

To: Special Master Lawrence Parker and Compliance Specialist Ramona McKissic
From: Plaintiffs' Counsel
Date: February 25, 2019
Re: Plaintiffs' Case Review Findings and Report

Plaintiffs' Case Review Report

I. Introduction and Summary

Plaintiffs have completed their fifth major review of a sample of Supplemental Nutritional Assistance Program (SNAP) and Medicaid case files. The purpose of the file review was to assess the progress made by the New Mexico Human Services Department toward compliance with Section III of the Second Modified Settlement Agreement (Doc. 853) and to verify that systemic or programmatic barriers to proper application determinations and access to benefits do not exist within HSD's application processing practices. *See* Doc 853, Section IV, Paragraph A(1).

The *Hatten-Gonzales* Second Modified Settlement Agreement, as adopted and incorporated in the Court's Order Approving and Adopting Second Revised Modified Consent Decree (Doc. 854) (hereafter "the Decree"), requires the Department to put in place procedures for accepting and processing both SNAP and Medicaid applications. These procedures must ensure families applying for benefits receive prompt, informed eligibility decisions based on the family's need for assistance. To achieve these goals, the *Hatten-Gonzales* Decree requires the Department to: 1) inform applicants of the eligibility factors that must be verified; 2) only require documentary verification of information that is necessary to determine eligibility and that cannot be obtained via electronic interface; 3) provide an individualized and detailed notice of eligibility; and 4) timely provide benefits to eligible families. The Decree requires HSD to remove systemic and programmatic barriers to assistance. Systemic and programmatic barriers are defined as "a policy or prevalent practice implemented at one or more of the ISD offices that results in the failure to

comply with federal law in the SNAP and/or Medicaid program and is not due to an isolated event or action.” *See* Decree, Section I, paragraph H.

A. Methodology

The Decree requires the parties to review a statistically significant sample of Medicaid and SNAP cases that include both applications and renewals. Decree, Section IV, paragraph A. HSD provided Plaintiffs with 290 cases. The findings in this report only contemplate the 288 cases with eligibility decisions between March and September of 2018. The parties agreed on a case review tool that would be used to collect data on cases. Defendant reviewed the cases that Plaintiffs reviewed and provided responses in four batches. Plaintiffs reviewed Defendant’s responses. Most did not contain reasoning or factual support for the disagreement with Plaintiffs’ Counsel. Where Plaintiffs’ could review specific facts or arguments by Defendant and agreed that that there was no error, adjustments were made to Plaintiffs’ findings.

An Excel document with four tables is attached as Exhibit A to this report. The four tables show plaintiffs findings, HSD’s response, and Plaintiff’s review of HSD’s findings:

- 1) Findings related to all cases, including all errors found and cases with no errors.
- 2) Error findings related to notices only.
- 3) Error findings related to verification only.
- 4) Error findings related to incorrect eligibility decisions only.

B. Summary of Findings

Summary of case review findings:

Cases with one or more errors	Number with loss of benefits
202	109

Illegal Notices and Forms

Cases with violation of federal law or Decree	Concurrent Loss or Delay in Benefits
127	70

Systemic Errors related to Notices and Forms

1. Eligibility notice states incorrect eligibility decision.
2. Notice of Case Action missing calculation table for both SNAP and Medicaid.
3. HUMAD does not populate with specific or correct documents and the lists of documents clients can turn in has not been reviewed by a literacy expert.
4. Denial reasons are incorrect and not using language reviewed by a literacy expert.
5. Medicaid renewal forms are not pre-populated.
6. Immigrant specific eligibility and verification notices do not meet requirements of Decree.

Illegal Verification Requirements

Cases with violation of federal law or Decree	Concurrent Loss or Delay in Benefits
119	72

1. Requiring proof of unchanged income at SNAP Interim Report
2. Requiring proof of income for Medicaid at interim report for SNAP, when no change is reported impacting Medicaid eligibility
3. Requiring families to turn in renewal forms without attempting administrative renewal in accordance with federal law.
4. Terminating SNAP because of NM Works home visit.

Illegal Eligibility Determinations

Cases with violation of federal law or Decree as to eligibility causing loss of benefits
62

Systemic Errors

1. Not providing 12 months of Medicaid.
2. ASPEN error prevents Retroactive Medicaid from approving in many instances without ASPEN help desk ticket due to known problem.
3. SNAP work requirement and student eligibility exemptions not applied correctly.
4. Homeless Shelter Deduction not applied correctly

1. Notices and Standard Form Documents.

The Decree requires that HSD provide written materials and standard form documents in compliance with 7 C.F.R. 273.2(c)(5) and 7 C.F.R. 273.10(g)(1)(ii) for SNAP and 42 C.F.R. 435.905(b) for Medicaid. Notices must be provided at no more than a 6th grade reading level, to be reviewed and certified by a literacy expert. Decree, Section III, paragraph A.

Plaintiffs found that 44% of cases had one or more violation of the Decree's requirement related to notices and standard form documents. **24% of cases had illegal notices and concurrent loss or delay of benefits.** Plaintiffs found that 77 cases had an incomplete or inaccurate Notice of Case Action and 29 cases had an improper verification request notice. _

A. Notice of Case Action

Federal law cited in the Decree requires Defendant to provide eligibility notices that include an accurate eligibility decision, benefit levels and certification periods. Benefit reductions of any kind are considered an adverse action against the benefit recipient. For Medicaid, *see* 42 C.F.R. § 435.919(a); For SNAP, *see* 7 C.F.R. § 273.13(a). Federal law requires that notices of adverse action include the following for Medicaid and SNAP benefits in understandable language:

- 1) The action that the state proposes to take;
- 2) The reason for the proposed action;
- 3) The household's right to request a fair hearing;
- 4) The availability of continued benefits and the household's responsibility for any over issuance;
- 5) Information about free legal representation.

The Decree requires all denial notices to contain the degree of specificity represented in the notices approved by the Court in *Ortiz v. Eichler*, C.A. No. 84-16 MMS (D.Del., April 21, 1989). This means that denial notices must be individualized, specific and contain an explanation of the mathematical calculation to determine eligibility, if the decision was based on income. Defendant's response shows that Defendant is aware that the NOCA does not comply with the Decree related to this requirement. Defendant's staff stated that there are plans to program SNAP and Medicaid notices to comply with the Decree, but could not provide a date for implementation. Plaintiffs raised issues with the NOCA calculation table in February of 2017 and June of 2018. *See* Docs 771 and 842. Plaintiffs also discovered that individuals who are denied because they are

not in an immigration status eligible for benefits are not provided the correct and agreed upon reason for denial. *See Section 4 below.*

B. Written Request for Verification (“Help Us Make a Decision” Form)

The Decree requires Defendant to comply with 7 CFR §273.2(c)(5), which requires state agencies to provide each household at the time of application for certification and recertification with a notice that informs the household of the verification requirements the household must meet as part of the application process. The notice shall also inform the household of the State agency's responsibility to assist the household in obtaining required verification provided the household is cooperating with the State agency as specified in 7 CFR §273.2(d)(1). The notice shall be written in clear and simple language and shall meet the bilingual requirements designated in 7 CFR §272.4(b). At a minimum, the notice shall contain examples of the types of documents the household should provide and explain the period of time the documents should cover. An identical notice is required for Medicaid. *See Decree, Section III, paragraph E.* HSD must give households 10 working days or the entire application period to provide verification, whichever is longer. Decree, Section III, Paragraph G(8).

Defendant also does not properly request further verification from families where the information the family has already provided is questionable or incomplete. The Decree requires that HSD send the family a notice that explains why the information a family submitted is incomplete or questionable. *See Decree, Section III, Paragraph (G)(3) and (8).* The parties designed the HUMAD with the functionality to provide this information, however; the case review showed that Defendant does not utilize it and instead repeatedly requires families to submit the same information. Not a single case contained this type of request and several cases showed that it is not in use. *See Case Numbers #####, #####, #####.*

Plaintiffs have consistently raised the issue with HSD that the language that populates in the HUMAD is not simple and a literacy expert has not reviewed it. Defendant had most of the HUMAD components reviewed by a literacy expert, but has not had the specific lists of documents that the HUMAD lists as examples of what families can turn in reviewed by an expert. See Joint Status Report (June of 2018), Doc. 844. The case review showed how this is problematic for families. In some notices, HSD lists its own electronic databases (SOLQ) or “client statement reasonably compatible” as examples of documents a client can provide. *See* Case Number ##### and #####. This is not intelligible to clients. The HUMAD also does not populate with specific information needed. For example, when HSD believes a family needs to provide proof of child support, the HUMAD does not list this as requested proof. Instead, HSD asks families for “proof of unearned income” and does not provide examples of proof, like a child support order. *See* Case number #####. This is a systemic problem identified by the USDA in March of 2018. Further, Plaintiffs observed that HSD utilizes a specific HUMAD seeking immigration status information for non-citizens that they did not share with Plaintiffs’ Counsel and that does not meet the requirements of the Decree and federal law. *See* case #####. Plaintiff counsel brought this notice to Defendant’s attention after learning HSD programmed the notice into ASPEN.

C. Delay Notice

The Decree requires that if there is a delay caused by HSD, HSD shall not deny the application and shall notify the household that its application is pending and inform the household of the reason for the delay and any action the household must take by the deadline to complete the application process. *See* 7 CFR 273.2(h) (3). Plaintiffs encountered cases with errors in the delay notice. Plaintiffs believe these cases show errors in the programming of the delay notice, since an automatic process triggers the delay notice. In several cases, the delay notices tell families that

HSD is reviewing their documents, when in fact, HSD still needed documents from the family. Ultimately, HSD denied the family benefits when they did not turn in documents. *See* Cases #####, ##### and #####. In some cases, HSD indicated that the decision occurred before HSD implemented auto-closure, but in others, HSD argued that there was nothing wrong with this process. In one case, HSD sent the family a delay notice, telling the family, correctly, that documents were missing. The delay notice provided the family with additional time to turn in the documents. However, the case automatically closed before the time on the delay notice ran. *See* Case #####. HSD did not agree that this was a problem. This is confusing and unfair to families who are seeking benefits. HSD must accurately state the deadline to provide documents in the delay notice.

D. Medicaid Renewal Form

In addition to the issues described above, Defendant's response shows that there is a systemic error in the Medicaid renewal notice that causes it to pre-populate with incorrect information about the family's income in violation of 42 CFR 935.916(a)(3). Defendant has not provided a date when the Department will fix this problem.

2. Illegal Verification Requirements

The Decree orders HSD to only require verification of information required to determine eligibility. *See* 42 CFR 435.952(c) and 7 CFR 273.2(a)(1). Decree Section III, Paragraph G. HSD must base requests for verification on information readily available to the applicant. Decree, Section III, Paragraph G(5) and 7 CFR 273.2(f)(4)(i).

Out of the reviewed sample, 119 (41%) contained one or more verification requests that was not necessary to determine eligibility. 56 cases contained an illegal request for verification to approve Medicaid and 35 cases contained illegal verification requests for SNAP.

42 cases illegally required Medicaid renewal forms from families when the case file did not document that a renewal was attempted using information available to the Department.

A. Medicaid Verification

For Medicaid, HSD cannot require an individual to provide additional information or documentation unless the Department needs the information and HSD cannot obtain it electronically or the information does not meet the “reasonable compatibility” standard, as described in the New Mexico State Verification plan, approved by CMS. *See*, 42 CFR 435.952(c). Information can be verified electronically where the electronic data source contains data that is “reasonably compatible” with what the applicant reported. In New Mexico, where the client reports income that is below the eligibility threshold and relevant data sources show income below the eligibility threshold, HSD must approve the case. The income information does not need to match exactly or even be from the same source. *See* Decree, Section III, Paragraph G(2). Once an individual is determined eligible for Medicaid, they are entitled to a 12-month certification period during which they are not required to re-new their eligibility. 42 CFR 435.916(a)(1).

The case review revealed a large number of systemic illegal requests for verification from households who participate in the Medicaid program. Plaintiffs identified a large share of cases where participants were required to turn in proof of income for Medicaid at the time of a SNAP renewal or interim report. This occurred despite the fact that they had several months remaining in their Medicaid certification period in violation of 42 CFR 435.916(a) (1) and despite the fact that the families had not reported a change in income that would impact Medicaid eligibility. In many cases, HSD terminated Medicaid when applicants did not turn in these documents, despite the family still being eligible. HSD informed Plaintiffs’ Counsel that it has a policy of requiring families to turn in all SNAP related verification at IR or Renewal in order to continue Medicaid.

It does this because federal law says that HSD must require families to turn in information related to SNAP to the extent the state finds it useful to determine Medicaid eligibility pursuant to 42 CFR 935.948(a)(2). As Plaintiffs have explained, this reading causes Defendant to violate multiple federal laws specific to Medicaid.¹ The Court in this case has already directed Defendant to fix its IT system so that HSD does not link verification for SNAP and Medicaid in a way that denies or reduces benefits due to requirements that apply only to the other program.² Further, CMS has clearly stated that procedural requirements for other programs should never cause an applicant to lose Medicaid unless he or she is ineligible and that state agencies must assess the usefulness of SNAP related information in the context of all Medicaid eligibility regulations.³ Plaintiffs also discovered several cases in which the worker failed to apply the reasonable compatibility standard, requiring applicants to turn in unnecessary income verification when HSD could have approved or renewed Medicaid using electronically available information. This also causes families to lose benefits.

1. Medicaid Renewal

For Medicaid cases that are up for renewal, HSD must first attempt to renew Medicaid using information obtained through trusted data sources available to the agency prior to requesting additional information from the household. *See* Doc. 475, Paragraph 5 and 42 CFR 435.916(a).

This is consistent with the Decree's requirement that Defendant utilize electronic databases for

¹ See 42 CFR 435.916(d)(1)(ii) (prohibiting renewal more frequently than every 12 months), 42 CFR 435.952(c) (prohibiting requests for documents not necessary to determine Medicaid eligibility); 42 CFR 435.949 (requiring use of electronic interfaces before requiring documentary proof); and 42 CFR 435.930(b) (prohibiting states from denying Medicaid to families who are not determined to be ineligible).

² See Doc. 587, paragraph 4 and Doc. 601, paragraph 2. (Both are stipulated orders).

³ See Federal Register, Vol. 77, No. 57, pg. 17184 "Under longstanding policy and Medicaid regulations, States are required to maintain eligibility for beneficiaries who meet Medicaid eligibility criteria. While a change in circumstances affecting eligibility under another program may also affect ongoing Medicaid eligibility, **an individual's decision not to receive benefits from another program or his or her noncompliance with the requirements of another program may not serve as grounds for termination of Medicaid eligibility.**"

information to the greatest extent possible. Decree, Section III, Paragraph G(2). If HSD is able to obtain all necessary information electronically, HSD must send a notice of renewal, prepopulated with information obtained by the Department. *Id.* If the form is correct, the head of household need only sign and return the form to HSD. *Id.* HSD automated the administrative renewal process in May of 2017. This means that HSD's computer system attempts administrative renewal without a worker having to initiate the process in every case. Case notes in the file do not show why an administrative renewal failed. An initial draft of a Design Document sent to Plaintiffs' counsel identifies two reason administrative renewal would fail: 1) where client last reported income above the eligibility threshold and no data is available from interfaces, and 2) in any case that interfaces show income above the eligibility threshold. However, a document HSD provided purporting to show the reasoning behind case comments that appear where administrative renewal fails indicates there are as many as 5 different reasons administrative renewal fails. Plaintiffs have requested additional design documents. With the current information available, the files do not show that administrative renewal was properly attempted according to federal law. Federal law requires case files to contain facts supporting the agency's decision. *See* 42 CFR 435.914(a)

Rather than re-certifying Medicaid cases where the household's last reported income was below the income threshold and data sources showed no income, the Department requires that households complete a MAD 608 Medicaid renewal form and turn in accompanying proofs. In addition to being an unlawful request for verification in violation of Decree, Section III paragraph G, a large share of families end up losing benefits when they are not able to turn in a renewal form that the cases files do not show is necessary to determine eligibility. This causes families to go without healthcare coverage.

SNAP Verification

For SNAP, HSD must use documentary evidence, such as pay stubs and utility bills, as the primary source of verification. 7 CFR 273.2(f)(4)(i).

With regard to SNAP interim reporting, federal law prohibits HSD from verifying income information that is not from a new source or that has not changed by more than \$100. 7 CFR 273.12(a). HSD has a policy of requiring all families to re-verify income at interim report if HSD has not verified it in the last 60 days. HSD does this based on USDA guidance on SNAP recertification processing. That guidance states that income is outdated when the state agency verified it more than 60 days from the first date of the new certification period.⁴ Interim reports do not establish a new certification period. Therefore, income verified at initial approval would not require re-verification at interim report. This is consistent with USDA guidance to not over-verify income at interim reports.⁵ HSD's interpretation would impermissibly nullify the reporting restriction at interim report that are meant to reduce burdens on families and administrative work for the state.

The case review showed that in a large share of cases HSD required families to submit information not necessary to prove SNAP eligibility. A number of families lost benefits or experienced delays due to the illegal requests for verification. For example, the Department terminated SNAP benefits after illegally requiring a family to verify unearned income (unemployment benefits) that could have been verified through electronic data sources as well as

⁴ See FNS Recertification Toolkit, p. 12 "While verification for the month of application is generally preferable, State agencies may use verification so long as it is no more than 60 days old relative to the first month of the new certification period and the household agrees that it is representative of their circumstances. This clarification is consistent with the recent revisions to 7 CFR 273.12(c)(3) and should also facilitate verification when processing an application in the last month of a household's current certification period."

⁵ See Memo to State Regional Directors, available at <https://fns-prod.azureedge.net/sites/default/files/snap/Interim%20Reporting%20Requirements%20for%20Participants%20Subject%20to%20Simplified%20Reporting.pdf>

cases in which a client was illegally required to verify loss of employment despite the fact that the clients are exempt from the SNAP work requirements that prohibit voluntarily quitting a job.

3. Incorrect Eligibility Determinations

The Decree requires HSD to provide applicants with a fair and equal opportunity to participate in the SNAP and Medicaid program, consistent with the goal of assisting all individuals seeking to apply for benefits. Plaintiffs identified 109 cases in which household members lost benefits or experienced a delay due to incorrect application of eligibility rules or processes. The largest share of denials was due to improper verification requirements as described above. **62 of the 288 cases (21.5%)** had incorrect application of eligibility rules that illegally denied benefits altogether or gave families fewer benefits than they were entitled to by law because HSD did not determine eligibility correctly.

These problems stem from HSD improperly calculating income for SNAP benefits and awarding families fewer months of eligibility than to which they are entitled. Federal law requires that families be required to renew Medicaid no more frequently than every 12 months. 45 CFR 435.916(a). The case review showed that HSD routinely denies families the full twelve months of eligibility for Medicaid that federal law requires when families are approved and renewed. HSD also illegally denies people experiencing homelessness the “homeless deduction” they are entitled to by law, which often results in a higher SNAP benefit. HSD’s response shows that the Department illegally requires individuals who are homeless to incur a housing cost to get the deduction. This makes no sense because many individuals who are homeless do not have shelter costs because they do not have shelter. 7 CFR 273.9(d)(6)(i) makes it clear that individuals must be provided the deduction if they are not receiving free shelter for the entire month. This does not mean that the family incurs actual costs. He or she might be sleeping outside. Where there are actual costs, individuals can elect to deduct actual costs, instead of taking the homeless shelter

deduction if those costs are higher and verified.⁶ This might happen for a family who temporarily stays in a motel for example. The federal definition of homelessness is intentionally broad to capture those people who do not have a permanent residence, including those who have temporary accommodations in someone's home.⁷ HSD must immediately stop denying eligible individuals this important income deduction.

The case review also showed that HSD terminates SNAP benefits when the TANF contractor is unable to meet with a participant during a home visit. Instead of following the appropriate procedure for requesting contact from a client and verifying questionable residency information when a home visit indicates the client may have moved out of state, HSD simply closes the case. This violates 7 CFR 273.12(c)3(i)(A). FNS wrote to HSD about this problem when it was discovered in cases from December of 2017 and January and February of 2018.⁸

The case review also showed that there are systemic problems with ASPEN that prevent proper approval of retroactive Medicaid. ASPEN requires a workaround (aka a "ticket") when the previous period of eligibility was for more than a 12-month period. When this happens, the ISD worker is locked out from determining eligibility for retroactive Medicaid and instead has to

⁶ 7 CFR 273.9(d)(6) (i) Homeless shelter deduction. A State agency may provide a standard homeless shelter deduction of \$143 a month to households in which all members are homeless individuals but are not receiving free shelter throughout the month. The deduction must be subtracted from net income in determining eligibility and allotments for the households. The State agency may make a household with extremely low shelter costs ineligible for the deduction. A household receiving the homeless shelter deduction cannot have its shelter expenses considered under paragraphs (d)(6)(ii) or (d)(6)(iii) of this section. However, a homeless household may choose to claim actual costs under paragraph (d)(6)(ii) of this section instead of the homeless shelter deduction if actual costs are higher and verified. A State agency that chooses to provide a homeless household shelter deduction must specify in its State plan of operation that it has selected this option.

⁷ See Food and Nutrition Act of 2008 §3(m), 7 U.S.C. §2012 (2008) and 7 C.F.R. § 271.2 (defining homeless individuals as those "who lack a fixed and regular nighttime residence; or whose primary nighttime residence is a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including a welfare hotel or congregate shelter); or an institution; or a temporary accommodation for not more than 90 days in the residence of another individual; or a place not designed for, or ordinarily used, as a regular sleeping accommodation for human beings (a hallway, a bus station, a lobby, or similar places).

⁸ See April 2018 Program Access Review conducted by FNS of the South Dona Ana County office.

submit a ticket to ASPEN administrators to ask them to make a change to the case so that retroactive Medicaid can be approved. If the ticket is not followed up on, the Program Request screen shows that retro was approved, but the Eligibility Summary will show retro months as closed. Ultimately, this means that retro was not truly approved due to ASPEN error. This is a known problem that must be fixed. *See* case number #####.

4. Rate of error in immigrant households.

Plaintiffs identified 35 cases that included non-citizens in the household. **Of those 34 cases, 23 had errors (67%) and 14 had benefits delayed or lost benefits for one or more months.**

Plaintiffs identified cases in which non-citizen household members were inexplicably required to re-verify their immigration status, when they were not even seeking benefits. Further, the case review showed that HSD is not utilizing the revisions the parties agreed to in the Notice of Case Action and HUMAD related to immigration status. HSD continues to deny families based on immigration status by telling them, they “do not meet immigration requirements.” Over two years ago, the Plaintiffs informed Defendant that this is not intelligible to families because they often interpret it to mean that there is a legal problem with their immigration status. We agreed on new language that explains the family is not in an immigration status eligible for benefits. This was documented in the reason codes supplied to and reviewed by a literacy expert. Defendant has repeatedly told the Court and Plaintiffs’ Counsel that the NOCA and accompanying reason codes are finalized and implemented following the literacy review. However, the file review showed that HSD continues to utilize the incorrect language, telling families that they do not meet immigration status requirements. HSD also utilizes a HUMAD to ask families for immigration status verification that states “foreign status not declared” and that does not list which documents or information the family must provide, in violation of the Decree, Section III, Paragraph E. *See* Case #####.

Conclusion

Plaintiffs' file review shows that HSD is not in compliance with the Decree, Section III and the requirement to remove systemic and programmatic barriers from the application process. These findings are similar to those found in earlier case reviews, where Plaintiffs' Counsel found that a large share of families receive incorrect notices and are required to provide verification that is not necessary to determine eligibility. *See* Docs. 294, 543, and 618 (exhibits 6-9) (the first file review that took place in this case is not on file with the Court). HSD must take immediate action to comply with the Decree, federal law and other Orders of the Court to prevent the illegal denial and delay to families eligible for food and medical assistance.