DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of Public Health and Science

Office for Human Research Protections
The Tower Building
1101 Wootton Parkway, Suite 200
Rockville, Maryland 20852
Telephone: 240-453-8120
FAX: 240-453-6909
E-mail: Lisa.Rooney@hhs.gov

August 27, 2007

Vimal Chaitanya, Ph.D.
Vice President for Research, Graduate Studies and International Programs
New Mexico State University
Office of the Vice President for Research, Graduate Studies and International Programs
MSC 3RES
PO Box 30001
Las Cruces, NM 88003-8001

RE: Human Research Subject Protections Under Federalwide Assurance 451

Research Project:	The Impact of Education in Navajo Nation Border Community Public Schools on the Hearts, Minds, and Spirits of Navajo Students (Code named The Navajo Racism Project by the Navajo Institute for Social Justice)
Principal Investigator:	Scott Wendell Bray, Ph.D.
Project Number:	NMSU Project Number 6012

Dear Dr. Chaitanya:

The Office for Human Research Protections (OHRP) has reviewed New Mexico State University's (NMSU) August 3, 2007 report that was submitted in response to a March 7, 2007 OHRP letter regarding the above-referenced research and NMSU's system for protecting human subjects.

In its letter dated March 7, 2007, OHRP made the following determinations:

(1) OHRP found that NMSU failed to report to OHRP an unanticipated problem involving risks to a subject/researcher; suspension of institutional review board (IRB) approval and termination of IRB approval. In addition, OHRP found that NMSU failed to have adequate written procedures ensuring prompt reporting to the IRB, appropriate institutional officials, the head of the sponsoring federal department or agency, if any,

and OHRP of (i) any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with Department of Health and Human Services (HHS) regulations at 45 CFR part 46 or the requirements or determinations of the IRB; and (ii) any suspension or termination of IRB approval. See HHS regulations at 45 CFR 46.103(a) and 45 CFR 46.103(b)(5).

Corrective Action: OHRP acknowledges that NMSU is implementing certain steps, as outlined in the August 3, 2007 NMSU report, to ensure that the NMSU IRB, appropriate institutional officials, the head of the sponsoring federal department or agency, if any, and OHRP are promptly informed of any unanticipated problems involving risks to subjects or other or any serious or continuing noncompliance with 45 CFR Part 46 or the requirements or determinations of the IRB; and any suspension or termination of IRB approval as required by 45 CFR 46.103(a) and 45 CFR 46.103(b)(5). See page 1 of the August 3, 2007 NMSU response letter. In addition, OHRP acknowledges that NMSU has revised its written procedures regarding the reporting of such events. OHRP finds that these corrective actions do not adequately address the determinations referenced above. In particular, OHRP notes that the steps outlined in the August 3, 2007 report and the revised written policy do not address the prompt reporting of serious or continuing noncompliance with 45 CFR part 46 or the requirements or determinations of the IRB and suspension or termination of IRB approval.

Required Action: Please provide OHRP with revised written procedures for ensuring prompt reporting to the IRB, appropriate institutional officials, the head of the sponsoring Federal department or agency, if any, and OHRP of (i) … any serious or continuing noncompliance with 45 CFR Part 46 or the requirements or determinations of the IRB; and (ii) any suspension or termination of IRB approval.

(2) OHRP found no documentation that the NMSU IRB reviewed and approved certain protocol changes prior to initiation of such changes as required by HHS regulations at 45 CFR 46.103(b)(4)(iii).

Corrective Action: OHRP reviewed the NMSU corrective action, which includes a new policy and form, regarding proposed changes to IRB-approved protocols. OHRP finds that this corrective action adequately addresses the above finding and is appropriate under the NMSU FWA.

(3) OHRP found that NMSU did not have written IRB procedures that adequately describe certain activities as required by HHS regulations at 45 CFR 46.103(b)(4).

Corrective Action: OHRP reviewed the NMSU revised procedures. OHRP finds that these revised procedures still do not include the procedures that the IRB will follow for determining which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review as required by HHS regulations at 45 CFR 46.103(b)(4)(ii).

Required Action: Please provide OHRP with written procedures that adequately describe the activity referenced above.

(4) OHRP found that the NMSU IRB approved an informed consent document for the above-referenced study that failed to include or adequately address certain elements as required by HHS regulations at 45 CFR 46.116.

Corrective Action: OHRP reviewed the NMSU corrective action. OHRP acknowledges that NMSU IRB will ensure that all applicable 45 CFR 46.116(a) information will be provided to each human subject when seeking informed consent.

Required Action: Please explain how the NMSU IRB will ensure that such information is provided to each human subject. For instance, will the NMSU IRB utilize an informed consent checklist? Will NMSU IRB members have a copy of the regulations available to them as a reference when reviewing draft informed consent forms, etc?

(5) OHRP found that when reviewing the above-referenced study the NMSU IRB lacked sufficient information to make the determinations required for approval of research under HHS regulations at 45 CFR 46.111.

Corrective Action: OHRP reviewed NMSU's corrective action. OHRP acknowledges that the NMSU IRB will determine that all applicable 45 CFR 46.111 criteria are satisfied before approving research.

Required Action: Please explain how the NMSU IRB will determine that the required criteria are satisfied prior to approving research. For instance, will the NMSU IRB utilize an IRB approval criteria checklist? Will NMSU IRB members have a copy of the regulations available to them as a reference when reviewing proposed studies, etc?

OHRP makes the following additional determinations:

(6) OHRP finds that under one of the levels of review detailed in the NMSU document entitled "NMSU Policy and Procedures for the Conduct of Research Involving Human Subjects (12/12/01) Research Involving Human Subjects: Principles and Procedures," (hereinafter referred to as the NMSU Policy) a person unaffiliated with the IRB has been approving non-exempt human subject research in violation of HHS regulations at 45 CFR 46.103(b), 45 CFR 46.109(a) and 45 CFR 46.110(b). See item (11) under the March 7, 2007 OHRP letter.

Corrective Action: OHRP acknowledges that NMSU will no longer utilize the level of review detailed in the NMSU Policy. Instead, all research activities qualifying for expedited review will be carried out by the IRB Chair or by one or more experienced reviewers designated by the Chair from among members of the IRB. OHRP finds that this corrective action adequately addresses the above finding and is appropriate under the NMSU FWA.

At this time, OHRP provides the following guidance/recommendations:

(7) OHRP notes that the NMSU corrective action regarding the review and approval of proposed modification requests states the following: "The IRB Chair or designee will review and approve the modification request, unless the nature of the proposed changes warrant review by the full IRB." OHRP suggests providing a qualifier/statement regarding the types of proposed changes that must undergo review by the convened IRB (vs. expedited review) prior to implementation; i.e., a proposed change that is more than a minor change in previously approved research. See 45 CFR 46.110(b)(2).

(8) OHRP acknowledges that the NMSU Request for Modification to Protocol Form includes the following language: "Changes may not be implemented prior to receiving IRB approval (except in emergency situations involving unanticipated problems involving risk to the human subjects)." Please note that the exception criteria noted in the NMSU form differs from the criteria stated in HHS regulations at 45 CFR 46.103(b)(4)(iii). According to the regulation, an IRB must review and approve all proposed changes prior to the initiation of such changes except when necessary to eliminate apparent immediate hazards to the subjects. OHRP recommends that NMSU change the language on the NMSU form to mirror the regulatory language.

(9) OHRP notes that the NMSU informed consent corrective action, which includes written informed consent procedures, lists a total of five (5) criteria that must be satisfied in order for an IRB to approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent or waive the requirement to obtain informed consent. It appears that the NMSU list is a combination of the criteria outlined in HHS regulations at 45 CFR 46.116(c) and (d). Please note that HHS regulations provide different informed consent waiver or alteration criteria depending on the nature of the research being conducted. HHS regulations at 45 CFR 46.116(c) outline the informed consent waiver or alteration criteria applicable to certain research or demonstration projects conducted by or subject to the approval of state or local government officials whereas HHS regulations at 45 CFR 46.116(d) provide the informed consent waiver or alteration criteria applicable to all other research.

(10) OHRP notes that the NMSU corrective action outlining how NMSU will ensure that human subjects research is approved by the NMSU IRB satisfies the criteria outlined in HHS regulations at 45 CFR 46.111 states the following: "The IRB will review and approve all research activities involving human subjects before data can be collected." See also Principles and Procedures Document, Review Procedures Section, page 6 which states "The IRB must review and approve all research activities involving human subjects before data can be collected." and the New Mexico State University Application for Permission to Use Human Subjects in Research, question one (1) under Protocol of Research Project which states "No data can be collected until IRB approval has been granted." According to HHS regulations at 45 CFR 46.109(a), an IRB must review and approve all research activities covered by this policy [45 CFR 46], including all interventions or interactions with a living individual that result in the collection of data.

> According to HHS 45 CFR 46.102(f), an intervention includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. Interaction includes communication or interpersonal contact between investigator and subject, e.g., obtaining informed consent. Thus, an IRB must review and approve all research activities, including all interventions or interactions with a living individual, before those interventions or interactions can occur given that these research activities are intended to result in the collection of data about living individuals.

OHPR provides the following guidance regarding the Principles and Procedures Document (dated July 1, 2007):

(11) Membership of IRB, page 6. OHRP acknowledges that the NMSU document references the term "ex-officio non-voting members of the IRB." Please note that there are no such entities as "ex officio" or "non-voting" IRB members under HHS regulations at 45 CFR part 46.

(12) Expedited Review Submission and Review Process, page 11 and Full Board Review Submission and Review Process, page 13. OHRP recommends that NMSU modify the language found under these sections to reflect that NMSU researchers will submit for IRB review and approval all grant applications associated with HHS-supported research. Please note that HHS regulations at 45 CFR 46.103(f) require that an institution with an approved assurance certify that each application or proposal for research covered by the assurance has been reviewed and approved by the IRB.

(13) Meeting Minutes, page 16. OHRP notes that this section provides the following: "All minutes will be held on file by the Office of Compliance for at least 3 years." OHRP suggests that NMSU identify the date or event that begins the 3 year record retention requirement. When identifying the date or event, please refer to HHS regulations at 45 CFR 46.115(b). These regulations require that IRB records, including IRB meeting minutes, be retained for at least 3 years, and records relating to research which is conducted be retained for at least 3 years after completion of the research.

OHPR provides the following guidance regarding the New Mexico State University Application for Permission to Use Human Subjects In Research (revised July 2007):

(14) Informed Consent Section, item 16(b). OHRP notes the following: "If a waiver of informed consent is requested, an informational letter is required. (A copy of the informational letter that will be used must be attached.)" Based on this language, it appears as if NMSU is soliciting information regarding waiver of documented informed consent vs. waiver of informed consent. See 45 CFR 46.116(d). If waiver of documented informed consent was intended by this question, OHRP suggests that NMSU provide guidance to researchers, either on the form or in the NMSU Principles and Procedures Document or both, regarding the criteria that must be satisfied in order to waive documented informed consent.

Please submit your response to the findings, questions and concerns noted above so that OHRP receives them no later than September 14, 2007. If during your review you identify additional areas of noncompliance with HHS regulations for the protection of human subjects, please provide corrective action plans that have been or will be implemented to address the noncompliance.

OHRP appreciates your institution's continued commitment to the protection of human research subjects. Do not hesitate to contact OHRP if you should have any questions regarding this matter.

Sincerely,

Lisa A. Rooney, J.D.
Compliance Oversight Coordinator

Cc: Ms. Manuela L. Zuezada-Aragon, Director, Compliance and Research Administration, New Mexico State University (NMSU)
Dr. John Irvine, IRB Chair, NMSU
Dr. Scott Wendell Bray
Dr. Bernard Schwetz, OHRP
Dr. Melody H. Lin, OHRP
Dr. Michael Carome, OHRP
Ms. Shirley Hicks, OHRP
Dr. Irene Stith-Coleman, OHRP
Dr. Kristina Borror, OHRP
Ms. Cathy Slatinshek, OHRP
Ms. Kelley Booher, OHRP
Mr. Barry Bowman, OHRP