IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN B., CARRIE G., JOSHUA M., MEAGAN A., and ERICA A. by their next friend, L.A.; DUSTIN P. by his next friend, Linda C.; BAYLI S. by her next friend, C.W.; JAMES D. by his next friend, Susan H.; ELSIE H. by her next friend, Stacy Miller; JULIAN C. by his next friend, Shawn C.; TROY D. by his next friend, T.W.; RAY M. by his next friend, P.D.; ROSCOE W. by his next friend, B.W.; WILLIAM B. by his next friend, K.B.; JACOB R. by his next friend, Kim R.; JUSTIN S. by his next friend, Diane P.; ESTEL W. by his next friend, E.D.; individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	**No. 3:98-0168** **Judge Haynes**
v.	)	
NANCY MENKE, Commissioner, Tennessee Department of Health; THERESA CLARKE, Assistant Commissioner, Bureau of TennCare; GEORGE HATTAWAY, Commissioner, Tennessee Department of Children's Services,	)	
Defendants.	)	

MONITORS' REPORT: INTRODUCTION AND SUMMARY CONCLUSIONS

The Monitors submit this report expressing their considered judgment as to the status of the State's compliance with the Consent Decree and suggesting ways in which the Court might view the record in this case. In preparing this document and in making their recommendations, the Monitors are conscious of several factors.

First, and foremost, there is an enormous amount of information available regarding EPSDT within the state of Tennessee, much of which the Monitors have not seen. Given the fact that the parties continue to engage in discovery disputes, and, clearly, that all information has not yet been exchanged, it was impossible for the Monitors to have viewed every document with potential evidentiary relevance.

Second, even that information which is available at this time is of an overwhelming volume. Consequently, the Monitors have attempted to pare down the information and to view that information which they have deemed to be most important in addressing the fundamental issues in the case. Moreover, to ensure that they were not missing a crucial piece of information, the Monitors established the process in this case by which they provided drafts of their individual reports to the parties, asked the parties to respond to those drafts and then met with the parties to ascertain whether the Monitors had missed important information in their reports.

Third, the Monitors have attempted to gain an overview of the system at a time when the landscape continues to change. Throughout the time during which the Monitors have been involved in the process, the State has continued to implement new programs and procedures which, in turn, are questioned by the Plaintiffs. Obviously, the Monitors' attempts to capture the system in freeze-frame are not consistent with the rapidly changing features of that system.

Finally, the Monitors have attempted to keep their focus on providing the Court with a report that will aid the Court in narrowing the issues in the case and better understanding the factual disputes. The Monitors remain conscious that their role is not as fact-finders or as Court-appointed experts, but merely as facilitators for the Court.

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A word on process: Each of the Monitors was responsible for one of the main pieces of the Report: Outreach - Robert Smith; Screening - Leilani Boulware; Diagnosis and Treatment - Susan Kay; Coordination - Alex Hurder; and DCS - Michael Passino. The Monitor assigned to a particular section drafted that portion of the Report, having reviewed the documents and met with persons who had information relevant to that topic. But rather than maintain a process that resulted in five individual reports without opportunity for collaboration, the Monitors met frequently to discuss the issues pervading the controversy and to assist each other in better understanding the totality of the situation. Each of the areas is inextricably meshed with the others. Each section of the Report, while drafted by one Monitor, was greatly influenced by the observations of all the Monitors. Consequently, this Introduction represents the considered judgment of all of the Monitors, each having considered his or her own areas and then looking together at the entire litigation.

The Monitors have two major recommendations relative to this litigation, both of which transcend their individual areas of investigation. These recommendations are based on their conclusion that the State Defendants have failed to establish current, substantial compliance with the Consent Decree. While each of the Monitors' individual reports notes areas in which compliance has likely been attained, the ultimate conclusion shared by the Monitors is that the State has failed to establish that it is in compliance with many substantial provisions of the Consent Decree.

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First, as to the children who are in DCS custody[1] and thus members of the subclass, the Monitors believe that this portion of the lawsuit should be segregated from the remainder. The Department of Children's Services is currently under court order in the *Brian A.* case[2] to improve services to children in its custody. The Department, in coordination with other state agencies, is working towards a system of evaluating and improving the system so that the issues raised in that litigation can be resolved and so that court jurisdiction can be ended. While the Monitors are not suggesting that the DCS components of this lawsuit be attached to the *Brian A.* case, they are suggesting that the subclass of children in DCS custody be cut out from the other members of the class and be dealt with separately. While *Brian A.* does not hold the solution to the physical and mental health needs of children in custody, the remedial forces of that litigation have produced a paradigm for measuring and improving the provision of EPSDT services to children in the custody of the Department of Children's Services.[3] Because the *Brian A.* class and the subclass here overlap, they have common interests without regard to the difference in the claims being pursued.

Through a settlement agreement and in response to a threatened contempt petition, the Department of Children's Services has reordered its treatment of children in its custody. The plan prepared in response to *Brian A.* – the *Path To Excellence* – seeks to enhance and improve DCS's ability to better serve the well being of children and their

[1] The Monitors very consciously only suggest segregating out the children actually in DCS custody, not those at risk of entering custody. Those "at risk" of entering DCS custody are not part of the *Brian A.* class and thus not subject to those processes. Moreover, those "at risk" are very hard to distinguish from other children with serious behavioral or physical health issues.

[2] *Brian A. v. Donald Sunquist*, No. 3-00-0445 (M.D. Tenn., Nashville Div.) (Campbell, J.). *Brian A.* represents a class of all foster children who are or will be in the legal custody of DCS, a class that includes approximately **eighty** percent of the children in the **D**epartment's custody**.**

[3] It is the Monitors' conclusion that – in general – the physical health of children in DCS custody is being properly provided. However, the behavioral health needs of those children have not been met in compliance with the Consent Decree.

families and has resulted in restructuring the Department; increasing and enhancing staff qualifications; extensive staff training; the development and improvement of resources outside the Department; the improvement of communications inside the Department and with service providers; the detailed, written articulation of goals, responsibilities and time lines; the enhancement of information systems relating to children and services; and the creation of extensive measures that enable the Department not only to monitor the well being of individual children but to evaluate the systems
that serve them. While these changes will not and cannot be implemented overnight, while the *Brian A*. monitors report that there have not yet been measurable improvements in individual outcomes for children resulting from these changes, and while there are a number of indications that the problems that have plagued the Department at the time when the *John B*. Consent Decree was entered continue, the simple fact is that these changes reflect an e*xtraordinary* commitment to children. The *Brian A.* model – involving evaluation, self-critique and measurable outcomes – could equally be utilized to evaluate and monitor the provision of behavioral health to children in the State's custody.

The Monitors' second recommendation would affect the children who are not in the custody of DCS. As to these children - indeed the much larger portion of the class - the Monitors recognize the State Defendants' resistance to ongoing and continuing judicial monitoring of the TennCare system. The Monitors understand and recognize that such resistance flows in part from theoretical and prudential concerns about the exercise of judicial power with respect to sovereign states, as well as from express and implied understandings in the Consent Decree (e.g., Paragraph 33 states that "authority for

initiating and developing policy belongs to the state.") Too, the Monitors recognize that the State's resistance is rooted in the practical consideration that litigation can thwart innovation and ingenuity in the complex enterprise of effectively delivering health care to children. On the other hand, each of these concerns was extant when the parties entered into the Consent Decree in order to correct agreed and serious problems with EPSDT compliance. Because the Monitors believe that the Defendants have not established that they are in current, substantial compliance with the terms of the Consent Decree in this case, the proper issue is how best to obtain and maintain compliance with the parties' agreement while being mindful of the Defendants' legitimate and important concerns. Indeed, a review of the Consent Decree reveals that the parties did not contemplate that the Defendants' management of the TennCare children be supervised and monitored in perpetuity, a proposition with which the Monitors, and, presumably the Court, strongly agree.

What is needed in this case is an exit strategy. The State needs to provide the Court and the Plaintiffs with a plan and with measures by which it can establish movement towards compliance with the Consent Decree. The standards and benchmarks leading to full compliance must be of the State's own devising. The language and spirit of the Consent Decree mandate the proactive delivery of healthcare by the State, which necessitates a comprehensive plan across all departments and agencies.[4] This plan must include: standards for access to care within a reasonable time frame; assurance of continuity of care; adequate primary and specialty provider networks; goals and action

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[4] Such a process is explicitly recognized in Paragraph 35 of the Consent Decree, which states:

> The parties have agreed, therefore, on the establishment of a remedial process which recognizes the primacy of the state's authority and responsibility, while giving the plaintiff class a means of evaluating and influencing state policies as they are developed.

plans; and procedures for monitoring and evaluating the quality and appropriateness of care and service and analysis of outcomes to determine whether efforts are effective.

Notwithstanding this inherent requirement in the Consent Decree itself, the Monitors were struck by the State's complete inability and unwillingness to demonstrate the existence of a comprehensive, on-going plan of action, complete with goals and objectives, and designed to assure compliance with the Consent Decree. The State can document a history of devised and then rejected plans, some prepared by the Plaintiffs, some by the Special Master, some in collaboration, but all discarded before they could become realized. The Defendants now rely on the "State of Tennessee Programmatic Process Response [t]o the John B. Consent Decree" (PPR)[5] as their "plan" to achieve compliance. But, they have yet to produce the PPR matrix which is the monitoring and measuring component of that plan. The State Defendants have produced the Consent Decree Grid,[6] which is the foundation of the PPR matrix. Notwithstanding the information provided in the Consent Decree Grid, which identifies much activity on the part of the State to address the requirements of the Consent Decree, the Consent Decree Grid does not fully address what the Consent Decree appears to anticipate is necessary: a comprehensive plan of action to achieve goals and objectives, monitoring of activities, analysis of outcomes, and continuous modifications based on such outcomes and analysis. The Consent Decree Grid does indicate much monitoring by the State, some analysis, and even less modification. But this process is limited and does not address the mandated comprehensive nature of the State's requirements under the Decree.

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[5] **Attachment to Decl. of Thomas Catron, Ph.D. (Jan. 31, 2006), entitled *State of Tennessee Programmatic Process Response [t]o the John B. Consent Decree* (Doc. No. 581).**

[6] **Consent Decree Grid, Attachment to Defs. Resp. to Feb. 14, 2006 Order (Doc. No. 624).**

Given this lack of a plan, and, more importantly, the lack of articulable, measurable objectives by which to measure compliance, it is not surprising that altogether too much energy in this lawsuit has been spent reviewing compliance with the screening measures. It is precisely because the screening percentage is the only objective and quantifiable measure within the four corners of the Consent Decree that it has become a battleground for entrenched parties who appear to have lost sight of larger and more important matters at stake.

It appears to the Monitors, therefore, that the parties have been spending a disproportionate amount of time and effort attempting to prove either compliance or lack of compliance with this measure when, in truth and in fact, the screening percentages themselves are of little value in assuring that children in Tennessee receive the health care to which they are entitled under EPSDT.

Screening is only effective if it leads directly to treatment and diagnosis. The more important measure of the efficacy of the Defendants' efforts to comply with Medicaid law is whether children are appropriately diagnosed and treated.

In sum, it is the view of the Monitors that the State Defendants have not provided information sufficient to establish that they can "ensure an effective child health program" as referenced in Paragraph 81 of the Consent Decree and as required by federal law. 42 C.F.R. § 441.61(c). But, cognizant of prudential limitations on on-going supervision of state agencies, the Monitors suggest that the State avail itself of the opportunity to establish an exit strategy that allows them to return to the business of sovereign authority.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Introduction and attached reports have been served on this 26th day of January, 2007, by the Electronic Court Filing System as follows:

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