

**MODERNIZATION OF THE FAMILY AND SOCIAL SERVICES ADMINISTRATION  
(FSSA) ELIGIBILITY PROCESS FOR MEDICAID, FOOD STAMPS, AND  
TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): AN INDIANA  
SOLUTION OR AN INDIANA PROBLEM?**

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## I. INTRODUCTION

In October 2007,<sup>1</sup> Indiana's Family and Social Services Administration (FSSA) changed the way it processed Medicaid, food stamp, and Temporary Assistance for Needy Families (TANF) applications by implementing eligibility modernization.<sup>2</sup> Under this new system, a private coalition headed by International Business Machines (IBM) processes applications for Medicaid, food stamps and TANF using state-of-the-art technology.<sup>3</sup> Many Hoosiers who need Medicaid, Food Stamps, or TANF have been adversely affected by the State's implementation of this process in the counties in Indiana where this new system has been rolled out.<sup>4</sup> Indiana officials believe that eligibility modernization is "an Indiana solution."<sup>5</sup> However, many people contend that eligibility modernization in Indiana is a nightmare for Hoosiers in need of Medicaid, Food Stamps, or TANF and for Indiana attorneys assisting their clients with the application and eligibility process.

"Keith Huffman, President of the Indiana Chapter of the National Academy of Elder Law Attorneys [(NAELA)], has compiled a list of some . . . complaints under the new [modernized

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<sup>1</sup> Email from Jacob A. McClellan, Deputy General Counsel, Indiana Family and Social Services Administration, to Chad L. Rayle, Student, Thomas M. Cooley Law School (Oct. 7, 2008, 15:19 EST) (on file with author) [hereinafter McClellan Email].

<sup>2</sup> Brandi Watters, *Lawsuit Targets Welfare Rollout*, THE HERALD BULLETIN, Aug. 25, 2008, [http://www.theheraldbulletin.com/archivesearch/local\\_story\\_238221602.html](http://www.theheraldbulletin.com/archivesearch/local_story_238221602.html). According to IBM, "Modernization solutions help organizations cost-effectively and incrementally evolve core IT systems towards modern architectures and technologies—reducing maintenance burden and freeing up more of [Indiana's] resources to focus on developing new business requirements and capabilities." IBM, Enterprise Modernization, <http://www-01.ibm.com/software/info/developer/solutions/em/index.jsp> (last visited Oct. 17, 2008). "The attributes of a modernized system should be to provide better access, use modern technology and business processes to leverage efficiencies and better utilize staff members." Erin Linville, Ind. Family & Soc. Servcs. Admin., ELIGIBILITY MODERNIZATION: THE NEED FOR CHANGE 26 (2006), [http://www.in.gov/fssa/files/0020\\_001.pdf](http://www.in.gov/fssa/files/0020_001.pdf); [http://www.in.gov/fssa/files/0020\\_013.pdf](http://www.in.gov/fssa/files/0020_013.pdf); [http://www.in.gov/fssa/files/0020\\_028.pdf](http://www.in.gov/fssa/files/0020_028.pdf).

<sup>3</sup> Press Release, State of Ind., Office of the Governor, Governor Accepts Recommendation to Modernize FSSA Eligibility Processes (Nov. 29, 2006), at 3 (on file with author).

<sup>4</sup> See REASON FOUNDATION, POLITICIZING PRIVATIZATION IN INDIANA, [http://www.reason.org/outofcontrol/archives/2008/08/politicizing\\_pr.html](http://www.reason.org/outofcontrol/archives/2008/08/politicizing_pr.html) (last visited Nov. 17, 2008).

<sup>5</sup> Ind. Family & Soc. Servcs. Admin., ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, HIGHLIGHTS FROM THE INTER-AGENCY REVIEW COMMITTEE REPORT 1, [http://www.in.gov/fssa/files/Eligibility\\_Modernization\\_\\_An\\_Indiana\\_Solution.pdf](http://www.in.gov/fssa/files/Eligibility_Modernization__An_Indiana_Solution.pdf) [hereinafter ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION].

eligibility] system.”<sup>6</sup> Some of the most common complaints include: lost applications and applications not being entered into the appropriate applicant’s file; the FSSA request documents previously submitted and subsequently denying benefits for “failure to cooperate” if the documents are not resubmitted before its stringent deadlines; unreasonably long delays for eligibility determinations and appeals; Medicaid cases extending past the federal determination requirements of 45 or 90 days; and new authorized representative forms must be resubmitted because they were improperly entered when the original application was received.<sup>7</sup>

The theory that eligibility modernization negatively affects Indiana applicants and recipients in need of Medicaid, food stamps, and TANF is supported in five primary ways. First, statistics from Region One, consisting of twelve Indiana Counties, where the initial rollout of the modernized eligibility process occurred, clearly reveal that fewer applicants receive benefits as opposed to counties not under the modernized eligibility process.<sup>8</sup> Second, testimony from Medicaid applicants and recipients given at a July 31, 2008 meeting with the Select Joint Commission on Medicaid in Kokomo, Indiana regarding personal accounts of individuals negatively affected by Indiana’s eligibility modernization.<sup>9</sup> Gubernatorial candidate Jill Long-Thompson’s field team, who attended the meeting, noted “[t]he purpose of the meeting was to discuss the shortcomings of this new system and the resulting failures of the Family and Social Services Administration.”<sup>10</sup> Third, a September 16, 2008 hearing that lawmakers held to evaluate the modernization process raised complaints of long hold times, lost documentation, and

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<sup>6</sup> DENNIS K. FRICK & CLAIRE E. LEWIS, ELDER LAW INSTITUTE 2008 § 1, at 8 (2008).

<sup>7</sup> *Id.* at 8-9.

<sup>8</sup> Thomas, *FSSA Privatization Reveals Damning Statistics*, <http://www.blueindiana.net/showDiary.do?diaryId=2817> (last visited Oct. 19, 2008); Francesca Jarosz, Heather Gillers, Tim Evans & Bill Ruthhart, *Rollout of Indiana Welfare Changes Halted*, THE INDIANAPOLIS STAR, <http://m.indystar.com/detail.jsp?key=294349&full=1>; Affidavit of Nancy Griffin, Gultry, No. 46C01-0808-PL-000388 (Ind. Cir. Ct. filed Aug. 22, 2008).

<sup>9</sup> Donvila, *The FSSA Fizzle*, <http://www.progressivesouthbend.org/2008/08/fssa-fizzle.html> (Aug. 5, 2008, 12:05 EST) [hereinafter *The FSSA Fizzle*].

<sup>10</sup> *Id.*

the need for FSSA client face-to-face contact.<sup>11</sup> The numerous problems raised at each of these two hearings would fall under the “common complaint” problems.<sup>12</sup> Fourth, on June 23, 2008, “The Food and Nutrition Service of the U.S. Department of Agriculture (USDA) sent a letter to the Indiana’s [FSSA] ordering the state to delay any further rollout of the welfare changes until it improved its timeliness in processing [food stamp] applications.”<sup>13</sup> Fifth, there are currently three pending lawsuits which have been brought against Indiana State Officials because of the troubles Hoosiers face with the FSSA eligibility modernization process.<sup>14</sup>

Specifically, two of these three cases are being brought by the American Civil Liberties Union (ACLU), *Perdue v. Roob* and *Terrell v. Roob*.<sup>15</sup> *Perdue v. Roob*, formerly known as *Gibson v. Roob*,<sup>16</sup> “challenges the constitutionality and legality of the policy of the Indiana Family and Social Services Administration whereby individuals are denied or terminated from public benefits programs such as Medicaid and Food Stamps for allegedly ‘failing to cooperate’ in establishing their eligibility for the programs.”<sup>17</sup> *Terrell v. Roob*, formerly known as *Ely v. Roob*,<sup>18</sup> “challenges the new Medicaid policy of scheduling telephone hearings for appeals.”<sup>19</sup> The third lawsuit, *Gultry v. Daniels*,<sup>20</sup> is “seeking an injunction to block the rollout of a privatized system of welfare services in northwest Indiana (Region [Three]) that would eliminate

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<sup>11</sup> Ken Kusmer, *Roob: Floods Delaying Expansion of Welfare Changes*, EXAMINER, Sep. 16, 2008, [http://www.examiner.com/a-1590550~Roob\\_Floods\\_delaying\\_expansion\\_of\\_welfare\\_changes.html](http://www.examiner.com/a-1590550~Roob_Floods_delaying_expansion_of_welfare_changes.html).

<sup>12</sup> See FRICK & LEWIS, *supra* note 6, at 8-9.

<sup>13</sup> *USDA says Indiana FSSA Taking too Long to Process Food Stamps*, CHESTERTON TRIBUNE, July 31, 2008, [http://chestertontribune.com/Indiana%20News/7316%20usda\\_says\\_indiana\\_fssa\\_taking\\_to.htm](http://chestertontribune.com/Indiana%20News/7316%20usda_says_indiana_fssa_taking_to.htm) [hereinafter *USDA*].

<sup>14</sup> *Perdue v. Roob*, No. 49D10-0803-PL-013340 (Ind. Super. Ct. filed May 15, 2008); *Terrell v. Roob*, No. 49D10-0803-PL-010824 (Ind. Super. Ct. filed Mar. 10, 2008); *Gultry v. Daniels*, No. 46C01-0808-PL-000388 (Ind. Cir. Ct. filed Aug. 22, 2008) [hereinafter *Three Pending Lawsuits*].

<sup>15</sup> Email from Gavin M. Rose, Attorney, ACLU, to Chad L. Rayle, Student, Thomas M. Cooley Law School (Sep. 25, 2008, 10:44 EST) (on file with author) [hereinafter *Rose Email*].

<sup>16</sup> *Id.*

<sup>17</sup> ACLU-IN.org, Legal Docket, <http://aclu-in.org/subpage.asp?p=32> (last visited Oct. 15, 2008).

<sup>18</sup> *Rose Email*, *supra* note 15.

<sup>19</sup> ACLU-IN, *supra* note 17.

<sup>20</sup> *Gultry*, No. 46C01-0808-PL-000388.

or substantially reduce face-to-face contact with caseworkers in favor of phone call centers and computer intake run by private vendors.”<sup>21</sup>

This comment will discuss and analyze Indiana’s decision to modernize and privatize the FSSA eligibility process. It will also discuss the negative impact the modernization rollout is having on Indiana citizens in need of Medicaid, Food Stamps or TANF. Specifically, Part II will summarize Indiana’s FSSA and briefly discuss the Medicaid, food stamp, and TANF programs. Part II will then discuss the background of Indiana’s contract with the IBM Coalition to process Medicaid, Food Stamp, and TANF applications for Indiana’s FSSA. Part II will lastly convey the reasons Indiana chose to modernize and privatize the FSSA application process.

Part III addresses why Indiana’s decision to modernize and privatize the FSSA application process for Medicaid, food stamps, and TANF was a bad idea. First, statistics from the piloted eligibility modernization region will show that the number of people receiving Medicaid, food stamp, or TANF benefits in Region One has decreased since the modernized eligibility process was implemented.<sup>22</sup> In turn, more applicants statewide are being denied benefits for “failure to cooperate” with the FSSA in order to establish eligibility.<sup>23</sup> Second, the many problems Hoosier applicants face when applying for Medicaid, Food Stamps, or TANF because of eligibility modernization will be discussed. Third, the three pending lawsuits against State officials, which have been filed because of the looming and severely problematic modernization issues with the FSSA, will be addressed.<sup>24</sup> Fourth, a summary of the Texas Health and Human Services Commission’s now terminated eligibility modernization contract

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<sup>21</sup> Brandi Watters, *Lawsuit Targets Welfare Rollout*, THE HERALD BULLETIN, Aug. 25, 2008, [http://www.theheraldbulletin.com/archivesearch/local\\_story\\_238221602.html](http://www.theheraldbulletin.com/archivesearch/local_story_238221602.html).

<sup>22</sup> Francesca Jarosz, Heather Gillers, Tim Evans & Bill Ruthhart, *Rollout of Indiana Welfare Changes Halted*, THE INDIANAPOLIS STAR, <http://m.indystar.com/detail.jsp?key=294349&full=1>.

<sup>23</sup> Affidavit of Nancy Griffin, Gultry, No. 46C01-0808-PL-000388.

<sup>24</sup> Three Pending Lawsuits, *supra* note 14.

with Accenture will be discussed. A solution, that the eligibility modernization process problems in Indiana should be fixed and not abandoned, will be proposed. Lastly, Part IV will conclude and summarize that eligibility modernization for processing Medicaid, Food Stamp, and TANF applications in Indiana, in its current state, is not in the best interest of Hoosiers.

## II. BACKGROUND

### A. *What is Indiana's FSSA?*

FSSA stands for Family and Social Services Administration. "FSSA is a health care and social service funding agency. Ninety-four percent (94%) of the agency's total budget is paid to thousands of service providers ranging from major medical centers to a physical therapist working with a developmentally delayed child."<sup>25</sup> The FSSA includes the Division of Family Resources (DFR), which is the department that handles, and is modernizing, the eligibility process for Medicaid, Food Stamp, and TANF applications.<sup>26</sup> Other departments within the FSSA include the Office of Medicaid Policy and Planning, Division of Disability and Rehabilitative Services, Division of Mental Health and Addiction, and the Division of Aging.<sup>27</sup>

### B. *What is Medicaid?*

"Medicaid is available only to certain low-income individuals and families who fit into an eligibility group that is recognized by federal and state law."<sup>28</sup> Proceeds from Medicaid are not paid to the recipient; they are paid directly to the recipient's health care provider(s).<sup>29</sup> "Medicaid is a state administered program and each state sets its own guidelines regarding

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<sup>25</sup> Ind. Family & Soc. Servs. Admin. History/Overview, <http://www.in.gov/fssa/2361.htm> (last visited Oct. 15, 2008).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Ctrs. for Medicare and Medicaid Servs., Medicaid Program-General Information-Overview, [http://www.cms.hhs.gov/medicaidgeninfo/01\\_overview.asp](http://www.cms.hhs.gov/medicaidgeninfo/01_overview.asp)? (last visited Oct. 15, 2008).

<sup>29</sup> *Id.*

eligibility and services.”<sup>30</sup> Certain groups of individuals can apply for and receive Medicaid.<sup>31</sup> However, specific requirements must be met to qualify.<sup>32</sup> “These may include [an applicant’s] age, whether [the applicant is] pregnant, disabled, blind, or [elderly; the applicant’s] income and resources (like bank accounts, real property, or other items that can be sold for cash); and whether [the applicant is] a U.S. citizen or a lawfully admitted immigrant.”<sup>33</sup> There are variances in the ways that each state counts an applicant’s income and resources.<sup>34</sup> Additionally, “[t]here are special rules for those who live in nursing homes and for disabled children living at home.”<sup>35</sup>

### *C. What is the Food Stamp Program?*

“The food stamp program allows low-income people to buy food.”<sup>36</sup> “The Food Stamp Program is administered through each state, however 100% of benefits and 50% of administrative costs are federally funded. Federal regulations . . . are developed by the U.S. Department of Agriculture [(USDA)], Food and Nutrition Services [(FNS)].”<sup>37</sup> To qualify for food stamps, applicants must meet certain non-financial and financial requirements.<sup>38</sup> “Non-financial requirements include state residency, citizenship/alien status, work registration and cooperation with the [Indiana Manpower and Comprehensive Training (IMPACT)] Program.”<sup>39</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Soc. Sec. Online, Food Stamp Facts, <http://www.ssa.gov/pubs/10101.html> (last visited Oct. 17, 2008).

<sup>37</sup> Ind. Family & Soc. Servs. Admin., Indiana Food Stamp Program, <http://www.in.gov/fssa/dfr/2691.htm> (last visited Nov. 17, 2008).

<sup>38</sup> Ind. Family & Soc. Servs. Admin., Who is Eligible?, <http://in.gov/fssa/dfr/3099.htm> (last visited Nov. 17, 2008) [hereinafter Who is Eligible?].

<sup>39</sup> *Id.*

There are specific asset and resource limits an individual must meet to qualify.<sup>40</sup> “The asset/resource limits are \$2,000 per household except for households containing a member who is disabled or age 60 or older; then the limit is \$3,000.”<sup>41</sup> Countable assets include cash, bank accounts, personal property, automobiles, etc.<sup>42</sup> Exempt assets include the applicant’s primary residence, common household items, personal belongings, and life insurance.<sup>43</sup> “Most households also must meet and income limit [or income test].”<sup>44</sup> The income limit in Indiana is 130% of the current poverty level.<sup>45</sup> If an applicant’s household income does not exceed 130%, then the applicant will pass this income test.<sup>46</sup>

Food stamps can be used at any store approved by the USDA to buy either food or plant and seeds to grow and eat.<sup>47</sup> Indiana no longer distributes paper food stamps.<sup>48</sup> Instead, the State uses an Electronic Benefits Transfer (EBT) system.<sup>49</sup> Recipients of food stamps are issued an EBT card, which is similar to a credit card.<sup>50</sup> These cards can be used at approved supermarkets throughout the State.<sup>51</sup>

#### *D. What is TANF?*

“[TANF] provides [cash] assistance and work opportunities to needy families by [giving] states . . . the federal funds and wide flexibility to develop and implement their own welfare programs. The assistance is time-limited and promotes work, responsibility and self-

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Soc. Sec. Online, *supra* note 36.

<sup>45</sup> Who is Eligible?, *supra* note 38.

<sup>46</sup> Who is Eligible?, *supra* note 38.

<sup>47</sup> Ind. Family & Soc. Servs. Admin., How are Food Stamps Used?, <http://in.gov/fssa/dfr/3080.htm> (last visited Oct. 17, 2008).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

sufficiency.”<sup>52</sup> “Families with children under the age of 18 [sic] that are deprived of financial support from a parent by reason of death, absence from the home, unemployment, or physical or mental incapacity [are eligible for TANF].”<sup>53</sup> To qualify for TANF, a family’s total assets cannot exceed \$1,000, at the time an application is filed.<sup>54</sup> Note that the primary residence is an exempt asset.<sup>55</sup>

The amount of benefits that are distributed to TANF recipients depends upon the number of eligible family members and the total income of each eligible family member.<sup>56</sup> Benefits in Indiana range from \$139-\$697, per month.<sup>57</sup> “Welfare Reform efforts in Indiana have placed an emphasis on ‘work first’ and ‘personal responsibility,’ replacing cash assistance with transitional services that help people gain employment and depend less on public aid.”<sup>58</sup> Essentially, TANF provides temporary financial relief for families facing an array of difficult situations, allowing them to make “ends meet.”

*E. Indiana’s FSSA Contract with IBM – Why Indiana Chose to Modernize and Privatize the Eligibility Process for Medicaid, Food Stamps, and TANF*

On December 27, 2006,<sup>59</sup> Indiana’s FSSA entered into a ten-year, \$1.16 Billion contract with a coalition led by IBM to process applications for Medicaid, Food Stamps, and TANF.<sup>60</sup> Coalition members of this contract include “Affiliated Computer Services, Inc., Alpha Rae Personell, Inc., Crowe Chizek and Company, Haverstick Consulting, Interactive Intelligence,

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<sup>52</sup> U.S. Dept. of Health and Human Servs., About TANF, <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (last visited Oct. 17, 2008).

<sup>53</sup> Family & Social Services Administration, Temporary Assistance for Needy Families, <http://in.gov/fssa/dfr/4068.htm> (last visited Oct. 17, 2008).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> McClellan Email, *supra* note 1.

<sup>60</sup> USDA *supra* note 13.

Phoenix Data Corp., RCR Technology Group, and Arbor Education & Training.”<sup>61</sup> “The deal introduced telephone call centers, the Internet and fax services as means to apply for benefits. The deal was intended to make the processing of welfare benefits more efficient.”<sup>62</sup> The IBM Coalition processes an individual’s application and all supporting documentation to verify that an individual is eligible for Medicaid, food stamps, or TANF.<sup>63</sup> However, a State employee under the contract makes the final eligibility decision for an applicant.<sup>64</sup>

For modernization implementation purposes, Indiana separated its 92 Counties into four regions.<sup>65</sup> The modernization process was rolled out in Region One, which consisted of twelve Counties, on October 22, 2007.<sup>66</sup> Region Two is the largest of the four regions. Twenty-seven Counties in Region Two were modernized in March, 2008 while the remaining twenty counties in Region Two were modernized in May, 2008.<sup>67</sup>

Further rollout to the remaining Regions has been delayed for a few reasons. First, the FSSA is still rendering aid to flood victims after heavy rainfalls hit Central Indiana in early June, 2008.<sup>68</sup> Second, on June 23, 2008, “The Food and Nutrition Service of the U.S. Department of Agriculture (USDA) sent a letter to the Indiana’s [FSSA] ordering the state to delay any further rollout of the welfare changes until it improved its timeliness in processing [food stamp] applications.”<sup>69</sup> Third, on August 22, 2008, a group of LaPorte County residents who currently receive FSSA benefits “filed suit in LaPorte Circuit Court . . . seeking an injunction to block the

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<sup>61</sup> Press Release, *supra* note 3, at 1.

<sup>62</sup> USDA, *supra* note 13.

<sup>63</sup> See ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 6.

<sup>64</sup> ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 5.

<sup>65</sup> Ind. Family & Soc. Servs. Admin., INDIANA ELIGIBILITY MODERNIZATION, OVERVIEW FOR SERVICE PROVIDERS & COMMUNITY ORGANIZATIONS, 1, <http://www.in.gov/fssa/files/EligibilityModernizationandVCANOverview.pdf>.

<sup>66</sup> Citizens Action Coal. Educ. Fund, Background and Concerns about the Privatization of the FSSA, [http://www.cacefindiana.org/node/programs/health\\_care/privatization\\_fssa](http://www.cacefindiana.org/node/programs/health_care/privatization_fssa) (last visited Oct. 8, 2008).

<sup>67</sup> Niki Kelly, *Welfare Shift Debuts Under Fire*, THE JOURNAL GAZETTE, May 22, 2008, <http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20080522/LOCAL/805220367>.

<sup>68</sup> *Coast Guard Responds to Indiana Floods*, CBS NEWS, June 7, 2008, <http://www.cbsnews.com/stories/2008/06/07/national/main4161925.shtml>.

<sup>69</sup> USDA *supra* note 13.

rollout of a privatized system of welfare services in northwest Indiana (Region [Three]).”<sup>70</sup>

Currently, 59 of Indiana’s 92 counties are now modernized. Rollout to the remaining regions is anticipated to resume in December 2008, or January 2009.<sup>71</sup>

### 1. What is Eligibility Modernization?

According to IBM, “Modernization solutions help organizations cost-effectively and incrementally evolve core IT systems towards modern architectures and technologies—reducing maintenance burden and freeing up more of [Indiana’s] resources to focus on developing new business requirements and capabilities.”<sup>72</sup> “The attributes of a modernized system should be to provide better access, use modern technology and business processes to leverage efficiencies and better utilize staff members.”<sup>73</sup>

The new system eliminated the majority of state caseworkers and created a network for clients based on technology. Instead of traveling to a county welfare office for help applying for benefits, clients [can] now use an Internet application and telephone interviews with a call center in order to get benefits. [FSSA Secretary Mitchell] Roob has often compared modernization to the act of using an ATM instead of a bank teller for financial transactions.<sup>74</sup>

In December 2005, prior to the modernized system being rolled out, Roob said that a non-modernized system “simply does not provide the level of service citizens should expect and deserve.”<sup>75</sup>

### 2. Why Indiana Chose to Modernize the Eligibility Process

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<sup>70</sup> Watters, *supra* note 21.

<sup>71</sup> Kusmer, *supra* note 11.

<sup>72</sup> IBM, Enterprise Modernization 1, <http://www-01.ibm.com/software/info/developer/solutions/em/index.jsp> (last visited Oct. 17, 2008).

<sup>73</sup> Erin Linville, Ind. Family & Soc. Servs. Admin., ELIGIBILITY MODERNIZATION: THE NEED FOR CHANGE, [http://www.in.gov/fssa/files/0020\\_001.pdf](http://www.in.gov/fssa/files/0020_001.pdf); [http://www.in.gov/fssa/files/0020\\_013.pdf](http://www.in.gov/fssa/files/0020_013.pdf); [http://www.in.gov/fssa/files/0020\\_028.pdf](http://www.in.gov/fssa/files/0020_028.pdf), at 26.

<sup>74</sup> *Id.*

<sup>75</sup> Memorandum from E. Mitchell Roob Jr., Secretary, Ind. Family & Soc. Servs. Admin. to Ind. Coal. for Human Servs. 1 (Dec. 4, 2005) (on file with author). Roob went on to say that, “[o]ur new model will offer clients more communication channels and alternatives. . . . We believe these changes will both greatly improve client service and reduce error rates.” *Id.* at 1-2.

Indiana was operating the FSSA with outdated technology and the prior system was almost completely paper-based.<sup>76</sup> “Lost or misplaced documents [were] a regular occurrence.”<sup>77</sup> Clients did not have the option on the prior system to use technology to apply for benefits or to submit documents to the FSSA.<sup>78</sup> “The . . . system [was] wrought with errors, inefficiencies, complexity, inconsistency, fraud, and abuse. It [was] a system that [was] not working for clients in need of essential public assistance programs, such as Medicaid, TANF, and food stamps.”<sup>79</sup> FSSA also felt that modernizing would enable the department to “provide better customer service and access to [its] clients.”<sup>80</sup>

According to the State, “FSSA [operated] a broken, unwieldy public assistance eligibility system that [did] not best serve its clients in the need of benefits under Medicaid, TANF, and food stamps. [Many] problems within the [prior] eligibility system [and] the portal through which one [applied] for benefits [had to] be corrected for the system to work for clients and Hoosier taxpayers.”<sup>81</sup> Specific problems the State felt needed corrected include the following:

First, “Indiana has the worst record in the country in decreasing its welfare caseloads and moving people off welfare and into work.”<sup>82</sup> Between August 1996 and December 2005 welfare caseloads dropped an average of 58% across the country.<sup>83</sup> However, Indiana welfare caseloads only dropped 6% during this same timeframe.<sup>84</sup>

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<sup>76</sup> ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 2.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Linville, *supra* note 73, at 3.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 4.

<sup>82</sup> ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 9.

<sup>83</sup> Linville, *supra* note 73, at 4.

<sup>84</sup> *Id.*

Second, FSSA experienced high error rates for persons applying for Medicaid, food stamps, and TANF.<sup>85</sup> According to the State, “[35] percent of the Medicaid . . . applications [For Fiscal Year] (FFY) 2003 and 25 percent of the TANF applications (FFY 2006) approved by FSSA contained errors, either approving applicants who did not qualify and/or providing too little or too much assistance for those who did qualify.”<sup>86</sup> The State also said that the “FSSA paid Food Stamp recipients \$33.9 million more than they were entitled [to] (FFY 2005).”<sup>87</sup>

Third, slow processes fell below federal guidelines and customer service was poor.<sup>88</sup> Within this area the State noted that “[i]n January 2005, the Medical Review Team (MRT) responsible for examining applicant veracity and depth of disability, had a backlog of more than 13,000 cases; [65] percent of FSSA clients rated their satisfaction with the agency’s service as ‘below average;’ [and that 56] percent complained that the intake process was ‘too slow.’”<sup>89</sup>

Fourth, clients were inconvenienced by limited access to the FSSA.<sup>90</sup> Specifically, “[m]odern forms of access, such as the Internet and interactive voice response (IVR) systems, [were] not available to clients; [48] percent of FSSA clients found it difficult to reach a caseworker; [and] county offices [have] limited hours [of operation].”<sup>91</sup>

Fifth, FSSA lacked consistency among its offices.<sup>92</sup> There are “[107] county offices [which determined] and [verified] eligibility in 107 different ways.”<sup>93</sup> The State said “DFR processes and practices have developed over time and multiple administrations. As a result, there has been a lack of common operating processes, training and acculturation of

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 5.

<sup>93</sup> *Id.*

employees.”<sup>94</sup> The variances made controlling or improving this area nearly impossible.<sup>95</sup>

“FSSA clients [had] difficulty communicating with the agency and [had] no consistent expectation of service.”<sup>96</sup>

Sixth, FSSA had a “[l]ack of tracking capabilities and proper accounting programs[, making the] system ripe for corruption.”<sup>97</sup> The State said that “[a]t least 15 FSSA employees have been arrested since 2002 for fraud-related activities with the average case costing taxpayers \$50,000. At least 21 co-conspirators committed fraud against the state for an average case cost of \$60,000.”<sup>98</sup>

Seventh, caseworkers had overly burdensome caseloads.<sup>99</sup> The average caseload for a caseworker was 300 cases, while some caseworkers had a caseload of 700 cases.<sup>100</sup> The State went on to discuss the seriousness of the caseload problem:

Illustrating the depth of the problems in managing their cases are the alerts generated by the Indiana Client Eligibility System (ICES). An alert is an electronic reminder for the caseworker to perform some action concerning open or pending cases. As of early June 2006, caseworkers had 260,000 unprocessed open alerts – roughly 120 for every Indiana caseworker. Caseworkers should be able to attend to these activities while taking care of normal case maintenance; the [prior] system simply [did] not [afford] them the opportunity to do so.<sup>101</sup>

Eighth, the State recognized that there was “poor participation in programs designed to promote self sufficiency. As a result of the Deficit Reduction Act (DRA) of 2005, the federal government requires that [Indiana] meet a [minimum rate of] workforce participation for TANF

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<sup>94</sup> *Id.* at 16.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 5.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 16.

<sup>100</sup> Linville, *supra* note 73, at 26 (citing Indiana Client Eligibility System (ICES) extract report from Cognos. Caseloads, June, 2006).

<sup>101</sup> Linville, *supra* note 73, at 26, (citing ICES extract report from Cognos. Outstanding Alerts for Active/Inactive Workers, Report GCL010RA, June 8, 2006 (emphasis omitted)).

recipients of 50 percent.”<sup>102</sup> Traditionally, Indiana’s workforce participation rate for TANF recipients has been 33 percent.<sup>103</sup> The DRA requirement will be strictly enforced by the federal government.<sup>104</sup> If Indiana fails to meet the DRA requirement, then “[t]his could cost the state up to 5 percent of its TANF block grant, or \$10.3 million, and the federal government could require that Indiana replace these lost federal funds with state funds.”<sup>105</sup>

Additional reasoning by Indiana to modernize the FSSA’s eligibility process include the facts that: (1) the FSSA did not have a medical director, (2) technology across the divisions was not linked, (3) there was a lack of training and oversight of caseworkers, (4) there was no coordinated contracting system, (5) there was no coordinated purchasing system, (6) there was no coordinated effort to secure grants, and (7) that FSSA functioned in silos.<sup>106</sup>

### 3. Why Indiana Chose to Privatize the Eligibility Process

The primary reason that Indiana chose to privatize the FSSA application process for Medicaid, food stamps, and TANF is because modernizing internally would have been more expensive.<sup>107</sup> “FSSA estimated that about \$500 million in administrative savings would be achieved by the recommended solution, at a total cost of \$1.6 billion over 10 years (\$1.16 billion IBM coalition contract and \$500 million in-house) versus \$2.1 billion if FSSA attempted to modernize the system internally.”<sup>108</sup> “To modernize on its own, FSSA would have needed a \$50 million up-front investment and more years to implement. To acquire \$50 million, layoffs would

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<sup>102</sup> Linville, *supra* note 73, at 18.

<sup>103</sup> Linville, *supra* note 73, at 26 (citing TANF Datawarehouse, DFR Office of Management, Reports from 2000-2006).

<sup>104</sup> Linville, *supra* note 73, at 18.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 14-15.

<sup>107</sup> ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 3.

<sup>108</sup> Press Release, *supra* note 3, at 2.

have been necessary.”<sup>109</sup> “FSSA has had over 10 secretaries in the past 15 years. A project of this length and magnitude requires a continuity of leadership that FSSA simply [has not] had.”<sup>110</sup>

*a. Safeguards*

“There are [four] categories of performance standards under the contract with IBM, all of which [have] specific monetary consequences.”<sup>111</sup> The first category is Service Levels.<sup>112</sup> “The IBM-led Coalition will be held accountable for compliance with the steps for which they are responsible in the processing of Medicaid, TANF, and Food Stamp [sic] applications, re-determinations, and changes.”<sup>113</sup> The IBM-led Coalition must complete 100% of these steps correctly 95% of the time.”<sup>114</sup>

The second category of performance standards is Key Performance Indicators (KPIs).<sup>115</sup> This area focuses on potential problems recognized by the State.<sup>116</sup> “Initial KPIs include call center response time, call center hold time, maintaining posted office hours, imaging of verifying documentation, processing of applications, re-determinations and changes within a specified time period, web-site availability, and disaster recovery testing.”<sup>117</sup> The KPIs are regularly evaluated and penalties for non-compliance are assessed monthly.<sup>118</sup> Indiana has the flexibility to identify new KPIs as needed.<sup>119</sup>

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<sup>109</sup> ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 3.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 9.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

The third category of performance standards is Critical Transition Milestones.<sup>120</sup> Indiana must identify a minimum of eight critical milestones during the modernization transition.<sup>121</sup>

“Penalties will be imposed if IBM does not successfully achieve the objectively established acceptance criteria on or before the established date for completion.”<sup>122</sup>

The fourth category of performance standards is Federal Penalties.<sup>123</sup>

IBM will be held accountable for penalties imposed by the Federal government in which federal TANF minimum work participation requirements, or federal Food Stamp error rate requirements cause the State to pay a financial penalty to any federal Governmental Body, when any federal Governmental Body reduces its federal financial participation with the State, or when any federal Governmental Body requires the State to expend additional funds on any Program in lieu of a financial penalty.<sup>124</sup>

#### *b. Economic Development*

The economic development portion of Indiana’s contract with IBM has two categories, the first of which is new jobs and economic development consulting.<sup>125</sup> Under Indiana’s contract with IBM, 1,000 new jobs will ultimately be created in Indiana due to the privatization contract with the IBM coalition.<sup>126</sup> Also, any FSSA employee affected by the privatization contract was able to either keep their job with the State or hire on with the IBM coalition.<sup>127</sup> Additionally, “IBM will provide a maximum of 400 hours of economic development consulting services to the Indiana Economic Development Corporation without charge. . . . IBM estimates the value of these services to be \$100,000.”<sup>128</sup>

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 10.

<sup>126</sup> Press Release, *supra* note 3, at 1.

<sup>127</sup> ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 8.

<sup>128</sup> *Id.* at 10.

The second economic development category of Indiana’s contract with IBM is the State’s receipt of new assets.<sup>129</sup> “[IBM agreed to provide], at no charge, . . . a supercomputer . . . jointly owned by IU and Purdue, that . . . more that doubles the state’s high performance computing capacity. The [supercomputer will] be used to support academic and private sector life sciences research.”<sup>130</sup> IBM also provided three years of warranty support services and three IBM research staff members to work with IU and Purdue for one year to help operate the new supercomputer system.<sup>131</sup> IBM estimates that the total value of the supercomputer, warranty, and staff is \$6-\$7 million.<sup>132</sup> Also, “[IBM agreed to establish] a Future Technology Solution Design Center on the [Indiana University, Purdue University of Indianapolis] campus, which would focus on developing multi-core technologies for IBM and its alliance partners.”<sup>133</sup> The services, equipment, and software provided by IBM to the Center have an estimated value of \$2 million per year.<sup>134</sup>

Indiana’s FSSA notes that after a county is modernized and privatized, the office will remain open in that county;<sup>135</sup> caseworkers in modernized and privatized counties will be able to perform social service activities;<sup>136</sup> the State, *not the IBM coalition*, will determine final eligibility of an applicant for Medicaid, food stamps or TANF;<sup>137</sup> applicants can either apply in-person, by phone, internet, mail, fax, or email;<sup>138</sup> and income will be verified by cross-referencing other systems.<sup>139</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> Press Release, *supra* note 3, at 2.

<sup>131</sup> ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 10.

<sup>132</sup> Press Release, *supra* note 3, at 2.

<sup>133</sup> *Id.*

<sup>134</sup> ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 10.

<sup>135</sup> *Id.* at 5-6.

<sup>136</sup> *Id.* at 6.

<sup>137</sup> *Id.* at 5-6.

<sup>138</sup> *Id.* at 2.

<sup>139</sup> *Id.* at 5.

“IBM [Eligibility] Modernization solutions are supported by an experienced worldwide staff of professional services consultants to help implement solutions and support [FSSA] staff throughout the entire application modernization process. IBM brings proven methods, techniques, tools and skills, and a collaborative approach to support [the State] through the whole process.”<sup>140</sup>

### III. ANALYSIS

#### *A. Why Indiana’s Decision to Modernize and Privatize The FSSA Application Process was a Bad Idea*

##### 1. Statistics

The number of people receiving Medicaid, food stamp or TANF benefits in Region One has decreased since the modernized eligibility process was implemented.<sup>141</sup> In turn, more applicants statewide are being denied benefits for “failure to cooperate” with the FSSA in order to establish eligibility.<sup>142</sup> “The effort has . . . replaced face-to-face interviews for welfare assistance with call centers and computers, creating an obstacle for people without easy access to those technologies, said Glenn Cardwell, a former Vigo County state welfare director.”<sup>143</sup> In Region One, which consists of the first 12 Indiana Counties to implement eligibility modernization for Medicaid, food stamps, and TANF, some alarming statistics have been uncovered.<sup>144</sup> “Medicaid enrollment dropped by 4.5 percent – from 86,574 to 82,874 in [Region One] where the [FSSA] piloted the welfare changes during the first five months of 2008, said . . . Cardwell, [who is] now working with the critics of the eligibility process.”<sup>145</sup> “State data [also] show[ed] the number of people receiving food stamps has dropped more than 11 percent -- from

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<sup>140</sup> IBM, *supra* note 72.

<sup>141</sup> Jarosz, *supra* note 22.

<sup>142</sup> Griffin, *supra* note 23.

<sup>143</sup> Jarosz, *supra* note 22.

<sup>144</sup> Thomas, *FSSA Privatization Reveals Damning Statistics*, <http://www.blueindiana.net/showDiary.do?diaryId=2817> (last visited Oct. 19, 2008).

<sup>145</sup> *Id.*

67,370 to 59,617 -- from May 2007 [to May 2008] in [this same] 12-county region.”<sup>146</sup> “In the state’s remaining 80 counties -- which largely went unaffected by the welfare changes since they were rolled out -- Medicaid rolls grew from 735,703 to 755,623, or 2.7 percent.”<sup>147</sup> “The total number of cases denied for ‘Failure to Cooperate’ [reasons in Indiana] . . . for Food Stamps, Medicaid, and TANF was . . . 8,036 in May 2007 and 17,919 in May 2008. The number is reflective of the large volumes of complaints now coming in from fully privatized [Regions One and Two].”<sup>148</sup> “‘It tells me the people’s complaints are real,’ Cardwell said. ‘They’re submitting all the information that’s called for, but a certain number will get a notice a week or so later saying they failed to submit the required information [i.e., the applicant failed to cooperate].’”<sup>149</sup> Additionally, “released statistics [in late July 2008 showed] 11.5 percent of callers to the [Coalitions’] 800 number abandoned their calls, or hung up, without completing them. Some hold times were more than 10 minutes.”<sup>150</sup>

## 2. Problems Hoosiers Face when Applying for Medicaid, Food Stamps, or TANF due to the Rollout of Eligibility Modernization

In regions where eligibility modernization has been rolled out, many glitches with the new process have arisen.<sup>151</sup> Unfortunately for applicants and recipients undergoing recertification, these glitches have resulted in the denial or loss of Medicaid, food stamp, and TANF benefits.<sup>152</sup> On July 31, 2008, Indiana held a Select Joint Commission hearing on Medicaid.<sup>153</sup> “During a three-and-a-half-hour hearing . . . state lawmakers heard one horror story after another from Hoosiers who applied for Medicaid, food stamps, or [TANF] benefits using

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<sup>146</sup> Jarosz, *supra* note 22; *see* Griffin, *supra* note 23; *see also* Gultry, No. 46C01-0808-PL-000388.

<sup>147</sup> Jarosz, *supra* note 22.

<sup>148</sup> Griffin, *supra* note 23.

<sup>149</sup> Thomas, *supra* note 144.

<sup>150</sup> Jarosz, *supra* note 22.

<sup>151</sup> *See* FRICK & LEWIS, *supra* note 6, at 8-9.

<sup>152</sup> *See* Perdue, No. 49D10-0803-PL-013340; Terrell, No. 49D10-0803-PL-010824.

<sup>153</sup> *The FSSA Fizzle*, *supra* note 9. This meeting was held in Kokomo, Indiana. *Id.*

the new [modernized] application system piloted in 12 Indiana counties.”<sup>154</sup> Complaints from recipients of FSSA benefits include: lost documents, long hold times when calling the call center, processing delays, and unexplained denials.<sup>155</sup> An unexplained denial means an applicant receives a denial letter which states “failure to cooperate” as the basis for the denial.<sup>156</sup> The denial letter fails to specifically explain why the applicant was denied services by the FSSA.<sup>157</sup>

Recipients also “told stories of waiting months to receive services and during that time having to repeatedly go through the application process.”<sup>158</sup> These delays also include hospitals enrolling low-income pregnant women and newborns onto Medicaid.<sup>159</sup> An approval was rendered in days on the pre-modernized system for these women and infants.<sup>160</sup> It now takes weeks for an approval using the modernized eligibility process.<sup>161</sup>

Another problem raised is the fact that many elderly Hoosiers applying for Medicaid are not technologically savvy.<sup>162</sup> If a disabled elderly applicant cannot go to their local county office to apply for benefits due to their disability, then the applicant has an option of filing an application online.<sup>163</sup> Alternatively, if an disabled elderly applicant chooses to apply for benefits by phone, then they must navigate a difficult and confusing automated telephone system.<sup>164</sup> The ACLU in *Perdue v. Roob* alleges in its complaint, “the state is not in compliance with the American with Disabilities Act [sic] because it does not provide adequate accommodations to

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<sup>154</sup> Editorial, *Welfare Modernization*, EVANSVILLE COURIER & PRESS, Aug. 11, 2008, <http://www.courierpress.com/news/2008/aug/11/welfare-modernization-the-issue-new-fssa-welfare>.

<sup>155</sup> *Id.*

<sup>156</sup> Terry Stawar, *Stawar: A Welfare Privatization Check-up*, THE EVENING NEWS & TRIBUNE, [http://www.newsandtribune.com/archivesearch/local\\_story\\_235004035.html](http://www.newsandtribune.com/archivesearch/local_story_235004035.html) (last visited Oct. 18, 2008).

<sup>157</sup> *Id.*

<sup>158</sup> *The FSSA Fizzle*, *supra* note 9.

<sup>159</sup> Editorial, *supra* note 154.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Press Release, *supra* note 3, at 3.

<sup>164</sup> Editorial, *supra* note 154.

applicants with disabilities.<sup>165</sup> In every story at this hearing, lack of accountability by Indiana’s FSSA was the common theme.<sup>166</sup>

On September 16, 2008, Lawmakers held a hearing to evaluate the eligibility modernization process.<sup>167</sup> “In Muncie, where changes have occurred, [Marilyn Kay] Walker [a township trustee for Delaware County] said she has contended with the [coalition members] losing bank statements or documents needed to establish eligibility for benefits.”<sup>168</sup> The documents were faxed but the coalition claimed that it did not receive them.<sup>169</sup> “Myra Wiley, executive director of Mental Health America in Vigo County, complained that the [Coalition has] lost Social Security cards, birth certificates, work histories, income verifications – sometimes three or more times for the same client.”<sup>170</sup> “Walker and . . . Wiley . . . also told lawmakers that many clients need face-to-face contact with case workers to successfully enroll in benefit programs.”<sup>171</sup>

On June 23, 2008, “[t]he Food and Nutrition Service of the U.S. Department of Agriculture sent a letter to the Indiana Family and Social Services Administration ordering the state to delay any further rollout of the welfare changes until it improved its timeliness in processing applications.”<sup>172</sup> FNS Regional Administrator Ollice Holden asserts in her letter to the FSSA that modernization “was intended to make the processing of welfare benefits more efficient . . . [but] indicated it has had the opposite effect, at least when it comes to food stamps.”<sup>173</sup> Prior to the initial modernization rollout in Region One, FSSA was approving

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<sup>165</sup> Stawar, *supra* note 156.

<sup>166</sup> *The FSSA Fizzle*, *supra* note 9.

<sup>167</sup> Kusmer, *supra* note 11.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *USDA*, *supra* note 13.

<sup>173</sup> *Id.*

approximately 85% of the food stamp applications it received within the federally required 30 days.<sup>174</sup> “During the six months following the initial rollout, however, FSSA approved less than half of food stamp applications within 30 days, and an additional 43 percent during the 31-60-day time period, Holden wrote. FNS expects states to process 95 percent of food stamp applications within 30 days.”<sup>175</sup> Note however Indiana’s contention. The State asserts that applications were not being denied if they were not processed within 30 days.<sup>176</sup> Indiana claims that it was giving an applicant an additional 30 days to submit required documentation needed to process their application.<sup>177</sup>

### 3. Three Pending Lawsuits against State Officials in Indiana

#### *a. Perdue v. Roob*<sup>178</sup>

According to the Introductory Statement in the plaintiffs’ amended complaint, this is a class action lawsuit which seeks to enjoin Indiana’s FSSA from sending Medicaid, food stamp, and/or TANF applicants and recipients constitutionally deficient notices (a violation of the Fourteenth Amendment of the United States constitution) regarding the denial of benefits for “failure to cooperate” with the FSSA.<sup>179</sup> Next, the complaint seeks to enjoin the FSSA from denying benefits for specific “failure to cooperate” reasons including:

[F]ailure to cooperate in establishing eligibility, failure to cooperate in verifying income, failure to cooperate in verifying the value of resources, failure to verify Indiana residency, failure to complete a personal interview required to establish eligibility, failure to cooperate verifying assistance group composition, failure to return a signed re-determination form, failure to submit medical information necessary to establish eligibility, and/or failure to submit visual information necessary to establish blindness.<sup>180</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Perdue, No. 49D10-0803-PL-013340 at 1.

<sup>179</sup> *Id.* at 2.

<sup>180</sup> *Id.* at 5-6.

The complaint alleges that “[a]pplicants and recipients of services are routinely denied assistance for alleged ‘failure to cooperate’ notwithstanding the fact that the agency has failed to offer reasonable assistance to individuals attempting to comply with the numerous requirements imposed by the agency.”<sup>181</sup> This practice by the FSSA has a negative impact on disabled individuals and the plaintiffs assert this practice is in violation of the American with Disabilities Act.<sup>182</sup> Lastly, the complaint seeks to enjoin the FSSA’s practice of denying food stamps to applicants and recipients for “failure to cooperate.”<sup>183</sup> The plaintiffs contend that this practice is “in violation of federal law, as well as the Fourth Amendment [of] the United States Constitution.”<sup>184</sup>

The named plaintiff, Sheila Perdue is disabled.<sup>185</sup> Ms. Perdue has numerous physical and mental conditions, and specifically she is hearing impaired.<sup>186</sup> Ms. Perdue had been receiving Medicaid and food stamps for three to four years.<sup>187</sup> In December 2007, Ms. Perdue was notified by the FSSA that she had to take part in a phone interview to verify the assistance she was receiving.<sup>188</sup> Ms. Perdue did in fact take part in this phone interview.<sup>189</sup> However, Ms. Perdue was having trouble hearing due to her disability and asked for an in-person interview.<sup>190</sup> Her request was denied.<sup>191</sup> Ms. Perdue did not completely understand each of the interviewer’s requests, because of her hearing disability, and thus not every document requested by the FSSA

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<sup>181</sup> *Id.* at 2-3.

<sup>182</sup> *Id.* at 3.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 22.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 23.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

was submitted by Ms. Perdue.<sup>192</sup> However, Ms. Perdue did understand that documents had to be submitted in order for the FSSA to verify her eligibility for the programs she was enrolled in.<sup>193</sup>

After the telephone interview, Ms. Perdue compiled numerous documents and went to a local FSSA office where applicants and recipients of public assistance benefits were required to submit their documents for eligibility verification purposes.<sup>194</sup> Ms. Perdue asked a FSSA employee to help her complete her paperwork.<sup>195</sup> The FSSA employee told Ms. Perdue that she could not help her.<sup>196</sup> Therefore, Ms. Perdue left only the documents with the FSSA employee that she had gathered from home, not knowing if any additional information was required by the FSSA.<sup>197</sup> In January 2008, Ms. Perdue received a “failure to cooperate” letter from the FSSA and her Medicaid and food stamp benefits were therefore discontinued on January 31, 2008.<sup>198</sup> Unfortunately, Ms. Perdue did not have an attorney and did not know how to appeal the denial of her benefits.<sup>199</sup>

The FSSA never contacted Ms. Perdue to aid her in gathering the documents needed to certify the benefits she was receiving.<sup>200</sup> Also, the FSSA never advised Ms. Perdue of what documents were missing.<sup>201</sup> Ms. Perdue did not fail to cooperate with the FSSA.<sup>202</sup> Ms. Perdue tried to do what any reasonable person would do in her situation, which was to ask for assistance

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 23-24.

<sup>196</sup> *Id.* at 24.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 24-25.

<sup>200</sup> *Id.* at 25.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

from the FSSA to help her comply with its documents request.<sup>203</sup> However, that attempt by Ms. Perdue was unsuccessful.<sup>204</sup>

The theme is the same with each of the other plaintiffs involved in *Perdue*. They were all denied benefits for an alleged “failure to cooperate.” “The [*Perdue*] lawsuit claims FSSA denied or terminated benefits to each of the plaintiffs when the agency was missing some document such as a birth certificate or a medical record – documents that the plaintiffs had delivered previously [or attempted to deliver].”<sup>205</sup> Indiana ACLU Attorney Gavin Rose said “[modernization] creates obstacles for people with mental disorders and other disabilities, or those with limited schooling, further complicating an eligibility process with dozens of hurdles for each of Indiana’s 1.1 million welfare recipients.”<sup>206</sup>

If an applicant or recipient makes an objective, good faith effort to comply with a request by the FSSA, then the applicant or recipient should not be denied benefits for “failure to cooperate.” The FSSA should offer reasonable assistance to applicants and recipients in order to comply with the numerous and daunting requirements the FSSA imposes on individuals applying for or renewing Medicaid, food stamp, or TANF benefits.<sup>207</sup> After the FSSA has made a request for documentation to an applicant or recipient, and the applicant or recipient has in good faith complied with the FSSA’s request, then the FSSA should notify the applicant or recipient of any documentation it is missing and give the applicant or recipient a reasonable amount of time to produce the documentation in order to establish benefits.<sup>208</sup> If an applicant or recipient is willing

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<sup>203</sup> *Id.* at 24.

<sup>204</sup> *Id.*

<sup>205</sup> *ACLU Lawsuit Targets Indiana Welfare Changes*, THE CHESTERTON TRIBUNE, May 20, 2008, [http://chestertontribune.com/Indiana%20News/5206%20aclu\\_lawsuit\\_targets\\_indiana\\_wel.htm](http://chestertontribune.com/Indiana%20News/5206%20aclu_lawsuit_targets_indiana_wel.htm).

<sup>206</sup> *Id.*

<sup>207</sup> *See* *Perdue*, No. 49D10-0803-PL-013340 at 44-46.

<sup>208</sup> *Cf.* *Perdue*, No. 49D10-0803-PL-013340 at 22-25 (Sheila Perdue made a reasonable effort to comply with the FSSA’s document request but was never advised as to what documents were missing and instead denied benefits for “failure to cooperate.”).

to cooperate, then an applicant or recipient cannot fail to cooperate.<sup>209</sup> Additionally, an applicant or recipient should not be denied benefits for “failure to cooperate” when documentation has been submitted to the FSSA and inadvertently lost.<sup>210</sup> So long as an applicant or recipient can produce verification that a document was received by the FSSA, then the FSSA should consider the document received as of the date on the verifying document.<sup>211</sup>

The FSSA must provide reasonable accommodations to disabled Hoosiers applying for or renewing Medicaid, food stamp, or TANF benefits. “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>212</sup> A specific example would be that of Ms. Perdue.<sup>213</sup> When Ms. Perdue requested an in-person interview because she was hearing impaired, it should have been granted by the FSSA.<sup>214</sup> Interpreting the ADA, disabled individuals must also be provided reasonable access to county FSSA offices in order to access public benefits.<sup>215</sup> If a disabled individual requests the FSSA’s assistance, such as help in applying for benefits online while at a county office or help in determining what specific documents the applicant needs to submit to the FSSA, then the FSSA should be bound by the ADA to comply with that request so long as it is reasonable.

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<sup>209</sup> See, e.g., Perdue, No. 49D10-0803-PL-013340 at 2-3.

<sup>210</sup> Cf. Gultry, No. 46C01-0808-PL-000388 at 5 (“[O]fficials . . . in and near the affected pilot region have called on Defendants to halt the further spread of privatization of intake and eligibility services until problems can be resolved, caseworker face-to-face contact with recipients restored and recipients can be assured of no further diminution of services.”).

<sup>211</sup> Cf. IND. TR. P. R. 4.1. A verifying document would include a certified mail receipt, delivery confirmation, etc. *Id.*

<sup>212</sup> Americans with Disabilities Act, 42 U.S.C. § 12132 (1990). “The term ‘public entity’ means – (A) any State or local government; (B) any department, *agency*, special purpose district, or other instrumentality of a State or States or local government . . .” Americans with Disabilities Act, 42 U.S.C. § 12131 (1990) (emphasis added). “[T]he ADA prohibits discrimination against qualified individuals with disabilities by public entities. Activities covered include . . . [g]overnment services carried out by *contractors*.” Training Resource Center on the Americans with Disabilities Act, *ADA Solutions & FAQs for State and Local Government*, <http://www.adacourse.org/solutions.php?idarea=Government> (last visited Nov. 17, 2008) (emphasis added).

<sup>213</sup> Perdue, No. 49D10-0803-PL-013340 at 22-25.

<sup>214</sup> See Perdue, No. 49D10-0803-PL-013340 at 23 (Ms. Perdue’s request for an in-person interview was denied.).

<sup>215</sup> See Layton v. Elder, 143 F.3d 469 (8th Cir. 1998).

Accommodations must be provided to disabled persons in order to prevent discrimination and for Indiana's FSSA to fully comply with the ADA.<sup>216</sup>

*b. Terrell v. Roob*<sup>217</sup>

In January 2008, the FSSA implemented a new requirement for Medicaid applicants and recipients who request a fair hearing to appeal the denial or termination of benefits.<sup>218</sup> This policy was imposed by the IBM Coalition.<sup>219</sup> Applicants and recipients are now provided a notice that the hearing will be telephonic unless an in-person hearing is specifically requested within 10 days from the date on the notice.<sup>220</sup> The notice fails to inform appellants that an Administrative Law Judge (ALJ), who presides over the hearing, will make a credibility and eligibility determination.<sup>221</sup> The notice also fails to explain that if the appellant wants to use exhibits, then it is the appellant's responsibility to ensure that the county caseworker and the ALJ are provided with copies of exhibits prior to the hearing date.<sup>222</sup> The plaintiffs assert "this notice does not inform Medicaid appellants that they are waiving their due process right to an in-person hearing."<sup>223</sup> "[Failing] to request an in-person hearing within ten (10) days . . . does not constitute a knowing, intelligent, and voluntary waiver of that right."<sup>224</sup>

The class action lawsuit was "brought to enjoin [Indiana's FSSA] from providing the plaintiffs and the putative class with telephonic hearings unless and until they knowingly, intelligently, and voluntarily waive their right to an in-person hearing."<sup>225</sup> This lawsuit was also brought "to enjoin [the FSSA] to provide in-person hearings to all Medicaid appellants who have

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<sup>216</sup> See *Perdue*, No. 49D10-0803-PL-013340 at 22-25.

<sup>217</sup> *Terrell*, No. 49D10-0803-PL-010824.

<sup>218</sup> *Id.* at 1.

<sup>219</sup> Rose Email, *supra* note 15.

<sup>220</sup> *Terrell*, No. 49D10-0803-PL-010824 at 1.

<sup>221</sup> *Id.* at 1-2.

<sup>222</sup> *Id.* at 2.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

received telephonic hearings without knowingly, intelligently, and voluntarily waiving their right to an in-person hearing.”<sup>226</sup> The plaintiffs allege that the FSSA’s policy violates federal Medicaid law and the Fourth Amendment of the United States Constitution.<sup>227</sup>

The named plaintiff in this case is Paul Terrell. Mr. Terrell is physically disabled, suffering from “multiple heart conditions and nerve damage in his feet and legs. . . . [A]s a result of these conditions, he cannot walk.”<sup>228</sup> Additionally, Mr. Terrell suffered from depression.<sup>229</sup> “In early 2008, Mr. Terrell applied for Medicaid [for the first time].”<sup>230</sup> Mr. Terrell’s application was denied by the FSSA.<sup>231</sup> Thereafter, Mr. Terrell chose to appeal this decision and requested a fair hearing.<sup>232</sup>

On or about March 27, 2008, Mr. Terrell received a notice titled ‘Appeal Received – Notice to Appellant.’ This notice stated that it was ‘to inform [Mr. Terrell his] appeal ha[d] been received and provide other important information.’ Toward the middle of the notice, it stated that ‘[i]f you continue the appeal, the next step will be scheduling a hearing. YOU WILL BE SENT A TELEPHONE SCHEDULING NOTICE. This means your hearing will be conducted entirely over the phone. No contact is necessary if you agree with this procedure.’ It then stated that ‘[i]f you know that you will not want a telephone hearing, and would prefer to appear personally, please call the above toll-free number within ten (10) days of the above date.’<sup>233</sup>

Despite receiving this notice, Mr. Terrell did not understand that an in-person hearing could be requested and therefore, he did not call the toll-free number to request an in-person hearing.<sup>234</sup>

However, Mr. Terrell would have preferred an in-person hearing.<sup>235</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 6.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 7.

<sup>235</sup> *Id.*

Mr. Terrell then received a second notice entitled “Notice of Telephone Hearing.”<sup>236</sup> This notice advised Mr. Terrell of the date his telephonic hearing was to take place.<sup>237</sup> At this point Mr. Terrell realized the hearing would not be in-person.<sup>238</sup> This notice also conveyed to Mr. Terrell that (1) it was his responsibility to prepare exhibits for the ALJ’s consideration and to distribute copies of his exhibits to the ALJ and to the “other party” within 20 days of the date on the notice and (2) that the ALJ must have copies of Mr. Terrell’s exhibits no later than five days prior to the date of the hearing [hereinafter referred to as “exhibit responsibilities”].<sup>239</sup> However, this notice did not disclose who the “other party” was, nor did it disclose an address where exhibits were to be sent.<sup>240</sup>

Prior to his receipt of the second notice, Mr. Terrell was never informed the he would have to obtain, copy, and mail exhibits he wanted to use for the hearing.<sup>241</sup> Mr. Terrell thought his medical records would be relevant to determine whether or not he would qualify for Medicaid, however he did not possess copies of any of these records.<sup>242</sup> Mr. Terrell believed that: (1) he would have to pay to obtain copies of his medical records; (2) that it would have been difficult to obtain the medical records and meet the FSSA’s deadlines; and (3) he could not afford the costs associated with making and mailing the copies because of his limited financial means.<sup>243</sup>

Ultimately, Mr. Terrell appeared for the scheduled telephonic hearing.<sup>244</sup> The FSSA representative stated that she was unprepared for the hearing.<sup>245</sup> Mr. Terrell was never provided

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 8.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

copies of the exhibits that the FSSA was going to introduce into evidence at the hearing.<sup>246</sup> The FSSA representative convinced Mr. Terrell to withdraw the appeal with prejudice.<sup>247</sup> “Mr. Terrell did not understand what he was being asked to do, as he was unfamiliar with the process, and therefore agreed.”<sup>248</sup>

James Clutter, another disabled plaintiff in this lawsuit, applied for Medicaid in February 2008, was denied in June 2008, and appealed.<sup>249</sup> After receiving the “Appeal Received – Notice to Appellant” in early August 2008, Mr. Clutter called the phone number on the form because he preferred an in-person hearing.<sup>250</sup> A FSSA representative confirmed with Mr. Clutter that an in-person hearing would be scheduled.<sup>251</sup>

In late August 2008, Mr. Clutter received the “Notice of Telephone Hearing” informing him that his telephonic hearing had been scheduled, despite the fact that he timely requested an in-person hearing.<sup>252</sup> This notice also informed Mr. Clutter of his “exhibit responsibilities.”<sup>253</sup> Prior to this notice, Mr. Clutter was unaware that he would have to obtain, copy, and mail his exhibits.<sup>254</sup>

The third plaintiff in this lawsuit is Richard Eldridge, who is disabled.<sup>255</sup> Mr. Eldridge applied for Medicaid in July 2007 and received one denial letter in May 2008.<sup>256</sup> A subsequent denial letter was received by Mr. Eldridge listing a separate reason for his Medicaid denial even

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 9.

<sup>250</sup> *Id.* at 9-10.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 10.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 10-11.

<sup>256</sup> *Id.* at 11.

though he took no action between receiving these two denial notices.<sup>257</sup> Mr. Eldridge appealed and thereafter received the notice entitled “Appeal Received – Notice to Appellant.”<sup>258</sup> When he received the notice, Mr. Eldridge did not understand that he could request an in-person hearing.<sup>259</sup> Therefore, Mr. Eldridge did not call the toll-free number within the ten day deadline.<sup>260</sup> However, an in-person hearing would have been preferred by Mr. Eldridge.<sup>261</sup>

Later, Mr. Eldridge received the “Notice of Telephone Hearing.”<sup>262</sup> This notice informed Mr. Eldridge of his “exhibit responsibilities.”<sup>263</sup> At no previous point in time was Mr. Eldridge aware that he would have to obtain, copy, and mail his exhibits.<sup>264</sup> Mr. Eldridge contacted the FSSA to discuss what information he could provide as exhibits.<sup>265</sup> He was informed by a FSSA representative that it would forward any evidence he submitted as an exhibit to the ALJ.<sup>266</sup> Mr. Eldridge appeared for his scheduled telephonic hearing.<sup>267</sup> An hour prior, he received a package from the FSSA consisting of copies of both parties exhibits for the hearing.<sup>268</sup> However, numerous copies of exhibits that Mr. Eldridge submitted to the FSSA that he intended to use at the fair hearing were missing.<sup>269</sup> Therefore, the ALJ did not have all of Mr. Eldridge’s exhibits for review.<sup>270</sup> Despite this fact, the hearing proceeded as scheduled.<sup>271</sup> Mr. Eldridge was given

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<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 12.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 12-13.

<sup>267</sup> *Id.* at 13.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

seven days to re-submit the missing exhibits to the ALJ, however further testimony was prohibited.<sup>272</sup>

Prior to the FSSA's modernization and privatization, all Medicaid appeals were in person.<sup>273</sup> Given the delay in processing mail, appellants have approximately one week to request an in-person hearing.<sup>274</sup> Many applicants simply do not understand the appeal notice.<sup>275</sup> For some appellants, such as one who is homeless or out of town, requesting an in-person hearing within the ten-day deadline would be impossible.<sup>276</sup> Additionally, some appellants may not own a telephone, thus making it more difficult for them to schedule an in-person hearing.<sup>277</sup>

Fair hearings for the appeal of an adverse decision should always be in-person unless an appellant opts to schedule a telephonic hearing.<sup>278</sup> This would allow ALJ's to make valid credibility and eligibility determinations.<sup>279</sup> An appellant would not have to bear the burden of gathering, copying, and submitting their exhibits to the ALJ and the FSSA within an unreasonable deadline. Likewise, appellants would knowingly waive their due process right to an in-person hearing by having to specifically request a telephonic hearing if the FSSA changed the fair hearing requirement back to the way it was prior to January 2008, which was in-person.

*c. Gultry v. Daniels*<sup>280</sup>

A group of eight LaPorte County, Indiana citizens brought suit against Governor Mitch Daniels, Secretary of the FSSA Mitch Roob, and Director of the DFR Zach Main to stop the rollout of the FSSA's modernization and privatization in 13 northwest counties in Indiana,

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 14.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 15.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *See Id.* at 2.

<sup>279</sup> *See Id.* at 1-2.

<sup>280</sup> Gultry, No. 46C01-0808-PL-000388.

otherwise known as Region Three.<sup>281</sup> *Gultry v. Daniels* is the most recent FSSA lawsuit concerning the many concerns applicants have about eligibility modernization and privatization. Region Three is one of the two remaining regions where eligibility modernization has *not* been rolled out. Therefore, applicants in this region apply for benefits the “old way,” i.e., at a local FSSA office while meeting face-to-face with a caseworker.<sup>282</sup>

This lawsuit ultimately seeks a permanent injunction, enjoining Indiana officials from rolling out the modernization process in Region Three, to restore Region Three DFR county offices back to their pre-privatization status, and put Region Three DFR caseworkers back into their previous roles.<sup>283</sup> The plaintiffs demand “[t]hat there be full restoration of the number of state caseworkers in existence at each county office in Region [Three and] . . . to [completely] restore face-to-face contact between [applicants,] recipients and caseworkers for the purpose of intake and eligibility.”<sup>284</sup> Also, the plaintiffs demand that State officials be enjoined from closing any of the county offices in Region Three.<sup>285</sup>

### 1. The Plaintiffs Factual Claims

“[In 2005 Indiana] announced plans to ‘privatize’ or outsource to private, for profit corporations the intake and eligibility functions for three federal programs, including TANF, Food Stamps and Medicaid which had traditionally been administered by . . . [the] FSSA.”<sup>286</sup> In Mitch Roob’s initial plan, the number of state employees working for the FSSA who processed benefit applications would be reduced from 2,500 to 500.<sup>287</sup> Roob also wanted to close a number

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<sup>281</sup> *Id.* at 1-2, 8.

<sup>282</sup> See ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 2.

<sup>283</sup> *Gultry*, No. 46C01-0808-PL-000388 at 8.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 2.

<sup>287</sup> *Id.*

of FSSA county offices and only have regional offices for applicants and recipients to access.<sup>288</sup> This plan has been revised and there still remains an office open in every county.<sup>289</sup> However, the threat of county office closings is real and face-to-face contact would be drastically reduced.<sup>290</sup>

The modernized eligibility system replaces face-to-face caseworker contact with technology.<sup>291</sup> This will create problems for elderly persons who are aged or disabled and in need of Medicaid, food stamps, or TANF because a majority of these citizens are unfamiliarity with the internet, automated call systems, etc.<sup>292</sup> The FNS raised concerns about FSSA state employee reductions.<sup>293</sup> In a letter dated October 16, 2006, to Mitch Roob, FNS said “[w]e are concerned that the projected staff levels may be insufficient to ensure a successful implementation, based on other State’s experiences in implementing large scale service delivery charges.”<sup>294</sup> The letter went on to say “[p]rior FNS experience with large scale State modernization efforts suggests that maintaining staffing levels commensurate with current program needs is advisable until all phases are complete to assure customer service and program integrity.”<sup>295</sup>

Indiana Officials knew, since discussions of privatization began, of the many concerns raised by service providers, Indiana employees, government officials, and others that there could be negative implications on these public assistance programs despite the claims of the defendants and the IBM Coalition that service would improve and the State will save money from entering

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 2-3.

<sup>293</sup> *Id.*

<sup>294</sup> Letter from Ollice C. Holden, Regional Administrator, U.S. Dep’t of Agric., Food and Nutrition Serv. to E. Mitchell Roob, Jr., Secretary, Ind. Family & Soc. Servs. Admin. (Oct. 18, 2006).

<sup>295</sup> *Id.*

into this contract.<sup>296</sup> Also, Mitch Roob was previously employed with ACS, a company that is a part of the IBM Coalition and a company “that was termed ‘scandal plagued’ in a December 4, 2006 edition of *Information Week*.”<sup>297</sup> The defendants are deemed knowledgeable about other State’s attempts and failures to privatize the Medicaid and food stamp process to either improve customer service to applicants and recipients or to save the States’ money (referring to Texas and Florida).<sup>298</sup>

Since Indiana implemented the eligibility modernization rollout in regions, different processes were in place in different counties, depending if the region had been modernized or not. As many predicted, modernization “resulted in a reduction of benefits and eligible applicants in a time of economic stress in the piloted region.”<sup>299</sup> “Privatized intake and eligibility allegedly blame the applicant for failure to cooperate.”<sup>300</sup> However, the reduction in “face-to-face contact with State caseworkers and a reliance on technology increase the barriers for approved benefits.”<sup>301</sup>

Many Hoosier applicants and recipients do not have access to a telephone or computer which makes using the call center or the internet to initiate their applications difficult if not impossible.<sup>302</sup> The State has still insisted on rolling out the eligibility modernization process to the remaining Indiana counties.<sup>303</sup> Elected officials and editorial boards in and around Region One have asked the State to stop the eligibility modernization rollout until: (1) the frequent problems applicants and recipients face with the modernized eligibility process can be resolved;

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<sup>296</sup> Gultry, No. 46C01-0808-PL-000388 at 3.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 3-4.

<sup>299</sup> Gultry, No. 46C01-0808-PL-000388 at 4; *see Jarosz supra* note 22; *see also Griffin, supra* note 23; Thomas, *supra* note 144.

<sup>300</sup> Gultry, No. 46C01-0808-PL-000388 at 4.

<sup>301</sup> *Id.* at 4-5.

<sup>302</sup> *Id.* at 5.

<sup>303</sup> *Id.*

(2) in-person contact with caseworkers is restored; and (3) recipients no longer lose their much needed services.<sup>304</sup> The plaintiffs cited various articles to support these assertions.

“[Indiana’s] . . . privatization of the welfare system is seriously flawed. The 500 people who [attended] a town hall meeting in Muncie [the week of May 11, 2008] is ample evidence, as are the . . . letters and calls from desperate families to local newspapers after losing their Medicaid and food stamp benefits.”<sup>305</sup> The article went on to say “[i]t is irresponsible, however, for the FSSA to continue the privatization process without resolving the problems [that many needy Hoosiers are facing].”<sup>306</sup> The relationship between the FSSA and would-be recipients has broken down.<sup>307</sup> “Some of those who have tried to get welfare assistance through the FSSA have found their path blocked, they say, by barriers of technology and service loops.”<sup>308</sup>

“Bring back the caseworkers. That was the resounding message of welfare clients . . . during a town hall meeting [June 25, 2008] in Bloomington, Indiana.”<sup>309</sup> Chris Holly, who works for Medicaid Solutions and represents people on Medicaid said “[w]e need to go back to having a single caseworker assigned to each person – someone who understands and who is accountable.”<sup>310</sup> An Indiana Legal Services representative said “[t]he problem is that there is no prompt way to resolve problems through the call center, something that used to be done quickly through local caseworkers. . . . There are plenty of explainers at the call center, but no one there has the authority to correct problems.”<sup>311</sup> Perry Township Trustee Dan Combs said “[t]he problem is bigger than I thought it was. We’ve reached the point where even our

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<sup>304</sup> *Id.*

<sup>305</sup> *Privatization*, THE STAR PRESS, May 19, 2008 (on file with author).

<sup>306</sup> *Id.*

<sup>307</sup> *Welfare Needs Personal Touch*, SOUTH BEND TRIBUNE, May 31, 2008,

<http://southbendtribune.com/apps/pbcs.dll/article?Date=20080531&Category=Opinion&ArtNo=805310369&SectionCat=&Template=printart>.

<sup>308</sup> *Id.*

<sup>309</sup> Danny Denny, *Bring Back the Caseworkers*, BLOOMINGTON HERALD TIMES, Jun. 25, 2008 (on file with author).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

developmentally disabled are left on their own if they can't find someone to advocate for them.”<sup>312</sup> This means one simple error on an individual's application or a recipient's annual recertification can result in a denial of benefits for “failure to cooperate.”<sup>313</sup> The same holds true if documentation was sent or faxed to the Document Center but was subsequently lost or illegible.<sup>314</sup>

The plaintiffs in *Gultry* also assert in their complaint that the FSSA has ignored FNS's request that the FSSA cease the modernization rollout until the State comes into compliance with processing food stamps in the federally mandated 30 day time frame.<sup>315</sup> Mitch Roob has publicly stated that he does not believe the federal government has the authority to stop the modernization rollout.<sup>316</sup> The State claims that its decision to temporarily suspend the eligibility modernization rollout is due only to the FSSA's continued support rendered to the victims in Central Indiana of the early June 2008 flooding.<sup>317</sup>

## 2. The Plaintiffs Legal Claims

The complaint asserts that applicants and recipients in modernized counties are not being advised in a significant or substantive way of their right to: (1) a face-to-face interview for eligibility determination purposes with a state employee, which is in violation of 7 C.F.R. § 273.2(e); (2) appeal a decision for “failure to cooperate,” in violation of § 2040.00.00 of the Indiana Client Eligibility System (ICES) Manual; and (3) a continuation of benefits pending the appeal of a “failure to cooperate” denial, in violation of § 2040.00.00 of the ICES Manual.<sup>318</sup>

The plaintiffs also claim that pursuant to I.C. 12-15-1-4, a State employee from an applicant's

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<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Gultry*, No. 46C01-0808-PL-000388 at 5.

<sup>316</sup> *Gultry*, No. 46C01-0808-PL-000388 at 5-6; *see The FSSA Fizzle*, *supra* note 9.

<sup>317</sup> *Gultry*, No. 46C01-0808-PL-000388 at 5.

<sup>318</sup> *Id.* at 6.

county must make the final determination of Medicaid eligibility, not a state employee outside of the applicant’s county or a non-state employee.<sup>319</sup> The plaintiffs likewise assert that the intent of the FSSA to close DFR county offices limits access to applicants and recipients of Medicaid, food stamps, and TANF “in violation of the Rehabilitation Act of 1973 (Pub.L. 93-112, Section 504) and Title VI of the Civil Rights Act of 1964 (42 USC Section 2000d).”<sup>320</sup> The plaintiffs additionally contend that the State has permitted the IBM Coalition to conduct certification interviews and to certify food stamp applications in violation of the Food Stamp Act of 1977 § 272.4.<sup>321</sup> “The . . . Act . . . specifically prohibits non-state agency employees from conducting certification interviews or certifying food stamp applications.”<sup>322</sup> Additionally, processing food stamp applications in excess of 30 days is in violation of the Food Stamp Act of 1977 and § 2020.05.00 of the ICES Manual.<sup>323</sup>

That plaintiffs complaint further alleges that “[p]ursuant to I.C. 12-13-5-3, . . . Indiana . . . has designated county offices to serve as agents for the [DFR] in the performance of ‘all public welfare activities in the counties’ and such delegation by Defendants to private vendor [sic] employees in call centers and processing facilities is improper and unlawful.”<sup>324</sup> Moreover, TANF decisions must be made in an applicant’s county office according to I.C. 12-14-2-12.<sup>325</sup> Approval or denial of TANF benefits by a State or IBM Coalition employee made outside of an applicant’s county office is in violation of the law.<sup>326</sup> The defendants are alleged to have specifically violated I.C. 12-15-30-4 which caps the length of a contract to administer part of the

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<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 6-7.

<sup>321</sup> *Id.* at 7.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

State's Medicaid program to no more than four years.<sup>327</sup> Lastly, the plaintiffs complaint asserts that by rolling out the eligibility modernization and constantly modifying this process since its inception, the State has applied different standards to different applicants and recipients in violation of I.C. 12-13-2-3(5).<sup>328</sup>

“[T]he [first] thing that needs to be done to improve the ailing system is to establish caseworkers who can follow each case from beginning to end, and who have the authority to fix individual problems that arise.”<sup>329</sup> The caseworker in this position should be employed by the FSSA in the county that the applicant or recipient resides.<sup>330</sup> Any person who applies for or renews their Medicaid, food stamp, or TANF benefits should be given the option of a face-to-face interview with a county caseworker.<sup>331</sup> This would be an alternative to applying for benefits via the internet, telephone, or fax and also an alternative to taking part in a phone interview to renew a recipient's benefits.<sup>332</sup>

The State must meet federal deadlines for approving or denying applications for Medicaid, food stamps, or TANF. If the FSSA fails to meet the deadlines, then the FSSA must be held accountable for not complying with either Indiana or Federal law. It is unacceptable and appalling for the FSSA to allow an individual with little, if any, resources to wait an unconscionable amount of time before approving a qualified applicant's benefits. State Senator Vi Simpson said “[w]e can put pressure on the governor to penalize the vendors (IBM and Affiliated Computer Services) if we feel they are not complying with either the terms of the

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<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 7-8.

<sup>329</sup> Dann Denny, *Legislators Vow to put Pressure on Governor, Agency to Improve Service*, BLOOMINGTON HERALD TIMES, Jun. 29, 2008 at 2 (on file with author) [hereinafter *Legislators Vow*].

<sup>330</sup> *See* Gultry, No. 46C01-0808-PL-000388 at 6-7.

<sup>331</sup> *See* Gultry, No. 46C01-0808-PL-000388 at 6.

<sup>332</sup> *Cf.* Gultry, No. 46C01-0808-PL-000388 at 6 (“[R]ecipients in privatized counties are not being advised in any meaningful or substantive manner of their right to a face-to-face interview [sic] with a state employee for determination of eligibility in apparent violation of 7 C.F.R. Section 273.2(e).”)

contract or with federal rules.”<sup>333</sup> According to Indiana’s contract with the IBM Coalition, penalties can be imposed upon the Coalition for non-compliance with Key Performance Indicators which include the “processing of applications [and] re-determinations . . . within a specified time period.”<sup>334</sup>

#### 4. The Texas Health and Human Services Commission’s Contract with Accenture

Texas’s contract with Accenture was relatively similar to Indiana’s contract with the IBM Coalition. In June 2005 “[t]he Texas Health and Human Services Commission (HHSC) . . . awarded a five-year contract to Accenture . . . to help improve the way Texans apply for social services such as Medicaid and food stamps.”<sup>335</sup> The contract was worth \$899 million.<sup>336</sup> Accenture was hired to lead Texas’s modernization efforts.<sup>337</sup> “HHSC’s plan . . . allow[ed] Texans to apply for Medicaid, food stamps, TANF, and other programs in person, through the Internet, over the phone and by fax or mail.”<sup>338</sup> Texas citizen could only apply for benefits in-person before the Accenture contract was implemented.<sup>339</sup>

In December 2006, concerns about Texas’s contract with Accenture came to light. “Privatizing state social services was supposed to save Texas taxpayers money, streamline a cumbersome bureaucracy and speed up the delivery of assistance to the state’s neediest residents.”<sup>340</sup> Texas HHSC “pulled the plug on the much-ballyhooed pilot project the agency

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<sup>333</sup> *Legislators Vow*, *supra* note 315, at 1.

<sup>334</sup> ELIGIBILITY MODERNIZATION: AN INDIANA SOLUTION, *supra* note 5, at 9.

<sup>335</sup> Accenture, Texas Health and Human Services Commission Selects Accenture to Help Improve Citizen Access to Services, [http://newsroom.accenture.com/article\\_print.cfm?article\\_id=4228](http://newsroom.accenture.com/article_print.cfm?article_id=4228) (last visited Oct. 25, 2008).

<sup>336</sup> News Release, Center for Public Policy Priorities, CPPP Statement on Texas’ Termination of Accenture Contract, Mar. 13, 2007 (on file with author).

<sup>337</sup> Accenture, *supra* note 335.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> Editorial Board, *Privatization Lessons Learned*, CORRIDOR WATCH.ORG, Dec. 29, 2006, [http://www.corridorwatch.org/ttc\\_2007/CWA0612290.htm](http://www.corridorwatch.org/ttc_2007/CWA0612290.htm).

rolled out in Travis and Hays counties.”<sup>341</sup> Accenture employees were making costly errors.<sup>342</sup> “Many families were wrongly denied services or lost eligibility for services because Accenture workers made policy decisions they lacked training and experience to make.”<sup>343</sup>

According to Albert Hawkins, Commissioner of Texas’s HHSC, “[w]e didn't draw the line between vendor work and state work in the right place.”<sup>344</sup> “Hawkins . . . stopped Accenture from screening applicants following the Central Texas pilot flop.”<sup>345</sup> Accenture employees were shifted to performing back office functions, such as collecting and entering applicant data. State employees were then assigned the jobs of applicant eligibility determination.”<sup>346</sup> “Recognizing the privatization experiment was not working, Hawkins slashed the contract with Accenture by \$356 million and ended some of its functions two years early – in 2008 instead of 2010.”<sup>347</sup> However, “the two parties could not agree on changes to implement a ‘rebalancing’ of the contract.”<sup>348</sup> On March 13, 2007, Texas HHSC announced that its eligibility modernization contract with Accenture would be dissolved.<sup>349</sup> The contract officially terminated in November 2007.<sup>350</sup>

#### IV. CONCLUSION

Indiana is so far into the eligibility modernization project that there is no turning back. Over half of Indiana’s counties are currently operating under the modernized eligibility system. The State put forth many legitimate reasons for modernizing and privatizing the eligibility

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<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> William Welsh, *Accenture, Texas say Adios to Outsourcing Contract*, WASHINGTONTECHNOLOGY, Mar. 14, 2007, [http://www.washingtontechnology.com/online/1\\_1/30277-1.html](http://www.washingtontechnology.com/online/1_1/30277-1.html).

<sup>349</sup> *Id.*

<sup>350</sup> News Release, *supra* note 336.

process for Medicaid, food stamps, and TANF. To abandon the eligibility modernization project now would cost Indiana millions of dollars.<sup>351</sup> State Senator Vi Simpson and State Representative Peggy Welch, who are on the Medicaid Oversight Committee, stated that they do not believe the modernized system will be scrapped.<sup>352</sup>

Indiana's reasoning for contracting with the IBM Coalition to process Medicaid, food stamp, and TANF applications is clearly valid. The issues the FSSA faced, pre-modernization, were genuine and the State was faced with two options: privatize or fix the broken system on its own. Indiana chose the less expensive and what seemed as the practical approach to the problem: privatization. The State saved Hoosier taxpayers \$500 million by not taking the modernization project on itself. However, it seems as though the State did not anticipate, nor did it plan for, the problems that arose after a region had been modernized and privatized.

Ultimately, eligibility modernization for processing Medicaid, food stamp, and TANF applications in Indiana, in its current state, is not in the best interest of Hoosiers. There are many defects in the FSSA's modernized eligibility system. These defects negatively affect a large number of Indiana's neediest citizens from obtaining Medicaid, food stamp, or TANF benefits. If the plaintiffs in the three pending lawsuits against Indiana officials are successful, then many of Indiana's FSSA eligibility modernization problems will be resolved. Also, the State or the IBM Coalition must be held accountable for violating any Indiana or Federal law which results in the denial of Medicaid, food stamp, or TANF benefits to an applicant or recipient that meets all of the program requirements and should qualify for Medicaid, food stamp, or TANF benefits but for the State's violation of Indiana or Federal law.

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<sup>351</sup> *Legislators Vow*, *supra* note 329, at 1.

<sup>352</sup> *Id.*