



U.S. Department of Justice

Civil Rights Division

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Special Litigation Section - PHB
950 Pennsylvania Avenue, NW
Washington, DC 20530

May 19, 2009

By U.S. and Electronic Mail

Fred Cohen, Esq.
Court Monitor
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Re: United States v. Ohio; No. 2:08-cv-475 (S.D. Ohio)

Dear Mr. Cohen:

Thank you for your May 16, 2009 email transmitting the draft First Annual Report ("Report") in S.H. v. Stickrath, No. 2:04-CV-1206. Pursuant to § V.H of the stipulation in United States v. Ohio, No. 2:08-cv-475, we provide the following comments. As we indicated in our letter of May 18, 2009, if we have any further comments, we will provide them to you by no later than May 29, 2009.

As a threshold matter, we are pleased to see the Report's list of important reforms that the State has undertaken and commend the State for these initiatives. As for the status of compliance, we have the following major concerns: (1) the Report essentially defers for one year the Monitor's compliance assessments; (2) the Report does not address the provisions of the U.S. v. Ohio stipulation; and (3) the Report does not follow the U.S. stipulation's monitoring methodology. Consequently, it is not possible to discern the level of compliance with our agreement. In more detail, the Report does not purport to provide an assessment of compliance with either stipulation, instead focusing primarily on foundational work that the State and the Monitoring team have undertaken over the past year and laying out expectations for actual compliance assessments in the coming year. In light of the monitoring timetable in U.S. v. Ohio, which required an immediate commencement of monitoring activities that you have not followed,¹ and in light of high

¹ Specifically, the U.S. v. Ohio Stipulation requires that during the first year, the monitor shall issue a report every six months and that such reports are to be based upon site visits conducted no more than six weeks prior. See § V.H.

- 2 -

profile incidents such as the recent death of an ODYS staff member following an apparent altercation with youth, the assault of another staff member, and an alleged riot, we are in disagreement with this approach and believe more urgency is required. Accordingly, we urge you to follow the monitoring schedule, and the assessment and reporting mechanisms set forth in U.S. v. Ohio.

In past correspondence and in the current Report, you state that these and other criteria in the U.S. v. Ohio stipulation are incorporated into the "more expansive" S.H. agreement. Report, p. 9. Although there are many similarities between the two agreements, there are many areas in which the U.S. v. Ohio stipulation is more stringent. As we noted at the March 27, 2009 meeting, the mental health section includes involuntary medication administration requirements not found in the S.H. stipulation. See III.B.12.a. Additionally, the U.S. v. Ohio stipulation also requires the development and implementation of a system to ensure that youth with mental illness who do not have the adaptive functioning to manage daily living activities are provided appropriate housing. Such a requirement is not found in the S.H. stipulation. Similarly, the use of force section requires that all use of force incidents be investigated, while the S.H. stipulation requires the investigation of such incidents only if they require first-aid treatment. This is not an exhaustive list of distinctions but underscores that the U.S. v. Ohio stipulation requires a distinct assessment. You do not provide that assessment in this Report.²

Separately, we seek, and our stipulation entitles us to, an assessment of the State's progress towards achieving its goals. the Report is addressed almost exclusively to the requirements of S.H. and does not comport with the monitoring methodology

Instead, you unilaterally decided to transfer the requirements of the first year into the second year. "It is the second year of monitoring and visiting each facility twice that will begin to tell the story..." Report, p. 14.

² In this regard, your Report, at 15, reads out of our Stipulation any obligation on the State to provide rehabilitative services. In fact, § III.F of our stipulation provides, "[t]he State shall provide adequate, structured Rehabilitative Services." In the absence of an adequate understanding of our stipulation, it is difficult to monitor compliance with it.

- 3 -

required in the U.S. v. Ohio stipulation.³ The Report contains little objective data that serve as a foundation for the Monitor's assessments. The Report indicates that use of objective data is now in the beginning stages, despite the fact that this process was supposed to have begun a year ago. Again, the U.S. v. Ohio stipulation states unequivocally that objective statistical data shall be collected and analyzed to monitor performance of each substantive provision of the stipulation.⁴ This requirement is also an essential component of the State's development of the capacity to evaluate and maintain its performance after the expiration of the stipulation.

Separately, the Report states, at p. 46, that the Department's input regarding policies and procedures submitted on May 8, 2009, was too late to be reflected in the completed work. We disagree. In October 2008, we and our expert provided technical assistance to the State regarding its draft policies and procedures and identified our basic concerns. At that time the two issues identified were a lack of a training mechanism and the lack of a quality assurance mechanism through which the implementation of the policies and procedures as well as their efficacy could be verified. These issues remain unresolved. The policy concerns we raised in our letter of May 8, 2009 were not new. They were simply a detailed recitation of longstanding, unaddressed concerns.

As to the specific substantiative topics addressed in the Report, we note the following:

A. Protection from Harm

The Protection from Harm section of the U.S. v. Ohio stipulation has various sections, including Use of Force, Seclusion and Restraint. See § III.A. Seclusion and restraints are key provisions in the U.S. v. Ohio stipulation. The State is required to develop and implement policies and procedures that

³ The Stipulation requires that for each substantive provision, the Monitor's reports shall specify the level of compliance, i.e., "noncompliance" or "substantial compliance." § V.H.

⁴ We note, paranthetically, that a data-driven assessment approach has been endorsed by our experts, class counsel, and within the Monitor's expert team. Whether it is too late to adopt such an approach for purposes of the Report, we urge the Monitor to do so going forward.

- 4 -

provide guidance about the use, documentation and administrative review of seclusion. Id. It is not clear from the Report, however, what the status of compliance in this area is, although you identify this as an area that your team has discussed with the State. Report p. 39. We note that you comment that most youth in seclusion spend less than four hours in seclusion. Id. We believe that any time in seclusion in the absence of appropriate policy for implementation, documentation and administrative review is potentially inappropriate.

Similarly, the U.S. v. Ohio stipulation requires that the State develop policies and procedures so that only safe methods are used and only under certain situations. It is not apparent from the Report whether the State has in fact drafted or is otherwise addressing these requirements. We are concerned that the State has not progressed in developing these policies.

B. Mental Health

The U.S. v. Ohio stipulation describes in detail the State's obligations with regard to mental health. Generally, the State is obligated to develop and implement policies that are consistent with generally accepted professional standards with regard to screening, immediate referrals, mental health assessments, treatment service determinations, treatment teams, integrated treatment plans, housing of mentally ill youth, staffing, medication, staff training, suicide prevention and quality assurance/improvement program. These areas are largely unaddressed with any specificity. We note that the Monitor requests permission from the Court to submit a supplemental report on mental health within 120 days, Report p. 87, and urge the Monitor to provide an assessment of compliance as to each of these areas.

C. General Medical Care

With regard to the State's obligations to provide adequate medical care as described in the U.S. v. Ohio we note the Report's paucity of information. The "Medical, Mental Health and Dental," discussion provides two paragraphs to the medical care provided to youth at the facilities. Generally, the U.S. v. Ohio stipulation requires that the youth receive routine, preventative and emergency medical and dental care, that health care assessments are provided in a manner that provides health care confidentiality, that initial health assessment be conducted and that medication for chronically ill youths not be discontinued for non-medical reasons. The Report fails to address these important provisions.

- 5 -

D. Grievance Process

It appears that the Report ignores two key requirements in the U.S. v. Ohio stipulation. First, the Report does not describe whether youth are provided with information regarding the grievance process during their orientation. This is specifically required under our stipulation. § III.D. Second, the Report notes that the existing grievance draft encourages informal resolution of grievances and that "no formal, written grievance may be filed unless there is a recorded effort at informal resolution." Report at 72. Such a policy, albeit in draft form, is in direct contradiction of our stipulation which provides the State to develop a grievance system which include "no formal or informal preconditions to the completion and submission of a grievance. . . ." § III.D.1.

E. Special Education

In reviewing the Special Education section of the Report, we again find that provisions from the U.S. v. Ohio stipulation are overlooked. For example, the U.S. v. Ohio stipulation requires that the State develop policies and procedures to appropriately notify and involve parents, whenever possible, ensure adequate staffing, provide prompt and adequate screening and ensure that the Individual Education Plans (IEP) meet certain requirements. While the Report discusses the shortcomings of the IEPs, the other provisions are not addressed. § III.E. Further, there is no discussion in the Report that the requirement for quality assurance through annual staff training is being met.

F. Programming

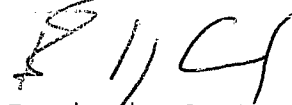
Despite the fact that both the S.H. and U.S. v. Ohio stipulation both describe programming requirements, the Report fails to address this topic beyond quoting language. See paragraph 56 and § III.F.1, respectively. Generally, both require the State to develop a mix of physical, recreational, or leisure activities.

- 6 -

G. Documentation

We note that the Report largely fails to address the documentation requirements at § III.G of our stipulation and ask that the Monitor assess these requirements going forward.

Sincerely,



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CC: (Via email)

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