STATE OF MAINE
KENNEBEC, ss.

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

PAUL BATES, et al.,

Plaintiffs

v.

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 January 16, 2013 to June 30, 2013.

Riverview Psychiatric Center

Although Riverview Psychiatric Center is not presently supervised by the Court, given its importance to the overall mental health system, there are significant developments that should be noted. As discussed in the last two progress reports, Riverview has been challenged by a substantial increase in the number of forensic admissions since 2012. The imbalance between forensic and civil clients persists and worsens. The situation is aggravated further by the fact that client-specific security concerns on Lower Saco, the most acute forensic wing of the hospital, has in recent months required the full time presence of two correctional officers around the clock and a reduction in the overall capacity of the wing. The substantial increased security costs are funded from the hospitals existing budget.

Since March 1, 2013, the hospital has experienced two serious security situations on the Lower Saco Unit which have led to two "substantial allegation surveys" by the Center for Medicare & Medicaid Services ("CMS") and the Licensing Division of the Maine Department of Health and Human Services ("DHHS") acting as the State Survey Agency. One incident involved a client assaulting a member of the staff and the second involved jeopardy to the health and safety of patients arising from the actions of correctional officers providing unit security. In both instances, the CMS surveys have been conducted promptly and thoroughly, and CMS has issued a detailed list of deficiencies. The hospital has submitted a plan of correction for consideration by CMS and took immediate steps to remove the causes of patient jeopardy. CMS has an effective remedy for correcting deficiencies, it has both the authority and the intention to suspend payment for Medicare services unless the deficiencies are addressed to its satisfaction.

When I recommended in 2011 that this Court suspend active supervision of Riverview, I noted that other adequate mechanisms exist to monitor Riverview's operations. Among the mechanisms mentioned were the survey procedures of CMS and the Licensing Division of DHHS. I have examined the reports of the surveys conducted by CMS, the plans of correction submitted by Riverview, and I have discussed the incidents with the Superintendent of the hospital. Although the deficiencies noted in the CMS surveys could constitute a violation of the

Consent Decree and serve as the basis for requesting reinstatement of active supervision under the terms of this Court's December 8, 2011 order, I do not at this time make such a request. At this point, CMS has yet to act upon the plan of correction, and it is too early to judge the adequacy and effectiveness of its response.

The Maine Legislature considered bills submitted by the administration to alleviate the increased demand for forensic services at Riverview. The Legislature enacted LD 1433 that allows, but does not require, the State Forensic Service to observe an incarcerated person at a correctional facility, rather than at Riverview, for evaluation purposes. A more comprehensive approach was presented in LD 1515 that would provide mental health services in a correctional facility, rather than Riverview, for persons transferred from jail, persons charged with crimes seeking mental evaluations and adults found incompetent to stand trial. Essentially, this bill would create a mental health unit in a correctional facility and reserve the increasingly limited forensic capacity at Riverview for clients who have been found not criminally responsible. LD 1515 received approval in both the House and Senate but carried a fiscal note of more than $3,000,000 per year and, in the end, was not funded by the Appropriations Committee. The bill remains with the Committee.

The budget of the hospital remains adequate but barely so. In my last progress report, I noted that the hospital needs for FY 13 included $1,085,944 for an audit of Disproportionate Share Funding ("DSH"). This amount was provided in the Department's budget. The Legislature, however, took no steps to address the potential loss of future DSH funding that will result from an increased forensic population

The funds for ACT team services for FY 14 and 15 were provided in the amount requested, namely $216,857 per year. $50,000 was provided in FY 14 for sidewalk repairs and upgrading the hospital duress system. The funds requested for replacing an obsolete electronic medical records platform were not provided but the budget contains authorization to transfer available balances from Riverview personal services appropriations for that purpose. I am advised that the available balances may be sufficient to cover the cost of a new system. Finally, staffing at the hospital remains adequate although the coverage and assignment of the nursing staff is included in the operational deficiencies noted by CMS.

Developments in Community Mental Health

The availability of the much needed funding for additional mental health services in the community, particularly for those ineligible for MaineCare, continues to presents a mixed and shifting picture. In approaching the biennial budget, DHHS requested an additional $4,664,250 for additional mental health services for each of the two years. The Governor's proposed budget included $2,000,000 for FY 14 but nothing for FY 15. While the budget was pending before the Legislature, the Attorney General designated $2,700,000 from a settlement with Janssen/Risperdal for mental health services for FY 14. At this point, it appeared that DHHS might be fully funded for the first year of the biennium and have a golden opportunity to demonstrate the effect of adequate funding on waitlists for mental health services. Ultimately, however, the Legislature accepted the funds designated by the Attorney General but rejected the $2,000,000 proposed by the Governor, leaving DHHS with $2,700,000 for a single year. To its credit, the Department now proposes to make available carryover non-lapsed funds from FY 12 and 13 in the total amount of $2,015,000 for additional mental health services for FY 14, thereby

recapturing the opportunity to demonstrate the effect of adequate funding on waitlists in the coming fiscal year.

The most persistent and glaring example of non-compliance with the Consent Decree is the Department's failure to promptly provide timely community integration services ("CI") for those with severe and persistent mental illness. Essentially, CI involves the assignment of a caseworker to assist and guide the client in constructing an individual service plan and accessing needed services that are available within the community. CI is the most basic form of mental health service and the gateway to all other forms of mental health treatment. As I have mentioned before, the Department entered into a binding agreement in 1990 that class members would have a caseworker assigned within 2 days of a request if hospitalized and 3 days if not hospitalized. Non-class members were to have one assigned within 7 days. **Six months ago, I reported that there were a total of 387 people on a wait list for assignment of a case worker and on average they were experiencing a wait of more than 40 days, with some waiting up to 300 days. Today, the situation is worse. 543 people, both class members and non-class members including those who are MaineCare eligible and those who are not, are now on the waitlist and they are waiting an average of 58 days, with some waiting for more than 350 days.** Clearly, the trend is in the wrong direction, although it may be influenced to some extent by the funding uncertainty that accompanies the budget process and the end of the fiscal year.

The challenge for the Department and its Office of Substance Abuse and Mental Health Services ("SAMHS") is real but it should be manageable. Within the last year, SAMHS has improved its capacity for tracking and monitoring waitlists. Beginning July 1, 2013, SAMHS will enhance the information exchange with state staff and service providers by providing a weekly list by agency of the number of consumers on the waitlist and a week by week comparison to calendar year 2012. In addition, it will post on its website APS reports, and waitlists by provider and service. SAMHS has a process improvement project underway with a pilot group of six providers and has included performance measures in all of its provider contracts. These changes are designed to produce improved contract management. With full funding available for FY 14, SAMHS has a unique opportunity to reduce the waitlists for services and demonstrate its ability to achieve a reasonable degree of compliance with the Consent Decree, thereby providing a track record to persuade the Legislature to fully fund mental health services in FY 15 and beyond. This fiscal year could be a year of accomplishment.

In the coming months, I will continue to meet with the SAMHS staff on a monthly basis and will report on progress.

Dated: July 18, 2013

Daniel E. Wathen, Court Master