

# MAINE STATE LEGISLATURE

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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 June 1, 2009 to November 30, 2009.

**Resolution Regarding Departmental Advocacy.**

In my last progress report dated June 11, 2009, I described an unresolved controversy concerning the obligation of the Department to advocate before the Maine Legislature for the funding necessary to achieve compliance with the Consent Decree. It was my view that the Department was not in compliance with its obligation to advocate for adequate funding. Before the Court established a hearing schedule for the controversy, the parties and I agreed upon the protocol attached hereto as "Exhibit A". The protocol should improve the quality and timeliness of the information provided by the Department. It also provides a more specific definition of the Department's obligation under Paragraph 268 of the Settlement Agreement to "exert good faith efforts to obtain adequate funding from the Legislature." In addition to the protocol, I adopted the revised compliance standard attached hereto as "Exhibit B" which specifies the methods for measuring the Department's compliance with Paragraph 268 and complements the advocacy protocol. With this procedural issue now resolved to the satisfaction of all, it is my recommendation that the Court dismiss its outstanding order to show cause dated December 27, 2007.

**Administrative streamlining.**

In October, the parties and I proposed an amendment to the paragraph 281 of the consent decree to ease the administrative burden involved in reporting on public wards without impairing the opportunity for oversight. The Court accepted the amendment and I have amended the approved plan accordingly. At present, the parties and I are considering a change in the Department's procedure for maintaining a current and accurate list of class members. Once again, the goal will be to ease the administrative burden without impairing the quality of the effort. I expect to make a recommendation on this matter in the near future.

## **Overview of Department's Quarterly Progress Reports With Regard to Community Mental Health.**

The Department's methods of reporting are satisfactory and improving. Considering the reports for the last two quarters, it is evident that substantial progress has been made with respect to the system development portion of the approved mental health plan. Of the 119 components included in the original plan, the Department reports that 112 have been completed or deleted. The final certification process has just begun and I have accepted the certification of completion regarding one component--the establishment of community service networks. Focusing on the compliance standards, however, the Department claims to have fully met only 5 of the 18 compliance standards included in the reports. The most significant deficiencies noted in the delivery system relate to the timely assignment of case workers, staffing ratios for ACT teams as well as guardians for public wards, the handling of unmet needs and interim plans in the individual support planning process, housing and the availability of treatment services. Deficiencies in these areas reflect the adverse budgetary changes in the last two years and hinder the Department's ability to comply with its own comprehensive mental health plan. These critical areas are also most susceptible to continued deterioration from future budget cuts.

### **Availability of Community of Mental Health Services.**

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.

Because of budgetary developments, the negative effects noted in the Monitor's report have continued in the last six months and are likely to become even more profound in the near future. The unmet needs data gathered by the Department is not totally current or reliable at this point, but considered in light of other data points, together with anecdotal information, it confirms that many people with severe and persistent mental illness are delayed or denied in receiving necessary mental health services. Contrary to the notion that MaineCare is an entitlement program, the shortage of mental health services seems to affect, to a degree, those with MaineCare as well as those without it. The daily waitlist reports for Community Integration and ACT services maintained by APS Healthcare ([www.qualitycareforme.com](http://www.qualitycareforme.com)) and the unmet needs data support the conclusion that mental health services are often either unavailable or unavailable in a timely manner.

ACT services, an intense form of treatment, are required by people whose symptoms require a very high level of daily care. People receiving ACT services are often one step removed from requiring hospitalization or have just been released from hospitalization. Community Integration services are on the opposite end of the treatment spectrum. The provision of a caseworker is the most basic form of mental health service offered by the State, but it is critically important in navigating the complexities of the mental health system, developing a treatment plan and gaining a foothold on the road to recovery. Community integration services are so basic that the Department bound itself in the Settlement Agreement to insure the assignment of a community support worker within three working days of a request from a class member who is not hospitalized and two working days for a hospitalized class

member. These standards have never been achieved by the Department and the current data confirms that we continue to miss the mark by a wide margin. Management and supervision can always be improved but at this point, and for at least the past two years, a significant impediment to compliance has been adequate funding for mental health services.

BRAP funding for housing provides the clearest and best documented illustration of the deteriorating service resulting from a lack of adequate funding. The Department's request for increased BRAP funding was denied in the last legislative session. The number of people waiting for a BRAP voucher increased 33% in the first quarter of this fiscal year to a total of 248. The number of persons who are waiting after having been discharged from a psychiatric hospital within the last six months has increased 54%. Homeless applicants have increased 45%.

It is beyond dispute that Maine's delivery system for community mental health services has been under increasing strain during at least the past two years and faces the current and developing budgetary challenges in a weakened condition with services in short supply.

### **Budget Outlook for Adult Mental Health.**

On November 20, 2009, Governor Baldacci issued a curtailment order that included the following provision:

***Mental Health community- \$1,341,864***

***Reductions of \$350,000 payments to 6 hospitals for involuntary psychiatric admissions for uninsured patients; reductions to reimbursements for a variety of community supports for uninsured persons, reductions in support for family support, respite and public education, consolidation of warm line services and reductions in training funds.***

Stripped of budget technicalities, the order essentially eliminates the limited and inadequate general fund support that has been available for mental health services for class members and non-class members who are ineligible for MaineCare coverage. Among the most critical services affected or eliminated are hospitalization, community integration (caseworkers), daily living support services, ACT services and family support services, public education and respite services provided by NAMI.

It is important to bear in mind that the \$63,144,713 curtailment is designed to deal only with the \$69 million gap in revenues experienced from July through October. In addition, the curtailment order recites that \$24 million in losses were carried over from the close of the last fiscal year, "leaving revenues at approximately \$93 million behind budgeted levels, year to date." On top of that, the current budget has booked \$30 million in savings from streamlining initiatives that have yet to be developed. The Appropriations Committee has requested that the Health and Human Services Committee find \$9 million of the booked savings in the Department's budget. Finally, there are informed estimates circulating that revenues may decline by an additional \$200 to \$400 million over the balance of the biennium. If those dire forecasts are confirmed, the additional reduction in expenditures will be addressed in supplemental budget proposals during coming legislative sessions.

The satisfaction of future budget reductions solely by continued reductions in general fund support could eliminate all Department general fund services, including the limited and

vitaly important funds that remain available for adult mental health. The coming legislative session will be a challenging and important time for the Department and the mental health community. As I pointed out in my last report, the service gaps created by budget reductions must be addressed at some point, and this would be true even if there were no consent decree. Persons denied necessary mental health services; reappear in emergency rooms, hospitals, shelters and jails and the end result is often more costly and less effective. The Department's response to the fiscal challenges and its newly-defined obligation to advocate in good faith for needed resources will be of considerable importance in the coming months.

### **Riverview Psychiatric Center.**

Riverview and its predecessor AMHI have been important focal points in the Department's efforts to live up to its contractual obligations to improve the complete mental health system, hospital as well as community. Historically, tragic conditions at AMHI triggered the consent decree. As the tertiary mental health facility for Maine that provides both forensic and civil hospitalization, Riverview is appropriately viewed as an important point of reference for gauging the status of the entire system administered by the Department. Although the hospital still has a way to go to achieve full compliance, it is a far better institution today than it was even six years ago. Recently, primarily as the result of a new facility opening in the Bangor area, Riverview has been able to arrange community placements for a number of civil clients with complex medical needs in addition to serious mental health issues. Some of these people had been "stuck" in the hospital for a year or more. As a consequence, the discharge data for civil clients is better today than it has been at any time in recent years. At present only four clients are experiencing delays in discharge beyond 30 days and two of those have declined a number of community placements, while one of the remaining two requires a placement that can accommodate complex medical needs and the other has a special need for accessible housing. The improvement, however, will be temporary. In general, the facilities that are available for community placement are often inconveniently located from the perspective of the client and their family. Facilities for elderly and medically-compromised clients continue in short supply now that the Bangor facility is filled. The curtailment order will necessarily complicate the placement of hospital clients without MaineCare. I am impressed, however, by the effort, ability and perseverance of the staff at Riverview in seeking appropriate community placements for clients no longer benefiting from hospitalization.

Areas of hospital performance that require improvement as reflected in the most recent quarterly reports and confirmed by my on-site visits are client satisfaction generally and with particular reference to recent changes regarding the availability of food, timely response to grievances, timely production of forensic reports, the incidence of restraint, regular and timely AIMS testing for side effects to psychotropic medications and the delay and expense in filling staff vacancies occasioned by the hiring freeze process. Although it is difficult to document and measure, my visits and discussions at Riverview cause me concern that communications within the hospital are less open and that the focus has shifted, slightly but perceptibly, from recovery toward custody and control.

In order to maintain the significant progress that has been achieved at Riverview, and to maintain momentum in difficult times, I urge the Department, the Administration and the Maine Legislature to undertake and support the following actions in the coming months:

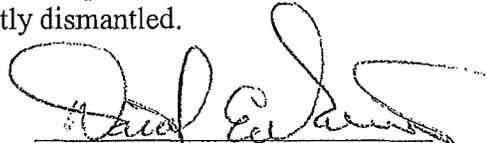
1. Exempt nursing, direct care and treatment-related positions from the hiring freeze

2. Maintain the Riverview budget and expend it only for services at the hospital
3. Exert a vigorous management effort to prevent the reemergence of a custodial and punitive culture at Riverview
4. Continue staff training, and retraining if necessary, in the goals, philosophy and techniques of recovery-oriented treatment

**Conclusion.**

This is a critical time for the people of Maine, and particularly for those individuals and families who deal with severe and persistent mental illness. It would be unreasonable to suggest that the mental health services provided by the Department be exempt from the recession and the resulting revenue reductions that we currently experience. On the other hand, we must not forget that in an earlier time of serious systemic failure the Department obligated itself to provide a defined level of mental health services and enlisted the authority of the Courts to enforce that solemn obligation to the people of Maine. The Department adopted a comprehensive mental health plan in 2006 and, under difficult circumstances, it has made significant progress in implementing that plan. Our modest goal during this period of financial stress must be to insure that essential mental health services are maintained, and that the benefits and protection conferred on all of the people of Maine under the Department's plan are, in a worst-case scenario, only temporarily deferred rather than permanently dismantled.

DATED: December 8, 2009



Daniel E. Wathen, Court Master

STATE OF MAINE  
KENNEBEC, ss.

SUPERIOR COURT  
DOCKET NO.: CV-89-88

PAUL BATES, et al.,	)
	)
Plaintiffs	)
	)
v.	)
	)
COMMISSIONER, DEPARTMENT	)
OF HEALTH AND HUMAN	)
SERVICES, et al.,	)
	)
Defendants	)

RECOMMENDATION

On December 22, 2008, I issued a proposed funding recommendation that became the subject of an unsuccessful effort at informal dispute resolution. By letters dated respectively July 7, 2009 and July 14, 2009, the Plaintiffs and the Department each invoked formal dispute resolution pursuant to paragraph 295 seeking to clarify the Department’s obligations under paragraph 268. As a result of a series of discussions and negotiations, the parties are in agreement that the following recommendation may be entered:

**By agreement of the parties and with the concurrence of the court master, the following protocol is adopted to clarify communications regarding the budget:**

1. After providing a copy of the final budget approved by the Legislature in accordance with paragraph 268 of the Settlement Agreement, the Department will meet with the court master and plaintiffs’ counsel within the first two months of each new fiscal year, to review and discuss the Department’s work plan for expending the funds appropriated by the Legislature for that fiscal year for adult mental health services. This meeting will include an opportunity for the parties and the court master to discuss their preliminary assessments of the adequacy of the funds appropriated to satisfy the Department’s obligations under the Consent Decree Plan, as well as an opportunity to discuss the budget proposals for adult mental health services that the Department is considering.
  
2. The Department will provide to the court master and plaintiffs’ counsel, promptly following submission, copies of the budget requests for adult mental health services that it submits to the Governor’s office through the Department of Administrative and Financial Services (DAFS) for the biennial budget, in the even numbered years, and for the supplemental budget, in the odd numbered years. If compliance with budget instructions from DAFS means that the

Department's budget submissions will reflect less than the amount of funding reasonably calculated to meet its obligations under the Consent Decree Plan, then the Department must also submit requests that are reasonably calculated to meet its obligations under the Consent Decree Plan.

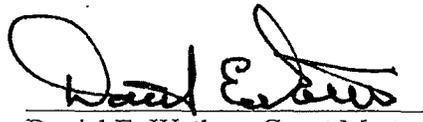
3. The Department will provide to the court master and plaintiffs' counsel, promptly following submission, copies of any budget proposals submitted to DAFS in response to instructions regarding proposed curtailments. Upon written request of the court master and in a timely manner, the Department will provide a statement describing the impact of proposed reductions on the Department's ability to meet its obligations under the Consent Decree Plan.

4. After the Governor submits a proposed biennial or supplemental budget to the Legislature, the Department will notify the court master and plaintiffs' counsel of any budget requests made by the Department to satisfy its obligations under the Consent Decree Plan that were not included in the Governor's proposed budget.

5. The Department will present to the Legislature's Joint Standing Committee on Appropriations and Financial Affairs and the Joint Standing Committee on Health and Human Services (in writing and orally, if permitted to make an oral presentation) the budget requests that were made by the Department to satisfy its Consent Decree obligations, including those that were not included in the Governor's proposed budget. The presentations to each committee will occur before that committee has taken final action on the Governor's proposed budget. In the presentation, the Department will explain the scope and importance of the requests and express support for obtaining these funds in order to meet the Department's Consent Decree obligations. Any subsequent Department presentations and responses to legislators' questions regarding these budget requests at committee work sessions, or at other meetings with legislators held at the direction of the full committee, shall be consistent with the content of this presentation. The Department shall submit copies to the court master and plaintiffs' counsel of its written presentation, prior to presenting it to the committees and shall thereafter submit copies of any written communications subsequently submitted to these committees regarding these budget requests. For purposes of this paragraph, "the Department" means the Commissioner or the Commissioner's authorized designee.

6. The parties and the court master will re-evaluate this protocol to determine whether it should be terminated or revised, before the Governor submits the next biennial budget. The terms of the protocol shall remain in effect until such time as the terms have been modified or terminated by agreement of the parties and approval of the court master, or by order of the court.

Dated: September 1, 2009

  
Daniel E. Wathen, Court Master

STATE OF MAINE  
KENNEBEC, ss.

SUPERIOR COURT  
DOCKET NO.: CV-89-88

PAUL BATES, et al., )  
 )  
 Plaintiffs )  
 )  
 v. )  
 )  
 COMMISSIONER, DEPARTMENT )  
 OF HEALTH AND HUMAN )  
 SERVICES, et al., )  
 )  
 Defendants )

CORRECTED  
AMENDMENT TO COMPLIANCE  
STANDARDS

**After consulting with counsel, I hereby amend the compliance standards regarding paragraph 268, as approved on October 29, 2007, and last amended on September 1, 2009 to read as follows:**

Compliance with the Department’s ¶268 obligations would be demonstrated by:

- submission of the budget proposals for adult mental health services given to the Governor, with pertinent supporting documentation showing requests for funding to address unmet needs; [II.3] and
- submission of the written presentation given to the legislative committees with jurisdiction over the DHHS budget (currently the Joint Standing Committee on Appropriations and Financial Affairs and the Joint Standing Committee on Health and Human Services), which must include the budget requests that were made by the Department to satisfy its obligations under the Consent Decree Plan and that were not included in the Governor’s proposed budget, an explanation of the scope and importance of the requests and an expression of support for obtaining these funds in order to meet the Department’s obligations under the Consent Decree Plan. [II.4]

The above-described submissions constitute the defendants’ prima facie showing of compliance with the obligation to “take all necessary steps and exert good faith efforts to obtain adequate funding from the Legislature,” under ¶268. The burden would then shift to plaintiffs to present contrary evidence that the defendants had acted in bad faith with respect to these obligations. Evidence presented need not be restricted to evidence pertaining to defendants’ actions before or communications with the Joint Standing Committee on Appropriations and Financial Affairs and the Joint Standing Committee on Health and Human Services.

Dated: September 29, 2009

  
Daniel E. Wathen Court Master