, 442, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004), and that it is unlikely that the prohibited conditions or actions will recur, *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237, 247-48, 111 S. Ct. 630, 112 L. Ed. 2d 715 (1991) (requiring defendants to show that "it was unlikely that the school board would return to its former ways"); *LaShawn A v. Fenty,* 701 F. Supp. 2d 84, 111 (D.D.C. 2010).

3. The performance measures relied upon by the State to support its claims of substantial compliance with its EPSDT obligations do not, in fact, demonstrate that the TennCare program is reliably providing medically necessary EPSDT services to children enrolled in the program. For example:

a) some of the measures relied upon by the State are irrelevant because they relate to other aspects of the TennCare program and shed no light on the provision of EPSDT services;

b) other measures that purportedly relate to children's services only establish that TennCare or its managed care contractors have policies that are consistent with EPSDT requirements but do not show that the program is actually providing needed services to children, or is even capable of reliably doing so;

c) other measures are relevant but do not establish substantial compliance; and

d) still other measures are relevant and show that children are *not* receiving medically necessary EPSDT services with any reasonable degree of reliability.

4. The State's failure to effectively monitor its own compliance, and its resulting failure to "accurately and fully" report the status of its compliance to the Court, constitute a violation of Paragraph 104 of the Consent Decree ("Paragraph 104"). The State and its contractors have the resources and information, or access to the information, that are needed to accurately and fully report the status of the State's EPSDT compliance as required by that paragraph. Because the State lacks a process for accurately and fully reporting EPSDT compliance, *no one* knows or can inform the Court of the full extent of the State's noncompliance.
5. Plaintiffs' proof not only confirms the State's inability to carry its burden, but also establishes the continuing existence of a number of systemic problems that prevent TennCare children in the plaintiff class from receiving medically necessary EPSDT services. Plaintiffs' proof establishes that systemic barriers, including the State's failure to conduct effective outreach and to effectively coordinate EPSDT services, prevent children from reliably receiving services in each of the major components of the EPSDT program: screening, diagnosis and treatment. These barriers violate the Consent Decree and the provisions of the federal Medicaid Act which it enforces, 42 U.S.C. §§ 1396a(a)(43), 1396d(a) and (r).
6. Compliance with the Consent Decree and the implementation of an effective EPSDT program are feasible, as the State acknowledged when it negotiated the Consent Decree. The State continues to acknowledge on an ongoing basis by accepting federal Medicaid matching dollars that the TennCare program can and must implement EPSDT. However, without the ability to know, or willingness to acknowledge, that there are systemic problems that violate the Consent Decree, the State cannot be expected to correct those violations and achieve compliance.

7. Critical to the State's implementation of the Consent Decree is adherence to an effective process of continuous quality improvement that is guided by accurate performance monitoring. Such monitoring must utilize measures that are tailored to the requirements of the Consent Decree. The failure of the State's quality improvement processes to achieve compliance with the Consent Decree, and the State's inability to accurately assess its own compliance, are the result of its failure to establish and monitor such measures.

8. The Court has the duty and inherent power to enforce its orders, including consent decrees, and its powers include issuing suitably tailored remedial orders to address ongoing violations. *U.S. v. State of Mich.*, 18 F.3d 348 (6th Cir. 1994); 62 F.3d 1418 (6th Cir. 1995). In light of the State's failure to implement the Consent Decree, and the State's crucial failure to accurately and fully assess and report the status of compliance, further relief is appropriate and necessary. The Court should order the State, in consultation with the Plaintiffs, to establish a process to effectively measure TennCare's performance against the requirements of the Consent Decree, thereby enabling the parties to efficiently assess compliance in the future without the need to resort to litigation to do so.

B. Short summary of Defendants' theory

1. The State is entitled to vacatur of the Consent Decree and all other injunctive relief and dismissal of this case with prejudice because the State has satisfied the criteria established by the Consent Decree itself for termination of the Decree and the end of this case. Specifically, Paragraph 113 of the Decree, Doc. No. 12 at 54, states that it "shall expire upon proof that the Defendants have reached an Adjusted Periodic Screening Percentage ('APSP') and a Dental Screening Percentage ('DSP') of 80% and are in current, substantial compliance with the requirements herein."

2. The State will prove at the hearing that it is in current, substantial compliance with the requirements set forth in the Consent Decree. Because this Court has held that the 80% screening performance percentage standards must be vacated under the Sixth Circuit's ruling in this case, *see* Doc. No. 1455 at 10, the State respectfully submits that it need not demonstrate that an APSP and DSP of 80% have been achieved in order to be entitled to relief. However, the State will prove at the hearing that it has in fact achieved both an APSP and DSP of more than 80%, and as suggested in the Court's earlier opinion, the State will rely on this proof as "evidence of the State's compliance with the Consent Decree." *Id*

C. Issues to be submitted to the Court

1. To the extent the State's compliance with the Consent Decree provisions requiring the State achieve an Adjusted Periodic Screening Percentage ('APSP') and a Dental Screening Percentage ('DSP') of 80% remain relevant following the Court's Preliminary Order vacating these provisions of the Decree, has the State proved by a preponderance of the evidence that it has achieved an 80% APSP and 80% DSP?
2. Has the State proven by a preponderance of the evidence that it is in substantial compliance with the requirements of the Consent Decree?

D. Procedural issues

1. Plaintiffs have stipulated to the authenticity of all of the State's exhibits and have notified the State of their objections, on grounds of relevance and/or hearsay, to the admissibility of three of the State's exhibits. The State is reviewing the over 1,000 exhibits on Plaintiffs' Final Exhibit List and is still determining its position with respect to the authenticity, relevance and admissibility of Plaintiffs' exhibits.

In general, the State has informed Plaintiffs that it does not expect to have authenticity objections to those documents on Plaintiffs' exhibit list that were produced from the State. Nor does the State intend to lodge hypertechnical foundation or hearsay objections when there is no reason to question the reliability of an exhibit. And once the State understands the purpose for which a document is being introduced (either from the testimony of the witness or from Counsel's proffer), it does not expect to have many (if any) relevance objections so long as Plaintiffs provide a reasonable explanation of how the document is relevant to the issues before the Court. Accordingly, the State proposed that the parties agree that any exhibit either party intends to introduce into evidence must either be introduced through a witness who can testify to its relevance (and if necessary lay a proper foundation) or the party introducing the exhibit must make a proffer (either in writing or orally) as to the relevance of the document and the purpose for which it is being introduced.

In light of the State's willingness to reserve objections regarding authenticity and foundation for only those exhibits as to which there is reason to question reliability, Plaintiffs see no need to call witnesses to establish authenticity or foundation. Plaintiffs propose to follow the process used in this case in 2001, when they proffered their exhibits as a group at the end of their proof, with the expectation that the Court will take under advisement the proffer, and any objections thereto, and rule on disputes regarding admissibility after the trial ends. It is Plaintiffs' position that the relevancy of most of their exhibits is self-evident and that, in a bench trial, the Court need not rule on relevance prior to the end of the trial and can better assess relevance of an exhibit with the benefit of the parties' proposed findings of fact and conclusions of law.

The parties request the Court's guidance regarding the handling of objections to admissibility of exhibits in light of their disagreement.

2. In its Memorandum of Preliminary Findings, Doc. No. 1455 at 14, the Court "reach[ed] the preliminary conclusion that Paragraphs 43, 50, 58, 60, 61(ii), 71(ii), and 78-84 of the Consent Decree, in addition to paragraphs 45-49 and 61(iii), are subject to vacatur." At the parties' request, the Court did not enter a final, appealable order on these provisions pending resolution of the remaining issues in the case. It is the State's position that neither side should be required to present proof on the paragraphs which the Court has concluded (albeit preliminarily) are subject to vacatur at the upcoming hearing. Assuming the Court does not alter its preliminary conclusions, the presentation of evidence that bears solely on these paragraphs would be a waste of the Court's time and impose an unnecessary burden on the parties. Should the Court amend its preliminary conclusion with respect to any of these paragraphs, the State reserves the right to present evidence demonstrating its compliance with those paragraphs at a subsequent hearing.

Plaintiffs do not agree with this view. It is the Plaintiffs' position that the trial should dispose all of the evidentiary claims of either party, and that it is impractical and inconsistent with the State's previous positions for the State to reserve any of its evidentiary claims for a subsequent hearing. The State urged the Court at the March 24, 2011 hearing to withhold a definitive ruling on the State's *vacatur* motion until it had tried the State's factual claims of compliance with the Consent Decree. The State argued that a definitive ruling on the *vacatur* motion should be withheld until after the evidentiary hearing on compliance, so that the State's legal and factual claims could be the subject of a single appeal. (Doc. No. 1457 at 64-67.) The Plaintiffs acquiesced to the State's position, which the Court accepted.

The parties should present at the upcoming trial any evidence that they want the Court to consider that bears on the question of whether the Consent Decree should be vacated, or waive the right to present such evidence at a later date.

3. The State retains potential concerns about the Plaintiffs' plans to present deposition transcripts in lieu of the live testimony of witnesses who were deposed solely because Plaintiffs had represented that they would call them at trial. In particular, the State maintains its belief that the rules of evidence, properly understood, would not so permit. Moreover, if permitted, this approach will enable the Plaintiffs to present these witnesses without expending any of the time the Court has allocated to each side to present their respective cases. In the interests of avoiding unnecessary disputes, however, the State has offered to forego its objections to this procedure if in turn Plaintiffs will agree that the State is no less entitled to introduce and rely upon deposition transcripts from any fact witnesses who serves as caregiver or next friend for a plaintiff class member and Plaintiffs included on their preliminary witness list (whether on the ground that the statements of those witnesses at their depositions constitute admissions by party opponent, *see* 30B Fed. Prac. & Proc. Evid. § 7018 (1st ed.); *Shell v. Parrish*, 448 F.2d 528, 534 (6th Cir. 1971), or, alternatively, that the State reserves the right to call such witnesses as its own, with the benefit of the same procedures available to Plaintiffs).

Plaintiffs disagree. It is the Plaintiffs' position that:

a) Both parties' use of deposition transcripts is governed by Fed. R. Civ. Pro. 32. The depositions of Plaintiffs' witnesses were taken, as the transcripts note, "pursuant to all applicable rules", and the State did not attempt at the time it took the depositions to limit their use. Rule 32(a)(4)(B) authorizes Plaintiffs' use of the depositions of

several witnesses who live beyond 100 miles from the place of the trial. Plaintiffs have informed the State that they do not object to the State's use of the deposition of any other fact witnesses covered by the Rule 32(a)(4)(B).

b) On July 19, 2011, the Plaintiffs stated their intent to use the deposition transcripts of unavailable witnesses at the trial. (Doc. No. 1503 at 6.) The State argued the matter at the case conference the next day, complaining that it would have approached the depositions differently had it been aware that they might be used as evidence. (Doc. No. 1504 at 7 – 8, 24-25) The Court stated it that it would defer action on the matter until the State raised it. *Id.* This put the State on notice that, if it felt it needed additional cross-examination, it should file a motion or seek to re-depose the witnesses. The State did nothing.

c) Rule 32 provides no authorization for the State's use of depositions of witnesses who live within 100 miles of the place of hearing and are available for the State to present as live witnesses. Rule 32(a)(3) permits the use of the deposition, regardless of a witness's availability, of an adverse "party , or anyone who, when deposed, was the party's officer, director, managing agent or designee." None of the witnesses in question fit that description. They are the caregiver relatives, and not necessarily next friends, of children who are members of the plaintiff class. Even in an instance where the witness is acting as next friend, the child remains the real party in interest. *L.W. v. Knox County Bd. of Educ.,* No. 3:05-CV-274, 2006 WL 2583153, at *2 (E.D.Tenn. Sept. 6, 2006) (citing *Helminski v. Ayerst Laboratories, a Div. of American Home,* 766 F.2d 208 (6th Cir. 1985). For purposes of discovery, a next friend is not a party. Wright and Miller, Section 2171 ("A next friend of an infant is not technically a party

and is not subject to interrogatories.", citing *Ju Shu Cheung v. Dulles*, 16 F.R.D. 550, 552 (D.Mass. 1954)).

d) Plaintiffs do not oppose the State's alternative plan to call as its own witness any individual whom the Plaintiffs preliminarily listed as a witness but ultimately decided not to call. Plaintiffs do not contest the State's right to call these witnesses and elicit their live testimony, but only oppose the State's attempt to use of the witnesses' transcripts in a manner not permitted by Rule 32.

E. Amendment of pleadings to conform to this order

1. The parties' pleadings are amended to conform to this Agreed Pretrial Order, which supplants the parties' pleadings.

F. Compliance with requirements regarding discovery and disclosures.

1. The parties exchanged witness lists on October 7, 2011. The parties have agreed that they will exchange, on October 28, 2011, witness lists reflecting the sequence in which witnesses are expected be called during each side's case in chief, with the understanding that a party would only deviate from the order if there is a compelling justification involving a witness's schedule, and notice of the deviation should be provided as soon as the need is known to counsel. During the trial, each party will provide the other side 24 hour advance notice of the witnesses to be called the next day.
2. The parties exchanged exhibit lists on October 7, 2011.
3. The parties have complied with the requirements of the Case Management Order (Doc. 1464), as amended, and the requirements of Fed. R. Civ. Pro. 26 regarding expert witness reports and discovery except to the extent raised by any motions in limine filed prior to the pretrial conference. Although the State has potential concerns as to whether it has timely and

fairly received certain materials upon which Plaintiffs' proposed experts may be relying in support of their opinions, it asserts that any such concerns can best be ventilated and addressed at hearing depending upon the testimony actually offered by a particular expert witness. Similarly, the State asserts that any concerns as to whether a particular "hybrid" expert offered is in fact qualified as an expert in relevant part can best be ventilated and addressed at hearing when a specific proffer is made as to the witness's claimed expertise.

4. The parties disclosed in their witness lists those witnesses whose testimony they will present by deposition transcript. Plaintiffs propose that, in lieu of filing designations, counterdesignations and objections, all objections to the transcripts be reserved until after the trial and the exchange of proposed findings of fact and conclusions of law. At that point, either party can file objections to any transcript excerpts cited in their opponent's proposed findings of fact. This procedure will save the parties the time and expense of designating, and the Court the time spent reading, excerpts that may ultimately never be relied on by either party. The only parts that will be read or that will potentially require rulings on objections will be those excerpts actually relied upon to support a requested finding. The State has declined to accept this proposal.

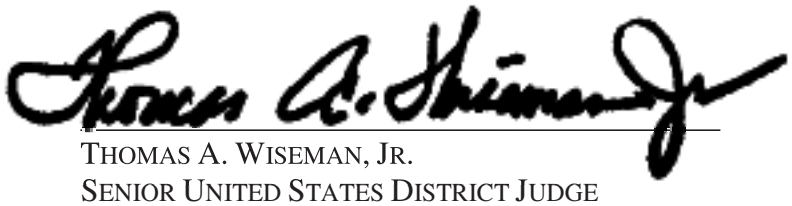
The State disagrees with this approach. If the introduction and admission of deposition testimony is postponed until after trial, the State will be deprived of the opportunity to present evidence clarifying or rebutting the deposition testimony ultimately admitted. Like witness testimony and exhibits, deposition testimony should be introduced in a party's case-in-chief so the other side has the opportunity to respond in its own case or in rebuttal.

In the event that the Court requires the parties to submit transcript designations, counter-designations and objections, they will exchange transcript designations by October 19, 2011. The parties disagree on the date for exchanging counter-designations and objections to designated deposition testimony. Plaintiffs propose the date of October 28, 2011, in order to complete the process before trial. The State believes more time is necessary and proposes November 7, 2011. The parties seek the Court's guidance on this matter.

G. Pretrial Conference

1. The parties have requested that the pretrial conference scheduled for October 18, 2011 at 10:00 a.m. go forward, as they seek the Court's guidance on the matters in dispute as set forth above.

IT IS SO ORDERED BY AGREEMENT this 1st day of November, 2011.



THOMAS A. WISEMAN, JR.
SENIOR UNITED STATES DISTRICT JUDGE

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