IN THE ARBITRATION OF

KEVIN S., *et al.*,

Plaintiffs,

vs.

NEW MEXICO CHILDREN, YOUTH and FAMILIES DEPARTMENT, and NEW MEXICO HUMAN SERVICES DEPARTMENT,

Defendants.

DEFENDANTS' RESPONSE BRIEF

Pursuant to Section IX, Step-2(1)(a) of the Dispute Resolution procedures of the Final Settlement Agreement ("FSA"),[1] the New Mexico Children, Youth, & Families Department ("CYFD") and the New Mexico Health Care Authority (formerly New Mexico Human Services Department) ("HCA" or "HSD") (collectively the "State") respectfully submit this Response Brief in advance of the arbitration hearing scheduled to commence on August 20, 2024 (the "Hearing").

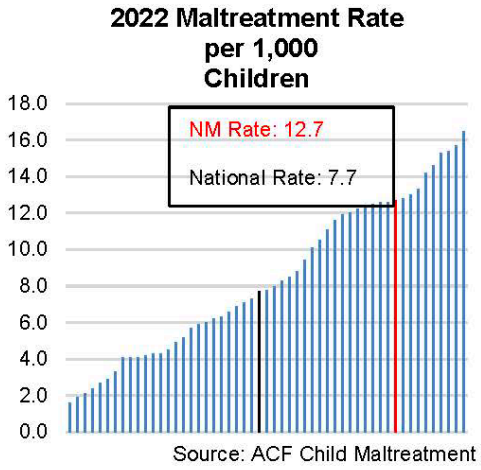
The State denies that it has breached the FSA or the 2023 Corrective Action Plan (the "CAP")[2] which arises from, expressly incorporates, and is supplemental and subsidiary to the FSA. This Response Brief is intended to frame the factual and legal issues that will be resolved through the presentation of testimony and evidence at the Hearing, not to conduct a "paper trial on the merits," which is "disfavored" under New Mexico law.[3]

[1] The title of the relevant document is the "Settlement Agreement," which is sometimes referred to as the "Final Settlement Agreement," (FSA) and is attached as Exhibit A to Plaintiffs' Notice of Arbitration.
[2] The full title of the relevant document is the "Corrective Action Plan for Partial Resolution of Issues in Dispute" executed by the parties on June 30, 2023 (hereinafter referred to as the "CAP") and is attached as Exhibit B to Plaintiffs' Notice of Arbitration.
[3] *See, e.g., Associated Home & RV Sales, Inc. v. Bank of Belen*, 2013-NMCA-018, ¶ 34, 294 P.3d 1276, 1285; *Romero v. Philip Morris Inc*., 2010-NMSC-035, ¶ 9, 148 N.M. 713, 721, 242 P.3d 280, 288.

INTRODUCTION

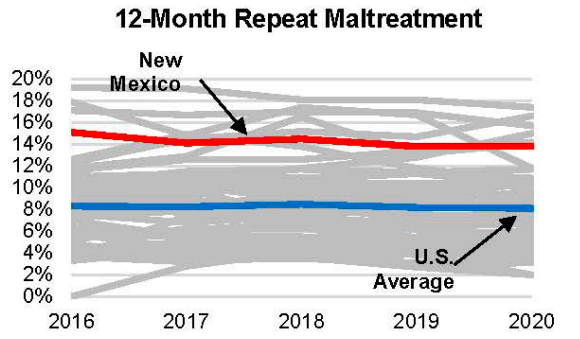
The State agencies and dedicated individuals responsible for providing support and services to children in state custody face seemingly insurmountable challenges and unending public criticism. First and foremost, New Mexico suffers from a high rate of child maltreatment and repeat maltreatment due to societal, economic and systemic causes, including parental substance abuse, poverty, domestic violence, and other behavioral health issues.

Key Data



Source: ACF Child Maltreatment

- The rate of child maltreatment in New Mexico is significantly higher than the national average. In 2022, 12.7 children out of every 1,000 children experienced maltreatment, a total of 5,817 children.
- Leading risk factors of child maltreatment include parental substance abuse, poverty, domestic violence, parental history of trauma, and other behavioral health issues.
- The state, through Medicaid and other means, is investing to address these root causes by increasing funding for behavioral health, substance use treatment, and other services significantly over the last several years.



Source: ACF Children's Bureau

- The rate of repeat maltreatment, or the rate at which children in New Mexico experience maltreatment again within 12 months of an initial allegation has historically been nearly twice the national average.
- If New Mexico had the same rate of repeat maltreatment as the national rate, roughly 360 fewer cases would occur annually.
- As of the second quarter of FY24, New Mexico's repeat maltreatment rate was 14.2 per 1,000 children, while the national benchmark was 9.

The challenges to New Mexico's child welfare system are compounded by steep poverty levels and a severe shortage of doctors to treat children in state custody. "In 2022, New Mexico had the highest poverty rate in the nation at 17.6 percent, and since at least 2000, New Mexico has persistently ranked as one of the poorest states in the country."[4] In addition to contributing to high levels of child maltreatment, New Mexico's severe poverty creates many other challenges for the State, including a longstanding shortage of physicians to treat all New Mexicans, including children in State custody. "Thirty-two of the state's 33 counties are designated Health Professional Shortage Areas. As a result, New Mexicans typically wait months to see a doctor, travel out of state to find one or use hospital emergency rooms for non-urgent medical needs."[5]

Table 1. New Mexico Poverty Ranking

Year	State Ranking (lower is worse)
2022	1st
2021	3rd
2020	3rd
2010	2nd
2000	1st

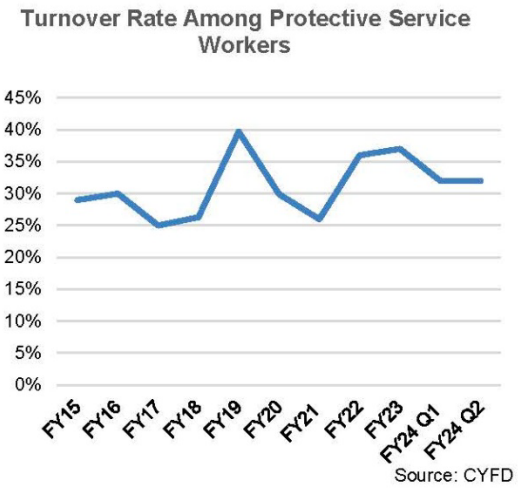
Source: US Census Bureau

Further compounding the challenges facing New Mexico's child welfare system is the indisputable fact that the State, like the rest of the country, suffers from high turnover and vacancy rates among child protective services workers, which then results in higher caseloads. These staff shortages have many causes, including low employee morale, a shortage of qualified applicants, and insufficient funding to fill open positions or adequately increase caseworker pay to compete with comparable jobs in the market – all of which exist on top of burnout, secondary-trauma stress, and emotional fatigue suffered by child welfare workers.[6]

[4] "Despite Benefits, Poverty Persists," Legislative Finance Committee Progress Report (12/11/2023) (https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Progress%20Report%20-%20Costs%20and%20Stacking%20Income%20Support.pdf).

[5] "Where have all the doctors (and nurses) gone? A dire scarcity of providers leaves New Mexicans without health care" (https://searchlightnm.org/where-have-all-the-doctors-and-nurses-gone/).

[6] "Individuals in helping professions, particularly those that serve vulnerable populations, are at increased risk of a host of negative outcomes caused by regular exposure to traumatic and emotionally draining work experiences." Shauna L. Rienks, "Promoting a Healthy and Resilient Child Abuse & Neglect Workforce: An exploration of child



- As of fall 2023, CYFD had roughly 50 vacant permanency planning workers and more than 580 vacancies in the Protective Services.
- In the second quarter of FY24, the turnover rate among protective services workers was 32 percent. The agency's target is 20 percent.
- According to the Annie E. Casey Foundation, turnover rates among child welfare workers average 30 percent nationally, while annual turnover rates at or below 12 percent are considered optimal in health care and human services. High turnover is associated with more placement disruptions, time in foster care, incidents of child maltreatment, and re-entries to foster care.

Additionally, CYFD currently relies on an antiquated data system – Family Automated Client Tracking System (FACTS) – to manage cases. FACTS was developed in the 1990's using COBOL, an archaic and near-extinct programming language that makes it difficult for CYFD to find contractors or staff to make modifications or changes. FACTS was never designed to collect and report data in the ways that CYFD now reports data under the Kevin S. FSA, the 2022 Kevin s. Memorandum of Understanding ("MOU"), or CAP. Nor is FACTS capable of serving as CYFD's document storage and management system. Recognizing that the FACTS system cannot meet CYFD's current technology needs, the State is already modernizing its child welfare information system to comply with federal Comprehensive Child Welfare Information System (CCWIS) requirements. In 2022, CYFD issued a comprehensive RFP and, in April 2024, CYFD awarded a contract to develop, implement and maintain a new CCWIS system to replace FACTS.

welfare caseworkers' experience of secondary trauma and strategies for coping" (cites omitted). "By the very nature of their work, social workers tend to have frequent exposure to clients who have been traumatized, putting them at risk for their own emotional and behavioral disruption . . . ." *Id.* This secondary traumatic stress (STS) can manifest suddenly with symptoms that are similar to those experienced by individuals who have had primary exposure to trauma resulting in post-traumatic stress disorder (PTSD), with physiological symptoms that may include sleeplessness and increased blood pressure; emotional symptoms that may include depression, irritability, and emotional numbness; and behavioral symptoms that may include low motivation, oversensitivity, and memory or concentration loss."

But until the new CCWIS system is implemented and operational, CYFD will continue to face technological obstacles under its legacy data system that no arbitration award can cure.

The State will present evidence and testimony at the Hearing demonstrating that the State has made "good faith efforts to achieve substantial and sustained progress" on the four substantive issues raised by Plaintiffs in their Amended Notice of Arbitration (the "Amended Notice"):[7] (a) CYFD Workforce Caseloads, (b) Resource Family Recruitment, (c) Well-Child Visits, and (d) "Real Time" Data Submissions to the Co-Neutrals.

LEGAL STANDARD

A. Plaintiffs Have the Burden to Prove the Existence and Breach of a Contract

In order to establish a breach of contract claim, a party must show that (1) there was a contractual obligation; (2) the opposing party breached the contract; and (3) the breach resulted in damages. *See Cent. Mkt., Ltd., Inc. v. Multi-Concept Hosp., LLC*, 2022-NMCA-021, ¶ 38, 508 P.3d 924. As the party alleging breach of a contract, Plaintiffs have the burden to prove by a preponderance of evidence all the elements of their claim. *See, e.g., Fed. Rsrv. Bank of Dallas v. Upton*, 1930-NMSC-012, ¶ 20, 34 N.M. 509, 285 P. 494, 496; *Cent. Mkt., Ltd., Inc.*, 2022-NMCA-021, ¶ 38 ("[a] plaintiff claiming breach of contract has the burden of proving . . . breach of the contract . . . ."); *United Nuclear Corp. v. Allendale Mut. Ins. Co.,* 1985-NMSC-090, ¶ 14, 103 N.M. 480, 485, 709 P.2d 649, 654 ("It is the general rule, not only in New Mexico but elsewhere, that issues of fact in civil cases are to be determined according to the preponderance of the evidence."); UJI 13-304 NMRA (in a civil action, "[a] party seeking a recovery has the burden of proving every essential element of the claim by the greater weight of the evidence.").

[7] On May 20, 2024, Plaintiffs served a Notice of Arbitration (the "1st Notice"). On July 15, 2024, Plaintiffs served an Amended Notice of Arbitration (the "Amended Notice").

B. FSA Performance Standard

The FSA both provides for this arbitration and expressly defines the "Performance Standard" applicable to it. "Meeting the Performance Standard means making good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Target and Target Outcome."[8] "A finding of good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Target or Target Outcome shall be based on whether Defendants have made all reasonable efforts to achieve each Implementation Target or Target Outcome." *Id.*

C. The CAP Is Not a Separately Enforceable Contract

The CAP is not a "separate contract" independent from the FSA, but rather the first step of an agreed alternative dispute resolution remedy to resolve disputes over whether the State met the Performance Standard in the FSA. Plaintiffs agreed that "[a]ny dispute arising out of or related to" the FSA would be subject to a two-step dispute resolution process.[9] The initial step requires that the parties first "attempt to resolve the dispute through mediation" and a "corrective action plan."[10] The *second step* is this arbitration.[11] The CAP is expressly subsidiary to the FSA.

1. The State Received No Independent Consideration for the CAP

"For a contract to be legally valid and enforceable, it must be factually supported by an offer, an acceptance, consideration, and mutual assent." *DeArmond v. Halliburton Energy Servs.,*

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[8] FSA at 2-3.

[9] FSA at 10, § IX ("Dispute Resolution").

[10] FSA at 10 ("Dispute Resolution: Step 1 – Alternative Dispute Resolution) ("For any dispute over whether the Defendants have met the Performance Standard for an Implementation Target or Target Outcome by the agreed-upon deadline, the Co-Neutrals and the Parties shall attempt to agree on a corrective action plan through mediation."). The CAP itself acknowledges that it is "Step 1" of the FSA's dispute resolution process. CAP at 1 ("In the spirit of collaboration, counsel for Plaintiffs, CYFD and HSD . . . employed good-faith, best efforts to discuss and resolve disputes in furtherance of Step 1 of the Dispute Resolution process set forth in Section IX.A of the March 2020 Final Settlement Agreement ("Agreement")."

[11] FSA at 10-11 ("Dispute Resolution: Step 2 – Arbitration) ("After the Parties have completed the alternative dispute resolution process set forth in Step 1 [the CAP] and any time to resolve the disputed issue through a corrective action plan has elapsed, any Party may initiate binding arbitration.").

Inc., 2003-NMCA-148, ¶ 9, 134 N.M. 630, 82 P.3d 573. The party seeking enforcement of an agreement bears the burden of establishing the existence of an enforceable contract. *See id*. "Absent evidence of bargained-for exchange between the parties, the agreement lacks consideration and is unenforceable." *Piano v. Premier Distrib. Co*., 2005-NMCA-018, ¶ 6, 137 N.M. 57, 107 P.3d 11 (internal quotation marks and citation omitted).

By its own terms, the CAP was undertaken to comply with the FSA dispute resolution procedure and "in the spirit of collaboration" to try to "ensure that children currently in state custody are able to benefit from the State's commitments as outlined in the [Final Settlement] Agreement." CAP at 1. The CAP notably sets forth only "commitments CYFD and HSD agree to take" and contains no indication that those commitments were made in exchange for any promise made by Plaintiffs other than those already made in the FSA itself. Promises made by one party that were not bargained for in exchange for a specific promise by the other party lack consideration necessary to support an enforceable contract. *See Romero v. Earl*, 1991-NMSC-042, ¶ 6, 111 N.M. 789, 810 P.2d 808 ("Consideration adequate to support a promise is essential to enforcement of the contract and must be bargained for by the parties. . . . Something is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.") (internal quotation marks and citation omitted). Simply put, Plaintiffs make no promise to Defendants in the CAP and thus Defendants received no consideration for it.

2. If Plaintiffs Intended a Strict Liability Standard to Apply to the CAP, There Was No Mutual Assent and the CAP is Unenforceable.

"In order for a promise . . . to be legally enforceable, there must be an offer, an acceptance, consideration, and mutual assent." UJI 13-801 NMRA; *see also* UJI 13-816 NMRA (mutual assent) (providing instruction to be given "when a case presents a [fact] question as to whether a misunderstanding resulted in the absence of mutual assent required for the formation of a

contract.").[12] In order for a binding contract to exist "there must be an objective manifestation of mutual assent by the parties to the material terms of the contract." *Pope v. The Gap, Inc.*, 1998-NMCA-103, ¶ 11, 125 N.M. 376, 961 P.2d 1283; UJI 13-802 NMRA ("A material term is any term without which a party would not have entered into the contract.").

> Parties mutually assent "when they have the same understanding of the contract's terms; [however] where they attach materially different meanings to the terms, there is no meeting of the minds." *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 20, 134 N.M. 630, 81 P.3d 573. "Where one party meant one thing and the other party meant another, the difference going to the essence of the supposed contract, the court will find no contract in law or equity unless the court should find that one party knew or had reason to know what the other party meant or understood." *Trujillo v. Glen Falls Ins. Co.*, 1975-NMSC-046, ¶ 10, 88 N.M. 279, 540 P.2d 209.

Chavez v. Chavez, No. A-1-CA-39426, 2023 WL 7131788, at *2 (N.M. Ct. App. Oct. 30, 2023).

The evidence at the Hearing will be that (1) the State understood and intended that the FSA's Performance Standard applied to the CAP; (2) the State understood and intended that application of the FSA's Performance Standard was material to the CAP; and (3) State would not have agreed to the CAP if the FSA's Performance Standard did not apply.

If Plaintiffs persuade the arbitrator at the Hearing that Plaintiffs did not intend for the FSA's Performance Standard to apply, and that Plaintiffs instead intended a "strict liability" standard to apply (a "silent" standard found nowhere in the CAP or FSA), then there was no meeting of the

[12] UJI 13-816 NMRA provides:

> Mutual assent requires a showing of agreement by the parties to the material terms of the contract. Mutual assent may be shown by the parties' written or spoken words, by their acts or failures to act, or some combination thereof. Ordinarily, when one party makes an offer, and the other party accepts the offer, there is mutual assent.
>
> When the parties attach materially different meanings to the words of an offer, there is no mutual assent if:
>
> 1. Neither party knows or has reason to know the meaning attached by the other; or
> 2. Each party knows or has reason to know the meaning attached by the other.

minds on that essential point, and thus no mutual assent as to a material term, and the CAP cannot be an enforceable contract under New Mexico law.

3. The CAP Must Be Construed With the FSA

Even if the CAP could be an enforceable contract, the CAP is inextricably intertwined and must be construed with the FSA. In New Mexico, "the touchstone for interpreting a written agreement is to ascertain and apply the intent of the parties." *Levenson v. Haynes*, 1997-NMCA-020, ¶ 13, 123 N.M. 106, 934 P.2d 300. "Where the terms of a written agreement are clear, intent must be ascertained from language used. But where there is an ambiguity, intent may be ascertained from the language and conduct of the parties and the surrounding circumstances." *Sunwest Bank of Roswell, N.A. v. Miller's Performance Warehouse, Inc.*, 1991-NMSC-085, ¶ 11, 112 N.M. 492, 816 P.2d 1114 (internal quotation marks and citation omitted). "An ambiguity exists in an agreement when the parties' expressions of mutual assent lack clarity." *Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶ 12, 114 N.M. 778, 845 P.2d 1232. "The question whether an agreement contains an ambiguity is a matter of law to be decided by the trial court." *Id.* "If the court determines that the contract is reasonably and fairly susceptible of different constructions, an ambiguity exists." *Id.*

Once an agreement is found to be ambiguous, "the meaning to be assigned the unclear term is a question of fact." *Id.* ¶ 13. "In order to determine the meaning of the ambiguous terms, the fact finder may consider extrinsic evidence of the language and conduct of the parties and the circumstances surrounding the agreement, as well as oral evidence of the parties' intent." *Id.* When parties to an agreement attach different meanings to the same terms, New Mexico courts "apply the test from the Restatement (Second) of Contracts § 201 (1981) (Restatement) to determine their meaning." *Chisos Ltd. v. JKM Energy, L.L.C.*, 2011-NMCA-026, ¶ 16, 150 N.M. 315, 258 P.3d 1107. That test provides:

> (1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
>
> (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
>
> > (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
> >
> > (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.
>
> (3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be failure of mutual assent.

Restatement (Second) of Contracts § 201 (1981).

Importantly, "where the meaning of a material contract term is in dispute a party seeking affirmative relief based upon its interpretation necessarily bears the burden of establishing that its interpretation controls." *Farmington Police Officers Ass'n Commc'n Workers of Am. Local 7911 v. City of Farmington*, 2006-NMCA-077, ¶ 16, 139 N.M. 750, 137 P.3d 1204 (emphasis added). In other words, Plaintiffs bear the burden of proving that the Parties intended a strict liability standard to apply to the CAP.

To meet their burden of proving that the Arbitrator should interpret the CAP such that the FSA's Performance Standard does not apply, Plaintiffs must demonstrate one of two things:

> (a) That Plaintiffs did not know that the State believed that the FSA's "good-faith effort" standard governed their performance under the CAP, and that the State knew that Plaintiffs intended that the CAP would be independently enforceable under a "strict liability" standard; or
>
> (b) That Plaintiffs had no reason to know of the different performance standard ("good-faith effort" from the FSA) attached by the State, and that the State had reason to know the "strict liability" standard attached by Plaintiffs.

See Restatement (Second) of Contracts, § 201(2).

"In determining the intent of the parties[, the arbitrator] must consider the entire contract and not just selected portions." *Medina v. Sunstate Realty, Inc.*, 1995-NMSC-002, ¶ 8, 119 N.M. 136, 889 P.2d 171. *Shah v. Devasthali*, 2016-NMCA-053, ¶ 10, 371 P.3d 1080 ("The contract will be considered and construed as a whole, with meaning and significance given to each party in its proper context, so as to ascertain the parties' intentions.").

Documents executed by the same parties that refer to each other are properly construed together. *See Bd. of Educ., Gadsden Indep. Sch. Dist. No. 16 v. James Hamilton Const. Co.*, 1994-NMCA-168, ¶ 13, 119 N.M. 415, 891 P.2d 556 (explaining that "when two . . . documents refer to each other, they are properly construed together"). The CAP repeatedly refers to the FSA's Performance Standard, including acknowledging at the outset that "[n]othing in this CAP shall be construed to modify the obligations in the Agreement [FSA], including but not limited to . . . meeting the Performance Standard as set forth in the Agreement [FSA]." CAP at 1 (emphasis added). The CAP separately references the FSA's Performance Standard for each "target" set forth in the CAP, "targets" that unsurprisingly mirror the structure and language of the FSA:[13]

1. **CYFD Workforce Caseload**: "CYFD is obligated to meet the agreed upon Performance Standard as to this target as set forth in the Agreement." CAP at 2 (emphasis added).

2. **Building out family-based placements**: "CYFD and HSD are obligated to meet the agreed upon Performance Standard as to this target as set forth in the Agreement." CAP at 3 (emphasis added).

3. **Bringing children placed out of state back to New Mexico**: "CYFD and HSD are obligated to meet the agreed upon Performance Standard as to this target as set forth in the Agreement." CAP at 5 (emphasis added).

[13] In their Notice of Arbitration, Plaintiffs identified the following "Disputes for Arbitration": (A) CYFD Workforce Caseloads; (B) Resource Family Recruitment (i.e. Building out family-based placements); and (C) Well Child Visits (Appendix D).

4. **Critical Incident Review (CIR)**: "CYFD and HSD are obligated to meet the agreed upon Performance Standard as to this target as set forth in the Agreement." CAP at 7 (emphasis added).

5. **Data Needed to Monitor Progress | Real Time Data**: "CYFD and HSD are obligated to meet the agreed upon Performance Standard as to this target as set forth in the Agreement." CAP at 8 (emphasis added).

6. **Pilots For Coordinated Action Within Local Communities**: "CYFD and HSD are obligated to meet the agreed upon Performance Standard as to this target as set forth in the Agreement." CAP at 9 (emphasis added). "CYFD and HSD shall, in accordance with the Performance Standard in the Agreement will [sic] make all reasonable efforts to implement recommendations that will improve outcomes for children as contemplated in the Agreement." CAP at 15 (emphasis added).

7. **Appendix C:** "CYFD and HSD are obligated to meet the agreed upon Performance Standard as to this target as set forth in the Agreement." CAP at 15 (emphasis added).

8. **Appendix D**: "CYFD and HSD are obligated to meet the agreed upon Performance Standard as to this target as set forth in the Agreement." CAP at 21 (emphasis added).

Construed together, the language of both the FSA and CAP make clear that: (1) the CAP is not a settlement agreement separate and independent from the FSA;[14] (2) the CAP is part of an alternative dispute resolution remedy agreed to in, and subject to, the FSA; (3) the State never agreed or intended that a standard other than the FSA's Performance Standard would apply to the CAP.

D. Treatment of the Co-Neutrals Corrective Action Plan (CAP) Implementation Memo

The FSA authorizes the Co-Neutrals to issue "Annual Reports" "on Defendants' progress towards the Implementation Targets and Target Outcomes."[15] "The period of assessment for each annual report shall be the previous calendar year." *Id.* The "Co-Neutrals' [annual] reports will assess Defendants' progress with respect to each Implementation Target and Target Outcome and

[14] Plaintiffs' Opening Brief acknowledges that "Breaches of the CAP are related to the FSA because the Parties have agreed that the CAP is remedial" and "the CAP must be fully implemented for the State to be able to comply with the FSA." *Id.* at 30.
[15] FSA at 7, VI (Process); Section C. (Implementation); subsection 4 (Annual Reports).

will evaluate whether Defendants have met the Performance Standard with respect to any Implementation Target and Target Outcome for which the deadline is due or has passed." *Id.* (emphasis added).[16]

Nowhere does the FSA or CAP authorize the Co-Neutrals to issue additional interim reports like the "Co-Neutrals' Corrective Action Plan (CAP) Implementation Memorandum" dated February 23, 2024 (the "CAP Memo").[17] The CAP provides only that, "[a]s determined appropriate by the Co-Neutrals, the CAP commitments may be referenced in the Co-Neutrals' Annual Report," which assesses whether the State has met the Performance Standard. CAP at 1. Indeed, the CAP Memo itself acknowledges that it is based on "preliminary analyses" and that "[t]he Co-Neutrals do not make any judgments regarding FSA Performance Standard achievement within this memorandum; those judgments are reserved for the Co-Neutrals' Annual Report, which is due on November 15, 2024."

Moreover, the Co-Neutrals acknowledge that "the data analysis included in this memorandum is based upon preliminary data submissions by the State" and that "most data have not yet been validated by the Co-Neutrals." Acknowledging that their CAP Memo is not an official, validated annual report authorized under the FSA (or the CAP), the Co-Neutrals soften its applicability to "discussions" between the parties: "The Co-Neutrals have prepared this memorandum to ensure that certain relevant and current information is available to the Parties to inform their ongoing discussions about progress in Kevin S." Plaintiffs' reliance on the CAP Memo to invoke this arbitration is misplaced.

[16] While the FSA authorizes the Co-Neutrals to monitor and assess in their annual reports whether the State has met the Performance Standard as to certain targets, the FSA provides only that any deficiency identified in those annual reports results in reassessment the following year. FSA at 8 (Monitoring). "If the Co-Neutrals find that the Defendants have not met the Performance Standard for a specific Implementation Target, the Implementation Target shall be reassessed every year thereafter until the Performance Standard is met."

[17] The CAP Memo is attached as Exhibit E to Plaintiffs' Amended Notice of Arbitration (served July 15, 2024).

The FSA's "Dispute Resolution" procedures limit the role of the Co-Neutrals in arbitration and make clear that the Co-Neutral annual reports may only be submitted "as evidence" at arbitration: "The Co-Neutrals shall not be called as witnesses in the arbitration but their reports may be submitted as evidence." FSA at 11. The CAP Memo is not a "report" authorized by the FSA (or the CAP). The Co-Neutrals themselves acknowledge that the CAP Memo is "preliminary," not "validated," and that "judgments regarding the FSA Performance Standard" are instead reserved for the Co-Neutrals next annual report. Plaintiffs' demand for this arbitration in reliance on the CAP Memo is premature. If the arbitrator accepts the CAP Memo as evidence, the arbitrator should give it less weight than it would an annual report.

E. The State's March 12 Letter Does Not Admit Any Breach

Plaintiffs' Opening Briefly repeatedly cites but purposely misstates a letter from the State responding to the Co-Neutrals' CAP Memo.[18] Plaintiffs argue that the letter is an "unqualified" admission that the State has breached the CAP,[19] but that is false and mischaracterizes the substance of the letter.

While the State acknowledged and agreed with certain parts of the CAP Memo, the State went on to detail at length various reasonable, good faith efforts to improve and make progress on agreed Target Outcomes in the FSA, including with respect workforce caseloads (FSA BTO10), foster family recruitment (FSA BTO6), well-child visits (FSA DTO4), and data submissions. In other words, the State's letter responding to the CAP Memo is not an admission of any breach of

[18] The State's 3/12 Letter is attached as Exhibit G to Plaintiffs' Notice of Arbitration.
[19] *See, e.g.,* Pls. Opening Br. at 10 ("On March 12, 2024, the State responded and admitted to its breaches of the CAP with little or no qualification."); *id.* at 20 ("The State is in breach of its resource family recruitment commitments, and it admitted this is the case in its March 12, 2024 letter."); id. at 23 ("In the State's March 12, 2024 letter, it admitted the Co-Neutrals' conclusions regarding well-child visits were accurate.").

any contract, but rather extrinsic evidence of the State's understanding and intent that the FSA's Performance Standard applied to the CAP.

Plaintiffs rely entirely on their strict liability theory to claim that the letter is an admission. The State denies that it ever agreed or intended that a strict liability standard would apply to the CAP, and otherwise denies that the letter is an admission of any breach of any contract.

DISCUSSION

A. Workforce Caseloads

The State will demonstrate at the Hearing that is has made good faith efforts to recruit and retain caseworkers in order to reduce workforce caseloads. As discussed above, both the State and the country face many challenges in recruiting and retaining child welfare caseworkers – most causes for which are entirely outside of the control of child welfare agencies. The Co-Neutrals' CAP Memo acknowledged these challenges with respect to the State's Treatment Foster Care ("TFC") agencies' struggle to maintain sufficient capacity.[20]

To try to improve recruitment and retention of caseworkers, the parties agreed in the FSA at Appendix B, Target Outcome 10, that CYFD would "create a CYFD Workforce Development Plan" (the "WDP"). CYFD worked diligently during the COVID pandemic toward meeting the extended deadline for the WDP (May 30, 2021, under the Parties' Extension Agreement, not December 1, 2020, as the Plaintiffs claim in their Opening Brief). The State's WDP plan was ultimately approved by Co-Neutrals on July 13, 2023, thirteen days after the CAP was signed, and long before Plaintiffs commenced this arbitration. In short, CYFD met its commitment to work with the Co-Neutrals to develop a plan to recruit and retain caseworkers, and will present evidence and testimony at the Hearing that CYFD has made good faith efforts to implement that plan.

[20] CAP Memo at 12.

CYFD has worked for several years to develop its data to better inform workforce decisions including efforts to improve its data around caseloads. Plaintiffs' Opening Brief notably ignores that the Co-Neutrals have not yet calculated caseloads in any report, nor have they offered validated metrics under the Data Validation Plan pursuant to the FSA regarding caseloads. Thus, the foundational work the State has undertaken to develop a system of reporting reliable data from complex, varied and large data sets (outside of FACTS which is incapable of producing these metrics) is ignored and uncredited by Plaintiffs.

Plaintiffs' Opening Brief also notably omits the Co-Neutral's confirmation of significant State progress in addressing data quality on caseloads in the six (6) months following approval of the WDP and CAP, a task foundational to both the WDP and caseload standards.[21] The CAP states that "CYFD will work closely and cooperatively with the Co-Neutrals to ensure progress towards meeting the caseload standards" which it did as evidenced by the Co-Neutrals' statement regarding improved data.[22]

Moreover, CYFD provided the Co-Neutrals data under the CAP regarding caseloads, and the Co-Neutrals then provided that data to the Parties as "relevant and current information […] to inform their ongoing discussions" – not as a finding or assessment under the Performance Standard or any other purported standard (e.g., "strict liability").[23] In fact, the Co-Neutrals' explicitly stated in the CAP Memo that they reserve judgment, validation and assessments for their Annual Report.[24] Finally, Plaintiffs cite CYFD's data provided to the Co-Neutrals under both the FSA and CAP in their Opening Brief, they also attempt to portray the State as failing to collect and report

[21] CAP Memo at 6.
[22] CAP at 2.
[23] CAP Memo at 1.
[24] *Id.* at 1.

data under the FSA and CAP (no commitment to real-time data as described by Plaintiffs exists in the FSA which has specific language regarding data).[25]

CYFD continues to provide monthly data to both the Co-Neutrals and Plaintiffs regarding staffing pursuant to the MOU. While the Co-Neutrals' were silent on voluntary turnover rates in their CY2022 Annual Report due to concerns over "staffing data in FACTS" (which is not prominent in calculating voluntary staff turnover rates for which SHARE is used), the Co-Neutrals' CY 2021 Annual Report documents years of low turnover rates for PSD workers: 2019 = 0.10; 2020 = 0.09; 2021 = 0.12) further demonstrating CYFD's efforts to retain staff.[26]

B. Resource Family Recruitment

The State will demonstrate at the Hearing that is has made good faith efforts to recruit and retain resource families. Plaintiffs cite Appendix B Implementation Target 1.1, B Target Outcome 1.1 and B Target Outcome 7.1 as significant to the commitments of FSA and CYFD's efforts.

The deadline for Appendix B Implementation Target 1.1, the State's foster home recruitment and retention plan, was originally December 1, 2020, and then extended under the Parties' Extension Agreement to June 1, 2021. The Co-Neutrals assessed that the State met the Performance Standard in 2021 and therefore, it is "no longer subject to monitoring, [and] it is severable from the rest of the Agreement".[27] CYFD and HCA continue to work diligently toward placing children in least restrictive and appropriate placements.

Appendix B Target Outcome 1.1, the prohibition of certain placements unless in extraordinary circumstances, has not yet met the Co-Neutral's Performance Standard. However, in their CY 2022 Annual Report, the Co-Neutrals document the percentage of children

[25] Plaintiffs' Opening Brief at 27.
[26] Co-Neutrals' 2021 Annual Report at 68.
[27] FSA at 10.

experiencing placement in a setting applicable to this deliverable has been between 2% to 4% of the annual cohort of Children in State Custody ("CISC") for several years; between 96% and 98% percent of CISC between 2019 and 2022 have not experienced placement to an out-of-state facility, office or hotel/motel. In other words, between 2019 and 2022, 102 CISC or fewer children experienced a placement out-of-state, in an office, or at a hotel/motel out of as many as 3,881 total CISC.[28] Significantly, as validated by the Co-Neutrals, placement to out-of-state facilities decreased from 57 CISC in 2019 to 14 CISC in 2022.[29]

Appendix B Target Outcome 7.1, children placed with kin, has been a strong point for CYFD. The FSA requires that "[**b]y December 1, 2022**" CYFD place "**at least 40%** of **children in out-of-home care […] with kin**" (emphasis added).[30] The Co-Neutrals found that CYFD met the Performance Standard for CY2022 and while they did not previously offer a Performance Standard Assessment, their 2023 Annual Report documents a period of at least 24 continuous months (the term which a Target Outcome must meet a Performance Standard) of over 40% of children in state custody in out-of-home care placed with relatives or fictive kin which has "steadily increased each year since 2019".[31]

Plaintiffs assert that "[b]etween 2020 and 2022, the State failed to make any progress on developing family-based placement for children in State custody" and emphasize the State's struggle to approve new culturally reflective non-relative foster homes.[32] They also argue the aforementioned Settlement Agreement commitments (Appendix B Implementation Target 1.1, Target Outcome 1.1 and Target Outcome 7.1) demonstrate the centrality of foster home placements

[28] Co-Neutrals' 2022 Annual Report at 54.
[29] *Id* at 54.
[30] FSA at 7a.
[31] Co-Neutrals' 2022 Annual Report at 90-91.
[32] Plaintiffs' Opening Brief at 19.

in the FSA. Thus, while the Co-Neutral's have reported and validated the State's efforts to "provide children in custody with a safe, appropriate place to live […] in the **most family like setting** consistent with each child's needs", Plaintiffs fail to acknowledge this aspect of work Plaintiffs themselves emphasize as central to foster care placements: efforts to place CISC with kin and reduce congregate care and office placements (emphasis added).[33]

Plaintiffs also fail to credit the State with addressing the foundational work which CYFD has undertaken to improve resource home recruitment on a long-term basis. CYFD quickly contracted Jonathan Salazar after signing the CAP and tasked him with improving CYFD's efforts to recruit foster parents. Its reorganized structure led to the development of specialized teams focused on resource home recruitment and retention. CYFD made changes to its policy and procedure to provide an easier path to license respite resource homes and is developing Foster Care Plus families.

Finally, while not an issue raised in Plaintiffs' Notice of Arbitration, Plaintiffs' indirectly criticize the State's TFC placements. While Plaintiffs credit the State for providing data on 31 children referred for new or reauthorized TFC services, Plaintiffs fail to identify a key element of the CAP agreement: TFC services, as shown in the data provided to Co-Neutrals and then Plaintiffs, are not being denied by MCOs. Rather, as identified by the Co-Neutrals, "[a]gencies denied 84 percent of these referrals [to TFC]" and "74% of denied referrals" were due to "the lack of an appropriate treatment match".[34] To be clear, TFC agencies (not CYFD or HCA) recruit TFC homes. Moreover, TFC homes are not obligated to accept CISC, nor is placement simply a matter of choice between the family and child or youth. As the Co-Neutrals correctly identify, TFC

[33] Plaintiffs' Opening Brief at 17-18.
[34] CAP Memo at 11.

placements require clinical matches: "[p]lacements in TFC are based on whether the service is clinically appropriate for the child and if there is a therapeutic match".[35]

CYFD and HCA provided evidence during the term of the CAP – which the Co-Neutrals repeated in their CAP Memo – that an average of 7 referrals for a child were sent to TFC agencies.[36] All parties agree that there is a need for more TFC homes in New Mexico, but, in their rush to blame the State, Plaintiffs fail to account for the particularly high rate with which agencies are denying CISC referrals.

C. Well-Child Visits

The State will demonstrate at the Hearing that is has made good faith efforts to provide children in state custody with well-child visits as quickly as is reasonably possible.

1. New Mexico Suffers from Severe Shortage of Healthcare Providers Including in Primary Care, Family Practice, and Pediatrics

New Mexico is a medically underserved state that suffers from a chronic and accelerating shortage of health care professionals, particularly in primary care and pediatrics. The Health Resources and Services Administration (HRSA)[37] has designated most of New Mexico to be Medically Underserved Areas/Populations and Health Professional Shortage Areas.[38] Medically Underserved Areas/Populations are areas or populations designated by HRSA as having too few primary care providers, high infant mortality, high poverty, or a high elderly population.[39] Health Professional Shortage Areas identify geographic areas, populations groups, or facilities within the

[35] *Id* at 12.
[36] *Id* at 11.
[37] Health Resources and Services Administration (HRSA) is an agency of the U.S. Department of Health and Human Services tasked with improving access to health care services for people who are uninsured, isolated or medically vulnerable. (https://www.hrsa.gov).
[38] Health Resources & Services Administration, *MUA Find*, https://data.hrsa.gov/tools/shortage-area/mua-find; HPSA Find, https://data.hrsa.gov/tools/shortage-area/hpsa-find.
[39] Health Resources & Services Administration, *Medically Underserved Areas and Populations (MUA/Ps)*, https://bhw.hrsa.gov/shortage-designation/muap.

United States that are experiencing a shortage of health care professionals. HRSA has designated most of New Mexico to be (a) Medically Underserved Areas and Medically Underserved Populations; and (b) Health Professional Shortage Areas.

For many reasons, New Mexico has historically struggled to recruit and retain a sufficient number of doctors to treat its citizens. One reason is that health care for many New Mexicans is funded by public payers (e.g. Medicaid) and public payers have historically paid less than private insurance. As a result, Doctors who practice in New Mexico are often paid less than their peers in surrounding states. Simply put, a doctor can often find a better-paying job practicing medicine outside of New Mexico. Primary care physicians and pediatricians are amongst the lowest paid physicians in New Mexico and are particularly difficult to recruit and keep in New Mexico.

To address New Mexico's longstanding and worsening physician shortage, the New Mexico Legislature created the New Mexico Health Care Workforce Committee (the "NMHCW Committee"), a group of stakeholders that includes representatives of state agencies, the New Mexico Legislature, health professional licensing boards, health professional associations, health care workforce training institutions, large health insurers and health systems and other key organizations. The NMHCW Committee develops recommendations to the Legislature to improve the training, recruitment and retention of health professionals in the state, and to increase access to providers in the state's rural and underserved areas.

In 2024, that Committee observed that "the nation will face dramatic shortages in the health care workforce in coming years. Two estimates forecast a national primary care physician shortage of more than 37,500 by 2034." *Id.* at 1. "In New Mexico, these national concerns are compounded

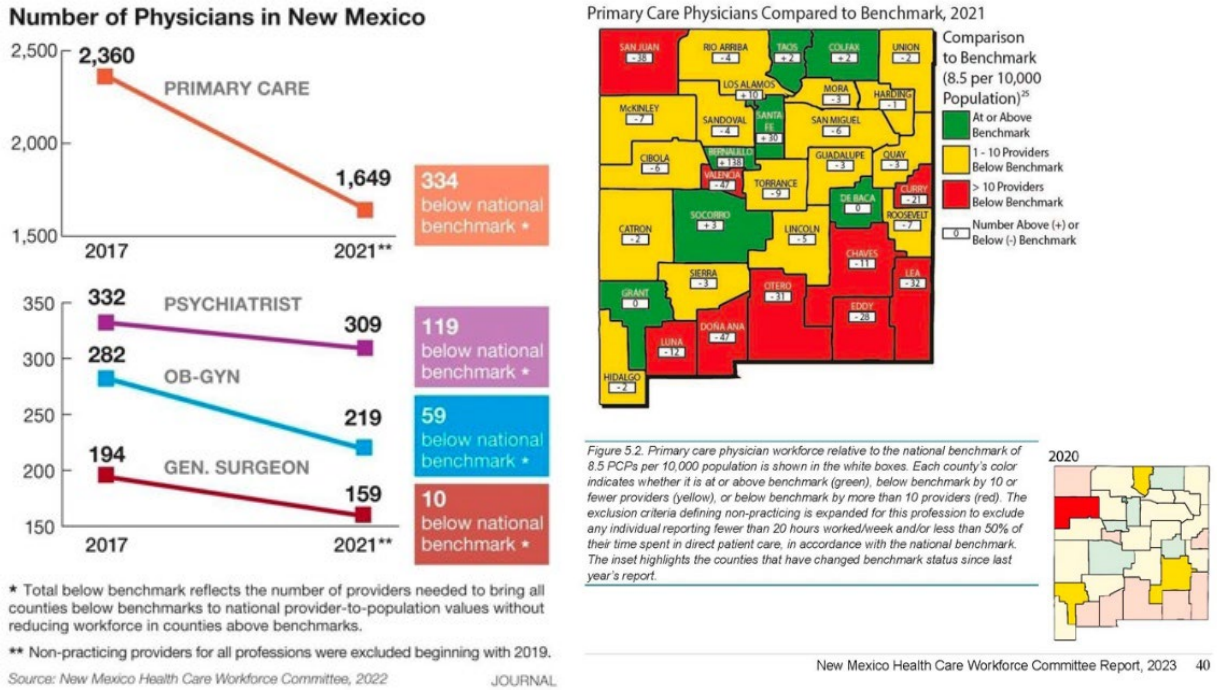
by the unique needs of a large, frontier minority-majority state." *Id.*[40] "New Mexico furthermore faces substantial health disparities related to income inequality and other social determinants of health." *Id.*

For over a decade, that Committee has documented the steep decline in primary care providers available to treat all New Mexicans. For example, in 2021, New Mexico had 1,649 primary care physicians – 700 fewer than the state had in 2017 – which is 334 primary care physicians *below* national provider-to-population benchmarks. "Overall, in New Mexico there is an average of 5.04 primary care physicians per 10,000 population, meaning for each primary care physician, there are about 2,000 people to serve." 2024 Report at 27. Any New Mexican who has sought to establish a relationship with a new primary care provider well knows that, if that physician is accepting new patients at all, it can often take months to get an initial appointment.

Table 1.3. Summary of Health Care Professionals with New Mexico Licenses Practicing in the State 2021
A. Physicians

Profession Metric	2013	[b]	2016[c]	2017	2018	2019[d]	2020	2021	Net Change Since 2013
PCPs									
# in New Mexico	1,957		2,076	2,360	2,162	1,581	1,607	1,649	-308
Total Below Benchmark[a]	153		139	126	136	336	328	334	181
Counties Below Benchmark	23		22	16	18	26	27	25	2

[40] "The state's median county is 3,758 square miles – one and one-half times the size of Delaware and requiring more than 45 minutes to traverse by car at highway speeds.13 The median county population density is 7.04 people per square mile, just above the 6 people per square mile criterion for frontier status. Thirty-one percent of the state's 2.1 million residents reside in rural or frontier counties."



Importantly, nearly half of New Mexico's population, and virtually all children in State custody, receive medical care through Medicaid. Medicaid is a joint federal and state program that provides health coverage for low-income families and children. Due to budget limitations, Medicaid has historically paid health care providers significantly lower rates to provide healthcare services than other payers (e.g. private insurance or Medicare), which has further limited an already depleted network available to treat children in State custody. As the Legislative Finance Committee recently noted: "Medicaid clients face challenges accessing timely care" because "insufficient numbers of providers cause Medicaid clients to experience challenges accessing care when they need it . . . ."[41]

Plaintiffs' argument that the State is contractually obligated to ensure that 100% of children in State custody receive a well-child check within thirty days is (1) contrary to the Parties'

[41] *See* Medicaid 2024 Accountability Report, Legislative Finance Committee (https://www.nmlegis.gov/entity/lfc/Documents/Program_Evaluation_Reports/Medicaid%20Accountability%20Report.pdf).

agreement that the State would make good efforts to progress toward that goal; and (2) wholly unrealistic or even impossible in light of the indisputable challenges facing New Mexico's depleted healthcare system.

2. Requests for "Real-Time" Data Not Reasonable

Historically, data for well-child checks has been validated by the Co-Neutrals annually in their Annual Report in accordance with the Data Validation Plan based on either a service date from Medicaid or EPSDT flag in FACTS. This frequency was established in part due to the lag in provider billing and processing claims that necessarily impacts the data provided to the Co-Neutrals as a service date. For example, a provider has 90 days within which to bill for a well-child checkup and an additional 30 days is provided for administrative review and processing totaling a potential for 120-day lag between the date a well-child service occurs and the date it is registered in a State system.

While CYFD and HCA have collected and made available well-child provider notes in a good faith effort to comply with the CAP, the reality is that collecting medical records from health providers, resource homes and others has proved challenging and created enormous burdens on the State staff. In practice, the process was particularly burdensome on CYFD staff as a new process and an administratively intensive process. Nevertheless, CYFD assigned administrative support to better track well-child checks and increased efforts to support PSD staff through micro-learnings.

The State did provide all provider notes in its possession on the dates identified in the CAP and informed the Co-Neutrals that provider notes not provided were not in the State's possession. The State also did provide Medicaid service dates to the Co-Neutrals under the CAP and while the Co-Neutrals reserved their assessment of the same for their 2024 Annual Report, the information was provided. Thus, while Plaintiffs emphasize missing documentation, the process of providing

well-child provider notes is labor intensive and is not the only source of data that should be considered when assessing the State's efforts to have CISC seen within 30 days of coming into care and or as promptly after 30 days as possible.

D. Data Submissions

The State will demonstrate at the Hearing that is has made good faith efforts to provide timely data to the Co-Neutrals. To be clear, the FSA does not require that the State provide "real-time" data to the Co-Neutrals. Instead, the State has attempted to cooperate with the Co-Neutrals' informal requests for updates, data, files, records and other information, including providing remote access to CYFD's antiquated FACTS system on top of and in addition to providing an annual data submission to the Co-Neutrals in accordance with the FSA. Under the MOU and the CAP, the State has significantly increased its reporting to both the Plaintiffs and Co-Neutrals. But that effort has created significant burdens on the State, and resulted in loss of staff frustrated with what they view as endless requests for evermore data from systems never designed to provide it, all detracting from frontline work to serve children and families in need.

Moreover, many of the data issues raised by Plaintiffs were resolved well before Plaintiffs initiated this arbitration. For example, while the State did not produce the number of TFC homes (and not placements as is required in the FSA) until February and April 2024, it did in fact provide the information. Moreover, while the State did not produce 100% of the provider notes for children in State custody longer than 30 days, it did provide all relevant notes in its possession timely and on the dates due under the CAP.

The State will present evidence and testimony to demonstrate its good faith efforts to produce reasonable and timely data, as well as evidence of the adverse impact that ever-increasing and always-expanding requests for data have had on State operations.

PLAINTIFFS IDENTIFY NO ACTUAL REMEDY

Plaintiffs devote much of their Opening Brief to requesting that "the Arbitrator order specific performance of the State's CAP Commitments,"[42] but fail to identify a single action that the arbitrator could order the State to perform. Plaintiffs also suggest that the arbitrator consider a "mandatory injunction," but identify no act that could be mandated or enjoined.

The State denies it has breached any contract. But even if the Arbitrator finds that the State has not met the Performance Standard, Plaintiffs offer no path forward. The challenges facing the State are societal, economic and systemic problems. Neither the State nor the arbitrator can conjure new caseworkers, physicians, or treatment foster families. Nor can the arbitrator order the State to ignore a reported case of child maltreatment because it increases the caseload for a caseworker or supervisor beyond a certain benchmark. Nor can the arbitrator order the State to force a child who is at least 14 years to receive medical treatment if they choose otherwise. N.M.S.A. § 24-7A-6.2(A) (providing that "[a]n unemancipated minor fourteen years of age or older" has the right to make their own medical decisions). Nor can the arbitrator order the State to provide "real-time" access to children's medical records or claims information when providers have 90 days to submit claims for payment. Nor can the arbitrator order the State to force foster parents or physicians to provide the State with a child's medical records. Nor can the arbitrator enter an order that modernizes the State's antiquated information system. Nor can the arbitrator order that the New Mexico Legislature appropriate additional funds.

[42] Plaintiffs acknowledge that "monetary damages awarded in this case would be inadequate. Funds provided to individual Plaintiffs would not be adequate to provide children in State custody with lasting safety, trauma informed care, and safeguarded rights. This is the case because Plaintiffs lack the authority and infrastructure to assume care of children in State custody." Pls. Opening Br. at 29-30

Because Plaintiffs have offered no example of any specific act that could be performed, mandated or enjoined, Plaintiffs have no fair opportunity to respond or challenge any proposed remedy.

Plaintiffs notably close their Opening Brief by raising the possibility of seeking a future "receivership" of New Mexico's child welfare system. Rather than offer particularized examples of specific performance, Plaintiffs ask the arbitrator to broadly order "full implementation of the CAP" now because such an "order will allow for alternate forms of equitable relief to be used . . . in the future." An arbitrator's order placing a state's child welfare system in receivership would be an extreme and unprecedented remedy, and Plaintiffs' attempt to use this arbitration to set the foundation for some future petition for receivership is not realistic or productive.

The only cognizable remedy Plaintiffs identify is a claim for attorney's fees.

NO ADMISSIONS OR WAIVER

This Response Brief is intended to frame the factual and legal issues for the Hearing and is not intended to substantively respond to each and every factual and legal argument asserted by Plaintiffs in their 35-page Opening Brief. To the extent that this Response Brief does not address an argument or factual claim in Plaintiff's Opening Brief, the State denies the same and reserves its right to present evidence and testimony at the Hearing, including to rebut any evidence offered by Plaintiffs in support of Plaintiffs' breach of contract claim.

CONCLUSION

For all of these reasons, the State requests that the arbitrator enter an award finding that Plaintiffs have not met their burden to establish a breach of a contract.

Respectfully Submitted on: July 29, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July 2024, I served foregoing by electronic mail on the arbitrator all counsel of record.

JACKSON LOMAN STANFORD DOWNEY & STEVENS-BLOCK, P.C.

By: /s/Travis G. Jackson/s/
Travis G. Jackson