DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO	**COPY** ▲ COURT USE ONLY ▲
Plaintiffs: **VALERIE IMANI HAWTHORNE-BEY**, *et al.* Defendants: **KAREN REINERTSON**, Executive Director of the Healthcare Policy and Financing, *et al.*	Case Number: **04 CV 7059** **Courtroom 1**
O R D E R	

THIS MATTER comes before the Court on Plaintiffs' Motion for a Preliminary Injunction against Defendants. The Court in part grants and in part denies Plaintiffs' requested relief.

Plaintiffs are eleven Colorado residents who have received or applied for public benefits. Plaintiffs have had their applications delayed beyond the required processing time, have seen their benefits reduced, terminated, or delayed without cause, or have received legally insufficient notices since the inception of the Colorado Benefits Management Systems (CBMS).

Defendant Karen Reinertson is the director of the Colorado Department of Health Care Policies and Financing. She is also the designated administrator of the Colorado Medical Assistance Program, the Childrens' Health Plan Plus (CHP+), and the Old Age Pension Health and Medical Program (OAP). Defendant Marva Livingston is the Executive Director of Colorado Department of Human Services (CDHS) and the administrator for the Food Stamp, Colorado Works, and OAP programs. Collectively, the Defendants shall be referred to as the Executive Directors, the State, or Defendants.

Plaintiffs have requested that the Court enter orders in five different categories: (1) benefits processing and issuance, (2) noticing, (3) corrective action plan, (4) appointment of a special master, and (5) reporting. There are subheadings under each category. The Court grants or denies Plaintiffs' requests as follows:

A. BENEFITS PROCESSING AND ISSUANCE

1. Compliance With Applicable Law

Exhibit 55 sets the benchmark for the number of cases within each high-level program that are out of compliance with timely processing requirements. In each program area, the Defendants are required to reduce the out-of-compliance cases by forty (40) percent on or before February 28, 2005. Each sixty (60) days thereafter, the Defendants must reduce each program area's out-of-compliance cases by forty (40) percent until substantial compliance with federal and state law is achieved.

The Court has chosen Exhibit 55 to set the benchmark rather than Exhibit TTT for several reasons. Exhibit 55 shows that at the end of November 2004, there were 29,361 cases out of compliance with federal or state processing requirements. Hopefully, by mid-December, the State has been able to reduce this number. Setting the benchmark with Exhibit 55 instead of Exhibit TTT gives the State three full months to achieve the initial forty percent reduction.

Furthermore, Exhibit TTT shows 17,557 cases out of compliance. Adding the 8,000 CHP+ cases that are processed by Affiliated Computer Systems (ACS), 25,557 cases are out of compliance by the State's own count. Both Plaintiffs' figures and those recently compiled by the State establish the same fact – thousands of cases have not been processed in the time required by federal and state law.

The Court has little faith in Exhibit TTT. Testimony established that approximately 16,000 cases were out of compliance before the implementation of CBMS. Exhibit TTT, however, shows that approximately 12,000 of those cases came from Weld County alone. This obviously cannot be correct. The Court concludes that Exhibit 55 more accurately reflects the number of out-of-compliance cases.

A forty percent reduction in out-of-compliance cases by February 28, 2005, is a realistic goal. Defendants have contracted with a State group, the Document Solution Group (DSG), for processing of newborn, prenatal, and family medical applications. DSG started processing cases during the week of November 22. Since then, DSG has added additional staff and is in a position to process numerous cases that were not previously processed. Additionally, ACS has added processing capability and personnel in both its Denver and Atlanta offices. Finally, in October 2004, the Department of Human Services established the Centralized Data Entry Team (CDET). Presently CDET has approximately thirty full-time employees, but the Director of Human Services has authorized an increase to fifty-seven. The Court expects that CDET shall quickly be up to full strength.

These additional processors should enable Defendants to meet the forty percent goal set by the Court. Mr. Rice, the manager of the food stamps program for the Department of Human Services, testified that the 9,000 food stamp cases that are out of compliance should be processed in their entirety by mid-February. Defendant Marva Hammons, in a December 6, 2004 letter to the United States Department of Agriculture, responded to the problem of late processing of food

stamp applications by stating, "We expect sustainable productivity in about six weeks." See Exhibit 137. Assuming that the testimony and statements of Defendants' representatives are true, the goal mandated by the Court may be achieved.

If Defendants are unable to meet this minimum goal of forty percent, it will clearly establish that Defendants have a much larger problem on their hands than they now admit. Failure to meet this minimum goal will require further action from this Court.

2. Emergency Processing Procedures.

Throughout this seven-day hearing on the Motion for Preliminary Injunction, Plaintiffs have requested emergency processing procedures. During closing arguments, Counsel for Plaintiffs tendered a specific proposal to the Court and Defendants' counsel. For the most part, the Court feels Plaintiffs' proposal is reasonable and necessary for the protection of Colorado residents facing immediate harm. With 25,000 to 29,000 cases not being processed as required by federal and state law, numerous individuals have been put in precarious positions. It is essential that Defendants establish a mechanism for granting the aid the law requires they provide to those who are eligible for benefits and in an emergency situation.

An Emergency Processing Unit shall be established. This Unit shall serve those individuals who are in an emergency situation because:

(1) Their applications have not been timely processed within the time frames set forth in federal and state law;

(2) A County Department of Social Services determines that, under the applicable eligibility standards, their benefits have been improperly reduced, terminated, or suspended; or

(3) The State verifies, to its satisfaction, that the applicant or recipient:

- (a) is facing immediate hunger;
- (b) is without medication or medical treatment when such absence endangers the applicant or recipient's health or life;
- (c) is without shelter or is facing imminent risk of eviction or foreclosure;
- (d) is without utilities or is facing imminent risk of utility shut-offs;
- (e) is facing any other circumstance that puts the applicant or recipient in imminent peril of physical injury, harm, or extreme hardship.

To meet these emergency needs, Defendants shall establish and adequately staff an 800 number. Because the holidays are fast approaching, the Court will not require Defendants to establish this Emergency Processing Unit as quickly as Plaintiffs have requested. However, the procedure must be established and adequately staffed on or before December 31, 2004.

Defendants shall process emergencies within five (5) business days. In processing these emergency situations, Defendants may request assistance from the County Department of Social Services, but the responsibility for processing these emergencies lies with the State of Colorado.

Defendants shall require all County Departments of Social Services to refer emergency situations that are unresolved after twenty-four hours to this State Emergency Processing Unit. Defendants shall make all reasonable efforts to publicize this State Emergency Processing Unit and to inform both county departments and needy individuals how they may contact the State Emergency Processing Unit.

The Defendants presently have some emergency procedures. However, the Court is not convinced that these procedures are definite enough, or adequate to handle emergencies. Testimony indicated that some counties were even unaware of the emergency procedures the State currently has in place. The Emergency Processing Unit, as described above, is essential and must be established.

3. Overpayments

Defendants shall not seek recovery of overpayments to any program until such time as the affected County's Director of Social Services, or his or her designee, is satisfied that an overpayment has been made to a recipient and that the overpayment was not caused by the failure of CBMS to operate properly. No overpayment will be sought from a recipient because of an error caused by the application of CBMS.

B. NOTICING

Even prior to the implementation of CBMS, the State and EDS were aware that there was a problem with accurately notifying recipients about grants or denials of benefits. This problem may even have been known a full year before CBMS was implemented. To date, Defendants and EDS have been unable to solve this problem.

The problem with noticing must be substantially corrected on or before February 28, 2005. Without proper notice to a prospective beneficiary, the right to an appeal is meaningless.

C. CORRECTIVE ACTION PLAN

The Court is not requiring Defendants to prepare and submit for the Court's approval a corrective action plan. The Court is requiring results; it is not requiring a particular plan for obtaining those results.

The federal government, through the Department of Agriculture, is requiring the State to prepare a corrective action plan for the issuance of food stamps. The food stamp program has approximately one-third of the cases that are out of compliance with federal and state law. Therefore, a corrective action plan is going to be prepared for a large segment of the out-of-compliance cases.

In addition to the fact that Defendants are submitting to the Federal Government a Corrective Action Plan regarding food stamps, the Court has two additional reasons for not requiring Defendants to submit an additional corrective action plan.

First, this Court does recognize the Separation of Powers doctrine as expressed in Article III of the Colorado Constitution. Case law also makes clear that "the district court does not have the right to interfere with the Executive Branch of government in the performance of its' statutory duties." McDonnell v. Juvenile Court for the Second Judicial District, 864 P.2d 565, 567 (Colo. 1993); accord Kort v. Hufnagel, 729 P.2d 370 (Colo. 1986).

Director Reinertson and Director Hammons have the responsibility delegated by statute to administer these various programs. By this Order, the Court is only requiring the Directors to comply with federal and state law and provide emergency assistance for those in need who are eligible for benefits.

Second, a corrective action plan, although prepared and presented in good faith, means very little. Defendants' Exhibit T is a Transition Summary and Plan. It is a Plan set forth by the State to inform the Court and Plaintiffs what action the State plans to take to solve the problems created by the implementation of CBMS. At p. 16 of Exhibit T the transition plan indicates that priority one Help Desk Tickets will be assigned to the appropriate staff within fifteen minutes of being received, and will be resolved within four hours from the time submitted to the State. The Court is not doubting Defendants' good faith in setting forth these time frames for priority one Help Desk Tickets, but the State has never resolved a priority one Help Desk Ticket in four hours, nor will it be able to do so any time soon.

The transition Plan looks good, but is meaningless. For the Court to require a corrective action plan at this time would take an enormous amount of resources for the State to complete. The Plan's usefulness, like the Transition Summary and Plan of Exhibit T, would not mean much. The Court is looking for results, not plans.

D. APPOINTMENT OF SPECIAL MASTER

The Court is declining to appoint a special master at this time. If the Defendants are unable to reduce the number of cases out of compliance by forty percent by February 28, 2005, the Court will revisit this issue.

As stated previously, the United States Department of Agriculture is exercising its oversight responsibilities as to the food stamp program. There are other independent oversight mechanisms in place at the present time. These include the Governor's Task Force, the Colorado

Commission on Information Management, and a Social Services Director's Association within each county. These oversights are worthwhile. The best oversight the Court has seen so far is the diligence of Plaintiff's attorneys and their staff. The Court is confident this oversight will continue.

E. REPORTING

To assure compliance with this Order of the Court, reporting by the Defendants is necessary. The Court, however, does not want to make the reporting criteria so burdensome as to interfere with the Defendants' time and ability to process applications and redeterminations. With this in mind, the Court is requiring Defendants to report to the Court and Plaintiffs' counsel as follows:

(a) On January 31, 2005, and again on February 28, 2005, Defendants shall report the number of new applications that have not been processed within the time required by federal and state law;

(b) On January 31, 2005, and again on February 28, 2005, Defendants shall report the number of cases the Emergency Processing Unit has received, and the number of those they have resolved;

(c) On January 31, 2005, and again on February 28, 2005, Defendants shall report, for each program, the number of recertifications/redeterminations that are out of compliance with applicable federal and state law;

(d) On or before January 31, 2005, Defendants shall report steps they have taken to publicize the Emergency Processing Unit.

(e) Every sixty (60) days after February 28, 2005, Defendants shall report the number of new applications and the number of recertifications/redeterminations that are out of compliance.

F. BENEFIT FREEZE FLAGS

To ensure the benefit recipients receive their benefits while their case is converted from the Legacy system to CBMS, a process referred to as "cleansing," the State has provided that all recipients under the Legacy system will continue to receive their benefits through February 28, 2005. The State claims there are 380,312 cases still being cleansed (Exhibit PPP). Plaintiffs presented evidence that this number is over 600,000.

Both sides agree the ten largest counties will not have completed the cleansing process by February 28, 2005. For that reason, the Court is requiring the State to keep the benefit freeze flag in effect until further Order of the Court.

Below, the Court will discuss the law and the facts that support this issuance of a preliminary injunction.

PLAINTIFFS HAVE THE RIGHT TO REQUEST INJUNCTIVE RELIEF

The thrust of the Court's Preliminary Injunction is to require the Defendants to comply with the timeframes set forth by federal and state law for processing applications and redeterminations for welfare benefits. Defendants have admitted in their preliminary injunction hearing brief that the Court has this authority. At p. 41 of their preliminary injunction hearing brief, Defendants stated:

> Here, the Court clearly has jurisdiction to determine whether the departments are complying with statutory requirements established for the determination and issuance of public assistant benefits. Assuming *arguendo* the Court finds noncompliance with the statutory or regulatory requirements and all other factors required for a mandatory injunctive relief are met in this case, the Court may order the departments to comply with the statutes (emphasis added.)

The Court, through this Preliminary Injunction, is "requiring the department to comply with the statutes." It is undisputed that the Court has the authority to enter such an Order.

The parties disagree as to whether the Plaintiffs have a private right of action to seek further relief requested in this case. The determination of this issue awaits another day.

PLAINTIFFS' CLAIMS ARE NOT MOOT

Because the eleven named Plaintiffs were made part of this lawsuit, their claims have become known to the State. Defendants have done their best to solve Plaintiffs' problems. But even if a particular Plaintiff is now receiving the benefit or benefits to which they are entitled, that does not mean their case is now moot.

In Humphrey v. Southwestern Development Co., 734 P.2d 637 (Colo. 1987), the Colorado Supreme Court recognized two exceptions to the rule that courts would decline to decide litigation that has become moot. The first exception is that the court will hear a case which has otherwise become moot if the matter involves issues that could be repeated. The second exception is when a case involves a question of "great public importance." Both these exceptions are applicable to this case.

The issues raised by Plaintiffs are ones that continue to reoccur. CBMS is a new, complex, and complicated system. The errors made with regard to Plaintiffs' benefits are sure to occur, for a variety of reasons, in other cases. Thus these problems are capable of being repeated. Also, it is estimated that one out of seven Colorado residents apply for benefits from one or more