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 TO
PLAINTIFFS' SECOND MOTION FOR CLARIFICATION

The Arbitrator should deny Plaintiffs' Second Motion for Clarification[1] (the "2nd Motion") because the Settlement Agreement ("FSA")[2] giving rise to this arbitration expressly defines the "Performance Standard" applicable to CYFD and HSD. "Meeting the Performance Standard means making good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Target and Target Outcome."[3] Plaintiffs do not dispute that Plaintiffs agreed in the FSA that CYFD and HSD were required to make *good faith efforts* and *progress* to meet agreed upon *targets*.[4] Plaintiffs instead now seek to have the Arbitrator disregard the plain language of the FSA and apply a different, heightened standard – what Plaintiffs refer to as a "strict liability" standard[5] – a term found nowhere in the FSA or the CAP. Plaintiffs ask the Arbitrator to impose this heightened standard on CYFD and HSD because, according to the Plaintiffs, (1)

[1] The full title of the 2nd Motion is Plaintiffs' *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* (served on June 4, 2024) (hereinafter the "2nd Motion").
[2] 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.
[3] FSA at 2-3.
[4] 2nd Motion at 4.
[5] 2nd Motion at 5 ("[T[he Arbitrator should apply . . . a strict liability paradigm.").

"[t]he CAP is a separate contract from the FSA" and (2) "the CAP is silent as to the applicable standard controlling what constitutes a breach, [and therefore] the default of strict liability applies to the CAP." Both arguments are wrong.

A. The CAP is Not a Separate Contract Independent of the FSA

The CAP is not a "separate contract" independent from the FSA,[6] but rather the first step of an agreed alternative dispute resolution remedy to try to resolve disputes over whether CYFD and HSD performed under the FSA. In addition to agreeing to the defined Performance Standard ("good faith efforts" and "progress" to meet agreed upon "targets"), Plaintiffs further agreed that "[a]ny dispute arising out of or related to" the FSA would be subject to a two-step dispute resolution process. FSA at 10, § IX ("Dispute Resolution"). The initial step requires that the parties first "attempt to resolve the dispute through mediation" and a "corrective action plan." 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.").[7] In short, the CAP is part of *the first step* to try to resolve any dispute as to whether Defendants have "met the Performance Standard" of the FSA.

The *second step* is this arbitration. 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

[6] 2nd Motion at 6 ("The CAP is a separate contract from the FSA..")

[7] 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").")

elapsed, any Party may initiate binding arbitration."). Because both the CAP and this arbitration form a two-step process to resolve "[a]ny dispute arising out of or relating to the [FSA],"[8] Plaintiffs cannot claim that the FSA's Performance Standard does not apply to the CAP or in this arbitration. The Arbitrator can and should deny the 2nd Motion on that basis alone.

B. The CAP Expressly Refers to and Incorporates the FSA Performance Standard

Plaintiffs next argue that "CAP is silent as to the applicable standard," 2nd Motion at 6, but that is easily rejected. The CAP expressly acknowledges 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). That language alone is dispositive.

The CAP goes on to expressly and separately re-incorporate the FSA's Performance Standard as to each and every "target" outlined in the CAP, including the three "Disputes for Arbitration" identified in Plaintiffs' 5/20/24 Notice of Arbitration commencing this arbitration:[9]

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).

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).

[8] FSA at 10.

[9] 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).

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 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).

In short, Plaintiffs' argument that the CAP "is silent" as to the Performance Standard is incorrect and repeatedly contradicted by the CAP itself.

In breach of contract cases brought under New Mexico law, "the role of the [arbitrator] is to give effect to the intention of the contracting parties." *Bogle Farms, Inc. v. Baca*, 1996–NMSC–051, ¶ 21, 122 N.M. 422, 925 P.2d 1184, 1190. "The primary objective in construing a contract is not to label it with specific definitions or to look at form above substance, but to ascertain and enforce the intent of the parties as shown by the contents of the instrument." *Bogle Farms, Inc. v. Baca*, 1996–NMSC–051, ¶ 21, 122 N.M. 422, 925 P.2d 1184 (citing *Shaeffer v. Kelton*, 1980–NMSC–117, ¶ 8, 95 N.M. 182, 619 P.2d 1226, 1229). 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; (2) the CAP is part of an alternative dispute resolution remedy agreed to in, and subject to, the FSA; (3) the parties expressly agreed and understood that the Performance Standard would apply to the FSA, the CAP and in this arbitration.

C. Whether CYFD and HSD Met the Performance Standard is a Question of Fact to Be Decided by the Arbitrator at the Arbitration Hearing

Plaintiffs next argue: (1) disputed facts on the merits; and (2) that the Co-Neutrals – and not the Arbitrator – have authority to decide (and have already decided) whether CYFD and HSD have met the Performance Standard as to certain targets. Defendants vigorously dispute Plaintiffs' claim that these agencies have not made reasonable, good faith efforts to meet the targets agreed upon in the FSA and CAP. Defendants were prepared in December 2023 and remain prepared now to present evidence demonstrating their good faith efforts at the Arbitration Hearing. The Arbitrator should deny the 2nd Motion because it invites the Arbitrator to make rulings on disputed facts in advance of the presentation of evidence at the Arbitration hearing.

The Arbitrator should also reject Plaintiffs' argument that the Co-Neutrals – and not the Arbitrator – have authority to decide whether Defendants met the Performance Standard. 2nd Motion at 5 ("The FSA tasks the Co-Neutrals with determining whether Defendants have satisfied the Performance Standard as to each Target Outcome."). The FSA authorizes the Co-Neutrals to prepare and issue informational reports, disagreements over the content of them are not subject to arbitration. FSA at 7 (Annual Reports) ("These assessments are intended to be informational, and disagreements related to the content of these reports shall not proceed through the dispute resolution process in Section IX.").

While the FSA authorizes the Co-Neutrals to monitor and assess in their reports whether the Defendants have met the Performance Standard as to certain targets, the FSA provides only that any deficiency identified in such reports results in reassessment the following year – not a finding in arbitration that Defendants have breached the FSA or the CAP. "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." FSA at 8 (Monitoring).

Nowhere does the FSA authorize the Co-Neutrals to make findings of fact or conclusions of law binding upon the Arbitrator or this arbitration. Recognizing that Defendants may disagree with the Co-Neutral reports, the FSA's arbitration procedures instead limit the role of the Co-Neutrals in arbitration and make clear that the Co-Neutral 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.

D. The Covenant of Good Faith and Fair Dealing Applies to All Parties

Plaintiffs last argue that the covenant of good faith and fair dealing inherent in all contracts requires that neither party act in a way that "injure[s] another party's rights, benefits, or ability to perform under the contract." 2nd Motion at 9 (citations omitted).

Defendants agree.

In the FSA, the Parties expressly agreed that "[n]o Party shall initiate the arbitration process in Step 2 until the time for Defendants to complete any corrective action plan has expired." FSA at 10 (emphasis added). The parties agreed to the CAP on June 30, 2023. The CAP expressly stated that: "The Parties agree that this CAP shall expire on January 5, 2024." CAP at 1 (emphasis added). Despite agreeing that the CAP expired on January 5, 2024, and despite agreeing in the FSA that Plaintiffs would not initiate arbitration until the time for Defendants to complete the CAP had expired, Plaintiffs breached the FSA by demanding arbitration on October 20, 2023 – alleging that Defendants had breached the CAP months before it expired.

Plaintiffs' premature demand for arbitration was also a breach of the covenant of good faith and fair dealing because it interfered with CYFD and HSD's ability to perform under the FSA and CAP. CYFD and HSD were required to divert significant time and resources away from operations

in support of children and families to defend against Plaintiffs' premature arbitration, which Plaintiffs later abandoned on the eve of the hearing.[10] Disputes about whether and which party has breached the covenant of good faith and fair dealing are questions that should be decided at the Arbitration hearing after the presentation of evidence.

CONCLUSION

For all of these reasons, Defendants respectfully request that the Arbitrator find that the FSA's Performance Standard applies in this arbitration, and otherwise deny Plaintiffs' 2nd Motion.

Respectfully submitted,

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

By /s/Travis G. Jackson/s/
R. Eric Loman
Travis G. Jackson
Attorneys for Defendants
201 Third Street, Suite 1500
Albuquerque, NM 87102
(505)767-0577
eric@jacksonlomanlaw.com
travis@jacksonlomanlaw.com

[10] Plaintiffs unilaterally dismissed the arbitration on December 7, 2023 – four days before the arbitration was scheduled to commence on December 11, 2023.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served via electronic mail and on the following counsel for Plaintiffs on the 20th day of June 2024.

ARBITRATOR
Charles R. Peifer
Peifer, Hanson, Mullins & Baker, P.A.
20 First Plaza NE, Suite 725
Post Office Box 25245
Albuquerque, New Mexico 87125
Telephone: (505) 247-4800
cpeifer@peiferlaw.com

Michael Hart
Martinez, Hart, Sanchez & Romero
1801 Rio Grande Blvd. NW, Suite A
Albuquerque, NM 87104
505-806-1780
mikeh@osolawfirm.com
Counsel for Plaintiffs

Tara Ford
Public Counsel
610 South Ardmore Avenue
Los Angeles, CA 90005
(213) 385-2977
tford@publiccounsel.org
Counsel for Plaintiffs

Christina West
Kayla Jankowski
Barnhouse Keegan Solimon & West, LLP
7424 4th Street NW
Los Ranchos De Albuquerque, NM 87107
Office: (505) 842-6123
cwest@indiancountrylaw.com
kjankowski@indiancountrylaw.com
Counsel for Plaintiffs

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

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