

IN ARBITRATION PROCEEDINGS

ALBUQUERQUE, NEW MEXICO

KEVIN S. and CHRIS W., children by Bette Fleishman, their Next Friend; JENNIFER H., a Child, by Liz McGrath, her Next Friend; DIANA D., a child, by Ernestina R. Cruz, her Next Friend; BRIAN J., a child, by Matthew Bernstein, his Next Friend; ELLIOT J. and MICHAEL J., children, by Feliz Rael, their Next Friend, OLIVIA L., a child, by Georgia Berrenberg, her Next Friend; MATTY B., JUSTIN B., and JACKSON B., children, by Gabrielle Valdez, their Next Friend; LUCAS M. and JULIAN M., children, by Mariel Willow, their Next Friend; on behalf of themselves and all others similarly situated; DISABILITY RIGHTS NEW MEXICO; and NATIVE AMERICAN DISABILITY LAW CENTER,

*Plaintiffs,*

vs.

TERESA CASADOS, in her official capacity as Cabinet Secretary for the Children, Youth and Families Department, and KARI ARMIJO, in her official capacity as Cabinet Secretary for the Human Services Department,

*Defendants.*

***In a dispute arising from:***

*Kevin S., et al. v.  
Blalock, et al.*

No. 1:18-cv-00896

U.S. District Court  
(D. New Mexico)

**Arbitrator:**  
Charles Piefer

**PLAINTIFFS'  
RESPONSE BRIEF**

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## I. INTRODUCTION

When the State removes children from their parents, the children are taken not only from their families but also often from their entire support systems. With this State power comes the responsibility to meet its legal obligations and provide children with a better environment than that from which they were removed. Yet CYFD and HSD have long known that New Mexico's child welfare system inflicts harm on the children in the State's care.<sup>1</sup> In March 2020, the State agreed to a roadmap to fix it – the FSA.<sup>2</sup> The State has not kept its promises in the FSA or the remedial CAP. The cost of continued State failure to fulfill its promises in the CAP, the best interim solution available to remedy this situation, could not be higher for children in foster care in New Mexico.

The FSA was carefully designed to propel the State forward to improve its child welfare system. After three years of the State failing to make progress on the majority of its FSA commitments, the Parties negotiated the CAP, setting forth basic, remedial activities necessary to provide for the children entrusted to the State's care. Among other activities, the State contracted with the Plaintiffs to set and meet remedial caseload benchmarks; immediately assign one placement staff to focus solely on foster parent recruitment in five high-needs counties; ensure that children received Well-Child visits within 30 days; and provide data necessary to track and manage these commitments. Despite the State's touted commitment to improving conditions for children in its custody, both the Defendants' failure to meet the outcomes required by the CAP and the limited efforts the State made to reach those outcomes demonstrate Defendants' lack of genuine commitment to meeting its contractual obligations.

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<sup>1</sup> See *Kevin S., et al. v. Jacobson, et al.*, No. 1:18-cv-00896, Complaint, 75 (2018), <https://kevinssettlement.com/wp-content/uploads/2020/02/1066.pdf>.

<sup>2</sup> *Kevin S., et al. v. Blalock, et al.*, No. 1:18-cv-00896, Settlement Agreement, 2–3 (2020), Documents – KEVIN S. SETTLEMENT (kevinssettlement.com) [hereinafter FSA].

The State continues to insist it is committed to improving its systems. Yet, at the same time the State also contends that taking the steps necessary for improved conditions for New Mexico’s foster children is impossible. But this is far from the truth. There were 2,755 children in CYFD Protective Services custody at some time from January 1, 2022 to December 31, 2022,<sup>3</sup> roughly on par with a large New Mexico high school.<sup>4</sup> To meet the needs of this relatively small population of children, HSD and CYFD receive billions of state and federal dollars.<sup>5</sup> Yet, in its Opening Brief, the State argues that hiring an administrative staffer to track well child checkups and having meetings about scheduling and documentation is the best the State could do to ensure it has crucial information regarding the medical needs of the children in its care.<sup>6</sup> Similarly, despite being on notice for years that there is a woefully insufficient number of foster homes for children, the State glosses over its failure to meet the specific promise of assigning one placement staff in each of the five (5) highest needs counties to focus exclusively on recruiting foster homes.<sup>7</sup> The Co-Neutrals’ September 18, 2023 letter also documented reports from the State’s own staff that the CAP commitments were not being implemented.<sup>8</sup> Most tellingly, the

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<sup>3</sup> Judith Meltzer and Kevin Ryan, Co-Neutrals’ 2022 Annual Report (2023), <https://kevinssettlement.com/home-2/reporting-documents/> [hereinafter Co-Neutrals’ 2022 Annual Report].

<sup>4</sup> See V. Sue Cleveland High School, *About Our School*, <https://cleveland.rpps.net/o/cleveland/page/about-our-school> (last visited July 28, 2024) (showing enrolment of 2,631 students).

<sup>5</sup> In Fiscal Year 2024, HSD’s combined federal and state revenue topped 10 billion dollars. See Letter from State of New Mexico Health Care Authority, *Transmittal of the Health Care Authority (630) FY 2025 Appropriation Request*, 18, <https://www.hsd.state.nm.us/wp-content/uploads/HCA-FY25-Budget-Request-Submission.pdf> (noting details in the attached “Financial Summary”). In addition, CYFD’s Protective Services Budget for Fiscal Year 2024 topped 200,000.00 (in thousands). See “New Mexico Legislative Finance Committee Child Welfare System,” (June 11, 2024), <https://www.nmlegis.gov/Handouts/ALFC%20061124%20Item%206%20LegisStat%20-%20New%20Mexico%20Child%20Welfare%20System.pdf> (Details for the CYFD Protective Services Revenue are available at 17, Special Appropriations Budget at 18, and Information and Technology Investment at 19.).

<sup>6</sup> Defendants’ Opening Brief at 13.

<sup>7</sup> *Id.* at 10–12.

<sup>8</sup> Letter from Co-Neutrals to Parties (Sep. 18, 2023) (<https://kevinssettlement.com/home-2/reporting-documents/>) [hereinafter Co-Neutrals’ September 18, 2023 Letter].

State's decision to pause hiring for months ensured that it would be unable to meet its remedial caseload obligation by January 5, 2024.<sup>9</sup>

This decision – to freeze hiring – coupled with a failure to provide assurances to Plaintiffs constituted a repudiation of the CAP. Plaintiffs properly initiated arbitration in 2023 based on this repudiation, but dismissed due to the State's assurances during arbitration that it could and would perform under the CAP. Now that the CAP compliance period has ended, it is clear the Defendants did not keep their promises, regardless of the standard applied to assess the State's performance. The *Kevin S.* organizational plaintiffs witness first-hand how the State's breaches of the CAP wreak havoc on children's lives: the lack of caseworkers resulting in critical activities necessary to the well-being and permanency of children being delayed, incomplete, or abandoned; children left to languish in unsafe and inappropriate placements; and children whose health needs are not timely identified, much less treated. The CAP must be performed for this suffering to ease.

## II. ARGUMENT

### A. Defendants Failed to Comply with the CAP under Both the Strict Liability Performance Standard under New Mexico Contract Law and the Good Faith Performance Standard from the FSA.

In their opening brief, Defendants point to a limited number of actions taken to perform under the CAP, and argue these efforts are sufficient to satisfy the FSA performance standard. Notably, Defendants do not (and cannot) argue that they fully performed under any of the CAP commitments at issue in this arbitration or that they made all reasonable efforts in an attempt to do so. Accordingly, regardless of whether the Arbitrator applies the default contract standard of

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<sup>9</sup> *Id.* at 4 (“[CYFD staff] acknowledged the state hiring process, the schedule for New Employee Training and graduated caseloads, which is an essential retention strategy, meant meaningful caseload relief for incumbent CYFD caseworkers, supervisors, and managers was unlikely before 2024.”)

strict liability or the FSA performance standard to the CAP, Defendants breached the CAP in multiple areas.

Strict liability, rather than the FSA performance standard, should be applied to the CAP because the CAP and the FSA are separate contracts and the language in the CAP supports, rather than alters, the application of the default contract standard of strict liability. *See Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, ¶¶ 30–31, 118 N.M. 203. For example, the CAP provides that “the commitments outlined in the CAP are necessary and will be undertaken in the time set forth in the CAP[.]”<sup>10</sup> The CAP also employs outcome based, rather than effort based, requirements that Defendants must meet in order to comply with the Agreement.<sup>11</sup>

Should the Arbitrator determine strict liability applies to the CAP, any non-performance under the Agreement constitutes a breach. Restatement (Second) of Contracts § 235 (1981); *see also* Committee Commentary to NMUJI 13-822 (citing *Cochrell v. Hiatt*, 1981-NMCA-152, 97 N.M. 256) (“The breach may occur either through a total failure to perform or a negligent or incomplete performance.”).

As detailed in Plaintiff’s opening brief, the Co-Neutrals’ findings demonstrate that Defendants did not fully perform their CAP commitments in any of the four areas specified in Plaintiffs’ Notice of Arbitration: (1) CYFD Workforce Caseloads;<sup>12</sup> (2) Resource Family

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<sup>10</sup> *Kevin S., et al. v. Blalock, et al.*, No. 1:18-cv-00896, Corrective Action Plan, 2–3, 8, 21 (2023), Documents – KEVIN S. SETTLEMENT (kevinssettlement.com) [hereinafter CAP].

<sup>11</sup> *Id.* at 2 (“By December 31, 2023, no Investigation Case, Permanency Planning, In-Home Services, or Placement worker will have over 200% of the applicable caseload standards documented in the 2023 Data Validation Plan approved by the Co-Neutrals, including trainees with graduated caseloads”); *id.* at 23 (“The State will come into full compliance with Target Outcome 4 (100% of children in state custody receiving a Well-Child visit within 30 days) by January 1, 2024.”).

<sup>12</sup> *See* Plaintiffs’ Opening Brief at 12.

Recruitment;<sup>13</sup> (3) Well-Child Visits;<sup>14</sup> and (4) Data Submission.<sup>15</sup> For example, the Co-Neutrals' CAP Implementation Memorandum revealed that 19% of case-assignable workers exceeded the caseload threshold agreed to in the CAP and 13% of individuals assigned as primary workers on at least one case were supervisors.<sup>16</sup> The Co-Neutrals also concluded the State produced records to verify completion of a Well-Child visit for only 36 percent of the records requested.<sup>17</sup> Defendants agree with the majority of the Co-Neutrals' conclusions regarding the State's failure to fully perform in the four areas in dispute in this arbitration.<sup>18</sup>

Alternatively, if the Arbitrator determines that the FSA performance standard applies to the CAP, which Plaintiffs deny, the limited actions Defendants took within the CAP compliance period were not sufficient to constitute all reasonable efforts, and therefore cannot be considered "good faith" efforts as defined in the FSA, to achieve each CAP commitment. As discussed in Plaintiffs' motion discussing the performance standard applicable to the CAP, the FSA specifies that a finding that good faith efforts were made by Defendants must be based on "whether Defendants have made all reasonable efforts to achieve each contractual requirement."<sup>19</sup> "Defendants' subjective intentions, plans, or promises" have no bearing on whether this standard was satisfied.<sup>20</sup>

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<sup>13</sup> See Plaintiffs' Opening Brief at 17.

<sup>14</sup> See Plaintiffs' Opening Brief at 21.

<sup>15</sup> See Plaintiffs' Opening Brief at 24.

<sup>16</sup> *Kevin S., et al. v. Blalock, et al.*, No. 1:18-cv-00896, Co-Neutrals' Corrective Action Plan Implementation Memorandum, 7 (2024), <https://kevinssettlement.com/home-2/reporting-documents/> [hereinafter CAP Implementation Memorandum].

<sup>17</sup> *Id.* at 18.

<sup>18</sup> See Plaintiffs' Opening Brief at 17, 20–21, 23–24, 27; Letter from the State to Plaintiffs (Mar. 12, 2024) (available at Exhibit G to Plaintiffs' the Notice of Arbitration) [hereinafter State's March 12, 2024 Letter].

<sup>19</sup> FSA at 2–3.

<sup>20</sup> *Id.*

In their attempt to argue that the State satisfied the FSA performance standard, Defendants list efforts which stray from the subjects in dispute. For example, Defendants allege efforts they made to achieve CAP obligations not at issue in this arbitration,<sup>21</sup> efforts made after the CAP compliance period,<sup>22</sup> efforts they plan to make in the future,<sup>23</sup> and efforts they made to negotiate the CAP.<sup>24</sup> The Arbitrator should not consider any of these alleged efforts in determining whether the efforts Defendants took to satisfy the CAP commitments at issue in this arbitration (during the period specified by the CAP) constituted all reasonable efforts under the FSA performance standard.

When Defendants' Opening Brief is examined for all potentially relevant efforts Defendants claim to have made, the following are listed regarding CYFD's Workforce Caseload commitments: First, CYFD claimed that through its efforts to implement the Workforce Development Plan, it has made improvements in terms of tracking data, increasing recruitment, and reducing turnover. However, no details were provided about these claims.<sup>25</sup> Second, CYFD claimed to have negotiated a pause in union requirements for posting classified positions for a period of 14 days.<sup>26</sup> Lastly, CYFD allegedly provided staff with inequity pay and reclassified into appropriate pay bands.<sup>27</sup> Setting aside the fact that the hiring freeze made it harder, if not impossible, for CYFD to meet its Workforce Caseload commitments, the efforts Defendants

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<sup>21</sup> *See, e.g., id.* at 6–7 (listing efforts to engage with New Mexico Nations, Tribes, and Pueblos).

<sup>22</sup> *E.g.* State's March 12, 2024 Letter at 2 (The State claimed for the first time to have appointed placement workers to work on resource home recruitment and retention for the five high-needs counties designated in the CAP, after admitting that "[b]ecause of staffing vacancies, the assigned placement worker for the five counties did not take place during the designated time.").

<sup>23</sup> *E.g.* Defendants' Opening Brief at 10 (explaining that CYFD will continue to make various efforts).

<sup>24</sup> *E.g. id.* at 5–7.

<sup>25</sup> *Id.* at 9–10.

<sup>26</sup> *Id.* at 10.

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



point to be minimal and do not consist of all the reasonable efforts CYFD *could* have made to meet the outcomes required by the CAP, should Defendants be able to demonstrate that the efforts claimed were *actually* made. Examples of reasonable efforts that could have been made include,

[r]eexamine and streamline the hiring process to address vacancies in offices and within units. Develop a statewide hiring plan, including targets and dates, informed by county-specific needs and opportunities, and assign high-level staff to manage the plan on a routine basis, with a dashboard tracking progress reportable to you on a frequent cadence. Consider specific central office or regional staff assigned to recruit all kinds of needed CYFD field office staff, prioritizing those field offices with the highest turnover rate and/or vacancies. CYFD needs a high-level central office logistics person who is focusing solely on staffing issues and recruitment/retention issues. Publicly highlight (at least within CYFD) and give credit to field offices when vacancy or turnover rates decline.<sup>28</sup>

As for Resource Family Recruitment, Defendants claim to have undertaken the following efforts. First, CYFD allegedly designated a team to focus on five target counties. The State claims the teams met weekly and implemented recruitment efforts such as partnering with churches to host meetings, hosting meetings and presentations, distributing flyers, producing advertisements and information, and staffing informational booths.<sup>29</sup> However, in the State's March 12, 2024, letter, the State acknowledged that "[b]ecause of staffing vacancies, the assigned placement worker for the five counties did not take place during the designated time."<sup>30</sup>

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<sup>28</sup> See Letter from Co-Neutrals to Parties at 2–3 (Sep. 27, 2022) (<https://kevinssettlement.com/home-2/reporting-documents/>). These recommendations are only a small subset of the workforce related recommendations made by the Co-Neutrals. See also Co-Neutrals' September 18, 2023 Letter at 2 ("Last year we made numerous recommendations to the agencies (see attached) and we restate those here because they remain critical opportunities to establish stability in order to advance the Kevin S. commitments. We urge the State first and foremost to take every reasonable step as urgently as possible to ensure adequate staffing and repair conditions in the CYFD offices. In addition, we recommend CYFD quickly retain a group of temporary workers, perhaps experienced retirees as other states have done, to move permanency cases toward adoption finalization by completing backlogged disclosures, and hire staff specifically for the CYFD oncall system as other states have done.").

<sup>29</sup> Defendants' Opening Brief at 10–11.

<sup>30</sup> State's March 12, 2024 Letter at 2.

Second, CYFD executed a contract with Johnathan Salazar and allegedly used his findings to launch the Placement Pillar.<sup>31</sup> Not only was Mr. Salazar’s methodology ineffective, as shown by the net loss of resource homes between July 2023 and November 2023,<sup>32</sup> but the State reported to the Co-Neutrals that Mr. Salazar’s model would not launch in *any counties* until February 2024.<sup>33</sup> The State claims that additionally, under the Placement Pillar, it created additional teams, each with its own purpose. The actions allegedly taken by these teams were limited to the development of local recruitment and retention plans,<sup>34</sup> participation in meetings,<sup>35</sup> and identification of prospective resource homes and some efforts to assist the homes with licensure.<sup>36</sup> The State did not specify which of these efforts took place during the CAP compliance period. The Co-Neutrals have also concluded that during the CAP compliance period, “[i]mplementation of county-based recruitment plans [was] not well organized or proactive.”<sup>37</sup> CYFD also claims to have renewed a contract with the SAFE Consortium and hired temporary workers and contracted with an additional contractor to assist with the completion of home studies.<sup>38</sup> Again, Defendants declined to specify when these actions occurred or provide any details regarding their claimed staff and contractor recruitment.

Despite CYFD’s claims that it tried to keep its promises, in January 2024 the Co-Neutrals reported that the situation on the ground was not consistent with the claims above being implemented in a meaningful way. Instead, “[w]e were told that when resource family

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<sup>31</sup> Defendants’ Opening Brief at 11.

<sup>32</sup> CAP Implementation Memorandum at 7.

<sup>33</sup> *Id.* at 9.

<sup>34</sup> Defendants’ Opening Brief at 11.

<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.* at 12.

<sup>37</sup> Letter from Co-Neutrals to Parties at 5 (Jan. 26, 2024) (<https://kevinssettlement.com/home-2/reporting-documents/>).

<sup>38</sup> Defendants’ Opening Brief at 12.

recruitment is discussed, it is during ad-hoc meetings among existing investigative, PPW, and placement staff at the county offices as an additional piece of work. Staff pervasively reported that there is no funding available for resource family recruitment activities ... Given children's office stays, placement challenges, and other demands on too few workers, there continues to be a lack of focus on retention of resource parents."<sup>39</sup> Moreover, Defendants' Opening Brief fails to identify any efforts whatsoever made by HSD to increase the number of available Treatment Foster Care placements. As with Defendants' Workforce Caseload commitments, it is clear that not all reasonable efforts were made to satisfy Defendants' resource family recruitment and retention obligations. Examples of reasonable efforts that should have been taken, and were recommended by the Co-Neutrals, include:

adding a specific staff person in each CYFD county office who is charged with and has the dedicated time available to focus on recruiting non-kin resource families. Identify a leader in central office to help these assigned individuals know about best approaches to engaging community members to be willing to be and continue as resource families. Assign recruitment targets for each office and manage the gross and net gains monthly with a dashboard reportable to you on a routine monthly cadence.<sup>40</sup>

The efforts Defendants listed in their Opening Brief aimed at achieving their Well-Child Visit commitments are incredibly sparse. First, CYFD claims to have hired an EPSDT Coordinator to track the business processes around Well-Child visits.<sup>41</sup> Second, HSD allegedly meets weekly with the EPSDT Coordinator to work on scheduling and documentation issues.<sup>42</sup> Administrative support and minimal administrative coordination between Departments related to scheduling are paltry and ineffective efforts to deliver on an essential State obligation:

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<sup>39</sup> Letter from Co-Neutrals to Parties at 5 (Jan. 26, 2024).

<sup>40</sup> Letter from Co-Neutrals to Parties at 5–6 (Sep. 27, 2022).

<sup>41</sup> Defendants' Opening Brief at 13.

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

identifying the health and mental health needs of vulnerable children who are in the custody of the State due to allegations of abuse and neglect. Unsurprisingly, the Co-Neutrals reported that during their visits in September 2023 and January 2024, “CYFD staff identified barriers they experienced in scheduling and completing well-child visits.”

Again, Defendants failed to take multiple remaining reasonable efforts to increase timely well-child visits. The Co-Neutrals have shared information with Defendants regarding co-locating nurses or community health care workers in child welfare offices, a strategy states have used to timely link children to health providers for screening and treatment.<sup>43</sup> In addition, HSD could have designated staff to oversee managed care company (MCO) compliance with the obligation to provide Well-Child visits to children in foster care within 30 days.<sup>44</sup>

Finally, regarding the State’s data submission commitments, Defendants’ opening brief does not list a single specific effort it has made during the CAP compliance period to improve its ability to collect and report the data required by the CAP. Instead, Defendants vaguely claim that at some point, they expended time and resources to modify their electronic systems.<sup>45</sup> The facts on the ground do not support the claim that meaningful efforts to comply with the CAP were made.<sup>46</sup> The number and capacity of CYFD personnel utilized to collect and report the data

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<sup>43</sup> Information about co-location of children’s health care units within child welfare has demonstrated success in linking children to health care in other states including New Jersey. *See, e.g.,* Center for Health Care Strategies, Inc., *Making Medicaid Work for Children in Child Welfare*, 49 (June 2013) [https://www.chcs.org/media/Making\\_Medicaid\\_Work.pdf](https://www.chcs.org/media/Making_Medicaid_Work.pdf); PowerPoint, Chris Chytraus, *The Health of Children in Utah’s Child Welfare System*, 9, 10, 13, [https://www.utcourts.gov/content/dam/courts/juv/cip/docs/Health\\_of\\_Children-CW.ppt](https://www.utcourts.gov/content/dam/courts/juv/cip/docs/Health_of_Children-CW.ppt).

<sup>44</sup> The CAP states that HSD and CYFD will enter a Memorandum of Understanding (MOU) with the Department of Health to allow HSD, CYFD and the MCOs to facilitate Well-Child visits through Public Health Offices. Once the CAP implementation period ended, the Co-Neutrals found the State was reportedly “working on” an MOU. *See* CAP Implementation Memorandum at 16.

<sup>45</sup> Defendants’ Opening Brief at 14.

<sup>46</sup> For years, both HSD and CYFD have been working on updating their data systems to come into compliance with federal requirements, including requirements for quality assurance, monitoring, reporting and cross system coordination for years, HSD since at least 2013 and CYFD since at least 2018. *See* LFC Hearing Brief, *Medicaid Management Information System Replacement (MMISR) Project Update* (August 26, 2021)

required under the CAP and FSA has not meaningfully changed since the FSA was executed, despite constant notification from the Co-Neutrals that the State's data is lacking in quality, quantity, or both. In addition, HSD did not produce the limited Well-Child visit and Treatment Foster Care data required by the CAP and requested by the Co-Neutrals on multiple occasions.<sup>47</sup>

Defendants' explanation that the State's electronic systems were not designed to provide aggregate data also does not justify Defendants' failure to meet the CAP's data requirements.<sup>48</sup> Any time and resources allegedly spent modifying these systems have not resulted in compliance, as evidenced by the Co-Neutrals' findings of incomplete and late data submissions.<sup>49</sup> Aside from Defendants' preexisting legal obligations to collect data, the Parties executed the FSA in March 2020. The State has had over four years to improve or create new data collection systems. The State has not made any significant improvement in data reporting, which undermines its argument that it is taking all reasonable efforts to collect and share the data required by the CAP.

Whether evaluated under a strict liability standard or the FSA performance standard, Defendants failed to meet their obligations under the CAP. Defendants do not dispute that they have not met the outcomes specified in the CAP areas at issue or that they provided the Co-

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<https://www.nmlegis.gov/handouts/ALFC%20082421%20Item%209%20Medicaid%20Management%20Information%20System%20Replacement%20Update%20MMISR.PDF>; Presentation, New Mexico Legislative Finance Committee, *New Mexico's Child Welfare System*, 19 (June 24, 2024), <https://www.nmlegis.gov/Handouts/ALFC%20061124%20Item%206%20LegisStat%20-%20New%20Mexico%20Child%20Welfare%20System.pdf>.

<sup>47</sup> See Health Care Authority, *Human Services Department Budget Invests in Transforming the Lives of New Mexicans* (last visited July 28, 2024), <https://www.hca.nm.gov/2022/12/14/human-services-department-budget-invests-in-transforming-the-lives-of-new-mexicans/>; Letter from State of New Mexico Health Care Authority, *supra* note 5, at 18.

<sup>48</sup> Ed Williams, *CYFD Deputy Secretary Steps Down*, Searchlight New Mexico (Nov. 23, 2021), <https://searchlightnm.org/deputy-secretary-resigns-from-cyfd-in-new-mexico/> (describing circumstances related to CYFD canceling the "massive \$45 million overhaul to update the state's Comprehensive Child Welfare Information System.").

<sup>49</sup> CAP Implementation Memorandum at 19.

Neutrals with all the data required. Additionally, Defendants do not argue that their minimal efforts to satisfy the CAP requirements constitute all reasonable efforts as required by the FSA performance standard. Rather, Defendants argue that the efforts they made were sufficient to qualify as good faith efforts under the FSA performance standard, while ignoring the FSA's requirement that a finding of good faith efforts "shall be based on whether Defendants have made all reasonable efforts" to achieve each commitment.<sup>50</sup>

**B. Defendants' Claims that it is Impractical or Impossible to Satisfy Their Obligations Under the CAP are not Sufficient to Excuse Their Performance**

Defendants claim in their opening brief that the State's obligations under the CAP regarding CYFD Workforce Caseloads and Well-Child Visits are impracticable or impossible to satisfy.<sup>51</sup> In particular, Defendants contend it is impracticable for CYFD to hire and retain staff, as its ability to do so has been damaged by "inflammatory publicized statements" about the Agency and because of high rates of turnover of agency staff.<sup>52</sup> They also claim that obtaining timely Well-Child visits for all children in State custody is impossible and is hindered by a statewide shortage of medical providers.<sup>53</sup>

Under New Mexico contract law, the terms impossibility and impracticality are used interchangeably to refer to one legal doctrine (hereinafter referred to as impossibility). *See Summit Properties, Inc. v. Pub. Serv. Co. of New Mexico*, 2005-NMCA-090, ¶ 32, 138 N.M. 208, 219, 118 P.3d 716, 727. The instances in which a party will not be required to render performance under a contract due to impossibility are limited to specific factual circumstances. Specifically, a party asserting an impossibility defense based on a fact that was present at the

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<sup>50</sup> FSA at 2–3.

<sup>51</sup> Defendants' Opening Brief at 3, 9, 13.

<sup>52</sup> Defendants' Opening Brief at 3, 9.

<sup>53</sup> Defendants' Opening Brief at 13.

time a contract was executed must make a showing that when the contract was executed, the “party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made[.]” Restatement (Second) of Contracts § 266 (1981); *see also* N.M.R.A. CIV. U.J.I. § 13-840, Committee Commentary (“A good discussion of the principles underlying the doctrine of impossibility or impracticability of performance can be found in chapter 11 of the Restatement (Second) of Contracts.”); Restatement (Second) of Contracts 11 Intro. Note (1981) (“Determining whether the non-occurrence of a particular event was or was not a basic assumption involves a judgment as to which party assumed the risk of its occurrence.”); *Silver Mountain Res., LLC v. Silver Holdings, LLC*, No. 13-CV-0469 SMV/GBW, 2014 WL 11460545, at \*5 (D.N.M. Mar. 7, 2014) (citing *Wood v. Bartolino*, 1944-NMSC-018, ¶10, 146 P.2d 883, 886) (The doctrine is not applicable to situations where “a party impliedly assumes a greater obligation to perform despite any impracticability.”). Additionally, a party asserting an impossibility defense must show that it “took virtually every action within its powers to perform its duties under the contract[.]” *Summit Properties, Inc.*, at ¶ 32 (citing *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294–95 (Fed. Cir. 2002)).

Defendants are unable to make the showings necessary for the doctrine of impossibility to excuse or justify defaulting on their CAP obligations regarding CYFD Workforce Caseload commitments. Neither the CAP nor the FSA were based on an assumption that CYFD had a good reputation in the eyes of New Mexicans, or that public, negative statements would not be made about CYFD.<sup>54</sup> CYFD’s poor public perception, caused in part by the deaths of numerous

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<sup>54</sup> The Governor herself has publicly referred to the systems serving New Mexico children as “broken.” *See infra*, note 56.

children in its custody, predates the creation of both the CAP and the FSA.<sup>55</sup> As evinced by the statements of high ranking State officials, CYFD leadership was aware of the issues with its reputation at the time the CAP and FSA were executed.<sup>56</sup> As such, when Defendants agreed to

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<sup>55</sup> See, e.g., Brittany Costello, *CYFD's 'Perception Problem'*, KOB4 (May 16, 2024), <https://www.kob.com/new-mexico/4-investigates-cyfds-perception-problem/>; Kim Vallez, *CYFD's Broken System Part 1: The Death of 4-yr-old James Dunklee*, KRQE (Mar. 16, 2020, 4:55 PM MDT), <https://www.krqe.com/news/crime/cyfds-broken-system-part-1-the-death-of-4-yr-old-james-dunklee/>; Kim Vallez, *CYFD's Broken System Part 2: The Issues CYFD Is Facing*, KRQE (Mar. 17, 2020, 5:02 PM MDT), <https://www.krqe.com/news/crime/cyfds-broken-system-part-2-the-issues-cyfd-is-facing/>; Chris McKee, *CYFD Pays Nearly Quarter-Million Dollars in Late Funding to Foster Families, Providers*, KRQE (May 4, 2023, 5:39 PM MDT), <https://www.krqe.com/news/new-mexico/cyfd-pays-nearly-quarter-million-dollars-in-late-funding-to-foster-families-providers/>; Courtney Allen, *Former CYFD Employees Files Whistleblower Lawsuit, Detail 'Toxic' Work Environment*, KRQE (Jun. 24, 2021, 10:01 PM MDT), <https://www.krqe.com/news/new-mexico/former-cyfd-employees-file-whistleblower-lawsuit-detail-toxic-work-environment/>; Jonathan Fjeld, Griffin Rushton, *New Mexico CYFD Secretary to Resign May 1*, KOB4 (Apr. 13, 2023, 9:16 PM), <https://www.kob.com/news/top-news/new-mexico-cyfd-secretary-to-resign-may-1/>; Ann Pierret, *Lawsuit: CYFD Failure Led To Toddler Suffering Months of Abuse*, KRQE (Feb. 22, 2023, 10:00 PM MST), <https://www.krqe.com/news/investigations/lawsuit-cyfd-failure-led-to-toddler-suffering-months-of-abuse/>; Alexa Skonieski, *Foster Child Allegedly Molested at Albuquerque Children, Youth, Families Department Office Building*, KRQE (Feb. 1, 2023, 10:00 PM MST), <https://www.krqe.com/news/new-mexico/foster-child-allegedly-molested-at-albuquerque-children-youth-families-department-office-building/>; John Cardinale, *Judge Stan Whitaker Calls Upon CYFD to Make Changes*, KOAT7 (Dec. 16, 2022, 6:11 PM MST), <https://www.koat.com/article/judge-stan-whitaker-calls-upon-cyfd-make-changes/42270928>; John Cardinale, *New Mexico Attorney General Raul Torrez Talks About Issues He Wants to Tackle*, KOAT7 (Jan. 5, 2023, 10:14 PM MST), <https://www.koat.com/article/new-mexico-attorney-general-raul-torrez-talks-issues-he-wants-tackle/42412904>; Colleen Heild, *CYFD Pays \$280K More in Tragic Child Abuse Case*, Albuquerque Journal (Oct. 22, 2022), [https://www.abqjournal.com/news/local/cyfd-pays-280k-more-in-tragic-child-abuse-case/article\\_88cccefa-8711-5cbe-839b-058899df5288.html](https://www.abqjournal.com/news/local/cyfd-pays-280k-more-in-tragic-child-abuse-case/article_88cccefa-8711-5cbe-839b-058899df5288.html); Ed Williams, *These Foster Kids Need Mental Health Care. New Mexico Is Putting Them in Homeless Shelters.*, Searchlight New Mexico (Oct. 7, 2022), <https://searchlightnm.org/new-mexico-foster-care-rtc-teens/>; Colleen Heild, *New Mexico's Repeat Child Abuse Rate 'Among Worst' in US, Report Says*, Albuquerque Journal (Sep. 26, 2022), [https://www.abqjournal.com/news/local/new-mexicos-repeat-child-abuse-rate-among-worst-in-us-report-says/article\\_49dda7aa-5a85-5ec5-b65e-b023352c9f94.html](https://www.abqjournal.com/news/local/new-mexicos-repeat-child-abuse-rate-among-worst-in-us-report-says/article_49dda7aa-5a85-5ec5-b65e-b023352c9f94.html); Transforming Culture Together, Collaborative Safety Review New Mexico Children Youth & Families Department, (2022), [https://www.codastory.com/wp-content/uploads/2023/07/New\\_Mexico\\_CYFD\\_CS\\_Review\\_07-21-22.pdf](https://www.codastory.com/wp-content/uploads/2023/07/New_Mexico_CYFD_CS_Review_07-21-22.pdf); Lauren Villagran, *Governor-Driven Understaffing Keeps N.M.'s Kids at Risk*, Searchlight New Mexico (October 31, 2018), <https://searchlightnm.org/governor-driven-understaffing-keeps-n-m-s-kids-at-risk/>.

<sup>56</sup> See, e.g., Robery Nott, *Governor Announces Plan to Overhaul 'Dysfunctional' Child Welfare Agency*, The Santa Fe New Mexican (Feb. 17, 2023), <https://nmpoliticalreport.com/nmleg/governor-announces-plan-to-overhaul-dysfunctional-child-welfare-agency/> (“We are embracing as professionals that this department is dysfunctional,” Lujan Grisham said at a news conference at the state Capitol.”; “The agency, primarily tasked with keeping vulnerable young residents safe, has faced fierce criticism for years — often in relation to high-profile child deaths — along with persistent struggles to recruit and retain critical staff and meet key goals.”); Daniel J. Chacón, *Senate Confirms Casados to Lead Troubled Child Welfare Agency*, The Santa Fe New Mexican (Feb. 1, 2024), <https://nmpoliticalreport.com/nmleg/senate-confirms-casados-to-lead-troubled-child-welfare-agency/> (“Baca asked Casados twice whether the agency is in crisis. ‘There is a crisis in the work we do, but operating in crisis mode will not get us the results that we need,’ she told him. When pressed to answer the question, Casados replied: ‘Yes, there is a crisis across the state.’ . . . During the confirmation hearing, Casados referenced the ‘negative’ press CYFD receives, a complaint she has lodged in the past.”). Importantly, public awareness of problems with CYFD staffing predate the Kevin S. lawsuit. See, e.g., Villagran, *supra* note 55 (“With a vacancy rate of 15.7 percent, the Children, Youth and Families Department (CYFD) can’t keep childcare assistance offices open, much less staff its critical



the CAP Workforce Caseload requirements, they assumed the risk that negative statements about CYFD, and the Agency's reputation would make it difficult for it to recruit and retain the staff needed to satisfy its contractual obligations.

Similarly, when executing the CAP, Defendants assumed the risk that high CYFD turnover rates would make it difficult to satisfy its caseload obligations. As noted by Defendants in their opening brief, the high rate of child-welfare staff turnover has been a longstanding problem.<sup>57</sup> CYFD leadership had good reason to be aware, and was aware, of the Agency's staff retention problems long before the execution of the CAP and the FSA.<sup>58</sup> Lack of CYFD worker turnover was also certainly not a basic assumption the CAP was based on, given the CAP specifies that the "Parties agree that there is an urgent need to recruit and *retain* case workers[.]"<sup>59</sup>

Additionally, as addressed previously, when the Arbitrator analyzes the actions Defendants took to satisfy CYFD's Workforce Caseload commitments, it will be clear that in no way did the Agency take virtually every action within its powers, nor make all reasonable efforts, to recruit and retain caseworkers. For example, CYFD's multi-month hiring freeze actively undermined its ability to recruit new caseworkers during the CAP compliance period. Finally, CYFD cannot credibly claim, let alone demonstrate, that the events and actions which led to negative public statements about the Agency and its poor reputation were not its fault.

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Child Protective Services bureau. The fallout is evident in the state's double-digit rates of repeat maltreatment in abuse cases.").

<sup>57</sup> Defendants' Opening Brief at 9 ("In 1960, over six decades ago, the Children's Bureau published a study which stated: Turnover of staff in social agencies has been a serious concern of agency administrators for at least the past 10 years.").

<sup>58</sup> Transforming Culture Together, *supra* note 55, at 1, 13 ("In December of 2021, Collaborative Safety (CS) was engaged by New Mexico Children Youth and Families Department (CYFD) to partner in conducting an independent systemic analysis of five child fatalities that occurred in the year 2021."; "Turnover was a consistent theme discussed across the cases mapped as a part of this review.").

<sup>59</sup> CAP at 2 (emphasis added).

The State is similarly unable to evade responsibility for its Well-Child Visit CAP commitments under the doctrine of impossibility. New Mexico faced a shortage of healthcare providers prior to the execution of the CAP and the FSA,<sup>60</sup> and leadership of both CYFD and HSD knew this was the case at the time the CAP and the FSA were executed. As with all of Defendants' impossibility claims, the Secretaries of both Agencies were and are responsible for understanding the issues inhibiting the State from satisfying the legal duties it owes to children in its custody and would be admitting to a dereliction of those responsibilities should they attempt to claim they were not aware of such issues. In fact, one of the purposes of the FSA that Defendants agreed to is for the Agencies to develop a network of the behavioral health providers sufficient to meet the needs of children in State custody.<sup>61</sup> Consequently, the lack of healthcare providers in the State was a fact Defendants explicitly took into account and assumed the risk for when they negotiated and agreed to the CAP, rather than basing their agreement to the CAP on the assumption that New Mexico would have a robust system of healthcare providers available

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<sup>60</sup> See, e.g., Angel Salcedo, *New Mexico Legislature Looking to Relieve Pressure on Health Care Industry*, KOAT7 (Feb. 23, 2022, 10:55 AM MST), <https://www.koat.com/article/new-mexico-relieving-pressure-on-healthcare-system/39180394#:~:text=Our%20state%20faces%20a%20massive%20health%20care%20worker,to%20invest%20in%20our%20state%27s%20nursing%20education%20programs>; Vanessa G. Sánchez, *Where Have All the Doctors (and Nurses) Gone?*, Searchlight New Mexico (Feb. 8, 2023), <https://searchlightnm.org/where-have-all-the-doctors-and-nurses-gone/>; UNM Sandoval Regional Medical Center, *2022 Community Health Needs Assessment* (2022), [https://unmhealth.org/about/\\_files/srmc-chna-2022.pdf](https://unmhealth.org/about/_files/srmc-chna-2022.pdf); Ryan Boetel, *University of New Mexico Dean Proposes Free Medical School to Address Doctor Shortage*, The Albuquerque Journal (Oct. 22, 2019), <https://www.lcsun-news.com/story/news/education/2019/10/22/university-new-mexico-dean-proposes-free-medical-school-doctor-shortage/4064395002/>.

<sup>61</sup> See, e.g., Daniel J. Chacón, *Governor-Backed Fund Would Address Shortage of Health Care Providers in Rural Areas*, The Santa Fe New Mexican (Jan. 26, 2023), <https://nmpoliticalreport.com/news/governor-backed-fund-would-address-shortage-of-health-care-providers-in-rural-areas/> (“Armijo said the state is experiencing ‘critical shortages’ of all types of health care in rural areas.”); FSA at 4 (“Ensure sufficient human resources to meet the needs of Children in State Custody including ... behavioral health providers”); *Id.* at 12a (“HSD and CYFD will create a Behavioral Health Care Workforce Development Review with the objective of supporting and expanding provider capacity to provide community-based mental and behavioral health services”); *Id.* at 14a (“By December 1, 2021, HSD will require that MCOs have a provider network sufficient to meet the needs identified in the Behavioral Health Care Workforce Development Review and hiring plans.”); Transcript of Oral Argument, *M.G. v. Scrase*, No 23-2093, March 19, 2024, 5–6 (HSD acknowledged to the Tenth Circuit that “there is a long-standing nursing shortage in New Mexico and throughout the nation that was exacerbated by the COVID pandemic.”).

for the Agencies to utilize. Nor can Defendants claim the lack of healthcare providers is not due, at least in part, to their own actions — including their failure to spend the money allocated by the legislature to develop New Mexico’s healthcare provider network.<sup>62</sup>

Defendants’ claim that compliance with the CAP’s Well-Child commitments is impossible, thereby excusing their lack of performance under the CAP, also fails. At the time the CAP was executed, Defendants had been aware of their FSA obligation to ensure that all children in State custody received a timely Well-Child visit for at least three years. The State was also aware the compliance with this target would be very difficult, given its low Well-Child visit performance numbers preceding 2023.<sup>63</sup> By agreeing in the CAP to come into compliance with Appendix D, Target Outcome 4 of the FSA “(100% of children in state custody receiving a Well-Child visit within 30 days) by January 1, 2024” as a remedial measure, the State assumed the risk for any ongoing difficulty it would experience in complying with the standard. It may not now argue, after agreeing to provide all children in custody with timely Well-Child visits for a second time, that it has been impossible to achieve all along. And, as is the case with the State’s other impossibility arguments, the State is simply unable to prove that it took virtually every action within its powers to satisfy its CAP Well-Child visit obligations. An obvious example of its

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<sup>62</sup> See, e.g., LegisSTAT, Topic Area: Repeat Child Maltreatment, New Mexico Legislative Finance Committee (Dec. 14, 2023), <https://www.nmlegis.gov/Entity/LFC/Documents/LegisStat%20Children%20Youth%20and%20Families%20Department%20%20Decemer%202023.pdf> (noting that “in FY23 the Legislature appropriated \$20 million to develop more behavioral health provider capacity for children” and that “[m]ultiple LFC reports have noted the \$20 million appropriation for behavioral health provider capacity remains unspent.”).

<sup>63</sup> The State found that in 2020, “47.37% of all episodes of custody longer than 30 days that began during the reporting year included a well-child checkup within 30 days of the child entering State custody (369/779).” CYFD, Kevin S. 2019–2020 Report: Quantitative Monitoring Outcomes, 19–20, <https://www.cyfd.nm.gov/kevin-s-settlement/>. For 2021, the Co-Neutrals found that “[t]he data show that of the 43 episodes of custody that reached their 30th day in December 2021 (the period of review for this metric since the commitment began on December 1, 2021), 20 (47%) included a well-child check-up within the period.” Judith Meltzer, Kevin Ryan, and Pamela Hyde, Co-Neutrals’ 2021 Annual Report, 103 (2022), <https://kevinssettlement.com/home-2/reporting-documents/>. The Co-Neutrals also concluded that “fewer than half (44%) [of the required children] received a timely well-child medical checkup” in 2022. Co-Neutrals’ 2022 Annual Report at 11.

noncompliance in making all efforts was its utter failure to collect and report to the Co-Neutrals the well-child visit data required under the CAP.<sup>64</sup>

The Arbitrator should assess Defendants’ impossibility defenses in this matter as the special master appointed in *M.G. v. Armijo* did regarding HSD’s assertion that it was impossible for the Managed Care Organizations (MCOs) it had contracted with to provide the services necessary to satisfy HSD’s obligation to provide authorized private duty nursing hours to medically fragile children due to a lack of nurses in New Mexico:

First, the difficulty in finding nurses willing to provide PDN hours does not qualify as “the occurrence of an event, the non-occurrence of which was a basic assumption upon which the contract was made.” The difficulty in finding qualified health care providers is nothing new, even though the difficulty may have been exacerbated since COVID. During the recent hearing in front of the Tenth Circuit, HSD expressly acknowledged that “there is a long-standing nursing shortage in New Mexico and throughout the nation that was exacerbated by the COVID pandemic.” Transcript of Oral Argument, *M.G. v. Scrase*, No 23-2093, March 19, 2024, pages 5–6

...

The MCOs knew that there was a nursing shortage, and entered into contracts with HSD accepting the entrepreneurial risk associated with providing adequate services

...

Second, HSD has – at best – shown that the various health agencies have difficulty in finding PDN nursing hours at the reimbursement rates that they are offering. HSD has not offered meaningful evidence that significantly more PDN hours could not be obtained, only that more PDN hours cannot be obtained at the reimbursement rates that the health agencies are offering.

Assessment of the Special Master at 5–7, *M.G. et. al. v. Kari Armijo, et. al.*, No. 1:22-cv-0325 MIS/DLM (D.N.M. May 29, 2024) (citations included).

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<sup>64</sup> See CAP Implementation Memorandum at 18.

### **C. Defendants' Failure to Comply with the CAP is Not Excused by the October 2023 Arbitration**

Defendants attempt to distract from their failures by asserting the defense that their nonperformance of the CAP is excused by Plaintiffs' initiation of arbitration in October 2023.<sup>65</sup> However, the previous arbitration was properly initiated in good faith in accordance with New Mexico law regarding anticipatory repudiation, given that Defendants took action that rendered them unable to satisfy their CAP commitments, and that Defendants refused to provide assurances that they would comply with the CAP. Indeed, Plaintiffs specified in their October 20, 2023 Notice of Arbitration that they had chosen to initiate arbitration in response to the CYFD hiring freeze — which rendered it unwilling and unable to perform — and Defendants' explicit refusal to provide assurances.<sup>66</sup> Only after Defendants' fervent assertions during to the last arbitration that they should be given the full time period specified in the CAP to comply (implying that they would perform within the contract period) did Plaintiffs decide to dismiss. Plaintiffs would not have dismissed absent Defendants' argument that the past arbitration was premature. For these reasons, the previous arbitration was distinctly different from typical breach of contract claims, like those brought in the current arbitration. Under New Mexico law, the doctrine of anticipatory repudiation, also known as anticipatory breach, is “an exception to the general rule that only a party's failure to perform as promised constitutes a breach.” *Salehpoor v. New Mexico Inst. of Mining & Tech.*, 2019-NMCA-046, ¶ 14, 447 P.3d 1169. This exception

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<sup>65</sup> As counsel for Defendants stated during the June 25, 2024 motions hearing, Defendants assert that Plaintiffs breached the CAP and the FSA as an affirmative defense rather than as a claim for relief. Additionally, the Arbitrator should not consider these arguments by Defendants as a claim for relief because Defendants did not follow the dispute resolution procedure in the FSA by filing a notice of arbitration.

<sup>66</sup> October 20, 2023 Notice of Arbitration, attached hereto as Exhibit A.

allows a party “to treat the contract as breached upon learning of the other party’s repudiation of its contractual obligations.” *Id.*

A party may repudiate a contract in two ways. First, a party may affirmatively repudiate the contract by either making a statement indicating the party will breach the contract or by taking a “voluntary affirmative act” that would render that party “unable or apparently unable to perform” their commitments. *Hoggard v. City of Carlsbad*, 1996-NMCA-003, ¶ 6, 909 P.2d 726; *see also* Restatement (Second) of Contracts § 250 (1979). New Mexico follows both the Second Restatement of Contracts and Corbin on Contracts. *See PA Aviace Ltd.v. Eclipse Aviation Corp.*, No. CIV 06-929 MCA/RHS, 2006 WL 8443318, at \* 17 (D.N.M. Nov. 9, 2006) (“New Mexico courts appear to follow the Restatement (Second) of Contracts and Arthur Corbin’s treatise entitled Corbin on Contracts (1951), with respect to the theory of anticipatory breach of contract asserted here.”); *see also* N.M.R.A. CIV. U.J.I. § 13-824, Committee Commentary (citing Restatement (Second) of Contracts § 250 (1981)). An affirmative act sufficient to constitute repudiation need not make performance absolutely impossible. *See* 10 CORBIN ON CONTRACTS § 54.1 (2023) (an act that makes performance “more difficult” may “amount to a positive manifestation of intention not to perform the first contract.”).

Second, when a party has reasonable grounds to believe that the other party will commit a breach, it may demand assurance of performance from that party. Restatement (Second) of Contracts § 251 (1981). If the party from which assurance was demanded fails to “provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case[.]” the party demanding assurance may treat the failure as repudiation of the contract. *Id.*<sup>67</sup>

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<sup>67</sup> Unlike what Defendants have argued previously, in a situation where one party repudiates, the other party is not limited to only suspending their performance under the contract. Instead, the party also has the option of suing for

Defendants repudiated the CAP both when they took affirmative action that made it very difficult, if not impossible, for the State to comply with its CYFD Workforce Caseload commitments, and when after taking such action, they refused to provide assurance to Plaintiffs. CYFD unilaterally imposed a hiring freeze on frontline staff and supervisors in May 2023, while the CAP was being negotiated.<sup>68</sup> The hiring freeze lasted for months.<sup>69</sup> On September 18, 2023, the Co-Neutrals sent a letter directly addressing the impact the decision to implement a hiring freeze had on the State's ability to comply with the CAP.<sup>70</sup> Specifically, the Co-Neutrals wrote:

To our dismay, across the board, CYFD staff at all levels during our meetings last week described conditions in the CYFD offices as significantly worse than last year, in part due to the decision to pause most routine hiring at CYFD for months ...

CYFD supervisors and managers reported that CYFD essentially stopped hiring supervisors and senior staff in May 2023, and did not include these positions in the agency's August 2023 rapid-hire event, despite pervasive supervisor and senior staff vacancies. They reported the vacancies have deprived many caseworkers of adequate supervision and support and some workers currently have no direct supervisors...

CYFD staff and managers at all levels consistently said that once the agency begins to hire staff and supervisors routinely again, it will take a while to recover from the hiring pause. They acknowledged the state hiring process, the schedule for New Employee Training and graduated caseloads, which is an essential retention strategy, meant meaningful caseload relief for incumbent CYFD caseworkers, supervisors and managers was unlikely before 2024.<sup>71</sup>

On September 22, 2023, Plaintiffs sought clear assurances that the State would meet its obligations under the CAP, including a specific assurance that CYFD would "cease all hiring freezes, pauses or other delay tactics that impede CYFD from meeting the Department's

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breach. *See Gilmore v. Duderstadt*, 1998-NMCA-086, ¶ 19, 125 N.M. 330, 336 (noting that a "repudiating party can be charged with breach").

<sup>68</sup> *See* Co-Neutrals' September 18, 2023 Letter at 2 ("CYFD staff and managers at all levels reported that CYFD paused routine hiring of frontline staff and supervisors across the state in May 2023").

<sup>69</sup> *Id.* at 1 (CYFD leadership made the "decision to pause most routine hiring at CYFD for months").

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1, 2, 4.

obligations[.]”<sup>72</sup> On October 6, 2023, the State replied to Plaintiffs, stating that “[t]here is no requirement for additional written assurances to be provided beyond what are already described in the 2023 CAP.”<sup>73</sup>

Defendants’ ancillary defense that Plaintiffs’ initiation of the previous arbitration violated the covenant of good faith and fair dealing implicit in the CAP also fails. Defendants are unable to demonstrate, as it is their burden to do so when asserting a defense, that the arbitration harmed their rights under their CAP or their ability to benefit under the CAP. *Tafoya v. Seay Bros. Corp.*, 1995-NMSC-003, ¶ 8, 119 N.M. 350, 352, 890 P.2d 803, 805 (“The party alleging an affirmative defense has the burden of persuasion.”). Plaintiffs had already afforded Defendants the benefit of entering a CAP and deferring arbitration for Defendants multiple and repeated failures to perform under the FSA long before the arbitration was initiated.

Further, even if it were possible for Plaintiffs to violate the covenant by taking action that made it more difficult for Defendants to perform under the CAP, which Plaintiffs deny,<sup>74</sup> Defendants will be unable to demonstrate that the work done in preparation for the arbitration, prevented either Agency from complying with the CAP. Notably, if Defendants’ argument held any weight, they would have been in full compliance with the CAP two months after its expiration, yet they remain non-compliant to this day.

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<sup>72</sup> See Notice of Arbitration, Ex. A, at pp. 9–12 (Sep. 22, 2023 Letter from Plaintiffs to Defendants, at 10).

<sup>73</sup> See Notice of Arbitration, Ex. A, at pp. 14–15 (Oct. 6, 2023 Letter from Defendants to Plaintiffs).

<sup>74</sup> This is because under the standard applicable to the covenant of good faith and fair dealing, a party breaches the covenant if it does something “that will injure the rights of the other to receive the benefit of their agreement[.]” or from “undercut[ting] another party’s rights or benefits under the contract.” *Bourgeois v. Horizon Healthcare Corp.*, 1994-NMSC-038, ¶ 16, 872 P.2d 852, 856 (citing *Watson Truck & Supply Co. v. Males*, 1990-NMSC-105, ¶ 12, 801 P.2d 639, 642); see also *Kropinak v. ARA Health Servs., Inc.*, 2001-NMCA-081, ¶ 5, 33 P.3d 679, 681 (citing *Watson* at ¶ 12, 642).



### III. CONCLUSION

Regardless of the standard applied, Defendants have undisputedly failed to comply with the terms they agreed to in the CAP. Plaintiffs ask the Arbitrator to order equitable relief including specific performance, other equitable relief, and reasonable attorneys' fees and costs.

Dated: July 29, 2024

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date set for below, I caused to be served by First Class United States Mail and electronic mail, one true copy of the foregoing:

**PLAINTIFFS' RESPONSE BRIEF**

on the following individuals, addressed as follows:

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Executed this 29th day of July 2024 at Albuquerque, New Mexico.

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BERNARD S. RODEY (1856-1927)  
PEARCE C. RODEY (1889-1958)  
DON L. DICKASON (1906-1999)  
WILLIAM A. SLOAN (1910-1993)  
JACKSON G. AKIN (1919-2010)  
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ASCHULTZ@RODEY.COM

October 20, 2023

*Sent via U.S. Mail and Electronic Mail*

Teresa Casados, Interim Cabinet Secretary  
Children, Youth and Families Department  
State of New Mexico  
P.O. Drawer 5160  
Santa Fe, NM 87502-5160

Kari Armijo, Acting Cabinet Secretary  
Health and Human Service Department  
Office of the Governor  
490 Old Santa Fe Trail, Room 400  
Santa Fe, NM 87501

**Re: *Kevin S., et al. v Blalock, et al.*  
Case No. 1:18-cv-00896**

**NOTICE OF ARBITRATION**

Dear Interim Secretary Casados and Acting Secretary Armijo:

Pursuant to Section IX of the Parties' March 2020 Final Settlement Agreement ("FSA") in the matter of *Kevin S. v Blalock, et al.*,<sup>i</sup> Plaintiffs notify you of their intention to proceed to arbitration on the terms of the Parties' June 2023 Corrective Action Plan ("2023 CAP").<sup>ii</sup> As detailed in Plaintiffs' September 22, 2023 correspondence to CYFD and HSD, more than three years into the FSA, and after the Parties' repeated mediation regarding the State's failure to meet Target Outcomes and Implementation Targets, the New Mexico child welfare system is in a state of disarray, and children in state custody are in significant danger.

Under the FSA, the Parties must engage in alternative dispute resolution (Step 1) prior to initiating binding arbitration (Step 2). Plaintiffs have fulfilled these steps. In December 2021, Plaintiffs initiated Step 1 based on CYFD and HSD's failure to comply with the FSA. Mediation resulted in the Parties' June 2022 Memorandum of Understanding ("2022 MOU"), which set forth commitments the State agreed to undertake to come into compliance and ensure the safety of children in its custody.<sup>iii</sup> In

Notice of Arbitration

October 20, 2023

Page 2

January 2023, based on CYFD and HSD's continued noncompliance, Plaintiffs again initiated Step 1. Mediation resulted in the Parties' June 2023 Corrective Action Plan ("2023 CAP"), which again set forth specific commitments the State agreed to undertake, including commitments regarding workforce development, reduction of caseloads, recruitment of resource families, and the safe, appropriate placement of children in family settings.

On September 18, 2023, the Co-Neutrals sent a letter to Plaintiffs documenting increasingly dire circumstances for children in state custody. That letter is attached as **Exhibit A**. "Last year we described to the Parties a system that was in crisis. This year, based on reports from scores of CYFD employees at all levels and key stakeholders with whom we met, we believe the system is in a *state of chaos*." The Co-Neutrals' letter cast serious doubt on the State's willingness and ability to timely and fully achieve commitments in the 2023 CAP by its expiration in January 2024. Indeed, the letter documented State action that has directly interfered with its ability to meet its obligations, including CYFD's choice to pause routine hiring for frontline staff and supervisors across the state for months in 2023.

On September 22, 2023, Plaintiffs notified CYFD and HSD of their intent to initiate arbitration absent the State's written assurances regarding nine deliverables. That letter is attached as **Exhibit B**. On October 6, 2023, the State replied to Plaintiffs, stating that "[t]here is no requirement for additional written assurances to be provided beyond what are already described in the 2023 CAP." That letter is attached as **Exhibit C**. Based on the State's breach of the 2023 CAP, Plaintiffs are now initiating Arbitration.

Very truly yours,

RODEY, DICKASON, SLOAN, AKIN &  
ROBB, P.A.

*Andrew G. Schultz*

By

Andrew G. Schultz

MARTINEZ, HART, SANCHEZ &  
ROMERO, P.C.

*F. Michael Hart*

by

F. Michael Hart

PUBLIC COUNSEL

*Tara Ford*

By

Tara Ford  
Amelia Piazza

Enclosures

Notice of Arbitration

October 20, 2023

Page 3

cc w/ enclosures: Charles R. Peifer  
Julie Sakura, General Counsel, CYFD  
John Emery, Acting General Counsel, HSD

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<sup>i</sup> The FSA is available at:

chrome-extension://efaidnbmnnnibpcajpcgglefindmkaj/https://www.cyfd.nm.gov/wp-content/uploads/2022/12/2020\_02\_06-kevin\_s\_agreement\_final.pdf

<sup>ii</sup> The 2023 CAP is available at:

chrome-extension://efaidnbmnnnibpcajpcgglefindmkaj/https://www.cyfd.nm.gov/wp-content/uploads/2023/07/Kevin-S.-Corrective-Action-Plan-June-30-2023.pdf

<sup>iii</sup> The 2022 MOU is available at:

chrome-  
xtension://efaidnbmnnnibpcajpcgglefindmkaj/https://kevinssettlement.files.wordpress.com/2022/06/kevin-s-mou.pdf



Center for the  
Study of Social Policy



September 18, 2023

Acting Cabinet Secretary Teresa Casados  
New Mexico Children, Youth, and Families Department

Acting Cabinet Secretary Kari Armijo  
New Mexico Human Services Department

Tara Ford  
Kevin S. Plaintiffs' team

Via electronic mail

Re: Follow up from Co-Neutrals' Site Visit

Dear Acting Secretaries and Ms. Ford,

Thank you for meeting with us last week in New Mexico. Over the course of the week, we met with CYFD caseworkers, supervisors and managers in Albuquerque and Santa Fe (including numerous personnel also covering additional CYFD county offices); CYFD staff and supervisors at the Receiving Center in Albuquerque; the Governor of the Taos Pueblo, his staff and CYFD and HSD leadership at the Santa Fe Indian School; the Lieutenant Governor of the Laguna Pueblo, his staff and CYFD and HSD leadership at the Laguna Pueblo; child behavioral health stakeholders; as well as the parties.

We are appending our letter to the CYFD and HSD Secretaries of September 2022, in which we expressed concerns about challenges we observed during our site visits in New Mexico last year, including high CYFD staff caseloads, the agencies' inadequate supply of family-based placements and CYFD's on-call system. In that letter, we made numerous recommendations, which we have discussed repeatedly with State leaders over the past year. To our dismay, across the board, CYFD staff at all levels during our meetings last week described conditions in the CYFD offices as significantly worse than last year, in part due to the decision to pause most routine hiring at CYFD for months. We were repeatedly and consistently told the result has been substantial vacancies across the agency in investigative positions, PPWs, senior workers, supervisors and management staff. This has created unreasonably large caseloads among caseworkers and supervisors with managers at multiple levels carrying caseloads as well.

HSD and CYFD staff and managers at all levels expressed to us their passion for the agencies' missions, as well as a commitment to the children and families of New Mexico. Because it was not possible to proceed with the parties' meeting last week, we want to convey to you directly the feedback that we received during our recent meetings in New Mexico. The information is of deep concern to us and includes conditions for children that are currently dangerous.

**EXHIBIT A**



During our meetings, we learned:

- CYFD staff and managers at all levels consistently reported that conditions in the CYFD offices are significantly worse than last year, primarily due to exorbitant caseloads and substantial vacancies caused by attrition, insufficient hiring and numerous employees currently on Family and Medical Leave.
- CYFD staff and managers at all levels reported that CYFD paused routine hiring of frontline staff and supervisors across the state in May 2023. They described two CYFD rapid-hire events – one in May and one in August – but said the results of those events did not keep pace with attrition, and left many positions vacant, resulting in high caseloads for caseworkers and supervisors that many described as “unprecedented” in their experience at CYFD. We were told the rapid hire events did not include supervisors and senior workers.
- For example, CYFD staff reported to us that as of this week, there is no PPW caseworker in CYFD’s Santa Fe Office. One investigator reported 51 open child abuse/neglect investigations, including six new cases assigned the morning we met.
- Because of substantial vacancies, all the CYFD county office managers with whom we met described serving as the primary caseworker for between 25 and 40 children currently. These case assignments, we were told, in numerous instances do not appear in the agency’s data reports. In our work with other states, we have never seen so many children’s cases being managed directly by supervisors and county managers.
- CYFD supervisors and managers reported that CYFD essentially stopped hiring supervisors and senior staff in May 2023, and did not include these positions in the agency’s August 2023 rapid-hire event, despite pervasive supervisor and senior staff vacancies. They reported the vacancies have deprived many caseworkers of adequate supervision and support and some workers currently have no direct supervisors.
- The remaining CYFD supervisors with whom we spoke reported they directly carry many children’s cases, without exception, and expressed concern that they have been unable to supervise their staff appropriately due to burgeoning workloads. Many described their jobs as “impossible” because of the large number of staff they are assigned to supervise and the substantial number of children whose cases they are directly managing.
- At least eight CYFD employees – both managers and staff – indicated they have prepared their resignations and are currently discerning whether to terminate their employment with CYFD because of the conditions that had worsened since May 2023. They report that they have stayed because of their commitment to their colleagues and their desire to not make things even more difficult for them.
- The lack of staffing is exacerbated by the requirements for additional on-call work. Many CYFD caseworkers and supervisors are required to work “on-call” shifts overnight, and inadequate staffing means many of them do so numerous times per



month. The on-call assignments require staff and supervisors to respond to emergencies overnight then report to work the next morning. The result in multiple instances was reported to be caseworkers and supervisors going without sleep for more than 24 hours, several times per month, including in some instances during extensive drives when they are forced to transport children because of a lack of transportation aides. This practice is a serious safety concern. Many CYFD staff and supervisors said the practice had led numerous colleagues to resign since May 2023.

- CYFD staff reported to us that vacancies and insufficient hiring in Albuquerque have also resulted in many CYFD caseworkers and supervisors being required to monitor children in offices because of a lack of safe placements for children and/or older youth's reported refusal of placements. They feel untrained to take on these direct caregiving responsibilities and are frequently in situations where they feel unsupported and unsafe.
- Because of staffing shortages, CYFD staff and supervisors reported a significant backlog of legally free children in pre-adoptive homes for whom permanency is stalled because CYFD staff have been unable to complete the disclosures necessary to advance the case.
- CYFD staff, supervisors and managers at all levels reported that staff shortages had worsened communication with relative and non-relative caregivers, and contributed to families choosing to close their homes over the past several months, worsening the shortage of family-based placements. Several tribal representatives with whom we met also described poor communication with staff in CYFD offices, citing unreturned phone calls and emails due to staffing shortages.
- CYFD staff and managers in Albuquerque reported that one of the most significant providers of behavioral health services to children in Bernalillo County had notified the State it was closing at the end of this month. CYFD staff and managers said there is no plan in place to transition children in custody to new providers and they were unaware of HSD, the MCOs or the CBHC playing any visible role to prevent a cutoff in behavioral health services to children in state custody as a result of the closure.
- CYFD staff reported a backlog for families awaiting home studies in order to become resource parents. Some CYFD staff said they understood the contract for the vendor who trains CYFD staff to conduct home studies, Children's Consortium, had not been timely renewed by CYFD in July 2023. Numerous other CYFD staff and managers in Albuquerque reported that one of CYFD's private vendors, All Faiths, told CYFD staff that it could not accept new home study referrals in September due to volume. At least one staff reported they have been assigned to complete home studies for new families but they have not received specialized training to do so.
- CYFD staff who are assigned to recruit families as resource caregivers said they lacked resources and an overall strategy to do the work effectively, and in any event, many said the CYFD offices had become so consumed by rising caseloads that they have shifted their focus to include helping their colleagues manage children's cases. They felt that

even if they identified willing families, there were insufficient staff to conduct home studies and complete licensure for them.

- CYFD managers reported that a major reorganization of CYFD is scheduled to take effect at the end of the month, but they were unaware of a communication strategy to inform frontline employees of the changes. Among the CYFD staff at all levels with whom we spoke, there is widespread confusion about the nature of the reorganization, its purpose, the timing of the personnel shifts and its intended impact.
- Because the CYFD supervisors and county managers with whom we spoke are carrying a diverse portfolio of children's cases (e.g., Investigations, PPW, Placement and In Home) they assumed they would have to continue to do so regardless of what, if any, new role they were assigned as part of the reorganization.
- Many CYFD caseworkers and supervisors, in particular, expressed confusion and anxiety about the reorganization, unsure of what it meant. We learned from several CYFD managers that the reorganization will move primary case management for adoption cases from Placement staff to PPW staff, but none of the Placement and PPW staff with whom we met were aware of that possible shift. Some of the CYFD managers expressed concern to us that shifting this responsibility for primary case management of adoption cases to PPW staff, although theoretically a positive change, in the midst of the current staffing shortages would worsen conditions in the offices.
- CYFD staff and managers at all levels consistently said that once the agency begins to hire staff and supervisors routinely again, it will take a while to recover from the hiring pause. They acknowledged the state hiring process, the schedule for New Employee Training and graduated caseloads, which is an essential retention strategy, meant meaningful caseload relief for incumbent CYFD caseworkers, supervisors and managers was unlikely before 2024.
- CYFD staff and managers at all levels described substantial service gaps for children, particularly behavioral health services, and with few exceptions, did not describe any meaningful assistance in their cases from HSD or the MCOs.

Last year we described to the Parties a system that was in *crisis*. This year, based on reports from scores of CYFD employees at all levels and key stakeholders with whom we met, we believe the system is in a *state of chaos*. Positions are pervasively vacant in CYFD due to attrition, and numerous staff are reported to be on Family and Medical leaves due to job stress. Supervisors and managers are acting out of role, directly managing children's cases. They describe doing their very best, but the reality leaves them too little time for actual supervision of staff, many of whom are reportedly resigning before their first anniversary because of poor work conditions. Resource families are closing their homes, reportedly in numerous instances due to poor communication with overwhelmed caseworkers and supervisors. At the same time, a reported backlog of new (kin and non-relative) families awaiting home studies grows. A mounting number of children and families ready for adoption reportedly await the completion



of their case disclosures; CYFD staffing shortages are stalling permanency cases. And some investigators are assigned dangerously high caseloads, unable to keep up with the crush of work. From the many consistent reports we received, the situation is worse than last year, deteriorating, and requires effective immediate action to protect children's safety.

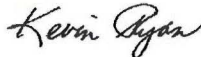
Last year we made numerous recommendations to the agencies (see attached) and we restate those here because they remain critical opportunities to establish stability in order to advance the *Kevin S.* commitments. We urge the State first and foremost to take every reasonable step as urgently as possible to ensure adequate staffing and repair conditions in the CYFD offices. In addition, we recommend CYFD quickly retain a group of temporary workers, perhaps experienced retirees as other states have done, to move permanency cases toward adoption finalization by completing backlogged disclosures, and hire staff specifically for the CYFD on-call system as other states have done.

Thank you again for your time last week. We are available to meet with you to discuss ideas for dealing with this emergency.

Sincerely,



Judith Meltzer  
Center for the Study  
of Social Policy



Kevin Ryan  
Public Catalyst

cc: Julie Sakura, General Counsel, CYFD  
John Emery, Acting General Counsel, HSD  
Alex Castillo Smith, Deputy Cabinet Secretary, HSD  
Governor Perez, Special Projects Coordinator, CYFD  
Farra Fong, Deputy Director, Fostering Connections Bureau, CYFD  
Jennifer Archuleta-Earp, Program Deputy Director, CYFD  
Sarah Meadows, Performance and Accountability, CYFD  
Bianca Foppert, Change Implementation Coordinator, CYFD  
Sally Jameson, Project Manager, Office of the Secretary, HSD

Attachment



**THE PUBLIC INTEREST LAW OFFICE OF THE LOS ANGELES COUNTY AND BEVERLY HILLS BAR ASSOCIATIONS**  
The Southern California Affiliate of The Lawyers' Committee for Civil Rights Under Law

September 22, 2023

*Via Email and U.S. Mail*

Teresa Casados, Interim Cabinet Secretary  
Children, Youth and Families Department  
State of New Mexico  
P.O. Drawer 5160  
Santa Fe, NM 87502-5160

Kari Armijo, Acting Cabinet Secretary  
Health and Human Services Department  
Office of the Governor  
490 Old Santa Fe Trail, Room 400  
Santa Fe, NM 87501

**Re: Kevin S., et al. v. Blalock, et al., No. 1:18-cv-00896**  
**Demand to Cure Non-Compliance with the June 30, 2023**  
**Corrective Action Plan**

Dear Interim Secretary Casados and Interim Secretary Armijo:

We are in receipt of correspondence from the Co-Neutral's Team dated September 18, 2023 and earlier letter dated September 27, 2022, collectively attached as Exhibit A. The chaos of the child welfare system and the dire harms facing children in State custody described in their correspondence is matched or exceeded by our investigation and experience. There can be no doubt that children in State custody in New Mexico are being harmed due to the failure of CYFD to comply with its repeated promises to reform the child welfare system, reform which requires a continuum of services provided in partnership with HSD. Both agencies completely and utterly have failed to perform. As the Co-Neutrals make plain, we are in a state of emergency and children coming into the State's custody and care are entering a system that is even more broken than it was last year.

This letter notifies you that CYFD and HSD are in breach of the June 30, 2023 Corrective Action Plan, signed and negotiated by both of you on behalf of CYFD and HSD. Given this breach, we demand immediate and specific written assurances that your agencies will come into compliance with the June 30, 2023 Corrective Action Plan (2023 CAP), specifically performing all agreed upon commitments. *See* 2023 CAP, attached here as Exhibit B. In the event that you do not provide us with acceptable written assurances by the close of business on October 6, 2023, we will consider CYFD and HSD to be in breach of the 2023 CAP and immediately will request arbitration. Acceptable written assurances will include the specific actions the State intends to take to come into compliance with the 2023 CAP, the timeline for each action, the person responsible for each action, and person responsible for ongoing written reporting to Plaintiffs' counsel that each action has been timely completed.



In order for CYFD and HSD to avoid arbitration, you must provide the following assurances:

First, CYFD will cease all hiring freezes, pauses or other delay tactics that impede CYFD from meeting the Department's obligations to make progress towards meeting caseload standards as agreed to in the 2023 CAP. In addition, CYFD must comply with the caseload standards agreed to in the 2023 CAP. CYFD must provide specific written assurances as to the steps the Department will take to come into compliance with the agreement by December 31, 2023.

Second, CYFD must address its commitment to a public/private strategy to recruit and retain resource families. CYFD needs to provide detailed documentation that assignment of staff as agreed to in the Corrective Action Plan is in place and that staff are not being tasked with other departmental duties. In addition to specific performance of the agreed upon staffing, CYFD must stop impeding the efforts of the professionals by failing to devote necessary resources to support these positions. Specifically, CYFD needs to provide written assurances of actions that will be taken to ensure: 1) home studies are complete; 2) other resources are available as needed to allow persons assigned to effectively perform their work; and 3) effective supervision is provided to them to meet the obligations in the 2023 CAP. CYFD needs to provide information on the status of the contracts with private providers for resource family recruitment and assurance that these contracts are in place as required by the 2023 CAP.

Third, our independent investigation and experience representing children in State custody demonstrates that HSD is not ensuring MCO provision of TFC placements, including consideration of single case agreements, for children in State custody. HSD must specifically perform this term of the agreement and provide written assurances regarding its compliance with its obligation to have a reliable system to immediately (within 5 days) identify alternative services for children recommended for TFC when those placements have been denied, reduced, modified or delayed. The failure to have an adequate network of care is directly related to the extraordinary time spent by CYFD staff who are supposed to be finding placements for children who are now in inappropriate placements, abandoned in offices and relegated to out-of-state placements. Despite meeting multiple times weekly, often daily, the staff has proven unable to find foster homes or TFC providers willing to be the home base for children currently in inappropriate placements, especially when they require individualized services.

Fourth, our independent investigation has uncovered HSD's breach of its obligation to double the number of HFW facilitators from 26 to 52. We have been informed that providers are confused about the requirements for HFW Facilitator credentials and are concerned that existing HFW Facilitators may not meet recently imposed requirements – meaning that HSD has implemented requirements that will decrease the base number of existing HFW facilitators. HSD must provide immediate written assurances with actions necessary meet its obligations to double the number of HFW sites from 10 to 20 and to double the number of HFW facilitators from 26 to 52 by December 31, 2023.

Fifth, despite the known harm of improper placements, children are still being placed in offices. These children are not being provided with basic safety, privacy, or even minimally nutritious food. As the Co-Neutrals report, staff who are unprepared and untrained are being

tasked with supervising these office placements. The fact that children continue to be placed in offices where they are in such dire risk of harm, vividly demonstrates that CYFD has breached its obligation under the 2023 CAP to provide a safety plan for children subject to critical incidents. The 2023 CAP requires the safety plan to include steps with service and supports necessary to address the harm of all critical incident and steps to be taken to protect the child from such harm in the immediate future. We know first-hand that children harmed while in these dangerous placements are not provided with needed services and supports. CYFD and HSD must provide immediate written assurances of the actions the State will take to end all office placements. CYFD and HSD's written assurances must include actions taken to ensure that children's basic rights are not being violated when they are abandoned to office placements. At minimum, these assurances must ensure that children's basic rights are protected and enforced as set forth in NMSA §32A-6A-12. In addition, CYFD and HSD must provide the Co-Neutrals and Counsel for Plaintiffs with, *inter alia*, a daily list for each child in the office that includes:

- a) The name, position, and licensing of each staff supervising the child in an office, including but not limited to both direct care staff and supervisors;
- b) The total hours per individual staff/supervisor assigned to supervise the child in an office;
- c) The hours for all shift changes; and
- d) The overtime for each individual staff/supervisor assigned to supervise the child in an office

Sixth, while the Doña Ana County Pilot Project has had one meeting, the San Juan County Pilot Project still does not have a facilitator, nor has it yet met. The State must provide specific written assurances detailing how the State intends to remedy this breach of contract. We bargained for a specific length of time for each pilot project and we demand specific performance of the full nine months for each pilot. Both Departments must provide written assurances that the State will support each pilot for the full nine months.

Seventh, the State is in breach of its 2023 CAP obligations to include additional resources in the CYFD budget to support Nations, Tribes and Pueblos in New Mexico, who at their discretion choose to provide services for Native children in State custody. To be clear, the CYFD Office of Tribal Affairs has been diligent in its effort to comply with Appendix C obligations in the 2023 CAP. Yet, their efforts are undermined by the State's failure to allocate or seek resources to build capacity and to partner with Nations, Tribes and Pueblos to ensure that Native American children in State custody are connected to their communities. Specifically, the State is in breach of its obligation to make good faith efforts to negotiate Joint Powers Agreements and single case contracts with Nations, Tribes and Pueblos. Because these discussions have not occurred, CFYD and HSD budgets do not include additional funding that Nations, Tribes and Pueblos might request, additional funding which CYFD agreed to include in its budget requests under the 2023 CAP. The State must specifically comply with these agreements. We need to receive specific written assurances that demonstrate that the Governor's budget will include resources for JPAs and single source contracts with Nations, Tribes and Pueblos.



Eighth, HSD will be in breach of its agreement to ensure that 100% of children in State custody will receive a well-child visit within 30 days of entering custody by January 1, 2024. HSD must provide specific written assurances of steps that it will take to ensure compliance with this obligation.

Finally, CYFD and HSD have been on notice for the past 12 months that they have failed to live up to the promises and requirements of the *Kevin S.* settlement agreement. CYFD and HSD have continued to ignore these obligations and disregard the specific recommendations from the Co-Neutrals despite agreeing to the 2023 CAP meant to remediate past non-compliance. Given the litany of the Departments' abject failures and the current dangerous chaos impacting children in State custody, both CYFD and HSD must provide unequivocal written assurances that they are aware of, and that they fully will comply with, the recommendations provided by the Co-Neutrals in both their September 18, 2023 correspondence as well as those included in their correspondence from September 2022.

In light of the State's breach of the 2023 CAP, we do not believe that holding an All Parties meeting will be useful. If we do not receive acceptable written assurances setting forth specific actions the State will take and clear timelines for each action needed to come into compliance with the 2023 CAP by the close of business on October 6, 2023, we will request arbitration.

It is time for the State to live up to its promises. The clear failure of both CYFD and HSD to comply with the requirements to which they voluntarily agreed is harming the children that both of your Departments have an obligation to serve and protect.

**By:** PUBLIC COUNSEL

*Tara Ford*  
*Amelia Piazza*

**By:** PEGASUS LEGAL SERVICES FOR CHILDREN

*Bette Fleishman*  
*Sara Crecca*

**By:** NATIVE AMERICAN DISABILITY RIGHTS

*Therese Yanan*

**By:** DISABILITY RIGHTS NEW MEXICO

*Gary Housepian*  
*Jesse Clifton*

**By:** MARTINEZ, HART, SANCHEZ & ROMERO, P.C.

*F. Michael Hart*

**By:** RODEY LAW FIRM

*Andrew G. Schultz*

*Counsel for Plaintiffs Kevin S., et al.*

Attachments: Exhibits A and B  
Service List of New Mexico Tribal Leadership

cc: ***Via Email and U.S. Mail:***

New Mexico Governor, Michelle Lujan Grisham (*emailed through* General Counsel)  
New Mexico Attorney General, Raúl Torrez  
New Mexico Speaker of the House, Javier Martinez  
New Mexico Senate President Pro Tempore, Mimi Stewart  
Kevin Ryan and Judith Metzler, the Kevin S. Co-Neutrals Team  
Julie Sakura, General Counsel for CYFD  
John R. Emery, General Counsel for HSD

***Via U.S. Mail (see full Service List, attached):***

Navajo Nation, President Buu Nygren  
Navajo Nation Council, Office of the Speaker  
Jicarilla Apache Nation, President Edward Velarde  
Mescalero Apache Tribe, President Eddie Martinez  
Pueblo of Acoma, Governor Randall Vicente  
Pueblo of Cochiti, Governor Everett P. Herrera  
Pueblo of Isleta, Governor Max Zuni  
Pueblo of Jemez, Governor Dominic Gachupin  
Pueblo of Laguna, Governor Wilfred Herrera  
Pueblo of Nambe, Governor Nathaniel Porter  
Ohkay Owingeh, Governor Larry Phillips, Jr.  
Pueblo of Picuris, Governor Craig Quanchello  
Pueblo of Pojoaque, Governor Jenelle Roybal  
Pueblo of San Felipe, Governor Carl Valencia  
Pueblo de San Ildefonso, Governor Christopher Moquino  
Pueblo of Sandia, Governor Stuart Paisano  
Pueblo of Santa Ana, Governor Nathan Garcia  
Pueblo of Santa Clara, Governor J. Michael Chavarria  
Pueblo of Santo Domingo, Governor Esquipula Tenorio  
Pueblo of Taos, Governor Gary Lujan  
Pueblo of Tesuque, Governor Milton Herrera  
Pueblo of Zia, Governor Valentino Pino  
Pueblo of Zuni, Governor Arden Kucate  
Ysleta Del Sur (APCG Member), Governor E. Michael Silvas  
All Pueblo Council of Governors  
Five Sandoval Indian Pueblos  
Eight Northern Indian Pueblos Council

***Via Email only:***

NMTIC, President, Jacqueline Yalch



# State of New Mexico

## CHILDREN, YOUTH and FAMILIES DEPARTMENT

MICHELLE LUJAN GRISHAM  
GOVERNOR

HOWIE MORALES  
LIEUTENANT GOVERNOR



TERESA CASADOS  
INTERIM CABINET SECRETARY

October 6, 2023

*Kevin S. Plaintiffs' Counsel*

*Via Electronic Mail*

Re: *Kevin S. Corrective Action Plan*

Dear Plaintiffs' Counsel:

We have received your letter dated September 22nd addressing concerns related to the 2023 Corrective Action Plan (CAP), which was mutually agreed upon by the State and plaintiffs' counsel on June 30, 2023. We feel confident that these concerns are misplaced, as you know the CAP does not expire until January 5, 2024, meaning the state's caseload commitments must be met by December 31, 2023. By the CAP's plain terms, the commitments "will be undertaken in the time set forth in the CAP."

The State and plaintiffs are united by a common commitment enshrined in the FSA and the CAP, specifically to ensure the safety of children in state custody and foster positive outcomes as we work collaboratively towards transforming the child welfare system. The state felt confident that all parties established trust during the process to develop the CAP, and we are disappointed that this trust has not been extended to us as we take the steps needed to meet the terms of the Corrective Action Plan within the agreed-upon time frames. The CAP was the culmination of months of negotiations and courageous conversations between and among the parties. The State is proud of the collaborative efforts by everyone involved to formulate action steps to further the state's successful system reform embodied in the Final Settlement Agreement ("FSA"). Given the exceedingly challenging nature of reforming such a complex and troubled system, a crucial element of successfully doing so is ensuring accountability while also acknowledging and celebrating incremental changes. We value the dedication and effort of the State employees who are striving to meet these commitments. We acknowledge there is still much work to do to improve the child welfare system; however, a recognition of the contributions made to date would greatly benefit staff morale. For many staff, this letter had a profoundly negative impact.

The second, third, fourth, sixth, seventh, and eighth requested assurances are already captured in the 2023 Corrective Action Plan. There is no requirement for additional written assurances to be provided beyond what are already described in the 2023 CAP. The CAP itself is our written assurance of how and when we will meet our commitments.

Although we are not obligated to provide written assurances of the items described in the CAP, we can report the following: CYFD has hired over 260 new staff since June 2023. The rapid hire event in August 2023 brought in 575 in-person applicants; 133 offer letters were sent, and 97 of

**EXHIBIT C**

them were accepted. Sixty-six of those accepted positions started the week of September 2, 2023. CYFD currently has 115 positions posted on the State Personnel Office website for positions across the agency.

The fifth requested assurance includes the issue of office stays, which is not specifically addressed in the CAP. However, since implementation of the 2023 CAP, we have forwarded critical incident notifications and safety plans to the Co-Neutral team, which is the party responsible for providing quarterly information to plaintiffs' counsel.

HSD is refining its data collection and analysis processes, especially with regard to treatment foster care to have a more comprehensive and accurate understanding of the system. Additionally, HSD is taking measures to guarantee that children within our welfare system receive well-child visits within the initial 30 days of entering care. And the Department is partnering with CYFD to support the expansion of high-fidelity wraparound services. Each of these initiatives underscores our unwavering dedication to the safety and prosperity of the children under our guardianship.

In response to the perception that CYFD and HSD might be overlooking obligations or recommendations from the Co-Neutrals, we respectfully disagree. Both agencies continue to meet regularly with the Co-Neutrals to discuss various strategies for successful implementation of *Kevin S.* commitments and improved ongoing monitoring of outcomes. The State has maintained good communication and collaboration with the Co-Neutral team and has implemented many of their suggestions.

We hope that we can work together in good faith to achieve the agreed upon goals from the CAP by December 31<sup>st</sup>, 2023. It is our shared belief that by meeting these goals, we can substantially enhance the well-being and futures of children in state custody.

Sincerely,

*/s/ Teresa Casados*  
CYFD Cabinet Secretary

*/s/ Julie Sakura*  
CYFD General Counsel

*/s/ Kari Armijo*  
HSD Cabinet Secretary

*/s/ Alex Castillo Smith*  
HSD Deputy Secretary

*/s/ John Emery*  
HSD General Counsel

cc: Judith Meltzer  
Kevin Ryan