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Admitted in: ME

February 4, 2021

Michele Lumbert, Clerk
Kennebec County Superior Court
1 Court Street, Suite 101
Augusta, ME 04330

Re: Paul Bates, et al. v. Commissioner, Department of Health and Human Services, et al.
Docket No. CV-89-088

Dear Michele:

Enclosed please find a progress report and attachments pursuant to paragraph 299 dated February 4th 2021 in the above-captioned matter. I provided a copy to Justice Stanfill.

Thank you for your attention to this letter and enclosure.

Sincerely yours,

Daniel E. Wathen

DEW/jjq
Enclosure

Cc/w/enc: Molly Moynihan, AAG
(Via email) Phyllis Gardiner, AAG
Mark Joyce, Esq.
Kevin Voyvodich, Esq.
Peter Rice, Esq.

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

This report covers the period from October 2, 2019, the date of my last report, to the present date.

Path to Substantial Compliance

The Consent Decree came into existence on August 2, 1990, and incorporated a settlement agreement signed by the parties. That agreement consists of 103 pages with 303 separately numbered paragraphs addressing in extensive detail all aspects of inpatient and community- based care, supervision, treatment, housing, and support for persons with serious mental illness. In 2007, in compliance with a mandate of the Supreme Judicial Court of Maine, the parties, their counsel and I crafted an agreed-upon set of compliance and performance standards keyed to all the elements of the Settlement Agreement. These included fifty compliance standards for the system, thirty four compliance and performance standards for community services, and thirty seven compliance standards for inpatient services provided at Riverview Psychiatric Center.

Over the years, a large majority of the compliance and performance standards were consistently met, while some, due to changing circumstances, were no longer useful as a means of evaluating the Department's progress. As a result, with the agreement of the parties, in December 2016 I entered an

order deleting sixty of the performance standards. In that same year, we reviewed the Performance Reports of the Department together with the provisions of the Consent Decree to determine the remaining trouble spots that stood in the way of achieving substantial compliance. Eventually, we agreed that the primary areas of non-compliance within the community mental health system resulted from the lack of timely access to mental health services and the related need for the Department to improve its management of the providers of mental health services. Paragraph 277 of the 1990 Settlement Agreement provides that the Department's:

> Contracts with agencies for the provision of mental health services shall require the individuals or agencies to accept all referrals of all class members. Once the interdisciplinary team determines that the class member requires specific services, no agency under contract with the Department may refuse those services except when, in the case of a residential facility, there are no vacancies, and in the case of other services, the extension of services would cause the agency to exceed pre-established staff client ratios.

Paragraph 51 of the Settlement Agreement requires that agencies under contract shall be subject to sanctions for non-compliance. In effect, the Settlement Agreement mandated that a provider could not reject a person referred for services except for reasons of capacity. Despite this explicit language, the Department's contracts and rules fell far short and, as I often noted in prior reports, the actual practice was quite different. Contracts typically required the provider to cooperate generally with the Department in meeting the terms of the Consent Decree, but Paragraph 277 was not explicitly referenced until 2016 when I recommended that the Department enforce the provisions of Paragraphs 277 and 51.

In 2016, the Department began to make progress in dealing with the waitlist for community integration, a crucial service for those with severe mental illness, by monitoring the performance of providers and requiring that a referral result in a face to face contact within seven days. As I reported in 2018, the Department then devoted substantial effort to incorporate performance goals into all of its contracts and rules for mental health services and to improve the quality of their management information system. This effort eventually came to naught as a result of staff reductions in 2018 that resulted in at least a temporary abandonment of improvements in the management information system. The parties,

counsel, and I ("the work group") then prepared legislation to supplement the Department's contract enforcement efforts by adding a procedure for departmental review and a private right of action in cases of a provider's contested refusal or termination of mental health services. This effort drew widespread opposition from the provider community and despite being presented as a Governor's bill by two different administrations to two different legislatures, it never got out of committee, partly as a result of a COVID-shortened session in the final presentation.

After full discussion of a recommendation I had made for the Department to unilaterally impose a contractual provision for third party enforcement by a private right of action, I withdrew the recommendation because it did not seem possible to provide a quick and summary court process without enabling legislation. In August of 2020, the work group determined to explore another avenue for making progress toward substantial compliance. This effort eventually resulted in crafting revised compliance standards that focus primarily on the major problems—timely access to services and improved management of provider performance. Throughout the years of 2019 and 2020, the Department, acting through what is now designated as the Office of Behavioral Health ("OBH"), demonstrated a willingness and a commitment to hold providers accountable for their performance obligations and an improved capacity to provide reliable data to mark its progress. I noted this encouraging trend regarding provider accountability in my progress report issued in October of 2019. After five months and many meetings, both virtual and socially-distanced outdoor gatherings, the work group produced seventeen quantitative compliance standards that focus squarely on timely access to services and the enforcement of Paragraph 277. I have adopted these standards in accordance with Paragraph 291 of the Settlement Agreement. Counsel have entered into an agreement on behalf of the parties acknowledging that compliance with the revised standards over the requisite period of time will "constitute substantial compliance with the terms of the Settlement Agreement, " thereby providing the basis for requesting the Court in the future to dissolve the injunction and dismiss the action against the Department. My order amending the compliance standards, the agreement of the parties, and the revised compliance standards are attached

hereto. It should be noted that the agreement calls for enhanced contract enforcement as well as enhanced advocacy for those failing to receive mental health services in a timely manner.

I commend the parties for finding a reasonable and meaningful current definition of substantial compliance and providing the tools that are needed to achieve the standards adopted and the means for documenting the Department's progress. Substantial compliance has not yet been achieved but it is within sight and achievable. Barring some unforeseen circumstance, my progress reports in the future will mainly focus upon the seventeen revised compliance standards.

Operation of the Mental Health System During the Year of COVID 19

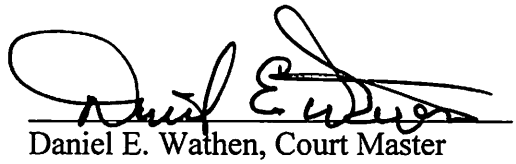
Clearly the year 2020 was anything but normal and the mental health system was affected, but from my perspective a commendable level of service was maintained under challenging circumstances. By way of example, I have monitored nearly all the discharge meetings at Riverview Psychiatric Center when patients were ready for residential services in the community in this past year. Despite the fact that congregate adult residential settings proved prone to COVID outbreaks, the staff at Riverview, OBH, and the providers of the services managed those referrals without unusual or significant disruption. The need for mental health services is great. During 2020, more than 72,454 people received mental health treatment in Department funded services, 19,064 of whom had serious mental illness. 3,161 individuals were discharged from inpatient psychiatric services. The Department expended $215,824,867.22 of State and Federal funds on just the eight basic mental health services offered in the communities of Maine. In the last months of 2020, approximately 64% of the persons referred for community integration services were admitted to service within seven days. In the same period 63% of the persons referred for ACT services were admitted for service within seven days. Although medication management services remain in short supply, 14,692 people received those services. Obviously, there is still a need for improvement

but I am convinced that the revised compliance standards focus upon the correct issues, and that they are measurable, understandable, and achievable.

Riverview has done a commendable job of protecting its staff and patients from COVID since last March, but this has necessitated a reduction in admissions and population. In order to have a quarantine unit available, one of the four units has been reserved for new admissions and others requiring quarantine. Members of the staff have tested positive and the hospital has staged its staff to ensure that full coverage remains available in the event of COVID exposure to any staff member or in any one of the units, thereby necessitating quarantine. As a result, the hospital has operated at 50 to 60% of patient capacity during the last half of 2020 and has given priority to forensic admissions. Before COVID struck, Riverview was achieving a record level of admissions and discharges. Admissions, including civil admissions, should increase in the reasonably near future. Dorothea Dix Psychiatric Center opened its new gero-psychiatric unit at the beginning of this year and that should allow it to accept additional referrals from Riverview.

The critical importance of psychiatric hospital beds in Maine and the impact access to those beds has on the entire medical system is amply demonstrated by the recent decision of the Supreme Judicial Court of Maine in A.S. v. Lincoln Health, 2021 Me. 6. Accordingly, I will continue to monitor and report on admissions, discharges, and waitlists at both Riverview and Dorothea Dix.

Dated: February 4, 2021



Daniel E. Wathen, Court Master

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

ORDER AMENDING
COMPLIANCE STANDARDS

In furtherance of the parties' agreement dated January 20, 2021, attached hereto, and in accordance with Paragraph 291 of the Settlement Agreement, I do hereby adopt the attached Revised Compliance Standards in place of the standards adopted by Order dated October 29, 2007. These standards are adopted for the purpose of evaluating and measuring the Department's compliance with the relevant terms and principles of the Settlement Agreement. The standards shall be applied to the conduct of the Department from this date forward and shall remain in effect until amended.

Dated: January 21, 2021

Daniel E. Wathen, Court Master

{W12587104.1}

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

AGREEMENT OF THE PARTIES

Plaintiffs and Defendants, acting through the undersigned counsel, agree to the following as the conditions upon which the injunction entered as part of the Consent Decree issued by the Superior Court on August 2, 1990, in *Bates v. Glover*, Docket No. CV-89-88, may be dissolved:

1. The Department of Health and Human Services ("the Department") shall continue to fund the Consumer Council System of Maine (CCSM) to enable the Council to carry out all of its functions as defined in statute, 34-B M.R.S. § 3611. Defendants shall make all good faith efforts as necessary to obtain appropriations sufficient to fund CCSM to provide these services in accordance with the terms of its contract.

2. The Department shall designate one or more staff persons at its Office of Behavioral Health ("OBH") to serve as a contact point for adults with serious and persistent mental illness, or their guardians and advocates, who encounter barriers to obtaining timely access to services from mental health service providers under contract with the Department. It is understood that the role of the designated staff person or persons shall not be to serve as a case manager for individual consumers of mental services, but shall instead be to take appropriate

steps to ensure that providers meet their contractual obligations to serve those consumers. Contact information for the point of contact will be made publicly available on the OBH website.

3. The Department shall contract with Disability Rights Maine, Inc. ("DRM"), as the protection and advocacy organization for Maine designated pursuant to 5 M.R.S. § 19502, to provide a range of advocacy services for adults with serious and persistent mental illness in Riverview Psychiatric Center, Dorothea Dix Psychiatric Center, and in the community. The expanded scope of work shall include: obtaining timely access to services, providing training and education regarding rights of mental health recipients; assisting with administrative hearings; and bringing any concerns to the attention of OBH regarding providers' compliance with the Rights of Recipients of Mental Health Services, 14-193 C. M. R. ch. 1, and with any other obligations set forth in statute, rule or contract relating to providing mental health services to adults in Maine with serious and persistent mental illness. Defendants shall make all good faith efforts as necessary to obtain appropriations sufficient to fund DRM to provide these services in accordance with the terms of its contract.

4. The Department shall submit quarterly reports and, if requested, the underlying data on which the reports are based, to Plaintiffs' counsel and to the Court Master regarding each of the compliance standards agreed to by the parties and adopted by the Court Master, by Order dated January 20, 2021. These standards supersede the previous compliance standards adopted by the Court Master on October 29, 2007.

5. When Defendants have demonstrated compliance with each of the compliance standards during at least four (4) out of six (6) consecutive quarters, the parties agree that this shall constitute substantial compliance with the terms of the Settlement Agreement. The first quarter to be counted will be the first quarter in which the Department reports data on all of the

compliance standards reflecting MaineCare and/or OBH-funded providers of services named in the standards and subsequent to the adoption of relevant rules. Defendants shall file a notice of substantial compliance with the Court, and Plaintiffs shall have thirty (30) days thereafter in which to file any objections. If Plaintiffs object, the Court shall hold a hearing to consider those objections and determine whether Defendants have achieved substantial compliance. In the absence of any objections, or upon a finding after hearing that Defendants have achieved substantial compliance as defined in this paragraph, the injunction dated August 2, 1990 may be dissolved.

Dated this 20th of January, 2021

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Bates v. Commissioner, Department of Health and Human Services, Docket No. CV-89-088

Revised Compliance Standards

January 20, 2021

Timely Access:

1. Measure: Days between referral to a Private NonMedical Institution (PNMI; MaineCare Section 97 Appendix E) and acceptance of Department referrals for clients who are inpatient.
   Standards:
   a) Acceptance decisions are communicated within 5 business days of referral for at least 80% of referrals.
   b) Except in cases where Department approval for refusal is granted, at least 80% of referrals are accepted within 5 business days from referral or from rejection of authorization to refuse referral.

2. Measure: Days between referral and admission to PNMI for clients who are inpatient.
   Standard:
   a) Excluding situations when discharge is delayed due to inpatient adult not being clinically ready for discharge, at least 80% of referrals are admitted to a PNMI bed within 30 calendar days from the date of referral.

3. Measure: Length of time on waitlist for Bridging Rental Assistance Program Voucher.
   Standard:
   a) Vouchers are issued on average within 14 calendar days for eligible adults discharging from a psychiatric facility, those who are categorized as homeless based on United States Housing and Urban Development (HUD) definition of literal homelessness, and those who are being released from incarceration.

4. Measure: Days between referral and initial face to face assessment for Community Integration services.
   Standards:
   a) Face-to-face assessment occurs within 7 business days of referral for at least 60% of referrals, excluding those who agree to be put on hold for service.
   b) Face-to-face assessment occurs within 30 calendar days of referral for at least 85% of referrals, excluding those who agree to be put on hold for service.

5. Measure: Days between referral and initial face to face assessment for Assertive Community Treatment services.
   Standards:
   a) Face-to-face assessment occurs within 7 business days of referral for at least 60% of referrals, excluding those who agree to be put on hold for service.
   b) Face-to-face assessment occurs within 30 calendar days of referral for at least 85% of referrals, excluding those who agree to be put on hold for service.

6. Measure: Days between Department referral and admission for Medication Management.
   Standards:
   a) At least 75% of adults referred by the Department will be provided medication management service within 7 calendar days of discharge from psychiatric inpatient treatment.
   b) At least 85% of adults referred by the Department will be provided medication management service within 14 calendar days of discharge from psychiatric inpatient treatment.

7. Measure: Response times to requests to Maine Crisis Line (MCL).
   Standard:
   a) In at least 90% of cases, phone calls are responded to within 10 seconds, and texts/SMS and emails are responded to within 120 seconds.

8. Measure: Time from determination of need for face-to-face contact or when adult in crisis was ready and able to be seen to Initial face-to-face contact as a result of a call to the MCL.
   Standards:
   a) More than half of adults determined to need face-to-face assessment are seen within 2 hours of referral to mobile crisis.
   b) At least 85% of adults determined to need face-to-face assessment are seen within 3 hours of referral to mobile crisis.

9. Measure: Time between completion of Initial face-to-face Crisis Assessment contact and Final Disposition/Resolution of crisis.
   Standard:
   a) More than half of adults have disposition/resolution within 3 hours of completion of initial face-to-face crisis assessment.

10. Measure: Percent of adults involuntarily admitted for psychiatric treatment as the final disposition from a call to the MCL.
    Standard:
    a) Less than 5% of adults in crisis are involuntarily admitted for psychiatric treatment as the final disposition from a call to the MCL.

11. Measure: Percent of adults who are readmitted within 30 calendar days of discharge from Crisis Stabilization Units (CSU).
    Standard:
    a) Adults are readmitted to a CSU within 30 calendar days from discharge less than 20% of the time.

12. Measure: Psychiatric inpatient admission within 30 calendar days of discharge from Crisis Stabilization Units.
    Standard:
    a) No more than fifteen percent (15%) of adults discharged from Crisis Stabilization Units are admitted for inpatient psychiatric treatment within 30 calendar days.

13. Measure: Days between referral and admission of adults to Behavioral Health Home (BHH).
    Standards:
    a) Admission occurs within 7 business days of referral for at least 60% of referrals, excluding those who agree to be put on hold for service.
    b) Admission occurs within 30 calendar days of referral for at least 85% of referrals, excluding those who agree to be put on hold for service.

Contract Management and Enforcement:

14. Measure: Number of requests for rejection of referral granted for reasons other than staffing ratios, capacity, or not meeting eligibility criteria per MaineCare rule.
    Standard:
    a) Less than 5% of requests to reject referral for reasons other than staffing ratios, capacity, or not meeting eligibility per MaineCare rule are granted.

15. Measure: Number of referral rejections or terminations of services without authorization that result in sanctions.
    Standard:
    a) Violations of contract provisions or MaineCare rule provisions requiring prior approval before rejecting referrals or terminating services result in sanctions at least 95% of the time.

State Hospital:

16. Measure: Riverview Psychiatric Center makes effective use of its capacity for inpatient hospitalization.
    Standards:
    a) RPC maintains licensing, accreditation by the Joint Commission, certification by the United States Department of Health and Human Services Centers for Medicare and Medicaid Services (CMS), and maintains funding levels calculated to meet those accreditation and certification standards.

    b) Seventy percent (70%) of patients who remained ready for discharge were in fact discharged within 7 calendar days of a determination that they had received maximum medical benefit from inpatient care.

    c) Eighty percent (80%) of patients who remained ready for discharge were in fact discharged within 30 calendar days of a determination that they had received maximum medical benefit from inpatient care.

d) Ninety percent (90%) of patients who remained ready for discharge were in fact discharged within 45 calendar days of a determination that they had received maximum medical benefit from inpatient care.

Reporting:

17. Measure: The Department provides timely quarterly reports on each standard to the Court Master and Plaintiffs' Counsel.
    Standard:
    a) Reports are provided no later than 60 calendar days after the end of each quarter.