

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

D.G., by Next Friend G. Gail Stricklin, <i>et al.</i>,)	
for themselves and those similarly situated,)	
)	
Plaintiffs,)	
v.)	Class Action
)	Civil Action No. 08-CV-074-GKF-FHM
BRAD HENRY, in his official capacity as)	
Governor of the State of Oklahoma, <i>et al.</i>,)	
)	
Defendants.)	
)	

PLAINTIFF CHILDREN’S MOTION TO COMPEL AND
BRIEF IN SUPPORT OF MOTION

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PLAINTIFF CHILDREN’S MOTION TO COMPEL

The Plaintiff class herein (“Plaintiff Children” or “Plaintiffs”) respectfully move pursuant to Rules 37(a)(1), 34 and 26(b)(1) of the Federal Rules of Civil Procedure, to compel the Oklahoma Department of Human Services Defendants (“DHS Defendants”) to produce the following records: (1) reports that show the total number of foster children assigned to DHS’s caseworkers; (2) documents regarding the Program Improvement Plans that DHS was legally required to prepare and implement following the federal government’s mandated reviews of Oklahoma’s child welfare system; (3) records concerning DHS’s budget and spending practices; and (4) reports prepared by review boards, task forces, committees and other child welfare professionals which have evaluated the child welfare system in Oklahoma and/or the child welfare performance of DHS, as well as correspondence relating to such evaluations. The grounds for this motion are set forth in the following supporting brief.

BRIEF IN SUPPORT OF MOTION TO COMPEL

Preliminary Statement

In the face of DHS Defendants' deliberate refusal to comply with their discovery obligations, Plaintiff Children have been left with no choice but to bring this motion to compel. What is difficult to understand about DHS Defendants' conduct is that they are well aware of the existence of the documents at issue, and know full well that those records are both relevant to Plaintiff Children's claims and can be produced without any undue burden to DHS, yet DHS Defendants simply refuse to produce them. Based on their conduct, the DHS Defendants are more interested in delaying and frustrating Plaintiff Children's ability to pursue their claims than in abiding by the Federal Rules of Civil Procedure.

The documents that Plaintiff Children seek by this motion bear directly on the claims asserted in the Complaint. For example, Plaintiff Children allege that DHS's caseworkers are saddled with excessively high workloads which prevent them from providing adequate care and oversight to the foster children under their charge. Remarkably, DHS has recently acknowledged that it does not systematically track its workers' total workloads, which means that senior management at the agency does not even know how overburdened its caseworkers really are. Just as remarkably, reports showing the caseworkers' total workloads exist, though they are not systematically tracked and the workload data reflected in those reports apparently does not make its way up the DHS chain of command. Plaintiff Children now seek production of these reports, which apparently are the *only* reports at DHS that show the true workloads of DHS's caseworkers.

Plaintiff Children also seek the production of documents relating to the Program Improvement Plans ("PIPs") that DHS was required to put into effect following the federal

government's first and second round Child and Family Service Reviews ("CFSRs"). In connection with those reviews, the federal government concluded that DHS failed to achieve substantial compliance with nearly every outcome aimed at measuring the safety, permanency and well-being of the state's foster children. Under federal law, DHS was therefore required to submit PIPs aimed at addressing those deficiencies, and progress reports showing the extent to which the goals of those PIPs were being met. Without any basis, DHS has refused to produce: (a) the progress reports and performance data it submitted to the federal government following the first round CFR; (b) the PIP itself that was approved by the federal government in October 2009 following the second round CFR; and (c) correspondence between DHS and the federal government concerning any modification of the first round PIP and the terms of the second round PIP. This is a discrete set of documents likely to contain information directly bearing upon the agency-wide problems alleged in the Complaint. There is no justification for DHS's withholding of these records.

Nor is there any valid basis for DHS's withholding of the budget and spending records that Plaintiff Children now seek. Not only are these records relevant to whether the agency-wide problems alleged in the Complaint have been caused, even in part, by DHS's failure to properly manage its finances, but many of the records in question have been specifically identified during the deposition process and their location is well known to DHS. Unfortunately, DHS Defendants will not take reasonable steps to assemble and produce these documents unless they are ordered to do so by the Court.

Finally, Plaintiff Children seek to compel the production of documents regarding any evaluations or assessments of Oklahoma's child welfare system conducted by governmental task forces, committees, private consultants or other child welfare professionals. Such information,

like the PIP-related records, is likely to bear upon many of the systemic deficiencies that are alleged in the Complaint. That DHS may not want to share criticism of its performance is no excuse for refusing to produce it.

For the foregoing reasons, and as set forth below, Plaintiff Children's motion to compel should be granted.

Statement of the Facts

Nine Named Plaintiff Children commenced this action in February 2008 on behalf of themselves and approximately 10,000 similarly situated foster children, charging DHS with operating a foster care system in which Plaintiff Children are routinely victimized by agency-wide practices and deficiencies in violation of Plaintiff Children's constitutional rights. *See* Complaint (Dkt. 2) ¶ 8. Among the systemic deficiencies at issue, the Complaint alleges, *inter alia*, that DHS fails to protect children from abuse and neglect while in state custody, such that Oklahoma has placed among the three worst states in the nation for each of the past five years in the rate at which children in foster care have been maltreated; DHS assigns excessive caseloads to its child welfare caseworkers and supervisors, thereby preventing the caseworkers from adequately monitoring foster children's placements and safety; DHS engages in dangerous monitoring and oversight practices, including the failure of caseworkers to visit foster children in DHS custody with the frequency required even under DHS's own policies; DHS has failed to develop a sufficient number and array of placements to meet Plaintiff Children's needs, with the predictable result that Plaintiff Children are routinely placed in unsafe foster homes, shelters and other facilities; and DHS subjects Plaintiff Children to harmful multiple moves while in state custody. As a result of these and other failures, which have been well documented and known to

DHS for years, DHS harms foster children and exposes them to unreasonable risks of harm. *Id.*

¶¶ 9-10.

On July 2, 2008, Plaintiff Children served their Second Request for Production of Documents (“RFP”) on DHS Defendants. (A true copy of the Second RFP is attached hereto as Exhibit 1.) These requests seek documents bearing upon the improper agency-wide practices and deficiencies outlined in the Complaint. The very next day after being served with these requests, DHS Defendants moved to stay all class-related discovery (Dkt. 145), including the discovery requested under the Second RFP, pending the Court’s rulings on two motions to dismiss that DHS Defendants had filed in April 2008.

On August 11, 2008, the Court stayed class-related discovery pending a determination on the motions to dismiss, but allowed discovery on the Named Plaintiffs’ individual claims to proceed (Dkt. 165). That stay was lifted when DHS Defendants’ dismissal motions were denied in January 2009 (Dkt. 210, 220). DHS Defendants then took another 30 days before serving responses and objections to the Second RFP. (A true copy of DHS Defendants’ responses and objections, dated February 6, 2009, is attached hereto as Exhibit 2.) After serving their objections, DHS Defendants waited another four months – until June 1, 2009 – before producing a single document responsive to the Second RFP. That production was woefully inadequate, consisting mainly of a small number of records generated by DHS’s quality control unit.

On May 5, 2009, the Court granted Named Plaintiffs’ motion for class certification, and certified a class consisting of all children who are or will be in the legal custody of DHS: (1) due to a report or suspicion of abuse or neglect, and (2) who are or will be adjudicated deprived due to abuse or neglect (Dkt. 270). Shortly before a scheduling conference was to occur for the purpose of discussing discovery deadlines and other case milestones, DHS Defendants again

moved to stay class-related discovery pending their appeal of the class certification ruling to the Tenth Circuit (Dkt. 285). This Court granted the requested stay on July 8, 2009, while again allowing discovery on the Named Plaintiffs' individual claims to proceed (Dkt. 298).

Notably, one of the grounds advanced by DHS when they sought the second stay was the representation to the Court that they would be making a production to Plaintiffs of approximately 400,000 pages of documents concerning "certain [unidentified] class-wide issues." Dkt. 285 at 5. On July 15, 2009, DHS Defendants made that production. The 400,000 pages arrived, but not the telling documents sought by the instant motion.

On February 8, 2010, the Tenth Circuit affirmed this Court's class certification Order, thus terminating the second class-related discovery stay (Dkt. 324, 329). Shortly after the Tenth Circuit's decision, Plaintiff Children's counsel asked DHS Defendants' counsel when DHS Defendants would be producing additional documents responsive to the Second RFP. DHS Defendants' counsel provided their answer at a meet and confer on February 23, 2010, when they advised that *DHS Defendants were refusing to produce any other documents responsive to the Second RFP*. (A true copy of an e-mail from Plaintiffs' counsel to DHS Defendants' counsel memorializing the parties' discussion at the February 23, 2010 meet and confer is attached hereto as Exhibit 3.)¹ Apparently, DHS Defendants believe that the simple act of asserting objections in their response to the Second RFP relieves them from the obligation of producing records that

¹ At a later point in the meet and confer, Plaintiffs' counsel asked counsel for DHS Defendants whether their refusal to provide any additional responsive documents meant that they were no longer willing to reconsider objections to certain individual requests contained in the Second RFP – objections that DHS Defendants had previously agreed to reconsider before they filed their second stay motion in June 2009. DHS Defendants' counsel responded that they would advise within seven days whether they were willing to reconsider those objections and produce any of the requested documents. *See* Ex. 3. On March 2, 2010, DHS Defendants' counsel confirmed that DHS Defendants were standing on their objections to the Second RFP and were refusing to produce any other documents responsive to those requests. (*See* March 2, 2010 e-mail from Donna De Simone, a true copy of which is attached hereto as Exhibit 4.)

they know to be responsive to Plaintiff Children's requests, relevant to Plaintiff Children's claims, and capable of production without any undue burden to DHS.

Plaintiff Children have made diligent efforts in compliance with Local Rule 37.1 to resolve the discovery matters at issue in this motion without the need for court intervention, including the conference with DHS Defendants' counsel on February 23, 2010. Notwithstanding these good faith efforts, DHS Defendants have steadfastly refused to produce the requested information, necessitating this motion. As discussed further below, Plaintiff Children are entitled to an Order compelling DHS Defendants to produce the requested documents.

Argument

I. DHS DEFENDANTS SHOULD BE COMPELLED TO PRODUCE THE DOCUMENTS AT ISSUE.

A. The Federal Rules Authorize Broad Discovery.

Courts have uniformly held that the scope of discovery is deliberately broad and is intended to allow parties "to obtain the fullest possible knowledge of the issues and facts before trial." *Martinez v. Cornell Corr. of Tex.*, 229 F.R.D. 215, 218 (D.N.M. 2005) (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)); *see also* 8 Charles Alan Wright & Arthur R. Miller, *Fed. Practice and Procedure* § 2007 (3d ed. 2008) ("[t]he broadest scope of discovery is favored under the federal rules."). Under Fed. R. Civ. P. 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" Fed. R. Civ. P. 26(b)(1).

Relevant information need not be admissible at trial, as long as it "appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* A request for discovery is appropriate if there is "any possibility" that the information sought may be relevant to the claim

or defense of any party. *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicer of Haverstraw, Inc.*, 211 F.R.D. 658, 663 (D. Kan. 2003) (citations omitted).

Likewise, Fed. R. Civ. P. 34, which describes the process for the request and production of documents, “has been liberally construed to facilitate the discovery process.” *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Midland Bancor, Inc.*, 159 F.R.D. 562, 566 (D. Kan. 1994). Federal Rule 37(a) provides that if a party fails to properly respond to document requests under Federal Rule 34, the requesting party may move to compel a response to those requests. *See* Fed. R. Civ. P. 37(a).

B. Plaintiff Children Are Entitled To Reports Showing The Total Number Of Foster Children Assigned To DHS's Caseworkers.

The Complaint alleges that high worker caseloads are contributing to DHS's failure to visit and adequately monitor Plaintiff Children, thereby subjecting them to constitutionally prohibited harm and threatened harm. *See, e.g.*, Complaint (Dkt. 2) ¶¶ 8, 121-124.² That high worker caseloads are dangerous for foster children cannot be seriously disputed. Indeed, ██████████, the Programs Administrator of the Resource Unit in DHS's Child and Family Services Division (“CFSD”), recently acknowledged that one consequence of high caseloads is that “children and families suffer.” ██████████ Dep. (attached hereto as Exhibit 5) 51:20, Jan, 6, 2010; *see also id.* at 53:11-13 (Q: “So, bottom line, excessive caseloads are bad for kids?” A: “Yes.”). Moreover, this Court has recognized that a cap on caseloads may constitute a permissible remedy in this case. *See* Transcript of May 5, 2009 Motion Hearing at 16-17 (Dkt. 272). Thus, it is beyond dispute that documents addressing the workloads of the caseworkers assigned to Plaintiff Children are relevant to their claims.

² The Oklahoma Child Death Review Board has repeatedly recommended that DHS reduce its caseloads – which exceed national standards – in order to reduce the number of deaths due to child abuse or neglect. *See, e.g.*, Complaint (Dkt. 2) ¶ 8.

Request No. 13 of Plaintiffs' Second RFP seeks such documents. Specifically, it requests the production of "[a]ll evaluations, reports, and/or aggregate data concerning caseloads of caseworkers" assigned to Plaintiff Children. Ex. 1 at 12. In response, DHS Defendants asserted the standard boilerplate objections: that the request is "vague," "its scope is impermissibly broad," it "calls for information that is not reasonably calculated to lead to the discovery of admissible evidence," and "answering it would impose an unfair and undue burden upon OKDHS Defendants." Ex. 2 at 15-16. These objections, however, did not deter DHS Defendants from producing the caseload records that they wanted Plaintiff Children to see when they produced documents on July 15, 2009. This is a perfect example of the type of selective production which the DHS Defendants have engaged in to date.

In particular, as part of their July 15, 2009 production, DHS Defendants produced monthly "YI 600B" reports that purport to track each caseworker's monthly workloads. (The YI 600B reports are referred to as "Monthly Workload Supporting Detail.") In fact, these 600B reports comprised nearly one-third of the 400,000 pages that DHS Defendants produced on that date. On January 26, 2010, DHS Defendants also produced other workload records, from DHS's "YI 684" database, that purport to show the number of children assigned to caseworkers who work in the counties where the Named Plaintiffs have been placed.³ The problem with the YI 600B and YI 684 reports, however, is that they only show the caseworkers' "primary" assignments and completely omit the workers' "secondary" assignments. As is frequently the case, if a child is moved outside of the county where the child's Juvenile Court proceeding is pending, then two caseworkers have responsibility for that child's care: (i) the "primary"

³ DHS Defendants produced the YI 684 records only after Named Plaintiffs had to move to compel their production on November 11, 2009 (Dkt. 315), and more than two months after DHS Defendants agreed to produce them at a "meet and confer" held on November 23, 2009.

caseworker, who works in the county of Court jurisdiction and who is responsible for keeping the Court apprised of the child's status, and (ii) the "secondary" worker, who works in the county where the child has been placed and who is responsible for visiting the child.⁴ *See, e.g.*, Okla. Admin. Code § 340:75-6-48(a)(1)(B) (2009). Thus, to have an accurate count of a caseworker's **total** workload, it is necessary to know the number of children assigned to that worker on both a "primary" **and** "secondary" basis. While the YI 600B and YI 684 reports provide information regarding the workers' primary assignments, they do not provide any information with respect to the workers' secondary assignments.

In an attempt to bridge this information gap, on January 8, 2010, Plaintiff Children's counsel requested DHS to provide documents showing the number of cases and children assigned to DHS caseworkers on a secondary basis. *See* January 8, 2010 e-mail from W. Kapell to D. De Simone, attached hereto as Exhibit 7. At a meet and confer on January 14, 2010, DHS Defendants' counsel agreed to inquire whether DHS has such information. *See* January 15, 2010 e-mail exchange between W. Kapell and D. De Simone, attached hereto as Exhibit 8. On February 1, 2010, DHS Defendants' counsel reported that "no reasonably identifiable documents exist" which show the number of secondary case assignments and associated children assigned to DHS's caseworkers. *See* February 1, 2010 e-mail from D. De Simone to W. Kapell, attached hereto as Exhibit 9.

Thus, by DHS Defendants' own admission, DHS does not systematically track its caseworkers' secondary assignments. Since secondary assignments are a principal component of

⁴ According to ██████████, the Program Administrator for CFSD's Permanency, Adoptions and Independent Living Unit, primary and secondary caseworkers "have equal responsibility" in the care and oversight of foster children in DHS custody. ██████████ Dep. (attached hereto as Exhibit 6) 40:14-16, Aug. 6, 2009.

the workers' total case assignments, this means that DHS also fails to systematically track the total number of children being assigned to its workers.

While DHS does not track total worker caseloads systematically, some, if not all, DHS caseworkers do provide reports to their immediate supervisors that show the total number of children assigned to them, including children assigned on a secondary basis. Indeed, a small number of these reports were included in DHS's prior productions relating to the nine Named Plaintiffs. Attached hereto as Exhibit 10 is an example of one such report, dated December 2, 2008, for a caseworker named [REDACTED]. A comparison of this report with Ms. [REDACTED]'s YI 600B report for the same time period (a copy of which is attached hereto as Exhibit 11), shows that the 600B report substantially understates Ms. [REDACTED]'s true workload: whereas the 600B report lists Ms. [REDACTED] as being assigned to **27 children** in November 2008, the monthly report that Ms. [REDACTED] provided to her supervisor shows that she was really assigned to **43 children**, including five secondary cases (*see* Ex. 10 at 1-2).

The discrepancy concerning Ms. [REDACTED]'s caseload totals is not an isolated instance of poor record keeping by DHS. As another example, caseworker [REDACTED]'s YI 684 report indicates that she was responsible for **31 children** as of February 2, 2009. *See* YI 684 report, attached hereto as Exhibit 12. But an e-mail from Ms. [REDACTED]'s supervisor ([REDACTED]) to Assistant County Director [REDACTED], also dated February 2, 2009, reveals that the YI 684 report substantially understates Ms. [REDACTED]'s true workload. Ms. [REDACTED] was really responsible for **60 children**. *See* February 2, 2009 e-mail from [REDACTED] to [REDACTED], attached hereto as Exhibit 13. The assignment of 60 children to Ms. [REDACTED], and 43 children to Ms. [REDACTED], supports the allegation in the Complaint that DHS is assigning excessive caseloads to its workers, is 3-4 times higher than the workload levels recommended by the Child Welfare

League of America and the Council on Accreditation, and is consistent with the finding of Dr. Peg Hess, an expert retained by the Named Plaintiffs, who concluded that numerous “systemic deficiencies and persistent preventable failures” appear to exist at DHS, including “a severely overburdened workforce.” *See* Supplemental Report entitled “Review of Named Plaintiffs’ Case Files” (attached hereto as Exhibit 14) at 7, 8 and 84.⁵

That the YI 600B and YI 684 reports fail to accurately track the true workloads of DHS’s caseworkers is not surprising given that neither report includes the workers’ secondary case assignments. The monthly reports that DHS caseworkers provide to their immediate supervisors appear to be the only documents that provide a true count of employee workloads. For this reason, they need to be produced.

As for DHS Defendants’ objections, their assertion that the requested workload reports constitute “information that is not reasonably calculated to lead to the discovery of admissible evidence” is frivolous. Ex. 2 at 15-16. And the request for these reports is neither “vague” nor “impermissibly broad,” as DHS Defendants claim, since DHS Defendants know exactly what documents are being sought and the universe of documents in question is limited to monthly workload reports that DHS caseworkers have provided to their immediate supervisors. *Id.* at 15. Nor can DHS Defendants possibly meet their burden of proving that the production of such reports would be “unduly burdensome.” These reports are readily identifiable and should be maintained by the supervisors who received them either on their computers or in their paper files.

⁵ Dr. Hess has a PhD in Social Work from the University of Illinois and 39 years of experience as a social work practitioner, educator and researcher. Her initial report, summarizing her review of DHS case files for five of the Named Plaintiffs, was provided to DHS Defendants on September 30, 2009, and filed with the Court on November 11, 2009 in support of Named Plaintiffs’ Motion to Compel of that date (Dkt. 315, Exhibit A). Dr. Hess’s Supplemental Report, pertaining to her review of two additional Named Plaintiffs (Ex. 14), was provided to DHS Defendants on February 25, 2010.

For the foregoing reasons, DHS Defendants should be compelled to produce any monthly workload reports that DHS's caseworkers have provided to their supervisors since January 1, 2007. These reports are likely to contain important information regarding the caseworkers' true workloads.

C. Plaintiff Children Are Entitled To Documents Concerning The Federal Government's CFSRs And The PIPs Developed As A Result Of The CFSRs

In Request Nos. 21-26 of their Second RFP (Ex. 1), Plaintiff Children request information regarding the CFSRs that were conducted in Oklahoma by the U.S. Department of Health and Human Services ("HHS") and the mandatory PIPs that DHS has developed in response to those reviews. The federal CFSR process is designed to assess whether states are in conformity with federal child welfare benchmarks. The reviews examine outcomes in the areas of child safety, permanency, and well-being and evaluate systemic factors that affect the quality of the services being delivered to children and families throughout the state. Under federal law, if a state is not in substantial conformity with any CSFR outcome or systemic measure, it must develop and submit a PIP to HHS for approval within 90 days of receiving notice of non-conformity. *See* 45 C.F.R. § 1355.35(c)(1) (2010). DHS has failed to achieve substantial conformity with nearly every outcome reviewed in both of the CFSRs that the federal government has conducted in Oklahoma to date.⁶ As a result of this poor performance, the

⁶ Oklahoma's initial CFSR was completed in 2002 (the first round CFSR"), and a PIP was approved by HHS in January 2003 (the "January 2003 PIP"). The state's second CFSR was conducted in 2007 and completed in March 2008 (the "second round CFSR"). According to testimony by DHS officials, DHS's PIP in response to the second round CFSR was approved by HHS in October 2009. *See* ████████ Dep. (attached hereto as Exhibit 15) 190:14-191:10, Dec. 18, 2009. *See also* Children's Bureau Child and Family Services Reviews: Status of Program Improvement Plans and Subsequent Child and Family Services Reviews, *available at* http://www.acf.hhs.gov/programs/cb/cwmonitoring/general_info/pipstatus.htm.

federal government has required DHS to develop and implement PIPs following these CFSRs to address DHS's multiple areas of nonconformity.

Pursuant to Request Nos. 21-26, Plaintiff Children seek the following records for the period from January 1, 2007 to the present: (1) documents regarding the implementation of Oklahoma's January 2003 PIP that DHS developed in response to the first round CFSR, including quarterly and annual status reports and performance data that DHS submitted to HHS (Req. Nos. 23-26); and (2) documents regarding the second round CFSR, including records regarding the negotiation and preparation of the October 2009 PIP (Req. Nos. 21-22, 26).⁷

DHS Defendants responded to these requests by asserting the same litany of unsupportable boilerplate objections that they assert in response to nearly all of Plaintiff Children's document requests, stating that they are vague, impermissibly broad, unduly burdensome, and call for information not reasonably calculated to lead to the discovery of admissible evidence. *See* Ex. 2 at 20-24. Defendants also objected that Plaintiffs' requests are burdensome to the extent they seek "information on a regional, area, and county level" (*id.*) and, in response to Plaintiffs' request for documents regarding Oklahoma's second round CFSR (Req. No. 21), direct Plaintiffs to "publicly available information on the [HHS] website at www.acf.hhs.gov." (*id.* at 21) – a response that makes little sense given that neither the October 2009 PIP submitted in response to the second round CFSR nor the correspondence between DHS

⁷ *See* Plaintiffs' Second RFP (Ex. 1), at Req. Nos. 21-22 (seeking documents regarding the second round CFSR and the preparation of any potential second round PIP); Req. No. 23 (seeking documents regarding the implementation of the first round PIP, including mandated quarterly and annual reports submitted to HHS); Req. No. 24 (seeking requests to modify the first round PIP and responses to these requests); Req. No. 25 (seeking aggregate data submitted pursuant to the first round PIP); and Req. No. 26 (communications and correspondence between and among DHS and HHS regarding both the first and second round CFSRs and PIPs). While Plaintiff Children's original requests sought these documents from January 1, 2004 to the present, Plaintiffs have modified their requests and now seek only those documents reflecting responsive information from January 1, 2007 to the present.

and HHS regarding that PIP are matters of public record. Subject to these objections, Defendants stated that “to the extent Plaintiffs’ requests seek information on a state-wide level,” they would make responsive documents available for inspection “at a mutually agreeable date, time and location.” Ex. 2 at 21-24. However, following the Tenth Circuit’s affirmance of this Court’s class certification order, DHS Defendants backed off this representation and, without explanation, informed Plaintiff Children that no documents responsive to these requests will be produced. *See* Exs. 3 and 4.

There can be no question that information regarding Oklahoma’s performance in meeting federal child welfare benchmarks is relevant to Plaintiff Children’s claims. The very purpose of this action is to “redress the ongoing aggregate problems and failures at DHS,” including its failure to provide safe and adequate living situations, meet children’s service needs, and adequately monitor the safety of children in DHS foster care custody. *See* Complaint ¶ 7. These are among the same failures the federal CFSRs have identified and that the PIPs are designed to address. *See* Complaint ¶¶ 8-9, 61-66. Therefore, documentation regarding DHS’s attempts to address these deficiencies, including DHS’s quarterly and annual reports to HHS regarding the implementation of the first round PIP, and DHS’s correspondence with HHS regarding the terms of the second round PIP, is clearly relevant to the instant litigation.⁸ Such records are also relevant to Plaintiff Children’s allegations that the failures of Oklahoma’s child welfare system

⁸ As discussed above, a state must submit its proposed PIP to HHS for approval within 90 days of receiving notice of nonconformity. *See* 45 C.F.R. § 1355.35(c)(1). If a state’s PIP does not meet with HHS’s approval, the state has 30 days to revise and resubmit the plan for approval. *See* 45 C.F.R. § 1355.35(c)(3). Here, it took DHS nearly 18 months to develop an acceptable second-round PIP following the completion of the second round CFSR in March 2008. Plaintiff Children’s request for communications between DHS and HHS (Req. No. 26) is particularly relevant since these documents will likely reveal the issues underlying the extended PIP negotiations and to what extent DHS’s unwillingness or inability to identify necessary action steps caused delay.

have been well documented and known to DHS for years, yet DHS Defendants have consistently failed to remedy them, subjecting children in DHS custody to harm and imminent risk of harm. *See* Complaint ¶¶ 10, 56, 239. Plaintiff Children are thus entitled to the requested information not only to establish DHS's failure to meet minimum standards for children, but also to show that DHS Defendants have acted with deliberate indifference or a lack of professional judgment in managing the child welfare system.

DHS Defendants' boilerplate objections that these requests are vague, overbroad and unduly burdensome are meritless and must be overruled. First, Plaintiff Children's requests are not vague. The CFSR and PIP process referenced in Request Nos. 21-26 is clearly set forth and defined in federal regulations (*see* 45 C.F.R. § 1355.31-37 (2010)) and thus, DHS Defendants cannot credibly deny understanding the information Plaintiff Children seek. Second, the requests are neither overly broad nor unduly burdensome. Indeed, Plaintiffs' requests primarily seek information Defendants are already required by law to provide to HHS. *See, e.g.*, 45 C.F.R. § 1355.35(a) (2010) (requiring the submission of PIPs); § 1355.35(d)(4) (2010) (requiring the submission of quarterly status reports); and §1355.35(e)(4) (2010) (providing for the submission of requests to modify or renegotiate the terms of a PIP). Moreover, DHS's correspondence with HHS regarding the first and second round CFSRs and PIPs, and the status reports that DHS is required to submit to HHS pursuant to the CFSR and PIP process, are not likely to be voluminous and are likely to be contained in a small number of files at DHS. One would reasonably expect that DHS keeps all of its reports to HHS regarding the CFSR process, and all correspondence with HHS regarding that process, in a single place.

In sum, DHS Defendants should be compelled to produce the requested information regarding DHS's first and second round CFSRs and PIPs. This information is directly relevant to Plaintiff Children's claims, and DHS's refusal to produce such records is without basis.

D. Plaintiff Children Are Entitled To DHS Budget And Spending Records

In Request No. 50 of the Second RFP, Plaintiff Children request the production of documents "regarding DHS child welfare and foster care budgets, projections, requests, allocations, and spending" Ex. 1 at 20.⁹ DHS Defendants initially objected to this Request, asserting that it was vague and impermissibly broad, that it called for information not reasonably calculated to lead to the discovery of admissible evidence, and that answering it would impose an unfair and undue burden. Ex. 2 at 39. Defendants also objected to the Request as burdensome, to the extent that it sought "information on a regional, area, and county level." *Id.* Subject to those objections and "to the extent that Plaintiffs' [sic] request information on a state-wide level," DHS Defendants agreed to make documents responsive to this request available for inspection by Plaintiffs "at a mutually agreeable date, time and location." *Id.* Following the Tenth Circuit's decision affirming class certification, DHS Defendants turned their back on this representation as well.

Plaintiff Children are entitled to documents regarding DHS's budget requests and spending practices, particularly insofar as these documents relate to the agency's child welfare operations, as such records are directly relevant to whether the agency-wide problems alleged in the Complaint are the result of a failure on the part of DHS to properly manage its finances. Among other things, Plaintiff Children are entitled to see to what extent, if any, DHS has attempted to use its budget requests and spending activities to address the serious problems noted

⁹ Like its other requests, Plaintiff Children now seek such information for the period from January 1, 2007 through the present.

in the Complaint regarding the excessive workloads assigned to DHS's caseworkers and the extreme shortage of foster homes and other placements available to Plaintiff Children.

DHS Defendants' objections, based on vagueness, overbreadth and undue burden, are specious. DHS's proposed budget requests are discrete in scope and volume, and DHS knows exactly what documents have been requested. [REDACTED], the Director of DHS's Field Operations Division, the division that employs the caseworkers and supervisors assigned to Plaintiff Children, testified that all of the budget forms completed by Field Operations are sent to DHS's Finance Division. *See* [REDACTED] Dep. (attached hereto as Exhibit 16) 154:7-10, June 17, 2009. According to Mr. [REDACTED], the budget requests are on "Form BR-1" and include coversheets that describe each line item in the budget, and the level of priority assigned to each such item, "[a]nd they're sent as an entire package back to finance." *Id.* at 171:7-20. There is no valid excuse for DHS's refusal to produce such specifically-identified budget documents, especially given that they are kept at a single location, *i.e.*, in DHS's Finance Division. Plaintiff Children are entitled to the budget request forms generated not only by the Field Operations Division, but by the Child and Family Services Division ("CFSD") of DHS as well.

Likewise, Plaintiff Children's request for DHS's spending records is not vague or overbroad, nor would it subject DHS to undue burden. For example, when asked at his deposition whether he could determine the percentage of the Field Operations Division's budget that is actually spent on child welfare services, Mr. [REDACTED], the Division's Director, responded that his "payroll monitoring report[s]" provide such information. *Id.* at 164:23-165:4. He also stated that these monthly reports are kept in a filing cabinet to which he has ready access. *Id.* at 168:8-12. Plaintiff Children are entitled to the production of these reports, as well as any similar reports maintained by CFSD. In blatant violation of their discovery obligations, DHS

Defendants have simply refused to take reasonable steps to assemble and produce records that they know are responsive. They should be compelled to produce such documents now.

E. Plaintiff Children Are Entitled To Documents Regarding Evaluations And Assessments Of Oklahoma’s Child Welfare System

In Request No. 101 of their Second RFP, Plaintiff Children request the production of documents regarding any and all reports, studies, evaluations, and assessments of the child welfare system in Oklahoma, or the child welfare performance of DHS, including reports issued by any legislative or gubernatorial body, committee or task force, or commission, private consultant, or other child welfare professional, and any communications or memoranda regarding such reports, studies, evaluations, and assessments.¹⁰ Ex. 1 at 30-31. In Request No. 102, Plaintiff Children specifically request documents concerning one such review – that conducted by the American Bar Association Center on Children and the Law (“ABACCL”). *Id.* at 31.

DHS Defendants objected to these Requests, asserting that they are vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. *See* Ex. 2 at 69. DHS Defendants also objected to the request for documents concerning the ABACCL’s review on the ground that the documents in question were protected by the attorney-client privilege and the attorney work product doctrine. *Id.*¹¹

DHS Defendants’ relevance objection is without merit. The Complaint alleges various ongoing systemic deficiencies at DHS, including, *inter alia*: (1) its failure to provide safe and adequate living situations for foster children and to meet their service needs; and (2) its failure to

¹⁰ Plaintiffs have modified this Request, and are now seeking only such documents generated from January 1, 2007 through the present.

¹¹ DHS Defendants’ privilege claims with respect to the ABACCL review are addressed in Sections 1.a. and 1.b., *infra*.

adequately monitor the safety of foster children due to an overburdened and mismanaged workforce and dangerously inadequate oversight practices. *See, e.g.*, Complaint ¶ 7. The documents sought by Request Nos. 101 and 102 are likely to bear upon these systemic deficiencies, and thus are clearly relevant.

Likewise, Plaintiff Children's request for such documents is not vague, overbroad or unduly burdensome. Any reports or assessments of DHS's child welfare operations since January 1, 2007, should be known to DHS's management, especially at the more senior levels within the agency. It is also unlikely that such a large number of reports of this nature exist that their production would cause DHS to sustain any undue burden.

Accordingly, DHS Defendants should be required to produce all such reports, assessments and evaluations of the child welfare system in Oklahoma, along with any correspondence that DHS may have engaged in with the parties who conducted these reviews, and any internal communications within DHS concerning such reviews.

1. Documents Concerning The ABACCL Review Should Be Produced

One such review that DHS clearly knows about is the assessment conducted by the ABACCL. According to a news article in *The Oklahoman*, a draft of a report prepared by the ABACCL with regard to its review was provided to DHS on May 18, 2007. *See* Nolan Clay and Randy Ellis, "Report Rips DHS," *The Oklahoman*, April 27, 2008, a true copy of which is attached hereto as Exhibit 17. The newspaper has made this draft report available on its website. *See* American Bar Association, Center on Children and the Law: Oklahoma County Juvenile Court Child Abuse and Neglect Case Handling Assessment, May 18, 2007, *available at*

http://downloads.newsok.com/documents/a14aba_rh.pdf (the “Draft Report”). A copy of the Draft Report is attached hereto as Exhibit 18.¹²

On August 5, 2009, DHS Defendants provided a privilege log in response to Plaintiff Children’s request for documents concerning the ABACCL’s review. *See* OKDHS Privilege Log August 5, 2009 (attached hereto as Exhibit 19), attached to Third Supplemental Response of OKDHS Defendants to Plaintiffs’ Second RFP. The log lists four documents that contain “comments of counsel”¹³ and asserts that these records are protected from disclosure under the attorney work-product doctrine. The Third Supplemental Response to which the log is attached also purports to incorporate all responses and objections set forth in the earlier Response, including presumably the assertion of attorney-client privilege contained therein. As explained below, these four documents are not protected under the work produce doctrine or the attorney client privilege.¹⁴

¹² Documents concerning the ABACCL’s review are clearly relevant because the Draft Report is replete with findings regarding systemic and structural problems at DHS. For instance, the Draft Report recommends that DHS should “reassess its commitment to its current organizational structure” and observes that “[i]n some ways, specialization has fractured the caseworker’s authority and decreased individual effectiveness.” Ex. 18 at 11. Moreover, according to the Draft Report, “many have noticed that disruptions created with every transfer [to a new caseworker] contribute to delay and reduce a family’s opportunities for success” (*id.* at 13), and “[i]t is common knowledge that because of turnover, management has been forced to select its supervisors from a relatively small and comparatively inexperienced group of tenured caseworkers.” *Id.* The Draft Report further notes that “[o]ne of the most important indicators of system efficacy is the number of children found to achieve permanency in a review,” and that, “[i]n this review, only four out of twenty-four children . . . achieved permanency. On average, children included in the sample took 12 months longer to achieve permanency than the national average” *Id.* at 18.

¹³ Two of the documents are dated May 7, 2007; the others are dated May 15 and May 18, 2007.

¹⁴ The log improperly fails to specify the individuals who authored and received the listed records beyond identifying “OKDHS legal counsel” as the author and “ABA legal counsel” as the recipient of all four documents.

a. The Attorney-Client Privilege Does Not Apply

The law concerning attorney-client privilege is clear. The Tenth Circuit has stated: “The [attorney-client] privilege protects ‘confidential communications by a client to an attorney made in order to obtain legal assistance’ from the attorney in his capacity as a legal advisor.” *Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982, to “Custodian of Records, Ellison, Nelson, & Kennedy,” Attorneys*, 697 F.2d 277, 278 (10th Cir. 1983) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).¹⁵ The privilege “is to be construed narrowly.” *Id.* at 278. A party resisting discovery based on attorney-client privilege (or work-product protection) has the burden of establishing that the privilege applies. *See Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984).

It is simply not possible that the comments on the four documents listed in the privilege log are protected attorney-client communications. According to DHS Defendants’ own log, those documents passed between “OKDHS legal counsel” and “ABA legal counsel.” Ex. 17. Thus, for the privilege to apply, an attorney-client relationship must have existed between DHS and the ABA at the time of the communications. Obviously, this is not the case, and DHS’s suggestion to the contrary is without merit.

b. The Attorney Work Product Doctrine Does Not Apply

The work-product doctrine is equally clear. It protects only (1) “documents and tangible things”; (2) “*prepared in anticipation of litigation or for trial*”; (3) “by or for another party or by or for that other party’s representative.” *Feldman v. Pioneer Petroleum, Inc.*, 87 F.R.D. 86, 88 (W.D. Okla. 1980) (emphasis added) (quoting 8 Charles Alan Wright & Arthur R. Miller,

¹⁵ Because this is a federal-question suit pursuant to 42 U.S.C. § 1983, principles of the common law determine the applicability of any privileges. *See, e.g., In re Qwest Communications International*, 450 F.3d 1179, 1184 (10th Cir. 2006); *Winton v. Board of Com’rs of Tulsa County, Okla.*, 188 F.R.D. 398, 399 (N.D. Okla. 1999).

Federal Practice and Procedure: Civil § 2024 (1970) at 196-97). “The inchoate possibility, or even the likely chance of litigation, does not give rise to work product. To justify work product protection, the threat of litigation must be real and imminent.” *Williams v. Sprint/United Management Co.*, No. 03-2200-JWL-DJW, 2006 WL 266599, at *10 (D. Kan. Feb. 1, 2006) (internal quotation omitted).

Here, it cannot legitimately be claimed that counsel’s comments on the four documents in question were prepared in anticipation of litigation. According to the log, the comments were prepared in May 2007, a full nine months before this action was commenced in February 2008. Moreover, the ABA study was commissioned by DHS *a full two years* before Plaintiffs filed their Complaint in this matter.¹⁶

Accordingly, neither the attorney-client privilege nor the work product doctrine applies here, and DHS Defendants should be compelled to produce the four documents listed on their privilege log (Ex. 19). DHS Defendants should also be required to produce any and all other correspondence that it may have had with the ABACCL concerning the ABA’s review and/or its report, and any and all internal communications that DHS may have had on these subjects.

¹⁶ The Draft Report notes that the ABACCL “was first asked by the Oklahoma County Department of Human Services (OKDHS) to conduct an assessment of the Oklahoma County Juvenile Courts in March of 2006.” Ex. 16 at 2.

Conclusion

For the foregoing reasons, Plaintiff Children respectfully request that the Court grant their motion to compel in all respects.

Dated: March 24, 2010

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