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

BRIAN A., et al.	)	
	)	Civil Action No. 3-00-0445
v.	)	Judge Campbell
	)	Magistrate Brown
PHIL BREDESEN, et al.	)	

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

Plaintiffs respectfully submit this brief in reply to Defendants' Response to Plaintiffs' Motion for a Temporary Restraining Order, or, in the Alternative, a Preliminary Injunction, and in further support of the Motion.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO ASSERT VIOLATIONS OF THE SETTLEMENT AGREEMENT STEMMING FROM IMPLEMENTATION OF THE OVER-COMMITMENT LAW

Defendants erroneously assert that because the *named* Plaintiffs, already committed to DCS custody at the time of the filing of the Complaint and no longer in DCS custody today, cannot suffer injury due to T.C.A. § 37-2-205(f) (the "Over-Commitment Law"), they lack standing to challenge it. Defendants rely entirely on *Rosen v. Tenn. Comm'r of Fin. & Admin.*, 288 F.3d 918 (6th Cir. 2002). (Defs. Br., at 10-14).[1] *Rosen* is distinguishable because the Over-Commitment Law perpetuates and aggravates the very conduct alleged in the Complaint, and so involves "claims originally part of the action." *Cf. Rosen*, 288 F.3d at 928. Further, *current* and

[1] *Rosen* involved a class of applicants and insureds of a Tennessee medical insurance program who allegedly were refused or dropped from coverage without due process of law. *Rosen*, 288 F.3d at 921-22. The motion for a preliminary injunction challenged a modification of program eligibility requirements that rendered an entire subset of the class statutorily ineligible for coverage, pursuant to a modified Medicaid waiver, rather than a change in the process by which Tennessee handled case-by-case determinations of eligibility. *Id.* at 922-23.

future members of the *Brian A.* class have suffered, or are immediately threatened with, injury. Finally, the class here is an inherently transitory class of children who inevitably leave or age out of state custody—unlike the *Rosen* class, which included adult applicants and insureds.

Though enacted after the filing of the Complaint, the Over-Commitment Law merely codifies the very conduct complained of therein: Defendants' "systemic failure" to provide children in DCS custody "with legally required services," such that injunctive relief was needed "to ensure that Defendants adequately care for and protect children in state custody." (Compl. ¶ 2).[2] The Complaint details the resources and services that the State of Tennessee is obligated to provide to children in its custody. (*Id.* ¶¶ 131-214).

The Over-Commitment Law arbitrarily cuts off state funding for those very resources and services for certain children, in violation of the provisions of the Settlement Agreement that addressed these claims in the Complaint.[3] The statute directs DCS to "allocate resources for children placed in state custody" according to an "average state commitment rate" rather than according to the actual need for services for all foster children in DCS custody in each county, and it cuts off further funding to any county whose commitments exceed a pre-set level. T.C.A. § 37-2-205(f)(1)(A). Although the intended, inevitable result of the law is to unlawfully pressure judges to commit fewer children to DCS custody (also violating the Settlement Agreement), it is

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[2] *See also id.* ¶¶ 7-9, 22, 65 (Fourteenth Amendment guarantees children in state custody "the right to services necessary to prevent children from deteriorating or being harmed physically, psychologically, or otherwise"), 69 (First and Ninth Amendments guarantee children removed from homes "the right to services in accordance with reasonable professional judgment").

[3] The Settlement Agreement expressly addresses DCS's unconditional obligation to fund care for children in custody, stating that no limits be placed other than those in the Agreement itself: "Except where a particular provision of this Settlement Agreement establishes a specific limit on the resources required to be allocated, *defendants shall commit* all necessary resources (administrative, personnel, financial and otherwise) to implement all provisions of the Settlement Agreement." (January 2009 MSA § I(A)(13) (emphasis added)). T.C.A. § 37-2-205(f) directly violates this remedy. The state's refusal to pay the daily cost for some children in DCS custody is especially pernicious given, at in least in one county the new law has affected, the lack of DCS services to keep children safely at home and the lack of county funds to pay the state's daily cost of children in state custody. *See* Exhibit S-28 (Meldrum Dep.) at 61:6-12, 80:25-81:4, 141:21-23.

foreseeable that some children will be placed in DCS custody in excess of the cap and that state funding for their care will be cut off.[4]

The named Plaintiffs had standing to make the claims in the Class Action Complaint. As to Defendants' refusal to fund care for certain children in DCS custody, Plaintiffs need not now show that *named* Plaintiffs will be injured by the particular conduct sought to be enjoined, since "with respect to claims originally part of the action," it is "certainly true" that named Plaintiffs "can represent the interests of other members of the class on an issue in which they might not otherwise have the requisite personal stake." *Rosen*, 288 F.3d at 928. Defendants' assertion that Plaintiffs' claim is "new" because the statute is new is thus simply incorrect.

Here, as in *Sosna v. Iowa*, 419 U.S. 393, 401 (1975), "the issue sought to be litigated escapes full appellate review at the behest of any single challenger" because of the inherently transitory nature of the class: children in foster care who need the services affected by the Over-Commitment Law. In *Sosna*, the Supreme Court held that the named plaintiff had standing to assert a constitutional challenge to a one-year residency requirement for obtaining a divorce because, although the waiting period had lapsed for the named plaintiff, "[t]he controversy may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id* at 402.[5]

Even if the Over-Commitment Law is fully effective in unlawfully influencing judges' decisions and preventing "over-commitments," Plaintiffs can easily demonstrate injury or

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[4] Indeed, *Defendants* argue that the statute's intent is solely to shift to the counties the costs of caring for children *in DCS custody* once the pre-set commitment limits are exceeded. (Defs. Br., at 24). They should therefore be estopped from asserting, based on the assumption that no children in custody will be affected by the law, that Plaintiffs lack standing.

[5] *Rosen* acknowledged that *Sosna* permits standing when a controversy no longer relevant to named plaintiffs (here, the State's failure to provide resources) still is alive with respect to unnamed class members. "[A] loss of personal stake by the named plaintiffs down the road does not necessarily lead to loss of the ability to prosecute the suit on behalf of unnamed plaintiffs who continue to have such a stake." 288 F.3d at 928 (citing *Sosna*, 419 U.S. at 399).

imminent injury to at least two distinct subsets of the class.[6] First, the challenged law injures class members who were initially not committed due to the influence of the Over-Commitment Law, but were later committed after suffering harm flowing from that initial pre-commitment decision. At deposition, Judge April Meldrum of Anderson County Juvenile Court testified about the effect of the Over-Commitment Law on her decision-making. Constrained by ethical considerations from discussing specifics of pending cases (Exhibit S-28 (Meldrum Dep.) at 147:23-148:1), she described in general terms cases where she had avoided commitment due to the Over-Commitment Law, only to find later that the alternative placement had failed to the detriment of the child.[7] These children were improperly denied entry into the class but now are members of the class, and have been injured by the Over-Commitment Law.

Second, under Tennessee law, children may be removed by DCS from their families on an emergency or other basis prior to any court hearing on commitment, T.C.A. § 37-1-114(a)(2), and Juvenile Court judges are empowered to adjourn commitment hearings for up to 30 days, during which time the child remains in DCS custody, T.C.A. § 37-1-128(c)(1), (3), Tenn. R. Juv.

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[6] Thus, Plaintiffs have standing for claims relating to the impact on judicial decision-making in violation of §§ I(A)(2) and I(A)(12) of the January 2009 MSA, as well as to any cutoff in funding.

[7] She testified:

> I've had situations where in the past if [DCS] brought me an aunt [as a placement] who had no income, I would not give her custody because it was clear to me she had no income. But, now what's happening is [DCS] will bring the aunt . . . and they will say we know she has no income, Your Honor, but we're going to pay her light bill this month, we're going to provide all these services . . . . And so skeptically I would say yes, I will give that a try [but] unfortunately those things fall through. . . . [O]n many of these cases [DCS] and the courts alike are now stretching so far out there that those kids then are ultimately still coming into custody and . . . you wonder what further damage have we done. Because we have not only removed them from their parents, but now we have placed them in two different places within two weeks or one month or whatever. So many times what's coming as lately is the Department will present an option, and . . . I'm willing to try, but it's tenuous, very tenuous. And you know, that child ends up coming in anyway, because [DCS] either wouldn't or couldn't provide the services or funds . . . to make that stick. . . . I think that that almost compounds injury than if I'd placed the child in a foster home in the first place than having two separate places they have been at.

(Exhibit S-28 (Meldrum Dep.) at 151:1-152:15).

P. 17. Such children are therefore already class members.[8] Any child initially removed by DCS prior to a commitment decision by a Juvenile Court judge faces imminent risk of harm in the form of an inappropriate placement influenced by the Over-Commitment Law.[9]

Accordingly, Plaintiffs have standing to seek this Preliminary Injunction.

II. THE EVIDENCE SHOWS THAT THE OVER-COMMITMENT LAW HAS ACTUALLY INTERFERED WITH JUDICIAL DECISION-MAKING AND HAS LED TO DIFFERENTIAL TREATMENT OF CHILDREN

The uncontroverted evidence establishes that one primary target of the Over-Commitment Law was Judge Meldrum of Anderson County, because DCS officials believed her to be "over-committing" children.[10] At deposition, Judge Meldrum testified that *all* of her commitment decisions have been directly affected by the Over-Commitment Law, because her county (her employer and the site of her court) lacks the resources to do what that law now requires it to do—pay the state's full daily cost for children in DCS custody over the state's pre-set limit.[11] (Exhibit S-28 (Meldrum Dep.) at 133:18-23, 155:1-5).

Additionally, Judge Meldrum testified that, within the considerations allowed under the other provisions of Title 37 of the Tennessee Code, the Over-Commitment Law has caused her to

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[8] The Complaint's class allegations include "all foster children who are or will be in the custody of DCS [including] dependent and neglected children, 'unruly' status offenders . . . and children who were voluntarily placed into custody by their parent(s) or guardian(s)." (Compl. ¶ 19). The Complaint further alleges that "In certain circumstances, the emergency removal of a child from his or her parent(s) . . . may take place before a court makes a finding on a petition to commit a child to custody." (*Id.* ¶ 49). Such pre-commitment removals are deemed by statute to be State "custody." *See* T.C.A. § 37-1-113(a) ("A child may be taken into custody: (1) Pursuant to an order of the court under this part . . . [or] (3) By a . . . social worker of the department of human services, . . . if there are reasonable grounds to believe that" the child is dependent and neglected).

[9] At least one named plaintiff, Amy D., was in DCS custody prior to a commitment decision. (Compl. ¶¶ 104-106).

[10] *See, e.g.,* Exhibit S-32 (Campbell Dep.) at 81:8-23); Exhibit S-17 (DCS chart showing a statewide average commitment rate for dependent and neglected and unruly children for FY ending June 30, 2009 of 3.6 and a rate for Anderson County of 17 for the same types of commitments); Exhibit S-36 (June 2, 2009 email from Aaron Campbell, DCS Legislative Director to Commissioner Viola Miller, stating "Anderson county [*sic*] clearly understands that they have a huge problem on their hands—their judge. They have asked us to partner closely with them to deal with this issue. We have the support of their county commission to work with the judge to bring down unneeded commitments.").

[11] Judge Meldrum testified that the lack of DCS services in her county, in addition to a high number of methamphetamine lab seizures and other drug-related problems, is a major factor in her high commitment rates relative to those of other counties. (Exhibit S-28 (Meldrum Dep.) at 61:6-12, 70:4-71:9, 80:25-81:4, 125:13-17, 128:3-11, 129:18-130:22, 131:16-22).

treat individual children differently than she would have if the law were not in effect. Specifically, she testified that she has had conversations with other judges about transferring jurisdiction (in those cases where jurisdiction properly lies in more than one county) to a county with a lower commitment rate than Anderson County's (*id.* at 149:25-150:14), and that she has authorized the detention in police offices, DCS offices, and her courtroom until late at night of children who, prior to the Over-Commitment Law, she would have committed to a "safe foster home" (*id.* at 145:1-146:3; *see also id.* at 147:17-148:6). She also testified that she will now allow a detention-eligible child "to spend the night in detention . . . so that the Department can identify a relative option to keep them out of [DCS custody]" (*id.* at 146:14-147:16, 152:16-20), and that she is actively considering the pre-commitment use of an emergency shelter in a neighboring county in individual cases where, prior to the Over-Commitment Law, she would have committed those children to DCS custody. (*Id.* at 153:7-155:15).

This undisputed record evidence establishes both the risk of *and the actual* interference with judicial decision-making that are the intended and inevitable result of the Over-Commitment Law.[12] The evidence also establishes the differential treatment of children in Anderson County that has resulted from the inevitable operation of that law.

III. THE OVER-COMMITMENT LAW VIOLATES MULTIPLE PROVISIONS OF THE *BRIAN A.* SETTLEMENT AGREEMENT

Defendants' argument that the purpose of the Over-Commitment Law is solely "to limit state spending" (Defs. Br., at 9) is unavailing. The evidence establishes that the Over-

[12] *See also* Amicus Brief of the Tennessee Council of Juvenile and Family Court Judges in Support of Plaintiffs' Motion for a Preliminary Injunction ("Amicus Br."), at 5, 6.

Commitment Law from its inception was specifically intended to affect, and is in fact affecting, judges' decisions to commit children to DCS custody.[13]

Defendants' assertion (which Plaintiffs dispute) that the Over-Commitment Law is a benign "cost sharing" measure simply proves too much. The Settlement Agreement imposes upon Defendants the following obligation:

> Except where a particular provision of this Settlement Agreement establishes a specific limit on the resources required to be allocated, *defendants shall commit all necessary resources* (administrative, personnel, financial and otherwise) to implement all provisions of the Settlement Agreement.

(January 2009 MSA, at § I(A)(13) (emphasis added)). By forcing counties to pay the state's daily cost of foster care for children in DCS custody—indisputably a cost necessary to implement provisions of the Settlement Agreement—Defendants are conclusively violating § I(A)(13) of the Settlement Agreement. This has especially dangerous consequences in this fiscal year, because most (if not all) of the state's counties had already finished their own budgeting process by the time the Over-Commitment Law was enacted, and had not budgeted resources to fill the gap the statute will inevitably create.[14]

The Over-Commitment Law also violates the plain terms of § I(A)(2) of the Settlement Agreement, in which Defendants undertook the specific obligation to ensure that "child welfare decision-makers . . . have the professional capacity to make determinations as to when making efforts to preserve the biological family, or leaving the child with that family, is neither safe for

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[13] *See, e.g.,* Exhibit S-18 (excerpt from Tennessee Fiscal Year 2009-2010 Budget), at Bates # 733 (setting out as a "Standard: Reduce the number of dependent/neglected, unruly children entering out-of-home care," and setting out a base for FY 2009-2010 of 2,622 children (down from 5,195 in FY 2007-2008 and an estimated 3,202 in FY 2008-2009)); Exhibit S-33 (Cimino Dep.) at 79:7-12 (acknowledging that the Over-Commitment Law was developed by DCS as a way of trying to meet the budget standard of reducing new entries into care); Exhibit S-4 (CD: *Hearing on H.B. 2389 Before the Tennessee House Finance, Ways and Means Comm., 106th Gen. Assem.* (Nashville, March 31, 2009)), at 01:19:00 – 01:20:45 (testimony of DCS Commissioner Viola Miller); Exhibit S-54 (DVD: *Hearing on Possible Effects of S.B. 2357 Before the Legis. Comm. of the Anderson County Bd. of Comm'rs* (Anderson County, May 28, 2009)), at 01:23:05 – 01:24:37 (statement of DCS Budget Director Doug Swisher); Exhibit S-5 (CD: *Hearing on S.B. 2357 Before the Tax Study Subcomm. of the Tennessee Senate Finance, Ways and Means Comm., 106th Gen. Assem.* (Nashville, May 12, 2009)), at 01:01:04 – 01:01:45 (statement of State Senator James Kyle).

[14] *See* Exhibit S-28 (Meldrum Dep.) at 141:21-23; Exhibit S-30 (Green Dep.) at 61:24-62:4.

the child nor likely to lead to an appropriate result for the child." The statute's intended, inevitable *and proven* result is its effect on Tennessee's Juvenile Court judges, who are certainly "child welfare decision-makers" under the Settlement Agreement. By ensuring that the judges will consider the impact of the Over-Commitment Law when making commitment decisions, the statute violates § I(A)(2) of the Settlement Agreement in that it impairs judges' capacity to make their decisions.

Because of its intended, inevitable *and proven* effect on Tennessee's Juvenile Court judges, the Over-Commitment Law also violates the rights of Plaintiff children to due process and to the equal protection of the law.[15] By inevitably infecting the commitment decisions made regarding Plaintiff children—decisions which are life-altering—with considerations other than the case-by-case factors that must be considered to ensure their safety and well-being, the Over-Commitment Law violates Plaintiffs' due process right to a fair hearing in a fair tribunal, before a judge who is "capable of judging a particular controversy fairly *on the basis of its own circumstances*." *U.S. v. Morgan*, 313 U.S. 409, 421 (1941) (emphasis added).[16]

Similarly, the Over-Commitment Law also works to deprive Plaintiff children of the equal protection of the law, in that its intended, inevitable *and proven* result is that some children will be treated differently than others.[17] (*See, e.g.*, Exhibit S-28 (Meldrum Dep.) at 145:1-155:15 (describing actual differential treatment of children); *see also* Amicus Br., at 8 (describing how the Over-Commitment Law will result in differential treatment, both within a given county and among the various counties); Exhibit S-30 (Green Dep.) at 57:20-25). The Over-Commitment

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[15] In doing so, the statute also violates § I(A)(12) of the January 2009 MSA, in which Defendants undertook the specific obligation to ensure that Plaintiff children are "provide[d] a fair hearing and their constitutional and other legal rights should be enforced and recognized." Here, *DCS's actions* directly infringe upon those rights.

[16] *See also In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."); Amicus Br., at 5-6.

[17] Defendants do not address the equal-protection argument raised by Plaintiffs in their Memorandum in Support of their Preliminary Injunction Motion, Docket No. 297 at 17-21.

Law arbitrarily distinguishes among similarly situated children based on considerations entirely unrelated to their case-specific facts. It also unconstitutionally provides some class members with state-funded custodial care, while denying others. It is therefore fundamentally unfair and violates their right to the equal protection of the law.[18]

Defendants' argument that the influence of the Over-Commitment Law on judges does not create a constitutional due process violation (*see* Defs. Br., at 16-25) is unpersuasive.[19] The cases cited by Defendants in support of that argument examine some of the influences that a judge (or other adjudicator) might possibly face, and which of them are so *likely* to cause bias that the right to due process is offended. However, none of these cases reached the question of whether any of the decisions at issue actually *were* influenced.[20] In stark contrast, the evidence here shows that the decisions of judges in the cases of current class members have been and are being influenced *now* by the Over-Commitment Law. (*See* Exhibit S-28 (Meldrum Dep.) at 144:1-18, 145:1-155:15; Exhibit S-30 (Green Dep.) at 62:5-11; *see also* Amicus Br., at 5, 6).

Additionally, none of the decisions cited by Defendants considered a law that had the effect of impermissibly *circumscribing* judicial decisions. Thus, the apparently categorical statement of the Sixth Circuit cited by Defendants—that the only cases in which potential bias was found to violate due process involved either (1) a decision-maker with a direct pecuniary interest in his decisions, or (2) an overlap of executive and adjudicative functions in the decision-maker (*see* Defs. Br., at 21 (citing *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989)))—is

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[18] As explained in Plaintiffs' Memorandum in Support of their Preliminary Injunction Motion, the Over-Commitment Law withstands neither strict scrutiny nor rational-basis review. (*See* Docket No. 297 at 19-21).

[19] Nowhere do Defendants argue that the Over-Commitment Law does not interfere with judicial independence; they argue only that the interference is not of constitutional dimensions. While Plaintiffs assert that this interference violates both § I(A)(2) of the January 2009 MSA and children's constitutional rights, the former can be determined solely within the four corners of the Settlement Agreement.

[20] *See, e.g.*, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("We make clear that we are not required to decide whether in fact [the justice whose decisions were at issue] was influenced, but only whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation to the average . . . judge to . . . lead him to not hold the balance nice, clear and true.").

simply inapposite. Because of this factual dissimilarity, the absence here of the two factors identified in *Hammond* is not conclusive.

The correct standard for determining whether the Over-Commitment Law deprives Plaintiffs of due process is whether the statute creates "a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true. The Due Process Clause may [thus] sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). Here, the pressure exerted on Juvenile Court judges by the Over-Commitment Law certainly impairs the appearance of justice. Moreover, the record evidence shows that this pressure has actually affected judicial decisions.

CONCLUSION

For all of the foregoing reasons, as well as those reasons set forth by Plaintiffs in their Preliminary Injunction Motion, Plaintiffs respectfully request that this Court issue a preliminary injunction enjoining the implementation of T.C.A. § 37-2-205(f) until such time as the Court can conduct a hearing to declare unlawful and permanently enjoin T.C.A. § 37-2-205(f), together with such other and further relief as may be necessary.

DATED: October 9, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura Mumm, hereby certify that, on October 9, 2009, a true and correct copy of Plaintiffs' Reply to Defendants' Response to Motion for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction has been served Defendants' counsel, Douglas E. Dimond, Esq., Office of the Attorney General, Cordell Hull Building, Ground Floor, 425 Fifth Avenue North, Nashville, Tennessee 37247, electronically by operation of the Court's electronic filing system and by email to Doug.Dimond@ag.tn.gov.

DATED: October 9, 2009

Laura Mumm