

1 On June 8, 2004, the Court issued a Permanent Injunction requiring Defendants to
2 provide treatment and develop programs for Plaintiffs. [*See* Doc. No. 277]. The Permanent
3 Injunction addresses the following three areas: (1) safety, freedom from undue restraint, and
4 treatment under safe conditions; (2) minimum adequate or reasonable training to ensure safety,
5 freedom from undue restraint, and to prevent a person's pre-existing self-care skills from
6 deteriorating because of his commitment; and (3) implementation and placement plans. [Doc.
7 No. 277.]

8 **A. The Amended Permanent Injunction**

9 On June 30, 2005, the Court issued an Amended Permanent Injunction ("API"). [Doc No.
10 307.] The API specifically addressed Defendants' duty to conduct annual Multi-Disciplinary
11 Treatment Team ("MDTT") evaluations:

12 Defendants shall conduct an interdisciplinary evaluation of each
13 Plaintiff to determine the specific areas in which each individual needs
14 training. These multi-disciplinary evaluations shall be repeated for all
15 Plaintiffs at *annual intervals*, unless required more frequently by each
16 Plaintiff's needs.

17 (*See* API at ¶ II.B.1) (emphasis added). The API further requires that "the psychiatrist shall serve
18 on a [MDTT] for any plaintiff whose individualized service includes the use of behavior
19 modifying medications or for whom such has been recommended" and "the psychiatrist consults
20 with the Plaintiff's primary care physician, psychologist, nurse and other appropriate members of
21 Plaintiff's MDTT." (*See* API at ¶ I.J.2.) The API requires the psychiatrist to develop and sign an
22 overall treatment plan that includes "clear, objective, and measurable short-term, intermediate,
23 and long-range goals and objectives" for each Plaintiff. (API at ¶ I.J.3.)

24 **B. Appointment of Court Monitors**

25 On August 31, 2007, pursuant to a stipulation of the parties, the Court appointed two
26 Court Monitors to monitor the Defendants' "progress in complying with the terms of the [API]
27 and any subsequent orders of the Court relating to the [API]." [*See* Doc. No. 433.]
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DISCUSSION

Plaintiffs request that the Court hold Defendants in contempt and impose sanctions on Defendants for Defendants' failure to meet their obligations under the API. Specifically, Plaintiffs assert that, in direct contravention of the API, Defendants have failed to conduct two MDTT evaluations per week during the 30-week period spanning from June 16, 2008 (the start date identified in the ACIP) through January 16, 2009 (the filing date of Plaintiffs' Contempt Motion).

In opposition, Defendants initially stated that they had completed 11 MDTT evaluations, and that they continue to conduct the required evaluations. (Opp. at 6-7.) Therefore, Defendants assert, they are not in violation of the API. (*Id.*) Defendants alternatively argue that this conduct constitutes "substantial compliance" with the API, and therefore the Court should not find Defendants in contempt. (*Id.* at 8-10.)

On February 13, 2009, during oral argument on the Contempt Motion, Defendants advised the Court that the information in their opposition was in error (Defendants erroneously stated they had completed 11 MDTT evaluations based on the assumption that both a psychiatrist and psychologist were required to participate on the MDTT) and the Court granted Defendants' request to file supplemental materials. [Doc. No. 560.] Defendants filed a supplemental declaration by Dr. Andrea Leitheiser on February 18, 2009 and provided the Court Monitors with a copy of all of the MDTT evaluations (115 in total) for their review. [Doc No. 573.] In her supplemental declaration, Dr. Leitheiser stated that Defendants actually completed 61 MDTT evaluations, and that Defendants did not believe that a psychiatrist and psychologist are both required members of the MDTT. (*Id.*)

The Court Monitors reviewed the MDTT evaluations (also known as Individual Habilitation Plans ("IHPs")) in order to determine Defendants' compliance. As an initial matter, the Monitors noted that they could not assess the IHPs for true compliance because none of the

1 IHPs met the standard of care set forth in the “Interim Individual Habilitation Plan (IHP) Policy
2 and Procedure” effective December 2, 2005 (the “IHP Policy”). [Doc. No. 588; *see also* Doc.
3 No. 339.] In particular, the Monitors explained that it was unclear where the consumer
4 information originated, what assessments were completed, whether there was any previous
5 progress, or what future treatment or programs were discussed. [Doc. No. 588 at 17].

6 Generally, the Court Monitors provided the following analysis for the 115 IHPs submitted
7 by Defendants: (1) 27 were duplicates; (2) 9 were void of information on the forms attached to
8 the cover sheet; (3) 8 had only a case manager participate; (4) 3 showed a cover sheet with the
9 case manager and one team member; and (5) 21 contained information, but did not identify
10 MDTT members on the cover sheet or the sign off sheet. Thus, there only remained 47
11 “complete” IHPs for the Monitors to evaluate.

12 With respect to these 47 IHPs, the data showed that in 35 cases, the client was present (or
13 74%), in 22 cases a psychiatrist was present (or 47%), in 22 cases a psychologist was present (or
14 47%) and in 16 cases both a psychiatrist and psychologist were present (34%).

15 Pursuant to the express language in the API, as well as the ACIP, Defendants were
16 required to conduct at least two MDTT evaluations per week beginning on June 16, 2008. (*See*
17 ACIP at 20.) Using June 16, 2008 through January 16, 2009 (the filing date of Plaintiffs’
18 Contempt Motion) as the relevant time period, Defendants were required to complete 60 IHPs.
19 To determine whether Defendants substantially complied with the API, the Court considers
20 (1) the number of IHPs completed during the relevant time period; (2) whether the MDTTs were
21 comprised of all of the necessary members; and (3) whether the IHPs were substantively
22 compliant with the API and the IHP Policy.

23 Numerically speaking, the Court finds that if the MDTTs and IHPs are otherwise
24 compliant with the API, the completion of 47 IHPs constitutes substantial compliance.
25 Unfortunately, though, the Court finds that the IHPs were not completed in a manner that
26 satisfies the API. As a result, the Court finds that Defendants have not completed any IHPs in
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1 compliance with the API, and, therefore, cannot be in substantial compliance. Moreover,
2 Defendants' failure to comply cannot be excused based on a good faith and reasonable
3 interpretation of the API. There is no ambiguity in the API with respect to the requirements for
4 the composition of the MDTT. In fact, the API unequivocally states that a "psychiatrist *shall*
5 serve on a [MDTT] for any Plaintiff whose individualized service includes the use of behavior
6 modifying medications or for whom such has been recommended." (API at ¶ I.J.1) (emphasis
7 added). In addition, the substantive requirements for the IHPs are delineated in both the API and
8 the IHP Policy. (API at ¶ I.J.3; IHP Policy at 7.) Therefore, there is no basis for the Court to
9 excuse Defendants' violation of the API based on a good faith or reasonable interpretation of the
10 API.

11 Of particular concern is Defendants' failure to follow the IHP Policy with regard to the
12 contents of the IHP. [Doc. No. 338, Ex. D at 7.] Based on the Court's review of the 47 IHPs, the
13 Court finds numerous deficiencies in the IHPs. The largest, and most common deficiency, is
14 Defendants' failure to adequately identify goals and objectives in the IHPs, which are defined
15 comprehensively in the IHP Policy. (See IHP Policy at 3.) By way of an example, the Court
16 notes that a long range goal "to comply with his mental health treatment" is not the type of goal
17 contemplated by the IHP Policy, or the API. Moreover, the IHPs fail to reference any prior IHPs
18 that were prepared for the subject consumer, therefore running afoul of the requirement to
19 include a "summary of progress toward previous IHP goals and objectives." (IHP Policy at 7.)
20 Although the foregoing deficiencies are two of the most egregious deficiencies, the Court notes
21 that the IHPs are also deficient in other substantive areas. As a result, none of the 47 IHPs
22 comply with the API.

23 In addition, the majority of the IHPs fail to substantially comply based on the composition
24 of the MDTT. Only 34% (16/47) of the IHPs were prepared by an MDTT that included both a
25 psychiatrist and a psychologist. As discussed above, the API expressly requires a psychiatrist to
26 serve on the MDTTs. Although it appears there is an exception to the psychiatrist's participation
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1 if behavior modifying medications are not used or recommended, Defendants have not indicated
2 that this was the case for any MDTTs lacking a psychiatrist. Although the lack of psychiatrist
3 participation in the MDTTs is troubling, the Court is even more troubled by the fact that of the
4 115 IHPs originally submitted by Defendants, 8 had only a case manager participate, 3 indicated
5 that only a case manager and one team member participated, and 21 contained no information
6 regarding who participated. Therefore, more than 25% (32/115) of the IHPs Defendants
7 submitted to the Monitors for compliance review were prima facie non-compliant.

8 Based on the foregoing, the Court finds, by clear and convincing evidence, that
9 Defendants have violated the API by failing to substantially comply with its requirements.
10 Moreover, the Court finds that Defendants' failure to comply was not based on a good faith or
11 reasonable interpretation of the API.

12 CONCLUSION

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14 The Court finds that Defendants have failed to show cause why they are not in contempt.
15 Therefore, the Court finds Defendants in CONTEMPT and SANCTIONS Defendants as follows:
16 Defendants shall pay a monetary penalty to the Clerk of Court of \$500.00 for each non-compliant
17 IHP, for a total monetary penalty of \$30,000.00 (\$500.00 x 60). The Court further ORDERS as
18 follows:

- 19 1. Defendants shall certify in writing to the Court, no later than July 15, 2009, that each
20 employee who conducts MDTT evaluations or prepares IHPs has familiarized his or
21 herself with the IHP Policy. Each of these employees shall certify, no later than July 15,
22 2009, that he or she has reviewed the IHP Policy and is familiar with its requirements.
- 23 2. Defendants shall review and revise 60 of the currently deficient IHPs in order to complete
24 them in compliance with the API. Each MDTT shall be properly constituted and each
25 IHP shall comply with the requirements set forth in the IHP Policy. The first 30 of these
26 IHPs shall be completed no later than September 1, 2009, and shall be provided to Court
27 Monitor James J. Kiffer on that same date. The second 30 of these IHPs shall be
28 completed no later than October 1, 2009, and shall be provided to Dr. Kiffer on that same
date. For these 60 IHPs, a member of the MDTT shall personally visit the consumer at
the consumer's place of residence prior to revising the IHP. The MDTT member shall
bring the current version of the IHP to the visit in order to assess the consumer's needs.

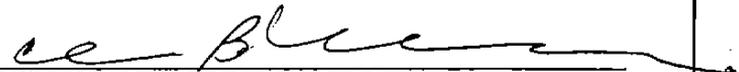
1 3. To facilitate satisfactory completion of these 60 IHPs, Dr. Kiffer shall provide Defendants
2 guidance and training on how to conduct an API-compliant MDTT evaluation and how to
prepare an API-compliant IHP.

3 4. On September 1, 2009 and October 1, 2009, Executive Director of DMHSA, Dr. David
4 L.G. Shimizu, shall file with this Court a sworn declaration setting forth the manner in
which Defendants have complied with this Order.

5 The Court hereby STAYS the execution of the monetary penalty until further order of
6 the Court. Failure to comply with this Order in its entirety may result in further findings
7 of contempt and the imposition of additional sanctions.

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9 IT IS SO ORDERED.

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11 Dated this 1st day of July 2009.

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15 CONSUELO B. MARSHALL
16 UNITED STATES DISTRICT JUDGE
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