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 Interim Cabinet Secretary for the Children, Youth and Families Department, and KARI ARMIJO, in her official capacity as Acting 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

MOTION FOR CLARIFICATION THAT THE CORRECTIVE ACTION PLAN IS AN ENFORCEABLE CONTRACT WITHOUT AN ALTERED PERFORMANCE STANDARD, OR, ALTERNATIVELY, CLARIFICATION OF THE FSA PERFORMANCE STANDARD

Plaintiffs move the Arbitrator to clarify that the Corrective Action Plan ("CAP"), the agreement subject to this arbitration, should be enforced as any other contract, and that the Performance Standard agreed to in the Final Settlement Agreement ("FSA") does not apply. Alternatively, Plaintiffs move the Arbitrator to clarify the FSA Performance Standard.

BACKGROUND

This matter concerns Defendants' breach of the third settlement agreement between the Parties – the CAP. The CAP is a partial settlement agreement executed as a remedial measure to address Defendants' failure to perform specific promises under the FSA. Plaintiffs initiated arbitration to seek specific performance of the CAP and to hold Defendants to their contractual promises made for the benefit of children in State custody. Arbitration is "a contractual remedy for the settlement of disputes by extrajudicial means." *Christmas v. Cimarron Realty Co*., 1982-NMSC-079, ¶ 7, 98 N.M 330 (citing *King Cnty. v. Boeing Co*., 18 Wash. App. 595, 602 (1977).)

On September 22, 2018, Plaintiffs, consisting of thirteen foster children and two non-profit organizations, filed a class action lawsuit claiming violations of: (i) Section 504 of the Rehabilitation Act; (ii) the Americans with Disabilities Act (42 U.S. C. §12101 *et seq.*); (iii) the Fourteenth Amendment to the United States Constitution; (iv) the Medicaid Act's Early and Periodic Screening Diagnostic and Treatment Services and Reasonable Promptness Provisions (42 U.S.C. § 1396 *et seq*.); and (v) the Indian Child Welfare Act (25 U.S.C. §§ 1915(a), (b)). Since that time and over the past several years, the Parties have executed multiple settlement agreements to attempt to resolve this dispute, one of which is at issue in this arbitration.

After extended mediation, the Parties negotiated and executed the FSA in February 2020. *See* Exhibit A attached to Plaintiffs' Notice of Arbitration, dated May 20, 2024. The FSA set forth a detailed and evidence-based plan for Defendants to build out an integrated, trauma-responsive system of care that ensures safe, appropriate placements and provides appropriate and consistent medical and mental health care for all children in State custody. Defendants committed to complying with statutory requirements and improving New Mexico's child welfare system through a series of performance objectives to be met in 2020, 2021, and 2022. To monitor Defendants' performance, the Parties authorized two, mutually agreed upon experts (the "Co-

Neutrals") to evaluate and audit Defendants' compliance with the FSA. The FSA also defined a Performance Standard that would be used by the Co-Neutrals in their evaluation of Defendants.

In November 2021, the Co-Neutrals completed their Annual Report for 2020, which found, using the FSA Performance Standard, that Defendants had not met the Implementation Targets and the Target Outcomes that Defendants contractually agreed to in exchange for Plaintiffs dismissing their lawsuit. Co-Neutrals' Baseline and 2020 Annual Report (November 15, 2021), https://cssp.org/resource/kevin-s-et-al-v-blalock-and-scrase-co-neutrals-baseline-and-2020-annual-report-november-15-2021/. In December 2021, given the urgency of the issues at stake, Plaintiffs elected to initiate mediation as agreed to in the FSA to address Defendants' breaches of the FSA. As a result of mediation, the Parties entered into a second settlement agreement, the Memorandum of Understanding ("MOU") in June of 2022, which focused on limited, initial remedial commitments that the State would meet to make progress towards compliance with the FSA. On November 15, 2022, the Co-Neutrals issued their Annual Report for 2021, which again found that the State failed to meet their obligations under the FSA. Co-Neutrals' Baseline and 2021 Annual Report (November 15, 2022), https://cssp.org/resource/kevin-s-et-al-v-blalock-and-scrase-co-neutrals-baseline-and-2021-annual-report-november-15-2022/ [hereinafter Co-Neutrals' 2021 Annual Report].

Based on the State's continued breach and resultant harm to children in State custody, on January 6, 2023, Plaintiffs again initiated extensive mediation discussions. As a result, the Parties executed a third settlement agreement, the CAP, on June 30, 2023 to attempt to remediate a limited set of breaches of the FSA and MOU by Defendants. *See* the CAP attached as Exhibit B to Plaintiffs' Notice of Arbitration. As stated in their Notice of Arbitration, Plaintiffs initiated this arbitration to address Defendants' breaches of the CAP, seeking specific performance of

Defendants' contractual obligations therein. Rather than attempting to address every breach by Defendants of the FSA, the MOU and the CAP, Plaintiffs have raised only breaches of the CAP because Defendants agreed to, and must, satisfy their CAP commitments before they will be able to come into compliance with the broader requirements of the FSA.[1]

Defendants have previously argued that the Performance Standard contained in the FSA applies to the CAP and that the Performance Standard only requires the Defendants to make good faith efforts, regardless of the outcomes of their efforts. Plaintiffs disagree and bring this motion to clarify that the Performance Standard only applies to the FSA, not the CAP, but if it did apply, it requires that Defendants not just *try* in good faith, but that they *take all reasonable efforts* to achieve each CAP commitment, as determined by the Co-Neutrals.

LEGAL ARGUMENT

I. Settlement Agreements Are Enforceable Contracts.

"Public policy encourages settlement agreements, and the courts have a duty to enforce them." *Env't Control, Inc. v. City of Santa Fe*, 2002-NMCA-003, ¶ 19, 131 N.M. 450 (citing *Bd. of Educ. for the Carlsbad Mun. Sch. v. Dep't of Pub. Educ.*, 1999-NMCA-156, ¶ 14, 128 N.M. 398); *see also Montano v. NM Real Est. Appraiser's Bd.*, 2009-NMCA-009, ¶ 12, 145 N.M. 494 (citing *Env't Control, Inc.*, 2002-NMCA-003, ¶ 19, and *Bd. of Educ. for the Carlsbad Mun. Sch.*, 1999-NMCA-156, ¶ 14) ("It is well-settled law that New Mexico courts generally enforce settlement agreements.") A settlement agreement cannot be set aside merely because subsequent events prove the settlement to have been unwise or unfortunate for a party. *Id*. (citing *In re Tocci*,

[1] The Parties agreed that purpose of the CAP was to partially resolve areas of dispute arising out of the State's failures to meet Implementation Targets and Target Outcomes as identified in the Co-Neutrals' 2021 Annual Report and it resolved only those issues specifically identified in the CAP. *See* CAP at 1-2; *see also* CAP, Ex. A. The Plaintiffs' Notice of Arbitration seeks to enforce promises made in the CAP; Plaintiffs do not waive their rights to secure any and all other relief and remedies that may be available to them as provided by the FSA.

1941-NMSC-015, ¶ 28, 45 N.M. 133). . Instead of setting aside unwise settlement agreements, New Mexico courts have consistently held that "in negotiating a settlement contract, the parties are bound by its provisions and must accept both the burdens and benefits of the contract." *Id* (citing *Cortez v. Cortez*, 2007-NMCA-154, ¶ 14, 143 N.M. 66). The FSA, the MOU, and the CAP include relevant processes and outcomes that Defendants agreed are realistic and necessary and have been successfully implemented and achieved by other states, often as a result of litigation.[2] Regardless, the CAP is a settlement agreement that should be enforced as required by New Mexico law as Defendants received the benefit of Plaintiffs dismissing the lawsuit.

II. The Performance Standard, As Defined In The FSA, Does Not Apply to the CAP.

When Defendants executed the CAP, Defendants agreed to take specific actions and to reach defined outcomes. To determine whether Defendants breached the CAP, the Arbitrator should apply contract law, which embraces a strict liability paradigm. "[C]ontract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault." *Paiz v. State Farm Fire & Cas. Co*., 1994-NMSC-079, ¶¶ 30-31, 118 N.M. 203 (quoting 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 12.8, at 190 (1990) (citing *Patton v. Mid–Continent Sys., Inc.,* 841 F.2d 742, 750 (7th Cir. 1988)) ("[L]iability for breach of contract is, prima facie, strict liability. That is, if the promisor fails to perform as agreed, he has broken his contract even though the failure [was] in no way blameworthy.") Contract liability is

[2] *See e.g.,* Center for the Study of Social Policy, *New Jersey Child Welfare System Ends Federal Court Oversight* (Oct. 30, 2023), https://cssp.org/about-us/connect/press-room/new-jersey-child-welfare-system-ends-federal-court-oversight; National Center for Youth Law, *David C. Lawsuit Transforms Utah's Child Welfare System* (June 28, 2007), https://youthlaw.org/news/david-c-lawsuit-transforms-utahs-child-welfare-system; National Health Law Program, *Washington State's Commitment to Robust Mental Health Services and Supports for Children and Youth Brings to a Close TR Lawsuit* (Sept. 15, 2021), https://healthlaw.org/news/washington-states-commitment-to-robust-mental-health-services-and-supports-for-children-and-youth-brings-to-a-close-tr-lawsuit, also collectively attached hereto as Exhibit 1.

strict liability, and the obligor is therefore liable for breach of contract even if he is without fault. Restatement (Second) of Contracts 11 Intro. Note (1981).

The CAP is a separate contract from the FSA. The CAP did not incorporate the Performance Standard adopted in the FSA or specify that an alternate, non-strict liability standard would apply to Defendants' performance. Unless otherwise specified by the parties, "[w]hen performance of a duty under a contract is due, any non-performance is a breach." Restatement (Second) of Contracts § 235 (1981). "The breach may occur either through a total failure to perform or a negligent or incomplete performance." Committee Commentary to NM UJI 13-822 (citing *Cochrell v. Hiatt*, 1981-NMCA-152, 97 N.M. 256). In the FSA, the Parties specified that the Performance Standard would alter standard contract law. However, because the CAP is silent as to the applicable standard controlling what constitutes a breach, the default of strict liability applies to the CAP.

The Parties agreed not to alter standard contract law in the CAP, as they did in the FSA, because the CAP contains Defendants' separate promises to take remedial steps, that if taken, would demonstrate their desire and ability to fulfill their promises in the FSA. In 2021 and 2022, Defendants' FSA performance was abysmal. In the Co- Neutrals' Annual Report for 2021, they concluded "CYFD and HSD did not in 2021 meet the Performance Standard for the 31 [Target Outcomes] assessed in this report." Co-Neutrals' 2021 Annual Report at 8. They later concluded, "[t]he State met the Performance Standard for five (12%) of the 42 Target Outcomes due in 2022." Co-Neutrals' Baseline and 2022 Annual Report at 10 (November 15, 2023), https://cssp.org/resource/co-neutrals-2022-annual-report-kevin-s-et-al-v-blalock-and-scrase/. Based on these results, in the beginning of 2023, the Parties negotiated the CAP as a remedial measure, detailing steps and outcomes necessary for Defendants to fully achieve in order to

approach compliance with the FSA. CAP at 1, 2, 3, 5, 7, 8, 9, 15, and 21. Because children in State custody could not wait for Defendants to do anything but fully perform under the CAP, the Parties did not incorporate the FSA Performance Standard nor alter normal contract law that requires full and complete performance of every contractual CAP obligation.[3] As specified in the CAP, the Parties agreed all the CAP commitments "will be undertaken in the time set forth in the CAP[.]" CAP at 1.

The actions of the Co-Neutrals, who were present during or aware of the negotiations culminating in the CAP, support the conclusion that the FSA Performance Standard does not apply to the CAP. After the performance period specified in the CAP ended on January 5, 2023, the Co-Neutrals issued one letter, dated January 26, 2024, and one Memorandum, dated February 23, 2024. *See* Exhibits D and E, attached to Plaintiffs' Notice of Arbitration. The Co-Neutrals' January letter detailed the issues they had observed during site visits to CYFD offices and explained that the "State's weak performance implementing many aspects of the CAP – for example, with respect to caseloads and focused resource family recruitment – appears to have worsened the situation." Exhibit D, attached to Plaintiffs' Notice of Arbitration, at 1. In the Co-Neutrals' CAP Implementation Memorandum, they applied the data provided by Defendants to qualitatively assess Defendants' performance of the CAP commitments without analysis of Defendants' efforts. *See* Exhibit E, attached to Plaintiffs' Notice of Arbitration. Unlike in their previous reports, the Co-Neutrals do not apply the FSA Performance Standard when analyzing

[3] Even full compliance with every CAP promise within the time specified would put the Parties in a position where Defendants would still need to make considerable progress in order to comply with the FSA, and remove children in State custody from imminent and significant danger.

Defendants' performance under the CAP. As such, any finding by the Co-Neutrals that Defendants did not fully meet a CAP commitment constitutes a breach of the CAP.

III. Even If The CAP Adopted The FSA Performance Standard, The Defendants Agreed To Do More Than Merely Try to Satisfy the CAP Obligations.

Even if the FSA Performance Standard applied to the CAP, which Plaintiffs deny, the FSA Performance Standard requires Defendants to take *every* reasonable effort to achieve the required outcomes. The commitments Defendants made to fix the New Mexico child welfare system in the FSA are substantial. As such, the Parties designed the FSA so that Defendants would not automatically be found in breach of the agreement if, despite all reasonable efforts, they made significant progress toward, but failed to fully satisfy, all Target Outcomes in the FSA. FSA at 5.[4] The FSA tasks the Co-Neutrals with determining whether Defendants have satisfied the Performance Standard as to each Target Outcome, along with quantifying the amount of progress Defendants make towards satisfying the same. FSA at 5.

The FSA defines the Performance Standard as:

> [T]he level of achievement Defendants must meet with respect to each Implementation Target and Target Outcome in order to fulfill the terms of the Agreement. Meeting the Performance Standard means making good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Target or Target Outcome. 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. **This standard is not intended to assess Defendants' subjective intentions, plans, or promises.** FSA at 2 and 3 (emphasis added).

While the Performance Standard definition employs the term "good faith efforts," the Parties negotiated the specific language in the definition to ensure that the Performance Standard

[4] Rather, the Parties would attempt to mediate lingering issues of non-compliance with the Target Outcomes, assuming the State had satisfied the Performance Standard.

requires more from Defendants than a subjective, and likely biased, belief that they tried. "This standard is not intended to assess Defendants' subjective intentions, plans or promises." *Id.*

First, these good faith efforts may not be made in any manner Defendants see fit. Instead, all good faith efforts must be aimed at achieving substantial and sustained progress towards the outcomes the Parties agreed on, as determined by the Co-Neutrals. Further, the Co-Neutrals, who are tasked with determining whether Defendants satisfied the Performance Standard, are instructed to base their evaluation of the sufficiency of Defendants' good faith efforts on whether Defendants have taken *all* reasonable efforts to achieve the promised outcomes. Because the Performance Standard definition specifies that Defendants' "plans, or promises" do not suffice, the Co-Neutrals are required to assess the adequacy of the actions Defendants *actually* have taken, and whether there remain actions Defendants *should* have taken in order to meet the agreed upon outcomes. The Co-Neutrals determine which actions are reasonable and aimed at achieving substantial and sustained progress by referencing their substantial experience and expertise in system-wide child welfare reform – not Defendants' subjective beliefs. Should the Arbitrator determine the FSA Performance Standard applies to the CAP, then Defendants must have taken all reasonable efforts to achieve each of the promises they made in the CAP within the timeframe specified.

The FSA Performance Standard also requires more from Defendants than they refrain from breaching the implied covenant of good faith and fair dealing (which is a claim, not a performance standard), and which requires parties to a contract to act in a way that does not injure another party's rights, benefits, or ability to perform under the contract. *See Bourgeous v. Horizon Healthcare Corp*., 1994-NMSC-038, ¶ 16, 117 N.M 434 (citing *Watson Truck & Supply Co. v. Males*, 1990-NMSC-105, ¶ 12, 111 N.M. 57) (Under the covenant of good faith and fair

dealing, parties are prohibited from doing "anything that will injure the rights of the other to receive the benefit of their agreement."); and *Kropinak v. ARA Health Servs., Inc*., 2001-NMCA-081, ¶ 5, 131 N.M. 128. Violation of the covenant, on its own, "constitutes a breach of contract." Implied covenant or promise of good faith and fair dealing, 23 Williston on Contracts, § 63:22 (4th ed.); *Apodaca v. Young Am. Ins. Co*., No. CIV 18-0399 JB/JHR, 2023 WL 7706283, at *17 (D.N.M. Nov. 15, 2023) (quoting *Bourgeous v. Horizon Healthcare Corp*., *supra*) (the covenant "becomes part of the contract and the remedy for its breach is on the contract itself.") Accordingly, the Parties would not have bargained for and drafted this detailed provision only to restate a principle of New Mexico contract law that already applied to the Parties.

WHEREFORE, Plaintiffs respectfully request the Arbitrator issue a pretrial order clarifying that the FSA Performance Standard does not apply to Defendants' performance under the CAP. Alternatively if the Arbitrator finds the FSA Performance Standard does apply, issue an order, clarifying the Performance Standard requires Defendants to take all reasonable actions to achieve Defendants' CAP promises.

Dated: June 4, 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:

MOTION FOR CLARIFICATION THAT THE CORRECTIVE ACTION PLAN IS AN ENFORCEABLE CONTRACT WITHOUT AN ALTERED PERFORMANCE STANDARD, OR, ALTERNATIVELY, CLARIFICATION OF THE FSA PERFORMANCE STANDARD

on the following individuals, addressed as follows:

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Executed this 4th day of June 2024 at Albuquerque, New Mexico.

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EXHIBIT 1

New Jersey Child Welfare System Ends Federal Court Oversight

Newark, NJ and Washington, DC (October 30, 2023)—Today's release of a final report by the Center for the Study of Social Policy (CSSP), the court-appointed Monitor in the federal class action lawsuit Charlie and Nadine H. v. Murphy, marks the successful conclusion of almost two decades of work to improve New Jersey's child welfare system. Over this period, New Jersey has worked to bring its child welfare policies and programs into compliance, with the goal of creating a system that keeps children safe, healthy, and connected. The final report can be found here.

CSSP was appointed in 2006 by the Honorable Stanley R. Chesler of the United States District Court for the District of New Jersey as Federal Monitor of Charlie and Nadine H., aimed at improving outcomes for children, youth, and families served through New Jersey's child welfare system. As Monitor, CSSP was charged with independently assessing the State's compliance with the goals, principles, and outcomes of the Court's Orders in the lawsuit. All prior CSSP Monitoring Reports can be found here.

To end federal court oversight, Parties to the lawsuit—the New Jersey Department of Children and Families (DCF), Governor Phil Murphy, and Plaintiff's lawyers, A Better Childhood—presented the Court with an Exit Plan and Agreement ("Exit Plan"), identifying actions that would allow successful exit from the lawsuit and creating legal requirements and structures to sustain the outcomes of the successful reform work. The Exit Plan required the State to devise and maintain a comprehensive qualitative review system, to codify elements of the lawsuit's requirements (for example, caseloads, staff training, data collection and reporting) into state law, and to establish the Staffing and Oversight Review Subcommittee (SORS) of the New Jersey Task Force on Abuse and Neglect (NJTFCAN)—as the entity responsible for reviewing and publicly reporting on DCF performance going forward. On December 20, 2022, the New Jersey legislature passed the SORS legislation, which includes, among other things, caseload standards and the obligation to keep children within their own communities, maintain contact with their siblings and relatives, and have their educational needs met.

The addendum report released today, in accordance with the six-month Transition Period reflected in Judge Stanely Chesler's dismissal order of April 25, 2023, assesses DCF's progress toward meeting its obligations from April 25 to October 25, 2023. It describes the new Collaborative Quality Improvement (CoQI) process, which uses data to identify what is working well and what needs improvement; details SORS' new role of reviewing DCF performance; and highlights recent DCF accomplishments in its ongoing effort to support families and reduce the number of children who enter state custody.

This is a landmark day for New Jersey. During its time under federal court oversight with independent monitoring by CSSP and collaboration between the State and the court monitor, DCF dramatically changed almost every aspect of its system, including:

- Taking an overworked, untrained workforce to one that provides staff with training, professional development, and support with manageable enough caseloads to allow them to adequately serve children and families.
- The number of children in foster care declined dramatically (from 10,000 to 3,000 children) due to efforts to keep children safe in their homes and communities and find permanent homes for children who needed them.
- Children who do need placement are increasingly connected with kin, most of whom are licensed and financially supported.

- DCF has developed supports, placements, and services to meet children's needs including access to a wide range of health and behavioral health services to promote healing and successful development.
- DCF developed capacity to collect, report on and use data to review their performance and assess outcomes; they have implemented robust quality improvement processes.
- New Jersey has developed one of the only statewide Universal Home Visiting programs; and built and sustained 57 Family Success Centers (FSCs), "one-stop shops" that provide wrap-around resources and supports for families to prevent the need for child welfare intervention.
- Through the development of Child Health Units with nurses in every Local Office and enhanced funding for its Children's System of Care, New Jersey has become a model of successful integration of systems that support children and youth's well-being.
- New Jersey has also become a national model in the creative use of Mobile Response Stabilization Services (MRSS), and other interventions to assist families and kin caregivers in need of support.
- Due to a focus on prevention of maltreatment, New Jersey now uses family separation as a safety intervention significantly less often than the national average.

Judith Meltzer, the Federal Court Monitor since 2006, stated: "Today is a day to celebrate the accomplishments made by the State of New Jersey. DCF has not only achieved and largely maintained performance that meets the goals and requirements of Charlie v. Nadine H., lawsuit, but, importantly, it continues its deep commitment to being a self-correcting and nimble organization, no longer requiring federal court oversight. With the ending of the federal lawsuit, State leaders in the executive and legislative branches and New Jersey's community partners and child and family advocates will be key to long term sustainability."

Meltzer further stated, "New Jersey's success in reforming its child welfare system could not have been accomplished without the critical role played by Judge Stanley Chesler, Governor Murphy and his predecessors, Plaintiffs, the State legislature, private providers, key advocates, and, most importantly, the many DCF leaders and staff at all levels who helped support and implement changes."

"The release of the final CSSP report in the Charlie and Nadine H. case marks a new and exciting day forward for the New Jersey Department of Children and Families," said NJ DCF Commissioner Christine Norbut Beyer. "We're grateful to everyone who has been a part of our reform journey, but especially the staff of the Department who have embraced and embodied reform over the last two decades to elevate the practice of child welfare in New Jersey and improve outcomes for the children and families we support as a system.

"With today's final CSSP report, we're validating the hard work of many individuals over the past 20 years to correct systemic deficiencies, secure needed resources and structural partnerships, to develop our capacity to learn and grow from data, and to become a national leader in the child welfare arena. We're energized for what comes next, as we continue to follow a transformative agenda to reshape what it means to serve children and families in New Jersey, honoring what we learned along the reform path, but also owning our transformative potential and destiny."

About CSSP. The Center for the Study of Social Policy (CSSP) works to achieve a racially, economically, and socially just society in which all children, youth, and families thrive. We translate ideas into action, promote public policies grounded in equity, and support strong and inclusive communities. We advocate with and for all children, youth, and families marginalized by public policies and institutional practices. Learn more at www.CSSP.org.

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David C. Lawsuit Transforms Utah's Child Welfare System

JUNE 28, 2007

In November 1991, a former Court Appointed Special Advocate ("CASA") in Salt Lake City contacted NCYL with concerns about Utah's child welfare system. More than a year of investigations and meetings with state officials followed. On February 25, 1993, seventeen children—represented by NCYL and co-counsel—sued the Governor of Utah and other state officials. The federal lawsuit, *David C. v. Leavitt* (later known as *David C. v. Huntsman*), sought lasting reform for Utah's abused and neglected children. Over the course of *David C.*'s fifteen years, Utah's child welfare system transformed from one of the most dismal and underfunded in the country into a model to be studied and emulated.

The facts that gave rise to the lawsuit were nothing short of a nightmare. David C., the lead plaintiff, entered foster care at age three along with his brothers. Nine months later, David witnessed their foster parent beat David's older brother to death. When David and his younger brother were removed from the foster home, David had marks covering his entire body. Despite his post-traumatic stress disorder, David received virtually no therapy. The other lead plaintiffs in the case similarly alleged placement in unsafe and abusive foster homes, lack of mental health treatment, delays in investigating abuse and neglect reports, and more.

In May 1993, the court granted the plaintiffs' motion to certify the case as a class action. The class included all children in Utah's foster care system, as well as—over the defendants' objection—children still living at home but who were reported as abused or neglected.

Settlement talks began soon after. On August 29, 1994, the court approved the parties' proposed settlement agreement. The agreement contained ninety-three provisions addressing ten substantive areas that the defendants would need to complete over a four-year period. The settlement also established a three-member monitoring panel that would issue regular reports on the defendants' progress. Over the next several years, the monitoring panel found persistent noncompliance with the settlement; in fact, conditions in Utah's system were growing worse in certain areas.

In March 1997, in response to the plaintiffs' enforcement motion, the court ordered the monitoring panel to create a comprehensive plan to address the defendants' lack of progress. The panel enlisted outside assistance from the Child Welfare Policy and Practice Group, and the court agreed to give the defendants additional time to finalize this new plan. The resulting "Milestone Plan" was published in May 1999. In October 1999, the court issued an order retaining jurisdiction over the case and ordering the defendants to implement the Milestone Plan, with the Child Welfare Policy and Practice Group monitoring their progress.

The Milestone Plan included nine key milestones—containing 112 tasks in total—that Utah would need to meet to improve its child welfare system. The plan called for case process reviews of 900 cases to monitor whether certain practices were being performed. In addition, the quality of services would be analyzed through in-depth reviews of

a small number of cases. The agency would form regional and state-wide quality improvement committees to incorporate stakeholder input. The Milestone Plan also called for the development of a practice model, with policies and training for staff, to ensure that reforms would reach front-line workers.

The next two years were tied up in litigation, as the defendants attempted to get out from under court oversight. In March 2001, the defendants lost their appeal of the district court's October 1999 order. The Tenth Circuit Court of Appeals rejected the defendants' argument that the district court exceeded its powers by extending the original four-year settlement term. The Tenth Circuit also rejected the defendants' argument that the plaintiffs should have been able to foresee that the defendants would not comply with the settlement. The Tenth Circuit stated that "it would defy logic for [the plaintiffs] to agree to include the four-year Termination Provision in the Agreement if they actually foresaw that Utah would not be in substantial compliance with the terms of the Agreement at the end of the four-year period."

In August 2002, in light of slow progress and recent state budget cuts, the plaintiffs filed another enforcement motion. In response, the court ordered the parties to work together to address the shortcomings in meeting the Milestone Plan. Over the next few years, the parties modified the Milestone Plan several times to ensure that needed improvements would occur, while also allowing flexibility to revisit those aspects of the plan that were proving unworkable.

Utah began making real progress under the Milestone Plan, assisted by new legal counsel on both sides and new agency leadership. In May 2007, the parties finalized an Agreement to Terminate the Lawsuit. It called for the defendants to run their system, without active oversight from a court monitor or plaintiffs' counsel, for eighteen months. The Child Welfare Policy and Practice Group then conducted a final review, which showed the defendants' compliance with the Milestone Plan. Based on these results, the plaintiffs agreed to final dismissal of the lawsuit on December 31, 2008. The defendants agreed to continue operating their system in accordance with the Milestone Plan until December 30, 2010.

By the case's conclusion, NCYL had devoted more resources to the *David C.* case than it had to any other case up to that point. The payoff was well worth the effort. The transformation of Utah's system impacted roughly 1,500 children in foster care at any given point and 10,000 to 15,000 children who were the subject of abuse and neglect reports each year. Utah had shown that it had the capacity and will to make these changes and to sustain them over time.

The improvements to Utah's child welfare system could be seen both quantitatively and qualitatively. During the course of the lawsuit, the number of caseworkers more than doubled, from 282 to 612. Caseloads decreased to 13-15 cases per worker, down from an average of 19 cases. Where NCYL's early investigations revealed that hundreds of foster children had not received regular medical check-ups, by the end of the lawsuit, 94% of children were receiving timely health assessments. The timeframes for conducting abuse and neglect investigations shortened drastically, with 96% of investigations occurring on time. Utah now had a state-of-the-art data management system, leading to greater transparency and accountability. Significantly, Utah dedicated meaningful funding to the reforms, increasing the child welfare budget from $50 million in 1993 to $151 million in 2007.

The plaintiff children were represented by NCYL and the law firms Morrison & Foerster LLP and Jones, Waldo, Holbrook & McDonough.

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Washington State's Commitment to Robust Mental Health Services and Supports for Children and Youth Brings to a Close TR Lawsuit

Seattle, Washington – In November 2009, the *TR* lawsuit (https://healthlaw.org/resource/t-r-v-dreyfus-u-s-district-court-western-district-of-washington/) was brought on behalf of a class of Medicaid eligible children under age 21 in Washington State who have a mental illness or condition and need intensive home and community based services to treat that condition. In 2013, the parties entered into a settlement agreement, which was approved by the federal court. The parties subsequently spent the next 8 years ensuring the commitments of that agreement came to fruition so that children and youth in Washington would benefit from the services and mental health system changes that were made. On September 8, 2021, pursuant to an agreement between the parties that the exit terms of the settlement were substantially satisfied by the State, the Court dismissed the lawsuit (https://healthlaw.org/wp-content/uploads/2021/09/194-Dismissal-Order-fees.pdf).

> *As counsel in this case, the National Health Law Program appreciates the commitment of the State to the needs of its children and families who rely on Medicaid services to meet their mental health needs*

"As a result of the *TR* lawsuit, Washington established the Wraparound with Intensive Services (https://www.hca.wa.gov/health-care-services-supports/behavioral-health-recovery/wraparound-intensive-services-wise) (WISe), a statewide program that provides intensive mental health services and supports to thousands of children and youth, and their families, in their homes and communities each year. These services have resulted in positive outcomes for many children and their families and prevented the placement of these youth in intuitional settings," said Kim Lewis (https://healthlaw.org/team/kim-lewis/), Managing Attorney of NHeLP's Los Angeles office. "Over the past 8 years, the State of Washington has demonstrated a strong commitment to building a lasting system of care that promotes intensive community-based mental health services and values a family centered treatment team model, while addressing systemic challenges from data collection to workforce shortages and a global pandemic."

"As counsel in this case, the National Health Law Program appreciates the commitment of the State to the needs of its children and families who rely on Medicaid services to meet their mental health needs, and the hard work and commitment of our co-counsel in this case, in particular Disability Rights Washington (https://www.disabilityrightswa.org/) and the National Center for Youth Law (https://youthlaw.org/)."

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