

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROSIE D. ET AL.,)	
Plaintiffs,)	
)	
v.)	C.A. No. 01-cv-30199-MAP
)	
CHARLIE BAKER ET AL.,)	
Defendants.)	

MEMORANDUM AND ORDER RE:
PLAINTIFFS' MOTION FOR ORDER TO IMPROVE ACCESS TO
SERVICES, AND MOTION TO APPROVE AND ORDER DISENGAGEMENT
MEASURES, ACTIONS TO IMPROVE ACCESS TO REMEDIAL SERVICES,
AND PROVISIONS ON OUTPATIENT SERVICES
(Dkt. 835 and 847)

March 13, 2019

PONSOR, U.S.D.J.

Introduction

Two motions remain before the court for ruling:
Plaintiffs' Motion for Order to Improve Access to Services
(Dkt. 835) and Plaintiffs' Motion to Approve and Order
Disengagement Measures, Actions to Improve Access to
Remedial Service, and Provisions on Outpatient Services
(Dkt. 847). The court was on the point of issuing rulings
on these two motions, when Defendants filed their Notice of
Appeal of the court's ruling denying their Motion Regarding

Substantial Compliance and to Terminate Monitoring and Court Supervision (Dkt. 878). In light of the general rule that, with certain exceptions, the filing of an appeal deprives a district court of the power to act substantively in a case until proceedings on appeal conclude, the two motions will be denied without prejudice. The discussion below will lay out the court's reasoning.

II. Discussion

In January 2006, the court entered judgment in this class action, finding that Defendants had violated the Medicaid statute by failing to provide -- with reasonable promptness -- early and periodic screening, diagnostic, and treatment ("EPSDT") services to low-income children suffering from serious emotional disturbances ("SED"). Rosie D. v. Romney, 410 F.Supp.2d 18 (D. Mass. 2006).

In July 2007, the court adopted Defendants' proposal for a judgment and remedial order that would address the violations and provide timely, mandated services. (Dkt. 367.) As part of this order, Defendants took on the responsibility to make available to the Plaintiff children a system of intensive care coordination ("ICC") services that would oversee their treatment. (Dkt. 368, at 11-14.)

A summary of Defendants' progress in implementing the judgment and remedial order, including the ICC services, appears in the court's recent Memorandum and Order Re: Defendants' Motion Regarding Substantial Compliance and to Terminate Monitoring and Court Supervision. (Dkt. 877.) As that memorandum makes clear, despite improvements in the care system Defendants have continued to fail in their efforts to provide mandated ICC services with reasonable promptness. This critical Medicaid violation remains unremedied and leaves Defendants out of compliance with the remedial order they themselves proposed. Based on this, the court has denied Defendants' motion. As noted, that ruling is now under appeal.

Simultaneous with Defendants' motion, Plaintiffs filed their own flip-side Motion to Approve and Order Joint Disengagement Measures, Actions to Improve Access to Remedial Services, and Provision on Outpatient Services. (Dkt. 847.) Their motion seeks to obtain from the court an order requiring Defendants to take specific steps to cure the ongoing violation of the ICC provisions of the judgment, as well as other provisions. Plaintiffs' motion reprises two earlier motions submitted by Plaintiffs (Dkt.

776 and 777), which the court denied without prejudice at a time, roughly a year and a half ago, when Defendants' progress in compliance appeared, at least in several areas, to be encouraging. (Dkt. 815 at 2.) Plaintiffs' current motion also offers in substance arguments presented in Plaintiffs' still-pending Motion to Improve Access to Services. (Dkt. 835.)

With this background, here is how things now stand. Defendants have argued that they are in compliance with the judgment and remedial order and therefore should be freed from court oversight. Their motion to terminate court supervision has been denied and is now under appeal. Plaintiffs have argued repeatedly, and now argue again, that the court should mandate additional specific steps by Defendants to bring them into compliance with the remedial order.

While the court will be denying Plaintiffs' motions without prejudice in light of the appeal, it should be noted that they offer strong arguments. A review of the record makes it obvious that Defendants are, at a minimum, still failing to provide ICC services to Plaintiff class members with reasonable promptness, as they promised and as

the Medicaid statute requires. One-third to one-half of the Plaintiff class members, severely disabled children, still suffer extended waiting periods for care coordination appointments -- periods that exceed, sometimes grossly exceed, the fourteen-day Medicaid standard that Defendants themselves adopted.

Disturbingly, Defendants' efforts to address the problem have flagged recently, with the result that the timeliness violations have gotten worse, meaning that even more children are waiting even longer for services. Certain developments appear to evidence Defendants' diminished commitment. For example, ¶47 of the remedial order requires Defendants to designate a Compliance Coordinator with "the necessary authority to review, evaluate, design, and implement strategies to facilitate compliance with this Judgment by the Defendants, their agencies, agents, and employees." (Dkt. 368 at 26.) Yet, for months now, this position has remained filled only on an interim or "acting" basis by an official with other substantial duties. Reports are overdue, and unconvincing excuses are being offered for the lack of progress and backsliding.

Under these circumstances, the suggestions offered by Plaintiffs for action have force. Depending on the outcome of the pending appeal, the actions proposed may be found to be appropriate. If Defendants' appeal is unsuccessful, the court may want to consider, for example, setting deadlines for Defendants to (a) appoint a full-time compliance coordinator whose primary responsibility will be to provide leadership to Defendants' compliance efforts; (b) to submit Defendants' long overdue report on Out-Patient services, and (c) to provide the Court Monitor any remaining Massachusetts Practice Review reports covering the year 2018 and, if appropriate, succeeding years. Most importantly, the court may want to consider requiring Defendants to submit a concrete plan to improve access to ICC services substantially and promptly. Defendants' failure to offer any such action plan, despite repeated requests, has confounded efforts to make progress in this area for more than a year now.

Nothing in this memorandum, or in the pendency of the appeal, should be construed as relieving Defendants of their obligation to comply fully with the remedial order they proposed and agreed to. Indeed, in their papers

Defendants have acknowledged their obligation to comply with the order and challenge only the need for ongoing monitoring and court oversight. The remedial order makes clear that it is "subject to the Court's exercise of ongoing jurisdiction to insure implementation." (Dkt. 368, at 29.) Defendants' appeal does not appear to challenge this provision of the order, though it does seem to suggest that the court can exercise its ongoing responsibility to insure implementation without monitoring and oversight.

Finally, it should be noted that the half-time term of the Court Monitor has been extended until June 30, 2019 and may well be extended beyond that. It is the court's assumption that she will continue her work, to insure that the judge who inherits this case will be informed of the status of compliance efforts during the pendency of the appeal.

III. Conclusion

For the reasons set forth above, Plaintiffs' Motion to Improve Access to Remedial Services (Dkt. 835) and Motion to Approve and Order Disengagement Measures, Actions to Improve Access to Remedial Services, and Provisions on

Outpatient Services (Dkt. 847) are hereby DENIED, without prejudice.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U.S. District Judge