

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

CELIA VALDEZ, *et al.*,

Plaintiffs,

v.

MARY HERRERA, *et al.*,

Defendants.

No. 1:09-cv-00668 JCH/DJS

**DEFENDANT HSD'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

As a preliminary matter, HSD¹ submits this Response in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Response") pursuant to its good faith, but incorrect, belief that such Response was due on September 27, 2010. The basis for HSD's belief is fully explained in its Motion to Extend Time to Respond to Plaintiff's Motion for Partial Summary Judgment, which is filed concurrently with this Response.

I. INTRODUCTION

The legal issue involved in Plaintiff's motion for summary judgment is narrow. It concerns HSD's responsibility when an applicant for public assistance fails to check a box on the required "declination" form in response to the question "If you are not registered to vote where you live now, would you like to apply to register to vote here today?" There is no dispute that pursuant to

¹ The named defendants Pamela S. Hyde, Fred Sandoval, and Carolyn Ingram of the New Mexico Human Services Department are collectively referred to as "HSD."

Section 7 of the National Voter Registration Act (“NVRA”), 42 U.S.C. § 1973gg-5, HSD is required to “distribute [a voter registration application] with each application for . . . service or assistance, and with each recertification, renewal, or change of address . . . unless the applicant, in writing, declines to register to vote.” There is also no dispute that by checking the “no” box in response to the question asking if the applicant would like to apply to register to vote, an applicant has given a declination in writing. In such cases HSD is not required to provide applicants with a voter registration application.

The sole issue at hand surrounds HSD’s responsibility when an applicant fails to check either box on the required “declination” form. In general, HSD’s current policy in this specific area is not in dispute and thus there are no disputed issues of material fact. Partial summary judgment in Plaintiff’s favor, however, is inappropriate because HSD’s policy is consistent with the NVRA and Plaintiff is therefore not entitled to judgment as a matter of law.

II. FACTUAL ISSUES

Plaintiff makes seven factual assertions in her Motion for Partial Summary Judgment and HSD does not dispute those seven factual assertions. However, as a footnote to her seventh

factual statement Plaintiff asserts an additional fact, and that specific fact is disputed.² While HSD does not dispute the seven material facts as asserted by Plaintiff, a comprehensive understanding of HSD's current policy and procedure in this area is crucial to understanding the application of the specific provisions of Section 7 of the NVRA at issue. HSD therefore submits the following factual background in an effort to provide greater context and a more comprehensive explanation of HSD's current *policy* in this area.³

The Income Support Division ("ISD") of the New Mexico Human Services Department ("HSD") is the State agency that administers public assistance throughout the State of New Mexico. Such assistance includes the Supplemental Nutrition Assistance Program ("SNAP") (commonly know as the "Food Stamp" program), Temporary Assistance to Needy Families ("TANF" or "cash assistance"), and medical assistance through numerous categories of

² The fact asserted by Plaintiff is "[p]rior to HSD's finalizing of the current policy on or about January 2010, Defendants for many years did not consistently provide voter registration forms or the 'declination form' to all eligible benefits applicants and clients." [Doc. 109 at 6] While this fact is not material to the specific legal issue at hand, HSD would be remiss to not point out the misleading citations to the record Plaintiff provides in support of this fact. The first two citations are to two of HSD's NVRA policy documents, the "ISD-GI's," which plainly do not support Plaintiff's factual contention. The second two citations are to two separate deposition transcripts, attached as Exhibits 1 and 2 to Plaintiff's Motion, both of which do not support the factual assertion and both of which are taken wholly out of context. For example, Plaintiff points out that the two deponents do "not recall" certain things relating to voter registration, which in and of itself is not supportive of the alleged fact. A closer reading of the portion of the Espinosa deposition transcript, attached to Plaintiff's Motion as Exhibit 1, reveals that the discussion in this portion of the transcript related to the activities of HSD's upper level management (bureau chiefs and regional operations managers) in relation to voter registration. Ms. Espinosa generally testified that upper level management had meetings and discussions about "what we need to do in our offices, review of numbers when we had them, reminders . . . talk about how we put our procedures in place, what needs to happen . . . training, that kind of thing." A closer reading of the portion of the Fisher transcript, attached to Plaintiff's motion as Exhibit 2, reveals that Ms. Fischer testified that she did not recall if she herself worked with voter registration during the time she was a supervisor, approximately between 1993 and 2003, because "it's been too long."

³ As Plaintiff is seeking partial summary judgment against HSD because of its *policy* in this area, and because such policy is generally undisputed, HSD's intent here is only to "flesh out" and emphasize certain aspects of its policy. To the extent that Plaintiff interprets any factual assertion as going beyond "policy" characterizations, HSD qualifies such assertions, for the purpose of this Response only, as being expressions of what is required by its policy.

Medicaid, among others. While SNAP, TANF, and Medicaid are the larger and main categories of assistance programs, HSD administers approximately 76 different public assistance programs. The number of applicants last month for SNAP alone provides a small snapshot into the high number of applications that HSD handles on a monthly basis. For example, HSD processed 14,932 SNAP applications in August 2010. HSD Monthly Statistical Report, for August 2010, available at <http://www.hsd.state.nm.us/isd/files/MSR%2009-2010.pdf>.

In general, an applicant applies for public assistance (or “recertifies/renews” benefits they are already receiving) by completing an application for assistance and providing it to one of thirty-four ISD county or “field” offices located throughout the state. While there are applications forms that are specific to certain categories of public assistance, there is one main application form referred to as the “ISD 100” that can be utilized to apply for any category of public assistance. *See* ISD 100 “Program Application,” attached hereto as Exhibit 1. As the ISD 100 can be utilized to apply for any category of assistance, it is the chief application distributed by ISD to individuals who wish to apply for public assistance. The ISD 100 equals eight dense pages of information. The first four contain the actual application itself and the last four contain important information and various disclosures.

Once an ISD field office receives an application for assistance, a caseworker interviews the applicant, either in person or over the telephone, in order to determine if the applicant is eligible to receive public assistance, or in the case of recertification or renewal, to determine whether the applicant is eligible to *continue* to receive public assistance.⁴ *See* Roth Deposition Transcript, attached hereto as Exhibit 2 at 172-73:1-11. While each ISD field office and each caseworker

⁴ There are certain categories of Medicaid that do not require an interview in order to determine an applicant’s eligibility for assistance.

may document interviews differently – some offices require caseworkers to fill out a pre-printed “narrative,” others have a electronic narrative that is filled out on the computer, while others may document the results of the interview on the application itself – all interviews are designed to review all provisions of the application and document the responses of the applicant. *See* Espinosa Deposition Transcript, attached hereto as Exhibit 3 at 58:24-25, 63:15-16, 82-83:17-3, 89:19-20, 90:14-18.

All ISD applications include the NVRA mandated “declination” provision and thus HSD’s policy is that the declination provision is reviewed during the applicant’s interview. The NVRA dictates the precise language that must be included in the declination provision and HSD utilizes that precise language. However, in addition to the precise language required by the NVRA, HSD added to the declination provision, a signature box for the applicant to sign. Thus, the current declination provision, which is incorporated into all of ISD’s applications, including applications for recertification and renewal and in change of address forms, contains the following language and appears in substantially the same format:

Register to Vote

If YOU are NOT registered to vote where you live now, Would you like to register to vote here today? (Please check one) YES NO

IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.

The NATIONAL VOTER REGISTRATION ACT provides you with the opportunity to register to vote at this location. If you would like help in filling out a voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private.

IMPORTANT: Applying to register or declining to register to vote WILL NOT AFFECT the amount of assistance that you will be provided by this agency.

Signature	Date
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CONFIDENTIALITY: Whether you decide to register to vote or not, your decision will remain confidential. **IF YOU BELIEVE THAT SOMEONE HAS INTERFERED with your right to register or to decline to register to vote, or your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with the Office of the Secretary of State, 419 State Capital, Santa Fe, NM, 87503, (phone: 1-800-477-3632).**

During the interview, the caseworker reviews the declination provision and verbally asks the applicant if the he or she would like to register to vote. *See* ISD-GI 08-37, attached hereto as Exhibit 4. There are several different scenarios that can happen during this process. If the “yes” box is checked, the caseworker provides the applicant with a voter registration application. If the “no” box is checked, the caseworker does not provide the applicant with a voter registration application. If the boxes are left blank and the applicant responds to the verbal question affirmatively, a voter registration application is provided to the applicant. If the boxes are left blank and the applicant responds to the verbal question in the negative, a voter registration form is not provided to the applicant. In all circumstances, however, HSD’s current policy is to request that the applicant sign the declination provision. *See* excerpt from HSD’s “New Forms Introduction Presentation,” attached hereto as Exhibit 5. In addition, as part of the usual course of the interview, the caseworker documents this portion of the interview. *See* Exhibit 3, Espinosa Transcript at 58:24-25, 63:15-16, 89:19-20, 90:14-18.

III. ARGUMENT

HSD has implemented a policy and process in order to meet its obligations under the NVRA that is not only consistent with the explicit language of the NVRA but which also executes HSD's obligations in the most efficient and effective manner. Plaintiff's interpretation of Section 7 of the NVRA is not only incorrect, but it renders certain provisions of the NVRA meaningless. In addition, the practical result of such an interpretation would be a less effective application of the underlying purpose of the NVRA.

a. HSD's Policy is Compliant With the NVRA and is the Most Effective and Efficient Way for HSD to Execute its Responsibilities Under the NVRA.

HSD's fundamental obligations under Section 7 of the NVRA are clear. HSD is required to: (1) distribute a voter registration application with each application for assistance including applications for recertification or renewal, and each change of address form, *unless* the applicant declines to register to vote, in writing; (2) provide a declination form to applicants which provides the applicant the opportunity to decline in writing to register and which provides important disclosures; and (3) assist applicants in filing out the voter registration application in the same manner HSD assists applicants in filing out its own applications, unless the applicant declines to register to vote or refuses such assistance. While these comprehensive obligations are clear and undisputed, the execution of these obligations, and particularly the execution of the requirement to distribute voter registration applications, unless an individual declines to register to vote in writing, is the core of this dispute.

In order to meet its obligation to distribute voter registration forms, HSD utilizes the declination form for its intended purpose – to ask each applicant if they would like to register to

vote and to provide a method by which applicants can decline, in writing, to register to vote. The NVRA requires the declination form to include the following

The question, ‘If you are not registered to vote where you live now, would you like to apply to register to vote here today?’. . . the statement, ‘Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.’; boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote . . . together with the statement (in close proximity to the boxes and in prominent type), ‘IF YOU DO NOT CHECK EITHER BOX YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.’; the statement, ‘If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private.’

42 U.S.C. § 1973gg-5(a)(6)(B) (hereafter referred to as “Subsection B”). According to the plain meaning of this language, failing to leave the checkboxes blank means that HSD will consider the individual to have declined to register to vote. In essence, declining to register to vote “in writing” is defined by Subsection B of the statute. According to Subsection B, an individual can decline to register to vote “in writing” by checking the “no” box or by not checking a box at all.

While Subsection B plainly permits HSD to treat blank checkboxes as a “declination in writing,” HSD has independently added additional safeguards that more meaningfully implement its responsibilities under the NVRA. Specifically, HSD verbally addresses voter registration in its interviews of applicants and has also added a place for applicants to sign the declination provision. Thus, an individual who:

- responds to the verbal question relating to voter registration asked during the interview in the negative;
- chooses not to check a box;

- is informed by the written declination provision that by not checking a box the person is considered to have decided **not** to register to vote; and
- who then signs the declination provision

has unquestionably declined, in writing, to register to vote. In all other circumstances, the individual will have either checked a box or responded in the affirmative when verbally asked if he or she would like to register to vote (and thus will have been provided a voter registration application).

HSD's efforts to both include a signature block on the declination form, and to verbally address voter registration with applicants during interviews provide further confirmation that an applicant who has not checked a box has truly declined to register, in writing. The applicant's signature also creates an important record. In this sense, it makes the declination provision more meaningful. The declination provision is but one portion of a dense, eight page application. An applicant could easily overlook the declination provision in his or her review of the dense and lengthy ISD 100 form. Asking an applicant to sign the provision ensures that the individual has seen it. Blank checkboxes then truly demonstrate that an individual did not simply miss or skip over them, but that the individual read the provision, considered and chose to leave the boxes blank, after being informed that leaving the boxes blank constituted a declination to register to vote. This record, together with the caseworker's interview documentation meaningfully document HSD's monitoring and compliance with the NVRA.

b. Plaintiff's Interpretation of the NVRA Renders Certain Provisions of NVRA Meaningless

As described above, HSD's policy in this area is compliant with Section 7 of the NVRA. Plaintiff contends, however, that HSD's interpretation ignores the provision of Section 7 that

states that failure of an applicant to check either box is “deemed to constitute a declination to register for purposes of subparagraph (C).” Subparagraph (C), in turn, relates to the providing of assistance to “each applicant who does not decline to register to vote.” 42 U.S.C. 1973gg-5(a)(6)(C). Plaintiff’s application of the NVRA is not inconsistent with either of these provisions.

Plaintiff places primary emphasis on this provision and in doing so, reads out of the statute the provision that explicitly permits public assistance agencies, such as HSD, to treat unchecked boxes as declinations to register to vote. Plaintiff contends that the provision that references subparagraph (C) solely means that blank checkboxes permit HSD to decline to assist an applicant as provided for in subparagraph (C). This interpretation, however, is in direct conflict with and renders meaningless the specific language required to be given to applicants, namely: “IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.” If the sole consequence of not checking either box is that a public assistance agency can decline assistance pursuant to subparagraph (C), the notification in the declination provision would have reflected that fact (i.e. applicants would instead be informed, “IF YOU DO NOT CHECK EITHER BOX, WE WILL NOT HELP YOU IN FILING OUT THE VOTER REGISTRATION APPLICATION FORM”). The statute, of course, does not require this disclosure. Instead, the NVRA informs applicants that failing to check a box means that they have decided not to register to vote and at the same time informs them: “If you would like help in filling out the voter registration application form, *we will help you*. The decision whether to seek or accept help is yours” 42 U.S.C. §

1973gg-5(a)(6)(B)(iii) (emphasis added). Under Plaintiff's interpretation, this entire provision becomes meaningless.

IV. CONCLUSION

For the foregoing reasons, HSD respectfully requests this Court deny Plaintiff's Motion for Partial Summary Judgment.

DATED: September 27, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all parties of record via the CM/ECF case management system for the United States District Court for the District of New Mexico this 27th day of September, 2010.

/s/
Elaine P. Lujan