UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Western Division

ROSIE D., et al., Plaintiffs, v. DEVAL L. PATRICK, et al., Defendants	C.A. No. 01-30199-MAP

DEFENDANTS' RESPONSE TO PLAINTIFFS'
PROPOSED FORM OF ORDER

At the May 18, 2010 status conference in this case, there was much discussion of anecdotal evidence of potential service recipients having to wait for access to Intensive Care Coordination ("ICC") services. The Court invited plaintiffs to file a proposed form of order, setting forth what steps, if any, the Court should direct defendants to take in order to ensure timely access to ICC. The plaintiffs availed themselves of this opportunity on or about June 1, 2010. Having reviewed the plaintiffs' submission, the Executive Office of Health and Human Services ("EOHHS") hereby responds, primarily to reassert its position that no order on this subject is either necessary or appropriate at this time.

As demonstrated in their June 1, 2010 Implementation Report, the defendants remain in full compliance with the existing Judgment. In addition, the defendants continue to collect data on each of the services contemplated by the Judgment, and to

provide periodic reports to keep the Court, the Monitor, and the plaintiffs apprised of their activities, progress, and potential problems. Accordingly, no additional order is required to ensure: (1) that data are collected with respect to wait lists that providers may have, or any other facet of the remedy services; (2) that the defendants will be diligent in assuring that the remedy services are made available, on a timely basis, to Medicaid members; (3) that all relevant information will be timely reported to the Court; or (4) that the defendants will continue to cooperate with the Monitor in her oversight of the remedial process.

Regarding the specific provisions of the plaintiffs' proposed form of order, the defendants respond as follows:

Data Collection

The defendants have developed a plan to collect high-quality and complete data regarding access to ICC services, have shared the plan with the plaintiffs, and will implement it without the need for a court order. Accordingly, beginning on July 1, 2010, the defendants will collect data on the number of individuals eligible for ICC services who are actually waiting for those services. This data-collection effort will focus specifically on eligible MassHealth members under the age of 21, with a medical need for ICC services, who have expressed an interest in obtaining ICC services.

The plaintiffs' proposed enlargement of the scope of data collected is not appropriately targeted to the issue of whether members are waiting for ICC services. The plaintiffs have suggested that the Court direct the defendants to collect four additional sets of data with respect to access to ICC services: the number of referrals received each month; the number of referred youth for whom a telephone contact is made within 24

hours; the number of referred youth for whom a face-to-face interview was conducted within three calendar days of the referral; and the number of families who requested a meeting after three days.

While these additional data sets might appear, on their face, to add detail to the data already being collected, the defendants have actively selected against collecting data in the manner described, out of concern that such additional data will skew or corrupt the data sets they are compiling. For example, by focusing on "referrals," the first two proposed data sets would "sweep in" information about people who are not under age 21 and eligible for MassHealth Standard or Commonwealth; children who are the subject of a referral by a third party, who may not be aware that they have been referred; and children and families who have been referred for ICC services, but have either declined such services or have been found not to have a medical need for ICC.[1] The plaintiffs' latter two proposed data sets are similarly flawed, in that they, too, aggregate information about "referrals," rather than about eligible members who actually want the service.

The defendants' data collection process in its current form, as described in earlier status reports and at the recent status conference, will collect data, on a monthly basis, regarding the number of eligible, interested members who are waiting for services, including ICC. The process will also collect data regarding the total length of time that any eligible, interested member has had to wait to access the appropriate service. The defendants submit that these are the proper questions to be asking at this point in time, and that broadening the scope of the data collection will, paradoxically, undercut the utility of the data collected.

[1] The defendants are separately collecting information about referrals to ICC, but for the reasons already stated, those data are not properly included in a report designed to identify wait times for services.

Elimination of Provider Waiting Lists

Paragraphs 2 and 3 of the plaintiffs' proposed order would require the defendants to make "best efforts" to eliminate providers' waiting lists for services, without any tangible description of what steps defendants must take, why they must take them, or how to measure their compliance with such a directive. As such, a "best efforts" order would add nothing substantive or objective to the defendants' current obligations, while exposing them, at least in theory, to sanctions should they fail to meet an unstated and subjective standard. The defendants are already obligated, under both the Judgment and applicable EPSDT requirements, to provide eligible and interested MassHealth members with access to ICC and other remedial services. The defendants have been, and are, complying with these obligations. A "best efforts" order is neither necessary nor appropriate.

Court Reports

The defendants will continue to make semi-annual reports to the Court addressing their compliance with the Judgment, and will continue to file such other status reports as the Court may periodically deem necessary or useful.

Monitor Assessment

Paragraph 5 of the plaintiffs' proposed order is likewise superfluous, as it does not alter the Monitor's existing oversight of the defendants' implementation of the Court's Judgment, nor does it modify the defendants' existing obligations to provide information to the Monitor upon her request, or in furtherance of her duties under the Judgment.

Conclusion

Because the obligations that would be imposed under the plaintiffs' proposed form of order are at best redundant, and, at worst, could unwittingly detract from the parties' shared mission of ensuring timely access to ICC and other remedy services, the Court should decline to enter any further order at this time.

Respectfully submitted,

MARTHA COAKLEY
ATTORNEY GENERAL

/s/ Daniel J. Hammond
Daniel J. Hammond BBO #559475
Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, Ext. 2078

Date: June 18, 2010

I hereby certify that a true copy of this document was served electronically upon counsel of record through the Court's electronic filing system on today's date.

/s/ Daniel J. Hammond

Daniel J. Hammond
Assistant Attorney General