

LAW WEEK

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Competency Litigation Concludes With Consent Decree

Results require new divisions within Department of Human Services

BY **TONY FLESOR & JULIA CARDI**
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Long-running litigation over the time-frame for competency evaluations for criminal defendants resolved with a consent decree.

After the issue went through multiple rounds of litigation and settlements, the consent decree is expected to resolve the litigation. The result includes changes in the Colorado Department of Human Services' structure and is expected to lead changes in other states around the country.

The latest litigation involved Iris Eytan of Eytan Nielsen, Caleb Durling of Fox Rothschild and Ellie Lockwood of Snell & Wilmer on behalf of Disability Law Colorado. DLC was also represented by Tim Scalo of Snell & Wilmer and Mark Ivandick and Jennifer Purrington of DLC, all under the umbrella of the Colorado Lawyers' Committee.

The latest litigation started when the attorneys reopened litigation from 2012 after an earlier settlement expired.

The large-scale issue began even earlier, though, with a criminal defendant who was incompetent to stand trial but was awaiting a competency evaluation. Eytan said DHS was required to evaluate him, but there was no statutory guideline for a reasonable time for that evaluation.

Eytan said the defendant, who had only been charged at that point, sat waiting in jail with his case stayed while awaiting the competency evaluation. His, and others', detention was a 14th Amendment due process violation, Eytan said.

"[He] was in jail for six months before the public defender came and said this situation was going on." Eytan, Lockwood and another attorney stepped in and found the situation wasn't limited to that case — 80 others were waiting for evaluations as well.

Those cases resulted in a settlement that required evaluations to happen within 24 days. That settlement expired in 2009, though, with the opening of a 200-bed forensic facility in Pueblo, which was expected to reduce wait times.

By 2010, they alleged in the latest case's complaint, the wait times began building up all over again. The group of attorneys reopened the earlier litigation and reached settlements in 2012 and 2016. By the summer of 2017, the department said they were out of compliance and asked for a six-month timeout to come back into compliance. Eytan said they have still yet to come back into compliance.

After months of settlement negotiations, DLC and the department agreed to mediate the issues and on March 15, entered into a consent decree. Eytan said a consent decree was the goal from day one. "Disability Law Colorado felt that was the only real way to impact a systemic issue, but the state would never agree," she said.

According to Durling, the change in administration in the governor's and attorney general's offices marked a major change in getting the consent decree.

"We had seen a different concern, attention and appreciation from them about this issue and how to address it," Durling said.

The consent decree requires:

- The appointment of a special master to assist in creating a new competency system and monitor the department's progress.
- The creation of two new units in the department, one which will create data collection and analysis systems, the other which will require the hiring of clinicians to interface with the courts and community service providers.
- The development of a system to streamline competency services in the community to reduce the need for expensive inpatient beds.
- The development of a triage system to ensure that the most acutely ill pretrial detainees will be transported from jails to the hospital in seven days instead of 28 days.
- Delivery of mental health treatment and clinical assessments in jail during the interim period before transfer to an inpatient bed at the hospital.
- Shortened deadlines for comple-

tion of competency evaluations and restorations.

- The end of the department's policy of freezing civil beds for use by pre-trial detainees.
- Continued court oversight over the consent decree that could, in the event of the department's violation, result in fines and liquidated damages of up to \$10 million a year that will be placed in a trust to be utilized for non-departmental and community mental health services.

KEYS TO THE CONSENT DECREE

Sen. Pete Lee sponsors a pair of bills that implement the consent decree. He said he doesn't fault DLC for bringing the lawsuit, because their purpose is to make sure people with disabilities have protection for their rights.

"They're doing their job, and they were asserting that we weren't as a state. And we weren't," Lee said. "It takes a lot of money to set up mental health and behavioral health and substance abuse systems, and amongst the competing priorities of education [and] transportation, we didn't put sufficient resources into these programs."

Senate Bill 222 requires the Department of Health Care Policy and Financing to develop measureable ways of monitoring efforts to prevent Medicaid recipients from becoming involved with the criminal justice system.

Among other provisions, Senate Bill 223 requires if a court orders inpatient restoration services for a defendant that the Department of Human Services has to offer services within seven days to defendants with the most serious of mental health issues. The bill also requires the Department of Human Services to develop a system to electronically track the status of defendants for whom competency to proceed has been raised.

The attorneys said the consent decree goes further than any of the previous settlements by introducing key operational pieces rather than guidelines to follow. And those pieces

are what separate this consent decree from settlements and consent decrees in other parts of the country.

The provision that requires a triage system for the most ill detainees is seen as a key aspect that takes the consent decree one step further, according to Durling. He referred to the split as having two "tiers" in the process.

"We were taking this war that's been going on in a lot of places — set time frames, fines — but how do we move this forward? This is a real opportunity to move this forward and get results for a lot of people," Durling said.

According to Lockwood, the fines specified in the consent decree are significant as well. If the department can't meet deadlines, that will result in fines, but that money will go into an account and be used for non-department mental health services, she said. "That money ultimately will be going to the right people but in different ways."

Those fines are capped at \$10 million per year, but Lockwood said she thinks the department might hit those caps in both of the first two years.

The appointment of the special master is also significant in providing oversight for the department as well. Other states have independent monitors, Eytan said, but the difference in this consent decree is that it requires systemic changes that require completely new divisions within the department.

"Everyone's figured out how to do timeframes and fines, but they aren't fully working," Eytan said. "The criminal justice system was failing because the mental health system is broken, but now the people most in need of inpatient psychiatric care will be moved from jail to a hospital in seven days, instead of the current four to five months," Eytan said.

Lee, who also advocates for criminal justice reform, said the ultimate goal of the changes is to reach a place where mental health services are "affordable, accessible and available."

"You can't get there until you define 'there,'" he said.

— Tony Flesor, TFlesor@circuitmedia.com;
Julia Cardi, JCardi@circuitmedia.com