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

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| THE UNITED STATES OF AMERICA<br><br>Plaintiffs<br><br>vs.<br><br>THE COMMONWEALTH OF PUERTO RICO;<br><br>The Honorable PEDRO J. ROSSELLO, Governor of the Commonwealth of Puerto Rico, in his official capacity;<br><br>THE JUVENILE INSTITUTIONS ADMINISTRATION;<br><br>ZORAIDA BUXO, Secretary of the Department of Corrections and Rehabilitation, in her official capacity;<br><br>MIGUEL RIVERA, Director, Juvenile Institutions Administration, in his official capacity;<br><br>DR. CARMEN FELICIANO VDA. DE MELECIO, Secretary of Health, Department of Health, in her official capacity;<br><br>DR. NESTOR GALARZA, Director, Anti-Addiction Services Department, in his official capacity;<br><br>VICTOR FAJARDO, Secretary, Department of Education, in his official capacity;<br><br>PEDRO PIERLUISI, Secretary, Justice Department of the Commonwealth of Puerto Rico, in his official capacity;<br><br>CARMEN RODRIGUEZ, Secretary, Department of Social Services, in her official capacity;<br><br>DANIEL VAZQUEZ TORRES, Director Humacao Detention Center, in his official capacity;<br><br>EDGARD ORTIZ ALBINO, Director, Mayagüez Industrial School, in his official capacity;<br><br>NORMA CRUZ, Director, Ponce Central Training School, in her official capacity; | CIVIL 94-2080CCC |

FRANCISCA APONTE, Director, Ponce Victoria Street Training Center, in her official capacity;

PAULITO DIAZ DE GARCIA, Director, Ponce Detention Center for Girls and Ponce Industrial School for Girls and Boys, in her official capacity;

JULIO CUALIO BONET, Director, Guaynabo Training School, in his official capacity; and

LYDIA LASALLE, Acting Director, Central Metropolitan Training School of Bayamón, in her official capacity;

Defendants

**ORDER**

The Court has before it the Commonwealth defendants' latest Motion Under the Prison Litigation Reform Act to Terminate Particular Prospective Relief Provisions filed on October 22, 2012 ("PLRA Motion") (**docket entry 1038**), where it seeks the termination of paragraph 30 of the Consent Order and of paragraphs 62, 66, 67 and 71 of the Settlement Agreement, all pertaining to mental health services for the confined juveniles. The United States opposed the request for termination on October 22, 2012 (docket entries 1042 and 1043), averring that defendants have not achieved full compliance with any of these five provisions and that, as a result, the confined youths continue to suffer harm. Defendants replied to the opposition on December 14, 2012 (docket entry 1056). The Court has also reviewed all the filings related to the Commonwealth defendants' PLRA Motion, namely the Monitor's Interim PLRA Report filed on December 6, 2012 (docket entry 1054-1), the Commonwealth defendants' Response to the Monitor's Report filed on December 22, 2012 (docket entry 1062-1), the Monitor's Response to Defendants' Comments filed on January 29, 2013 (docket entry 1068-1), the United States' Supplemental Memorandum of

Law filed on May 28, 2013 (docket entry 1085) and the Monitor's PLRA Report filed on May 30, 2013 (docket entry 1087-1). Having done so, it now RULES as follows:

**Paragraph 30 of the Consent Order (C.O. 30)**

C.O. 30 provides: "Defendants provide adequate qualified staff members for the residential treatment program, which include a child psychiatrist, psychologist, occupational therapist, social workers and nurses."

As the Commonwealth defendants correctly point out, the Court Monitor "had not recorded a negative rating for this stipulation for the last 18 months . . ." PLRA Motion, at p. 13. See also docket entries 947-1, 960-1, 977-1, 1004-1, 1018-1 and 1025-1. We do note that in the last Compliance Ratings filed before the PLRA Motion, that for the Second Quarter 2012 filed on August 13, 2012 (docket entry 1033-1), the Monitor awarded negative ratings to C.O. 30 in three categories: staffing compliance, resource compliance and general compliance, and in support of those ratings commented: "Psychologist hours had been cut from 35 to 30 hours in general. Some psychologists work only 28 hours. While this is not per se a violation of the Consent Order, the Monitor's consultant believes that the number of hours is insufficient." The Monitor, however, is correct in his observation that the number of hours of psychologists services is not a violation of paragraph 30 of the Consent Order. See docket entry 1033-1, at p. 9. Thus, the negative ratings awarded by him premised on that consideration are innocuous to our PLRA determination.

The United States, in turn, has advanced in its Opposition that since the Commonwealth defendants are not in compliance with paragraph 29 of the Consent Order which compels them to maintain a 48-bed residential mental health treatment program, they necessarily cannot be in compliance with the subsequent provision, i.e. C.O. 30., that requires them to "provide adequate qualified staff members for the residential treatment program." These are two separate provisions, however, and compliance with paragraph 29 of the Consent Order is not in issue since defendants have not requested its termination.

The United States has also argued, based on findings of its expert consultant Dr. Laura Davies, that the mental health program is being underutilized and that youths are being denied access to adequate mental health care, using as parameters for residential care the provision of "6-8 hours per day of group, individual and specialized services." Opposition, at pp. 7-8. This is a spin-off of the Monitor's position, already rejected above as he himself recognized that nowhere in C.O. 30 is it required that a minimum number of hours of services be provided daily onsite. While it is apparent that both the Monitor and the United States are attempting to rewrite C.O. 30 by adding as a component of the residential treatment program that the staff provide a minimum number of hours of service, the fact remains that said requirement is nowhere to be found in the current plain language of that section. It only requires defendants to "provide adequate qualified staff members for the residential treatment program," and this they have done for at least the last two years as evidenced by the record. See also Exh. A of the PLRA Motion. Thus, the Court is unable to make the required statutory findings to continue the relief mandated in C.O. 30, and concurs with the Commonwealth defendants that it should be **terminated**.

**Paragraph 62 of the Settlement Agreement (S.A. 62)**

S.A. 62 provides as follows:

> In addition to the mental health staff required by ¶ 36 of the Consent Order approved by the Court in this case in October 1994, Defendant shall provide ambulatory psychiatric services by a team. This team shall be composed of a child psychiatrist, a child psychologist and a social work counselor. All mental health care personnel shall have written job descriptions and meet applicable Commonwealth licensure and/or certification requirements. Defendants, specifically AIJ, will provide for residential treatment and, if needed, in-patient hospitalization for those cases where such service is needed.

Defendants contend that they are in compliance with the portions of this provision requiring an ambulatory psychiatric services team duly licensed and certified and with written job descriptions, and in support have submitted extensive documentation attached to their PLRA Motion which we have reviewed. See Exhs. A, B, C, D & F. They also represent that

they are providing residential treatment through the AIJ's program called PUERTAS, and in-patient hospitalization when needed through ASSMCA's emergency psychiatric facilities.

In its Opposition, the United States again relies on the Monitor's findings and on the conclusions of its own expert, Dr. Davies. Plaintiff stresses that the Monitor's last Compliance Ratings filed shortly before the PLRA Motion (docket entry 1033-1) found defendants to be completely non-compliant with this provision in the categories of Policy Compliance, Staffing Compliance, Documentation Compliance and General Compliance. But having reviewed the Monitor's comments on his Compliance ratings as to this particular provision, we observe again a disconcerting pattern of imposing conditions that are not specifically contemplated in its terms. For example, the Monitor indicates as a deficiency the "absence of a single master treatment plan," yet there is no requirement in S.A. 62 for such "single master treatment plan." Nor is there a requirement of a "team approach to providing mental care," as argued by the United States quoting from Dr. Davies' expert report where she made the broad observation that "there is not always a single diagnosis per patient . . . at any given time: the psychiatrist and psychologist have distinct diagnoses for the same patient." Opposition, at p. 8 (quoting from Dr. Davies' Report, Exh. A at p. 8). The only requirement spelled out in S.A. 62 is that ambulatory psychiatric services be provided by a team, which the Monitor acknowledges is being done when he observes that "the services are provided by a team."

Similarly, the Monitor notes with regard to the third part of S.A. 62 on residential treatment and in-patient hospitalization, when needed, that "there are no special residential placements for youth in detention," although S.A. 62 does not provide anywhere for a "special" residential treatment. It only speaks of residential treatment. Additionally, the Monitor points out that "[d]ocumentation does not reflect the efficacy of treatment or lack thereof so that adjustments can be made." Still, the only documentation requirements included in S.A. 62 are quite specific: written job descriptions and Commonwealth licensure

and/or certification requirements. There is simply no requirement for documentation that reflects the "efficacy of treatment." as the Monitor assumes.

The evidence submitted by the Commonwealth defendants, on the other hand, confirms their averment of being in compliance with the specific requirements of S.A. 62: ambulatory psychiatric services are being provided by a team composed by a child psychiatrist, a child psychologist and a social worker counselor, all of whom have written job descriptions and meet the applicable license and/or certification requirements of the Commonwealth. In this regard, we quote from the sworn statement under penalty of perjury submitted by Mr. Miguel Segura-Contreras, the Director of Programs and Services for Youth of the Commonwealth's Department of Corrections, who attested that:

> . . . all the child psychiatrists, psychologists, social workers and occupational therapists providing services to youth under the agency care have graduated from accredited universities, and have met all the standards required by their respective professional organizations to be certified, and are at all times during their service time with the agency, certified/qualified professionals in their respective fields as required by S.A. 62 . . .
>
> . . . the hiring of the professionals that provide mental health and related services to the youth under the care of the agency is done using a competitive system of interviews, years of experience in the field and the institution from which degrees were obtained as a means to recruit the best qualified candidates for the positions.

Docket entry 1038-1, ¶¶ 4, 6.

Additionally, residential treatment is available as well as in-patient hospitalization when needed. Nothing more is required by S.A. 62. As we find defendants to be in compliance with S.A. 62, we are unable to make the statutorily required written findings that would justify the continuation of the prospective relied mandated by it. Therefore, we are compelled to order the **termination** of S.A. 62.

**Paragraph 66 of the Settlement Agreement (S.A. 66)**

S.A. 66 reads: "An AIJ child and/or adolescent psychiatrist shall develop a protocol for the use of psychotropic medication by other physicians. A training program will

complement this protocol. A child and/or adolescent psychiatrist will be available on an on-call basis at all times."

Defendants indicate in their PLRA Motion that they "have developed a protocol for the use of psychotropic medications [which] has been followed in the determination of the need for administration of such medication and during the administration of such medication to the youth" and that "[a] training program has been developed and effectuated complementing the protocol required by federal stipulation." PLRA Motion, at p. 16. In support of their averment, they rely mainly on the sworn statement under penalty of perjury of Dr. Arcangel Rodríguez-Muñiz, Coordinator of Mental Health Services for Juveniles at the Commonwealth's Department of Corrections and Rehabilitation, who attests exactly what they informed in the Motion: that "the agency has a protocol for the use of psychotropic medications and that such protocol has been followed in the determination of the need for administration of such medication and during the administration of such medication to the youth " and that "a training program has also been developed and effectuated complementing the protocol required by federal stipulation S. A. 66." Docket entry 1038-5, at p. 1.

The Monitor, however, relies on the opinion of an unidentified consultant in his second Quarter 2012 Compliance Ratings when commenting, as to S.A. 66, that "there should be central oversight of psychiatric services by a psychiatrist." Docket entry 1033-1, at p. 11. There is no requirement in S.A. 66 of central oversight for psychiatric services by a psychiatrist. The implied supervision mentioned by the Monitor is by means of the protocol and on-call consultation, and both are in place.

The United States raises as an argument that its expert, Dr. Davies, noted the lack of an adequate protocol for the use of psychotropic medications. This is one of many conclusions reached by this expert during a visit to three juvenile facilities operated by AIJ (Humacao, Bayamón and Villalba) on September 28-30, 2011 after being retained by the

U.S. Department of Justice to evaluate mental health care and treatment at the Commonwealth juvenile facilities. Under the heading "Inadequate Treatment," at pages 18-22, Dr. Davies sets forth multiple observations, most of them stated in general terms without specific underlying factual data. For example, she refers to "gross underdiagnosis of most disorders," inadequate "monitoring of youth mental health needs," "[t]here are omissions of psychotropic medication therapy when appropriate and provision of psychotropic medications for unclear reasons," that "[a]nti-depressants, antipsychotics, mood stabilizers, and stimulants . . . are not being utilized for more than a handful of the youth," "Cognitive Behavioral Therapy . . . was not observed," "[p]sychiatrists in AIJ facilities should perform full biopsychosocial diagnostic assessments and prescribe medications according to the community standard of care," "[s]ince substance abuse disorders are one of the most frequent diagnoses . . . it is striking that there aren't youth on Topamax or Naltrexone, when . . . these can be quite helpful." The United States has sifted through the Davies Report which is replete with conclusions unsupported by data and based on her professional judgment. Once identified, they are opposed as evidence of non-compliance or deficiencies corresponding to the various paragraphs which are the object of the request for termination of five specific paragraphs of the Consent Order and Settlement Agreement. Defendants are correct when they state in their Reply (docket entry 1056, at p. 5) that "[t]he Davies Report does not specifically address any of the particular five paragraphs which have been submitted for termination by the Defendants in this PLRA Motion." It is also true, as defendants contend at page 6 of their reply, that the provisions contested "cannot be considered narrowly tailored as required by the PLRA to retain them, if under the scenario put forth by Dr. Davies in criticizing the professional judgment of the local mental health professionals, the Court is required to make decisions as to whether care is 'appropriate' without becoming an arbiter between two different, and perhaps valid professional judgment conclusions." The Vistaril example given by Dr. Davies and highlighted by the United States

at page 2 of its Opposition is one such example of divergent professional judgments regarding medications. It is not for the Court, in adjudicating a PLRA Motion on termination of prospective relief, to engage in the resolution of conflicts between experts of the sort pointed out as deficiencies by the United States via Dr. Davies' opinion.

Finally, once again, requirements are read into S.A. 66 as in other stipulations which completely vary its content and scope. Such is the case with the requirement, based on the Davies Report, at page 20, that "psychiatrists in AIJ facilities should perform full biopsychosocial diagnostic assessments." The United States advances this as a grounds for concluding that the "protocol for the use of psychotropic medications" required at S.A. 66 is inadequate. But a protocol is in place, a training program complements it, and a child and/or adolescent psychiatrist is available on an on-call basis at all times. Nothing else is required by S.A. 66. **The Commonwealth defendants having established that they are in full compliance with the requirements of S.A. 66, the same is ORDERED TERMINATED**.

**Paragraph 67 of the Settlement Agreement (S.A. 67)**

S.A. 67 provides that:

> Defendants shall obtain specific informed consent from a juvenile's parent or legal guardian or from the state court for the use of psychotropic medication for each juvenile on such medication. All psychotropic medications will be prescribed by a licensed psychiatrist and/or physician. All psychotropic medication will be reviewed and approved by an AIJ child psychiatrist. In all cases, the family of any juvenile taking psychotropic medication will be informed in writing by the family's case manager.

As the Commonwealth defendants correctly point out in their Reply (docket entry 1056, at p. 14), in its Opposition to the PLRA Motion the United States does not contest their compliance with sentences 2, 3 and 4 of this provision. Its only gripe is with the Commonwealth's fulfillment of the first sentence's requirement on obtaining "specific informed consent" before using psychotropic medications on a juvenile. In this regard, the Commonwealth defendants argue that they have developed a specific informed consent

form which is used in all cases in which psychotropic medication has been determined to be necessary as part of the mental health treatment for a youth. They also represent that the consent form is discussed among the psychologist, minor and parent or guardian of the minor, that a psychiatrist is consulted during the discussion, and that, if doubts persist, a personal meeting is arranged between the psychiatrist, minor and the parent/guardian.

The United States, however, echoes the Monitor's observations that the consent form does not provide for "informed" consent for it allegedly fails to list risks associated with the medications. It also relies on its expert's conclusions that the informed consent forms reviewed by her left off "important side effects" and, for a particular set of the drugs (Prozac, Paxil and Zoloft), the risk of suicidal ideation.

We have examined the entire consent form submitted by the Commonwealth defendants (docket entry 1038-2), and find that it complies with the requirements of "specific informed consent" established in S.A. 67. It does include suicidal ideation and behavior as possible side effects and, contrary to Dr. Davies' findings, the list of side effects is not limited to headaches and sedation. In fact, this is another conclusion stated by Dr. Davies in general terms without factual support which is advanced by the United States to establish that there is a current, ongoing violation of the prospective relief stipulated by the parties which requires its continuation. Quite to the contrary, the record before us establishes that the Commonwealth defendants have fully complied with the prospective relief enumerated in S.A. 67, and we find no grounds to extend its life. Accordingly, **S.A. 67 is also TERMINATED**.

**Paragraph 71 of the Settlement Agreement (S.A. 71)**

The Commonwealth defendants also seek to terminate S.A. 71, which provides: "Stimulants, tranquilizers, and psychopharmacological drugs shall only be used as deemed medically necessary and shall not be administered for punishment."

The Commonwealth defendants have sufficiently established that all the members of their treatment team are duly licensed and have graduated from recognized programs that are professionally licensed, and have further attested that the determinations to use stimulants, tranquilizers, and psychopharmacological drugs are done by those fully qualified professionals using relevant medical criteria and not to punish the youth under the care of the agency. The United States opposes termination of S.A. 71, however, again relying on the Monitor's conclusions expressed at docket entry 1033-1 that:

> The Monitor's consultant and Plaintiff's consultant identified during recent reviews instances where medication would appear to be unnecessary. Most noteworthy were cases where emergency medications were administered after the emergency was over and the need to medicate had passed. Emergency medication in all cases involved Haldol a powerful antipsychotic in cases where psychosis is not the issue. Use of less powerful and safer yet equally effective medications such as Ativan is nonexistent.

The United States also expands on the conclusion of Dr. Davies, already acknowledged by the Monitor in his, on youths who were "overmedicated" by being given medications which she understood were not needed for their diagnosed conditions.

The Monitor's unidentified consultant and Dr. Davies both assume that their medical judgments on the need for the prescribed medications and the determination that an emergency existed should override that of the psychiatrists who treat the juveniles at critical times. However, there is no factual nor scientific basis to justify the conclusion that there have been instances where medication would appear to be unnecessary or that there "were cases where emergency medication were administered after the emergency was over and the need to medicate had passed." The conclusion that Ativan should be used as opposed to Haldol in cases where psychosis is not an issue is yet another example of a medical judgment which is advanced to defeat that of the psychiatrist who administered the medication to a juvenile in specific circumstances. There is no support to even explain why in particular cases pharmacological drugs were medically unnecessary. Above all, there is absolutely no indication that "[s]timulants, tranquilizers, and psychopharmacological drugs"

were actually being "administered for punishment," which is what S.A. 71 addresses and forbids. **Hence, the Court finds no justification to further extend the duration of S.A. 71, and hereby ORDERS its termination**.

**CONCLUSION**

For the reasons stated above, the Commonwealth defendants' latest PLRA Motion (**docket entry 1038**) is GRANTED in its entirety. Accordingly, the Court ORDERS that paragraph 30 of the Consent Order and paragraphs 62, 66, 67 and 71 of the Settlement Agreement be immediately terminated as prospective relief provisions.

SO ORDERED.

At San Juan, Puerto Rico, on August 28, 2013.

S/CARMEN CONSUELO CEREZO
United States District Judge