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July 1, 2014

**VIA ELECTRONIC MAIL:**

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**Re: JM v. NM DOH, NO. CV-07-604 RB/ACT**

Dear Mr. Block and Ms. Cordova:

We are writing to provide to you Plaintiffs' submission for inclusion in DDPC's fourth annual report with respect to implementation of the January 8, 2010 settlement agreement in *JM et al. v. New Mexico Department of Health et al.* ("Settlement Agreement").

Unfortunately, this report is a negative one. Although it has been over four years since Plaintiffs dismissed their lawsuit against the State in exchange for Defendants' promises to take specific actions set forth in the Settlement Agreement, DOH Defendants and DDPC Defendants still have not provided some of the promised benefits to a number of the hundreds of former Training School residents who are entitled to the benefits of the Settlement Agreement.

Last year, the Department of Health (DOH) achieved substantial compliance with its initial obligation to assist the former residents to apply for various government-funded services. The Settlement Agreement contemplated achieving that result in ten months; but it took over three years. However, DOH has thus far failed to complete its second obligation: to have its employees, the Community Services Integration (CSI) case managers, assist the former residents to get the other services and supports that were recommended for them by the neutral evaluator, above and beyond

applying for services. In addition DOH has been failing to provide some of the former residents with the on-going case management services from CSI workers that are also required by the Settlement Agreement

### **Noncompliance During the First Year (May 2010 through June 2011)**

The letter drafted by Plaintiffs' counsel on July 1, 2011, that was included in DDPC's first annual report, set out the violations of the Settlement Agreement that occurred between May 2010 and June 2011.

In 2010, the Department of Health (DOH) first substantially violated the Settlement Agreement by excluding from its benefits those people who were enrolled in any Waiver program; over 100 people. On August 10, 2010, the Arbitrator ordered DOH to promptly cure that violation by arranging for professionals from the Columbus Organization to provide the required decisional capacity evaluations to all eligible persons, including those persons enrolled in a Waiver program.

In 2010, Defendants also violated the Settlement Agreement by blocking our ability to evaluate compliance, and to assist members of the proposed class, by refusing to honor the release of information forms signed by 30 members of the proposed class. After a November 9, 2010 Arbitration Hearing, the Arbitrator ordered all Defendants to comply with our record requests within 30 days of receipt of a request; ordered DOH to verify in writing any refusal by a member of the proposed class to be contacted by DOH agents; and ordered DOH to have its Community Services Integration project ("CSI") staff, DOH employee case managers, provide the required periodic visits to members of the proposed class.

In November 2010, the DOH Defendants issued their first report regarding their actions to comply with the Settlement Agreement. The report showed that CSI case managers were not visiting members of the proposed class at least quarterly and were also maintaining caseloads that exceeded the limit set forth in the Settlement Agreement (no more than 40 people per case manager). On November 20, 2010, Plaintiffs' counsel made our third arbitration demand, and on December 16, 2010 the third Arbitration Hearing was held. On January 20, 2011, the Arbitrator ordered Defendants: to report on the activities of CSI workers; to report periodically on the status of guardianship, Personal Care Option (PCO) and Waiver applications for members of the proposed class; to comply with CSI personnel, caseload, and visitation standards; and to meet and confer with Plaintiffs' counsel regarding provision of notice of the Settlement Agreement to eligible people.

### **Noncompliance During The Second Year (July 2011 through June 2012)**

The details of the violations of the Settlement Agreement that occurred between July 2011 and June 2012 were set forth in the July 2, 2012 letter from Plaintiffs' counsel that was included in DDPC's second annual report.

On August 24, 2011, Plaintiffs' counsel wrote to Defendants and asked them to address the fact that at least 29 individuals were not yet receiving the PCO services to which they were entitled under the Settlement Agreement. We also asked for the names, contact information, and copies of all CSI

materials pertaining to those individuals to enable us to assist them ourselves, and offered to enter into the type of confidentiality order we had entered into with the DDPC in order to protect those individuals' confidentiality. On November 2, 2011, Defendants responded to some of our questions, but refused to provide us with the individuals' names and contact information.

On February 10, 2012, Plaintiffs' counsel again wrote and asked Defendants to promptly address our ongoing concerns regarding Defendants' apparent failure to fully comply with the Arbitrator's November 2010 and January 2011 Orders, as well as with the Settlement Agreement. On March 2, 2012 we met with Defendants to discuss our February 10, 2012 letter. On April 2, 2012, Defendants provided a written response that did provide Plaintiffs' counsel with some additional information, but did not remedy a number of violations of the 2010 and 2011 Orders, as well as the other violations of the Settlement Agreement.

On June 4, 2012, Plaintiffs' counsel made our fourth arbitration demand, to remedy Defendants' failures to fully comply with the 2010 and 2011 Orders, and seeking additional remedial orders regarding Defendants' other violations of the Settlement Agreement.

On June 22, 2012, Defendants provided Plaintiffs' counsel with updated redacted Service Plans regarding the individuals referred by Columbus for services from CSI workers. Those Service Plans, unfortunately, provided additional and ongoing evidence that some CSI workers were not providing our clients with the level of case management support required by the Settlement Agreement.

### **Noncompliance During the Third Year (July 2012 through July 2013)**

The details of the violations of the Settlement Agreement that occurred between July 2012 and June 2013 were set forth in the August 15, 2013 letter from Plaintiffs' counsel that was included in DDPC's third annual report.

On July 19 and 24, 2012, the fourth Arbitration Hearing was held. The Arbitrator ordered that:

- 1) The parties cooperatively determine and designate the information about Defendants' actions to implement the Settlement Agreement which Defendants would provide to Plaintiffs' counsel in order to comply with Section 9 of the Arbitrator's January 2011 Order requiring a "third report" regarding CSI actions; and
- 2) DOH promptly prepare and distribute a spreadsheet containing the agreed-upon information.

On January 16, 2013, nearly six months later, DOH provided Plaintiffs' counsel with their initial Spreadsheet and attachments, and then updated the Spreadsheet and attachments nine days later in response to our concerns with their initial production. On February 7, 2013, Plaintiffs' counsel wrote to DOH and its counsel, identifying with specificity how even their updated Spreadsheet and attachments demonstrated a continuing failure to fully comply with the Arbitrator's Orders. On February 11 we met with DOH to discuss our concerns. On March 8, Defendants responded to the February 7 letter, including a second updated Spreadsheet and attachments. The letter belatedly addressed the concern we had identified the previous summer regarding 38 specific individuals who

had not received all of their quarterly, in-person CSI visits. While the March 8 updates did provide some additional information, they nevertheless represented a continuing failure to remedy substantial violations of the Arbitrator's June 2012 and January 20, 2011 Orders.

On May 13 Plaintiffs' counsel made our fifth arbitration demand, requesting that the Arbitrator conduct an arbitration to remedy DOH's failures to fully comply with the Arbitrator's Orders, and to enter additional remedial orders regarding DOH's other violations of the Settlement Agreement.

On June 17, the fifth Arbitration Hearing was held. The Arbitrator found that, as of June 2013, DOH had completed the DD Waiver application process for all but a small number of people; that the PCO application process had been completed by DOH, except those for whom PCO services were "declined," and that guardianship applications had been submitted to the DDPC for those people recommended by Columbus. The Arbitrator concluded that Defendants had substantially complied with the requirement for completing applications for Waiver, PCO and guardianship services for members of the proposed class identified by Columbus as needing those applications.

At the June 17 Arbitration Hearing, evidence was presented regarding a number of individuals, indicating that they were in no better position than a year ago, in spite of our drawing specific attention to their plights. Plaintiffs requested additional orders regarding CSI services. However, the parties disagreed about what the Settlement Agreement requires CSI workers to do for people, beyond the applications for Waiver, PCO and guardianship services.

### **Concerns Regarding DDPC's Actions During the Third Year Regarding Guardianship**

In October 2012, Plaintiffs' counsel requested a meeting with DDPC and DDPC's counsel to discuss with DDPC's Executive Director, Agnes Maldonado, the situations of the 26 individuals listed in DDPC Office Of Guardianship's (OOG) Second Annual Report as not having received the guardianship for which Columbus had made a referral. Many of those people had their guardianship file at OOG closed, without any court determining whether the person needed the guardianship support recommended by Columbus. After the meeting in December 2012, DDPC agreed to petition the applicable courts to consider guardianship petitions for those additional 26 people for whom guardianship was recommended by Columbus.

At the time we submitted our August 15, 2013 letter for inclusion in DDPC's third annual report, we understood that DDPC had initiated all such petitions. However, evidently due to staffing issues in OOG, many of those cases did not move forward. When we wrote the August 15, 2013 letter, we hoped that those guardianship cases would soon be moved forward by OOG, enabling a judge to decide whether, and to what extent, any form of guardianship is necessary for the people identified by Columbus as needing a guardian. Unfortunately, DDPC has not cured the problems we identified in August 2013.

### **Noncompliance During the Fourth Year (August 2013 through June 2014)**

The remainder of this letter summarizes the areas of noncompliance since we wrote our August 2013 letter.

On September 6, 2013, the Arbitrator convened a status conference, at the end of which he directed the parties to meet to discuss Plaintiffs' remaining concerns with CSI's work on behalf of 27 individuals under Paragraph 3(d) of our Settlement Agreement.

The parties met on September 6, 16, and 23, and October 16, 2013. On November 6, 2013, the DOH Defendants provided Plaintiffs with a letter and attached documentation, summarizing our meetings and CSI's efforts to implement the recommendations for each of the 27 individuals. (Letter attached as Ex. 1.) Plaintiffs responded to Defendant's letter on November 18, 2013. (Letter attached as Ex. 2.)

On December 5, after reviewing the two letters, the Arbitrator determined that the parties had not achieved what the Arbitrator had intended, and asked the parties to jointly develop a series of tables of information to help Plaintiffs' counsel, and if necessary the Arbitrator, to more efficiently assess whether the Settlement Agreement's terms had been met.

On January 15, 2014, the parties provided their joint tables to the Arbitrator. The next day, the Arbitrator conducted a telephonic hearing with the parties. The Arbitrator confirmed with Plaintiffs' counsel that we had received sufficient documentation and other information from Defendant in order to make our determination of whether CSI had implemented the Columbus recommendations for the 27 individuals pursuant to Paragraph 3(d) of our Settlement Agreement.

On February 13, 2014, Plaintiffs' counsel made our sixth arbitration demand, on the basis that, among the twenty-seven (27) people who have signed Releases of Information forms authorizing the State to provide Plaintiffs' counsel with their records, DOH's CSI workers had failed to fulfill the requirements of the Settlement Agreement in two ways. First, a majority of those people had still not received the benefit of one or more specific recommendations made by Columbus, although years had gone by since those recommendations were made. Second, most of those individuals also had not received the "assistance from the CSI project" that DOH promised to provide them. At the Arbitrator's request, we agreed to address only the first failure by DOH in the sixth Arbitration Demand, reserving for a future date our opportunity to address the second failure. We requested that the Arbitrator conduct an arbitration to address these ongoing violations of the Settlement Agreement and requested that the Arbitrator enter additional remedial orders regarding those violations. (Demand attached as Ex. 3.)

On March 14, DOH Defendants responded to our sixth arbitration demand in a letter to the Arbitrator. (Response attached as Ex. 4.) On April 1, Plaintiffs' counsel replied to DOH Defendants' response in a letter to the Arbitrator. (Reply attached as Ex. 5.) The sixth Arbitration Hearing, regarding the people who still have not received the benefit of one or more specific recommendations made by Columbus, is scheduled for July 29, 2014.

## **Ongoing Concerns Regarding DDPC's Failure to Complete Guardianship Proceedings**

On December 18, 2013, Plaintiffs' counsel learned from DDPC that it had recently hired Marina Cordova as DDPC's new legal counsel and head of the Office of Guardianship (OOG). We were invited to meet with Ms. Cordova and the new DDPC Executive Director, John Block III, in a couple of months, giving Ms. Cordova a chance to familiarize herself with the status of the Foley guardianships and to begin working on all remaining guardianships.

On February 7, 2014, Plaintiffs' counsel met with Ms. Cordova, Mr. Block, and DDPC's counsel in the Foley case. We discussed, among other things, what still remained to be done by DDPC under the Settlement Agreement for the 26 individuals listed in OOG's Second Annual Report as not having received the guardianship for which Columbus had made a referral. DDPC committed to do the following:

1. Provide us with a copy of the form of petition for guardianship used by DDPC's former legal counsel for our review and comment;
2. File petitions for appointment of corporate guardians under the Probate Code, in the nearest county, respectively, for each of the five individuals (Individual ## 3385, 3386, 3476, 3521, and 3544) residing on Navajo lands, and also appraise the Navajo Human Services Department of these petitions and work with them to secure guardianships for those five individuals;
3. File a petition for corporate guardianship for each of the eight remaining individuals (Individual ## 858, 3404, 3407, 3413, 3443, 3473, 3481, and 3792) whose cases DDPC identified to us in our 2/7/14 meeting as "Pending"; and
4. For Individual #4107, file a motion to amend her guardianship (currently only a sole guardianship in favor of her mother, who is herself partially incapacitated) to provide for either a co-guardian or a successor guardian.

On June 25, after having not heard anything from DDPC in over four months since our February 7 meeting, Plaintiffs' counsel emailed Ms. Cordova, Mr. Block, and Norman Weiss, DDPC's counsel in the *JM* case to follow-up on our February 7 meeting regarding the agreed-upon actions and asking where things stand on those actions. On July 1, Mr. Weiss emailed us a copy of DDPC's draft petition, in response to DDPC's commitment #1 immediately above. There has been no other response to our June 25, 2014 email.

We are sad to report that, during the past year, the performance of DDPC's OOG has been characterized by frequent disorganization and a lack of follow-through regarding its obligations under the parties' Settlement Agreement. Of the 26 individuals listed in OOG's Second Annual Report in 2012 as not having received the guardianship recommended by Columbus, at least half of those people still have not received a guardian. Since August 2013 we have been patient, recognizing that DDPC's personnel issues have handicapped its efforts. However, nearly five months ago Plaintiffs' counsel met with DDPC personnel to discuss what needs to be done by the OOG for those 26 individuals. Since that time, we have received no information from DDPC (other than the above-mentioned draft petition sent by Mr. Weiss on July 1, 2014), which leads us to conclude that nothing has been accomplished by the OOG since February 7. We are deeply concerned that, contrary to DDPC's mission to "promote advocacy, capacity building, and systemic

change to improve the quality of life for individuals with developmental disabilities and their families," OOG's performance over the last four and a half years, with respect to the former Training School residents who are beneficiaries of our Settlement Agreement, has not improved the quality of life for the former Training School residents who need assistance with their decision-making.

## **Conclusion**

These are the most important areas in which the Settlement Agreement remains out of compliance at this time:

1. CSI personnel have not implemented some of the recommendations made by Columbus for members of the proposed class, and some CSI personnel are not effectively providing needed case management assistance to members of the proposed class;
2. Most members of the proposed class who are eligible for, and need, Waiver services are not yet getting them;
3. Dozens of members of the proposed class who need assistance in order to make decisions still do not have the guardian or medical surrogate decision-maker which they need;
4. ALTSD Defendants are improperly reducing Personal Care Option services for members of the proposed class, and CSI case managers are not effectively assisting the class members to prevent inappropriate reductions in PCO services;
5. People who are stuck in nursing homes are not getting assistance from CSI to get out; and
6. DDPC's OOG has still not done everything in its power and within its authority to secure a guardianship for each individual for whom Columbus made a referral.

Over four years have passed since Plaintiffs agreed to dismiss their lawsuit against Defendants in exchange for Defendants taking the actions set forth in the Settlement Agreement. Nevertheless, many members of the proposed class still have not received all of the benefits of the 2010 Settlement Agreement.

In light of Defendants' continuing failures to comply with some of their obligations under the Settlement Agreement, counsel for Plaintiffs yet again request that the DDPC advocate on behalf of former residents of the Training Schools and assist those people to obtain the things to which they are entitled under the Settlement Agreement. We also request that DDPC promptly provide the former residents of the Training School who need guardians with the assistance they need from the OOG to obtain needed support in making informed choices about their living arrangements, their finances, and the services they receive.

Very truly yours,

*Peter Cubra*

Peter Cubra

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November 6, 2013

**SENT VIA EMAIL**

Peter Cubra, Esq.  
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Albuquerque, NM 87107

**Re: *Foley v. DOH, et al*, Case No. 07-CV-00604-RB-ACT**

Dear Peter and John,

Attached are documents for the 32 former residents for whom Plaintiffs raised questions related to the service plans provided at the September 6 status conference. At that meeting, Arbitrator Gross directed Defendants to meet with Plaintiffs' counsel and answer the remaining questions regarding the extent of the assistance provided or not provided to the 32 former residents under Paragraph 3d of the Settlement Agreement. Those meetings were held September 6, September 16, September 23, and October 16, 2013.

In addition to the documents included in this communication, Defendants underscore that significant amounts of information on the assistance provided by CSI workers under the Settlement Agreement has already been provided to Plaintiffs' counsel. Following the August 2012 Arbitration, Defendants provided Plaintiffs' counsel with a grid containing all information requested by plaintiffs on notice, dates of assessments, referrals to the DD waiver, referrals for guardianship or Power of Attorney, and Personal Care Option. The grid was accompanied by a CD containing narrative documentation of all "other recommendations" made by the Columbus Organization reviewers and recorded in the "Recommendations" field of the Columbus Assessment tools. The information available to Plaintiffs' counsel on the grid, as well as the narrative information on the "Other Recommendations" may be reviewed with the documents included in this transmission for a more complete representation of the assistance provided by CSI workers, and the formal recommendations of the Columbus reviews.

At the September 6, 2013 status conference with Michael Gross, the parties were asked to come to agreement on what services are provided by CSI, in addition to the services detailed in the grid and "Other Recommendations". The parties agreed that the job duties as listed by then



Peter Cubra, Esq.  
John Hall, Esq.  
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CSI worker Shadee Brown (attached) describe a spectrum of assistance that may be provided if requested by the individual or suggested by CSI. Other than the specific settlement agreement languages to visit at least quarterly, facilitate the application to the DD waiver, PCO or surrogate decision maker, CSI duties are dependent on the needs and requests of each individual.

Also at the September 6, 2013, status conference, Defendants explained that the formal Columbus recommendations as recorded in the Recommendations field of the assessment document are recorded in the "Other Recommendations" document created by counsel. Columbus occasionally made statements in the summary of the assessment document that could be construed as "recommendations." The follow up on these "recommendations" has been recorded in the Service Plans created by CSI.

The dates above reflect the meetings with Plaintiffs to address any additional questions regarding the service plans. Those answers are recorded in the documents attached, titled "Follow up to September 6, 2013 status conference". Occasionally, Plaintiffs raised questions unrelated to any formal or embedded recommendation. Those additional questions are also included in the attached September 6 follow up document.

We look forward to your response, due November 16, 2013. The parties have already agreed to a telephonic status conference on Friday November 15, 2013, with Michael Gross. Since the due date for Plaintiffs' response falls on a date following the scheduled status conference, Defendants will contact Michael to see if he prefers to reschedule the status conference.

Sincerely,

WALZ AND ASSOCIATES

*/s/ Kathyleen M. Kunkel*

*/s/ Anne T. Alexander*

Kathyleen M. Kunkel

Anne T. Alexander

KMK/ATA/scc

Enclosure(s): as stated

Peter Cubra, Esq.  
John Hall, Esq.  
November 6, 2013  
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November 18, 2013

VIA EMAIL ONLY: [Mike@mikegrosslaw.com](mailto:Mike@mikegrosslaw.com)

Mr. Michael A. Gross, Arbitrator

**Re: Defendants' November 6, 2013 Letter and Attachments**

Dear Arbitrator Gross:

To help us all prepare for tomorrow's teleconference at 11:30 Mountain time, we are sending to you the Defendants' November 6, 2013 letter, attached, and this response to the letter. Time is limited tomorrow because Jerry Walz, Kathy Kunkel and I all have a hearing before Judge Parker at 1:30, and I hope that sending the letters to you now will enable you to give us directions about next steps during tomorrow's conference.

Defendants' letter, together with this response, make it clear that, even among the twenty people eligible for assistance from the CSI project who authorized DOH to provide their information to Plaintiffs' counsel, Defendants' CSI workers have not fulfilled the requirements of the settlement agreement in two ways. First, many of those people have still not received the benefit of one or more specific recommendations made by Columbus. Second, most of the eligible individuals also have not received the "assistance from the CSI project" that they were promised in 2010. That second problem is now compounded by the recent departures of Chris Futey, the head of the CSI project, as well as three CSI workers, two of whom have recently been replaced.

The lack of performance of these two requirements of the settlement agreement for these twenty people is especially concerning, because it seems likely that, due to the advocacy and monitoring by Plaintiffs' counsel, these twenty people have gotten superior attention from CSI and Defendants, compared to the hundreds of other people who are also entitled to the benefits of the settlement agreement, with whom we are not in contact.

Five of the twenty people, H [REDACTED], P [REDACTED] C [REDACTED], T [REDACTED] G [REDACTED], J [REDACTED] P [REDACTED] R [REDACTED] L [REDACTED] and J [REDACTED] M [REDACTED] (it is not clear why Mr. M [REDACTED] is not included in the list of 32 people who provided Releases), have died since Plaintiffs' counsel initiated the fourth arbitration demand in June 2012. None of them had all their Columbus recommendations fulfilled before they died. Included below is an explanation of the ways that each of them didn't receive the CSI assistance required by the settlement agreement.

The highly variable performance of CSI workers revealed by the documents provided to Plaintiffs' counsel, described in part below, makes clear that CSI workers have not received the training and



supervision they require in order to properly provide the required assistance to eligible individuals on their caseloads. Even without further evidence, it is clear that, in addition to promptly fulfilling the Columbus recommendations, DOH also needs to 1) clarify in writing what it expects CSI workers to do, and 2) provide closer supervision to its CSI personnel.

Below are descriptions of violations of the settlement agreement of which we are aware. The descriptions delineate two problems with Defendants' letter.

1. The letter sometimes misstated the specifics of the concerns which were expressed by us during our meetings; and
2. The letter often did not list some of the problems with CSI performance that we discussed during our conferences with Defendants' counsel (T ██████ G ██████, whose discussion you sat in on, is the most clear example).

### **Individuals About Whom Plaintiffs Still Have Outstanding Concerns**

#### **1. F ██████ F ██████ (1689)**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Mr. F ██████ during their meetings:

1. How does staff solicit a simple "yes" "no"? What happened to communication device? [NOTE: Although we raised these same concerns years ago with Defendants and with the DOH nursing home (Fort Bayard) in which Mr. F ██████ continues to reside, Defendants' letter observes that, according to a facility social worker, an SLP in late 2013 is "in the process of developing an alternative communication program for 2618."]
2. Why is 1689 on oxygen? [Defendants misstate our concern. We observed that Mr. F ██████ is now on continuous oxygen, and are concerned about when and why this became a problem. While their letter states that Mr. F ██████ was on continuous oxygen back in 2010, but not in 2011 and 2012, it fails to address why he is back on continuous oxygen in 2013.]

In addition to those issues, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Mr. F ██████ which Defendants' counsel did not acknowledge in their letter:

3. Is Mr. F ██████ receiving the appropriate levels of PT, OT, and SLP, as recommended by Columbus?
4. What level of support does DOH expect CSI to provide to individuals, like Mr. F ██████, who are in a nursing home or ICF/MR facility? What is the proper intensity of CSI services for such individuals? [They have not addressed our concern.]

#### **2. H ██████ M ██████ (1955)**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Mr. M ██████ during their meetings:

1. No mention of installing "grab bars" in the bathroom. They only cost \$12.00 at WalMart. [They have not addressed our concern. Moreover, the Columbus recommendation for making the bathroom accessible is more complex than merely installing grab bars]

In addition to that issue, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Mr. M [REDACTED] which Defendants' counsel did not acknowledge in their letter:

2. What is CSI's responsibility when their clients' families also have disabilities, or special needs, which renders them less than fully capable of caring for the CSI client? In Mr. M [REDACTED] case, Adult Protective Services (APS) has found that his family has neglected Mr. M [REDACTED] and that their home is not clean. [They have not addressed our concern.]
3. Are members of Mr. M [REDACTED] family an appropriate choice to become his guardian? [While their letter observes that guardianship is pending, it does not make clear who has been proposed to be the guardian, and whether this proposed person is a family member.]

### 3. E. T [REDACTED] (2618)

Recently, Ms. T [REDACTED] got a new CSI worker and the new worker has established communication with E [REDACTED] and her family. In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Ms. T [REDACTED] during their meetings:

1. Research possibility of earlier application to DDW to expedite DDW application. [Actually, the request is for an earlier "allocation" to the DD Waiver, to begin services]
2. Concerned about sisters who care for 2618. [The letter notes that APS has an open case on one sister, S [REDACTED]; however, it did not address our concern about the appropriateness of any of the other sisters, including [REDACTED] and [REDACTED], who have also had findings made by APS.]
3. Review family decision to stop PCO. [It is not at all clear from the letter who made the decision to stop E [REDACTED] PCO services, or with whom CSI is discussing resuming PCO. The letter makes reference to "sister's husband," or "family" four times. Who are these people? The imprecise documentation, and failure to differentiate between identified family members is specifically important in this case where Ms. T [REDACTED] has many sisters and strong concerns have been raised with regard to at least one of them ([REDACTED]).]

In addition, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Ms. T [REDACTED] which Defendants' counsel did not acknowledge in their letter:

4. We asked Defendants' counsel to confirm with Sally Faubion of The Arc of New Mexico (proposed corporate guardian for Ms. T [REDACTED]) whether Ms. Faubion feels it was appropriate for Ms. T [REDACTED] to have moved in with her sister [REDACTED]. [They have not addressed our concern.]

### 4. L [REDACTED] R [REDACTED] (2882)

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Ms. R [REDACTED] during their meetings:

1. What was date 2882 allocated to waiver? [Addressed. However, the underlying issue we raised was that I [REDACTED] hadn't yet begun receiving the therapies and some of the services listed in her DD Waiver service plan. We sought support from CSI to get the services and therapies started]

In addition, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Ms. R [REDACTED] which Defendants' counsel did not acknowledge in their letter:

2. CSI personnel have noted that, due to her advanced age, Ms. R [REDACTED] mother has become unable to properly manage her daughter's affairs, and that I [REDACTED] needs assistance from CSI to obtain either a co-guardian or a guardian with full capacity.

**5. C [REDACTED] R [REDACTED] (2980)**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Ms. R [REDACTED] during their meetings:

1. Not enough specificity.

Actually, during the meetings, Plaintiffs' counsel raised the following concerns regarding Ms. R [REDACTED] which Defendants' counsel did not acknowledge in their letter:

2. What level of support does DOH expect CSI to provide to individuals, like Ms. R [REDACTED] and Mr. F [REDACTED], who are in a nursing home or ICF/MR facility? What is the proper intensity of CSI services for such individuals? [They have not addressed our concern.]
3. What assessment has been performed of Ms. R [REDACTED] language abilities? [The letter only observes in an unspecific manner that a speech language and communication assessment was completed, and that communication strategies were implemented in C [REDACTED] ISP. C [REDACTED] used to speak intelligibly and, when we last visited with her, she was not expressing herself verbally]
4. In her contact notes dated 4/9/13, the CSI worker noted that the ICF/MR nurse Wendy "also reported that she will see her urologist soon and have a CAT scan to follow up on the cyst she was treated for last year." We asked whether the cyst is problematic, and why there was no documentation regarding this in ensuing months. [They have not addressed our concern.]
5. Columbus recommended that Ms. R [REDACTED] be "evaluated by a PT to determine if any therapy or other intervention is needed to minimize any deterioration of her scoliosis"? Since Ms. R [REDACTED] was apparently evaluated by a PT on 3/10/11 who recommended pool exercises for her, we inquired what has happened since with regard to physical therapy for Ms. R [REDACTED]? [In their letter they only note that over two years ago, on 8/10/11, the CSI worker "[e]mailed ATM to check on status of SLP eval and PT eval," but there is no further mention of what PT services are being provided or of any follow-up.]

**6. H [REDACTED] P [REDACTED] C [REDACTED] (4502) -DECEASED**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Mr. C [REDACTED] during their meetings:

1. Want more case management than 4502 received. [Although Defendants are now acknowledging that CSI's role is to provide case management, some CSI workers do not perform typical case management duties for their clients, including Mr. C█████. In the letter, Defendants provide the same eight pages of CSI's contact notes for Mr. C█████ which they already provided before we expressed our concern to them. CSI worker Doug Baker's testimony at the 2013 arbitration showed that he was not providing Mr. C█████ with case management. Pages of documentation of Mr. C█████'s lack of services and declining health, without effective intervention, is not case management.]

In addition, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Mr. C█████ which Defendants' counsel did not acknowledge in their letter:

2. What level of support does DOH expect CSI to provide to individuals, like Mr. C█████, Mr. F█████, and Ms R█████, who are in a facility? What intensity of CSI services and supports are expected for such an individual? [Like with Mr. F█████ and Ms R█████, they have not addressed our concern.]
3. Did Mr. C█████ ever receive the recommended "psychiatric evaluation by clinicians experienced with individuals who have co-existing conditions of intellectual disability and behavioral health," as recommended by Columbus? [They have not addressed our concern.]
4. Are there expectations or rules for CSI personnel with regard to Columbus recommendations, and have the rules been reduced to writing? [They have not addressed our concern.]
5. CSI did not implement the Columbus recommendation to connect Mr. C█████ to the nursing home ombudsman to obtain advocacy. What does DOH expect CSI workers to do with regard to individuals in a nursing home and CSI's relationship with the nursing home ombudsman program? Would Mr. C█████ have benefited if CSI had provided a release to the ombudsman and if CSI and the ombudsman had coordinated their efforts? [They have not addressed our concern.]
6. Although Mr. C█████ had both a documented developmental disability as well as a documented psychiatric diagnosis, he never received the specialized services to which he was entitled under federal PASRR regulations. What does DOH expect CSI workers to do to ensure that individuals in nursing homes receive all of the specialized services to which they are entitled? [They have not addressed our concern.]
7. Columbus recommended that Mr. C█████ explore getting out of the nursing home. The Supreme Court's *Olmstead* decision suggests that nursing homes should be a last resort for individuals with developmental disabilities. What does DOH expect CSI workers to do with regard to assisting an individual residing in a nursing home to move out into the community? What does DOH expect CSI workers to do to assess the situations of individuals on their caseloads who reside in a nursing home to determine whether a transition into the community is desirable and, if so, how to facilitate such a transition? [They have not addressed our concern.]

**7. T█████ G█████ (6209) -DECEASED**



You were present at the conclusion of the last arbitration session when the parties discussed at length the details of Mr. G█████'s illness and death, the inhabitable condition of his house, and CSI's failure to learn of his death for over a year. We discussed a number of contact notes that described Mr. G█████'s worsening medical condition and inability to access treatment and medication. In their letter, Defendants' counsel characterized the following as the one concern raised by Plaintiffs' counsel regarding Mr. G█████ during that meeting:

1. No confirmation that referral to UNM dental clinic ever happened. [Although the letter confirms that there is "[n]o evidence in contact notes that referral was made prior to individual's death."]

In addition, during the meeting, Plaintiffs' counsel also raised several other far more important concerns regarding Mr. G█████ which Defendants' counsel did not acknowledge in their letter:

2. What does DOH expect CSI workers to do when an individual served by CSI is identified as having worsening medical issues and/or is having difficulty obtaining needed medications for medical issues. When an individual is not getting to doctor's appointments, should CSI take any action? [They have not addressed our questions.]
3. When an individual served by CSI is identified as appropriate for PCO services, is it sufficient for CSI to hand that individual the application form to fill out? Is it appropriate for CSI to assume that APS will assist the individual with the PCO application? [They have not addressed our concern.]
4. What is the expected role of CSI with respect to the landlord of an individual on their caseload? For example, when Mr. G█████'s pipes burst and his landlord turned off his water. [They have not addressed our concern.]
5. What is CSI expected to do when it learns that an individual's medications have run out? [They have not addressed our concern.]
6. Under what circumstances does DOH expect CSI personnel to assist the individual to move from their present living situation to a better living situation? [They have not addressed our concern.]
7. What does DOH expect CSI personnel to do if they have concerns regarding the individual's diminishing capacity to manage their medical care? [They have not addressed our concern.]
8. If the individual cannot be located, as was the case with Mr. G█████, what does DOH expect CSI personnel to do to attempt to locate the individual? [They have not addressed our concern.]

**8. B█████ S█████ (6252)**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Ms. S█████ during their meetings:

1. CSI accepted guardian's refusal of assessment and did not ask 6252 if she wanted the assessment. [Ms. S█████ has never had a guardian, although one is now being pursued.]

In addition, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Ms. S█████ which Defendants' counsel did not acknowledge in their letter:

2. What does CSI understand to be the authority of an individual's POA to make decisions for that individual? [They have not addressed our concern.]
3. What is DOH's expectation of CSI workers with regard to when the individual with a Power of Attorney, herself or himself, should be directly consulted regarding their wishes? Does DOH expect CSI workers to only speak to a person who received the Power of Attorney, or to speak to the individual who granted the POA? [They have not addressed our concern.]
4. Has DOH's Eligibility unit made a determination with regard to Ms. S█████' application for the DD Waiver?

**9. J.L. B█████ (6425)**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Mr. B█████ during their meetings:

1. Recommendations for nutritional counseling and therapies were discussed over the phone. Should have done face to face discussion. [It appears that CSI conducted a face-to-face visit with Mr. B█████ regarding these Columbus recommendations following our meetings with Defendants.]

In addition, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Mr. B█████ which Defendants' counsel did not acknowledge in their letter:

2. It appears that the Columbus recommendation regarding nutrition was closed. What does that mean, and was that appropriate? [They have not addressed our concern.]
3. What has happened with regard to the Columbus recommendations regarding physical and occupational therapies? It is not clear whether these recommendations, too, have been closed and, if so, what does that mean and was that appropriate? [They have not addressed our concern.]

**10. M█████ T█████ (6509)**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Mr. T█████ during their meetings:

1. Why can't he get allocation letter sooner? [First, the letter is confusing; it states that Mr. T█████ "has allocation date of 12/2/2008." We assume that is his registration date for the waiting list, but we would like them to confirm this. Second, our issue is that Mr. T█████'s setting is unsafe, and we asked if he could receive expedited DD Waiver services]
2. Medicaid? [We told them that Mr. T█████'s brother had said that Mr. T█████ is back on Medicaid, and we asked them whether this is correct. They confirmed in the letter that Mr. T█████'s Medicaid has been reinstated]

In addition, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Mr. T█████ which Defendants' counsel did not acknowledge in their letter:

3. Columbus recommended that Mr. T█████'s home receive modifications for his accessibility, and a new roof. CSI notes explain that no funding source has been found for a new roof, but

no explanation has been given whether CSI assisted Mr. T█████ to install "grab bars" in the bathroom. They only cost \$12.00 at Wal-Mart.

4. Columbus also recommended day services to enable Mr. T█████ to have meaningful activities. No explanation has been provided why he is not getting any day services.

**11. J█████ P█████ (6590) -DECEASED**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Ms. P█████ during their meetings:

1. Long time frame did 6590 receive food stamps?

In addition, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Ms. P█████ which Defendants' counsel did not acknowledge in their letter:

2. If an individual is eligible for public benefits, such as food stamps, what does DOH expect CSI personnel to do with regard to facilitating that individual receiving those benefits? And, as in Ms. P█████'s case, if the individual has a corporate guardian who is not getting around to securing those benefits, what is CSI expected to do? [They have not addressed our concern.]
3. What is the expectation for CSI regarding assigning a CSI worker who speaks the native language of the individual? For example, Ms. P█████ was a native Spanish speaker, with limited English language skills, but she was not assigned a CSI worker who spoke Spanish, and it is not clear what attempts, if any, were made by CSI to pair Ms. P█████ with a Spanish-speaking CSI worker. [They have not addressed our concern.]

**12. D█████ C█████ (7777)**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Ms. C█████ during their meetings:

1. What was issue with PASRR? [Plaintiff asked why CSI entered note re: PASRR. While the letter states that "PASRR was completed in 5/14/1998," it is not clear whether the required second level of review was completed in order to determine whether Ms. C█████ should receive specialized services in the nursing home. We believe that she is entitled to specialized services based upon her developmental disability and her mental health issues.]
2. What the schedule was for allocation to the waiver, by region. [The actual issue is, how close is Ms. C█████ to being able to start DD Waiver services?]

In addition, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Ms. C█████ which Defendants' counsel fail to acknowledge in their letter:

3. Has Ms. C█████ received any of the "extensive counseling services" recommended by Columbus? [The letter does not address this, but Ms. C█████'s CSI Service Plan responds to this, essentially noting that the corporate guardian thinks Ms. C█████ doesn't need the counseling.]

4. What does DOH expect CSI workers to do to ensure that individuals in nursing homes receive all of the specialized services to which they are entitled? [They have not addressed our concern.]
5. What level of support does DOH expect CSI to provide to individuals, like Ms. C█████, Mr. C█████, Mr. F█████, and Ms R█████, who are in a facility? What intensity of CSI services and supports are expected for such an individual? [Like with Mr. F█████ and Ms ██████ they have not addressed our concern.]
6. Columbus recommended that Ms. C█████ receive DD Waiver services to enable her to get out of the nursing home. The Supreme Court's *Olmstead* decision suggests that nursing homes should be a last resort for individuals with developmental disabilities. What does DOH expect CSI workers to do with regard to assisting an individual residing in a nursing home to move out into the community? What does DOH expect CSI workers to do to assess the situations of individuals on their caseloads who reside in a nursing home to determine whether a transition into the community is desirable and, if so, how to facilitate such a transition? [They have not addressed our concern.]
7. We told Defendants that we understand that Ms. C█████ has recently experienced weight changes, both up and down. Why is she experiencing these fluctuations in weight? [They have not addressed our concern.]

**13. ██████ J█████ (8012)**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Ms. J█████ during their meetings:

1. 8012 had her PCO hours reduced. What is appropriate amount of advocacy by CSI worker when individual has PCO hours reduced? [The letter did not respond to their own characterization of our concern]

In addition, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Ms. J█████ which Defendants' counsel did not acknowledge in their letter:

2. What is DOH's expectation for CSI involvement when there has been a threatened reduction in the individual's PCO hours? Can CSI advise the individual and/or her family or guardian, can CSI personnel advocate with the managed care company or with the state Medicaid agency? Plaintiffs want to know whether CSI workers can be authorized to participate in a Medicaid fair hearing if such participation is requested by the individual/guardian/family? [They have not addressed our concern in their letter.]
3. What is DOH's expectation when a particular CSI worker has been rejected by the guardian of an individual? Will DOH re-assign a case to attempt to establish a functional relationship? [They have not addressed our concern.]
4. What is CSI's responsibility when their clients' family member also has a disability or special needs which interferes with the relationship between CSI and the individual? [They have not addressed our concern.]

**14. ██████ L█████ (8998) -DECEASED**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Mr. L [REDACTED] during their meetings:

1. Did he see MD for lump on neck? [Actually, we asked what CSI did to confirm what the family had told CSI regarding whether Mr. L [REDACTED] had been seen by a doctor to properly evaluate the lump on his neck, including the name and location for any such doctor. They have not addressed our concern.]

In addition, during their meetings, Plaintiffs' counsel also raised the following concerns regarding Mr. L [REDACTED] which Defendants' counsel did acknowledge in their letter:

2. What is DOH's expectation for CSI personnel when an individual's family is not willing to work with the CSI worker? [They have not addressed our concern.]

**15. A [REDACTED] C [REDACTED] (9440)**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Ms. C [REDACTED] during their meetings:

1. Not enough response to recommendations 3 and 4. [In the letter, with regard to both of these recommendations, Defendants note that CSI spoke to TRESKO on 6/24/10 "about providing day hab services" to Ms. C [REDACTED]. TRESKO reportedly informed CSI over three years later, on 9/12/13, that TRESKO's day hab does not include the areas recommended by Columbus, "formal training in independence skills, ADL skills, Braille or navigating outdoors." CSI has since attempted to contact Ms. C [REDACTED]'s guardian/sister to explain that these services might be available through the Commission for the Blind, but the sister has reportedly not responded.]

**16. J [REDACTED] B [REDACTED] (9815)**

In their letter, Defendants' counsel characterized the following as all of the concerns raised by Plaintiffs' counsel regarding Mr. B [REDACTED] during their meetings:

1. Has physician completed letter required for Medicaid to make eligibility decision? [Actually, our concern is that the CSI worker delayed contacting the doctor for years and has not yet facilitated the letter that would allow J [REDACTED] to get a lift for his wheelchair]

In addition, during the meetings, Plaintiffs' counsel also raised the following concerns regarding Mr. B [REDACTED] which Defendants' counsel did not acknowledge in their letter:

2. What does DOH expect CSI workers to do when an individual served by CSI is identified as having medical issues? When an individual is not getting to doctor's appointments, should CSI take any action? What is their protocol?? [They have not addressed our concern.]
3. What is CSI's protocol regarding what information should be put in the individual's contact notes? [They have not addressed our concern.]
4. When does DOH expect CSI workers to make a referral to APS? When a referral has been made by CSI, which responsibilities are CSI's and which are APS'?

**17. J. M. (9205D) DECEASED**

It is unclear why Mr. M. was not listed among the thirty-two people who provided Releases. Nonetheless, Plaintiffs described our concerns about Mr. M. to Defendants during our meetings. However, Mr. M. was not mentioned in Defendants' letter.

During the meetings, Plaintiffs' counsel raised the following concerns regarding Mr. B.:

1. What does DOH expect CSI workers to do when an individual served by CSI is identified by CSI as having worsening medical issues?
2. What does DOH expect CSI workers to do to ensure that individuals in nursing homes receive all of the specialized services to which they are entitled?
3. What level of support does DOH expect CSI to provide to individuals, like Mr. M., Ms. C., Mr. C., Mr. P., and Ms. R., who are in a facility? What intensity of CSI services and supports are expected for such an individual?
4. Columbus recommended that Mr. M. receive DD Waiver services to enable him to get out of the nursing home. The Supreme Court's *Olmstead* decision suggests that nursing homes should be a last resort for individuals with developmental disabilities. What does DOH expect CSI workers to do with regard to assisting an individual residing in a nursing home to move out into the community? What does DOH expect CSI workers to do to assess the situations of individuals on their caseloads who reside in a nursing home to determine whether a transition into the community is desirable and, if so, how to facilitate such a transition? [They have not addressed our concern.]

**Individuals About Whom Plaintiffs' Concerns Were Addressed  
When Defendants Took Action In Response To These Concerns**

After discussions during the meetings with Defendants, as noted in their November 6, 2013 letter, as well as the additional information provided in that letter, Plaintiffs have no remaining questions or concerns regarding the situations of the remaining 13 individuals:

**1. D. B. (2785)**

In their letter, Defendants' addressed the concerns raised by Plaintiffs' counsel regarding Mr. B. during their meetings as follows:

1. Did CSI talk to ISD office to confirm that 2785 is receiving all food stamps that he is entitled to? [Addressed.]
2. What was entry about social security on 8/28/2013? [Addressed.]

**2. D. H. (6009)**

In their letter, Defendants' addressed the concerns raised by Plaintiffs' counsel regarding Mr. H. during their meetings as follows:

1. Follow-up on dental and employment options. [Addressed.]

**3. J. G. (6657)**

In their letter, Defendants' counsel addressed the concerns raised by Plaintiffs' counsel regarding Ms. G. during their meetings as follows:

1. Mealtime plan? [Addressed.]
2. Weight issues? [Addressed.]
3. Has she been seen by a psychiatrist? [Addressed.]

**Individuals Who Are Not On The CSI Caseload Because They Are Enrolled In A Waiver Program And Did Not Receive A Guardianship Recommendation From Columbus**

1. J. L. (1011W)
2. G. G. (2263DE)
3. E. H. (3121W)
4. C. B. V. (3155W)
5. S. K. (3539W)
6. K. C. (4951W)
7. R. H. (5972W)
8. D. A. (7753W)
9. W. H. (7951W)
10. C. M. (7980W)
11. H. H. (8224W)
12. S. L. (8435W)
13. C. E. (8754W)

**Conclusion**

Among the fifteen people we are in contact with who are eligible for assistance from the CSI project, a number still have Columbus recommendations that have not been fulfilled, and one is still waiting for her Columbus assessment. Since the Columbus recommendations were generally issued between two and three years ago, that failure is very concerning. However, the more troubling problem is that the "assistance provided by the CSI project" has been less than adequate for all twenty of the people whose records we have received, and most of those eligible individuals have received very poor case management support from CSI. Of the five people who have died, none of them received assistance from the CSI project that was anywhere near the case management support required by the settlement agreement.

Going forward, it is vital that DOH clearly establish in writing its expectations for its CSI workers. Only if CSI workers receive clear guidance about how to perform their jobs, and sufficient training and supervision, will Defendants' commitments be fulfilled.

Accordingly, we reiterate below the topics which we've requested DOH to address in writing, to establish for CSI workers the expectations they should fulfill when providing assistance to the 200 surviving people who are entitled to assistance from the CSI project pursuant to the settlement agreement.

At a minimum, DOH should clarify in writing its expectations regarding the following:

1. What level of support does CSI provide to individuals who are in a nursing home or ICF/MR facility? What is the proper intensity of CSI services for such individuals?
2. For clients in facilities, are there expectations or rules for CSI workers with regard to Columbus recommendations, and have the rules been reduced to writing?
3. What do CSI workers do to ensure that individuals in nursing homes receive all of the specialized services to which they are entitled?
4. What do CSI workers do with regard to assisting an individual residing in a nursing home to move out into the community? What do CSI workers do to assess the situations of clients who reside in a nursing home to determine whether a transition into the community is desirable and, if so, how to facilitate such a transition?
5. When do CSI workers make a referral to APS? When a referral has been made by CSI, which responsibilities are CSI's and which are APS'?
6. What do CSI workers do when an individual served by CSI is identified as having worsening medical issues and/or is having difficulty obtaining needed medications for medical issues?
7. When an individual is not getting to doctor's appointments, should CSI take any action?
8. What does CSI do when it learns that an individual's medications have run out?
9. What do CSI workers do if they have concerns regarding the individual's diminishing capacity to manage their medical care?
10. When an individual served by CSI is identified as appropriate for a particular program or service (e.g. PCO services, or food stamps), is it sufficient for CSI to hand that individual the application form to fill out?
11. What is CSI's involvement when there has been a threatened reduction in the individual's PCO hours? Can CSI advise the individual and/or her family or guardian? Can CSI personnel advocate with the managed care company or with the state Medicaid agency? Can CSI workers be authorized to participate in a Medicaid fair hearing if such participation is requested by the individual/guardian/family?



12. What is CSI's role with respect to the landlord of an individual on their caseload? (For example, when Mr. G██████'s pipes burst and his landlord turned off his water.) Under what circumstances do CSI personnel assist the individual to move from their present living situation to a better living situation?
13. If the individual cannot be located, as was the case with Mr. G██████, what do CSI personnel do to attempt to locate the individual?
14. What is CSI's responsibility when their clients' families or guardians also have disabilities or special needs which renders them less than fully capable of caring for the CSI client?
15. What does CSI understand to be the authority of an individual's Power of Attorney to make decisions for that individual? What do CSI workers do with regard to when the individual with a POA, herself or himself, should be directly consulted regarding their wishes? Do CSI workers only speak to a person who received the Power of Attorney, or do they speak to the individual who granted the POA?
16. What is CSI's protocol regarding what information should be put in the individual's contact notes?
17. What does CSI do regarding assigning a CSI worker who speaks the native language of the individual?

Once DOH clarifies how CSI workers should do their jobs, then DOH should adequately train its CSI workers, and also provide them with the supervision and support they require to ensure that the 200 surviving members of the proposed class in the JM litigation receive the "assistance from the DOH Community Services Integration project" that was promised to them on January 8, 2010.

Very truly yours,

*Peter Cubra*

Peter Cubra

cc w/ encl. via email only:

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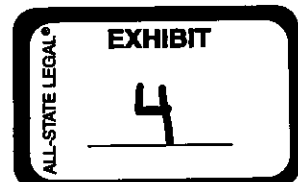
***Re: Foley v. DOH, Defendants' Response to Plaintiffs' Sixth Arbitration Demand***

Dear Arbitrator Gross:

Below please find Defendants' response to Plaintiffs' Sixth Arbitration Demand. Plaintiffs' narrative, history and overview are factually inaccurate and based on unfounded assumptions. Defendants will address those assumptions and factual errors. Defendants will then address the allegations made by Plaintiffs in their arbitration demand. Defendants are prepared to present documentary and testimonial evidence to support their responses.

### **I. Introduction**

Plaintiffs' Introductory paragraphs contain numerous misleading statements. For example, Plaintiffs' state that "five (5) of the 32 did not get specific recommendations," or, for those individuals who did receive specific recommendations, that "a majority of those people have still not received the benefit of one or more specific recommendations made by Columbus,



although years has [sic] gone by since those recommendations were made.” [Pltfs.’ Sixth Arbitration Demand p. 1]

Actually, the five individuals referenced in Plaintiffs Introductory paragraph did not receive *any* recommendations from Columbus following their Decisional Capacity Assessments, and the majority of individuals who “have not received the benefit of one or more specific recommendations” declined, had a guardian or substitute decision-maker decline, or were ineligible for a program due to other reasons. To portray the Defendants as noncompliant when a program or service is declined or the individual is ineligible, particularly when Plaintiffs are in possession of the facts, goes beyond advocacy to unacceptable.

Plaintiffs’ Introductory paragraphs allege that CSI workers have failed to fulfill the requirements of the Settlement Agreement in two ways. First, by not effecting each and every recommendation of the Columbus reviewer for every former resident, and second, that most of those individuals also have not received the assistance from the CSI project that they were promised. [Pltfs.’ Sixth Arbitration Demand p. 1] Although this information is not new, Defendants will review here the scope of the Settlement Agreement, the CSI “project”, and the CSI workers’ authority, resources, and practice.

**A. The Settlement Agreement**

The Settlement Agreement provided that the Columbus Organization would perform two assessments, a Needs Assessment and a Decisional Capacity Assessment to former residents of the state’s institutions for the developmentally disabled. Both assessments were optional and offered to the former residents, their guardians or Power of Attorney. The Needs Assessment did

not make determinations of eligibility for any program nor did the Decisional Capacity Assessment determine an individual's competence. The resulting recommendations were suggestions, not mandates, and did not necessarily reflect the individual's or family's cultural values, preferences or interests. At times the recommendations were based on information that was later determined to be inaccurate. Where relevant, Defendants will identify the cases where these situations arose.

The Settlement Agreement was structured to provide former residents with an opportunity to meet with the Columbus representatives, to be assessed for possible referral to the DD waiver, the Personal Care Program or other appropriate programs if the results of the screenings and assessments identify services the former resident may need, to receive a Decisional Capacity Assessment for possible referral to the Office of Guardianship where the individual's capacity would be determined as defined by law, and to be visited at least quarterly by a member of CSI.

Specific language in the agreement made it clear that former residents would be assisted by CSI in their applications for any program; however, each individual would be considered for eligibility in accordance with program guidelines, eligibility, criteria and available funding subject to the agencies respective statutory and regulatory responsibilities. Both parties were aware that the waiting list for services under the DD Waiver was approximately eight (8) years at

the time of the settlement. To support those who needed more assistance in their daily activities, Defendants agreed to offer each person on the waiting list the Personal Care Option.<sup>1</sup>

**B. CSI Project**

Plaintiffs allege that Defendants have not complied with the Settlement Agreement as they have failed to provide the assistance from the CSI project. Plaintiffs provide no specific complaints and state that they are reserving this argument for a future date. In this response, Defendants will include their efforts to provide answers to the questions posed by Plaintiffs regarding issues outside the Columbus recommendations, as those questions took up much of the meetings and communications with Plaintiffs' counsel in September, October, and November 2013, and were part of the Tables provided to Plaintiffs in January 2014.

The CSI project is a term describing state efforts to identify, organize, contact, conduct outreach, provide education, facilitate applications and provide a community based state employee as liaison to those former residents of the state's three institutions for the developmentally disabled who fall within the terms of the Settlement Agreement. The CSI project preceded the Settlement Agreement, and some of the current CSI workers assisted in the efforts to locate the former residents. Those CSI workers also performed face to face visits and facilitated applications to public programs years before the formal agreement.

The CSI unit is a part of the Developmental Disabilities Supports Division. CSI workers have access to experts in the field of developmental disability. There are no specific services

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<sup>1</sup> The Medicaid PCO program is designed to permit a person to live in his or her home rather than a nursing facility, and to maintain or increase personal independence. Personal Care attendants provide a range of services to individuals who need help with activities of daily living because of a disability or functional limitations. [www.nmbiac.com/PDF/Final\\_PCO\\_tip\\_sheet\\_012810.pdf](http://www.nmbiac.com/PDF/Final_PCO_tip_sheet_012810.pdf)

provided by CSI other than those described in the Settlement Agreement; to visit as needed and to assist with referrals to other programs as requested by the individual. As has been discussed with Plaintiffs on multiple occasions, the assistance provided by CSI is individual specific. Not every former resident is interested in the assistance offered by CSI. Plaintiffs' allege that there is highly variable performance among CSI workers. Defendants dispute this and assert that it is the variable nature of each individual and their circumstances that result in highly variable outcomes.

**C. The DD Waiver**

The services offered by the DD Waiver are an important backdrop to understanding the construction of the Settlement Agreement. Information regarding the scope of the services available, the number of individuals surrounding the individual on the waiver, and the role of the case manager are essential background to understanding the scope of the January 8, 2010, Settlement Agreement. As stated in the first sentence of paragraph 3(a) of the Settlement Outline, Columbus was to presumptively “*exclude* all individuals who are currently receiving services under the DD waiver, the D&E waiver, and the medically fragile waiver.” [Settlement Agreement ¶3 (a)] This was because Defendants administered the waivers referred to in ¶3 (a) of the Settlement Agreement and understood the breadth of services already provided to the individuals who were served by the waivers. Greater detail regarding the services provided under the DD waiver will be described as appropriate in the response below.

**D. Plaintiffs' Overview**

Defendants object to Plaintiffs' allegation that “it seems certain that, due to the advocacy and monitoring Plaintiffs' counsel have provided those twenty-seven people, they have gotten

superior attention from CSI and Defendant, compared to the hundreds of other people who are also entitled to the benefits of the Settlement Agreement, with whom we are not in contact”. [Pltfs.’ Sixth Arbitration Demand, p. 2]

For most of the 32 individuals, the information provided to Plaintiffs since January 2013 has not changed. Defendants reported monthly through the service status reports on CSI efforts to meet the terms of the Settlement Agreement regarding all individuals who were eligible for the benefits of the Settlement Agreement. In addition, the grid provided in January 2013, documented the dates of notice, the date of each Needs Assessment, the date of each Decisional Capacity Assessment and whether or not there were recommendations related to those assessments. Plaintiffs have the dates that any individual was referred to the Office of Guardianship and the outcome of those referrals. Plaintiffs have the information on anyone referred for a POA or Health Care Decision maker and the outcome of those referrals. Plaintiffs have the dates of each individual’s referral to PCO and the outcome of those referrals, as well as the reason any individual was not receiving PCO. In January 2013, Defendants also provided narrative reports on every individual’s Other Recommendations. Defendants continue to provide Plaintiffs with monthly visitation reports on all individuals eligible for this benefit under the Settlement Agreement.

Defendants have been producing the same information to Plaintiffs regarding the status of completion of the Columbus recommendations since the grid was produced in January 2013. This information was repeated in the Follow up to Status Conference Held September 6, 2013, the informal discussions held with Plaintiffs in September and October 2013, and in the Tables

provided in January 2014. Individual lives are dynamic, and there may be amendments to the information occasionally as the individual's circumstances change, however, as the documents demonstrate, the majority of the follow up information has not changed.

As noted above, CSI cannot impose the Columbus recommendations on individuals with capacity, or on guardians. In every case where a recommendation has not been effected, CSI has provided the explanation. Defendants strongly object to Plaintiffs' repeated representation that individual or family decisions represent CSI failure to implement Columbus recommendations, and further suggest that Plaintiffs make such repeated representations to create the appearance of noncompliance where in fact it does not exist.

**II. Recommendations Deemed "Not Completed" per Plaintiffs; Recommendations Deemed "Completed" By Defendant; Recommendations Plaintiffs Deemed Not Completed In Timely Fashion**

Plaintiffs' Sixth Arbitration Demand, Section III p. 4 seems to indicate that Defendants have stated that recommendations are not completed. Defendants object to these misrepresentations, and attach the documents provided to Plaintiffs in the past year as evidence of Defendants' actual responses.

1. **L. R. L. R.** received one recommendation. CSI completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014] **L. R.** received a Needs Assessment and was referred to the waiver by Columbus on August 6, 2010. CSI facilitated the application and continued to visit **L.** and provide assistance until she was allocated to the waiver. She was expedited to the waiver on August 30, 2012. Although there was no referral for a guardianship evaluation, CSI



assisted in the appointment of a guardian.

The waiver provides an array of residential, habilitation, employment, therapeutic, and family support services. (<http://www.nmhealth.org/ddsd/developmentaldisabilities/programddwaiverpg1.htm>.) Each individual on the DD waiver is surrounded by an interdisciplinary team (IDT). The IDT is responsible for the development of the individual service plan (ISP) and for identifying the agencies and individuals responsible for providing the services and supports identified in the ISP. The IDT shall consist of the following members: the individual with the developmental disability, a case manager, the guardian, (if applicable), a helper (friend, housemate, family member, teacher, co-worker, current or former employee of an agency with which the individual has had contact, foster grandparent, or any other person from the individual's circle of relatives, friends and acquaintances). NMAC 7.26.5.7A(2). The case manager is an independently funded professional responsible for service coordination to individuals with developmental disability on the developmental disabilities waiver; the case manager must be external to, and independent from the community service provider agency. NMAC 7.26.5.7.(2)(b). "The Case Manager serves as an advocate for the individual, and is responsible for the development of the Individual Service Plan (ISP) and the ongoing monitoring of the provision of services included in the ISP." DD Waiver Service Standards, November 1, 2012, revised April 23, 2013, Case Management Services, p. 49. <http://nmhealth.org/ddsd>.

Pursuant to the terms of the Settlement Agreement, I [REDACTED] R [REDACTED] is no longer followed by CSI as once she obtained a case manager, the responsibility for coordination of services, specifically those recommended by Columbus rested with the case manager. CSI provided the

Columbus recommendations to the case manager who indicated that the IDT team would take them into consideration. Plaintiffs' Arbitration Demand states that Plaintiffs requested support from CSI to get the services and therapies started. [See Pltfs.' Sixth Arbitration Demand, p.5] CSI has no authority to coordinate the care of an individual on the waiver. The CSI worker did continue to visit and assisted I█████ following her allocation to the waiver until the case manager, Jason Hewitt, was fully in charge. Plaintiffs may exercise the Request for Regional Office Intervention (RORI) described in the Settlement Agreement. [¶3a] The RORI system is the standard DDS mechanism, familiar to the Plaintiffs, to obtain assistance for individuals on the DD Waiver as sought by Plaintiffs in their complaint.

2. T█████ G█████ T█████ G█████ received three recommendations. CSI completed two of the three recommendations before Mr. G█████ died. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014] Mr. G█████ received both a Needs Assessment and a Decisional Capacity Assessment on January 10, 2011. There were no recommendations related to his capacity, and Mr. G█████ was his own guardian. CSI assisted Mr. G█████ in re-establishing his SSI benefits. Concern regarding Mr. G█████'s living arrangements led CSI to make a referral to Adult Protective Services (APS). APS took Mr. G█████ to the doctor to as part of the application for PCO. The physician did not hospitalize or otherwise intervene in Mr. G█████'s life. The CSI service plan from 2011 states "CSI will monitor referral to UNM Dental Clinic for 6209" however, Mr. G█████ died before the referral was completed.

3. Mr. ██████ Mr. ██████ received one recommendation; to name a Health Care Decision Maker. This recommendation was completed 2/8/2011 when Mr. ██████'s brother identified himself as medical power of attorney for Mr. ██████ [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014] There were several embedded recommendations that describe the DD Waiver services Mr. ██████ might benefit from once he is allocated to the waiver. Although Mr. ██████ is not yet eligible for any of the waiver services suggested, CSI has attempted to connect Mr. ██████ with similar services through other funding.

For example, CSI attempted to locate a service that would provide Independent Living services. The efforts CSI undertook to identify funding and locate a provider for this service is documented in CSI contact notes. Unfortunately there is no provider in the area where Mr. ██████ lives. Mr. ██████ was not interested in exploring employment but agreed to explore day habilitation. He began attending two days a week in November 2013. APS responded to a report in September 2013 that Mr. ██████ did not have food in his home, was not getting his money and was running away. Per APS these reports were not substantiated. There is a pending referral for guardianship at the Office of Guardianship (OOG). There is no update from OOG as to the status of the referral. CSI continues to talk to Mr. ██████'s family (who has cared for Mr. ██████ for many years) as to their interest in becoming guardian or POA. The family continues to consider this request. CSI is very involved with Mr. ██████ and his family and will continue to provide support until Mr. ██████ is allocated to the DD Waiver.

Plaintiffs complain that CSI did not ascertain Mr. ██████'s current status on the DD waiver waiting list until 2/26/2013. [See Pltfs.' Sixth Arbitration Demand p. 11] Mr. ██████

was informed that he was not a match for service on 3/12/2010 because he lacked a DD diagnosis and was therefore not a match under federal and state definitions. CSI worked with Mr. T█████ and his family to have a TEASC evaluation performed by a neuropsychiatrist to revisit the determination of developmental disability. The evaluation took place August 23, 2010. On September 7, 2012, Dr. Campbell sent releases of information to various parties/hospitals to obtain more information related to Mr. T█████'s developmental disability status. The TEASC evaluation was received by DDSD on October 17, 2012. The DD Waiver evaluation was completed with the family the next month, and was hand delivered to the eligibility unit on December 12, 2012. Mr. T█████ was not determined to be a match for service until 2/26/2013. However, his earlier registration date of 12/2/2008 will be used by DDSD to determine his allocation date. This recommendation follow up was not untimely, and further, demonstrates CSI's persistence and commitment to assist individuals to establish eligibility.

4. E█████ T█████ Ms. T█████ received six recommendations. All of E█████ T█████ recommendations have been completed by CSI. The pending guardianship is the responsibility of the Office of Guardianship; however the sister currently caring for Ms. T█████ has been cooperative and has sought guardianship since August 2013. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014] Ms. T█████'s family did not permit CSI contact in the first few years of CSI efforts. APS has been contacted multiple times. In August of 2013, APS reported to CSI that APS had tried to meet with family many times without success. This is consistent with the efforts of CSI to meet with Ms. T█████ and her family. On August 15, 2013, APS and CSI made a home visit together but were still unable to meet with Ms. T█████

CSI efforts to locate Ms. T████ are well documented in the contact notes. On August 19, 2013 CSI learned that Ms. T████ was now living with a different sister. CSI was able to meet with the sisters and Ms. T████. On 8/21/2013, CSI reviewed all the Columbus recommendations with Ms. T████ and her family. The 8/21/2013 note reads as follows:

Met with E████ and two of her sisters, █████ and █████. E████ stays with up to 4 of her sisters. Lately she has been primarily staying with █████ as she is at home more than other who are working... E████ presents as well groomed with hair done, clean clothing and nice appearance. She was quiet but would answer CSI questions with 1-2 word responses. Went over Columbus recommendations with the 3 ladies. E████'s toe/foot and walker-she had fallen several years ago when asstmt was done and at that time but it was discontinued after she was well. She did use a walker for some time but for at least a year or so she has been ambulating without assistive devices and does just fine. E████ was walking within the home during this visit. She said she does use the handrails when on steps. Family feels there is no further need to follow up on her previous injury or PT as this was accomplished. Asked the sisters and E████ if they felt she needed any ambulation devices such as a walker and they felt she did not. Discussed DDW application and at this time the family is not interested in completing the application. Talked about what E████ does during the day and inquired if they were interested in some daytime service programs if we could find one. The sisters thought it would be a good idea. They then pointed to a tin butterfly on the dining room wall saying that E████ made it years ago when she was in a day time program. Talked about the obstacles with funding but CSI will look into what may be available and get back to Sarah on this. Talked about recommendation for behavioral consult regarding desensitization strategies. Both sisters have no idea why this would be recommended. They felt E████ does just fine and is not stressed and has normal reactions, not over-reactions in public. They did not see a need for this and do not want to pursue. Talked about guardianship need. █████ volunteered to pursue legal guardianship and requested CSI get her the information to start the process. Other discussion included that E████ needs to get dentures and they tried to have her fitted but without success. They will try again. Not sure if E████ will tolerate if dentures are not a perfect fit and that was the initial problem. E████ was diagnosed with diabetes about a year ago when seeing her physician. Since then she has reportedly went from 200 # to 150# via diet. She is not on any medications for diabetes as of yet. E████ sometimes has urinary accidents when she is asleep at night. █████ has been

waking E up once in the night to use the bathroom. They are also having her wear a brief at night. Talked about the cost and suggested they talk to doctor at next visit to get a script so Medicaid can cover the cost of the briefs. Her physician is in Shiprock. Sister's inquired about what if E becomes ill and needs to be in the hospital overnight or something... will her Medicaid insurance pay for that? Informed them that Medicaid should cover those types of Medical expenses. E is not getting food stamps but thought she might go and apply soon to see if she can get that benefit. stated that she thought about applying for PCO a couple of years ago but did not follow through. E is not receiving. They do not think they want to pursue at this time with PCO. On 8/22/2013 CSI explored options in Farmington via internet and telephone for day services (Dungarvin, PMS Project Shield, High Desert Family Services; private pay costs would be \$2.58 per 15 minute interval) without waiver funding in place unable to find a DD specific provider unless family is able to private pay. The Farmington Senior Center may be an option as E is a senior based on her age. On 10/9/2013 CSI talked with and E about the senior center. They do have the contact information to go and check it out at their discretion.

Since that visit in August 2013, CSI has been successful in assisting the family to apply for and receive PCO services. Ms. T's family applied for the DD Waiver, and Ms. T was a match for service as of 1/9/2014. E has a knee brace and crutches, and although her sister wants E to get an x-ray of her knee to check it out more thoroughly, so far her doctor disagrees with this request. has been waiting to hear from the Office of Guardianship as to her interest in becoming guardian however, there has been no contact from the Office of Guardianship. The application for guardianship was submitted by CSI on 9/23/2011. Since October 2013, CSI has made four attempts to follow up on the guardianship referral. CSI's last information on this issue was that a new attorney had been assigned by OOG February 14, 2014.

Plaintiffs further allege that CSI failed to complete the recommendations for Ms. T in a timely fashion. [See Pltfs.' Sixth Arbitration Demand pp. 10, 11.] The Columbus

recommendations do not bind families. The obligation incurred by the Settlement Agreement is for CSI to follow up with families on the suggestions made by Columbus. The documents provided by Defendants to Plaintiffs clearly illustrate the efforts of CSI to establish meaningful contact with the family of Ms. T█████. CSI and APS have only been successful in making progress with Ms. T█████'s family on the Columbus recommendations in the past year, when Ms. T█████ went to live with her sister ██████. While CSI has followed up on the recommendations to the best of their ability, there is a pending guardianship application. Pursuant to CSI practice, the Columbus recommendations will be provided to any appointed guardian, and reviewed at that time.

5. H█████ P█████ C█████ Mr. C█████ received three recommendations. CSI completed their obligations under the Settlement Agreement [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014] The first recommendation was to review Mr. C█████' PASRR evaluation.<sup>2</sup> A new PASRR, including required Level II screening, was conducted 7/23/2012. The determination was that Mr. C█████ was not a candidate for specialized services due to his medical condition.

Plaintiffs complain that the PASRR was not conducted until 7/30/2012, however, the recommendation was to have Mr. C█████ current PASRR reviewed. [See Pltfs.' Sixth Arbitration Demand, p. 11] On 11/16/2010, CSI confirmed with the Director of Nursing and

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<sup>2</sup> Preadmission Screening and Resident Review (PASRR) is a federal requirement to help ensure that individuals are not inappropriately placed in nursing homes for long term care. PASRR requires that 1) all applicants to a Medicaid-certified nursing facility be evaluated for mental illness and/or intellectual disability; 2) be offered the most appropriate setting for their needs (in the community, a nursing facility, or acute care settings); and 3) receive the services they need in those settings. [www.medicaid.gov](http://www.medicaid.gov)

case manager that the review of Mr. G [REDACTED] existing PASRR had been conducted.

The second recommendation stated that Mr. C [REDACTED] could benefit from support from an advocate independent from his family in voicing his preferences regarding his living situation and in reviewing his due process options. On 8/21/2012 the state Ombudsman came to the nursing home, observed Mr. C [REDACTED] and according to the Director of Nursing, the ombudsman did not find anything wrong with Mr. C [REDACTED]' placement.<sup>3</sup> Both Plaintiffs and CSI contacted the state Ombudsman in response to this recommendation.

The third recommendation described the DD Waiver services that should be afforded to Mr. C [REDACTED] once he was allocated to the DD Waiver. There were extensive efforts by CSI Doug Baker, CSI supervisor Chris Futey, Plaintiffs' counsel and agents, Defense counsel, and the DDSD Mi Via program staff to obtain the services described in the third recommendation. These efforts are well documented and too lengthy to be included here. Although Mr. C [REDACTED] was on the waiting list for the DD Waiver, he would not have been allocated for some time. All parties assisted in applying for the Mi Via waiver, for which he was eligible as a nursing home resident. Mi Via is designed for participants who have disabilities to manage their own services and supports within an approved plan and budget. With the assistance of a Consultant, participants develop their own Service and Support Plan (SSP) to meet their functional, medical, and social needs. Participants decide what services they need and how to spend their Mi Via budget. The

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<sup>3</sup> The New Mexico Ombudsman Program is a resident-centered program designed to advocate for the civil and human rights of individuals living in long-term care facilities. Ombudsmen provide a voice to vulnerable adults who might otherwise go unheard. Through regular visits to nursing homes and assisted living facilities, Ombudsmen assist residents by advocating for their rights, investigating complaints, helping to resolve concerns, and ensuring they receive the quality of care they deserve. Services are free, confidential and provided statewide by more than 100 certified volunteers and 12 state staff.[nmsaging.state.nm.us/Long\\_Term\\_Ombudsman.aspx](http://nmsaging.state.nm.us/Long_Term_Ombudsman.aspx)



cooperative effort to establish Mi Via services was underway however, there were concerns expressed by all parties that Mr. C█████ was too medically complex to live safely on the Mi Via waiver, and he died before the issue was resolved.

6. R█████ H█████ Mr. H█████ received one recommendation. CSI completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

Mr. H█████ is on the waiver, and he received his Decisional Capacity Assessment on September 24, 2010. There was no referral for a guardian. His only recommendation read "Referral for assistance from CSI/DDSD to obtain appointment of a health care decision maker to assist Mr. H█████ with medical decisions." For each individual on the waiver that received a Columbus recommendation following their Decisional Capacity Assessment, the CSI supervisor submitted a Request for Regional Office Intervention (RORI). The purpose of the RORI was to have the appropriate DDSD regional office convey the Columbus recommendation to the individual's IDT team and have the IDT team consider the Columbus recommendation. On October 10, 2011, CSI received a response to the RORI previously submitted to the IDT team supporting Mr. H█████. The IDT team responded that "5972's [R█████ H█████] brother is his health care decision maker. If brother is not able, 5972's [R█████] aunt who lives in Artesia would serve as 5972's [R█████] Health Care Decision Maker." In January 2014, CSI was informed that the aunt in Artesia had recently died. The current CSI supervisor informed Mr. H█████'s case manager that the aunt had been identified as a backup to Mr. H█████'s brother and requested that the team revisit the recommendation. The IDT team did consider the issue as requested in an IDT meeting

in February 2014, and reported to CSI that Mr. H's team believes his current supports are sufficient, however they will continue to review his need for this type of support in the future.

7. B. S. Ms. S did not receive any assessments as her POA declined the assessments on August 3, 2010 following receipt of notice. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

Plaintiffs object to Defendants use of the term "guardian" to describe her POA. CSI correctly identified the surrogate decision maker as her Power of Attorney in the original service plan provided to Plaintiffs. CSI is in possession of the notarized durable power of attorney signed by Ms. S. This document identifies [redacted] as the true and lawful attorney for Ms. S to "execute all or any of the following acts, deeds and things: to manage and conduct all my affairs of every kind and nature, specifically, but not limited to, executing all instruments deemed necessary, firms, corporations, states or the United States...giving my said attorney full power and authority to do everything whatsoever necessary." [See Durable Power of Attorney, attached] Defendants have explained to Plaintiffs on several occasions that CSI bases their decisions as to the authority of an individual's POA to make decisions for that individual on the authority contained in the language of the document. CSI understood Ms. S POA to have the express authority to decline the assessments offered by Columbus.

Defendants have attached the documents previously provided to Plaintiffs that record the other services and programs CSI was successful in facilitating for Ms. S, including facilitating the application and establishing eligibility for the DD waiver.

8. J█████ P█████ Ms. P█████ had six recommendations. CSI completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

Plaintiffs' Sixth Arbitration Demand identifies two of the six recommendations on p. 7 as not completed. First, Plaintiffs object that CSI deferred to Ms. P█████'s caretaker before a guardian was appointed. Ms. P█████ received a referral for guardianship August 17, 2010. CSI facilitated this referral to the Office of Guardianship as required by the Settlement Agreement. The corporate guardian, Quality of Life, was not appointed until October 4, 2011. CSI spoke to the corporate guardian on 8/22/2012 and discussed the Columbus recommendations, including the recommendation to get a new physician and determining whether Ms. P█████ had any children. CSI called the corporate guardians again October 31, 2012, to see if they had followed up on the Columbus recommendations. On November 11, 2012, CSI called Melinda Patton, the owner of Quality of Life guardianship agency, to alert her to the lack of follow up by the appointed guardians and to discuss the Columbus recommendations. On November 6, 2012, CSI received an email from the guardian indicating that he would follow up on all recommendations.

On July 17, 2012, Ms. P█████ visited her new physician. There was no referral for a swallow study by this physician.

CSI discussed the issue of children with the long time caretakers in October of 2010. At that time, the caretakers acknowledged that Ms. P█████ sometimes stated she had a daughter but never gave a name. The family, who had been caring for Ms. P█████ for over 30 years, stated that they had no idea how to proceed to locate a possible daughter. On June 10, 2013, CSI revisited

the issue of Ms. P█████'s children with the family. At this time, the family stated that Ms. P█████ referred to her stuffed animals as children. Defendants have no data to support Plaintiff's newly asserted allegation that "for years they stated that Ms. P█████ DID have children and that Ms. P█████ asked to find them." CSI was unable to obtain any reliable information regarding children and Ms. P█████

Defendants assert that CSI did meet the terms of the Settlement Agreement. All of Ms. P█████'s recommendations were completed. CSI worked through the corporate guardians to complete the recommendations. The fact that there was a delay in appointing a guardian, and then poor response from the appointed guardian, is not evidence of CSI noncompliance with the Settlement Agreement.

9. D█████ C█████ Ms. C█████ received three recommendations. CSI has completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

Plaintiffs' Sixth Arbitration Demand identifies one recommendation as not completed. "7777 should receive extensive counseling services. She may well have PTSD as well as depression. This should be initiated as soon as possible." [Pltfs.' Sixth Arbitration Demand, p. 7] CSI has completed their obligations under the Settlement Agreement.[See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

Plaintiffs' refusal to recognize the authority of the corporate guardian to make a decision regarding the recommendation for counseling for Ms. C█████ is not evidence of noncompliance by CSI. Plaintiffs suggest that CSI should address the refusal by the corporate guardian with the

Developmental Disabilities Planning Council. The corporate guardian is appointed to make all major decisions regarding the incapacitated person's care and safety. Both Plaintiffs and CSI have respected the authority of other guardians to accept or reject the Columbus recommendations, and guardians are not bound by any particular recommendation just because they consented to the assessment.

10. W [REDACTED] H [REDACTED] Ms. H [REDACTED] received two Columbus recommendations. CSI has completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

For each individual on the wavier that received a Columbus recommendation following their Decisional Capacity Assessment, the CSI supervisor submitted a Request for Regional Office Intervention (RORI). The purpose of the RORI was to have the appropriate DDSD regional office convey the Columbus recommendation to the individual's IDT team and have the IDT team consider the Columbus recommendation. The CSI supervisor sent the RORI to the appropriate regional office on January 26, 2011 regarding both the recommendation for a Health Care Decision Maker and to have Ms. H [REDACTED]'s sister appointed POA. On April 26, 2011, the IDT indicated to the CSI supervisor that the team elected to invoke the New Mexico Health Care Decisions Act and declined to pursue POA as Ms H [REDACTED]'s sister is very involved with the team.

Following Defendants' January exchange of information with Plaintiffs, Defendants have contacted both the case manager and the sister of Ms. H [REDACTED]. Ms. H [REDACTED]'s sister has agreed

that the time has come to make more permanent arrangements for Ms. H [REDACTED]'s care and will explore POA. The CSI supervisor has mailed the relevant documents to Ms. H [REDACTED]'s sister.

11. I [REDACTED] J [REDACTED] Ms. [REDACTED] received three recommendations. CSI has completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

Plaintiffs' Arbitration Demand rejects CSI's response to the Columbus recommendation #2, "CSI should assist the family in obtaining any assistance that may be available to have the bathroom modifications completed. (This would assist the caregivers in safely showering her, reducing the risk of falls, which she is fearful of. She is also heavy, and her sister, the caregiver, has some difficulty in safely getting her into the tub.) CSI documented the following on 3/18/2011:

"Face to face visit at her house in Tecolotito. Met with her, her sister [REDACTED], her niece and her grandniece. I [REDACTED] greeted CSI staff and said goodbye before CSI staff left. She answered few questions directly. Her sister, [REDACTED], reported that things are going well. [REDACTED] is currently getting paid for 32.5 hours a week through the PCO program. [REDACTED] clarified that the issue with the bathroom is not physical accessibility, but I [REDACTED]'s desire to take a bath or shower. Once she is in the tub she enjoys bathing, but is resistant to the idea when suggested. No needs identified at this point."

Plaintiffs' also reject CSI's response to recommendation # 3, "Family should request 8012's PCP to consider another attempt for a GYN examination and mammogram and to receive the flu vaccine and H1N1 this fall."

On 5/20/2011, three months after CSI had first established contact with Ms. [REDACTED] and her family, CSI documented that the PCO hours, and reimbursement, for Ms. J [REDACTED]'s sister had been cut. There are many entries following this date that demonstrates CSI's efforts to assist

the family in the appeal of the PCO hour cut. DOH also appealed directly to the Human Services Department to review any reduction in hours for individuals identified as Foley, and provided the names of all individuals that might be impacted. Despite this, the hours for Ms. J. [REDACTED]'s PCO were reduced pursuant to a change in the rules promulgated by the Human Services Department. Ms. J. [REDACTED]'s family was angry and blamed CSI for the outcome of the Fair Hearing. From August 17, 2011 until 2/14/2012, the family resisted all efforts to continue visits with CSI. On 2/14/2012, the family emailed CSI that they only wanted email contact from CSI. On 8/29/2013, the CSI supervisor contacted the family, via email, with the following message:

“Good Morning Annabel. Angela Pacheco was your CSI contact person here at DOH for IJ. I have needed to reassign this case for IJ. In the past, I have seen that you have requested only email contact and have indicated that if you needed anything you would contact us. Please let me know if there is anything that we can do for IJ. We would be happy to reinstate face to face visits on a quarterly basis. My contact info is listed below”.

A new CSI was assigned on 9/9/2013 and reviewed all Columbus recommendations with the family. In December 2013 a third CSI worker was assigned and the family initially agreed to resume face-to-face visits. However in January 2014, the family stated in an email that unless CSI could increase the number of PCO hours Ms. J. [REDACTED] was receiving, the family did not desire any visits. The family made the same statement to CSI in March 2014 and has requested a Do Not Contact status.

CSI asserts that they have completed the Columbus recommendations to the best of their ability and that the guardian has the authority to decline to follow any of the recommendations even if they consented to the assessments.

11. R [REDACTED] L [REDACTED] Mr. I [REDACTED] received four recommendations. CSI completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013, and January 14, 2014]

Plaintiffs' object to Defendants' response to Recommendation # 2 "Discuss with the family the possibly [sic] of finding any community programs or day activities that may be available". The report that is generated out of the data base to create service plans does not include a field for the date of entry. The report that is generated out of the database to create contact notes does include a field for the date of entry. CSI has been asked to include dates in their service plan documentation; however, early entries frequently did not include this information. CSI will testify as to the approximate date of the discussion with the family that is documented in the service plan. CSI did document in the contact notes on March 21, 2013, that "the woman that did the assessment did not listen to them and seemed to record what she wanted to." CSI would not challenge the family guardian if there was a direct refusal to accept the recommendation for day habilitation.

Plaintiffs also reject CSI's response to Columbus recommendation #3, "Discuss with family follow up with the physician on the status of the large lump on the back of his neck." Defendants have provided Plaintiffs with the dates CSI had discussions with Mr. I [REDACTED] mother and brother regarding medical visits. The response to this recommendation was not untimely. [Pltfs.' Sixth Arbitration Demand, p. 12] The documents attached record discussions on 2/24/2011, 6/21/2012, 12/12/2012, and 9/13/2013; the discussions in June, December and September were all specifically regarding the lump on Mr. I [REDACTED]'s neck. On 2/11/2013 CSI



documented that Mr. L [REDACTED] was seen regularly at a local clinic. The local clinic continued to monitor the lump on the neck. Defendants documented the following information directly from the Needs Assessment in their January 16, 2014 Table:

“Columbus reviewer notes that 8998 had annual physical examinations, laboratory work, EKG, he receives flu vaccine annually and received H1N1. He has had pneumovax and immunizations are current”. [Defendants January 16, 2014 Table]

CSI had no reason to demand further information from the family.

12. A [REDACTED] C [REDACTED] Ms. C [REDACTED] received two specific recommendations, and two embedded recommendations. CSI has completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

Plaintiffs object to CSI’s responses to the embedded recommendations. The Columbus Assessment Recommendation box did not contain the embedded recommendations. It was not until October 2012 under the leadership of CSI supervisor Chris Futey that these summary statements in the body of the assessment were deemed to be de facto recommendations.

Plaintiffs first object to CSI’s response to the recommendation that Ms. C [REDACTED] would also benefit greatly from training in the areas of navigating outdoors, reading Braille, money skills, and overall development of programs to increase her independence. Plaintiffs isolate parts of this statement. CSI dealt with the statement in its entirety, not in increments. CSI first provided assistance to Ms. C [REDACTED] in 2009, working with the Commission for the Blind to obtain a new cane and other devices (a talking wrist watch and Braille games) for the visually impaired. In 2010, in response to the Columbus recommendation, CSI negotiated a transfer from Ms.

C■■■■'s then day habilitation site, which was only available two days a week, to a new day habilitation site (Tresco) where she could attend five days a week. This negotiation included securing additional funding for Ms. C■■■■. This has been documented in every set of contact notes provided to Plaintiffs. Tresco does not provide formal training in independence skills, ADL skills, Braille or navigating outdoors. Tresco is not bound by the suggestions of the Columbus reviewer. Tresco did clarify that while the day habilitation does not formally teach the skills identified by Columbus, the day habilitation does promote, emphasize and teach social skills, increased friendships, recreational and leisure activities with peers. CSI has been in contact with Ms. C■■■■'s sister, who is also her guardian. Ms. C■■■■ has declined CSI's offer of assistance to involve Ms. C■■■■ with the Commission for the Blind in Las Cruces.

13. J■■■■ B■■■■ Mr. B■■■■ received six recommendations. CSI has completed all but one of the six Columbus recommendations. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

Plaintiffs object to CSI's response to the Columbus recommendation to "discuss the possibility of him living in his own house, which is probably more space than he needs, but would give him access to the bathroom, better ventilation, heat, a separate kitchen, and probably a safer environment." The Columbus recommendation was to discuss the possibility of Mr. B■■■■ moving from the garage apartment he lives in, into his own house that he rents out. The documents provided to Plaintiffs clearly document CSI's discussions on this specific topic, in 2010, 2011 and 2013. CSI's concern regarding Mr. B■■■■'s refusal to move led him to

discuss the situation with Adult Protective Services August 5, 2010. APS did not remove Mr. B██████████.

In addition to CSI's multiple discussions with Mr. B██████████, and as a result of CSI's mounting concerns, CSI made a referral for a corporate guardian January 28, 2013. CSI also made a referral to APS on the same date due to Mr. B██████████'s living conditions. Mr. B██████████ remained in his garage apartment. A court hearing was held May 1, 2013. The Office of Guardianship informed CSI that the court found Mr. B██████████ to have the capacity to make his own decisions.

Mr. B██████████ has not expressed any interest in moving out of his garage or making any alterations to the garage. CSI will continue to meet with Mr. B██████████ and will continue to make referrals to other state agencies as CSI deems appropriate for Mr. B██████████'s health and safety.

Plaintiffs also object to CSI's response to CSI's follow up on the recommendation to determine if Mr. B██████████ is eligible to receive a lift for his truck through Medicaid. CSI has documented the exceptionally complicated course of the efforts to make this determination. The efforts of CSI to facilitate the necessary paperwork to the appropriate Medicaid vendor are detailed in the Table provided to Plaintiffs in January 2014. Since then, CSI has determined that the fax from the doctor's office was never received by the Medicaid vendor, Amerigroup. Also since that date, the State of New Mexico ended their contract with Amerigroup. CSI is attempting to have Amerigroup honor the 2013 request and is beginning the process again with the new Medicaid vendor.

14. F█████ F█████ Mr. F█████ received four recommendations. CSI completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

Plaintiffs object to CSI's response to Recommendation #3, "DD Waiver services should be expedited, if at all possible, due to his age and the length of time he has been in this facility." Mr. F█████ was placed on the DD Waiver waiting list on 2/23/2011. Because Mr. F█████ resides in a nursing home, he does not meet criteria for an expedited allocation to the DD Waiver.

15. H█████ M█████ Mr. M█████ received five recommendations. CSI has completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014]

Plaintiffs object that this recommendation was not completed in a timely fashion. The specific recommendation was to "follow up with the family on possible guardianship with the family in the future". The Decisional Capacity Assessment noted that:

"[...] he is content in his home and has a very supportive family. His father is a farmer and is still working every day. His mother and sister provide all the physical care he requires. The family takes him with them when they go shopping or other activities in the community...There appears to be much love in this family. The family was approached about the possibility of guardianship. The family does not want to pursue this at this time. The father has POA."

Defendants have documented discussion with family regarding guardianship on 3/3/2011, 5/25/2011, 11/26/2012, 1/15/2013, 5/21/2013, and 8/26/2013. This information was provided to Plaintiffs in previous documents. In 2012 CSI learned that neither Mrs. M█████ nor H█████ were

citizens. The family wanted to wait until the citizenship was final for both Hector and his mother, and this was accomplished January 2, 2013. On 1/15/2013 CSI assisted the family in completing the Office of Guardianship application and faxed it to the Office of Guardianship.

16. J.L. B██████ Mr. B██████ received four recommendations, two of which were embedded. CSI has completed their obligations under the Settlement Agreement. [See Attached documents provided to Plaintiffs August 15, 2013 and January 14, 2014] Plaintiffs' complain that recommendations regarding nutritional counseling and physical and occupational therapy assessments were not completed until 2013. [See Pltfs.' Sixth Arbitration Demand, p. 11]

Plaintiffs object to CSI's responses to the embedded recommendations. The Columbus Assessment Recommendation box did not contain the embedded recommendations. It was not until October 2012 under the leadership of CSI supervisor Chris Futey that these summary statements in the body of the assessment were deemed to be *de facto* recommendations.

### **III. Conclusion**

Former residents of the state's institutions for the developmentally disabled are not part of a class, their case histories and the reason they were at one time a resident of a state institution for the developmentally disabled vary significantly. Some former residents work full time, and others have families they successfully raised without state intervention. There have been individuals who went on to become active duty military. Many family members have cared for their developmentally disabled relatives without significant state oversight for 30 or 40 years. A number of those family members expressed suspicion or simple reluctance at the offer to become involved with the state, and building relationships of trust took months to years to establish. In

some cases, CSI was able to quickly forge a relationship and work with the family to explore the recommendations of the Columbus reviewer. Other families emphatically refused to participate in any way. The range of responses to Columbus recommendations and CIS efforts from the individuals and families varies markedly. The decisions of the individual or family who opted not to participate, who withdrew their consent, or who were slow to respond are not evidence of Defendants' noncompliance, they are evidence that CSI is working with people who have the right to self-determination. The Settlement Agreement acknowledged the individuals' right to refuse. "After receiving such notice, individuals may decline to receive the benefits of this agreement" [Settlement Agreement ¶5 (a)]

The former residents did not seek the benefits described in the Settlement Agreement, and none of the former residents are bound by the Settlement Agreement. It is Plaintiffs and Defendants that are bound by the terms of the Settlement Agreement, and neither can attempt to modify the agreement years after the fact.

Respectfully submitted,

WALZ AND ASSOCIATES, P.C.

*/s/ Jerry A. Walz*  
*/s/ Kathyleen M. Kunkel*  
*/s/ Anne T. Alexander*

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March 14, 2014  
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April 1, 2014

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Mr. Michael A. Gross, Arbitrator

**Re: Plaintiffs' Reply in Support of Their Sixth Arbitration Demand**

Dear Arbitrator Gross:

We are writing to reply to certain assertions made by Defendant DOH in its March 14 Response to Plaintiffs' Sixth Arbitration Demand ("Demand"). We are only responding in this letter to those points that are responsive to the issues we actually raised in our Demand.

As our Demand and this Reply make clear, and as Defendant's Response tacitly acknowledges, many of the people we are directly assisting have not received things explicitly recommended by Columbus. Therefore, we ask that you schedule a hearing at your first convenient opportunity, to address the violations of the Settlement Agreement that we initially brought to your attention in our June 4, 2012 Fourth Arbitration Demand.

**I. Defendant's Response Addresses Issues Not Included in This Arbitration**

As an initial matter, we are concerned that Defendant's Response is inconsistent with your explicit direction regarding the scope of our Demand. As we explained in our Demand:

... Defendant's CSI workers have failed to fulfill the requirements of the Settlement Agreement in two ways. First, a majority of [the twenty-seven] people have still not received the benefit of one or more specific recommendations made by Columbus, although years has gone by since those recommendations were made. Second, most of those individuals also have not received the "assistance from the CSI project" that Defendant promised to provide them. *At your request, Plaintiffs will address in this letter only the first failure in this Arbitration Demand, reserving for a future date our opportunity to address the second failure....*

On January 16, 2014, you conducted a telephonic hearing with the parties [during which you addressed the tables created jointly by the parties and presented to you the previous day]. You confirmed with Plaintiffs that we had received sufficient documentation and other information from Defendant in order to make our determination of *whether CSI has implemented the Columbus recommendations for the twenty-seven individuals pursuant to Paragraph 3(d) of our Settlement Agreement*. You invited Plaintiffs, if we had any outstanding concerns *regarding*





*the completion of the relevant Columbus recommendations*, to address them in a further arbitration demand, as we are doing here.

*At your request, Plaintiffs are saving for a future date their opportunity to address with you Defendant's other ongoing violation of the Settlement Agreement; its failure to provide the "assistance from the CSI project" that was promised in 2010.*

Demand at 2, 3, and 12 (emphasis added). Defendant has not objected to our understanding of your direction to the parties regarding the limited scope of our Demand. However, in spite of your direction, and our confirmation of the same in our Demand, Defendant spends a good portion of its Response addressing issues that are not the subject of our Demand. For example:

... Defendants will review here *the scope of the Settlement Agreement, the CSI "project", and the CSI workers' authority, resources, and practice.*

Plaintiffs allege that Defendants have not complied with the Settlement Agreement as they have failed to provide the assistance from the CSI project. Plaintiffs provide no specific complaints and state that they are reserving this argument for a future date. In this response, *Defendants will include their efforts to provide answers to the questions posed by Plaintiffs regarding issues outside the Columbus recommendations*, as those questions took up much of the meetings and communications with Plaintiffs' counsel in September, October, and November 2013, and were part of the Tables provided to Plaintiffs in January 2014.

Response at 2 and 4 (emphasis added). We will not reply here to matters raised by Defendant in its Response which are not within the scope of your direction and our Demand, except to note that we dispute many of the statements made by Defendant as to these other issues which are outside this arbitration. We reserve the right to address such issues and Defendant's related statements, when Defendant's failure to provide the "assistance from the CSI project" to members of the proposed class comes before the Arbitrator.

## **II. In Its Response, Defendant Re-Framed Its Position Regarding Whether The Columbus Recommendations Have Been Completed**

Rather than continuing the argument that several Columbus recommendations had actually been "completed," the Response shifted gears, stating instead that some Columbus recommendations haven't been completed because "CSI cannot impose the Columbus recommendations on individuals with capacity, or on guardians." See Response at 7. The current argument evidently is no longer that all but three people have had all of their Columbus recommendations "completed." Rather, the Response now argues that recommendations should be deemed "complete" whenever someone has stated they don't want the benefit of the Columbus recommendation, irrespective of whether the person who said "no" has any lawful authority over that member of the proposed class.

The Response "objects" that our Demand described "family decisions" to refuse a Columbus recommendation as a "CSI failure to implement Columbus recommendations." See Response at 7.

That argument is inaccurate. On many occasions, and on behalf of several individuals, we have acknowledged before the Arbitrator that: (1) decisions by an individual whom Columbus has not recommended for a surrogate decision maker based upon Columbus' assessment that the person lacks decisional capacity and (2) decisions by an individual's court-appointed guardian, are both legitimate situations in which Defendant can claim, not that a recommendation is "complete," but rather that CSI can be excused from making further efforts to get that Columbus recommendation completed.

In the interest of clarity, we repeat here Defendant's previous acknowledgement that a knowing and informed decision to forego a Columbus recommendation, that is made by a competent person who has legal authority to make the decision, is a legitimate basis for Defendant to be excused from further efforts to get a Columbus recommendation completed.

Defendant's Response, however, repeatedly uses statements regarding who is declining a Columbus recommendation on behalf of an individual that muddy what should be a clear point:

[T]he majority of individuals who "have not received the benefit of one or more specific recommendations" declined, had a guardian or *substitute decision-maker* decline, or were ineligible for a program due to other reasons.... Both [the Needs Assessment and the Decisional Capacity Assessment] were optional and offered to the former residents, their guardians or *Powers of Attorney*....

Defendants strongly object to Plaintiffs' repeated representation that individual or *family decisions* represent CSI failure to implement Columbus recommendations ....

Other *families* emphatically refused to participate in any way.... The decisions of the individual or *family* who opted not to participate, who withdrew their consent, or who were slow to respond are not evidence of Defendants' noncompliance, they are evidence that CSI is working with people who have the right to self-determination."

Response at 2, 7, and 29 (emphasis added).

Defendant inconsistently sprinkles its Response with statements, or at least implications, that a Columbus recommendation should be considered "complete" if: (1) an individual who is waiting for the appointment of the guardian recommended by Columbus; (2) an individual's "substitute decision maker"; (3) an individual's "power of attorney"; or (4) their "family" declines a Columbus recommendation. Respectfully, the three named Plaintiffs in the initial proposed class action which led to the Settlement Agreement were all neglected, exploited and/or abused by people who were not their legal guardians, but who were similarly characterized by the State as that Plaintiff's "substitute decision maker."

Accordingly, a Columbus recommendation that has not been declined by a person who is both competent to make decisions and also authorized by the law to make the decision, is not "complete," and Defendant is not relieved of its duty to make future efforts to get the recommendation completed.

### III. People Whose Recommendations Were Previously Termed “Not Completed”

We identified in our Demand three individuals whose recommendations Defendant acknowledged in the Tables provided to us were “not completed.” Defendant’s Response objected to these “misrepresentations” that “seem[] to indicate that Defendants have stated that the recommendations are not completed,” and Defendant “attach[ed] the documents provided to Plaintiffs in the past year as evidence of Defendants’ actual responses.

#### **L. R. (2882)**

Regrettably, we, indeed, mistakenly characterized Ms. R. in our Demand as one of the people for whom Defendant explicitly characterized her recommendations as “not completed.” Rather, in the Table provided by Defendant, Defendant *did not* state whether or not each of the three listed recommendations was completed. (Unlike for every other recommendation at issue for the other 26 individuals, where Defendant specifically indicated either “COMPLETED” or “NOT COMPLETED.”) However, Defendant’s text shows that the three recommendations have in fact not been completed, based on Defendant’s responses in the Table as noted below.

1. Columbus: “2882 appears to need the following DD Waiver services: ... b) Supported Employment.”
  - a. ***Defendant***: “*ISP written 3/12/2013. Waiting for budget to be approved to start services. Will take supported employment recommendation into consideration*”
2. Columbus: “2882 appears to need the following DD Waiver services: ... c) Nutritional Counseling to address obesity and health considerations related to hypertension and hypercholesterolemia, including guidelines for caloric and nutrient intake, menu planning, portion control, and cooking methods.”
  - a. ***Defendant***: “*ISP written 3/12/2013. Waiting for budget to be approved to start services. Will take supported employment recommendation into consideration.*”
3. Columbus: “2882 appears to need the following DD Waiver services: ... d) Behavior Support Consultation and assessment, including identification of needs and recommendations for strategies and interventions.”
  - a. ***Defendant***: “*ISP written 3/12/2013. Team did not agree that 2882 required behavior support services.*”

#### **T. G. (6209D)**

According to the “DOH: Status of Completion” column of Mr. G.’s Table, Defendant stated “NOT COMPLETED” for two of his recommendations, as we stated in our Demand. Defendant refers you to the Table in support of its assertion that “CSI completed two of the three recommendations before Mr. G. died,” *see* Response at 9, but the Table merely confirms our point.

**Mr. T (6509)**

According to the "DOH: Status of Completion" column of Mr. T's Table, Defendant stated "NOT COMPLETED" for one of his recommendations, as we confirmed in our Demand. Defendant has not contradicted or otherwise challenged its own statement in the Table.

**RECOMMENDATIONS DEEMED "COMPLETED" BY DEFENDANT  
THAT WERE NOT COMPLETED**

We identified thirteen individuals whom Defendant characterizes in the Tables as having certain of their recommendations "Completed," when those recommendations are actually "Not Completed."

**Ms. T (2618)**

We identified five recommendations that should not properly be characterized as "Completed" because, among other reasons, and according to her Table, either the "family declined" the recommendation (1, 2, 4, and 5) or CSI "[d]iscussed with family, considering" (3). In its Response, Defendant points out that, after Ms. T was moved from the home of one sister to another in the summer of 2013, CSI began to develop a working relationship with a different sister. Nonetheless, Ms. T is still waiting for the guardian Columbus recommended. Moreover, even setting aside whether a sister has the authority to refuse a Columbus recommendation, Defendant's own Table merely states that the unauthorized sister is "considering" whether to proceed with the Columbus recommendation. Moreover, Adult Protective Services has had cases alleging neglect of Ms. T by the very "family" members whom Defendant states "declined" the Columbus recommendations.

**Ms. R (2882)**

1. Columbus: "2882 appears to need the following DD Waiver services: a) Speech and Language Assessment, including identification of needs and recommendations for strategies for augmentative communication."

In its Response, Defendant informed us that Ms. R's DD Waiver services have been started. However, Ms. R's situation presents an ongoing problem. She did not get the Decisional Capacity Assessment she needed because Columbus was erroneously told that she had a guardian. Her elderly mother was subsequently appointed guardian. However, CSI's July 23, 2012 application for a guardian for Ms. R states that Ms. R still needs to obtain a guardian, because her mother who was appointed guardian after the Columbus assessments were completed is "elderly and unable to continue as adequate decision maker."

**Ms. R C (4502)**

1. Columbus: "The status of 4502's PASRR evaluations should be reviewed. As federally mandated under Olmstead, ..."

The Response did not address our assertion that Columbus determined that the first PASRR was deficient. Defendant's follow-up PASRR merely repeated the first, deficient one, which Columbus stated should be reviewed, because the first one, like the second one, did not address Mr. C's developmental and psychiatric conditions which entitled him to specialized services.

2. Columbus: "4502 could benefit from support from an advocate independent of his family in voicing his preferences regarding his living situation and in reviewing his due process options."

Mr. C never received the recommended independent advocacy. According to Defendant, "[o]n 8/21/2012 the state Ombudsman came to the nursing home, *observed* Mr. C and ... did not find anything wrong with Mr. C placement." Motion at 15 (emphasis added). It is not clear whether the ombudsman even spoke to Mr. C; but it is clear that they did not provide the independent advocacy.

3. Columbus: "4502 should be afforded the following DDW Services: ..."

Before his death, Mr. C was never afforded the services recommended by Columbus. Defendant has provided in its Response a number of reasons for why this did not happen, but the fact remains that this recommendation should be properly classified as "Not Completed."

**R. H. (5972W)**

Columbus recommended that Mr. H receive a health care decision maker to assist him with medical decisions. CSI learned from Mr. H's IDT that his brother is his HCDM and, if his brother is not able, his aunt in Artesia can serve as HCDM. We have made CSI aware on many occasions, including in our Demand and the Tables, that Mr. H's brother, "another former Training School resident and DD Waiver participant, may be even more incapacitated than Mr. H." Defendant has not refuted this point in its Response. Despite the obvious problems with this situation, Defendant takes no responsibility for this situation: "[T]he IDT reported to CSI that Mr. H's team believes his current supports are sufficient, however they will continue to review his need for this type of support in the future." See Response at 17.

**B. S. (6252)**

1. DOH: "Individual's POA refused Columbus assessments."

The Response does not claim either that CSI has ever provided Ms. S with the Notice of her rights required by the Settlement Agreement, or spoken to Ms. S herself about her right to assistance from Defendant. We maintain that Defendant must afford Ms. S an opportunity to express her wishes about waiving her rights under the Settlement Agreement. From the contact notes provided to us, it is evident that CSI has spoken with Ms. S directly about other matters. Defendant has given no explanation for not informing Ms. S of her rights.

**M. T. (6509)**

1. Columbus: "CSI is also being requested to assist 6509 in obtaining a Care Health [sic] Decision Maker."

Defendant has not said why it cannot "help Mr. T. . . . to obtain the recommended guardianship," as we stated in our Demand.

2. Columbus: "6509 could also benefit from DD Waiver Services as follows: ... 2) Nutritional Counseling."

The Response fails to address whether Mr. T. has ever received the nutritional counseling. We must assume that Defendant implicitly concedes that this recommendation is not completed.

3. Columbus: "6509 could also benefit from DD Waiver Services as follows: ... 3) Exploration of Supported Employment options and interests."
  - a. Plaintiffs: Unclear whether any day services have actually begun.

The Response fails to address whether Mr. T. has actually begun any day services; Defendant only confirms again that Mr. T. was "enrolled" for day services in November 2013.

**J. P. (6590) (Deceased)**

1. Columbus: "Follow up with 6590's caregiver to ensure that a new doctor is identified and an annual physical is scheduled, as well as health screenings and a referral for a swallow study is made, if indicated."
2. Columbus: "Discuss with 6590 any interest in exploring the whereabouts of her children and assist and support her in whatever decision she makes."

Defendant has added information that was not present in the Tables. However, although CSI apparently spoke with Ms. R. guardian about the recommendations for a new physician and discussing with Ms. R. the whereabouts of her children, all Defendant told us regarding these recommendations is:

On November 11, 2012, CSI called Melinda Patton ... to alert her to the lack of follow up by the appointed guardians and to discuss the Columbus recommendations.

On November 6, 2012, *CSI received an email from the guardian indicating that he would follow up on all recommendations...* On June 10, 2013, CSI revisited the issue of Ms. R.'s children *with the family*. At this time, *the family* stated that Ms. R. referred to her stuffed animals as children.

Response at 18 (emphasis added). Defendant does not assert that the issue of her children was ever discussed *with Ms. R.* nor that any attempt was made to talk with Ms. R. in her native Spanish. Defendant asserted that "CSI worked through the corporate guardians to complete the

recommendations” See Response at 19. That evidently means that Defendant believes it is appropriate to assign a corporate guardian to perform CSI’s responsibilities.

D [REDACTED] G [REDACTED] (7777)

1. Columbus: “7777 should receive extensive counseling services. She may well have PTSD, as well as depression. This should be initiated as soon as possible.”

Defendant is aware of the extensive and severe trauma suffered by Ms. C [REDACTED], because it has previously provided to us numerous documents establishing the same. Defendant has not denied this. We have asked Defendant to “address” the refusal by the corporate guardian and do everything within its power to effect the recommendations of Columbus. Defendant has so far only shown that it will, seemingly without question, defer to the decision by a corporate guardian.

W [REDACTED] H [REDACTED] (7951W)

1. Columbus: “Obtaining a healthcare decision maker.”
2. Columbus: “Obtaining power of attorney for her sister to be appointed as the authorized decision maker.”

Defendant informs us for the first time that:

Defendants have contacted both the case manager and the sister of Ms. H [REDACTED]. Ms. H [REDACTED]’s sister has agreed that the time has come to make more permanent arrangements for Ms. H [REDACTED]’s care and will explore POA. The CSI supervisor has mailed the relevant documents to Ms. H [REDACTED]’s sister.

Response at 20-21. The actions by CSI demonstrate that, although Defendant may be on course to complete these recommendations, at this time these recommendations remain “Not Completed.”

K [REDACTED] J [REDACTED] (8012)

1. Columbus: “CSI should assist family in obtaining any assistance that may be available to have the bathroom modifications completed....”
2. Columbus: “The family should request her PCP to consider another attempt for a GYN examination and mammogram and to receive the flu vaccine and H1N1 this fall.”

Defendant has not provided any information, as we requested, more recent than March 18, 2011 regarding assistance with bathroom modifications and addressing Ms. J [REDACTED]’s behavioral difficulties, including her fear of medical treatment and bathing.

R [REDACTED] I [REDACTED] (8998)

1. Columbus: “Discuss with the family the possibly [sic] of finding any community programs or day activities that may be available.”

Defendant explains that its system does not contain the date when any such discussion took place, and that its CSI personnel did not include the date in spite of being asked to include this information. Defendant refers to CSI's entry on March 21, 2013 that "the woman that did the assessment did not listen to them and seemed to record what she wanted to." This comment does not appear to confirm that CSI assisted Mr. L [REDACTED] to obtain day activities, or even if the discussion even involved community programs or day activities.

2. Columbus: "Discuss with family follow-up with the physician on the status of the large lump on the back of his neck."

Defendant has still not provided any answer to our specific question: What did CSI do to confirm what the family had told CSI regarding whether Mr. L [REDACTED] had been seen by a doctor to properly evaluate the lump on his neck, including the name and location for any such doctor?

A [REDACTED] C [REDACTED] (9440)

1. Columbus: "9440 would also benefit greatly from training in the areas of navigating outdoors, reading Braille, money skills, and overall development of programs to increase her independence."

Defendant states, "Plaintiffs isolate parts of this statement. CSI dealt with the statement in its entirety, not in increments." Response at 24. This recommendation, by its very structure, is composed of subparts. Defendant's "entirety" is composed of those subparts, and Defendant fails to address those subparts. Defendant also observes that "Tresco is not bound by the suggestions of the Columbus reviewer." *Id.* at 25. This is, of course, true. But Defendant *is* bound by the *recommendations* of Columbus.

2. Columbus: "9440 needs to be provided with more opportunity to develop socially, increase friendships, and experience more recreational and leisure activities with peers. She enjoys the day program and would like to attend full time."

Defendant states that Ms. C [REDACTED] is now at a new Tresco day hab site, "where she *could* attend five days a week." *See* Response at 25 (emphasis added). The Response does not make clear, however, whether Ms. C [REDACTED] actually attends five days a week. It also does not make clear if Tresco's day habilitation provides the services and opportunities recommended by Columbus in this and the previous recommendations.

J [REDACTED] B [REDACTED] (9815)

1. Columbus: "Discuss the possibility of him living in his own house, which is probably more space than he needs, but would give him access to the bathroom, better ventilation, heat, a separate kitchen, and probably a safer environment."



Defendant claims that “Mr. B [REDACTED] has not expressed any interest in moving out of his garage or making any alterations to the garage.” Response at 26. As we made clear in our Demand, Mr. B [REDACTED] explained to us his reasons for not being able to effect his desire to move out of the garage—financial reasons. And it remains unclear what Defendant has done to address this financial issue or to explore alternative arrangements that would satisfy Columbus’ recommendation.

2. Columbus: “Investigate if he is entitled to receive a lift for his truck through Medicaid.”
  - a. Plaintiffs: If the insurance company has lost the doctor’s letter, further action is still required. CSI worker delayed contacting the doctor for years and has still not facilitated the physician’s letter, or an alternative method, that would allow Mr. B [REDACTED] to get a lift for his wheelchair.

Defendant states that “the State of New Mexico ended their contract with [the Medicaid vendor] Amerigroup. CSI is attempting to have Amerigroup honor the 2013 request and is beginning the process again with the new Medicaid vendor.” Response at 26. These developments are encouraging, but they make clear that this recommendation is still “Not Completed.”

#### V. RECOMMENDATIONS NOT COMPLETED IN TIMELY FASHION

We identified eight individuals for whom at least some of their recommendations, if they were completed, were not completed in a timely fashion.

##### F [REDACTED] F [REDACTED] (1689)

1. Columbus: “DD Waiver services should be expedited, if at all possible, due to his age and length of time he has been in this facility.”
  - a. Defendant: Application “COMPLETED: 10/20/12.” DD Waiver services not provided.

Defendant does not address timeliness.

##### H [REDACTED] M [REDACTED] (1955)

1. Columbus: “Follow up with the family to discuss guardianship further.”
  - a. Defendant: “Guardianship completed 10/23/13.”

Defendant’s explanation for why the guardianship took so long is unavailing.

##### E [REDACTED] T [REDACTED] (2618)

1. Columbus: “This reviewer suggested to the family that they schedule a medical appointment to specifically address 2618’s toe, foot, and knee problems and in the meantime, obtain a walker for home use.”
  - a. Defendant: “COMPLETED: 8/21/2013.”
2. Columbus: “Options for employment or alternatives for a meaningful day.”

- a. Defendant: "COMPLETED: 8/21/2013."
3. Columbus: "Medical/therapeutic assessment and treatment for gait and balance issues."
  - a. Defendant: "COMPLETED: 8/21/2013."
4. Columbus: "Desensitization for uncooperative/resistive behavior during medical and dental procedure."
  - a. Defendant: "COMPLETED: 8/21/2013."

Defendant does provide pages of explanation for why CSI personnel failed to timely discharge these recommendations, but these too are unavailing.

**H. P. C. (4502)**

1. Columbus: "The status of 4502's PASRR evaluations should be reviewed. As federally mandated under Olmstead, ..."
  - a. Defendant: "COMPLETED. 7/30/2012."
2. Columbus: "4502 could benefit from support from an advocate independent of his family in voicing his preferences regarding his living situation and in reviewing his due process options."
  - a. Defendant: "COMPLETED 8/21/2012."
3. Columbus: "4502 should be afforded the following DDW Services: ..."
  - a. Defendant: "COMPLETED: 8/13/2013"

Defendant fails to directly address, much less attempt to rebut or allay, our concerns regarding timeliness. We take issue with Defendant's statement that "[t]he third recommendation described the DD Waiver services that should be afforded to Mr. C. *once he was allocated to the DD Waiver.*" See Response at 15 (emphasis added). As the parties both know, DD Waiver services is a short-hand way of describing those services which Columbus recommends for an individual even before they get on the Waiver. Defendant's acknowledgment of the same is evidenced by its claim of the "extensive efforts by CSI ... to obtain the services described in the third recommendation." *Id.*

**J. L. B. (6425)**

1. Columbus: "6425 could benefit from nutritional counseling to address weight loss and heart-healthy dietary needs."
  - a. Defendant: "COMPLETED 9/12/13."
2. Columbus: "6425 could also benefit from physical and occupational therapy assessments to identify strategies for his optimal mobility, independence, and safety"
  - a. Defendant: "COMPLETED 9/12/13."

We understand that it was not until October 2012 that CSI chose to recognize the "embedded" recommendations as Columbus recommendations for which Defendant was responsible. However, notwithstanding that, these two particular recommendations were not "completed" until nearly a year later, in September 2013.

**M T (6509)**

1. Columbus: "CSI is being requested to ascertain his current status on the DD Waiver Waiting list and communicate this information to 6509."
  - a. Defendant: "COMPLETED: 2/26/2013."
2. Columbus: "6509 could also benefit from DD Waiver Services as follows: ... 2) Nutritional Counseling."
  - a. Defendant: "COMPLETED: 10/10/2013."
3. Columbus: "6509 could also benefit from DD Waiver Services as follows: ... 3) Exploration of Supported Employment options and interests."
  - b. Defendant: "COMPLETED: 8/23/13."

Defendant did address our timeliness concern with the first recommendation, but its explanation is unavailing. Defendant failed to address our timeliness concerns with the second and third recommendations.

**J P (6590)**

1. Columbus: "Assist 6590 in obtaining Medicaid benefits for health coverage and food stamps as soon as possible."
  - a. Defendant: "COMPLETED: ... Food stamps 10/11/2013."
2. Columbus: "Expedite obtaining PCO Services, if possible."
  - a. Defendant: "COMPLETED: 11/01/2012."
3. Columbus: "Follow up with 6590's caregiver to ensure that NM ID card is obtained and bank account is opened for 6590."
  - a. Defendant: "COMPLETED: ... ID card: Issue date 6/12/2013."

It appears that Defendant's only response to our timeliness concerns regarding these three recommendations is: "The fact that there was a delay in appointing a guardian, and then poor response from the appointed guardian, is not evidence of CSI noncompliance with the Settlement Agreement." See Response at 19. This sentence, assuming it was intended as a response to these concerns, is unspecific and unavailing.

**R L (8998)**

1. Columbus: "Discuss with family follow-up with the physician on the status of the large lump on the back of his neck."
  - a. Defendant: "COMPLETED: 2/11/2013."

By way of response, Defendant refers you and us to "[t]he documents attached record discussions on 2/24/2011, 6/21/2012, 12/12/2012, and 9/13/2013." Looking through the attachments related to Mr. L, we do not see any reference to discussions on these four dates, much less any description of what was discussed. Our timeliness concern arises from the date provided by Defendant in the parties' Table for Mr. L.

Mr. Michael Gross  
April 1, 2014  
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## CONCLUSION

In light of the ongoing disputes about (1) what is required by the Settlement Agreement to implement Columbus recommendations and (2) under what circumstances Defendant can be excused from actually facilitating completion of Columbus recommendations, we request that you select a date for the arbitration at your earliest opportunity, so we can schedule this matter.

Thereafter, we can address the issue raised by Defendant in the Response: how to clarify Defendant's obligation, in addition to getting Columbus recommendations completed, to provide members of the proposed class with the "assistance from the CSI project" that is required by the Settlement Agreement.

Very truly yours,

*Peter Cubra*

Peter Cubra

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