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' REPLY

The Massachusetts Executive Office of Health and Human Services ("EOHHS") hereby submits this reply to the Defendants' opposition to EOHHS's motion to clarify the judgment in this case.

The plaintiffs' opposition is a curious document. It takes great pains to advance a proposition with which the defendants fundamentally agree: that case studies may constitute a useful component of compliance evaluation, insofar as they give the Monitor, the Court, and the parties a window in to how remedy services are actually being delivered, and what roadblocks, if any, stand between children with Serious Emotional Disturbances and the services that have been created to treat them. EOHHS does not quarrel with the proposition that case studies should be part of the Monitor's compliance-review effort and has, indeed, endorsed it. See Defendant's August 20, 2010 Memorandum at 10-11; Affidavit of Emily Sherwood ("Sherwood Affidavit") at ¶¶ 22-24.

Rather, EOHHS's objection is to the specific methodology the Monitor proposes to use in collecting and evaluating these case studies. As described in the defendants' earlier memorandum, the Community Service Review ("CSR") that the Monitor intends to use is ill-suited to the task at hand. Among other things:

- The CSR collects and aggregates data about member children that go well beyond the scope of the Judgment, relating to criteria that the defendants have no authority to influence, under either the Judgment or the Medicaid Act on which the Judgment is predicated. By way of example only, the CSR compels reviewers to gather information about a child's living situation, the capacity and commitment level of her parents/guardians/caregivers, and the appropriateness of her education plan and school enrollment.
- The CSR then requires reviewers to assign numerical scores to each of these criteria. Setting aside the intrinsic problems of subjectivity and inter-rater consistency that this creates, it also leads to an endgame wherein each case study is assigned an "acceptable" or "unacceptable" composite score, based in part on criteria unrelated to the defendants' duties under the Judgment.
- While the CSR has never been subjected to peer review, the one extant evaluation of its progenitor and prototype – denoted at the time as the Quality Service Review, or "QSR" – identified a number of these shortcomings. Accordingly, the authors of "Quality Service Review Field Test Report and Recommendations for Future Use (the "South Florida Report")," a team of mental health researchers at the University of South Florida, concluded that the QSR/CSR should be used only for quality improvement/practice refinement, and not as an assessment tool to measure compliance. See Defendants' Memorandum at 7-8. Dr. Ivor Groves, a principal creator and architect of the QSR/CSR tool, acknowledges in his affidavit submitted with the plaintiff's opposition that "the score assigned to rate the child and care giver status should not be used to make judgments about the system performance. That is to say . . . a poor rating or score on child status does not mean that the system is necessarily performing below expectations or

> judgment requirements." Groves Affidavit at ¶ 25. Yet, because assessments of such status indicators are incorporated into the numerical score ultimately assigned to a given case study, they bear directly on whether a given case is deemed to have an acceptable or unacceptable outcome.

All of which begs the question: To what end does the Monitor intend to apply CSR case study results? There are really only two possible answers: (1) as a metric for gauging the defendants' compliance with the Judgment; or (2) as a quality-improvement tool, designed to identify ways that the Commonwealth's social-services system could better serve children with SEDs and their families. For different reasons, each proposed use is flawed, and the Court should countenance neither.

The CSR's shortcomings as a compliance metric were chronicled in the defendants' Memorandum, and were addressed in the South Florida Report appended thereto. Without limitation, these problems included the overbreadth of the data collected and scored; the inability to assure consistency among the army of evaluators who conduct the interviews and assign the scores; and the unsustainability of the CSR as a compliance metric going-forward, given the prohibitive human resources necessary to carry out a CSR audit. Mary I. Armstrong, one of the principal authors of the South Florida Report and now an Associate Professor at the College of Behavioral and Community Sciences at the University of South Florida, states in her affidavit, attached as Exhibit A hereto (the "Armstrong Affidavit") that these shortcomings identified in the QSR remain problematic today, notwithstanding the evolution of the QSR into the current CSR and the Monitor's efforts to retrofit the CSR to this case. See Armstrong Affidavit at ¶¶ 5-6. In short, the South Florida Report found the CSR to be an inapt measure of system compliance in 2002, and it remains so today.

To the extent that the Monitor intends to use the CSR for a different purpose – i.e., to suggest improvements to the defendants' program architecture, independent of whether the Defendants are in compliance with the terms of the Judgment – this would exceed the scope of her authority under Paragraph 48 of the Judgment. The Monitor's charge under the Judgment is to "independently review the Defendants' compliance with this Judgment." Judgment at ¶ 48(a)(3). For her to undertake a quality-improvement project – particularly one as methodologically flawed as the CSR – transcends this role. Accordingly, this Court should intervene to stop the CSR from going forward, and should refrain from ordering the defendants to finance an activity that is neither required nor permitted under the Judgment.[1]

CONCLUSION

For the reasons discussed herein, together with the reasons set forth in EOHHS's August 20, 2010 Memorandum, this Court should grant EOHHS's Motion to Clarify the Judgment.

Respectfully submitted,

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[1] This is the relevance of the Affidavit of Stephen Barnard (the "Barnard Affidavit"), attached to the defendants' Memorandum. The defendants are not suggesting that the Commonwealth's fiscal problems should insulate them from their duty to comply with their obligations under the Judgment. On the contrary, the defendants argue that because the CSR does not further the Monitor's mission under the Judgment, the defendants should not be compelled to pay for it. The Barnard Affidavit merely illustrates that EOHHS is in a uniquely poor position at this time to underwrite an expense that does not relate to its compliance with the Judgment.

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Date: September 22, 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

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