UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Patricia Welsch, by her father and natural guardian, Richard Welsch, et al, on behalf of herself and all other persons similarly situated,	)	MEMORANDUM ORDER
Plaintiffs,	)	No. 4-72-Civ. 451
vs.	)	
Arthur E. Noot, et al,	)	
Defendants.	)	

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Plaintiffs' present motion requires the Court to resolve two difficult questions: whether the defendants have failed to comply with paragraphs 37 and 39 of the Consent Decree approved by this Court on September 15, 1980, and, if so, whether the relief sought by plaintiffs is the proper and appropriate remedy for defendants' noncompliance. Plaintiffs allege that actions by the defendants, including a reduction in the funds available for staff salaries, a failure to transfer protected staff positions at Rochester State Hospital, a hiring freeze, and the payment of five Central Office employees out of the State hospital salary account, have resulted in the employment of an insufficient number of staff to serve the retarded. Defendants assert that the State is suffering from a severe financial problem and claim that they have fulfilled their responsibilities as best they can given the financial resources presently available. Defendants suggest that despite the reduction in funds allocated to the State hospital salary accounts, there has been no diminution in the quality of care given the plaintiff class because of several mitigating factors: (1) the system is financed on the assumption that normally there are vacancies; (2) Rochester State Hospital positions were not immediately reassigned to other hospitals; (3) the Commissioner's hiring freeze on positions that do not directly care for the needs of the retarded is reducing the staff who work with the mentally ill and chemically dependent, but not those who work with the mentally retarded.

The issue of adequate staff to serve the needs of the mentally retarded has been an underlying concern of this Court throughout the course of this litigation. In the first trial in 1973, which the parties agreed to limit to

conditions at Cambridge State Hospital, the Court found that residents had a constitutional right to a humane and safe living environment based upon the due process and cruel and unusual punishment clauses and a right to a minimally adequate program of individual habilitation under the due process clause and State law. See Welsch v. Likins, 373 F.Supp. 487, 491-501, 502-03 (D. Minn. 1974). The Court emphasized at that time that:

> "The most critical need at Cambridge to fulfill both of these rights is for sufficient personnel to care for, supervise, and train the residents." Welsch v. Likins, No. 4-72-Civ. 451, slip op. at 11 (D. Minn. October 4, 1974).

The Court ordered the achievement of specific staffing ratios at Cambridge and the employment of sufficient support personnel to "liberate the direct care staff from the diverting domestic tasks that the evidence shows now overburden them." Id., slip op. at 19. The Court also required that the Commissioner of Welfare propose to the Governor sufficient funding for the achievement of additional staff ratios by June 1, 1975. The Governor rejected the Commissioner's request. An additional hearing was held regarding the conditions at Cambridge, and the Court found in April 1976 that several of the provisions of the October 1974 Order relating to staffing had not been complied with. Modifications were made in the October 1974 Order, and the Court again ordered the employment of sufficient staff to achieve particular staff-resident ratios. See Welsch v. Likins, No. 4-72-Civ. 451, slip op. at 22-27 (D. Minn. April 15, 1976). The Court then held that although it could not attach Medicaid funds because such relief was barred by the Eleventh Amendment, it could enjoin provisions of the State constitution and State statutes that impeded compliance with the Court's Order. See Welsch v. Likins, No. 4-72-Civ. 451, slip op. at 3 (D. Minn. July 28, 1976).

On appeal to the Eighth Circuit, the Court of Appeals upheld the staffing ratios but vacated this Court's July 28, 1976 Order and remanded for further consideration after the Legislature had completed its current session. The Court of Appeals reasoned that the staffing requirements were positive, constitutional requirements that could not be ignored, and that "experience has shown that when governors and state legislatures see clearly what their constitutional duty is with respect to state institutions and realize that the duty must be discharged, they are willing to take necessary steps, including the appropriation of necessary funds." Welsch v. Likins, 550 F.2d 1122, 1130 (8th Cir. 1977). The Cambridge Consent Decree, approved by this Court in December 1977, obviated the need for any further Court Order and incorporated staffing

requirements similar to those ordered by the Court. Several compliance hearings were held before the monitor pertaining to these staffing standards.

In 1980, this Court approved a Consent Decree governing all State hospitals with mentally retarded residents: Brainerd State Hospital, Cambridge State Hospital, Faribault State Hospital, Fergus Falls State Hospital, Moose Lake State Hospital, Rochester State Hospital, St. Peter State Hospital, and Willmar State Hospital. The staffing requirements established in Part IV of this Decree have already been the subject of several compliance hearings before the monitor. The plaintiffs' present motion is directed towards paragraphs 37 and 39, which provide for staffing requirements until the ultimate goals of the Decree are met. These ultimate goals are contained in paragraphs 46 through 55 of the Decree, and are to be met as the population in the State hospital system is reduced to the level indicated in paragraph 14. Paragraphs 36 through 40 are, in the Court's view, designed to maintain the present number of staff to serve the mentally retarded until the desired staff-to-resident ratios are achieved at each State hospital.

As the population in the State hospitals declines, the Decree thus protects 4,120.48 of the 5,677 full time equivalent positions in the complement for the State hospital system because these positions directly or indirectly serve the mentally retarded. Paragraph 37 states that "[t]here shall be no reduction" in the 2,915.93 direct care positions allocated to the mentally retarded "until such time as each state hospital has positions sufficient to meet all of the staffing requirements of paragraphs 46 through 55 of this Decree." Paragraph 39 governs the remaining 1,204.55 indirect care or general services positions that serve the needs of all State hospital residents, including those positions funded through laundry salary accounts. This paragraph provides that:

> "If there is a reduction or reallocation of these positions, at least 45 percent of staff removed from these positions must be allocated to serve mentally retarded persons. (For example, if 100 of these positions are eliminated, at least 45 will be reallocated to serve mentally retarded individuals and will be added to the 2915.93 positions referred to in paragraph 37). This process of reallocating at least 45 percent of these positions shall continue until such time as each state hospital has positions sufficient to meet all of the staffing requirements of paragraphs 46 through 55."

Appendix A of the Decree specifically identifies the positions protected at each State hospital:

APPENDIX A

Staff Allocations

		MR	OTHER	MI-CD
1.	Anoka	0		364.4[1]
2.	Brainerd	378.25	206.1[2]	72.55
	MLC	55	—	0
3.	Cambridge	698.8	44.6[3]	0
4.	Faribault	926.2	65.6[4]	0
5.	Fergus Falls	242.25	157.25	184.4
6.	Moose Lake	147.73	138.9	200.27
7.	Rochester	125	187.3	154.9
	Surgical Unit		56.7*	
8.	St. Peter	185.7	157.6	296.6
9.	Willmar	157	190.5	283.4
		2,915.93	1,204.55	1,556.52
		Protected	45% to MR[5] if reduced	Not Protected

* 54.7 is the correct figure.

1. Since Anoka serves only mentally ill and chemically dependent persons, any reduction in staff is not governed by this agreement.

2. The 1981 Salary Roster lists 175.5 positions as General Service (GS) and 30.6 positions for laundry. These two numbers are combined to give the 206.1. The same procedure is used with Willmar and St. Peter.

3. Cambridge is listed as having 743.4 positions. The 40 over-complement positions are not included here. There are 216.67 positions listed as General Services. Plaintiffs have agreed that 10 percent of this general service staff (21.6 positions) may be classified as "Other" so that 45 percent of the reductions from this portion of the staff will be reallocated to MR. The remaining 23 positions in the "Other" category are laundry workers.

4. Faribault follows the same procedure as Cambridge. Of the 206 general service workers, 10 percent (20.6) are classified as "Other" and 45 laundry workers are added to give a 65.6 total.

5. According to data from June, 1980, the hospitals serving more than one disability group (i.e., all except Anoka, Cambridge, and Faribault) had a population of approximately 3050 of which approximatley 1350 were mentally retarded. Based upon these population figures, 45 percent is used as a basis for pro-rating general service staff.

I. COMPLIANCE

In signing the Decree, the defendants agreed to be responsible for maintaining the staffing requirements contained in paragraphs 37 and 39. The facts pertaining to the defendants' actions are not in dispute,[1] and based upon a review of these facts the Court must agree with the monitor that the defendants have failed to fully comply with the obligations imposed by the Decree. Defendants suggest that the current financial climate has made it impossible for them to strictly comply, but to allow the defendants to unilaterally change the Decree or to ignore certain provisions when compliance becomes difficult would render the agreement meaningless. The Court recognizes the difficult position that the defendants are in, but must, on this record, conclude that the four separate actions discussed below have resulted in violations of paragraphs 37 and 39 of the Decree.

A. Reductions in funds available for ¶ 37 and ¶ 39 positions

This category includes three specific actions:

(1) Defendant Commissioner of Finance directed each State agency to set aside 2% of gross payroll costs in order to meet any increase that resulted from labor contracts negotiated for fiscal year 1982;

(2) Defendant Commissioner of Public Welfare ordered that each State hospital system salary account be reduced by 2.3% to bring the account within the amount appropriated;

(3) Various internal transfers of funds were made at each State hospital to account for the reductions described above.

Before each of these actions is discussed in more detail, a brief review of the funding process is necessary.

The appropriations process

The Welfare Department's initial budget request is submitted to the Governor for his submission to the Legislature. The Governor reduced the amount requested by the Department of Public Welfare for fiscal year 1982 by over 100 million; the Department's request for fiscal year 1983 was also reduced. The Legislature's initial appropriation was approximately what the Governor recommended.

	FY 1982	FY 1983
DPW request	$ 755,919,600	$ 835,914,200
Governor's recommendation	$ 653,721,300	$ 663,384,600
Appropriation	$ 656,349,200	$ 663,079,800

The Legislature reduced the program totals across the board by $3,324,300 to reach the fiscal year 1982 appropriation of $656,349,200 when it appeared that expenditures would otherwise exceed revenues. This reduction was in effect increased by an additional $1,413,700 due to internal transfers of funds that the Department made to restore funds to several accounts that the Legislature had cut that the Department felt needed to be funded. The Department thus began the fiscal year having to cut $4,737,700 from the line item appropriations approved by the Legislature in order to balance the Department's budget.

The hospital salary account

The 1981 Legislative appropriation for fiscal year 1982 for the State hospital salary account is a combination of several appropriations. The line-item appropriation for fiscal year 1982 salaries was $107,995,500, but this figure was decreased by $944,052 to account for the State hospital share of the across the board reduction made by the Legislature. An additional appropriation for increased salary related costs (insurance and cost of living increases (COLA)) was made to the Commissioner of Finance, who allocated $3,727,478 to the Department of Welfare State hospital salary accounts for these purposes. Excluding the funds appropriated for teacher retirement plan expenditures, the net funds appropriated by the State Legislature for State hospital salary accounts in fiscal year 1982 were thus as follows:

Chapter 360 appropriation	$ 107,955,500
less State hospital share of reduction	(944,052)
State hospital share of supplemental appropriation for insurance and COLA	3,727,478
Net appropriation	$ 110,738,926

This $110,738,926 did not include funds necessary to meet the salary and fringe benefit increases for State employees that were anticipated as a result of labor contracts to be negotiated for fiscal year 1982. An appropriation for a salary supplement to meet these costs was made to the Commissioner of Finance, but the Commissioner notified State agencies on May 21, 1981, that the amount appropriated might not be sufficient to meet the actual costs of the collective bargaining agreements as negotiated. Each agency was thus directed to set aside 2% of gross payroll costs to insure that the agency could fully honor all provisions of the agreements ultimately negotiated. The Commissioner of Finance ordered this 2% set aside because under Minnesota Statutes § 16A.15(3) he is

required to certify that for every obligation incurred there is a sufficient unencumbered balance in the fund against which the obligation is incurred. If any expenditure is authorized without sufficient funds being available, the Commissioner of Finance is personally liable and may be removed from his position, and the State's obligation to pay is presumed invalid. The Finance Commissioner's 2% set aside reduced the amount that was allocated to the State hospital salary accounts at the beginning of fiscal year 1982. Given this 2% reduction, the amount available in the State hospital salary accounts was as follows:

Net appropriation	$ 110,738,926
Less 2% set aside	(2,150,567)
Total allocation	$ 108,588,359

The other reduction in the salary accounts that occurred resulted from actions taken by Commissioner Noot. The Department of Public Welfare established a plan for the State hospital salary accounts that provided for an expenditure of $108,588,359, or 98% of the net appropriation, to account for the Commissioner of Finance's 2% set aside. The Commissioner of Welfare then determined that additional reductions had to be made to balance the Department's own budget, so he reduced local aid to counties by $2,468,800 (a 4% reduction in services except those for the mentally retarded, which were only reduced 1%) and on June 14, 1981, he ordered that an additional 2.3% be cut from State hospital salary accounts at each State institution. This reduction was specifically imposed in lieu of the elimination of specific positions: the Commissioner's memorandum made reference to a reduction of a total of 241 positions from all State institutions, for a savings of $4,459,000.

Part of the Commissioner's 2.3% reduction was required because of the Commissioner's inability to reduce income maintenance program expenditures in proportion to the Legislature's across the board reduction in appropriated funds for fiscal year 1982, but part was also required because of the Department's own actions in restoring several funding cuts made by the Legislature. In the course of the appropriations process the Legislature had made some funding reductions that were unacceptable to the Department, so the Department returned to the Legislature to obtain approval of the transfer of an additional $1,413,700 from the State hospitals and aid to counties to restore funds for the particular administrative purposes noted below:

Division of Department of Welfare	Amount reduced	Primary expenses
Special Services	$ 760,000	Rent
Information systems	200,000	Computer system for welfare payments - staff and computer time
Long term care rates	100,000	Salaries for nursing home auditors; fees for hearings
Financial management	200,000	Workers' and unemployment comp; salaries for staff who pay/collect DPW bills
Social Services Administration	100,000	Staff salaries; contracts and grants for programs
Local fiscal audits	53,700	Auditors
TOTAL	$ 1,413,700	

In the Court's view, the restoration of these funds demonstrates the defendants' ability to effectively influence funding decisions and priorities. There is no doubt that the lack of sufficient funds for State hospital salaries is a result of actions by the defendants as well as by the Legislature.

Internal transfers within each institution were made to adjust for the 2.3% reduction and the 2% set aside. Total adjustments in the MR and GS accounts at each institution governed by the Decree were as follows:

INSTITUTION	MR ACCOUNT	GS ACCOUNT	LAUNDRY
Fergus Falls	($207,461)	($132,869)	
Moose Lake	($245,402)	$ 19,365	
St. Peter	($136,500)	($ 86,509)	($25,350)
Willmar	$0	($224,549)	($10,361)
Cambridge	($553,919)	($190,186)	$12,776
Faribault	($710,907)	($151,796)	($31,219)
Brainerd	($329,353)	($197,071)	($27,484)
TOTALS	($2,183,542)	($960,615)	($81,638)

Analysis

The monitor determined that the appropriate starting point for judging compliance with paragraphs 37 and 39 was the amount for State hospital salaries included in the Total Salary Spending Plan, or $110,134,505.[2] As the figures above illustrate, the monitor determined that because of the 2% set aside, the Commissioner's 2.3% reduction, and the internal transfers, the MR salary account was reduced by $2,183,542, or approximately 118 positions on the basis

of an average per position cost of $18,500.[3] The GS and Laundry accounts were reduced by $1,042,253, or approximately 56.34 positions based upon an average cost of $18,500 per position. Thus the monitor concluded that funding for the positions protected under the Decree was reduced by a total of $3,225,795--an amount equal to approximately 174.34 positions. Based upon these figures, the Court must agree with the monitor's analysis and conclusion that:

> "Given the assumption that full funding for salary and fringe benefits for all positions on a salary roster covered by either paragraph 37 or paragraph 39 of the Decree would constitute compliance with those paragraphs, any reduction in such funding raises questions regarding compliance. Although it must be recognized that some positions will necessarily be vacant when turnover occurs, and that funding in an amount less than full funding for every day of the year for all positions could still be sufficient considering such turnover, the amounts at issue here are sufficiently large to constitute non-compliance with paragraph 37 and, since no transfer has been made of 45% of positions or funds from the salary rosters and salary accounts covered by paragraph 39, a violation of that section as well. The fact cannot be overlooked that the process of establishing the final salary plan started with a need to reduce positions. (Exhibit 17; Fact Statement, ¶25). While the Department chose not to identify specific positions for elimination, the dollar reductions have had the same effect."[4]

Defendants refute this finding by contending that plaintiffs have the burden of establishing noncompliance and although plaintiffs have established a reduction in funds available to hire staff to fill protected positions, plaintiffs have failed to establish conclusively that the quality of care has been diminished. The Court is not persuaded by this argument. The staffing standards in paragraphs 37 and 39 were agreed to by both parties when they entered into the Consent Decree. Granted, these paragraphs limit administrative flexibility within the State hospitals, but this was the method chosen by the parties to monitor the quality of care being given to the mentally retarded residents until the ultimate goals of the Decree are met. It would defy common sense to find--absent further evidence--that so large a reduction in the money available for salaries has not affected the number of persons who can be employed: defendants have failed to rebut the inevitable inference that a $3,225,795 reduction simply cannot be completely absorbed without adverse effects.

Defendants nonetheless contend that a key element of their defense is that "at any given time, a certain number of the 5677 authorized staff positions are vacant. Thus, while the Commissioner balanced his budget by cutting the salary accounts by 2.3%, this does not translate into a 2.3% reduction in staff positions." The translation may not be completely equal, but defendants have failed to act on the monitor's past suggestions that criteria be developed to

determine at what point a reduction in funding is tantamount to a reduction in positions. Defendants argue that excluding Rochester the average vacancy rate for all State hospitals since March 1981 has been 218.9 positions; thus a reduction in funding equal to a total of 174.34 positions has not yet affected the level of care being received by the plaintiff class. This average vacancy rate presents a somewhat misleading picture. First, the overall average rate includes Anoka State Hospital, which is not covered by the Decree. Second, the overall average rate includes some positions that are not protected by the Decree. Finally, there is no meaningful base rate to compare changes to--figures for March 1981 through January 1982 do not demonstrate the vacancy rate that could have been achieved had no funding reductions been imposed.

Even so, it is clear from the figures presented below that the vacancy rate has been increasing--evidence, perhaps, that the funding cuts are resulting in less staff being employed.

ADJUSTED VACANCY DATA: COMPLEMENT AND MULTI-FILLED[5] POSITIONS AT THE STATE HOSPITALS 3/81 - 1/82

DATE	NUMBER OF VACANCIES	% OF POSITIONS
March, 1981	179.90	3.49%
April, 1981	167.60	3.25
May, 1981	195.77	3.80
June, 1981	212.02	4.11
July, 1981*	------	----
August, 1981	230.27	4.46
September, 1981	217.63	4.22
October, 1981	217.51	4.22
November, 1981	275.22	5.34
December, 1981	244.81	4.75
January, 1982	248.36	4.81

*July data not used because of AFSCME strike

March 1981 - June 1981 vacancy rate	3.66%
October 1981 - January 1982 vacancy rate	4.78%
Overall average vacancy rate	4.25%

The monitor concluded that "The vacancy rate . . . does not indicate that compliance with paragraphs 37 and 39 has been achieved despite the reductions made [in finding]."[6] The Court agrees that the vacancy figures incorporated into the Undisputed Statement of Facts ¶64 are inflated--the figures above also fail to establish compliance despite the reduction in funds. In the Court's view, plaintiffs have carried their burden of establishing noncompliance with the Decree. Defendants' failure to cooperate in any effort to determine more precisely the relationship between funding cuts and positions eliminated and their failure to present more specific information or data to demonstrate that the protected positions are being filled at an average or normal rate requires the Court to conclude that the absolute standards presented in paragraphs 37

and 39 are not being met.

Defendants assert that the Court should not find a violation of the Decree in any event because the lack of funds for State hospital salaries was the result of legislative action. The Legislature is not a party to this action, but key legislators and the Governor were consulted prior to the defendants' signing the Decree. The only paragraph in the Decree that might be read as placing a condition on the staffing requirements is paragraph 88, which provides:

> "88. Prior to each session of the Legislature for the duration of the Decree, the Commissioner shall propose to the Governor for submission to the Legislature all measures necessary for implementation of the provisions of this Decree."

Certainly Commissioner Noot proposed adequate funding to the Governor, and the Legislature's initial appropriation of $110,738,926 to the State hospital salary accounts may have been sufficient to fund these accounts as projected by the Department in the Total Salary Spending Plan absent the 2% set aside and the 2.3% reduction. The Commissioner of Finance's 2% set aside was required by State law and the Commissioner of Welfare is required to balance the Department's budget, but this does not change the Decree's staffing provisions. The defendants after considerable negotiation and opportunity for deliberation entered into a Decree in which they agreed to explicit staffing standards. When the parties sought to condition compliance on legislative approval, they did so. The staffing requirements contain no such condition. Once approved by this Court, the Decree became the judgment of this Court, and as the Third Circuit recently confirmed, "it is obvious that a party to a binding judgment cannot comply with its terms by ignoring strictures placed upon it in the hope that they will disappear." Delaware Valley Citizens' Council for Clean Air et al v. Commonwealth of Pennsylvania, No. 81-2303, slip op. at 17 (3rd Cir., filed March 1, 1982). The reductions in funding and the internal transfers made by the defendants establish noncompliance with the Decree.

B. Closing Rochester State Hospital without transferring the ¶37 and ¶39 positions to other institutions

As part of the appropriations act passed in the 1981 regular session, the Legislature decided to close Rochester State Hospital. This decision was clearly unforeseen by both parties when the Decree was drafted, but both have acknowledged that paragraphs 37 and 39 apply. The hospital was to close in stages--the surgical unit and the chemical dependency unit were closed on July 1, 1981. The remaining units were to be gradually closed by June 30, 1982.

There is no dispute that the 125 direct care positions at Rochester are protected by paragraph 37 and that 54.7 surgical unit and 187.3 general services positions are protected by paragraph 39. Under the Decree, no reduction in paragraph 37 positions is allowed--paragraph 39 positions may be reduced, but 45% of the reduction must be transferred to paragraph 37 positions. No transfer of funds or positions to other institutions has yet occurred. Defendants projected at the hearing on this matter that 94 of the 125 direct care positions may be transferred in April 1982, but no other transfers of positions or funds are planned.

The monitor determined that to comply with paragraph 37 of the Decree the defendants had to transfer all 125 MR positions plus sufficient funds to pay for those positions or an amount equal to the average per position cost as the positions were vacated. In order to comply with paragraph 39 of the Decree, the monitor determined that the defendants would have to transfer 45% of the surgical unit and general services positions plus 45% of the total cost or the average per position cost as these positions are vacated. Defendants have transferred 94 of the 105 mentally retarded residents to other institutions[7] and they recognize that the actions outlined by the monitor are required by the Decree,[8] but assert that they have not complied for two reasons: First, the Legislature did not share the view that the surgical unit and general services positions were 45% protected and anticipated that the savings achieved by the closing of Rochester would be due in part to salary savings generated by these vacant positions. Second, the transfer of direct care positions has been delayed and will be implemented only in part because of a lack of funds.

The statute enacted by the Legislature provided that "Direct care positions shall be transferred to other state hospitals in the same proportion as patients are transferred." Minn. Laws 1981, ch. 360, §2, subd. 5. There is no indication in the law itself that 45% of the GS and surgical unit positions are or are not to be transferred, but defendants are correct that a worksheet prepared by a Senate staffer and general floor debate in the Senate alluding to the savings that would be achieved by closing the hospital seem to indicate that the Legislature did not contemplate the transfer of any percentage of these paragraph 39 positions to other institutions.

Although the closing of Rochester was not anticipated, and hence no explicit provision in the Decree was designed to address what is required when an

institution is closed, the intent of paragraphs 14, 37, and 39 was to decrease the population in the State hospitals and maintain the current staffing levels in order to achieve the ultimate staffing ratios provided for in paragraphs 46 through 55. The monitor's finding of noncompliance as a result of the closing of Rochester State Hospital and the defendants' failure to transfer any protected positions to maintain the current staffing levels is consistent with the Decree's purpose, and the Court finds that the monitor's finding is justified. As with the funding cuts described above, the 94 transferred residents cannot simply be absorbed at other institutions without an impact on the quality of care. Moreover, defendants' present failure to transfer any positions amounts to a unilateral change in the requirements of the Decree. Defendants' internal memoranda clearly demonstrate that they themselves recognize the actions required for compliance are different from the actions they have taken. The Court thus has no doubt that the monitor's determination of noncompliance should be adopted.

C. The Commissioner's September 30, 1981 hiring freeze on paragraph 39 positions without 45% of these positions being transferred

By memorandum dated September 30, 1981, the Commissioner of Welfare imposed a moratorium on hiring and expenditures for both the Department of Welfare's Central Office and the institutions that excluded "direct patient care positions at the institutions." Dennis Boland, Director of the Residential Facilities Division of the Mental Health Bureau, indicated in a subsequent memorandum that the hospital administrators could fill these direct care positions if such action were within the parameters of the salary spending plan. Mr. Boland also indicated that general support positions directly involved within the MR program and under the Welsch v. Noot agreement could be filled in the same way as direct care positions, provided that he be sent a written statement regarding the decision to fill such a position.

The Department has no plans to transfer 45% of the positions "frozen" under the Commissioner's order to paragraph 37 positions, as paragraph 39 requires. The monitor concluded that holding the GS positions open without this 45% transfer was a violation of the Decree. Defendants argue that the creation of vacancies among general support positions that serve other disability groups generates savings without affecting the service level rendered to the plaintiffs. Defendants urge that the Commissioner's directive is clear and because it does not affect positions related to the mentally retarded it is not a

violation of the Decree.

Implementing the directive may not be as clear as defendants suggest, however, and the 45% figure was chosen for paragraph 39 positions precisely to avoid having to determine position by position whether the laundry worker or cook or maintenance person served the mentally retarded or other groups. Most likely, there will be some overlap. Although these general services positions may have less direct contact with the residents, their services are certainly important in maintaining the quality of care that the residents are entitled to under the Decree. If defendants could effectively demonstrate that no protected positions are affected, the Court could more easily find that the Commissioner's hiring freeze absent a 45% transfer of the "frozen" positions was consistent with the Decree's requirements. Plaintiffs are not required to determine whether frozen GS positions are MR-related or not: the language of the Decree presents a compromise by both parties that is not being honored in this instance by the defendants. The Court thus finds that the September 30, 1981, hiring freeze absent the 45% transfer of positions violates paragraph 39 of the Decree.

D. Funding the salaries of five Central Office employees through the State hospital salary accounts

Paragraph 28 of the Decree requires the employment of three persons to provide technical assistance to further the development of community-based residences for mentally retarded persons. The three TAP staff perform these functions out of the Central Office, but were employed in positions included in the Cambridge State Hospital salary roster and were paid out of the Cambridge State Hospital salary account. This method of funding was also used to pay the salary of Al Beck, an employee of the Department of Public Welfare who works in the Central Office. Mr. Beck's position has been included in the Cambridge State Hospital salary roster for eight years. In a recent staff allocation memorandum,[9] Mr. Boland indicated that these four positions would now be taken out of the Cambridge account and funds for these salaries would be "taken off the top" of the MR AID account. Mr. Boland stated in his memorandum that he would decide later to which facility these individuals will be assigned "for administrative purposes." Alice Huston, an employee of the Department of Public Welfare who also works in the Central Office, has been employed in a position assigned to Fergus Falls State Hospital and paid out of the Fergus Falls general support salary account. Her position has been funded this way for the past three years.

The monitor found that the defendants could not pay these individuals from the State hospital salary accounts and comply with the Decree unless sufficient funds are placed in the accounts to cover all the protected positions and the salaries of these five people. The Court agrees. Their jobs are related to serving the mentally retarded, but they do not perform functions that hospital staff do, which is what paragraphs 37 and 39 are designed to provide for. Although defendants have no separate appropriation for TAP staff and the other two positions were funded from the hospital salary accounts prior to the Consent Decree, the Decree does not contemplate the diversion of any protected positions from the State hospital staff to serve other functions. Both the Cambridge monitor and the present monitor have concluded that unless funds in addition to those needed to pay the salaries of the protected positions are provided, a violation of the Decree has occurred. The Court agrees that the effect of paying these five individuals from the State hospital salary accounts has effectively reduced the complement of protected positions in the State hospitals. Such a result necessarily means that the defendants have failed to comply with the Decree.

II. REMEDY

The Court has thus determined for the four reasons discussed above that the defendants are in violation of paragraphs 37 and 39 of the Decree. The more difficult question that must now be addressed involves the appropriate remedy for this noncompliance. Plaintiffs seek a detailed Order from this Court ensuring full funding for all paragraph 37 and 39 positions, establishing a Resident Enrichment Program funded out of the balance of the fully funded paragraph 37 accounts that was unexpended in fiscal year 1982 because of noncompliance, and requiring the defendants to guarantee at the beginning of each fiscal year the funds necessary for the required positions and to justify any reductions before they are imposed. Plaintiffs acknowledge that their proposed relief will require the expenditure of funds not appropriated for State hospital salaries, and request the Court to include in its Order a provision that State law cannot be enforced or followed if such law impedes compliance with the Decree.

Defendants oppose plaintiffs' proposal, and assert that the Court should treat defendants' response to plaintiffs' motion as a motion to modify the Decree to conform to the defendants' abilities to comply, given the State's present financial condition. The Court rejects this option. Defendants are always free to move the Court to modify the Decree and to present evidence as to the changed conditions that justify such a modification. Until this Court has the

opportunity to consider fully such a motion, the defendants are bound by the terms of the Decree they signed less than two years ago.

This Court also rejects the defendants' assertion that the violations are insubstantial when viewed in the context of the Decree as a whole. To the contrary, the Court finds that adequate staffing is of vital importance to the plaintiff class, as it directly affects the defendants' ability to achieve the goals of the Decree for those residents who remain at the State hospitals. Restraints, seclusion, and drugs are less frequently necessary as a means to control behavior, and habilitation plans can be meaningfully implemented only when adequate staff is provided.[10] The Court believes that a reduction in staff of the magnitude present here--in the absence of any evidence to the contrary--presents a serious violation that substantially affects the quality of care received by the plaintiff class. Such noncompliance must be remedied.

Defendants object to the particular relief proposed by the plaintiffs because in their view it is not carefully tailored to fit the violation. Defendants claim that plaintiffs' proposed relief is much too expansive because the defendants have acted in good faith and have made great strides toward meeting the needs of the mentally retarded, no constitutional violation is present, and the Court should not become so involved in the detailed fiscal and operational affairs of the State. Defendants urge the Court to consider the financial problems that existed in fiscal year 1982--the Legislature was required to cope with serious deficits and several downward revisions of the State's revenue projections. Finally, defendants challenge the requested relief on the grounds that it violates the Eleventh Amendment and is questionable in light of recent caselaw. These contentions merit close examination.

Defendants claim that full funding for every position and the Resident Enrichment Program violate the Eleventh Amendment because the Legislature normally funds the salary accounts with the expectation that there will be some vacancies and the accounts will fund some nonsalary items. Plaintiffs suggest that if the Eleventh Amendment bars the proposed Resident Enrichment Program, defendants could simply avoid compliance altogether by never spending the required amounts. Further, plaintiffs contend that the substance of the present award is enforcement of the prospective relief contained in the Consent Decree.

Absent a waiver of sovereign immunity, the Eleventh Amendment prohibits a retroactive award of monetary relief against the State. See Edelman v. Jordan, 415 U.S. 651, 666 n.11, 668, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Prospective

injunctive relief is, of course, not prohibited by the Eleventh Amendment. See Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). As the Court in Edelman recognized, "the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex Parte Young will not in many instances be that between day and night," 415 U.S. at 667, but the Court finds that the relief sought by the plaintiffs in this case is not barred by the Amendment. Insofar as the defendants entered into the Decree, which required the State to provide salaries for the staff positions protected by paragraphs 37 and 39, they have waived Eleventh Amendment immunity. See New York State Ass'n for Retarded Children, Inc. v. Carey, 596 F.2d 27, 39 (2d Cir.), cert. denied, 444 U.S. 836, 100 S.Ct. 70, 62 L.Ed. 46 (1979). This immunity is only waived insofar as necessary to implement the Decree, however, and the Court agrees with the defendants that full funding for all positions may not be required. The relief ordered by the Court thus grants the defendants the opportunity to establish the amount necessary to comply fully with the Decree by filling all protected positions. If defendants can demonstrate that less than full funding is required, then such an amount will be sufficient for compliance.

The question of whether the Resident Enrichment Program is a damage award that would not ensure compliance in the future but rather would be compensation for past deprivation is a close one. Compare Miener v. State of Missouri, et al, No. 80-1971 (8th Cir., filed February 4, 1982)(compensatory educational services for handicapped person barred by Eleventh Amendment). Although the Court believes that such relief is not barred, it need not reach this question because it has determined that it will not require the expenditure of fiscal year 1982 funds for this purpose. The Court recognizes that the defendants are attempting to serve the needs of the mentally retarded in a time of fiscal austerity, and although plaintiffs suggest that Commissioner Noot has "consistently and deliberately chosen to comply with directives other than those given by this Court on matters directly related to the issues before this Court," the Court cannot find willful misconduct or bad faith on the record presently before it. Moreover, the Court approves of the progress that has been made in improving the conditions in the State hospitals and in providing community-based residences for the plaintiff class. Although defendants' good faith and compliance with other portions of the Decree do not relieve them of their responsibility under paragraphs 37 and 39, the Court will adopt the defendants' suggestion to take

their good faith and financial problems into account in fashioning the relief for their present noncompliance and will only enforce prospective standards.

Defendants suggest that even plaintiffs' prospective relief is inappropriate because there is no constitutional violation present: the violations found as to the Cambridge subclass in 1974 and 1975 cannot be the basis for relief for the 80% of the class who have never had a factual determination made of their conditions. The 1980 Decree was approved by this Court prior to any formal adjudication of unconstitutional conditions at the remaining State hospitals --only the plaintiffs had presented their case in the 1980 trial--but the Court cannot so easily separate the constitutional claims determined in the Cambridge phase of the litigation and the present violations of the 1980 Consent Decree. Defendants negotiated the paragraph 37 and 39 standards as a continuation of the Cambridge litigation, which included the Court's determination of plaintiff class members' constitutional rights.[11] The Court determined that adequate staffing was critical to the achievement of plaintiffs' constitutional rights, and the Eighth Circuit agreed that these rights must be protected. See Welsch v. Likins, 550 F.2d 1122, 1132 (8th Cir. 1977). In the Court's view, the Decree's staffing standards are thus firmly grounded in and flow directly from plaintiffs' constitutional rights, and because fulfillment of these standards is necessary to protect plaintiffs' rights, the Court will order nothing less than full compliance.

In framing an appropriate remedy, the Court must, however, consider the interests of State authorities in managing their own affairs. See Milliken v. Bradley, 433 U.S. 267, 280-81, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). The Court appreciates that this interest is strong, and is mindful of the Eighth Circuit's opinion that "[p]rimarily, it is the function of the state to determine . . . what kind of a hospital system it is going to operate." Welsch v. Likins, 550 F.2d at 1132. Plaintiffs' request that the Court order the expenditure of unappropriated funds notwithstanding any provisions of State law raises fundamental questions that require the Court to consider carefully the State's interest in controlling its fisc and the plaintiff class members' right to adequate care and habilitation. Plaintiffs request in this regard must not be granted unless "the case is clear and the need for federal interference urgent." Welsch v. Likins, 550 F.2d at 1131.

Nonetheless, the Court rejects the defendants' contention that in light of recent caselaw it is powerless to order that actions be taken to achieve

compliance because the Legislature controls the appropriation of funds. Defendants' strongest argument is that New York State Ass'n for Retarded Children, Inc. v. Carey[12] controls this case and precludes any action that would supersede State law, but the Carey case is distinguishable from the present case on several grounds. The defendants' duty under the Consent Decree is different from the Governor's duty in Carey: as this Court has determined, the staffing requirements under the 1980 Consent Decree are absolute. In Carey, the Governor's duty under the Decree was to submit to the Legislature proposals to fund the Review Panel--defendants' duty here is not discharged by the submission of a proposal to the Governor for his submission to the Legislature. Although the Court has found that the defendants have acted in good faith in their attempts to provide adequate staffing in accordance with paragraphs 37 and 39 of the Decree, the Court is not prepared to find that the defendants have done all they could to comply. More importantly, the staffing standards in the present case are directly related to "positive, constitutional requirements" that "cannot be ignored," Welsch v. Likins, 550 F.2d at 1132, whereas in Carey the Court could find no basis for assuming that the State's refusal to fund the Review Panel was related to constitutional violations at Willowbrook.

In short, the Court is asked to enforce provisions of a Decree that embodies critical, constitutionally-based standards that the defendants have already determined they will be bound by. In this situation, it appears that the need for the Court to become involved is urgent and compelling: the defendants must provide the staff that they agreed to provide or the Decree would be meaningless. The Court agrees with the defendants that State law need not be enjoined at this time, however, because if, as defendants assert, they have acted in good faith on the belief that their actions were reasonable, prudent, and not in violation of the Decree, they should now willingly take the steps necessary to comply. See Welsch v. Likins, 550 F.2d at 1132. The Court is aware of the financial problems that the State has been experiencing, and can appreciate the difficulty that defendants have encountered in allocating fewer dollars than they might otherwise have had at their disposal. Because of defendants' lack of bad faith and in consideration of all the circumstances presented, the Court will only order the defendants to maintain present funding for fiscal year 1982 and to meet the standards established in this Court's Order by the beginning of fiscal year 1983. The Court trusts that with the resolve and cooperation of the legislative and executive branches of State government, the defendants will fulfill their obligation to ensure that

plaintiff class members receive the humane and adequate treatment which they are constitutionally entitled to and which the defendants in 1980 agreed to provide.

The defendants and the State have recognized that other legal obligations must be honored despite financial constraints,[13] and unless modified, the Court views the Decree as a binding legal obligation that must be honored as well. The Court expects nothing less from the defendants, and lest there be any doubt, the Court will not hesitate to use its full power to ensure compliance should further relief become necessary because the defendants have again failed to live up to their commitment to the plaintiff class.

ORDER

Accordingly, on the basis of the record and proceedings herein, the defendant Commissioner of Public Welfare, the defendant Chief Executive Officers of the several State hospitals involved in this action, their successors in office, all persons in active concert or participation with them, including, but not limited to, the defendant Acting Commissioner of Finance and the defendant Commissioner of Administration and their successors in office are hereby ordered to take the following actions:

PART I

Because the defendants have asserted that full funding for every protected position for the entire fiscal year for all salary related expenses need not be allocated to the paragraph 37 and 39 salary accounts on the first day of each fiscal year in order to achieve compliance with paragraphs 37 and 39 of the Consent Decree,

IT IS ORDERED THAT:

1. The defendants shall submit to plaintiffs and the monitor any evidence or data that support the above contention within thirty (30) days of the date of this Order.

2. The plaintiffs shall have fifteen (15) days from the receipt of the defendants' submission to respond to the defendants' data and to present their own evidence of the level of funding that is required to achieve compliance with paragraphs 37 and 39 of the Decree.

3. The monitor shall hold a hearing and within thirty (30) days of the hearing shall make Findings of Fact regarding:

(a) the level of funding necessary for full compliance with paragraph 37 of the Decree, as required pursuant to paragraphs 12 and 13 of this Order;

(b) the level of funding necessary for full compliance with paragraph 39 of the Decree, as required pursuant to paragraph 14 of this Order.

4. The defendants shall bear the burden of proving that less than full funding as indicated in the Total Salary Spending Plan or as indicated by the average per position cost of $18,500 used by the Department or Public Welfare is required.

5. Either party may, within thirty (30) days of the issuance of the monitor's findings, move this Court for the amendment or modification of those findings. Absent such a motion, the monitor's findings shall be automatically incorporated into this Order.

PART II

6. No further reductions shall be made in fiscal year 1982 in the sums allocated to paragraph 37 salary accounts except

(a) in accordance with specific authorization in this Order, or

(b) in accordance with transfers of positions and funding from one paragraph 37 salary roster and salary account to another paragraph 37 salary roster and account, or

(c) in such amount as this Court determines, upon a motion made by defendants no later than May 1, 1982, could reasonably be expected to be unspent from salary related expenditures for a particular salary account in fiscal year 1982 as a result of normal turnover and attrition in circumstances in which the authority to hire was clear, full funding for all positions was available, and appropriate use was made of over-complement positions and multi-filled positions.

7. No further reduction shall be made in fiscal year 1982 in the sums allocated to paragraph 39 salary accounts, excluding those at Rochester State Hospital except

(a) in accordance with specific authorization in this Order, or

(b) in accordance with transfers of funds and positions from one of these salary accounts and the corresponding salary roster to another paragraph 39 salary account, or

(c) in accordance with transfers of 45% of funds and positions from one of these salary accounts and the corresponding salary roster to a paragraph 37 salary account and its corresponding salary roster, or

(d) in such amount as this Court determines, upon a motion made by the defendants no later than May 1, 1982, could reasonably be expected to be unspent for salary related expenditures for a particular salary account in fiscal year 1982 as a result of normal turnover and attrition in circumstances in which the authority to hire was clear, full funding for all positions was available, and appropriate use was made of over-complement positions and multi-filled positions.

8. The defendants may provide for payment of workers and unemployment compensation, patient pay, and consultants' services from paragraph 39 salary accounts.

PART III

On or before the first day of fiscal year 1983,

9. There shall be transferred from the MR salary account roster at Rochester State Hospital to the paragraph 37 salary rosters of the other State hospitals 125.0 full-time-equivalent positions, which may be divided among the several State hospitals in such manner and as the Commissioner of Public Welfare deems appropriate.

10. There shall be added to the paragraph 37 salary rosters of the State hospitals a total of 24.6 full-time-equivalent positions, which may be divided among the several State hospitals in such a manner as the Commissioner of Public Welfare deems appropriate, which represents 45% of the total number of positions eliminated as a result of closing the Surgical Unit at Rochester State Hospital.

11. There shall be transferred to the paragraph 37 salary rosters of the State hospitals a total of 84.3 full-time-equivalent positions, which may be divided among the several State hospitals in such manner as the Commissioner of Public Welfare deems appropriate, which represents 45% of the total number of positions on the GS and the outside hospital care salary roster eliminated as a result of closing Rochester State Hospital.

12. There shall be allocated to the paragraph 37 salary accounts for each State hospital receiving the positions transferred pursuant to paragraphs 9 through 11 *a sum of money sufficient to ensure compliance as determined by the* Court or the monitor pursuant to Part I of this Order.

PART IV

On or before the first day of fiscal year 1983 and on or before the first day of every fiscal year thereafter until June 30, 1987, unless otherwise

ordered by this Court:

13. There shall be allocated to the paragraph 37 salary accounts sufficient funds to ensure compliance with paragraph 37 and paragraph 39 of the Decree as determined by the Court or the monitor pursuant to Part I of this Order.

14. There shall be allocated to paragraph 39 salary accounts of each State hospital sufficient funds to ensure compliance with paragraph 39 of the Decree as determined by the Court or the monitor pursuant to Part I of this Order.

15. In the event that the full amount of money required for compliance for a portion of a fiscal year cannot be determined at the time the allocation is made pursuant to paragraphs 13 and 14 of this Order, for reasons such as the lack of data to calculate cost of living allowances or the lack of resolution of a labor contract negotiation, as soon as the information is available there shall be allocated to the paragraph 37 and paragraph 39 salary accounts sufficient funds to provide for payment of these additional expenses for all positions then required by paragraphs 37 and 39 to be on the paragraph 37 and 39 salary rosters.

16. The allocation of funds to the paragraph 37 and 39 salary accounts pursuant to paragraphs 13 through 15 of this Order shall not be reduced except as provided in this Order.

17. Funds allocated to paragraph 37 and 39 salary accounts pursuant to paragraphs 13 through 15 of this Order shall be used solely to pay salary related expenses for persons employed in State complement positions or over-complement positions (including student workers but excluding patient pay) except that

(a) subject to paragraph 61 of the Consent Decree, payment may be made from the appropriate salary account for consultants who provide professional services of the type required to meet the professional staffing requirements of paragraphs 46, 47, 48, 49, 51, 53, 55, and 67o(2)(b) of the Consent Decree, and

(b) this Order shall not govern the use of any portion of these accounts that is available to be used for other purposes as determined by the Commissioner of Public Welfare pursuant to paragraph 22 of this Order.

18. In calculating actual expenditure costs for the MR and GS salary accounts at any State hospital pursuant to this Order, the defendants shall not include any salary related expenditures for Al Beck, Alice Huston, or persons filling the positions required by paragraph 28 of the Consent Decree. Salary related expenses for these five individuals shall not be paid out of any paragraph 37 or paragraph 39 salary account unless there is allocated to those salary accounts an additional sum equal to the sum necessary for such payments. Nothing in this Order shall be construed to relieve the defendant Commissioner of the obligation to implement paragraphs 28 through 33 of the Consent Decree.

19. The Commissioner of Public Welfare and the Chief Executive Officers shall hold none of the positions on the paragraph 37 and 39 salary rosters open for the purpose of reducing expenditures except

(a) positions in these categories may be held open by a Chief Executive Officer in an earlier part of a fiscal year in order to meet seasonal staffing needs or other programmatic needs later in the fiscal year, and

(b) positions on the paragraph 39 salary rosters may be maintained open or eliminated so long as there is a reallocation to paragraph 37 salary accounts of 45% of the paragraph 39 positions and salary account funds which will not be spent.

20. The amount of money allocated to a paragraph 37 salary account may be reduced in any amount so long as an equal amount of money and positions are transferred to another paragraph 37 salary account and roster.

21. The amount of money allocated to any paragraph 39 salary account may be reduced in any amount so long as an equal amount of money and positions are transferred to another paragraph 39 salary account and roster.

22. The amount of money allocated to any paragraph 37 or paragraph 39 salary account may be reduced or spent for an alternative purpose other than payment of salary related expenses only if compliance with paragraphs 37 and 39 as determined by this Order would not be affected.

PART V.

DEFINITIONS

23. "Consent Decree" -- the Consent Decree in this action approved by the Court on September 15, 1980.

24. "Chief Executive Officers" -- the defendant Chief Executive Officers of Brainerd State Hospital, Cambridge State Hospital, Faribault State Hospital, Fergus Falls State Hospital, Moose Lake State Hospital, Rochester State Hospital, St. Peter State Hospital, and Willmar State Hospital.

25. "State hospitals" -- those institutions listed in paragraph 24 of this Order. Anoka State Hospital is not included in this term as used in this Order.

26. "Salary roster" -- the listing of State hospital positions together with the classification and payment for those positions of the type submitted to the Court pursuant to paragraph 40 of the Consent Decree.

27. "MR salary roster," "GS salary roster," "regional laundry salary roster" -- those portions of the salary roster for each State hospital listing positions in those respective categories.

28. "Paragraph 37 salary roster" -- those salary rosters which formed the basis for the 2,915.93 full-time-equivalent positions identified in paragraph 37 and Appendix A to the Consent Decree. Those salary rosters include all the MR salary rosters, the salary roster for the Minnesota Learning Center at Brainerd State Hospital, all but ten percent of the positions on the GS salary roster at Faribault State Hospital, and, by reason of paragraph 59 of the Consent Decree, all of the GS salary roster and the regional laundry salary roster at Cambridge State Hospital.

29. "Paragraph 39 salary roster" -- those salary rosters which formed the basis for the 1,204.55 full-time-equivalent positions identified in paragraph 39 and Appendix A to the Consent Decree. Those salary rosters include the GS salary rosters at all the State hospitals (with the exception of those GS salary rosters included in whole or in part within the definition of "paragraph 37 salary roster"), the regional laundry salary roster (excluding that roster at Cambridge State Hospital), Rochester surgical unit salary roster, and the Rochester outside hospital care salary roster.

30. "Salary accounts" -- the accounts established by the Minnesota Department of Finance to which funds are allocated for the purpose of payment of salaries, fringe benefits, other salary related expenditures, workers' compensation and unemployment compensation expenses, and consultants' services. The terms "MR salary account," "GS salary account," and the like refer to the salary accounts corresponding to the salary rosters referred to in paragraph 27 of this Order.

31. "Paragraph 37 salary accounts" -- the salary accounts for paragraph 37 salary rosters.

32. "Paragraph 39 salary accounts" -- the salary accounts for paragraph 39 salary rosters.

33. "Salary related expenditures" or "salary related expenses" -- those costs which made up the "Total Salary Spending Plan" in column 6 of the Salary Spending Plan received as Exhibit 19, a copy of which is attached to this Order as Appendix A--salaries and fringe benefits as indicated in column 1 of that document, career ladder costs (column 2), shift differential costs (column 3), holiday and regular overtime (column 4), and health testing costs (column 5). Specifically not included within this term are those costs indicated in columns 10 through 12 of that document.

PART VI

34. Plaintiffs are entitled to reasonable attorneys' fees, which shall be determined after a hearing on a motion which shall be made within thirty (30) days of the date of this Order.

Judgment will be entered as ordered.

March 23, 1982.

/s/ Earl R. Larson
United States Senior District Judge

FOOTNOTES

1. Unless otherwise indicated, the facts included in this opinion are contained in the Statement of Undisputed Facts agreed to by both parties November 3, 1981.

2. See Plaintiffs' Exhibits for motion to be heard January 15, 1982, Welsch v. Noot, No. 4-72-Civ. 451 (D. Minn.), Exhibit 19, page 2 col. 6, line 29 (Total Hospitals), attached as Appendix A to this Order.

3. The Department of Public Welfare has used this figure in internal documents when calculating the average per position cost. See Undisputed Statement of Facts ¶25.

4. Findings, Conclusions and Recommendations ¶4D.1, December 7, 1981.

5. Rochester vacancies are excluded. Figures are computed from Defendants' Exhibits for motion to be heard January 15, 1982, Welsch v. Noot, No. 4-72-Civ. 451 (D. Minn.), Exhibit 254 & Plaintiffs' Exhibits, id., Exhibit 210.

6. Findings, Conclusions and Recommendations ¶4D.3, December 7, 1981.

7. Presumably the remaining 11 residents are in community-based facilities.

8. See, e.g., Undisputed Statement of Facts ¶¶ 36, 38, 39.

9. Plaintiffs' Exhibits for motion to be heard January 15, 1982, Welsch v. Noot, No. 4-72-Civ. 451 (D. Minn.), Exhibit 255, Staff Allocation Memorandum, 1/5/82 at page 2.

10. See Welsch v. Likins, No. 4-72-Civ. 451, slip op. at 11, 20, 24-25 (D. Minn. October 1, 1974); Welsch v. Likins, 373 F.Supp. 487, 503 (D. Minn. 1974).

11. See Welsch v. Likins, 373 F. Supp. at 499, 502-03.

12. 631 F.2d 162 (2d Cir. 1980). In Carey, the Legislature refused to fund a Review Panel ordered by the district court to oversee a Consent Decree entered into in 1975 to improve conditions for the 5200 mentally retarded residents at Willowbrook. The Governor was a party to the litigation and requested funding from the Legislature for the seven member panel. The Legislature refused to appropriate any money for this purpose, specifically deleting the Governor's request for funds. Upon plaintiffs' motion, the district court entered an order that found the Governor in contempt unless the funding was provided, but, on appeal, the Second Circuit reversed this contempt order. The Decree contained a provision that expressly stated that the defendants would take the actions required by the Decree within the framework of the State's constitution and laws and subject to any legislative approval that might be required. See id. at 167.

13. See, e.g., Undisputed Statement of Facts ¶7c; Plaintiffs' Exhibits for motion to be heard January 15, 1982, Welsch v. Noot, No. 4-72-Civ. 451 (D. Minn.), Exhibit 18 at page 3; Exhibit 126 at pages 15, 24, 36; Exhibit 127.