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VIA ELECTRONIC MAIL:

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

Dear Ms. Skaar, Mr. Block, Ms. Bourassa and Ms. Tapia:

We are writing to provide to you Plaintiffs' reply to the responses to our letter of August 17, 2015 that were issued by the Department of Health (DOH) Defendants and the DDPC, for the DDPC's fifth annual report regarding Defendants' implementation of the January 8, 2010 settlement agreement in *JM et al. v. the New Mexico Department of Health et al.*.

As an initial matter, we appreciate that the DDPC has agreed to publish at least one more report regarding the progress in fulfilling Defendants' obligations under the settlement agreement. We are hopeful the DDPC will conclude the guardianship proceedings for the people identified by the Columbus Organization as requiring the assistance of a guardian to ensure that those people receive the assistance they need with decision-making, so that informed consent will be given on their behalf regarding their affairs, their medical treatment and their services.

DDPC's response to Plaintiffs' allegations that DDPC's Office Of Guardianship (OOG) has not fulfilled its responsibilities contains misleading information and is unpersuasive

The August 28, 2015 letter issued by Marina A. Tapia did not deny the following assertions made in Plaintiffs' August 17, 2015 letter:

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.

Ms. Tapia's letter did not refute that those commitments were made on February 7, 2014. Indeed, the letter ignored the first concern; that the actions that were taken by the OOG were untimely. For example, it took the OOG five months to send us a form developed by the OOG for petitioning

courts. More significantly, the OOG's actions in getting guardianship proceedings initiated have been very slow. At the time of DDPC's September 2015 letter, some of the people whom the DDPC promised in February 2014 would have guardianship petitions filed for them were still waiting for a case to be filed, *nineteen months* after OOG committed to filing them. Even now, *two years* after the commitment was made, some people are still waiting for the DDPC to initiate guardianship proceedings, although they were recommended by Columbus five years ago. The untimely actions by the OOG are harming the people we represent.

The letter also admitted that the OOG's February 7, 2014 promise to file petitions in state court on behalf of people living on Navajo land was not fulfilled by the OOG; but implied that the DDPC decided to ask the Navajo Nation to set up guardianships instead, stating, "The Executive Director of DDPC is arranging to meet with the President of the Navajo Nation." In actuality, our understanding is that just one letter was sent by the DDPC to the President of the Navajo Nation, and that letter was sent *after* the Plaintiffs submitted their August 2015 letter to the DDPC (over one and a half years after the DDPC's promise to work with the Navajo Nation was made). Moreover, the OOG has evidently done nothing to "work with" the Navajo Human Services Department, and it appears that nothing has been done to follow up the September 2015 letter. The people living on the Navajo Nation are not being helped by the DDPC.

The letter also contains illogical and contradictory statements. For example, it stated,

Plaintiffs' counsel has refused to understand guardianship and that a petition requesting the appointment of a guardian must be supported by a Report of the Qualified Health Care Professional (QHCP). Plaintiffs demand for OOG attorneys to file petitions without a QHCP is tantamount to telling OOG attorneys to violate the Rules of Civil Procedure, the Probate Code, and the Rules of Professional Conduct.

However, after stating that it would "violate the Rules of Civil Procedure, the Probate Code, and the Rules of Professional Conduct" to file a guardianship petition without "a Report of the Qualified Health Care Professional (QHCP)," the letter then states, "Thus far, two petitions without a QHCP have been filed"

The OOG's failure to fulfill the commitments which the DDPC made to former Training School residents, over six years ago, has left those people with intellectual and developmental disabilities without the support they need in making informed choices about their living arrangements, their finances, and the services they receive. Due to the failure of the DDPC to comply with the 2010 agreement, some former Training School residents are going without services to which they are entitled, because no one is in place to provide consent to those needed services.

We hope that the DDPC will act promptly to rectify the situation.

DOH Defendants Remain in Noncompliance

The first sentence of Paragraph 3(d) of the parties' Agreement reads: "Every former resident who is not receiving services through a Waiver program will be offered assistance from the DOH

Community Services Integration project.” The question of precisely what constitutes the Community Services Integration (CSI) project’s “assistance” is disputed by the Parties. The Arbitrator recently ruled that the settlement agreement’s language does not provide either the specificity or clarity that would allow the Arbitrator to rule with regard to Plaintiffs’ allegation that some Columbus recommendations remain unfulfilled by the DOH Defendants.

However, Plaintiffs’ counsel believe that, irrespective of whether they can prove that certain Columbus recommendations have not been completed, many individuals are not receiving the case management services, termed “assistance from the CSI project,” that DOH promised to provide them. In fact, the DOH Defendants’ August 2015 response merely states, “The State firmly assert that they have met the terms of the settlement agreement, they will continue to meet with those individuals who are eligible under the settlement agreement and who are interested in the support and services defendants can provide.” The settlement agreement requires DOH Defendants to do more than having CSI workers “meet with” former Training School residents “who are interested in the support and services defendants can provide” four times a year. That is not case management.

These are the most important areas of the settlement agreement that are not yet fulfilled:

1. 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 member of the proposed class 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; and
5. People who are stuck in nursing homes are not getting assistance from CSI to get out.

Six 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.

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 those former residents of the Training Schools 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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