IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

THI OF NEW MEXICO AT LAS CRUCES, LLC d/b/a Las Cruces Nursing Center,

Petitioner/Appellant,

vs.

No. 31,588

NEW MEXICO HUMAN SERVICES DEPARTMENT,

Respondent/Appellee.

PETITIONER/APPELLANT'S REPLY BRIEF

On Appeal from the Hon. Barbara J. Vigil, District Court Judge
First Judicial District Court, County of Santa Fe
Case No. D-101-CV-200903533

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Oral argument is requested in this matter

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I. Introduction

The core issue in this case is whether THI of New Mexico at Las Cruces, LLC d/b/a Las Cruces Nursing Center ("THI") has standing to pursue Medicaid benefits on behalf of Miguel Zuniga ("Mr. Zuniga"), and therefore, whether the District Court's dismissal of THI's case was error based on its determination that THI lacked standing and that the issues before the District Court were made moot by Mr. Zuniga's death. The New Mexico Human Services Department ("HSD") urges this Court to consider arguments that skirt the substantive issues at hand, and in so doing, has misstated federal and state law and failed to provide any meaningful response to the notable public policy concerns set forth by THI in its efforts to enforce the rights of an applicant for Medicaid benefits.

II. Applicable Standard Of Review

THI does not rely on the substantial evidence standard, but maintains that the contentions it has raised as a matter of law are just that, questions of law that will be reviewed by the Court *de novo*. *See* BIC 5; *Strata Prod. Co. v. Mercury Exploration Co.*, 121 N.M. 622, 627 (1996). Within these questions of law may be issues related to the District Court's application of law to the facts of the case, which an appellate court is free to review *de novo*, as well. *See* BIC 5; *Ponder v. State Farm Mut. Auto. Ins. Co.*, 129 N.M. 698, 701 (2000) ("[W]e use the substantial evidence standard for review of the facts and then make a de novo

review of the trial court's application of the law to those facts...."). Although the HSD contends that its "specialized expertise" is implicated in this matter, and therefore, the Court should afford deference to the agency's interpretations of the issues, the Court is not bound by the interpretations of the HSD. *Rio Grande Chapter of the Sierra Club, v. N.M. Mining Comm'n*, 133 N.M. 97, 102 (2003) ("It is the function of the courts to interpret the law, and courts are in no way bound by the agency's legal interpretation."). The questions of law THI has presented in this case are recognized by the HSD as such and each specifically identified in turn. *See* AB 4 ("THI raises five contentions as a matter of law..."). However, the HSD argues that THI has failed to specify which of the District Court's holdings are being challenged on appeal. *See* AB 5. The fact that the HSD can identify the questions of law at issue in this case illustrates that THI has set forth its arguments in a manner that meets the "specific attack" requirement of NMRA § 12-213A(4). Because THI has set forth specific questions of law for *de novo* review by this Court, THI's arguments should be considered in their entirety.

III. Argument

A. The District Court's Determination That THI Lacked Standing Was Improper Because It Is Inconsistent With State And Federal Law.

The Admission Agreement and Authorization Statement executed by Mr. Zuniga properly effectuated an assignment by which THI has standing to pursue

Medicaid benefits on behalf of Mr. Zuniga. THI has made clear that it contests the District Court's findings that the Admission Agreement and Authorization Statement were defective. *See* BIC 6-8. The HSD adopts these holdings as legally accurate without citing any legal authority to support same. *See* AB 6-7. The Admission Agreement was signed by Mr. Zuniga's daughter on his behalf with Mr. Zuniga indicating his consent to same with an "X" mark on the document. RP 27. The HSD's argument that Mr. Zuniga's daughter was unauthorized and required to be acting under a Power of Attorney ignores that Mr. Zuniga also signed the Admission Agreement indicating his consent to the same. *See* AB 7; RP 27. The Authorization Statement was similarly signed by Mr. Zuniga with an "X" mark in the presence of two (2) witnesses who also signed the document demonstrating the authenticity of his signature. RP 29-30. The HSD contends that a notary certification was required, but fails to cite any authority for this alleged requirement. *See* AB 7. In fact, New Mexico state law is clear that an "X" mark constitutes a valid signature. *See, e.g., Assoc. Home & RV Sales, Inc. v. R-Vision, Inc.*, 2006 U.S. Dist. LEXIS 95631, *14 (D.N.M. 2006). NMSA § 55-1-201(b)(37) defines a signature as "any symbol executed or adopted by a party with a present intention to authenticate a writing" and the Official Comment to this provision explains that, "[a]uthentication may be printed, stamped or written; it may be initials or by thumbprint... [and] [n]o catalog of possible authentications

can be complete." *Id.* This definition unquestionably includes an "X" mark made by a paraplegic, the authentication of which is evidenced by witness signatures on the documents.[1] *See* RP 27-30. The HSD has not provided any legal or factual support to challenge the authenticity of Mr. Zuniga's signature.

Additionally, pursuant to the valid assignment set forth in the Authorization Statement, THI was independently authorized to appeal the HSD's denial of Mr. Zuniga's Medicaid application. It is through this assignment that THI seeks to enforce the right of Mr. Zuniga to be heard at a fair hearing, as THI became the Medicaid applicant by virtue of the assignment. As is well-established by New Mexico case law, the legal effect of an assignment is that the "assignee stands in the shoes of his assignor." *See, e.g., Investment Co. of the Southwest v. Reese,* 117 N.M. 655, 660 (1994). The HSD misunderstands THI's position in that THI does not claim to have independent standing aside from the assignment, nor does THI need to rely on any independent authority for its standing.[2] As expressly permitted by federal Medicaid regulations, Mr. Zuniga authorized THI to assist him in the pursuit of Medicaid benefits by assigning this right to THI in writing. RP 27-29;

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[1] Because the Admission Agreement and Authorization Statement effectuated a valid assignment of Mr. Zuniga's rights to THI, the HSD's argument that this Court may find it is without jurisdiction is irrelevant. *See* AB 8-9.

[2] The HSD cites to the New Mexico Administrative Code provision allowing appeal hearings for providers, but this provision is inapplicable in this matter. *See* AB 9. Provider hearings are afforded to those healthcare entities who are receiving Medicaid payments for care and services rendered to a Medicaid recipient and seek to contest some issue related to payment of same. *See* NMAC § 8.353.2.

BIC 6-8. When Mr. Zuniga's Medicaid application was denied, THI sought appeal of this denial pursuant to NMAC § 8.200.430.12, which states that "[a Medicaid] applicant can request a hearing if his/her application for services is denied." The federal regulations expressly permit an applicant to have anyone of their choice assist them in the Medicaid application process and in no way limit this designation.[3] Therefore, THI had standing to be heard at a fair hearing pursuant to the assignment in its capacity as the actual Medicaid applicant. The HSD further contends that the issue of whether an individual is a Medicaid applicant is a question of fact, but THI's position is that it is the Medicaid applicant by virtue of a legal assignment, so the issue is clearly a legal question. *See* AB 11. The HSD confuses the issues with a drawn-out discussion regarding whether Mr. Zuniga was an actual Medicaid "recipient" entitled to payment of benefits. *See* AB 11-12. THI does not seek to enforce the payment of Medicaid benefits at this juncture, but

[3] *See* 42 C.F.R. §§ 431.206(b)(3) and 435.908. Specifically, 42 C.F.R. § 431.206(b)(3) requires that state agencies inform every applicant "[t]hat he may represent himself or use legal counsel, a relative, a friend, or other spokesman." Any assertion by the HSD or the District Court that Mr. Zuniga is limited in his ability to designate someone to pursue Medicaid benefits on his behalf is preempted by the above-stated federal regulations. *See, e.g., Lewis v. Alexander*, Case No. 2006-3963 (E.D. Pa. August 23, 2011) (holding that where a state Medicaid law conflicts with a federal Medicaid statute or regulation, the state law is unenforceable); *Lankford v. Sherman*, 451 F.3d 496, 510 (8th Cir. 2006) (explaining that "[w]hile Medicaid is a system of cooperative federalism, the same [preemption] analysis applies; once the state voluntarily accepts the conditions imposed by Congress[,] the Supremacy Clause obliges it to comply with federal requirements").

simply seeks to enforce Mr. Zuniga's right to *pursue* said benefits, a right guaranteed by federal law. *See* 42 C.F.R. § 431.200, *et seq.*; BIC 8-12.

Furthermore, courts have specifically noted the desirability of the assignment of medical and health benefits as a policy matter and have upheld Authorization Statements substantially similar to the one at issue in this case.[4] The HSD has refused to respond to this well-established case law on the issue, instead calling the assignment a "conflict of interest." AB 10. This assertion does not invalidate the assignment or diminish the well-established precedent on this issue. Moreover, NMSA § 27-2-1 cannot invalidate the assignment. The HSD's interpretation of the statute as limiting a Medicaid applicant's ability to pursue Medicaid eligibility is an unreasonable reading of the statute and is preempted by federal law. *See supra* note 3. As such, the District Court's finding that THI did not have standing pursuant to the valid assignment effectuated by Mr. Zuniga in writing is in error and must be reversed.

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[4] *See, e.g., Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1289 (5th Cir. 1988); *Bonetti Health Care Center, Inc. v. Department of Public Welfare*, Pa. Commw. Ct., No. 1339 C.D., Simpson, R. (March 7, 2012); BIC 11-13. In *Bonetti*, the court addressed the issue of a medical provider appealing a resident's denial of Medicaid benefits pursuant to a signed Authorization Statement. Specifically, the Court found that "upon execution of the 'Authorization Statement,' Bonetti stepped into [resident]'s shoes and *acquired* [resident]'s rights and duties concerning her right to pursue [Medicaid] eligibility." *Bonetti*, at pg. 9 (emphasis added). The Court went on to find that the Department of Public Welfare "cannot challenge the validity of the assignment between [resident] and Bonetti...." *See Bonetti*, at pg. 10.

B. The District Court's Determination That Mr. Zuniga's Death Rendered The Issues In This Case Moot Was Improper.

An appellate ruling in this case that THI has standing to pursue Medicaid benefits on behalf of Mr. Zuniga would provide THI with actual relief, thus the issues before this Court were not rendered moot by the death of Mr. Zuniga. *State v. Sergio B.*, 132 N.M. 375, 378 (N.M. Ct. App. 2002).

i. The HSD's Assertion That THI Did Not Have Independent Authorization Does Not Resolve The Mootness Issue.

Because federal Medicaid regulations provide that an applicant for Medicaid benefits may designate whomever he chooses in his pursuit of Medicaid benefits, including filing any appeals and representing the applicant at a hearing on same, the issue of THI's standing as Mr. Zuniga's authorized representative is not rendered moot as THI could still be afforded a fair hearing on the merits of the appeal of the denial of Mr. Zuniga's Medicaid application. *See* 42 C.F.R. §§ 431.206(b)(3) and 435.908. The HSD advances the following arguments: that THI was required to file the District Court appeal independently in its own name as the assignee of Mr. Zuniga's appeal rights; that THI was simply a spokesperson for Mr. Zuniga; that the assignment required THI to be the named appellant on the request for fair hearing; that THI was required to move for a substitution of parties following the death of Mr. Zuniga; and that these assertions illustrate that THI is not the proper appellant, so the issues before the Court are moot. *See* AB 15-16.

None of these assertions are supported by legal authority[5] or illustrate that there is no actual controversy in this case. *Id.* Moreover, the HSD once again fails to address the substantive issue of the right of a Medicaid applicant to choose anyone as his representative in pursuit of Medicaid benefits, or the fact that Mr. Zuniga expressly assigned his right to pursue Medicaid benefits to THI. As the assignee of Mr. Zuniga's right to pursue Medicaid benefits, THI stands in Mr. Zuniga's shoes and is entitled to a fair hearing on an adverse decision with respect to his application for Medicaid benefits—a right that continues after the applicant's death. *See* 42 C.F.R. § 431.200, *et seq.*; NMAC § 8.200.430.12; *e.g.*, *Investment Co. of the Southwest v. Reese,* 117 N.M. 655, 660 (1994). Any claim by the HSD that it is not bound to afford an applicant a right to a fair hearing is contrary to federal law. *See id.*; *supra* note 3.

Additionally, the HSD misconstrues the significance of the case law that THI has presented illustrating that courts have made clear that, regardless of the death of a Medicaid applicant, when a dispute for care and services rendered remains, the case is not moot. *See* AB 16-17; BIC 16-18. The HSD argues that these cases are inapplicable because the individuals bringing suit on behalf of the Medicaid applicants in these cases were proper appellants to which compensatory relief could be provided and THI is not. AB 16-17. However, the HSD does not

[5] NMRA § 1-025A(1) does not require a substitution of parties, and is irrelevant in this case as THI is acting as the assignee of Mr. Zuniga's rights.

challenge the fact that, in all of these cases, the courts found that the Medicaid applicant's death did not render the case moot because the question of ultimate liability for the care and services rendered to the Medicaid applicant extended beyond the applicant's death. *See, e.g., James v. Richman,* 547 F.3d 214 (3d Cir. 2008); *O'Callaghan v. Commissioner of Social Services*, 53 Conn. App. 191 (1999); *Stevens v. Ind. Dep't of Pub. Wel.*, 566 N.E. 2d 544 (Ind. Ct. App. 1991). As the ultimate liability for the care and services provided to Mr. Zuniga by THI is still at issue, the matter is not rendered moot by Mr. Zuniga's death. Moreover, even in the event that this Court were to find that the issues before it have been rendered moot by Mr. Zuniga's death, it is still free to review the case under the "capable of repetition, yet evading review exception"—a contention not challenged by the HSD. *See New Energy Econ., Inc. v. Shoobridge*, 149 N.M. 42, 48 (2010).

ii. The HSD's Assertion That Mr. Zuniga's Medicaid Eligibility Is Not Resolvable Is Irrelevant and Inconsistent With Federal Law.

Whether or not Mr. Zuniga is ultimately found eligible for Medicaid benefits has no bearing on the issues before this Court and certainly does not render this case moot. The HSD argues that it has the authority to summarily deny Mr. Zuniga's Medicaid application without affording him a fair hearing because a social security number has not yet been secured on his behalf, and that its unilateral

action is not subject to review by an impartial decision maker at a fair hearing.[6] The HSD is correct that it may deny an application for Medicaid benefits based on state regulations, but it cannot refuse to provide an applicant for Medicaid benefits the opportunity to challenge this action at a hearing where he is able to present arguments and testimony to illustrate that the agency action was incorrect or unlawful. The right to a fair hearing is a right every applicant for Medicaid benefits is entitled to as a matter of law and cannot be limited by the state Medicaid system. *See* 42 C.F.R. § 431.200, *et seq.*; *see also, e.g., Lewis*, Case No. 2006-3963, at *2; *Lankford*, 451 F.3d at 510. As such, the HSD's assertion that the Court must consider the resolvability of Mr. Zuniga's Medicaid eligibility is inconsistent with federal law, and therefore, cannot provide a basis for the dismissal of Mr. Zuniga's appeal on mootness grounds. Mr. Zuniga and, by way of the authority granted to it pursuant to the Authorization Statement, THI, is entitled to a fair hearing on the adverse action taken on Mr. Zuniga's Medicaid application. Therefore, an actual controversy exists and the District Court erred in determining that the death of Mr. Zuniga rendered these issues moot.

C. The District Court's Dismissal Of THI's Case Was Improper Because It Did Not Preserve Mr. Zuniga's Constitutional Due Process Rights.

[6] *See* AB 18. The HSD's statement that "[a]pparently, the Social Security Administration... also rejects THI's purported assignment by Mr. Zuniga" has no factual support in the record and is stated for its mere inflammatory effect. *See id.*

The District Court's failure to allow THI, as the assignee of Mr. Zuniga's right to pursue Medicaid benefits, to be heard at a fair hearing on the appeal of the adverse action taken on Mr. Zuniga's Medicaid application violates the rights and protections afforded to Mr. Zuniga under the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV § 1. As the HSD made clear in its response to the District Court's inquiry regarding whether a fair hearing had been conducted in Mr. Zuniga's case, a fair hearing was never afforded to Mr. Zuniga from October 2009 forward. *See* RP 60. The HSD cites the document by which it issued the dismissal of Mr. Zuniga's fair hearing as evidence that Mr. Zuniga was provided an opportunity for a fair hearing consistent with his due process rights. *See* AB 13-14; RP 9. This portrayal of the document not only completely mischaracterizes the substance of the same, but misapplies the concept of the constitutional right to due process. *See id.*

The right to due process includes the right to contest the HSD's decision to deny Mr. Zuniga's application for Medicaid benefits, which further includes the right to challenge the HSD through the presentation of evidence, witness testimony, and arguments. *See generally Goldberg v. Kelly*, 397 U.S. 254 (1970) (explaining that due process requires timely notice of adverse action; an opportunity to be heard, confront adverse witnesses, and present evidence and arguments; representation; and an impartial decision maker). A dismissal of an

appeal without the opportunity for a fair hearing does not comport with procedural due process. Further, the HSD contends that the dismissal was proper because THI is a provider and was not otherwise legally authorized as Mr. Zuniga's representative. AB 14. First, there is no requirement in the federal regulations that an authorized representative of a Medicaid applicant be "legally" authorized through a Power of Attorney or otherwise, nor does the HSD cite any New Mexico regulation requiring this designation.[7] Second, as is noted above, as the assignee of Mr. Zuniga's right to pursue Medicaid benefits, THI assumed Mr. Zuniga's right to due process. To deny THI—which has been expressly authorized by Mr. Zuniga in writing to pursue Medicaid on his behalf—a fair hearing that comports with due process is a flagrant violation of the requirements of the Constitution.

D. The District Court's Reversal Of Its May 13, 2011 Order Was Improper Because The Order Was A Final Judgment On The Merits.

The District Court's reversal of its May 13, 2011 Order was error because the Order was a final decision on the merits from which the HSD did not seek proper relief. The HSD is correct that the right to appeal is restricted to final orders and decisions, but incorrect in its contention that the May 13, 2011 Order was not final and appealable. In *High Ridge Hinkle*, cited by the HSD, this Court explained that the Supreme Court has defined a final order as that which "ends the

[7] *See supra* note 3.

litigation on the merits and leaves nothing for the court to do but execute the judgment." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 33 (Ct. App. 1994). The Order was a final decision on the merits that left nothing for the District Court to do but execute the judgment. RP 57-58.

The HSD represents the Order as unclear and wavering when it was neither. *See* AB 19. The Order did not "contemplate" anything, but gave an explicit directive contingent on a fact readily ascertainable—whether or not the HSD had properly afforded THI a fair hearing as the authorized representative of Mr. Zuniga. *See id.*; RP 57-58. The HSD conceded that a hearing had not been held during the timeframe in question, and therefore, the Order commanded that THI prepare the order for entry by the District Court "denying the [HSD's] Motion to Dismiss and granting the appeal reversing the denial by the [HSD] of THI's request as the legal representative of Mr. Zuniga for a fair hearing...." RP 58. NMRA § 1-058 explains that the District Court first announces its decision (as in the May 13, 2011 Order) and then will "designate the counsel who shall be responsible for preparation of the order" for entry. NMRA § 1-058A(2). Before entry, opposing counsel is afforded "a reasonable opportunity to examine the [order] and make suggestions or objections." NMRA § 1-058C. The HSD could have objected, but instead simply failed to comply with the Order and filed an untimely and improper Motion to Dismiss. The HSD now claims that this motion

was timely and proper pursuant to NMRA § 1-074P, but NMRA § 1-074P does not absolve the HSD from properly objecting to the final Order. *See* AB 20; NMRA § 1-074P. As such, it was error for the District Court to consider the HSD's motion and reverse its final judgment in this case announced for entry in the May 13, 2011 Order.

E. THI's Background And Summary Of Proceedings Are A Straightforward Depiction Of The Case.

THI's presentation of the facts and proceedings surrounding Mr. Zuniga's pursuit of Medicaid benefits are not disingenuous and are intended to provide the Court an overview of the tortuous path of Mr. Zuniga's pursuit of Medicaid benefits. First, the HSD states that Mr. Zuniga's application for Medicaid benefits was not denied, but accepted and considered. AB 1. The record illustrates, however, that the HSD issued a notice to Mr. Zuniga on January 24, 2011, the first line of which states that Mr. Zuniga's "application for assistance... has been denied." RP 68. The HSD secondarily takes exception to THI's assertions that the Admission Agreement and Authorization Statement are valid, instead relying on the District Court's statements that the documents were defective and ignoring the substantive issue of a Medicaid applicant's right to freely assign to or authorize whomever he chooses the right to pursue Medicaid benefits on his behalf. *See* AB 1-3. As is discussed above, THI contends that these documents explicitly authorize it to pursue Medicaid benefits of behalf of Mr. Zuniga. *See supra* Part

III.A. Last, THI's account of the May 13, 2011 Order is grounded in legitimate legal authority and is in no way misleading or contentious. *See supra* Part III.D.

IV. Conclusion

THI has been duly authorized in writing by Mr. Zuniga as the assignee of his right to pursue Medicaid benefits, including the pursuit of appeals. The effect of this assignment places THI squarely in Mr. Zuniga's shoes, as is well-established by New Mexico law, and requires that THI be afforded all of the rights to which Mr. Zuniga would have been entitled. The District Court erred in determining that THI lacked standing pursuant to this assignment because Mr. Zuniga has the right to authorize any party of his choice to challenge the denial of his Medicaid application and the authorization is consistent with state and federal law. As such, there is an actual controversy to which an appellate ruling could provide actual relief in the form of a fair hearing. Mr. Zuniga's right to a fair hearing is a fundamental due process right, which has been violated by the District Court's dismissal. As such, and in accordance with state and federal law, the District Court's dismissal of THI's appeal is in error and must be reversed, and a fair hearing must be scheduled on Mr. Zuniga's appeal.

V. Request For Oral Argument

THI respectfully requests oral argument in this matter to address the interplay between state and federal law and substantial policy considerations.

Respectfully Submitted,

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