

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Patricia Welsch, et al.,)	4-72 Civ. 451
)	
Plaintiffs,)	<u>FINDINGS OF FACT</u>
)	<u>AND RECOMMENDATIONS</u>
-vs-)	<u>PURSUANT TO PARAGRAPH</u>
)	<u>95(g)</u>
Leonard W. Levine, et al.,)	
)	RE: Failure to Fill Third
Defendants.)	Technical Assistance Position

FINDINGS OF FACT

1. On December 27, 1984, a Notice of Initial Determination of Non-compliance was issued pursuant to Paragraph 95(e) of the above-captioned Decree (hereinafter the Decree). The Notice was based on the fact that the Department of Human Services (DHS) had elected not to fill the third Technical Assistance Position which had been vacated as a result of the retirement of Gordon Krantz on November 2, 1984, despite Paragraph 28 of the Decree which states that the "Commissioner shall allocate three [such] staff positions". DHS's position was (and continues to be) that three actual positions are not necessarily required because their functions will more than adequately be discharged by eight Regional Service Specialists who had recently been hired as part of and to assist in the administration of the Waivered Service Program and other aspects of service development for mentally retarded persons. Ex.'s 2 and 4.

2. The Monitor issued a Notice of Non-compliance because of his "[i]nitial [d]etermination that the Decree is mandatory and does require three discrete Technical Assistance staff".

3. After attempts were made to resolve the matter, informally and then formally, through the procedures established in Para-

graphs 95 (f) and (g), a hearing was held on April 29, 1985, as provided for by Paragraph 95(g).

4. Oral argument was presented by counsel based on stipulations of fact. The findings and recommendations herein are based on said stipulations together with oral argument and memoranda as well as exhibits offered by DHS and accepted as part of the record. Since a mixed question of law and fact is presented, in order to render the recommendations required by Paragraph 95(h) of the Decree, it is necessary that the stipulations and the record as a whole be read against the dictates of the Decree.

5. While careful consideration has been given to all arguments, it continues to be the Monitor's judgment that the plain language of the Decree requires three Technical Assistance Positions be filled. Until and unless a modification is duly obtained from the Court, the Defendant Commissioner is in non-compliance with the said provisions. The Department has already been admonished once that it may not unilaterally change the Decree. Welsch v. Noot, Memorandum Order, March 23, 1982 at 5.

6. Paragraph 28 of the Decree calls for three staff positions to be filled to perform various technical assistance functions "in order to implement this Decree". Paragraph 31 provides that the positions are to be filled through a special selection process including the participation of the Plaintiffs. In contrast, the Regional Service Specialists (hereinafter RSSs) are not hired through this process, and their mission is not tied to the Decree. Paragraph 30 also reinforces the fact that these three positions are to be separate from normal Department personnel

as does the "Minnesota Department of Welfare Six Year Plan of Action, 1981-1987, for Mental Retardation Services". (A copy of the Plan is attached hereto.) The latter, which essentially constitutes an implementation plan for the Decree, speaks to the nature and purpose of these positions. Like the newly hired RSSs, as well as other personnel in the Department, the objective is to "provide assistance to counties and to providers and developers of community-based services". Id. at 16. However the objective "is additional to the present and on-going work of the Department in that it requires three set-aside positions". Id.

7. As stated above, DHS maintains that the eight RSSs more than make up for the loss of the third Technical Assistance Position. Whether this is the case or not and whether the Decree should then be changed, can only be determined through the modification process, either by stipulation or by petition. There are strong legal and policy reasons for such a proceeding. While the Defendants have advanced some arguably sound justifications, their averments must be tested out through a proceeding in which burdens and standards of proof are allocated and all relevant facts and factors can be examined.

8. By way of analogy, if one of three physicians at one of the State Hospitals retired, would the Hospital be able to argue that the position could be kept vacant because of several newly hired nurse practitioners or physician's assistants? Short of a stipulation, duly approved, it could only be done through a modification proceeding in which facts are examined and determined. The facts may support the argument; the point is that

the findings and the ultimate determination cannot be made unilaterally but by the Court.

9. The Department's response in this matter (Ex. 4) does show (at least on the face of it) substantial overlap between the qualifications and functions of the RSSs and the Technical Assistance Positions. A modification proceeding would test out the validity of the overlap and whether the stringent burden that must be met in a modification petition is satisfied. Even as the Defendants might proffer evidence on the relevance and importance of the RSSs, other considerations which may offset, neutralize, or otherwise have an impact on this issue might have to be examined. By way of example only:

- Are the technical assistance functions under Paragraph 33, in fact, being carried out;
- Despite the hiring of the RSSs, has the rationale for their existence, the emergence of the waiver and a more complex service development process, increased, lessened, or maintained the need for three Technical Assistance Positions;
- Paragraph 35 of the Decree requires the Commissioner to seek an appropriate number of licensors whose duties also overlap with Technical Assistance staff. Reportedly, the Commissioner recently received less licensors from the Legislature than requested, possibly impacting on the duties of the Technical Assistance staff.

10. There may be other arguments that the Defendants could make. While not required by the Decree, DHS created the position

Welsch compliance officer. Depending on the parameters and duties of this position, it may be having an impact on the duties of the Technical Assistance Positions. In short, unless there was a Court approved stipulation, these or other arguments as well as the averments made by the Defendants in their response to the Notice of Non-compliance, could and should only be tested in a proper proceeding.

11. Finally, it is of significance that "the parties are unable to determine at this time to what extent the RSSs activities have prevented from arising or have ameliorated problems so that the technical assistance specialists, Gerald Nord and Mary Kudla, never had to become involved". Stipulation, p. 3.

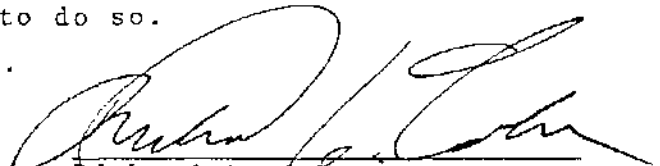
RECOMMENDATIONS

PURSUANT to Paragraph 95(g), in order to remedy the non-compliance found to exist, the following recommendations are made:

1. By July 5, 1985, the Commissioner in accordance with the provisions of Paragraph 31 of the Decree shall commence filling the third Technical Assistance Position.

2. By said date, he shall notify, in writing, both the Monitor and the Plaintiffs of his intention to do so.

Dated: June 25, 1985


Richard A. Cohen
Court Monitor

cc. Leonard W. Levine, Commissioner
Luther Granquist
Deborah Huskins

NF 2.9.4 MIR 6 YEAR PLAN.

Minnesota Department of Public Welfare

Six Year Plan of Action, 1981-1987

and

Biennial Budget Request, 1982-1983

for Mental Retardation Services

prepared by the

Mental Retardation Program Division

MINNESOTA DEPARTMENT OF PUBLIC WELFARE
SIX YEAR PLAN OF ACTION, 1981 - 1987
and
BIENNIAL BUDGET REQUEST, 1982-1983
for MENTAL RETARDATION SERVICES

prepared by the
Mental Retardation Program Division
January, 1981