

SECOND ANNUAL REPORT SHOWS UTAH STILL FAILS CHILDREN; UTAH OFFICIALS WITHDRAW MOTION TO DISMISS

By Darryl Hamm

According to the court monitor in the *David C. v. Leavitt* (Clearinghouse No. 48,842) litigation, Utah's Division of Child and Family Service (DCFS) has a long way to go before it can come into compliance with the terms of the consent decree. In his second Annual Report, the court monitor, Paul Vincent of the Child Welfare Policy and Practice Group (CWPPG), identified numerous areas where DCFS' performance actually declined from the prior year and several instances in which implementation of provisions is as much as two years behind the schedule.¹ This most recent schedule is a modification of a schedule originally slated for completion by 1998. The court monitor noted that the "[c]ase process review results for 2001 are sobering in a number of regards. While the results are mixed, with some specific areas of improvement, the overall results are down from the already modest 2000 results."²

Utah's dismal performance has definitely harmed its foster children and other children who are the subject of the agency's investigations into reports of abuse and neglect. For example, the court monitor found that an increasing number of children involved with Child Protective Services (CPS) were placed in shelter care instead of settings that were more likely to be continuous placements such as with relatives or stable foster family homes. Once placed in shelter care, children removed from their families also were found not to receive follow-up visits from social workers to determine their adjustment or need for

services. Further, the court monitor found that DCFS' performance had declined in providing home-based services designed to support children and families identified as at risk or struggling to maintain and improve their own homes. The monitor also found that children were frequently placed in foster care without providing essential information regarding the safety and welfare of the child to the new placement.

In the face of these dismal findings, Utah has persisted in filing appeals and motions to have the case dismissed. The Tenth Circuit denied one such appeal in March 2001. After the Supreme Court subsequently denied their petition for a *writ of certiorari* on October 1, 2001, Utah was back in district court the very next month filing yet another motion seeking dismissal of the case on grounds of sovereign immunity and abstention. NCYL has vigorously opposed these motions and appeals. Given this opposition and the Tenth Circuit's recent withdrawal of its prior opinion in *Joseph A. v. Ingram*,³ a New Mexico child welfare reform case, Utah officials withdrew their latest motion to dismiss in late January.

¹ Paul Vincent, who formerly directed Alabama's child welfare agency, heads CWPPG. The group has overseen enforcement of decrees for child welfare reform in several states.

² CWPPG, "Annual Compliance Report: The Performance Milestone Plan, A Comprehensive Progress and Performance Report at 34 (hereinafter referred to as the "CWPPG Annual Report").

³ *Joseph A. v. Ingram*, 262 F.3d 1113 (10th Cir. 2001), opinion withdrawn and superseded on rehearing in part by *Joseph A. v. Ingram*, 275 F.3d 1253 (10th Cir. 2002)

Background⁴

The consent decree stems from a complaint in the *David C. v. Leavitt* case initially filed by NCYL attorneys on February 25, 1993, on behalf of a class consisting of all children reported as abused and neglected and all foster children in Utah.⁵ In response to the original filing, DCFS agreed to negotiations, which resulted in an extensive Settlement Agreement, approved by the court in August 1994. This original consent decree provided a road map for reforming Utah's child welfare system and addressed all aspects of DCFS' operations including child protective services, family services, foster care, medical care, shelter care, education and mental health services. To ensure that the plaintiff children actually obtained the benefits of these promised reforms, the consent decree included descriptions of verifiable standards for compliance, and called for the creation of a Monitoring Panel.

By 1996, NCYL became concerned, based on monitoring reports that showed that DCFS' treatment of children was actually declining rather than improving. Implementation of the consent decree was plagued by delay, disputes over monitoring data, and serious and persistent levels of non-compliance with specific mandates of the consent decree. NCYL filed a motion seeking a remedy for defendants' noncompliance. On March 17, 1997, Judge David Winder found that "serious problems remain in the state's child welfare system"

⁴ For previous *Youth Law News* articles on *David C.*, see Henry, "NCYL Sues Utah Child Welfare System" - (January-February 1993); Grimm, "Triumph in Utah Child Welfare Litigation; Long Road Ahead in Implementing Reforms; McElroy, "New Guardian Ad Litem System Key to Utah Child Welfare Reform; Matthews, "*David C.* Settlement Now 'State of the Art'"; and "Several Children Died During *David C.* Litigation" - (September-October 1994); Henry, "Plaintiffs Ask for Receivership as Utah Child Welfare Agency Gets Worse" - (March-April 1996); Finberg, "Utah Plaintiffs Ask Court to Extend Settlement Agreement" - (May-June 1998); and Finberg, "Utah Judge Denies Settlement Extension but Orders Reforms" - (July-August 1998)

⁵ *David C. v. Leavitt*, Case No. 93-C-206W (D.Utah).

and ordered the Monitoring Panel to create a Comprehensive Plan for Compliance.⁶

In August 1998, shortly before expiration of the original four-year term of the consent decree, the Monitoring Panel issued the Comprehensive Plan for Compliance. NCYL immediately filed a motion to enforce the Monitoring Panel's Plan. In a September 17, 1998 Order, the Court took NCYL's motion under submission and gave DCFS eight months to refine the Comprehensive Plan so as to ensure it would lead to the substantive reforms mandated by the consent decree.⁷ In 1999, the revised version of the Comprehensive Plan became known as the Milestone Plan. After reviewing the Milestone Plan and comments from all parties, on October 19, 1999, the court modified the consent decree and ordered DCFS to comply with the Milestone Plan while retaining jurisdiction to oversee its implementation.⁸ To monitor the implementation of the Milestone Plan, the court ordered the CWPPG to serve as monitor so long as compliance provisions had not been met and required CWPPG to file an annual report with the court detailing DCFS' progress towards compliance with the Milestone Plan.

Court Monitor's Methodology of Review

There are a total of nine major objectives ("milestones") in the Milestone Plan that DCFS is required to meet in order to be deemed in compliance. The Milestone Plan's objectives include:

- Practice Model Development;
- Training and Implementation;
- System Investments;
- System Management Structures;
- Priority Focus Areas;
- Accountability Structures;
- Trend Data Analysis;
- Case Process Review;

⁶ *David C.* Order (March 17, 1997) (unpublished).

⁷ *David C.* Order (September 17, 1998) (unpublished).

⁸ *David C.* Order (October 19, 1999) (unpublished).

- Qualitative Case Record Review; and Quality Improvement Committees.

Within each of these major objectives, DCFS has a list of tasks it is required to meet before the monitor can deem that it is in compliance with the Milestone Plan's requirements.

In evaluating DCFS' progress towards compliance with the Milestone Plan, CWPPG reviews four areas of performance:

- Timeliness and completion of tasks identified in the plan;
- Performance on case processes identified in the plan;
- Performance on qualitative case reviews;
- DCFS' performance on outcome trends identified in the Plan.⁹

As of September 1, 2001, there were 112 tasks that DCFS was required to complete since implementation of the Milestone Plan began in 1999. These tasks represent commitments by DCFS in the form of specific action steps, strategies and interventions. In the Milestone Plan, each of these tasks is assigned a particular deadline for completion. CWPPG assesses whether the tasks were completed through on-site observations, interviews of key DCFS staff and review of relevant documents. Each of the nine "milestones" has a series of tasks that include such items as deadlines for developing and implementing a training curriculum for staff; completing a staff turnover rate study; issuing quarterly reports on implementation of plans; and developing and putting into operation a new computer data system.

CWPPG also uses case process reviews and qualitative case reviews as two other essential mechanisms for measuring DCFS' compliance. The Milestone Plan, identifies roughly 50 case processes that are to be performed routinely in relevant case situations.¹⁰ Some of these processes are

considered "critical" and require that the monitor find that DCFS perform them in at least 90 percent of its cases. The other case processes are deemed "essential" and require that they be completed in at least 85 percent of the cases reviewed. An example of a case process is whether the caseworker met privately with the child outside the presence of the out-of-home care provider at least once each month in the review period. CWPPG reviewed a combined total of 981 cases, including foster care cases, CPS cases and home-based cases.

The qualitative case reviews involve an in-depth analysis of a small sample of cases in which skilled child welfare practitioners from CWPPG, members of the DCFS, and other professionals trained by CWPPG interview all of the major players on a case using a structured protocol.¹¹ The interviewers make professional judgments about the current status of the child and family and the quality of DCFS' system performance. Items measured in the protocol for child and family status include safety, stability, permanence and emotional well being of the child. System performance indicators include the rates that DCFS completes functional assessments; successful transitions; inclusion of child and family participation; and adequate service planning. Compliance occurs under this measure when 85 percent of the cases attain acceptable scores for both DCFS' performance and the family and child status. Reviews were conducted on a regional basis. Seventy-two cases were reviewed in the Salt Lake Valley and twenty-four cases were reviewed in each of the other four regions in the state.

CWPPG also uses a fourth measure of assessment, outcome trend indicators. With this measure, CWPPG reviews a number of outcomes for children to provide further information about DCFS' performance in meeting the needs of children. There are a total of 16 outcomes that are measured including the number of children attaining permanency within 12 to 24 months from

⁹ CWPPG Annual Report at 11.

¹⁰ CWPPG Annual Report at 24.

¹¹ CWPPG Annual Report at 40.

out-of-home removal; average length of stay in out-of-home care; and the number of children experiencing fewer than three placements while in foster care.

Court Monitor's Findings

In each of the four areas reviewed, CWPPG documented major problems that have impeded successful implementation of the Milestone Plan, clearly demonstrating DCFS' continued failure to meet the needs of the protected class of children.

Timeliness and Completion of Tasks

With respect to the timeliness and completion of tasks, there remain significant hurdles. In many instances, DCFS is more than two years behind in completing vital tasks and has failed to implement many of the planning tasks it has completed. While DCFS has completed 76 percent of the tasks it was suppose to complete as of September 1, 2001, the most critical and complex tasks such as training, policy development and a flexible resource design are seriously behind schedule and are not current with projected timetables.¹²

For example, a critical aspect of the Milestone Plan is the implementation of a Practice Model for frontline social workers, administrators, foster parents, and other professionals that provides the foundation for a "consistent child welfare philosophy, reliable direction on day-to-day professional practice, and training for specific skills with proven effectiveness in child welfare."¹³ In particular, the Practice Model is based on the following child welfare principles of protecting "children through completing accurate and timely investigations, helping families select and participate in appropriate services that will remedy previous difficulties, meeting the special needs of children, selecting and supporting strong foster families, and making durable adoptive placements."¹⁴ DCFS was supposed to have completed the curriculum for the Practice

Model training by August 1, 1999. As of December 1, 2001, the curriculum was still not complete.¹⁵

The annual report documents numerous other tasks DCFS has failed to complete in a timely manner. For example, the policy development necessary for implementing the Practice Model has yet to be completed in spite of the February 2000 deadline and DCFS does not anticipate completion until spring 2002.¹⁶ This failure translates into a lengthy delay for DCFS' staff to receive critical direction on assessments, family team conferencing, case planning approaches and several other child welfare practices. DCFS also was to have trained staff on how to use wrap-around services by September 1999, but as of December 1, 2001, DCFS has not completed this training of its staff.¹⁷ In another vital area, DCFS has failed to develop a flexible fund procedure that would allow caseworkers to access state funds to provide individualized services for children to help prevent disruption or change of placements when unique circumstances arise. This procedure was to have been distributed to staff by June 1999 and DCFS has not only yet to develop the procedure, but as of December 1, 2001, had not fully financed the flexible fund as required under the Milestone Plan.¹⁸

Case Processing and Qualitative Case Reviews

The case process review revealed serious deficiencies in DCFS' practices that caused detriment to children. Of the roughly fifty case processes identified by CWPPG as essential or critical, DCFS met the performance standards for only 18 percent of them. In fact, DCFS' performance this

¹² CWPPG Annual Report at 24.

¹³ Performance Milestone Plan, May 1999, at 5.

¹⁴ Performance Milestone Plan, May 1999, at 5-6.

¹⁵ CWPPG Annual Report at 53.

¹⁶ CWPPG Annual Report at 52.

¹⁷ CWPPG Annual Report at 19. Wraparound services are typically defined as highly individualized services that are community based and cover at least three or more areas of a child and family's life such as health, education, substance abuse, mental health, or other appropriate supportive services.

¹⁸ CWPPG Annual Report at 54.

year declined from its performance standard of just 25 percent in 2000. Almost twice as many standards dropped (29) in comparison to those that improved (15). The detriment to children is most clearly demonstrated when looking at specific declines in the case processing reviews. For example, the following critical case process dropped from 93.8 percent in 2000 to 78.9 percent in 2001:

If this is a priority one case involving severe maltreatment, severe physical injury, or recent sexual abuse causing trauma to the child; was a medical examination of the child obtained no later than 24 hours after the report was received?¹⁹

There is no apparent excuse for a fall off in such a critical area of child welfare. CWPPG, unfortunately, documented numerous other case processing problems. In CPS cases, children were increasingly placed in shelter placements instead of more stable kinship or stable foster families; caseworkers frequently failed to interview the child's natural parents or guardians when their whereabouts were known; caseworkers failed to conduct follow-up visits after making shelter placements to assess the children's adjustment or need for services; and caseworkers frequently failed to make visits outside normal working hours to locate children who were the subject of abuse and neglect reports.²⁰

Similar and equally disturbing results were found for family preservation and foster care services. With respect to family preservation services, CWPPG found declining performance in the timely initiation of service plans completed for the family within 30 days of CPS closure; DCFS' increasing failure to include services in the service plan that were identified as needed in the family's risk assessment or risk referral form; and declining use of

family teams (teams made up of parents, children, teachers and other appropriate professionals with connections to the family) to create family preservation service plans.²¹ In the case process review for foster care CWPPG found that in only 35 percent of the cases did new caregivers receive basic available information essential to the child's safety and welfare; DCFS also provided minimal sibling visitation (twice-monthly visits) for only 38 percent of children; and DCFS had inconsistent and low performance measures for following up on recommendations made on health, mental health, dental, or educational disability exams.²²

CWPPG did identify a few areas of strength. DCFS was doing a better job of identifying family strengths and making improved efforts at identifying kinship placements, but the high number of weaknesses easily overshadowed these few areas.²³

CWPPG also found similarly dismal results in its qualitative case reviews. In the assessment of child and family status, CWPPG found that stability, permanence, and the emotional well being of children were all areas where DCFS needed to make improvements.²⁴ DCFS also received poor scores for its system performance, particularly in the following areas: (1) poor family team formation and coordination; (2) inadequate input from children and families in case decision-making; (3) poor assessment of child and family needs and failure to follow up on identified assessment needs; (4) a low priority for looking beyond the current case challenges to address long-term needs and successful transitions; (5) poor service planning for providing needed interventions for children and families; and (6) not utilizing child and family teams to make intervention plans adaptable when the original plan is unsuccessful.²⁵ These deficiencies may contribute to the poor

¹⁹ CWPPG Annual Report at 26.

²⁰ CWPPG Annual Report at 36.

²¹ CWPPG Annual Report at 38.

²² CWPPG Annual Report at 38-39.

²³ CWPPG Annual Report at 38.

²⁴ CWPPG Annual Report at 48.

²⁵ CWPPG Annual Report at 48-49.

results for emotional well-being and permanence results.

Outcome Trend Indicators

CWPPG's assessment of outcomes revealed a number of disturbing trends. First, the rate at which DCFS provided permanency for foster youth, either adoption, guardianship, or other permanent stable placements, declined markedly in 2001.²⁶ Second, the number of children with new substantiated allegations of abuse who had a prior substantiated report of abuse within the past 12 months increased from 942 to 1,237 between 1999 and 2001.²⁷ Third, the outcome indicator measuring DCFS' initiation of investigations into child abuse reports showed that DCFS is still not meeting minimal timelines.²⁸ Finally, 40 percent of children in foster care experienced three or more placement changes not counting their initial shelter placement.²⁹

Court Monitor Recommendations

In light of DCFS' poor overall performance, CWPPG has recommended a series of steps to improve the agency's performance and in turn the outcome for children. These recommendations include having DCFS expedite its timetables for completing the training program for caseworkers and the policies supporting the development and implementation of the Practice Model.³⁰ Additional recommendations include expanding the number of personnel available to serve as mentors and trainers; implementing a meaningful flexible fund procedure; and improving the use of data from the qualitative case reviews and outcome trend indicators so the information can be used to focus DCFS' efforts on improving performance.³¹

In addition, CWPPG emphasized some positive steps that DCFS has taken in response to prior monitoring recommendations. DCFS has hired six "milestone" coordinators for a period of one year to increase attention to full implementation of the Milestone Plan. In addition, DCFS has increased staffing in areas of training, state level specialists, and computer support for its new data system.³²

While NCYL fully supports these recommendations and any positive changes initiated by DCFS, we remain concerned about whether additional measures will be needed to ensure improved outcomes for abused and neglected children in Utah. For example, hiring "milestone" coordinators for one year is helpful, but does not demonstrate the level of commitment necessary to sustain long-term improvements in DCFS' system.

Utah's Litigation Efforts to Avoid Its Obligations

Rather than channeling their full energy into reforming the child welfare system, Utah has instead spent a considerable amount of time filing appeals and motions seeking to prevent enforcement of the Milestone Plan. Immediately after the district court issued its order in October 1999, calling for the implementation of the Milestone Plan, Utah officials filed an appeal with the Tenth Circuit. In its appeal, Utah alleged that the court did not have the power to modify the four-year termination provision in the original settlement agreement. In addition, Utah argued that even if the court had such power, plaintiffs had not met the required standard of changed circumstances necessary for modifying a consent decree.

In opposition to the appeal, NCYL maintained that according to the standard set forth by the Supreme Court under *Rufo v. Inmates of the Suffolk County Jail*, court had the authority to modify an unambiguous provision of the original settlement

²⁶ CWPPG Annual Report at 61.

²⁷ CWPPG Annual Report at 60-61.

²⁸ CWPPG Annual Report at 64.

²⁹ CWPPG Annual Report at 65.

³⁰ CWPPG Annual Report at 52-53.

³¹ CWPPG Annual Report at 59.

³² CWPPG Annual Report at 51-52.

agreement.³³ NCYL also maintained that Utah's significant noncompliance over the initial four-year term of the decree constituted the change of circumstances necessary to trigger the court's ability to modify the consent decree. On March 9, 2001, after review of the pleadings and oral argument, the Tenth Circuit unanimously upheld the district court's decision to modify the consent decree by extending the time of the court's jurisdiction to monitor compliance with the settlement agreement.³⁴ The Tenth Circuit specifically held that the district court had the power to modify a termination provision pursuant to the Supreme Court's decision in *Rufo* and found that Utah's noncompliance constituted the required change of circumstances.³⁵

Utah's Petition for Writ of Certiorari

In June 2001, not satisfied with the Tenth Circuit's decision, Utah filed a petition for writ of certiorari with the U.S. Supreme Court, again challenging the district court's power to modify the termination provision in the original settlement agreement. Utah asserted that Supreme Court precedent and doctrines of federalism and separation of powers denied the district court the authority to rewrite a material term of an unlitigated consent decree. The defendants claimed that the decision created a split in the circuit courts

because the Tenth Circuit's application of the *Rufo* standard diverged from decisions by the Second, Third, and Sixth Circuit Courts of Appeals.

In July 2001, NCYL filed a brief in opposition to Utah's petition for writ of certiorari. On plaintiffs' behalf, NCYL challenged the legal question on which defendants sought review, relying on the Tenth Circuit's determination that the modification at issue did not materially expand the state's obligations under the consent decree. The Tenth Circuit held that:

It is unnecessary for this court to decide whether a court lacks authority to modify an unlitigated consent decree in a way that materially expands the defendant party's obligations because this case does not present that question. ... [T]he extension of the term of the Agreement to allow Utah to fulfill the very obligations it voluntarily undertook when it entered into the Agreement is not in itself an imposition of additional material obligations on Utah.³⁶

Additionally, plaintiffs relied on case law explicitly rejecting the argument that material terms of consent decrees are immune from modification and that the Supreme Court and lower federal courts have consistently held termination provisions in consent decrees to the same standard for modification as other provisions.³⁷ Finally, plaintiffs denied any conflict in case law between the Tenth Circuit's decision and those decisions cited by the defendants from the Second, Third, and Sixth Circuit Courts of Appeal. NCYL noted that these cases either predated *Rufo*; involved decisions concerning a court's interpretation of a consent decree rather than

³³ See *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992). In *Rufo* the Court articulated the following standard for modifying consent decrees:

a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstances . . . Modification is also appropriate when a decree proves to be unworkable because of unforeseen obstacles . . . or when enforcement of the decree without modification would be detrimental to the public interest.

Rufo, 502 U.S. at 384, 393, 112 S.Ct. at 760, 765.

³⁴ *David C. v. Leavitt*, 242 F.3d 1206 (10th Cir. 2001).

³⁵ *Id.* at 1212-13.

³⁶ *David C. v. Leavitt*, 242 F.3d at 1211-12.

³⁷ See *Chrysler Corp. v. United States*, 316 U.S. 556, 62 S.Ct 1146 (1942); *Holland v. New Jersey Dept. of Corrections*, 246 F.3d 267, 270(3rd Cir. 2001); *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1019, 1021-22 (6th Cir. 1994).

its modification; or entailed a court's application of the *Rufo* standard to sharply differing facts from those present in *David C.*³⁸

On October 1, 2001, the Supreme Court denied Utah's petition for *writ of certiorari* without comment.³⁹ This legal victory for the plaintiffs not only allows ongoing enforcement by the district court to continue, but also has positive ramifications for child advocates seeking to enforce consent decrees. The Tenth Circuit's decision prevents child welfare agencies from dragging their feet and waiting out the term of a consent decree without implementing reforms necessary to improve their systems. Advocates now will be able to request that the court modify the time period covered by a consent decree when they can demonstrate that there was significant noncompliance on the part of the child welfare agency.

Utah Claims Sovereign Immunity & Younger Abstention Require Dismissal of Litigation

In spite of its defeat at the Tenth Circuit and the Supreme Court's refusal to grant their petition, Utah officials persisted in their efforts to evade their responsibilities under the Milestone Plan. On November 9, 2001, officials filed a motion to dismiss with the district court. In this motion, they alleged that the lawsuit should be dismissed on the basis that they are protected by sovereign immunity and the *Younger* abstention doctrine. This motion was based on the Tenth Circuit's initial holding in *Joseph A. v. Ingram* issued in August 2001.⁴⁰

³⁸ See e.g., *United States v. International Brotherhood of Teamsters*, 141 F.3d 405 (2nd Cir. 1998); *Fox v. HUD*, 680 F.2d 315 (3rd Cir. 1982); *Lorain NAACP v. Lorain Bd. Of Education*, 979 F.2d 1141 (6th Cir. 1992).

³⁹ *Leavitt v. David C.*, 122 S.Ct. 56 (2001).

⁴⁰ *Joseph A. v. Ingram*, 262 F.3d 1113 (10th Cir. 2001), *opinion withdrawn and superseded on rehearing in part by Joseph A. v. Ingram*, 275F.3d 1253 (10th Cir. 2002).

In *Joseph A.*, a child welfare reform case in New Mexico, the Tenth Circuit had initially held that the plaintiffs' lawsuit was barred by the Eleventh Amendment on the grounds that the Adoption and Safe Families Act of 1997 (ASFA) and the Adoption Assistance and Child Welfare Act of 1980 (AACWA) contained a detailed remedial scheme that met the Supreme Court's *Seminole Tribe* exception to the *Ex Parte Young* doctrine.⁴¹ The Tenth Circuit concluded that the federal government's ability to audit and withhold funds from the state for any violations of AACWA and AFSA was an adequate remedy and therefore New Mexico was entitled to the Eleventh Amendment's sovereign immunity protection from any lawsuits brought by private parties pursuant to those laws. The Tenth Circuit also held in *Joseph A.* that a number of provisions in the consent decree would require the federal district court to interfere in the state's juvenile proceedings. The court in *Joseph A.* concluded that this interference required the federal district court to dismiss the case pursuant to the Supreme Court's *Younger* abstention doctrine.⁴²

⁴¹ Pursuant to the Supreme Court's ruling in *Ex Parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment generally is not a bar to suits in which a party seeks only prospective equitable relief against a state official. Under its holding in *Seminole Tribe*, the Supreme Court created an exception to the *Ex Parte Young* doctrine that bars lawsuits against state officials seeking prospective injunctive relief when the lawsuit is based on a violation of a federal statute that contains a detailed remedial scheme for obtaining relief for any alleged violations of the statute. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The rationale being that Congress has expressed intent to limit relief to a specified scheme and that this intent would be circumvented if a party could pursue a lawsuit under the *Ex Parte Young* doctrine seeking injunctive relief.

⁴² The *Younger* abstention doctrine requires federal courts to abstain from hearing cases they would otherwise have jurisdiction over if the federal proceeding would (1) interfere with an ongoing state judicial proceeding (2) that implicates important state interests and (3) affords an adequate opportunity to raise the federal claims. *Younger v. Harris*, 401 U.S. 37 (1971).

The Utah defendants filed their motion to dismiss relying on the court's initial holding in *Joseph A.* Like the defendants in *Joseph A.*, the Utah defendants alleged that as state officials, the court should dismiss the case because they enjoyed sovereign immunity protections from lawsuits based on violations of ASFA and AACWA just like the defendants in *Joseph A.* Further, they alleged that the case also needed to be dismissed because the federal district court's enforcement of the Milestone Plan would require the federal judge to interfere with state juvenile court proceedings in the same manner as the federal court's enforcement of the New Mexico consent decree.

NCYL raised numerous arguments in opposition to the defendants' motion to dismiss. First, NCYL asserted that the district court had already held a number of years ago that the Eleventh Amendment's sovereign immunity protections did not apply to the defendants in this case.

In its March 17, 1997 Order, the district court had explicitly decided that Utah waived its Eleventh Amendment claim of sovereign immunity when it agreed to the consent decree. Second, NCYL asserted that by signing onto a consent decree containing federal judicial enforcement provisions as well as modification provisions, defendants unequivocally waived their right to sovereign immunity.⁴³

In addition, NCYL contended that defendants had expressly waived all defenses as the consent decree contains an explicit provision to that effect. NCYL also noted that courts have found that the defense of abstention can indeed be waived.⁴⁴ Further, NCYL stressed that even if there

was not a waiver that the consent decree in this matter did not meet the criteria for applying the *Younger* abstention doctrine. There were no provisions in the consent decree that interfered with any state proceedings and the Utah juvenile courts did not provide an adequate forum to resolve plaintiffs' class action suit seeking relief for federal and constitutional violations.

NCYL filed the opposition to Utah's motion to dismiss on December 17, 2001. On January 7, 2002, a few days before Utah's reply brief was due, the Tenth Circuit vacated its earlier dismissal of *Joseph A.* and issued a new opinion reversing its prior decision.⁴⁵ The new decision represents a major victory for child welfare reform advocates throughout the country as the Tenth Circuit held that the Eleventh Amendment does not bar a lawsuit against state officials pursuant to their obligations under the ASFA and AACWA (for a more extensive treatment of the *Joseph A.* case, see page XX in this issue). In its new opinion, the Tenth Circuit also reversed the district court's blanket application of the *Younger* abstention doctrine to the entire New Mexico consent decree and remanded the case to the district court for a determination of whether individual provisions of the consent decree are barred by the *Younger* abstention doctrine.

In spite of the somewhat mixed results in the revised *Joseph A.* opinion, the plaintiffs in *David C.* derived an immediate benefit from the change in the Tenth Circuit's opinion. Based on the Tenth Circuit's withdrawal of its prior holding, the Utah defendants initially asked for additional time to file their reply brief to NCYL's opposition to their motion to dismiss. Apparently, based on their reading of the Tenth Circuit's revised opinion in *Joseph A.*, the Utah defendants concluded that their motion to dismiss no longer had any merit under either the *Younger* abstention theory or on Eleventh Amendment grounds. On January 25, 2002, the Utah defendants voluntarily withdrew

⁴³ Courts in other circuits have explicitly denied sovereign immunity defenses when the consent decrees include such provisions. See *Watson v. Texas*, 261 F.3d 436 (5th Cir. 2001); *Marisol A. v. Giuliani*, 157 F.Supp.2d 303 (S.D.N.Y. 2001).

⁴⁴ See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380 n.1 (1992)(citing *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 (1977)); *Morrow v. Winslow*, 94 F.3d 1386, 1390 (10th Cir. 1996).

⁴⁵ *Joseph A. v. Ingram*, 275 F.3d 1253 (10th Cir. 2002).

their motion to dismiss prior to the scheduled date for a hearing on their motion.

Conclusion

The results of the Annual Report demonstrate a need for increased scrutiny of Utah's reform efforts in the coming year. Allowing DCFS space to develop and implement the reforms called for in the Milestone Plan has not proven effective. Among other things, this case illustrates that unless there is a strong cadre of leaders within the agency who believe in a consent decree's reforms, successful implementation of those reforms will be difficult to achieve. Utah's foot dragging and failure to implement key aspects of the Milestone Plan indicates a potential lack of buy-in and support from DCFS' key leaders. In addition, Utah's interminable litigation has drained energy and resources away from its most important responsibility of improving services for abused and neglected children.

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