



## **DISABILITY RIGHTS NEW MEXICO**

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James Jackson, Executive Director

*Promoting and Protecting the Rights of Persons with Disabilities*

VIA ELECTRONIC MAIL

September 29, 2013

Secretary Sidonie Squier  
New Mexico Human Services Department  
P. O. Box 2348  
Santa Fe, New Mexico 87504

Re: Impact of termination of Medicaid funding to 15 New Mexico Behavioral Health Provider Agencies.

Dear Secretary Squier:

Disability Rights New Mexico has been following the impact of the termination of Medicaid funding to New Mexico behavioral health service providers by the Human Services Department in late June 2013. We are gravely concerned that three months after this action by the Human Services Department, individuals who were receiving services from the New Mexico provider agencies have seen significant disruption of services and the Human Services Department, OptumHealth and the Arizona agencies have yet to stabilize the provider network. The Human Services Department, the Interagency Behavioral Health Purchasing Collaborative and OptumHealth all have legal obligations to those who are receiving services or who are entitled to receive services through New Mexico's publically funded behavioral health service system. Given the disruption in the delivery of services since June 24, 2013, we believe all entities are failing to live up to their respective obligations.

As you know, the New Mexico Human Services Department is the single state Medicaid agency responsible for administering and/or supervising the administration of New Mexico's Medicaid program and as such, has the ultimate responsibility to assure proper delivery of any service funded through Medicaid. 42 U.S.C. § 1396a (a)(5); 42 C.F.R. § 431.10. In addition, the Human Services Department is a member of the Interagency Behavioral Health Purchasing Collaborative. NMSA 1978, 9-7-.6.4 A. The Purchasing Collaborative is the legal entity with authority to "contract for behavioral health services and to make decisions regarding the

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administration, direction and management of state-funded behavioral health services and care in New Mexico.”, State of New Mexico Interagency Behavioral Health Purchasing Collaborative State Wide Behavioral Health Contract, .09.630.7903.0063, Article I, 1.1 and its amendments. (“Contract”), NMSA 1978 9-7-6.4 B (5).

Through the Purchasing Collaborative, New Mexico contracted with managed care organization OptumHealth New Mexico (“Optum”) to manage, administer and direct state funded behavioral health services, which includes services funded by Medicaid as well as other funding streams. Optum is known as the Statewide Entity (SE). *Id.* As such, Optum is responsible for managing and administering all of the Medicaid funds used to provide behavioral health services in New Mexico. DRNM believes these entities are falling short of their obligations to provide behavioral health services to which participants are entitled.

### **Reasonable promptness and network adequacy**

HSD, the Collaborative, Optum and its contractors have many legal obligations when running a Medicaid managed care program. Two fundamental ones are that **care be provided with reasonable promptness**, 42 U.S.C. 1396a(a)(8), and that **the provider network must be adequate**. 42 C.F.R. § 438.207 (emphasis added). State regulations and the Optum contract are more specific. People with emergent needs must be seen within two hours. Urgent care must be available within 24 hours. “For non-urgent behavioral health care, the request to appointment time shall be no more than 14 days, unless the member requests a later time.” 8.305.8.18 E (5) NMAC. See also, Optum Contract at p. 61. As of July 1, Core Service Agencies (CSAs) are required to respond to referrals from out of home placement agencies within 48 hours. Similarly, state regulations require managed care organizations (which include the Statewide Entity, Optum) to “ensure that there are a sufficient number of behavioral health providers, based on the least restrictive, medically necessary needs of its members, available statewide to members to allow reasonable choice.” 8.305.18 E NMAC. If a provider network is not adequate, it is not possible to provide services with reasonable promptness. Following are examples of failures to meet these requirements.

It was reported to DRNM that most of the agencies in Albuquerque were offering appointments to clients a month after a request for an appointment rather than within 14 days as required by regulation. As recently as the week of September 9, 2013, UNM Mental Health Center was having problems with making referrals to Agave, who took over Pathways. Inpatient discharge planners were reporting they were having trouble getting a live person on the phone. Another source reported that Agave, which also took over the services provided by TeamBuilders, does not have sufficient clinical staff and is unable to provide basic services and people were being turned away.

Significant reductions in services have been reported at the former Hogares, now run by Open Skies. For example, Hogares had a Memorandum of Understanding with Albuquerque Public School (APS) to provide behavior management services in the public schools. As of this writing, Open Skies does not have an MOU with the school district, leaving students who had been receiving Behavior Management Services (BMS) through Hogares without this critical in school support. Hogares had 3 BMS coordinators, each of whom supervised 15 BMS workers. As of September 20<sup>th</sup>, Open Skies had only one BMS coordinator with fewer than 15 BMS workers.

This handful of workers provides behavioral support in locations other than schools; none are doing work in the schools. This failure to provide behavior management services to students who require them has a deleterious affect on these students, for those needing BMS services are more likely to have difficulty in their school programs, increasing the likelihood that they will engage in behaviors that disrupt the classroom and result in some sort of exclusion from class, or increased likelihood of seclusion or restraint.

DRNM also received a report that eight or more Comprehensive Community Support Service (CCSS) staff left Open Skies, leaving many consumers without this significant support service. This service is a fundamental component of core service agency responsibility, as it helps families navigate and secure their services to support and provide care for their children. Each CCSS staff person averaged a caseload of 25 children and their families. That means that at least 200 fewer children and their families are being served by Open Skies as were served by Hogares. In addition to the children and families not receiving services, as of last week there were reportedly 96 children and their families on a waiting list for these services. This is unacceptable.

La Frontera took over the ACT (Assertive Community Treatment) program at Southwest Counseling Services. The ACT program serves people with the most severe psychiatric disabilities; it is a very structured program that is supposed to have 24-hour capability and fidelity to the model is critical. This ACT program had 60 clients. We have been informed that the clinical director was fired and a prescribing nurse practitioner left the agency. It is not clear to us who is managing this important, intensive clinical program, how it is providing the necessary wrap around services 24 hours a day and how medications are being prescribed and managed. In addition, SWCS purchased vehicles which it used to take ACT clients to the program for their services. We understand that La Frontera chose not to purchase those vehicles. It is unclear how ACT clients, many of whom are indigent, homeless and without transportation, will access their program. Further, it has been reported that La Frontera will be providing psychiatry services for ACT clients through “tele-psychiatry.” It is hard to understand how this method is true to the ACT model or that it could be adequate for people with the most serious mental illnesses.

Further, DRNM has heard disturbing reports from three unrelated sources that CYFD is not referring children in need of behavioral health services because those services are not available. If this is true, CYFD, Optum and HSD are in direct violation of their contractual obligations. The Statewide Entity--Optum--is required to “ensure that children in the custody or supervision of CYFD receive a behavioral health screening within 24 hours of referral to a network provider and receive a behavioral health assessment and any medically and clinically necessary covered services and care coordination as appropriate.” Contract at p. 37. CYFD, as a member of the Collaborative, has its own obligation to assure that the Collaborative’s behavioral health contractor is meeting the terms and conditions of its contract so that the children in its custody and in its programs get the behavioral health care they need.

These are but some of the examples that lead DRNM to believe that HSD, the Collaborative, Optum and its contractors are neither maintaining an adequate provider network nor providing services with reasonable promptness.

### **Transition requirements**

It appears that HSD overlooked another requirement in the “transition.” When there are “unexpected changes in the composition of its provider network that would have a significantly negative effect on member access to services or on the MCO’s/SE’s ability to deliver services included in the benefit package...and it is determined that the provider is unable to meet their contractual obligation, the MCO/SE *shall be required* to submit a transition plan(s) to HSD for all affected members.” 8.305.6.18 NMAC (emphasis added). In this instance, HSD, the Collaborative, and Optum created the massive changes in the provider network. Given the apparent disarray in at least several areas of the provider network, it does not appear that a transition plan was created or implemented.

Finally, DRNM takes no position on whether terminating Medicaid funding to 15 New Mexico behavioral health care providers was legal. We do, however, take issue with the manner in which this “transition” was implemented as the state had less onerous options to choose from to address the “credible allegations” of fraud. We are gravely concerned about the impact this “transition” is having on the very people the system was designed to serve as it appears the provider network is not withstanding the shock of the abrupt takeover executed without an adequate transition plan, and that it will take considerable time to return to its previous level of functioning. Our concerns are further compounded by the fact that the whole behavioral health system will be subsumed by Centennial Care in January, 2014.

### **Remedial Action**

HSD has legally authorized mechanisms to address these failures. When organizations charged with providing Medicaid funded managed care services are “unable to provide the necessary services covered under the contract to a particular enrollee, the MCO...must adequately and timely cover these services out of network for the network enrollee, for as long as the MCO...is unable to provide them.” 42 C.F.R. § 438.206 (b) (4), 42 C.F.R. § 438.207; 8.305.6.9 NMAC. As a way of resolving the non-compliance with provisions of Medicaid law, state regulation and the Optum contract, we recommend that HSD take the following steps *immediately*:

1. Develop a system to identify *all* individuals who were served by the 15 CSAs before June 24, 2013.
2. Determine whether each person is currently receiving services, and if not, why not.
3. Affirmatively reach out to those previously receiving services but who are not currently.
4. Assure that care is responsibly continued at the same level as before. Where possible, the new managers of behavioral health care should maintain the services of the patient’s current provider.
5. For those who were receiving services and are not now in services because the new agency is unable to serve them, or for those who are waiting to receive services, “cover these services out of network for the network enrollee, for as long as the MCO...is unable to provide them.” 42 C.F.R. § 438.206 (b) (4).
6. Monitor and ensure that services are delivered in the time frames required by state regulation.

7. Provide a monthly progress report to CMS, the legislature and the public to demonstrate that HSD is taking the necessary steps to assure the service system meets state requirements. 42 C.F.R. § 438.207.

Sincerely,



Nancy Koenigsberg, Legal Director  
Jim Jackson, Executive Director

Cc: Brent Earnest, Deputy Secretary  
Diana McWilliams, CEO, New Mexico Interagency Behavioral Health Purchasing Collaborative  
Julie Weinberg, Medical Assistance Division Director  
Raymond Mensack, General Counsel  
John O'Brien, CMS