December 4, 2007

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 May 1, 2007 to November 30, 2007:

Adoption of Compliance Standards:

With the assistance of counsel and the Department, complete and detailed standards for evaluating and measuring the Department's compliance with the terms and principles of the Settlement Agreement were adopted on October 29, 2007. Compliance standards, together with the Comprehensive Plan, complete the procedural structure called for by the Consent Decree. With an approved plan and an agreed means of measuring its execution, attention can now effectively be focused on the performance of the Department.

Managed Care:

As detailed in my prior reports, the Department has been engaged in an effort to implement managed care for adult mental health services for nearly the past two years. Over time, the focus of the Department shifted from a full at-risk managed care plan to a more limited proposal for the retention of an Administrative Service Organization. The Comprehensive Plan, approved on October 13, 2006, provides that "Any managed care

contract will be consistent with the principles and requirements of the Settlement Agreement and with this plan," and "will be submitted to the court master for review and approval." Effective September 1, 2007, the Department entered into an agreement with Innovative Resource Group LLC, d/b/a APS Healthcare Midwest for managed care services. The agreement was entered into without my approval and, in my judgment, is not consistent with the principles and requirements of the Settlement Agreement and the Comprehensive Plan.

A brief summary of my interaction with the Department with reference to the ASO Agreement may be helpful: I first received a draft agreement for review on September 13, 2007. After exchanging suggested changes, but without reaching agreement, I was informed on September 27, 2007 that the Department would like a prompt response because it needed to proceed with execution "without further delay." After further exchanges of suggested changes, with some minor adjustments accepted, I informed the Department on October 19, 2007, that I was unable to approve the ASO Agreement as proposed because it was not linked to the Comprehensive Plan, and that I would issue a formal order denying approval within a matter of days. This prompted further conversations, and on October 24, I forwarded, for the Department's consideration, a draft of a formal statement of my objections to the ASO Agreement. This statement gave rise to further exchanges of suggested changes, culminating on October 30 with a request from the Department that I provide an additional opportunity for them to develop a Rider that would, in accord with my suggestions, link the ASO Agreement to the Comprehensive Plan in a meaningful way. Ultimately, I received a response on November 21, 2007, informing me that the Department was unable to

accommodate my suggestions, while offering alternatives that were unacceptable. At this point that I learned that the ASO Agreement had been executed and had become effective as of September 1, 2007, with the final processing occurring in the Division of Purchases on October 29, 2007.

It seems almost a tautology that a comprehensive plan for managing a mental health system should cover all aspects of management, whether delivered by the principal or an agent. My decision not to approve the ASO Agreement was based on the conclusion that it fails to demonstrate consistency with the principles and requirements of the Settlement Agreement and the Comprehensive Plan, in, at least, the following respects:

1. The ASO Agreement is not aligned in any significant manner with the Comprehensive Plan that guides the Department's delivery of services and it has no obvious connection or means of coordination with the Plan. Although the ASO Agreement requires reports concerning the number of case managers or community integration workers assigned to class members, in no other significant respect is it subject to or connected with any of the other twenty-eight performance standards that apply to community services under the Plan. In the absence of any meaningful linkage between the management services purchased by the Department and the management responsibilities that it has assumed in the Comprehensive Plan, there is no reasonable basis to conclude that the managed care services, conceived as a means of controlling costs, will support rather than hinder the Department's efforts to comply with the Settlement Agreement.

2. A major component of the Comprehensive Plan relates to response times and unmet resource needs. Table 1 of the Plan distinguishes between the expected response time for providers to either provide the service or make interim plans, and the point at which the failure to provide the service "signifies a lack of capacity in the system and triggers the need for development of additional resources." The first timeframe relates to managing individual service delivery while the second relates to system capacity. The ASO Agreement makes no reference to response times for service and imposes no obligation on the Contractor to manage, monitor, support or report on either aspect of service delivery. Although the ASO Agreement requires the Contractor to provide a gap analysis in year 1, it calls for a comparison with "national guidelines" rather than a comparison with the specific standards and requirements adopted in the Comprehensive Plan. Having spent considerable time and effort in defining the specific Maine guidelines that will lead to compliance with the Settlement Agreement, it seems imprudent for the Department to contract for management services without a commitment from the Contractor to support and observe them.

3. The standards for determining the clinical appropriateness of services, prior authorization, and utilization review are undefined, as are the standards for challenging an adverse determination. Such standards will be fashioned by the Contractor and the Department after the program is in operation, and this may in fact be necessary. As the ASO Agreement now stands, however, members have an uncertain basis for requesting services or challenging adverse determinations. Given that the managed care initiative in Maine has been advanced in part as a means of cutting or containing costs, the Comprehensive Plan's requirement of prior approval by the court master, which carries

with it an opportunity for judicial review, should not be quickly ignored or converted into an opportunity for participation.

4. The Department has suggested that the ASO Agreement is confined narrowly to the provision of eligibility determination, prior authorization, utilization review and limited retrospective review. In fact, the ASO Agreement confers broad and extensive management responsibility on the Contractor with regard to treatment plans, utilization standards, supervision of providers' services, audit, quality improvement, provider relations, training and network development, to name just a few. Under the terms of the ASO Agreement, the Department seeks to partition patient care activities between the Contractor and the Department, with only the Department obliged to support and pursue the performance standards of the Comprehensive Plan. Such an illogical and complicated division of responsibility and accountability can only impede the effort to improve coordination and continuity of care. It is one thing to divide management responsibilities between the Department and its Contractor, it is quite another to have two sets of management principles and standards, one higher and one lower, and hold only the Department accountable to the higher standards.

Recently, I met with representatives of the Department and APS Healthcare Midwest and they expressed a willingness to consider amending the ASO Agreement to accommodate some of the concerns that I have set forth.

Implementation of Comprehensive Mental Health Plan:

The Department's report for the most recent quarter ending September 30, 2007, attached hereto as Exhibit A, documents the progress made by the Department in implementing the Plan. Progress has been made but a number of the Plan components

demonstrate levels of delay of ten months to one year: component #14, hospital contracts for involuntary inpatient beds; component #33, realignment of residential services; component #37, housing database for PNMI; component #58, evaluation of peer services; component #62, increase crisis beds; component #64, create observation beds; component #68, telemedicine for psychiatric consultation; component #73, emergency department training; component #88, expanded vocational rehabilitation services; and component # 116, mental health agency licensing reviews. Whether the achievement of these goals is entirely within the control of the Department, or not, it is apparent that there has been some slippage in the accomplishment of short term goals.

The primary area of concern, however, is the Department's delay in meeting its obligation to assess and remedy service gaps in the seven community networks. In my progress report of May 18, 2007, I noted that reasonable access to core services is a key element of the Plan. Accordingly, I recommended that the Department comply with the Plan not later than by July 15, 2007, and "identify the resource gaps in each network, establish remedial measures with fixed time frames for implementation and request additional funding to cover those gaps." Having initially agreed to provide the assessment by November of 2006, the Department did not challenge my recommendation. On July 13, 2007, it presented the assessment of resource gaps attached hereto as Exhibit B. Plaintiffs' counsel questions the scope and content of the analysis as wells the methodology employed by the Department in gathering this information, but, in any event, it is evident that the assessment does not comply with the requirements of the Plan. For example, significant gaps are noted in residential, outpatient and medication management services, but no remedial measures are identified

other than continuing to access available funds for residential needs and conducting further study and analysis of outpatient and medication management services. With respect to residential assistance, it is particularly noteworthy that a waitlist for the Departments' Bridging Rental Assistance Program (BRAP) went into effect as the assessment was produced. Since that time, BRAP has been limited to five vouchers a week for the entire state. As of August 17, there were forty-five people on a four-tier waitlist, with those below the second tier left virtually without hope. The quarterly report reveals that 103 people are currently on the waitlist, with 80 of those being homeless. As presented, the assessment failed to address this critical need.

Plainly and simply, the Department has not yet completed the first step in discharging its responsibility under the Plan to assure that each of the seven networks provide reasonable access to at least the eight core mental health services. The Department has failed to establish remedial measures and fixed time frames for implementation for areas of inadequate coverage for core mental health services. I discussed my concerns with the Department shortly after receiving the assessment. In recent weeks, the Department has made an effort to address some of the resource gaps more effectively. The emergency request for BRAP funding, noted recently in the quarterly report, is one example. In addition, on November 30, 2007, the Department amended its assessment of resource gaps by filing the document attached hereto as Exhibit C. Both of these steps are positive, but the question remains whether the Department has, in accordance with the Plan, diligently pursued the necessary preliminary steps for providing reasonable access to core mental health services.

Recommendation:

The action of the Department with respect to managed care and the assessment of resource gaps affect the core of the Settlement Agreement and the Comprehensive Plan. Accordingly, it is my recommendation that this Court exercise the supervisory authority reserved to it under paragraph 8 of the Consent Decree and paragraph 12 of the Settlement Agreement to inquire whether, in respect to the matters addressed herein, the Department has complied with the obligations it has assumed under the Comprehensive Plan, and to issue such remedial orders or directions to the Court Master as the Court may determine.

DATED: December 4, 2007

Daniel E. Wathen
Court Master