



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

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Via email

Ronnie Cohn
250 Garth Road, #2K3
Scarsdale, New York 10583

Barry C. Taylor
Equip for Equality
20 North Michigan Avenue, Suite 300
Chicago, IL 60602

Scott M. Mendel
K&L Gates LLP
70 West Madison Street, Suite 3100
Chicago, Illinois 60602-4207

Re: *Ligas v. Norwood* – Defendants’ Response to the Monitor’s Fourth Annual Report

Dear Ronnie, Barry and Scott:

As discussed at the January 21, 2016 parties’ meeting, enclosed is Defendants’ Response to the Monitor’s Fourth Annual Report.

Sincerely,

/s/ Brent D. Stratton

Brent D. Stratton

Encl.

DEFENDANTS' RESPONSE TO THE MONITOR'S FOURTH ANNUAL REPORT

The Monitor's Fourth Annual Report ("FAR" or "the Report") finds the State out of compliance under the category of "Resources and Capacity." The two primary reasons for the Monitor's finding are (i) the lack of a State budget and (ii) the fact that funding rates for providers have not increased in a number of years. Specifically, the Monitor noted that "resources for implementation" have significantly worsened during Fiscal Year 2016. (FAR, p. 7)

But the Report does not point to any concrete, identifiable changes within the system since the Third Annual Report was issued at the end of 2014 to support the statement that conditions "have significantly worsened." In fact, the only significant change between this Report and the last one is that the budget impasse has resulted in providers getting paid more quickly than they have in the past. Importantly, one constant between the two reports is that the State has continued to meet and exceed the required benchmarks for transitioning individuals from the PUNS List and ICF/DDs into the community.

For the reasons explained more fully below, the State respectfully disagrees with the Monitor's finding. While the State acknowledges that the Report raises some issues deserving of significant attention, they do not support a finding of non-compliance. Despite this disagreement, the following memorandum provides some proposed recommendations in response to the concerns raised in the Report, while also recognizing the significant challenges imposed by the State's current fiscal situation.

I. Background – The Consent Decree and “Resources and Capacity”

The Consent Decree has multiple paragraphs that identify the State’s obligations when it comes to the resources necessary for compliance. Paragraph 4, “Development of Resource Capacity,” states in part:

Funding for services for each Individual with Developmental Disabilities will be based on the Individual’s needs using federally approved objective criteria regardless of whether the Individual chooses to receive services in an ICF-DD or in a Community-Based Setting; provided, however, nothing in this Decree shall require Defendants to change their current method for establishing funding or from adopting new methods based upon federally approved criteria.

Paragraph 5, “Resources and Budget Requests,” states in part:

Annual budgets submitted by the Defendants on behalf of their agencies shall request sufficient funds necessary to develop and maintain the services, supports and structures described in the Decree, consistent with the choices of Individuals with Developmental Disabilities, including Class Members. Defendants shall take steps sufficient to implement funding mechanisms that facilitate transition among service settings...

In addition to the above, the Decree sets specific measurable benchmarks to demonstrate compliance in both transitioning individuals into community-based settings and the development of the resources necessary to ensure such transitions (Decree, Paragraphs 17-19 and 20-23). By June 30, 2016, 2,500 individuals on the PUNS (Prioritization of Urgency of Needs for Services) list are required to have been served in community settings, and by December 31, 2015, two-thirds (or 923) of the 1,399 known ICF/DD Class Members (as of June 15, 2015) were to have transitioned into community-based services.

To measure compliance with the Decree, the previous Court Monitor created “Compliance Evaluation Standards” in July, 2012. The standards measured are as follows:

- I. Resources and Capacity
- II. Class Member List(s)
- III. Transition Service Plans
- IV. Transition for Class Members in ICF/DDs
- V. Crisis Services
- VI. Transition for Class Members on Waiting List
- VII. Outreach
- VIII. Implementation Plan
- IX. Data Reports

Under the “Resources and Capacity” portion, resources are to be “provided consistent with the choice of a class member and the requirements of Paragraphs 17 through 19 and 21 through 23 of the Decree” describing the numerical transition benchmarks for class members residing in ICF/DDs and those on the PUNS list. (Compliance Standards p. 4) The measures for “Resources and Capacity” specifically state “[r]ates for community-based services, services in community-based settings and ICF/DD services are adequate.” (Compliance Standards p. 5)

II. Response to the Findings in the Fourth Annual Report

In the Fourth Annual Report, the Monitor finds the Defendants out of compliance in the areas of resources and capacity. The major concerns identified in support of this finding are the lack of state budget and the rates for CILA and ICF-DD providers. The Report concluded that “[u]ntil such time as concrete steps are taken to enact a State budget and address the staffing crisis and resulting decrease in service quality as well as a lack of development in the community, the Monitor finds noncompliance with this compliance standard.” (FAR, p. 21) The Department respectfully disagrees and suggests that, while these matters are certainly of concern to all involved, they do not rise to the level of a finding of non-compliance for the reasons set forth below:

A. Lack of a State Budget

With respect to the current budget impasse, the Monitor found that “it cannot be assumed that the sufficient funds described in ¶5 will be available.” (FAR, p. 12) However, this conclusion is contrary to Defendants’ monumental efforts to continue payments for DD Medicaid services, in spite of the budget impasse. As set forth in great detail in the Report, the Defendants have agreed to comply with a number of Court orders, which in essence, guarantee payments will continue in the absence of an FY16 budget. Payments are to continue in no less than the amount and frequency which occurred during FY15.

The Department has updated the Monitor on a monthly basis on the status of payments, and has remained current in all provider payments for DD services (not only those involving Ligas Class Members). In fact, while in past budget years, providers had to endure long and delayed payment cycles due to budgetary shortfalls, payments are currently being paid at a *much faster rate* than in past years, when the State was operating with a fully functioning budget. Any assumption that this will not continue is premature at best, and disregards the current payment situation. Indeed, given the consistent and timely payments made by Defendants, it cannot be assumed that there *will not* be sufficient funds available. Determinations of compliance or non-compliance should be based on the quantitative standards agreed to by the parties. Unless and until the State is unable to make payments to support the services required under the Consent Decree and ¶5, the budget impasse simply provides no basis to support a finding of non-compliance.

B. Rates for CILA and ICF Providers

The Court Monitor also based the finding of non-compliance on the funding rates for CILAs and ICF-DDs, describing a resulting “staffing crisis and resulting decrease in service

quality” and “lack of development in the community.” (FAR, p. 21) The Department disagrees. Based on the information currently available, there is neither a systemic staffing crisis and resulting decrease in service quality, nor a lack of development in the community. Certainly there are areas of concern, but these concerns do not rise to the level of non-compliance.

a. ICF-DD Rates

First, with respect to the ICF-DD rates, this issue was addressed only a year and a half ago and found *not* to rise to the level of non-compliance. In January, 2014, the Intervenors argued that the Department was out of compliance with the Decree because it had not raised ICF-DD rates in recent years. The Intervenors’ position was characterized by the Monitor to be a claim that the “resources necessary” per the decree “means whatever it takes to provide quality services to ICF/DD residents.” In support of this claim, the Intervenors provided the parties and Monitor with examples of increased costs and the resulting difficulties facing specific providers, including submission of cost analysis for each identified provider (of whom the Intervenors identified 4 specific non-profit ICF/DD providers).

Notably, many of the concerns raised in 2014 are the same as those identified in the Fourth Annual Report. However, the Report identifies only general anecdotal statements, without any additional specific facts to demonstrate worsening conditions for the ICF-DD providers and which the Department is unable to refute with any specificity. (The Department will, however, continue to look into and attempt to resolve any specific matters that are brought to its attention). For example, the following chart demonstrates

that nearly identical issues are raised in both the 2014 submission from the Intervenors and now the Fourth Annual Report:

<u>2014 Submission</u>	<u>Fourth Annual Report</u>
<ul style="list-style-type: none"> • Staffing shortages • Inability to retain staff due to wages • Cuts to nursing services • Cuts to therapy services (art, music, aquatic) • Misericordia operating at \$21,371 deficit per ICF/DD resident 	<ul style="list-style-type: none"> • Staffing shortages • Inability to retain staff due to wages • Cuts to nursing services • Cuts to therapy services (unspecified) • “One agency is losing \$20,000 annually for each person living in an ICF/DD setting

Based on the submissions by the parties, the prior Monitor submitted a special report on the ICF rate issue on August 1, 2014 (“8/1/14 Report”) rejecting the Intervenors’ argument. In the report, the Monitor determined that the “overarching intent of Paragraph 4 is to preserve real choices and options...to ensure that the ICF/DD option remains as a viable choice.” (8/1/14 Report, p. 5)

While the prior Monitor considered the rate issue to be a concern and one that should remain “high on the agenda,” he did not find the Defendants out of compliance (nor did he find non-compliance on these same issues in his Third Annual Report, filed October 1, 2014—only 16 months ago). To the contrary, the report specifically noted: “The Decree was ordered on June 15, 2011. Common sense would suggest that, if the parties and intervenors had agreed to address the stagnant rates of ICFs/DD, *the Decree would have contained some specific reference to this issue*, as the rates had been the same for more than three years at that time. The fact that there is no specific mention of ICF/DD rates in the

Decree runs counter to the idea that there was any expectation of periodic increase in rates.” (8/1/14 Report p. 6 (emphasis added)) The Monitor went on to state that “this case is about capacity and choice...[S]hould rates or rate structures interfere with these choices, they then would indeed become relevant to compliance with the Decree.” (8/1/14 Report, p. 6) The Monitor determined that, even in light of the specific submissions on the four individual non-profit ICF/DD providers, there was “insufficient factual evidence to establish that ICF/DD services under the Illinois Medicaid state plan is not a viable option for adults with developmental disabilities.” (8/1/14 Report, p. 7)

The issue then becomes what has substantially changed with respect to ICF/DD viability as a choice for the developmentally disabled since this report and the subsequently filed Third Annual Report, which also found no areas of non-compliance? The evidence currently presented does not establish that ICF/DD placement is no longer a viable choice. Rather, the findings and anecdotal evidence in the Fourth Annual Report support only the previously rejected argument of the Intervenors that the “resources necessary” per the decree “means whatever it takes to provide quality services to ICF/DD residents.” There are no specific instances identified of individuals who are unable to choose an ICF/DD level of care due to a systemic issue.

There are currently 232 ICF/DDs serving developmentally disabled individuals in Illinois. Since July 1, 2014, two (2) ICF/DDs have closed without entering into a downsizing agreement. Thirty-eight (38) others have elected to close via downsizing, with the vast majority of providers electing to reorganize and develop CILAs to continue to serve the individual residents under the Medicaid Waiver (a choice of an alternate ICF/DD placement

was available for those who chose that level of care). However, with 232 remaining, ICF/DDs remain a viable choice.

b. CILA Resources and Capacity

The Fourth Annual Report also finds non-compliance with respect to resources and capacity for CILAs. Again, the Report relies considerably on anecdotal statements regarding CILA rates, staffing and expansion to which it is impossible for the Department to respond with any specificity. As with the statements provided to support the ICF/DD concerns, the Department will of course look into any specific matters brought to its attention and attempt to find a resolution.

Some of the anonymous, non-specific, anecdotal concerns raised in the Report include an agency “closing a CILA and moving residents to vacancies in other homes it operates due to staffing shortages;” “[a]ll providers have stalled opening new CILAs and are also reducing existing CILA capacity to stay financially viable;” and “[a] four-person CILA which would serve three Ligas Class members has been ready to open for four months but remains vacant because the agency cannot adequately staff existing operations.” (FAR, p. 17-18) These individual anecdotes do not demonstrate that there is a system-wide issue. For example, while most of the statements are impossible to refute as they are anonymous and lacking in any specificity, the Department is familiar with one CILA that is ready to open but has not due to staffing. However, the staffing issue is not what is implied. Rather, the provider has asked for a higher direct care staff rate to employ staff with higher qualifications. The Department simply does not provide for graduated rates for direct care staff unless they are specialized staff such as a nurse or therapist. This example has nothing to do with the basic staffing rate. Similarly, since the Third Annual Report was

issued on September 30, 2014, there have been nine (9) new CILA licenses issued to providers. These providers have already received five (5) funding awards to serve Ligas Class Members in these newly developed CILAs and another award is currently pending. This is clearly contrary to the anecdotal and anonymous claim that “[a]ll providers have stalled opening new CILAs.”

With respect to CILA resources and capacity, the health of the system can largely be determined by the ability to move individuals out of ICF/DDs or from the PUNS list into community settings, rather than relying on anonymous anecdotal statements. Currently, the Department is ahead of all transition goals. By June 30, 2016, the benchmark is that 2,500 individuals from the PUNS list must be receiving services. The Department had reached 96% of that goal already (2,402 individuals) with nearly six months remaining. The benchmark for transition from ICF/DD services to community settings is currently 1,447 by June 30, 2017, and the Department has reached 88% of that goal (the interim goal of 923 transitions by December 31, 2015 was exceeded by 37.5% with 1,269 individuals having transitioned). These transition rates clearly demonstrate that CILAs remain a viable choice for Class Members.

As noted in the Fourth Annual Report, there are a number of individuals who have been selected from the PUNS list to receive services but have not yet initiated services for a variety of reasons. However, the fact that not everyone selected has been served, or that certain individuals have waited over one year to initiate services, does not support a finding that the resources and capacity of the community system fail to comply with *Ligas*. There are numerous factors that must be considered, many of which do not point to a deficiency in the system. For example, there may be individuals who desire a particular

geographic area or provider, but there may not be sufficient interest to justify the creation of a new CILA (a four bedroom CILA will not be created if only one or two individuals are requesting that provider or location). Indeed, the Monitor's own report listed 37 different reasons for barriers to transition for individuals moving from the PUNS list and 22 reasons for barriers for individuals moving from ICF/DDs, many of which have nothing to do with provider capacity or resources (such as waiting on assessment, needing to obtain Medicaid eligibility, undecided between CILA and home-based services, and undecided about receiving services).

Regardless of the many reasons why individuals have not yet initiated services, an examination of the progress in this area demonstrates that the resources and capacity are, in fact, available. As of September 1, 2014, there were 307 individuals who were selected for services over one year ago but for whom services have not yet been initiated.

Individuals from the March 2014 PUNS selection who have waited more than a year to initiate services were added to the list on August 10, 2015, bringing the total number to 434. However, the number of individuals who have not yet initiated services has been reduced to 137 as of January 29, 2016. There have been a total of 4,306 individuals selected from the PUNS list under *Ligas*, with 2,539 of those selected actively seeking services.¹ Only 5.3% of those actively seeking services have yet to be served, demonstrating the availability of resources and capacity.² The fact that a small percentage of individuals is experiencing a delay in obtaining services due to various, complex factors

¹ Certain individuals selected from the PUNS list no longer wanted to pursue services, had moved out of state or were otherwise unable or unwilling to pursue services.

² Prior PUNS selections have the following numbers of individuals awaiting initiation of services: 2/2012= 7 of 800 selected (0.9%); 6/2012= 6 of 626 selected awaiting services (1%); 10/2012=33 of 1680 selected (2%); 9/2013= 10 of 500 selected (2%); and 3/2014= 81 of 700 selected (11.6%).

is not a valid measure of the system as a whole. Considering nearly 95% of those pursuing services have begun receiving services, it simply cannot be said that there is a systemic deficiency in community resources and capacity.

Similarly, the Fourth Annual Report identifies 101 individuals currently waiting to transition from ICF/DDs, and was as high as 191. Updated data for January, 2016, reflects that figure is now down to 88. These individual cases have been the subject of discussion and analysis, but the circumstances surrounding these cases do not indicate an overall deficiency in community resources and capacity. Based on the December figures cited in the Fourth Annual Report, 65 individuals (65% of the December total of 101) on this list fall into categories that have little to do with overall resources or capacity in the community, but rather reflect individual preferences for (1) a particular CILA development, (2) geographical area, (3) a specific provider, and (4) not actively pursuing placement. Families and guardians certainly have the ability to choose a provider and location, but exercise of these choices should not lead to the conclusion that there is insufficient capacity for the system as a whole, especially as there are continued CILA developments (as noted above, including by ICF/DD providers) and vacancies in existing CILAs.

In fact, according to the data collected by the Department, there has been continued expansion of providers under the DD waiver since the Decree was signed. Fifty-five (55) ICF/DD providers have downsized or closed their ICF/DD sites, either converting to or developing new community-based sites as a result. Forty-six (46) new CILA licenses have been issued, four (4) additional providers have begun offering day habilitation services, and five (5) new providers have been enrolled in the Medicaid system to provide Service Facilitation under the Home-Based Service and Support (HBS) Program. There are

currently 7,400 Personal Support Workers being paid under the HBS program, compared to 4,900 in June, 2011. In light of these facts, the Department respectfully contends that it remains in compliance with the *Ligas* Decree.

III. Further Discussions

While the Department believes the findings of non-compliance are not warranted at this time, it is fully aware of these areas of concern. The Department is committed to continuing discussions with the Plaintiffs, Intervenors, and Monitor to identify strategies and proposals outside of the *Ligas* Decree requirements that will reduce financial pressure on both community and ICF/DD providers.

While we are open to discussing other suggestions, we offer the following courses of actions for consideration:

- The Division is required to develop and monitor performance measures as a part of its federally approved Medicaid Waiver. We currently have over 30 performance measures in the Waiver through which we collect data, review compliance, analyze trends, and develop remediation. We must report results to the Centers for Medicare and Medicaid Services (CMS) on an annual basis. These measures cover such quality of life areas as eligibility, choice, service planning and implementation, abuse/neglect/exploitation, individual rights, as well as financial integrity. The measures are now being reviewed as we develop the renewal application for the Adult Waiver, due no later than April of 2017, but can also be modified at the change of a Waiver Year. We would be willing to seek input from the Parties on these measures and routinely discuss results of monitoring activities.
- As previously suggested by the Department, additional qualitative indicators can be identified in order to more accurately and precisely measure the non-numerical requirements of the Decree. Potential measurements could include additional data for both ICF/DDs and CILAs reflecting vacancies, development of capacity, quality of life and other measurable factors. In developing such factors, we can refer to the core indicators utilized by the National Association of State Directors of Developmental Disabilities Services (NASDDDS) to better assess the sufficiency of Illinois' resources and capacity.

The Department remains committed to the tenets of the *Ligas* Decree and looks forward to suggestions from all sides on ways in which we can serve this population more effectively, efficiently and with enhanced overall outcomes.