UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS, WESTERN DIVISION

ROSIE D.*, et al.*, **Plaintiffs,** **v.** **Charles Baker*, et al.*,** **Defendants.**	**CIVIL ACTION NO. 01-30199-MAP**

INTERIM REPORT ON IMPLEMENTATION

The Defendants hereby submit this Interim Report on Implementation ("Report") as requested by the Court at the June 8, 2016 status conference, in preparation for the hearing scheduled for September 28, 2016.

At the last status conference, the Court asked the parties to set forth their views on the trajectory of this litigation, addressing "this is where we've come; this is where we still have to go . . . as we approach the final chapter of this litigation." Tr. 55:24-56:4. More specifically, the Court irected the parties to exchange documents on three topics, as follows:

1. The Defendants were to draft a three-to-four-page sustainability framework for Mobile Crisis Intervention (MCI), and the plaintiffs were to respond. Defendants sent their framework to Plaintiffs on August 1, 2016 and Plaintiffs replied on August 18, 2016. Defendants also had an opportunity to permit consultant Kappy Madenwald to review their proposal. In consideration of comments received from Plaintiffs and from Ms. Madenwald, Defendants subsequently revised their framework, which is attached as Exhibit 1.

2. The Plaintiffs were to draft a proposed order with respect to Outpatient as a Hub, and the Defendants were to respond. Plaintiffs sent their proposal to Defendants on July

29, 2016, and Defendants replied on August 19, 2016. The parties had a call on September 13, 2016 to discuss this matter, and Defendants received a revised proposed order from the Plaintiffs on the same day. By agreement of the parties, the Plaintiffs will file their revised proposed order as part of their status-report filing on or before September 20, 2016, and the Defendants will file their response thereto on or before September 23, 2016. Defendants' response will include an update on implementation on the agreement of the parties with respect to outpatient as a hub. Because the precise contours of the Plaintiffs' proposal remains fluid as of the date of this filing, the parties have agreed that the Defendants will defer all discussion of this issue until their September 23, 2016 filing.

3. The parties were to exchange their review of disengagement criteria. Plaintiffs gave their proposal to Defendants at a meeting on July 20, 2016, and Defendants responded with their proposal on August 15, 2016. Defendants' response is attached as Exhibit 2.

The parties met in person on July 20, 2016 and by phone on August 4, 2016 and September 13, 2016 in regard to the tasks above.

Additionally, the Defendants continued agreed-upon activities as shown in Exhibit 3, a revised Schedule of Disengagement Activities.

Defendants will not comment further in this status report on Defendants' proposed MCI sustainability framework, which is attached as Exhibit 1. And, unlike Defendants' regular status reports, this report will not detail the ongoing status of the implementation of the agreed-upon disengagement activities (which are set forth in Exhibit 3) or the other program improvement efforts that Defendants continue to undertake on their own initiative, but will be prepared to discuss these at the next status hearing. Rather, the remainder of this status report will relate to Defendants' position with respect to disengagement and "this final chapter of the litigation."

In 2012, the Defendants presented this Court with a comprehensive statement regarding the Defendants' compliance with the terms of the Remedial Order, setting forth prima facie evidence of substantial compliance and grounds to end monitoring. Then, as now, Defendants believe themselves to be in substantial compliance with the Remedial Order.

However, at the urging of the Court, between February and July of 2013, Defendants and Plaintiffs conducted an extensive negotiation resulting in a document setting forth (1) numerous areas related to access and utilization that Plaintiffs believed needed to be addressed as part of disengagement and (2) Plaintiffs' proposed outcome measures for each of these numerous areas. Plaintiffs and Defendants listed their (often differing) expectations regarding each outcome measure. Setting aside disagreement on what the ultimate measures might be, Defendants nonetheless agreed to undertake multiple data collection projects to respond to the Plaintiffs' outcome measures. These data collection projects included, without limitation: remedy service utilization reports for youth receiving services from state agencies (Departments of Mental Health, Youth Services, and Children and Families); changes to the case review process (at that time called the System of Care Practice Review); a case review of 50 youth receiving outpatient service as their hub; and analysis and reporting of changes in Child and Adolescent Needs and Strengths (CANS) ratings for youth in Intensive Care Coordination (ICC) and In-Home Therapy (IHT). These projects were added to Defendants' ongoing data reporting. In addition, Defendants agreed to produce Practice Guidelines for four services.

Defendants agreed to undertake this series of discrete tasks on the understanding that the accomplishment of the tasks would lead to reductions in monitoring and reporting, and that, as tasks were accomplished, issues would be removed from the scope of this litigation. Defendants summarized the status of these tasks, and others that were subsequently added, on a

grid that showed tasks still outstanding using colored bars[1] and regularly provided it to the Court, along with narrative updates of Defendants' status in accomplishing of these agreed-upon activities. An updated version of that grid, the revised Schedule of Disengagement Activities, is attached as Exhibit 3.[2]

These tasks required over three years of intensive effort on the part of the Defendants, and they are now nearly complete, as Exhibit 3 demonstrates. There has, however, been no narrowing of the litigation and no reduction in monitoring (although the Defendants anticipate that the Court will fully remove MCI from the scope at the upcoming status hearing, in response to Defendants' submission of their MCI sustainability framework). The Defendants continue to meet with the Court Monitor for two hours most weeks, report to the Court three to four times per year (rather than twice per year as directed in the Judgment), and meet with Plaintiffs' counsel typically once to three times per quarter.

While the Plaintiffs and Monitor have on many occasions contributed very useful insights and assistance, which has been much appreciated by the Defendants, this comes at a high cost to Defendants' system and the children and families it serves. Defendants believe that the parties have together reached a point where the returns from monitoring and reporting are swiftly diminishing.

The great work of the *Rosie D* case has been done. Remedy services are in place. Significant enhancement of outpatient will be accomplished within days of this filing, thus aligning the care-coordination services provided by outpatient clinicians with those delivered by IHT and ICC providers. MassHealth has developed, in the MPR, a reliable and valid tool

[1] Tasks subsequently added included, but were not limited to: review of MCI by consultant Kappy Madenwald, creation of guideline for Outpatient as a Hub, an attestation form that outpatient clinicians must use to indicate discussion with caregivers of ICC as an option, and a case review of DMH youth to be conducted by the Court Monitor.

[2] An update on the status of Defendants' implementation of the agreement related to Outpatient as a Hub will be submitted with Defendants' response to Plaintiffs' revised proposed order on September 23, 2016.

that measures service quality in its two flagship services, and that guides its service improvement efforts. EOHHS has developed clear and thoughtful plans to enhance the workforce pipeline that has diminished due to forces outside of Defendants' control, and to strengthen IHT quality and retention of staff. It has added a staff position to manage acute care services so it can, among other things, manage MCI even more closely than in the past.

What remains now is ongoing improvement work. It is tempting to believe that extended Court involvement could bring the constellation of remedy services, perhaps, to near perfection. It is tempting, too, to believe that, with further judicial oversight and scrutiny, the Defendants might someday arrive at some indicator that the system will remain "fixed" in perpetuity. But every day that Defendants devote to reporting and monitoring is a day not invested in work to improve services for children and families. The Defendants sincerely believe that the moment is fast approaching when the remedy services must be managed like any other mature Medicaid service, with all of the responsibilities – and discretion – that that implies.

Two analogies may help to clarify the present situation; one is from medicine, and the other from psychotherapy. [3] Medical practitioners have learned that testing and monitoring can be lifesaving in some circumstances, while in other circumstances they can lead to harm – because they can be costly and intrusive, and sometimes lead to unnecessary and harmful medical or surgical intervention. The patient and physician must weigh the potential benefits and risks of scanning and testing, and must think closely about what the outer limits are or should be.

In psychotherapy, when a treatment relationship has been strong and helpful, and has

[3] A dictum from the world of Physics expresses a related conclusion. Per the Heisenberg Uncertainty Principle, to merely observe a complex system is to change that system.

led to improvement, it is hard to end. The patient and the therapist need to confront the fear that the patient will fail, will relapse, without the continuing support of the therapist. Anxiety and sadness, along with celebration of progress and independence, are ineluctably part of the process.

Although *Rosie D* has been an adversarial process, it has also been a collaborative process among many parties and individuals with a common ultimate goal. This process has resulted in great improvements to a system that serves our most precious and vulnerable population. But as the current workforce challenges for ICC and IHT providers demonstrate, Court involvement does not guarantee that there will be no ups and downs. Defendants have demonstrated in the past that they have a system that can provide access to services within the Commonwealth's Medicaid standard. Yet waitlists have arisen recently as a result of state-wide workforce shortages, due to the improving economy and competition for hiring in the industry. The longer the Court keeps the case open, the more of these cyclical fluctuations will arise. This is the nature of a living system. The continued involvement of the Court, the Court Monitor, and the Plaintiffs, as valuable as it may be, nonetheless redirects valuable time and effort that the Defendants would otherwise be spending on improving the services for children and families. Some anxiety about the future is to be expected as the parties contemplate ending, or even significantly reducing, the monitoring and reporting that have become the daily reality over the ten years since the Judgment was issued, but the facts show that it is truly time to take major steps toward disengagement.

Although Defendants continue to believe that they are in substantial compliance with the Remedial Order of the Court, past experience has taught that the Court prefers that the parties work together and reach agreement on the path forward. Accordingly, Exhibit 2 contains Defendants' proposals for final disengagement, expressed as responses to cognate

proposals put forth by the Plaintiffs. Defendants are willing to employ these measures to move toward disengagement in the foreseeable future.

As Exhibit 2 demonstrates, Defendants have mostly accepted the measurement methods proposed by the Plaintiffs, although Defendants propose a percentile measure of access to ICC rather a mean wait time. The parties differ in the targets that they propose as disengagement thresholds, and in the time periods for which the targets must be met. In brief, Defendants propose targets that they believe are reasonable both in terms of meeting the needs of children and families, and in being attainable (and sustainable) within a reasonable time period. Defendants object in principle to being measured on child outcomes, which depend on many factors beyond the MassHealth service (although child and family outcomes on the MPR are strongly positive), which the Court expressly recognized when it issued the Remedial Order. Defendants also propose that once a target is reached for the specified period of time, the associated issue will be removed from the scope of this litigation. Defendants do not believe the Court wishes to oversee MassHealth's services for many more years and believe this proposal offers a realistic exit strategy.

Defendants agree with the Plaintiffs that the Massachusetts Practice Review (MPR) is a valid and useful tool for assessing important elements of the system's performance. Defendants disagree, however, with specific measurement targets and specifically with Plaintiffs' proposal that 66% of cases should fall into the top two levels ("good" and "exemplary") on various MPR measures, as a precondition to full disengagement. Defendants' proposal focuses on keeping practice (70% of the time) in the top three levels ("fair," "good," and "exemplary"). Defendants' proposal does not reflect low standards - – Defendants want, of course, to raise every practitioner's level of practice -– but it reflects Defendants' primary commitment to moving practice that currently falls in unacceptable zones ("adverse" or

"poor"), where harmful practices occur or best practices rarely occur, into zones which indicate that best practices are being employed by clinicians, even if sometimes not consistently so. The Defendants' proposal would permit resources to be allocated where, in the Defendants' view, they are needed most.

Intensive Care Coordination and In-home Therapy involve complex and difficult work. As Defendants have explained in recent reports, industry workforce shortages have increasingly meant that Care Coordinators and In-home Therapists are often recent graduates with excellent motivation but with limited practical experience. Even with good supervision, clinicians at this level of experience perform imperfectly. "Good" performance is what EOHHS expects – indeed, should expect -- of experienced clinicians. "Fair" performance is what it expects as newly minted clinicians are learning.

A learning clinician will typically perform at different levels in different areas and may excel in some areas while lagging in others. By way of example, Defendants pulled an MPR review at random (#258, October, 2015) and found a four year-old girl whose IHT was rated "fair" in seven areas of practice and "good" in three areas of practice. The clinician had a master's degree in Mental Health counseling and less than 12 months' experience in IHT. Youth and family progress were both "good." The mother reported no dissatisfaction with services, but the reviewer felt the clinician could be seeing the family more frequently and, in particular, should be spending more time working with the mother without children present. The reviewer also commented that a more thorough family assessment and better care coordination would have helped in working with this family, in large part because "[e]ngagement with the family was great." While this brief example was chosen at random, it illustrates how a clinician may miss some opportunities that might have supported faster, more sure-footed progress, yet still do many things well and, ultimately, still help a child and family

move forward. This example, and others like it, should not be written off as a failure for measurement purposes.

The MPR data also generally support the idea that "fair" practice helps children and families. For example, in the 120 MPR case reviews completed in the most recent fiscal year (ending June 2016), 42 youth (or 35%) in ICC and IHT fell into the "fair" level of Assessment, a key area of practice because it is foundational to so many other areas. Of those 42 youth, 35 (83%) experienced at least "fair" progress. For families, 32 (76%) showed at least "fair" progress. Similarly, in the same MPR sample, 43 youth (36 %) had "fair" Service Delivery. Of these 43 youth, 33 (77%) experienced at least "fair" progress. Among the 43 families, 31 (72%) experienced at least "fair" progress. As a final example, in the same sample of 120 cases, 35 youth (29%) experienced a "fair" level of Care Coordination. Of these 35 youth, 28 (80%) experienced at least "fair" progress. Similarly, among their 35 families, 28 (80%) experienced at least "fair" progress. "Fair" *Rosie D* services are helping children and families, even as MassHealth strives to further improve them.

Therefore, Defendants believe that their proposed targets involving the MPR are reasonable and appropriate for disengagement.

Since Defendants' *prima facie* showing of substantial compliance in 2012, Defendants have not objected to periodic extensions of monitoring while discrete disengagement activities were completed. Given the accomplishment of those discrete tasks and the change in focus to achievement of quality metrics, Defendants now request that:

- MCI be fully removed from the scope of litigation, including monitoring and reporting;
- Status hearings be reduced to twice per year for one year and then discontinued;
- Active monitoring be reduced to no more often than monthly calls or meetings

between the Court Monitor and the Defendants. The Court Monitor would focus on two remaining projects: (1) the MPR and (2) outpatient as a hub, and would of course be available to consult to the Court as needed;

- Meetings between the parties occur on an as-needed basis only, but no more than quarterly;
- The lawsuit shall be discharged, subject to retained jurisdiction as specified in the Judgment, upon Defendants' accomplishment of all targets as specified in Exhibit 2; except that Defendants reserve the right to request a hearing to revise those targets as circumstances may require.

The time has come to set the path towards real and final disengagement. Defendants respectfully suggest that their proposal provides a realistic and achievable path to disengagement, and does so in a way that advances and honors the great work of the parties, the Court Monitor, and the Court itself in establishing and improving behavioral health services provided to some of the most fragile children and families in the Commonwealth.

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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