UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LORETTA ROLLAND, et al., Plaintiffs	)	
v.	)	Civil Action No. 98-30208-KPN
DEVAL PATRICK,[1] et al., Defendants	)	

MEMORANDUM AND ORDER WITH REGARD TO PLAINTIFFS' MOTION FOR A FINDING OF NONCOMPLIANCE WITH THE DIVERSION PROVISIONS OF THE SETTLEMENT AGREEMENT, TO LIFT THE STAY, AND FOR FURTHER RELIEF (Document No. 401)
January 16, 2007

NEIMAN, C.M.J.

Presently before the court is Plaintiffs' motion for further relief concerning certain "diversion" provisions of the parties' Settlement Agreement. (Document No. 402 ("Pls.' Brief"), Ex. A (hereinafter the "Settlement Agreement").) The agreement arose out of an action by a class of mentally retarded and developmentally disabled individuals against certain state government actors. "Diversion," as defined in that agreement, entails the prevention of "inappropriate or unnecessary admission of persons with mental retardation or other developmental disabilities into nursing facilities." The primary obligation for establishing and implementing a diversion plan falls on the

[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Governor Deval Patrick is hereby substituted for the former Massachusetts governors who have been listed as defendants in their official capacities. The clerk shall forthwith make the appropriate changes to the docket sheet.

Department of Mental Retardation ("DMR").

Plaintiffs' motion asks that the court (1) find that Defendants have not complied with their obligations to establish an effective diversion plan, (2) lift the stay imposed by the Settlement Agreement, and (3) order Defendants to take certain remedial actions. The parties agreed that a decision on Plaintiffs' motion could be made on the record without an evidentiary hearing. The court heard oral argument on Plaintiffs' motion on September 25, 2006.

For the reasons which follow, the court has determined that, Plaintiffs' assertions to the contrary, Defendants are in substantial compliance with the diversion provisions of the Settlement Agreement as they currently stand. While more significant results would have been welcomed, Defendants, in the court's opinion, cannot be held to account in the way Plaintiffs suggest. Accordingly, it will deny Plaintiffs' motion. Nonetheless, for reasons which will become evident, the court is considering withdrawing its prior approval of Defendants' diversion plan barring a showing by them that the plan should remain in effect.

I. BACKGROUND

The parties are no doubt well versed in the factual and procedural background of this matter. Suffice it to say for present purposes that the court conducted a fairness hearing on December 17, 1999, and approved the Settlement Agreement on January 10, 2000. The implementation of the diversion component of that agreement, over which the court retained jurisdiction, is currently at issue.

By its terms, the Settlement Agreement, is "not . . . enforceable by contempt or

by a breach of contract action in state or federal court." (Settlement Agreement ¶ 27.) Rather, the agreement obligates Plaintiffs to first "notify Defendants of any alleged noncompliance" and to "request a meeting for the purpose of attempting to resolve the problems identified." (*Id*. ¶ 30.) If the meeting fails to resolve the issue, the parties are obligated to engage in at least two days of mediation. (*Id.* ¶ 31.) Only if mediation fails may Plaintiffs "file a motion with the Court seeking a judicial determination that Defendants are not substantially complying with the Agreement." (*Id*. ¶ 32.) The motion cannot be filed until at least thirty days have passed from Plaintiffs' initial notification to Defendants. (See *id*. ¶ 30.) If the court thereafter finds "that Defendants are not substantially complying with the Agreement[,]. . . it may lift the stay otherwise imposed under paragraph 28, and the Plaintiffs may seek injunctive and other relief based upon the then existing facts and law." (*Id*. ¶ 32.)

The present issue concerns Defendants' compliance with paragraph 12 of the Settlement Agreement which, in its entirety, provides as follows:

> By March 1, 2000, after consultation with two of the Plaintiffs' representatives, the Defendants will establish a Diversion Plan designed to prevent the inappropriate or unnecessary admission of persons with mental retardation or other developmental disabilities into nursing facilities. DMR will take the lead role in designing, developing, and monitoring the Plan. The Plan will include:
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> > (a) coordination with interested agencies to ensure that DMR is notified as soon as admission to a nursing facility is sought for a person who is believed to have mental retardation or a developmental disability other than mental retardation;

> (b) a provision that DMR will review the status of all new admissions of persons with mental retardation or other developmental disabilities to nursing facilities;
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> (c) development of community supports for persons who do not meet the applicable criteria for admission to a nursing facility;
>
> (d) training on diversion and service provision for staff involved in nursing facility admission; [and]
>
> (e) a description of the types of services which DMR can offer in the community.

(*Id.* ¶ 12.) Paragraph 13, in turn, provides that "[t]he decision as to whether to make any modifications in its Diversion Plan shall remain solely with the Commonwealth and its agencies." (*Id*. ¶ 13.)

Another provision of the Settlement Agreement, paragraph 4(d), concerns diversion as well. It establishes a schedule of diversion to residential programs, with numerical minimums, for class members who would otherwise be admitted to nursing facilities, more specifically, "at least 25 such persons in FY 2000, and at least 50 such persons in FY 2001 through 2005." (*Id*. ¶ 4(d).) As Plaintiffs acknowledged at oral argument, neither these minimum diversion targets nor Defendants' compliance therewith are presently at issue.

It should be noted, however, that, soon after the Settlement Agreement was approved, Plaintiffs brought to the attention of the court their concerns about Defendants' asserted failure to complete the diversion plan by March 1, 2000, as required by the opening sentence of paragraph 12. That particular issue was resolved

at the time, although, as explained below, the court is concerned about the plan's continued viability.

In any event, the current dispute is of more recent origin and targets the remaining provisions of paragraph 12. Relying on what they describe as measuring devices of performance -- *i.e.*, admission rates, census levels and individual results -- Plaintiffs assert that Defendants' efforts at diversion fail to effectively divert individual class members from nursing facilities. Plaintiffs argue that admission rates have surged from approximately 200 to 500 people per year, census reductions have fallen short of the number of community placements, and many class members are being inappropriately admitted to nursing facilities.

For their part, Defendants assert that they are in full compliance with paragraph 12. In addition, Defendants argue that Plaintiffs' motion is grounded not on the terms of the Settlement Agreement itself, but on non-binding statements at the fairness hearing which preceded the court's approval.[2]

II. DISCUSSION

The court previously addressed the definition of "substantial compliance" in the context of yet another historical dispute between the parties concerning specialized services. That analysis applies here as well. First, the court determined that the meaning of substantial compliance obviously depends on the paragraph of the

[2] Defendants also argue that Plaintiffs' motion should be denied because of Plaintiffs' alleged non-compliance with the mediation provisions of the Settlement Agreement. The court disagrees. First, the court deems Plaintiffs' efforts to mediate in this instance more than adequate. Second, the court has determined that requiring the parties to re-enter mediation with respect to diversion would be an exercise in futility.

Settlement Agreement alleged to have been violated. *See Rolland v. Cellucci,* 138 F. Supp. 2d 110 (D. Mass. 2001). The provision presently at issue is the introductory portion of paragraph 12, which requires Defendants to create a diversion plan "designed to prevent the inappropriate or unnecessary admission of persons with mental retardation or other developmental disabilities into nursing facilities."

Second, the court determined that substantial compliance does not mandate "full" compliance. *See id*. As the First Circuit has explained, "no particular percentage of compliance can be a safe-harbor figure, transferable from one context to another." *Fortin v. Comm'r of Mass. Dep't of Pub. Welfare*, 692 F.2d 790, 795 (1st Cir. 1982) (citation omitted). "Like 'reasonableness,'" the First Circuit stated, "'substantiality' must depend on the circumstances of each case, including the nature of the interest at stake and the degree to which noncompliance effects that interest." *Id. See also Morales-Feliciano v. Parole Bd. of the Com. of Puerto Rico*, 887 F.2d 1, 4 (1st Cir. 1989) (high degree of compliance required where noncompliance puts prisoner's Eighth Amendment interests at risk). Here, of course, the interest at stake -- diverting mentally retarded and developmentally disabled individuals from inappropriate placements in nursing homes -- is significant.

To be sure, Plaintiffs acknowledge that paragraph 12 does not expressly require the diversion plan to be "effective," an adjective which lies at the heart of Plaintiffs' motion. Nonetheless, Plaintiffs assert, any other reading would be nonsensical. Moreover, Plaintiffs argue, the court, when addressing Plaintiffs' motion, should take into account the overall purpose of the Settlement Agreement, *i.e*., reducing the

population of class members being inappropriately admitted to or confined in nursing facilities. Plaintiffs' points are well taken. As described below, however, it does not necessarily follow that a diversion plan which falls short of Plaintiffs' expectations is necessarily violative of the Settlement Agreement or, indeed, *in*effective.

The seeds of Plaintiffs' discontent were sown years ago during the course of the fairness hearing, to which they now refer the court. In particular, Plaintiffs cite the testimony of Dr. Charles Lakin, one of their experts, who testified that the "most important factor" in depopulating nursing facilities "is the reduction in the number of people going in, not the increase in the number of people going out." (Pls.' Brief, Ex. B. ("Hrg. Tr.") at 52.) Dr. Lakin cautioned that if "200 people a year are moved out of a place and 200 more come in, you haven't accomplished anything, particularly if you view a practice as one that you would like to change." (*Id*. at 51.) Dr. Lakin also questioned "how a guarantee that 50 people a year will be diverted will achieve the ultimate end of decreasing the use of nursing facilities when, according to the data provided to me at least, it looked like about 200 people a year were going in." (*Id*. at 53.) If an "excellent" diversion plan is not developed, Dr. Lakin testified, "the number of people in nursing facilities will stay the same or it could grow larger. It's, you know, it's who's coming in the back door while you're opening up the front door." (*Id*. at 54.)

Plaintiffs also cite their counsel's explanation at the fairness hearing that an effective plan "should do substantially more diversion than just the numbers set forth in the agreement." (*Id*. at 82.) At the time, however, Plaintiffs' counsel also acknowledged the limits of their agreement with Defendants. "[O]bviously," counsel

stated, "we negotiated for what we could get." (*Id*.)[3]

As Plaintiffs note, the court too expressed some concerns at the fairness hearing about the diversion plan. (See *id*. at 79-80.) "Dr. Lakin," the court stated, "indicated that he had figures that there were more numbers than that who are potentially coming into the nursing homes per year. So that even if you were to divert 50 into community

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[3] A fuller text of counsel's statement, as quoted by Plaintiffs in their memorandum, follows:

> I want to add one point because obviously we negotiated for what we could get, so in one sense the numbers are that, but in terms of how we got comfortable with the numbers, we had in mind that this system has been essentially, as Dr. Lakin testified, an equilibrium in terms of the total population for decades, and that's obviously because while people are coming in, a lot of people are dying. Some people are moving out, but a lot of people are dying.
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> So you're in equilibrium, and the thought was would this number -- and out of that, let's say the number tends to be around 1600, give or take, over the years, and our assumption was that the huge majority of those people would be better off in the community, but we knew that or we expect that a certain number of those will say no to the community. So taking a working hypothesis, I don't know, 75 percent or something of that number, that might end up in the community, that would be 1200 out of 1600.
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> So, we were looking at total numbers of placements, both the new placements for the people that were moving out and also the diverted placements, and the feeling was if we can get a total number that would accommodate the realistic expectation who might move out, that over time, somehow that would work out.

(*Id*. at 82-83.) What Plaintiffs did not quote in their memorandum, however, was the last sentence of counsel's statement: "Now, obviously, this is an issue that you heard we're nervous about, but that was part of the thought process that was going on." (*Id*. at 83.)

placements, you may have 150 coming in, which raises the issue of keeping the nursing home population static overall." (*Id*. at 80.) Plaintiffs' counsel shared the court's concern and, in response, estimated that there were "approximately 200 or more admissions a year of persons with mental retardation, developmental disabilities." (*Id*. at 81.) It was at this point that Plaintiffs' counsel stated, as described, that they "negotiated for what [they] could get." (*Id*. at 82.)

In any event, the court approved the parties' settlement. In doing so, the court made mention of Dr. Lakin's testimony that "only the full implementation of a diversion plan could accomplish the goal of reducing the nursing home population of mentally retarded and other developmentally disabled individuals." (Document No. 137 at 19.) The court also noted that Plaintiffs were "sanguine about the ability of the diversion plan to achieve their objectives and to cause, or assist in causing, a *dramatic reduction* in admissions." (*Id.* at 19-20 (emphasis added).)

In pursuing their present motion, Plaintiffs make much of this latter statement, arguing that a "dramatic reduction" in the nursing home population was what the court itself "expected" and "recognized" as being part of the Settlement Agreement. (Pls.' Brief at 6, 12.) Plaintiffs assert that there has been no such "dramatic reduction." Rather, Plaintiffs claim, the admission rates have gone from 200 to 500 per year and, concomitantly, reductions in the nursing home census have fallen well short of community placement, thereby undermining the central purpose of the Settlement Agreement. Unfortunately for Plaintiffs' cause, the court disagrees.

As an initial matter, the court wants to make clear that its words about a

"dramatic reduction" in the nursing home population were merely descriptive of Plaintiffs' hopes. Moreover, these words, even generously construed, were no more than precatory. At most, the court was echoing Plaintiffs' wish that the parties' settlement would accomplish the goals to which they and, indeed, the court aspired, *i.e.*, a significant reduction in the nursing home population. The court, however, did not change -- nor did it mean to change -- the precise terms of the Settlement Agreement which the parties reached through negotiation and compromise. *Cf. Rolland v. Romney*, 318 F.3d 42, 52 (1st Cir. 2003) ("the [statutory] provision giving rise to the asserted right must be couched in mandatory rather than precatory terms"). In response to Plaintiffs' motion, then, the court is left to measure not whether there has been a "dramatic reduction" in the nursing home census, but whether Defendants have substantially complied with the express terms of the Settlement Agreement. *See Accusoft Corp. v. Palo*, 237 F.3d 31, 39-40 (1st Cir. 2001) (failure to comply with provisions of settlement agreement is determined by "the usual consideration of contract interpretation"). As described, these terms, set out in paragraph 12 of the Settlement Agreement, require Defendants to establish a diversion plan "designed to prevent the inappropriate or unnecessary admission of persons with mental retardation or other developmental disabilities into nursing homes."

Two more preliminary matters need to be mentioned as well. First, Plaintiffs' arguments to the contrary, the parties were quite clear in paragraph 12 about Defendants' obligations with respect to "diversion." This clarity stands in some contrast to the definition of "specialized services." (Compare Settlement Agreement ¶ 14 *et.*

seq.) Second, as was true when Plaintiffs sought to lift the stay with respect to the specialized services component of the Settlement Agreement, their burden of proof is somewhat lighter than the burden they would bear were they seeking contempt, "one of the most potent weapons in the judicial armamentarium." *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991). As Plaintiffs are well aware, the Settlement Agreement is not enforceable by contempt, at least in the first instance. (Settlement Agreement ¶ 27.) Proof of noncompliance merely results in the lifting of the agreed-upon stay; further relief may come later based on "then existing facts and law." (*Id.* ¶ 32.)[4]

These introductory matters aside, there is apparently no dispute that Defendants met or exceeded the minimum diversion targets set out in paragraph 4(d) of the Settlement Agreement for fiscal years 2001 through 2005. (See Plaintiffs' Mem. at 11; Document No. 413 ("Defs.' Brief"), Ex. ("Gryzwarz Aff.") ¶ 32.) There is also no dispute that Defendants developed a diversion plan, albeit late, that the plan (entitled Consolidated Diversion Plan) was approved by the court on March 27, 2001, or that the plan further defined diversion as follows:

> Diversion occurs before an admission when the circumstances regarding an individual change sufficiently to prompt consideration of admission to a nursing facility and interventions, if available and appropriate, could be designed to prevent admission. Diversion also occurs after an individual has been admitted to a nursing facility and interventions, if available and appropriate, could be designed to prevent the continued stay of the individual

[4] Even were the court's contempt powers invoked here, it is well established that "courts are to construe ambiguities and omissions in consent decrees as redounding to the benefit of the person charged with contempt." *Gilday v. Dubois*, 124 F.3d 277, 282 (1st Cir. 1997) (citations and internal quotation marks omitted).

beyond 90 days.

(Pls' Brief, Ex. E at 1.) Nor is it really disputed that Defendants have worked collaboratively with nursing facilities and hospitals to implement the diversion plan. Plaintiffs' arguments to the contrary, Defendants have done more than merely implement a plan on paper.[5]

The issue at the heart of Plaintiffs' motion, therefore, is whether Defendants' diversion plan has prevented "inappropriate" and "unnecessary" admissions into nursing facilities of persons with mental retardation or other developmental disabilities. More to the point, the question before the court is whether Defendants substantially complied with the provisions of paragraph 12 of the Settlement Agreement.

In support of their assertion that Defendants have failed in this regard, Plaintiffs first allege that admission rates have gone from 200 to 500 per year for the three fiscal years prior to the motion. Were this true, the surge in admissions would be unacceptable under most circumstances. There are, however, several significant flaws in Plaintiffs' argument. For one thing, the 200 figure which Dr. Lakin cited during the course of the fairness hearing -- and which may well have informed Plaintiffs' stance when negotiating the Settlement Agreement -- does not appear to have been particularly reliable even at that time. It evidently derives from reports to DMR from its

[5] That being said, the court is not convinced that "diversion" should continue to include a ninety-day window after admission, as provided in Defendants' plan. Counting as diversions individuals who are placed within ninety days of admission is like a railroad counting as "on-time" arrivals taking place within twenty minutes of a scheduled stop; it helps the railroad's statistics, but not its commuters. *See The "On Time Performance" Fraud*, www.lirrcommuters.org (last visited Jan. 12, 2007).

former contractor, Metro West, which reflect pre-admission screenings, not the actual number of admissions. Since the actual number of admissions included direct admissions from hospitals, thereby bypassing the screening process, the number of yearly admissions was likely higher than 200. As Defendants note, Dr. Lakin himself understood this fact at the time. (See Defs.' Brief at 16 (citing Pls.' Brief, Ex. I at 32.) In addition, administrative changes since adopted by DMR have provided a more accurate -- and, hence, higher -- number of acknowledged admissions. For example, DMR now counts each of multiple admissions that an individual may have during the course of the year. Thus, Dr. Lakin's and, in turn, Plaintiffs' assumption about equilibrium, *i.e.*, the number of admissions equaling the number of discharges and deaths, was far from accurate.

Further, as Defendants assert, it could not be assumed at that time that the number of deaths and discharges per year would remain constant at 200. In fact, Defendants claim, the number of discharges per year -- including classmembers who experience a short term stay of less than 90 days -- has increased since the Settlement Agreement and is substantially higher than Plaintiffs' estimate. This increase, Defendants persuasively argue, has actually resulted in a declining census: the number of individuals with mental retardation and developmental disabilities in state nursing facilities declined from 1,585 in July of 2000 to 1,036 in July of 2006. (See Grzywarz Aff. ¶ 22.)

Although Plaintiffs recognize this declining census, they nonetheless assert that the decline ought to have been significantly greater. Wish that were true; but, as

Defendants argue, the data may actually understate their compliance because the figures utilized by Plaintiffs were not further adjusted for nursing home residents -- approximately one-third of class members presently in nursing facilities -- who refused community placements. Plaintiffs do not address this issue.

Numbers aside, the question remains whether Defendants' diversion plan has prevented "inappropriate" and "unnecessary" admissions into nursing homes. Of course, as Defendants argue, the fact that admissions are higher than expected does not necessarily mean that those admissions are "inappropriate" or "unnecessary." Still, the record before the court reveals that there have indeed been some inappropriate admissions, particularly those individuals identified by Plaintiffs' expert, Dr. Gant. In large part, Dr. Gant attributes such admissions to Defendants' failure to inform potential admittees of meaningful alternatives, or to marshall the necessary services and supports to avoid admissions entirely, or at least to ensure a prompt discharge within thirty days.

Defendants, in fact, concede that at least two of the individuals identified by Dr. Gant would not be admitted under more recently developed pre-admission screening tools. This candor by Defendants is appreciated but, to say the least, troubling. The very purpose of diversion is to avoid inappropriate admissions. If there are pre-admission tools to accomplish this end, as the court believes there are, the court can only wonder why they were not in place earlier. For example, two recent pilot projects implemented by Defendants have demonstrated that a higher percentage of class members can be diverted from admissions through a combination of new strategies and

enhanced efforts. Nonetheless, the court has been unable to extrapolate from the examples proffered by Plaintiffs that Defendants are in *substantial* noncompliance with their diversion obligations.

It should be noted, however, that Plaintiffs do argue that if, as Defendants assert, the sharp increase in admissions is due, at least in part, to changes in the accuracy of the pre-admissions screening process, the court should modify the Settlement Agreement "due to a significant change in facts." (Pls.' Brief at 13 n.4.) At best, however, Plaintiffs make this argument in passing. Thus, it is impossible for the court to determine at this time whether Plaintiffs could meet the various standards for modification of a consent decree set forth in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992), upon which Plaintiffs primarily rely.

This is not to say that the court remains satisfied with Defendants' diversion plan. *Cf. Jones' El v. Schneiter*, 2006 WL 2168682, at *2 (W.D. Wisc. July 31, 2006) (citing *Rufo* and "[t]he majority of circuits" which "have held that courts may move *sua sponte* to modify or terminate [consent] decrees"). It must be remembered that the court approved the plan at a time when Defendants' efforts were lagging. (See generally Document No. 213 (Mar. 27, 2001 Mem & Ord).) Moreover, the parties' respective arguments at the time did not address the merits of the diversion plan, simply the delay in its implementation. (See *id*.) Now, however, the court's review of the plan reveals that at least some of its provisions may no longer be viable or appropriate, for example, the ninety-day rule (see n.5, *supra*).

For all these reasons, the court is considering withdrawing its approval of

Defendants' diversion plan. The court, however, will first give Defendants forty-five days to show cause why the plan as designed ought to remain in place. Alternatively, Defendants can, within that time period and in consultation with Plaintiffs, present for the court's approval a new plan which not only takes into account the court's concerns, but incorporates as well the updated screening tools employed by Defendants and the lessons learned from their pilot projects. As for Plaintiffs' present motion for a finding of noncompliance, however, that motion will be denied.

III. CONCLUSION

For the reasons stated, the court finds that Defendants have substantially complied with paragraph 12 of the Settlement Agreement. Accordingly, Plaintiffs' motion is DENIED. However, as explained, the court is considering withdrawing its prior approval of the diversion plan unless, within forty-five days, Defendants either (1) show cause why the plan ought to remain in place or (2) present a new plan for the court's approval.

IT IS SO ORDERED.

DATED: January 16, 2007

/s/ Kenneth P. Neiman
KENNETH P. NEIMAN
Chief Magistrate Judge