

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
OFFICE OF THE COURT MONITOR



Report to the Court and Parties

E.H., et al., v. Khan Matin, et al.

January 27, 2010

■ INTRODUCTION ■

On July 30, 2009, the Thirteenth Circuit Court in the person of Judge Louis “Duke” Bloom issued a court order appointing a Court Monitor to oversee the implementation of significant improvements in the behavioral health system in West Virginia. As required by that order, the Court Monitor is to regularly submit a report to the Court and the Parties of the progress of the West Virginia Department of Health and Human Resources (DHHR) with regard to implementation of those measures agreed to by the Parties and ordered by the Court. This report shall serve as the Monitor’s first regular report to the Court and Parties since his appointment.

The report will address the progress made by the Parties with regard to the court orders on **“Case Management”**, **“Traumatic Brain Injury”** and the **“Agreed Order”**. It will address the timetable adherence to these orders by the Parties and the Court Monitor.

A section of the report will also focus on the activities of the new Special Assistant to the Court Monitor. The Special Assistant was employed by the Court Monitor on November 02, 2009, to conduct activities related to the implementation of a consumer tracking system and to provide oversight to individuals committed to either public or private hospitals. These responsibilities were described in the Agreed Order.

TIMETABLE ADHERENCE

The Court Monitor notes that the Department is not in full compliance with any aspect of the three orders. In fairness to the Parties, the Court Monitor recognizes that even if a target date was not achieved, considerable activity may have been occurring to accomplish the proposed objective and that some delays are inherent in the implementation of these issues. For example, the administration of DHHR has changed since the initial court order; state purchasing and budgetary requirements may slow the ability of the DHHR to put programs in place; and so forth. The Court Monitor believes that it is important to recognize and give credit for achievements. Nonetheless, the Department is deficient in meeting any of the court-ordered or agreed timelines.

CASE MANAGEMENT ORDER

■ ***Hiring of an Independent National Expert to Review Utilization Management***

Guidelines. The Parties are scheduled to make the selection of a national expert at their meeting on January 05, 2010. Proposed candidates were asked to respond to several questions developed by the Parties by December 28, 2009. The questions were designed to establish the candidate's "readiness" and knowledge with regard to the topic of Utilization Management in the Clinic and Rehabilitation options of West Virginia's Medicaid program. Clinical Services Management, P.C., was selected as the consulting agency on January 15, 2010. The

agency will begin work in February, 2010. Target Date of November 01, 2009 has not been met.

■ ***Findings on Impact of Mountain Health Choices and Recommendations for Modifications by the Court Monitor.*** The Court Monitor is conducted a study surveying all licensed behavioral health centers in West Virginia. Centers were asked to submit a description of the impact of the Mountain Health Choices program on consumers and on the business and clinical function of the Centers. The submission of individual stories was encouraged, if possible. Responses were reviewed by the Court Monitor who is planning to file his report/recommendations to the Court and Parties within the expected time line. Target date of February 01, 2010 is expected to be achieved.

■ ***Recommendations on Utilization Management Guidelines Submitted to the Court Monitor/Parties by the National Consultant.*** Time line adherence is contingent upon the schedule of the consultant and support staff. Target date of March 01, 2010 is unlikely to be achieved.

■ ***Notification to Court on Agreement/disagreements with Recommendations of the National Expert.*** Target date of May 01, 2010, is expected to be achieved.

TRAUMATIC BRAIN INJURY (TBI) ORDER

■ ***Development of a TBI Waiver Application and Submission to the Court Monitor/Parties.*** The Court Monitor and Parties received a draft TBI Waiver application on November 13, 2009. A conference meeting with the Parties to review the application and provide comment occurred on December 09, 2009. The Court Monitor provided written comments to the Secretary of DHHR on December 10, 2009. In that response the Court Monitor complimented the Secretary's Office for the expediency with which her office completed the first draft of the TBI waiver application. The target date for this activity was to have been September 7, 2009, however the respondent filed a request for an extension to November 13, 2009. This request was granted by the Court Monitor, therefore the modified target date was achieved. Nonetheless, the waiver application was not submitted to CMS by January 2010, and the timeline was not met.

■ ***Development of a Strategic Plan for Securing Funding for a TBI Trust Fund.*** The Court Monitor/Parties received this plan on November 18, 2009. The Monitor has inquired as to whether the Plan has the requisite support of the Secretary of DHHR and requested clarification as to the role her Office will play in the implementation of the plan. Target date of October 07, 2009, was not met, however the plan was developed.

■ ***Submission of a Final TBI Waiver Application to the Court Monitor by November 22, 2009.*** This time line has not been achieved.

NOTE: The Court Monitor can foresee that securing vendors for this program, working with the state's purchasing division and final submission to the federal Centers for Medicare and Medicaid Services (CMS) will take considerably more time than had been allowed in the original time frames. The Court Monitor would like the Department to submit an explanation to the Court for all delays in meeting the waiver submission timelines.

ACTIVITY REPORT ON THE AGREED ORDER



■ ***Addition of 35 Care Coordinators.*** DHHR

has indicated that 18 Care Coordinators were to be allocated to several of the Comprehensive Behavioral Health Centers and 17 additional Care Coordinators were to be employed by independent agencies providing care coordination throughout the state. Although resources have been allocated by DHHR, no Requests for Proposal (RFP) have yet been issued by BHCF, pending identification of areas of greatest need. Time line on this activity has not been achieved.

■ ***Addition of five Group Homes.*** Much discussion has occurred with the provider and advocacy communities regarding the group home development activities contained in the court order, however respondents/petitioners have not yet made any concrete

decisions as to where the programs will be developed and located, and what populations will be targeted. The fiscal resources have been allocated by DHHR for these programs but no Requests for Proposals (RFPs) have yet been issued although the Department has developed draft RFPs. The Court Monitor is insistent that the Parties continue to address this activity with urgency. Time line has not been achieved.

■ ***Development of 39 Residential Program Slots and 3 Day Treatment Centers.*** The fiscal resources have been allocated by DHHR for these programs but a decision on location and a programmatic description of day treatment centers is still under discussion. Different geographic areas of the state appear to have different needs, depending on the density and diagnostic nature of the behavioral health population. The Parties are attempting to obtain data to support evidence-based decisions. The Special Assistant developed a suggested model for supported living which is being reviewed. The Court Monitor is insistent that the Parties make a decision on these programs in early 2010. Time line of July 1, 2009, has not been achieved.

■ ***Crisis Stabilization Units:*** The Court monitor has reviewed use of Crisis Stabilization Unit (CSU) beds on a daily basis. CSU beds in most areas continue to be under-utilized. The Special Assistant will convene a meeting of CSU clinical and administrative staff to discuss possible causes for under-utilization of CSU beds. That meeting is scheduled February 17, 2010, and will result in a report to the Parties.

The Court Monitor also notes that although the agreed order indicates that the Department is to reimburse providers for CSU services for enrollees in Mountain Health Choices Basic Plan, no payment for those services has yet been received by any provider, nor has retroactive payment promised by the Department been processed after more than two years. The Department remains out of compliance with the Agreed Order on this issue.

■ ***Creation of the Highland Hospital Assessment and Evaluation Center.*** This Center was proposed in order to provide intensive assessment and referral services for 72 hours prior to commitment for individuals in crisis. Highland Hospital staff was trained by the Supreme Court on January 22, 2010. The unit is expected to open in the next two weeks. The time line of July 1, 2009, has not been achieved.

■ ***Increase in Selected Salaries at Bateman and Sharpe Hospitals.*** The Court Monitor has been advised by DHHR that \$495,000.00 was spent at Sharpe Hospital and \$592,819.00 at Bateman Hospital for the purpose of increasing salaries for Psychiatrists, Registered Nurses, Licensed Practical Nurses (LPNs) and direct care staff. Nurses were granted immediate pay raises but LPNs and Direct Care Staff were required to accrue three years of seniority before their eligibility for the increase was established. The remaining \$277,181.00 will be allocated over the next several years as staff tenure nears the three- year requirement. This time line has been achieved.

■ ***Employment of the Special Assistant.*** The Court Monitor was required to hire a full time individual to oversee the consumer tracking system and commitments as they pertain to the Agreed Order by September 01, 2009. The Special Assistant to the Court Monitor was hired on November 02, 2009. A section of this report is dedicated to a description of the activities of that individual. Time line was not achieved however the Special Assistant is currently in place.

■ ***Employment of 5 Additional Security Guards at Bateman Hospital.*** As of the date of the November Meeting of the Parties, one security guard has been hired and positions for four additional security guards were being processed within the Division of Personnel. Time line was not achieved.

■ ***Unit for dually diagnosed mental health and addictions patients at Bateman Hospital.*** The Court Monitor has toured the unit which is ready to be opened. The administration of the hospital is in the process of recruiting staff for this program. Time line was not achieved.

■ ***Formalization of a process to ensure consistent prescribing practices between inpatient and out patient physicians, including a doctor-to-doctor handoff protocol and implementation of a relevant state regulation or policy statement.*** The Bureau of Behavioral Health and Health Facilities has developed a draft preliminary analysis of the

problem and contributory issues but a clear policy/procedure is not yet in place. The deadline for achievement of this goal was January 01, 2010. Time line has not been achieved.

The Court Monitor must conclude that although progress has been achieved, the Department/Respondent remains deficient in meeting the timelines specified in the Court's Orders.

ACTIVITIES OF THE SPECIAL ASSISTANT TO THE COURT MONITOR

The Special Assistant to the Court Monitor is tasked, according to the Court Order, with “oversight of commitments as the parties agreed to in the Agreed Order”. That Agreed Order states: “Beginning on July 1, 2009, DHHR shall provide oversight for individuals who have been committed to either public or private hospitals through (a) the implementation of a consumer tracking system; (b) a tracking Memorandum of Understanding and (c) oversight by the Office of the Ombudsman for Behavioral Health, which shall employ at least one full-time individual to oversee this function no later than September 1, 2009”.

The Special Assistant (SA), Sheila Kelly, began work on November 2, 2009. Because Ms. Kelly had previously served DHHR as an Assistant Commissioner of the Bureau for Behavioral Health and Health Facilities (BHFF) and as Program Manager in the Behavioral Health program of the Office of Health Facility Licensure and Certification (OHFLAC), she was able to “hit the ground running” and immediately begin meeting with constituency groups to discuss issues contributing to the problem of overbedding at Bateman Hospital.

The activities of the SA have been hampered by the DHHR’s reservations as to relinquishing Protected Health Information (PHI) to the Office of the Court Monitor. The SA had intended to begin reviewing data and interviewing patients at the state psychiatric facilities and in the diversion hospitals in order to identify gaps in community services and issues in commitment of patients across the State. She sent a letter to diversion hospital administrators advising them that she would be contacting them to set up meetings to discuss methods by which she could access medical records and committed patients funded by BHFF and/or DHHR through Medicaid. An analysis of the issues is contained in Appendix 1, but essentially the DHHR has expressed reluctance to release names and demographic information to the Office of the Court Monitor due to privacy issues. This has prevented the SA from performing this crucial aspect of her work.

Nonetheless, the SA has been involved in several activities related to her job function as follows:

- The SA met with administrators at Bateman and Sharpe Hospitals to discuss problems in admissions, diversions, commitments, and discharges of patients. In future, she would like to begin interviewing patients who fall into three categories: newly admitted patients; patients in the hospital over 6 months or who have spent six months in the hospital over the past 12 months; and patients who have been repeatedly admitted.

- The SA met with staff from the Pretera Center to review a data management system that Pretera has developed for tracking and monitoring individuals who are at risk for commitment or who have been committed. This system could be easily implemented in each geographic area. Pretera submits a copy of its data on a monthly basis to the SA.

- The SA convened a meeting of commitment certifiers representative of the comprehensive community behavioral health centers across the state. The purpose of the meeting was to discuss local and more universal problems with the commitment system. As a result of that meeting, an extensive list of problems and recommendations was generated, catalogued by the SA and submitted to the Parties for an initial review. The Office of the Court Monitor intends to release a report containing suggestions for policy or other

procedural changes in the commitment process to the Department in February once the items have been thoroughly reviewed for accuracy.

■ The SA serves on several multi-disciplinary committees co-chaired by a provider and BHHF representative. Those committees include: Overbedding; Rates and Charity Care; Crisis Support Units; Adult Community Support Services; and Mountain State Health Choices. All of these themes are relevant to the mission of the Office of the Court Monitor and the SA.

The Office of the Court Monitor and the SA note the continued crisis in overbedding, particularly at Bateman Hospital. On December 16, 2009, the population at Bateman was 10 over licensed capacity at 100 and 70 patients had been diverted to private psychiatric hospitals for treatment. The vast majority of these patients were from the Charleston and Huntington area. Many were addicted, homeless and/or readmissions, making it highly likely that they would be in the facility for an extended time. The system had reached the point that the diversion facilities were all at capacity, forcing Bateman to admit all remaining committed patients and placing the hospital over licensed capacity.

SUMMARY AND RECOMMENDATIONS OF THE COURT MONITOR

The Court Monitor believes that it is fair to say that while many specific time lines within the three court orders/agreements have not been achieved by the Parties, there has been some progress on the part of respondents and petitioners. The Monitor feels that the DHHR has worked towards compliance with the Court's orders with regard to ***Case Management, Traumatic Brain Injury and the Agreed Order***, but nonetheless is deficient in full compliance with the court-ordered timelines.

In addition to the aforementioned activities, the Court Monitor has toured crisis stabilization units located in Wheeling, Princeton and Huntington and provided the Parties with a written report of each program reviewed.

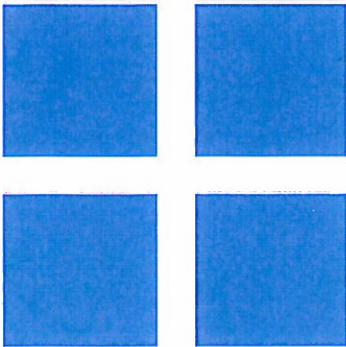
The Monitor also visited and reviewed the site and architectural design plans for the new 50 bed forensic unit being planned at Sharpe Hospital. Relocation of fifty forensic patients from the general psychiatric units at Sharpe should alleviate some of the psychiatric overbedding problem, at least temporarily. However, forensic patients continue to accumulate in the State Hospital System at a rate of about eight to twelve additional long term patients per year. The addition of fifty beds should improve the situation, but only in the short term. The Court Monitor has been advised that the Department is now re-evaluating (conducting a bed analysis) the size of the planned

unit, which will delay the ground-breaking further and also delay addressing the problems the forensic population is presenting as Sharpe Hospital attempts to provide acute care.

While the Monitor's Office transitioned from the "Office of the Ombudsman" to "The Court Monitor's Office", some complaints and requests for assistance continued to be received. All calls were tracked and logged and referred to the appropriate individual, usually within DHHR, for resolution.

The Court Monitor meets monthly with the administrative staff of the office of the Secretary of DHHR. Many informal and formal issues are managed effectively in that manner.

The Court Monitor also meets every six weeks with the Parties to review progress in this case and to address other issues that may interfere with full implementation of the Court's orders. Meetings occurred on August 17, 2009; September 29, 2009; November 10, 2009; and January 05, 2010.



The Court Monitor conducted meetings with providers, consumers and advocacy agencies to familiarize them with the role of the Court Monitor's Office. The Monitor requested "white papers" describing ideas for design and implementation for the activities (group homes, residential slots, day treatment programs) delineated in the Court's orders. In this way, all entities have an opportunity for input and may feel that they have made a contribution to the process.

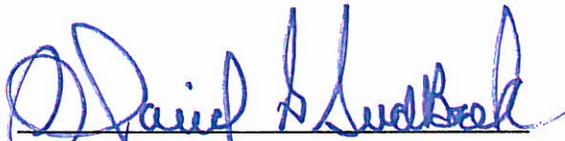
In conclusion, the Monitor would like to make the following formal recommendations for the consideration of the Parties:

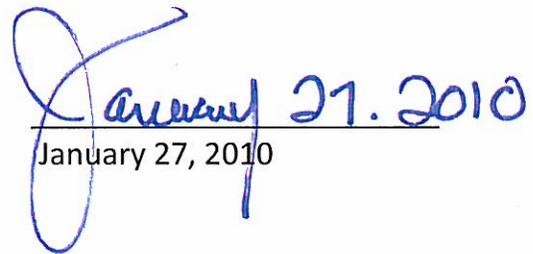
RECOMMENDATION # 1.) The Department shall submit to the Court Monitor and to the Court a written justification by March 1, 2010 as to the reasons for the lack of compliance with the court-ordered timelines in the *"Traumatic Brain Injury Order"*, *"Agreed Order"* and *"Case Management Order"*. The Department shall outline measures necessary in the future to comply with all court-ordered timelines identified.

RECOMMENDATION # 2.) The Department shall submit a detailed timeline for implementation for the clinical services (e.g., group homes, supported living slots, day

treatment programs, and crisis stabilization units) described in the Agreed Order and will set goals for reduction of the forensic and general populations at Sharpe and Bateman Hospitals to within licensed capacity at both facilities.

Pursuant to Section 8.02(6)(c) of the West Virginia Behavioral Health Care Delivery System Plan, the Parties may file objections to these recommendations within fifteen (15) business days of the date of these formal recommendations.


David G. Sudbeck, Court Monitor


January 27, 2010

APPENDIX

SUMMARY OF DATA ACCESS ISSUES

OFFICE OF THE COURT MONITOR

December 1, 2009

According to the Court Order converting the Office of the Behavioral Health Ombudsman to the Office of the Court Monitor (OCM), the "Court Monitor shall have access to all facilities and records, access to patients, staff, contractees, or any other person affected by the behavioral health delivery issues at issue herein, for the purpose of gathering information relevant to measuring compliance with law and orders of the Court resulting from this matter. The Office of the Court Monitor shall be subject to the provisions of W.Va. Code §27-3-1".

The Bureau for Behavioral Health and Health Facilities (BHFF) has expressed concern about the privacy rights of patients due to the Special Assistant to the Court Monitor's requests for access to medical records, staff, data pertaining to commitments, patients, and other information normally subject to privacy regulations, both in the state facilities and in the private psychiatric facilities to which committed patients have been diverted. Those reservations are based on three statutes: W.Va. §27-3-1, HIPAA, and 42 CFR Part 2.

The Special Assistant (SA) is tasked, according to the Court Order, with "oversight of commitments as the parties agreed to in the Agreed Order". That Agreed Order states: "Beginning on July 1, 2009, DHHR shall provide oversight for individuals who have been committed to either public or private hospitals through (a) the implementation of a consumer tracking system; (b) a tracking Memorandum of Understanding and (c) oversight by the Office of the Ombudsman for Behavioral Health, which shall employ at least one full-time individual to oversee this function no later than September 1, 2009".

The SA met with the individual at BHHF responsible for data organization and tracking. As a result of that meeting, the SA requested the following data on a regular basis:

- Weekly list by name of everyone in the diversion hospitals through the commitment process with age, sex, county of origin, hospital of diversion, source of diversion (county, location such as ED, crisis unit, etc.), diagnostic group, placement prior to admission, description of any medical issues if possible, date of admission and length of stay as of the day of the report;
- List of all people admitted to Sharpe and Bateman, same general info.
- Quarterly list of people who have been in Sharpe, Bateman or a diversion hospital for longer than six months (not including forensics) and length of stay, diagnostic group, age, sex, medical issues;
- Quarterly list of people in the hospitals (either state or private) with developmental disability diagnoses, including but designating those who are forensic;
- List of people in the hospitals (either state or private) with guardians, designating those with DHHR guardians;
- List of people by month and state of origin, age, sex, length of stay for those admitted or diverted from out of state for past year, minimum; and
- Monthly list of those who have been admitted/diverted more than once in the past twenty four month period, denoting frequency of readmission.

In addition, the SA sent letters to the administrators of all diversion hospitals expressing her intent to visit each hospital psychiatric unit in order to interview patients who have entered the hospital through the commitment process, and possibly staff as well. She met with the administrative and admissions staff at Bateman and Sharpe Hospitals to discuss commitment, diversion, admission, and other issues relevant to her mission, including her intent to interview patients, both those newly

admitted and those who had been in the hospital long term. She developed a draft Consent for Interview form to be signed by each individual with whom she met on a face to face basis.

The SA has also requested direct access to the state hospital system's clinical electronic health record, Vista.

The SA met with the Commissioner of BHFF to discuss data and medical record access concerns. The three statutory limitations to medical record access were enumerated as described above. The Office of the Court Monitor believes that state statute allows the SA access to the requested information as follows (excerpt from W.Va. Code §27-3-1-(b)(3)): "Confidential information may be disclosed.....Pursuant to an order of any court based upon a finding that said information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section".

The SA subsequently met with the Chief Privacy Officer, Sallie Milam, in her office at the West Virginia Health Care Authority. Ms. Milam reviewed the court orders described above including her own HIPAA and other privacy materials. Her suggestions were as follows:

- Ms. Milam believes that the qualification in §27-3-1-(b)(3) is relevant and may be sufficient to allow the Department to counter the confidentiality requirements of §27-3-1. However, the order does not include the required language from § 27-3-1, thus creating something of a grey area. On the one hand, it would appear that the Court wants the SA to have access to needed records without undue burden, and on the other hand, if the Court intended the SA to have access to the documents without patient consent, it could have stated such and included the appropriate language;

- She suggested that the Office of the Court Monitor develop and implement a privacy, security and confidentiality policy and procedure which would adopt the Executive Privacy Policies by reference and which would prevent the Court Monitor from releasing any confidential health information to any party without written permission of the patient or by court order specific to the patient or patients in question. Such prohibitions would apply to any entity included in the Meeting of the Parties (e.g., the BHHF, the BMS, Mountain State Justice, WV Advocates, etc.). The impact would be that the SA would generally provide information in a de-identified format. The Office of the Court Monitor would commit to taking steps to safeguard PHI as described in the Privacy Policies incorporated by reference;
- In lieu of returning to Court to obtain an order clarifying the intent, the SA indicated that a suggestion had been made that the Court Monitor provide DHHR with the needed clarification around the balancing test requirements of § 27-3-1. Ms. Milam agreed that she could understand DHHR needing something from the Court and agreed that the Court Monitor should explore whether DHHR felt that a memorandum from the Court Monitor would be sufficient. The memo of clarification would contain a reference to the exceptions to confidentiality described above, the Office's policy regarding release of PHI, the OCM's commitment to ask only for that information minimally necessary to achieve the mission of the court orders; and a commitment to meet those same guidelines in future data requests;
- With regard to HIPAA, she indicated that the OCM and the SA do not seem to neatly fall into existing HIPAA disclosure categories. On the one hand, the HIPAA judicial process regs do not neatly fit, as they seem to be designed more for traditional litigation. On the other hand, the "required by law" disclosure provisions are generally utilized with public health authority or oversight disclosures. Additional research may be needed to determine which approach is most appropriate. From the SA's perspective, obviously, the HIPAA's policy

regarding “Disclosures of Protected Health Information That Are Required by Law” (attached) would be the easiest and most efficient to administer. The only difficult aspect of this policy is the mandate that the OCM comply with “Accounting of Disclosures of Protected Health Information”. This may present some challenges in facilities which may not have automated Accounting capability.

- With regard to 42 CFR Part 2, she suggested that the Auditing exception of Subpart D, Sec. 2.53 may enable the Department and private hospitals to permit access to records of individuals with a history of substance abuse/addictions. This section is also attached.
- Ms. Milam suggested that the OCM may wish to develop a privacy “fact sheet” summarizing these supports to the rights of the OCM to PHI to be used in meetings with private hospital administrators.
- Lastly, Ms. Milam offered to contact a resource at the federal Office of Civil Rights for further clarification if needed.

Needless to say, it is the position of the OCM that in order for the SA to be able to do her job, she must have access to patients, data and medical records as necessary. The OCM would prefer not to return to Court to obtain an order mandating access to that information, feeling that there are sufficient legal permissions inherent in statute to allow relatively unfettered access to the minimum necessary data and PHI required.

The OCM is more than willing to develop a privacy, security and confidentiality policy as recommended by Ms. Milam. The Office has no interest in violating the privacy of any individual with whom office staff come into contact and will take precautions to ensure that such violation does not occur.

