

MH vs. Monreal

Case Number: 12-cv-08523

Independent Monitor: David Muhammad

Consent Decree Compliance Report

Quarter 1 (Jan. 2015 – March 2015)

Six months after the Consent Decree was signed and three full months after its effective date, Defendants have made some progress in compliance with the terms of the Consent Decree and seem sincere in their attempts to ultimately achieve substantial compliance. At this time, however, Defendants are not in substantial compliance with the Consent Decree and have significant progress to make to realize this end.

The Illinois Department of Juvenile Justice (IDJJ) has very clearly expressed its intent to make far reaching reforms of its system to improve youth outcomes. These reforms include an overhaul of the parole process, which has already been renamed Aftercare. Implementing the use of graduated sanctions, a new risk assessment, and more access to community based services are all very encouraging. IDJJ's Director inspires significant confidence in her commitment to make deep and lasting reforms to her department.

The Parole Review Board's (PRB) new Chairman has also pledged cooperation with the Consent Decree and the PRB has already made promising changes to forms and processes. Youth now regularly have representation during the revocation process. Preliminary Hearings to determine probable cause occur systematically and are operated in a professional manner. The PRB has also announced that it intends to address two large outstanding Consent Decree issues: 1) the need to establish an appeals process for Final Revocation Hearings; and 2) the need to provide a written explanation of the assessment of evidence, and how that evidence meets the preponderance of evidence standard, subsequent to Final Revocation Hearings.

After the Monitor's visit in February 2015, a memo was sent to the parties outlining several areas of non-compliance and accompanying recommendations. Defendants provided a substantive response to that memo and accordingly made several corrections to revocation forms and held a training for PRB members (Monitor's Memo and Defendants' response are provided as Attachments A and B). This immediate follow up was another encouraging sign that Defendants intend to comply with the Consent Decree.

Monitoring Process

This report is based upon the following activity that occurred during the report period:

- Staff and attorney interviews, IDJJ and PRB.
- Interviews of youth who have gone through the revocation process since the January 1, 2015, enforcement date.
- Reviews of case files and corresponding revocation paperwork for youth going through the revocation process.

- Interviews of attorneys appointed to represent youth going through the revocation process.
- Interviews with members of the PRB, including the outgoing and incoming Chairmen.
- Reviews of correspondence and material submitted by Plaintiffs.
- Reviews of correspondence and material submitted by Defendants including information provided pursuant to Monitor request.
- Observation of Final Revocation Hearings.
- Observation of Preliminary Hearings.

At this point, the Monitor has only visited two facilities to review files, interview youth, and observe hearings. The Monitor has yet to visit two additional facilities that hold Revocation Hearings, Kewanee and Harrisburg. Therefore, although there are a few findings of substantial compliance with portions of the Consent Decree, those findings may need to be considered preliminary until the Monitor can visit all the facilities that hold hearings.

Review of Critical Issues

The final section of this report includes a paragraph by paragraph review of Defendants' compliance with the Consent Decree; highlighted immediately below are four major concerns and challenges of particular importance at this time.

1. Assessment of Evidence and Preponderance of Evidence

Paragraph 29 of the Consent Decree mandates that Defendants provide written explanation of the PRB's Final Revocation Hearing decisions which includes an assessment of the evidence and how that evidence meets the preponderance of evidence standard. Defendants are wholly non-compliant with this provision of the Consent Decree. This is both a technical issue and a more substantive one. As a technical issue, the PRB is not writing out the reasons for decisions, the evidence those decisions are based on, and are not explaining how the preponderance of evidence standard was met on Final Revocation Hearing forms. Defendants have been made aware of this issue and have pledged to address it.

In addition to not explaining in writing the assessment and preponderance of evidence standard that was considered, in some of the cases observed, it did not appear that the preponderance of evidence standard was *used* when determining that a youth had violated the terms of Aftercare/Parole. Instead, there appears to be a default determination that a youth is "declared a violator"; in fact, this box is *always* checked on the Final Revocation Hearing form, regardless of whether or not a youth's parole was resumed. When asked, attorneys representing youth reported to the Monitor that they could only remember one instance, out of the hundreds of hearings they have collectively participated in, where a youth was not declared a violator.

In one of the hearings observed by the Monitor, a violation was submitted on a youth for a new offense; no violations other than the new offense were alleged in the violation report. By the time of the youth's Final Revocation Hearing, the new offense had been dismissed. The PRB Member conducting the hearing then decided to resume the youth on parole. Although this was the desired outcome of the attorney and youth, the Final Revocation Hearing form was still marked, youth "declared to be a violator." There appeared to be no basis for the

finding of the youth to be a violator. In response to the draft version of this report, Defendants pointed out that this single case could be an anomaly, which is possible. Although the Monitor is concerned that for every file reviewed, the result of each hearing was that the youth was “declared to be a violator” – it is not unrealistic that the majority of youth who reach a final Revocation Hearing will have been found to violate one of the terms of their Aftercare/Parole.

Even when the preponderance of evidence standard appears to be met, there are still problems with what is written on the forms themselves, *which are the only record of the hearings*. In one case, the PRB Member wrote on the Final Revocation Hearing form, “youth admitted to substance use.” However, the Monitor observed this hearing and the youth never did admit to this. The youth did test positive for drugs and the youth’s attorney agreed to the youth being revoked so that he could move on in the process, but the youth never actually admitted to drug use in the hearing.

Recommendation: There is both a technical and substantive issue. Technically, having better forms that require a written assessment of the evidence and a section specifically to detail how the evidenced meets the preponderance of evidence standard is necessary. One potential remedy is to have law clerks, take notes, complete the forms, and provide general staff support at each Final Revocation Hearing. More substantively, PRB Members need additional training to understand how to conduct a deliberative process where the evidence is assessed and a preponderance of evidence standard is met.

2. Hearing Issues at Final Revocation Not Found to Have Probable Cause

Plaintiffs have pointed out and attorneys for the youth have raised concerns that PRB members are hearing and considering alleged violations that were determined not to have probable cause at the Preliminary Hearing. While observing hearings and reviewing files, the Monitor has corroborated this concern.

In one case, the main reason for the violation was a new offense, but no probable cause was found at Preliminary Hearing on that new offense because the attorney argued and the Hearing Officer agreed that a reading of the police report showed that no real criminal offense occurred. Therefore, the Hearing Officer at the Preliminary Hearing ruled that there was no probable cause. And although the new offense was clearly the impetus of the violation being submitted, the Aftercare Specialist also included other violations in the report, which is common practice. Probable cause was found for some of the other lower level violations.

At the revocation hearing, the PRB Member refused not to consider the new offense, which was still pending, saying, “If you have a new charge, I will not release the individual.” When the youth’s attorney pressed the Board member on the issue, saying he was inappropriately considering an issue that was determined not to have probable cause, the PRB Member said “well I will just violate him on the other issues”, which had not yet been discussed. After never hearing arguments regarding the other alleged violations, the PRB Member decided to continue the hearing until the next Board hearing date to see what happens with the pending charge. The PRB Member ended the hearing telling the youth, “if this new case goes away, I will resume you.”

Recommendation: In order to rectify this problem, when probable cause is not found at

Preliminary Hearing on some violations but is found for others, those violations for which no probable cause was found should be stricken from the violation report and not made available to the PRB at the Final Revocation Hearing.

3. No Appeals Process

Paragraph 30 of the Consent Decree mandates that Defendants establish an appeals process for Final Revocation Hearings and inform youth in writing of their right to appeal. To date, no appeals process has been officially established. On March 18, 2015, Defendants did provide Monitor with a one page draft outline of an appeals process that they hope to implement soon.

Defendants were also not informing youth of their right to appeal. After the Monitor's visit in February, the subsequent memo sent to the parties pointed out that youth were not being notified of their right to appeal the final revocation decision. In response to the memo, the Defendants did add language to the Final Revocation Hearing form that mentions the right to appeal in a small box. It is unclear if youth are even receiving the form with the notice on it and if so if that portion of the form is made known to them. In response to this draft report, Defendants report that youth and attorneys do receive copies of the Final Revocation Hearing form with the notice to appeal language on the form.

Recommendation: Defendants should immediately implement an appeals process with feedback from Monitor and Plaintiffs. Youth should be verbally notified of their right to appeal by the PRB Member immediately following Final Revocation Hearings. The right to appeal and the corresponding process should also be explained in writing to youth and counsel.

4. Host Site Delays:

Youth who are being resumed on parole often have to wait several days, if not weeks, for IDJJ to approve their release plans, including their residency, which is known as a "Host Site". This may be one of the biggest problems delaying Aftercare/Parole, unnecessarily keeping youth incarcerated after they have been approved for release.

In one case, a youth was being violated for failure to take his medications. The only violation that was determined to have probable cause at Preliminary Hearing was his failure to take his medications. The youth testified that he did in deed take himself off of medication and had been fine for a year but had begun having problems and then began re-taking his medication. Since he had been in custody his medication changed. His Aftercare Specialist requested that the PRB revoke his parole and that he remain in custody for at least an additional 30 days (he had been in custody pending his hearing for 30 days already) so that he could become stable on his medication. The PRB Member resumed his parole pending approval of the Host Site, which was the same place the youth had been living before coming into custody, his mother's house, which had been approved by IDJJ at the youth's original parole date. Even though the PRB Member did not revoke the youth's parole, facility staff mentioned after the hearing that it usually takes 14 days to approve the Host Site and that the Aftercare Specialist asking for the additional 30 days to stabilize medication was the same staff person charged with Host Site approval. The inference was that as a result, the desired outcome (continued custody) would be realized regardless of the PRB Member's decision not to revoke.

Recommendation: IDJJ should modify its policy of postponing investigation of a Host Site for youth who are admitted to IDJJ facilities for revocation proceedings. IDJJ should begin

investigating appropriate Aftercare plans upon each youth's entry into the facility. This should allow youth to be released the day of their Final Revocation Hearing if they are resumed on parole. Also, in those instances where a youth's parole is resumed, the youth is returning to the same location they were residing in prior to coming into custody for revocation proceedings, and where there are no known changes or challenges to that Host Site, youth should be immediately released to the site pending IDJJ re-investigation and approval. Lastly, a maximum time should be given to IDJJ to finalize/approve Host Sites after a PRB Hearing results in a decision to parole/release a youth.

Consent Decree Compliance

Paragraph 9: All proceedings conducted in compliance with Constitution, state statutes, *Faheem-El*, and *Downie v Klincar*.

Substantial Compliance? **No**

Status: Paragraph 5 of the Faheem Consent Decree states:

“In determining whether the parole violation warrant should be withdrawn pending a final revocation hearing, the hearing officer and the Chairman of the Prisoner Review Board, or a member thereof, shall consider, among other factors, whether the parolee appears to present a risk of danger to any person or the community, whether it appears likely that the parolee may flee, or such other reasonable factors as the Prisoner Review Board deems appropriate.”

Although the Preliminary Hearings currently occurring at IDJJ include a quick consideration of whether the parole violation warrant should be dropped pending the Final Revocation Hearing, there is no evidence that there is consideration of the factors listed in this section of the Faheem Consent Decree. Further, the Monitor has not found any instances where a youth has been granted their request to lift the warrant and be released pending a Final Revocation Hearing. After the first draft of this report was prepared, Defendants did report that there has been a single case of a youth's warrant being lifted and released pending the Final Revocation Hearing.

Concerning the Downie Consent Decree, as noted under Paragraph 20, youth are regularly revoked based solely on allegations contained in police and parole violation reports — with no extrinsic corroborating evidence or ability to subpoena relevant witnesses. This problem is also connected to a larger issue, one that has not been considered as a factor of Defendants' compliance to this provision of the MH Consent Decree:

Allegation of New Criminal Violation, Case Pending

The majority of violation cases that Monitor has observed or reviewed stem from allegations of new criminal offenses. In all circumstances, the criminal matter was either unresolved or dismissed. Youth charged with a new criminal offense in adult court are often released on bond by the criminal court having jurisdiction over the new offense; these youth are then transferred to an IDJJ facility to address the juvenile parole violation matter. At the FPRH, with the criminal case still pending, the parole violation hearing is often continued pending resolution of the criminal charge. The youth, who has often been authorized for bond release by the criminal court, is held in IDJJ during this continuation period. Though initial FPRHs are occurring within the 45 day period, these continuances extend the period beyond that

timeframe, all the while keeping youth in custody.

A seminal question arises – should Defendants move forward with a parole revocation proceeding based on an allegation of a new criminal offense where that offense is pending? In lieu of the existing practice of concurrent parole violation and new criminal offense proceedings, trailing disposition of the parole violation matter until the adjudication of the criminal proceeding, would result in a more appropriate outcome for most youth (e.g. these youth would not be held in a custody setting).

Paragraph 10: Defendants shall serve all youth with copy of his/her Parole Violation Report (PVR) and the accompanying within 1 business day of IDJJ entry.

Substantial Compliance? **Yes**

Status: During the most recent visit, 29 youth cases were reviewed; only three youth were not served their PVR report within 2 business days of entry. In interviewing youth and staff, this practice of serving youth with their PVR appears to be consistent and systematic.

Paragraph 11: Class Counsel shall develop Know Your Rights materials and provide to DJJ. DJJ shall provide Know Your Rights material to each youth.

Substantial Compliance? **N/A**

Status: Plaintiffs have not completed the material.

Paragraph 14: Defendants shall provide sufficient resources so that each youth is represented by appointed counsel at every stage of the parole process including Preliminary Parole Hearings (PPH), Final Parole Revocation Hearings (FPRH), and appeals or requests for reconsideration.

Substantial Compliance? **Unclear**

Status: With the exception of the appeals process, which has not been implemented yet, youth are being represented at every stage of the parole revocation process. Therefore there could be a finding of substantial compliance with this provision; however the question of resource sufficiency for attorney services is currently at issue, as reflected in the motion to compel filed by the Plaintiffs. While the question is outstanding, Monitor observations do corroborate Plaintiffs' concern regarding the quality of representation. Specifically, Monitor observed attorneys preparing for hearings only minutes before those hearings were to begin, a clear lack of preparation in most instances, and at times minimal in-hearing advocacy, as evidenced in part by youth speaking freely and in a self-incriminating fashion, unimpeded or protected by counsel.

Monitor's independent review of attorney contracts indicates that some of identified issues could be addressed in part through contract modification as follows:

- The Scopes of Services are limited and not specifically reflective of Consent Decree objectives. The Scopes of Services need to be broadened to clearly reflect representation objectives outlined under Consent Decree.
- The contracts are written in such a way that the inference is that compensation is tied only to work onsite at IDJJ facilities on hearing days. This is also how the attorneys understand the contracts. The contract language suggests and the appointed attorneys understand that they are not permitted to bill for any time preparing for case outside of days they are onsite at IDJJ facilities for hearings.

The Monitor has asked Defendants about this issue and the response was that

appointed attorneys are compensated at a full day's rate for any day they are in IDJJ facilities representing youth. Defendants claim and the Monitor has observed that very rarely, if ever, are attorneys actually in the facilities representing youth for full business days and that they are often there only half of the day, which the attorneys corroborated. Defendants argue that non-compensated time preparing for hearings is balanced by full day rates being paid for days that the attorneys work significantly less than full days.

- There is no mention of appeals process representation in the contracts. Contracts should be amended to reflect an appeals process.
- Anticipated caseload/client levels: Defendants should estimate numbers of youth to be represented by each attorney over the course of a contract year. Without this information, attorneys do not know what the workload associated with these contracts will be, and cannot proactively adjust non-contract appointments/caseloads accordingly to ensure adequate time for youth representation.
- Referral mechanism: Contracts need to be modified to outline the process by which counsel appointments will be made, including relevant timeframes.

The Monitor will continue to engage appointed counsel to determine if sufficient resources are being provided or if the contracts should be restructured.

Paragraph 14: Defendants shall accommodate youth requests to communicate confidentially with retained or prospective counsel.

Substantial Compliance? **Unclear**

Status: Monitor observed appointed counsel meeting privately with youth immediately prior to hearings. However, counsel articulated concerns, verified by Monitor observation, that IDJJ staff sometimes rush these meetings in order to begin the hearings such that the sufficiency of private communication time is questionable. Further, one attorney reported that she had attempted to call a client on a number of occasions and had been unable to speak to the youth at the facility. No attorney reported that they have been able to talk to their clients via the phone. Defendants note that a process has now been put in place for attorneys to talk with youth via phone.

Paragraph 15: Youth are not permitted to waive appointed counsel unless private counsel has been retained.

Substantial Compliance? **Yes**

Status: Monitor is not aware of any attempts to waive appointed counsel.

Paragraph 19: Preliminary Parole Hearings (PPH) occur within 10 business days of DJJ entry pursuant to a Parole Violation (PV) report to determine whether there is probable cause to believe the alleged PV was committed.

Substantial Compliance? **Yes**

Status: During both monitoring visits, Defendants provided the Monitor with a spreadsheet showing youth who were having PPHs. During the first visit, of the 26 youth who were on the spreadsheet who had PPHs, only one was listed as having their hearing more than 10 business days after admission to IDJJ. On the second visit, of the 13 youth on the spreadsheet who had

received PHHs, only one was listed as having their hearing more than 10 business days after admission to IDJJ. In interviewing youth and staff, this practice of holding a PHH within 10 business days of DJJ entry appears to be consistent and systematic.

Paragraph 20: Defendants will provide youth and counsel all evidence to be used against youth during Parole Revocation proceeding, within 2 business days of appointment of counsel or receipt of evidence, whichever occurs later.

Substantial Compliance? **Unclear**

Status: Counsel typically receive the PV Report upon appointment, which is the main evidence used in the Final Revocation Hearings. But a majority of violations are based on allegations of new offenses, and during the interview of appointed counsel, all reported that they rarely receive the police reports connected to the alleged new offenses. Limited access to any evidence as related to those new offenses is problematic. Counsel specifically outlined concerns regarding lack of access to police reports, and their inability to exercise subpoena power (as they would be able to do in a regular court proceeding) as factors contributing to inability to zealously defend youth. In response to this draft report, Defendants reported that in all cases where the appointed counsel have requested a subpoena, the PRB has processed those requests within 1-2 days. Defendants add that the documentation appointed counsel indicate that they are not receiving is information that the PRB itself does not yet possess.

The Monitor will continue to monitor this issue to determine compliance status.

Paragraph 24: Defendants shall provide youth and counsel with a written probable cause determination.

Substantial Compliance? **Yes**

Status: The Preliminary Hearing Report of Findings documents the probable cause determination. These reports are provided to youth routinely after the Preliminary Hearing. It is worth noting that, in response to the Consent Decree, Defendants hired Hearing Officers at each facility to conduct Preliminary Hearings to determine Probable Cause. The Hearing Officer at the St. Charles facility is very professional and thorough in conducting the hearings.

Paragraph 24 & 28: Each youth shall receive a Final Parole Revocation Hearing (FPRH) within 45 days of entry into custody to determine if PV occurred and if revocation is appropriate. If the violation is a matter of public record, is uncontested, or if the youth is found guilty of or pleads to a new criminal violation, the violation shall be deemed to have occurred. In that event, at the final revocation hearing, PRB hearing officer to consider only any argument or evidence regarding whether or not youth's parole should be revoked for the violation.

Substantial Compliance? **Yes**

Status: Youth are routinely having their FPRHs within 45 days. Off all hearings the Monitor observed and the many files the Monitor reviewed, none reflected cases where the violation was based on a new offense with a conviction or a guilty plea. Therefore, there is a determination of substantial compliance.

A concern has come up related to this provision of the Consent Decree however. The Consent Decree is narrowly constructed as related to factors to be considered at the FPRH. Specifically, the Consent Decree indicates that where a new criminal violation can be deemed to have occurred, the PRB Member will consider only any argument or evidence related to whether or not the youth's parole should be revoked for that violation. The Consent Decree does not

speak to factors to be taken into account at FPRH under any other circumstance. But a concerning pattern has come up that could relate to this provision of the Consent Decree:

Consideration of In-Custody Behavior

In many interviews with youth and in hearings observed, PRB Members are taking into account behaviors that the youth exhibited while in-custody, post violation, in adjudicating the parole violation. Between the first and second Monitoring visits, Defendants appear to have made some progress on this issue; but continued diligence is needed to ensure that PRB Members are considering only the original violation/s in determinations, not post-violation institutional behavior.

Although, based on the strict letter of the Consent Decree, Defendants appear to be in substantial compliance with this provision, serious concerns are raised by Defendants' practice as regards to the consideration of institutional behavior in violation determinations.

Paragraph 29: Defendants shall provide youth and counsel with a written explanation of PRBs decision in the FPRH to include a description and assessment of evidence and brief statement describing how evidence meets preponderance standard.

Substantial Compliance? **No**

Status: The status of this provision is detailed in the above section in Review of Critical Issues.

Paragraph 30: The PRB will establish an appeals process and will include in Parole Revocation decisions a notice that revocation may be appealed. A panel of three PRB members not involved in the original Parole Revocation decision are to hear the appeal and the appeal is to be decided no later than 21 days after receipt

Substantial Compliance? **No**

Status: The status of this provision is detailed in the above section in Review of Critical Issues.

Paragraph 42: Defendants shall appoint counsel no later than 5 business days after service of PVR or DJJ entry.

Substantial Compliance? **Unclear**

Status: Attorney appointments are done via email; accordingly, a file review does not enable confirmation of appointment timelines. Defendants verbally outlined an appointment timeline that does meet the Consent Decree standards, but when interviewed the attorneys suggested that the 5 day timeframe is not regularly met.

The Monitor will continue to investigate this issue to determine compliance status.

Additional Issues

While the subject of this section may fall outside of the scope of the Consent Decree, the issue of committing youth to the state system for relatively minor offenses, strikes at the heart of the *purpose* of the Consent Decree itself.

Nationwide, a number of states have eliminated the practice of committing youth to state systems for minor offenses. While in Illinois the practice is declining, especially with the passage of Redeploy Illinois, there are still a number of youth on Aftercare/Parole in Illinois whose original offense for which they are on parole is relatively minor. These offenses include simple drug

possession, trespassing, theft, and even obstruction of identification, which can reflect something as minor as giving a police officer a fake name. Though the basis for original IDJJ jurisdiction is not at issue in this Consent Decree, when these youth have minor violations of the terms of their Aftercare/Parole and are then arrested and incarcerated for 30-60 days pending revocation proceedings, the concern regarding the underlying reason for state involvement becomes inherently intertwined with the purpose of the Consent Decree.

Even for youth who are accused of major violations of their Aftercare/Parole conditions, which is arguably the majority of the youth who are appearing before the Parole Review Board, the comfort that the system has with keeping these youth in custody for several days and weeks even after a decision to release them has been made is concerning and possibly implicates due process violations.

In fact, suspicion of being in violation of Aftercare/Parole conditions has become the primary reason youth are admitted into IDJJ facilities. A report released by IDJJ in November of 2014, "Trends & Characteristics of Youth Admitted to the IDJJ, 1993-2013," includes its most recent data. According to the report, "during the period from 1993 to 1996, technical parole violators accounted for less than 20 percent of all IDJJ admissions, but . . . by 2013, technical violators accounted for 50% of all admissions to IDJJ."

Numerous studies, reports, and quality research has proven that incarceration has harmful effects on youth and causes further trauma to a population that has often already suffered many adverse childhood experiences. Compliant with federal guidelines and congruent with most other states in the country, Illinois state law indicates that "Juveniles should be treated in the least restrictive manner possible while maintaining the safety of the community."