

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al.,

Plaintiffs,

v.

MATIN, et al.,

Defendants.

**ORDER REGARDING
ENFORCEMENT OF TRAUMATIC BRAIN INJURY CONSENT ORDERS**

On May 22, 2009, the Court conducted an evidentiary hearing regarding the enforcement of two Consent Orders related to the provision of services to victims of traumatic brain injury ("TBI") in West Virginia. Following the hearing, the Court ordered the parties to undergo mediation, however, mediation was unsuccessful.

Based on evidence presented by the parties at the evidentiary hearing, the legal memoranda filed herein, the arguments of the parties, and the pertinent law, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

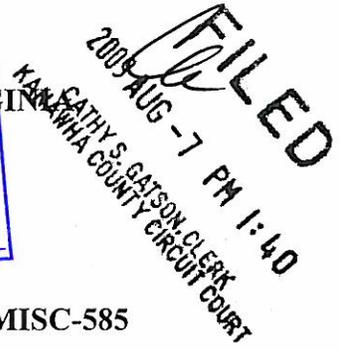
1. In July 2001, the Court ordered the parties to undergo mediation on the provision of behavioral health services to individuals with TBI.¹ As a result of mediation, the parties entered into an agreement, formalized by an Order entered August 6, 2001 ("2001 Consent Order"). *See* Respondents Exhibit 3 ("R. Ex. 3").

2. Pursuant to the 2001 Consent Order, the parties agreed to engage in "good faith efforts" to secure funding for a Medicaid TBI Waiver. R. Ex. 3. Upon receipt of such

¹ *See State ex rel. Matin v. Bloom*, 223 W.Va. 379, 674 S.E.2d 240,242-246 (2009), for a more detailed procedural history of this matter.



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appropriation, DHHR agreed to “promptly file with federal authorities for a Medicaid TBI Waiver.” *Id.*

3. DHHR has not engaged in “good faith efforts” to secure funding for a Medicaid TBI Waiver, nor has DHHR applied for a Medicaid TBI Waiver. *See* Hr. Tr. 37-39, 44, 93-94, 99, 137, 144-146.

4. Due to the lack of compliance with the 2001 Consent Order, and at the request of the Court, the parties again engaged in mediation on TBI services in June 2007. The parties came to another agreement, which is reflected by a Consent Order entered by the Court on July 3, 2007 (“2007 Consent Order”). *See* Petitioners Exhibit 1 (“P. Ex. 1”).

5. The 2007 Consent Order establishes a specific timeline by which a TBI system of services was to have been developed, funded, and implemented. Hr. Tr. 15; P. Ex. 1. Pursuant to the timeline, a system of TBI services was to be implemented by April 2009. P. Ex. 1 at page 4. The timeline outlined in the 2007 Consent Order was developed by DHHR employees, and agreed to by the parties. Hr. Tr. 11-13, 24.

6. In the 2007 Consent Order, the parties recognized the importance of adequate state funding to provide for an effective TBI system of service. P. Ex. 1 at pages 4-5. Accordingly, they agreed that a TBI Trust Fund should be established with a dedicated source of state funding. Hr. Tr. 15; P. Ex. 1 at pages 4-5.

7. Some of the measures set forth by the 2007 Consent Order were accomplished by DHHR, including, but not limited to, the provision of funds to establish the infrastructure for a TBI system of service. *See* Hr. Tr. 17-18, 22, 63.

8. DHHR did not, however, fulfill all of its obligations, including, but not limited to, the failure to support efforts to establish dedicated state funding for a TBI system of services. *See* Hr. Tr. 17-22, 31, 37-39, 63, 93-94, 99, 130, 135-137, 145-147; P. Ex. 3.

CONCLUSIONS OF LAW

1. The Supreme Court of Appeals has stated, “A court may, under its inherent powers, reinstate a cause which has been dismissed by consent of the parties, and enter such orders and decrees as may be necessary to enforce the decrees entered before dismissal.” *State ex rel. Matin v. Bloom*, 223 W.Va. 379, 674 S.E.2d 240, 247 (2009) (quoting Syl. pt. 1, *Seal v. Gwinn*, 119 W.Va. 19, 191 S.E.2d 860 (1937)). Accordingly, the Court has the authority, and indeed the obligation, to enforce the 2001 and 2007 Consent Orders, which were freely entered into by the parties.

2. The Court concludes that DHHR has violated the 2001 Consent Order because it has not engaged in “good faith efforts” to secure funding for a Medicaid TBI Waiver, nor has DHHR applied for a Medicaid TBI Wavier.² Accordingly, the Court hereby orders DHHR to take the following steps to ensure performance of its agreement under the 2001 Consent Order:

- a) Within thirty (30) days, DHHR shall develop an application for a Medicaid TBI Waiver and submit the application to the Court Monitor and parties for comment and review.
- b) The Court Monitor and parties shall review the application and submit comments and suggestions to DHHR within fifteen (15) days.

² At the hearing and in memoranda filed herein, DHHR has called into question the necessity of a TBI Waiver, however, the Court will not address the merits of this issue, because DHHR previously agreed to apply for a Medicaid TBI Waiver pursuant to the 2001 Consent Order.

- c) DHHR shall then submit a final application to the Court Monitor within sixty (60) days.
- d) If necessary, the Court Monitor should convene a meeting with the parties to resolve any disputes. If the parties are unable to come to an agreement, the Court Monitor should report his findings to the Court and the Court will set the matter for a hearing.
- e) DHHR shall apply for a TBI Medicaid Waiver by January 2010.
- f) After receiving approval for the TBI Waiver, DHHR shall implement the TBI Wavier program to provide the necessary services identified by the TBI Oversight Committee.

3. With regard to the 2007 Consent Order, the Court concludes that DHHR has not complied with the letter as well as the spirit of the parties' agreement, particularly with regard to developing a dedicated source of state funding for TBI services.³ Therefore, the Court orders DHHR to take the following steps to ensure performance of its agreement under the 2007 Consent Order:

- a) DHHR shall work with the TBI Oversight Committee and the TBI Coordinator to develop a plan for funding the TBI Trust, as contemplated by the 2007 Consent Order.
- b) A plan to secure adequate state funding for the final phase of the TBI system of service should be submitted by the TBI Oversight Committee

³ Although DHHR has argued that it was not solely responsible for implementation of the 2007 Consent Order, ultimately, the evidence presented reflects that under the 2007 Consent Order, DHHR is the catalyst for implementation of a TBI system of services and DHHR has failed to fulfill its duties as the party with "fiscal responsibility to render other behavioral health services and programs." See P. Ex.1 at page 1.

and the TBI Coordinator, with the assistance of DHHR, to the Court Monitor within sixty (60) days.⁴

- c) Thereafter, the Court Monitor should regularly report to the Court regarding progress on implementation of the funding plan.
- d) The TBI Trust should be operational and funded by July 1, 2010.
- e) A TBI system of services shall be available to victims of TBI by July 1, 2010.

4. Finally, given DHHR's failure to abide by its previous agreements in the 2001 and 2007 Consent Orders, the Court reserves the right to find DHHR in contempt and to impose appropriate sanctions.

DECISION

Therefore, for the reasons set forth above, the parties are **ORDERED** to act in accordance with the provisions of this Order. The objection of any party aggrieved by this Order is noted and preserved. The Clerk is directed to send a certified copy of this Order to all counsel of record and to the Court Monitor.

ENTERED this 7th day of August 2009.



Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. RATSON, 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
DAY OF _____ 2009

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA CLERK

⁴ The Ombudsman for Behavioral Health, David G. Sudbeck, has served as a member of the TBI Oversight Committee, however, by Order entered July 30, 2009, the position of the Ombudsman for Behavioral Health was terminated. As Mr. Sudbeck has been appointed Court Monitor and considering the change in his duties and responsibilities, the Court finds that it would no longer be appropriate for Mr. Sudbeck to serve as a member of the TBI Oversight Committee. Rather, the Court orders a representative of the Petitioners to replace Mr. Sudbeck on the TBI Oversight Committee.