

**Mecklenburg Board of Commissioners
Action Item
January 08, 2013**

Subject: Recommendation for MeckLink

- ACTION:**
1. Direct staff to continue working toward implementation and to engage consultants to assure readiness and insure progress.
 2. Authorize the County Manager, with the assistance of Counsel, to bring an action in the Office of Administrative Hearings as outlined in the attached memo to the Board of County Commissioners from J. Daniel Bishop dated January 8, 2013.
 3. Reaffirm commitment to the legislative agenda item to protect Mecklenburg's ability to implement the MeckLink MCO.
 4. Instruct staff to continue advocating to DHHS that the decision of former Acting Secretary Delia should be overturned .

Staff Contact: Harry L. Jones, Sr., County Manager

Presentation: Yes No

BACKGROUND/JUSTIFICATION: .

PROCUREMENT BACKGROUND:

POLICY IMPACT:

FISCAL IMPACT:

	Current Fiscal Year Impact	% Funding	Next Fiscal Year Impact	% Funding	New Positions FT PT
Federal					
State					
Other					
County					
Capital Project					
TOTAL					

MUST BE COMPLETED IF FUNDING IS INVOLVED

ATTACHMENT (S): 1) Letter from J. Daniel Bishop

Memorandum

To: Mecklenburg Board of County Commissioners

From: J. Daniel Bishop

Date: January 8, 2013

Re: Legal defects in the HHS Secretary's decision to reassign Mecklenburg Area Mental Health's (MeckLINK) Medicaid waiver implementation duties

On December 31, 2012, Acting DHHS Secretary Albert A. Delia notified MeckLINK and General Assembly committee co-chairmen by letter that he was "reassigning MeckLINK Behavioral Healthcare to Cardinal Innovations Healthcare Solutions for operation of the 1915(b)/(c) waivers" "in accordance with [Session Law] 2011-264," which is the statute mandating statewide implementation of the Medicaid waiver for mental health services. He explained that the Session Law "required" DHHS "to determine by January 1, 2013 if [LMEs] are able to begin operations under the 1915(b)/(c) waivers" and that because MeckLINK would be ready to begin operations on April 1, instead of February 1, "I feel it is my obligation to conclude that MeckLINK cannot be considered ready to assume waiver operations."

To the committee chairmen, Secretary Delia noted that MeckLINK, with an April 1 go-live date, could start operating sooner than the substitute LME, Cardinal Innovations, which "will likely take 120 to 180 days" to commence operations in Mecklenburg County. Allowing MeckLINK to complete implementation, he observed, would result in "greater savings [to the State] in the current fiscal year" (not to mention avoid the waste of Mecklenburg County's \$3 million implementation expenditure and displacing MeckLINK's 200 plus employees). Nevertheless, the Secretary stated that to allow MeckLINK to accomplish this preferable outcome would require legislative revision of "the time requirements in the statute."

Our opinion is that Secretary Delia's decision is legally unsound as much as it defies common sense. An internal DHHS implementation plan reflects a previous -- and correct -- interpretation that the January 1, 2013 statutory milestone was not for operational readiness determinations for the 11 LMEs selected to implement the waiver, but instead to require other LMEs "to merge with or be aligned through an interlocal agreement with" one of the 11 LMEs approved by DHHS through prior RFA processes to operate as an MCO under the Medicaid waiver.¹ Those LMEs would become subject to administrative reassignment of management of the Medicaid waiver for their service areas to another LME if they "fail[ed] to comply with this requirement" to merge or align via interlocal agreement with an approved LME.²

In October 2012, DHHS began interpreting the January 1 milestone as a deadline to certify operational readiness, following expressions of expectation by Joint Oversight Committee members for DHHS to achieve operating savings by accelerating the completion of the waiver implementation ahead of the statutory deadline of July 1, 2013. Even so, Secretary Delia's letters do not assert that January 1 itself was the deadline to "go-live," but rather a point at which DHHS must judge LMEs' operational readiness. As a standard to judge readiness, the Secretary looked to whether LMEs were projected to be able to "go-live" by February 1, and the Secretary apparently certified at least four LMEs other than Mecklenburg that were expected to "go-live" on February 1. The statute did not impose the February 1 standard. DHHS adopted it administratively, although it is presently unclear by what mechanism.

Secretary Delia's letters stated that "in October LMEs were notified that they would be required to demonstrate readiness to operate under the waiver no later than February 1, 2013," and that MeckLINK was so notified (presumably orally) "[i]n a meeting with DHHS staff." Although Session Law 2011-264 exempts DHHS from ordinary rulemaking processes for the Medicaid waiver implementation, rules and policies must nevertheless be properly published and clear. As yet, we cannot identify any written notice to MeckLINK or other proper publication by DHHS that a February 1 "go-live" date was an immutable and bright-line standard by which a January 1 readiness determination would be made and that noncompliance would result in summary reassignment of waiver implementation duties. We have learned that DHHS began stating this to the Committee in October, but this is not proper publication.³

Mecklenburg County was aware only that the February 1 date was an implementation objective, having been adjusted from an earlier objective of January 1. As to that earlier objective, written communication from DHHS appears to be via an email by Division of Medical Assistance Director Michael Watson to the County Manager's office and MeckLINK that "I would strongly encourage you to work toward a Waiver start date of January 1, 2013," which "would give Mecklenburg County LME a grace period of up to six months before you come up against final implementation date mandated in the legislation (July 1, 2013)." DHHS's "strong encouragement" and reference to a six-month "grace period" for Mecklenburg County's benefit are at odds with DHHS's newly articulated position.

Even if DHHS properly adopted the bright-line February 1 standard, and even if DHHS was correct in its modified interpretation of the January 1 milestone as a readiness determination deadline, Secretary Delia erred in deciding that he was without discretion in the action he took on December 31. Although the deadline under such an interpretation to certify readiness was statutory, the standard applied was administrative and subject to the exercise of administrative discretion. The law treats an agency's failure to recognize its own discretion as a per se abuse of discretion.

Even if Secretary Delia acted properly in refusing to certify MeckLINK's readiness as of January 1, he exceeded his statutory authority in immediately reassigning MeckLINK's Medicaid waiver implementation responsibilities. The statute prescribes as a first step that the Secretary require "LMEs that have not been approved to merge with or be aligned through an interlocal agreement with" an approved LME. Only "[i]f any LME fails to comply with this requirement" is reassignment of waiver implementation prescribed. Secretary Delia skipped the interim step.

The summary withdrawal of MeckLINK's waiver implementation function also contravenes other applicable statutes and rules. LMEs are a fundamental part of the statutory scheme for delivery of mental health services, and considerable due process is accorded before local functions can be withdrawn by DHHS. The Secretary cannot "remove from an LME [] or designate another entity as eligible to implement any function" until a failure to meet a critical performance measure has continued for three consecutive months despite focused technical attention from the Department."⁴ Assuming that the February 1 operating standard was a "critical performance measure," DHHS could not properly reassign the waiver implementation function until May 1 at the earliest. Moreover, DHHS permanent rules require it to give written notice of such a deficiency, issue a Plan of Correction and provide the LME "focused technical assistance" for up to six months before removing an LME function.⁵

Mecklenburg County is entitled to seek redress from Secretary Delia's decision via an administrative appeal to the Office of Administrative Hearings, subject to final determination by an administrative law judge (ALJ).⁶ An ALJ is empowered to stay Secretary Delia's action pending a final decision upon motion for a preliminary injunction, which would afford MeckLINK the opportunity to demonstrate readiness to operate by April 1 (as predicted by DHHS) or earlier.

Secretary Delia's action can be reversed on the grounds that he:

- Exceeded his authority;
- Acted erroneously;
- Failed to use proper procedure;
- Acted arbitrarily or capriciously; or
- Failed to act as required by law or rule.⁷

As indicated by the previous discussion, we believe that every one of these grounds exists in the present matter.

Independently, the ALJ is empowered to determine that DHHS's rule to certify operational readiness by an inflexible reference to predicted readiness on February 1 -- despite a July 1 statutory implementation deadline -- is void as applied in this case on grounds that such a rule:

- Is not within DHHS's statutory authority;
- Was not made clear and unambiguous to MeckLINK; or
- Was not reasonably necessary to enable the agency to fulfill a duty (namely implementation by July 1) delegated to it by the General Assembly.⁸

We believe that each of these grounds also exist.

¹ See “Partnering for Success: The 1915(b)/(c) Medicaid Waiver Initial DHHS Strategic Implementation Plan” p. 17: “By 01/01/2013, DHHS will assign responsibility for uncommitted counties or those counties in which a LME application was not successful to existing LME-MCOs.”

² The relevant statutory excerpts are as follows:

SECTION 1.(a) The Department of Health and Human Services (Department) shall proceed with statewide restructuring of the management responsibilities for the delivery of services for individuals with mental illness, intellectual and developmental disabilities, and substance abuse disorders through expansion of the 1915(b)/(c) Medicaid Waiver. It is the intent of the general assembly that expansion of the 1915(b)/(c) Medicaid Waiver will be completed by July 1, 2013

. . .

SECTION 1.(b) By August 1, 2011, the Department shall select LMEs that have been assessed to meet minimum criteria for Waiver operations according to the requirements of RFA #2011-261 issued on April 1, 2011.

SECTION 1.(c) The Department shall require LMEs that have not been approved by the Department to operate a 1915(b)/(c) Medicaid Waiver by January 1, 2013, to merge with or be aligned through an interlocal agreement with an LME that has been approved by the Department to operate a 1915(b)/(c) Medicaid Waiver. If any LME fails to comply with this requirement, the Department shall assign responsibility for management of the 1915(b)/(c) Medicaid Waiver on behalf of the noncompliant LME to an LME that is successfully operating the Waiver and successfully meeting performance requirements of the contract with the Department.

N.C. Sess. Laws 2011-264.

³ “Notwithstanding any other provision of law, an agency that is exempted from this Article by G.S. 150B-1 or any other statute must submit a temporary or permanent rule adopted by it to the Codifier of Rules for inclusion in the North Carolina Administrative Code. These exempt agencies must submit a rule to the Codified or Rules within 30 days after adopting the rule.” N.C. Gen. Stat. § 150B-21.21 (2012).

⁴ N.C. Gen. Stat. § 122C-115.4(d)(3).

⁵ 10A N.C. Admin. Code. § 26C.0601, et seq. (2012).

⁶ N.C. Gen. Stat. Ch. 150B, Art. 23.

⁷ *Id.* § 150B-23(a)(1)-(5).

⁸ *Id.* § 150B-33(b)(9).