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VIA ELECTRONIC MAIL:

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

Dear Ms. Maldonado and Ms. Fragoso:

We are writing to provide to you Plaintiffs' submission for inclusion in the DDPC's third annual report with respect to implementation of the January 8, 2010 settlement agreement in *JM et al. v. the New Mexico Department of Health et al.*. Significant progress has been made in the past year, but we are sorry to report that, although it has been over three years since Plaintiffs dismissed their lawsuit against the State in exchange for Defendants' promises to take specific actions set forth in the settlement agreement, Defendants have not yet provided to the hundreds of former Training School residents some of the promised benefits to which they are entitled. Defendants also have not fully complied with the Arbitrator's Orders, in a timely and fair way.

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

The letter drafted by Plaintiffs' counsel on July 1, 2011, that was included in the DDPC's first annual report, set out the violations of the settlement agreement that occurred between May 2010 and June 2011. They are briefly summarized here to provide context for the more recent problems in the third year.

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 July 29, 2010, Plaintiffs' counsel made our first arbitration demand, and on August 10, 2010, the Arbitrator ordered DOH to promptly arrange 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. On June 14 and 30, 2010, Plaintiffs' counsel sent thirty release forms to Defendants, but Defendants did not provide any of the requested documents. On October 22, 2010, Plaintiffs' counsel made our second arbitration demand. On November 9, 2010 the second Arbitration Hearing was held. 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.

Defendants issued their first report regarding their actions to comply with the settlement agreement at the beginning of November 2010. The report showed that the 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.

On March 23, 2011, Plaintiffs' counsel and Defendant DOH met and conferred, and agreed upon 11 follow-up actions. However, as of our July 1, 2011 letter to the DDPC, Defendant DOH still had not provided Plaintiffs' counsel with the following information it had agreed to provide:

1. A single document showing all CSI activities for members of the proposed class;
2. An update regarding the search for certain computer disks containing DOH information and what had been done to check state Records Archives for the records of the people who had signed releases;
3. Details regarding DOH's placement on a "Do Not Contact" list of certain individuals who had reportedly elected to "opt out" of the settlement agreement's benefits; and
4. What had been done, and was planned, for those individuals on the Do Not Contact list.

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 the

DDPC's second annual report. Those violations are briefly summarized here to provide context for the more recent problems in the third year.

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. We asserted that Defendants had failed to provide:

1. The report describing the activities of Defendants' CSI personnel which the Arbitrator ordered on January 20, 2011;
2. Documents requested by Plaintiffs' counsel within 30 days of receipt of those requests;
3. An affidavit verifying how they have confirmed and documented in writing an explicit refusal to be contacted by Defendants for the 41 individuals listed as "Do Not Contact" in Defendants' November 2010 status report;
4. Monthly reports compliant with their established reporting requirements; and
5. The needed level of CSI assistance to some eligible individuals.

We also asked Defendants to provide us with the names of the 101 individuals about whom we had expressed concerns in this letter. We stated that we wanted the names in order to review the records and other information we already possessed regarding those 101 people, to evaluate whether each of them was receiving the benefits to which they were entitled under the settlement agreement.

On March 2, 2012 we met with Defendants to discuss our February 10, 2012 letter. At the meeting Plaintiffs' counsel submitted to Defendants 22 Regional Office Requests for Intervention ("RORIs") regarding individuals about whom we had specific concerns. 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 adequately helping our clients. Those problems are illustrated below by the examples of Mr. A and Ms. B.

At the time of the June 22, 2012 arbitration, Mr. A was a 58-year old man with developmental disabilities who was still stuck in a nursing home after being placed there against his wishes over three and one-half years earlier. The nursing home had never provided him with the specialized services to which he was entitled under federal Preadmission Screening and Annual Resident Review (PASRR) regulations, to address his developmental disabilities. Following the October 20, 2010 evaluation of Mr. A, Columbus made the following two referrals to CSI:

- The status of [Mr. A's] PASRR evaluations should be reviewed.... Further evaluation, identification of specialized services (as appropriate), and consideration of less restrictive living alternatives should be incorporated into that process.
- [Mr. A] 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.

CSI's sole response to these referrals was to give a copy of the Columbus report to the nursing home's director of nursing and case manager, after which CSI closed its work on the Columbus referrals.

At the time of the June 22, 2012 arbitration, Ms. B was an 87-year old woman with developmental disabilities who had been placed in the 1970s by the Training School into a Shelter Care Home with people who were not her family, without a guardian. After the state shut down the facility, the owner took Ms. B into her home, where Ms. B performed chores. Following the August 4, 2010 evaluation of Ms. B by Columbus, the following referrals were made to CSI:

- [Apply for a guardian for Ms. B.]
- [Apply for the DD Waiver.]
- Expedite obtaining PCO Services, if possible.
- [obtain an ID card for Ms. B]
- [get Medicaid reinstated]

Fourteenth months later, a corporate guardian was appointed. PCO services had not been obtained; a DD Waiver application had still not been completed; Medicaid was not reinstated and no ID card had been obtained. But once a corporate guardian was appointed, CSI simply handed the tasks over to the guardian.

Noncompliance During the Third Year (July 2012 through June 2013)

The remainder of this letter summarizes the areas of noncompliance July 2012 through the present.

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 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 (Letter attached as Exhibit 1). On February 11 we met with DOH to discuss our concerns.

On March 8, Defendants responded to the February 7 letter (Letter attached as Exhibit 2), 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. However, 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, 2013 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. (Demand attached as Exhibit 3.)

On June 10, DOH Defendants responded to our fifth arbitration demand in a letter to the Arbitrator. (Letter attached as Ex. 4.)

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 for those people, except those for whom PCO services were "declined," and that guardianship applications had been submitted for those people recommended by Columbus. The Arbitrator concluded that Defendants have substantially complied with the requirement for completing applications for Waiver, PCO and guardianship services for member of the proposed class identified by Columbus as needing those supports.

At the June 17, 2013 Arbitration Hearing, evidence was presented regarding Mr. A and Ms. B, and other individuals, indicating that they are in no better position now than a year ago, in spite of our drawing specific attention to their plights. Plaintiffs have 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. Therefore, the arbitration will reconvene on September 6, 2013 to address the CSI issues. The parties were unable to agree upon a form of order reflecting the June 17, 2013 Arbitration Hearing and so, on July 11, 2013, they submitted Plaintiffs' Proposed Form of Order and Defendants' Proposed Form or Order, respectively, to the Arbitrator.

In order to provide context for the Arbitrator's current orders as well as Defendants' continuing violations of the Settlement Agreement and the Arbitrator's previous Orders, Plaintiffs' counsel's Proposed Form of Order began with a recitation of the Arbitrator's findings since the parties entered into the Settlement Agreement three and a half years ago. Our proposed order concluded with:

1. Defendants will continue to meet the CSI caseloads standards established in Paragraph 3(d) of the Agreement;
2. Defendants will promptly complete the PCO and Waiver application process for any person identified by Columbus as eligible for Waiver services whenever the eligible individual, or any duly appointed guardian, Power of Attorney or healthcare surrogate, elects to pursue PCO or Waiver services on behalf of that individual;
3. Defendants' CSI personnel will implement each eligible person's CSI service plan;
4. Counsel for the parties will meet and confer at their earliest convenience in an effort to reach agreement about the nature and quality of assistance that CSI personnel should provide to individuals pursuant to Paragraph 3(d); and
5. If the parties do not reach agreement about the nature and quality of CSI assistance that should be provided pursuant to Paragraph 3(d), an arbitration hearing will be held on September 6, 2013 to decide that issue.

In contrast, Defendants' Proposed Form of Order simply stated that Defendants have complied with Paragraph 3(c) of the Settlement Agreement and that Defendants have a continuing obligation under Paragraph 3(c) with regard to individuals with pending guardianship referrals.

On July 30, 2013, the Arbitrator adopted, verbatim, Defendants' Proposed Form of Order as the Arbitrator's own order.

Concerns Regarding Guardianship Issues

In October 2012, Plaintiffs' counsel requested a meeting with DDPC and DDPC's counsel to discuss with the DDPC's Executive Director, Agnes Maldonado, the situations of the 26 individuals listed in the 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 the OOG closed, without any court determining whether the person needed the guardianship support recommended by Columbus.

After the meeting, the DDPC agreed to petition the applicable courts to consider guardianship petitions for those additional 26 people for whom guardianship was recommended by Columbus. We understand that the DDPC has initiated all such petitions. Evidently due to staffing issues in the DDPC's Office of Guardianship, many of those cases do not seem to be moving forward. We hope that those guardianship cases will soon be moved forward by the Office of Guardianship, 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.

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. Many members of the proposed class who are eligible for the Personal Care Option program still are not receiving those services, and some of them have had their applications for PCO services halted by people who have no legal authority to prevent the class member from receiving the PCO services for which they are eligible;
3. Most members of the proposed class who are eligible for, and need, Waiver services are not yet getting them;
4. 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;
5. 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; and
6. People who are stuck in nursing homes are not getting assistance from CSI to get out.

A full three and one-half 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 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 again urge the DDPC to advocate on behalf of members of the proposed class, to assist those people to obtain the things to which they are entitled under the settlement agreement and, especially, to promptly help them to get the assistance they need from the DDPC's Office of Guardianship 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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