UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LORETTA ROLLAND, et al., Plaintiffs	)	
v.	)	Civil Action No. 98-30208-KPN
ARGEO PAUL CELLUCCI, et al., Defendants	)	

MEMORANDUM AND ORDER WITH REGARD TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' ACTIVE TREATMENT POLICY AND CERTIFICATION REPORT ON COMPLIANCE WITH MAY 3, 2002, ORDER (Docket No. 328)
August 14, 2002

NEIMAN, U.S.M.J.

At issue is Plaintiffs' opposition to Defendants' certification report regarding compliance with the court's order of May 3, 2002 (Docket No. 323, hereinafter "May 3rd Order"). As specified in its subsequent order of July 17, 2002, the court has construed Plaintiffs' opposition as a motion to (1) "determine that . . . Defendants' policy on 'active treatment' is inconsistent with" the May 3rd Order and (2) "require the parties to participate in mediation." (Docket No. 328 at 8.)

Having now considered the parties' memoranda and oral arguments, the court will allow Plaintiffs' motion in part. Although the court does not order mediation, it nonetheless has determined that certain portions of Defendants' policy are inconsistent with its May 3rd Order and need to be revised immediately.

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I. BACKGROUND

On May 3, 2002, the court, addressing Plaintiffs' amended motion for further relief concerning specialized services, determined that (1) only a few class members were receiving specialized services, (2) specialized services were not being timely provided, (3) over three hundred class members may have been erroneously rejected for specialized services, and (4) significant service delivery problems existed due to the dichotomy between nursing homes and day habilitation programs. (See May 3rd Order at 27-40.) The court concluded that, although it was "reluctant to redesign the entire structure of service delivery, there [were] five specific changes which must be made in order to remedy Defendants' noncompliance." (*Id.* at 43.) Defendants were also required to "promptly seek and consider Plaintiffs' views with respect to designing and implementing each of the changes" and, with regard to four of the changes, to certify and file with the court within sixty days a detailed report regarding compliance. (*Id.* at 45.)

Defendants filed their sixty-day certification report on July 5, 2002, in which the three changes presently at issue were addressed in some detail.[1] In essence, Defendants assert in their report that compliance with the three mandated changes is reflected in two documents: (1) a new "policy" issued on July 2, 2002, by the Massachusetts Secretary of the Executive Office of Health and Human Services ("the July 2nd policy" or "the policy"), and (2) a "measuring device" for that policy.

[1] The report on the fourth change was delayed by the court upon agreement of the parties.

Both documents are attached to Defendants' report.

On July 16, 2002, Plaintiffs filed an opposition to Defendants' report -- which, as indicated, the court construes as a two-part motion -- and asked for the relief described above. Defendants filed their response to Plaintiffs' opposition on July 25, 2002, and the court heard oral argument on July 31, 2002.

II. DISCUSSION

Although Plaintiffs request a mediation order, they offer no detailed argument in that regard and Defendants ask not to be forced into such discussions. Given these polar-opposite positions, the court deems it imprudent to order mediation at this time. Accordingly, it will focus on Plaintiffs' main request, that the court determine that the July 2nd policy is inconsistent with its May 3rd Order and mandate appropriate relief. In framing its discussion, the court will address *seriatim* the three mandated changes at issue and the extent of Defendants' compliance.

A.

In the May 3rd Order, the court first determined that "the fragmented assessment of class members' needs can no longer be tolerated." (May 3rd Order at 43.) "Each class member," the court explained, "must have a coherent, integrated treatment plan which guides his or her services across all settings." (*Id.*) Accordingly, the court ordered that Defendants, within sixty days, "establish and implement a system for (a) a [Department of Mental Retardation ("DMR")]

coordinator and one individual service plan for each class member with mental retardation, and (b) a case manager and an interdisciplinary treatment plan for each class member with other developmental disabilities." (*Id.*)[2]

Defendants have exerted significant effort with respect to these requirements. From the face of the July 2nd policy, it appears that Defendants will assign each class member with mental retardation a DMR service coordinator and each class member with developmental disabilities a case manager from the University of Massachusetts. Moreover, it appears from the policy that these coordinators and case managers will have significant responsibilities with respect to their assigned clients. Finally, to Defendants' credit, the policy endeavors to create a more integrated service delivery system.

Even so, the July 2nd policy falls short of the first set of requirements, as set forth in the court's May 3rd Order, in several significant ways. Most notably, the policy, by its own design, fails to adequately establish a single individual service plan for each class member. This failure, the court concludes, will perpetuate not only the inadequate delivery of specialized services to class members, but the dichotomy between nursing homes and day habilitation centers as well.

As Plaintiffs assert, the July 2nd policy authorizes not one, but multiple (at

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[2] While the mandated "integrated treatment plan" is described as an "individual service plan" in part (a) and as an "interdisciplinary treatment plan" in part (b), it became clear at oral argument that those terms are interchangeable. The court, therefore, will hereinafter simply refer to the mandated plan as an "individual service plan."

least two and perhaps three or four) plans. For example, every class member in a nursing facility must have a "Plan of Care" ("POC") governed by state Department of Public Health ("DPH") and federal regulations. In addition, class members who receive day habilitation funded by Medicaid and regulated by the state Division of Medical Assistance ("DMA") will have an "individual support plan." Class members who receive other specialized services not offered through a day habilitation provider will have a "specialized services" plan. And finally, class members who receive more than one major service from DMR or who are also class members in a separate consolidated case, *Ricci v. Okin*, Civil Action Nos. 72-0469-T, 74-2768-T, 75-3910-T, 75-5023-T and 75-5210-T, will have a DMR "individual service plan."

While the multiplicity of plans may well continue, given existing regulations and other court orders, the most significant problem with the July 2nd policy is that it fails to establish, as ordered, an overarching individual service plan that is "coherent" and "integrated" and "which guides [each class member's] services across all settings." (May 3rd Order at 43.) In essence, the warren created by the July 2nd policy is simply too complicated for any class member to negotiate.

At best, the July 2nd policy would have the POC serve as the primary plan for most, but not all, class members. However, as became crystal clear at oral argument, the POC, while needed for planning nursing services, is not an appropriate vehicle as presently designed for the "coherent" and "integrated" individual service plan contemplated by the court. As described in the July 2nd

policy, the POC will neither provide a comprehensive overview of the goals to be achieved once an individual class member enters the system nor govern the ongoing provision of specialized services to individuals. In addition, the POC fails to form the basis of a plan for community placement, although, as Defendants themselves note, class members will need to have such plans when they move into the community.

Relatedly, as discussed at oral argument, the "coherent, integrated treatment plan" for each class member must, by necessity, involve a single interdisciplinary team to formulate a comprehensive plan reasonably early in the process for arranging, providing and monitoring active treatment. The July 2nd policy, however, fails to establish such a team. As presently designed, the July 2nd policy calls for a different team for each type of plan to be formulated at intervals which are not fully coordinated. For example, the initial POC, which Defendants treat as the single plan, is established well before the assessment for specialized services is completed let alone implemented.

This is not to say that the POC, if properly designed, could not serve as the individual service plan. But something significantly more than the surface involvement of service coordinators and case managers in the POC is needed. To meet the court's May 3rd Order, the POC, if it is to serve as the overarching individual service plan, must be established early in the process, involve an interdisciplinary team (including service providers), be coherent and integrated with

such other plans as are necessary in order to guide each class member's services across all settings, and have at its head either the DMR coordinator (for each class member with mental retardation) or the case manager (for each class member with other development disabilities).

For now, however, the July 2nd policy continues the "fragmented assessment of class members' needs." Accordingly, the court determines that it is inconsistent with the first change mandated by its May 3rd Order.

B.

The second change mandated in the May 3rd Order concerned "active treatment." Given Defendants' resistance to the active treatment requirement, the court found it necessary to spell out their obligations in greater depth and to require as follows:

> Within 60 days, Defendants shall establish and implement a *clear* policy of "active treatment" to be provided to all class members who need specialized services. *See* 42 C.F.R. §§ 483.120(b) and 483.440(a)(1). Active treatment shall be comprised of the provision of services which are: (a) relevant to meet assessed needs; (b) sufficient in intensity and frequency to promote growth or prevent deterioration; (c) individualized and integrated; and (d) continuous and with carry over from community programs and settings in nursing facilities. Specialized services determine to be needed pursuant to this policy shall be provided regardless of whether or not they're covered in Massachusetts' Medicaid plan.

(May 3rd Order at 43-44 (emphasis added).)

Unfortunately, the July 2nd policy displays a continued resistance to the

active treatment standard. Although citing the appropriate regulations by number, the policy fails to describe in a "clear" manner, i.e., in one place, the components of active treatment. Instead, the policy disperses these components throughout the text. While the dispersal is not itself objectionable, the court believes it necessary for agency and nursing home staff members to clearly understand the *overall* concept of active treatment.

In this regard, the court notes that neither of DPH's circular letters issued prior to the May 3rd Order and upon which Defendants still rely -- one dated December 20, 2000, and another dated September 21, 2000 -- makes any mention of active treatment. (See Docket No. 331, Defendants' Response to Plaintiffs' Opposition . . ., Exhibit D (Handouts 4 and 5).) The court, in its May 3rd Order, found these letters inadequate because they merely suggested, but did not require, the incorporation of specific goals, objectives and strategies into nursing home plans. More problematically, DPH's most recent circular letter of July 10, 2002, although speaking in mandatory language, also fails to mention the active treatment standard. (See *id.*, Exhibit D (Handout 6).) While it adequately addresses the need for carry over services, the July 10, 2002, letter would benefit staff members throughout the system if it described and utilized the active treatment standard as well.

At bottom, the federal definition of "active treatment" must be specifically incorporated into Defendants' July 2nd policy and the policy must clearly state that

all class members are to be provided a program of active treatment irrespective of where they receive their services. The policy must also indicate that specialized services need to be provided in a manner that promotes the integration of class members into the community. Because the July 2nd policy does none of this, the court determines that it is inconsistent with the second change mandated by its May 3rd Order.

C.

A third change mandated by the May 3rd Order concerned Defendants' compliance with the active treatment standard. The court required that, "[w]ithin sixty days, Defendants' reports pursuant to ¶ 24(b) of the settlement agreement shall incorporate measuring devices in compliance with the active treatment standard."[3] While the measuring device proffered by Defendants will necessarily have to be changed -- insofar as it addresses the POC and not the individual service plan which must be adopted -- the court finds the device otherwise adequate at this time.

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[3] Paragraph 24(b) of the parties' settlement agreement requires that Defendants "provide semi-annual reports to the Plaintiffs" addressing "the provision of specialized services to class members in the form prescribed in ¶ 18." (Docket No. 115 at 10.) Paragraph 18, in turn, requires that the periodic reports "regarding Defendants' progress in providing or arranging for specialized services . . . shall indicate what specialized services, if any, the individual [is] determined to need according to the individual's most recent PASARR report[,] . . . what specialized services, if any, Defendants have provided or arranged for that individual during the reporting period[,] and . . . whether the individual has refused to accept any specialized services offered by the Defendants." (*Id.* at 9.)

III. CONCLUSION

Defendants' policy fails to fully comport with the first two parts of the court's May 3rd Order. Accordingly, the court hereby ALLOWS Plaintiffs' motion as follows:

> Defendants are ordered to revise the July 2nd policy forthwith so as to meet the concerns described above and specifically comply with the May 3rd Order. Defendants shall file a redraft of the policy with the court no later than September 3, 2002. In redrafting the policy, Defendants shall immediately involve Plaintiffs' counsel. If Plaintiffs have continuing objections to the redrafted policy presented to the court, they shall indicate their objections in writing by September 10, 2002.

In all other respects, Plaintiffs' motion is DENIED.

IT IS SO ORDERED.

DATED: August 14, 2002

KENNETH P. NEIMAN
U.S. Magistrate Judge