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**Rosie D. *E-*News                  September 2018**

**Judges Ponsor and Stearns Hold Oral Argument on Defendants’ Motion for Substantial Compliance and Plaintiffs’ Motion for Further Orders**

As part of a planned transition in judicial oversight of the *Rosie D*. case, Judge Michael Ponsor and Judge Richard Stearns jointly presided over oral arguments held on September 27, 2018.   These arguments focused on Defendants’ Motion for Substantial Compliance and to Terminate Monitoring and Court Supervision and Plaintiffs’ Opposition to that Motion.  They also touched briefly on the Plaintiffs’ Motion for Further Orders.

The Court began by noting long standing problems with timely access to remedial services, asking how the defendants could assert substantial compliance in light of data showing waiting lists in excess of the 14 day state Medicaid standard.  In response, the defendants argued: 1) that the language of the Judgment did not specifically require adherence to the Medicaid reasonable promptness standard; 2) that the ongoing Medicaid violations alleged by the plaintiffs were not the same violations the Court found in its 2006 liability decision and could only be addressed by the filing of a new lawsuit; and 3) that the Commonwealth could not be found in violation of the reasonable promptness standard unless it was interposing barriers to accessing remedial services.

Describing the defendants’ argument as “tortured,” the Court pointed out that its Judgment was expressly intended to cure violations of EPSDT and Medicaid reasonable promptness requirements.  Noting that not all CSAs had excessive wait times, the Court posited that the problem may not necessarily be the economy or workforce challenges, but the State’s management of the system, lack of sanctions, and the need for an increase in the number and capacity of service providers.

The Court also noted that the defendants’ 2012 submission on the status of implementation did not seek termination of Court oversight, and acknowledged that specific tasks remained to be done.  The plaintiffs likewise had asserted that the work of implementation was ongoing.  Given these shared views, the Court had encouraged the parties to negotiate joint disengagement criteria as an alternate route to abruptly ending active court oversight, and endorsed subsequently-negotiated Disengagement Measures that established objective, measurable compliance requirements that would lead to the termination of active judicial supervision.  However, the defendants never met these standards or achieved these metrics.  Instead, as the plaintiffs argued, the Defendants simply decided to abandon these agreements, disregard these Disengagement Measures, and claim substantial compliance with the Court’s Judgment.

The Court questioned the plaintiffs about the provision of the Judgment anticipating the end of active court supervision, court monitoring, and reporting in 2012.  The plaintiffs pointed out that this provision must be read in conjunction with the Court’s authority to ensure compliance with its Judgment, and to remedy continuing violations of federal law.  If the State is not in compliance with the Judgment and federal law, the Court clearly has the authority to do what is necessary to ensure compliance, including extending monitoring and reporting as well as entering further remedial orders.  As the Court itself noted, in the absence of monitoring and reporting it would be “flying blind.”  The plaintiffs argued that continuing monitoring and reporting should be among the Court’s first actions in the event of a finding of noncompliance, leaving the future of active monitoring closely tied to its decision on the defendants’ Motion.

The plaintiffs went on to describe the provisions of the Judgment where they assert continuing jurisdiction is required, including the delivery of remedial services consistent with the requirements of the Judgment and the defendants own program standards, and the completion of CANS assessments for youth in acute and continuing care settings.  Finally, the plaintiffs emphasized the need for modification of the Court’s remedial order to ensure that youth who rely on outpatient services for care coordination receive this key remedial service consistent with the Judgment.

The Court indicated its intent to issue a ruling promptly, but stated that this may take several months.  In the interim, the Court requested that the Court Monitor, Karen Snyder, remain in place and gave the defendants one week to report their position on extending the Monitor’s budget beyond December 31, 2018.

The plaintiffs’ and defendants’ Motions, Oppositions, Replies, and exhibits are all available in the news stories below and in the motion section of the website's [**library**](http://www.rosied.org/page-526903).

**Defendants’ File Motion and Memorandum in Support of Substantial Compliance and to Terminate Monitoring and Court Supervision**

The defendants pressed forward this summer with their long-standing claim that they are in compliance with the 2007*Rosie D.*Judgment to redress violations of the Medicaid Act and provide quality mental health services to youth with serious emotional disturbance. The [**motion**](http://www.rosied.org/resources/Documents/Doc848.pdf), filed in early August, calls upon the federal court to end its oversight of the case and terminate the appointment of court monitor Karen Snyder, who has held this position for 11 years.  The state, which has claimed compliance with the*Rosie D*. Judgment since May of 2012, maintains it has put in place a reformed system that offers “a robust and dynamic network of services” that includes behavioral screening services, crisis management, intensive care coordination and in-home behavioral services.

Among the multiple attachments to the motion was a document captioned [***Statement of Material Facts***](http://www.rosied.org/resources/Documents/Doc855.pdf)and an [**affidavit from Marylou Sudders**](http://www.rosied.org/resources/Documents/Doc856.pdf), secretary of the Executive Office of Health and Human Services (EOHHS), who cited the efforts to launch the Children’s Behavioral Health Initiative, the wraparound service model, and the more recent increase in competitive rates for providers.

The plaintiffs, citing consistently low scores on service effectiveness and persistently long wait-times for services, adamantly oppose ending court oversight.  They set forth their objections, as well as evidence of noncompliance and ongoing federal law violations, in a highly detailed filing earlier this month. *See story below.*  Both sides will present their positions at a hearing in US District in Springfield Thursday, September 27th.

**Plaintiffs’ File Opposition to Defendants’ Motion for Substantial Compliance and To Terminate Monitoring and Court Supervision**

The [**plaintiffs laid out their opposition**](http://www.rosied.org/resources/Documents/Doc857.pdf)to the state’s motion to end court supervision in *Rosie D*. case in a September 10thfiling that included 15 exhibits. Citing data and reports produced by the state that underscore an ongoing failure to provide adequate services and timely access to medically necessary treatments, the plaintiffs argued the defendants continue to violate the Judgment and the EPSDT provisions of the Medicaid Act.

The plaintiffs also pointed out that the state has not put in place a durable remedy or developed a promised sustainability plan describing how they intend “to maintain the infrastructure and remedial services in their current form.”

The plaintiffs acknowledged the state’s progress regarding the notice, education, outreach, screening, referral, and information technology provisions of the Judgment, and proposed that the Court relinquish its oversight in these specific areas.  However, they maintained active supervision and ongoing court monitoring must continue until the state fully addresses outstanding areas of noncompliance regarding assessments, service coordination and planning, timely access to services and adequate provider and network capacity.

An oral hearing on the pending motions is scheduled in US District Court in Springfield on Sept. 27.

**Defendants' File Reply to Plaintiffs' Opposition to Defendants' Motion Regarding Substantial Compliance**

Three days before the scheduled hearing in US District Court, the defendants continued to represent they are in substantial compliance with the*Rosie D*. Judgment.  In their [**reply to the plaintiffs’ opposition to their motio**n](http://www.rosied.org/resources/Documents/Doc865.pdf) to terminate court oversight, the defendants dismissed the plaintiffs’ concerns about service effectiveness and provider adequacy as well as timely access to medically necessary services as required under the EPSDT provisions of the Medicaid Act.  In so doing, defendants also repudiated the utility and import of years of data collected by the state to monitor waiting lists and evaluate the delivery of remedial services.

The defendants continue to insist that they are not bound by the Joint Disengagement Measures to which they agreed in 2013 which not only set forth goals to improve timely access to services but also called for a sustainability plan to ensure the current infrastructure is maintained in the future.  The defendants have never produced a sustainability plan; moreover, as the plaintiffs have stressed, they have consistently failed to ensure timely access to remedial services.

These are among the issues to be presented at the upcoming hearing in federal court in Springfield Sept. 27.

**Plaintiffs' Submit** **Reply to Defendants’ Opposition to Motion to Approve and Order Disengagement Measures, Actions to Improve Access to Remedial Services, and Provisions on Outpatient Services.**

Briefing on the Court’s authority to enforce, modify and clarify the standard for compliance with its Judgment concludes with plaintiffs’ submission of their [**Reply to Defendants’ Opposition to Motion to Approve and Order Disengagement Measures, Actions to Improve Access to Remedial Services, and Provisions on Outpatient Services**](http://www.rosied.org/resources/Documents/Doc864.pdf)**.**

In the spring of 2017, the plaintiffs’ filed motions asking that: (1) the disengagement measures, jointly negotiated by the parties, be entered as an order of the court; and (2) that the Judgment be modified to reflect the roles and responsibilities given to outpatient therapists who provide care coordination for youth outside of Intensive Care Coordination (ICC) and In-Home Therapy (IHT). Although originally denied without prejudice in 2017, the Court noted that it possesses the power to enforce these measures to the extent necessary to ensure compliance with the Remedial Order, and that “[i]f developments over the coming months suggest that a formal ruling or amendment to the Judgment is necessary, one or both of the motions may be refiled.”  Order re: Plaintiffs’ Motion to Approve Joint Disengagement Measures, September 27, 2017 (Doc. 815).

After months of requests for concrete plans from the Commonwealth to improve access and address waiting lists for remedial services, the Court suggested plaintiffs’ counsel refile its motions, including a proposed order to ensure timely access to services. [**Plaintiffs’ Motion to Approve and Order Disengagement Measures, Actions to Improve Access to Remedial Services, and Provisions on Outpatient Services**](http://www.rosied.org/resources/Documents/Doc847.pdf)was filed on August 6, 2018. **[Defendants’Opposition](http://www.rosied.org/resources/Documents/Doc858.pdf" \t "_blank)**, filed on September 10, 2018, argues that modification is not warranted, and that the Court does not have authority to enforce its Judgment, absent a finding of contempt.  Oral arguments will be held on September 27, 2018.