



DATED: August 19, 2008  
ATLANTA, GA

Respectfully Submitted,

---

JEFFREY O. BRAMLETT

Georgia Bar No. 075780

bramlett@bmelaw.com

COREY F. HIROKAWA

Georgia Bar No. 357087

hirokawa@bmelaw.com

BONDURANT, MIXSON & ELMORE,  
LLP

1201 W. Peachtree St. N.W., Ste. 3900

Atlanta, GA 30309

Phone: (404) 881-4100

Fax: (404) 881-4111

---

MARCIA ROBINSON LOWRY

*pro hac vice*

mlowry@childrensrights.org

IRA P. LUSTBADER

*pro hac vice*

ilustbader@childrensrights.org

DANIEL W. E. HOLT

*pro hac vice*

dholt@childrensrights.org

CHILDREN'S RIGHTS

330 7th Ave., Fl. 4

New York, NY 10001

Phone: (212) 683-2210

Fax: (212) 683-4015

## TABLE OF CONTENTS

Table of Contents . . . . .	i
Table of Authorities . . . . .	ii
Preliminary Statement . . . . .	1
Factual Background . . . . .	9
I.    Outcome Measures 9 and 10 of the Consent Decree . . . . .	9
II.   State Defendants’ Performance on Outcome Measures 9 and 10 . . . . .	14
III.  Class Counsel’s Efforts to Reach Agreement on Curative Actions Without Further Litigation . . . . .	15
Argument . . . . .	17
I.    The Legal Standard for Civil Contempt . . . . .	17
II.   State Defendants’ Noncompliance Constitutes Contempt of Court . . . . .	22
Conclusion . . . . .	24

## TABLE OF AUTHORITIES

<i>Abbott Laboratories v. Unlimited Beverages, Inc.</i> , 218 F.3d 1238 (11th Cir. 2000) . . . . .	21
<i>Cagle v. Sutherland</i> , 334 F.3d 980 (11th Cir. 2003) . . . . .	18
<i>Citronelle-Mobile Gathering, Inc. v. Watkins</i> , 943 F.2d 1297 (11th Cir. 1991) . . . . .	19
<i>Combs v. Ryan’s Coal Co.</i> , 785 F.2d 970 (11th Cir. 1986) . . . . .	19, 20, 21
<i>Commodity Futures Trading Comm’n v. Wellington Precious Metals, Inc.</i> , 950 F.2d 1525 (11th Cir. 1992) . . . . .	19, 20, 21
<i>Cunningham v. Hamilton County</i> , 527 U.S. 198 (1999) . . . . .	18
<i>Fla. Ass’n for Retarded Citizens, Inc. v. Bush</i> , 246 F.3d 1296, (11th Cir. 2001) . . . . .	19
<i>Frew v. Hawkins</i> , 540 U.S. 431 (2004) . . . . .	17
<i>Ga. Power Co. v. NLRB</i> , 484 F.3d 1288, 1291 (11th Cir. 2007) . . . . .	21
<i>Howard Johnson Co. v. Khimani</i> , 892 F.2d 1512, 1516 (11th Cir. 1990) . . . . .	21
<i>In re Lawrence</i> , 279 F.3d 1294, 1300 (11th Cir. 2002) . . . . .	18, 21
<i>NLRB v. Triple A Fire Protection, Inc.</i> , No. 96-6944, 2002 WL 987269 (11th Cir. Feb. 5, 2002) . . . . .	20
<i>Parker v. Scrap Metal Processors, Inc.</i> , 468 F.3d 733 (11th Cir. 2006) . . . . .	19, 20
<i>Reynolds v. Roberts (Reynolds I)</i> , 207 F.3d 1288 (11th Cir. 2000) . . . . .	18, 19
<i>Reynolds v. McInnes (Reynolds II)</i> , 338 F.3d 1201 (11th Cir. 2003) . . . . .	17, 18, 19

<i>Rowe v. Jones</i> , 483 F.3d 791 (11th Cir. 2007) . . . . .	17, 24
<i>United States v. City of Miami</i> , 664 F.2d 435 (Former 5th Cir. 1981) . . . . .	17
<i>United States v. Hayes</i> , 722 F.2d 723 (11th Cir. 1984) . . . . .	20
<i>United States v. Roberts</i> , 858 F.2d 698 (11th Cir. 1988) . . . . .	20
<i>United States v. Rylander</i> , 460 U.S. 752 (1983) . . . . .	20
<i>Western Union Holdings, Inc. v. Eastern Union, Inc.</i> , No. 1:06-CV-01408-RWS, 2007 WL 2683714 (N.D. Ga. Sept. 7, 2007) . . . . .	20
<i>Willy v. Coastal Corp.</i> , 503 U.S. 131 (1992) . . . . .	18

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

KENNY A., by his next friend, Linda  
Winn, et al., Plaintiffs

vs.

SONNY PERDUE, in his official  
capacity as Governor of the State of  
Georgia, et al., Defendants

Civil Action No. 1:02-cv-01686-MHS

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
ORDER FOR DEFENDANTS TO SHOW CAUSE WHY THEY SHOULD  
NOT BE ADJUDGED IN CIVIL CONTEMPT AND SANCTIONED**

Plaintiffs respectfully submit this memorandum of law in support of their motion, pursuant to Federal Rule of Civil Procedure 70(e), for an order for State Defendants to show cause why they should not be adjudged in civil contempt and sanctioned for their noncompliance with Outcome Measures 9 and 10 of the Consent Decree entered by this Court on October 28, 2005.

**Preliminary Statement**

This contempt motion is Plaintiffs' first post-judgment request for Court intervention in this action since a Consent Decree was entered by the Court in October of 2005. State Defendants remain in undisputed, significant noncompliance with two critical provisions of the Consent Decree that require the

State Defendants<sup>1</sup> to make efforts to find permanent homes for identified groups of foster children, so that these children do not grow up as wards of the state. The noncompliance at issue in this motion has denied hundreds of foster children the opportunity to grow up in permanent families and not in state custody, and court intervention is necessary if these children are not to be deprived of permanent families forever.

A core area of the Consent Decree requires State Defendants to make efforts to find permanent homes for children who were already in state custody at the time the Consent Decree was entered in 2005, given the potentially irreparable harm and deterioration suffered by children subjected to years in the state's child welfare system – especially one, such as DHR, that still requires comprehensive reform to address longstanding failures.

---

<sup>1</sup> The “State Defendants” include Sonny Perdue, in his official capacity as Governor of Georgia; the Georgia Department of Human Resources (“DHR”); B. J. Walker, in her official capacity as Commissioner of the Georgia DHR; the Fulton County Division of Family and Children Services (“DFCS”); Dannette Smith, in her official capacity as Director of the Fulton County DFCS; the DeKalb County DFCS; and Walker Solomon, in his official capacity as Director of the DeKalb County DFCS. The term “State Defendants” does not include Defendants Fulton County and DeKalb County, the claims against which were separately resolved in two county-specific settlements concerning Plaintiffs’ “right-to-counsel” claims. (*See* Consent Decree (Oct. 28, 2005)(Docket No. 488); [Fulton County] Consent Decree (Feb. 13, 2006) (Docket No. 519); Consent Decree Between Plaintiffs and DeKalb County, Georgia (Mar. 23, 2006) (Docket No. 525-4).)

Importantly, the Consent Decree requires heightened efforts at finding these fixed groups of foster children permanent homes, but not perfection in performance. Recognizing that successful outcomes may not be attainable for all of the children who had already spent a number of years in state custody, the parties agreed to, and the Consent Decree requires, only partial success. But Defendants have not even made necessary efforts to achieve these modest goals.<sup>2</sup>

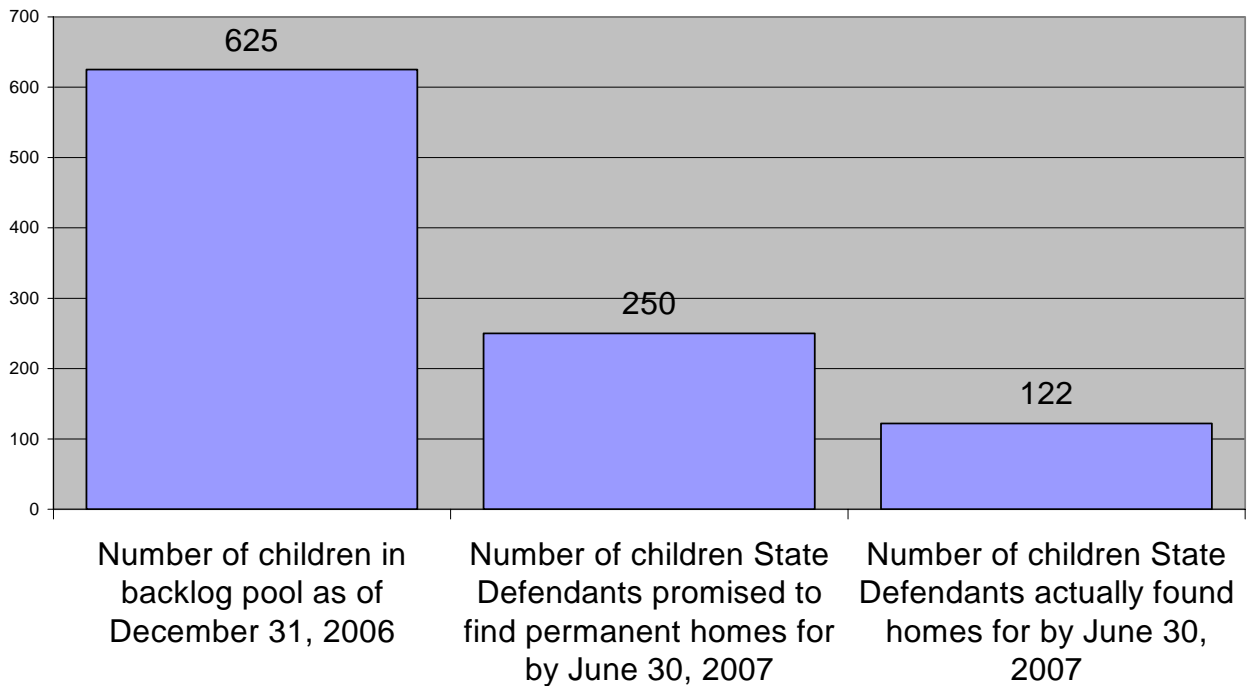
Outcome Measure 9 starts with the foster children already in DHR custody for up to 24 months at the time the Consent Decree was entered in 2005. (*See* Consent Decree § 15(9).) State Defendants were required to reduce the 625 children in the Outcome 9 “backlog pool” as of December 31, 2006, by 40% (i.e., by 250 children) by June 30, 2007, by placing them permanently with their families or relatives, or by finding them new families through adoption. State Defendants achieved only 20% compliance on this measure, finding permanent

---

<sup>2</sup> The harms to foster children who languish in government custody without permanent homes are widely recognized. *See* Peg Hess, *A Review of Case Files of Foster Children in Fulton and DeKalb Counties, Georgia* 70 (Nov. 14, 2003) (Docket No. 342) (citing David Fanshel & Eugene Shinn, *Children in Foster Care: A Longitudinal Investigation* (1978); Victor Pike et al., *Permanent Planning for Children in Foster Care: A Handbook for Social Workers* (1977); Theodore Stein et al., *Children in foster homes: Achieving continuity of care* (1978)). *See also* Mark Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth*, Chapin Hall Center for Children at the University of Chicago (2007).

homes for only 122 children.<sup>3</sup> Put another way, State Defendants’ performance on Outcome Measure 9 in the first half of 2007 was as follows:

**Outcome Measure 9 Performance - Period III**

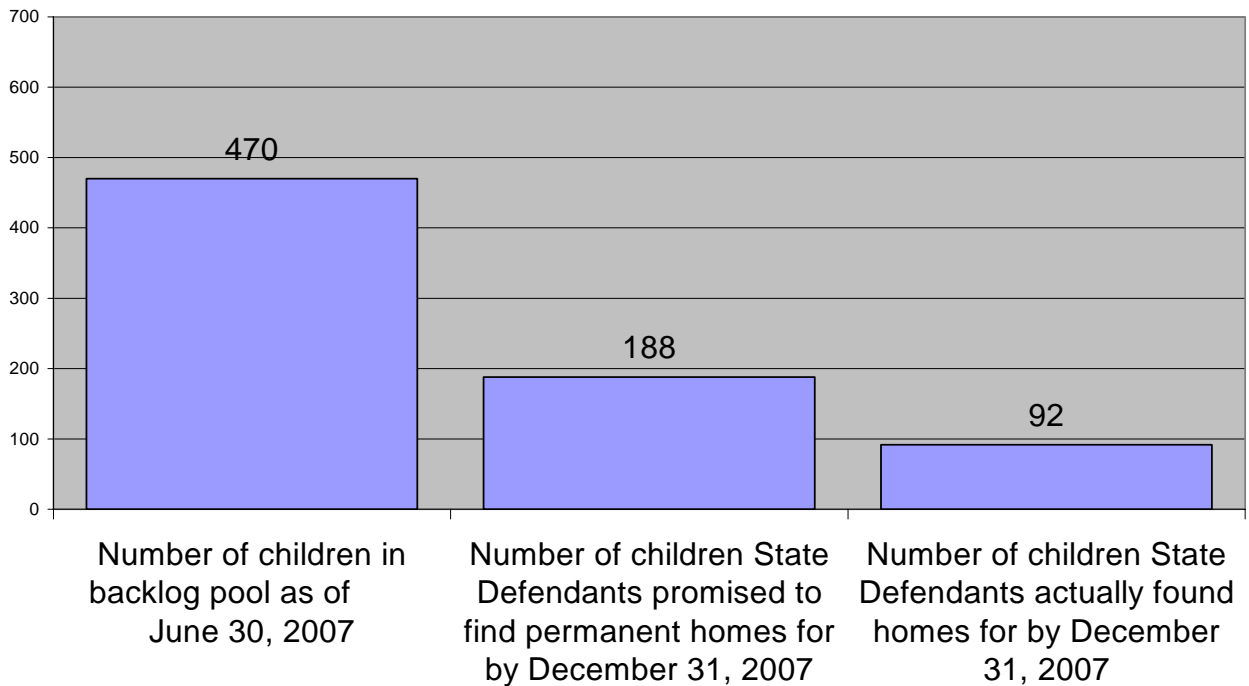


For the next time period, State Defendants were required to reduce the 470 children in this pool as of July 1, 2007, by 40% (i.e., by 188 children) by December 31, 2007. Again, State Defendants achieved only 20% on this measure,

<sup>3</sup> See Dimas & Morrison, *Period III Monitoring Report: Kenny A. v. Perdue: January 1, 2007 to June 30, 2007* (“*Period III Rep.*”) (Dec. 14, 2007) (Docket No. 571), at p. 64.

finding permanent homes for only 92 children.<sup>4</sup> Represented graphically, State Defendants' performance in the second half of 2007 was as follows:

**Outcome Measure 9 Performance - Period IV**

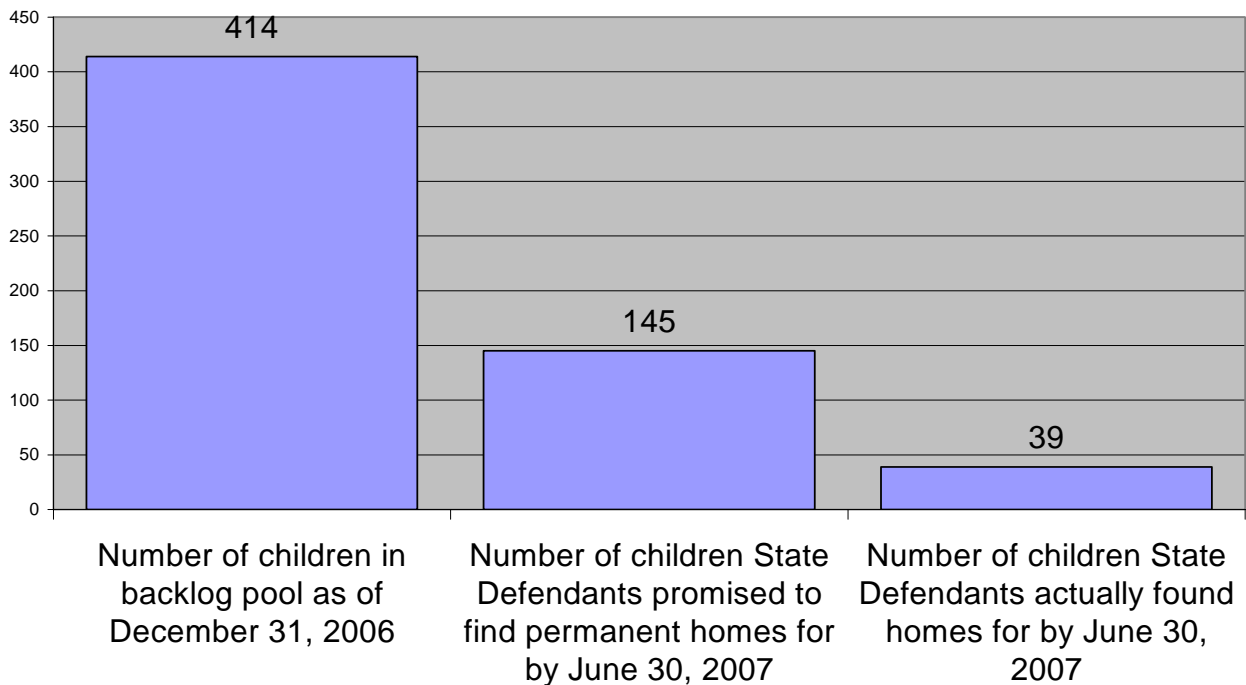


Outcome Measure 10 concerns children already in DHR custody for more than 24 months as of the entry of the Consent Decree in 2005. (*See Consent*

<sup>4</sup> *See Dimas & Morrison, Period IV Monitoring Report: Kenny A. v. Perdue: July 1, 2007 to December 31, 2007 ("Period IV Rep.")* (May 14, 2008) (Docket No. 577), at p. 50. The number of children in the Outcome 9 pool as of June 30, 2007, is not simply the number as of December 31, 2007, minus those for whom permanent homes were found, because some children reached the age of 18 during this period and were discharged from DHS custody, or were discharged from DHS custody for some other reason (such as running away or entering the juvenile justice system) and thus were never provided permanent homes. *See id.* This same issue applies to Outcome Measure 10.

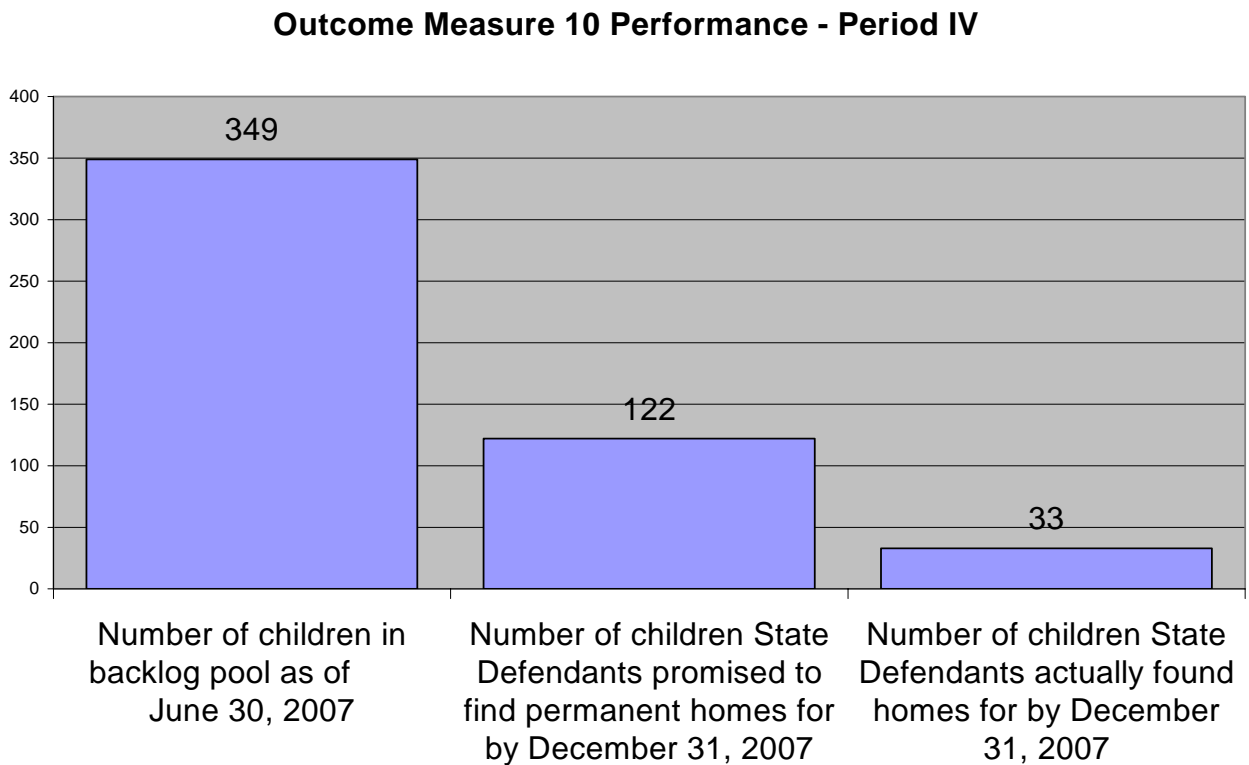
Decree § 15(10).) State Defendants were required to reduce the 414 children in this pool as of December 31, 2006, by 35% (i.e., by 145 children) by June 30, 2007, by placing them permanently with their families or relatives, or by finding them new families through adoption. DHR Defendants achieved only 9% compliance on this measure, finding permanent homes for only 39 of these children.<sup>5</sup> Presented in graphic form, State Defendants' performance on Outcome Measure 10 in the first half of 2007 was as follows:

**Outcome Measure 10 Performance - Period III**



<sup>5</sup> *Per. III Rep. 64-65.*

Similarly, State Defendants were required to reduce the 349 children in this pool as of June 30, 2007, by 35% (i.e., by 122 children) by December 31, 2007. Again, State Defendants achieved only 9% compliance on this measure, finding permanent homes for only 33 children.<sup>6</sup> Put another way, State Defendants' performance on Outcome Measure 10 in the second half of 2007 was as follows:



In addition to taking a reasonable position on the level of success required in finding permanent homes for children in these two “backlog pools,” the Consent Decree does not micromanage. Rather, it leaves to DHR and DFCS management

---

<sup>6</sup> *Per. IV Rep. 50.*

of the various initiatives and implementation strategies required to meet State Defendants' promises to these children. While it was State Defendants' choice of how to meet their obligations, it is clear that the required heightened efforts to help these children find permanent homes were not made. For the period January 1, 2007 to June 30, 2007, State Defendants promised to find permanent homes for 395 out of 1,039 children (for Outcome Measures 9 and 10 combined); they met their obligations for only 161 children. For the period from July 1, 2007 to December 31, 2007, State Defendants promised to find permanent homes for 310 out of 819 children (again, for Outcome Measures 9 and 10 combined); they met their obligations for only 125.

State Defendants' undisputed noncompliance with Outcome Measures 9 and 10 amply establishes clear and convincing evidence of contempt. Without a finding of contempt and remedial action, more of the nearly 650 children for whom the requirements of Outcome Measures 9 and 10 were still applicable as of December 31, 2007 – almost one third of the entire Plaintiff class – will continue to reach the age of 18 and will be discharged from (or “age out” of) DHR custody without ever having a chance at a permanent family. It is not yet too late for some of these children, but without judicial intervention and given State Defendants' inadequate and noncompliant performance, it soon will be.

## **Factual Background**

### **I. Outcome Measures 9 and 10 of the Consent Decree**

Plaintiffs are a class of abused and neglected children in the custody of the Georgia Department of Human Resources (“DHR”) in Fulton and DeKalb Counties.<sup>7</sup> The complaint in this action was filed in 2002, alleging that the state’s operation of the child welfare system in Fulton and DeKalb Counties was so mismanaged, overburdened and dangerous, that abused and neglected children were subjected to harms and risks of harm every day by the very system that is charged with protecting them. The complaint alleged, among other things, that foster children in state custody were denied basic safety, protection, treatment, and care, and that foster children routinely languished in government custody for years, sometimes their entire childhoods, without an opportunity to be promptly and safely returned to their biological families, or, when that is not possible, to placed with another permanent family out of state custody, such as through adoption.

After over three years of litigation, and on the eve of trial, the parties entered into settlement negotiations. A settlement was reached, which this Court later

---

<sup>7</sup> The class is defined in the Consent Decree as all “children who have been, are, or will be alleged or adjudicated deprived who (1) are or will be in the custody of any of the State Defendants; and (2) have or will have an open case in Fulton County DFCS or DeKalb County DFCS.” (Consent Decree § 2(D).)

approved and entered as a Consent Decree on October 28, 2005. The Consent Decree requires comprehensive reform of the child welfare system as operated in Fulton and DeKalb Counties, and mandates dramatic improvements in numerous management processes and services, as well as improved outcomes for abused and neglected children in state custody.

As provided for in § 16 of the Consent Decree, independent Accountability Agents James T. Dimas and Sarah A. Morrison are charged with monitoring and issuing semiannual reports on State Defendants' compliance with the mandates of the Decree.<sup>8</sup>

One of the guiding Principles in the Consent Decree concerns the critical need for class member children, who have already been removed from their biological families because of abuse or neglect, to have the opportunity to be raised in permanent families rather than grow up in state custody. Thus, the first enumerated Principle in the Consent Decree provides:

---

<sup>8</sup> See James T. Dimas & Sarah A. Morrison, *Period I Monitoring Report: Kenny A. v. Perdue: October 27, 2005 to June 30, 2006* ("Period I Rep.") (Nov. 3, 2006) (Docket No. 548); Dimas & Morrison, *Period II Monitoring Report: Kenny A. v. Perdue: July 1, 2006 to December 31, 2006* ("Period II Rep.") (June 15, 2007) (Docket No. 559); Dimas & Morrison, *Period III Monitoring Report: Kenny A. v. Perdue: January 1, 2007 to June 30, 2007* ("Period III Rep.") (Dec. 14, 2007) (Docket No. 571); Dimas & Morrison, *Period IV Monitoring Report: Kenny A. v. Perdue: July 1, 2007 to December 31, 2007* ("Period IV Rep.") (May 14, 2008) (Docket No. 577).

Georgia's child welfare system must actively promote and support the opportunity for children to grow up within a safe, nurturing family, either their biological family or, if that is not possible, within an adoptive family.

(Consent Decree § 3(1).) Furthermore, the third enumerated Principle states:

Foster care should be as temporary an arrangement as possible, with its goal being to provide a permanent home for the child as quickly as possible. In making the determination about what plans and services will best meet this goal, the child's interests must be paramount.

(Consent Decree § 3(3).)

Recognizing that targeted remedies are necessary in order to find permanent homes for children who were already in state custody when the Consent Decree went into effect, the Decree contains specific requirements, among them those contained in Outcome Measures 9 and 10, designed to benefit those children. The full text of Outcome Measure 9 (Consent Decree § 15(9)) provides:

Children in custody for up to 24 months and still in custody upon entry of the Consent Decree (children in the "24 month backlog pool"): For all children in the 24 month backlog pool, by the end of the second reporting period at least 35% shall have one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship. For children in the 24-month backlog pool who remain in custody at the end of the second reporting period, by the end of the third reporting period at least 40% shall have one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship. For children in the 24-month backlog pool who remain in custody at the end of the third reporting period, by the end of the fourth reporting period at least 40% shall have one of the following permanency

outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship.

Outcome Measure 10 (Consent Decree § 15(10)) provides:

Children in custody for more than 24 months and still in custody upon entry of Consent Decree (children in the “over 24 month backlog pool”): For all children in the over 24 month backlog pool, by the end of the second reporting period at least 35% shall have one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship. For all children in the over 24 month backlog pool who remain in custody by the end of the second reporting period, by the end of the third reporting period at least 35% shall have one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship. For all children in the over 24 month backlog pool who remain in custody by the end of the third reporting period, by the end of the fourth reporting period at least 35% shall have one of the following permanency outcomes: reunification, permanent placement with relatives, permanent legal custody, adoption, or guardianship.

As of December 31, 2007, the end of the fourth reporting period, which is the most recent date for which official data are available, 355 children remained in the Outcome Measure 9 backlog pool, meaning that they had been in custody for up to 24 months when the Consent Decree went into effect on October 27, 2005, and were still in custody more than two years later. (*Period IV Rep.* 51.) As of the end of the fourth reporting period, 289 children remained in the Outcome Measure 10 backlog pool, meaning that they had already been in custody for more than 24 months when the Consent Decree went into effect and, as of December 31, 2007,

had been in custody for more than 50 months. (*Id.*) Thus in total, there were 644 children in the two backlog pools as of December 31, 2007, more than 32% of the entire class of children under the Consent Decree.<sup>9</sup> State Defendants' failure to comply with the requirements of those Outcome Measures forms the basis for this motion.<sup>10</sup>

---

<sup>9</sup> The sum of the 644 children who remained in the backlog pools on December 31, 2007, and the 1,341 children who remained in the Outcome Measure 8 cohort on that date, indicates a total class population of 1,985. (*See Period IV Rep.* 49, 51.) As the Outcome Measure 8 cohort is defined as "all children entering custody following the entry of the Consent Decree," (Consent Decree § 15(8)(a), (b)), it encompasses all class members who are *not* in one of the backlog pools.

<sup>10</sup> As documented in the four monitoring reports issued by the Accountability Agents to date, in every six-month reporting period since the Decree went into effect, State Defendants have failed to comply with the majority of the applicable Outcome Measure requirements and with numerous additional process requirements. (*See generally Period I Rep.; Period II Rep.; Period III Rep.; Period IV Rep.*) Class Counsel have invoked the enforcement procedures contained in § 17 of the Consent Decree on five separate occasions and continue in their efforts to reach agreements with State Defendants on curative action plans to remedy the various areas of noncompliance, beyond those that form the basis for this motion, without having to seek judicial remedies. (*See Ex. A, Letters from I. Lustbader to B. Woodard dated May 22, 2007 (Ex. A-1), June 27, 2007 (Ex. A-2), Oct. 17, 2007 (Ex. A-3), Jan. 11, 2008 (Ex. A-4), June 6, 2008 (Ex. A-5).*) Should those ongoing efforts prove unsuccessful, however, Class Counsel reserve the right to seek judicial remedies at a future date for any or all noncompliance as provided in § 17(D) of the Consent Decree.

## **II. State Defendants' Performance on Outcome Measures 9 and 10**

Outcome Measures 9 and 10 came into effect with the second reporting period (July 1 to December 31, 2006) and the Accountability Agents later reported that State Defendants met the requirements of both measures during that period. (*Period II. Rep.* 44–47.) On Outcome Measure 9, which required performance of at least 35%, State Defendants achieved 49%; on Outcome Measure 10, which required at least 35%, State Defendants achieved 36%. (*Id.* at 45–46.) Thereafter, however, State Defendants' performance plummeted and has remained in significant noncompliance with the requirements of the Consent Decree.

Beginning with the third reporting period (January 1 to June 30, 2007), and continuing thereafter, the Decree requires performance of at least 40% on Outcome Measure 9, an increase from the initial minimum of 35%. At the same time, however, State Defendants' performance on this measure fell to 20% in the third reporting period, half of what the Decree requires. (*Period III Rep.* 64.) In the fourth reporting period State Defendants' performance remained at 20%, compared to the Decree requirement of at least 40%. (*Period IV. Rep.* 50.)

On Outcome 10, the requirement of which remains at 35% or better for the duration of the Consent Decree, State Defendants' achieved only 9% in the third reporting period, barely a quarter of the performance required by the Decree.

(*Period III Rep.* 64–65.) State Defendants’ performance showed no improvement in the fourth period, coming in again at only 9%. (*Period IV Rep.* 50.)

On information and belief, State Defendants failed to achieve compliance with the requirements of either Outcome Measure 9 or 10 during the fifth reporting period (January 1 to June 30, 2008) and remain in significant noncompliance with the requirements of both Outcome Measures 9 and 10.

### **III. Class Counsel’s Efforts to Reach Agreement on Curative Actions Without Further Litigation**

Section 17(C) of the Consent Decree requires Class Counsel to provide written notice to State Defendants if, “to the best of Class Counsel’s knowledge, information, and belief (formed after an inquiry reasonable under the circumstances), State Defendants are in violation of th[e] Consent Decree.” If State Defendants accept, without necessarily admitting, the assertion of noncompliance, then the parties must attempt to reach a mutually agreeable curative action plan to remedy the noncompliance by a specified deadline. (Consent Decree § 17(D)(3).) The Decree provides that “in no event shall Class Counsel seek an appropriate judicial remedy for the accepted noncompliance until at least 45 days after State Defendants have responded . . . and until both sides have conferred in good faith to resolve any differences. The parties may, by

mutual agreement, extend the time period specified in this subsection.” (Consent Decree § 17(D)(3).)

Pursuant to § 17(C), on January 11, 2008, Class Counsel delivered written notice to State Defendants, asserting noncompliance with Outcome Measures 9 and 10.<sup>11</sup> State Defendants responded in writing on February 5, 2008, accepting without necessarily admitting the alleged noncompliance and beginning the 45-day time period for mandatory negotiations toward a mutually agreeable curative action plan. (*See* Consent Decree § 17(D)(1), (3).)

Thereafter, Class Counsel engaged State Defendants in written, telephonic, and face-to-face negotiations with the goal of reaching agreement on a curative action plan. Because State Defendants responded to Class Counsel’s assertion of noncompliance on February 5, the mandatory 45-day period for negotiations specified in § 17(D)(3) ran from that date to March 21, 2008. Although, under the terms of the Consent Decree, Class Counsel could have sought a judicial remedy at that point, Class Counsel continued their efforts to reach a negotiated agreement with State Defendants for another 118 days, until it became apparent to Class

---

<sup>11</sup> In the same letter, Class Counsel also asserted noncompliance with Outcome Measures 21 and 29. (*See* Ex. A-4.) Those provisions are not the subject of this motion.

Counsel on July 17, 2008, that the parties were at an impasse and could make no further progress toward agreement on a curative action plan.<sup>12</sup>

## **Argument**

### **I. The Legal Standard for Civil Contempt**

“Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.” *Frew v. Hawkins*, 540 U.S. 431, 440 (2004). As the Court of Appeals for the Eleventh Circuit recently noted, “because consent decrees are entered by the court and are judicially enforceable, they function like any other court order or judgment and thus ‘may be enforced by judicial sanctions, including citation for contempt if [they are] violated.’” *Rowe v. Jones*, 483 F.3d 791, 797 (11th Cir. 2007) (per curiam) (quoting *United States v. City of Miami*, 664 F.2d 435, 440 (Former 5th Cir. 1981) (*en banc*), alteration in original); see also *Reynolds v. McInnes (Reynolds II)*, 338 F.3d 1201, 1208 (11th Cir. 2003) (“[C]onsent decrees, like all injunctions, are to be

---

<sup>12</sup> The written exchanges between the parties concerning curative actions to remedy noncompliance, subsequent to Class Counsel’s initial assertions of noncompliance on Outcome Measures 9 and 10 (Ex. A-4) are not attached to this motion, as Class Counsel understand them to be in the nature of settlement negotiations and thus confidential between the parties. For the same reason, all portions of Ex. A-5 other than Class Counsel’s assertion of noncompliance have been redacted. Of course, Class Counsel will promptly provide all such correspondence, without redactions, if requested by the Court.

enforced through the trial court's civil contempt power."); *Cagle v. Sutherland*, 334 F.3d 980, 987 n.9 (11th Cir. 2003) ("Consent decrees are court orders and can readily be enforced by contempt citations and the court's inherent powers."); Fed. R. Civ. P. 70(e) (2007) ("The court may also hold the disobedient party in contempt" to enforce a judgment for a specific act). When, as here, defendants fail to comply with the terms of a consent decree, the court may exercise its civil contempt power in order to force their compliance. "Civil contempt is designed to force the contemnor to comply with an order of the court." *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 207 (1999) (quoting *Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992)); accord *In re Lawrence*, 279 F.3d 1294, 1300 (11th Cir. 2002) ("[C]ivil contempt sanctions are intended to coerce compliance with a court order.").

Not only do courts have the authority to enforce consent decrees through civil contempt, but plaintiffs who seek judicial enforcement of consent decrees are required to move the courts to invoke that power. "If the plaintiffs believe that the defendants are failing to comply with a [consent] decree, in order to enforce it the plaintiffs *must* move the court to issue an order for the defendants to show cause why they should not be adjudged in civil contempt and sanctioned." *Reynolds II*, 338 F.3d at 1208 (emphasis added) (citing *Reynolds v. Roberts (Reynolds I)*, 207

F.3d 1288, 1298 (11th Cir. 2000)); accord *Fla. Ass'n for Retarded Citizens, Inc. v. Bush*, 246 F.3d 1296, 1298 (11th Cir. 2001) (per curiam) (same).

Plaintiffs seeking judicial enforcement of a consent decree follow a straightforward procedure. See, e.g., *Reynolds II*, 338 F.3d at 1208 (specifying procedure). They must file a show-cause motion, “cit[ing] the injunctive provisions at issue and set[ting] out that the defendants have refused to obey the decree.” *Reynolds II*, 338 F.3d at 1208 (citing *Reynolds I*, 207 F.3d at 1298). “If satisfied that the plaintiffs’ motion states a case for non-compliance, the court should order the defendants to show cause why they should not be held in contempt and [should] schedule a hearing on it.” *Reynolds II*, 338 F.3d at 1208 (citing *Reynolds I*, 207 F.3d at 1298).

The “party seeking civil contempt bears the initial burden of proving by clear and convincing evidence that the alleged contemnor has violated an outstanding court order.” *Commodity Futures Trading Comm’n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992) (citing *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir. 1991); *Combs v. Ryan’s Coal Co.*, 785 F.2d 970, 984 (11th Cir. 1986)). “Once the movant makes a prima facie showing of a violation, the burden shifts to the alleged contemnor to produce detailed evidence specifically explaining why he cannot comply.” *Parker*

*v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 740 (11th Cir. 2006) (citing *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988)); accord *Commodity Futures Trading Comm’n*, 950 F.2d at 1529 (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)). “The burden shifts back to the initiating party *only* upon a sufficient showing by the alleged contemnor. The party seeking to show contempt, then, has the burden of proving ability to comply.” *Commodity Futures Trading Comm’n*, 950 F.2d at 1529 (citing *Combs*, 785 F.2d at 984) (emphasis added); accord *NLRB v. Triple A Fire Protection, Inc.*, No. 96-6944, 2002 WL 987269 (11th Cir. Feb. 5, 2002); *Western Union Holdings, Inc. v. Eastern Union, Inc.*, No. 1:06-CV-01408-RWS, 2007 WL 2683714, \*4 (N.D. Ga. Sept. 7, 2007) (“If, and only if, the alleged contemnor makes a sufficient evidentiary showing, then the burden shifts back to the party seeking contempt to prove the ability to comply.”).

Establishing inability requires more than “a mere assertion of inability” by the defendant. *Parker*, 468 F.3d at 740 (citing *United States v. Hayes*, 722 F.2d 723 (11th Cir. 1984)). To meet its burden on an inability defense, the contemnor must “produce detailed evidence specifically explaining why he cannot comply” with the consent decree. *Parker*, 468 F.3d at 740. The proffered evidence must “establish that he has made in good faith all reasonable efforts to meet the terms

of the court order he is seeking to avoid.” *In re Lawrence*, 279 F.3d at 1297 (quoting *Commodity Futures Trading Comm’n*, 950 F.2d at 1529).<sup>13</sup>

The Eleventh Circuit construes this evidentiary requirement “strictly.” *Commodity Futures Trading Comm’n*, 950 F.2d at 1529 (quoting *Combs*, 785 F.2d at 984). “Even if the efforts he did make were ‘substantial,’ ‘diligent’ or ‘in good faith,’ . . . the fact that he did not make ‘all reasonable efforts’ establishes that [respondent] did not sufficiently rebut the . . . prima facie showing of contempt.” *Commodity Futures Trading Comm’n*, 950 F.2d at 1529 (quoting *Combs*, 785 F.2d at 984 (alterations in original)). Furthermore, the “focus in a civil contempt proceeding ‘is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.’” *Ga. Power Co. v. NLRB*, 484 F.3d 1288, 1291 (11th Cir. 2007) (quoting *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990)).

If the court finds the defendants to be in contempt, “the district court has broad discretion to fashion an appropriate remedy.” *Abbott Labs. v. Unlimited Beverages, Inc.*, 218 F.3d 1238, 1242 (11th Cir. 2000).

---

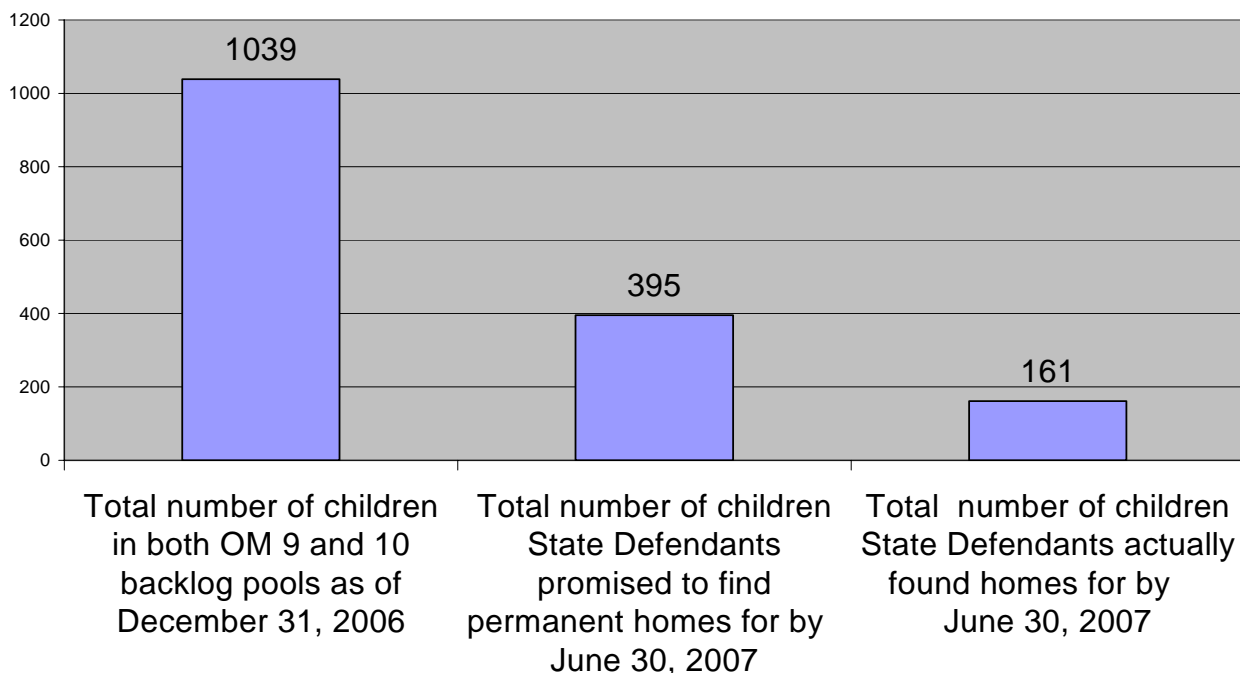
<sup>13</sup> Plaintiffs reserve the right to request expedited discovery, if necessary, in order to respond to any evidence that State Defendants may proffer in support of an inability defense.

## **II. State Defendants' Noncompliance Constitutes Contempt of Court**

The Consent Decree signed by the parties, and approved and entered by this Court, imposes various enforceable obligations on State Defendants. Among these obligations are those embodied in Outcome Measures 9 and 10. These provisions set reasonable measures for performance, negotiated at arms length, that require far less than perfect success in finding permanent homes for all of the children who need them. The Consent Decree further affords State Defendants full management discretion in developing their strategies for meeting their obligations. Yet the undisputed performance data establish that State Defendants have failed to come anywhere near making reasonable efforts to meet their obligations to the children, whose lives are dramatically impacted by State Defendants' noncompliance.

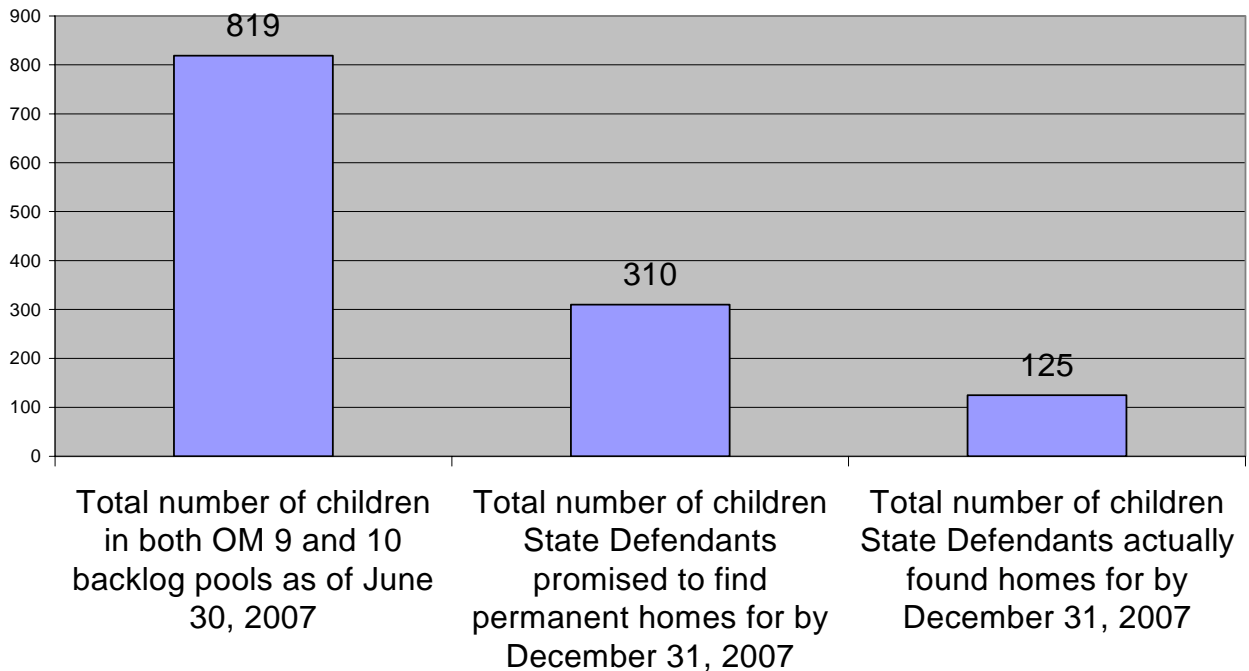
For the third reporting period (January 1 to June 30, 2007), State Defendants were required to achieve performance of at least 40% on Outcome Measure 9 and at least 35% on Outcome Measure 10. The Accountability Agents reported that State Defendants achieved performance of only 20% on Outcome Measure 9 and only 9% on Outcome Measure 10 during the third reporting period. (*Period III Rep.* 64–65.) Represented graphically, State Defendants' combined performance on Outcome Measures 9 and 10 in the first half of 2007 was as follows:

**Combined Performance on Outcome Measures 9 and 10 -  
Period III**



For the fourth reporting period (July 1 to December 31, 2007), State Defendants were again required to achieve performance of at least 40% on Outcome Measure 9 and at least 35% on Outcome Measure 10. The Accountability Agents reported that State Defendants again achieved performance of only 20% on Outcome Measure 9 and only 9% on Outcome Measure 10 during the fourth reporting period. (*Period IV Rep. 50.*) Presented in summary form, State Defendants combined performance on Outcome Measure 9 and 10 for the second half of 2007 was as follows:

### Combined Performance on Outcome Measures 9 and 10 - Period IV



The above easily constitutes clear and convincing evidence that State Defendants are in noncompliance with Outcome Measures 9 and 10 of the Consent Decree and should therefore be held in contempt of court. *See, e.g., Rowe*, 483 F.3d at 797 (prescribing citation for contempt where defendant violates consent decree).

### Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court issue an order for State Defendants to show cause why they should not be adjudged in

civil contempt and sanctioned. Fed. R. Civ. P. 70(e). If State Defendants fail to show cause, this Court should issue an order finding them in contempt and schedule an evidentiary hearing for the purpose of determining an appropriate judicial remedy to cure State Defendants' noncompliance with Outcome Measures 9 and 10.

Respectfully submitted this 19<sup>th</sup> day of August 2008.

---

JEFFREY O. BRAMLETT  
Georgia Bar No. 075780  
bramlett@bmelaw.com  
COREY F. HIROKAWA  
Georgia Bar No. 357087  
hirokawa@bmelaw.com  
BONDURANT, MIXSON &  
ELMORE, LLP  
1201 W. Peachtree St. N.W., Ste. 3900  
Atlanta, GA 30309  
Phone: (404) 881-4100  
Fax: (404) 881-4111

---

MARCIA ROBINSON LOWRY

*pro hac vice*

mlowry@childrensrights.org

IRA P. LUSTBADER

*pro hac vice*

ilustbader@childrensrights.org

DANIEL W. E. HOLT

*pro hac vice*

dholt@childrensrights.org

CHILDREN'S RIGHTS

330 7th Ave., Fl. 4

New York, NY 10001

Phone: (212) 683-2210

Fax: (212) 683-4015

**CERTIFICATION PURSUANT TO LOCAL RULE 7.1D**

I hereby certify that the foregoing brief has been prepared in 14-point Times New Roman, one of the typeface and point-size selections approved by the Court in Local Rule 5.1C.

---

JEFFREY O. BRAMLETT  
Georgia Bar No. 075780  
bramlett@bmelaw.com  
COREY F. HIROKAWA  
Georgia Bar No. 357087  
hirokawa@bmelaw.com  
BONDURANT, MIXSON &  
ELMORE, LLP  
1201 W. Peachtree St. N.W., Ste. 3900  
Atlanta, GA 30309  
Phone: (404) 881-4100  
Fax: (404) 881-4111

---

MARCIA ROBINSON LOWRY  
*pro hac vice*  
mlowry@childrensrights.org  
IRA P. LUSTBADER  
*pro hac vice*  
ilustbader@childrensrights.org  
DANIEL W. E. HOLT  
*pro hac vice*  
dholt@childrensrights.org  
CHILDREN'S RIGHTS  
330 7th Ave., Fl. 4  
New York, NY 10001  
Phone: (212) 683-2210  
Fax: (212) 683-4015