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Have you contacted your U.S. Representative and asked him/her to cosponsor H.R. 3995? If yes, have you followed-up? Contact Tamie with any questions and to receive H.R. 3995 advocacy materials (605-399-1624; tamie327@hotmail.com)

VOR Weekly E-Mail Update
March 14, 2008

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1. OREGON: LEGISLATIVE PROGRESS TO HALT ABUSE DIES IN SHORT SESSION
-----Oregon

VOR Perspectives (newsletter)
March 2003, Vol. 2, No. 3
Editor: Sid Stuller, VOR Oregon State Coordinator
Several Bills were introduced in the short session of the legislature, which might have helped to stem the tide of abuse, neglect, and death among persons in state licensed 24-hour care. These bills did not make it through the process, and died in committee.

House Bill 3617, introduced by Rep. Sara Gelser, D Corvallis would have created a list of persons unsuitable for employment in facilities serving the MRDD population. According to some sources, she will reintroduce this bill next January in the longer session. HB 3617 did,

in fact, make it through the House committee on Human Resources and Women's Wellness with a do pass recommendation, following amendments. The same fate arose with SB 1089 which made it through the Senate Committee on Health and Human Services, and was forwarded to Ways and Means where it stopped. SB 1089 would have empowered the appointment of an outside person or entity to review the functions of the Department of Human Services Mental Health Services with the idea of presenting a report to the legislature on improving, streamlining, and enabling the DHS to perform better than it presently does. The Bill was Sponsored by Senators Margaret Carter, D, Portland and Allen Bates, D, Medford. This bill was also amended in committee.

The longer Legislative session may see some new faces following the upcoming November election. This will call for another educational effort by advocacy groups on behalf of persons with MRDD.

Editor's Note:

Editor (Sid Stuller) had this to say in his regular feature, the "Curmudgeon's Corner": "While we were happy to note the passage of a bill dealing with extra investigators to seek out abusers of our young school sports participants, and the advance of a bill to protect our canine friends, it certainly put into perspective the relative position of our most vulnerable and defenseless citizens with MRDD in state licensed facilities. They appeared to be in line for legislative protection just after the dogs. Thank you's to Rep. Sara Gelser and those on the House committee, which passed HB 3617. ODDC reports Rep. Gelser will reintroduce this bill in the next session. Also, thanks to legislators like Sen. Burdick who bothered to respond to appeals for supporting SB 1089 behalf of persons with mental health issues and who was and would have supported passage of HB 3617."

2. WASHINGTON STATE: \$17 MILLION DAMAGE AWARD VALIDATES CASE

Source: MORE LAW (Beckman, et.al vs The State of Washington), as reprinted in Perspective (OR VOR, Sid Stuller), March 2003
In the year 2000, attorneys representing three developmentally disabled men with IQs of less than 60 who were placed in a state licensed Bremerton group home operated by Troy Nelson. Nelson previously had been discharged from a nursing home for suspected abuse. The state investigators failed to follow up on these allegations, and Nelson got a group home license. The plaintiffs said that the three severely disabled

men were raped and tortured at this group home during a 1 ½ yr. residency. Twenty witnesses for the plaintiffs recounted repeated efforts to warn DSHS by letters and faxes. Only after the State's attorney general's investigator became involved, did the State DSHS case workers respond. Nonetheless, the facility and the alleged abusers continued to receive operational funds.

After many months of repeated warnings of abuse, the Office of the Attorney General investigated the state-licensed facility and determined that the developmentally disabled plaintiffs had been "physically and sexually abused for several months at least." The determinations were made by the Attorney General's lead investigator for the Office of Medicaid Fraud Control. Over 20 separate interviews and working on the case for two full months followed. The abuse was occurring the entire time that the warnings of abuse were being ignored by DSHS and its caseworkers. The investigator also testified that DSHS "stonewalled" his attempts to obtain information once he began to follow leads to the case.

At trial, defendant DSHS attempted to persuade the jury that its own determinations were merely internal department "findings" and should not be interpreted as "judicial determinations." Defendant DSHS attempted to persuade the jury that there was no way of telling what may have happened since the residents could not speak for themselves. Despite the determinations of the Attorney General's Office, Defendant DSHS argued that the plaintiffs were not injured and, if they had been injured, the damages were not great and did not have any lasting physical or psychological effects.

The trial lasted six weeks, and the jury found in favor of the plaintiffs and awarded a total of \$17 Million in compensatory and punitive damages.

3. NORTH CAROLINA: Positive Medicaid ruling allowing an individual to sue a state is upheld by federal appellate court

Summary: The Supreme Court declined to review a case in which the 4th Circuit Court of Appeals ruled that individuals could sue a state if it fails to provide Medicaid services for which they eligible with "reasonable promptness." The Supreme Court's decision to decline review (denial of cert) lets stand the favorable appellate court decision. Positive Medicaid ruling allowing an individual to sue a state is upheld by federal appellate court

The Fourth Circuit in *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007) ruled that Medicaid - which guarantees provision of medical assistance with

"reasonable promptness" - is privately enforceable - meaning individuals have a right to sue if a state fails to provide services for which they are eligible. The Court did not rule whether an individual can sue claiming failure to enforce the Medicaid's freedom of choice provision because it held that the plaintiff had failed to state a claim for its violation.

In this federal case, Doe, a developmentally disabled adult sought a waiver for community-based care from South Carolina but only received respite care. After waiting several months and exhausting administrative appeals, Doe sued South Carolina for failure to provide community-based residential care with "reasonable promptness."

On March 3, 2008, the U.S. Supreme Court today denied the Petition of the South Carolina Department of Health and Human Services and the South Carolina Department of Disabilities and Special Needs, refusing to grant cert., leaving intact the favorable 4th Circuit opinion.

The 4th Circuit case can be found at

<http://caselaw.lp.findlaw.com/data2/circs/4th/051570p.pdf>

4. BY ANALOGY: The NORTH CAROLINA News & Observer investigative series found that the state's mental health reform led to astronomical community costs, compromised care and fraud

Summary: The following is an excerpt from the first in a five part NC News & Observer series on the state's mental health reform efforts titled "Mental Disorder: The Failure of Reform."

The series focuses on the aftermath of the 2001 mental-health reforms which came about after several state studies and a 1999 U.S. Supreme Court decision (Olmstead) that caused state leaders to conclude that they were relying too heavily on psychiatric hospitals. That reliance ran counter to the high court's decision that requires states to treat people with disabilities in the least restrictive setting.

Yet, as the News & Observer series finds, the reform has led to financial fraud, astronomical community costs, and compromised treatment - the expected failings of aggressive deinstitutionalization. It was predictable - people were displaced from psychiatric hospitals before community services were in place, costs were underestimated, privatization opened the door for opportunistic providers who took advantage of every loophole (and there were many). As a result treatment suffered and costs skyrocketed. According to the News & Observer, in January 2005, the state told the federal government those two services, community support for children and community support for adults, would cost less than \$5 million a month. By February 2007, when the Health

and Human Services accountability team started an audit, the monthly bill was \$93.5 million (per month).

The full series can be found at:

<http://www.newsobserver.com/2771/story/962049.html> and includes these articles:

Part 1: Reform wastes millions, fails mentally ill

Part 2: Companies cash in on new service

Part 3: Serious mental therapy fades

Part 4: Hospitals, nearly forgotten, teem with abuse

Part 5: Patients die from poor care

Reform wastes millions, fails mentally ill

Mental-health changes aimed to improve community treatment, but providers took clients shopping, swimming and to movies for \$61 an hour

By Pat Stith and David Raynor, Staff Writers

(emphasis added)

February 24, 2008

North Carolina's mental-health reform was supposed to improve treatment for the mentally ill and provide good value for taxpayers. It has done neither.

The state has wasted at least \$400 million in an ill-conceived and poorly executed plan to treat more mentally ill people in their own communities and fewer in the state's four psychiatric hospitals, a News & Observer investigation shows.

Local governments, forced to stop offering treatment, were replaced by providers out to make a profit. Most of their workers were high school graduates, not licensed professionals, but the bill was stunning. In a few months, the cost of the community support program was \$50 million a month, more than 10 times what the state had expected.

Providers took some clients to movies or shopping, charging taxpayers \$61 an hour.

Meanwhile, some seriously ill people had to do without treatment. Services that were more likely to help them avoid hospitalization were in short supply.

It was almost a year before the state reacted.

Hundreds of providers have abused the system, the state now says, charging for services that were unnecessary or were not performed. So far, the state Department of Health and Human Services has demanded that the providers pay back \$59 million. A government review last fall of more than 12,000 people receiving a rapidly expanding community

service indicated that hundreds of millions of dollars had been wasted. That review said 89 percent of the treatment was medically unnecessary or given in the wrong amount.

Since the General Assembly ordered sweeping changes in 2001, the cost of caring for the mentally ill has more than doubled, to \$1.5 billion a year.

Here's one example of why: Last February, a worker employed by a Durham provider spent five hours with a 13-year-old girl, asking about her day at school and assisting with her homework, according to a government audit. The worker, called a paraprofessional, wrote that "While [the child] was reviewing the vocabulary word, Paraprofessional went to the store for [the child's] mother."

For that session, the company was paid \$305.

North Carolina tried to change too many things too quickly, according to Paula Cox Fishman of Greensboro, an activist who has followed reform closely.

"It's a mess," she said. "It's going to be hard to turn this runaway train around."

Responsibility for carrying out mental-health reform fell to the Department of Health and Human Services, led for six years by Carmen Hooker Odom, Gov. Mike Easley's appointee. Department officials made key decisions that hobbled the program. They defined too loosely the community support services companies would offer, and they agreed to pay too much for it.

'Worse off right now'

Harold Carmel, president of the N.C. Psychiatric Association, holds the Easley administration responsible.

"The devil was in the details," Carmel said in an interview. "And they didn't think through all the details. They were overwhelmed by the task. They still are."

Hooker Odom announced her resignation last May, two weeks after informing the governor about what she called a "deeply disturbing" audit of mental-health providers.

Easley and Hooker Odom, the two officials most responsible for implementing mental-health reform, declined to be interviewed. Rep. Verla C. Insko, a Democrat from Chapel Hill, was the primary

sponsor of the reform law. She is not proud of the results.

"I think we're worse off right now," Insko said. "What they did was bring in easy-to-serve people, maybe even people who ... didn't need the service."

She said the lack of proper treatment is causing more people who are mentally ill or who have a substance-abuse problem to be taken to hospital emergency rooms -- or jail. And they're rotating in and out of the state's psychiatric hospitals. On some days, state hospitals are so full that they are refusing to accept new patients.

Since 2001, at least 13 people committed suicide or overdosed on drugs less than a week after being discharged from state hospitals. Some died within hours.

In a case that grabbed headlines in May 2007, Stephen Ryan Gibson led state troopers on a 70-mile chase in a stolen car. The chase ended with his shooting death on Interstate 40 in Raleigh. Gibson, 23, had been sent to Dorothea Dix Hospital on an involuntary commitment order a month earlier.

Hospital officials decided outpatient care was enough and released him in less than two hours. Records show the adult admissions ward at Dix was at or over its capacity for much of that week.

Counties forced out

More than six years ago, the General Assembly voted overwhelmingly to tear down, then rebuild, the way the state treats mentally ill people, about 210,000 of whom seek state help each year.

The state set out to reduce the use of its four hospitals and shift treatment to communities. A study requested by legislators said part of the additional cost could be paid for with money saved by shrinking hospitals and staff.

Federal, state and local governments provide mental-health services to the poor. A little more than a third of the cost is borne by the state and local governments in North Carolina, the rest by federal taxpayers. Before reform, mental-health services were provided at the local level by county and regional groups and the private providers who, in effect, worked for them.

After reform, counties were forced to get out of the treatment business. They formed local groups that were supposed to manage the

providers.

But the state got the plan backward, forcing the counties to divest first.

"We were told to do it right away," said Yvonne Copeland, executive director of the N.C. Council of Community Programs, which represents the county entities.

Services at the local level started drying up with little or nothing to take their place, and the state eliminated more than 500 hospital beds. No one expected that it would take years to get approval for a new, supposedly improved package of community services from the federal government.

Federal approval of the new services didn't come until late December 2005. The state launched its new community services three months later, on March 20, 2006.

The Department of Health and Human Services had planned for years for that Monday in March, writing descriptions for the services it wanted, figuring out how much to pay and haggling with federal officials over the details.

Finally, on March 20, the state began offering an array of mostly new services to people suffering from mental illness or substance abuse. Seven of the services, including intensive in-home therapy for severely emotionally disturbed children, are most likely to keep people out of hospitals. Two other, more basic, services were known as community support.

And from that day to this, community support services have hemorrhaged money.

Stunning costs

In January 2005, the state told the federal government those two services, community support for children and community support for adults, would cost less than \$5 million a month. [By February 2007, when the Health and Human Services accountability team started an audit, the monthly bill was \$93.5 million.]

Now department officials say that estimate was flawed and should have been increased.

As Carmel said, the devil really was in the details. The state:

* Set a \$61-an-hour rate for services performed by workers with only a

high school diploma.

- * Allowed providers to recruit clients and determine what services they needed, which permitted providers to refer clients to themselves.

- * Allowed people to receive 30 days of service without government authorization.

- * Allowed companies to start work immediately and qualify later.

The latter two actions came because the state was concerned that people who had been served under an old community program would be denied or that there wouldn't be enough companies to provide service.

"I think, with the benefit of hindsight, we made those initial entrance criteria more liberal and loose than they needed to be," said Leza Wainwright, deputy director of the Division of Mental Health,

Developmental Disabilities and Substance Abuse Services.

Taxpayers would pay dearly for each of those decisions.

In the summer and early fall of 2006, officials at Health and Human Services apparently paid little or no attention to the bills pouring in.

They saw that more people were being served, but they had expected it, Wainwright said. They had hoped for it.

If officials had been alert, they would have been stunned. About 90 percent of the money was going to the two community support services.

In June 2006, the bill for community support was \$27.5 million, half as much as the state had expected to pay in a year. By August, the bill had almost doubled, to \$50.7 million. It continued to grow.

By February 2007, when the Health and Human Services accountability team started an audit, the monthly bill was \$93.5 million.

"I've heard the analogy used here that this sort of lined up to be the perfect storm," said Jim Slate, the director of budget and analysis at Health and Human Services. "Did we know it was going to do what it's done? No. Nobody had a clue."

Health and Human Services had expected that the child and adult community support programs would be delivered, in part, by people with college educations and even advanced degrees. The department had agreed to pay a "blended" rate for that mix.

"The initial rate of \$61 per hour assumed that the higher skilled staff would be involved in about one-quarter of the services rendered," Hooker Odom, the former secretary of health and human services, told Easley in a letter last April. She said her department's auditors had discovered that 98 percent of the service was being provided by high school graduates.

What Hooker Odom did not say in her letter was pivotal: Her department had agreed to pay high-skill wages without requiring high-skill workers.

By November, when Health and Human Services declared a moratorium on new providers, 784 were being paid for community support -- but only 137 for more critical services.

The numbers tell the story: From March 2006 through January 2008, community support for children and adults cost nearly \$1.4 billion, 90 percent of new community spending. During that same period, the government spent \$78 million -- 4.9 percent -- on the seven services more likely to reduce the need for hospitalization.

Officials had intended to spend more on those more intensive services than on community support.

The department concedes that it set the rate too high for the two community support programs and too low for most of the other services for more seriously ill people. It cut the rate for child and adult community support last April but still has not raised the rates paid for the other services.

Audit reveals abuses

Recollections differ now as to when Health and Human Services officials realized that mental-health reform spending was out of control. By some accounts, it was October or November 2006, but officials waited until early 2007 to do anything about it.

"I guess we just did not foresee the magnitude of the problem," Wainwright said.

On Jan. 16, 2007, auditors were finally ordered to saddle up. Dan Gerlach, senior adviser to the governor, was stunned when he learned Jan. 17 about the explosion in spending: "I said, 'Holy cow!'"

He notified legislative leaders the same day.

After the audit results were in, Hooker Odom huddled with top officials of her department on Wednesday, April 4. She told a subordinate to poll her Rate Setting Review Board, some of whom had already left for Easter.

They agreed to slash the rate paid for community support to \$40 an hour.

Hooker Odom, in a memo to the governor two weeks later, described some of the abuses her auditors had uncovered: Providers had been taking children swimming, or to a movie, or out to eat, all for \$61 an hour.

They went to the mall, too. A bill from a company in Greensboro showed a worker taking an 18-year-old on a two-hour trip to improve his social skills. "He went to the game room and talked with one of the kids there ... Progress made."

The bill: \$122.

A Pinnacle company worked on even more basic skills. "Staff suggests client to get up," one document reads. "Client agreed to get up." Other activity included suggesting eating breakfast and taking a shower. They later went for a ride. The bill was \$366.

The state saw bills such as these and cut the rate. The outcry from providers was immediate.

On April 26, the department backtracked, raising the rate to \$51. But the damage had been done: Setting the rate for community support too high, and leaving it there for slightly more than a year, cost taxpayers \$118 million.

The overpayments have continued on a lesser scale: The state is still paying high-skill wages but won't start requiring high-skill workers until March 1.

In the last week of April, Hooker Odom began telling subordinates that she would resign to take a job as president of Milbank Memorial Fund in New York, a foundation that studies health policy.

Easley said she had been planning her move for months. He issued a statement praising her.

"She has handled one of the most challenging jobs in the state with great skill," he said.

Assigning blame

Easley has tried to distance himself from mental-health reform. He blames legislators, saying Hooker Odom "vigorously" opposed the sweeping changes approved in 2001.

"It just happened sort of overnight in late October [2001], and we never thought they would do it," Easley told reporters at a December

news conference.

Easley blames the agencies formed by county governments, which were partly responsible for keeping an eye on those providers.

"All we are is the banker," the governor told reporters. "We can audit, and we can offer suggestions, but they're not accountable to DHS [Health and Human Services]. DHS has been getting a black eye over the system not working, and they don't have any way to control it."

The state in November hired Mercer Health Benefits LLC for \$794,000 to evaluate the county programs. That study is due May 15, in time for the legislature to consider it this summer.

Copeland, representing the county groups, said her members aren't blameless, but she says the governor is off-base.

"The counties did not close up the hospitals," she said. "Let's be clear that the [counties] have no authority. They only administer the state's policies. That's it."

Insko acknowledges that legislators tried to do too much too fast. She wishes they had started the program on a small scale.

But she rejects Easley's recent statement about her reform bill. "I understand that the governor has said that the secretary opposed it," Insko said, referring to Hooker Odom. "She never told me she opposed it. No one in the department ever told me they opposed it." Hooker Odom's replacement, Dempsey Benton, is trying to repair the mental-health system. The former Raleigh city manager has cut spending on community support by 19 percent, taken direct control of the state's psychiatric hospitals and won the confidence of legislative leaders.

"This program is going to have to be doing much better in terms of balancing the expenditures with the quality of service," Benton said. "I expect it to be under a microscope."

Tamie Hopp

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