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April 13, 2016

MEMORANDUM

TO: Senator John Arthur Smith, Chairman LFC
Representative Jimmie C. Hall, Vice-Chairman LFC
LFC Members

THRU: David Abbey, LFC Director
Charles Sallee, LFC Deputy Director

FROM: Jon Courtney, Ph.D., Program Evaluation Manager LFC

SUBJECT: Special Review-Financial Impact of Hatten-Gonzales Lawsuit

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Summary. A 2014 ruling under the decades old case known as the Hatten-Gonzales lawsuit found New Mexico families were being improperly denied food and medical assistance. A series of court orders sought to have the Human Services Department (HSD) remedy the situation including stopping all automatic denials and closures of Medicaid and Supplemental Nutrition Assistance Program (SNAP and formerly called food stamps) cases. HSD has testified to the Legislative Finance Committee (LFC) on a number of occasions that the Hatten-Gonzales lawsuit and court orders have resulted in financial costs to the state with the potential of keeping people on Medicaid that otherwise should not be on Medicaid. Given the Medicaid budget situation and projected shortfall that will result in cuts to provider rates and possible changes to benefits, this special review sought to examine what, if any, financial impact the lawsuit has had on the state. The review estimates a general fund financial impact of $2.4 million in additional benefits and $3 million in administrative costs for a total of $5.4 million since 2014. The review also found an upcoming court case could have additional financial impact for the state with potential results of financial sanctions and a partial takeover of HSD.

Background. A class action lawsuit, known as the Debra Hatten-Gonzales lawsuit, was brought against HSD in 1988. The lawsuit alleged HSD violated numerous federal laws in determining eligibility for food stamps and Medicaid. The plaintiffs and HSD reached a settlement

agreement (consent-decree) in August 1990 that HSD has remained under for twenty-six years. Over the years, a number of court orders have been granted to a number of plaintiffs alleging non-compliance with the consent-decree.

Most recently, the Center on Law and Poverty acted as plaintiffs and won a May 2014 decision from United States District Court for the District of New Mexico (District Court) which found HSD was failing to comply with a portion of the consent-decree demanding the state remove "systemic or programmatic barriers" from the consent-decree's requirement that the state provide "100% compliance with the federal application processing time standards in the Food Stamps and Medicaid programs." One of the results of the May 2014 District Court decision was a court order directing HSD to stop automatic denial and closure of SNAP and Medicaid cases and providing instruction on prioritization of cases and reporting requirements.

District Court evaluated HSD's progress in 2015 and found that although HSD was making substantial progress toward complying with parts of the court order, HSD was not in compliance. In 2015, District Court appointed a magistrate judge as a compliance monitor. On February 22, 2016, the Center on Law and Poverty filed a brief with the court purporting HSD's continued non-compliance with the Hatten-Gonzales court order regarding Medicaid and SNAP eligibility and renewal. The brief claims tens of thousands of needy New Mexicans have been unlawfully denied Medicaid and Food Assistance and HSD continues to carry overdue applications and renewals. The Center on Law and Poverty is requesting HSD be put into a limited receivership that would allow an expert chosen by the Court to run, on a day-to-day basis, those aspects of HSD that are necessary to implement the consent-decree. A hearing on this matter is scheduled for late April 2016.

Major Events in the Hatten-Gonzales Lawsuit

1988	Hatten-Gonzales lawsuit against the Secretary of HSD filed alleging HSD violated federal laws in determining eligibility for food stamps, Aid to Families with Dependent Children (AFDC) and Medicaid.
1990	Parties reach a Settlement Agreement approved by District Court for the District of New Mexico requiring HSD to reform its application processing practices and granting plaintiffs a role in monitoring compliance.
1992	The Settlement Agreement was twice modified extending deadlines and imposing a schedule for developing a computerized tracking system.
1993	Plaintiffs completed two file reviews.
1998	AFDC program was replaced with Temporary Assistance to Needy Families (TANF) and references to AFDC are deleted from the Settlement Agreement. United States District Court dismisses the case while retaining jurisdiction to vacate the judgment and reopen the case if the Settlement Agreement is breeched. Later that year the Court vacates the judgment and restores the case to its active docket. In August the Court enters a Modified Settlement Agreement addressing HSD's non-compliance and changes in federal law.
2005	Plaintiffs complete a case review of 180 files finding violations of Settlement Agreement requirements in every county reviewed in virtually every aspect of the application process. Plaintiffs file a report on the review and a motion to enforce

	compliance. HSD files a motion to dismiss which United States District Court denies.
2006	The Court grants the plaintiff's motion finding HSD breached its duty and that cooperation will be enforced. HSD files another motion to dismiss which is denied by the Court.
2007	HSD files a motion to dismiss which is denied by District Court. HSD appeals the motion to the United States Court of Appeals Tenth Circuit which dismisses the appeal based on lack of jurisdiction.
2008	Plaintiffs move for District Court to rule on a second motion to enforce compliance with court order in which plaintiffs seek to keep HSD from requiring an applicant to provide SSN numbers and immigration status of non-applicants living in the household. The Court grants the motion to the plaintiffs.
2014	Plaintiffs file a motion to enforce compliance citing illegal denials and closures of food and medical benefits and District Court finds HSD is failing to comply with portions of the Modified Settlement Agreement and grants a Motion to Enforce Compliance.
2015	District Court appoints Magistrate Judge Carmen E. Garza as a compliance monitor. HSD submits monthly status reports to court.
2016	Center on Law and Poverty files a motion to find HSD in contempt of court and asks that HSD be entered into a limited receivership.

Fiscal Impact of the Consent-Decree. Since the 2014 District Court decision, the Hatten-Gonzales lawsuit has triggered additional Medicaid benefits of $11.9 million ($2.4 million general fund) and about a $3 million impact in administrative costs for a total of approximately $5.4 million general fund. Although the financial impact of the Hatten-Gonzales lawsuit goes back 26 years, the most recent impact stems from the 2014 court decision corresponding with Medicaid expansion. Many states electing to expand Medicaid experienced increases in overdue applications and renewals similar to New Mexico, however other states were not under a related consent-decree which presented New Mexico with additional legal challenges.

The overdue cases can be divided into four categories for SNAP and Medicaid:

1. SNAP overdue renewals
2. Medicaid overdue renewals
3. SNAP overdue applications
4. Medicaid overdue applications

There are two potential financial impacts of the Hatten-Gonzales case. First are potential enrollees who are receiving benefits who would not have received benefits if not for the court decision. Second are administrative costs in terms of staff time, attorney's fees, and contracts. SNAP benefits are fully funded by the federal government and therefore have no immediate financial impact to New Mexico for food benefits. Medicaid has approximately a 70 percent federal match for the regular Medicaid program and 100 percent for the expansion population for the time period covered by this analysis. It should be noted that it was not an objective of this review to determine if HSD's practices for determining eligibility are in accordance with law. Additionally, it should be noted the administrative impact is at least partially federal funds.

Fiscal Impact to Medicaid. There is an estimated financial impact to Medicaid of $11.9 million, $2.4 million general fund, related to the Hatten-Gonzales lawsuit. HSD reports a total of 223 thousand overdue renewals from May 2014 to December 2015 at a total cost of $396 million. HSD estimates 97 percent of these cases are still eligible for Medicaid and approximately 3 percent of the payments can be attributed to the Hatten-Gonzales lawsuit. This is based on the pre-ACA Medicaid attrition rate of 3 percent. The impact reflects a mixture of fee-for-service payments and managed care capitation rates from May 2014 through December 2015. The 3 percent figure represents the $2.4 million general fund estimate and an estimated 6,686 unduplicated enrollees.

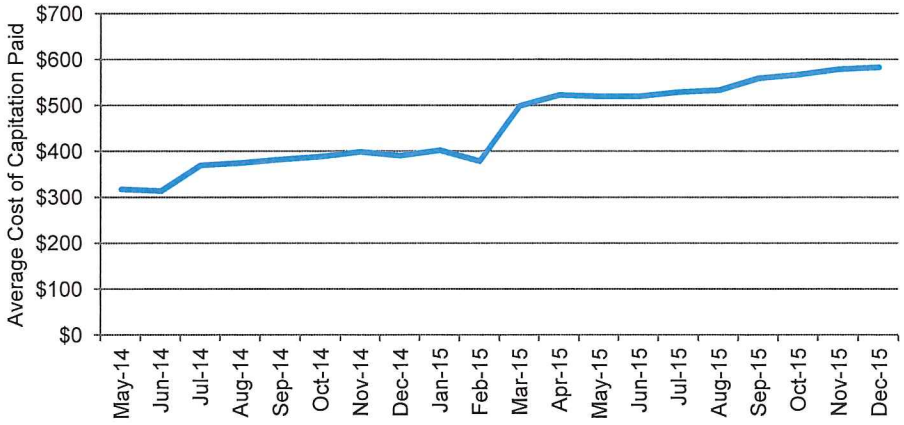
Table 1. Payments Associated With Overdue Renewals May 2014-December 2015

	Total Fee For Service Count (Duplicated Individual Count)	Average Fee For Service Claim Paid	Total Fee For Service Paid (in millions)	Total Capitation Count (Duplicated Individual Count)	Average Cost of Capitation Paid	Total Capitations Paid (in millions)	**Total Cost (in millions)**	**Total General Fund Impact**
All Overdue Renewals	50,086	$1,204.57	$60.33	713,046	$470.72	$335.64	**$395.97**	**$79.19**
Hatten-Gonzales Impact Based on 3 Percent Attrition Rate	1,503	$1,204.57	$1.81	21,391	$470.72	$10.07	**$11.88**	**$2.38**

Source: HSD
Note: General Fund impact is based on a blended FMAP estimated by HSD.
Unduplicated members impacted by the Hatten-Gonzales lawsuit are 6,686

During this period of time, the average cost of capitation paid for overdue renewals also rose by $266 dollars between May 2014 and December 2015 as shown in Chart 1.

Chart 1. Average Cost of Capitation Paid for Overdue Renewals

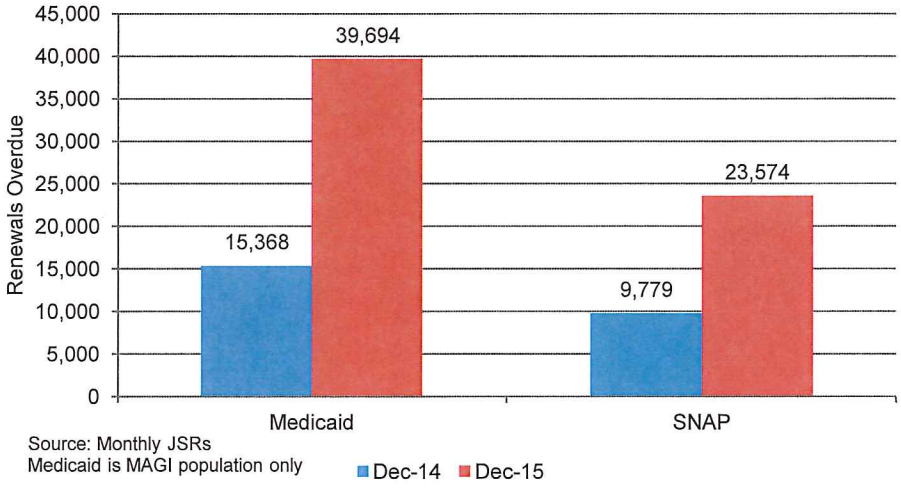


Source: HSD

Overdue renewals and overdue applications other than those represented in Table 1 are primarily ineligible for services and therefore have no financial impact.

Overdue Renewals. The number of overdue renewals for SNAP and Medicaid is increasing. The number of overdue SNAP renewals in Medicaid has more than doubled to 39,694 in December 2015, whereas the number of overdue SNAP renewals more than doubled to 23,574 as shown in Chart 2.

Chart 2. Number of Overdue Renewals

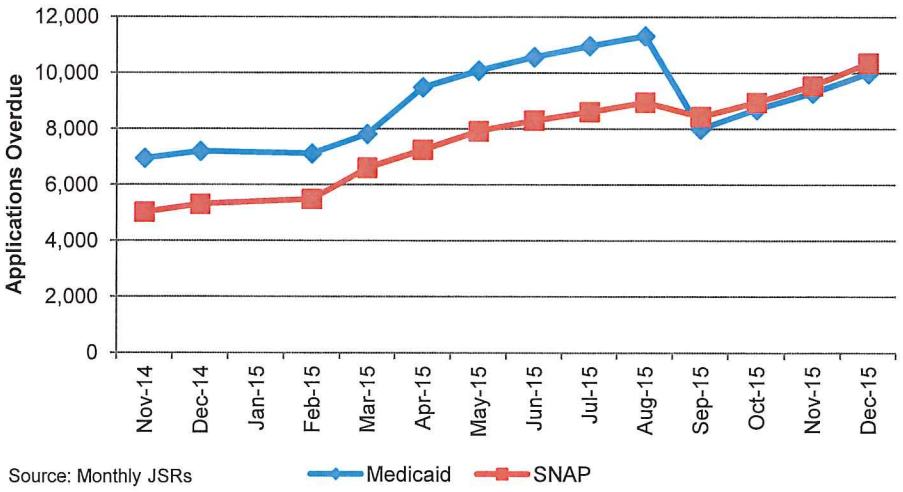


Upon review of court documents, HSD states most Medicaid cases classified as overdue represent files HSD has worked as far as they can. Furthermore, HSD states there is missing information or other circumstances that do not allow the files to be worked further and for this reason HSD determined these renewals are not eligible for services at this time. However, the renewals cannot be closed due to the Court Order representing the reason for the increasing number of overdue cases.

Court documents represent some overdue renewal and recertification for SNAP and Medicaid as not being processed. According to court documents, families with SNAP recertification have lost food assistance because recertification has not been processed. According to the 5th monthly joint status report to the Court, HSD states it has done all it can to process these cases and is not issuing closure because of the Court Order.

Overdue Applications. The number of overdue SNAP and Medicaid applications has increased over the past year. After a decrease in September 2015, the number of overdue SNAP and Medicaid applications continued rising through the end of 2015. In November 2015 the number of overdue applications stood at 9,536 for SNAP and 9,289 for Medicaid shown in Chart 3. According to court documents these overdue applications are "primarily ineligibles due to court order." If this is the case, there should be no impact to potential enrollees, however if potential enrollees that have overdue renewals are eligible for services and not receiving them, this could adversely impact a families health and well-being.

Chart 3. Number of Overdue Applications



Source: Monthly JSRs

Compliance Administrative Costs. In total HSD reports about $3 million in administrative costs from the Hatten-Gonzales lawsuit between 2014 and 2016. The assumption is made here that these costs are all absorbed by general fund although it is likely that some federal funding supplements these figures. Additionally, staff costs such as case workers and HSD employed attorneys would exist regardless of the lawsuit but are attributed to being dedicated to that effort here based on HSD estimates.

HSD has at least two contracts in place totaling $1.4 million to help reach compliance with Hatten-Gonzales court orders. The larger of these contracts is to Deloitte. An additional $1.3 million was added to a $13 million contract with Deloitte. The contract modification will add an additional 12 full time employees to Deloitte for the purposes of DHG related change requests. HSD has also entered into a $90 thousand contract with Maximus and CTS for literacy review and expert consultation on notices.

Table 2. Current HSD Contracts To Reach Compliance With DHG

Contractor	Purpose	Amount
Deloitte	DHG related change requests	$1,333,280
Maximus Health Services and CTS	Literacy review for all notices to clients	$90,000
Total		**$1,423,280**

Source: DHG court documents and Sunshine Portal

HSD has paid $241 thousand in plaintiff attorney's fees since FY14 including reimbursement for the Center on Law and Poverty to conduct two case reviews. Two attorneys (the Yohalems) along with the Center on Law and Poverty have represented the plaintiffs in the Hatten-Gonzales lawsuit. A part of the court decision on the Hatten-Gonzales case requires HSD (the defendant) to pay plaintiffs' attorney fees as shown in Table 3.

Table 3. Plaintiff Attorney's Fees

	Center on Law and Poverty Fees	Jane Yohalem Fees	Daniel Yohalem Fees	Total
FY14	$31,403	$2,120	$6,399	**$39,922**
FY15	$70,811	$40,516	$27,390	**$138,718**
FY16	$49,060	$948	$12,548	**$62,556**
Total	**$151,274**	**$43,584**	**$46,337**	**$241,196**

Source: HSD

HSD had increased personnel costs of at least $1.3 million related to the Hatten-Gonzales lawsuit. These costs include HSD legal staff time and field staff time. The field staff time is notable as HSD put together a "Tiger Team" composed of the Income Support Division's (ISD's) most efficient staff to clear overdue cases in 2014. According to court documents HSD made overtime work mandatory in 2014 to clear the overdue cases. HSD indicates that field staff financial impact has been almost $1.1 million including caseworker overtime.

Table 4. HSD Field Staff Financial Impact

QIS DHG case manual review of timeliness on cases –	5 staff. 20 hours per month	$43,358
Staff assigned solely to DHG compliance	5 ISD staff full-time on DHG	$449,461
Caseworker Overtime in 2015 paid statewide post back log, for purposes of re-working cases as required by the court.		$591,372
Total HSD Field Staff Time		**$1,084,191**

Source: HSD

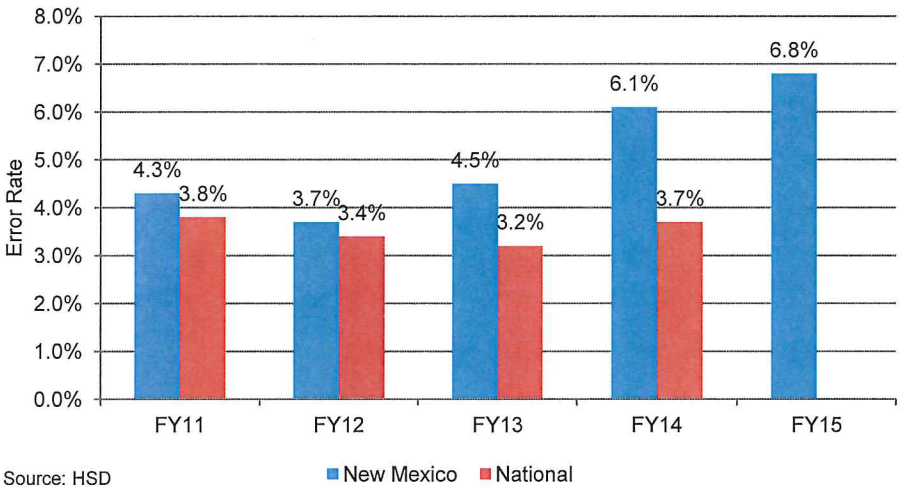
In addition, due to numerous legal issues related to the Hatten-Gonzales lawsuit, HSD reports approximately $222 thousand in legal staff expenses from April 2014 to the present date. This is distinct from plaintiffs' legal fees paid out by the state.

SNAP Eligibility Determination Performance and Payment Error. HSD's performance in benefit denials for SNAP disqualifies New Mexico for bonus federal funding. HSD makes errors by improperly denying, suspending or terminating SNAP benefits, or sending notices not in compliance with Federal rule, in approximately half of all cases. Part of the Hatten-Gonzales lawsuit is regarding improper benefit denials for SNAP. A February 2016 brief filed by the Center on Law and Poverty accuses HSD of procedurally denying and closing SNAP cases violating the 2015 court order. A USDA measure on case and procedural error rates (CAPERs) measure whether a state properly denied, suspended, or terminated SNAP benefits to certain households or properly notified those households of the decision. In 2014, about 25 percent of states' actions to deny or terminate SNAP benefits were found to be improper nationally. The same year eight states including New Mexico were around 50 percent. In FY15 the rate for New Mexico was 47.3 percent. New Mexico is likely missing out on federal funding as a result of high error rates as states with low error rates can qualify for bonus funding.

The payment error rate for SNAP in New Mexico has risen over the last four years and is almost twice the national average. States have a goal of 96 percent payment accuracy with no higher than a four percent error rate. New Mexico had a 6.8 percent payment error rate for SNAP in

FY15. As a comparison, the national error rate in FY14 was 3.7 percent. Error rates can reflect either overpayments (which theoretically cost the government money) or underpayments (which theoretically save the government money). New Mexico errors skew heavily toward the overpayment side.

Chart 4. New Mexico Reported SNAP Error Rate



Source: HSD

Medicaid Eligibility Determination and Payment Error. In October 2015 HSD started producing an approval application processing timeliness report for Medicaid in response to the court order. The report showed approved applications processed within federal timelines. Performance for October 2015 was 96.2 percent and November was 97.3 percent. The Center on Law and Poverty claims that the report does not reflect what is required in the court order because denials are not included in the report and because the timeframe does not go back far enough.

The Centers for Medicare and Medicaid Services (CMS) have been in the process of developing reporting requirements for payment error rates. CMS has developed the Payment Error Rate Measurement (PERM) program to measure improper payments in Medicaid and CHIP and will produce error rates for each program. CMS is rolling the program out in phases and New Mexico is included in the first group of seventeen states that are currently in the process of submitting reports. In future years the performance of New Mexico will be able to be compared to other states and provide the state another tool to improve the quality of its payment system.

Future Implications of Hatten-Gonzales lawsuit. HSD's continued non-compliance with Hatten-Gonzales lawsuit court orders could place the state at significant financial risk. The Center on Law and Poverty has repeatedly cited non-compliance with court orders in monthly joint status reports to District Court. In their recent Plaintiffs Reply to District Court the Center on Law and Poverty outlined nine areas of noncompliance.

The objective of this evaluation is not to determine compliance or noncompliance, but the Legislature should be made aware of the current accusations against HSD and suggested penalties by the Center on Law and Poverty. Resulting court action could potentially put the state at significant financial risk relating to financial sanctions and entrance into a receivership.

Center on Law and Poverty List of Items Asserting HSD Non-compliance

1. Defendant's response does not demonstrate or even mention compliance with this Court's order concerning Medicaid renewals Doc.475;
2. Defendant has not brought a single notice into compliance with the decree;
3. Defendant has not promulgated new state regulations that comply with the law;
4. Defendant has not provided a date when new employees will be trained to process cases as required by federal law and the Decree;
5. Defendant has not fixed its ASPEN application processing system so that it does not require entry of a document to prove immigration status;
6. Defendant does not track the timeliness of Medicaid processing;
7. Families with cases pending to close and deny have not received an individualized delay notice;
8. The Department has not provided data to show the status of backlogged cases;
9. Defendant restricted applicant access to local offices to deal with current processing delays.

Source: Plaintiff Reply Filed in District Court March 21, 2016

HSD disagrees with the Center on Law and Poverty's characterization of continued non-compliance with the Hatten-Gonzales lawsuit. HSD contends that it is in substantial compliance with the court's consent-decree and the changes that are required by the decree are very complex, HSD's task is large, and the recognition that to effectuate change requires time reflects reality.

HSD also contends that Center on Law and Poverty has not been cooperative or constructive with the process. The improvements require the Department to work with outside firms and contractors and within real time confines involving such things as programming necessary IT changes and that the Center on Law and Poverty continuously attempts to redefine the standards for compliance.

Case Review by Plaintiffs. Two court ordered case reviews conducted by the Center on Law and Poverty found significant issues in sample cases from Medicaid and SNAP overdue applications and renewals, however the sample size was too small to be representative. A February 2015 court order required HSD to provide the Center on Law and Poverty a random sample of 124 case files to review that are overdue and pending denial and closure. A second order called for another 120 case files to be provided by HSD to the Center on Law and Poverty in October 2015. For each review cases were evenly split between Medicaid applications, Medicaid renewals, SNAP applications and SNAP renewals (30 cases per category). The Center on Law and Poverty completed the most recent review of the 120 cases finding significant issues in many of the cases in all four categories and provided a report of their findings to LFC at the LFC's March 2016 hearing. They found that in a majority of the cases HSD was at fault for delays in renewals and applications. However, the Center on Law and Poverty's case review was too small to be considered representative of the entire population of overdue cases representing only 0.005 percent of the total. However, the case review did raise significant issues alleging HSD error for Medicaid and SNAP renewal and application delays. However HSD notes that the alleged "significant issues" identified by the Center on Law and Poverty in the case file review have not been verified by the Court. These are part of the ongoing unproven allegations frequently made by the Center on Law and Poverty that HSD disputes. HSD may consider recommending to New Mexico District Court a third party review of a representative sample of cases to determine status of cases in the population of overdue applications and renewals if they plan to use such information in future decisions.

Upcoming Court Hearing. An upcoming District Court hearing could result in financial sanctions and a partial takeover of HSD. A District Court hearing is scheduled for April 28th on a motion filed by the Center on Law and Poverty asking the court to find HSD in contempt of court and be placed into a limited receivership which could pose a significant financial risk to the state. The Center on Law and Poverty argues HSD is still out of compliance with a consent-decree from the decades-old Hatten-Gonzales class action lawsuit regarding SNAP and Medicaid applications and renewals. If the court finds HSD in contempt, it could issue sanctions until compliance is achieved. If the court orders a receivership, a court-chosen expert would run aspects of HSD necessary to implement the consent-decree.

A similar receivership was entered into by the California department of corrections for inmate health care. In 2010, the California Legislative Analyst's Office identified proposals by the receiver as posing significant financial risk to the state. Spending on services related to the receivership grew from $882 million in 2006 to almost $2 billion in 2009; the increases were largely driven by greater usage of contract medical services, such as specialty medical care, private ambulance transportation, and nursing and pharmacy registry usage. The receivership which was entered into in 2006 is ongoing now in its tenth year.

Recommendation: HSD should provide the LFC with an update regarding their compliance with the Hatten-Gonzales lawsuit.

DA:CS/JC/jle

Cc: Dr. Tom Clifford, Secretary, Department of Finance and Administration
Brent Earnest, Secretary, Human Services Department
Keith Gardner, Chief of Staff, Office of the Governor

HUMAN SERVICES
DEPARTMENT

Susana Martinez, Governor
Brent Earnest, Secretary

April 11, 2016

Mr. David Abbey, Director
Legislative Finance Committee
325 Don Gaspar, Suite 101
Santa Fe, NM 87501

Re: Response to Legislative Finance Committee Report
Financial Impact of Hatten-Gonzales Lawsuit

Dear Mr. Abbey:

Please accept this letter as the Human Services Department's (HSD) response to the Legislative Finance Committee's (LFC) "Financial Impact of Hatten-Gonzales Lawsuit" report. HSD finds the report to be a reasonable representation of the background and financial impact of the Hatten-Gonzales lawsuit.

With or without the court's action or the long-standing consent decree, HSD continuously strives to improve its eligibility processes and is committed to providing accurate, timely and accessible information to applicants. This is clearly evident in our effort to ease and streamline the application process via online and over-the-phone applications. Nevertheless, we recognize that the May 2014 order by the United States District Court may place HSD at risk for financial penalties and disallowances from federal oversight agencies.

HSD will continue to mitigate that risk, and we believe that the department is in substantial compliance with the Debra Hatten-Gonzales (DHG) court orders and is committed to resolving the issues identified in the DHG consent decree. Faced with a projected shortfall in the Medicaid program that will result in cuts to provider rates and possible changes to benefits, HSD is eager to alleviate the financial pressures on the Medicaid program that the DHG lawsuit brings. The department has put together a multi-disciplinary team of individuals that are focused on meeting the requirements of the DHG lawsuit. It is the department's plan to continue to comply with the requirements of the consent decree and disengage from the lawsuit as soon as possible.

Thank you for the opportunity to comment on the special review report of the financial impact of the DHG lawsuit. We appreciate and commend the diligent work of your staff to understand the complexity of this lawsuit and evaluate the financial impact. We remain committed to continued collaboration with the LFC.

Sincerely,

Brent Earnest
Cabinet Secretary

Office of the Secretary | PO Box 2348 – Santa Fe, NM 87504 | Phone: (505) 827-7750 Fax: (505) 827-6286