

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

J.H., by and through his next friend, Flo Messier; L.C., by and through her next friend, Flo Messier; R.J.A., by and through his next friend, J.A.; Jane Doe, by and through her next friend Julia Dekovich; A.B., by and through his next friend J.B.; S.S., by and through his next friend, Marion Damick; G.C., by and through his next friend, Luna Pattela; R.M., by and through his next friend, Flo Messier; P.S., by and through his next friend M.A.S.; T.S., by and through his next friend Emily McNally; M.S., by and through his next friend Emily McNally; and all others similarly situated;

Plaintiffs,

v.

Theodore Dallas in his official capacity as Secretary of the Pennsylvania Department of Human Services; Edna I. McCutcheon in her official capacity as the Chief Executive Officer of Norristown State Hospital; Robert Snyder in his official capacity as the Chief Executive Officer of Torrance State Hospital;

Defendants.

Civil Action No. 1:15-cv-02057-SHR

Judge Sylvia H. Rambo

**BRIEF IN SUPPORT OF PLAINTIFFS' RENEWED AND AMENDED
MOTION FOR PRELIMINARY INJUNCTION**

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I. INTRODUCTION

More than one year after this Court approved an interim Settlement Agreement, ECF 35 (“Settlement”), persons charged with a crime but deemed not competent to stand trial are still waiting months, and in many cases well over a year, for transfer from county jails to the two Department of Human Services (“DHS”) hospitals that provide competency restoration treatment. Plaintiffs have been pressing DHS for months to address these issues, but DHS has resisted tackling its failures in a realistic and effective manner. As a result, Plaintiffs renew and amend their motion for a preliminary injunction, initially filed on October 22, 2015, ECF 4, so as to stop DHS’ violation of Plaintiffs’ constitutional rights.

Since the Settlement, the number of class members awaiting admission to the two state hospitals has grown. DHS’ January 29, 2016, report listed 215 patients awaiting treatment beds at the time of Settlement. In DHS’ latest report, dated April 28, 2017, that figure has grown to 258. More importantly, the wait times for persons who are jailed while awaiting treatment remain unacceptably high and, in many instances, actually have increased. According to DHS’ own data, of the 35 patients accepted from jails into Norristown State Hospital (“NSH”) this calendar year, 23 waited more than 300 days. Of those, 15 waited more than 400 days, 5 over 500 days, 2 waited more than 600 days, and one Philadelphia man

waited a staggering 788 days in jail before being moved. Wait times for admission to Torrance State Hospital (“TSH”) have always been shorter than at NSH, but since the Settlement they also have increased from an average of 79 days in January 2016 to 106 in November 2016 (the last month for which DHS reported an average). Of the 57 patients admitted to TSH this calendar year, 38 patients waited over 90 days, 49 waited over 30 days, and only 2 waited 7 days or less. In sum, wait times at both NSH and TSH far exceed the 60 days that DHS has conceded is unconstitutional. ECF 35 at ¶ 1. And even that 60 days is significantly longer than decreed unconstitutional by various federal courts.

In part, the current crisis stems from DHS’ failure to implement fully the Settlement of last January. At this point, however, it is abundantly clear that more beds are needed. Plaintiffs have been pressing DHS since last September to address its failure to implement the provisions of the Settlement and its failure to reduce wait times. DHS has responded with foot-dragging. To be sure, DHS largely has committed the financial resources specifically contemplated by the Settlement, but when that expenditure did not reduce wait lists or wait times, DHS punted. Given the magnitude of the problem and the failure of DHS’ strategies up to that point, it was entirely reasonable to have expected DHS to make significant new changes, such as proposing a new plan, committing additional funds and hiring experienced professionals who would attack the ongoing crisis with energy

and initiative. Instead, DHS has done next to nothing. After efforts to prod DHS into action proved unsuccessful, at the beginning of April, Plaintiffs proposed a new plan to DHS, requested a prompt response and advised that Plaintiffs were prepared to return to Court. DHS requested more time to respond and then advised Plaintiffs that they should wait additional weeks so that DHS could study the problem further. There has been enough waiting. More beds are needed now.

Given the ongoing and egregious constitutional violations, Plaintiffs ask the Court to:

1. Impose a maximum wait time of seven days for DHS to transfer Class A members from jail to competency restoration treatment;¹
2. Order DHS to hire an independent consulting firm, answerable to the court, to provide a thorough analysis of the individuals on the wait list and the forensic population, and to identify a strategy to achieve wait list and wait time reduction down to the maximum wait time; and

¹ Class A is: “a class comprising all persons who have been, or will be in the future, charged with a crime in the State of Pennsylvania, and who: (i) are adjudged by a court to be mentally incompetent to stand trial; (ii) are committed to Defendants for competency restoration treatment; and (iii) have not been admitted by Defendants for such treatment within seven (7) days of the date of the court’s commitment order.” Plaintiff’s Motion for Class Certification, ECF 2 at 4.

3. Order DHS, while awaiting completion of the independent assessment, to open an additional 100 beds within six months, and subsequently follow the strategy identified by the independent consultants.

II. STATEMENT OF FACTS

A. EVENTS GIVING RISE TO LAWSUIT

This putative class-action lawsuit was filed in October 2015 to remedy DHS' systemic and indefensible constitutional violations of the Fourteenth Amendment rights of mentally disabled criminal defendants who are incompetent to stand trial. *See generally* Complaint, ECF 1. When a criminal defendant is found initially not competent to stand trial, the criminal charges are suspended, the case is not prosecuted, and the Commonwealth has a choice: it can try to restore the person's competence and proceed with the criminal case, it can move for civil commitment, or it can dismiss the charges and release the person. *See* 50 Pa. Stat. Ann. §§ 7301, 7304, 7403; Mem. Law Supp. Pls.' Mot. Prelim. Inj., ECF 9 at 1; ECF 9-1, Ex. A ¶¶ 7-15 (Patella Declaration). Because the criminal case is suspended, the Commonwealth cannot simply continue to jail such persons. *See* 50 Pa. Stat. Ann. §§ 7304, 7403. Recent federal cases hold that if the Commonwealth seeks to restore competence, it must transfer the incompetent person from a penal

institution—a prison or jail—into an appropriate mental-health placement for treatment within *seven days*. See ECF 9 at 23-31 and discussion at III.A.1, *infra*.

The time it takes DHS to transfer persons from jail to a mental-health facility is much longer. Delays at NSH had been increasing steadily since 2012. ECF 9-1, Ex. A ¶ 17 (Patella). When Plaintiffs filed this case in late 2015, DHS’ delays in accepting patients to NSH were typically 9-12 months, and sometimes exceeded one year. *Id.* In 2015, through September (the month immediately before Plaintiffs sued), the average patient awaiting transfer to NSH from Philadelphia waited an average of 397 days, with the longest wait being 589 days. *Id.*, at ¶ 19. Based on the understanding of undersigned counsel, these were among the longest, and likely the longest, delays in the United States. Wait times to gain admission to TSH were better than for NSH but still unconstitutional, averaging in 2014 almost 70 days (or almost *ten times* the maximum wait times imposed by some federal courts), with a high of 119 days. ECF 1-2, Ex. M (McIntosh).

The negative consequences of keeping class members in jail while waiting for competency restoration treatment are many and severe. Jails do not meet the needs of the mentally ill. See ECF 9 at 18-20. For example, patients awaiting transfer from the Philadelphia Detention Center to NSH “risk victimization from other inmates,” can be and often are moved to segregation units due to disciplinary issues arising from their disabilities or illnesses, and their

mental condition deteriorates. ECF 9-1, Ex. A ¶¶ 24-26, 31 (Patella). Defendants receive little or no mental health treatment, regardless of whether they are in the general population or in restricted housing. *Id.* ¶¶ 15, 24. When Defendants in the Philadelphia Detention Center do receive treatment, they often face adverse side effects from the medications provided—medications which differ from those provided at NSH. *Id.* ¶ 26.

One public defender reported that she “regularly see[s] clients whose mental status seems to deteriorate during their time at the Philadelphia Detention Center while they await transfer to Norristown.... [M]any become remote and non-communicative. In others, I can see that they have less of a grasp on reality, battling voices in their heads or otherwise unable to carry on any semblance of conversation.” ECF 9-2, Ex. B ¶ 15 (Messier). She also described negative impacts on the attorney-client relationship that result from the delays, as clients “become more suspicious, and less engaged,” losing confidence in their attorneys. These negative impacts can continue after competency restoration. *Id.* ¶16. Plaintiffs have demonstrated increased hostility, non-responsiveness, disorientation, or lack of awareness of their surroundings or situation, and decreases in personal care, communication, and interaction with family members. *See* ECF 9 at 21-22.

Leading up to this lawsuit, public defenders complained about the pattern of unconstitutional delays, but, as indicated, the situation got worse, not better. ECF 9-1, Ex. A ¶¶ 44-48 (Patella). Undersigned counsel investigated this case for over a year and brought suit only after efforts to resolve the matter consensually failed.

B. THE INTERIM SETTLEMENT

On the eve of trial, January 27, 2016, the parties agreed to an *interim* settlement, which this Court approved. ECF 35. At the time, the most pressing problem facing the forensic mental health system was that there were simply not enough beds to accommodate the demand. The crux of the Settlement was that DHS would commit funds to add more than 120 new beds to the system, assess the needs of the persons then on the wait lists to determine the resources that would be necessary to solve the systemic problem, and create a strategic plan for solving the overall problem of widespread and lengthy delays. DHS refused at that time to agree to a maximum allowable wait time for persons to stay in jail while awaiting transfer for treatment, but the parties agreed to try and resolve that issue while DHS began to add new beds under the Settlement. Importantly, DHS stipulated that wait times exceeding 60 days violated the Constitution. This was an essential concession because at the time of Settlement, average wait times, even at TSH, exceeded 60 days. The Settlement did not extinguish any of Plaintiffs' claims nor resolve their outstanding motion for preliminary injunction, and DHS was not

released from any liability. This was an *interim* settlement that began the essential work of expanding system capacity to reduce wait times, and the final resolution would await additional study to evaluate the problem and posit a solution.

The Settlement's key provisions are summarized as follows:

- DHS admitted that the wait times exceeding 60 days violated constitutional norms. ECF No. 35 at ¶ 1.

- DHS agreed not to oppose certification of a class of persons that have been declared incompetent by the courts to stand trial on criminal charges and who have been ordered committed to NSH or TSH for treatment to help them attain competence. *Id.* at ¶ 2.

- DHS agreed to create 120 new less restrictive beds and provide \$1 million for additional “supportive housing” placements in Philadelphia. *Id.* at ¶ 3.

- DHS agreed to make assessments of all persons on the wait lists to be admitted to NSH and TSH and of all persons already at NSH and TSH “to determine which persons would be eligible legally and clinically for less restrictive placement and, if so, what barriers exist to such a change in placement.” In addition, the assessments of persons “not legally eligible presently for less restrictive placement . . . shall include an explanation for why the person is not eligible and what it would take to make the person eligible.” In other words, the assessments were to determine who could be sent to placements less restrictive

than the state mental hospitals, who was not eligible for such placement and the obstacles to moving persons in both groups to less restrictive settings. *Id.* at ¶ 5.

- DHS agreed to develop a “strategic plan for reducing the wait times for admission of Class A members to clinically appropriate competency-restoration-treatment placement options within a constitutionally allowable time period.” *Id.* at ¶ 6.

- The parties agreed to “attempt to negotiate a maximum allowable wait time,” with a proviso that any time after ninety days, Plaintiffs could move the Court to decide this issue. *Id.* at ¶ 7.

C. DHS’ FAILURE TO COMPLY WITH THE SETTLEMENT

1. Wait times

Notwithstanding DHS’ infusion of new resources, the agency’s constitutional violations have continued unabated. Every single day, DHS is violating the Constitution and, every single day, class members are being jailed when the law clearly requires that they be placed in treatment facilities. The problem is that, despite the 120 additional beds required by the Settlement, DHS has failed to fund enough total beds to meet the need. Indeed, there are more people on the wait lists for NSH and TSH than at the time of the Settlement. According to DHS’ own data, in late January 2016, when the parties entered the Settlement, NSH had 176 persons on the wait list. As of late April 2017, DHS’

own data showed that NSH had 211 people on its wait list. Ex. A. Likewise, the numbers have grown at TSH. In January 2016, TSH had 39 people on its wait list. On April 28, 2017, TSH's wait list was up to 47 people. Ex. B. Combining the two lists, at the time of the Settlement there were 215 people waiting, whereas on April 28, 2017, there were 258 persons in jails across the Commonwealth who have been found not competent to stand trial and were awaiting transfer to a DHS-approved mental health facility. Ex. A-B.

In addition to the increased number of people on the wait lists, stunningly long wait times persist. They are longer than the seven-day maximum requested by Plaintiffs and adopted by two federal courts; they are longer than any maximum time imposed by any federal court; and they are longer than the 60 days that DHS stipulated violates the Constitution. In January 2016, according to DHS, the wait time to get into NSH averaged 261 days. Ex. C-D. In November 2016, DHS claimed this figure had decreased to 175 days. *Id.* Even accepting the accuracy of this claimed average wait time, the delays still far exceed constitutional limits. But, the DHS average is based on recent changes in calculation methodology. After the Settlement, DHS adopted a new policy of expediting admissions in severe cases. Plaintiffs do not contest this change, and endorsed it as necessary for the sickest patients while wait times remained excessively long. The consequence,

however, is that the delays for the balance of people on the wait list—those for whom admission is not expedited—are actually longer.

To illustrate the ongoing problems, DHS-produced wait lists from this year show how long people actually transferred to the hospital waited. People with short waits were “expedited,” under the process explained above.

2017 Transfers to NSH

DHS List Date	Date DHS Rec'd Referral	Date Admitted to DHS	Wait Time in Jail	Moved on Expedited Basis	Gender
1/13/17	12/7/16	1/19/17	43	Y	M
1/13/17	9/2/15	1/18/17	504	N	F
1/20/17	11/9/15	1/26/17	444	N	M
1/20/17	9/3/15	1/25/17	510	N	F
1/27/17	12/6/16	2/2/17	58	Y	M
1/27/17	11/20/15	1/30/17	437	N	M
1/27/17	5/8/15	1/31/17	634	N	F
2/3/17	11/20/15	2/9/17	447	N	M
2/3/17	9/14/15	2/8/17	513	N	F
2/10/17	1/26/17	2/16/17	21	Y	M
2/10/17	3/22/16	2/15/17	330	Y	F
2/10/17	12/7/15	2/13/17	434	N	M
2/10/17	12/7/15	2/13/17	434	N	M
2/17/17	4/22/16	2/22/17	306	N	F
2/17/17	1/23/16	2/21/17	395	N	M
2/17/17	1/11/16	2/22/17	408	N	M
2/17/17	1/4/16	2/23/17	416	N	M
2/24/17	2/22/17	2/27/17	5	Y	F
2/24/17	9/20/16	3/2/17	163	Y	M
2/24/17	8/15/16	2/27/17	196	Y	M
3/3/17	2/3/16	3/8/17	399	N	M
3/3/17	2/3/16	3/9/17	400	N	M

3/10/17	1/31/17	3/13/17	41	Y	M
DHS List Date	Date DHS Rec'd Referral	Date Admitted to DHS	Wait Time in Jail	Moved on Expedited Basis	Gender
3/10/17	2/9/16	3/13/17	398	N	M
3/17/17	11/16/16	3/23/17	127	Y	M
3/24/17	4/28/16	3/29/17	335	N	F
4/7/17	5/9/16	4/12/17	338	N	F
4/21/17	2/26/15	4/24/17	788	N	M
4/21/17	3/10/16	4/24/17	410	N	M
4/21/17	3/22/16	4/24/17	398	N	M
4/21/17	2/13/17	4/13/17	59	Y	M
4/21/17	2/16/17	4/17/17	60	Y	M
4/21/17	2/22/16	4/18/17	421	N	M
4/21/17	10/3/16	4/6/17	185	Y	M

Twenty-three of the 35 transferees waited over 300 days; 15 waited more than 400 days; 5 over 500 days; 2 over 600 days; and 1 waited 788 days. Only 1 person waited less than 7 days. Even these wait times are understated as DHS calculates the starting date from when it receives the paperwork, which date is between one week and sometimes more than a month *after* the court-ordered commitment.

Though TSH's wait times have been substantially shorter than NSH's, the TSH wait times nonetheless exceeded even the stipulated 60-day maximum wait time. According to DHS, the average wait time at TSH was 79 days in January 2016. By November 2016, DHS reported that average wait times had risen to 105 days. Ex. C-D. The 2017 transfers to TSH illustrate the prolonged waits, particularly for men:

2017 Transfers to TSH

DHS List Date	Date DHS Rec'd Referral	Date Admitted to DHS	Wait Time in Jail	Moved on Expedited Basis	Gender
1/6/17	9/7/16	1/5/17	120	N	M
1/6/17	8/26/16	1/11/17	138	N	F
1/13/17	9/16/16	1/13/17	119	N	M
1/20/17	9/27/16	1/25/17	120	N	M
1/27/17	12/8/16	2/1/17	55	N	F
1/27/17	10/4/16	1/31/17	119	N	M
1/27/17	10/5/16	2/17/17	135	N	M
2/3/17	10/5/16	2/1/17	119	N	M
2/10/17	2/6/17	2/9/17	3	Y	M
2/10/17	10/11/16	2/13/17	125	N	M
2/10/17	10/6/16	2/8/17	125	N	M
2/17/17	1/4/17	2/15/17	42	N	F
2/17/17	11/1/16	2/22/17	113	N	M
2/17/17	10/23/16	2/21/17	121	N	M
2/24/17	2/6/17	3/2/17	24	N	F
2/24/17	1/26/17	3/1/17	34	N	F
2/24/17	11/18/16	3/2/17	104	N	M
2/24/17	11/18/16	3/2/17	104	N	M
2/24/17	11/10/16	2/24/17	106	N	M
3/3/17	2/9/17	3/9/17	28	N	F
3/3/17	11/22/16	3/6/17	104	N	M
3/3/17	11/18/16	3/3/17	105	N	M
3/3/17	11/18/16	3/7/17	109	N	M
3/3/17	11/18/16	3/7/17	109	N	M

3/3/17	11/18/16	3/9/17	111	N	M
3/10/17	2/6/17	3/15/17	37	N	F
3/10/17	12/7/16	3/8/17	91	N	M
DHS List Date	Date DHS Rec'd Referral	Date Admitted to DHS	Wait Time in Jail	Moved on Expedited Basis	Gender
3/10/17	12/6/16	3/13/17	97	N	M
3/10/17	12/7/16	3/14/17	97	N	M
3/10/17	11/18/16	3/9/17	111	N	M
3/17/17	2/21/17	3/23/17	30	N	F
3/17/17	2/21/17	3/23/17	30	N	F
3/17/17	2/6/17	3/20/17	42	Y	M
3/17/17	2/6/17	3/23/17	45	Y	M
3/17/17	12/7/16	3/17/17	100	N	M
3/17/17	12/9/16	3/23/17	104	N	M
3/24/17	3/16/17	3/22/17	6	Y	F
3/24/17	12/9/16	3/29/17	110	N	M
3/24/17	12/9/16	3/29/17	110	N	M
3/24/17	12/9/16	3/29/17	110	N	M
3/31/17	2/28/17	3/28/17	28	N	F
3/31/17	1/4/17	4/5/17	91	N	M
3/31/17	12/23/16	4/4/17	102	N	M
4/7/17	3/7/17	4/10/17	34	N	F
4/7/17	1/4/17	4/5/17	91	N	M
4/7/17	1/4/17	4/5/17	91	N	M
4/14/17	4/10/17	4/18/17	8	Y	M
4/14/17	3/31/17	4/19/17	19	N	F
4/14/17	3/9/17	4/12/17	34	N	F
4/14/17	1/12/17	4/18/17	96	N	M
4/21/17	1/19/17	4/26/17	97	N	M
4/21/17	3/31/17	4/26/17	26	N	F
4/28/17	3/16/17	4/27/17	42	Y	M
4/28/17	1/19/17	5/3/17	104	N	M
4/28/17	1/19/17	5/3/17	104	N	M
4/28/17	1/13/17	5/1/17	108	N	M

Only two of the 57 people transferred to TSH this year waited less than 7 days.

Thirty-eight (38) of the people waited over 90 days.

Undersigned counsel and their expert believe that Pennsylvania's delays are among the worst—and likely are—the worst in the nation. Some measure of perspective can be gleaned by comparing Pennsylvania to its Southern neighbor, Maryland. There, a similar crisis also led to a 2016 lawsuit. But, the reported Maryland delays leading up to the suit were on the order of 27 days, not hundreds of days as in Pennsylvania.² And the suit in Maryland challenged that state's failure to make transfers when the Court ordered them—which was typically one day after the commitment hearing. Complaint at ¶ 3-4; Ex. 1, Atts. A-D, *Fredia Powell, et al. v. Maryland Dept. of Health and Mental Hygiene, et al.*, No. 24C16003484 (June 8, 2016). Maryland's delays pale in comparison to the waits endured by Pennsylvania's patients.

In conclusion, DHS continues to violate the constitutional rights of 200-plus severely mentally-ill people daily. While DHS has taken some steps to address the wait times, these have not corrected the essential problem and, in some respects,

² Dan Morse, Mental Health Crisis Ensnarers Inmates, Judges, Jailers and Hospitals, *The Washington Post*, June 7, 2016, https://www.washingtonpost.com/local/public-safety/mental-health-crisis-ensnarers-inmates-judges-jailers-and-hospitals/2016/06/07/b5379c7c-2aa1-11e6-a3c4-0724e8e24f3f_story.html

this problem has worsened since the Settlement. Plaintiffs have attempted to work with DHS for over a year to achieve voluntary compliance, but without success. DHS has refused to negotiate a maximum time limit governing when Class A members must be transferred from jail for treatment, as required by the Settlement in ¶ 7. The Settlement specifically provides that Plaintiffs may return to Court to resolve this issue. *Id.* Plaintiffs gave DHS express written notice of DHS' failure to comply with the Settlement by letters dated September 23, 2016, November 15, 2016, and April 5, 2017.³ *See* Ex. I, F, and K.

2. Assessments

The assessments required in the Settlement were intended to serve two essential purposes. ***First***, the assessments were designed to assist DHS in making the determinations necessary to provide the class members with the best treatment options required by law, *i.e.*, treatment in the least-restrictive setting possible. ***Second***, the assessments were critical to determining the resources needed to address and correct the systemic problem of excessive, inhumane, and

³ It is apparent that whatever else is wrong, DHS needs to add a lot more beds to the system. Plaintiffs have adjusted the relief in this motion from what they requested in the April 5, 2017, letter. We have concluded that a properly conducted study is essential to determining the allocation of beds. Given DHS' inability to conduct a proper study, we have opted to ask the Court to order DHS to contract with a consultant who has the credentials and experience to do the assessment right. That assessment can and should seek to place patients in the least restrictive setting appropriate for the circumstances, which means that the number of new forensic beds needed simply cannot be determined at this time.

unconstitutional wait times. For example, DHS continually has taken the position that it does not want to add more forensic beds at NSH and TSH, instead preferring to add community placement slots. But, if the assessments were to show that there are people on the wait list who can be placed only in these most secure facilities, such as people charged with felonies, then DHS would need more forensic beds in secure facilities. DHS should have completed the assessments by the end of March, 2016. ECF 35 at ¶ 5. DHS did not do so. When Plaintiffs asked for the assessments in September, DHS delayed until mid-October and then produced an elaborate chart that included useful information but not the required determinations. Ex. G, E; *see also*, Ex. L-M (produced in December).

Similarly, DHS did not complete the assessments for persons “not legally eligible presently for less restrictive placement” because it did not “include an explanation for why the person is not eligible and what it would take to make the person eligible.” ECF 35 at ¶ 5.

3. Strategic plan

DHS also failed to produce by the end of March a strategic plan for “reducing the wait times for admission of Class A members to clinically appropriate competency-restoration-treatment placement options within a constitutionally allowable time period.” ECF 35 at ¶ 6. When Plaintiffs requested to see the plan in September, DHS did not immediately produce one, which

suggests that it had never been completed. Instead, on October 11, DHS produced a plan that contained no clearly defined specific objectives, no deadlines or means of measuring progress for its overarching “Action Steps,” and minimal allocations of responsibility. *See* Ex. H.

For example, among the “Target Results” identified in the plan are: “Reduce the number of individuals on the wait list for admission to the Regional Forensic Psychiatric Centers (RFPCs)”⁴ and “Reduce the wait times for individuals on the wait list for admission to the RFPCs.” *Id.* at 1. This is all well and good, but the “target” does not specify by how much wait lists and wait times should be reduced or deadlines for reducing them. It is little wonder with a plan like this that DHS has been so complacent in the face of what anyone else would recognize as a fiasco. The only “plan” DHS had was to invest the limited resources specifically required by the Settlement as a baseline. *Id.* at 1-2.

If DHS had developed an adequate plan for reducing delays to a “constitutionally allowable time period,” and, more importantly, understood the necessity of such a plan to solving this urgent problem, it would have continuously analyzed updated assessments of the persons on the wait lists, projected how many additional beds at which levels of security needed to be added to reduce the wait

⁴ NSH and TSH are the two RFPCs in Pennsylvania.

times to a constitutionally allowable level, and adopted a plan to add those beds within a finite time period. The plan would have included cost estimates and how to secure needed funding. DHS did none of this. Whatever DHS did, it has not come up with a strategic plan for “reducing the wait times for admission of Class A members to clinically appropriate competency-restoration-treatment placement options within a constitutionally allowable time period,” as required by the Settlement. ECF 35 at ¶ 6.

Plaintiffs have been pointing out DHS’ failure to remedy the ongoing delays since September of last year. By letter of September 23, 2016, plaintiffs advised DHS that “notwithstanding early positive signs, we are now eight months out and there appears to be little progress The average wait time for class members in Philadelphia to be admitted to Norristown or otherwise transferred from jail is on average a staggering *350 days*.” Ex. I at 1 (emphasis in original). This led to an October 13 call between the parties, which was followed by Plaintiffs’ November 15, 2016, letter advising that “right now, it appears that you need about 240 new beds to clear the current wait list It has been over nine months since the interim settlement and well over a year since we met with you and the Secretary, when you urged us not to sue because DHS was going to resolve these issues.” Ex. F at 1. Plaintiffs wrote again on November 23, advising that “we anticipate going back to court to resolve our differences,” but asking for a written response to the

concerns raised in plaintiffs' letters and suggesting a face-to-face-meeting. Ex. J at 1-2. The meeting was held in Harrisburg on December 15. At the meeting, DHS officials expressed a desire to work towards an amicable resolution and indicated they would try to address our concerns. But nothing happened. Plaintiffs requested access to DHS' raw data on delays, which was promised but not delivered. On January 26, Plaintiffs again made clear that they were prepared to return to Court. Then the CEOs of NSH and TSH and Phil Mader requested a call with Plaintiffs' consultant, Dr. Joel Dvoskin, which was then scheduled for February 13. But, DHS abruptly canceled the call and never re-scheduled it.

On April 5, 2017, having failed to prod DHS into any meaningful action, Plaintiffs sent DHS a list of proposed solutions and requested a response within one week. *See* Ex. K. DHS requested additional time to respond, due to the untimely death of DHS Deputy Secretary Dennis Marion. Eventually, DHS asked Plaintiffs to await completion of a newly commissioned study, which appears to have been prompted by Plaintiffs' April 5 letter. The study would be conducted by an outside firm that specializes in management and operational consulting. Their consultant's website indicates that they help "clients achieve and sustain superior operational performance." Operational Performance Solutions, Inc., About Us <http://www.opsgroupinc.com/lean-process-improvement/about/> (accessed May 10, 2017). Plaintiffs have not seen any evidence of the firm's experience working on

forensic mental health matters, nor that they will assess the patients on the wait list, patients in treatment or awaiting transfer out of the hospitals, or additional treatment capacity needed to bring wait times down to constitutional levels. The consultants may make DHS more “lean,” which is the consultants’ stated specialty, but while DHS may be able to operate more efficiently, the fundamental problem that cannot be avoided is that the system lacks adequate capacity to serve the demands of its very sick patients.

It has now been over a year since the Settlement and over six months since Plaintiffs began pointing out the failure of DHS’ initial post-settlement strategies, and DHS still has no plan. Notwithstanding our frustration with DHS’ delaying tactics, we wish to acknowledge that relations with DHS’ counsel have been professional and amicable. Yet, at long last enough is enough. Fifteen months after the Settlement agreement is far too late for DHS to hire a management consultant with no forensic experience who will neither look at patient characteristics nor propose a plan to reduce wait times to constitutional levels. Plaintiffs cannot delay resolution of this matter and restoration of their constitutional rights any longer.

III. ARGUMENT

A. DHS’ CONSTITUTIONAL VIOLATIONS REQUIRE ENTRY OF A PRELIMINARY INJUNCTION.

DHS' ongoing constitutional violations, which are causing irreparable harm to hundreds of vulnerable people every day, require prompt judicial relief. DHS has failed to meet its requirements under the Settlement, and more importantly, has failed to eliminate the hundreds of ongoing violations of Plaintiffs' constitutional rights. The Court retained jurisdiction over this matter under the Settlement. ECF 35 at ¶ 12. Plaintiffs now ask the Court to order the relief DHS has failed to provide and that is needed to fix the serious, widespread, and ongoing constitutional violations.

It has become clear that the additional bed space added by DHS is insufficient to solve the current crisis and that much stronger measures are needed. For this reason, Plaintiffs renew their outstanding preliminary injunction motion and amend it to ask this Court to order that: (1) DHS transfer all class A members for competency restoration treatment within seven days, as required by other federal courts; (2) DHS hire an independent consultant to analyze the forensic population and identify a strategy to reduce wait times to a constitutionally acceptable level; and (3) DHS create 100 new treatment spots immediately, and make available whatever resources are identified in the independent consultant's report as necessary to achieve a constitutionally permissible wait time.

Plaintiffs are entitled to a preliminary injunction for further relief because: (1) they are likely to succeed on the merits; (2) they are suffering and likely to

continue to suffer irreparable harm in the absence of the injunction; (3) Defendants will not suffer greater harm than the Class A members if the injunction is granted; and (4) granting the injunction is in the public interest. *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014); *see also* Pls.’ Mot. Prelim. Inj., ECF 4; ECF 9.

1. Class A members are likely to prevail on the merits of their constitutional claims.

It is undisputed that DHS’ failure to transfer Class A members for treatment in a timely manner violates the Constitution. **First**, the due process clause of the Fourteenth Amendment requires that there be some reasonable relation between the detention and a legitimate purpose for which an individual is detained, *see Jackson v. Indiana*, 406 U.S. 715, 738 (1972). **Second**, the due process clause imposes a separate duty to protect the safety and welfare of the Class A members, who Defendants are holding involuntarily and preventing from being able to help themselves. *See DeShaney v. Winnebago Cty. Dep’t of Social Servs.*, 489 U.S. 189, 198-200 (1989); *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982); *see generally* ECF 9.

DHS concedes that excessive waits violate the Constitution. It stipulated in the Settlement that wait times longer than 60 days are unconstitutional. ECF 35 at ¶ 1. Since it is also undisputed, based on DHS’ own data, that most patients wait

longer than 7 days, and even longer than the 60 days DHS has stipulated is unconstitutional, DHS is currently in violation of the Settlement and the Constitution.

Every federal court to consider this issue has required that transfers must occur in less than twenty-one days. *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003) (7 days); *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, 101 F. Supp. 3d 1010, 1023 (W.D. Wash. 2015) (7 days absent individualized good cause finding), *vacated and remanded on other grounds*, 822 F.3d 1037 (9th Cir. 2016); *Advocacy Ctr. for the Elderly and Disabled v. Louisiana Dep't of Health and Hosps*, 731 F. Supp. 2d 603, 627 (E.D. La. 2010) (hereinafter “Louisiana Advocacy Center”) (21 days). Other federal courts have determined that waits shorter than those Class A members presently endure in Pennsylvania are unconstitutional. *See Disability Law Ctr. v. Utah*, 180 F. Supp. 3d 998 (D. Utah 2016) (wait times of 30 to 180 days unconstitutional); *Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934 (E.D. Ark. 2002) (6 months wait for treatment unconstitutional).⁵

⁵ The parties settled this lawsuit by agreeing to maximum wait times of 48 hours to 45 days, depending on the stage of treatment and severity of the individual’s condition. *See John E. Dannenberg, Prompt Mental Health Services Ordered for Arkansas Pretrial Detainees, Prison Legal News (July 15, 2003)*,

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In light of DHS' failure to make measurable (or even any) progress to decrease the wait times and reduce the number of impacted Class A members on the wait lists, Plaintiffs seek to establish and enforce a clear, maximum allowable wait time, as allowed in Settlement ¶ 7, and to set a concrete timetable by which DHS will reduce wait times to this limit. This new relief will, however, require this Court to decide and grant Plaintiffs' Motion for Preliminary Injunction.

Recent developments in *Trueblood* provide a comparable example of the need to revisit and modify orders to add additional specificity to ensure progress is made in reducing wait times for transferring patients to mental-health facilities for treatment. In that case, Washington state moved for additional time to fulfill the court's order to reduce wait times to the court-ordered seven days for both competency evaluations and restoration treatment. *Trueblood v. Wash. Dep't of Soc. and Health Servs.*, No. C14-1178 MJP, 2016 WL 4533611 at *1 (W.D. Wash. Feb. 8, 2016). The court found defendants had failed to take, or to even attempt to take, several steps that would have contributed to progress in reducing wait times in the eight months they were given to reduce them. *Id.* at *4. The court permitted an additional five months to comply with the Court's previous order, but also

Footnote continued from previous page

<https://www.prisonlegalnews.org/news/2003/jul/15/prompt-mental-health-services-ordered-for-arkansas-pretrial-detainees>.

ordered additional specific steps and deadlines by which these steps must be taken, including implementation of a triage system and appointment of a Director of Forensic Services. *Id.* at *4-8.

The most recent dispute in *Trueblood* revolves around how many *days* Washington may take to complete evaluations, and Washington did not even appeal the part of the district court order that required the transfer of criminal defendants for *treatment* within 7 days. *Trueblood v. Wash. Dep't of Soc. and Health Servs.*, No. C14-1178 MJP, 2016 WL 4268933 (W.D. Wash. Aug. 15, 2016; *Trueblood*, 822 F.3d at 1042. In Pennsylvania, the discussion is about how many *months* people must wait for transfer to treatment, and in a substantial number of cases over a *year*.

Because the relief provided by the Settlement has proven insufficient and because DHS has shown no ability or inclination to resolve the problem of delays on its own, a preliminary injunction requiring additional steps to ensure that wait lists are reduced is necessary and appropriate.

2. Plaintiffs are suffering irreparable harm

Class A members are suffering irreparable harm because they are being detained for unconstitutional lengths of time in penal institutions and because they are not receiving adequate and necessary mental-health treatment. Plaintiffs, who

have been adjudged incompetent to stand trial, must be treated outside of a penal setting, civilly committed, or released:

[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

Jackson, 406 U.S. at 738. Plaintiffs have a fundamental right to be free from imprisonment: “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (setting presumptively reasonable time limits on immigration detention); *see also*, *United States v. Washington*, 549 F.3d 905, 917 & n.17 (3d Cir. 2008) (“potential for excess prison time” is irreparable harm).

Moreover, prolonged incarceration of severely mentally ill people, like the Class A members, threatens serious psychological harm. The *Trueblood* court found that “prolonged incarceration exacerbates mental illness, making symptoms more intense and more permanent, and reducing the likelihood the person’s competency can ever be restored.” 2015 WL 1526548, at *6. The district court highlighted the importance of obtaining treatment quickly:

For class members suffering from mental illness, each additional day spent incarcerated—especially in solitary confinement—makes that class member’s mental illness more habitual and harder to cure, resulting in longer restoration periods or in the inability to ever restore that person to competency. Longer restoration treatment periods increase the cost to the state and therefore to the public of treating that individual, and longer restoration periods stymie the efficient use of restoration bed space.

2016 WL 4268933 at *13. The Louisiana *Advocacy Center* court found that psychotic individuals’ conditions can be exacerbated while in jail, 731 F. Supp. 2d at 625, and the *Terry* court cited evidence that delay in evaluation and/or treatment makes it more difficult to treat mentally ill inmates in the future. 232 F. Supp. 2d at 940-41.

The combination of illegal imprisonment and failure to receive essential mental-health treatment while in detention unquestionably amounts to irreparable harm.

3. The harm to class members of not granting an injunction outweighs harm to DHS of ordering timely transfers to treatment, and an injunction is in the public interest.

The cost to DHS of providing the resources needed to cease violation of Plaintiffs’ due process rights cannot be compared with, nevermind outweigh, the heavy costs of the due process violations Plaintiffs currently face. A lack of funds is not a legitimate state interest. *See Louisiana Advocacy Ctr.*, 731 F. Supp. 2d at 624 (“[L]ack of funding cannot justify the continued detention of defendants who

have not been convicted of any crime, who are not awaiting trial, and who are receiving next to no mental-health services.”); *Mink*, 322 F.3d at 1121 (“Lack of funds, staff or facilities cannot justify the State’s failure to provide . . . treatment necessary for rehabilitation.” (internal quotation marks and citation omitted)); *Terry*, 232 F. Supp. 2d at 944 (same). *See also Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 351 (3d Cir. 1987) (holding that county’s financial burden is not a legitimate state interest to justify violating prisoners’ rights: “in the absence of alternative methods of funding, the County must assume the cost of providing inmates with elective, nontherapeutic abortions”).

Ensuring that individuals detained awaiting competency restoration treatment do not face excessive wait times in prisons and jails is in the public interest. The Commonwealth’s purpose in holding Plaintiffs is to provide them with competency restoration treatment so that they might stand trial. However, the current excessive wait times undermine the Commonwealth’s interest in treating Plaintiffs because while they languish without treatment, Plaintiffs’ competency is likely to deteriorate further. *See Mink*, 322 F.3d at 1121 (explaining that such “incapacitated criminal defendants do not receive care giving them a realistic opportunity of becoming competent to stand trial”). The recent Utah federal court decision aptly summarized the point:

The lengthy detention of incompetent defendants in county jails without adequate mental health treatment is not reasonably related to the State's interest in determining whether there is a substantial probability that the defendants' competency can be restored in the foreseeable future or to its interest in actually restoring their competency so they may quickly and fairly be tried. The State is instead undermining these goals by holding incompetent defendants in jail for months without providing them adequate treatment.

Disability Law Center, 180 F.Supp.3d at 1012.

IV. RELIEF

Plaintiffs request that this Court grant a preliminary injunction ordering the following relief to reduce the wait lists and wait times:

1. DHS to transfer all Class A members to a non-punitive, mental-health setting for restoration treatment within seven days, and to set a schedule by which DHS shall attain compliance with the constitutional limit;
2. DHS to hire an independent consulting firm suggested by Plaintiffs and approved by the court to conduct a thorough evaluation of the individuals on the wait list and the forensic population. This evaluation will determine what roadblocks exist that are preventing wait list and wait time reduction and identify methods and resources needed to attain compliance with the limit set in paragraph 1, *supra*; and
3. DHS to open an additional 100 beds within six months to make new treatment options available in a timely manner, and to make additional beds

and resources available as determined appropriate by the consultants in paragraph 2, *supra*.⁶

A. THE COURT SHOULD ORDER A MAXIMUM WAIT TIME OF SEVEN DAYS.

DHS has steadfastly refused to negotiate toward identifying a maximum allowable wait time, leaving Plaintiffs no choice but to exercise their right under Settlement ¶ 7 to move that the court set the maximum allowable wait time at seven days.

Plaintiffs ask that the Court impose the same seven-day time limit imposed by federal courts in *Mink* and *Trueblood*. See III.A.1, *supra*. The *Trueblood* court followed *Mink*, wherein the Ninth Circuit upheld the district court's ruling that mentally incapacitated criminal defendants must be admitted for treatment within seven days of a court's competency finding. 322 F.3d at 1123. Courts in both cases drew support for the maximum wait times from the language and history of the states' respective commitment statutes, but the overarching constitutional imperative is not subject to legislative vicissitudes: "Holding incapacitated criminal defendants in jail for *weeks or months* violates their due process rights

⁶ If, in the course of opening new beds, DHS is able to reduce the wait list through other means, *e.g.*, placing patients in community settings, then the number of new beds to be opened could be reduced by the corresponding reduction in the wait list.

because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals.” *Mink*, 322 F.3d at 1122 (emphasis added). While some courts have used slightly longer periods, given DHS’ lack of success in reducing the wait lists, this Court should enter the maximally protective measure.

A seven-day transfer period strikes the appropriate balance between the manifest interests of the Class A members and any ill-defined countervailing interests that DHS might advance. Plaintiffs have a legitimate interest in freedom from incarceration absent a criminal conviction and in receiving competency restoration treatment. *Mink*, 322 F.3d at 1121 (“Incapacitated criminal defendants have liberty interests in freedom from incarceration and in restorative treatment”). DHS, on the other hand, has offered no legitimate interest in detaining Plaintiffs for more than seven days. To be sure, DHS faces administrative hurdles and resource constraints, but, as explained above, such limitations cannot justify Plaintiffs’ prolonged incarceration. *Disability Law Ctr.*, 180 F. Supp. 3d at 1010 (“[T]he court reads *Jackson* to suggest that a state’s interest in, and sole justification for, continuing to detain a defendant pretrial after he has been declared incompetent—opposed to releasing him—is to evaluate whether there is a substantial probability that he will become competent in the foreseeable future.”).

Pursuant to Settlement Agreement ¶ 7, Plaintiffs request a preliminary injunction setting a maximum allowable wait time of 7 days and a firm deadline by which DHS must reduce the wait time to that maximum period.

B. DHS MUST HIRE AN INDEPENDENT CONSULTING FIRM TO ANALYZE THE WAIT LIST AND PROVIDE A STRATEGY TO REDUCE WAIT TIMES

DHS should be required to hire an independent consulting firm with expertise in the area of forensic mental health to analyze the persons on the wait list, identify potential obstacles to timely transfers or placements in appropriate treatment, assess system capacity to meet treatment demands, and suggest solutions to overcome these obstacles and reduce wait times to a constitutionally allowable level. As currently required by ¶ 5 of the Settlement, DHS should have “determine[d] which persons would be eligible legally and clinically for less restrictive placement and . . . what barriers exist to such a change in placement.” Additionally, DHS was supposed to assess which persons are “not legally eligible presently for less restrictive placement” and explain “why the person is not eligible and what it would take to make the person eligible” for transfer out of the hospital. In this way, the assessments were supposed to help inform the parties as to what kind of placements were needed to reduce wait times.

With the lack of progress made since the Settlement, the need for greater, continued attention by DHS to the wait lists and wait times is essential. Requiring

DHS to hire an independent consultant with requisite expertise and experience will ensure that a concrete strategy is identified and pursued, which DHS has failed to do in the 15 months since the Settlement. Once the wait list is reduced, the identified strategy can be tailored to ensure that the wait times do not return to an unconstitutional level.

DHS had their opportunity over the past year to reduce the wait times by whatever means they deemed appropriate, and they have failed. Plaintiffs are now entitled to a specific plan that will ensure their needs are met as quickly as possible.

C. THE COURT SHOULD ORDER DHS TO OPEN ADDITIONAL FORENSIC TREATMENT PLACEMENTS WITHIN A SPECIFIED TIME PERIOD.

DHS has shown that when left to its own devices, without supervision, it makes only incremental progress, if any. *See supra*, § I. *Trueblood* is persuasive precedent that a more specific remedy is necessary and appropriate to compel a defendant that has demonstrated an inability to fix unconstitutionally long delays. *See supra* § III.A.1. Since DHS has failed to make adequate progress toward reducing wait times to a constitutionally-acceptable level by its own nebulous “plan,” this Court should direct DHS to take specific steps that will actually achieve constitutional compliance.

The only method that is guaranteed to move individuals into treatment is to make additional treatment spots available, *i.e.*, more beds. Plaintiffs have had their constitutional rights violated for too long waiting for DHS to reduce wait times by other means. DHS must begin to open new beds immediately in order to meet the needs of the state's forensic population in a timely fashion while the analysis is completed by the independent consultant. The state has 64 beds that are currently unused in Building 9 at NSH, and additional beds are being vacated as part of the NSH closure of "civil commitment units" that could be put to use for the first 100 beds. In what geographic areas and at what treatment levels beds are ultimately needed to solve the grave systemic problem will need to await the consultant's study, but at this point the system lacks so many beds that DHS could add them at any and all levels without fear that they will subsequently be unnecessary. Plaintiffs require swift action from DHS to address their constitutional violations, and opening additional beds is the only option that guarantees timely progress.

V. CONCLUSION

Both sides in this litigation expected and hoped that the Settlement would reduce wait times substantially, but unfortunately the effort has failed. The past 15 months of inadequate and halfhearted efforts by DHS to comply with the Settlement has failed to reduce the number of severely mentally ill people languishing in the state's jails or reduced the egregious wait times. DHS continues

to violate hundreds of Class A members' constitutional rights daily. This Court must provide greater oversight of the reform process and exert more pressure on DHS to reduce wait times significantly and quickly.

Dated: May 11, 2017

Respectfully submitted,

/s/ **Witold J. Walczak**

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** Pro Hac Vice Application*

Forthcoming; admitted only in Virginia;

practicing law in the District of

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application for admission to the D.C.

Bar and under the supervision of

*lawyers of the firm who are members in
good standing of the D.C. Bar.*