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' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR CLARIFICATION

The Massachusetts Executive Office of Health and Human Services ("EOHHS"), defendant in the above-named matter, hereby submits this memorandum of law in support of its Motion for Clarification, filed herewith.

Introduction

In the July 16, 2007 Judgment in this case, the Court directed that a Court Monitor (the "Monitor") be appointed, and invested the Monitor with several enumerated powers. Among those powers was the authority to "independently review the Defendants' compliance with this Judgment." See Judgment at ¶ 48(a)(3). The Judgment also empowered the Monitor to "recommend further or corrective actions necessary to redress any problems identified in implementing this Judgment." Id. at ¶ 48(a)(5). In the fall of 2009, the Monitor announced to the parties her intention of using a tool known as the Community Service Review (or "CSR") to look at the delivery of Intensive Care Coordination and In-Home Therapy. See Affidavit of Emily Sherwood

("Sherwood Affidavit"), attached hereto as Exhibit A, at ¶ 3. The CSR is a proprietary instrument developed and owned by Human Systems & Outcomes, Inc., of Tallahassee, Florida, and is designed to review human service systems of care. See Affidavit of Emily Sherwood ("Sherwood Affidavit"), attached hereto as Exhibit A, at ¶ 3.

The Monitor stated from the outset that she intended to modify the CSR in various ways, in order to retro-fit it to the task of reviewing ICC and In-Home Therapy. Sherwood Affidavit at ¶ 3. From the beginning, EOHHS expressed to the Monitor its belief that the CSR was ill-suited for use in evaluating the Defendants' compliance, but agreed to work with the Monitor in her effort to make the CSR more applicable to the task at hand. Id. at ¶¶ 3 through 11. That process lasted several months, as the Monitor provided multiple iterations of the CSR, and EOHHS offered its comments and criticisms regarding each successive version. Id. at ¶¶ 3 through 11. The process culminated in the Monitor's request for "final comments" by the end of July; she promised to review those comments, then promulgate her final version of the CSR, in time to be used by evaluators beginning in the fall of 2010. Id. at ¶ _11. EOHHS timely submitted its final comments; as of this date, the Monitor has not issued her "final" version of the CSR.

While the Monitor has engaged in good-faith and protracted discussions with EOHHS regarding the content and function of the CSR, it has become clear that there remains a fundamental discord as to whether the CSR is an appropriate methodology for reviewing the Defendants' implementation of the Judgment, and whether it can be sufficiently modified so as to make it appropriate. Accordingly, EOHHS submits this dispute to the Court at this time, seeking guidance.

ARGUMENT

As generally described at the July 20, 2010 status conference, EOHHS's objections to the Monitor's proposed implementation of the CSR are: that the CSR is an inapt tool for measuring compliance; that if the Monitor's intends to use the CSR as a tool for quality improvement, as opposed to compliance measurement, that is ultra vires to the Judgment and her role in monitoring compliance with the Judgment; that Defendants have more appropriate tools for quality improvement already at hand; and that proceeding with the CSR will unnecessarily swell the Monitor's budget.

As a preliminary matter, EOHHS notes that the Monitor appears to be conflating two distinct concepts: determining whether the Defendants are in compliance with the Judgment, on the one hand, and evaluating the quality and impact of services being delivered, on the other. The Defendants have complied with the Judgment if they have performed each of the tasks they were affirmatively ordered to undertake in the text of the Judgment itself; this, in turn, is the focus of the periodic paragraph-by-paragraph status reports that the Defendants have filed throughout the post-Judgment period, which are, in turn, critiqued by the plaintiffs and by the Monitor and reviewed by the Court. The present dispute, then, does not turn on a question of compliance.

The Defendants agree, however, that they should collect data regarding the quality and robustness of the remedy services as actually performed, and on the outcomes for the children who receive such services, and, as set forth below, the Defendants are collecting just such data.[1] However, to the extent the Monitor proposes to engage in

[1] Defendants note that outcome measures have been developed in accordance with paragraph 46.e. of the Judgment and that, in accordance with that provision, such outcome measures are solely for the purpose of program improvement and may not be used for arguing that the Defendants are out of compliance with any order of the Court, including the Judgment itself

quality improvement activities and outcome measures in a way that the Defendants do not agree is reasonably calculated to collect useful data; is duplicative of or inferior to data that Defendants have readily at hand; and unnecessarily imposes financial costs on the Defendants during an austere budgetary cycle, EOHHS must object.

I. THE CSR, EVEN AS MODIFIED BY THE MONITOR, IS DESIGNED TO MEASURE SYSTEM-WIDE OUTCOMES, NOT TO GAUGE COMPLIANCE WITH THE JUDGMENT IN THIS CASE.

In its simplest terms, the CSR is a process to evaluate a subset of youths who have sought out one of two remedy services under the Judgment, whereby a member of a team of evaluators interviews a broad array of stakeholders (in most cases, the child him/herself, parents/guardians, treating clinicians, care coordinators and team members, among others), and assigns a quantitative score to reflect each individual youth's status and progress as a result of the proffered services. Scores for each subject child in various areas are then aggregated, and given an "acceptable" or "unacceptable" designation. The Monitor has frequently expressed to EOHHS that the chief virtues of the CSR as an evaluative tool are that it (a) employs a "case-study" approach, so as to gauge how effective remedy services are for actual class members; and (b) that it generates quantifiable data in an area that is often and necessarily subjective and diffuse.

These putative virtues of the CSR, however, are also its most significant shortcomings as a device for measuring compliance with the Judgment, to the extent that that is indeed the Monitor's goal for using it. The case-study model necessarily raises the question of consistency among interviewers, both in terms of the questions asked and the scores assigned. This is particularly true where, as here, the core service being evaluated – Intensive Care Coordination ("ICC") – uses concepts and language with which many of

the CSR reviewers will be unfamiliar, calling into question the reliability of the scores such reviewers will assign. See, generally, attachment to Sherwood Affidavit at Exhibit 3 thereto (USF Paper), pages 2-3

The more significant problem, however, is that the CSR purports to measure (and therefore hold the Defendants accountable for) numerous factors outside their control and, indeed, outside the scope of the Judgment or the provisions of the Medicaid Act on which it is based.

By way of example, CSR reviewers will evaluate, and assign numerical values to, a number of issues pertaining to a child's status and that of his/her caregiver – conditions precedent over which EOHHS has virtually no influence, either under the Judgment or in day-to-day practice. CSR reviewers will be "scoring" such criteria as whether a child is safe in his/her home; the severity of his/her cognitive or mental health disabilities; the stability of the child's family situation; the social, educational, cognitive, health, and financial resources of a child's family and principal caregivers; and the resources available in the municipality where the child lives. See Exhibit 1 to Sherwood Affidavit (August 3 memo from E. Sherwood to K. Snyder) at 1-2. While such information must be collected to give context to an individual child's case, the CSR will also use it to build a "score" that determines whether that child has made "acceptable" or "unacceptable" progress, which, in turn, will be used to evaluate how and whether the Defendants have complied with the Judgment. Use of these data in this way necessarily skews the effectiveness of the CSR as an evaluative tool.

Similarly, CSR reviewers will make quantitative judgments about the performance of service systems that have nothing to do with Medicaid and, as a result,

are well beyond the scope of the Rosie D. litigation and the Remedy Plan. Placement decisions by the Department of Children and Families ("DCF") and the Department of Youth Services ("DYS"), all of which are subject to disposition by the state's Juvenile Court system, and individual education plans developed by local education authorities will all be numerically graded by CSR reviewers, even though each of these factors lies outside the purview of the provisions of the Medicaid Act that are the subject of this litigation and the Remedy that this Court ordered the Defendants to implement. See attachment to Sherwood Affidavit at 1-2. Accordingly, here, too, extrinsic factors will inevitably corrupt the process of evaluating whether the Defendants have complied with that Judgment.

Some of this could be cured by removing Youth and Caregiver Status and certain Youth Progress Indicators from the list of elements numerically scored and aggregated – a suggestion that EOHHS has made to the Monitor on multiple occasions, thus far without success. In a larger sense, however, it is indicative of how conceptually ill-suited the CSR is to the task of evaluating compliance with the Judgment in this case.

Many of these criticisms are echoed by a team of mental health researchers at the University of South Florida in their report, "Quality Service Review Field Test Report and Recommendations for Future Use," which is attached as Tab 2 to the Sherwood Affidavit. [2] In 2002, the Florida Department of Children and Families was considering

[2] EOHHS engaged the services of a researcher who searched for peer reviewed academic literature supporting the use of the Community Service Review, the Wraparound Fidelity Index, the Team Observation Measure and the Child and Adolescent Needs and Strengths tool as evaluation tools. While there is peer reviewed literature supportive of the CANS and the WFI, the researcher located no peer reviewed evaluation of the CSR. She did locate the University of South Florida report. See. Affidavit of Hannah Karpman, attached hereto as Exhibit B..

using a version of the CSR[3] as a quality-assurance tool for evaluating the performance of the Department's community-based care. As part of its due diligence before entering into a contract with the CSR's creator, the Florida agency commissioned a field test and analysis by researchers at South Florida.

The researchers conducted an extensive field test of the CSR, so as to assess its strengths and weaknesses as an evaluative tool. The researchers observed all aspects of 11 case reviews conducted by a CSR review team, including all file reviews, all interviews, and all scoring sessions. See Tab 2 to Sherwood Affidavit at 3-6. Their ultimate objective was to assess the utility of the CSR for three discrete purposes: (1) for evaluation of a system's performance; (2) for quality assurance ("QA") with respect to a system or an individual service provider; and (3) for quality improvement ("QI") (i.e., identifying gaps or weaknesses in a system of care and prescriptions for fixing them) . See Tab 2 at 6-8.

Though the South Florida research team was clearly impressed by the child- and family-specific data gleaned from the CSR's case-study method, it concluded that the CSR was "most appropriate for use in a QI model that is focused on practice refinement or improvement as opposed to a QA model focused on compliance." Tab 2 at 11. The research team specifically recommended against employing the CSR process in either an evaluative or quality-assurance context, citing many of the same problems that EOHHS has identified to the Monitor here: that the CSR is extremely resource-intensive, requiring a high volume of interviewers, shadows, and support personnel; that standardization of criteria and scoring among interviewers is difficult to achieve or

[3] At that time, the CSR was marketed under the name "Quality Service Review" or "QSR. It was, however, an earlier iteration of the same tool, designed and marketed by the same company. For ease of reference, it will be denoted herein as the "CSR."

maintain; and that the focus on child and family status indicators makes it extremely difficult to isolate variables. Id. Ultimately, the researchers conclude:

> [CSR] is based on the belief that each individual case can be used as a valid test of a system at a particular place and time. This can only be done by taking a close look at both the status of the individuals and the functioning of the system. Any shortcuts alter the utility of the [CSR]. In addition, **the [CSR] process was designed in the spirit of practice refinement and improvement. Any process developed with a primary goal of addressing compliance or looking for deficits would no longer be a [CSR] process.** As such, the recommended use of the [CSR] process is within a Quality Improvement structure.

Tab 2 at 12.

The same objections obtain here. The CSR process – even after the Monitor's good-faith efforts to refine and retrofit it – remains what it was designed to be: a method for appraising the performance of an entire "system of care," including components such as juvenile justice, child welfare and education, *as it is reflected in case practice by these system partners, for individual children.* So, it is both overbroad -- in that it assesses the performance of system partners other than MassHealth, its health plans and providers -- and not properly focused for compliance review purposes, in that it assesses front-line staff case practice and delivers case-practice-level feedback to staff. Nonetheless, the Monitor intends to use it as a metric to determine whether the Defendants have complied

with the Judgment in this case.[4] The South Florida researchers rejected that application of the product in Florida; for many of the same reasons, this Court should do the same.[5]

II. MORE APPROPRIATE TOOLS FOR QUALITY IMPROVEMENT ARE ALREADY AVAILABLE AND IN USE.

As set forth in detail in the Sherwood Affidavit, the leading national scholarship on quality improvement in systems of care for children with mental health needs suggests that certain factors are paramount in measuring the effectiveness of a service-delivery network: to be useful, quality improvement must be harmonious with the goals of the system; it must have maximum buy-in from all stakeholders; it must measure outcomes on systemic and individual levels; it must measure cost savings and long-term system viability; it must generate prescriptive lessons to facilitate quality improvement, going forward; and it must form the basis for ongoing self-evaluation by system operators, after the external evaluation is complete. See Sherwood Affidavit at ¶ 21. In alignment with these objectives, the Defendants have developed a comprehensive plan for quality improvement which, they submit, should serve as the backbone of the compliance-review and quality-improvement efforts in this case.

The benefits of this approach are spelled out in detail in the Sherwood Affidavit at ¶¶ 22 through 24. Among other virtues, this plan makes use of data already being

[4] If, on the other hand, the Monitor's purpose is to use the CSR to identify opportunities for quality improvement in the Commonwealth's broad system of human services, educational services and juvenile justice, that is well beyond the scope of her authority – which, as previously stated, is limited to independent review of the Defendants' "*compliance* with this Judgment." See Judgment at ¶ 48(a)(3). *[emphasis supplied]*.

[5] Indeed, if the Court agrees with Defendants that the CSR is not a valid metric for assessing compliance with the Judgment, then the Court must constrain the Monitor from implementing it; failure to do so would be condoning an ultra vires act, one that exceeds the Monitor's authority under the Judgment.

collected (including, prominently, CANS data documenting status of service recipients) and evaluative tools already being employed, to create an aggregated picture of how well the remedy services are being delivered, and the extent to which children are benefitting from having received the remedy services. The tools include the Wraparound Fidelity Index ("WFI") and the Team Observation Measure ("TOM"), nationally recognized tools developed by Eric Bruns, Ph.D. and others to assess the extent to which care coordination programs faithfully adhere to the principles, phases and activities of Wraparound as defined by the national Wraparound Initiative. Taken together, CANS, WFI and TOM data will give the Monitor, and ultimately the Court, the raw materials with which to assess the magnitude and quality of services being delivered under the Judgment.

EOHHS readily acknowledges, however, that this quantitative review is not sufficient, by itself, to provide the three-dimensional picture the Court has asked for. While its aggregation of anecdotal evidence is unquestionably one of the strengths of the CSR, as Ms. Sherwood explains: "One of our many concerns about the CSR is that it may provide us with a lot of stories, but stories that are unique in their themes, so that we would not have useable or generalizable feedback on the operation of our system." Sherwood Affidavit at ¶ 23

EOHHS proposes, therefore, that it be directed to work with the Monitor – as it has previously offered to do – in designing a case study regime that generates data more useful in analyzing the existing structure of services. Among other things, such a case study regime could attempt to flesh out such issues as: reasons why certain CSAs have "outlier" scores on the WFI, demonstrably higher or lower than the statistical norm, and what can be learned from that; why children with comparable CANS scores are receiving

different kinds or intensities of services; and whether, and if so, why, children whose primary care Behavioral Health Screen indicated a possible Behavioral Health condition are not receiving Behavioral Health services. Id. Such data would be useful both in evaluating the present system and in identifying shortcomings that need to be addressed. Also – in contrast to case studies performed by reviewers under the CSR – this case study regime, by using existing quantitative data as a starting point, would help the Defendants to refine and develop their overall quality improvement approach, which must be sustainable and effective for the long-term. Sherwood Affidavit at ¶¶ 23, 24.

In short, EOHHS submits that the means of determining compliance with the Judgment are the status reports that the EOHHS submits in accordance with the Judgment, along with the Monitor's review of such status reports and objections to them, if any. In addition, EOHHS is engaged in a number of quality improvement initiatives, described above. Just as courts are instructed, in the first instance, to allow state defendants to proffer remedial plans to cure identified gaps in their compliance with the Medicaid Act – see, e.g., Missouri v. Jenkins, 515 U.S. 70, 88, 98 (1995) (noting "bedrock principle" that "federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs") – so should this Court give the Defendants an opportunity to propose an effective compliance metric, subject to the Court's review. Where, as here, the status reports provided by the Defendants demonstrate compliance with the Judgment and the quality improvement activities proposed by the Defendants properly implement the provisions of paragraph 46.e of the Judgment – and, indeed, are better tailored to do so than the regime favored by the Monitor – the Court should approve this approach.

III. EOHHS IS NOT IN A POSITION TO ABSORB THE INCREASE IN THE MONITOR'S BUDGET THAT WILL NECESSARILY ARISE IF SHE PROCEEDS WITH THE CSR REVIEW, AS PLANNED.

Finally, EOHHS's substantive objections to the CSR review are only heightened by the unwarranted fiscal consequences that will flow from her going ahead as planned.

Over the preceding several years, the Monitor's annual budget has been set at $470,000, the cost of which is borne entirely by EOHHS. As set forth in the affidavit of Stephen Barnard (the "Barnard Affidavit"), attached hereto as Exhibit C, the Monitor's budget is paid each year out of an appropriation line item specifically designated for Rosie D. administrative costs, Line Item 0400-0950. See Barnard Affidavit at ¶ 3. As a result of declining tax revenues, this fiscal year the Legislature has cut that line item from approximately $4 million in Fiscal Year 2009 to approximately $2.6 million in Fiscal Year 2011, id., meaning that all payroll, training activities, and consultant fees, including the entirety of the Monitor's budget, must be paid out of a dramatically smaller pool of funds.

Moreover, funds cannot practicably be transferred from other areas of the EOHHS budget, which has itself been reduced from approximately $145 million in Fiscal Year 2009 to its present level of approximately $90 million. Barnard Affidavit at ¶ 6. As it is, EOHHS has eliminated over 100 part-time positions, is not filling vacancies created by departing or retiring employees, and has eliminated or sharply reduced discretionary Medicaid programs, and is currently determining whether staff lay-offs will be necessary to comply with its current or anticipated future budgetary restraints. Id. at 7. A recent federal appropriation– reinstating certain "enhanced federal reimbursement funds" that had previously been withheld – will mitigate the short-term impacts of some of the

service and rate cuts that had been anticipated, but will have little if any effect on the sharp decreases in administrative funds available. Barnard Affidavit at ¶¶ 8-9. It is against this bleak fiscal backdrop that the Monitor's annual budget would increase by almost 50 percent – from $470,000 to $670,000, by the Monitor's estimate – if she were to proceed with the CSR reviews as planned.

This would matter little, of course, if the additional funds were necessary to fulfill the Defendants' obligations under the Judgment. But, as set forth above, the CSR is neither necessary nor sufficient to meet the Monitor's compliance-review responsibilities. Accordingly, where the proposed CSR reviews are not an appropriate means of evaluating the Defendants' compliance with the Judgment, and where better-tailored tools have already been contracted for and are available for use, the Court should not authorize this added and unnecessary expense.

Conclusion

For the reasons set forth above, the Court should (a) direct the Monitor not to proceed with the CSR review process, but rather to assess the Defendants' compliance with the Judgment in the manner set forth above; or (b) in the alternative, and at a minimum, direct the Monitor to further modify the CSR so as to cure the problems with it identified herein.

Respectfully submitted,

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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

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