IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

CASA FOR CHILDREN, INC., an Oregon not-for-profit organization,

Plaintiff,

v.

STATE OF OREGON by and through its DEPARTMENT OF HUMAN SERVICES; FARIBORZ PAKSERESHT, in his official capacity as Director of the Oregon Department of Human Services; and APRILLE FLINT-GERNER, in her official capacity as Director of Child Welfare, Oregon Department of Human Services,

Defendants.

Arbitration Arising from Agreement Settling
Case No. 3:16-cv-018195-YY

ORDER

MCSHANE, Judge:

Plaintiff moves for an order enforcing the 2018 Settlement Agreement in which the Defendants agreed to incrementally decrease the number of hotel placements of children in state care. Plaintiff argues Defendants[1] are not in compliance with the portions of the agreement that require Defendants to wind down this practice of "Temporary Lodging." ODHS acknowledges it

[1] Although there are several named Defendants, the Court refers to the Defendants collectively as ODHS or Oregon Department of Human Services throughout this Order.

is not in compliance but argues several factors beyond its control made it impossible (or impractical) to comply with the Agreement.

The parties are well versed in the facts and the Court will not delve into that background here. The Court agrees that ODHS is not in substantial compliance with the Agreement and never has been throughout the Agreement's timeframe. While ODHS has certainly faced challenges in complying with the Agreement, these challenges cannot serve as an excuse for preventing ODHS from achieving substantial compliance. Indeed, while the Court notes ODHS appears to be making some strides in tackling this problem, those strides have generally come too little and too late. Because the Defendants are not in substantial compliance with the Agreement and they have not shown substantial compliance was impossible or impracticable, the Court orders some of the relief requested by Plaintiff. The Court will deny what it views as some of the more punitive measures of enforcement. Additionally, the Court notes that it too is bound by the terms of the Agreement that both sides voluntarily chose to agree to (and be bound by).

The Agreement limits the number of times ODHS may temporarily lodge children and young adults in its care. The Agreement acknowledges the practice will take some time to unwind and includes "step down" limits of:

> No more than 120 children from June 2018-December 2018;
> No more than 90 children from January 2019-June 2019;
> No more than 45 children from July 2019-December 2019;
> No more than 23 children from January 2020-June 2020;
> No more than 12 children during any six-month period from July 2020 forward.

Agreement at III.C.

Previously, in a January 2019 Order, this Court found ODHS was not in substantial compliance with the Agreement. In that Order, the Court required ODHS to hire a Resource

Management Director (RMD) to oversee compliance with the Agreement's limitations on temporary lodging.

In June 2020, ODHS confirmed that it expected to return to substantial compliance by September 2021. Ward Decl. Ex. 2. However, due to "unforeseen challenges . . . ODHS was unable to return to compliance by September 2021." Def. Resp. 4. From July 2018-Decebmer 2018, and again from January 2019-June 2019, ODHS lodged 74 unique youths. Ward Decl. ¶ 4. Over the next six-month period ending in December 2019, ODHS lodged 97 unique youths. *Id.* The number dropped to 65 during the period ending June 2020, and then down to 37 from July 2020-December 2020. *Id.* In every six-month period since December 2020, the number of unique youths lodged has risen: 51 in the period ending June 2021; 52 for the period ending December 2021; 61 for the period ending June 2022; and 67 for the period ending December 2022. *Id.* As noted above, the Agreement required ODHS to lodge no more than 12 children in any six-month period after June 2020.

ODHS argues staffing shortages brought on by COVID-19, along with a decrease in providers following the passage of Senate Bill 710, largely excuse its noncompliance. Regarding the former, ODHS argues it has experienced a "demonstrable, significant struggle with recruiting and retaining enough workforce in all areas of the child-caring system, both internally within ODHS and externally with placement and service providers." Anderson Decl. ¶ 10. As to the latter, SB 710, enacted in 2021, narrowed the instances where a provider may use physical restraints on a youth. It also imposed liability on providers who violate the law. ODHS argues, "Providers have cited SB 710 regulations as a reason for denying high needs children from otherwise available placements or discharging children." *Id*. at 10.

The court finds ODHS's claims of impossibility or impracticability unpersuasive. While COVID-19 and SB 710 appear to have had some impact on ODHS's ability to comply with the Agreement, the Court notes ODHS has a lengthy, and unbroken, history of noncompliance. This noncompliance extends well beyond the start of the pandemic or the 2021 enactment of SB 710.[2] And, as noted by Plaintiff, "ODHS committed fewer violations of the Agreement *during* the pandemic (mid-2020 to end of 2021) than before or after." Reply 4. Additionally, while the Agreement contains an express provision ODHS may utilize in order to demonstrate "an unavoidable national or regional circumstance has occurred that temporarily prevents compliance," ODHS neglected to use that process here. *See* Agreement at III.B. In the Court's view, ODHS's practice of temporary lodging children appears to have become essentially entrenched within the agency. As ODHS is coming to understand, stamping out that practice, which it agreed to do upon entering the Agreement, has proven to be perhaps more difficult than expected. But that this is a challenging area with many moving parts does not excuse ODHS's noncompliance. Finally, the Court appreciates the detail Plaintiff provides outlining how ODHS's complaints of a lack of residential treatment providers, along with assurances that the agency is "actively working to increase capacity," go back to 2016 and essentially continue to the present day. Pl.'s Mot. 21-24. The Court agrees with Plaintiff's description:

> In short, ODHS has always portrayed a dire shortage of [Behavior Rehabilitation Services] beds as a primary reason it cannot avoid "hoteling," but it has never sufficiently addressed the shortage despite receiving ample funding for that purpose. Instead, it has evolved from blaming "temporary lodging" on the BRS shortage, to blaming the BRS shortage on the pandemic. All the while, the agency's data indicate "missing BRS beds" are not what inappropriately placed children are

[2] As noted, the Court found ODHS in noncompliance back in January 2019 and extended the Agreement while ordering ODHS to hire the RMD.

> missing, and it now admits BRS capacity will not "solve the problem in its entirety."

Pl.'s Mot. 23-24.

Perhaps the most obvious of the "too little, too late" steps concern the reimbursement rates paid to resource parents. In July 2016, ODHS' child welfare director noted the reimbursement rate had not increased in over ten years. Pl.'s Mot. 24-25. That year, ODHS requested a rate increase in its biennial Agency Request Budget. The rate increase went into effect in January 2018. However, that rate increase only covered "56.5% of the cost of raising a child." Andreson Decl. ¶ 27.a.i. Despite that, and despite the obvious (and universally accepted) belief that increasing reimbursement rates is one of the most surefire ways to recruit resource parents, ODHS did not request another rate increase, at least in its biennial Agency Request Budget, *until nearly five years after the 2018 rate increase went into effect*.[3]

ODHS argues it "is doing everything reasonably possible to return to compliance with those limits and thus respectfully asks that this Court deny Plaintiff's enforcement motion. At a minimum, ODHS' performance with the numeric limits should be temporarily excused until it is able to ramp up needed capacity." Def.s' Resp. 42. The Court disagrees. There is ample evidence to support the Plaintiff's argument that since 2016 ODHS has reported a lack of suitable

[3] While the Court commends ODHS on the current proposed increase, which would raise the rate to between 90-100% of the cost of raising a child (with biennial inflation adjustments), in the context of the current dispute, this proposal comes several years too late. And while the Court is cognizant of budget issues constantly faced by state agencies, the shockingly low reimbursement rate from January 2018 to the present is perhaps a sign that ODHS is not taking its obligation to substantially comply with the Agreement as seriously as Plaintiff expects. Regardless, the Court agrees with Plaintiff that "a key solution to recruiting and retaining more resource parents, and winding down ODHS' use of inappropriate placements, has been screaming out to ODHS for years: increase base rates to reflect the actual cost of caring for a child. The agency hasn't done it." Pl.'s Mot. 27. In fact, the Court is somewhat shocked to learn that this does not appear to be a case where a lack of funding is the cause of noncompliance. ODHS has spent over $20,000,000 to temporarily lodge foster children. The *average nightly cost* to temporarily lodge a child currently runs *over $2,500*. Pl.'s Ex. 4 at 2. Instead, it appears ODHS is throwing money at the wrong solutions.

placements as the reason the agency resorted to "temporary lodging" and insisted it was working diligently to increase capacity. Over seven years later, in its Response to this enforcement action, ODHS essentially repeats these same arguments.[4] But this argument has become nothing more than a stale mantra and the Court has lost faith in ODHS' ability to end this entrenched policy on its own.

The Court finds ODHS in substantial noncompliance with the Agreement. The Court agrees with Plaintiff that additional steps must be taken to assist ODHS in achieving substantial compliance. An outside expert is needed and the Court agrees that, at this time, it does not appear that ODHS knows how to wind down temporary lodging on its own. The Court appoints Marty Beyer as a special master to make specific recommendations for to the Court. ODHS shall enter into a one-year contract in which Ms. Beyer spends the first three months gathering information and formulating recommendations to the Court to integrate into an Order. Ms. Beyer will spend the next nine months monitoring and reporting on progress.[5]

[4] ODHS relies now on one new argument; that SB 710 led to the current issues preventing substantial compliance. In her order signing that bill into law, then-Governor Brown explicitly noted a concern that the bill might result in foster children with the highest needs being refused services. RJN, Ex. 25 at 1. The Governor ordered ODHS to "track and report to me and to the pertinent legislative committees any impact to placement and treatment capacity that results from implementation of this legislation." RJN, Ex. 25 at 2. Although ODHS states it is complying with that order, the Court agrees with Plaintiff that the fact that ODHS failed to present here such tracking and reporting submitted to the Governor undermines ODHS' argument that SB 710 is responsible for its substantial noncompliance.

[5] Plaintiff dedicates a substantial amount of briefing to the argument that ODHS fails to provide culturally competent supports. Based on the record, the Court agrees. However, at this time, the Court finds these arguments beyond the scope of the present dispute. These issues may well be something Ms. Beyer investigates and reports on. But the Agreement defines a "foster child" as "a child up to and including age 17 in the custody of the Oregon Department of Human Services who is in substitute care." Agreement at II.B. The Agreement is devoid of any mention of a foster child's racial or sexual or gender identity. Again, at this time, the Court finds these arguments extend just a bit beyond the general scope of the Agreement and, more specifically, the specific question here of whether ODHS' substantial noncompliance is excused by impossibility or impracticability. That said, the Court could see a time where Plaintiff's arguments and ideas in this area are more compelling when looking at ways to ensure ODHS meets its obligations under the Agreement.

The Court at this time declines to impose financial sanctions for continuing noncompliance, but leaves the door open to revisit in the future, if necessary.

Due to the extensive history of noncompliance, the Court extends the Agreement to December 31, 2026.

Plaintiff is entitled to reasonable attorney fees and costs. The parties shall make best efforts to reach an agreement on this issue without requiring the Court's intervention.

Finally, the court is unpersuaded by Plaintiff's argument that ODHS violates the spirit, if not the letter, of the Agreement by underreporting. ODHS argues (1) it reports all temporary lodging required by its understanding of the Agreement and (2) it has clearly communicated this understanding to Plaintiff's counsel. Specifically, ODHS notes:

> [T]here are some circumstances where a child or young adult may stay in a hotel with someone they know without the presence of ODHS or contracted staff, which ODHS does not consider temporary lodging that requires reporting. . . . Categories and examples of times when a child or young adult may stay overnight in a hotel but ODHS does not consider temporary lodging under the Settlement Agreement include the following:
>
> > a. Parents live in hotels with children for a variety of reasons, including lack of available housing, or housing affordability. It is not unusual for families to receive financial assistance from state agencies, including ODHS, to pay for housing costs, including hotels.
> >
> > b. A parent, kith/kin, or potential resource provider has not been willing to have a child or young adult in their home due to sexual harming behaviors, pet harming behaviors, and/or fears about other persons/children in the home, but wants to be a support and possible resource to the child or young adult. The agency has worked to support that parent or kith/kin in a hotel setting and at times in an Airbnb.
> >
> > c. A parent, family member, or kith/kin may have other persons in their home that are not safe and not willing to leave the home, or roommates or other relatives who are unwilling to have the

> child/young adult in the home, so the person stays in a hotel with a child or young adult as an alternative.
>
> d. A parent who is willing to leave their unsafe partner, but the partner will not leave the home. The parent may be supported in a hotel but needs support for nighttime caregiving. A relative or other kith/kin may provide overnight supervision in a hotel.

McClure Decl. ¶¶ 20-21.

The Court agrees with ODHS that the above occasions do not qualify as temporary lodging under the Agreement. The Agreement, and the Court's recollection of the nature of negotiations, indicate reporting is required for temporary lodging when ODHS staff stays in the hotel with the child and provides direct care and supervision.[6] While it is debatable whether the above circumstances constitute best practices or advance the agency's mission, the Agreement simply does not require ODHS to report instances where a youth stays in a hotel with family or kin rather than ODHS staff.

DATED this 18th day of July, 2023.

/s/ Michael McShane
Michael J. McShane
United States District Judge

[6] To be fair, the Agreement is not crystal clear on this point. That said, the Court agrees with ODHS that the Agreement as-a-whole indicates that the parties intended "temporary lodging" to include not every instance where a child in ODHS custody spends the night in a hotel, but rather only those instances where ODHS is obligated to ensure the child gets to and from school (or provide the child with "appropriate activities during the day time hours."). Agreement at 3.G-H. The Court concludes the Agreement requires reporting in instances where ODHS is in more direct control of a child's daily activities than, say, when ODHS arranges for a non-ODHS adult to stay in a hotel with the child. This reading aligns with the Court's recollections of settlement discussions, which seemed centered on avoiding instances of a child staying in a hotel with an ODHS employee who is responsible for the child's care and supervision (rather than an adult not employed by ODHS who has a prior personal relationship with the child). In fact, under the Court's reading of the Agreement, there are times—such as when an ODHS employee is transporting the child to a new placement across the state—that a child's night in a hotel with an ODHS employee does not qualify as "temporary lodging."