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Two Steps Forward, One Step Back in Utah's Child Welfare Reforms:

State's Progress Towards Compliance Remains Slow as Recent Results Show Children Remain at Risk

by Darryl Hamm and Corene Kendrick

While there are recent positive developments to share in the *David C. v. Leavitt* case (Clearinghouse No. 48,842), the court monitor's most recent annual report details the distance still to go in the implementation of the case's remedies.¹ In response to NCYL's motion to enforce the court's prior remedial order that was filed in August 2002, the federal district court in Utah recently entered a stipulation and order that promises to

help steer Utah's Division of Child and Family Services (DCFS) back towards a path to compliance and successful reform of its child welfare system.² Although this success holds promise for future improvements for the care of Utah's foster children, there are broader social and political forces such as the state's recent budget crises, that remain as a constant threat to derail any progress and leave Utah's abused and neglected children in the lurch.

After months of negotiations between DCFS officials and NCYL attorneys, the federal judge entered an order approving the negotiated stipulation between the two in March 2003. Shortly before the court entered its order, the Utah Legislature appropriated additional funds so DCFS could hire 51 new caseworkers and trainers, to implement the Stipulation Order and

facilitate compliance with the Milestone Plan. The Milestone Plan is the remedial plan that the court ordered in 1999 to address DCFS' failure to comply with the original court ordered Settlement Agreement entered in 1994 that had been scheduled for completion by 1998.

However, the good news of the Stipulation Order and new caseworkers was tempered by the release of the court monitor's third Annual Compliance Report. This report, submitted to District Judge Tena Campbell, identified numerous critical areas where DCFS still has not taken the appropriate steps to implement the provisions of the Milestone Plan.³ The court monitor, Paul Vincent of the Child Welfare Policy and Practice Group (CWPPG), noted that three important areas that had been highlighted in the pre-

vious year's report as needing prompt completion were "behind schedule at the time and still not completed."⁴ The court monitor wrote "the most critical and complex challenges, primarily related to training, policy development and flexible resource design, are in process but are not current with projected timetables for completion. These same areas were identified as behind schedule for the past two years."⁵

A History of Noncompliance and Court Defiance

The court monitor's 2003 report is not surprising to those familiar with the bumpy road of the settlement of *David C. v. Leavitt* was filed by NCYL on February 25, 1993, on behalf of a class consisting of all present and future Utah children reported as abused and neglected, as well as all foster children in Utah.⁶ An extensive settlement agreement was approved by the court in August 1994, and provided a detailed outline for reforming the state's child welfare system. Over the next two years, monitor-

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1 For previous Youth Law News articles on *David C.*, see Marcia Henry, *NCYL Sues Utah Child Welfare System*, Youth Law News, Jan.-Feb. 1993, at 4; William Grimm, *Triumph in Utah Child Welfare Litigation: Long Road Ahead in Implementing Reforms*, Youth Law News, September-October 1994, at 1; Pat McElroy, *New Guardian Ad Litem System Key to Utah Child Welfare Reform*, Youth Law News, September-October 1994, at 9; Martha Matthews, *David C. Settlement Now 'State of Art'*, Youth Law News, September-October 1994, at 12; Martha Matthews, *Several Children Died During David C. Litigation*, Youth Law News, Sept.-Oct. 1994, at 20; Marcia Henry, *Plaintiffs Ask for Receivership as Utah Child Welfare Agency Gets Worse*, Youth Law News, Mar.-April 1996, at 1; Jeanne Finberg, *Utah Plaintiffs Ask Court to Extend Settlement Agreement*, Youth Law News, May-June 1998, at 20; Jeanne Finberg, *Utah Judge Denies Settlement Extension but Orders Reforms*, Youth Law News, July-Aug. 1998, at 9; Darryl Hamm, *Second Annual Report Shows Utah Still Fails Children: Utah Officials Withdraw Motion to Dismiss*, Youth Law News, Jan.-Feb. 2002, at 13.

2 Stipulation to Enter Order to Enforce the Court's 1999 Remedial Order and Settlement Agreement, *David C. v. Leavitt*, No. 2:93-CV-206C (D. Utah, Mar. 17, 2003) [hereinafter Stipulation Order].

3 Child Welfare Policy and Practice Group's (CWPPG) Annual Compliance Report: The Performance Milestone Plan, A Comprehensive Progress and Performance Report, *David C.* (D. Utah March 14, 2003) (No. 2:93-CV-206C) (hereinafter "CWPPG Annual Report 2001-02").

4 CWPPG Annual Report 2001-02, *supra* note 3 at 4.

5 *Id.* at 23.

6 Plaintiffs' Complaint – Class Action, *David C. v. Leavitt*, (D. Utah, Feb. 25, 1993) (No. 2:93-C-206W).

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ing reports indicated that DCFS' treatment of children was declining rather than improving, implementation of the consent decree was plagued by delay, and there was continuing noncompliance with the decree. NCYL filed a motion seeking a remedy for noncompliance, and in March 1997, Judge David Winder ordered the monitoring panel to create a comprehensive plan for compliance.⁷

The panel released the compliance plan in August 1998, shortly before the expiration of the original four-year term of the consent decree. NCYL filed a motion to enforce this new plan, and in September 1998 Judge Tena Campbell took NCYL's motion under submission and gave DCFS eight months to refine the new plan.⁸ In 1999, the new plan was renamed the Milestone Plan, and submitted by DCFS to the court. Upon review, Judge Campbell modified the original consent decree in October 1999 and ordered DCFS to comply with the Milestone Plan,

7 *David C.*, No. 2:93-CV-206C, slip op. at 29-30 (D. Utah Mar. 17, 1997).

8 *David C.*, No. 2:93-CV-206C, slip op. at 4 (D. Utah Sept. 17, 1998).

while retaining jurisdiction to oversee implementation.⁹ To monitor implementation, Judge Campbell ordered that CWPPG serve as monitor so long as compliance provisions had not been met, and file annual reports with the court detailing Utah's progress towards compliance with its Milestone Plan.¹⁰

The two previous court monitor reports detailed the gaps and severe problems in the agency. However, the state officials' response in the face of these dismal findings was even more disturbing. Instead of addressing the problems identified by CWPPG, Utah filed repeated appeals and motions to dismiss the case in 2001, that were either denied by the Tenth Circuit (and the Supreme Court denied Utah's petition for a *writ of certiorari* in October 2001) or withdrawn by the defendants based on subsequent holdings from the Tenth Circuit.¹¹ In response to a state budget crisis in Spring 2002, DCFS proposed budget cuts to the Utah legislature, including a proposal that the court monitor's budget be slashed by 70 percent.¹² The legislature subsequently complied with DCFS' request to wipe out this significant percentage of the monitor's funding.

9 *David C.*, No. 2:93-CV-206C, slip. op. at 2 (D. Utah Oct. 19, 1999).

10 Paul Vincent, former director of Alabama's child welfare agency, heads CWPPG. The group has overseen enforcement in several states of settlement decrees for child welfare reform.

11 For further discussion of DCFS' appeals and dismissal motions, see the prior article in *Youth Law News* (Jan/February 2002).

12 Letter from Paul Vincent, CWPPG, to the Hon. Tena Campbell, Federal District Court Judge (July 27, 2002) (on file with author).

CWPPG, as court monitor, was so worried about the cuts within the DCFS budget that it wrote the court expressing its concerns that the budget reductions and monitoring cuts would compromise the division's ability to meet its court-ordered Milestone obligations. Among the items slated for cuts that CWPPG highlighted were:

- Reduction in the funding of providers (\$731,600)
- Reduction in adoption subsidies (\$420,000)
- Reduction in one-time adoption subsidies (\$1.8 million)
- Reduction in court monitors contract (\$236,000)
- The loss of 48 full-time employees.¹³

Against this backdrop of continued noncompliance and defiance, in August 2002 NCYL filed a motion to enforce Judge Campbell's October 1999 remedial order directing DCFS to comply with the Plan.¹⁴ In the 2002 motion to enforce, NCYL requested that the federal court order DCFS to restore the funding to the monitor, and that the court use the monitor's expertise to develop a remedy to address Utah's continued intransigence and noncompliance over the past three years. The NCYL motion documented Utah's noncompliance and poor child welfare practices, such as their failure in nearly

13 CWPPG Annual Report 2001-02, *supra* note 3 at 24-25.

14 See Plaintiffs' Motion to Enforce the Court's 1999 Remedial Order and Settlement Agreement, *David C.*, (D. Utah August 22, 2002) (No. 2:93-CV-206C).

two-thirds of all new placements to provide caregivers with adequate information essential to the child's safety, health and welfare.¹⁵ Within days after NCYL filed its motion to enforce, the monitor reported that the state restored CWPPG's full monitoring budget for fiscal year 2003.

November 2002 Hearing on Motion to Enforce

On November 21, 2002, the court heard NCYL's motion to enforce the 1999 remedial order. The court took testimony from both the court monitor and the DCFS director, Richard Anderson, with regards to DCFS' compliance with the Milestone Plan. The court heard testimony and had documentation of DCFS' failure to show any significant improvement in its performance in the monitor's most recent case processing reports and qualitative case reviews. When asked by the court to specify the priority areas for improving DCFS' ability to comply with the court's remedial order, the monitor identified the lack of adequate staffing resources, the need for additional training of DCFS caseworkers, implementation of policies to improve the consistency of DCFS practice, and improvements on how the agency uses flexible funds to meet the needs of children and families.¹⁶

15 In the CWPPG Annual Report 2001-02, the monitor notes that there has been minimal improvement in this area—in only 39% of cases did child welfare workers provide the new caregiver with adequate information.

16 2002 Motion to Enforce Hearing Record at 52-58, *David C.*, (D. Utah November 21, 2002) (No. 2:93-CV-206C) [hereinafter "2002 Motion to Enforce Record"].

In the DCFS director's testimony, he acknowledged that the agency had seen staff reductions since the Milestone Plan that included the loss of approximately 80 employees, and that 47 of those employees were front line child welfare caseworkers.¹⁷ With regards to training, the defendants had informed the court that they had trained all of their caseworkers.¹⁸ Later in the proceeding, the monitor contradicted this and indicated that he had recently participated in a focus group of caseworkers and most of those caseworkers had not had the training required under the Milestone Plan.¹⁹ The monitor also noted the absence of a flexible fund policy despite repeated discussions with DCFS officials over the need for one.²⁰

Judge Campbell requested that the parties attempt to address the priority areas identified by the monitor in settlement meetings and see if an agreement could be reached. Judge Campbell made it clear in her statements to the parties that she wanted input from both parties. As a future consideration, the court did acknowledge the defendants' arguments that some of the standards in the Milestone Plan were proving especially burdensome and asked the parties to discuss the possibility of "trimming" the Milestone Plan.

¹⁷ *Id.* at 101.

¹⁸ *Id.* at 30.

¹⁹ *Id.* at 49.

²⁰ *Id.* at 70-71.

Stipulation Order

In following the court's request, the parties met several times in Spring 2003 to draft a mutually acceptable stipulation order to address the priority areas identified by the monitor. After lengthy negotiations, the parties drafted a mutually acceptable stipulation order and proposed order. Judge Campbell signed the order on March 17, 2003. Key elements of the stipulation order include:

- DCFS must enact all policies, guidelines, and rules necessary for implementing the Milestone Plan on or before May 6, 2003. This should have been done by February 2000.
- DCFS must develop and implement rules and guidelines for staff on how to use flexible funds required by the Milestone Plan, on or before April 29, 2003. All training of staff on how to use flexible funds must be completed by July 22, 2003. Flexible funds are for wrap-around, non-traditional services to families. This should have been done by October 1999.
- DCFS must hire eight new full-time trainers to meet current and ongoing training needs of staff. All trainers must be hired and employed by DCFS no later than July 1, 2003. The training should have been completed by November 2000.
- In order to reduce case-loads, DCFS will hire 53 new full-time positions in

order to comply with the Milestone Plan. Eight will be trainers, and 45 will be new caseworkers. All employees will be hired and employed by the first pay period of July 2003.

- DCFS will implement a centralized, computerized tracking system to record all training that each staff member has attended.

Third Annual Court Monitor Report

The CWPPG report released in March 2003 analyzed DCFS' performance in the period October 1, 2001 through September 30, 2002. Because the practices reviewed by CWPPG are almost a year old by the time the report is prepared, the data do not always reflect current practice. Nevertheless, the report analyzes DCFS' performance in complying with the nine major objectives in the Plan. Within each of the major milestone objectives, DCFS has a list of tasks it must meet before the monitor will deem it is in compliance with the court's requirements.

Court Monitor's Methodology

In evaluating DCFS' compliance with the Milestone Plan, CWPPG reviews four areas:

- Timeliness and completion of tasks and activities identified in the plan;
- Performance on case processes identified in the Plan;
- Performance on qualitative case reviews; and

- Performance on outcome trends identified in the Plan.²¹

In order for CWPPG to make the decision that DCFS has achieved performance sufficient to merit a recommendation of exiting from court supervision, the court monitor will examine the following areas. If all three are met, the monitor will notify the court that DCFS has achieved compliance with the Plan:

- If appropriate Milestone Plan objectives have been achieved, and necessary infrastructure and self-correcting processes are in place;
- If outcome indicators trends are consistent with indicators of appropriate practice; and,
- If performance on case process measures and qualitative measures are at levels meeting Plan standards for exit.

Court Monitor's Findings and Analysis

The court monitor wrote, "of the 112 milestone tasks that were to have been completed through September 2002, 86 percent have been completed. Seventy six percent had been completed in the prior review year. The most critical and complex challenges, primarily related to training, policy development and flexible resource design are in process but are not

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²¹ CWPPG Annual Report 2001-02, *supra* note 3 at 10.

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current with projected timetables for completion. These same areas were identified as behind schedule for the past two years.²²

The monitor goes on to note that “Most of the Milestone tasks were relatively simple to accomplish and...the majority of these have been accomplished. The heart of the Plan, in terms of importance, effort, and resources required is in three areas...it is in these three crucial areas of Milestone task completion that the Division has still not complied.”²³

The monitor looked at whether required procedures are being followed by social workers when dealing with reports of abuse and neglect. The monitor assessed 52 case procedures for approximately 800 cases and found that only 17 percent of those procedures were followed enough to meet required standards.²⁴ For example, the monitor found that in less than 50 percent of cases did caseworkers visit children in shelter care within the first two days of placement to determine the child's adjustment and needs.²⁵ And after

the first two days of placement, in only 25 percent of cases did the caseworkers visit children in shelter care at least weekly to monitor how they were doing.²⁶ Given that the percentage of children in Utah living in group homes and shelters is upwards of 25 percent, this statistic translates into large numbers of children with little or no contact with their caseworker.²⁷

The monitor report also noted with concern the low performance on what is perhaps the most important standard, “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?” The study found that this occurred in only 80 percent of the cases, and the minimal standard for performance is 90 percent of cases.²⁸ The CWPPG report concludes that in “overall attention to case processes—to those important steps in casework that are recorded in the case record—remains problematic.”²⁹

Similarly, for the qualitative case reviews (QCRs), the monitor reported that while DCFS has made progress, the child welfare agency needs to make further improvements in numerous areas before

it can reach the Milestone Plan's compliance standards. The QCRs involve an in-depth analysis of 168 cases employing skilled practitioners who interview all relevant parties (e.g. foster parent, parents, child, therapist, attorneys, and child welfare workers) and evaluate the case documents.³⁰ Based on this assessment, the practitioners give each case scores on both the current status of the child and family and on the quality of the child welfare's system performance.

In the latest annual review, the monitor reported mixed results on the QCRs. While he observed improvements in certain areas such as safety, health, and physical well being, he noted DCFS continued to need improvement in important areas such as stability, prospects for permanence, and family resourcefulness.³¹ For system performance, which assesses a child welfare system on measures such as its ability to take a long-term view of a child's case, completing effective assessments of child and family needs, and making good service plans to address a child's identified needs, the monitor noted that DCFS' improvement in this area “fell short of achieving the performance levels required for compliance.”³² Although these results are less than encouraging, the monitor indicated that DCFS has started to show improvement in its QCR scores for the 2003 review period.³³

Implementation of the Stipulation and Order

In June 2003, the parties were back in court for a status conference to assess DCFS' progress in implementing the Stipulation Order. In the monitor's June 2003 Status Report, the monitor concluded that DCFS “is making satisfactory progress in complying with the court's order regarding the stipulation.”³⁴ In specific, DCFS has actually met the timelines for implementing policies; developing a training plan; approving a flexible fund policy; and hiring 31 of the 53 caseworker and trainer positions that need to be in place by July 2003.³⁵ Although DCFS' initial work in complying with the latest court order is highly encouraging, there are a number of challenges that remain before DCFS can come into full compliance with all of the court's orders.

Besides completing some of the procedural steps set forth in the Stipulation Order DCFS will need to improve its performance and services for children and families. DCFS cannot expect to achieve compliance if it continues to repeat past trends of stagnating or declining performance on its actual delivery of service to children and families as measured by the case processing and qualitative case reviews. Plaintiffs will continue to assess the monitor's

²⁶ *Id.* at 27.

²⁷ Children's Rights Inc., *Child Welfare Statistics*, http://www.childrensrights.org/policy/child_welfare_statistics.htm.

²⁸ CWPPG Annual Report 2001-02, *supra* note 3 at 35.

²⁹ *Id.* at 39.

³⁰ *Id.* at 39-40.

³¹ *Id.* at 46.

³² *Id.* at 47-48.

³³ *Id.* at 48.

³⁴ CWPPG's Status Report To: United States District Court for the District of Utah, Central Division, RE: The David C. Settlement Agreement, *David C.*, (D. Utah June 16, 2003) (No. 2:93-CV-206C) (hereinafter “2003 Status Report”).

³⁵ 2003 Status Report, *supra* note 34 at 2-4, *David C.* (No. 2:93-CV-206C).

²² *Id.* at 23.

²³ *Id.* at 24.

²⁴ *Id.* at 32.

²⁵ *Id.* at 27.

reports on DCFS' progress in coming into compliance with basic needs of children.

The monitor's most recent regional qualitative case review in the Southwestern Region does indicate DCFS' potential for compliance with the Milestone Plan's standards. In this review, the monitor indicated that this region has produced the best results and attributes the results to the "strong support of front-line staff by management, effective and carefully planned mentoring of new and experienced staff, conscientious implementation of the [Milestone Plan's] Practice Model training . . ." ³⁶ DCFS has shown an overall trend of improved performance in meeting the needs of children and families in its relatively small southwest regional office. In the latest analysis, the monitor reports that the region met compliance standards for the Child and Family Status portion of the qualitative case reviews and achieved substantial gains in its System Performance. ³⁷

These recent regional results demonstrate that with appropriate implementation of the Milestone Plan's provisions for training and good child welfare practice, DCFS can actually make significant progress towards compliance with the Milestone Plan standards. Although these latest regional results suggest that

the Milestone Plan standards are not unduly burdensome, NCYL and DCFS have agreed pursuant to the court's request to initiate discussions on trimming portions of the Milestone Plan that DCFS considers unachievable or excessively burdensome. The parties will begin these negotiations in the coming months.

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Corene Kendrick was a law clerk at NCYL during the Spring of 2003. She will soon begin a Skadden Fellowship at Children's Rights, Inc. in New York City.

³⁶ Child Welfare Policy and Practice Group and The Office of Services Review, Department of Human Services Southwest Region Report: Qualitative Case Review Findings (2003) [hereinafter "2003 Southwest Region Report"].

³⁷ 2003 Southwest Region Report, *supra* note 36 at 7-8.