

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civ. No. 99 - 1435 (GAG/MEL) |
| |) | |
| THE COMMONWEALTH OF PUERTO RICO, |) | |
| <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

**UNITED STATES' SUBMISSION ON THE RECENT
UTILIZATION OF THE DSPDI BUDGET**

On August 8, 2019, the Court ordered the Commonwealth to file with the Court a statement under penalty of perjury explaining why the allocated budget for DSPDI (Division de Servicios a las Personas con Discapacidad Intelectual de Puerto Rico) had not been used in its entirety in each of the last four fiscal years. Order, ECF No. 2562, at 2.

In its order, the Court referenced that the Commonwealth had reported to the office of the Joint Compliance Coordinator (JCC) that a cumulative total of more than eight million dollars in DSPDI-allocated funds were not spent on services and supports for people with developmental disabilities, including our participants, during this time period. *Id.* at 1. The Court ordered the Commonwealth to explain why it failed to inform the Court, the office of the JCC, and the United States of all this and to explain where the DSPDI funds went. *Id.* at 2.

The Court also directed the Commonwealth to provide a reason why the Court should not take additional measures, including the possible appointment of a receiver or Special Master, to

ensure that DSPDI funds are utilized fully going forward. *Id.* The Court then instructed the JCC to provide a copy of its order to the Executive Director of the Financial Oversight and Management Board and to the Presidents of both the House of Representatives and the Senate of Puerto Rico. *Id.* at 3. The JCC reported almost immediately that it complied with the Court's order. Notice of Compliance with Directives of the Court, Aug. 8, 2019, ECF No. 2563.

On September 9, 2019, in response to the Court's order, the Commonwealth filed a brief motion, an unsworn declaration from the DSPDI Director, and a budget report in response to the Court's order. Commonwealth Submission, ECF No. 2585.

The Court then ordered the United States to file a response by October 10, 2019. Order, Sept. 16, 2019, ECF No. 2586. The United States' response is set forth below.

In short, the Court has issued clear orders for more than a decade directing the Commonwealth to maintain the DSPDI budget in order to sustain services to vulnerable participants with developmental disabilities, but, over the past four fiscal years, the Commonwealth took almost \$20M from funds that the legislature had allocated to serve this population, with as the Commonwealth admits, "disastrous" effect on the Commonwealth's compliance with Court orders in this case.

I. The Court Has Issued Multiple Orders Over Many Years to Protect the DSPDI Budget and DSPDI Services from Cuts

In its recent order, the Court stressed that it has been "adamant in reiterating that the budget for DSPDI cannot be reduced or curtailed in any manner that could cause the interruption of critical services, which, in turn, imperil the health, safety, and welfare of the most vulnerable population in this case." Order, Aug. 8, 2019, ECF No. 2562, at 1. It appears that the Commonwealth has not complied with this directive.

A. The Court Has Repeatedly Reviewed the Adequacy of the DSPDI Budget

From the outset, Judge Gelpi has made safeguarding the DSPDI budget a priority. The first agenda item at his initial status hearing was “New Budget for the Mental Retardation Program.”¹ Mins. of Proceedings, Nov. 16, 2006, ECF No. 554 (referencing that the Program budget had just been increased to \$43M).

Since that first status hearing, the Court has routinely reviewed and issued orders to safeguard proposed and existing Program budgets. *See, e.g.*, Mins. of Proceedings and Order, Jan. 19, 2012, ECF No. 1212 (advising “the Commonwealth to maintain the same budget currently assigned to the program for the fiscal year 2012-2013”). An extensive list of Court orders and minutes in this case related to maintaining the Program budget over the years is set out in Attachment A.

B. The Court Has Repeatedly Ordered that DSPDI Services Not Be Cut

In concert with its directives to protect the Program budget, the Court has regularly issued orders and minutes to ensure that participants’ needs are being met and are not being adversely affected by cuts to supports and services.² *See, e.g.*, Mins. of Proceedings and Order,

¹ The Commonwealth program serving people with developmental disabilities has had many different names over the years. Initially, it was the Mental Retardation Program. The Commonwealth later renamed it the Intellectual Disabilities Program. Today, we refer to it as the DSPDI. In any quoted materials in the remainder of this submission, we have substituted the archaic and less appropriate names for “DSPDI” or the “Program.”

² As the Court is aware, the Commonwealth has agreed to provide critical clinical, habilitation, residential, and other services and supports to participants with developmental disabilities in a series of Court orders. *See, e.g.*, Interim Settlement Agreement, Docket No. 2, Apr. 30, 1999; Community-Based Service Plan, Oct. 9, 2001, Docket No. 104; and the Joint Compliance Action Plan (JCAP), Oct. 19, 2011, ECF No. 1185-1. The JCAP even includes language that the Commonwealth is to maintain the integrity of its community service-delivery system, including an adequate budget for the Program. JCAP at 6-7. The Court and the parties have executed several other agreed-upon documents that support these orders.

Feb. 25, 2010, ECF No. 954 (the “services to the participant[s] of the program shall remain uninterrupted”); Order, Apr. 8, 2016, ECF No. 1799 (the Court stressed that “[u]nder no circumstances can the services to the participants be curtailed, and institutionalization is not an alternative”). Set forth in Attachment B is a lengthy list of Court orders that demonstrate the ongoing importance that the Court has placed on adequately funded participant services.

C. The Court Issued an Order to Protect DSPDI Funding and Services Earlier This Year

In the Court’s latest order solely devoted to the DSPDI budget, the Court synthesized both the DSPDI budget and adequate participant service provisions in one comprehensive order. The Court stressed up front that it “*is important that the budget for DSPDI for fiscal year 2019-2020 be adequate* so as to enable the Commonwealth to develop and implement needed remedial measures to ensure compliance with existing Court Orders in this case and to meet the needs of persons with developmental disabilities in the Commonwealth’s service-delivery system.” Order, Apr. 22, 2019, ECF No. 2443, at 1 (emphasis added).

The Court noted that the current Program budget was \$39M and that the proposed budget for the next fiscal year was about \$35M, a cut of \$4M. *Id.* The Court found that, although “recent additional demands on the agency strongly suggest that a budget *increase* is warranted, at the very least, the *current budgeted amount must be maintained next fiscal year* in order for the Commonwealth to implement much needed reform.” *Id.* (emphasis added).³

See, e.g., Benchmarks (revised) Feb. 22, 2017, ECF No. 1998-1; and the Joint Action Plan, Mar. 29, 2019, ECF No. 2423.

³ In its recent order, the Court stated that it was “troubled” by the fact that DSPDI requested a budget of about \$4M less than that ordered by the Court. Order, Aug. 8, 2019, ECF No. 2562, at 2.

The Court then reached two primary conclusions. First, the Court stressed that budget cuts would greatly impair the Commonwealth's ability to comply with existing court orders in this case: "Cuts to the DSPDI budget will [] render the Commonwealth *unable to take the steps necessary to come into compliance with numerous Court orders ... in a timely manner.*" *Id.* (emphasis added). Second, and perhaps more importantly, the Court emphasized that budget cuts will hurt vulnerable people: "Any reduction in the DSPDI budget would ultimately cause the interruption of critical services, thus *imperiling the health, safety, and welfare of the participants who are vulnerable persons with disabilities.*" *Id.* (emphasis added).

Given all this, the Court ordered that the "present DSPDI budget of \$39M shall be maintained for fiscal year 2019-2020." *Id.* at 3. The Court issued a substantially similar order six years earlier. Order Re: Fiscal Year 2013-14 Budget, Apr. 30, 2013, ECF No. 1368.

D. The Court Has Acted to Maintain DSPDI Funding/Services During the Fiscal Crisis

The Court has been cognizant of the pervasive fiscal crisis impacting the Commonwealth and has placed heightened emphasis on protecting the Program budget during the crisis. In 2009, for example, the Court directed that the "May 14, 2009 status conference will be devoted primarily to a thorough review of the FY 2009-10 [Program] budget. The Court is generally aware of the fiscal crisis confronting the Commonwealth at the moment and is concerned about any potential fiscal impact that may affect [Program] participants in this process and how that might impact on compliance. The Court is concerned that any budgetary reduction from the current fiscal year should not produce a negative impact on the court's mandated programs, services and supports. The Commonwealth should come prepared to discuss whether or not any potential budgetary reduction might impact on the Commonwealth's ability to comply with existing orders in this case and/or meet the needs of [Program] participants." Order, Apr. 8,

2009, ECF No. 852.⁴

At the onset of the fiscal crisis, the Court ordered the Commonwealth to include in its monthly reports to the Court detailed data and information related to balances in the several internal accounts that comprised the \$40.9M budgeted for DSPDI. Mins. of Proceedings and Order, Aug. 14, 2009, ECF No. 883. In a separate order, the Court emphasized that the “Court expects the Commonwealth to ensure the health, safety, and welfare of participants by complying with the Court’s many orders. To that end, the Commonwealth must adequately fund the operation of [DSPDI] through the entire fiscal year ... to meet the needs of participants, who shall be guaranteed their full rights under the Constitution and law of the United States. To help ensure this, the Commonwealth shall report monthly to the Court, [the JCC], and the United States the total amount expended by the [Program] so that all parties can better monitor funding needs as certain thresholds are approached. In addition, the Commonwealth shall provide information each month to [the JCC] that shows that community providers are being paid monthly in a timely manner.” Order, Aug. 17, 2009, ECF No. 884.

⁴ Around this time, the Parents and Family Association filed a letter with the Court expressing concern about the fiscal crisis and its likely negative impact on participants as a result of millions of dollars in proposed annual cuts in Program personnel, services, and supports. Letter from Asociacion de Padres, Familiares y Amigos de Personas con Retardacion Mental to Hon. Gustavo Gelpi, June 16, 2009, ECF No. 870. The following year, about three dozen parents and family members filed a letter with the Court expressing grave concerns about arbitrary cuts in funding to community providers that would lead to adverse outcomes for their loved ones with developmental disabilities. *See* Mot. Presenting Informative Letter, July 29, 2010, ECF No. 1001, at 2 (asserting that the Commonwealth “has already reduced the fees to the professionals who render direct services to our children in the daily programs and providers by 15% ... [t]his has affected the services that our daughters and sons need and have the right to receive”).

II. Senior Commonwealth Officials Were Aware of this Case, the Court's Orders, and Their Obligations to Participants

Senior Commonwealth officials were well aware of the instant case and were aware of the Court's budget and service orders in this case. As set forth below, the Secretary of the Treasury and the Director of the Commonwealth Office of Management and Budget (OMB) were also aware of their central role in ensuring the flow of allocated funds to DSPDI to pay for essential services for participants, and they were certainly aware that constraints on the Program budget could violate Court orders in this case.

A. Senior Commonwealth Officials Were Aware of this Case and of the Court's Orders

A few years ago, when addressing a possible lapse in funding to pay community providers, the Court held an emergency hearing where it required the presence of the following senior Commonwealth officials: the Attorney General of Puerto Rico, Cesar Miranda; the Secretary of the Treasury, Juan Zaragoza; the Secretary of Health, Ana Rius M.D.; and the Director of OMB, Luis Cruz. Order, Apr. 22, 2016, ECF No. 1825. On April 26, 2016, that hearing took place, preceded by a conference in chambers where all of the referenced Commonwealth officials were present and participated.

In addition to this, the Court has made affirmative and repeated overtures to senior Commonwealth officials to alert them to this case and to the many Court orders, including those aimed at maintaining the DSPDI budget and participant services.

Governor's Personal Representative. Over the years, the Court has directed various Governors to appoint "personal representatives" to actively participate in this case. For example, the Court ordered Governor Rossello to appoint a personal representative to "participate in all Hearings, as well as in all matters related to the present case" in order to keep the Governor

“informed of all relevant and important matters related to the present case.” Order for the Appointment of a Governor’s Personal Rep., Jan. 31, 2017, ECF No. 1981. The Court added that the personal representative will have the “crucial responsibility of keeping the Governor directly informed of all issues regarding the health reform that [is] being dealt with in the present case.” *Id.* at 1-2. The Court instructed the office of the JCC to provide this order to the Governor through proper channels. *Id.* at 2.

Years earlier, the Court decreed that it “is incumbent that the new Governor of Puerto Rico assign his representative to this litigation (previously, it was [Health Secretary] Dr. Perez Perdomo), given the importance of the same to the United States citizens who reside in Puerto Rico who [have developmental disabilities] ... The Governor’s representative [is] expected to participate in [upcoming community site visits], which are essential to their understanding of this case and its resolution.” Order, Jan. 9, 2009, ECF No. 799.

The Deputy Legal Advisor to the Governor, as well as the Deputy Secretary of Health, then participated in onsite home inspections with the Court, the JCC, and with counsel for the parties. Mins. of Proceedings Order, Feb. 5, 2009, ECF No. 812.

At a status conference that week, the Court again directed the Governor to appoint a personal representative, with decision-making authority, to attend to all issues in this case. *Id.* Shortly thereafter, the Court set a deadline for the Governor to appoint a personal representative to this case. Mins. of Proceeding and Order, Feb. 6, 2009, ECF No. 812 (modified). The Governor’s representative later participated in a status hearing before the Court. Mins. of Proceedings and Order, Aug. 14, 2009, ECF No. 883.

Secretary of Health. The Court has required the regular participation of the Commonwealth Secretary of Health. In addition to the April 2016 hearing and conference

referenced above, Dr. Rosa Perez Perdomo, Secretary of the Department of Health of Puerto Rico, participated in a status hearing before the Court on November 16, 2006 (Mins. of Proceedings, ECF No. 554) and on December 17, 2007 (Mins. of Proceedings and Order, ECF No. 675). The Court even designated Dr. Perdomo as the “Court’s spokesperson before the Commonwealth Legislative Assembly during the upcoming Fiscal Year 2008-2009 budget hearings.” Order, Apr. 18, 2008, ECF No. 698. The Secretary of Health later participated in a different status conference. Mins. of Proceedings and Order, Feb. 25, 2010, ECF No. 954, and has been present at more recent ones.

In its Transition Orders, the Court ordered the Secretary of Health to deliver a copy of the orders to the transition committee for the incoming gubernatorial administration during the Department of Health transition meetings. Transition Order, Dec. 10, 2008, ECF No. 794, at 5; Supp. Transition Order, Nov. 12, 2012, ECF No. 1299, at 4; Second Supp. Transition Order, Mar. 22, 2016, ECF No. 1795, at 4; *see also* Min. Order, Dec. 6, 2006, ECF No. 1946, at 2 (ordering the Commonwealth to “personally deliver to the individual presiding the transition committee for the incoming administration these minutes” as well as a transition order package).

OMB Leadership. In addition to the April 2016 conference referenced above, the Court has also directed OMB leadership to participate in other hearings in this case. Most recently, on July 2, 2018, the Court ordered the Director of OMB to participate in an upcoming hearing. Order, ECF No. 2275. Years earlier, the Deputy Director of the OMB, Romano Sampiolo, participated in a status hearing before the Court. Transcript, May 14, 2009, at 28-29, 45-54.

Other Entities. As referenced above, the Court directed the JCC to provide a copy of the Court’s instant August 8, 2019 order to the Fiscal Board and to leadership within the Puerto Rico legislature. Order, ECF No. 2562, at 3.

Finally, the Commonwealth has confirmed to the United States that the Court's orders have been provided to other executive agencies, such as Treasury and OMB. In response to our query about the Court's orders, counsel for the Commonwealth replied that "DSPDI has confronted problems with the approval of proposals and in the budget assignment, this regardless of the Court Orders that *have been notified to all pertinent agencies.*" Email from Idza Diaz to Richard Farano, Sept. 11, 2019 (emphasis added).

B. The Commonwealth Agreed that Constraints to the DSPDI Budget Could Violate Court Orders in this Case

The product of the emergency hearing/conference on April 26, 2016, was a negotiated consent order (here called the "Remedial Order") that implicated budget and payment practices in a number of local Commonwealth agencies. The language of this Remedial Order was crafted, jointly agreed-upon, and submitted to the Court by the parties; the Court then quickly adopted it and signed the order. Remedial Order to Ensure Timely Prospective Payments to Providers Serving People with Developmental Disabilities, May 11, 2016, ECF No. 1838, at 2.

In the Remedial Order, it was agreed that Treasury and OMB play a central role in ensuring that participants in this case receive essential services as a direct result of the larger Commonwealth budget and invoice approval process. Indeed, the Commonwealth Secretary of the Treasury and the Commonwealth OMB Director made affirmative representations that were memorialized in the Remedial Order: "these officials all agreed that services for individuals with DD are essential under the Constitution of the Commonwealth of Puerto Rico, that failure to make timely payments for these services would place the health, safety, and welfare of people with DD in jeopardy, and that invoices for these essential services will be given priority status for payment and shall be paid in a timely manner, regardless of the current fiscal crisis." *Id.*

To better ensure payment for essential participant services that year, the Remedial Order then memorialized that OMB would release about five million dollars in DSPDI budget “reserves” funding. *Id.* at 5. This provision, in essence, recognizes that the OMB “reserves” process has an impact on DSPDI services for participants. Most importantly, through its joint submission of the proposed Remedial Order, the Commonwealth agreed that “any reduction to *or other constraint* on the budget of the [Program] could cause the interruption of critical services that would violate a host of Court orders in this case and would imperil the health, safety, and welfare of vulnerable people with disabilities.” *Id.* ¶ II.G, at 5 (emphasis added).

As we discuss in greater detail below, in spite of the clear language in the Remedial Order, Treasury and OMB repeatedly disobeyed the Court’s orders by refusing to authorize the use of almost \$20M in DSPDI funding that the legislature had allocated to DSPDI over the past four fiscal years. Unfortunately, given their familiarity with this case and with the Court’s budget and other orders, it appears that they may have done so willfully.

III. The Commonwealth Has Failed to Safeguard DSPDI Funds and Utilize Them Fully for Services and Supports for People with Developmental Disabilities

The Court in its recent order concluded that the Commonwealth failed to use millions of dollars in funding allocated to DSPDI in recent years. Order, Aug. 8, 2019, ECF No. 2562, at 1. The Commonwealth’s Budget Report confirms that the Commonwealth failed to use almost \$20M of the DSPDI budget over the last four fiscal years. The exact cumulative total in the Commonwealth’s Budget Report is \$19,684,737.00. Budget Rep., Sept. 9, 2019, ECF No. 2585-2, at 2-5, 8-12. On September 11, 2019, counsel for the United States confirmed with counsel for the Commonwealth that this total is correct. We set out below details from the Commonwealth’s Budget Report for each of the four most recent fiscal years.

Further, the Commonwealth repeatedly admits that the unused DSPDI funding had a direct negative impact on participant services. Most notably, the Commonwealth admits that the “creation of reserves and [the] freezing of surpluses” were “*disastrous* for the fulfillment of the commitments of the DSPDI and compliance with the Court Orders.” *Id.* at 13 (emphasis added).

A. The Commonwealth Admits that Almost \$20M in Allocated DSPDI Funding Was Not Utilized for DSPDI Services for Participants

1. Fiscal Year 2015-2016

In FY2015-16, DSPDI reports that a total of \$5,342,343.00 (\$5,118,000.00 in “reserves” and \$224,343.00 in “balances”) of the total DSPDI budget was not utilized. *Id.* at 2-3, 8-9.

DSPDI admits that because the \$5.3M was not utilized, it could not implement several projects to help support and serve people with developmental disabilities, including: telemedicine, digitalization of clinical and administrative records, recruitment of “social intercessors,” and perhaps most importantly, “continuation with the deinstitutionalization of the participants.” *Id.* at 2, 8-9.

The explanation of “reserves” and “balances” in the DSPDI Budget Report is not clear (*see, e.g.*, “the expired balance will also be expired”). *Id.* at 5. However, whether a sum was designated as a “reserve” or as a “balance” is secondary because the end result was the same – the allocated money was no longer available to DSPDI to use, as the reserves and balances were returned to the Commonwealth’s General Fund.

Unfortunately, there are inconsistencies in the Commonwealth’s representations with regard to reserve funds in 2016. As referenced above, the Commonwealth’s recent budget report reveals that \$5,118,000.00 was held in “reserves” and not utilized by DSPDI for participant supports or services. Yet, in the 2016 joint proposed Remedial Order addressing provider

payments, the Commonwealth represented that OMB had released the reserves attached to budgetary funding for the Program, including about \$5M designated for reserves in the 2015-16 fiscal year. Remedial Order ¶ II.G, at 5 (the “Commonwealth and its OMB confirms that it has released the “reserves” attached to budgetary funding for the [Program], including the approximately five million dollars designated for reserve in the current fiscal year”). *See also* Transcript, Emergency Status Conf., Apr. 26, 2016, at 12. These representations are inconsistent and cannot be reconciled.

2. Fiscal Year 2016-2017

In FY2016-17, DSPDI reports that a total of \$5,121,543.15 (\$1,870,971.00 in reserves and \$3,250,572.15 in balances) of the total DSPDI budget was not utilized. Budget Rep. at 3.

DSPDI blames the Commonwealth’s Department of the Treasury and OMB, as well as a new local Puerto Rico law requiring reduction of operational expenses and a five percent cut in purchasing, for its inability to utilize all allocated DSPDI funds. *Id.* at 3. DSPDI references four “Circular Letters” from OMB and/or Treasury, but there is no reference in the budget report that the Commonwealth provided these letters to the Court, the office of the JCC, or the United States. *Id.* at 3, 9-10.

3. Fiscal Year 2017-2018

In FY2017-18, DSPDI reports that a total of \$5,235,942.92 (all in balances) of the total DSPDI budget was not utilized. *Id.* at 4, 10.

DSPDI reports that OMB “did not approve several petitions that were presented,” which DSPDI reports “caused that the money reserved for those purposes had to be returned to the General Fund.” *Id.* at 4. DSPDI admits that the unutilized funds caused the “postponement of the deinstitutionalization of the participants” and impaired “staff recruitment.” *Id.* at 4.

DSPDI also reports the “Fiscal Control Board did not approve the request for the transfer of funds between items” to pay the JCC and to repair air conditioners at the day centers. *Id.* at 4.

4. Fiscal Year 2018-2019

In FY2018-19, DSPDI reports that a total of \$3,984,907.93 (\$2,166,200.00 in reserves and \$1,818,707.93 in balances) of the total DSPDI budget was not utilized. *Id.* at 4.

DSPDI reports “[s]everal transactions were not approved by [OMB] and some contract invoices did not reach the contract ceiling so the money reserved remained unused.” *Id.* at 4.

As a result of execution failures, DSPDI failed to open at least two community homes, failed to expand a day program, and failed to recruit personnel, meaning the money was unspent and then returned to the General Fund. *Id.* at 12.

The statement in the recent budget report that over \$1.8M in balances were swept out of DSPDI at the end of the fiscal year is striking given that the Commonwealth provided recent assurances to the United States, which were then included in a joint filing just three months ago: “Counsel for the Commonwealth also provided assurances that money was not to be swept out of DSPDI at the end of the fiscal year.” Joint Submission to Address Issues Raised in Recent Court Orders, July 10, 2019, ECF No. 2527, at 2-3.

IV. The Commonwealth’s Failure to Fully Utilize DSPDI Funds Violates the Court’s Orders and Directives

In its recent order, the Court concluded that the failure to fully utilize funds allocated to DSPDI for services and supports for our participants “denotes a pattern of reducing the DSPDI’s budget in clear contravention of multiple court orders.” Order, Aug. 8, 2019, ECF No. 2562, at 2. The Commonwealth’s numerous admissions in its Budget Report, juxtaposed with the many Court orders set out above and in Attachments A and B, underscores this conclusion.

A. The Court Has Already Stressed the Importance of Utilizing the Full Program Budget

This is not the first time the Court has addressed the issue of full utilization of budgeted funds for the Program. In May 2007, for example, the Court held at least two status hearings with the parties where the budget topic arose. At the status on May 21, 2007, the Court “discussed with the parties the use of *all* FY 2007 Commonwealth funds assigned to this case.” Mins. of Proceedings and Order, ECF No. 615 (emphasis added).

A few days later at a second status, the Court noted that “approximately \$6,000,000 earmarked for this case for FY 2006-2007 have yet to be used (prior to June 30, 2007).” Mins. of Proceedings and Order, May 25, 2007, ECF No. 617, at 2. *Id.*

In a clear directive to the Commonwealth that all budgeted Program funds should be utilized for the benefit of people with developmental disabilities, the Court then stressed that the Commonwealth “should make efforts to utilize the[s]e monies for the programs in this case, so as to avoid having to return these monies to the Treasury Department, or the same being used for another purpose.” *Id.* (emphasis in original). It appears that the Commonwealth has ignored this Court directive.

B. The Commonwealth Failed to Adequately Notify the Court and the United States

The Court added that had the Court been informed of the situation in a timely manner, “measures could have been taken to guarantee that 100% of the resources included in the ordered budget would have indeed been used to provide essential services to all participants.” Order, Aug. 8, 2019, ECF No. 2562, at 2. In fact, the Commonwealth was obligated to inform the Court and the United States in a timely manner of the nature and impact of the restrictive internal budgetary practices, but it did not do so. As noted above, there is no reference in the Commonwealth’s Budget Report that the Commonwealth provided the Court or the United

States with proper notice of the restrictive Treasury and OMB practices. Indeed, the DSPDI Director indirectly admitted that the Commonwealth failed to inform the United States of the Commonwealth's failure to utilize the entire DSPDI budget in recent years: "DSPDI understood that since it was notifying the JCC [of the situation] and was working with the JCC on this matter, that said notification was enough." Decl. of Lumary Hernandez, Sept. 9, 2019, at 2.

V. DSPDI's Efforts to Blame Other Agencies for the Budget Restrictions Have No Bearing, Because the Commonwealth Itself Is Responsible for Implementation of the Court's Orders

A. Treasury and OMB

In its Budget Report, DSPDI, a sub-agency within the Commonwealth Department of Health, blames the Commonwealth Department of the Treasury and OMB for restricting DSPDI's ability to use all of the funds allocated to DSPDI by the legislature: "Treasury and [OMB], restrict[ed] the use of the [DSPDI] budget that caused the funds not to be used in their entirety in the fiscal years 2015 to 2019." Budget Rep. at 2.

But, the Commonwealth cannot avoid responsibility simply because DSPDI claims its hands were tied by fellow Commonwealth agencies. This case is broader than just DSPDI; the Commonwealth of Puerto Rico and the Governor of Puerto Rico are Defendants in this case, thereby extending legal responsibility beyond DSPDI to all Commonwealth executive departments, including Treasury and OMB. The Court has long recognized this, and as referenced above, it has regularly required the participation of officials and Commonwealth agencies beyond DSPDI boundaries.

More significantly, the Court has already taken action, without objection from the Commonwealth, to limit local agency practices when the effect of those practices was going to conflict with the Court's orders to ensure adequate services to participants in this case.

A few years ago, the Court learned that a new Executive Order required the Puerto Rico OMB to review and approve virtually all contracts and position appointments, including those with people or entities serving or supporting people with developmental disabilities in this case. Order, July 30, 2013, ECF No. 1405, at 1. The Court concluded that this “administrative process could render the Commonwealth unable to take timely steps to comply with these Court Orders.” *Id.* The Court was concerned with the continuity of services, the interruption or diminution of services, and lost momentum in meeting individuals’ needs. *Id.* at 2.

As a result, the Court ordered OMB “to promptly evaluate and approve legitimate new and existing contract and position proposals, submitted by the [Program] to OMB, in such a way that the delivery of needed protections, services, and supports to persons with developmental disabilities in the Commonwealth’s service-delivery system is not compromised. This shall be done immediately.” *Id.*

The Commonwealth did not object to this order directed at limiting OMB practices. It could not be clearer than that OMB was the proper subject of the Court’s jurisdiction and that the Court could order OMB to alter its practices that conflicted with the Court’s orders. *See also* Remedial Order, May 11, 2016, ECF No. 1838, discussed at length above, where the Court ordered non-DSPDI agencies to tighten invoice review and approval practices to ensure timely payment to community providers serving participants.

In its August 8, 2019 order, the Court emphasized that the Commonwealth “has no discretion to impair any Court allocated resources within DSPDI aimed at protecting and improving the well-being of the ID/DD population.” Order, Aug. 8, 2019, ECF No. 2562, at 2. Yet, in its Budget Report, the Commonwealth asserts, in essence, that the directives of local OMB (and the Treasury Department) supercede the authority of this Court and the many orders

of this Court not to constrain the Program budget or reduce participant services. For example, there is reference in the Budget Report that an agency like DSPDI can make a request to OMB to grant an exception so that the budgeted sums will not be returned to the General Fund. Budget Rep. at 5. DSPDI reports that the judicial and legislative branches, as well as the University of Puerto Rico, are exempted from having to make exception requests. *Id.* at 5.⁵

But, the Court has already issued a series of orders that Program funding was not to be constrained and that services to participants were not to be cut. Given these orders, there is no need to seek an exemption from local OMB that would prevent transfer of funds out of DSPDI to the General Fund. OMB was already so limited by the Court's orders.

B. Financial Oversight and Management Board

The Commonwealth also points unjustifiably to the external Fiscal Board as a reason for ignoring the Court's orders. The Commonwealth asserts that DSPDI and all Commonwealth agencies have been negatively impacted "in their fiscal matters due to the decisions of the Fiscal Control Board to achieve savings ... for reasons outside its control, not all proposals for [use] of its budget have been authorized by ... the Fiscal Board, frustrating the DSPDI's efforts." Budget Rep. at 13.

But the Fiscal Board does not have authority to impede Commonwealth actions to comply with federal court orders like the ones in this case. *See* Section 204(d)(1) of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) 48 U.S.C. § 2144(d)

⁵ In her declaration, the Director of DSPDI states that "DSPDI should receive the same exemption granted the Judicial, Legislative Branch and the University of Puerto Rico regarding the use of the required balances. In order to obtain this exemption, the DSPDI would require the aid of the Court." Decl. of Lumary Hernandez, Sept. 9, 2019, ECF No. 2585-1, at 1-2. There is a similar statement in the Budget Report. Budget Rep. at 13.

(2016) (“Implementation of Federal Programs.—In taking actions under this Act, the Oversight Board shall not exercise applicable authorities to impede territorial actions taken to – (1) comply with a court-issued consent decree or injunction, or an administrative order or settlement with a Federal agency, with respect to Federal programs”).

Consistent with this, in a 2018 order in the instant case, the Court decreed: the “Court notes – and the Commonwealth shall so inform the fiscal board – that the constitutional rights of the participants in this case must be safeguarded at all costs. More so, the obligations of the Commonwealth in this case are based on federal law, and the Court is not bound by actions taken by the board.” Order, Apr. 17, 2018, ECF No. 2244.

VI. Conclusion

The foregoing demonstrates that the Commonwealth repeatedly failed to comply with myriad Court orders to maintain the DSPDI budget and DSPDI services for participants in spite of the fact that senior Commonwealth officials knew of these federal Court orders. As a result, close to \$20M in funding allocated to DSPDI was not utilized over the past four fiscal years. The Commonwealth admits that this had a “disastrous” impact on the ability of DSPDI to comply with Court orders and to deliver services to participants to meet their needs.

VII. Next Steps

As referenced above, the Court directed the Commonwealth to provide a reason why the Court should not take additional measures, including the possible appointment of a receiver or Special Master, to ensure that DSPDI funds are utilized fully going forward. Order, Aug. 8, 2019, ECF No. 2562, at 2. Other than offering a vague reference to possibly making an exemption request of OMB, the Commonwealth is silent on what additional measures can be taken to prevent this from happening again.

The United States sets out below possible next steps for the Court.

Enforcement Actions. The Court could issue an order for specific performance, directing the Commonwealth again to comply with its earlier order that the DSPDI budget be maintained at \$39.05M. *See* Order, Apr. 22, 2019, ECF No. 2443, referenced above. Other options include holding Commonwealth officials in contempt, and, as the Court suggests, appointing a Special Master or a receiver. Whether a sound basis for such measures exists, the United States does not endorse them at this time as mechanisms that will materially advance the Commonwealth's compliance with the Court's underlying orders regarding delivery of services to the participants that meets their needs.

Enhanced Monthly Reporting. The Court could impose specific and enhanced reporting requirements, filed with an attestation of accuracy, under penalty of perjury, by senior Commonwealth officials, with regard to the DSPDI budget and its utilization throughout the year. This would be akin to the Court's 2009 Order that required monthly filings with the Court specifying how budgeted funds were being utilized. *See* Mins. of Proceedings and Order, Aug. 14, 2009, ECF No. 883 and Order, Aug. 17, 2009, ECF No. 884, both referenced above.

Special Account. In 2016, the Court discussed the possible use of an earmarked account for Program funds. At the emergency status conference in 2016, the Court said the following:

It is my understanding that the [Program] budget which is close to 40 million give or take – and I presume next year it's going to be the same amount – that's earmarked in my view even though it's state moneys. So, my concern is, where is that money going to? If it's earmarked, it should go into a special account. ... Perhaps the Court by order can guarantee that that's kept in a particular account that cannot be touched. My feeling is that other matters are needed, they use some of that money and then they put it back. Again, I don't know what's going on but it's happened for several administrations. And, again, I think we need to protect that money which is earmarked by the Commonwealth legislature.

Transcript, Emergency Status Conf., Apr. 26, 2016, at 14-15.

Whether there is an evidentiary basis for imposition of such a measure, the United States does not endorse it as a mechanism that will materially advance compliance with the Court's underlying orders regarding the delivery of necessary services to participants.

The United States respectfully requests that the Court take note of the foregoing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Richard J. Farano
RICHARD J. FARANO
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United States Department of Justice

ATTACHMENT A

The Court has routinely reviewed and issued orders to safeguard proposed and existing Program budgets. *See, e.g.*, Mins. of Proceedings, Nov. 16, 2006, ECF No. 554 (agenda item for status hearing was “New Budget for the [Program]” which stood at about \$43M); Mins. of Proceedings and Order, May 21, 2007, ECF No. 615 (Court encouraged Commonwealth to use “all FY 2007 Commonwealth funds assigned to this case”); Mins. of Proceedings and Order, May 25, 2007, ECF No. 617, at 2 (“It appears that the proposed Commonwealth FY 2007-2008 budget of the Department of Health will not significantly impact the creation of new homes and day centers”); Order, Apr. 18, 2008, ECF No. 698 (“The Court has carefully reviewed the proposed budget to be submitted by the Commonwealth Executive, and finds the same [at] a minimum to be reasonable and adequate in order for the Commonwealth to fully comply in this case with its obligations under federal laws towards the island’s [people with developmental disabilities]”); Mins. of Proceedings and Order, Apr. 18, 2008, ECF No. 699 (“The proposed budget approved by the Commonwealth Executive for fiscal year 2008-2009 is \$41,000,000. The Court finds this budget appropriate and necessary ...”); Mins. of Proceedings Order, Feb. 5, 2009, ECF No. 812 (setting as an agenda item for the next status “the projected budget for 2009-2010”); Order, Mar. 25, 2009, ECF No. 849 (alerting the parties to “come prepared to discuss the 2009-10 [Program] budget”); Order, Apr. 8, 2009, ECF No. 852 (announcing that the next status would be “devoted primarily to a thorough review of the FY 2009-10 [Program] budget” given the fiscal crisis and concerns about its possible negative impact on participant services); Mins. of Proceedings and Order, Aug. 14, 2009, ECF No. 883 (noting that the Program budget was \$40.9M and that the Commonwealth should provide account balance information to the Court in its monthly reports); Order, Aug. 17, 2009, ECF No. 884 (same); Order, Dec. 11, 2009, ECF No.

926 (Program representatives “shall inform the court of the status of its budget for this Fiscal year up to the date of the status conference”); Mins. of Proceedings and Order, Apr. 27, 2011, ECF No. 1117 (ordering counsel for the Commonwealth to inform the JCC and the United States of the Health Department’s proposed 2011-2012 budget before it is provided to the Commonwealth’s legislature); Mins. of Proceedings and Order, Jan. 19, 2012, ECF No. 1212 (the Court “recommends the Commonwealth to maintain the same budget currently assigned to the program for the fiscal year 2012-2013); Order Re: Fiscal Year 2013-14 Budget, Apr. 30, 2013, ECF No. 1368 (it “is important to the Court that the budget for the [Program] for next fiscal year be adequate so as to enable the Commonwealth to develop and implement needed remedial measures to ensure compliance with existing Court Orders in this case and to meet the needs of persons with developmental disabilities in the Commonwealth’s service-delivery system,” ordering the Commonwealth to maintain the Program budget of \$39.05M for the next fiscal year, stressing that any “reduction in the [Program] budget could cause the interruption of critical services that would imperil the health, safety, and welfare of vulnerable persons with disabilities”); Order, July 30, 2013, ECF No. 1405 at 1 (the Court referenced that it “issued an Order requiring the Commonwealth to keep the total FY2012-13 budget for the [Program] of the Commonwealth Department of Health in place for FY2013-14, so that it may take needed steps to comply with existing Court Orders”; the Court reported that “Commonwealth representatives ha[ve] assured the Court that this has been done”); Order, July 2, 2018, ECF No. 2275 (ordering the Director of OMB to participate in an upcoming hearing on maintaining provider payments); JCC Informative Mot., July 11, 2018, ECF No. 2282 (presenting agreed-upon topics for the next status conference with the Court which included the “status of any potential budgetary impact to DSPDI”); Order, Apr. 22, 2019, ECF No. 2443 (it “is important that the budget for [DSPDI] for

fiscal year 2019-2020 be adequate so as to enable the Commonwealth to develop and implement needed remedial measures to ensure compliance with existing Court orders in this case and to meet the needs of persons with developmental disabilities in the Commonwealth's service-delivery system," ordering the Commonwealth to maintain the Program budget of \$39M for the next fiscal year, stressing that any "reduction in the DSPDI budget would ultimately cause the interruption of critical services, thus imperiling the health, safety, and welfare of the participants who are vulnerable persons with disabilities"); Order, Aug. 8, 2019, ECF No. 2562 (stressing that the Program budget cannot be reduced or curtailed in any manner, ordering the Commonwealth to explain why it may not have used millions of dollars allocated to DSPDI for participant services and supports over the past four fiscal years).

The Court has also held several hearings dedicated almost entirely to proposed cuts to the Program budget. *See, e.g.*, Transcripts, May 14, 2009 and Oct. 21, 2010.

The Court ordered that any increased funds for the office of the JCC not come out of the Program budget. *See* Budget Order for the JCC, Apr. 6, 2017, ECF No. 2032, at 2 ("the Court expressly Orders the Department of Health to ensure that any reallocation of the agency's budget to comply with the present directive does not affect under any circumstances the budget that is presently allocated to the Developmental Disabilities Program. The JCC Office is instructed to inform this Court immediately if any service is curtailed and/or impaired by any internal decisions of the Department of Health to the contrary").

ATTACHMENT B

The Court has regularly issued orders and minutes to ensure that participants' needs are being met and are not being adversely impacted by cuts to supports and services. *See, e.g.*, Mins. of Proceedings and Order, Oct. 8, 2009, ECF No. 899 (the Court noted that there "have been no budget cuts, staffing decreases, no freezing of positions and no fiscally negative moves ... [Sufficient funding] is essential so that services will remain uninterrupted"); Mins. of Proceedings and Order, Feb. 25, 2010, ECF No. 954 (the "services to the participant[s] of the program shall remain uninterrupted"); Mins. of Proceedings and Order, Aug. 19, 2010, ECF No. 1010 (the "services to the participants shall remain uninterrupted, unless otherwise ordered"); Order, Apr. 8, 2016, ECF No. 1799 (the Court stressed that "[u]nder no circumstances can the services to the participants be curtailed, and institutionalization is not an alternative"); Order, Apr. 9, 2016, ECF No. 1802 (the Court stated that it would issue "any and all corresponding orders to ensure that the participants are not left without essential services"); Order, Apr. 11, 2016, ECF No. 1815 (the Court emphasized that it "will issue any appropriate relief warranted to ensure the participants' welfare"); Order, Apr. 22, 2016, ECF No. 1825 (Court was prepared to issue a garnishment order to escrow funds from the Commonwealth to ensure future timely payments to community providers to avert a negative impact on the participants that could be "devastating and beyond repair"); Remedial Order, May 11, 2016, ECF No. 1838, at 2 (Court adopted parties' proposed order where senior Commonwealth officials all agreed that "services for individuals with [developmental disabilities] are essential under the Constitution of the Commonwealth of Puerto Rico, that failure to make timely payments for these services would place the health, safety, and welfare of people with [developmental disabilities] in jeopardy, and that invoices for these essential services will be given priority status for payment and shall be

paid in a timely manner, regardless of the current fiscal crisis”); Order, June 29, 2018, ECF No. 2273 (the Court stressed that it “will take any necessary and immediate action for the benefit of the participants. This may include, but is not limited to, garnishment of funds”). Many of these Court minutes and orders were cited in the JCAP, which memorialized that the “Court has issued a series of [] Orders that similarly reinforce the need for the maintenance and continuity of supports and services, especially in light of recent fiscal constraints.” JCAP at 7.

The Court has also issued a number of Transition Orders as a bridge between changing administrations to ensure continuity and to ensure that services are not interrupted or diminished. *See* Transition Order, Dec. 10, 2008, ECF No. 794, at 2 (the Court stressed that the Commonwealth is to “ensure the continuity of the protections, supports, and services currently provided to participants,” such that they are “not interrupted or diminished,” and such that “any progress and momentum toward meeting participants’ needs under Olmstead will not be lost”); Supp. Transition Order, Nov. 12, 2012, ECF No. 1299, at 3 (the Court emphasized, consistent with the 2008 Transition Order, that the Commonwealth shall “ensure the continuity and integrity of the protections, services, and supports provided to persons with developmental disabilities in the Commonwealth’s service-delivery system” and “ensure that these protections, services, and supports are not interrupted or diminished” and “ensure that any progress and momentum toward meeting the needs of these persons with developmental disabilities will not be lost”); Second Supp. Transition Order, Mar. 22, 2016, ECF No. 1795, at 3 (same).