

Motion for Immediate Relief

Exhibit 27



Director
Office for Civil Rights
Washington, D.C. 20201

January 26, 2010

The Honorable Sonny Perdue
Office of the Governor of Atlanta
203 State Capitol
Atlanta, GA 30334

Dear Governor Perdue:

On July 1, 2008, the State of Georgia entered into a Voluntary Compliance Agreement¹ (hereinafter VCA) with the Office for Civil Rights at the United States Department of Health and Human Services (OCR) to resolve complaints brought by several advocacy organizations alleging that the State failed to comply with the integration mandate of the Americans with Disabilities Act (ADA) as set forth in the Supreme Court's decision in *Olmstead v. L.C.*² The Agreement included numerous provisions to ensure that individuals with developmental disabilities and mental illness would be served in the most integrated setting appropriate to them. The Agreement further required data analysis, planning, resource allocation, and reporting to ensure systemic compliance with the ADA.

Pursuant to Article 4, Section IV (E) of the VCA, OCR is required to give notice to the State when it finds the State has failed to substantially comply with the VCA and set forth specific areas of non-compliance. Accordingly, I am writing to you to provide notice that OCR has found the State of Georgia out of compliance with the VCA. Below is a detailed explanation of the provisions of the VCA at issue and the specific actions or inactions of the State that OCR has determined constitute non-compliance.

Georgia's failure to implement the terms of the VCA has been an ongoing problem. OCR has repeatedly reminded State officials of missed deadlines, advised them of programmatic failures, and has facilitated extensive technical assistance since the parties signed the VCA in an effort to help Georgia comply.³ Nonetheless, more than 18 months

¹ Voluntary Compliance Agreement between the State of Georgia and the United States Department of Health and Human Services (HHS) Office for Civil Rights, July 1, 2008 (VCA).

² *Olmstead v. L.C.*, 527 U.S. 581 (1999).

³ The Substance Abuse and Mental Health Services Administration (SAMHSA) in HHS has provided significant staff resources and funding for technical assistance, beginning with a trip to Atlanta by SAMHSA's Director of the Center for Mental Health Services within a month of signing the VCA to offer SAMHSA's assistance in any area of the VCA in which Georgia wanted assistance. The Centers for Medicare and Medicaid Services in HHS has also provided technical assistance to Georgia in planning for and providing community services.

into the life of the VCA, Georgia has failed to substantially comply with it. OCR provided oral notification of its concerns on a regular basis throughout meetings and telephone calls with State officials during the life of this VCA. In addition, OCR notified the State in writing of its concerns regarding compliance with the VCA. On June 3, 2009, OCR sent a Memorandum to Abel Ortiz, then Olmstead Coordinator, and Denise McClain, Director of the Office of Transition Services, setting forth a list of deliverables under the VCA that had not been received by OCR.⁴ On October 8, 2009, OCR sent a letter to Department of Behavioral Health and Developmental Disabilities (DBHDD) Commissioner Frank Shelp and Dr. Andrew Phillips, then Olmstead Coordinator, specifying OCR concerns regarding non-compliance with key provisions of the VCA.⁵ On December 8, 2009, OCR sent a letter to Commissioner Shelp detailing OCR concerns with the budget information provided by the State and indicating that the budget requests would not be sufficient to comply with the VCA.⁶ This letter was also shared with your office and William Janes, the Olmstead Coordinator. OCR incorporates by reference all of these letters and memorandum herein.

The VCA further specifies that OCR and the State are to meet to confer within 30 days and attempt to reach agreement on the steps that must be taken to come into compliance with the agreement. Because Georgia has been previously notified about areas of concern regarding non-compliance and is in such serious violation of core provisions of the VCA, OCR has concerns about the State's ability and commitment to come into compliance with the VCA. If the State, however, wants to meet pursuant to this provision, OCR requests that this meeting be scheduled as soon as possible given the gravity of the issues.

In this formal finding of non-compliance, OCR relies on evidence that has been submitted by the State to OCR and other evidence obtained by OCR, including evidence gathered by the Department of Justice.

Below is a section-by-section review of the areas of non-compliance.

Article I. General Provisions:

Section II: Appointment and Role of the Olmstead Coordinator

(A) The Olmstead Coordinator will review the Monthly Progress Reports and any compliance concerns brought by OCR, and whenever deadlines specified under this Agreement are not met or the Olmstead Coordinator

⁴ Memorandum from Mary Giliberti, Supervisory Civil Rights Analyst, Roosevelt Freeman, Region IV Regional Manager, Jim Price, Senior Equal Opportunity Specialist, Chris Griffin, Regional Counsel, OCR, to Abel Ortiz, former Olmstead Coordinator, and Denise McClain, Director of the Office of Transition Services, *Status on Deliverables in the Agreement (Status on Deliverables Memorandum)* (Jun. 3, 2009).

⁵ Letter from Roosevelt Freeman, Region IV Regional Manager to Frank Shelp, Commissioner of DBHDD and Andrew Phillips, former Olmstead Coordinator (Letter to Commissioner Shelp and Dr. Phillips) (Oct. 8, 2009).

⁶ Letter from Roosevelt Freeman, Region IV Regional Manager to Frank Shelp, Commissioner of DBHDD, *Voluntary Compliance Agreement – Budget Concerns, (VCA Budget Concerns Letter)* (Dec. 8, 2009).

otherwise determines that progress is not sufficient and/or effective, the Olmstead Coordinator will convene within four weeks, a meeting of the affected State agencies to determine what policy, administrative, resource, and budgetary changes are necessary in the subsequent quarter to achieve the progress required under this Agreement or under the State’s Olmstead plan. For purposes of this paragraph, a deadline under this Agreement includes, but is not limited to, any instance in which an individual does not receive community services within 90 days of the discharge date specified in his or her Transition Plan... Within one week of the meeting... the affected State agencies will report back... with a Corrective Plan detailing the corrective measures each agency will take, along with the corresponding target dates, to assure compliance with this Agreement. On at least a quarterly basis, the Olmstead Coordinator will send a summary of any such Corrective Plans to OCR, the Olmstead Planning Committee... and to the independent consultants... The summary of Corrective Plans will include updates of all corrective actions completed and all corrective actions not completed by the target dates within the Corrective Plans. If requested, the State shall allow OCR and the State’s consultants access to the Corrective Plan or other underlying information used to create the summary of Corrective Plans.⁷

This provision of the VCA requires the Olmstead Coordinator to hold meetings and develop Corrective Plans to secure community services for individuals who remain in the institution for 90 days or more past their discharge dates. The Olmstead Monthly Progress Reports submitted to OCR indicate that beginning in September 2008, and continuing to September 2009, which is the last month for which the State has submitted data to OCR, there have been individuals with mental illness and developmental disabilities who remain in the hospital and exceed their discharge date by over 90 days. These numbers have steadily increased from six individuals with mental illness and one individual with developmental disabilities in September 2008 to 17 individuals with mental illness and 41 individuals with developmental disabilities in September 2009.⁸ Despite this significant increase in delayed discharge and the trigger of a deadline mandating a Corrective Plan since September 2008, the State has not provided OCR with a single summary of Corrective Plans.

The State has been previously notified of its their failure to comply with this section of the VCA. On June 3, 2009, OCR sent Abel Ortiz, then Olmstead Coordinator, and Denise McClain, Director of the Office of Transition Services, a list of that had not been received by OCR. OCR noted the requirement to submit quarterly summaries of Corrective Action Plans and reported that Georgia was not complying with it: “OCR has not received any summaries. Abel indicated he had called for corrective action in the DD system, but OCR has not received a summary. There are individuals according to the

⁷ VCA at 3.

⁸ Olmstead Monthly Progress Report, FY2009 and Olmstead Monthly Progress Report, July – September 2009.

monthly reports who are over 90 days past their discharge date and we have received no summaries of corrective plans for them.”⁹

Despite this notice of non-compliance, over eight months later, OCR has not received a single summary quarterly report. OCR also has never received any information indicating that the Olmstead Coordinator convened any of the meetings required under the Agreement. Given the growing number of individuals exceeding their discharge dates by over 90 days, the Olmstead Coordinator was required under the VCA to convene a meeting to discuss these trends and develop Corrective Plans to address them. Georgia has not provided any documentation required by the VCA to demonstrate compliance with this Section’s required review and correction of failure to meet discharge deadlines.

Section III: Assessing Statewide Need for Community Services

The Olmstead Coordinator, DHR and DCH will use demographic, survey, and other reliable data to make meaningful annual estimates of the need for community services in the State for individuals with DD and/or MH currently institutionalized or otherwise at risk of institutionalization. The data will provide the number of individuals institutionalized in State institutions who have been determined appropriate for community services, as well as the numbers of individuals in the community at risk of institutionalization for lack of community services. The data will be published yearly as part of the State’s Annual Olmstead Report which will use the data developed under this section to assess the need for community services within the State of Georgia.¹⁰

The VCA requires the Olmstead Coordinator, DHR, and DCH (now DBHDD) to use reliable data and make meaningful annual estimates of the needs for community services. This information must include the numbers of individuals institutionalized in State institutions as well as the number of individuals in the community at risk of institutionalization. The VCA requires Georgia to publish this data as part of the State’s Annual Olmstead Report, which was due in December 2009. Georgia has not published this data nor provided it to OCR despite our repeated requests.

Later provisions of the Agreement require the OPC to submit the Annual Olmstead Report in December. At the request of the Olmstead Coordinator, OCR waived the requirement for 2008 because the State was working on the Olmstead Plan and asked to focus on that task. However, OCR was clear that it was not waiving the requirement for 2009. OPC has not submitted the Annual Olmstead Report for 2009.

Section IV: Revising the State Olmstead Plan

(A) No later than seven months after the effective date of this Agreement, the State will create a new draft of a multi-year Olmstead Plan to make it

⁹ *Status on Deliverables Memorandum.*

¹⁰ VCA at 4.

consistent with this Agreement and to set forth new, concrete and realistic annual Olmstead goals. The Olmstead Plan shall include an annual schedule of anticipated discharges (in a de-identified format) for all individuals with DD and/or MH who are institutionalized and have been determined appropriate for community services and are not opposed to same, as well as how to obtain and/or maintain necessary community services for those at risk for institutionalization. The Olmstead Plan shall also include a comprehensive and effective plan to treat all institutionalized person having a preference for community services in the most integrated setting appropriate for each individual.¹¹

Under the terms of the VCA, the State had until January of 2009 to create a new draft of a multi-year Olmstead Plan to make it consistent with the Agreement. In the Spring of 2009, the State provided OCR with a first draft of its revised multi-year Olmstead Plan. On April 10, 2009, OCR notified the State that the Plan failed to meet the requirements of the VCA.¹² For example, it lacked an annual schedule of anticipated discharges for all individuals with developmental disabilities and/or mental health needs who have been determined eligible for discharge. The State provided an opportunity for public comment on the Plan and received multiple comments regarding the deficiencies of the Plan.

OCR agreed to allow the State additional time to hold stakeholder meetings, constitute workgroups, and produce a Plan that would comply with the Agreement. OCR made this concession with the understanding that this process would be completed within a reasonable time and upon verbal assurances of Dr. Andrew Phillips, then Olmstead Coordinator, in the Fall of 2009 that the process would be concluded by the end of the calendar year. Yesterday, January 25, 2010, William Janes, the new Olmstead Coordinator, announced that the Plan would not be completed until June 2010, to give him the opportunity to receive and incorporate meaningful input from the relevant state agencies responsible for carrying out the Plan. OCR notes that the VCA specifically requires that representatives of several agencies are members of the Olmstead Planning Committee in order to ensure their full participation in the Plan development. While OCR supports Mr. Janes' efforts to accomplish what should have been previously completed, we find the State out of compliance with the VCA for a failure to complete an Olmstead Plan that meets the requirements of the VCA in a timely manner. OCR also finds that the most recent draft of the Olmstead Plan submitted to OCR on January 21, 2010 continues to lack an anticipated annual schedule of discharges as required by the VCA.

(E) Review of the State's Olmstead Plan Progress: The Olmstead Planning Committee shall regularly receive reports regarding the State's progress in meeting the goals of the Olmstead Plan and the State's Annual Olmstead Report ... in order to identify policies, processes, or other problems that may frustrate the State from achieving the goals of the Olmstead Plan, and recommend

¹¹ VCA at 4.

¹² Comments submitted by the Office for Civil Rights, United States Department of Health and Human Service, re: *A New Life: State of Georgia Olmstead Strategic Plan* (April 10, 2009).

changes to advance the Olmstead Plan and Annual Olmstead Report objectives. The resulting recommendations shall be included in the subsequently issued Annual Olmstead Report.¹³

The State has not issued the Olmstead Plan or the Annual Olmstead Report. Accordingly, the OPC does not receive reports on the State's progress with respect to these two documents as required by the VCA. OCR finds that the State has failed to comply with this provision of the VCA.

(F) Regular Public Reporting of the State's Progress in its Olmstead Plan and New Goals: Each December, the OPC shall issue the Annual Olmstead Report for public distribution to consumers, potential consumers, service providers, advocates, and employees of State agencies, detailing the progress achieved pursuant to this Agreement and the Olmstead Plan, including the number of individuals leaving State-operated facilities, the census at the facilities, the numbers of persons awaiting community services, substantive and procedural policy changes made to meet Olmstead objectives, and the actions the State will take to accomplish its Olmstead goals and obligations in the years ahead. The Annual Olmstead Report shall make policy proposals and recommend specific funding for initiatives and resources... The Annual Olmstead Report shall consider the community services data described in Article 1, Section III to assess the need for community services in the State. The OPC will also assess all items addressed in the Olmstead Plan..., and, as appropriate, include an update of the Olmstead Plan in the Annual Olmstead Report.... The Annual Olmstead Report shall solicit, include and respond to public comments from interested members of the public and public advocacy organizations with concerns about Olmstead issues. Additionally, henceforth, the annual budget presentations made to the Board of Community Health and the Board of Human Resources shall include a section specifically addressing the respective Department's and the State's Olmstead-related goals. The presentations shall be maintained on the internet web sites of each Department, and shall be made available to all interested members of the public upon request....¹⁴

Because Georgia has not issued its Annual Olmstead report, it is in violation of all of the requirements in this provision of the VCA, which dictates public reporting of key indicators of progress under the VCA.¹⁵ Moreover, this provision requires the State to include a section specifically addressing Olmstead –related goals in the annual budget

¹³ VCA at 5.

¹⁴ VCA at 6.

¹⁵ On January 25, 2009, the State announced that it would provide the Annual Report at the February OPC meeting. The VCA specifically recognizes the importance of the Annual Report to the development of the budget cycle for the following year. Since the Governor's budget recommendation was submitted to the legislature in January and the legislature has begun consideration of this recommendation, this delay is significant. Moreover, OCR notes that it granted the State's request to be relieved of this requirement in 2008, so the State had additional time to prepare a timely Report.

presentations to the Board of Behavioral Health and Developmental Disabilities (DBHDD) (previously the Boards of the Department of Human Resources) and the Board of Community Health. In violation of the VCA, this year's presentation to the Board of DBHDD did not include a section specifically addressing the respective Department's and State's Olmstead-related goals and, to date, despite repeated requests, the State has refused to provide OCR with the VCA required budget presentation to the Board of Community Health.

Article 2: Provisions for Individuals with Developmental Disabilities

Section I: Preventing Unnecessary Institutionalization

(B) DHR utilizes an annual "Transition List," which identifies by priority the specific individuals who DHR is planning to discharge to the community within a given State fiscal year. In developing the annual Transition Lists, DHR shall annually place on the Transition List... a minimum proportion of the individuals who are on the up-to-date DD Olmstead List at the time of the creation of the Transition List. That proportion shall be one-fifth in the first year of the Agreement, one-fourth in the second year, one-third in the third year, one-half in the fourth year, and the remainder in the final year of the Agreement.... Each Transition Plan shall include the supports and services required to safely transition the individual, a proposed service provider, and a specified data of discharge. The discharge data determined by DHR will be reasonable and based on the assessed needs of the individual.... The State will marshal resources (see paragraph (E) of this section) needed to secure community services by the discharge date. The State will formulate its budget requests and utilize Federal funding provided to it under the "Money Follows the Person" (MFP) grant to adequately fund enough community services to ensure that institutionalized individuals on the Transition List can be placed in the community by the discharge date specified in their Transition Plan and the State will place such individuals by the discharge date specified in their Transition Plans.¹⁶

This provision requires the State to annually move an increasing proportion of the developmental disabilities (DD) population in State institutions onto a Transition List of persons who will be discharged to the community within that fiscal year, develop Transition Plans with discharge dates for those on the List, and place such individuals by the discharge date specified in their Transition Plan. The State is also required to formulate budget requests to adequately fund enough community services to discharge persons by the discharge dates specified in their Transition Plans.

In violation of this provision of the VCA, the State did not place the requisite number of individuals in the community within the first year. In particular, Georgia only placed 89

¹⁶ VCA at 7.

of the 174 individuals required to be discharged to the community during FY 2009.¹⁷ Moreover, in violation of this provision of the VCA, the State also has not formulated its budget requests to ensure it is adequately funding sufficient community services to discharge persons by the discharge dates specified in their Transition Plans.

For example, in FY 2010, Georgia is obligated under the VCA to place 201 individuals in the community.¹⁸ Yet, the State has only funded 150 Money Follows the Person (MFP) slots (the mechanism Georgia uses to fund each placement) for FY 2010 and has requested 150 new MFP slots for FY 2011.¹⁹ Because 201 individuals must be placed in FY 2010 and the State only discharged 89 of the 174 individuals required to be placed on the list in FY 2009, OCR concludes that the 150 slots will be inadequate in FY 2010 and will continue to be inadequate in FY 2011.

OCR's conclusion regarding inadequate resources is also based on the large number of admissions of individuals with developmental disabilities to hospitals statewide. In FY 2009, 240 individuals were admitted to State hospitals and all of them were placed on the DD Olmstead List.²⁰ Since the State must place a percentage of the up-to-date Olmstead List each year, this growth must be considered when analyzing whether the State has marshaled sufficient resources to ensure placement by an individual's discharge date. Neither the Governor's amended FY 2010 budget proposal nor the FY 2011 budget request include any additional resources for crisis services or diversion services needed to decrease admissions of individuals with developmental disabilities.

In addition, as noted above, the State is failing to place individuals by their discharge date as required under this provision of the VCA. The State's Monthly Progress Reports for FY 2009 and July – September of 2009 indicate that the State is failing to discharge individuals by their discharge dates and the number of individuals not being discharged on time is growing significantly over time. In September 2008, community services had not been secured for one individual on the DD Olmstead List by his/her discharge date. By September of 2009, this number had risen such that community services had not been secured for 86 individuals by their discharge date. Moreover, the number of individuals waiting to be discharged for substantial periods of time has increased precipitously. In September 2008, one individual on the DD Olmstead List was reported to exceed the discharge date by 60 days and one individual was reported to exceed the discharge date

¹⁷ Under the Agreement, one-fifth of the DD Olmstead List must be placed on the Transition List in the first year of the Agreement, FY 2009. OCR was given a list of 873 individuals on the original DD Olmstead List. MR/DD Olmstead Individuals in Georgia State Hospitals, Page 29, July 1, 2008. This required the State to place 174 of these individuals on the Transition List in the first year. The State placed 170 individuals on the Transition List in FY 2009, but did not place all of these individuals into the community in that fiscal year. They placed 89 individuals into the community. MR/DD Olmstead Individuals in Georgia State Hospitals, Page 29, July 1, 2008.

¹⁸ For FY 2010, the State is required to place an additional one-fourth of the current DD Olmstead List on the Transition List. According to the Monthly Reports, there were 804 individuals on the DD Olmstead List at the end of FY 2009; thus, 201 additional individuals should be added to the Transition List in FY 2010. Olmstead Monthly Progress Report, Fiscal Year 2009. In FY 2011, another third of the current DD Olmstead List will need to be served.

¹⁹ DBHDD Enhancement and Other Adjustments Justification Document, Page 3.

²⁰ Olmstead Monthly Progress Report, Fiscal Year 2009.

by 90 days or more. In September of 2009, 49 individuals on the DD Olmstead List had exceeded their discharge date by 60 days and 41 were waiting 90 days or more past their planned discharge dates.

In addition to the increased numbers of individuals with developmental disabilities waiting past their discharge dates, the average wait time has increased substantially. In September of 2008, individuals waited on average 25 days past their discharge dates. By September of 2009, this number had more than doubled to 52 days past their discharge dates.²¹ For all of the reasons stated above, OCR finds that the State has failed to comply with this critical provision of the VCA.

(D) Review of Transition Plans: Within 6 months after the execution of this Agreement, the State's consultant will review a sample of individual Transition Plans as needed to assess the competency of assessments and the reasonableness of the discharge dates and any and all conditions related to the transition or discharge dates. If the State's consultant finds individual or systemic problems with the competency of assessments or the reasonableness of the discharge dates, the State will timely implement the corrective measures identified by the State's consultant and continue to meet its obligations within five years of the execution of the Agreement.²²

On March 9, 2009, OCR interviewed Karen Green McGowen, the State's DD consultant. During the course of the interview, it became apparent that Ms. McGowen had not reviewed a sample of individual Transition Plans as required under the VCA. The State agreed to provide Ms. McGowan with a sample of Transition Plans so she could provide an analysis to OCR in compliance with the VCA.

On June 3, 2009, OCR sent a list of deliverables to Abel Ortiz, then Olmstead Coordinator, and Denise McClain, Director of the Office of Transition Services. OCR noted that it was awaiting a date to discuss the review of plans that had been sent to Ms. McGowan. The State has not provided a date for an interview for Ms. McGowan nor has it provided any written report of Ms. McGowan regarding the Transition Plans she was to review. Thus, to date, the State has failed to provide any evidence of its compliance with this section of the Agreement – more than a year after the deadline has passed and more than seven months after we formally requested compliance and evidence of that compliance.

(F) The State commits to continue to improve the delivery of community services and to eliminate the possibility of unnecessary institutionalization for those persons with developmental disabilities who do not oppose community services. Towards this objective the State commits to providing community services to all persons on the DD Olmstead List, consistent with each individual's own choice of placement, while simultaneously maintaining

²¹ Olmstead Monthly Progress Report, July – September 2009.

²² VCA at 8.

efforts to minimize the number of individuals awaiting community services after the effective date of this Agreement.²³

Under this provision of the VCA, the State commits to providing community services to all persons on the DD Olmstead List and to maintaining efforts to minimize the number of individuals in the community awaiting community services. As previously indicated, the State's budget request has been and continues to be inadequate to fund the community services required under this section of the Agreement. The Governor's FY 2011 budget documents submitted to the legislature specifies no increases to the DBHDD budget serving individuals with developmental disabilities, except for the 150 MFP slots and annualization of the waivers funded in FY 2010.

The Governor's Olmstead Budget Report provided by the State on January 24, 2010, indicates increases for waiver services from FY 2009-FY 2010 and an increase overall in Olmstead funds for individuals with developmental disabilities.²⁴ However, these documents also note that the funds for community services for individuals with developmental disabilities have declined from \$73.9 million in FY 2009 to \$69.7 million dollars in FY 2011, including decreases for Personal Living/Residential, General Family Support, Prevocational Services, and Behavioral Support. In addition, the State's most recent budget documents do not compare the expenditures to the need. OCR notes that the Governor's FY 2011 budget request for Adult Developmental Disabilities of \$267.9 million dollars is far below the DBHDD request for \$346.6 million.

Budget information previously provided by the State to OCR indicates that DBHDD identified a significant need for additional community services in its budget proposals and acknowledged that these services are not being provided. For example, in the State's Response No. 2 to OCR's request for budget information, the State provided a document entitled, "Conceptual Review: FY11 Proposals Background info – for discussion with OPB." This document stated, "in an effort to comply with Olmstead Voluntary Compliance Agreement the expansion of community services and the increased cost of transportation, the need for additional transportation resources has reached crisis levels in Georgia's DD services system. Without additional resources for transportation, many consumers will not be able to access services that otherwise would be available to them."²⁵ The VCA specifically defines community services to include transportation. See VCA Appendix: Definitions.

In addition, the Conceptual Review document discussed the critical need for additional waiver services beyond the 150 Money Follows the Person waivers included in the FY 2011 request. The proposal requested 950 Residential Comprehensive Waivers and 550

²³ VCA at 9.

²⁴ The Governor's Olmstead Budget Report – Fiscal Year 2009 through Fiscal Year 2011 (January 2010) at 7-8.

²⁵ Conceptual Review: FY11 Proposals Background info – for discussion with OPB, Page 1. The Governor's Olmstead Budget Report for FY 2009-FY 2011 indicates very small increases in the DCH budget for transportation services that serve the elderly, individuals with developmental disabilities and individuals with a mental health diagnosis. Olmstead Budget Report at 6.

Community Access and Family Support type services. The document states: “The most current DD Planning List data (July 2009) indicates that a total of 6,289 Georgians with DD are waiting for services. Of these individuals, 1,616 (over 26%) need a residential service (the most expensive community service). Also, at the end of FY09, there were 855 people living in state hospitals. Over 17,000 Georgians with DD live with caretakers age 60 and older (Braddock, et.al., 2008).”²⁶ Moreover, DBHDD cited the United States Supreme Court decision in *Olmstead v. L.C.* as the legal justification for its request for these additional services.

In the State’s Response No. 5 to OCR’s request for budget information, Beverly Rollins, Chief Fiscal Officer for the Division of Developmental Disabilities stated: “Our FY 2011 budget resource request includes 150 Money Follows the Person resources as well as 800 additional COMP Residential resources and 550 NOW (supports) resources that will also [affect] the Olmstead and VCA.” None of these services except for the 150 MFP services, were included in the Governor’s FY 2011 budget despite the judgment of the Chief Fiscal Officer that they will affect compliance with the VCA.²⁷

Furthermore, the Community Service Boards, which serve many individuals with developmental disabilities in the community, have noted the deleterious effects of cuts to the community services budget for developmental disabilities that have already been implemented. In a letter to Commissioner Shelp, they conclude, “An effective 44% decrease in state dollars in the Developmental Disability (DD) services contracts with CSBs has also severely impacted services.”²⁸

The failure to adequately fund community services for individuals with developmental disabilities violates the VCA and leads to poor outcomes. For example, lack of crisis services in the community causes needless admissions and readmissions to the State hospitals. In December of 2008, OCR intervened with the State on behalf of a young man who had previously been discharged from Central State Hospital to a group home. After a behavioral incident, he was taken to an emergency room when his provider could not address his behavioral challenges. He was then sent back to the State hospital where he remained for over a month before returning to the group home. He had another

²⁶ Conceptual Review: FY11 Proposals Background info – for discussion with OPB, Page 2

²⁷ The overall budget for Adult Developmental Disabilities Services declined from FY 2010 to FY 2011. In addition, the FY 2011 request for \$267,928,497 was substantially below the DBHDD request for \$346,596,652. The historical data in the Governor’s Olmstead Budget Report shows a significant decline in the State’s commitment to make progress in serving individuals with developmental disabilities in the community. In FY 2005, the State was funding 30 new waiver slots for the year. By FY 2007, the State has substantially increased its financial commitment and funded 1,500 new waiver slots. In FY 2008, 1,330 new slots were funded. But beginning in FY 2009, the first year of the VCA, the number dropped to 500 new waivers. For FY 2010 and FY 2011, the State is only requesting 150 new waivers per fiscal year. This data reveals a striking decline in progress and commitment to compliance with the ADA in violation of the VCA. Olmstead Budget Report at 14.

²⁸ Letter from the Community Services Board, CSB to Dr. Frank Shelp, Commissioner, DBHDD, (Oct. 30, 2009).

behavioral incident in October of 2008 and remained in the hospital for several months before finally being discharged.²⁹

Additional evidence confirms that this is not an isolated incident and individuals with developmental disabilities are admitted to Central State Hospital, the largest of the facilities serving people with developmental disabilities, because crisis services in the community are not adequate to address the behavioral needs of individuals with developmental disabilities.³⁰

Individuals with developmental disabilities are also institutionalized for long periods due to a lack of community services. As previously noted, increasing numbers of individuals are waiting in the hospital for more than 90 days past their discharge date for community services.³¹ In East Central Regional Hospital, experts found that 165 individuals were recommended for community placement and 145 of the 165 or 88% were waiting for funding and/or approved providers. Lack of waiver “slots” to fund community services was a major barrier to discharge in that facility.³²

OCR concludes that Georgia is violating the VCA by failing to provide adequate community services to individuals with developmental disabilities in its State institutions and has also failed to maintain its commitment to minimize the number of individuals awaiting community services.

Section III: Monitoring Progress

(A) Monitoring Progress and Olmstead Monthly Progress Reports: ...the Olmstead Coordinator shall require DHR to provide him with a Monthly Progress Report... For all individuals awaiting community services for 90 days or longer after the discharge date specified in their Transition Plan, the Monthly Progress Report will identify the specific barriers to that individual receiving community services, what corrective actions are to be taken to remove those barriers (including time frames), and the total length of time the individual has been awaiting community services....³³

²⁹ The most recent budget documents provided to OCR indicate a decrease in funding for behavioral support for individuals with developmental disabilities. As described in the document, these services assist the participant with significant, intensive challenging behaviors that interfere with activities of daily living, social interaction, work, or similar situations. The Governor’s Olmstead Budget Report (January 2009).

³⁰ Investigative Findings Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to the Honorable Sonny Perdue, Governor of the State of Georgia, *Investigation of the State Psychiatric Hospitals*, (DOJ Findings Letter) Page 12 (citing: Medical College of Georgia Report on CSH at 9) (Dec. 8, 2009).

³¹ Olmstead Monthly Progress Report FY 2009 and Olmstead Monthly Progress Report July – September 2009. See also Investigative Findings Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to the Honorable Sonny Perdue, Governor of the State of Georgia, *Investigation of the State Psychiatric Hospitals* (DOJ Findings Letter at Page 12. (Dec. 8, 2009)

³² First Expert Compliance Report of the East Central Regional Hospital (Accompanied the DOJ Compliance Report) (ECRH Expert Report), Pages 133 and 147 (Sept. 9, 2009).

³³ VCA at 10.

This provision requires the Olmstead Monthly Progress Reports to identify the specific barriers to securing community services for individuals who have remained in the hospital for 90 days or longer, corrective actions that will be taken, and the total length of time the individual has been waiting for community services. In violation of the VCA, Georgia's Olmstead Monthly Progress Reports provided to OCR have not included this information. OCR notified the State of this deficiency on June 3, 2009, in a List of Deliverables under the Agreement sent to Abel Ortiz, then Olmstead Coordinator and Denise McClain, Director of the Office of Transition Services. Under the section addressing the DD Monthly Report, OCR wrote, "There is no inclusion of the specific barriers for the person waiting more than 90 days, what corrective action will be taken (including time frames) and the total length of time they are waiting, which are required by the agreement."³⁴

The most recent Olmstead Monthly Progress Report sent to OCR on October 30, 2009, indicated that there were individuals exceeding their discharge date by more than 90 days beginning in September 2008 and continuing to September 2009, the last month in the report. The Olmstead Monthly Report further indicated that the numbers of individuals with developmental disabilities waiting more than 90 days had grown from one in September 2008 to 41 individuals in September 2009. In continuing violation of the VCA, Georgia did not provide any information regarding the specific barriers to discharge, corrective action that will be taken, and the total length of time the individuals have been awaiting community services. Accordingly, OCR finds that the State has failed to comply with this provision of the VCA.

Section IV: Adequately Preparing Individuals for Community Services

(A) Adopting community services as a treatment goal: The State shall ensure that all individuals in State-operated facilities shall receive such treatment or habilitation during their institutionalization as necessary to prepare those individuals adequately for community services.³⁵

This provision requires the State to provide the treatment and habilitation necessary to prepare individuals with developmental disabilities for community services. Experts reviewing East Central Regional Hospital found, "ECRH does not provide treatment in the development of skills necessary to achieve successful discharge."³⁶ In support of that finding, the experts noted that treatment interventions at ECRH did not provide opportunities to learn community living skills in the natural environment. Learning in the natural environment is important because "teaching strategies implemented in the natural context maximize the learner's opportunity to succeed in the natural environment. This

³⁴ Status on Deliverables Memorandum at 3.

³⁵ VCA at 11.

³⁶ ECRH Expert Report at 137.

accepted standard of practice is especially necessary for individuals who have intellectual impairments because they have difficulty with generalization.”³⁷

(D) Transition Planning: No individual shall be discharged pursuant to this Agreement without an appropriate Transition Plan that provides for the individual’s receipt of appropriate community services. The process of developing each individual’s Transition Plan will include collaboration with the individual... the individual’s family members, legal representatives, guardians, friends and any other persons designated by the individual. The Transition Plan shall address the individual’s goals and choices regarding living arrangements and services needed to achieve the individual’s goals. An appropriate transition plan under this Agreement shall memorialize the determination of community services in a single, comprehensive document which shall include the following: a) all areas of assessed need; (b) the specific community services that will be provided to meet the identified needs of the individual and the nature, frequency and duration of the services to be provided; and (c) transition services to prepare the individual for community services... Consideration of community services shall not be limited to currently available community services....³⁸

This provision requires the State to discharge individuals with developmental disabilities with an appropriate Transition Plan that addresses all areas of assessed need and the specific community services that will be provided to meet those needs. As previously noted, the State has not provided OCR with information from Ms. McGowan regarding her review of Transition Plans.

Experts reviewing Transition Plans at East Central Regional Hospital concluded:

Analysis of a review of sample plans for individuals with developmental disabilities that have been recently discharged from ECRH found there is no comprehensive placement support plan that identifies the individual’s preferences, non-negotiables, high-risk characteristics, supports, and services essential to the individual’s health and safety and identification of how those supports and services will be provided in the community.³⁹

Accordingly, OCR finds that the State has failed to comply with this provision of the VCA.

³⁷ ECRH Expert Report at 137. The experts further found that Individual Service Plans emphasized activities of daily living, rather than preparation for community living. In addition, there were limited opportunities for community-referenced instruction because of limited community integration experiences. None of the residents of Gracewood attended a day program away from the grounds of the facility. Also, individuals lacked opportunities to experience community services such as post office, grocery stores, recreational centers, church, etc. *Id.* at 140-141.

³⁸ VCA at 11.

³⁹ ECRH Expert Report at 143.

Article 3: Provisions for Individuals with a Mental Health Disability

Section I: Preventing Unnecessary Institutionalization

(B) Discharge of Individuals on the up to date MH Olmstead List: ... The State will develop a Person Centered Transition Plan (“PCTP”) for all individuals on the MH Olmstead List... The anticipated discharge date projected by DHR will be reasonable and based on the assessed needs of the individual and the State will marshal resources needed to secure community services by the discharge date by formulating budget requests of DHR to adequately fund enough community services to ensure that institutionalized individuals with MH, who are appropriate for community services and who do not oppose treatment, can be discharged to the community by the discharge date specified in the PCTP, and the State will place all such individuals by the discharge date specified in their PCTP.....⁴⁰

This provision requires Georgia to place all persons in State institutions who are on the State’s Mental Health (MH) Olmstead List into the community by the discharge dates in their Person Centered Transition Plans (PCTPs) and also requires Georgia to adequately fund community services to accomplish this. OCR finds that the State is not in compliance with either of these requirements. The State has failed to meet the first requirement because it is not placing all individuals on the MH Olmstead List by the discharge date specified in their PCTP. Olmstead Monthly Progress Reports from the State indicate that the number of individuals on the MH Olmstead List who are waiting for community services past their discharge date has more than doubled, from 15 individuals in July 2008 to 33 individuals in September 2009. Moreover, during the same time period, the numbers of individuals waiting more than 60 days past their discharge dates has nearly quadrupled -- from six in July 2008 to 22 by September 2009. The number of individuals waiting more than 90 days past their discharge dates for community services has similarly increased -- from five individuals in July 2008 to 17 individuals in September 2009. In all, the average number of days that individuals are waiting for community services past their discharge dates has risen dramatically from 65 days in July 2008 to 107 days in September 2009.⁴¹

⁴⁰ VCA at 13.

⁴¹ Olmstead Monthly Progress Report, FY2009 and Olmstead Monthly Progress Report, July – September 2009. Information from specific hospitals confirms this information. At Georgia Regional Hospital in Savannah, there are “a number of individuals (9-12 per month) on the facilities “Olmstead List” that have extended lengths of stay without robust efforts to secure an appropriate community placement. Second Expert Compliance Report of the Georgia Regional Hospital Savannah (Accompanied the DOJ Compliance Report) (GRHS Expert Report), Page 112 (November, 2009).

The State is also failing to meet the VCA requirement to marshal the necessary resources by formulating budget requests to adequately fund enough community services to ensure a timely discharge from the state psychiatric facilities. OCR specifically notified the State of its concerns regarding compliance with this provision prior to the Governor's submission of his FY 2011 budget request. On December 8, 2009, OCR sent Commissioner Shelp a detailed letter setting forth OCR's concerns about the budget documents the State provided to OCR. OCR specifically highlighted its concern with the increasing numbers of individuals waiting more than 90 days past their discharge dates and the need for additional funding for community services to address this area of non-compliance with the VCA.⁴²

OCR specifically identified concerns regarding the small increases in community services reflected in the State's budget documents. The State produced two documents entitled, "Conceptual Review Meeting: FY10 proposals Background info – for discussion with OPB." The first document requested approximately \$547,000 dollars for 50 residential slots to transfer consumers out of State hospitals and the second document requested \$467,000 dollars for 70 supported employment slots. The legal reasoning section of both documents cited the Supreme Court's decision in *Olmstead*. The State also produced a document entitled "Responses from the Office of MH" indicating budget requests for FY 2011 of \$4.6 million dollars to fund 100 intensive residential treatment services slots, 24 case managers, and improved services for deaf and hard of hearing persons.

In OCR's December 8th Letter to Dr. Shelp, OCR noted that these increases would be totally inadequate to meet the needs of individuals on the MH *Olmstead* List, given that 317 individuals were placed on the MH *Olmstead* List in FY 2009. In particular, OCR pointed to the failure of these proposed minor increases to meet the level and extent of community services needed in Georgia and recommendations to meet those needs identified by the Georgia Governor's Mental Health Service Delivery Commission Report (hereinafter MH Commission Report or Report) issued in December 2008.⁴³ This Report and additional evidence clearly indicate that, in violation of the VCA, the State has not marshaled the resources needed to meet the needs of individuals with mental illness in the State so that all individuals institutionalized can be discharged by the date indicated in their PCTP.

The Governor's FY 2011 submission is particularly deficient to meet VCA requirements for community services in the areas of employment, housing, transportation, case management, community mental health services, and specialty services.

Employment: The VCA specifically includes employment services in the list of community services required under the VCA.⁴⁴ The MH Commission Report noted that "supported employment services and activities have been described as one of the most

⁴² VCA Budget Concerns Letter.

⁴³ Georgia Mental Health Commission's Final Report (MH Commission Report or Report) (December 4, 2008).

⁴⁴ See VCA Appendix: Definition.

important strategies to engender empowerment in persons with psychiatric disabilities.”⁴⁵ In assessing current needs in Georgia, the Report concluded that the Department’s goal to enroll 50% of its consumers in supported employment would require a minimum of 657 slots to be funded per month.⁴⁶ However, the Report also indicated that Georgia had reduced access to this critical service. During FY 2009, approximately 550 persons were served in supported employment compared to 2,241 in FY 2008.⁴⁷ The MH Report found that “some Supported Employment providers have discontinued services altogether while others have had to decrease the number of staff and consumers served.”⁴⁸

In FY 2009, the first year of VCA implementation, Georgia cut the budget for supported employment substantially decreasing the ability of providers to offer this critical service. In FY 2010, instead of restoring funding for this essential service, the Governor’s Olmstead Budget Report –Fiscal Year 2009 – Fiscal Year 2011 (hereinafter Olmstead Budget Report) indicates that this service was again cut, from expenditures of \$4.0 million to annual budget of \$2.8 million and remains at that level in FY 2011.⁴⁹ Thus, OCR finds that the State has not marshaled resources to provide this community service to individuals on the MH Olmstead List, in violation of the VCA.

Housing: The VCA also specifically defines community services to include housing.⁵⁰ The Draft Olmstead Report provided to OCR indicates that a minimum of 2,000 supportive housing units over a five year period will be needed to serve individuals with mental illness in the State and that this is a conservative estimate because more units may be required after comprehensive assessment of the need for supportive housing is completed. The Mental Health Commission Report reported receiving testimony from multiple sources that lack of community services was one of the major barriers to expanding supportive housing and additional funding was needed.⁵¹ The Olmstead Budget Report indicates minimal funding increases for residential services between FY 2009 and FY 2010 and no increase in funding between FY 2010 and FY 2011.⁵² Moreover, total Olmstead Expenditures for the Department of Community Affairs, the agency responsible for developing supportive housing, indicates a decline in resources from \$21.7 million in FY 2009 to \$20.6 million in FY 2011. Furthermore, the Governor’s submission to the State legislature for FY 2010 and FY 2011 for DBHDD fails to recommend any additional resources for supportive housing. Thus, OCR finds that the State has not marshaled resources to provide this community service to individuals on the MH Olmstead List, in violation of the VCA.

⁴⁵ MH Commission Report at 24.

⁴⁶ MH Commission Report at 24.

⁴⁷ MH Commission Report at 37.

⁴⁸ MH Commission Report at 37.

⁴⁹ The Governor’s Olmstead Budget Report – Fiscal Year 2009 though Fiscal Year 2011 at 9.

⁵⁰ See VCA Appendix: Definition.

⁵¹ MH Commission Report at 17.

⁵² The Governor’s Olmstead Budget Report-Fiscal year 2009 through Fiscal Year 2011 at 9. OCR notes that the Governors FY 2010 budget submission and his FY 2010 Amended budget submissions to the legislature do not highlight increased resources for this service.

Transportation: The VCA also defines community services to include transportation.⁵³ The MH Commission Report stated, “consolidation of service locations and lack of public transportation in many areas of the state have made transportation to services one of the most pressing issues in the MHDDAD [Mental Health, Developmental Disabilities, and Addictive Diseases] service delivery system. At most consumer/family forums and regional board meetings, transportation is the top issue/complaint.”⁵⁴ The Olmstead Budget Report indicates a cut to coordinated transportation services from \$11.4 million in FY 2009 to \$9.7 million in FY 2010 and FY 2011.⁵⁵ There are no additional resources for transportation specified in the Governor’s Amended FY 2010 and FY 2011 DBHDD budget recommendations to the legislature. Thus, OCR finds that the State has not marshaled resources to provide this community service to individuals on the MH Olmstead List, in violation of the VCA.

Case Management: The VCA requires the full range of services and supports needed to live independently in the community, and case management services are essential to ensure that individuals receive the full range of services and supports.⁵⁶ The Mental Health Commission Report noted the need for additional case management in the State, particularly in the ten urban counties which have the highest number of State hospital admissions and readmissions and involvement with the Department of Corrections, as well as certain rural counties.⁵⁷ Moreover, the Report highlighted the need for intensive case management with small caseloads of 10-13 persons, a service that is currently lacking in the State mental health system. There are no additional resources for case management specified in the Governor’s Amended FY 2010 and FY 2011 budget requests to the legislature. The Olmstead Budget Report does not include intensive case management on the list of adult mental health services. Thus, OCR finds that the State has not marshaled resources to provide this community service to individuals on the MH Olmstead List, in violation of the VCA.

Community Mental Health Services: In OCR’s December 8, 2009 Letter to Commissioner Shelp, OCR further notified the State of its concern regarding current reductions to community provider contracts because this loss of funding has further reduced access to critical community mental health services. These contracts have been reduced by 5% in this fiscal year in anticipation of further budget reductions. A letter from the affected providers stated, “The Department’s decision earlier this fiscal year to withhold 5% from adult mental health services has already adversely impacted services across the state.”⁵⁸ The Olmstead Budget Report indicates no increases for these community mental health services for FY 2011. Accordingly, OCR finds that the State has failed to marshal resources for core outpatient services.

⁵³ See VCA Appendix: Definition.

⁵⁴ MH Commission Report at 28.

⁵⁵ The Governor’s Olmstead Budget Report – Fiscal Year 2009 through Fiscal Year 2011 at 9.

⁵⁶ See VCA Appendix: Definition.

⁵⁷ MH Commission Report at 20.

⁵⁸ Letter from Dr. Ellice Martin, President, Georgia Association of Community Service Boards to Dr. Frank Shelp, Commissioner of DBHDD (Oct. 30, 2009).

Although the State was notified of these concerns and its obligations under the VCA, the Governor's Amended FY 2010 and FY 2011 budget request documents submitted to the legislature specify no increased funding for community mental health services. Instead, the budget documents highlight additional funding for the State hospitals. The budget proposal specifies a transfer of \$6.7 million dollars from the Adult Mental Health Services budget to support Direct Care Support Services in the hospital (\$5.5 million) and the Adult Addictive Disease Service program (1.2 million). The documents also specify that an additional \$5 million dollars has been added to the Adult Mental Health Services budget to provide more funds for the hospital and \$21 million was added to the Direct Care Support Services budget to improve the quality of care in the hospitals.⁵⁹ So while the Governor's budget request to the legislature clearly reflects a marshaling of resources for the State hospitals, there is no similar effort to secure community services as required by the VCA. This clear reflection of institutional bias is exactly what the resource requirements in the VCA were designed to change.

Specialty Services: The VCA requires the full range of services and supports needed to live in the community.⁶⁰ Specialty services are necessary to ensure an adequate array of services to meet individualized needs. The Mental Health Commission Report further recognized that specialty services are not available statewide to individuals with mental illness. The Commission defined "specialty services" to include Assertive Community Treatment, Psychosocial Rehabilitation, mobile crisis services, crisis stabilization programs, residential services, supported employment and peer services."⁶¹ Below is an analysis of the need and the funding for each specialty service that has not been previously addressed:

Assertive Community Treatment: Staff at multiple State hospitals have stated that there are insufficient Assertive Community Treatment (ACT) teams to provide this service to discharged individuals who require them.⁶² An ACT team costs at least \$1 million dollars. The Olmstead Budget Report indicates a modest increase from \$5.7 million in FY 2009 to \$6.0 million in FY 2010 for Assertive Community Treatment, with no increase for FY 2011.

Psycho-Social Rehabilitation: The Mental Health Commission Report included Psycho-Social Rehabilitation (day treatment) as one of the services lacking in some parts of the State. Funding for Psycho-Social Rehabilitation Services has declined from \$4.3 million in FY 2009 to \$3.2 million in FY 2010 with no increase in FY 2011.

Mobile crisis services and crisis stabilization programs: The Mental Health Commission Report stated that the Georgia mental health system is in "crisis" and "the crisis is a direct result of the lack of community based crisis services such as crisis stabilization programs

⁵⁹ The Governor's FY 2011 budget request indicates that the overall DBHDD budget for Adult Mental Health Services is reduced from \$248.7 million in FY 2010 to \$236.5 million in FY 2011.

⁶⁰ See VCA Appendix: Definition.

⁶¹ MH Commission Report at 36.

⁶² DOJ Findings Letter, December 8, 2009, at 12.

and mobile crisis services.”⁶³ The Report discusses the importance of mobile crisis teams and crisis stabilization programs, which can be used together to respond effectively to consumers in psychiatric emergencies and avoid re-hospitalization. The Report concludes that Georgia can reach the goal of having statewide access to mobile crisis by adding 31 counties each year in FY 2010, FY 2011 and FY 2012. A mobile crisis team costs \$750,000 annualized.⁶⁴ The Olmstead Budget Report indicates that funding for mobile crisis services has declined slightly between FY 2009 and FY 2010 and there is no increase for FY 2011. Funding for crisis stabilization services increased slightly between FY 2009 and FY 2010 and there is no increase for 2011.⁶⁵

Peer Support Services: Georgia has been nationally recognized for its Peer Support Services program.⁶⁶ However, the Olmstead Budget Report indicates that resources to fund this innovative service have declined from \$3.94 million in FY 2009 to 3.89 million in FY 2010 and FY 2011.⁶⁷

Given the cuts and lack of increased resources for specialty services in the Governor’s budget requests, OCR finds that the State has failed to marshal resources to provide specialty services to individuals with mental illness, in violation of the VCA.

In sum, OCR finds that the State’s failure to discharge individuals on the MH Olmstead List by their discharge dates and its failure to marshal adequate resources to ensure compliance with this provision violates this provision of the VCA.

(C) Discharge of Individuals on the MH Olmstead List Within Five Years: The State will expand its provider network of community services to meet the needs of individuals on the MH Olmstead List attached as Exhibit B. In those instances where there are not currently providers capable of providing adequate services to those individuals on the MH Olmstead List, the State will expand its network of providers and services to meet the needs of those individuals. The State will formulate its budget requests to develop its provider capacity such that individuals on the MH Olmstead List will be discharged and placed in community services within five years...⁶⁸

This provision requires the State to expand its provider network to meet the needs of individuals on the MH Olmstead List created as of the date the VCA was signed, July 1, 2008, and to formulate its budget requests to develop its provider capacity. The State has failed to comply with these VCA requirements.

⁶³ MH Commission Report at 12.

⁶⁴ MH Commission Report at 12-13.

⁶⁵ MH Commission Report at 12.

⁶⁶ NAMI, *Grading the States: A Report on America’s Healthcare System for Serious Mental Illness* (2006) at 64.

⁶⁷ Governor’s Olmstead Budget Report at 9.

⁶⁸ VCA at 13.

On October 8, 2009, OCR notified the State of its concerns regarding the capacity of the State's provider network in a letter to Dr. Frank Shelp, DBHDD Commissioner, and Dr. Andrew Phillips, then Olmstead Coordinator. OCR cited the oral testimony of Dr. Andrew Phillips, given in his role as mental health consultant for the State. The letter noted, "Dr. Phillips stated that none of the transition plans that he reviewed specified supportive housing or supported employment as services for the individuals. He also cited a deficit in the availability of appropriate outpatient clinical care. These conclusions are very concerning given the large numbers of plans that he reviewed."⁶⁹ Dr. Phillips also noted that assessments of needed services appear to be reflections of staff understanding of available community resources.⁷⁰

The State's inadequate provider network for appropriate housing and employment services is confirmed by additional evidence. A review of discharge plans of the State Psychiatric Hospitals found that "hundreds more patients, particularly those destined to return repeatedly, are discharged to a variety of unsupervised locations, including personal care homes, that demonstrably do not provide the level of support necessary to support a person with severe mental illness."⁷¹ With respect to ECRH, a community provider reported that "DD community providers have supported employment programs. However, mental health programs do not provide supported employment."⁷²

OCR's consultant reviewed the discharge outcomes of several individuals who were on the MH Olmstead List created in July 2008. One example clearly demonstrates the State's failure to adequately develop its provider network and the negative consequences for individuals on the MH Olmstead List. This individual was originally discharged to a personal care home after spending over 25 years in Northwest Regional Hospital. When the personal care home closed, she was transferred to a nursing home rather than community-based housing due to the lack of housing options in her area of the State. The State has again needlessly institutionalized her because of its failure to comply with the VCA.

As previously noted, the State has recently withheld 5% of the resources given to community providers for mental health services, including outpatient care. This action contracts the capacity of community mental health providers to provide the outpatient services that Dr. Phillips found were lacking for individuals on the MH Olmstead List.

OCR's additional findings regarding the State's budget proposals and the need for community services are set forth under OCR's analysis of the State's compliance with Article 3, Section I (B) and incorporated by reference as if set forth herein.

The State provided OCR with a Corrective Plan with respect to the State's failures to expand the network of community providers to comply with this provision and its failure to provide community services in accordance with Article 3, Section 1 (F). The

⁶⁹ Letter to Commissioner Shelp and Dr. Phillips, October 8, 2009 at 4-5.

⁷⁰ Letter to Commissioner Shelp and Dr. Phillips, October 8, 2009 at 3.

⁷¹ DOJ Findings Letter, December 8, 2009, at 14.

⁷² ECRH Expert Report accompanying DOJ Compliance Letter for East Central Hospital, date, at 137-138.

Corrective Plan specifies timelines that are inappropriate given the urgent need for remediation of the current lack of capacity for community services. Under the timelines in the Corrective Plan, a new program will not be submitted to Centers for Medicaid and Medicare Services for approval until 2011, with no specified date for implementation.

In addition, OCR finds the Corrective Plan insufficient to establish compliance with this VCA provision and Article 3, Section 1 (F) for the following reasons: 1) the plan relies solely on a new Medicaid option and fails to address individuals who are not Medicaid eligible and their needs for additional provider capacity; 2) the plan is not funded because, as previously noted, the Governor's budget request to the legislature did not include increases for these community services; 3) the plan only addresses some services and does not specify the number of slots available and how they compare to the need; 4) the plan fails to acknowledge the current access and implementation problems with respect to services in the State Medicaid Plan and propose solutions that will assure OCR that these problems will be addressed; and 5) the plan fails to address infrastructure development and the resources needed for infrastructure development.

OCR finds that the State is out of compliance with this provision of the VCA because it has failed to expand its network of providers and formulate its budget to do so.

(E) Review of Transition Plans: Within six months after the execution date of this Agreement, the State's MH consultant will review a sample of individual PCTPs as needed to assess the competency of the assessments and the reasonableness of the discharge dates and any and all conditions related to the discharge dates. If the State's MH consultant finds individual or systemic problems with the competency of the assessments or the reasonableness of the discharge dates, the State will timely implement the corrective measures identified by the State's consultant, and continue to meet its obligations within five years of the execution of the Agreement.⁷³

This provision requires the State's MH consultant to review a sample of PCTPs and to assess the competency of the assessments and reasonableness of the discharge dates. Dr. Andrew Phillips, the State's mental health consultant, reviewed a sample of PCTPs in accordance with the VCA. In his oral testimony to OCR, he stated that the assessments were inadequate. For example, he stated that "it is not infrequent" that psychiatric assessments are missing from the file. He also concluded that psychosocial assessments were inadequate. He found that assessments tend to be reflections of staff understanding of available community resources, rather than individual needs.⁷⁴

Additional evidence confirms Dr. Phillips' conclusion. Expert review of a large number of assessments while on site at ECRH, GRHS, SWSH, CSH, and WCGRH found that they "substantially departed from generally accepted professional standards."⁷⁵

⁷³ VCA at 14.

⁷⁴ Letter from OCR to Commissioner Shelp and Dr. Andrew Phillips at 3-4., October 8, 2009.

⁷⁵ DOJ Findings Letter, December 8, 2009 at 20.

The State provided OCR with a Corrective Plan on November 24, 2009 for improving its assessment and person-centered planning process. For the assessment section, the State wrote, “DBHDD has contracted with expert consultants who will be facilitating major system-wide improvements in the assessment, treatment and transition planning procedures and practices. They will also address through training and supervision, the development, among staff, of the necessary competencies. Those consultants are in the process of developing the strategy and time lines for achievement of each element of the plan.” The State indicated that it would be providing OCR with time frames and measures once developed by the expert consultants, but did not give a target date for consultants to complete the strategy and timelines for improving staff competencies to do effective transition planning.

Article I, Section II of the VCA defines the requirements of a Corrective Plan. It must include the corrective measures that the agency will take along with corresponding target dates. Since the Corrective Plan for assessments fails to provide the corrective measures and any target dates, it does not address the State’s requirement to take timely action to correct the deficiencies identified by the State’s mental health consultant.

Accordingly, OCR finds that the State is out of compliance with this provision of the VCA.

(F) The Olmstead Coordinator will ascertain the level and extent of community services needed on a statewide basis for persons with MH, and base all budget proposals on such projected needs in order to adequately fund enough community services so that all institutionalized persons with MH, who are appropriate for community services and who do not oppose placement, can be placed in the community by the discharge date specified in the PCTP....The parties to the Agreement recognize that neither the Olmstead Coordinator nor the Governor can guarantee the legislative approval of any such budgetary proposal but that they shall make all good faith efforts to seek the resources necessary to address the service needs identified during the budget process.⁷⁶

Under this provision, the Olmstead Coordinator is required to ascertain the level and extent of community services needed on a statewide basis for persons with mental illness and base all budget proposals on such projected needs. In addition, the Olmstead Coordinator and the Governor must make all good faith efforts to seek the necessary resources to address the service needs identified. The State has failed to comply with both of these requirements.

Georgia has not provided OCR with any information indicating that the Olmstead Coordinator ascertained the level and extent of community services needed in the State for people with mental illness. On October 8, 2009, OCR sent a letter to Dr. Frank Shelp, Commissioner of DBHDD, and Dr. Andrew Phillips, the Olmstead Coordinator at the time, setting forth the Olmstead Coordinator’s obligation to ascertain the community

⁷⁶ VCA at 14.

services needed for persons with mental illness and developmental disabilities and further notifying the State that “the budget process and this budget proposal must meet the terms of the VCA and to do so, the budget proposal must include requests for sufficient resources to address the deficiencies identified by Dr. Phillips and meet the needs identified.”⁷⁷ The budget documents provided by the State to OCR do not reference any assessment of needs by the Olmstead Coordinator.

In addition to requiring an assessment of needs, the VCA specifies that the Governor and Olmstead Coordinator will make a good faith effort to seek the resources necessary to address the service needs identified during the budget process. Documents provided by the State to OCR included a budget proposal by DBHDD for FY 2010 of \$547,000 for 50 slots of new supportive housing with residential services and \$467,000 for additional supported employment services and incentive funding. The DBHDD further specified a budget proposal of \$2,465,000 for 100 intensive residential services slots, \$1,600,000 for 24 case managers, and \$535,000 to improve services for deaf and hard of hearing persons. Despite these requests by DBHDD, the Governor’s Amended FY 2010 and FY 2011 budget submissions to the legislature did not specify any resources for these community services. The Governor’s Olmstead Report confirms this conclusion.⁷⁸

In addition, as OCR previously informed the State, the increases proposed by DBHDD were inadequate to meet the needs identified in the State. In reaching this conclusion, OCR relied heavily upon the Governor’s Mental Health Service Delivery Commission Report because it included a thorough needs assessment for individuals with mental illness in Georgia. OCR has provided an analysis of the Governor’s budget request compared to the needs identified by the MH Commission Report and other evidence in response to Article 3, Section I (b). OCR incorporates by reference all of its findings for that provision as if set forth herein.

Accordingly, OCR finds the State out of compliance with this provision in the VCA.

(G) The State commits to continue to improve the delivery of community services and to eliminate unnecessary institutionalization for those persons with MH who have been determined appropriate for community services. Towards this objective, the State commits to providing community services to all persons on the MH Olmstead List, consistent with each individual’s own choice of accepted psychiatric treatment modalities, while simultaneously maintaining efforts to minimize the number of individuals awaiting community services after the effective date of this Agreement.⁷⁹

This provision commits the State to providing community services to all persons on the MH Olmstead List, consistent with each individual’s own choices, while maintaining

⁷⁷ Letter from OCR to Commissioner Shelp and Dr. Andrew Phillips, October 8, 2009, at 6.

⁷⁸ The Report details a small increase to residential services in FY 2010, but no increase in FY 2011 and cuts to supported employment services. Governor’s Olmstead Budget Report at 9.

⁷⁹ VCA at 15.

efforts to minimize the numbers of individuals awaiting services after the date of the VCA. The State has failed to comply with both requirements.

OCR has previously concluded that the State has failed to provide adequate community services for individuals with mental illness in its discussion of the State's compliance with Article III, Section I (B), (C) and (E) and in its previous letters to the State. These findings are incorporated by reference as if set forth herein.⁸⁰

The State's failure to fulfill its commitment to provide community services to those on the MH Olmstead List leads to very poor outcomes for these individuals with mental illness. The Olmstead Monthly Progress Report indicates that in FY 2009, 60 individuals were rehospitalized after discharge from the MH Olmstead List. Only 175 were discharged from the List that year.

OCR's consultant conducted a thorough review of the discharge outcomes for a random sample of 10 mental health consumers, many of whom had been in a State hospital for long periods prior to discharge (approximately eight years on average). These individuals were placed on the MH Olmstead List and discharged from State hospitals. Of these individuals, seven out of 10 or 70% were hospitalized in State or local hospitals within a year of discharge and some experienced multiple hospitalizations; three out of 10 were re-institutionalized in a nursing facility when they were unable to remain in their personal care home; and one of the 10 was arrested and went to jail.⁸¹

Two of the three individuals placed in a nursing facility also experienced multiple hospitalizations and several placements in different personal care homes since their initial discharge from the hospital. Despite these poor outcomes, they were repeatedly offered personal care homes as their housing placement and were not provided with Assertive Community Treatment.⁸²

The State's lack of community services impact those who are in State hospitals on the MH Olmstead List and those awaiting community services. For example, as previously noted, the current contracts for community providers have been reduced by 5% and the money withheld as a contingency for further budget cuts. These contracts fund services

⁸⁰ Letter to Commissioner Shelp and Dr. Phillips, October 8, 2009. VCA Budget Concerns Letter, December 8, 2009. See also DOJ Findings Letter, December 8, 2009 at 11 (finding "the lack of available community services continues to be a barrier to successful discharge of institutionalized persons who could be served in the community with appropriate support").

⁸¹ The VCA specifically excludes nursing facilities from the definition of community services. See VCA Appendix: Definitions.

⁸² The first individual was discharged from the hospital to a personal care home. After a week, he was placed in a crisis stabilization program. Then he went to a second personal care home. He was hospitalized and discharged back to the personal care home. When the personal care home closed, he went to a nursing facility. He was hospitalized at a local hospital and then at a state hospital. He was discharged from the state hospital to a third personal care home. Because of the unsafe conditions in the home, he was placed in two temporary placements before going back to one of the previous personal care homes, where he remains. The second individual had several hospitalizations after two failed personal care home placements and then was transferred to a nursing facility. Since being placed in the nursing facility, she has been hospitalized again.

for individuals discharged from the State hospitals and those in the community. Accordingly, this reduced funding does not maintain efforts to minimize the numbers of individuals awaiting community services.

For the reasons set forth in OCR's discussion of Article III, Section I (C), the State's Corrective Plan regarding the provision of community services is not sufficient to meet the State's obligations under this provision.

Accordingly, OCR finds that the State has failed to comply with this provision of the VCA.

Section III: Monitoring Progress

(A) Monitoring Progress and the Olmstead Monthly Progress Reports: ... Further the Olmstead Coordinator shall require DHR to provide him with a Monthly Progress Report ... For all individuals awaiting community services for 90 days or longer after the discharge date specified in their PCTP, the Monthly Progress Report will identify the specific barriers to that individual receiving community services, what corrective actions are to be taken to remove those barriers (including time frames), and the total length of time the individual has been awaiting community services. The State shall also develop and implement policies for collecting after-care data within 6 months of execution of this Agreement to determine the efficacy of the individual's PCTPs and provide the policies to OCR for review prior to implementation.⁸³

This provision requires that the Olmstead Coordinator be provided with detailed monthly reports for all individuals awaiting community services for 90 days or longer after their discharge date. The Olmstead Monthly Progress Reports submitted by Georgia to OCR fail to meet the requirements in the VCA. OCR notified the State of this deficiency on June 3, 2009, stating, "There is no inclusion of the specific barriers for the person waiting more than 90 days, what corrective action will be taken (including time frames) and the total length of time they are waiting, which are required by the agreement."⁸⁴

Even after receiving notice from OCR more than seven months ago, the Olmstead Monthly Progress Reports still fail to include any information regarding the specific barriers to discharge and the corrective action that will be taken with respect to any of the individuals who continue to be needlessly institutionalized because community services have not been secured 90 days or more past their discharge date.

Accordingly, OCR finds that the State has failed to comply with this provision of the VCA.

⁸³ VCA at 16.

⁸⁴ Status on Deliverables Memorandum.

Section IV: Adequately Preparing Individuals for Community Services

(A) Adopting community services as a treatment goal: The State shall ensure that all individuals with MH in State facilities shall receive such treatment or habilitation during their institutionalization as necessary to prepare those individuals adequately for discharge to the community.⁸⁵

This provision requires the State to provide treatment during mental health consumers' hospital stays to prepare them adequately for discharge to the community. The State has failed to comply with this provision of the Agreement.

An expert review of treatment at Georgia Regional Hospital Savannah concluded:

...the treatment interventions currently employed at the Savannah facility are neither therapeutic nor educational in nature and do not lead to the development of skills necessary to address barriers for discharge. The lack of active treatment has resulted in individuals returning to the community without the additional skills they need to be successful. Specific examples include the lack of behavioral programs for individuals who have demonstrated aggressive behaviors in the community or the lack of training in the medication adherence for those individuals who enter the facility due to the fact that they stopped taking their medications. For these individuals the clinical records do not document any efforts on the part of the clinical team to provide education regarding the need for taking medication or training in how to make it part of the persons daily routine.⁸⁶

In addition, site visits to multiple hospitals also revealed little or no active treatment activity.⁸⁷ The lack of treatment programming violates this provision of the VCA, which was designed to ensure that individuals received treatment in the hospital that would allow them to successfully transition to the community.

(B) Planning for community services while in an institution: Prior to finalizing the PCTP, the State shall solicit input from the intended community service providers who will likely be responsible for the individual's community supports and services and establish ongoing communication and dialogue on how to plan the transition to community services.⁸⁸

⁸⁵ VCA at 17.

⁸⁶ GRHS Expert Report accompanying Department of Justice's Compliance Report 2 for Georgia Regional Hospital Savannah, November 2009, at 114.

⁸⁷ DOJ Findings Letter, December 8, 2009, at 16.

⁸⁸ VCA at 17.

This provision requires the State to solicit input from the intended community providers who will be responsible for the individual's community supports and establish ongoing communication on how to plan the transition of the individual from the hospital to the community. The State has failed to comply with this requirement.

Dr. Andrew Phillips, the State's Mental Health Consultant, reviewed many discharge plans and toured the State hospitals. As OCR has previously documented, Dr. Phillips found that under current practices, provider input is practically non-existent and providers had not participated or contributed to the transition plans he reviewed.⁸⁹

Dr. Phillips' finding is confirmed by an expert review of discharge plans at multiple State hospitals. Although State and facility policies reflect the critical importance of community coordination, experts saw "no evidence that these policies are implemented in the great majority of cases."⁹⁰

The State has requested and received additional time to submit a Corrective Plan to OCR. However, OCR has concerns about the effectiveness of any future plan given the lack of resources for implementation. In meetings with OCR, the State has indicated that community providers are not specifically funded to provide transition services, but must do so out of the funds they receive under their contracts with the State. The Governor's FY 2011 budget indicates no increases for these contracts and 5% of these contracts have been withheld this fiscal year.

OCR finds that to date, the State is out of compliance with this provision in the VCA.

(D) Transition Planning: No individual shall be discharged pursuant to this Agreement without an appropriate PCTP that provides for the individual's receipt of appropriate community services... The process of developing each individual's PCTP will include collaboration with the individual and, as appropriate... the individual's family members, legal representatives, guardians, friends and any other persons designated by the individual. The PCTP shall address the individual's goals, and choices regarding living arrangements and services needed to achieve the individual's goals. An appropriate PCTP under this Agreement shall memorialize the determinations of community services in a single, comprehensive document which shall include the following: (a) all areas of assessed need; (b) the specific community services that could be provided to meet the identified needs of the individual and the nature, frequency, and duration of the services to be offered; and (c) transition services to prepare the individual for community services including counseling, habilitation, skill development or training, peer mentoring, site visits, or other services as appropriate. Where an individual is deemed appropriate for community based services and desires such services but no provider currently offers the

⁸⁹ Letter to Commissioner Shelp and Dr. Phillips.

⁹⁰ DOJ findings Letter at 15.

service required by the individual, the State will issue an individualized Request for Proposal to potential providers in an effort to develop the needed community-based service(s)....⁹¹

This provision of the VCA requires the State to develop PCTPs that include all areas of assessed need and the specific services that could be provided to meet the need and the nature, frequency and duration of the services.

In March and April of 2009, the State provided OCR with a sample of PCTPs. These plans were reviewed by Dr. Ken Thompson, Medical Director of the Substance Abuse and Mental Health Services Administration at the U.S. Department of Health and Human Services. On April 14, 2009, Dr. Thompson and OCR discussed the plans with Abel Ortiz, then Olmstead Coordinator, Denise McClain, Director of the Office on Transition Services, and other staff. Dr. Thompson set forth the major deficiencies in the PCTPs, including: the failure to identify why the individual was admitted to the hospital and tailor services to address those barriers to community placement, failure to specify the community provider who would be accountable for implementing the plan in the community, and lack of adequate description of the individual's needs and goals and specific services to meet the goals. Moreover, the PCTPs were in multiple formats making it very difficult to ensure they contained required information. During the meeting, Mr. Ortiz and Ms. McClain agreed with OCR that the PCTPs were inadequate.⁹²

OCR's finding regarding the PCTPs is further supported by an expert review of discharge plans on site at multiple State hospitals, which found that the plans, "substantially depart from generally accepted professional standards." The discharge plans "do not describe, identify, or secure the community resources necessary to serve patients in the community...."⁹³

The State submitted a Corrective Plan for the transition plans on November 24, 2009. The Corrective Plan indicated that the new transition policy will be finalized and disseminated in mid-January and an auditing policy to ensure adequate PCTPs will begin implementation in February 2010.

OCR first requested an auditing program in a meeting with the State on May 20, 2009 in response to the gross deficiencies of the PCTPs. OCR sought implementation of a review process to ensure that no individual would be discharged from a State hospital without an adequate PCTP. Recognizing that the development of additional policy, training staff, and improving staff competency would take time, OCR requested prompt action to address this violation of the VCA. Abel Ortiz, the then Olmstead Coordinator, agreed to institute a review process. On October 8, 2009, OCR notified the State that it had learned at a follow up meeting that this process had not yet been implemented. According to the Corrective Plan, this audit process will finally begin in February 2010, more than eight

⁹¹ VCA at 17.

⁹² Letter to Commissioner Shelp and Dr. Phillips at 8.

⁹³ DOJ Findings Letter, December 8, 2009 at 15.

months after OCR's initial request. OCR finds that individuals have been and continue to be discharged with inadequate PCTPs, in violation of the VCA.

The Corrective Plan also specifies that expert consultants will be hired and will be responsible for "facilitating major improvements in assessment, treatment and transition planning procedures and practices." The Plan, however, indicated that DBHDD would provide time frames and measures at an undefined time in the future once they are developed by the consultants. As previously noted, the VCA requires any Corrective Plan to specify deadlines by which tasks will be accomplished.

In sum, OCR finds that the State is currently out of compliance with this provision of the VCA because the PCTPs do not meet the requirements of the VCA and the Corrective Plan is insufficient to bring Georgia into compliance with these requirements.

Conclusion:

Since the signing of the VCA in July 2008, Georgia's compliance with the integration mandate of the Americans with Disabilities Act has worsened according to several key indicators. The number of institutionalized individuals with mental illness and developmental disabilities waiting past their discharge dates for community services has steadily increased and the amount of time they are waiting has risen precipitously as well.

Outcomes for those who are discharged from State facilities continue to be very poor due to a lack of appropriate discharge planning, community services, and follow up. Over fiscal year 2009, 60 individuals discharged from the MH Olmstead List were readmitted to the State hospitals. OCR's review of a sample of discharged consumers found that the vast majority had poor outcomes, including readmission to the State hospital, arrest and placement in jail, and re-institutionalization in nursing homes.

While the State has provided OCR with several corrective plans, the lack of definitive timelines, identified resources, and comprehensive implementation details indicate a failure of commitment and willingness to comply with the VCA. The absence of any additional resources for developing community services in the Governor's FY2010 Amended and FY 2011 budget request to the legislature confirms this conclusion.

Accordingly, for the reasons set forth above with respect to specific provisions of the VCA, OCR finds the State of Georgia substantially out of compliance with the VCA and is providing notice to the State of its conclusion.

Under the VCA, GA may seek a meeting to confer and determine if the State can come into compliance with the VCA. Given the scope of the non-compliance and lack of dedicated resources for community services, OCR has concerns about the State's ability and commitment to do so. If the State wants to have such a meeting, OCR requests the

meeting as soon as possible because of the grave consequences of the State's non-compliance for individuals with mental illness and developmental disabilities.

Sincerely,

A handwritten signature in black ink that reads "Georgina C. Verdugo". The signature is written in a cursive, flowing style.

Georgina C. Verdugo
Director

cc: W. Ryan Teague, Office of Governor, Sonny Perdue, by email
William H. Janes, Olmstead Coordinator, by email
Frank Shelp, Commissioner, GDBHDD, by email
Carolyn Frazier, General Counsel, GDBHDD, by email
Rhonda Medows, Commissioner, GDCH, by email
Clyde L. Reese, General Counsel, GDCH, by email