

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al.,

Plaintiffs,

v.

Civil Action No. 81-MISC-585
Judge Louis H. Bloom

MATIN, et al.,

Defendants.

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

**ORDER REGARDING
CASE MANAGEMENT SERVICES**

On July 2, 2009, the Court entered the "Agreed Order," which was the product of the parties' genuine efforts, following extensive mediation, to resolve their dispute regarding case management services in West Virginia's behavioral health care system. While the parties have resolved the majority of issues related to case management services, the following two issues have been presented to the Court for resolution: (1) restoration of mental health services for Medicaid eligible patients to traditional levels and (2) modification of utilization management guidelines to provide reimbursement for effective mental health services in the community.

Based on the evidence presented by the parties at the April 24 and 27, 2009 hearings, 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

Background

1. By Order dated March 27, 2002, the Court discontinued active court monitoring of this matter.¹ Pursuant to said order, eight issues were identified as unresolved and only major questions of non-implementation involving those issues could be brought before the Court. The current dispute arises out of two of those unresolved issues, namely case management services and traumatic brain injury (“TBI”).²

2. In July of 2008, the Ombudsman for Behavioral Health (“Ombudsman”) issued two reports. In his 2007-2008 Annual Report, dated July 3, 2008, the Ombudsman issued a report to the Court addressing (1) the provision and coordination of case management services and (2) the treatment of traumatic brain injuries.

3. The Ombudsman issued another report, dated July 3, 2008, which addressed the issue of overcrowding at Mildred Mitchell-Bateman Hospital (“Bateman Hospital”), a state mental health facility. This report detailed the severe overcrowding problem at Bateman Hospital, but also built upon issues regarding the provision and coordination of case management services. Specifically, the Ombudsman reported that Bateman Hospital was operating at census in excess of its certified capacity and that, as a result, the hospital was suffering various problems in performing its duty to care for patients.

4. The Ombudsman presented the report on overcrowding to the Department of Health and Human Resources (“DHHR”) for informal resolution. On August 27, 2008, DHHR responded to the report by acknowledging that serious overcrowding existed at

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.

² Unresolved issues related to TBI are addressed in a separate order.

Bateman Hospital, however, DHHR did not agree to the informal resolution proposed by the Ombudsman.

5. On August 28, 2008, the Court ordered the parties to present evidence on the issues identified in both of the Ombudsman's reports, including conditions at Bateman Hospital.³ The Court determined that a full evidentiary hearing was warranted because the Ombudsman Report raised significant issues as to non-compliance by DHHR with W.Va. Code § 27-5-9.⁴

6. DHHR petitioned the Supreme Court of Appeals of West Virginia for a Writ of Prohibition seeking to prohibit the Court from holding a hearing.

7. The Supreme Court denied the Petition for Writ of Prohibition on February 6, 2009, holding, in part, that the Court had authority to reopen the underlying case for an evidentiary hearing to determine whether statutory violations were occurring at state mental hospitals.⁵

8. On April 24 and April 27, 2009, the Court conducted evidentiary hearings to determine DHHR's compliance with W.Va. Code § 27-5-9. Specifically, the evidence adduced at the hearing focused on issues related to the overcrowding of state mental health facilities and case management services.

9. At the conclusion of the evidentiary hearings, the Court ordered the parties to undergo mediation. As a result of mediation, the parties submitted an Agreed Order, entered by the Court on July 2, 2009, which left the following two issues unresolved: (1) restoration of mental health services for Medicaid eligible patients to traditional levels

³ The Court also ordered the parties to present evidence on the continuing question of DHHR's compliance with the TBI Consent Orders of 2001 and 2007.

⁴ W.Va. Code § 27-5-9 establishes the rights of clients of State-operated mental health facilities.

⁵ The Supreme Court also held that the Court had authority to determine whether DHHR failed to comply with consent orders concerning services to individuals with traumatic brain injuries.

and (2) modification of utilization management guidelines to provide reimbursement for effective mental health services in the community.

Overcrowding at State Mental Health Facilities

10. The State of West Virginia's mental health facilities, Bateman Hospital and William R. Sharpe, Jr. Hospital ("Sharpe Hospital"), are persistently overcrowded due to the lack of available case management services for individuals suffering from mental illness and, in particular, the lack of mental health services available in the community. Hearing Transcript, pages 75-76, 98-100, 161-162, 210, 359 ("Hr. Tr. 75-76, 98-100, 161-162, 210, 359"); Petitioners Exhibits 16, 18 ("P. Ex. 16, 18"); Respondents Exhibit 2 ("R. Ex. 2").⁶

11. Bateman and Sharpe Hospitals are averaging significantly more patients daily than their licensed capacities. Hr. Tr. 15, 285, 298-299, 354; P. Ex. 1, 2, 10 11.

12. In addition to overcrowding at the state facilities, DHHR is currently "diverting" patients to private hospitals. Hr. Tr. 11-12, 62-63. An individual is "diverted" when a person is involuntarily committed, the state mental health facilities are near or over capacity, and a private hospital agrees to take the referral. *Id.* Bateman Hospital diverts 45 to 63 patients daily. Hr. Tr. 13, 15-18; P. Ex. 1. Sharpe Hospital has a similar number of daily diversions. Hr. Tr. 298-299; P. Ex. 1.

⁶ Respondents Exhibit 2 is a report issued by the legislatively created West Virginia Comprehensive Behavioral Health Commission in November 2008. In the report, the Commission states, "West Virginia's behavioral health system is rapidly moving toward a state of crisis *as a result of overcrowding of beds in state facilities and prisons and inadequate community support services to prevent problems.*" R. Ex. 2 at 1 (emphasis added). Included in the Commission's report are detailed recommendations for comprehensive reform of the behavioral health system, including a recommendation for investments in community-based treatments and supports. *Id.* at Appendix C.

13. The state mental health system, including patients housed at state facilities and patients housed in diversion beds, is nearly double capacity. On average, 345 patients are committed to the 240-bed statewide system each day. Hr. Tr. 16, 354.

14. Overcrowding at the state mental health facilities results in violations of West Virginia law, including regulations governing the number of people to a room, activities, privacy, proper treatment, and cleanliness. *See e.g.* Hr. Tr. 18-20, 71-72, 74-75; P. Ex. 12.

Causes of Overcrowding

15. Witnesses for both parties agreed that the current problem of overcrowding at state mental health facilities has been caused by the dramatic reduction in available community services for individuals suffering from mental illness. *See e.g.* Hr. Tr. 75-76, 98-100, 161-162, 210, 359; P. Ex. 16, 18; R. Ex. 2.

16. Community services have dramatically decreased in the past decade due to significant reductions in real dollars spent on these services by DHHR and the failure of DHHR, through a contracted entity, to give approval for reimbursement of these services.⁷ Hr. Tr. 102, 165-168, 205, 296, 362; P. Ex. 16, 18.

17. As a result of the reduction in community services, the number of involuntary commitments has increased far beyond the capacity of the system. Hr. Tr. 98-100, 127, 359; P. Ex. 3, 4, 5.

18. Also, beds at the state mental health facilities are being occupied by patients who are ready to live in the community, but are not discharged because appropriate placements and services are not available in the community. Hr. Tr. 75-76, 100-101, 113, 115-116, 361.

⁷ DHHR contracts with APS Healthcare to manage the utilization of services provided by mental health providers.

19. Witnesses for both parties uniformly testified that the solution to overcrowding at state mental health facilities is to restore adequate community services to individuals with mental illness. Hr. Tr. 75- 76, 100-101, 115-116, 189-190, 259, 312, 333, 374, 383; P. Ex. 7; R. Ex. 2.

20. Restoration of community services will eliminate overcrowding by helping individuals avoid involuntary commitment and by providing suitable placements and services to individuals who are ready for discharge. Hr. Tr. 100-101, 196.

Need for Meaningful Reimbursement for Community Services

21. At the evidentiary hearing, mental health care providers testified that they are unable to offer community mental health services because they cannot obtain meaningful reimbursement for providing these services. *See e.g.* Hr. Tr. 167, 214, 229. Providers identified the implementation of West Virginia's new Medicaid coverage plan, Mountain Health Choices ("MHC"), as one cause of the lack of adequate reimbursement for community mental health services. Hr. Tr. 214, 444-446.

22. MHC was implemented in 2007 in an effort to encourage healthy habits for Medicaid members "through promotion of personal responsibility." P. Ex. 26 at 2. MHC is a two-tiered program allowing members to choose a benefit package, either basic or enhanced services. *Id.* People choosing the enhanced package must sign a member agreement with their primary care provider, which requires members to meet certain responsibilities and expectations. *Id.* In the event an individual does not choose the enhanced package or does not complete the member agreement, he or she is enrolled in the basic package. *Id.*

23. Under both MHC packages individuals with mental illnesses are no longer eligible to receive certain community based mental health services that they were entitled to receive prior to implementation of MHC. Hr. Tr. 175-176; P. Ex. 26 at 8.⁸

24. Representatives of the mental health community were not included in MHC program design discussions. Hr. Tr. 221; P. Ex. 26 at 7. Further, once MHC was implemented, mental health providers experienced a sudden change in eligibility standards, whereby certain mental health services were no longer reimbursable. P. Ex. 26 at 8. Specifically, a number of providers testified to the negative impact of MHC's failure to reimburse for the provision of crisis stabilization services.⁹ See Hr. Tr. 179, 201-202, 232-233, 444-445; P. Ex. 16, 18.

25. Finally, mental health providers testified to some concern regarding whether the philosophy of MHC, to engage people in healthy lifestyles, fits with a mental health system that treats people in crisis. For example, Dr. Perry Stanley, a clinical director for Northwood Health Systems, stated:

Mental illness, for many people, is chronic and persistent, and I think that the Mountain Health Choices program probably treats mental illness the way that we treat some of our physical illnesses that can be cured, but for many people mental illness cannot be cured.

Hr. Tr. 234; *See also* Hr. Tr. 445.

26. Mental health care providers also testified that they are unable to offer community services, because they cannot obtain reimbursement for these services due to the restrictive utilization management guidelines employed by DHHR and the third party that

⁸ Under the enhanced package, members are entitled to more mental health services, but the amount of those services is still reduced. Hr. Tr. 176.

⁹ The Court notes that pursuant to the Agreed Order, DHHR has agreed to cover the costs of crisis stabilization for MHC members.

manages utilization for DHHR. Utilization Management Guidelines affect whether or not a Medicaid individual is eligible for mental health services or whether or not a mental health provider will be able to offer those services. Hr. Tr. 167-168, 229.

27. The restrictive utilization management guidelines and strict application of those guidelines has caused a reduction in the availability of community mental health services such as day treatment, case management, and basic living skills. Hr. Tr. 167-168; P. Ex. 16. The services denied and limited under the utilization management guidelines are those that have been identified by both parties as essential to remedying the overcrowding problem. *See* Hr. Tr. 76, 101, 147-148, 156-157, 163-165, 184-185, 211-213, 229, 234, 228-229, 258-259, 335, 400; P. Ex. 7, 16, 18; R. Ex. 2.

CONCLUSIONS OF LAW

1. The issue in this matter is whether DHHR is in compliance with W.Va. Code § 27-5-9, which creates specific enforceable rights for clients of the State's mental health facilities. W.Va. Code § 27-5-9 states, in pertinent part, as follows:

(a) No person may be deprived of any civil right solely by reason of his or her receipt of services for mental illness, mental retardation or addiction, nor does the receipt of the services modify or vary any civil right of the person...

(b) Each patient of a mental health facility receiving services from the facility shall receive care and treatment that is suited to his or her needs and administered in a skillful, safe and humane manner with full respect for his or her dignity and personal integrity.

(c) Every patient has the following rights regardless of adjudication of incompetency:

(1) Treatment by trained personnel;

(2) Careful and periodic psychiatric reevaluation no less frequently than once every three months;

(3) Periodic physical examination by a physician no less frequently than once every six months; and

(4) Treatment based on appropriate examination and diagnosis by a staff member operating within the scope of his or her professional license.

....

(g) The Secretary of the Department of Health and Human Resources shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to protect the personal rights of patients not inconsistent with this section.

2. Addressing the above-referenced statute, the Supreme Court of Appeals of West Virginia has stated, "It is the obligation of the State to provide the resources necessary to accord inmates of State mental institutions rights which the State has granted them under *W.Va. Code, 27-5-9* [1977]." Syl. pt. 3, *E.H. v. Matin*, 168 W.Va. 248, 257, 284 S.E.2d 232, 237 (1981).

3. The two limited issues presented for resolution herein directly relate to DHHR's compliance with *W.Va. Code § 27-5-9* for two reasons.

4. First, based on the evidence presented, the Court concludes that access to community mental health services is essential to addressing overcrowding at the State's mental health facilities. Without the provision of community services, Bateman and Sharp Hospitals will continue to suffer from overcrowding and violations of patients' rights established by *W.Va. Code § 27-5-9* will continue to occur. The two issues presented are central to providing individuals with mental illness access to mental health services in the community, thereby avoiding commitment and the potential for overcrowding.

5. Second, the Court concludes that DHHR is violating its own legislative rules that were adopted pursuant to *W.Va. Code § 27-5-9(g)*. Specifically, *W.Va. C.S.R. § 64-59-*

5.6 states, “The client has the *right to access treatment in the least restrictive setting*. The goal of treatment for a client shall be to address needs so as to permit the client to be in the least restrictive setting.” (emphasis added). Further, discussing clients' right to treatment, W. Va. C.S.R. § 64-59-6.1, provides:

All clients of behavioral health facilities have a right to treatment in the least restrictive setting, and are entitled to care and treatment including habilitation, rehabilitation, medical care, education and training, when appropriate, and to behavioral health and support services suited to their individual needs.

(emphasis added). The evidence presented reflects that clients' rights are being violated because individuals are being kept in inpatient, locked, institutional facilities, despite readiness for discharge into the community, based on the lack of available community services.

6. To ensure that patients in the State's mental health facilities are afforded those protections granted by W.Va. Code § 27-5-9, and the regulations passed pursuant to that statute, the Court has authority to order DHHR to fulfill its legal obligations. *E.H. v. Matin*, 168 W.Va. 248, 258, 284 S.E.2d 232, 237 (1981); *State ex rel. Matin v. Bloom*, 223 W.Va. 379, 674 S.E.2d 240, 246-247 (2009) (per curiam).

Reimbursement for Mental Health Services through Mountain Health Choices

7. Petitioners argue that mental health care providers are unable to offer sufficient community services because MHC has eliminated reimbursement for a number of mental health services provided to MHC enrolled individuals suffering from mental illness. Therefore, Petitioners assert that access to all mental health services should be restored to individuals enrolled in MHC.

8. Although the evidence presented suggests that the elimination of services reimbursed under MHC has impacted the provision of community mental health services, it is not clear, to the Court, that a restoration of all mental health services is the proper remedy. First, the Court notes that substantial evidence calls into question whether or not MHC is a program that is well suited to treating those suffering from mental health illnesses. *See* Hr. Tr. 234, 445; P. Ex. 26 at 5, 7-8. Further, keeping in mind that this issue directly relates to the ability of providers to offer community services, the Court finds that it does not have sufficient evidence before it which addresses the impact of the elimination of each specific service previously provided and the efficacy of restoring each specific service under MHC.¹⁰

9. Therefore, given these issues, the Court deems it appropriate and hereby orders the Court Monitor to (1) develop findings addressing the impact of MHC on community mental health services and (2) make a recommendation to the Court addressing whether MHC should be modified, if at all, to provide better access to, and encourage the provision of, community mental health services. The Court Monitor should bring together representatives of the mental health community and representatives of DHHR to discuss the impact of MHC on mental health care and take any further actions he deems necessary and appropriate to make an informed recommendation. Thereafter, the Court Monitor should report his findings and recommendation in a report filed with the Court no later than February 1, 2010. Any party objecting to the Court Monitor's findings and recommendation may file a request for a hearing, at which time each party will have the

¹⁰ For example, a number of providers testified to the negative impact of MHC's failure to reimburse for crisis stabilization services, however, DHHR has committed, pursuant to the Agreed Order, to reimburse all crisis stabilization services that are provided to enrollees in MHC.

right to present evidence. If there are no objections, the Court will issue an order based on the findings and recommendation of the Court Monitor.

10. Finally, despite DHHR's assertion that the Court does not have authority to interfere with its discretion to operate Medicaid, and therefore MHC, the Court notes that DHHR has agreed to reimburse providers for crisis stabilization services provided to individuals in MHC out of state funds, rather than Medicaid. Accordingly, even if the Court determines that restoring access to community based mental health services for individuals enrolled in MHC is necessary to bring DHHR in compliance with the law, DHHR will still have discretion to determine the methods it uses to implement compliance.

Review of Utilization Management Guidelines

11. Next, Petitioners assert that many mental health care providers are not able to provide services, such as day treatment, case management, and residential support services, because utilization management guidelines employed by DHHR, and a contracted third party, are improperly restrictive. Therefore, Petitioners assert that the guidelines must be revised to ensure clarity and appropriate authorization of essential services.

12. Significant evidence presented to the Court reflects that DHHR's failure to reimburse for services has led directly to mental health services not being provided in the community, and an increase in commitments to the State's mental health facilities. Therefore, to avoid overcrowding at the State's mental health facilities, the Court concludes that utilization management guidelines must be reviewed to ensure appropriate authorization for essential mental health services.

13. Accordingly, DHHR shall hire an independent national expert, jointly chosen by the parties and the Court Monitor, to review utilization management guidelines that govern authorization for community mental health services. The expert shall issue recommendations no later than March 1, 2010. The Court Monitor and the parties shall review these recommendations and work to come to an agreement regarding these recommendations. If the parties are unable to come to an agreement regarding certain recommendations, the parties shall notify the Court by May 1, 2010, of those recommendations not adopted with a statement explaining why said recommendations should or should not be adopted and implemented. Upon review, the Court will either issue an order or set the matter for hearing.

14. Again, although DHHR argues that the Court does not have authority to interfere with its discretion to operate Medicaid, the Court is simply requiring DHHR to undertake a meaningful review process, so that it can restore meaningful access to mental health services in the community and bring DHHR in compliance with W.Va. Code § 27-5-9.

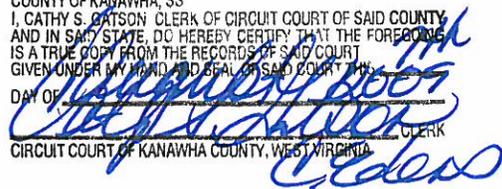
DECISION

Therefore, for the reasons set forth above, the Court hereby **ORDERS** the parties 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. CATSON, 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 August 2009


CATHY S. CATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA