

## STUDY OF BEHAVIORAL HEALTH AND DEVELOPMENTAL DISABILITIES SERVICES - BACKGROUND MEMORANDUM

Section 33 of 2017 House Bill No. 1012 ([appendix](#)) provides for a Legislative Management study of state and federal laws and regulations relating to the care and treatment of individuals with developmental disabilities or behavioral health needs.

1. The study must include a review of the following:
  - a. The state's services and delivery systems, including whether changes are necessary to maintain compliance with state and federal laws and regulations;
  - b. Efforts by other states to comply with the 1999 *Olmstead v. L.C.* case, including the planning and implementation process for any new programs;
  - c. Community- and non-community-based services, including the costs and effectiveness of services;
  - d. Noncompliance with state and federal laws and regulations, including a review of the fees and penalties for noncompliance;
  - e. A comparison of voluntary and involuntary compliance with state and federal laws and regulations, including a review of long-term costs and effectiveness;
  - f. The impact of implementation and expansion of selected programs that were added to address unmet needs, including the impact on costs and effectiveness of new programs;
  - g. Needed changes to address noncompliance and a timeline for completing changes;
  - h. Data on the number of individuals who would be impacted by voluntary compliance efforts, and data on the type of services that may need changing, including housing, peer counseling, outpatient treatment, crisis line access, and transportation services; and
  - i. An evaluation of the funding, mission, and caseload at the Life Skills and Transition Center, including the center's transition plan and number of clients eligible for community placement.
2. The legislative management shall report its findings and recommendations, together with any legislation necessary to implement those recommendations, to the 66<sup>th</sup> Legislative Assembly.

The committee was assigned the responsibility to conduct this study.

### BACKGROUND INFORMATION

The background information includes an overview of key statutes, an overview of services within the Department of Human Services (DHS), and an overview of the United States Supreme Court *Olmstead v. L.C.* case.

#### Overview of Key Statutes

North Dakota Century Code Section 50-06-01 defines "behavioral health" as the planning and implementation of preventive, consultative, diagnostic, treatment, crisis intervention, and rehabilitative services for individuals with mental, emotional, or substance use disorders, and psychiatric conditions.

Section 25-01.2-01 defines "developmental disability" as a severe, chronic disability of an individual which:

- Is attributable to a mental or physical impairment or combination of mental and physical impairments;
- Is manifested before the individual attains age 22;
- Is likely to continue indefinitely;
- Results in substantial functional limitations in three or more of the following areas of major life activity:

Self-care;

Receptive and expressive language;

Learning;

Mobility;

Self-direction;

Capacity for independent living; and

Economic sufficiency; and

- Reflects the individual's needs for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

Section 50-06-01.4 provides for the structure of DHS to include the State Hospital, the regional human service centers, a vocational rehabilitation unit, and other units or offices and administrative and fiscal support services as the Executive Director determines necessary. Furthermore, DHS must be structured to promote efficient and effective operations and, consistent with fulfilling its prescribed statutory duties, shall act as the official agency of the state in the discharge of functions not otherwise by law made the responsibility of another state agency, including among others:

- Administration of programs for individuals with developmental disabilities, including licensure of facilities and services, and the design and implementation of a community-based service system for persons in need of habilitation; and
- Administration of behavioral health programs, including:

A policy division responsible for reviewing and identifying service needs and activities in the state's behavioral health system in an effort to ensure health and safety, access to services, and quality of services; establishing quality assurance standards for the licensure of substance use disorder program services and facilities; and providing policy leadership in partnership with public and private entities; and

A service delivery division responsible for providing chronic disease management, regional intervention services, and 24-hour crisis services for individuals with behavioral health disorders.

Section 25-04-01 provides for DHS to administer and control the Life Skills and Transition Center in Grafton for individuals with developmental disabilities. The purpose of the center is to:

- Maintain the relief, instruction, care, and custody of individuals with developmental disabilities or other individuals who may benefit from the services offered at the center; and
- Provide onsite and offsite additional services and effectuate its powers and duties to best serve individuals with developmental disabilities and other individuals who may benefit from those activities.

### **Overview of Services Within the Department of Human Services**

Based on testimony provided by DHS during the 2017 legislative session, the Behavioral Health Services Division, Developmental Disabilities Division, regional human service centers, State Hospital, and the Life Skills and Transition Center administer the following services for behavioral health and developmental disabilities:

#### **Behavioral Health Services Division**

- Develops and enforces administrative code for licensing substance abuse treatment programs, opioid treatment programs, driving under the influence education programs, psychiatric residential treatment facilities, and regional human service centers.
- Reviews and investigates client and stakeholder complaints regarding licensed programs.
- Administers state and federal funds that support programs for the behavioral health system continuum of care and prevention, including Substance Abuse Prevention and Treatment Block Grant, Mental Health Block Grant, Project for Assistance in Transition from Homelessness, brain injury programs, gambling prevention and treatment, telephone resource and referral, substance abuse treatment, substance use disorder voucher programs, and extended services.
- Provides training and technical assistance to professionals, providers, individuals, and communities.
- Collaborates with stakeholders of the behavioral health system to address needs, gather data, and leverage resources.

#### **Developmental Disabilities Division**

- Administers the delivery of services for eligible individuals with an intellectual or developmental disability, and children from birth to age 3 with developmental delays.

- Services include residential and day supports, employment, family support, self-directed, corporate guardianship, infant development, and right track.
- Collaborates with regional human service centers, the Life Skills and Transition Center, federal agency representatives, school system personnel, university representatives, consumer advocates, families, and public and private organizations within the delivery system and monitoring of services.

### Regional Human Service Centers

- Provides a continuum of emergency services, including open access, community outreach, crisis residential, and private community hospital services. In addition, provides case management services for individuals with intellectual disabilities, and regional oversight of aging, child welfare, vocational rehabilitation, and developmental disabilities programs. Oversight activities include investigation of child and elder abuse, child care and foster care licensing, program oversight for developmental disabilities services, and regulatory oversight for county social services.
- Contracts for crisis, hospital, residential, transitional living, medical, and outpatient services.

### State Hospital

- Provides acute services, sub-acute services, specialized rehabilitation hospital services for individuals with severe and persistent mental illnesses and substance use disorder, specialized residential addiction services for adults in the custody of the Department of Corrections and Rehabilitation, and specialized residential services for individuals in the Sex Offender Treatment and Assessment Program.

### Life Skills and Transition Center

- Provides residential, vocational, and outreach services for individuals with developmental and intellectual disabilities. Residential services include 24-hour comprehensive medical and clinical programming services and supports, including services for adults with sex offending behaviors, individuals requiring skilled nursing and behavioral health services, and youth transitioning from the facility to a community setting. Vocational services include the Work Activity Program, which provides services for individuals at vocational work sites on campus and in the community. Outreach services include independent supported living arrangements, clinical assistance resources and evaluation services (CARES), CARES clinical services, and developmental disabilities behavioral health services.

### Overview of the United States Supreme Court *Olmstead v. L.C.* Case

*Olmstead v. L.C.*, 527 U.S. 581 (1999), is a United States Supreme Court case regarding discrimination against people with mental disabilities. In this case, the Court held under the federal Americans with Disabilities Act, 42 U.S.C. 126, individuals with mental disabilities have the right to live in the community rather than in institutions if, in the words of the opinion of the Court, "the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." The case was brought by the Atlanta Legal Aid Society, Inc.

In this case the Court decided mental illness is a form of disability and that "unjustified isolation" of a person with a disability is a form of discrimination under Title II of the federal Americans with Disabilities Act. The Court held that community placement is only required and appropriate when "[a] the State's treatment professionals have determined that community placement is appropriate, [b] the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and [c] the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. Unjustified isolation is discrimination based on disability."

About 10 years after the *Olmstead v. L.C.* decision, the State of Georgia and the United States Department of Justice entered a settlement agreement to cease all admissions of individuals with developmental disabilities to state-operated, federally licensed institutions ("State Hospitals") and, by July 1, 2015, "transition all individuals with developmental disabilities in the State Hospitals from the Hospitals to community settings," according to a Department of Justice fact sheet about the settlement. The settlement also calls for serving 9,000 individuals with mental illness in community settings.

Other entities and jurisdictions have also reached settlement agreements with the Department of Justice regarding the *Olmstead v. L.C.* decision, including United Cerebral Palsy of Oregon and Southwest Washington

(2015), Marion County Nursing Home District in Missouri (2013), Laguna Honda Hospital and Rehabilitation Center in San Francisco (2008), Rhode Island (2014), New Hampshire (2014), New York (2013), Texas (2013), Virginia (2012), Delaware (2010), North Carolina (2012), Nebraska (2008), and Puerto Rico (1999). The settlement agreements were reached as a result of complaints or suits filed in the various jurisdictions while others were the result of findings letters issued directing the entity or jurisdiction to comply with the *Olmstead v. L.C.* decision.

## PREVIOUS LEGISLATIVE STUDIES

Previous legislative studies include information on the 2013-14 interim Human Services Committee's study of behavioral health needs and related 2015 legislative action; and the 2015-16 interim Human Services Committee's study of behavioral health needs, including key legal obligations related to behavioral health services, and related 2017 legislative action.

### 2013-14 Interim Human Services Committee - Study of Behavioral Health Needs

During the 2013-14 interim, the Human Services Committee was assigned a study of behavioral health needs pursuant to Section 1 of 2013 Senate Bill No. 2243. The study included consideration of behavioral health needs of youth and adults and consideration of access, availability, and delivery of services. The study included input from stakeholders, including representatives of law enforcement, social and clinical service providers, education, medical providers, mental health advocacy organizations, emergency medical service providers, juvenile court, tribal government, and state and local agencies and institutions. The committee contracted with Schulte Consulting, LLC, to assist with the behavioral health needs study. The consultant's report identified six primary opportunities to better address behavioral health needs of youth and adults in North Dakota, which included service shortages, workforce expansion, insurance coverage changes, changes to the structure and responsibilities of DHS, communication improvement, and data collection and research expansion.

### 2015 Legislative Action

The 64<sup>th</sup> Legislative Assembly approved the following bills relating to behavioral health services:

- House Bill No. 1048, which relates to behavioral health licensure boards, requires behavioral health licensure boards to each develop a plan, in collaboration with the other boards, for the administration and implementation of licensing and reciprocity standards for licensees.
- House Bill No. 1049, which relates to addiction counselors, adds a new section to Chapter 43-45 relating to loans for certain behavioral health professions, amends Section 43-45-04 relating to duties of the Board of Addiction Counseling Examiners, provides legislative intent relating to statewide assessment of viable internship sites for addiction counselors program, and provides an appropriation of \$200,000 from the student loan trust fund to the Bank of North Dakota for the addiction counselor internship loan program revolving fund.
- Senate Bill No. 2012:

Adds \$388,492 from the general fund for extended services for individuals with serious mental illness to add 35 additional slots (this item was affected by August 2016 special legislative session budget reductions).

Increases funding of \$302,109 from the general fund for traumatic brain injury prevocational skills training to increase from 2 to 4 hours the amount of time allocated each month for each of the 50 slots (this item was affected by August 2016 special legislative session budget reductions).

Increases funding of \$180,783 from the general fund for extended services for individuals with traumatic brain injury to add 35 additional slots (this item was affected by August 2016 special legislative session budget reductions).

Increases funding by \$237,500 from the general fund to provide total funding of \$2,303,920 for controlled substance treatment services (this item was affected by August 2016 special legislative session budget reductions).

Adds \$146,459 from the general fund to provide a statewide telemedicine residency program.

Adds \$130,000 from the general fund for the ND Cares Task Force which provides support for service members, veterans, families, and survivors.

Adds \$903,983 of which \$685,895 is from the general fund for a 10-bed crisis residential and transitional living unit in the north central region (this item was affected by August 2016 special legislative session budget reductions).

Adds \$283,500 from the general fund for a 4-bed unit alternative care services for the west central region.

Adds \$250,000 from the general fund to provide Mobile-on-Call crisis services in the west central region (this item was affected by August 2016 special legislative session budget reductions).

Adds 11 full-time equivalent (FTE) positions and funding of \$1,520,369 from other funds to increase the Tompkins program from a 90- to a 105-bed unit.

- Senate Bill No. 2046, which relates to behavioral health services, adds a new section to Chapter 50-24.1 to require DHS to allow marriage and family therapists to enroll and be eligible for payment for behavioral health services provided to recipients of medical assistance.
- Senate Bill No. 2048, which relates to behavioral health services, adds a new section to Chapter 15.1-13 relating to teacher licensure requirements and a new section to Chapter 15.1-07 relating to mental health training provided by school districts. This bill also provides an appropriation of \$150,000 from the general fund to DHS to facilitate behavioral health services authorized by the Legislative Assembly, and \$750,000 from the general fund to DHS to establish and administer a voucher system to address underserved areas and gaps in the state's substance abuse treatment system and to assist in the payment of addiction treatment services provided by private licensed substance abuse treatment programs (this item was affected by August 2016 special legislative session budget reductions).

### **2015-16 Interim Human Services Committee - Study of Behavioral Health Needs**

During the 2015-16 interim, the Human Services Committee continued with a study of behavioral health needs pursuant to Section 7 of 2015 Senate Bill No. 2048. The study included consideration of behavioral health needs of youth and adults and access, availability, and delivery of services. The study included a review of services related to autism spectrum disorder, and input from stakeholders, including representatives of law enforcement, social and clinical service providers, education, medical providers, mental health advocacy organizations, emergency medical service providers, juvenile court, tribal government, and state and local agencies and institutions. The study included monitoring and reviewing strategies to improve behavioral health services implemented pursuant to legislation enacted by the 64<sup>th</sup> Legislative Assembly and other behavioral health-related recommendations presented to the 2013-14 interim Human Services Committee.

As part of its study, the committee reviewed behavioral health-related information, including an overview of behavioral health; an overview of a behavioral health system of care; key legal obligations related to behavioral health services; DHS's behavioral health services delivery system, including information on substance abuse disorder system, regional intervention and emergency services continuum, adult behavioral health services, children's behavioral health services; and reports on mental health training for school districts, involuntary treatment laws, the future role of human service centers and the State Hospital, the behavioral health needs assessment, and other committee information, including:

- Behavioral health definitions;
- Role and challenges of residential treatment services;
- Substance abuse treatment needs;
- A summary of information provided by the Council of State Governments relating to behavioral health and the criminal justice system;
- Federal Mental Health Parity and Addiction Equity Act, including the legal framework of the Act, the implications of the Act for the state, and requirements of the Act;
- Current behavioral health issues under consideration at the federal level;
- The need for more programs and services that address the unmet needs of consumers and families in the state, including consumer-centered support programs and a formal one-on-one peer support program;
- The need to address the addiction counselor workforce shortage, including supporting professional development for workers and assisting treatment providers with offering additional services;
- The definition of addiction counseling pursuant to Section 43-45-01;
- The need for a continuum of care model for mental health-related services that would be similar to those of the state's developmental disability system; and
- The need for additional behavioral health services.

### Key Legal Obligations Related to Behavioral Health Services

As part of its study, the committee received information from the Bazelon Center for Mental Health Law, Washington D.C., regarding legal obligations related to behavioral health services. The committee learned the legal framework for behavioral health services includes the United States Supreme Court ruling in the 1999 *Olmstead v. L.C.* case; Medicaid and the Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services; the federal Mental Health Parity and Addiction Equity Act of 2008; and the federal Affordable Care Act of 2010. The 1999 Supreme Court ruling determined that the Americans with Disabilities Act requires states to provide community-based treatment for persons with mental disabilities when a state's treatment professionals determine that such placement is appropriate; affected persons do not oppose such treatment; and placement can be reasonably accommodated, considering resources available in the state and the needs of others with mental disabilities. The ruling included protecting at-risk people with disabilities that live in the community, but have under-treated behavioral health conditions that place them at serious risk of institutionalization. In addition to state institutions, the ruling also applies to privately owned and operated facilities in the state's service delivery system. States must provide EPSDT services to Medicaid-eligible children and youth under age 21. States must also provide necessary health care, diagnostic services, treatment, and other measures to correct physical and mental illnesses and conditions regardless of whether services are specifically covered in the state's Medicaid plan. Early and Periodic Screening, Diagnostic, and Treatment also requires states to provide intensive home-based services to Medicaid-eligible children with a disability that affects behavior. The federal Substance Abuse and Mental Health Services Administration determined these services include intensive care coordination, peer services, intensive in-home services, respite care services, mobile crisis response and stabilization services, flex funds, trauma-informed treatments, mentoring, supported employment, and consultative services. The federal Mental Health Parity and Addiction Equity Act of 2008 provides that private health insurance plans that cover services for individuals with mental health or substance abuse disorders must be equitable with coverage for other health conditions; limits on coverage for these plans are not allowed to be stricter for behavioral health services than for other services; copayments and deductibles are not allowed to be higher for behavioral health services than for other services; and a plan that includes out-of-network coverage for physical health care, must include out-of-network coverage for behavioral health care.

### 2017 Legislative Action

The 65<sup>th</sup> Legislative Assembly approved the following bills relating to behavioral health services:

- House Bill No. 1012:

Adds funding of \$734,531, of which \$367,256 is from the general fund, for increasing the age of autism waiver through 11 years of age.

Added funding of \$18.25 million, of which \$9.13 million is from the general fund, for the autism spectrum disorder program.

Reduces funding of \$160,000 from the general fund for the Parents Listen, Educate, Ask, Discuss program.

Reduces funding by \$237,673 from the general fund for compulsive gambling services.

Adds funding of \$1,279,159, which includes reducing \$500,000 from the general fund, for the substance use disorder voucher program.

Adds \$4 million from federal funds for opioid treatment programs.

Adds \$200,000 from the general fund, for the substance use disorder voucher program for the 2015-17 biennium.

Section 14 of the bill provides legislative intent to allow DHS to include medication-assisted treatment as an allowable service under the substance use disorder voucher program.

Section 27 of the bill provides legislative intent that behavioral health service providers that receive funding from DHS submit process and outcome measures to DHS for programs and services supported by the state.

Section 28 of the bill provides legislative intent that telephone and directory services include private behavioral health service providers in the directory at no cost to the private behavioral health service provider.

Section 29 of the bill identified \$75,000 from the tobacco prevention and control trust fund for complying with youth access to tobacco reporting requirements under Title 45, Code of Federal Regulations, Part 96, Section 130. This section of the bill also requires the State Department of Health and local public health units to collect and disclose all required data reporting elements to DHS.

- House Bill No. 1040, which relates to behavioral health services, requires DHS to adopt rules for an evidence-based alcohol and drug education program for certain individuals under 21 years of age, and adds \$350,000 from the general fund for a children's prevention and early intervention behavioral health services pilot project (\$150,000); peer-to-peer support services (\$100,000); and family-to-family support services (\$100,000).
- House Bill No. 1041 provides for justice reinvestment initiatives including an appropriation of \$1,643,701 to DHS for implementing changes relating to statutory changes that will allow individuals convicted of certain felony offenses to qualify for temporary assistance for needy families, and changes that will allow faith-based organizations to provide services to individuals needing addiction treatment services.
- House Bill No. 1117 amends Chapters 14-10, 50-06, and 50-31 relating to changes in terminology for substance abuse and behavioral health.
- House Bill No. 1136 creates a new section to Chapter 50-06 to require DHS to establish and administer a voucher system to address underserved areas and gaps in the state's substance abuse treatment system and to assist in payment of addiction treatment services provided by private licensed substance abuse treatment programs and hospitals.
- Senate Bill No. 2015 provides an appropriation of \$7 million from other funds to DHS and authorizes 6 FTE positions for implementing a community behavioral health program; and an appropriation of \$500,000 from the general fund for contracting with a public or private entity to create, initiate, and facilitate the implementation of a strategic plan to increase the availability of all types of behavioral health services in all regions of the state.
- Senate Bill No. 2033, relating to clinical supervision of behavioral health professionals, provides statutory changes relating to licensure requirements for behavioral health professionals, and provides for a report to the Legislative Management.
- Senate Bill No. 2038, relating to behavioral health services policy changes, extends the holding period from 24 to 72 hours for emergency involuntary commitments for individuals with a serious physical condition or illness, changes youth mental health training requirements, and creates a children's behavioral health task force.
- Senate Bill No. 2039, relating to the role and function of DHS - Behavioral Health Services, changes the role and function of DHS Behavioral Health Services, including behavioral health definitions; administration of behavioral health programs; licensure process for regional human service centers; services available to individuals with serious and persistent mental illness; membership and role of advisory groups for human service centers; designation of behavioral health providers to furnish preventive diagnostic, therapeutic, rehabilitative, or palliative services to individuals eligible for medical assistance; and designation of the location of a second state hospital.
- Senate Bill No. 2042, relating to mental health professionals, establishes a tiered system for the roles of mental health professionals.
- Senate Bill No. 2088, relating to licensed addiction counselors, creates a new section to Chapter 43-45 relating to licensed clinical addiction counselors, and amends sections relating to the scope of practice for addiction counselors, and the licensure authority of the Board of Addiction Counseling Examiners.
- Senate Bill No. 2118, relating to compulsive gambling disorder, amends sections of Chapters 50-06 and 53-12.1 relating to gambling disorder prevention awareness, crisis intervention, rehabilitation, and treatment services.

### **PROPOSED STUDY PLAN**

The following is a proposed study plan for the committee's consideration:

1. Receive information from DHS regarding the state's services and delivery systems, including whether changes are necessary to maintain compliance with state and federal laws and regulations;
2. Receive information from representatives of tribal governments, DHS, and private providers regarding community- and non-community-based services, including the costs and effectiveness of services;
3. Receive information from DHS regarding the impact of implementation and expansion of selected programs that were added to address unmet needs, including the impact on costs and effectiveness of new programs; needed changes to address noncompliance and a timeline for completing changes;
4. Receive information from representatives of tribal governments, DHS, and private providers regarding data on the number of individuals who would be impacted by voluntary compliance efforts, and data on the type

of services that may need changing, including housing, peer counseling, outpatient treatment, crisis line access, and transportation services;

5. Receive information from DHS regarding an evaluation of the funding, mission, and caseload at the Life Skills and Transition Center, including the center's transition plan and number of clients eligible for community placement;
6. Conduct a tour of the Life Skills and Transition Center, subject to Legislative Management Chairman approval;
7. Receive information regarding state and federal laws and regulations, including a review of the fees and penalties for noncompliance;
8. Receive information to compare the voluntary and involuntary compliance with state and federal laws and regulations, including a review of long-term costs and effectiveness;
9. Receive information regarding efforts by other states to comply with the 1999 *Olmstead v. L.C.* case, including the planning and implementation process for any new programs;
10. Receive testimony from stakeholders, including family members; state, local, and tribal agencies and institutions; and private providers;
11. Receive comments by interested persons regarding behavioral health and developmental disabilities services study;
12. Develop recommendations and any bill drafts necessary to implement the recommendations; and
13. Prepare a final report for submission to the Legislative Management.

ATTACH:1