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February 29, 2012

The Honorable Nathan Deal
Governor, The State of Georgia
206 Washington Street
111 State Capitol
Atlanta, Georgia 30334

The Honorable David Cook
Commissioner, Department of Community Health
2 Peachtree Street NW
Atlanta, GA 30303

The Honorable Frank Shelp
Commissioner, Department of Behavioral Health and Developmental Disabilities
2 Peachtree Street NW
Atlanta, GA 30303

Assistant Attorney General Thomas Perez
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
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Washington, D.C. 20530

Elizabeth Jones, Independent Reviewer
Georgia/United States Department of Justice Settlement
608 Symphony Woods Drive
Silver Spring, MD 20901

Dear Governor Deal, Commissioner Cook, Commissioner Shelp, General Perez, and Independent Reviewer Jones:

I write to you with deep concerns about a proposed redesign of the Georgia Medicaid system for individuals with developmental disabilities and mental illness in the fourth year of the five year Settlement Agreement ("Settlement Agreement") between the United States Justice Department and the State of Georgia, which was signed in October 2010. I write to you on behalf of the Atlanta Legal Aid Society Mental Health and Disability Rights Project, which litigated the *Olmstead* case.

My concerns can be narrowed down to three key issues: (1) The Navigant Report, which

recommends a Medicaid Redesign, does not give any consideration to how the Settlement Agreement would be carried out under a redesign despite the fact that the implementation would begin in the fourth year of the five year Settlement Agreement and have a major impact on it; (2) The recommended Medicaid redesign likely would prevent the state from complying with the Settlement Agreement; and (3) The Redesign likely would substantially debilitate or eliminate the Department of Behavioral Health and Developmental Disabilities, which the state created after repeatedly expressing the importance of having a department that focused solely on people with mental illness, substance abuse issues, and developmental disabilities.

A BRIEF HISTORY

On April 18, 2007, the Justice Department opened up an investigation of conditions and practices in the State of Georgia's psychiatric hospitals. That investigation led to findings letters sent to former Governor Sonny Perdue in 2009 and 2010 with detailed findings of constitutional and statutory violations of the rights of patients, including severe incidents of abuse, neglect, and deaths. The Justice Department investigation led to litigation which resulted in settlement agreements signed in January 2009 and October 2010, which are both in effect today.

The October 2010 Settlement Agreement is of paramount concern. The Settlement Agreement is for five years and requires the State of Georgia to provide a substantial number of services in the community for men and women with mental health disabilities and developmental disabilities. The Settlement Agreement implements the state's obligations under the Americans with Disabilities Act and the United States Supreme Court's *Olmstead v. LC* decision. It was clearly contemplated when the settlement was signed that it primarily would be implemented by the Georgia Department of Behavioral Health and Developmental Disabilities ("DBHDD"). The Governor's press release issued on October 19, 2010 to announce the settlement stated, "In 2009, Governor Perdue and the Georgia General Assembly created DBHDD to focus solely on the policies and programs for people with mental illness, developmental disabilities and substance abuse."

This primacy of DBHDD to carry out these duties was earlier highlighted in Governor Perdue's January 13, 2010 State of the State message when he stated "We took a major step forward last year in creating an agency whose sole focus is caring for the mentally challenged and developmentally disabled. . . . Yes, it will cost more money, but I am confident the additional investment will result in better outcomes for our patients. I want to be clear, my interest is not driven purely by legal mandates, but from my personal belief that we have a moral obligation to serve those with disabilities." Governor Deal affirmed the state's duty immediately after being elected Governor stating in an interview on November 3, 2010 to WABE when he stated that carrying out the October 2010 Settlement Agreement "is important for us to address not just because the court has entered into an agreement but simply because it is the right thing to do."

THE MEDICAID REDESIGN

The Department of Community Health states on its website that it is conducting a "comprehensive assessment and recommended redesign of Georgia's Medicaid Program . . . Navigant Consulting was retained to assist the Department in conducting this review." The time table for this redesign is as follows:

- **Assessment – Completed**
  - August – December 2011, completed.
- **Recommendation – Underway**
  - January 2012, posting of Strategy Report.
  - January – April 2012, review and analysis of the Strategy Report.
  - April 2012 – Finalization of the Redesign Model.
- **Procurement – Later in 2012, 2013**
  - April – July/August 2012, procurement planning.
  - July/August 2012, procurement documents to be posted.
  - January 2013, contract award to successful vendor(s).
- **Implementation – Planned for Early 2014**
  - January/February 2014, implementation begins.

On January 17, 2012, Navigant issued its report. In the report, Navigant assessed nine different options for a Medicaid Redesign. It found that the three options that scored the highest for implementation of a redesign based on factors it chose were option 6, which is essentially a "care management organization plan, option 8, which is an enhanced care management organization plan," and option 9, which is a free market plan. Navigant then recommended carving in to this system individuals who receive behavioral health services and individuals who receive home and community based services and essentially all others with significant disabilities who receive Medicaid and Medicare. (Navigant Executive Summary, p. 12). Carve in of home and community based services, including developmental disability waiver services is described as "all long term care and acute care services would be provided through the primary delivery system and would not be carved out." (Navigant, p. M-12). Carve in of behavioral health is described by Navigant to mean all behavioral health services would be provided "through the same [Managed Care Organization] that provides general medical care either through its own provider network or by subcontracting with a behavioral health organization." (Navigant, p. 3-47). In short, Navigant recommends some type of care management organization plan with all individuals who receive Medicaid and Medicare and who receive home and community based

services or behavioral health services carved into such a system.

Navigant Recommendations Would Likely Lead to Non Compliance with Olmstead Settlement and Debilitate or Eliminate DBHDD

It is our conclusion that the Navigant report makes recommendations which would very likely put the state of Georgia out of compliance with its October 2010 Settlement Agreement with the Department of Justice for mental health and developmental disability services. The report does not discuss or contemplate a role for the Department of Behavioral Health and Developmental Disabilities. Any fair reading of the recommendations, in fact, reveals that the Department of Behavioral Health and Developmental Disabilites would be substantially debilitated or cease to exist under a CMO/carve in system.

A Medicaid redesign based on Navigant recommendations is scheduled to go into effect in January 2014. At that time, there will be one year and a half remaining in the October 2010 Georgia/Department of Justice Settlement Agreement related to the state's duties under the United States Supreme Court's Olmstead decision ("Olmstead Settlement"). The report in no way takes the settlement into consideration despite the enormous ramifications its recommendations would have if implemented and despite the fact that the contracting process is to begin and end this year.

Developmental Disability Services Would Transfer to CMOS in the 4th Year of 5 Year Settlement

Approximately half of the Olmstead Settlement involves Medicaid Waivers for people with Developmental Disabilities. If Navigant's CMO/Carve In recommendations are carried out, then in the middle of the 4th year of the 5 year settlement agreement, the oversight, governance, and operation of these services will apparently transfer from the Department of Behavioral Health and Developmental Disabilities to one or more CMOs under the oversight of the Department of Community Health. This seems apparent by the Navigant report's recommendation that the Department of Community Health "carve in" individuals who receive home and community based services. What is somewhat unclear is what will happen to all of the operators of the current developmental disability system in the state's regions and its central office. Reading between the lines, however, it is apparent that those positions would either cease to exist or transfer in some manner to both the CMOs and the Department of Community Health.

The Olmstead Settlement also ensures that hundreds of families with a person with a developmental disability will receive "family supports." These supports are state funded. If the Department of Behavioral Health and Developmental Disabilities does not disappear under the Medicaid redesign, then it would continue to be responsible for family supports while Medicaid Waivers would be under the CMOs and DCH. This will result in numerous inefficiencies, lack of coordination, and duplications of services. In short, it will be a mess.

Mental Health Services Likely Would Be Muddled in Hybrid Between DBHDD and CMOs in the 4th Year of 5 Year Settlement

The other half of the Olmstead Settlement involves services for people with mental illness. While not all of the individuals who receive services for mental illness under the Settlement qualify for or receive Mediciad, many do. There have been efforts to integrate Medicaid and state funded services as the state has rolled out the Olmstead Settlement. Moreover, in 2014, many, if not all, of those individuals who do not have Medicaid insurance and who receive mental health services will qualify for a Medicaid-like insurance in 2014 under the Affordable Care Act.

Under the CMO carve in system, there would be a messy hybrid relationship between the CMOs and DBHDD (if it continues to exist) for services for individuals receiving services rolled out under the Olmstead Settlement. Medicaid services would be supported through the CMOs and state funded services would presumably continue to be supported through DBHDD. (It is completely unclear how the new Affordable Care Act Medicaid like services would be done). One of the principle reasons for the DOJ litigation and the Olmstead Settlement was the lack of coordinated services for people with mental illness when they left state hospitals. The new attempts at coordinating the system will disintegrate as services are scrambled under the new hybrid system in the fourth year of the five year settlement agreement. Additionally, the state is expending tens of millions of dollars to roll out peer support, housing, case management and ACT team services to connect people to services and coordinate their care. (Most of these services either can be or are being funded through the Medicaid Rehab Option and other Medicaid). It is also unclear how a new hybrid system will manage all of these services and how they will be changed under the new system.

Other key parts of the Settlement Agreement involve supports to connect people in the hospitals with supports in the community and continuous quality improvement measures to enhance the supports. All of this will be scrambled as well in the fourth year of the five year settlement.

Almost All DD Services and Many MH Services Would Be Removed from DBHDD

The state Legislature and the former Governor went to considerable effort to create the Department of Behavioral Health and Developmental Disabilities. We were repeatedly told at the time that it was essential to have mental health, substance abuse, and developmental disability services provided through a cabinet level department. This was especially important for budgeting purposes. By removing essentially all of the Developmental Disability services from the Department and a significant portion of the mental health services from the Department, the state will be undoing much of the work that it has been done over the last three years. It appears entirely possible that the Department of Behavioral Health and Developmental Disabilities will lose both "Developmental Disabilities" and much of Behavioral Health. What then will be left?

Questions for Navigant About Olmstead Settlement and DBHDD

Based on our reading of the Navigant Report, we ask the following questions:

1. What will be the role of the Department of Behavioral Health and Developmental Disabilities after the implementaiton of the Medicaid redesign?

2. How will the state ensure compliance with the Olmstead Settlement in 2014 and 2015 after implementation of the Medicaid Redesign?

3. What will the governance, budgeting, and oversight structure be for individuals receiving Medicaid waivers for developmental disabilities under the Medicaid redesign?

4. What will the governance, budgeting, and oversight structure be for individuals who are on the waiting lists and receiving planning administrator services under the Medicaid Redesign?

5. What will be the governance, budgeting, and oversight structure for Medicaid and state funded mental health services? How will all of the new Olmstead Settlement services be affected by the recommended Medicaid Redesign?

6. Why is the state doing this in the areas of developmental disabilities and mental health at the beginning of the fourth year of a five year settlement agreement?

7. How were *Olmstead* obligations taken into account in the report? How will *Olmstead* obligations be taken into account and carried out under the Medicaid redesign?

I would greatly appreciate your responses to this letter and the above questions. Thank you for your consideration.

Sincerely,

C. Talley Wells
Attorney at Law