

PETER CUBRA  
KELLY K. WATERFALL  
attorneys  
3500 Comanche Rd NE, Suite H  
Albuquerque, NM 87107-4546

TELEPHONE:  
(505) 256-7690

FACSIMILE:  
(505) 256-7641

August 17, 2015

**VIA ELECTRONIC MAIL:**

Sandy Skaar, MSW  
Chair  
NM Developmental Disabilities Planning Council  
Albuquerque, NM 87111  
[Sandy@sdchoices.com](mailto:Sandy@sdchoices.com)

John Block III  
Executive Director  
NM Developmental Disabilities Planning Council  
625 Silver Ave. SW, Suite 100  
Albuquerque, NM 87102  
[John.Block@state.nm.us](mailto:John.Block@state.nm.us)

Marina A. Cordova  
Office of Guardianship Attorney & Manager  
NM Developmental Disabilities Planning Council  
625 Silver Ave. SW, Suite 100  
Albuquerque, NM 87102  
[MarinaA.Cordova@state.nm.us](mailto:MarinaA.Cordova@state.nm.us)

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

Dear Ms. Skaar, Mr. Block and Ms. Cordova:

We are writing to provide to you Plaintiffs' submission for inclusion in DDPC's fifth 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, like last year's report, is a negative one. The Settlement Agreement contemplated that the Defendants would fulfill their commitments in ten months; however, some of those promises, including those made by the DDPC, still haven't been completed. Although it has been over five years since Plaintiffs dismissed their lawsuit against the State in exchange for Defendants' promises to take specific actions set forth in the Settlement Agreement, both DOH Defendants and DDPC Defendants still have not provided some of the promised benefits to the

hundreds of former Training School residents who are entitled to the benefits of the Settlement Agreement.

DOH still has not completed its obligation to have its employees, the Community Services Integration (CSI) case managers, assist the former Training School residents to get the some of the services and supports that were recommended for them by the Columbus Organization, the neutral evaluator, several years ago. In addition, DOH is also failing to provide some of the former residents with the on-going case management services by CSI personnel which is required by the Settlement Agreement.

As to the DDPC, its Office Of Guardianship (OOG) has not yet completed its basic commitment; to obtain legal guardians for the people who were dumped out of the Training School many years ago who were determined by Columbus to lack the ability to manage their medical care, their finances and/or their other affairs. The DDPC's failure to arrange for needed guardians has been documented in our 2013 and 2014 submissions to the DDPC, but the DDPC's staff still has not remedied the problem, causing harm to several people.

### **DDPC's Office Of Guardianship has not fulfilled its responsibilities**

In October 2012, Plaintiffs' counsel requested a meeting with DDPC staff and DDPC's outside counsel to discuss with DDPC's then-Executive Director, Agnes Maldonado, the situations of the 26 individuals listed in the DDPC's 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 improperly closed by OOG staff, 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 and to ask the court to make the decision whether to institute some form of guardianship 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 had been told 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 be effectively 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, two years later, OOG's staff has still not cured the problems we identified in our August 2013 submission and a number of people who were determined in 2010 and 2011 to need a guardian still do not have one.

On December 18, 2013, Plaintiffs' counsel learned from DDPC that it had 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, but were asked to give Ms. Cordova a chance to familiarize herself with the status of the JM/Foley case guardianships and to begin working on the remaining guardianship cases.

On February 7, 2014, Plaintiffs' counsel met with Ms. Cordova, Mr. Block, and Norman Weiss, DDPC's outside counsel in the JM/Foley case. We discussed, among other things, what still remained to be done by DDPC under the Settlement Agreement, and particularly what was needed to assist the 26 individuals listed in OOG's Second Annual Report as not having received the guardianship for which Columbus had made a referral to OOG. 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, 2014, after having not heard anything from DDPC in over four months since our February 7 meeting, Plaintiffs' counsel emailed Ms. Cordova, Mr. Block, and DDPC's counsel in the JM/Foley case to follow-up on our February 7, 2014 meeting regarding the agreed-upon actions and asking where things stand on those actions. On July 1, 2014, counsel for DDPC in the JM/Foley case emailed us a copy of DDPC's draft petition, in response to DDPC's commitment #1 immediately above.

After we submitted our fourth letter to the DDPC on July 1, 2014, the DDPC hired a capable lawyer, Mia Chavez, to assist in getting needed guardianships established for some of our clients. Ms. Chavez communicated with us and collaborated with us in getting guardianships established for the people assigned to her. In addition to obtaining guardianships for the overdue Training School residents on her caseload, she also arranged for guardians for two additional former Training School residents whose worsening medical conditions necessitated guardianships, although they had not been evaluated by Columbus as needing a guardian in 2010. Unfortunately, Ms. Chavez left the DDPC shortly thereafter. Conversely, the former Training School residents whose guardianship cases had not been assigned to Ms. Chavez were not so fortunate. Communication with us regarding those people has not been forthcoming; collaboration about their cases has been scant and several of the people whose cases were assigned to OOG's other lawyer still do not have needed guardians.

In particular, the promises made to us on February 7, 2014 by DDPC's staff regarding the five people residing on Navajo land back have not been kept. Other people who were not on Ms. Chavez's caseload have also gone without needed guardianships.

It is my opinion that, with the exception of the work performed by Mia Chavez, the OOG has not performed in accordance with the 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." The Office Of Guardianship's performance over the last five and a half years, with respect to the former Training School residents who are beneficiaries of our Settlement Agreement, has not improved the lives of many former Training School residents who need assistance with their decision-making.

Accordingly, due to the OOG's failure to timely and effectively arrange for former Training School residents to obtain needed guardianships, as required by the Settlement Agreement, we request that the Planning Council now agree to extend its obligation under the Settlement Agreement to publish annual reports regarding former training School residents until a court has ruled upon a guardianship petition initiated by OOG for everyone that Columbus recommended for a guardianship. Otherwise, we will bring DDPC's violation of the Settlement Agreement before the arbitrator to seek a remedy for OOG's ongoing noncompliance with the 2010 Settlement Agreement.

### **DOH Remains in Noncompliance During the Fifth Year (July 2014 through July 2015)**

Since September 6, 2013, the Arbitrator has convened a number of status conferences regarding Plaintiffs' concerns with the performance of Community Services Integration (CSI) case managers who are supposed to assist former Training School residents who are on the waiting list for DD Waiver services and who, while they wait, are entitled to case management assistance from DOH's CSI personnel under Paragraph 3(d) of our Settlement Agreement.

On February 13, 2014 Plaintiffs' counsel made our sixth arbitration demand, arguing that the materials provided by DOH regarding the thirty (30) former Training School residents who have signed Release of Information forms authorizing DOH to share their Protected Health Information with Plaintiffs' counsel showed that DOH's CSI workers had failed to fulfill the requirements of the Settlement Agreement for twenty-seven (27) people for whom Columbus made specific recommendations, 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 case management services termed "assistance from the CSI project" that DOH promised to provide them. The first sentence of Paragraph 3(d) of the parties' Agreement reads: "Every former resident who is not receiving services through Waiver program will be offered assistance from the DOH Community Services Integration project."

The question of precisely what constitutes CSI's "assistance" is disputed by the Parties, and the arbitrator has not ruled upon what that first sentence requires of CSI. 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.

Some CSI personnel do a good job of assisting the former residents, but others do not provide them with effective assistance. For example, the Contact Notes of one CSI worker showed:

[A former resident] stated he had been in the hospital . . . for 1 month due to liver problems. [Mr. \_\_\_]'s stomach was distended .... (9/14/10)

I observed the house was a complete wreck. There was trash and garbage on the floors, countertops, and the house did not look like it had been cleaned –ever. [Mr. \_\_\_] showed me how the pipes were leaking through the ceiling and another place where they were leaking through the wall. (2/15/11)

[His] belly is swollen and he was in bed when I arrived. I asked him if he had gone back to the doctor and he said “No.” He probably needs a follow up with the doctor. (5/10/11)

CSI's last visit with [Mr. \_\_\_] was on June 10, 2011. There is no evidence in the Contact Notes that the CSI worker helped [Mr. \_\_\_] get medical care, homemaking assistance, help with plumbing to address his frozen pipes or provided any other case management services. Rather, the CSI worker merely dropped in on [Mr. \_\_\_]'s house every three months without providing him assistance.

[Mr. \_\_\_] died in July of 2011, having received neither the benefit of his Columbus recommendations nor any discernible “assistance” from CSI. Inexplicably, following his June 10, 2011 visit, the CSI worker did not discover that [Mr. \_\_\_] had passed away for 17 months, even though Plaintiffs' counsel readily learned of his passing by talking with a neighbor and speaking with his brother-in-law at the number listed in DOH Defendant's documents.

The arbitrator has scheduled the next arbitration for September 9, 2015. At that time, the arbitrator will address the Plaintiffs' allegations that DOH has failed to implement some of the recommendations made by Columbus. At a future time, the arbitrator may also address our allegation that some former residents are not receiving proper case management assistance from the DOH Community Services Integration project.

## **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, DD Waiver services are not yet getting them;
3. People who are stuck in nursing homes are not getting assistance from CSI to get out.
4. Some 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; and
5. 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 had made a referral.

Over five 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 repeat their request that the DDPC 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. We also again urge the DDPC to promptly help the former residents of the Training School who need guardians to get the assistance they need from 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

cc via electronic mail:

Weiss, Norm ([nweiss@srw-law.com](mailto:nweiss@srw-law.com))

Walz, Jerry A. ([jerryawalz@walzandassociates.com](mailto:jerryawalz@walzandassociates.com))

Sanchez-Sandoval, Gabrielle, General Counsel, DOH  
([Gabrielle.SanchezSandoval@state.nm.us](mailto:Gabrielle.SanchezSandoval@state.nm.us))

Robert Lennon, Assistant General Counsel NM ALTSD ([Robert.Lennon@state.nm.us](mailto:Robert.Lennon@state.nm.us))

Brian James, General Counsel NM HSD ([Brian.James@state.nm.us](mailto:Brian.James@state.nm.us))

Peifer, Charles ([cpeifer@peiferlaw.com](mailto:cpeifer@peiferlaw.com))

Simmons, Nancy L. ([nlsimmons@swcp.com](mailto:nlsimmons@swcp.com))

Higgins, Rachel E. ([rachelhigginsjd@gmail.com](mailto:rachelhigginsjd@gmail.com))

Hall, John ([johnfordhall@mac.com](mailto:johnfordhall@mac.com))