



## Minnesota Department of **Human Services**

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September 29, 2015

Ms. Lucinda E. Jesson, Commissioner  
Minnesota Department of Human Services  
P.O. Box 64998  
St. Paul, Minnesota 55164-0998

RE: Review of Invoices Submitted by the Jensen Settlement Agreement Court Monitor and Karsjens  
Litigation Technical Advisor  
Audit Report number: ASR 2015-16

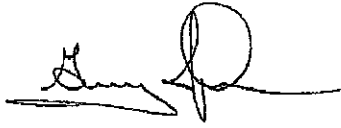
Dear Commissioner Jesson:

The Internal Audits Office was asked to review invoices submitted by David Ferleger in his role as court monitor for the Jensen Settlement Agreement and in his role as the court's technical advisor in the Karsjens litigation. The purpose of our review was to evaluate the process used to review and approve invoices, and, if control weaknesses are found, provide recommendations to improve controls over this process.

United States Federal Court the honorable Judge Donovan W. Frank established the general framework used to pay Mr. Ferleger and his consultants for services performed, including related expense reimbursements. The process established by Judge Frank includes a 10 day window from the date of the invoice for the department to object to any charges in the invoice. If no objection is received, the department's right to object is considered permanently waived. Accordingly, this review is not expected or intended to result in the recovery of funds already paid.

This review was conducted in accordance with governmental auditing standards generally accepted in the United States of America, except that the scope of the review was limited to reviewing the department's process used to pay invoices received from David Ferleger in his role as court monitor for the Jensen Settlement Agreement and in his role as the court's technical advisor in the Karsjens litigation. Our review included an analysis of invoices dated from July 17, 2012, to July 22, 2015, for services related to the Jensen Settlement agreement, and from February 26, 2014, to March 18, 2015, for services related to the Karsjens litigation. Consequently, this review should not be considered as meeting auditing requirements for a certified audit report and opinion.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gary L. Johnson', with a large, stylized loop at the end.

Gary L. Johnson  
Internal Audit Director

cc: Charles Johnson, Deputy Commissioner  
Connie Jones, Chief of staff, Direct Care and Treatment

**Review of Invoices Submitted  
by the Jensen Settlement  
Agreement Court Monitor and  
Karsjens Litigation Technical  
Advisor**

**ASR 2015-16  
September 29, 2015**

This information is available in alternative formats to individuals with disabilities by calling (651) 431-3623. TTY users can call through Minnesota Relay at (800) 627-3529. For Speech-to-Speech, call (877) 627-3848. For additional assistance with legal rights and protections for equal access to human services programs, contact your agency's ADA coordinator.

## Department of Human Services

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### Audit Participation

The following people provided key information or were interviewed during the preparation of this report:

David Ferleger, Esq.	Court Appointed Monitor Jenson Settlement Agreement
	Court Appointed Technical Advisor Karsjens Litigation
Anne Barry	Assistant Commissioner, Community and Partner Relations
Christina Baltes, RN, BSN, PHN, MA, QIDP	Compliance Officer
Peg Booth, Ph.D.	Director, Jensen Implementation Office
Robin Benson	Deputy General Counsel, Direct Care and Treatment
Corlyn Maxwell Bryant	Financial Services Director, Direct Care and Treatment

The following members of the DHS Internal Audits Office prepared this report:

Gary L. Johnson	Director
Margaret Brotherton	Auditor

## Background

On July 17, 2012, United States Federal Court the honorable Judge Donovan W. Frank appointed David Ferleger as an independent advisor to the Court to assess and monitor the implementation of the Jensen Settlement Agreement<sup>1</sup>. In his July 17, 2012, order, Judge Frank wrote that the Department of Human Services should:

*"[...] cooperate fully with David Ferleger, and provide him with access to the facilities, services, programs, data, and documents relevant to the Settlement Agreement. He may convene meetings, meet relevant individuals and groups, attend case-related court proceedings and review pleadings, motions, and documents submitted to the court."*<sup>2</sup>

To arrange payment for Mr. Ferleger's expenses, on August 8, 2012, Judge Frank issued an order stating that:

1. *"The monitor shall submit invoices to the Court for fees, expenses and consultants monthly, with copies to the parties. Each invoice shall be dated, and, to facilitate the process, the invoices may be submitted with a blank signature line for action by the Court."*
2. *Absent objection from a party for good cause shown (which objection was not resolved after first being discussed informally with the monitor), the Court will review the invoice and issue an appropriate order for payment from the Court's registry. If no objection is thereafter filed by a party with the Court within ten (10) days of the date of the invoice, any objection to the invoice shall be considered permanently waived."*
3. *As previously ordered, in light of the public purpose of this assignment, the monitor's fee shall be \$225 per hour (50% of his usual hourly rate for non-contingent work)."*<sup>3</sup>

On March 19, 2013, Judge Frank directed the Department and Mr. Ferleger to agree on and submit a budget for Mr. Ferleger's anticipated costs incurred in carrying out his duties as court monitor. In his order, Judge Frank wrote:

*"[...] the Court respectfully directs the parties to submit within 14 days a proposed budget for David Ferleger that also addresses his role. In the event that the parties are unable to agree to the scope of the role and responsibilities of Mr. Ferleger and/or a budget, the Court will enter an order upon receipt of the submissions of counsel and a response from David Ferleger."*<sup>4</sup>

On March 19, 2014, Judge Frank issued a new order governing payment to Mr. Ferleger for his work as the appointed court monitor. In his order, Judge Frank established the following guidelines:

1. *"The Court Monitor shall submit to the Court on an approximately monthly basis an invoice for fees and expenses with copies to the parties."*

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<sup>1</sup> CASE 0:09-cv-01775-DWF-FLN Document 136 Filed 12/05/11

<sup>2</sup> CASE 0:09-cv-01775-DWF-FLN Document 159 Filed 07/17/12

<sup>3</sup> CASE 0:09-cv-01775-DWF-FLN Document 160 Filed 08/08/12

<sup>4</sup> CASE 0:09-cv-01775-DWF-FLN Document 204 Filed 03/19/13

2. *A party may make an informal objection to an invoice for good cause shown, by providing written notice of the informal objection to the Court Monitor within five (5) days of the invoice, so that an effort may be made with him to resolve the objection.*
3. *The Court will review invoices and issue appropriate orders for payment from the Court's Registry. If no objection is filed by a party with the Court within ten (10) days of the date of the invoice, any objection to the invoice shall be considered permanently waived.*
4. *By agreement, the Minnesota Department of Human Services shall make a deposit to the Registry of this Court in the amount of \$315,599 on account for the estimated fees and expenses pursuant to this Order.*<sup>5</sup>
5. *Upon the Court's order determining that the Court Monitor's work under its orders has concluded, any balance remaining in the Registry account shall promptly be returned to the Minnesota Department of Human Services.*<sup>6</sup>

Also, on September 27, 2013, Judge Frank appointed Mr. Ferleger as technical advisor<sup>7</sup> in the Karsjens<sup>8</sup> litigation. Karsjens Document 434, filed March 17, 2014, provided the general framework for reimbursement as follows:

1. *The Rule 706 Experts shall submit on an approximately monthly basis, a single dated invoice to the Court for fees and expenses with copies to the parties. Each invoice shall include and aggregate separate invoices from each Expert. Documentation of expenses shall be included. The Technical Advisor may also submit such statements for his work.*
2. *A party may make an informal objection to an invoice for good cause shown, by sending an unfiled letter to the District Judge, Magistrate Judge, and the Court's Technical Advisor within five (5) days of the invoice, so that an effort may be made to resolve the objection.*
3. *The Court will review invoices and issue appropriate orders for payment from the Court's Registry. If no objection is filed by a party with the Court within ten (10) days of the date of the invoice, any objection to the invoice shall be considered permanently waived.*
4. *By agreement, the Department of Human Services shall make an interim budget deposit to the Registry of this Court in the amount of \$1,800,000 on account for the fees and expenses pursuant to this Order.*
5. *Upon the Court's order determining that the work under this Order has concluded, any balance remaining in the Registry account shall promptly be returned to the Department of Human Services.*

Between August 8, 2012, and July 22, 2015, Mr. Ferleger submitted 21 invoices for the Jensen Settlement Agreement and 9 invoices for the Karsjens litigation claiming the following:

	<u>Jensen</u>	<u>Karsjens</u>
Ferleger Services	\$ 317,025	\$ 34,358
Ferleger Expenses	\$ 67,555	\$ 13,758

<sup>5</sup> "The Court Monitor provided to DHS a cost estimate for March, 2014, through February 2015 totaling \$627,845. The Court's Registry currently holds approximately \$312,246 which is credited toward that the total cost estimate. Therefore, the deposit under this order is \$315,599."

<sup>6</sup> CASE 0:09-cv-01775-DWF-FLN Document 286 Filed 03/19/14

<sup>7</sup> CASE 0:11-cv-03659-DWF-JJK Document 341 Filed 09/27/13

<sup>8</sup> CASE 0:11-cv-03659-DWF-JJK Document 1 Filed 12/21/11

	<u>Jensen</u>	<u>Karsjens</u>
Consultant Services	\$ 343,531	\$ 635,181
Consultant Expenses	\$ 69,632	\$ 49,799
 Total Services	 \$ 660,556	 \$ 669,539
Total Expenses	\$ 137,187	\$ 63,557
 Total	 <u>\$ 797,743</u>	 <u>\$ 733,096</u>

On April 7, 2015, Lucinda Jessen, Commissioner of the Minnesota Department of Human Services (Commissioner Jessen) requested the Internal Audits Office review the expenses of Mr. David Ferleger, his staff and consultants and provide recommendations for reviewing costs going forward related to the Jensen Settlement Agreement and the Karsjens litigation.

### Scope

This review covered the reimbursement requests submitted for Mr. Ferleger's work as court monitor of the Jensen Settlement agreement from July 17, 2012, to the most current bill for services up to July 22, 2015, and as technical advisor for the Karsjens litigation from February 26, 2014, to the most current bill for services up to March 18, 2015.

### Objective

The objective of this review was to accomplish the following:

- Determine if the department had adequate internal controls over the process of reviewing costs incurred and invoiced by Mr. Ferleger.
- Evaluate costs claimed by, and reimbursed to, Mr. Ferleger and consultants to determine if they were reasonable and appropriate.
- Provide recommendations that strengthen the internal control framework to provide assurances that future billings are adequately reviewed and that prompt objections are made for questionable costs or inappropriate reimbursement claims.

### Methodology

Our work included evaluating Judge Frank's orders establishing Mr. Ferleger as the Court Monitor for implementation of the Jensen Settlement Agreement and as Technical Advisor for the Karsjens litigation. These orders also established the general framework used to pay Mr. Ferleger and his staff and consultants for services, and to reimburse him for expenses they incurred. We also reviewed the process established by the department for approving related budgets, tracking consultants, reviewing invoices, and objecting to items claimed in invoices. Finally, we evaluated previously paid claims to identify any errors, duplicate billings, or other items that appeared excessive or wasteful.

As indicated previously, Judge Frank has consistently stated that "[i]f no objection is thereafter filed by a party with the Court within ten (10) days of the date of the invoice, any objection to the invoice shall be considered permanently waived."<sup>9</sup> Accordingly, this review is not expected or intended to result in the recovery of funds already paid.

<sup>9</sup> CASE 0:09-cv-01775-DWF-FLN Document 160 Filed 08/08/12



## Finding

- 1. The department did not provide appropriate oversight of reimbursement requests filed by the court monitor. Appropriate oversight includes establishing a budget, tracking the use of consultants, and defining travel expense reimbursement guidelines.**

On August 8, 2012, the Court established the monitor's fee at \$225 per hour for the Jensen Settlement Agreement, and on March 19, 2013, directed the parties to agree to a budget for the services provided by the court monitor. The Department did not establish a budget for Mr. Ferleger's services and expenses until Mr. Ferleger proposed a budget for the period March 2015 through February 2016. Prior to that, Mr. Ferleger submitted invoices, the department had an opportunity to object to anything in them, and the court issued payment from funds set aside by the department.

Establishing a budget is an effective control to monitor costs associated with an activity. Once established, costs can be monitored, unexpected expenses and issues can be quickly identified and addressed, and assurance is provided that limited resources are being thoughtfully managed and efficiently used.

Consultants used to monitor and evaluate the implementation of the Jensen Settlement Agreement were billed through Mr. Ferleger's law firm. As Mr. Ferleger pointed out in a January 3, 2014, e-mail to DHS, having consultants billed through Mr. Ferleger's accounts saves time, simplifies logistics, and reduces DHS paper work.

While Mr. Ferleger was correct in the advantages gained by billing consultants in this manner, allowing Mr. Ferleger to manage the consultants is a disadvantage to the department, because fees, expense and travel reimbursements, contractual adjustments, and caps or cost limits are not being negotiated and standardized by the Department's contracts and procurement division. Additionally, without terms of the contractors' engagements clearly agreed to in advance, it is difficult for the department to properly evaluate invoices submitted by the contractors. For example, a review of contractor invoices submitted by Mr. Ferleger found one charging a lump sum (\$15,000) for the project with no supporting detail. In another example, one contractor charged \$200 per hour up to \$1600 per day plus expenses with no supporting details.

When reviewing contractor invoices, we had no clear understanding of the type of work, the contract deliverables, or the amount of work involved, and were, at times, unable to easily or adequately estimate an hourly wage to determine if the cost of the services received was reasonable. Key elements needed to be clarified and documented for proper controls over contracts include an agreed upon start date, clear description of services being purchased, expected deliverables, reimbursable expenses, a set hourly wage, a total project cost limit, and a targeted completion date.

Another area of concern relates to the court's efforts to set cost limits on contractors billed through Mr. Ferleger's account. In *Jensen Document 383*, filed on February 2, 2105, Judge Frank ordered that "[a]ll fees and costs incurred by the Court Monitor in carrying out his responsibilities for the period January 1, 2015, through June 30, 2015, shall not exceed \$250,000 and for the period July 1, 2015, through June 30, 2016, shall not exceed \$463,671." It was unclear to us which contractors should be included in the limits, and which ones should not. For example, on at least one occasion Roberta Opheim, State Ombudsman for Mental

Health and Developmental Disabilities, recommended that the department use a specific consultant to help analyze a client's situation. Mr. Ferleger agreed stating "His name is known to me from the field, and I accept DHS benefiting from his consultation." In this instance, it is unclear if this consultant should be included in the limits set for the court monitor, or if the department needed the advice of this consultant irrespective of the court monitor's activities.

After reviewing all contractor invoices for services performed, we found no issues for the rates being charged, and received acknowledgement that the department was generally satisfied with the consultants' work. However, given the poor controls over this process, there is a high risk that problems or issues could occur like unsatisfactory work, incomplete deliverables, or excessive, duplicative or unnecessary billings that would not be detected in a timely manner.

For travel related expenses, the parties did generally agree to use the travel per diems published by the United States General Services Administration (GSA). Those rates for 2015 include an allowance of \$135 per day for hotel and \$71 per day for meals. A minor issue noted with implementing GSA per diems limits involved inconsistent documentation for the claimed meal expenses. Specifically, some consultants provided meal receipts, including some showing alcohol being purchased, while others just claimed the allowance without receipts, and at least one claimed actual meal expenses that were generally less than the meal allowance. Documentation shows that Mr. Ferleger generally reviewed the meal receipts and removed any alcohol from the reimbursement request. The department should work with the Court monitor to present a consistent approach for reimbursement of meal expenses. A short conversation between the parties would clear up the inconsistent application of the GSA meal per diem, and provide consistent documentation to support this expense and provide assurance that state funds are not being wasted or used to purchase alcohol.

Another area of concern is that the court monitor is handling the administrative function of billing for the consultant expenses. We found at least one occasion where he charged us his professional rate of \$225 an hour for time spent explaining how the consultants should bill for their services. In *Jensen* Document 485, filed on August 10, 2015, Judge Frank granted the department's objection to the court monitor billing us for administrative time spent reviewing and constructing invoices.

Our review of prior expense claims and invoices found one large issue and one relatively minor issue that could have been detected or avoided had the department established proper controls in a timely fashion. The largest issue involves the payment of consultants on the Karsjens' litigation while traveling from their homes to Minnesota. For example, one Karsjens consultant billed the court and was reimbursed at least \$12,450 in travel time (airfare was reimbursed separately) for two trips from her home in New York to Minnesota. In general, we found that consultants in the Karsjens' litigation have been billing and getting paid their full professional rate to travel to Minnesota, while consultants for the Jensen Settlement Agreement are not. It is our opinion that paying consultants for their time spent traveling to Minnesota, as shown by the \$12,450 cost for just two trips from New York to Minnesota, is wasteful and not a proper use of taxpayer funds.

The relatively minor issue involves first class air fare. This may be permissible if the party traveling used their frequent flier miles to upgrade to first class, paid for the difference themselves, or if a first class ticket was similarly priced to a coach ticket. The department didn't initially have a conversation with Mr. Ferleger about this, resulting in no related agreement on

plane travel. Once an agreement is in place, both parties would know that any invoice reflecting first class airfare would need to be accompanied with an explanation and proper supporting documentation for why it should be considered reasonable and allowable. Another option is to agree to a maximum flight reimbursement and leave it up to the court monitor and consultants if they wish to fly first class and pay the difference in cost.

**2. The invoices and budget submitted by Mr. Ferleger include the charging of administrative duties performed by Mr. Ferleger and his assistant at their professional rate.**

In the recent budget submitted by Mr. Ferleger there were two items that are questionable and should be addressed: administrative hours for Mr. Ferleger and his assistant, and an \$1,800 monthly administrative charge.

We found several instances where Mr. Ferleger billed us for costs associated with invoicing the department for his services. On August 3, 2015, the Department formally objected to these administrative charges, and in *Jensen* document 485, filed on August 10, 2015, Judge Frank agreed and struck those lines from the court monitor's invoice.

The \$1,800 monthly administrative charge proposed by Mr. Ferleger in his most recent budget includes no explanation for what it includes. Judge Frank, in his August 8, 2012 order stated "*As previously ordered, in light of the public purpose of this assignment, the monitor's fee shall be \$225 per hour (50% of his usual hourly rate for non-contingent work).*"<sup>10</sup>

The \$1,800 administrative fee is in essence refunding part of that discount back to Mr. Ferleger. Given the court's acknowledgement that the public purpose of this assignment warrants a discount from Mr. Ferleger's typical hourly rate, we question the appropriateness of this flat administrative charge.

We discussed the \$1,800 administrative charge with Mr. Ferleger and was told that it covers general administrative overhead costs. These costs typically include office rent, heating and air conditioning, electricity, telephones, office supplies, insurance, etc. For the 12 month period ending June 30, 2015, Mr. Ferleger billed the Court for about 750 hours. When multiplied by the discounted rate, the cost of the discount to Mr. Ferleger is about \$168,000 in revenue. The \$1,800 monthly administrative fee, when annualized, results in \$21,600 of the discount returned to Mr. Ferleger to help cover his overhead. The department should clarify the intent of the initial court order, in light of the public purpose of this assignment, to determine if the administrative overhead fee is warranted and reasonable. The department should also continue to monitor the court monitor's invoices and object to any administrative charges found.

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<sup>10</sup> CASE 0:09-cv-01775-DWF-FLN Document 160 Filed 08/08/12

## **Recommendations**

- 1. The department should designate an individual or position as the control point for monitoring and managing the activities of the court monitor, and give that person the responsibility to negotiate budgets, appropriate rates, allowable costs, billable services, and acceptable documentation with the court monitor.**

To be clear, this role would not in any way influence or interfere with the court monitor in carrying out his duties. Rather, this role would be responsible for establishing or negotiating a budget for the court monitor, clarifying expense reimbursement issues such as travel time, first class airfare, meal reimbursement, hotel stays, and other miscellaneous expense related issues.

The control point would have knowledge of recent relevant court orders setting rate or cost limits, when and where the court monitor traveled, when he met with Department personnel, and when he engaged consultants to assist him with his duties. Additionally, the control point would be in the best position at the department to monitor and evaluate consultant services and costs. This comprehensive knowledge of the court monitor's and consultants' activities is necessary to provide proper evaluation and review of the court monitor's invoices.

To avoid a conflict with the court monitor's duties, the control point should be a person or position that is not involved with the implementation of the Jensen Settlement. The department needs to avoid even the appearance that the court monitor's activities or reports in any way influence the decisions to question or not question certain costs. The control point should be included in department communications with the court monitor, and should be responsible for establishing with the court monitor a reasonable budget that includes an agreement of appropriate rates, billable activities, consultant activities, proper supporting documentation, and allowable expense items.

- 2. The department should determine if any consultants should be contracted with directly by the department to provide advice irrespective of the court monitor's activities. For consultants working for or on behalf of the court monitor, the department should require that the court monitor have a written contract covering key contractual elements so the department can provide adequate oversight on the related costs.**

The department should evaluate consultants and determine if the consultant's advice and services are needed by the department to provide assurance that certain aspects of the Jensen Settlement Agreement have been properly implemented. In these situations where the department is seeking this information for its own needs, the department should contract directly with the consultant to provide the appropriate controls over the consultant's rate, hours billed, services provided, key deliverables, and related expenses.

In situations where the consultant is primarily reporting to the court monitor, the department should require and get a copy of the written contract between the consultant and the court monitor. At a minimum, this written contract should include the consultant's rate, estimated hours or project cost limit, a detailed description of the services provided, detailed information related to any specific deliverables, and expected contractual end date. The department is at a

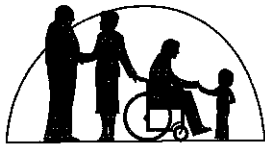
disadvantage when evaluating the costs of consultants without this key information on their activities.

Regardless of who the consultant is working for, the department should insist that time spent traveling from the consultants' home to Minnesota or from Minnesota to the consultants' home is not considered billable time.

3. **The department should continue to review the court monitor's invoices for time billed for administrative activities. Additionally, the department should file a formal objection to any administrative fees, services or overhead billed or included in proposed budgets to clarify the court's intention for covering administrative costs, including overhead, when the court set the monitors hourly rate in light of the public purpose of this assignment.**

The department should continue to evaluate future invoices submitted by Mr. Ferleger and object to any costs associated with time spent performing general administrative tasks. In our opinion, administrative costs related to monitoring the implementation of the Jensen Settlement Agreement should be included in his professional rate.

Mr. Ferleger's current proposed budget for his role as the court monitor for implementation of the Jensen Settlement Agreement includes a line item of \$1,800 per month to cover his administrative overhead. Given the public purpose of this assignment, the department should clarify with the court if administrative overhead was included in the court monitors rate of \$225 per hour, or if it should be billed separately in this manner.



Minnesota Department of **Human Services**

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October 6, 2015

Ms. Lucinda E. Jesson, Commissioner  
Minnesota Department of Human Services  
P.O. Box 64998  
St. Paul, Minnesota 55164-0998

RE: Clarification of report titled Review of Invoices Submitted by the Jensen Settlement Agreement Court Monitor and Karsjens Litigation Technical Advisor, dated September 29, 2015.  
Audit Report number: ASR 2015-16

Dear Commissioner Jesson:

On September 29, 2015, the Department's Internal Audits Office issued a report titled Review of Invoices Submitted by the Jensen Settlement Agreement Court Monitor and Karsjens Litigation Technical Advisor. In this report, the Internal Audits Office reported on their work reviewing invoices submitted by David Ferleger in his role as court monitor for the Jensen Settlement Agreement, and in his role as technical advisor for the Karsjens litigation. We also reviewed invoices submitted by consultants evaluating the Department's implementation of the Jensen Settlement agreement, and Rule 706 Experts evaluating issues on the Karsjens litigation.

The report correctly notes that the Rule 706 Experts were to submit invoices for services directly to the Court. To be clear, Mr. Ferleger played no role in reviewing or evaluating invoices related to Rule 706 Experts unless a party objected. For example, consulting services under "Karsjens" in the table on page 3 reflect only expenses incurred by the Rule 706 Experts appointed by the Court in the Karsjens litigation. Additionally, travel costs for Karsjens' Rule 706 Experts as described in finding one, where the experts were paid their professional rate for travel time to Minnesota, reflect an invoice submission process for which Mr. Ferleger did not play a role.

I bring this to your attention as the report was released before the clarifications could be made in the report. Please provide this clarification to all parties who received copies of the report.

Sincerely,

Gary L. Johnson  
Internal Audit Director

cc: Charles Johnson, Deputy Commissioner  
Connie Jones, Chief of Staff, Direct Care and Treatment