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United States District Court, E.D. Pennsylvania.

Terri Lee HALDERMAN, et al.
v.
PENNHURST STATE SCHOOL AND HOSPITAL, et al.

CIV. A. No. 74–1345. | Aug. 28, 1989.

Opinion

MEMORANDUM

RAYMOND J. BRODERICK, Senior District Judge.

***1** Once again there is litigation in the Pennhurst case. Motions have been filed to enforce the settlement approved by this Court on April 5, 1985.

This case was actively litigated for eleven years. It produced 28 published opinions and three arguments before the United States Supreme Court. On April 5, 1985, this Court approved a Settlement Agreement and entered a consent decree. In approving the settlement it was pointed out that when the action was tried in 1977, all parties were in agreement that Pennhurst as an institution was inappropriate and inadequate for the habilitation of the retarded. No one took issue with the many professionals who testified that "normalization" (the antithesis of institutionalization) is now universally accepted as the only successful method of habilitating a retarded person. Normalization requires that a retarded person must be cared for, trained and educated in a normal community environment. The settlement of the Pennhurst case was more than just the termination of eleven years of litigation. The settlement was hailed throughout the nation as recognition that the retarded have a right to minimally adequate habilitation in the least restrictive environment.

The empirical evidence has vindicated the opinions of the retardation experts that institutionalization at Pennhurst was not providing adequate habilitation. The transfers from Pennhurst to community living arrangements have enabled the retarded to develop their capabilities, enjoy a fuller life and in some instances become self-supporting residents in the community.

When the settlement was approved in April of 1985, 435 retarded individuals remained at Pennhurst, 719 having been previously transferred to Community Living Arrangements pursuant to this Court's orders.

Pursuant to the Settlement Agreement, the Commonwealth and County defendants agreed to provide community living arrangements to those members of the plaintiff class for whom such placement is deemed appropriate by the individual planning process, together with such community services as are necessary to provide each person with minimally adequate habilitation, until such time as the retarded individual no longer is in need of such living arrangements and/or community services. The defendants agreed to provide residential and habilitative services to all persons who have been furnished with such services pursuant to prior orders of this Court. The defendants also agreed to develop and provide a written habilitation plan, formulated in accordance with professional standards, to each member of the plaintiff class; provide an individualized habilitation program to each member of the plaintiff class; and permit each class member and his family or guardian to be heard in connection with his or her program. The defendants further agreed to provide an annual review of each person's individualized habilitation program, and to monitor the services and programs provided to the class members in accordance with a detailed, professionally-established monitoring and visitation procedure. It was further agreed that all persons provided with services under the terms of the agreement shall be afforded: (1) protection from harm; (2) safe conditions; (3) adequate shelter and clothing; (4) medical, health-related, and dental care; (5) protection from physical and psychological abuse, neglect, or mistreatment; (6) protection from unreasonable restraints and the use of seclusion; and (7) protection from the administration of excessive or unnecessary medication. The agreement mandated that no retarded person shall be transferred from Pennhurst solely to meet a timetable.

***2** The functions of the Hearing Master were to be discontinued upon approval of the settlement and in place of the Hearing Master, an independent neutral retardation professional, agreed upon by the parties was to be retained by the Commonwealth.

The Settlement Agreement also provided that the definition of the plaintiff class would be amended to provide that persons who were on the waiting list for placement at Pennhurst (and who had not received any habilitative services under any prior orders of this Court), as well as those persons who "may be placed" at Pennhurst, would no longer be considered members of the plaintiff class, and that their claims would be dismissed pursuant to Fed.R.Civ.P. 41 without prejudice to their asserting any claims which they may have had in any court of competent jurisdiction.

Finally, the settlement agreement specifically provides that this Court shall retain active jurisdiction until July 1, 1989, and that as of that date this action shall be marked closed, provided, of course, that at that time all defendants are in compliance with the agreement. On December 2, 1986, this court approved an agreement by the plaintiffs and the Philadelphia and Commonwealth defendants to amend the Settlement Agreement by extending the date for the closing of Pennhurst until October 31, 1986. (A stipulation was filed on October 1, 1987, to extend the closing date until October 26. Pennhurst was finally closed on October 27, 1987.) This amendment also extended the time for this Court's active supervision of the terms of the agreement as to the Commonwealth and Philadelphia County defendants from July 1, 1989, to a date in 1990.

Plaintiff Association for Retarded Citizens/Pennsylvania filed motions which were joined in by plaintiffs Halderman et al. for "Enforcement, Further Orders and Extension of the Final Settlement Agreement" as to the Delaware County, Montgomery County and Commonwealth defendants.

It should be noted that a motion was filed to enforce the settlement against Philadelphia County defendants. The Court on April 6, 1988, pursuant to a stipulation of the parties, appointed a team of experts to review and make recommendations concerning the retardation services to class members in Philadelphia. The Expert Team filed its report on July 29, 1988. The Philadelphia County defendants on June 20, 1989, moved to have the Commonwealth defendants held in contempt and to enforce the Final Settlement Agreement with respect to Philadelphia class members. The Court has scheduled a hearing to determine whether the Commonwealth and Philadelphia County defendants are in compliance with the settlement.

This Court held hearings over a period of four days between June 21st and July 6, 1989 in connection with the motions to enforce the Settlement Agreement as to the Delaware County defendants, the Montgomery County defendants and the Commonwealth defendants. On the basis of the evidence presented at these hearings, the Court finds that the Delaware and Montgomery County defendants and Commonwealth defendants are not in substantial compliance with the provisions of the Settlement Agreement and the judgments entered by the Court pursuant to Appendix A of the Settlement Agreement. The Court finds that the Delaware County defendants and the Commonwealth defendants are not in substantial compliance in that:

***3** 1. Ten class members from Delaware County reside at Embreeville Center, a commonwealth institution which houses about 300 individuals. These ten class members do not have Individual Habilitation Plans and have not been provided the community living arrangements mandated by the Settlement.

2. Eleven class members from Delaware County reside at Woodhaven, a 250 bed, Intermediate Care Facility. Not one of the eleven has an Individual Habilitation Plan and they have not been provided with the community living arrangements mandated by the Settlement.

3. Seventeen members of the class from Delaware County reside at Elwyn Institute, a large institutional type facility. Two of the 17 do not have Individual Habilitation Plans. These seventeen members of the class have not been provided with the community living arrangements mandated by the Settlement.

4. Two members of the class from Delaware County are presently residing at Pine Hill, an institutional type facility with a capacity of 158 beds which has been described by the Special Management Unit of the Commonwealth as a facility with inadequate staffing, no active treatment, no recreational, social or religious opportunities and an unreliable fire alarm system. These two members of the class have not been provided with the community living arrangements mandated by the Settlement.

5. Twelve class members from Delaware County reside in a 12 bed facility located on the main campus of Elwyn. This facility is inadequate for the habilitation of more than eight residents. These twelve members of the class have not been provided with the community living arrangements mandated by the Settlement.

6. Sixteen members of the class from Delaware County reside in two eight bed facilities in Aston. These facilities do not provide adequate habilitation in that there have been unexplained injuries to class members and the class members are receiving inadequate occupational and speech therapy, inadequate medical care and improper administration of psychotropic drugs. These sixteen members of the class have not been provided with the community living arrangements mandated by the Settlement.

7. Nine county case managers are handling 570 retarded individuals in Delaware County. This is an average of 63 persons for each case manager. This is in violation of the Settlement Agreement and the court decree entered under Appendix A which mandate that the caseloads shall not exceed about 30 persons for each case manager.

As the Court has found, 68 members of the Pennhurst class from Delaware County are not receiving the habilitation mandated by the Settlement Agreement and the decrees of this Court. It is regrettable that in Delaware County where there are only 191 residents in the

Pennhurst class, more than one third of them (68) have been denied the habilitative services mandated by the Settlement. It would appear that the Delaware County Defendants and the Commonwealth Defendants have been proceeding in total disregard of the terms of the Settlement Agreement.

***4** The Court also finds that the Commonwealth Defendants and Montgomery County Defendants are not in substantial compliance with the Settlement Agreement and/or the judgment orders of this Court as set forth in Appendix A as follows:

1. Two class members from Montgomery County are in Woodhaven although placements in community living arrangements have been recommended. These two members of the class have not been provided with the community living arrangements mandated by the Settlement.

2. Three class members reside at Pine Hill which as heretofore found by the Court is an institutional type facility with 158 beds which has been described by the Special Management Unit of the Commonwealth as having inadequate staffing, no active treatment, no recreational, social or religious opportunities and an unreliable fire alarm system. These three members of the class have not been provided with the community living arrangements mandated by the Settlement.

3. One member of the class is residing at a Comfort Home which is a private licensed facility with 30 to 40 beds. This person is not receiving the community living arrangements mandated by the Settlement.

The Court finds that Montgomery County defendants and the Commonwealth defendants have been providing the habilitation mandated for all the members of the class from Montgomery County with the exception of the two class members at Woodhaven, the three class members at Pine Hill and the one class member in a Comfort Home. This means that only six of the 200 class members from Montgomery County are being denied the habilitative services mandated by the Settlement. This is indeed commendable. However, although 97% of the Pennhurst class members from Montgomery County are receiving the habilitation ordered by the Court pursuant to the Settlement Agreement, the Court must find that Montgomery County is not in "substantial compliance." As long as one member of the class is being denied the habilitative services to which he or she is entitled pursuant to the Settlement, there is not substantial compliance.

On the final day of the hearings, the Commonwealth defendants filed a motion to dismiss all outstanding motions against them on the ground that since there had been no finding prior to July 1, 1989, that they were not in compliance with the Settlement Agreement, this Court lacked jurisdiction to proceed against them. As heretofore pointed out, the date of July 1, 1989, set forth in paragraph 16 of the Settlement Agreement was extended to a date in 1990 pursuant to the parties' amendment to the Agreement on December 2, 1986. Furthermore, even assuming July 1, 1989, was a crucial date, the Commonwealth defendants completely ignore the fact that the plaintiffs' motions claiming violations of the Settlement were filed in March, 1989. In addition, paragraph 14 of the Settlement Agreement specifically provides that the Court's orders as provided in Appendix A "shall remain in effect permanently."

***5** The injunctive decree in Appendix A requires that both the Commonwealth and the County defendants shall provide each class member with individual plans and services as provided in the Final Settlement Agreement. As found by the Court, this has not been done by the Delaware County defendants, the Montgomery County defendants and the Commonwealth defendants.

Paragraph A2 of the Court decree requires that the Commonwealth and the County defendants provide the class members community living arrangements as called for by the individual's habilitation plan. This has not been done by the Delaware and Montgomery County defendants and the Commonwealth defendants as found by the Court.

Paragraph A4 of the decree requires both the Commonwealth and the County defendants to develop and provide each member of the class with an individual habilitation plan. This has not been done by the Delaware and Montgomery County defendants and the Commonwealth defendants as found by the Court.

Paragraph A5 of the injunctive decree mandates that the Commonwealth and County defendants "monitor" the services and programs received by the class members.

A Special Management Unit was created by the Commonwealth defendants. Its function is defined in the Settlement Agreement as:

A unit of Commonwealth employees whose responsibilities include but are not limited to review and approval of plaintiff class member's Transitional Individual Habilitation Plans and the monitoring of the provision of services to mentally retarded individuals.

Its staff consists of a director, three monitors, three advocates and support staff.

The three monitors conduct about 120 on-site inspections each per year, in addition to visits conducted concerning incidents of death, abuse or harm. In performing its monitoring mission, the Special Management Unit

regularly discovers deficiencies in the services planned for or provided to individual class members. "Jawboning," however, is the only technique employed to obtain compliance by the County defendants with settlement. When deficiencies are identified, the unit notifies the involved County officials, attempts to persuade them to take corrective action, and follows up to determine if corrections are made. When "jawboning" fails, the Unit perceives itself as powerless to obtain compliance. The Special Management Unit has apparently never undertaken any other measures to correct a county's failure to supply the habilitation to which a class member is entitled pursuant to the Settlement.

Although negotiated by the parties, a consent decree is a judgment of the court the violation of which is punishable by contempt sanctions. *Interdynamics, Inc. v. Firma Wolf,* 653 F.2d 93, 96–7 (3d Cir.1981). The Court has the power to enforce consent decrees as it does any other judgments.

As stated in *Williams v. Vukovich,* 720 F.2d 909 (6th Cir.1983):

The terms of the decree, unlike those of a simple contract, have unique properties. A consent decree has attributes of both a contract and of a judicial act. *United States v. ITT Continental Baking Co.,* 420 U.S. 233, 236 n. 10, 95 S.Ct. 926, 934 n. 10, 43 L.Ed.2d 148 (1975); *Stotts [v. Memphis Fire Department*], 679 F.2d [541] at 556 [6th Cir.1982]. On the one hand, a consent decree is a voluntary settlement agreement which could be fully effective without judicial intervention. *See [United States v.] City of Miami,* 664 F.2d [435,] 439–40 [(5th Cir.1981) (en banc)]. In this sense the decree merely memorializes the bargained for position of the parties. *See United States v. Armour & Co.,* 402 U.S. 673, 681, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971).... A consent decree, therefore, should by strictly construed to preserve the bargained for position of the parties....

***6** A consent decree, however, is also a final judicial order. *See Carson* [*v. American Brands*], 450 U.S. [79,] 84, 101 S.Ct. [993,] 996 [1981]; *United States v. Kellum,* 523 F.2d 1284, 1287 (5th Cir.1975); *Stotts*, 679 F.2d at 557. Judicial approval of a settlement agreement places the power and prestige of the court behind the compromise struck by the parties. *See Stotts,* 679 F.2d at 557; *City of Miami,* 664 F.2d at 441.

720 F.2d at 920. As heretofore pointed out, this Settlement Agreement and the consent decree were approved by this court in a 31 page Memorandum which concludes:

This settlement is more than just a termination of litigation; it is the beginning of a new era for retarded persons. It is a confirmation that all parties to this litigation are now in complete agreement that the retarded citizens of this Commonwealth have a right to care, education and training in the community. It is a recognition by the Commonwealth and its counties that retarded persons are not subjects to be warehoused in institutions, but that they are individuals, the great majority of whom have a potential to become productive members of society.

610 F.Supp. at 1233–34. The Court's order of April 5, 1985, provides:

IT IS HEREBY ORDERED that the Final Settlement Agreement is APPROVED, and IT IS FURTHER ORDERED that the provisions of the Final Settlement Agreement executed on July 12, 1984 heretofore made a part of the record in this case shall have the full force and effect of an Order of this Court.

The Settlement of this litigation in 1985 propelled the Commonwealth of Pennsylvania into recognition as a leader in habilitation for its retarded citizens. However, it appears that in the past few years there has been a loss of momentum in this Commonwealth for achieving community living arrangements for the retarded. Although the experts in mental retardation agree that adequate habilitation for the retarded cannot be achieved in an institutional setting, the evidence presented at the hearing shows that some members of the Pennhurst class remain institutionalized. It is also difficult to understand why the Commonwealth defendants contended at this hearing that they have no legal obligation to the members of the Pennhurst class and that this Court is without jurisdiction to enforce the Settlement. For the reasons heretofore pointed out, such contentions by the Commonwealth defendants are not only lacking in merit, they border on the frivolous. The Commonwealth defendants, as well as the County defendants are legally bound by the Settlement which, after approval by this Court on April 5, 1985, became a court order together with the Court's decrees pursuant to Appendix A of the Settlement Agreement.

The Court's initial reaction in this matter was to find that the defendants, having violated the Settlement as well as the decrees of this Court, should be held in contempt and that sanctions should be imposed. However, after considering that there were more than 1200 residents in Pennhurst when this action was initiated and having been convinced by the empirical studies that the majority of these former Pennhurst residents have achieved substantial gains in their life skills as a result of the defendants' efforts, the Court has determined that the Commonwealth, Delaware and Montgomery County defendants should be given additional time to achieve substantial compliance.

ORDER

***7** AND NOW, this 28th day of August, 1989,

IT IS ORDERED: The motion of the Commonwealth defendants to dismiss all outstanding motions is DENIED;

IT IS FURTHER ORDERED: The Court having found that the Delaware County defendants, the Montgomery County defendants and the Commonwealth defendants are not in substantial compliance with the provisions of the Final Settlement Agreement and the decrees of this Court entered pursuant to the Settlement Agreement, it is ORDERED that the Delaware County defendants, the Montgomery County defendants and the Commonwealth defendants shall on or before March 1, 1990 comply with all provisions of the Final Settlement Agreement approved by this Court on April 5, 1985, and the decrees of this Court entered on April 5, 1985, in every and all matters wherein this Court found in its Memorandum of August 28th, 1989, said defendants were not in substantial compliance with the Final Settlement Agreement approved by this Court on April 5, 1985, and the decrees of this Court entered on April 5, 1985;

IT IS FURTHER ORDERED: The following provisions of the Final Settlement Agreement approved by this Court on April 5, 1985, including the Appendices and amendments thereto and the decrees of this Court entered on April 5, 1985, shall remain in full force and effect notwithstanding any language contained therein calling for earlier expiration: Paragraphs 10, 12–16, 18, 21, A5(b), A5(c), A5(e), and A8 until such time as the Court finds that the Delaware County defendants, the Montgomery County defendants and the Commonwealth defendants are in substantial compliance with all applicable provisions of the said agreement and decrees.

IT IS FURTHER ORDERED: The following reports shall be provided to the Court on or before the 5th day of each month. The first of said reports shall be due on October 5, 1989 and the final reports shall be due on March 5, 1990.

1) A report from the Delaware County defendants and the Commonwealth defendants setting forth the progress being achieved to comply with the Final Settlement Agreement and the decrees of this Court as to the 68 members of the class concerning whom the Court found that the Delaware County defendants and the Commonwealth defendants are not in compliance and, in addition, the report shall set forth the progress in reducing the caseloads of the Delaware County case managers.

2) A report from the Montgomery County defendants and the Commonwealth defendants setting forth the progress being achieved to comply with the Final Settlement Agreement and the decrees of this Court as to the six members of the class concerning whom the Court found that the Montgomery County defendants and the Commonwealth defendants are not in compliance.