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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Patricia Welsch, et al.,

Plaintiffs,

v. No. 4-72 Civil 451

Arthur Noot, et al.,

Defendants.

Following a careful review of the entire record in this matter, I herewith adopt in total the Findings, Conclusions and Recommendations submitted on April 7, 1982 by Frank J. Madden, Hearing Officer, regarding the above matter.

Respectfully submitted,

Lyle D. Wray

Dated this 7th day of April, 1982

Lyle D. Wray, Ph.D
Court Monitor

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Patricia Welsch, et al.,

Plaintiffs,

v.

Arthur E. Noot, et al.,

Defendants.

Paragraph 26 Hearing

FINDINGS OF FACT AND RECOMMENDATIONS

No. 4-72 Civil 451

On February 5, 1982, an evidentiary hearing was held before Frank J. Madden, Hearing Officer appointed by Lyle D. Wray, Court Monitor, pursuant to paragraph 95(g) of the Consent Decree. Lyle Wray was also present at the hearing. Luther A. Granquist, 222 Grain Exchange Building, 323 Fourth Avenue South, Minneapolis, Minnesota, appeared as counsel on behalf of the plaintiffs, and P. Kenneth Kohnstamm, Special Assistant Attorney General, 515 Transportation Building, St. Paul, Minnesota appeared on behalf of the defendants.

STATEMENT OF ISSUES

The issues for determination are as follows:

1. Whether or not the matter is within the jurisdiction of the Court Monitor pursuant to the Consent Decree.

2. Whether a reduction in developmental achievement center (DAC) services for Bruce L. (hereinafter "plaintiff") from five (5) days a week to three (3) days a week constitutes a violation of paragraph 26 of the Consent Decree.

FINDINGS OF FACT

Procedural Background

1. On October 6, 1981, the Court Monitor made an Initial Determination of non-compliance in accordance with paragraph 95(e) of the Consent Decree approved by the Court on September 5, 1980. That notice to Commissioner Noot stated that the Court Monitor had initially determined non-compliance because

"[p]rovision had not been made for the next year to provide plaintiff class member Bruce [L.] (discharged March 30, 1981 from Brainerd State Hospital) with the developmental program specified in his discharge plan and the plan developed by the case manager of the servicing county (Paragraph 26)." (Exhibit 1). Attached to this Notice when it was served upon the Commissioner were the discharge plan for Bruce L. prepared pursuant to paragraph 22 of the Decree (Exhibit 4) and a letter from Stearns County dated September 3, 1981 (Exhibit 11, Appendix H) which stated a limitation on funding for DAC services for Bruce L. for the one-year period commencing October 1, 1981. The Court Monitor made this initial determination following a visit to Worthington, Minnesota on September 21, 1981.

2. The initial determination requested a response from the Commissioner with such material and information as he might deem appropriate by October 12, 1981. No response was made to that request.

3. The Court Monitor conferred with counsel for the parties on October 26, 1981 and November 19, 1981. No resolution of the issue was reached.

4. On November 25, 1981 the Court Monitor issued a formal notice that an evidentiary hearing would be held pursuant to paragraph 95(g). Alternative dates for that hearing were scheduled depending upon how Stearns County provided for payment. A hearing date on January 15, 1982 was contemplated if Stearns County provided for full payment of a full time DAC program for Bruce L. until such time as the total sum allocated for calendar year 1982 was spent. The Court Monitor and the parties proceeded on the assumption that this payment procedure would be followed. The hearing date was postponed to February 5, 1982 because the Court scheduled a hearing on the staffing issues involving paragraphs 37 and 39 of the Decree for January 15th.

5. Fifteen exhibits were submitted by the plaintiffs

and received at the hearing. Additional exhibits were submitted by both parties subsequent to the hearing. Commissioner Noot was the only witness called by the plaintiffs. The defendant called no witnesses.

Background Information on Bruce L.

6. Bruce L. was born on July 28, 1941, in St. Cloud, Minnesota. There were complications at and shortly after birth. Reference is made in Brainerd State Hospital records to a mechanical injury at birth. He was committed as "feeble-minded" by Stearns County Probate Court on March 26, 1946. He remained in his parental home until admitted to Faribault State Hospital on June 20, 1947. He remained in the state hospital system for the next 34 years. In January, 1963 he was transferred to Cambridge State Hospital. Early in 1975 he was transferred to Brainerd State Hospital. (Exhibit 11, Appendix D).

7. The diagnosis of Bruce L. at Brainerd State Hospital included microcephaly, profound level of mental retardation, visual handicaps, major motor seizures, spasticity, and quadreplegia - severe. (Exhibit 13, Appendix F). He is non-ambulatory, but mobile. He has his own wheelchair which he propels slowly. (Exhibit 11, Appendix D).

8. Although diagnosed as profoundly retarded on the basis of two standardized tests, Bruce L. was noted at Brainerd to be able to speak a number of words clearly and to speak in short sentences meaningfully. (Exhibit 11, Appendix E). He had a number of self-care skills and was described as a friendly, although sometimes shy, person. He was described as very frightened by physical exams and shots. (Exhibit 11, Appendix D). The Brainerd State Hospital psychologist's report of October, 1980 stated that "[because of problems of spastic quadreplegia, poor vision, and limited environmental experience, it is difficult to fully assess Bruce's abilities and potential for further development." (Exhibit 11, Appendix E).

9. In July, 1980 the Brainerd State Hospital social worker prepared a "Referral Summary" on Bruce L. which indicated that the interdisciplinary team had recommended community placement

for Bruce "providing a facility can be located that will meet his physical as well as social needs." That summary indicated that to date there had been a scarcity of such facilities, but that Bruce "would benefit from a small group of peers and staff as well as from increased community involvement." (Exhibit 11, Appendix D).

Placement of Bruce L.

10. In March, 1981, Brainerd State Hospital staff and the social worker from Stearns County who serves as his case manager investigated the possibility of a community placement for Bruce. On March 16, 1981, the Brainerd State Hospital social worker, the living unit supervisor for Bruce at Brainerd, the Stearns County social worker, and Bruce visited Ridgewood group home in Worthington, Minnesota. Two days later, the Brainerd State Hospital social worker wrote to Bruce's parents (who presently reside in Sun City, Arizona) to recommend placement for Bruce L. at Ridgewood. In that letter she noted that the DAC in Worthington was then not accessible to persons in wheelchairs, but that a new building was under construction. The letter to Bruce L.'s parents stated that until the new building was completed, Bruce would receive a home-bound program for six hours a day, Monday through Friday. Thereafter, Bruce will be attending the new center six hours per day. The social workers indicated that a decision on discharge would be made at a meeting to be held on March 26, 1981, to be attended by Brainerd staff and the Stearns County social worker. (Exhibit 13, Appendix E).

11. The decision was made at this meeting on March 26 that Bruce L. would be provisionally discharged to Ridgewood on March 30, 1981. In accordance with paragraph 22 of the Consent Decree a discharge plan was developed which was signed by the Brainerd and Stearns County social workers, by the administrator of Project Independence-Ridgewood, and by Bruce L.'s parents. (Exhibit 4). That plan included the following provisions:

> Bruce will receive six hours per day, Monday-Friday, homebound developmental programming through the

> Developmental Achievement Center until such time as their new barrier free center is in operation; Bruce will then attend the Center six hours per day, Monday-Friday. Both Ridgewood and the Developmental Achievement Center will also provide recreational activities and encourage Bruce to participate.
>
> ....
>
> The provisional discharge may be revoked if substantial evidence is provided by the county social service agency that any of the following conditions are present and cannot be resolved in a more appropriate manner: (1) Bruce's health has deteriorated to the point where it is medically inadvisable for him to continue in the facility, (2) Bruce does not have the physical stamina to attend and participate in day programming for six hours a day, or (3) Ridgewood is unable to meet Bruce's needs for physical therapy or day programming.

12. Ridgewood group home is a barrier free Class B facility which is a part of Project Independence in Worthington. It is located in a residential area on the south side of Worthington, Minnesota. Ridgewood provides residential services for 15 men and women. (Exhibit 4; Court Monitor's observations on site visit). Ridgewood is licensed pursuant to DPW Rule 34. (Exhibit 11, Appendix A).

13. On March 25, 1981, the Stearns County social worker wrote to a social worker at the Nobles County Family Service Agency in Worthington to refer Bruce L. to that agency for services. (Exhibit 11, Appendix G). The Nobles County social worker, on May 14, 1981, participated in an annual team meeting for Bruce L. held May 14, 1981. (Exhibit 13, Appendix D). Thereafter, she prepared the post-placement evaluation required by paragraph 22(e) of the Consent Decree. In that evaluation she referred to the DAC program requirement and indicated that the homebound services were being provided. She reported that Bruce had some difficulties making the adjustment to Ridgewood. She concluded that the program and placement at Ridgewood were appropriate. (Exhibit 11, Appendix A).

Developments in Provision of DAC Services for Bruce L.

14. The initial homebound DAC services for Bruce L. required by his discharge plan were provided by assignment of one Nobles County DAC staff person to work with Bruce L. and one other Ridgewood resident on a full time (six hour a day,

five days a week) basis. For Bruce L., these services commenced March 31, 1981 and continued to the end of the year when the new building was completed. (Exhibit 12, paragraph 3).

15. This DAC program for Bruce L. was established in response to a referral from Stearns County to the Nobles County DAC. (Exhibit 12, Appendix A). In that referral letter, Stearns County requested the Nobles County DAC to provide a copy of their contract and placement agreement. A placement agreement was subsequently executed by both the Nobles County DAC and Stearns County which provided for payment for these services at a per diem rate of $23.60 commencing March 31, 1981. (Exhibit 12, Appendix B).

16. By letter dated September 3, 1981 and directed both to the Nobles County DAC and the Nobles County Family Service Agency, Stearns County stated as follows with regard to payment for DAC services for Bruce L.:

> Effective 10-1-81 Stearns County Social Services has allocated $50,346.00 through the Title XX Program to fund DAC services. Each mentally retarded adult client has been allocated an amount not to exceed $2,517.30 during the time period 10-1-81 through 9-30-82.
>
> We would ask that host county social services agencies and DAC staff review current DAC utilization by residents of Stearns County and design programs which best meet their need within the fiscal limits above. We would ask that consideration be given to spreading access to DAC services over the twelve month time frame.
>
> Given the present funding limitations, this letter serves as notice that any existing purchase of service contracts are void and must be renegotiated within the above limitations. While we regret any hardships this action may cause, we are hopeful it will not be necessary to impose any further reductions. (Exhibit 11, Appendix B; Exhibit 12, Appendix C).

17. The Nobles County DAC Board met on September 16, 1981 to discuss this matter. (The Nobles County DAC is a non-profit corporation established in 1963. It operates under the general direction of a Board of Directors which consists both of public officials such as a county commissioner, the director of the county family service agency, and a school superintendent and of other interested citizens and parents.) (Exhibit 12, paragraph 1). At that Board meeting the policy

was adopted "that all participants of our D.A.C. program will have the opportunity for the same number of days of service as stated in our host County contract." (Exhibit 12, Appendix D). The contract between Nobles County and the Nobles County DAC provides for 215 service days a year. (Exhibit 12, paragraph 6).

18. At the direction of the Nobles County DAC Board, the director of the DAC informed Stearns County of this action by a letter dated September 17, 1981. (Exhibit 12, paragraph 7 and Appendix E).

19. After these actions had been taken by Stearns County and the Nobles County DAC, the Court Monitor made a site visit to Worthington which led to the initial determination of noncompliance. (Exhibit 1).

20. In mid October, 1981, Stearns County modified the position stated in the earlier letter of September 3, 1981. The amount of funding was increased to $2,983.47 and allocated for calendar year 1982. This action was reflected in letters dated October 16, 1981 which read as follows:

> During the early part of September, a letter was sent to you regarding the maximum amount of funding each Stearns County resident was eligible to receive for DAC services. We wish to inform you of two changes. First, the funding period has been changed from 10-1-81 through 9-30-82 to 1-1-82 through 12-31-82. The second change is an individual allocation of up to $2,987.41 per person for the above time period.
>
> Again, we ask your assistance in developing program plans within the current fiscal limitations.
>
> Thank you for your time and consideration.
> (Exhibit 11, Appendix J; Exhibit 12, Appendix F).

21. Stearns County paid the established per diem for services for Bruce L. at the Nobles County DAC for calendar year 1981. (Exhibit 12, paragraph 9).

22. The per diem rate in 1982 for DAC services at the Nobles County DAC is $20.43. That rate is determined by taking the total budgeted expenditures for the DAC for 1982 and dividing that amount by 5,375 -- the number of service units to be provided. The number of service units is determined by multiplying the estimated number of participants (25) times

the number of program days (215). (Exhibit 12, paragraph 11).

23. The director of the Nobles County DAC states that the DAC will not be able to meet the budgeted expenditures for 1982 unless the per diem rate is paid for every participant for 215 days. (Exhibit 12, paragraph 13). This statement has not been disputed.

24. The Nobles County DAC submitted a DAC placement agreement to Stearns County which provided for services for Bruce L. in 1982 for 215 days of service at a per diem rate of $20.43. As of February 3, 1982 this contract had not been returned to the Nobles County DAC. (Exhibit 12, paragraph 10).

25. As of February 3, 1982, it was the understanding of both the Nobles County social worker and the director of the Nobles County DAC that Stearns County would pay for full time DAC services for Bruce L. in 1982 until the sum of $2,983.47 mentioned in the letter of October 17, 1981 had been expended. (Exhibit 11, paragraph 9; Exhibit 12, paragraph 10).

26. The maximum annual payment of $2,983.47 would provide for 146 days of DAC service for Bruce L. Since the Nobles County DAC has no classes in July, payment on a full time basis could provide service until mid September, 1982. (Exhibit 12, paragraphs 12 and 14).

27. Prior to the February 5, 1982 hearing, the director of the Nobles County DAC stated that the DAC will not provide services for Bruce L. when no payment is made for the per diem cost. (Exhibit 12, paragraph 14). The Nobles County social worker also recognized that the DAC took that position. (Exhibit 11, paragraph 10).

28. By letter dated February 5, 1982, Stearns County informed Bruce L. and the Nobles County DAC that "effective immediately all out-of-county Purchase of Service contract payments for such services will be pro-rated in the amount of $250.00 per month." (Exhibits 23 and 23A).

29. By letter to Stearns County dated February 17, 1982, the Nobles County DAC stated that the conditions established

by Stearns County were unacceptable. (Exhibit 16). Reference was made in this letter to the policy of the Nobles County DAC as stated in the letter from the DAC to Stearns County of September 17, 1981. (Exhibit 12, Appendix E). The Nobles County DAC concluded that "effective March 17, 1982, we will no longer provide D.A.C. services to either Bruce [L.] ... or ... [another Stearns County resident]." (Exhibit 16).

30. By letter dated February 19, 1982, from the director of the Ridgewood group home to Stearns County, Ridgewood indicated its intention to demit Bruce L. and the other Stearns County resident from the group home on March 17, 1982. (Exhibit 17).

31. A motion was brought by the plaintiffs before the United States District Court on March 3, 1982 seeking an order directing the Commissioner of Public Welfare to take whatever action might be necessary to maintain the current DAC placement for Bruce L. pending the outcome of this hearing and any Court action which might follow.

32. At the hearing on that Motion counsel for the Commissioner indicated that contact had been made with Stearns County officials (two of whom were present in the courtroom) to seek to resolve the matter. The Court deferred a ruling on the motion.

33. By letter dated March 8, 1982, counsel for the Commissioner informed the Court that "Defendant Noot has now been informed by Stearns County officials that they will continue to fully fund Bruce's DAC placement through May 15, 1982 or whenever this Court rules on plaintiffs' paragraph 26 compliance issue, whichever comes first." (Exhibit 26). A similar statement was made in a letter from Stearns County to the Nobles County DAC dated March 11, 1982. (Exhibit 27).

Need for and Appropriateness of Full Time DAC Services for Bruce L.

34. As has been noted above (paragraphs 10 and 11), in the discharge planning process for Bruce L. the provision of DAC services for him for six hours a day, five days a week

was specified. The discharge plan also provided that Bruce L.'s provisional discharge could be revoked if he did not have the physical stamina to participate in day programming for six hours a day or if Bruce L.'s needs for day programming could not be met by Ridgewood. (Exhibit 4). Full discharge was given on September 30, 1981. (Exhibit 11, Appendix I). The Nobles County servicing social worker stated on February 3, 1982 that the determination of Bruce L.'s needs made in the discharge planning process in March, 1981 "has been confirmed by the events of the last ten months." (Exhibit 11, paragraph 14). During the more than four months since the Court Monitor first raised the question of non-compliance on this issue, there has been no suggestion made by anyone that the program needs of Bruce L. were not correctly determined in his discharge plan.

35. The psychological evaluation conducted at Brainerd State Hospital in October, 1980 which determined, on the basis of standardized testing instruments, that Bruce L. had a very low I.Q., were made subject to the qualification, stated in the "Interpretation" section of that report, that "it is difficult to fully assess Bruce's abilities and potential for further development" because of his spastic quadreplegia, poor vision, and "limited environmental experience." (Exhibit 11, Appendix E). The problem of his quadreplegia remains and likely will remain for his life. Successful efforts have been made since his placement at Ridgewood to correct his visual deficits. (See Exhibit 15, paragraph 2; Exhibit 11, paragraph 13). Community placement for Bruce L. will, in itself, provide a broader environmental experience. In the opinion of the program coordinator at Ridgewood, a structured introduction to new experiences is important for Bruce L., who is fearful of new situations and changes in routine. (Exhibit 13, paragraph 8). In the team planning for Bruce L.'s discharge and in the planning for his program at Ridgewood, the team members concluded that a full time DAC program was needed for that purpose. (Exhibit 4; Exhibit 13, Appendices A and D).

Facts Relating to the Jurisdictional Issue Raised by the Commissioner

36. At the hearing held February 5, 1982, the defendant Commissioner questioned whether the proper procedure to be followed in consideration of the actions taken threatening continuation of Bruce L.'s DAC program was the procedure presently underway before the Court Monitor. He raised that question at the outset in response to a question posed by counsel for the plaintiffs. (Tr. 14-15). The Commissioner's counsel then went on to note that the normal statutory appeal process was set forth in Minn. Stat. §256.045. (Tr. 16).

37. After further discussion of the issue (Tr. 18-23), the hearing officer stated that the hearing should proceed and that the issue could be addressed in briefs submitted after the hearing. (Tr. 23). The issue was mentioned again by the Commissioner in his testimony. (Tr. 28, 32 and 50). Subsequent to the hearing defendant Noot submitted a Memorandum in Support of Dismissal of Paragraph 26 Compliance Proceedings for Want of Jurisdiction dated February 19, 1982.

38. The Court Monitor was not aware of any jurisdictional question or objection to the procedure initiated on October 6, 1981 until the Commissioner raised the question at the hearing.

39. The Court Monitor, in his Notice of Initial Determination, (Exhibit 1), requested a response to that Notice by October 12, 1981. None was provided. The only information provided in writing to the Court Monitor prior to the hearing related to Stearns County payment plans. (Exhibit 3). The question of jurisdiction was not raised at either of the conferences on this issue held on October 26, 1981 and November 19, 1981.

40. The Commissioner of Public Welfare testified at the hearing on February 5, 1982, that he assumed he received a copy of the Court Monitor's Notice of Initial Determination. (Exhibit 1). (Tr. 13). He testified that he "must have" received a copy of the Notice of Evidentiary Hearing. (Exhibit

2). (Tr. 13). He did not know why no response was made to the Notice of Initial Determination by October 12, 1981. (Tr. 13-14). He testified that he "always" directs the Department to follow up with matters which relate to compliance with the Consent Decree. (Tr. 14).

41. At no time prior to February 3, 1982 did anyone from the central office of the Department of Public Welfare contact the Nobles County social worker providing case management services for Bruce L. about the actions taken by Stearns County or the implications of that action for Bruce L. That social worker knew of no such request for similar information from any other employee of the Nobles County Family Service Agency. Since she had the direct case management responsibility for Bruce L., the Court Monitor concludes that it is highly probable that no request for information was made by DPW central office personnel of anyone in the Nobles County Family Service Agency.

42. The Director of the Nobles County DAC had received two or three telephone calls from Ardo Wrobel, the Director of the Mental Retardation Division of the Department of Public Welfare, prior to February 3, 1982 regarding the status of Stearns County payments for Bruce L.'s DAC services but no inquiries had been made up to that time from Mr. Wrobel or anyone else at the central office of DPW regarding the effect on Bruce L. of any termination of DAC services. (Exhibit 12, paragraph 15).

43. Some contact was made by DPW personnel prior to and after the February 5, 1982, hearing with Stearns County personnel regarding budget matters. (See Exhibits 3, 20, 21 and 22). Nothing in the record, both the testimony and the exhibits, indicates that DPW personnel made any effort from October 6, 1981, to the present time to investigate the programmatic ramifications for Bruce L. of the issue raised by the Court Monitor.

44. The Commissioner testified that both informal and formal "involvement" by DPW staff has been used in the past

"many times" to resolve particular disputes involving local governments and the private sector. (Tr. 77). Whatever his general directives to DPW staff with regard to issues arising under the Consent Decree may have been (see Tr. 14), the Court Monitor finds that no effort was made by the Commissioner or any of his staff to resolve the issue raised by the Court Monitor in the October 6, 1981 Notice by any means, formal, informal or otherwise.

45. The Commissioner and his attorney have taken the position that resolution of the "grievance" posed by Bruce L.'s case should be made through the appeal process provided by Minn. Stat. §256.045. (See paragraphs 36 and 37 above). Specific reference was made to the Lindstrom decision. (See Tr. 15; Exhibit 6).

46. The record contains three other recent decisions by the Commissioner on issues related to DAC services. (Exhibits 10, 18 and 19). In one of these cases, Exhibit 10, the Commissioner reversed county agency action terminating DAC services because the DAC client was over age 62 and living in a nursing home. However, in that decision the Commissioner added the note that "[c]ategorical limitations otherwise consistent with statute and rule may be implemented when budgeting considerations so require." (Exhibit 10, last page). In the most recent appeals decision, in which the defendant Commissioner approved a reduction in DAC services from five to three days a week, the conclusions approved by the Commissioner on February 17, 1982, include the following statements:

> It is not disputed that Petitioner has need for DAC services. The appeal issue presented is whether the Agency acted within its authority when because of its fiscal limitations it moved to reduce its provision of DAC services to him and to other persons to three days a week.
>
> ....
>
> The Bulletin [Instructional Bulletin #81-35, Exhibit B in the record here] is clear that if individualized assessment shows a person to be in need of DAC services, then such services are to be provided but within the fiscal resources available to the county board, and further that (in relevant part):

> '... If fiscal restraints make it impossible for the county to meet the level of services in its need assessment, a county board may modify or reduce the level of developmental achievement center services in a manner which is least detrimental to the individual client served. These modifications may result in a reduction of the number of days of service...'
>
> From the testimony and exhibits it is clear that Roseau County is now in unusual, difficult fiscal circumstances for provisions of social services. Because of such circumstances a number of social services were altogether eliminated from provision; DAC services were not. The reduction of DAC services to three days a week from the circumstances presented is a reasonable limitation of provision, and such limitation is consistent with the Commissioner's instruction that if reductions are made they be made in a manner which is least detrimental to the clients served. Given its fiscal circumstances, we regard the Agency's action under review here as a careful and prudent observance of the Commissioner's such instruction. The Agency will be affirmed. (Exhibit 19, pages 6-7).

47. Given the Commissioner's stated position in Exhibit 5 that he intends to apply Instructional Bulletin #81-35 and the Lindstrom decision in his administration of paragraph 26, and given the appeals decisions in the present record, the Court Monitor finds that it is likely that the Commissioner, should he be considering the case of Bruce L. in the administrative appeal process, would uphold the action by Stearns County.

DISCUSSION, CONCLUSIONS AND RECOMMENDATIONS

The threshold issue for determination is whether or not the Consent Decree confers upon the Court Monitor and his duly appointed hearing officer authority to consider the merits of the paragraph 26 compliance issues with respect to plaintiff. At the evidentiary hearing on February 5, 1982, the defendant raised the jurisdictional issue and subsequently submitted a memorandum in support of its motion to dismiss the compliance proceedings for want of jurisdiction.

In support of its position that there is no jurisdiction pursuant to the Consent Decree, the defendant cites the recent district court decision in Lindstrom v. State of Minnesota and Kittson County Welfare Board, 9th J.D. (December 10, 1981), and Minn. Stat. §§252.21 and 252.24, subd. 1 for the proposition that the counties' obligation to provide DAC services is limited by the amount of appropriations available. In addition, the defendant contends that the Commissioner's role with rspect to DAC services is strictly supervisory as provided by Minn. Stat. §252.24 and that since this statutory provision is incorporated into the Consent Decree, the Commissioner's responsibilities remain supervisory and were not modified or increased by virtue of the Consent Decree. Finally, the defendant relies upon paragraph 27 which provides for a social service appeal of proposed placement decisions pursuant to Minn. Stat. §256.045. For these reasons defendant submits that the appropriate forum for plaintiff's complaint is that made available by state law, namely an appeal through the normal administrative and judicial channels pursuant to Minn. Stat. §256.045.

The plaintiff contends that paragraph 95 of the Consent Decree clearly confers upon the Court Monitor authority to hear and consider the merits of the paragraph 26 compliance issues presented at the evidentiary hearing and that such authority is neither limited nor modified by paragraph 16 as contended by the defendant or by any other provisions of the Consent Decree.

The jurisdictional issue raised by the defendant must be resolved in accordance with the provisions of the Consent Decree setting forth the Court Monitor's responsibilities and power. The specific provisions relating to the Monitor's rights and responsibilities are set forth in Part VIII, paragraphs 91 through 98. Specifically, paragraph 95 provides in pertinent part as follows:

> When approved by the Court, the monitor shall be appointed to perform the following functions in his or her professional capacity as a neutral officer of the Court:
>
> a. The monitor shall review the extent to which the defendants have complied with this Decree.
>
> ....
>
> d. The monitor shall receive and investigate reports of alleged non-compliance with the provisions of this Decree from counsel for the plaintiffs and from other interested persons. If the monitor has reason to believe that the defendants have not complied with this Decree, the procedures established in subparagraphs (e) through (h) below shall be followed.

Paragraphs 95(e) through (g) referred to above specify what procedures the Court Monitor must follow if the Court Monitor determines that a provision of the Decree is not being followed. The Notice given (Exhibit 1), the conferences held, and the evidentiary hearing on February 5, 1982, were conducted in accordance with these procedures.

It is clear from paragraph 95 of the Decree that when an issue of compliance is raised with respect to any matter set forth in the Decree, the Monitor has both the right and the responsibility to investigate such issue in accordance with the procedures provided in paragraphs 95(e) through (g). Therefore, it is necessary to determine whether the reduction from five days to three days of DAC services provided to the plaintiff is a matter within the scope of the Decree.

Paragraph 26 of the Decree provides as follows:

> All persons discharged from state institutions shall be provided with appropriate educational, developmental or work programs, such as public school, developmental achievement programs, work activity, sheltered work, or competitive employment.

The issue presented at the February 5, 1982 evidentiary hearing falls squarely within the mandates of paragraph 26 since it

relates to the services provided to the plaintiff in a developmental achievement center upon his discharge from Brainerd State Hospital.

The issue is not removed from the Monitor's jurisdiction by paragraph 27 of the Consent Decree. Specifically, paragraph 27 relates to an appeal procedure pursuant to Minn. Stat. §256.045 regarding proposed placement decisions. In contrast, the present proceedings relate to a placement plan which was agreed upon and ultimately adopted and implemented. Subsequent to its implementation the plan was modified, and not until such modification did an issue arise with respect to the placement plan.

It must be emphasized that one of the primary purposes of the Consent Decree is to provide for less restrictive community placement of 800 mentally retarded persons in the state hospitals. Moreover, the Consent Decree confers upon the Monitor broad powers to insure compliance with the provisions of the Decree. In light of these considerations, to remove from the Monitor authority to review all disputes arising with respect to community placement plans which have been adopted and implemented would virtually nullify the investigative authority of the Monitor as set forth in paragraph 95 and would effectively undermine the force of the Decree as well as its purpose and the parties' intent.

On the basis of the foregoing, the hearing officer concludes that the Consent Decree confers upon the Court Monitor the authority to make recommendations regarding the merits of the issues presented at the evidentiary hearing regarding paragraph 26.

Plaintiff asserts that the Commissioner has failed to comply with the Consent Decree by failing to assure that appropriate DAC services will be provided to Bruce L. pursuant to paragraph 26 of the Consent Decree. It is the contention of the plaintiff that the responsiblity to assure appropriate DAC services is one imposed directly upon the defendant Commissioner rather than one for which the counties are to be

held solely accountable with the Commissioner acting merely in a supervisory capacity. While recognizing that some of the Consent Decree provisions incorporate statutes relating to the Commissioner's authority and role with respect to the providing of social services to mentally retarded persons, plaintiff contends that since there is no such reference to state statutes in paragraph 26, the Commissioner's authority is not limited to that granted by statute and rule. Rather, as provided by paragraph 1 of the Consent Decree, the Commissioner has direct responsibility and authority to assure that appropriate DAC services are provided to the plaintiff.

In addition, plaintiff contends that the appropriate DAC program for Bruce L. under paragraph 26 of the Consent Decree is that prepared by the interdisciplinary team at Brainerd State Hospital, the community residential facility representative, and the case manager from the county responsible for placement. This plan was prepared in compliance with paragraph 22 of the Consent Decree and provides for DAC services for Bruce L. six hours a day, five days a week. (Exhibit 4). Plaintiff contends that the threatened reduction of DAC services from five days to three days constitutes a failure of the defendant Commissioner to comply with paragraph 26 of the Decree. Finally, plaintiffs contend that the defendant Commissioner has acted in bad faith by failing to assure compliance with paragraph 26.

The defendant contends that a review of the Consent Decree as a whole and the negotiations which led to it demonstrates that the Decree incorporates existing state law and regulations as to the division of responsibilities between the Commissioner and the counties, and that pursuant to this division of responsibilities the Commissioner's role is merely supervisory. Therefore, the responsibility for determining whether Bruce L. will receive five or three days of DAC services per week falls upon the counties, and not the Commissioner, and falls within those decisions "otherwise specified" as the responsibility of someone other than the Commissioner.

(Consent Decree, paragraph 1).

The defendant further contends that the reduction made in DAC services for Bruce L. by Stearns County was a result of a budget deficit and was precisely the type of action upheld by the district court in Lindstrom v. State of Minnesota and Kittson County Welfare Board. (Exhibit 7). It is the contention of the defendant that since the court in Lindstrom held that the counties' obligation to provide DAC services is limited to the appropriations available and that since the Commissioner has provided policy guidelines to the counties to the effect that DAC services may be reduced but not eliminated, the Commissioner has fulfilled his supervisory responsibilities and has therefore complied with the Consent Decree. Finally, defendant contends that in light of the Consent Decree's incorporation by reference of existing statutory law and the Lindstrom decision, it has acted in good faith with respect to the DAC services provided to Bruce L.

In resolving the paragraph 26 compliance issues raised at the evidentiary hearing, the recent district court decision in Lindstrom cannot be ignored. The facts of the Lindstrom case are closely related to those in the present proceedings. Specifically, faced with a budget deficit Kittson County notified the counties hosting DAC services for its mentally retarded residents that expenditures for DAC services would be reduced from five to three days per week. The court upheld the actions of Kittson County and the Commissioner in reducing DAC services by stating the following:

> Without extending this opinion, we hold that the Commissioner's interpretation of D.P.W. Rules 160 and 185 is not clearly erroneous; in fact, it was mandated by the statutes quoted above. To permit the servicing or host county to foist a budget deficit upon Kittson County simply because five days of DAC care is preferable to three days is both unrealistic and unacceptable. Were we faced with complete elimination of the DAC programs for appellants, our decision would, obviously, be different. We note that all American citizens, including those physically or mentally handicapped, might well expect some changes in the services which have been, in the past, taken for granted. Kittson County's reaction to its impending deficit was logical and reasonable under the circumstances. (Exhibit 7, page 6).

In reaching this conclusion the court relied upon Minn. Stat. §§252.21 and 252.24, subd. 1 which provide that counties are authorized to make grants to developmental achievement centers for the mentally retarded, provided such grants are "within the limits of money appropriated."

Based on Minnesota statutory and case law it is clear that counties have authority to reduce DAC services to their mentally retarded residents in order to keep the costs within the limits of the appropriations available for such purposes. However, as noted in the Lindstrom decision, the counties may not engage in wholesale elimination of DAC programs. (Exhibit 7, page 6). This later conclusion prohibiting the wholesale elimination of DAC programs is evident from the mandates of paragraph 26 of the Consent Decree and apparent from the review of the intent of the Consent Decree as a whole.

While paragraph 26 is unequivocal with respect to requireing that programs be provided to all persons discharged from state institutions, it provides only subjective guidance as to the extent of the services and programs which must be provided. Specifically, paragraph 26 requires that "appropriate" DAC services must be provided. Clearly, paragraph 26 envisions an individualized determination of the services to be provided to each discharged person. When construed in the context of the Consent Decree as a whole, it is apparent that what constitutes "appropriate" DAC services must be determined in light of the needs of the individual and not on the basis of the appropriations available to the county responsible for the community placement. More specifically, while the county may retain the legal right to reduce DAC programming on an aggregate basis within the county pursuant to Lindstrom, such authority cannot be utilized as a means to detrimentally impact and undermine the fundamental tenets of the Consent Decree.

Plaintiff contends that the appropriate level of DAC services is clear in the present matter based on the discharge plan prepared by the interdisciplinary team at Brainerd State

Hospital, the community residential facility representative and the case manager from the county responsible for placement. The defendant, on the other hand, contends that while five days of DAC services may be preferable in the instant case, there is no evidence conclusively establishing that three days a week of DAC services would not be "appropriate." The contentions of both parties must be considered in establishing a standard which enables the counties to operate within the limits of their legal authority while at the same time insuring compliance with paragraph 26 of the Consent Decree.

In determining the appropriate level of DAC services the first consideration should be the discharge plan. The plaintiff's discharge plan was prepared by the interdisciplinary team at Brainerd State Hospital, the representative of the community residential facility, and the case manager from Stearns County, the county responsible for placement. (Exhibit 4). A post placement evaluation was conducted by the Nobles County social worker approximately six weeks after plaintiff was discharged from Brainerd State Hospital, and continued placement at Ridgewood with full time DAC services was recommended at that time. (Exhibit 11, Appendix A). The discharge plan and subsequent evaluation were prepared and conducted in accordance with paragraph 22 of the Consent Decree and therefore should be accorded substantial weight in determining what constitutes an appropriate level of DAC services for plaintiff. However, notwithstanding the careful planning and evaluation of plaintiff's community placement needs, the decisions and recommendations of those involved in this process are not absolute and inflexible. Therefore, the service level specified in plaintiff's discharge plan should not at this juncture be adjudged to be the only means of determining plaintiff's appropriate DAC service needs.

In a case such as this one where the care and services provided to an individual are in issue, the initial burden rests with the plaintiff to show first that there has been a change in the scope and level of services specified in the

discharge plan and the subsequent plans adopted by interdisciplinary teams regarding the individual, and second that such change in the services was made for reasons other than an assessment of the individual's needs. Since at present there is no specific mechanism provided in the Decree for the plaintiffs to directly acquire knowledge of a change in such scope and level of services of an individual class member, it is apparent that the Commissioner in his supervisory function should provide such notification to the plaintiff by the establishment of a timely and reliable reporting mechanism. Once the plaintiff has acquired such information and challenged such modification meeting the burdens set forth above, the defendant must insure that the county responsible for community placement is using all available funding appropriated for purposes of providing DAC services and that the individual class member is continuing to receive DAC services which are "appropriate" as mandated by paragraph 26 of the Consent Decree.

The determination of what constitutes "appropriate" services pursuant to paragraph 26 must, as stated previously, be made on an individual basis. Based on a review of the record in the present matter, there is not sufficient evidence from which such an individualized determination can be made. Specifically, while Exhibits 11 through 14 indicate that plaintiff has made improvements since his discharge plan was implemented, there is no evidence in the record from which a determination can be made as to whether such improvement would cease or continue with three days as opposed to five days of DAC services. Therefore, it is incumbent upon the defendant to demonstrate that Stearns County is using all available funds appropriated for purposes of providing DAC services and furthermore that the reduction in DAC services from five days a week to three days a week maintains the services at a level "appropriate" for the plaintiff.

The plaintiff has also contended that the defendant Commissioner has acted in bad faith with respect to the issues

raised at the evidentiary hearing. This contention is expressly rejected. First, in the Lindstrom case the court held that the Commissioner's approval of Kittson County's reduction in DAC services was neither arbitrary nor unlawful. Second, the Commissioner has clearly indicated in Instructional Bulletin #81-35 and his subsequent clarification thereof that counties may not eliminate DAC services, that they may not plan a budget short-fall to avoid their responsibility to provide DAC services and that in the event a county reduces DAC services it must demonstrate a bona fide financial crisis. (Exhibits 8 and 9). The foregoing demonstrates that the defendant Commissioner has acted reasonably to insure that DAC services are provided by the counties in accordance with the defendant's interpretation of paragraph 26 of the Consent Decree.

On the basis of the above noted Findings of Fact, Discussion and Conclusions, the hearing officer makes the following specific recommendations regarding the application of the above noted criteria for the resolution of disputes where a change has been made in the scope and level of DAC services provided to an individual class member pursuant to paragraph 26 of the Consent Decree in the present matter:

1. The record presently establishes that a change has been made in the discharge plan of Bruce L. and that the County of Stearns has decreased DAC programming from five to three days. In addition, it is uncontroverted that the change in the DAC programming for Bruce L. was not made on the basis of an assessment of individual needs, but rather on the basis of county budget constraints. Therefore, the burden in the present matter shifts to the defendant to demonstrate that the County of Stearns is using all available funding appropriated for purposes of providing DAC services and to demonstrate that the resulting DAC services are "appropriate" as mandated by paragraph 26 of the Consent Decree.

2. In order to expeditiously resolve the present matter, the Monitor shall retain jurisdiction and direct the defendant to provide to the Monitor and the plaintiff within ten (10)

days of the receipt of this decision evidence relating to the criteria as set forth in paragraph 1 above.

3. Within five (5) days thereafter the Monitor shall then schedule a further hearing, if necessary, to resolve this matter.

Dated this 7th day
of April, 1982

Frank J. Madden
Hearing Officer
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