

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 99 - 1435 (GAG)
)	
THE COMMONWEALTH OF PUERTO RICO,)	
<i>et al.</i> ,)	
)	
Defendants.)	
_____)	

SECOND SUPPLEMENTAL TRANSITION ORDER

I. Background

Since the inception of this case, the Court has issued a number of different orders to ensure that the Commonwealth of Puerto Rico provides effective protections, services, and supports to meet the individualized needs of persons with developmental disabilities in the Commonwealth’s service-delivery system. The Court has appointed a Joint Compliance Coordinator (“JCC”), two assistants, as well as counsel to the JCC, to monitor the Commonwealth’s compliance with the terms of the various orders, to work with the parties to minimize disputes, and to keep the focus on the Commonwealth developing and implementing measures to ensure the health, safety, and welfare of persons with developmental disabilities.

In recent years, in collaboration with the Court, the JCC, and the United States, the Commonwealth has taken steps to shift from an institutional model to a more integrated community-based model of service-delivery. These integration efforts are not only required by certain orders in this case, they are also consistent with the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132, which prohibits discrimination on the basis of disability by public

entities, as well as the Supreme Court's ADA decision in Olmstead v. L.C., 527 U.S. 581, 597 (1999), where the Court held that "[u]njustified isolation ... is properly regarded as discrimination based on disability."

For a more complete summary and description of the existing legal framework in this case, see the background section of the parties' Joint Compliance Action Plan ("JCAP"), entered as an order of the Court on October 19, 2011 (ECF No. 1185-1).

II. Need for Transition Order Protections

Around the time of the gubernatorial elections in 2008 and 2012, the Court issued separate Transition Orders, with specific language intended to minimize or eliminate the potential adverse impact the government administration change could have on the ongoing and future operations of the Commonwealth's Intellectual Disability Program ("IDP") and other pertinent Commonwealth agencies, and on the essential services provided to persons with developmental disabilities through them. Transition Order, Dec. 10, 2008 (ECF No. 794); Supplemental Transition Order, Nov. 12, 2012 (ECF No. 1299). Specifically, both Transition Orders contained provisions that, among other things, prevented the automatic termination of contract personnel that provided needed protections, services, and supports to persons with developmental disabilities.

The Court remains concerned that, pursuant to local law, and, mainly practice, when there is a change in gubernatorial administrations, Commonwealth contracts automatically terminate at the end of the calendar year before the inauguration of the newly-elected Governor. Without a properly crafted Transition Order to ensure continuity, key contractors in the instant case would be terminated without sufficient, or any, consideration of the potentially dire consequences to the persons with developmental disabilities who need the protections, services,

and supports these contractors provide. Moreover, it could be weeks or even months before officials in the new administration are able to contract with and/or hire replacement personnel; in the interim, persons with developmental disabilities would be vulnerable to not having their needs met and this could violate existing orders in this case. The Court notes that this is typically not a money issue – in 2008 and 2012, for example, there were sufficient budgeted funds to pay these contractors beyond the end of the calendar year and through the end of the fiscal year, which was six months into the administration of the new Governor.

III. Second Supplemental Transition Order

The 2016 gubernatorial election results in Puerto Rico will result in a change in administrations that will prompt the automatic termination of contract employees as referenced above. As in 2008 and 2012, the Court has a similar interest in mitigating circumstances associated with the gubernatorial election that might impede the uninterrupted delivery of needed protections, services, and supports to persons with developmental disabilities in the Commonwealth's service-delivery system. Therefore, the Court is issuing today a Second Supplemental Transition Order, set forth below, to reinforce the importance of the safeguards set forth in the previous Transition Orders and to update certain provisions, as appropriate:

- A. The Court's 2008 Transition Order (ECF No. 794) and 2012 Supplemental Transition Order (ECF No. 1299) shall remain in full force and effect to protect persons with developmental disabilities in the Commonwealth's system from destabilizing influences that could imperil their health, safety, and welfare.
- B. Consistent with the two previous Transition Orders, as well as subsequent Court orders related to maintaining the IDP budget, the Commonwealth shall: ensure the continuity and integrity of the protections, services, and supports provided to persons with developmental disabilities in the Commonwealth's service-delivery system; ensure that these protections, services, and supports are not interrupted or diminished; and ensure that any progress and momentum toward meeting the needs of these persons with developmental disabilities will not be lost.

- C. The Commonwealth presently engages a significant number of contract personnel to provide needed protections, services, and supports to persons with developmental disabilities in the Commonwealth's service-delivery system. As in 2008 and 2012, the Court continues to have a strong interest in ensuring that the continuity and integrity of needed protections, services, and supports not be compromised by the automatic termination of these contract personnel after the election and before the inauguration of a new Governor.
- D. Given the essential function of these contractors, the Court hereby orders the Commonwealth Department of Health to retain the services of all contract employees that provide protections, services, and supports to persons with developmental disabilities within the Commonwealth's service-delivery system, until further order of the Court. This includes the services of attorney Arlene Pérez Borrero, who has represented the health department for several years and is most familiar with this case.¹
- E. The Commonwealth shall ensure that there are sufficient funds to pay these contractors beyond the end of the 2016 calendar year and through the end of the current fiscal year, which ends on June 30, 2017.
- F. The provisions of this order should not be interpreted as creating any vested interest for the incumbents in any of the positions within the Commonwealth Department of Health. To the contrary, the Court recognizes that the incoming administration must be allowed to exercise its widest discretion, so long as the incoming administration complies with existing orders of the Court to provide needed protections, services, and supports to ensure the health, safety, and welfare of persons with developmental disabilities in the Commonwealth's service-delivery system.
- G. Upon motion by the Commonwealth, filed after the inauguration of the new Governor in January of 2017, the Court will consider any request to modify, amend, or vacate pertinent provisions of this order, as appropriate.
- H. The Commonwealth Secretary of Health is hereby ordered to deliver a copy of this order to the members of the transition committee for the incoming administration during the Department of Health transition meetings.

Prior to December 31, 2016, the JCC and the parties shall collaborate, and then inform the Court if necessary, on the need for additional provisions to better ensure the continuity and

¹ Any new attorney will need time to familiarize him or herself with this case. The special needs population in this case, however, cannot afford any delays because of this. Counsel Pérez-Borrero's presence will thus, allow for this much needed continuity during the transition period.

integrity of the protections, services, and supports provided to persons with developmental disabilities during and after the time of transition.

This Second Supplemental Transition Order closely tracks the language, format, structure, and scope of the 2012 Supplemental Transition Order, which was entered without objection by any party.

The Court's 2012 order repeatedly referenced that beneficiaries of the order include *all* persons with developmental disabilities in the Commonwealth's service-delivery system; there was no language limiting coverage to a select group within the system who at one time lived in a Commonwealth institution. *See, e.g.*, Supplemental Transition Order, Nov. 12, 2012 (ECF No. 1299) at 3 ("ensure the continuity and integrity of the protections, services, and supports provided to persons with developmental disabilities in the Commonwealth's service-delivery system").

This scope is appropriate and consistent with Commonwealth practice, as for years now, the Commonwealth has represented to the Court, the JCC, and the United States, that it does not run a bifurcated DD system where a select few individuals receive greater protections, services, and supports than others with similar conditions. Indeed, as the Court has noted in the past, it would be inequitable and unjust to treat some within the IDP system as "kings" and others as second-class citizens based on arbitrary criteria.

Given the interests of justice, and given that there is but one IDP and one unitary IDP budget, the Court clarifies that this Second Supplemental Transition Order, once again, includes all persons with developmental disabilities in the IDP, and not just those who at one time lived at a Commonwealth institution.

Not only is this consistent with the Supplemental Transition Order, it is consistent with the Court-imposed parameters of the JCAP, where the Court noted at the outset that “the Commonwealth has voluntarily assumed additional obligations which benefit *all* the IDP population.” JCAP, Oct. 19, 2011 (ECF No. 1185) (emphasis added). Since the entry of the JCAP in 2011, the Court has issued other orders that benefit all persons with developmental disabilities in the Commonwealth’s system. *See, e.g.*, Order Re: Fiscal Year 2013-14 Budget, Apr. 30, 2013 (ECF No. 1368) at 1 (directing the Commonwealth to maintain a budget for the IDP sufficient to ensure compliance with existing Court Orders in this case and to meet the needs of “persons with developmental disabilities in the Commonwealth’s service-delivery system.”).

SO ORDERED.

In San Juan, Puerto Rico, on this 22nd day of March, 2016.

s/ Gustavo A. Gelpí
GUSTAVO A. GELPI
United States District Judge