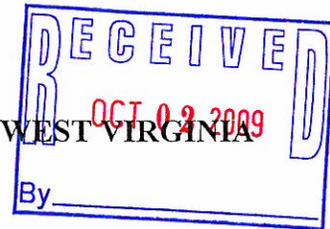


IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA



E.H., et al.,

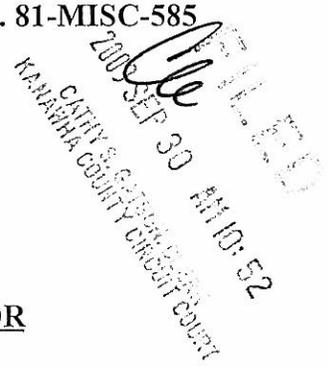
Petitioners,

v.

CIVIL ACTION NO. 81-MISC-585

MATIN, et al.,

Respondents.



**ORDER DENYING MOTIONS FOR STAY
AND MODIFYING ORDER APPOINTING COURT MONITOR**

Pending before this Court are (1) Respondents’ Motion for Stay of TBI Order Pending Appeal; (2) West Virginia Department of Health and Human Resources’ Motion for Stay of Order Regarding Case Management Services Pending Appeal; and (3) Respondents’ Motion for Stay, requesting stay of the Court’s Order Appointing Court Monitor. In response, Petitioners submitted a memorandum of law opposing each motion for stay. The parties presented their arguments in Court on September 24, 2009, and these issues are now ripe for ruling.

After consideration of the evidence, the parties’ arguments, and the law, the Court finds and concludes as follows¹:

1. Significant evidence was presented at evidentiary hearings that conditions of severe overcrowding at the state psychiatric facilities have led to numerous violations of West Virginia Code section 27-5-9. The evidence showed that these conditions were directly linked to Respondents’ failure to fund and provide adequate community mental health services. Petitioners

¹The Court addresses each Order separately, in response to Respondents three separate motions for stay.

and Respondents resolved many of these issues in an Agreed Order, entered on July 2, 2009. Petitioners and Respondents agreed in that Order that certain issues remained unresolved and were left to the Court's resolution. These two unresolved issues, as noted in the parties' Agreed Order, are (i) limitations on services to individuals in the Mountain Health Choices Plan and (ii) reductions in reimbursement for community mental health services. (See Agreed Order ¶ 12, July 2, 2009.)²

2. **Order Regarding Case Management Services:** To address the two unresolved issues and fully ensure that Respondents comply with state law, the Court entered an Order Regarding Case Management Services. This Order is simply procedural and places no substantive requirements on Respondents. Respondents argue that the Medicaid Plan, including the Mountain Health Choices program, does not violate Petitioners' rights under state law, including West Virginia Code section 27-5-9. At the current time, the Court takes no position on Respondents' contention. Rather, the Order simply requires Respondents to gather evidence and review their guidelines for further consideration of the Court. At this time, prior to receiving this evidence and report, this Order does not require any substantive change to the state's current funding procedures. Furthermore, the Court notes that if, after reviewing the evidence pursuant to the Order, the Court does ultimately determine that individuals are denied necessary services due to the state's failure to fund such services, any order of the Court will allow Respondents the choice of rectifying the problem through either state or federal funding. Such a decision, if it becomes necessary, would be within Respondents' discretion. The Court's Order thus raises no issues of preemption or separation of powers. As noted by the Supreme Court of Appeals of West Virginia, this "court is within its

²After the Agreed Order was entered, the parties were able to resolve the third issue listed as unresolved in paragraph 12, telemedicine reimbursement.

authority to conduct an evidentiary hearing [or otherwise collect evidence] to determine whether violations of West Virginia Code section 27-5-9 are occurring.” State ex rel. Matin v. Bloom, 674 S.E.2d 240, 247 (W. Va. 2009); see also E.H. v. Matin, 432 S.E.2d 207, 208 (W. Va. 1993); E.H. v. Matin, 284 S.E.2d 232 (W. Va. 1981). Given the entirely procedural nature of the Order, the necessity of proceeding to the fact-finding mission directed by the Order prior to any resolution of these outstanding issues, and the fact that additional delay will lead to continued legal violations, the Court determines that a stay of the Order Regarding Case Management pending appeal should be denied.

3. **Order Appointing Court Monitor**: In order to implement the Agreed Order, the parties agreed on July 2, 2009, that the Court would appoint David Sudbeck as Court Monitor and dissolve the Office of the Ombudsman. On July 30, 2009, the Court issued the Order Appointing Court Monitor to ensure careful oversight of the Agreed Order and to assist the Court in final resolution of this matter. This Order is also simply procedural and makes no substantive requirements of Respondents. Further, all parties have agreed that a Court Monitor is necessary to implementation of the Orders in this case. The Court has taken the points raised in Respondents’ Motion for Stay under consideration and has determined that these issues are best addressed through two modifications of the Order, rather than a stay. In regards to the Department’s remaining contentions, this Court finds that it has the authority to appoint a court monitor to assist with the details of implementation of the orders (including the Agreed Orders) in this case, and that the court monitor’s role does not violate the separation of powers doctrine. See State ex rel. Matin, 674 S.E.2d at 243; E.H. v. Matin, 432 S.E.2d 207 (1993).

4. **Order Regarding Enforcement of Traumatic Brain Injury Consent Orders:** The Order Regarding Enforcement of Traumatic Brain Injury Consent Orders was entered on August 7, 2009, after the Court found that Respondents had failed to comply with their agreements to fund and provide services to individuals with traumatic brain injury (TBI). The Order simply requires Respondents to comply with their previous agreements, as the Supreme Court approved in State ex rel. Matin v. Bloom, 674 S.E.2d 240, 247 (W. Va. 2009) (“A court may, under its inherent powers, reinstate a cause which has been dismissed by consent of parties, and enter such orders and decrees as may be necessary to enforce the decrees entered before dismissal.” (quoting syl. pt. 1, Seal v. Gwinn, 191 S.E. 860 (W. Va. 1937))). Although the Department questions this Court’s factual findings, those findings have considerable support on the record and are due significant deference on appeal. See, e.g., Fisher v. Berwind-White Coal Min. Co., 64 W. Va. 304, 61 S.E. 910 (1908). Given that this Order simply implements the parties’ agreements, the Order also fails to raise any constitutional questions or federalism concerns. There is a very short time period in the budget process during which Respondents may apply for a TBI Waiver and budget appropriately for TBI programming, as originally agreed in the Consent Orders and implemented by this Court’s recent Order. As a result, issuance of a stay would delay implementation of the Court’s Order for at least a year until the next budget cycle. This delay would lead to further violations of the Consent Orders and continued denial of services to individuals with TBI, strongly mitigating against issuance of the requested stay.

5. The Court has taken the parties’ additional legal and factual arguments into consideration, and has concluded that these arguments weigh against granting a stay of any of the three orders discussed above.

WHEREUPON, the Court DENIES Respondents' Motions for Stay of the Order Regarding Case Management Services, the Order Appointing Court Monitor, and the Order Regarding Enforcement of Traumatic Brain Injury Consent Orders.

In addition, the Court MODIFIES paragraph 13 of the Order Appointing Court Monitor to delete the final sentence; this paragraph now reads in its entirety: "The Office of the Court Monitor shall be staffed with one support staff as well as one full-time individual who will provide oversight of commitments, as the parties agreed to in the Agreed Order." The Olmstead Coordinator will remain under the auspices of the Department of Health and Human Resources. The Court further MODIFIES paragraph 18 of the Order Appointing Court Monitor to delete the reference to contractees, such that the paragraph now reads in its entirety: "The Court Monitor and staff shall be considered employees of the State of West Virginia and shall be eligible for all benefits at the level of state employees in the State of West Virginia."

The objections of Respondents are noted for the record. The Clerk is directed to send a certified copy of this Order to all counsel of record and to the Court Monitor.

ENTERED this 30th day of Sept, 2009.



Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 1
DAY OF October 2009
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA ekt

10/1/09
Date
Number of copies sent to
Number of copies retained
By: D. Sudbeck
J. Wagner
J. Martin
J. [unclear]
Other directives accomplished
Deputy Clerk