STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-89-088

PAUL BATES, et al.,

Plaintiffs

v.

BRENDA HARVEY, COMMISSIONER, DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants

COURT MASTER'S PROGRESS REPORT PURSUANT TO PARAGRAPH 299

The following report covers the period from November 30, 2008 to May 31, 2009.

Monitor's Report.

The Report of the Monitor appointed by this Court pursuant to an Order dated July 14, 2008, was completed and filed on March 4, 2009. The Report concluded that reductions and shifts in funding had negatively impacted the delivery of community mental health services throughout the State, were inconsistent with the requirements of the Consent Decree and barred attainment of substantial compliance.

The negative effects noted in the report, have continued and are quite apparent in current operations. The basic services of community integration, housing and mental health services continue in short supply, and are often unavailable for class members or non-class members without MaineCare coverage. At this point in time, as opposed to the date when the Monitor was appointed, the budgetary impact on services for class members ineligible for MaineCare coverage is an established fact.

Attempted Resolution Regarding Departmental Advocacy.

During the past several legislative sessions disagreements have arisen over the obligations of the Department to advocate before the legislature for the funding necessary to achieve compliance with the Consent Decree. My initial concern was that I often received the Department's budget proposals only as they became public and was provided with little information to assist me in understanding or evaluating the impact of the proposals on services. As a consequence, my efforts to advocate before the Legislative committees for needed resources or to oppose cuts were hindered by the lack of information and the Department's failure to publicly support any initiative that was either not included in or deviated from the Governor's proposed budget.

On December 22, 2008, I filed a recommendation in accord with Paragraph 298 that was designed to improve the information provided to plaintiffs' counsel and to me regarding the

development of the Department's budget and to require the Department to specifically advocate for supplemental budget requests that it had filed. The Department responded to my recommendation by requesting informal dispute resolution in accord with Paragraph 294.

In the succeeding months, I have worked with counsel for the parties to design a protocol that improves the quality and timeliness of the information provided by the Department and more specifically defines the Department's obligation under the Paragraph 268 of the Settlement Agreement to "exert good faith efforts to obtain adequate funding from the Legislature." We have been unable to reach agreement. At this point, we could either continue with formal dispute resolution if requested by either party pursuant to Paragraphs 295 or 297 or the Court could resolve the matter directly by proceeding on its order to show cause dated December 27, 2007 and determine whether the Department has complied with its obligations under Paragraph 268 and consider the imposition of appropriate relief in the event there is a finding of non-compliance or contempt. In the interest of judicial efficiency, time and expense, it is my recommendation that the Court proceed in accordance with this latter alternative.

Biennial Budget for Mental Health.

Although the Legislature is still at work, it recently enacted the biennial budget for FY 2010 and FY 2011. It reduced funding for private nonmedical institutions for adults with mental illness by eliminating $1,615,000 from the general fund for each of the two years of the biennium together with the federal fund matching share. Essentially the plan is to uncouple housing supports from treatment supports in so-called scattered site PNMI beds. I expressed concerns whether the treatment savings could be achieved without negatively impacting services, but the Department now has the task of demonstrating that the savings can be accomplished as planned.

The budget also reduces funding for community integration services by eliminating $1,683,730 for FY'10 and $1,910,941 for FY'11 from the general fund together with the federal fund matching share. This reduction is premised upon the substitution of a LOCUS score for a GAF score as part of the determination of eligibility for Section 17 services. I did not oppose this particular budget reduction.

In the last days of the budget session, the Legislature deappropriated $500,000 for each year from the special revenue accounts of Dorothea Dix Psychiatric Center and Riverview Psychiatric Center. This is noteworthy because it represents an example, in addition to those previously mentioned in the Monitor's report, of hospital funds being directed to non-hospital purposes.

Finally, an important feature of the budget as enacted is that it does not include additional funds ($3,476,288) requested by the Department for housing subsidies (BRAP) or the additional funds ($2,482,000) requested by the Department, in anticipation of an eventual unfavorable ruling regarding the Department's obligation to provide community mental health services for clients without Mainecare. These additional funds would have been used to address the critical housing shortage (in the last quarter the wait list for BRAP increased 41% over the prior quarter and applicants on the wait list coming from a psychiatric hospital increased 79%) and to provide

mental health services to class members and non-class member who are ineligible for MaineCare.

As shown on Exhibit A, attached hereto, non-match general fund support for non-Mainecare clients remains flat under the newly-enacted budget with the continued addition of $500,000 in funding from the State psychiatric hospitals. The mental health services – community budget which includes the funding set forth on Exhibit A, has been systematically reduced over the past eight years to the point where it is now $10,000,000 less per year than it was in FY'02. In these troubled economic times, it is good to hold flat funding, but at some point the service gaps created over the last several years for class members without MaineCare must be addressed.

Riverview Psychiatric Center.

My last progress report, dated December 4, 2008, noted that the Superintendent of RPC had resigned in September to accept employment at a private hospital. RPC was then being served by an acting Superintendent on a part time basis. I expressed concern that further delay in filling this vital position risked deterioration in the performance improvements that had been achieved. A hiring freeze was instituted in November of 2008 for all positions including direct care staff. It is worth noting that the hiring freeze was not occasioned by any reduction or curtailment of the budget at the hospital. The hospital budget remained unchanged and the minimum staffing ratios were maintained by the use of overtime.

The Monitor reported that as of February 13, 2009, there were twenty-three staff vacancies including eight nurses, seven Mental Health Workers, a physician, psychologist, research assistant, office assistant, Program Services Director, Chief Operating Officer, Quality Assurance Director, and the Superintendent.

In the early days of February I spoke with Commissioner Harvey and when I appeared before the Appropriations Committee on February 5, I was able to report that most of the positions had been released for posting. At this point in time most of those positions have now been filled. As of June 4, 2009 there are thirteen vacant positions and five anticipated vacancies subject to the hiring freeze. The vacant positions are mostly of recent vintage and will likely be released for posting in a short time. The management positions have been filled, or are in process, and the acting Superintendent, Mary Louise McEwen, has just been appointed as Superintendent as of the date of this report.

Although the staffing situation is now improved, the fact remains that the hospital has been under-staffed for more than six months and has operated with part time coverage in the top three leadership positions since September of 2008. The most recent quarterly report for Riverview provides some basis for concern that there has been slippage in the performance of the hospital. There is a continued increased use of restraint and seclusion, supervisors are not providing performance evaluations; client satisfaction rates are declining, client complaints about lack of respect are increasing, ongoing NAPPI training for staff has decreased and the medication error rate has increased. In addition, there appears to be an unusual rate of turnover in the staff psychologist positions. Hopefully, these performance issues will improve now that

the staffing problems have been addressed and full time management is about to be restored. Whether all of these performance problems can be attributed to the unexplained failure to maintain full staffing and to move quickly to fill the top management positions cannot be determined with certainty. It is beyond dispute, however, that the last six months have not helped the hospital maintain progress in achieving compliance. It is also beyond dispute that the next six months will be a challenging time for the new Superintendent if the hospital is to regain the road to progress.

The hospital continues to experience a relatively stagnant discharge situation. Discharge from the civil side of the hospital is hindered by a chronic lack of housing resources, the unavailability of community services for those without MaineCare and a critical shortage of community facilities for mental health clients with complex medical needs. (The one facility that serves those with complex medical needs, has a wait list of twelve.)

At present there are ten class members waiting for discharge and an eleventh who is no longer tracked because the prospects for community placement are non-existent because of complex medical needs. A number of these clients are not eligible for MaineCare. Eight of them require housing. The range of waiting time since the determination of clinical readiness for discharge ranges from 5 days to 537 with a median of 89 days.

The fact that there are only eleven clients awaiting discharge could be seen as a slight improvement, the total number has been higher. The fact of the matter is, however, that the civil side of the hospital, which is roughly equal to the forensic side of the hospital, has been slowly filling up with an overflow of forensic clients or those with some sort of a court hold. In recent weeks, as many as twelve or thirteen civil beds have been used to serve forensic clients. Forensic clients are not eligible for discharge based on clinical criteria alone. They remain in the hospital until a court authorizes their release. Thus the discharge statistics for civil clients must be considered in the light of a decreased client population. Out of thirty six civil clients, twelve, or one-third are stuck in the hospital well beyond the date of clinical readiness because of a shortage of community resources. When clients are not discharged in a timely manner, the scarce resources of the hospital are unavailable to others who are in critical circumstances in the community.

Development of Consumer Council.

The Consumer Council that was called for as part of the Department's Adult Mental Health Services Plan of 2006 has been finalized and is operational. It has hired an executive director and the Council has played an active and effective advocacy role before the Legislature and the Department during the past six months. In the past, the adult mental health system in Maine has suffered because of the absence of an effective and unified consumer voice. The initial efforts of the Council are promising and the increased involvement of consumers is crucial in terms of maintaining progress and achieving compliance.

Shift in Department's Approach to Clients Ineligible for MaineCare.

It is an unavoidable fact today that because of budget reductions, some class members are unable to receive the basic mental health services such as community integration, assertive community treatment and daily living supports. This situation directly contravenes the terms and spirit of the Settlement Agreement and the Adult Mental Health Services Plan. It is also true that non-class members ineligible for MaineCare are unable to obtain such services. Despite the current financial circumstances of the State, the Department must address the need for services and propose a plan to provide such services. Thus far, it is unclear whether the Department has any plan. A brief summary of the facts leading up to this point may be helpful:

- Prior to FY 2009, the Department funded mental health services included under the State's Medicaid Plan (i.e., community integration, ACT, daily living supports, skills development, out patient services, medication management and residential treatment) for class and non-class members ineligible for MaineCare with State funds, usually referred to as grant funds.

- In the Spring of 2008 the Department made a supplemental budget request to the Legislature to eliminate grant funding for such services. The request amounted to a reduction of approximately two million dollars and was premised on the conclusion that the Department had no obligation to fund such services for non-class members and, although it was obliged to provide services to class members by the Settlement Agreement, it represented to the Court that it could provide the necessary funding from other department funds. The Department also planned to stretch the available funds by shifting from grant funding to a fee for service. As I reported on December 4, 2008, experience did not match the Department's expectation and it suspended new non-MaineCare enrollments for services in some areas of the State by early November of 2008.

- The legality of the Department's budget proposal to eliminate services for non-class members ineligible for MaineCare, while extending services to class members ineligible for MaineCare was questioned and on October 29, 2008, I filed a recommendation that the withholding of services from clinically eligible non-class members would violate the parity provisions of the Settlement Agreement as construed by the Law Court, as well as the Department's own comprehensive plan. The Department did not challenge my recommendation and it has become binding.

- The Department now avoids discrimination by denying services to class members and non-class members alike.

- In anticipation of my ruling, in September the Department filed a supplemental budget request and a biennial budget request to provide services to non-class members and others who are ineligible for MaineCare. The biennial request was in the amount of approximately $2,500,000 for each year.

- On March 10, 2009, the Commissioner, responding to testimony from the Monitor concerning the unavailability of services, and my testimony concerning the outstanding budget requests that had not been presented for Legislative consideration, the

Commissioner presented prepared remarks to the Joint Standing Committee on Health and Human Services in which she stated that:

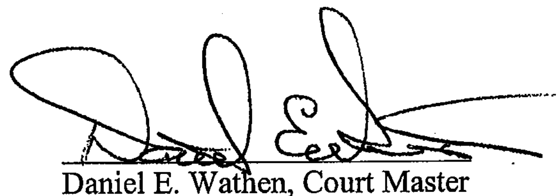
> Based on our preliminary cost estimates, the amount of funding that would be needed to provide the same services under the State Medicaid Plan to all those who are not eligible for MaineCare, plus the housing subsidies, vocational services, peer services and flexible WRAP funds that are outside the MaineCare program, would be **$74,323,859 in additional General Fund dollars year.** (emphasis in original).

In my judgment the preliminary estimate was deeply flawed, it was premised on national population figures and assumed that none of the 6,800 hitherto undiscovered persons with severe and persistent mental illness in Maine would be eligible for MaineCare. Subsequent estimates from the Department and others have tended to fall into a range from $3,000,000 to $13,400,000 in additional general funds for each year.

My own preliminary estimate of the cost for services for class and non-class member ineligible for MaineCare is approximately $3,000,000 in addition to the $2,750,000 that is currently budgeted and spent. In my judgment, the Department's initial budget request of $2,500,000 was not far from the mark and should have been presented and supported by the Department. In any event, in the coming months I hope to work with the Department to quantify the need for services, generate budget requests that reflect that need and "exert good faith efforts to obtain adequate funding from the Legislature." Compliance will never be achieved unless balanced funding is provided for both MaineCare clients and non-MaineCare clients. The Settlement Agreement predates the rise of MaineCare and makes no distinction between clients on the basis of MaineCare eligibility.

Conclusion.

We are at a critical stage in the effort to maintain progress in achieving compliance with the Settlement Agreement. It is imperative that in the next six months Riverview Psychiatric Center regains the path to progress. Although the financial circumstances of the State are challenging, the Department must, in the words of the National Alliance on Mental Illness, "focus on filling the existing gaps in services."



DATED: June 11, 2009

Daniel E. Wathen, Court Master

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EXHIBIT "A"

COMMUNITY SERVICE - CONTRACTS GENERAL FUNDS (non match), BLOCK GRANT ALLOCATIONS FY 09 - 10

	FY09 (as of 7/1/08) Beginning Balance	OAMHS Adjustments FY 09	Adjusted Total FY09	Curtailments FY09	OAMHS/DHHS REQUEST FY 09 SUPPLEMENTAL	GOVERNOR SUPPLEMENTAL FY 2009	FINAL FY 2009	OAMHS/DHHS GOV. REQ. FY 2010	GOVERNOR PROPOSED FY 2010	LEGISLATURE APPROVED FY 2010
TOTAL	$ 24,595,318.00	$ -	$ 24,595,318.00	$ (412,326.00)	$ 1,005,392.00	$ (361,657.00)	$ 24,233,681.00	$ 5,958,288.00	$ 24,539,066.00	$ 24,539,066.00
Miscellaneous: Disability Rights Center, NAMI, Maine Center on Deafness, Interpretor Services, Maine Coalition Against Sexual Assault,etc.	$ 621,856.00	$ -	$ 621,856.00	$ (12,518.00)		$ (12,518.00)	$ 609,338.00		$ 621,856.00	$ 621,856.00
ACT	$ 321,061.00	$ 323,019.00	$ 644,080.00		$ 15,500.00	$ -	$ 644,080.00	$ 62,000.00	$ 644,080.00	$ 644,080.00
Specialized Direct Services Home Based Elder Services	$ 303,082.00	$ -	$ 303,082.00				$ 303,082.00		$ 303,082.00	$ 303,082.00
Community Integration (1)	$ 1,000,000.00	$ 342,591.00	$ 1,342,591.00	$ (350,297.00)	$ 450,000.00	$ (350,297.00)	$ 992,294.00	$ 1,800,000.00	$ 1,342,591.00	$ 1,342,591.00
Housing Subsidies (BRAP)	$ 2,972,414.00	$ -	$ 2,972,414.00		$ 421,723.00		$ 2,972,414.00	$ 3,476,288.00	$ 2,972,414.00	$ 2,972,414.00
Individual and Group Counseling (includes Baxter)	$ 232,600.00	$ -	$ 232,600.00		$ 67,500.00	$ -	$ 232,600.00	$ 270,000.00	$ 232,600.00	$ 232,600.00
Medication Management	$ 923,129.00	$ -	$ 923,129.00			$ -	$ 923,129.00	$ 300,000.00	$ 923,129.00	$ 923,129.00
Outreach	$ 203,600.00	$ -	$ 203,600.00			$ -	$ 203,600.00		$ 203,600.00	$ 203,600.00
Wraparound and Flex Funds	$ 1,660,169.00	$ (799,383.00)	$ 860,786.00			$ -	$ 860,786.00		$ 860,786.00	$ 860,786.00
Crisis Mobile	$ 5,368,892.00	$ -	$ 5,368,892.00			$ -	$ 5,368,892.00		$ 5,268,892.00	$ 5,268,892.00
Crisis Stabilization Residential	$ 1,387,527.00	$ -	$ 1,387,527.00			$ -	$ 1,387,527.00		$ 1,387,527.00	$ 1,387,527.00
Peer Services (Including Warm Lines, Self Help, Social Clubs, Consumer Council System, Office of Advocacy)	$ 2,896,187.00	$ -	$ 2,896,187.00		$ 50,669.00	$ 50,669.00	$ 2,946,856.00	$ 50,000.00	$ 2,939,935.00	$ 2,939,935.00
Inpatient Hospitalization	$ 485,000.00		$ 485,000.00				$ 485,000.00		$ 485,000.00	$ 485,000.00
Daily Living Supports	$ 100,000.00	$ 133,773.00	$ 233,773.00			$ -	$ 233,773.00		$ 233,773.00	$ 233,773.00
Day Treatment/ Day Supports	$ 64,000.00	$ -	$ 64,000.00			$ -	$ 64,000.00		$ 64,000.00	$ 64,000.00
Transportation	$ 358,832.00	$ -	$ 358,832.00			$ -	$ 358,832.00		$ 358,832.00	$ 358,832.00
Housing Subsidies	$ 1,090,800.00	$ -	$ 1,090,800.00			$ -	$ 1,090,800.00		$ 1,090,800.00	$ 1,090,800.00
Residential Treatment (PNMI and Specialized NFs	$ 3,126,308.00	$ -	$ 3,126,308.00			$ -	$ 3,126,308.00		$ 3,126,308.00	$ 3,126,308.00
Supported Employment	$ 1,479,861.00	$ -	$ 1,479,861.00	$ (49,511.00)		$ (49,511.00)	$ 1,430,350.00		$ 1,479,861.00	$ 1,479,861.00

Rev. 6.09.2009

(1) Includes $500,000 for Community Integration, ACT from RPC and DDPC

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