Timothy P. Barth, MD, CCHP
Correctional Health Solutions
3265 North Wagner Road
Ann Arbor, Michigan 48103-1773
tbarthmd@umich.edu

EXPERT REPORT: TIMOTHY P. BARTH, MD, CCHP.

Pursuant to Rule 26(a)(2)(B) of the Federal Rules of Procedure, I submit this expert report on behalf of Defendants, Correctional Medical Services, Inc., Bency Mathai, M.D. and Craig Hutchinson, M.D.

A. Statement Of Qualifications

I, Timothy Paul Barth, MD, CCHP, am a practicing internist and emergency room physician. I am also a physician surveyor for the National Commission on Correctional Health Care (NCCHC). A true and correct copy of my *curriculum vitae* setting forth my qualifications is attached hereto as **Exhibit A.**

I have offered my expertise in consultation on many occasions including to the U.S. District Court in the Eastern District of Michigan (The Honorable Victoria A. Roberts). My advice in these matters is most frequently informal, after brief reviews of medical records. I have testified in both state and federal courts for both plaintiffs and defendants on prisoner health care issues. I am qualified as an expert in correctional health care in a number of states and federal judicial districts, including the venue of this court, as recently as January, 2009 (The Honorable Janet T. Neff). My three trial appearances as an expert were: *pro bono* for an inmate plaintiff, and recently, in January, 2007 and January, 2009, for correctional physician defendants.

My education, training, experience and professional activities in correctional health care qualify me to render an opinion in this case. These opinions are based on my knowledge of systems and care provision within correctional institutions. As a physician surveyor, I am also familiar with the published guidelines for adult correctional facilities (prisons and jails.)

My opinions in this case are to a reasonable medical certainty.

B. Statement of Data and Other Information Considered in Forming Opinions

I reviewed the following documents and records regarding this case:

1.) Plaintiff's Complaint and Second Amended Complaint (PAUL D. REINGOLD, Attorney for Plaintiff);

2.) Plaintiff's Affidavits of Merit, Expert Reports and/or Supplemental Expert Report, *Curricula Vitae* and Depositions: CAROL BRADFORD, MD (Otolaryngology/Head & Neck Surgical Oncology) and BRENT WILLIAMS, MD (Internal Medicine);

3.) Plaintiff's correctional health care and outside medical records;

4.) Tabbed Off-Site Requests and CMS records;

5.) Grievances, Inquiries and Responses;

6.) Plaintiff's Deposition (STEVEN MARK BRODER);

7.) Plaintiff's Expert's Depositions: CAROL BRADFORD, MD, (Otolaryngology) and BRENT WILLIAMS, MD (Internal Medicine);

8.) Defendants' Depositions: Michigan Department of Corrections' Administration and Staff: GEORGE PRAMSTALLER, DO (Family Practice) and PATRICIA BARRETT, RN;

9.) Defendants' Depositions: Correctional Medical Services, Sub-Contractors and Paid Consultants; CRAIG HUTCHINSON, MD (Internal Medicine), BENCY MATHAI, MD (Internal Medicine), AUDBERTO ANTONINI, MD (Internal Medicine) and RONALD KORNAK, MD (Otolaryngology), JOHN AXELSON, MD (Hematology/(Medical)Oncology), JAMES HAYMAN, MD (Radiation Oncology) and CHRISTINE TSIEN, MD (Radiation Oncology);

10.) Review of Defendants' Affidavits of Merit, Expert Reports and *Curricula Vitae* and Depositions: LEON PEDELL, MD (Internal Medicine), SILAS NORMAN, MD (Internal Medicine), MICHAEL J. STENDER, MD (Hematology /(Medical) Oncology) and EUDORO COELLO, MD (Hematology /(Medical) Oncology);

11.) Defendants Motion to Dismiss with Exhibits;

12.) Plaintiff's Response to Motion for Summary Judgment;

13.) Policy Directives and/or Operating Procedures of the MDOC concerning Health Services and Utilization Review.

C. **Summary of Care and Statement of Opinions**

1.) The Michigan Department of Corrections is responsible for all policies, procedures and programs in their correctional facilities, including health care. There are no separate processes of the contractors, Correctional Medical Services, Inc. (CMS), nor have processes been developed by CMS other than those requested by the MDOC and limited by MDOC resources. The medical record demonstrates no relationship ever existed between Dr. Hutchinson and Plaintiff, nor that Dr. Hutchinson was in any way involved in the review of his care, or established the processes whereby his care was reviewed for approval.

The process of utilization review (including the forms called "407's" and "409's" with their formats) was developed by United Correctional Care, Inc. with the MDOC. The use of facsimile transfer of information was decided at that time by decision of the MDOC. The actual utilization review process was based on standard nurse driven "Interqual Review Standards" with corporate physician oversight. Dr. Hutchinson did not arrive on the seen until late 1999, by which time all the processes for utilization review were well-entrenched.

Two of the alleged delays mentioned by Plaintiff's attorney highlight Dr. Mathai's attempts at intervention within the process required by the MDOC:

Dr. Kornak's initial evaluation of Plaintiff occurred on 11/13/01. Lesions were observed on both vocal cords at that time. The next day, 11/14, Dr. Mathai reviewed Dr. Kornak's request for "microlaryngoscopy in two to three weeks" and gave it to the MDOC coordinator to be forwarded to CMS's utilization reviewers for authorization. At that time, she scheduled Mr. Broder for follow-up 14 days from that date on 11/28, to check on the progress of the scheduling for surgery. She also filled out the recently suggested and approved "tickler" for 11/29, the day after Mr. Broder's appointment, just in case he did not show up on 11/28. Dr. Mathai did not receive Dr. Kornak's transcribed note from the clinic until Tuesday, 11/20. After review she

immediately gave it to the MDOC coordinator to forward to CMS's utilization reviewers.

Dr. Mathai also completed at that time, 11/29, an Offsite Specialty Referral 30-Day Follow-up form indicating she had reviewed the status of the microlaryngoscopy recommended for Mr. Broder and she was informed it would be scheduled shortly. Dr. Mathai, assuming that surgery would occur in the next few weeks and knowing that if cancer was found, Radiation Therapy would not see her patient until after the New Year, therefore scheduled her patient for a 1/2/02 visit in anticipation of the next step in his treatment.

The approval did not come until 12/5/01. No explanation is offered. The Plaintiff's attorney asserts that "CMS" did not schedule it until 1/11/02. It has repeatedly been testified that off-site scheduling was the responsibility of the MDOC Patient Services Department at Duane Waters Hospital. The scheduling required the coordination of three different clerical entities. The Patient Services Representative, who probably did not have Dr Kornak's note for review; a receptionist/secretary in Dr. Kornak's office who did not have Dr. Kornak's dictation, because, as Dr. Kornak testified, he does not keep office copies of his Duane Waters Clinic dictations; and the operating room scheduling clerk at Foote Hospital. Dr. Kornak was almost certainly not informed that Mr. Broder's surgery was being scheduled and certainly Dr. Mathai was not contacted. With the upcoming Christmas and New Years holidays, with surgery schedules being truncated to emergencies only because of these holidays, only knowledge by Dr. Kornak and his intervention would have permitted Mr. Broder to be added on to the surgical schedule. Intervention by Dr. Mathai would have only been effective through Dr. Kornak. When Dr. Mathai next checked her "tickler" file and completed a second Offsite Specialty Referral 30-Day Follow-up form on or about 1/2/02, Mr. Broder had not yet had his surgery. At least she could state with certainty that he would have his surgery on 1/11/02, and therefore approved the delay. She filled out another "tickler" for the end of January. To have gotten it done earlier would have

required a cancellation in the surgical schedule, Dr. Kornak's intervention and MDOC custody to move Mr. Broder to Foote Hospital.

Dr. Mathai was not hired to run a medical practice. She was hired to see patients, provide clinical impressions, and recommend treatment programs. These additional programs were to be carried out by MDOC employees, specifically the nursing staff and support services of healthcare. Dr. Mathai had essentially no control over these aspects of healthcare provision.

Despite kites in December and January by Mr. Broder, none of which were passed on to Dr. Mathai, Mr. Broder did not see the radiation oncologist until 2/5/02. This is apparently in response to Dr. Mathai seeing Mr. Broder in response to her "tickler" file appointment on 1/30/02. The record notes that Dr. Mathai called Patient Services to request scheduling of this appointment within a week.

When Dr. Hayman saw Mr. Broder, he noticed that a vital piece of information was missing from Mr. Broder's record at Foote Hospital. When staging individuals for treatment, the operating surgeon's physical examination of the neck and orophayngeal structures under anesthesia is critical information. Dr. Hayman could not find Dr. Kornak's operative note and he called Dr. Kornak's office to see if they had a copy. They didn't. So Dr. Kornak dictated a note (hence the date, 2/5/02) to remedy this deficit. Until radiation oncology received a copy of this note they could not proceed and Mr. Broder was returned to Parnell without a communicated definite simulation date. It then falls to the radiation oncologists to schedule Mr. Broder for simulation. It is incomprehensible why the radiation oncologist awaited an approval of CT. Simulation automatically includes CT imaging to measure internal anatomy and help localize the beam for radiation. The simulation occurred without approval of a CT scan because CT scanning is part of any radiation simulation and this simulation had already been approved and scheduled by patient services. Dr. Mathai left on maternity on 3/8/02.

2.) The process employed by MDOC within the prison environment concerning Plaintiff's care provision was not inhibited by any policy, practice, or procedure that was officially formulated, adopted and/or implemented by CMS and/or Dr. Hutchinson.

The records in this case show that the processes of Plaintiff's care provision within the MDOC environment were complicated, involving multiple people from utilization review personnel, scheduling clerks, custody staff, nursing staff, hospital schedules, on-site primary care physicians and specialty care physicians in the community. The effectiveness of the process was not inhibited by any policy, practice, or procedure that was officially formulated, adopted and/or implemented by CMS and/or Dr. Hutchinson.

The policies, practices, and/or procedures of CMS concerning the authorization and provision of medical care and/or the follow-up of medical care for Mr. Broder within the MDOC process are consistent with national guidelines/standards. Pursuant to its contract with the State of Michigan, CMS contracted with licensed health professionals to staff MDOC facilities and provide primary care services as medical service providers (MSP). Dr. Mathai was one such MSP. Contracts between CMS and MSP's required MSP's to provide primary care services consistent with their medical judgment and the applicable medical standard of care. CMS employed a Utilization Review Department to review and authorize requests for offsite medical specialty services where indicated. CMS's utilization reviewers timely authorized requests for Mr. Broder to receive recommended specialty care and/or follow-up medical examinations and treatment. CMS, it's utilization reviewers and MSP's properly operated within the processes employed by the MDOC. CMS's Utilization Review Department relied upon MDOC coordinators to fax information to them for their review and schedulers employed by the MDOC to schedule authorized medical examinations, follow-up care, and treatment. CMS utilization reviewers expected MDOC schedulers would schedule authorized medical care in consideration

of custody and transportation issues, the availability of the patient and medical providers, and the urgency of the medical condition involved, if any.

The MDOC's processes were developed as sequential processes that were negatively impacted by MDOC limitations with regard to information technology. However, Ms. Barrett, the Health Unit Manager describes the tracking of specialty care and off-site appointments as being accomplished in the medical records department by the department manager.

The Michigan Department of Corrections has consistently insisted on and retained all direct responsibility for the provision of health care for all inmates within their custody. This includes all decisions with regard to physician and mid-level staffing levels. They have also retained as there direct employees those health care professionals with the statutory responsibility for advocacy for their patients.

The MDOC uses a nurse driven health care system. Access to the entirety of the health care is through the nursing staff. The record indicates that Plaintiff had unimpeded access to the nursing staff, which had the responsibility to inform and keep Dr. Mathai abreast of the progress of his diagnosis and treatment of throat cancer. They were also the means whereby Plaintiff would be scheduled to see Dr. Mathai other than the appointments she scheduled based on her anticipated need to see him next. There is no indication in the record that Dr. Mathai deliberately overlooked a medical issue concerning Mr. Broder that was brought to her attention by nursing staff or anyone else.

Any alleged delay in providing medical care and treatment to Mr. Broder was not caused by a policy, practice, or procedure created and/or implemented by CMS, Craig Hutchinson, M.D., and/or Bency Mathai, M.D. Their actions and/or inaction were not a proximate cause of any alleged delay in Mr. Broder's treatment or alleged injuries.

3.) The concept of Standard of Care is what a reasonable physician of the same training and experience would do under similar circumstances. It refers to medical decision making not the minutiae of patient care coordination or the timeline of care delivery. This is especially true in the ambulatory care setting where multiple variables can confound how the care is provided.

The speculations of Plaintiff's experts are distorted by vision through a retrospectoscope (hindsight). Standard of Care does not include patient care advocacy based on omniscience with regard to events such as equipment failure and the absence of chemicals in the hospital radiology department.

Plaintiff's experts are careful to qualify their Standard of Care language as applicable to "South East" Michigan. It seems to acknowledge that the resources in Jackson in South Central Michigan, are different and can impose scheduling difficulties that are not the usual in the tertiary care environment of the second largest health care organization in Michigan. There are multiple tertiary care health care organizations in South East Michigan including Henry Ford, Detroit Medical Center, St. Joseph Mercy and William Beaumont. There are none in Jackson. The population of the city of Jackson in 2000 was approximately 36,000 – about the same number as students who annually register to attend classes at the University of Michigan. Jackson's ties to tertiary care hospital are to Battle Creek, despite its closer proximity to Ann Arbor/ Ypsilanti and Lansing/East Lansing.

A major issue affecting Community Standards of Care not understood by Plaintiff's experts are the security necessities of not notifying inmates of their appointments outside the prison. This is a general proviso to protect staff and the community from plans for an escape or other activities that might put people at risk. The end result of such a policy is that it can limit incarcerated patients from advocating for their own health care. However, incarcerated

individuals are usually aware of a timeline for their care and are usually quite successful in advocacy for themselves.

D. Conclusions

Plaintiff's alleged delays, if any, were the result of process problems and issues in the MDOC's off-site health care process and/or the decision making of off-site specialty care providers. Dr. Mathai's professional response to Plaintiff's health care needs was appropriate.

The MDOC is the primary author of all processes, programs, policies and procedures promulgated in the operation of their institutions including health care programs. Dr. Hutchinson and Correctional Medical Services, Inc., inherited an off-site review process that had been developed by the MDOC with a previous health care contractor. The polices, practices, and/or procedures of CMS were not a proximate cause of Plaintiff's alleged injuries.

E. Summary of Supporting Exhibits

See **B.** above.

F. Fee Schedule

My usual fees are:

Inmate/Family/Attorney Represented Plaintiffs

Pro bono for *pro se* and court appointed representation;
ADA cases – *per* court determination;
Represented by counsel:
$ 3,000 retainer;
$ 400 *per* hour (deposition, 4 hour minimum; trial, 8 hour minimum)
Plus travel expenses.

Physician/Health Care Professional Defendants

$ 350 *per* hour for record/document reviews and reports;
$ 375 *per* hour for depositions (4 hour minimum);
$ 3,500 *per* day or fraction thereof for trial; plus reasonable travel expenses.

G. List of Cases Testified to at Trial or By Deposition as an Expert

Jeremiah Owens (# 247944) v. Dennis Straub, et al., 98-CV-72548-DT (U.S.D.C., E.D. Michigan, S.D.) Appeared for inmate Plaintiff at deposition and trial, June 2001.

Aris et al. v. Allen et al., 1:05-CV-396-PWG (U.S.D.C., N.D. Alabama, E.D.) Appeared for defendant (State of Alabama) at deposition, June 2006.

Estate of Leonard Coley, et al. v. Ngozi Ejiogu, M.D., et al., 24-C-05-007428 MM (Circuit Court for Baltimore City, Maryland). Appeared for correctional physician defendant at deposition and trial, January 2007.

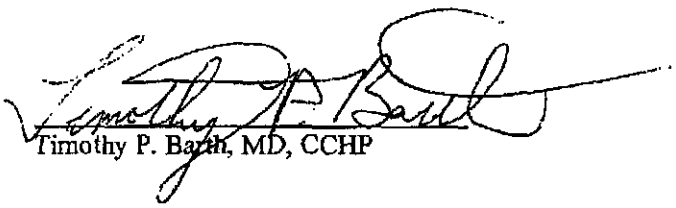
Estate of Kevin Fabian, Deceased v. Patricia Huling, RN, et al., 05-838-NH (Macomb County Circuit Court, Michigan). Appeared for correctional nursing defendants at deposition, October 2007.

Estate of Charles Jones v. Julianne Munro,et al. 2:05CV70454 (U.S.D.C., E. D. Michigan).

Frank Lee Howard, III, v. Badawi Abdellatif, M.D., et al., Case No: 2:05-cv-81 (U.S.D.C., W.D. Michigan, N.D.) Appeared for correctional physician defendants at deposition and trial, January 2009.

H. Signature

The above statements are true, based upon personal knowledge and professional expertise, and stated with reasonable medical certainty. I am competent to testify to such at trial. My opinions are provided subject to further information that may arise in this case.



Timothy P. Barth, MD, CCHP

Dated: May 14, 2009