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January 12, 2011

Preet Bharara  
United States Attorney for the Southern District of New York  
One St. Andrews Plaza  
New York, NY 10007

RE: *U.S. ex rel. Dr. Gabriel Feldman v. City of New York*  
09 Civ. 8381 (JSR)

Honorable Mr. Bharara,

We are disability rights advocates, consumers, community advocacy organizations, and lawyers representing people with disabilities. We request that you immediately withdraw the ill-considered Complaint-in-Intervention against the City of New York that was filed this week, alleging that the City is defrauding the United States by giving people Medicaid personal care services rather than placing them in nursing homes.

The lawsuit defies the Americans with Disabilities Act, as interpreted by the United States Supreme Court in *Olmstead v LC*, that requires states to provide services in the most integrated setting -- in their homes in the community -- rather than in institutions. The federal government has made a high priority of encouraging states to "rebalance" their long-term care services to provide more community-based alternatives and rely less on institutional care.

New York City should be commended -- not penalized -- for its successful efforts to further this federal goal. Though New York City has 50% more Disabled, Aged & Blind Medicaid recipients than the rest of New York State,<sup>1</sup> 16% more people live in nursing homes in the rest of the state than in the City. One out of three Medicaid dollars spent on the Disabled, Aged, & Blind in New York State outside of New York City is spent on nursing home care, compared to one out of four in New York City. *Id.*

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<sup>1</sup> [http://www.health.state.ny.us/nysdoh/medstat/quarterly/aid/2008/cy/docs/2008\\_cy\\_aid.xls](http://www.health.state.ny.us/nysdoh/medstat/quarterly/aid/2008/cy/docs/2008_cy_aid.xls)

The examples of so-called fraud in the Complaint portray people who undisputedly require long-term care services because of severe physical and mental disabilities -- the only question is where these services are to be provided. The City should not face civil fraud allegations for genuinely attempting to comply with what is required under *Olmstead* -- to provide services so that these individuals can live in their own homes, instead of being faced with a nursing home as the only alternative.

It is a myth that nursing homes always provide “more intensive,” “more appropriate,” or “safer” services than home care. 82-year-old “Patient C” in the complaint would not likely receive one-on-one care in a nursing home to prevent her from falling when, because of dementia, she tries to get out of bed without assistance.

Consumers face daunting hurdles as they attempt to obtain necessary care. The City often authorizes 24-hour care only when ordered to do so by the New York State Department of Health after an extensive hearing process.

Moreover, we question the allegation that New York City somehow benefits financially by authorizing these Medicaid home care services. It is not clear to us that the City has a financial incentive to authorize excessive home care -- the City’s share of Medicaid costs is the same for all long-term care services, whether at home or in nursing homes.<sup>2</sup>

In addition to draining precious resources from the City that are needed to administer this program, we are concerned that the lawsuit is already having a chilling effect and will discourage the authorization of adequate Medicaid home care for people who desperately need it to live in their homes. The fear this kind of lawsuit will engender is bound to result in an increase in the number of individuals who are institutionalized rather than being provided with services in the most integrated setting, as *Olmstead* requires. The mere specter of being haled into court to defend against civil fraud charges is certain to chill decision-makers into ordering institutionalization even when personal care services would be appropriate. The mere commencement of a suit like this threatens to wipe away years of progress.

In short, we believe the decision to commence a lawsuit like this was ill-considered. We urge you to withdraw the case or at least to request that it be marked off calendar while more constructive discussions can be held about the difficult issues involved in balancing the needs of individual patients against the goals of serving them in the most integrated setting, as the Americans With Disabilities Act demands.

Please advise us of your response to this request. We would be glad to meet with you or provide any further information. Please contact Valerie J. Bogart at (917) 817-9878 or Roger Bearden at (518) 894-7641.

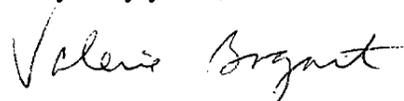
Thank you.

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<sup>2</sup> See N.Y. Soc. Serv. L. § 368-a; L. 2005 Ch. 58 PART C, Deborah Bachrach, Esq., et al, *Understanding the State/County Paradigm: The 2005 Medicaid Cap Legislation* (United Hospital Fund 2006) <<http://www.medicainstitute.org/assets/398>>

Very truly yours,



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## **ON THEIR BEHALF AND FOR THESE ORGANIZATIONS**

- Access to Independence of Cortland County, Inc., Cortland, NY
- Alzheimer's Association, New York City Chapter
- Autistic Self Advocacy Network, New York
- ADAPT, National
- ADAPT, New York City
- ADAPT, New York State
- ADAPT, Rochester
- American Association of People with Disabilities
- ARISE, Inc., Syracuse
- Barrier Free Living, New York City
- Boston Center for Independent Living, Boston, MA
- Bronx Independent Living Services
- Bronx Jewish Community Council
- Brooklyn Center for Independence of the Disabled
- Catskill Center for Independence, Oneonta
- Center for Disability Rights, Rochester
- Center for Disability Advocacy Rights (CeDAR), New York City
- Center for Public Representation, Northampton, MA
- Coalition of Institutionalized Aged and Disabled (CIAD), New York City
- Commission on the Public's Health System, New York City
- Community Access, New York City
- Consumer Directed Personal Assistance Association of New York State
- Disability Advocates, Inc., Albany
- Disabled In Action of Metropolitan New York
- Empire Justice Center, Albany/ Rochester/ Long Island, New York
- F.E.G.S. Health and Human Services System, New York City
- Harlem Independent Living Center
- Hearing Loss Association of America
- Home Care Council of New York City
- Independence Care Systems, New York City
- Independent Living Center of the Hudson Valley, Inc.
- Jewish Association of Services for the Aged (JASA), New York City
- Lenox Hill Neighborhood House, New York City
- Liberty Resources, Inc, Philadelphia
- Little People of America
- Medicaid Matters New York (statewide coalition of 130 organizations)
- Mercy Advocacy Program, Islip Terrace, NY
- Metropolitan Council on Jewish Poverty, New York City
- Morningside Retirement and Health Services (MRHS)
- National Association of the Deaf, Silver Spring, MD
- National Center for Law and Economic Justice, Inc.
- National Coalition for Mental Health Recovery
- National Council on Independent Living
- National Health Law Program (NHeLP), Washington, D.C.
- National Senior Citizens Law Center, Washington, D.C.
- National Spinal Cord Injury Association

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- New York Association on Independent Living.
- New York Association of Psychiatric Rehabilitation Services
- New York Memory Center (formally Park Slope Geriatric Center), Brooklyn
- New York State Disabilities Advocacy Association & Network, Rush, NY
- New Yorkers for Accessible Health Coverage, New York City
- North Country Center for Independence, Plattsburgh, NY
- Not Dead Yet, Rochester, NY (national office)
- One Stop Senior Services, New York City
- People Organized for Our Rights, Inc. (P.O.O.R.), Hamilton Beach, New York
- Pierro Law Group LLC, Albany, NY
- Project OHR, Inc., New York City
- Regional Aid For Interim Needs, Inc. (RAIN) Boston Secor Senior Center, Bronx, NY
- Regional Center for Independent Living, Rochester
- Resource Center for Accessible Living, Kingston
- Riverstone Senior Life Services, New York City
- Self-Advocacy Association of New York State, Inc.
- United Spinal Association, New York City (national office)
- UJA-Federation of New York
- Westchester Disability Advocacy Partnership (WDAP)
- Westchester Disabled On the Move Inc.

-- *list in formation* --

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