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California's protection and advocacy system

April 14, 2011

Via E-Mail and U.S. Mail

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RE: California Adult Day Health Care

Dear Ms. Mann, Mr. Wodatch, and Ms. Wohlenhaus:

Disability Rights California, AARP Foundation Litigation, National Health Law Program, the National Senior Citizens Law Center, and the law firm Morrison & Foerster, LLP (pro bono) represent the plaintiff class in *Cota v. Maxwell-Jolly*, Case No. C 09-3798 SBA, in the Northern District of California. We are writing to raise concerns about the dramatic impact that California's recent decision to eliminate its adult day health care (ADHC) program will have on the health and civil rights of tens of thousands of program participants who have been determined by the State to be at risk of institutionalization if they do not receive these services.

Specifically, on March 24, 2011, the Governor signed Assembly Bill 97 (Chapter 3, Statutes of 2011) (AB 97) which eliminates ADHC as an optional Medicaid benefit as soon as July 1, 2011. AB 97 indicates that the State intends to develop a federal waiver to fund a new community-based program. However, SB 69 (Budget Act of 2011), which remains unsigned by the Governor, appropriates only \$85 million to provide short-term transition and/or waiver services, which is approximately one-half the current appropriation for ADHC.

This drastic cut in funding, combined with the lack of assurances regarding the timing, funding, and availability of alternative services for ADHC participants both in the interim and after the waiver is in effect, has prompted us to seek your assistance.¹ While we acknowledge that elimination of an optional Medicaid service lies within the State's discretion, subject to approval by CMS, we believe that California's plan should be scrutinized closely for two important reasons.

First, ADHC is a "bundled" Medicaid service whose elimination should not disrupt beneficiaries' entitlement to the underlying Medicaid services (i.e., skilled nursing; personal care; physical, occupational, and speech therapy; mental health services). Second, ADHC's express purpose is to prevent or delay institutionalization. As such, elimination of this optional benefit should be viewed in the context of the resulting risk of institutionalization to beneficiaries.

Given the concerns outlined below about the deficiencies in the State's plan as we currently understand it, we ask that you: 1) reject the State's State Plan Amendment (SPA) request unless and until a waiver is in effect; and 2) require the State to provide adequate assurances regarding the

¹ On April 1, 2011 we requested information from the state regarding the timing of the implementation of AB 97, and assurances regarding the transition of ADHC from a Medi-Cal optional benefit to a federal waiver. We informed the state that we would be asking for assistance from CMS unless we received assurances by April 8, 2011 that adequate and appropriate transition services would be in place prior to the effective elimination date, which the state has not provided with sufficient particularity.

transition and conversion to a waiver that will prevent harm to affected individuals.

BACKGROUND

California's ADHC program is intended to prevent unnecessary institutionalization of people with disabilities. Eligibility for the program is determined by a multidisciplinary team of clinicians who must certify that the participant has "a high potential for the deterioration of their medical, cognitive, or mental health condition or conditions in a manner likely to result in emergency room visits, hospitalizations, or other institutionalization if ADHC is not provided." *Cota et al. v. Maxwell-Jolly et al.*, 688 F.Supp.2d 980, at 986 (N.D. Cal. 2010). There are currently approximately 37,000 participants depending on the program for therapeutic, social, and skilled nursing services for the purpose of restoring or maintaining optimal capacity for self care.² There are 311 approved ADHC centers located in 32 of California's 58 counties.³ ADHC is a "bundled" program. That means that within the ADHC program, and at one location, participants receive a number of mandatory and optional Medi-Cal services, including: nursing care; personal care; physical, occupational, and speech therapy.

In the last year and a half, the District Court for the Northern District of California has twice enjoined the State of California from implementing cuts to the Medi-Cal ADHC program. The Court first entered a preliminary injunction on September 10, 2009 preventing the State from reducing the maximum number of days per week of ADHC services from five to three "unless and until appropriate alternative Medi-Cal services are provided to prevent inappropriate institutionalization in violation of their rights under the [Americans with Disabilities] ADA and Section 504 of the Rehabilitation Act." *Brantley v. Maxwell-Jolly*, 656 F.Supp.2d 1161, 1174 (N.D. Cal. 2009). On February 24, 2010, the Court stopped California from implementing new, permanent, restrictive eligibility requirements for ADHC services that were due to take effect on or about March 1, 2010. The Court

² According to the California Department of Aging, as of December 2010, there were 37,357 Medi-Cal funded participants in ADHC programs across the state.

³ http://www.aging.ca.gov/programs/adhc/adhc_centers.asp

found that these new requirements would result in the loss of ADHC benefits to potentially thousands of Class Members in violation of Title II of the ADA, section 504 of the Rehabilitation Act, the Medicaid Act, and various other state laws. *Cota v. Maxwell-Jolly*, 688 F.Supp.2d 980 (2010). The second injunction has been appealed by the State and is pending in the Ninth U.S. Court of Appeals.⁴

2011-2012 BUDGET

In this third attempt to cut ADHC funding, California seeks to eliminate ADHC as an optional service altogether. The Governor signed AB 97 on March 24, 2011, which eliminates ADHC as an optional service under its State Plan, and we understand that the State will soon submit a State Plan Amendment to CMS seeking authority to make this change effective as early as July 1, 2011. AB 97 authorizes the State to create “short-term programs” to provide transition services when ADHC is eliminated. AB 97 also indicates that “[d]uring the 2011–12 Regular Session of the Legislature, legislation will be adopted to create a new program called the Keeping Adults Free from Institutions (KAFI) program... [a]s prescribed by subsequent statute, the Department of Health Care Services shall develop a federal waiver to maximize federal reimbursement for the KAFI program to the extent permitted by federal law.”

ADHC’s 2010-2011 budget was \$369.8 in total, of which \$176.6 came from state general funds. In the budget bill passed by the Legislature, SB 69 (Budget Act of 2011), this appropriation has been reduced by at least 50%, replaced by an \$85 million general fund appropriation, with unspecified federal matching funds, for transition of current ADHC enrollees and future waiver services. To date, SB 69 has not been signed by the Governor and thus, there is currently no appropriation to provide short-term transition and/or KAFI services.

AB 97 mandates the elimination of ADHC as an optional Medicaid service and authorizes a multistep process that purports to mitigate risks to

⁴ The State’s appeal is deferred pending the final disposition in *Oster v. Wagner*, No. 09-17581. *Oster* is, in turn, deferred pending the U.S. Supreme Court’s disposition in the case *Maxwell-Jolly v. Independent Living Center of Southern California, Inc.*, No. 09-958.

affected individuals. There are many problems with the process vaguely outlined in the bill. The most urgent of these is that the elimination of ADHC will occur without assurances that the participants will have a safe and seamless transition to replacement Medi-Cal and/or other services (including a federal waiver) that will address their risk for institutionalization in the absence of these services — the critical underpinning for each person's eligibility for ADHC services.

Other concerns include:

- Insufficient funding. A 50% cut to funding will result in significant reduction in services, leading to harms such as hospitalization, institutionalization, or even death to an untold number of participants. Moreover, it is not clear that the entire \$85 million specified in SB 69, even if the budget maintains this line item, will be eligible for federal matching funds, thus the cut to services may be even more drastic.

In the only cost analysis of ADHC elimination, the Lewin Group found, in 2010-2011, that should the ADHC program be eliminated, California would lose \$51 million over and above the estimated savings that would come from eliminating the program (excluding the loss of federal matching funds).⁵ The report projected annual losses to the State to increase to \$72 million in 2020-21, \$198 million in 2030-31 and over \$412 million in 2040-41. Moreover, the Lewin Group found that 14,000 ADHC participants would enter nursing facilities in the first year alone.

- Barriers to alternative services. AB 97 references alternative services to which ADHC participants can be transitioned; however there are numerous barriers to these individuals' receipt of such services, including eligibility restrictions, enrollment caps, geographic limitations, and limitations on coverage and scope of

⁵ The Lewin Group: Projected Economic Impact of Eliminating California's Medi-Cal Adult Day Health Care Program, Prepared for the Congress of California Seniors, May 18, 2010, at page 1.

<http://www.lewin.com/content/publications/EconImpactofEliminatingCAMedi-Cal Adult DayHC.pdf>.

services for those who do qualify. Moreover, limited resources and mobility issues make traveling to multiple locations to receive a patchwork of services untenable for ADHC participants. The State would need to make modifications to these programs to overcome these barriers and ensure that such alternative services are more than “theoretically available” to individuals who need them.

- Feasibility of “short term program” to fund transition. AB 97 requires the creation of a “short term program” to fund organizations to assist former ADHC participants to transition to other Medi-Cal services and/or to provide social or respite services to those participants. However, there is no requirement that such programs be fully in place before the elimination of ADHC and no details as to how this will be accomplished. Moreover, it is unclear whether these organizations will actually provide services or, instead, will merely attempt to link individuals to the alternative services, which, as described above, cannot at present accommodate the needs of everyone who will be affected.
- Feasibility of assessment and transition process. In order to accomplish an orderly transition, existing care plans will need to be implemented, or new care plans will need to be developed. AB 97 requires the 311 existing ADHC programs to provide care plans and relevant participant information to DHCS for the 37,000 ADHC participants. We believe the State needs to build in adequate time and resources for contractors to assess and transition this volume of fragile people in the coming months, even assuming ADHC providers are able to provide their full support in transitioning their participants. No changes should be made to existing programs until there is evidence that this transition is safely and effectively underway.
- Due Process Concerns. There is no indication that the State will provide adequate notice and the opportunity for participants to challenge their transition plans and/or the termination or reduction of the underlying Medi-Cal services for which they have been determined, in their State-approved ADHC plans of care, to qualify

and to need. In fact, the State has repeatedly taken the position that ADHC beneficiaries have no such due process rights. The State should be required to issue adequate notice and provide the opportunity for ADHC recipients to challenge any reduction or termination of mandatory or optional Medi-Cal services they currently receive as part of ADHC.

- Viability of a federal waiver. AB 97 states that the legislature will adopt new legislation to create a new program called the “Keeping Adults Free from Institutions” (KAFI) program. The apparent intent of the KAFI program is to narrow the scope of ADHC services and eligibility requirements for receipt of ADHC services: “This program will provide a well-defined scope of services to eligible beneficiaries who meet a high medical acuity standard and are at significant risk of institutionalization in the absence of such community-based services.” It is entirely speculative that this new program will (1) be passed by the legislature; (2) funded in the short term; and (3) continue to be viable through the application for and approval of a federal waiver. Funding to the existing program should not be cut until this alternative program has been approved and established.
- Lack of long-term alternatives for non-KAFI waiver participants: It is unclear whether and how AB 97 accounts for the long-term service needs of those individuals who will not receive KAFI and/or waiver services. For those individuals who will not qualify for the waiver program, or who exceed expected enrollment caps, AB 97 contains no provisions for long-term community-based alternatives to ensure they are not unnecessarily institutionalized. For such individuals, the “short-term program” would need to be extended or alternative services made available to meet their needs in order to avoid unnecessary institutionalization.

REQUEST TO CMS AND DOJ

On May 20, 2010, we were encouraged to read Ms. Mann’s State Medicaid Director Letter which recognized that although much progress has been made since the Supreme Court’s decision in *Olmstead v. L.C.* to improve community living opportunities for people with disabilities, “the demand for

community services continues to grow, and many individuals in need of these services struggle without them. In addition, State budget constraints threaten the progress that has been achieved, raising concerns about compliance with the ADA and *Olmstead*.” SMDL# 10-008.

We are asking that CMS, in concert with the Department of Justice, carefully review any State Plan Amendment (SPA) from California that eliminates ADHC as an optional Medicaid benefit with an eye to ensuring the State’s compliance with its obligations under the ADA and *Olmstead*. We ask that CMS not approve the SPA unless and until an appropriate waiver is in place to enable those who are eligible for waiver services to have a seamless transition. Moreover, we ask that the State provide adequate assurances that individuals who will not receive waiver services — either because they will not meet eligibility criteria or because of reduced capacity — are provided with adequate long-term services to prevent harm including hospitalization or institutionalization

Among the critical questions that we recommend you ask the State are the following:

1. How will the State ensure that participants who are risk of institutionalization without ADHC services and supports receive the services they need to remain in the community, both during the transition to and after the implementation of a federal waiver?
2. What are the time frames for submitting a waiver application, relative to elimination of the ADHC optional benefit?
3. Does California have sufficient case management resources to assess and transition ADHC participants to short-term transition, waiver and/or long-term alternative services?
4. Are the proposed existing “alternative services” adequate to meet the currently identified needs of ADHC recipients? How does the State plan to ensure that the short-term program will fill any gaps?

5. Are the funds currently appropriated sufficient to meet the objectives of the proposed transition plan, short-term program, waiver, and long-term services for non-waiver participants?
6. For those people who are currently eligible for ADHC services under the State Plan but who will not be eligible for such services under a waiver, what services will California make available to ensure that these individuals do not end up unnecessarily institutionalized?

We appreciate your leadership on all matters related to *Olmstead* compliance and we are eager to assist you in any way that we can.

Sincerely,

/s/

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