IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DEBRA HATTEN-GONZALES, et al.,

Plaintiffs,

vs.

No. CIV 88-0385 KG/CG
Consolidated with
No. CIV-88-0786 KG/CG

DAVID SCRASE, Secretary of the New Mexico Human Services Department,

Defendant.

PLAINTIFF'S MOTION TO ENFORCE COMPLIANCE WITH THE CONSENT DECREE AND ORDERS OF THIS COURT AND REQUEST FOR RELIEF

Plaintiffs respectfully move this Court to for an Order requiring Defendant to comply with the terms of the Second Revised Modified Settlement Agreement, entered August 1, 2018 (hereafter "the Decree") and the Court approved joint corrective action plans entered to address Defendant's non-compliance with the Decree. *See* Docs. 853, 878, 879. Specifically, Plaintiffs seek immediate relief to address Defendant's failure to implement the following corrective actions necessary to comply with the Decree and allow eligible New Mexicans to receive the food and medical care to which they are entitled: 1) changes to Defendant's IT system so that eligible New Mexicans in families that include immigrants are not illegally denied benefits, 2) changes to defendant's standard form notice language so that families receive information about the steps they must take to complete the application process and the reason they are denied benefits, and 3) implementation of basic eligibility information in a manual for workers so that HSD can achieve uniformity in processing and other requirements of the CAP. Plaintiffs also seek to enforce the procedural requirements of the Decree and this Court's Orders that require Defendant to meet and confer, submit joint status reports, provide information about changes to the application process, share information related to notices and IT changes, and establish communications between the parties via three Court

required experts. The recent dramatic shift in the tone and cooperation from HSD, perhaps coincidentally, coincides with a new General Counsel who previously represented HSD in this case. When he was last involved in this case, the Court had to issue an Order directing him to cooperate in good faith with Plaintiffs' Counsel. *See* Doc. 317, attached as Exhibit 1. Plaintiffs believe a similar Order is necessary at this time.

In support of this Motion, Plaintiffs state:

1. On August 27, 1998, the Court entered an Order Modifying the original Settlement Agreement in this case, along with the Modified Settlement Agreement.
2. Since 2013 alone, this Court has entered more than 10 separate Orders directing Defendant to take action to bring its administration of the food and medical assistance programs into compliance with the Second Modified Settlement Agreement. This included finding Defendant in Contempt and appointing a Special Master to monitor and provide technical assistance to HSD.
3. On April 5, 2018, the Court Ordered the parties to revise the Second Modified Decree to reflect the parts that have been completed, update requirements and dismiss all moot court orders. *See* Doc. 836, paragraph 4(a).
4. On August 21, 2018, the Court entered an Order Modifying the Settlement Agreement, along with the Second Modified Settlement Agreement (herein after "the Decree.")
5. The Second Modified Consent Decree contains the same substantive requirements as the first modified consent Decree. The Decree requires Defendant to timely process eligibility determinations and benefits and implement application processing practices that comply with federal law and regulations. It also requires a case review process and monitoring by class Counsel for Plaintiffs to determine Defendant's compliance. *See* Decree, Sections I-IV generally.
6. On January 31, 2019 Plaintiffs' counsel completed a review of 288 food and medical assistance cases and issued a report finding that Defendant is not in compliance with many requirements of the decree or Federal law. The Special Master validated this finding in a report. Defendant did not oppose the findings of the Plaintiffs or the Special Master.

7. On July 10, 2019, the parties jointly moved the Court for approval of a Corrective Action Plan (CAP) that would address the violations of the Decree uncovered in the Case review, as well as unfulfilled requirements under pre-existing Court Orders. The Court issued and Order approving the CAP on July 12, 2019. CAP is attached as Exhibit 2.
8. As set forth in detail below, Defendant is not complying with the Decree and CAP.

Memorandum of Law

I. DEFENDANT IS OUT OF COMPLIANCE WITH THE DECREE AND THE CORRECTIVE ACTION PLAN.

While Plaintiffs' Counsel and Defendant Secretary Scrase were able to cooperatively establish a Corrective Action Plan (CAP) that sets out actions that the Human Services Department (HSD) must take to comply with the Decree, Defendant no longer believes the requirements of the CAP and this Court's prior Orders require compliance.

(1) Defendant Will Not Set Deadlines to Stop Immigrant Eligibility Errors Caused by Defendant's IT System

Plaintiffs' review of case files in the most recent file review identified a 67% error rate in cases that include non-citizens in the household, and out of those error cases, 60% resulted in benefits delayed or lost for one or more months. *See* Plaintiffs' File Review report attached as Exhibit 3 and the Special Master's file review report, attached as Exhibit 4. The Court Approved joint corrective action plans list immigrant eligibility as a systemic barriers and identify defendant's IT system, training and notices that must be changes to eliminate the barrier. *See* Exhibit 2 at 4.b. Indeed, Defendant has been ordered to fix these barriers in several orders of the Court. *See* Docs. 587, 878, 879. The CAP requires Defendant to take specific actions to fix these barriers, including: training for the immigration specialist, improved immigration related trainings for HSD's Income Support Division (ISD) staff, and implementing previously identified IT fixes, known as "Change Requests" or CR's into ASPEN. *See* Exhibit 2, Section 4.b. Defendant has not completed these actions by the agreed deadlines and as to those other actions for which the parties agreed to determine deadlines at a later date with additional information from HSD, HSD has refused to provide deadlines.

Plaintiffs and Defendant have met as an immigration workgroup four times since July 18, 2019 to discuss the previously-ordered and agreed-upon IT Changes. These changes are intended to prevent illegal denial of benefits to eligible families by 1) ensuring that eligibility is determined based on immigration status, rather than immigration documents, 2) ensure that Defendant is not illegally barring eligible families from benefits by incorrectly applying a 5 year waiting period in federal law, known as the "five year bar" for some immigrants at 8 U.S.C. 1613, 3) correctly request immigration status information from applicants, and 4) correctly approve immigrants who are otherwise eligible and attest to an eligible immigration status but do not have verification at the time of application, as required by 42 CFR 435.956 (a)(5) and (b). *See* other Orders of the Court, Docs. 477, ¶ 5, 587 ¶7, 8, and 10, 601, ¶ 5 and 7.

At the first workgroup meeting, HSD's immigration specialist reported that CR 2174, which incorporated all the elements described above, would now be unreasonably broken into the following four separate IT changes to the ASPEN system: 1) CR 2174 five-year bar changes which will ensure immigrants who are exempt from the waiting period receive timely and accurate benefits, 2) CR 2884 eligibility changes to determine eligibility based on immigration status, 3) CR 2885 reasonable opportunity changes, and 4) CR 2886 the electronic immigration status verification process. *See* notes from the first immigrant eligibility meeting attached as Exhibit 5. Plaintiffs' Counsel and the Compliance Specialist requested the specific IT documents that contain the breakdown of IT functions addressed in each CR. *Id.* Defendant could only provide the new narrow version of CR 2174 and stated that no other documents had been developed to implement the other changes.

The parties planned to meet on August 19, 2019 with HSD's IT contractor DeLoitte. This meeting was then rescheduled to October 15, 2019. HSD cancelled the October 15, 2019 meeting and did not provide any information as to when the parties can work with Deloitte to complete the IT changes identified in the CAP and determine feasible deadlines. *See* Exhibit 6. In the meantime, Plaintiffs requested a meet and confer on immigrant related changes and training. HSD stated that it would not honor a request for a meet and confer on immigrant related issues until Plaintiffs provided documentation that the items in the CAP are necessary, the Special Master directed Defendant to meet with Plaintiffs' Counsel. *See* Exhibit 7. At

that October 1, 2019 meeting held at the Special Master's request, HSD notified Plaintiffs' Counsel and the Special Master that DeLoitte cannot meet to discuss the immigrant related IT changes until early 2020 at the earliest. HSD agreed to provide the Special Master and Plaintiffs' Counsel with a date by when HSD could initiate work and a plan that includes deadlines for implementing the IT changes in the CAP. On November 6, 2019, Defendant send a letter to Plaintiffs' Counsel and the Special Master, which does not identify any deadlines or dates for implementation of the IT changes. *See* Exhibit 8.

These issues have been litigated extensively in this case with multiple Orders, including the Order holding Defendant in contempt. *See* Doc. 757, p. 10-12 and Doc. 730, p. 10-12. Defendant's failure to implement these changes causes eligible members of the Plaintiff class to be denied benefits in violation of their rights under federal law. Defendant's failure to properly determine which immigrant applicants are subject to the 5 year bar causes families to be incorrectly denied benefits. For example, class member E.G., who has Deferred Action for Childhood Arrival (DACA) status applied for Medicaid benefits in December of 2018 and eligible for EMSA when her baby is born. E.G. gave birth to her child in March of 2019 and again sought EMSA to cover the birth and delivery of her child. After NM Center on Law and Poverty assisted E.G. in her EMSA case, HSD processed the EMSA, but could only do so by marking E.G. as "undocumented" in the case file and stated that this information is necessary to "make Emergency Medicaid process correctly." *See* Case Note from April 16, 2019, in Exhibit 9.

Class member M.A. sought benefits for her daughter, who has a border crossing card. The child was erroneously approved for full Medicaid and HSD ran eligibility for M.A., even though she was not seeking benefits for herself. In September, the child was terminated from Medicaid and her case status was changed to "volunteer attestation to undocumented" even though the child is not undocumented. *See* Case Note 12 in Exhibit 10. In addition, listing family members as undocumented in case files violates federal law at 41 CFR 435.914(a) and 7 CFR 273.2(f)(6) and subjects New Mexico families to potential reporting to Immigration and Customs Enforcement. HSD has a history of creating short cuts in case processing that includes incorrect client information. *See* Doc. 730, p. 17-20.

Defendant continues to request immigration status documents from families when they are not necessary to determine eligibility in violation of the Decree, Section III, ¶ (G)(1) and (2), and does so incorrectly. When class member C.A. applied for Emergency Medical Services for Aliens (EMSA) this month, HSD sent her a demand for verification of immigration status, which was listed as "immigration status not declared." *See* Exhibit 11. This is a program for individuals who are eligible for Medicaid, but for their immigration status. 42 CFR 440.255. In fact, New Mexicans seeking EMSA attest that they are not in an eligible status and no verification of immigration status should be required.

For families who may need to provide immigration status documentation, Defendant's form to request verification documents, known as a "HUMAD" (Help Us Make a Decision), is not programmed to be sent with language to adequately notify families of what is necessary to determine eligibility. The case review showed that HSD sends partially complete notices to families stating "immigration status not declared" without giving any information about the verification documents the client can turn in, or a deadline for doing so as required by the Decree Section III, Paragraph E and 7 CFR 273.2(d)(i). Standard form documents provided to Plaintiffs' Counsel in October of 2019 listing the language that goes into the HUMAD shows that "immigration status not declared" is a part of the standard language used for verification requests. *See* Verification Check List document, attached as Exhibit 12. HSD staff readily acknowledged this problem in an IT meeting, yet HSD's counsel states that it does not exist. *See* letter from Defendant's General Counsel, attached as Exhibit 7.

Defendant's system continues to notify households with family members who are not seeking benefits that family members who did not apply are denied because they "do not meet immigrant requirements." *See* Case Notes and standard Notices sent to a families seeking benefits only for their children, attached as Exhibit 13. In fact, these family members have not applied for benefits. Template documents that Defendant uses to create notices for all members of the Plaintiff class contain incorrect information for immigrant families that does not comply with the Decree. Defendant's list of denial reasons continues to use a standard denial reason "does not meet immigrant requirements" to deny both families who are not seeking benefits but are applying for ineligible members, and those who are not in an

immigration status eligible for benefits. This was verified in the case review. Defendant long ago agreed to change this denial reason to notify only immigrants who were seeking benefits that they are not eligible because they "are not in an immigration status eligible for benefits under federal law." *See* agreed list of denial and closure reasons attached as Exhibit 14. The reason for this change is that the current notice causes families to erroneously believe they cannot receive benefits because they do not meet federal requirements of their immigration status. This work was supposed to be done as a part of the CAP notice of case action changes. *See* Section Exhibit 2 at Section 2.c.3., (Spanish and English reason codes). However, Defendant now states that he will not put any resources towards changing application denial and closure reason codes. *See* letter from HSD attached as Exhibit 15. This is more fully discussed below.

2) Defendant's Immigrant Eligibility Training is Incorrect

The CAP states as part of the permanent solution to the immigrant eligibility systemic barrier, "Defendant will implement improved immigrant related trainings." *See* Doc 878-2. This has been a long standing requirement Ordered by the Court, see Docs 477, 587, and 601. Defendant's failure to implement accurate immigrant eligibility training is one of the reasons this Court held Defendant in Contempt. *See* Doc. 757, p. 10-12. On August 30, 2019, Defendant provided Plaintiffs with a copy of a new immigrant eligibility training webinar, as required by the CAP at 4.b(3)(c). In a letter dated September 20, 2019, Plaintiffs provided meaningful and important feedback to the webinar to improve the accuracy of the training, including the fact that Defendant has several IT changes on permanent hold and the training assumes that the IT system functions correctly. *See* Plaintiffs' letter attached as Exhibit 16. Most alarmingly, Plaintiffs expressed concern that the training advises workers to document a client as "volunteer attestation to undocumented status" whenever the immigration-status information provided cannot be verified after multiple attempts in the federal database used to verify immigration status information. *See* Slide attached as Exhibit 17. In this scenario, the client has not attested to an undocumented status. *Id.*

Defendant responded without substantively addressing plaintiffs' comments and denied that any changes are necessary. *See* Exhibit 7. After the Special Master required Defendant to meet with Plaintiffs' Counsel, HSD sent a letter stating that work to overcome the systemic barriers to immigrant eligibility is

not required by the CAP and that the training telling workers to document clients for whom immigration status could not be verified as having "attested to undocumented status" would be removed. *See* Exhibit 8. Defendant did not explain what workers would be told to do instead or when the training would be provided. In fact, HSD continues to incorrectly mark families as undocumented in their case files, something that both violates federal law and puts families in danger, should Immigration and Customs Enforcement seek information from HSD about families, as described for class member A.Q. and C.A. above.

3) Defendant's Notices do not Comply with the CAP or the Decree

New Mexicans do not receive notices that comply with the CAP or the Decree. The CAP identifies several systemic barriers in the Defendant's notices, Defendant has not remedied any of these systemic barriers and is openly refusing to fix others.

a. Notices do not notify families of the reason for a benefit decision based on income.

Federal law requires notices to explain the reason for a decision. To comply with the law, the Decree requires HSD to ensure all notices have the level of specificity required in *Ortiz v. Eichler*. *See* Decree, Section III, ¶ (B). This means that families receive a mathematical calculation in a benefit notice in order to show the reason for a benefit decision, particularly one that deny any amount of benefits based on the family's income. HSD also uses the calculation tables in Medicaid approval notices to notify families of the basis of the approval, as required by 42 CFR 435.916(a)(2)(i). The case review showed that a large share of families do not receive information about the basis of their Medicaid approval or benefit denial, as required by the law and the Decree, because the calculation table is not included in the notice. HSD agreed to fix this problem in the Court approved CAP. *See* Exhibit 2, Section 2.c.1. In meetings to implement the CAP-required IT change to address this error and in an email to HSD, Plaintiffs provided Defendant with an explanation of the continued basis of the calculation table problem, provided sample case numbers, and attached example notices demonstrating the problem that counsel for Plaintiffs received on behalf of their clients. *See* Exhibit 18.

On October 7, 2019, Defendant informed Plaintiffs' counsel that Secretary Scrase now believes calculation tables are not required and announced a plan to request a modification to the 2018 Consent

Decree and July 10, 2019 CAP to remove the requirement of including calculation tables in NOCAs. *See* Exhibit 19. To date, although nothing has been filed with the Court, HSD has halted all work to comply with this CAP requirement. In the meantime families do not consistently receive information about the basis of their Medicaid approval or the basis for a reduction or full denial of benefits. For example, in October 2019, HSD entered and incorrect standard deduction that applies to SNAP cases, causing the state to incorrectly notifying almost every family on SNAP that their benefits were being reduced. A large share of these families did not receive a calculation table that showed the deduction. As a result, families had no way of determining if the reduction was correct.

b. Notices do not contain correct denial and closure reasons

Federal law requires notices to accurately state the reason for a denial of benefits. *See* 7 CFR 273.13(a)(2); 42 CFR 432.210. The reason must be specific and individualized, providing enough information for an applicant to understand the reason for the agency's decision. Goldberg v. Kelly, 397 U.S. 254, 264-5 (1970). The case review showed that HSD did not provide applicants with accurate reasons for benefit denials. The CAP requires Defendant to implement notices with correct reason codes. *See* Exhibit 1 at Section 2.c.3. The CAP requires the Defendant to accomplish this through "continuous review and improvement of NOCAs (Notice of Case Action) through enhancement CRs" (Change Requests) *Id.* However, Defendant has stated that it will not address reason codes in the CAP related to the NOCA calculation tables, stated that reason codes are "likely to come up" when defendant is working on other CRs and that in the interim Defendant will not use its resources for "ongoing improvement activities and not to report on or explain reason codes." *See* Exhibit 15 at p. 3. HSD staff also informed Plaintiffs' Counsel in meetings that they do not intend to address reason codes in the NOCA CRs. When Plaintiffs raised this with Defendant at a meet and confer, HSD's General Counsel stated that the Department would not take any action to address incorrect denial reason notifications unless Plaintiffs' Counsel document the issues that exist. Plaintiffs responded that this is documented in the case review and required by section 2.c (3) of the CAP.

At the August 9, 2019 meet and confer, counsel for Plaintiffs again requested the Defendant's most recent list of denial reasons that populate in Notices. Defendant provided this list by email on August 19, 2019. *See* Exhibit 20. The provided list includes reasons that are not individualized or specific that violate the Decree and federal law. For example, the list included the following reason code: "you do not meet program requirements." This reason code is illegally vague. The Court previously ordered HSD to eliminate these illegal denial reasons. *See* Doc 549 Paragraph 6. Yet, these illegal reasons remain in HSD's most recent list of standard denial reasons that appear in notices. Members of the Plaintiff class continue to receive notices that state reasons that are not listed in Defendant's template, including a case decision reason that states: "Your case required a manual intervention." *See* Notice attached as Exhibit 21. Plaintiffs have also inquired about the continued use of the incorrect denial reason, "you do not meet immigrant requirements" and HSD General Counsel stated that this no longer appears in notices. When Plaintiffs inquired about when that was fixed, because it was identified as an issue to be remedied in the CAP and there has been no correspondence on this issue, HSD could not provide any information to verify this "fix." In fact, members of the Plaintiff class continue to receive this incorrect notice, as described in section I(1) above, see Exhibit 9 for an example.

In addition to the problems described above, HSD refuses to fix very basic errors in its notification system related to Emergency Medical Services for Aliens (EMSA). EMSA is a program that pays for medical costs stemming from an approved Emergency for an individual who is otherwise eligible for Medicaid but for his or her immigration status. *See* 42 CFR 440.255. In the review of HSD's notice language and documents, the parties discovered that HSD does not have a system for notifying applicants that they are denied EMSA based on a non-qualifying emergency. An appropriate notice would allow applicants to contest an illegal denial by proving they had a qualifying and bona-fide medical emergency. After years of attempting to address this simple issue and ensure that HSD has a system to notify New Mexicans denied EMSA at a sixth-grade reading level as required by federal law and the Decree, HSD agreed to incorporate this violation in the CAP, Section 4(d)(2). HSD then provided a "manual notice" that had never been shared with Plaintiffs' Counsel or the Special Master and stated that the notice was provided "as a courtesy." *See*

Exhibit 22. Despite the court approved agreement to address this issue through the CAP, HSD wrote to Plaintiffs' counsel on August 23, 2019 that the notice denying benefits based on a non-qualifying emergency "goes out through the third-party assessor, not HSD, [and] it is not an eligibility or a denial of eligibility notice. It is a coverage notice sent out by the MCOs. Not subject to DHG." Id. This is incorrect, all documents used in the application process are subject to the Decree's requirements, no matter who sends them out. The Decree states that

> "The application process begins when an application for SNAP or Medicaid assistance is submitted to HSD and ends when a notice of eligibility decision and, if eligible, benefits are deposited in the mail or available through electronic transfer. The application process includes providing relevant written information to the applicant, screening an application, holding an application interview, verifying eligibility factors, responding to applicant requests for assistance, extensions of time, and mailing an eligibility decision, and if eligible benefits." *See* Decree, Section I, paragraph A

The fact that Defendant outsources some functions of its eligibility determination to a third party does not eliminate the Decree requirement that Defendant's eligibility notices meet the requirements of the Decree. Defendant seemed to understand this when he incorporated this specific issue related to EMSA in the CAP, however, his position has changed in recent months and Plaintiffs simply seek the Court's direction to bring Defendant's notices into compliance with a very basic and long-standing requirement of the Decree.

c. Requests for Verification Do Not Meet the Requirements of the Decree and Defendant is Not Addressing these Issues as Required by the CAP.

Federal law and the Decree require HSD to request only those documents from applicants that are necessary to determine eligibility. *See* Decree, Section III, ¶ G(1) and (2). The Decree also requires Defendant to provide households with a notice that informs them of verification requirements the household must meet, including examples of documents that meet the verification requirement. *See* Decree, Section III, paragraph (E) and 7 CFR 273.2(c)(5). This has been an issue since the filing of the original complaint in this case and has been the subject of several case review findings. The case review showed that Defendant's notice requesting verification, known as the HUMAD (Help Us Make a Decision), is frequently incorrect. Defendant agreed to fix these problems in the CAP. *See* Exhibit 2, Section 2.a.

However, Defendant has not fixed these problems and does not have a process in place to meet the requirements of the CAP.

First, HSD maintains that problems they know about do not exist and will not be addressed, as described in Section I (1) above about HUMADs sent to non-citizens who did not declare immigration status. Second, HSD has chosen to delay addressing known issues with the HUMAD so corrections can be accomplished in conjunction with other IT "CR" changes, and then not address any of those changes. For example, the case review shows that HSD has a pervasive and illegal practice of terminating Medicaid for families who do not turn in paperwork that is only required for unrelated programs. Instead of ceasing verification from these families, HSD plans to issue an "optional HUMAD" in which families are told in a confusing fashion that the "following expense information is optional to provide." The notice goes on to request verification for Medicaid purposes, and states the family may be able to get a better category of Medicaid or have benefits extended if they turn in the paperwork. HSD agreed in meetings that the notice is confusing and must be changed, but does not have plans to do so. In addition, HSD has not provided any evidence that these supposed notice changes have gone through literacy review as required by the Decree. Further, if a client has reported a change in income on SNAP paperwork, that information may require paper documentation for SNAP proposes, but under Medicaid regulations and this Court's Orders, Medicaid can and must be renewed if the information can be verified electronically. *See* Doc. 475, ¶ 5. This means that an "optional HUMAD" may not be appropriate. Plaintiffs have raised this in IT meetings with Defendant and have not received a response. Third, HSD has not had language that tells applicants what documents can be turned in to meet the application requirements reviewed by a literacy expert. In some cases, language is not even written. Defendant does not have a coordinated process that can track all the necessary changes and ensure they are completed by the deadlines in the CAP.

d. Notices Regularly State that Benefits Have Changed When Benefits Have Not Changed

Federal law and the Decree require Defendant to issue accurate. The Defendant's notices often state that a participant's benefits have changed, when there is no change in benefits. This was identified as a problem in the case review. The CAP outlines that the Defendant will remedy this issue through an IT

change, known as CR 2499, with a completion date of September 10, 2019, and a training prior to the release of the IT solution. However, counsel for Plaintiffs received a client notice on September 11, 2019, the day after the deadline to remedy this issue, that stated a change in benefits when the benefit amount did not change. *See* Exhibit 21. Counsel for Plaintiffs raised this issue during a September 24, 2019 IT meeting. That meeting happened 12 days after the deadline set in the CAP to fix this issue. During that meeting, Defendant's representatives stated that the problem only happens when a case is processed following an "Interim Review." However, Counsel for Plaintiffs knows this is not the case, due to receipt of the September 11, 2019 notice. When Plaintiffs attempted to bring this to the attention of the appointed SNAP expert, with an HSD General Counsel Representative present, Plaintiffs were told to send the information to Paul Ritzma, HSD General Counsel and that no further changes would be made.

4) Even Though HSD Has Refused to Set Many Deadlines Necessary for Decree Compliance in the CAP, HSD is Expending Resources on Unrelated IT Projects.

While Defendant has not complied with federal law in the basic administration of SNAP and Medicaid, as evidenced by the case review and the items in the agreed-CAP, Defendant continues to expend resources on unrelated matters.

For example, since 2014, HSD has been under Court Order to fix its Medicaid Renewal process so that families are renewed onto Medicaid when HSD has sufficient information in the case file to do so. *See* Doc. 475, ¶5. The Case Review showed that in a large share of cases, families are not renewed onto Medicaid and are often illegally denied Medical assistance when they fail to turn in unnecessary paperwork. *See* Exhibit 1, Section 1.c. The joint CAP requires Defendant to fix the automated renewal process by the end of December 2019, so that it properly renews eligible families and in the interim, between July 21, 2019 and the implementation of the IT fix, HSD must manually review and renew Medicaid cases. HSD identified that the reason its automated system fails to properly renew families is because it does not access all available electronic interfaces, even though this is required by federal law. *See* CR document submitted to Deloitte, attached as Exhibit 23. Instead of accomplishing this task immediately, HSD has prioritized a new automated application processing practice, known as real time eligibility – which is an option under

federal law. This optional process requires the utilization of the same electronic interfaces that are mandatory at renewal. HSD has expended resources to implement RTE by November 1, 2019, while the basic functions of renewal are not fixed and immigrant eligibility changes, which have been required for over a decade, do not even have a start date. Plaintiffs are encouraged that Defendant is pursuing options to facilitate application approvals, but not when families will be kicked off or not be able to take advantage of the new process due to basic eligibility errors in HSD's IT system. Further, HSD has not implemented important content into a worker manual, that is required by the CAP and Doc. 712 and does not plan to do so until July of 2021. HSD has not even proposed the regulatory changes required by the CAP at Section 1.e. (c)(2), which are supposed to be done by October 31, 2019. *See* letter from Defendant stating the regulations would be re-published by August 13, 2019 attached as Exhibit 24. Defendant has not identified deadlines for implementing the long required changes to the online application and renewal form identified in the CAP at Section 4.a. *See* letter from HSD about these issues attached as Exhibit 25.

The Special Master recommended that HSD postpone plans to implement changes to SNAP and Medicaid that are not required for compliance with the Decree and federal law. *See* Exhibit 26, letter from the Special Master. In the past, the Court has similarly criticized HSD's attempts to implement program changes when basic program administration is not fixed. *See* Doc. 658, p. 20. At a minimum, these changes should not be prioritized above changes necessary to bring the basic administration of the programs into compliance with the Decree, federal law and the CAP.

II. **Defendant Is Not Complying With the Requirements of the Decree and Orders of the Court that Require Communication, Meet and Confers, and Sharing Information and Data**

The Decree requires that the parties make good faith efforts to resolve any differences that may arise in the course of rendering the Decree operational. Plaintiffs' Counsel have attempted to meet in good faith, share and seek information necessary to determine whether Defendant has made changes necessary to ensure New Mexicans receive the food and medical assistance to which they are entitled, and address problems that block compliance with the Decree, Court Orders and agreements between the Parties. In recent months, actions previously agreed to by HSD and specifically by Secretary Scrase have been

reversed by HSD and Plaintiffs have not been able to meet with or address issues directly with HSD as the Court intended. The Special Master has also reported difficulty in obtaining information from HSD and has had to direct HSD to meet and take basic steps, such as responding to draft status reports and providing essential data.

1. Defendant does not comply with the Meet and Confer and Joint Status Report process

Defendant does not timely draft or respond to draft Joint Status Reports and has stated that he does not believe the monthly Meet and Confer process is required by the Decree. The Court Ordered the parties to meet and confer no later than the 20th of each month. *See* Doc. 500, paragraph 12. Doc. 500 was modified on March 31, 2018, but paragraph 12 was not changed. *See* Doc. 835. The parties agreed to a process for drafting the Joint Status Reports following the Meet and Confer. Starting in August of 2019, Defendant has not drafted a JSR or responded to Plaintiffs' draft JSRs unless prompted by the Special Master. *See* Exhibit 27, emails from the Special Master directing Defendant to draft and respond to JSRs. After Defendant responded to Plaintiffs' most recent draft of a JSR following a directive from the Special Master, Defendant further obstructed the process by denying the existence of almost all of the objective outcomes of the meeting, despite confirmation of the outcomes by the Special Master. *See* Exhibit 28 and Doc. 891.

Similarly, Defendant has stated that Meet and Confers are not required by the Decree and usually initiates the development of agenda items only after being prompted by the Special Master. Defendant has also refused to meet and confer about Decree compliance issues outlined in the CAP, including the immigrant eligibility changes and denial reasons that appear in notices as described above unless Plaintiffs' Counsel re-document what has already been proven in a case review and even where specific steps are required by orders of the Court. This is the opposite of good faith negotiations required by the Decree.

2. Defendant does not allow Court Required Experts to Communicate with Plaintiffs' Counsel and the Special Master, as required by Doc. 836

The Court ordered HSD to appoint three "knowledgeable subject matter experts" in the program areas of SNAP, Medicaid and Immigration. The three positions have "exclusive responsibility for serving as liaisons between Plaintiffs' Defendant and the Special Master." *See* Doc. 836, paragraph (g). However,

Plaintiffs are told not to communicate directly with the Subject Matter Expert and to direct communication to HSD's General Counsel, even when Plaintiffs make requests of the experts with other members of HSD's legal team present. Other requests are simply not responded to. For example, in October HSD issued notices to all SNAP participants with incorrect benefit information due to an error in entering a new Standard Utility Allowance. Plaintiffs' Counsel inquired with the appointed SNAP expert via email on multiple occasions and copied HSD General Counsel Ritzma, yet no response was ever provided to Plaintiffs' concerns about the error and notices. In a meet and confer, Mr. Ritzma denied any knowledge of the Court's order on this matter.

3. Defendant does not share information about changes to the application process with Plaintiffs' Counsel

The Decree requires HSD to share information about changes to the application process and allow Plaintiffs' counsel 30 days to provide comment, unless emergency implementation is required. *See* Decree, Section IV, paragraph E. Defendant continues to roll out entirely new application procedures without providing Plaintiffs' Counsel an opportunity to comment. For example, Defendant plans to automate the application approval process for Medicaid, but has not provided any information about the IT logic or functionality. Plaintiffs have provided some feedback on the computer portal associated with the process, but could not provide meaningful comment without an overview of how the process works internally. Plaintiffs had to learn from external parties that the Defendant intents to implement these changes on November 1, 2019. *See* Exhibit 29.

4. Defendant does not provide data required by the Decree

The Decree requires Defendant to provide all the data listed in Section IV, including but not limited to quarterly data on the monitoring activities conducted by the federal agencies that oversee SNAP and Medicaid. Defendant failed to provide this data for over a year. When Plaintiffs' Counsel wrote to HSD about the problem, the information was not provided until the Special Master intervened and set deadlines for submission. *See* letter from Special Master in Exhibit 27. Since that time, Plaintiffs have learned of at least one critical visit from the Food and Nutrition Service detailing problems with

Defendant's SNAP EBT cards that was not provided to Plaintiffs' Counsel. Plaintiffs are uncertain what other required information Defendant is withholding.

5. Defendant does not provide information to the Special Master necessary to track compliance with the Decree.

The Court Order appointing a Special Master requires Defendant to "ensure that the special master is provided all information and data, access to all HSD offices and employees, access to case files, access to the ASPEN system and all HSD contractors working on the ASPEN system, and such other access or assistance as the special master determines may be necessary to perform the duties set forth in this Order." *See* Doc. 751 paragraph (F). The special master also has the duty of ensuring "that Plaintiffs' Counsel are supplied with data and other information necessary to allow them to track the status of compliance by HSD." Id. at paragraph (G).

The Special Master has consistently raised with Defendant that he must be able to receive information directly from Department staff related to Decree compliance. At the last meet and confer, the Special Master stated that he should not have to wait for HSD's General Counsel to review data and information that the Court Orders require HSD staff to provide upon request. The Special Master also stated that one of his requests for data was outstanding for over a month. The special master has directed HSD to provide data to Plaintiffs' Counsel on multiple occasions, but the data is not provided by the deadlines required.

Conclusion

Plaintiffs have worked diligently in good faith with Defendant to resolve the illegal denial and delays of benefits to eligible families found in the case review and that have been long standing in this case. Plaintiffs have attended meetings, sought to resolve these issues in Meet and Confers, and written many letters to Defendant. Defendant notified Plaintiffs that it intends to seek permission from the Court to cease regular meetings and cooperative work on this case. As the Court is aware, these problems have devastating impacts on the lives of New Mexicans, who are individuals and families that need access to food and healthcare, like all of us. Because of the increasing resistance to cooperation by Defendant and

because of the nature of this motion, Plaintiffs have not sought Defendant's position on this motion and are seeking the immediate assistance of the Court.

Wherefore, Plaintiffs respectfully request that this Court enter an Order requiring HSD to: Implement all changes required by the Court-Approved Corrective Action Plan by April 1, 2019;

1) Meet and Confer in good faith with Plaintiffs' Counsel no later than the 20th of each Month, submit a joint status report within 10 days of the meet and confer, and promptly provide all data and information required by the Decree,
2) Agree on and promptly provide the set of data or information by January 1, 2020, necessary to determine compliance with each of the items enumerated in the CAP, with deadlines for the data's submission to the Special Master and Plaintiffs' Counsel,
3) Comply with this Court's Order, (Doc. 751) and provide the Special Master and compliance specialist with direct access to all data and information they need to determine HSD's compliance with the Decree and other Orders of the Court.
4) Comply with this Court's Order Doc. 836, which requires Plaintiffs' Counsel to have direct access to the three subject matter experts in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2019, I filed the foregoing pleading electronically with the United States District Court, causing the same to be electronically served on opposing counsel, Paul Ritzma at paul.ritzma@state.nm.us.

/s/ SOVEREIGN HAGER

Sovereign Hager