

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

DEBRA HATTEN-GONZALES, et al.,

Plaintiffs,

vs.

Civ. No. 88-0385 KG/GBW  
Consolidated with  
Civ. No. 88-786 KG/GBW

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

Defendant.

ORDER STAYING CASE REVIEW PENDING APPEAL

Defendant David R. Scrase, Secretary of the New Mexico Human Services Department, filed a Notice of Appeal (Doc. 1061) with respect to the Court's Memorandum Opinion and Order directing the parties to conduct a case review (Doc. 1060). Dr. Scrase also filed a Motion to Stay pending appeal, in which he seeks a stay of the case review "and all proceedings in this matter pending appeal." (Doc. 1062). The Court held a hearing on this matter on Tuesday, October 4, 2022, at which counsel for both parties appeared and argued. For the reasons explained herein, the Court grants Dr. Scrase's Motion to Stay with respect to the case review and denies the motion in all other respects.

Dr. Scrase appears to appeal the Court's order for case review pursuant to 28 U.S.C. § 1292(a)(1), on the basis that the order materially alters the Consent Decree. Dr. Scrase does not identify in his Notice of Appeal, and did not argue at the hearing, any additional basis for appeal and did not assert that other aspects of the case—including, but not limited to, ongoing monitoring activities, implementation of the existing Corrective Action Plan (CAP), and other requirements of the Consent Decree—are implicated by the appeal.

“The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Stewart v. Donges*, 915 F.2d 572, 574 (10th Cir. 1990) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam)). “To regain jurisdiction, [the district court] must take the affirmative step of certifying the appeal as frivolous or forfeited, and until that step is taken it simply lacks jurisdiction to proceed[.]” *Id.* at 577–78. The proper focus is “whether the appeal from [the] motion [is] frivolous and whether the appeal should delay the [case proceedings].” *Id.* at 577. “The frivolousness standard is met if the district court finds the interlocutory appeal is a sham or a mere dilatory tactic for ... delay.” *Langley v. Adams Cnty., Colo.*, 987 F.2d 1473, 1477 (10th Cir. 1993); *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989); *Dixon v. Okla. Bd. of Veterinary Medical Examiners*, 2007 WL 9710984, at \*1 (E.D. Okla. Nov. 27, 2007) (quoting *Langley*).

The Court addresses these issues in reverse order. As an initial matter, the Court finds the appeal is a dilatory tactic meant for delay. Several important facts support this finding.

First, defense counsel argued that including waiver cases in the case review process<sup>1</sup>, which will be the third case review, would materially alter the terms of the Consent Decree, and cited this as the basis for appeal. Transcript of October 4, 2022, Motion Hearing, at 3:24-4:17.<sup>2</sup> However, defense counsel did not raise this issue during any previous case review process, including for cases reviewed for the period of April through September 2020: a time during

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<sup>1</sup> The case review process was stipulated and agreed to by the parties in the Consent Decree. The parties use a stipulated review tool, comprised of 16 questions, to review—or “read”—cases for compliance with federal regulations, the Consent Decree, and Court Orders. The case review provides a snapshot of the Defendant’s operations and allows the parties, the Special Master, and the Court to evaluate Defendant’s progress toward compliance.

<sup>2</sup> The Court’s citations to the hearing transcripts refer to the court reporter’s original, unedited versions. Any final transcript may contain some differences in page and line numbers.

which HSD operated under numerous waivers. *See* (Doc. 977) (Defendant’s Objections to Special Master’s Report, omitting any objection regarding waivers); *see also* Letter from Paul Ritzma to Teague Gonzales, NM Center on Law & Poverty, dated Apr. 1, 2020, attached hereto as Exhibit 1 (identifying 28 waivers under which HSD was operating). Now, for the first time, on the eve of the third case review, defense counsel objects to including in the case review those cases subject to various waivers. The timing of this newfound objection suggests a desire for delay, rather than a genuine quarrel with the process.

Second, defense counsel seeks to stay the entire case, including all “monitoring of this case by the plaintiffs,” Tr. at 17:2-3, despite his admission that the case review is “in a box” and can be “set aside” from the remainder of the case, Tr. at 10:11-12.<sup>3</sup> Defendant’s attempt to stay all compliance activities appears as a delay tactic, especially given the concededly narrow scope of the issue on appeal. Moreover, it appears to the Court that Defendant invoked appellate jurisdiction on a specious, if not fully spurious, basis solely to avoid a negative case review.

Third, Defendant’s pattern of conduct in this case evinces a disregard for the orders of this Court, the mandates of the federal programs at issue, and—of most concern—the people served by the New Mexico Human Services Department. The history of this litigation spans nearly 35 years, and while the Defendant has made progress toward compliance, there remains a lot of work. The key measure is a case review as originally agreed by the parties.

While the Court finds that the appeal was brought for impermissible reasons, the stated basis passes the barest threshold for a potentially valid invocation of appellate jurisdiction.

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<sup>3</sup> Relevantly, counsel’s complete statement reads: “I believe that the case review or the information regarding this case review, the sample, the information about the cases, all of that, it’s static. It’s in a box right now. And that box can be set aside, and we can let the Court of Appeals decide this issue.” Tr. at 10:8-13.

Therefore, the Court will not certify the appeal as frivolous as it relates to the case review and so a case review will not proceed at this time. However, given defense counsel's unprompted assertion that the case review process can be excised from the remainder of the case, including ongoing compliance and monitoring activities, the Court finds that the appeal implicates only the case review process and does not divest the Court of jurisdiction over the case *in toto*.

Defendant's Motion to Stay is granted as to the case review process. The parties will not engage in any activities related to the case review until the Tenth Circuit rules. When the Tenth Circuit rules, this Court will issue a new order for case review and will direct the parties to draw a new sample. Put another way, this means that any sample the parties may have agreed to draw prior to the entry of this Order is null and void: the parties *shall* use a sample drawn after the Tenth Circuit rules and after this Court's subsequent order for case review.

Defendant's Motion to Stay is denied as to all other aspects of the case. To the extent Defendant subsequently argues his appeal implicates or addresses aspects of the case not related to the case review, the Court certifies that appeal as frivolous following the hearing on this matter and for the reasons state above. *See Stewart*, 915 F.2d at 577; *United States v. Hines*, 689 F.2d 934, 936–37 (10th Cir. 1982). With this certification, this Court retains jurisdiction over all other aspects of the case, including, but not limited to, ongoing compliance and monitoring activities, ongoing implementation of the current CAP, and other requirements of Section III of the Consent Decree. These activities will continue unabated.

IT IS SO ORDERED.

  
UNITED STATES DISTRICT JUDGE



*Michelle Lujan Grisham, Governor  
David R. Scrase, M.D., Secretary  
Paul Ritzma, General Counsel*

April 1, 2020

Via Email: [teague@nmpovertylaw.org](mailto:teague@nmpovertylaw.org)

Teague Gonzalez, Esq.  
NM Center on Law & Poverty  
924 Park Avenue, SW, Ste. C  
Albuquerque, NM 87102

Re: Notification of Federal Waiver Requests and the Anticipated Changes to SNAP and Medicaid Related to Public Health Emergency Operations – COVID 19 Response

Ms. Gonzalez:

As a result of both the State and Federal Public Health Emergency declarations and pursuant to the guidance and instructions from the Food and Nutrition Service (FNS) and the Centers for Medicare and Medicaid Services (CMS) and the Governor’s Office, the New Mexico Human Services Department (HSD) is in the process of apply for a number of waivers and anticipates, as a result of the approval of those waivers, making changes to the Supplemental Nutrition Assistance Program (SNAP) and Medicaid programs. HSD’s notification to you of these waiver applications is not an admission or acknowledgement that HSD is under any obligation pursuant to the DHG consent decree to provide advance notice or an opportunity for a conference on these waivers and any anticipated changes that may result from federal approval. HSD has been directed by FNS and CMS to apply for and implement, upon approval, these waivers in response to the nationwide and statewide emergency related to COVID 19.

HSD, at the direction of FNS, CMS, and the Governor’s office submitted waiver applications for the following:

	<b>Program</b>	<b>Area of Change</b>	<b>Waiver Description</b>
1	Medicaid (MAGI)	Recertifications	Medicaid (MAGI) Extension of recertification dates by 3 months on Administrative Renewal failure

2	Medicaid (Non-MAGI and MSP)	Recertifications	Medicaid (Non-MAGI and MSP) Extension of Recertification Dates by 3 Months
3	Medicaid (IC/Waiver/PACE)	NF LOCs	Medicaid (IC/Waiver/PACE) NF LOCs
4	Medicaid (All Types)	Fair Hearing Requests	Fair hearing request extension
5	Medicaid (All Types)	Reasonable Opportunity	Reasonable Opportunity End Date Extension
6	Medicaid	Presumptive Eligibility	Medicaid (MAGI) Presumptive Eligibility Extending Eligibility Period
7	Medicaid	Presumptive Eligibility	Medicaid (MAGI) Presumptive Eligibility Increase Users Authorized as PED
8	Medicaid (MAGI)	Eligibility	Medicaid (MAGI) Eligibility Increase FPL Limit for MAGI Other Adult COE
9	Medicaid (MAGI)	Reasonable Compatibility	Medicaid (MAGI) Reasonable Compatibility
10	Medicaid (MAGI)	Self Attestation of Income	Medicaid (MAGI) Self Attestation of all information except Immigration/Citizenship
11	SNAP	ABAWD	SNAP Extend ABAWD Statewide Waiver
12	SNAP	Interviews	SNAP Interviews Extend EPPI

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13	SNAP	Recertifications	SNAP Waiver IR and Extend PR Review Dates
14	SNAP	Elderly/Disabled	SNAP Extension of Elderly/Disabled
15	SNAP	Interviews	SNAP and TANF - Allow for On-Demand Interviews
16	SNAP	Verification	SNAP Relaxation of Primary Source for Verification
17	SNAP	Verification	SNAP Align Verification Rules with Medicaid
18	SNAP	Benefit Issuance	SNAP One-Time Statewide SNAP Supplement
19	SNAP	TOP Suspension	SNAP Suspend TOP Debts
20	Field Operations	Statewide Queues	Field Operations - Automated Recurring Routing/Transfer of Tasks
21	TANF	Sanctions	TANF Sanctions Relief
22	TANF	Eligibility	TANF New COE
23	SNAP	Eligibility	SNAP Student Work Requirement Exemption
24	SNAP	Interview	SNAP Waiver Interviews for Recertifications and Applications
25	SNAP	EBT	SNAP Pandemic EBT (P-EBT)
26	Medicaid (All COEs)	Eligibility	Medicaid Reopening closed cases in March, 2020
27	SNAP	EBT	Online Purchase Pilot (OPP)
28	SNAP	EBT	Hot Foods EBT Waiver

In addition, HSD has taken substantial measures to increase the online and telephonic application process, allowing applicants to apply for benefits without having to come into an ISD office or have face-to-face interviews. HSD field offices remain open to those individuals who are unable

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to utilize the online or telephonic services. However, access to the field office is limited by the appropriate COVID 19 precautions.

Given that HSD is allocating all of its resources to maintaining operations and providing all of the services that are needed for the health, safety and welfare of the New Mexico's citizens during this crisis period, we are limited in our ability to respond to question or inquiries regarding the above actions at this time.

Respectfully,

/s/

Paul Ritzma

Cc: Lawrence Parker, Special Master  
Ramona McKissic, Compliance Specialist  
Daniel Yohalem, Esq.  
David Scrase, M.D., Secretary  
Angela Medrano, Deputy Secretary