

IN ARBITRATION PROCEEDINGS

ALBUQUERQUE, NEW MEXICO

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

Plaintiffs,

vs.

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

Defendants.

In a dispute arising from:

Kevin S., et al. v. Blalock, et al.
No. 1:18-cv-00896
U.S. District Court
(D. New Mexico)

Arbitrator:
Charles Piefer

**PLAINTIFFS'
OPENING BRIEF**

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PLAINTIFFS' OPENING BRIEF

I. INTRODUCTION

This dispute concerns whether the Defendant state agencies have fulfilled their obligations to New Mexico's children in the remedial Corrective Action Plan (CAP) agreed to on or about June 30, 2024. In consideration for dismissing all of their claims brought in federal district court, the *Kevin S* Plaintiffs bargained for specific steps and actions to be achieved by CYFD and HSD within a specific timeframe as set forth in the 2020 Final Settlement Agreement (FSA). The State largely failed to meet its obligations under the FSA.¹ The CAP is a remedial agreement that requires CYFD and HSD to take specific additional steps, which are enforceable obligations in addition to the promises in the FSA.

The *Kevin S.* Plaintiffs include children in foster care who have already experienced significant trauma for years before and while in state custody. Such trauma includes separation from their families, exposure to violence, and physical, emotional, and/or sexual abuse. Today, Defendants' failures to align their resources as promised in the CAP continues to harm children in State custody.

For example, Carmen S. is a seventeen-year old who has been under the State's care for over a decade, and is courageously sharing her experience. Plaintiffs brought this litigation and are seeking enforcement of their settlement agreements with Defendants, which would prevent

¹ See Judith Meltzer, Kevin Ryan, and Pamela Hyde, Co-Neutrals' Baseline and 2020 Annual Report (2021), <https://www.cyfd.nm.gov/kevin-s-settlement/> [hereinafter Co-Neutrals' 2020 Annual Report]; Judith Meltzer, Kevin Ryan, and Pamela Hyde, Co-Neutrals' 2021 Annual Report (2022) [hereinafter Co-Neutrals' 2021 Annual Report]; Judith Meltzer and Kevin Ryan, Co-Neutrals' 2022 Annual Report (2023) [hereinafter Co-Neutrals' 2022 Annual Report].

additional children from suffering as Carmen has.² Carmen is a kind and intuitive young woman who loves to express herself through artwork. She has been diagnosed with mild intellectual development disorder and a history of sexual abuse and trauma. In addition, she qualifies for special education services in the areas of emotional disturbance and specific learning disabilities under the Individuals with Disabilities Education Act. *See* 20 U.S.C. §1400 *et seq.* She is multiple grade levels behind in all academic areas.

The day after her seventh birthday, CYFD petitioned a court to remove her from her parents' and her maternal grandmother's custody. The Department sought, and the Court ordered, termination of Carmen's parents' rights in 2017. She has been freed for adoption for seven (7) years.

Carmen has had to adapt to over thirty (30) placement changes, educational disruptions, changing communities and substitute caregivers. CYFD placed Carmen with foster parents without providing specialized training or without even providing Carmen's full mental health history and identified developmental needs, despite requests made by Carmen's attorney.³ CYFD assigned over thirteen (13) PPWs⁴ to Carmen. Recently, CYFD assigned a recently hired PPW to Carmen's case, fresh off the initial PPW training. CYFD's assignment of multiple, insufficiently

² Because the Parties' briefs in this Arbitration are public, Carmen is proceeding using pseudonym. Concurrent with this pleading, the Plaintiffs will file under seal the Children's Court Order allowing Carmen's youth attorney to share information regarding this case in the Kevin S. arbitration, which order requires that juvenile court documents shall not be publicly disseminated. *See* Exh. A filed under seal.

³ A "Youth Attorney" is an attorney appointed to represent a child in CYFD custody who has reached her 14th birthday and is charged with the duty to represent a child in a proceeding for which the attorney has been retained or appointed. The attorney shall provide the same manner of legal representation and be bound by the same duties to the child as is due an adult client, in accordance with the rules of professional conduct. NMSA 32A-1-7.1(A).

⁴ Permanency Planning Workers have primary responsibility for youth in CYFD custody and are required to promote the safety, permanency and well-being for the youth, promote positive youth development and assist the youth in successfully transitioning into adult living. NMAC 8.10.9.7(K).

trained caseworkers to Carmen has resulted in a lack of consistency in communication, policy enforcement, and adequate case planning.

During the months covered by the CAP, the Special Master overseeing Carmen's case, sanctioned CYFD for failing to comply with court orders that required CYFD to conduct team coordination meetings, provide referrals for individual or family therapy, provide resources and specialized training for a family member providing care, and to identify or provide educational programs. The Special Master found that, if CYFD had complied with the orders, Carmen's placement may have been successful.

CYFD's failures resulted in Carmen having to sleep in CYFD's office visitation room from August 29, 2023 through October 1, 2023. During this period, CYFD improperly provided reheated frozen food prepared at the Bernalillo County Juvenile Delinquency Center and invaded Carmen's privacy by monitoring her showering and refusing her a razor for shaving even while failing to provide mental health treatment. Defendants' failures forced Carmen to find, on her own, a capable and willing family, who desires to become her legal guardian.

Carmen's experience highlights Plaintiffs' claims in this Arbitration. Plaintiffs claim that Defendants have failed to: hire and retain sufficient caseworkers; provide appropriate foster care placements and treatments; and identify and treat the health and mental health needs of children in state custody. The harm is not hypothetical. While Defendants may argue that fulfilling these legal obligations is hard, this is the responsibility the State assumes when it separates children from families and that it is contractually obligated to perform under the CAP.

II. PROCEDURAL HISTORY

A. The *Kevin S.* Lawsuit

On September 22, 2018, thirteen foster children and two non-profit organizations (Disability Rights New Mexico and Native American Disability Law Center) filed a class

action lawsuit against CYFD and HSD. The Complaint alleged that CYFD and HSD were violating: (i) Section 504 of the Rehabilitation Act; (ii) the Americans with Disabilities Act; (iii) the Fourteenth Amendment to the United States Constitution; (iv) the Medicaid Act's Early and Periodic Screening Diagnostic and Treatment Services (EPSDT) 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)). After an extended mediation, the Parties entered a Final Settlement Agreement ("FSA,") and Plaintiffs dismissed the lawsuit.

B. The Final Settlement Agreement

The Defendants negotiated and agreed to the FSA, which set forth a detailed and evidence-based plan for CYFD and HSD to come into legal compliance by building out an integrated, trauma-responsive system of care through a series of performance objectives to be met in 2020, 2021, and 2022. Defendants agreed to undertake action in four areas as identified in the four Appendices attached to the FSA. In each Appendix, Defendant promised to take specific actions in sequence, "Implementation Targets ("ITs"), and to reach Target Outcome ("TOs") by set deadlines.⁵

Appendix A focuses on building a trauma-responsive system, requiring the State to develop and train staff to implement needs assessment tools and to deliver individualized and timely trauma-responsive services to children.⁶ Appendix B focuses on building a system that moves from placing children from out-of-state care or office placements to

⁵ *Kevin S., et al. v. Blalock, et al.*, No. 1:18-cv-00896, Settlement Agreement, 2–3 (2020), <https://www.cyfd.nm.gov/kevin-s-settlement/> [hereinafter FSA].

⁶ FSA at 1a–4a.

stable, safe, appropriate, community-based and culturally placements in the least restrictive environment. Appendix B also required CYFD to develop a Workforce Development Plan to ensure CYFD’s workforce has adequate numbers of qualified personnel by December 1, 2021.⁷ Appendix C focuses on compliance with the Indian Child Welfare Act (“ICWA”), requiring CYFD to develop a state IWCA statute and an ICWA judicial unit, to increase recruitment and retention of Native resource families, and get federal funding for the same.⁸ Appendix D focuses on Behavioral Health Services, requiring Defendants to expand and provide additional training for healthcare workers, which would increase the availability of trauma responsive services, care coordination, treatment foster care, High Fidelity Wraparound (“HFW”) services, and regular well-child checkups.⁹

In the FSA, the Parties appointed Co-Neutrals, experts in the field of social services and foster care, who have the authority reasonably necessary to “evaluate and audit progress toward achievement of [IT] and [TOs].”¹⁰ The FSA required the Defendants to provide the Co-Neutrals with data that would be the basis for the Co-Neutrals’ reports on Defendants’ performance.¹¹

C. FSA Implementation and Dispute Resolution Attempts

In November 2021, the Co-Neutrals issued their first assessment of Defendants’ performance under the FSA.¹² The Report indicated that, even by mid-2021, Defendants had

⁷ FSA at 5a–7a.

⁸ FSA at 8a–11a.

⁹ FSA at 12a–14a.

¹⁰ FSA at 5.

¹¹ FSA at 5–8.

¹² Co-Neutrals’ 2020 Annual Report.

not met the performance standard for the vast majority of ITs and TOs. Because of these extensive failures and given the urgency of the issues at stake, Plaintiffs elected to initiate the FSA’s dispute resolution process through mediation in December 2021. After six months of mediation, the Parties entered a Memorandum of Understanding (“MOU”), which focused on preventing office stays and out-of-state congregate care placements and improving CYFD’s data reporting on workforce development.¹³ Unlike the CAP, the MOU aimed to improve performance under the FSA and did not set remedial benchmarks nor create new obligations.¹⁴

Unfortunately, the MOU was ineffective. On November 15, 2022, the Co-Neutrals again reported and once again identified significant deficiencies in the State’s 2021 performance across all areas. Based on the State’s continued noncompliance and resultant harm to children in state custody, on January 6, 2023, Plaintiffs again initiated mediation and a facilitated listening session with related parties, New Mexico tribes, which resulted in the Parties executing a Corrective Action Plan on June 30, 2023, for a limited set of issues in dispute.

D. The 2023 Corrective Action Plan

The CAP in no way modifies the Parties’ FSA. Instead, the CAP sets forth remedial, additional commitments that CYFD and HSD agreed to undertake to come into compliance with the FSA on a *limited set of issues*. The CAP establishes commitments pertinent to all

¹³ *Kevin S., et al. v. Blalock, et al.*, No. 1:18-cv-00896, Memorandum of Understanding, 1–4 (2022), (<https://kevinsettlement.com/home-2/reporting-documents/>) [hereinafter MOU].

¹⁴ *Id.* at 10 (“Nothing in this MOU creates new obligations independent of or in addition to the obligations in the FSA, nor does it in any way restrict or lessen the State’s existing obligations in the FSA or limit the authority of the Co-Neutrals’ team as set forth in the FSA.”).

four FSA Appendices, with an emphasis on Appendix B. Importantly, although CYFD made commitments related to Appendix C, HSD did not.

The CAP explicitly acknowledges that the Parties did not reach agreement on all disputed issues in the FSA. The limited issues addressed in the CAP include:

- For Appendix B: CYFD Workforce Caseload; Building Out Family-Based Placements; Bringing Children Placed Out of State Back to New Mexico; Review of Critical Incidents; and Pilot Programs for Coordinated Action in Local Communities;
- For Appendix C: Joint Powers Agreements with New Mexico tribes; Native Resource Family Recruitment and Retention; ICWA/IFPA Preferred Placements; and Resources for New Mexico tribes;
- For Appendix D: Well-Child Visits for Children in State Custody; and
- Data Needed to Monitor Progress.

Unlike the MOU, the CAP was negotiated as a remedial and enforceable contract with additional obligations. The Parties “jointly agreed that the commitments outlined in the CAP are necessary and will be undertaken in the time set forth in the CAP to improve the State’s ability to comply with its commitments.” As to each deliverable in dispute, the CAP provides that Defendants commitments are “to be implemented in addition to” the activities set forth in the FSA related to specific disputed deliverables addressed in the CAP.¹⁵

¹⁵ *Kevin S., et al. v. Blalock, et al.*, No. 1:18-cv-00896, Corrective Action Plan, 2–3, 8, 21 (2023), <https://www.cyfd.nm.gov/kevin-s-settlement/> [hereinafter CAP].

E. October 20, 2023 Arbitration

On September 18, 2023, the Co-Neutrals sent a letter to the Parties documenting increasingly dire circumstances for children in state custody, moving beyond “a system in crisis” to a “state of chaos.”¹⁶ The Co-Neutrals’ letter cast serious doubt on the State’s willingness and ability to timely and fully achieve CAP commitments by its expiration in January 2024. Indeed, the letter documented State action that directly interfered with its ability to meet its obligations, including CYFD’s choice to pause routine hiring for frontline staff and supervisors across the state for months in 2023—an action that CYFD concealed from Plaintiffs *during* the Parties’ CAP negotiations.

The downstream effects of understaffing substantially affected Defendants’ ability to perform all aspects of the FSA and put children at significant risk. For example, starting in June 2023, there was a significant increase in placements in CYFD offices, shelters and out-of-state residential treatment facilities. At the same time that CYFD froze hiring, CYFD elected to undergo a major reorganization, causing significant confusion and anxiety among staff, many of whom resigned. Simply put, the system was in disarray, and children and families shouldered the cost.

After receiving the Co-Neutrals’ report that the danger to children was increasing and after the Defendants rebutted Plaintiffs’ request to provide written assurances that Defendants would immediately take action to comply with the CAP, Plaintiffs initiated arbitration on October 20, 2024. Despite the State’s clear intention to ignore CAP requirement, the State objected to the arbitration as premature. As a result of Defendants objections and in an effort to

¹⁶ Letter from Co-Neutrals to Parties, 4 (September 18, 2023) (<https://kevinssettlement.com/home-2/reporting-documents/>) [hereinafter Co-Neutrals’ September 18, 2023 Letter].

save both Parties resources, Plaintiffs dismiss the arbitration without prejudice. Plaintiffs also relied on Defendants numerous assertions that they were dedicated to realizing the vision embodied in the FSA and CAP.

F. Co-Neutrals’ Findings in 2024 and Defendants Continued Non-Compliance

After dismissal, the Co-Neutrals met in person with many CYFD caseworkers, supervisors, and managers in several CYFD offices as well as leaders from several Pueblos and other stakeholders. On January 26, 2024, the Co-Neutrals then reported:

We had hoped when undertaking these visits to county offices, four months after our last site visits, that we would see evidence of improvement. However, what we heard and observed was to the contrary; we heard about deteriorating conditions and crisis situations in most of the offices we visited. In our assessment, the issues we identified in our September 2023 letter remain and, for the most part, there has been little to no progress in addressing them 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.¹⁷

Despite dire conditions being brought to the State’s attention in September 2023, and even after four additional months to perform, the State had still not taken any effectual actions to comply with the CAP.

On February 23, 2024, the Co-Neutrals issued a CAP Implementation Memorandum to ensure that “relevant and current information is available to the Parties.”¹⁸ Noting that the CAP was intended to address previously noted deficiencies, the Co-Neutrals found that compliance with the CAP had “not occurred in a meaningful way.”¹⁹ In response to the 2024 Co-Neutrals’

¹⁷ Letter from Co-Neutrals to Parties, 1 (Jan. 26, 2024) (<https://kevinssettlement.com/home-2/reporting-documents/>) [hereinafter Co-Neutrals’ January 26, 2024 Letter].

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

¹⁹ *Id.* at 19.

CAP Implementation Memorandum, Plaintiffs sent a letter to State on March 5, 2024, requesting the State's position regarding the recent Co-Neutrals' findings.

On March 12, 2024, the State responded and admitted to its breaches of the CAP with little or no qualification.²⁰ Specifically, Defendants admitted to not meeting the following CAP commitments that are the subject of Plaintiffs' claims in this arbitration: (1) CYFD Workforce Caseloads, (2) Family Based Placements, (3) Well-Child Visits, and (4) Data Submissions to the Co-Neutrals. Although the Parties continued discussions, the State failed to propose enforceable benchmarks to comply with the CAP, which caused Plaintiffs to initiate this arbitration.

III. LEGAL STANDARD

Arbitration is “a contractual remedy for the settlement of disputes by extrajudicial means.” *Christmas v. Cimarron Realty Co.*, 1982-NMSC-079, ¶ 7, 648 P.2d 788, 790 (citing *King County v. Boeing Co.*, 570 P.2d 717 (1977)). The terms of the FSA and CAP are interpreted under New Mexico law,²¹ which considers parties to an arbitration agreement to be bound by its terms *Christmas*, 648 P.2d at 790 (citing *Loukonen v. MacKay*, 490 P.2d 78 (Colo.App.1971)). The New Uniform Arbitration Act, NMSA 1978, §§ 44-7A-1 to -32 (2001), also applies to both the FSA and CAP.²² The CAP is a separate, enforceable contract without an altered performance standard. The Plaintiffs renew their argument that the CAP employs a strict liability standard, meaning any non-performance under the CAP constitutes a breach, regardless of fault.²³

²⁰ Letter from the State to Plaintiffs (Mar. 12, 2024) (available at Exhibit G in the Notice of Arbitration) [hereinafter State's March 12, 2024 Letter].

²¹ FSA at 12.

²² The Act, as adopted by New Mexico in 2001, applies to agreements “to arbitrate made on or after the effective date of that act.” NMSA § 44-7A-3.

²³ Alternatively, should the Arbitrator determine the FSA the FSA Performance Standard requires Defendants to take every reasonable effort to achieve the required outcomes. The State's subjective intentions, plans or promises are not to be assessed when determining whether Defendants have met the Performance Standard. *See* FSA at 2–3.

IV. STANDARD OF REVIEW

The Parties found it necessary to task the Co-Neutrals with assessing Defendants' performance related to the ITs, TOs, and CAP commitments because determining whether Defendants have satisfied those obligations involves a complex undertaking involving the validation and analysis of large amounts of data, in-depth fact finding efforts, and the application of specialized knowledge.²⁴ At minimum, the Co-Neutrals' conclusions are prima facie evidence to be overcome by a party in disagreement.

Because Defendants are required under the FSA and the CAP to provide the Co-Neutrals with the information necessary to assess their compliance with their commitments,²⁵ the existence of any information that was not provided to the Co-Neutrals, as well as issues with the quality of the information relied upon by the Co-Neutrals, cannot be used as a basis to reject their findings or to conclude that Defendants have not breached the CAP. Accordingly, any failure by

²⁴ See *Child Welfare Transforming Child Welfare to Serve Everyone Equitably*, Center for the Study of Social Policy, <https://cssp.org/our-work/focus/child-welfare/> (last visited July 15, 2024) (detailing the use of experts in child welfare cases such as: (1) in a Kansas lawsuit, to report and assess the State of Kansas' progress towards achieving the Performance Goals, Practice Improvements, and Outcomes under a settlement agreement; (2) in a Washington DC lawsuit using court appointed monitors to assess District of Columbia child welfare system's compliance with Court's final order; (3) in a New Jersey lawsuit using court appointed monitors to assess progress of the New Jersey Department of Children and Family Services toward meeting its obligations under a Modified Settlement Agreement; (4) in settlement of a lawsuit in Tennessee using an independent court monitor to track compliance of the State's child welfare system with performance standards and outcomes; (5) to track the South Carolina's obligations created by settlement and enforcement orders to improve outcomes of children removed from parents and in state custody; and (6) in a lawsuit in California to assess the progress of the Humboldt County Department of Health and Human Services, Child Welfare Services and Sheriff's Office in complying with a court judgment).

²⁵ FSA at 7 ("Defendants shall provide to Plaintiffs and the Co-Neutrals any data required to validate the Target Outcomes for the previous calendar year."); *Id.* ("If Defendants fail to provide accurate and verifiable data in a timely manner, the Co-Neutrals may find that they have not met the Performance Standard") (emphasis added); *Id.* at 8 (Defendants' staff "will provide the Co-Neutrals and their staff and/or consultants with access to all requested information, including confidential information . . ."); CAP at 8 ("The Parties agree that *it is imperative* for the State and the Co-Neutrals to have access to real time data to assist the State in meeting the obligations in the Agreement and that the *failure to have access to real time data has already delayed needed progress* on many deliverables. In order to monitor the State's progress more effectively, CYFD and HSD agree to provide real time data as follows . . .") (emphasis added).

Defendants to provide the information needed to accurately assess their performance must be construed against Defendants.

V. CLAIMS FOR RELIEF

A. Breach of CYFD Workforce Caseload Commitments

The CAP, a separate, remedial contract with short-term requirements governing CYFD frontline staff caseloads, was necessary due to CYFD’s longstanding failure to meet its more intensive workforce commitments under the FSA. The FSA’s workforce requirements are based on the common sense and research supported fact that an adequately staffed and qualified workforce is essential to a functioning child welfare system.²⁶ The Parties agreed that the first step toward reaching this goal was to develop a work plan (“workforce development plan”) that would “describe in writing the expected nature, scope, capacity, and structure of the workforce necessary to meet the obligations” in the FSA.²⁷

The workforce development plan was to be developed by December 1, 2020 and approved by the Co-Neutrals and fully implemented by December 1, 2021.²⁸ In addition, beginning by December 1, 2020, CYFD agreed to work with the Co-Neutrals to set the metrics for validating the caseload standard in the Data Validation Plan, the document that sets forth the methodology and data necessary to validate Defendants’ progress.²⁹ Yet, as late as February 16, 2022, CYFD’s Data Validation Plan did not include caseload standards for placement workers.³⁰

²⁶ FSA at 7a.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 6.

³⁰ See State of New Mexico Kevin S. Settlement Data Validation Plan (Feb. 16, 2022), <https://www.cyfd.nm.gov/kevin-s-settlement/> [hereinafter 2022 Data Validation Plan]. Notably, the 2024 Data Validation Plan also reiterates the caseload standard. State of New Mexico Kevin S. Settlement Data Validation Plan, 7, 76–77 (Apr. 14, 2024), <https://www.cyfd.nm.gov/kevin-s-settlement/> [hereinafter 2024 Data Validation Plan].

Belatedly, the April 10, 2023 Revised Data Validation Plan included complete caseload standards, including the caseload standard for placement workers effective as of July 1, 2022.³¹ CYFD's complete Workforce Development Plan was not finalized until July 13, 2023.³²

Ensuring that there are sufficient caseworkers to meet the needs of children in State custody is an express goal of the FSA.³³ Throughout their monitoring, the Co-Neutrals have consistently warned that one of the most pressing needs of the system is to address CYFD worker caseloads.³⁴ CYFD's Workforce Development Plan underscores that "an empirical caseload standard is necessary to monitor the distribution of cases among staff; better understand the impact of vacancies and turnover on work quality and case outcomes; and to determine staffing needs at the state, regional, and county levels."³⁵ As of May 2023, CYFD was still not even close to fulfilling its FSA commitments regarding caseload standards.³⁶ Given CYFD's failure to recruit and retain necessary staff, the Plaintiffs bargained for a separate, specific promise by the State that CYFD worker caseloads would meet specific remedial numbers by the end of the CAP compliance period. The State's promise to meet measurable outcomes is not subject to the FSA Performance Standard, as it focuses on results, not efforts.³⁷

³¹ State of New Mexico Kevin S. Settlement Data Validation Plan, 7 (April 10, 2023), <https://www.cyfd.nm.gov/kevin-s-settlement/> [hereinafter 2023 Data Validation Plan].

³² Co-Neutrals' 2022 Annual Report at 97.

³³ FSA at 4.

³⁴ See Co-Neutrals' 2020 Annual Report at 49–50; Co-Neutrals' 2021 Annual Report at 9; Co-Neutrals 2022 Annual Report at 12, 97.

³⁵ CYFD Workforce Development Plan at 11, <https://www.cyfd.nm.gov/wp-content/uploads/2023/07/Appendix-B-TO-10-CYFD-Workforce-Development-Plan.pdf>.

³⁶ Co-Neutrals 2022 Annual Report at 98.

³⁷ CAP at 2.

In the CAP, the Parties agreed that “there is an urgent need to recruit and retain case workers and to come into compliance with the caseload standard required by the Agreement. CYFD will work closely and cooperatively with the Co-Neutrals to ensure progress towards meeting caseload standards.” CYFD committed under the CAP to ensure that no case-assignable worker would have over 200% of the applicable caseload standard as documented in the 2023 Data Validation Plan, including trainees with graduated caseloads, and that no supervisors would carry any cases by December 31, 2023.³⁸ Additionally, the State agreed to provide monthly data reports with elements approved by the Co-Neutrals.³⁹

Yet, as acknowledged by the State, CYFD actually paused hiring – without the Co-Neutrals’ and Plaintiffs’ knowledge – while the Parties were finalizing the terms of the CAP and after the CAP went into effect.⁴⁰ CYFD leadership cannot credibly claim to have been ignorant of the impact that a hiring freeze lasting three and a half months⁴¹ would have on the right of Plaintiffs and children in state custody to benefit from reduced CYFD worker caseloads. Prior to the hiring freeze, Defendants had been made aware and had acknowledged that a sufficiently staffed agency would be the foundation successful reform efforts would necessarily rest upon.⁴²

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Co-Neutrals’ September 18, 2023 Letter (documenting that Co-Neutrals did not discover CYFD’s hiring pause until September 2023 site visits).

⁴¹ Colleen Heild, *CYFD Hiring freeze Helped Create ‘State of Chaos’ at Agency, Experts Say*, Albuquerque Journal (Oct. 2, 2023), https://www.abqjournal.com/news/cyfd-hiring-freeze-helped-create-state-of-chaos-at-agency-experts-say/article_12c0e2bc-5f02-11ee-8659-cf91bde61a13.html.

⁴² *E.g.* Co-Neutral’s 2021 Annual Report at 8 (“To achieve the promises of the FSA for children and families in New Mexico, the State’s investments and efforts must continue to focus on fundamental capacity building components of the FSA: (1) strengthening and stabilizing the CYFD and HSD workforce[.]”); State of New Mexico, Kevin S. Settlement Agreement August 1, 2021, Commitments Progress Report, 1 (“The State of New Mexico is committed to . . . [e]nsure sufficient human resources to meet the needs of children in state custody including trained caseworkers[.]”); FSA at 7a (“CYFD will create a CYFD Workforce Development Plan that will ensure CYFD’s workforce has adequate qualifications, expertise, skills, and numbers of personnel.”); Robert Nott, *Child Welfare in ‘Workforce Crisis,’ New Mexico Lawmakers Told*, Santa Fe New Mexican (Sep. 28, 2023),

The Co-Neutrals also made clear to Defendants that CYFD hiring should be prioritized and facilitated whenever possible. Specifically, the Co-Neutrals recommended that CYFD “[r]eexamine and streamline the hiring process[,]” “[d]evelop a statewide hiring plan[,]” and develop “solutions to the complexity and length of time it currently takes to process applications and make offers of employment[.]”⁴³

Rather than heeding the guidance of the Co-Neutrals, CYFD leadership chose to take action in direct conflict with the Co-Neutrals’ recommendations. In their letter issued after the termination of the hiring freeze, the Co-Neutrals made clear that the decision to pause hiring had a direct causal connection to rising worker caseloads and the lack of progress made towards Defendants’ other CAP commitments:

- “To our dismay, across the board, CYFD staff at all levels during our meetings last week described conditions in the CYFD offices as significantly worse than last year, in part *due to the decision to pause most routine hiring at CYFD for months.*”⁴⁴
- “[T]he result [of the hiring pause] has been substantial vacancies across the agency in investigative positions, PPWs, senior workers, supervisors and management staff. This has created unreasonably large caseloads among caseworkers and supervisors with managers at multiple levels carrying caseloads as well.”⁴⁵
- “[C]onditions in the CYFD offices are significantly worse than last year, primarily due to exorbitant caseloads and substantial vacancies caused by attrition, insufficient hiring and numerous employees currently on Family and Medical Leave.”⁴⁶
- “[V]acancies and insufficient hiring in Albuquerque have also resulted in many CYFD caseworkers and supervisors being required to monitor children in offices because of a lack of safe placements for children and/or older youth’s reported refusal of placements.”⁴⁷

[https://www.santafenewmexican.com/news/local_news/child-welfare-in-workforce-crisis-new-mexico-lawmakers\[1\]told/article_ee7e57ee-3e74-11ed-85dc-83c8288c8f0c.html](https://www.santafenewmexican.com/news/local_news/child-welfare-in-workforce-crisis-new-mexico-lawmakers[1]told/article_ee7e57ee-3e74-11ed-85dc-83c8288c8f0c.html) (Secretary Barbara Vigil describing the agency’ workforce crisis to the Legislative Courts, Corrections and Justice Committee.).

⁴³ Letter from Co-Neutrals to Defendants, 2–3 (September 27, 2022) (<https://kevinssettlement.com/home-2/reporting-documents/>) [hereinafter Co-Neutrals’ September 27, 2022 Letter].

⁴⁴ Co-Neutrals’ September 18, 2023 Letter at 1 (emphasis added).

⁴⁵ *Id.* at 1.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 3.

- “[S]taff shortages had worsened communication with relative and non-relative caregivers, and contributed to families choosing to close their homes over the past several months, worsening the shortage of family-based placements.”⁴⁸
- “CYFD staff who are assigned to recruit families as resource caregivers said they lacked resources and an overall strategy to do the work effectively, and in any event, many said the CYFD offices had become so consumed by rising caseloads that they have shifted their focus to include helping their colleagues manage children’s cases. They felt that even if they identified willing families, there were insufficient staff to conduct home studies and complete licensure for them.”⁴⁹
- “CYFD staff and managers at all levels described substantial service gaps for children[.]”⁵⁰

In choosing to implement the hiring freeze, CYFD leadership intentionally disregarded the effect a stagnant, if not decreasing, workforce would have on the agency’s ability to satisfy its CAP commitments. The Co-Neutrals confirmed the harmful impact of the hiring freeze.

Further, the Co-Neutrals’ CAP Implementation Memorandum confirmed the State failed to satisfy its workforce related promises in the CAP. The Co-Neutrals revealed that 19% of case-assignable workers exceeded the caseload threshold, leaving workers overwhelmed and unable to provide necessary attention and care to each case.⁵¹ The Co-Neutrals also found that, despite the CAP commitment, supervisors were still responsible for carrying a high volume of open cases. As of January 5, 2024,⁵² 13% of individuals assigned as primary workers on at least one case were supervisors. Moreover, the Co-Neutrals identified substantial discrepancies in the State’s data submissions.⁵³ Over 80 cases did not have an assigned primary worker, 15 cases were assigned to primary workers who were no longer CYFD employees, and there were numerous

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 3.

⁵⁰ *Id.* at 4.

⁵¹ CAP Implementation Memorandum at 4.

⁵² *Id.* at 5.

⁵³ *Id.* at 6.

data points with significant discrepancies between staff’s understanding of their caseloads and the State’s reported data.⁵⁴

The State’s March 12, 2024 Letter acknowledged the data reporting problems, stating “[t]he State is committed to steady progress in addressing issues with the quality of caseload data.”⁵⁵ Nor did the State deny any of the substantive failures found by the Co-Neutrals.⁵⁶ In effect, the State completely failed to address its CAP caseload commitments in 2023.

The State cannot continue to compromise the welfare of children through ongoing lapses in caseload management and data accuracy, as found by the Co-Neutrals and confirmed by the State itself. The State is in breach of its CAP workforce caseload commitments. Additionally, it is unambiguous that CYFD leadership violated the CAP by willfully taking action that was certain to hinder the agency’s ability to satisfy its CAP commitments and undercut Plaintiffs’ ability to benefit from the CAP.

B. Breach of Resource Family Recruitment Commitments

When the State separates children from their families, it assumes responsibility for their well-being. One of the most basic responsibilities the State has is to provide children in custody with a safe, appropriate place to live. Federal law requires states to place foster children in the most family-like setting consistent with each child’s needs. 42 U.S.C. § 675(5)(A). New Mexico recognizes that “to the maximum extent possible, children in New Mexico shall be reared as

⁵⁴ *Id.* at 3, n. 8 (Co-Neutrals’ inability to determine with certainty which and how many primary cases and individual in a case-assignable role is eligible to carry because of the State’s failure to provide training completion dates.); *Id.* at 6 (Staff reported meaningful discrepancies between their understanding of their caseloads and the counts reflected in FACTS; some supervisors and managers reported they were assigned to work on cases as the primary worker but those assignments were not reflected in FACTS.).

⁵⁵ State’s March 12, 2024 Letter at 1.

⁵⁶ *Id.*

members of a family unit.” NMSA § 32A-1-3. In the FSA, the State also expressly agreed that “[c]hildren in out-of-home care should be in the least restrictive, most connected, most family-like setting appropriate for their unique needs.”⁵⁷ The State also agreed that children should be in “stable placements that meet their needs and should be protected from harm caused by multiple placement moves.”⁵⁸ The Parties’ agreement as to the centrality of foster home placements is reflected by multiple specific FSA requirements, including:

1) requiring both agencies to develop a plan to increase recruitment and retention of culturally reflective community-based placements by December 1, 2020;⁵⁹

2) placing a prohibition, starting December 1, 2023, on placement in hotels, motels, offices and out-of-state providers except in extraordinary circumstances necessary to protect the safety and security of the child;⁶⁰ and

3) requiring, by “December 1, 2021, every child in out-of-home care will be in a licensed foster home placement unless a current finding of medical necessity requires otherwise or an Individualized Planning Meeting team determines that a non-clinical setting is in the child’s best interest.”⁶¹

In order to ensure a sufficient number of foster homes reflective of numbers and demographics of children in state custody, the FSA provides that the Co-Neutrals will approve annual Target Outcomes for a number of new foster homes for CYFD to approve each year and

⁵⁷ FSA at 5a.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 5a–6a.

⁶¹ *Id.* at 6a.

for HSD to approve a specified number of new treatment foster care placements.⁶² The data validated by the Co-Neutrals for 2022 demonstrates that “the total number of homes with foster care, specialized foster care, or relative foster care license did not increase since 2021.”⁶³ Between 2020 and 2022, the State failed to make any progress on developing family based placements for children in State custody. In response to these failures, the Parties executed a separate and remedial agreement, the CAP, requiring CYFD to develop and implement a public/private strategy to recruit and retain foster parents and requiring CYFD and HSD to develop a clear process to ensure children in State custody who require treatment foster care receive needed home based treatment.⁶⁴

In the CAP, CYFD agreed to *immediately* assign one placement staff per county to focus exclusively on resource family recruitment in five high-needs counties (Bernalillo, Dona Ana, Santa Fe, San Juan, and Chavez/Eddy), which collectively serve well over 500 children in state custody.⁶⁵ In addition, CYFD committed to enter into contracts with at least one private provider for resource family recruitment and retention by September 30, 2023, “with specific capacity focused on growing new foster homes *in each county throughout the State*.”⁶⁶

CYFD did not assign placement staff to focus exclusively on family recruitment in each of the five high-needs counties, nor did enter into a contract with at least one private provider with specific capacity focused on growing new foster homes in each county.⁶⁷ While CYFD did

⁶² *Id.* at 7a.

⁶³ Co-Neutrals’ 2022 Annual Report at 86.

⁶⁴ CAP at 3–5.

⁶⁵ Co-Neutrals’ 2022 Annual Report at 19.

⁶⁶ CAP at 3 (emphasis added).

⁶⁷ CAP Implementation Memorandum at 9.

enter into an agreement with one contractor, his methodology is entirely insufficient to address the State’s pressing need for rapid resource family recruitment. The State also reported to the Co-Neutrals that the contractor was not expected to “launch this model in one county [until] February 2024.”⁶⁸ In fact, according to the Co-Neutrals, “in the eight counties visited by the Co-Neutrals in January 2024, CYFD appears to have lost ground and staff reported that they do not have dedicated time and resources for this work. Implementation of county-based recruitment plans was not well organized or proactive.”⁶⁹ The data provided by the State mirrors the Co-Neutrals’ on-the ground observations. They found that between July and November 2023, CYFD experienced a net loss of 35 resource homes.⁷⁰ The importance of the State’s nonperformance cannot be overstated. The State’s recruitment failures have resulted an “acute shortage of resource families” *with babies* being left at the Bernalillo County Receiving Center, some for weeks.⁷¹ As for treatment foster care placements, the Co-Neutrals found that out of the children for whom CYFD submitted new requests for TFC services between August and December 2023, 78 percent were ultimately not placed in a TFC home.⁷² Out of those children, 77 percent were not placed in TFC due to a lack of an appropriate treatment match, demonstrating the need for additional TFC homes in New Mexico.⁷³

The State is in breach of its resource family recruitment commitments, and it admitted this is the case in its March 12, 2024 letter. The State “agree[d] with the Co-Neutrals’ statements regarding family-based placements.”⁷⁴ The persistent lack of dedicated placement staff in high-

⁶⁸ *Id.* at 8.

⁶⁹ *Id.* at 9.

⁷⁰ *Id.* at 7.

⁷¹ *Id.* at 9.

⁷² *Id.* at 10–11.

⁷³ *Id.*

⁷⁴ State’s March 12, 2024 Letter at 2.

needs counties and the failure to grow specific capacity throughout the state has inhibited children's placement in stable, supportive family environments. Until the State complies with these CAP commitments, children in State custody will continue to be harmed.

C. Breach of Well-Child Visit Commitments

All children in protective service custody in New Mexico have the right to prompt and comprehensive medical screening and treatment. New Mexico law requires early and periodic screening, diagnostic and treatment services ("EPSDT") to take place within 30 days when a Medicaid eligible child enters protective service custody. N.M. Code R. § 8.10.8.17(A). Similarly, children who enter protective service custody that are not eligible for Medicaid must receive a complete physical examination within the same time period. *Id.*

Under federal law, EPSDT is a mandatory service the State must provide to all Medicaid eligible individuals under the age of 21. *See* 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4)(A), 1396d(r).⁷⁵ The majority of children in foster care in New Mexico are eligible for Medicaid through Title IV-E of the Social Security Act. *See* 42 CFR 435.145. At a *minimum*, EPSDT must include the following components:

- (i) a comprehensive health and developmental history (including assessment of both physical and mental health development),
- (ii) a comprehensive unclothed physical exam,
- (iii) appropriate immunizations (according to the schedule referred to in section 1396s(c)(2)(B)(i) of this title for pediatric vaccines) according to age and health history,
- (iv) laboratory tests (including lead blood level assessment appropriate for age and risk factors), and
- (v) health education (including anticipatory guidance).

42 U.S.C. § 1396d(r)(1)(B).

⁷⁵ Among the important purposes of an EPSDT examination is to quickly identify any and all health issues that could affect the child's growth and development.

In the FSA, the State promised it would come into compliance with these preexisting legal obligations as to children State custody. Specifically, the State agreed that by “December 1, 2021, every Child in State Custody will receive a comprehensive well-child checkup within 30 Days of entering state custody.”⁷⁶ The State failed to keep this promise, resulting in the creation of the CAP. As a baseline upon which to measure its progress, the State concluded that for 2019, “45.74% of all episodes of custody longer than 30 days that began during the reporting year included a well-child checkup within 30 days of the child entering State custody (344/752).”⁷⁷ As for its 2020 performance, the State found, “47.37% of all episodes of custody longer than 30 days that began during the reporting year included a well-child checkup within 30 days of the child entering State custody (369/779).”⁷⁸ For 2021, the Co-Neutrals found that “[t]he data show that of the 43 episodes of custody that reached their 30th day in December 2021 (the period of review for this metric since the commitment began on December 1, 2021), 20 (47%) included a well-child check-up within the period.”⁷⁹ Finally, the Co-Neutrals concluded that “fewer than half (44%) received a timely well-child medical checkup” in 2022.⁸⁰

Under the CAP, the State agreed that by January 1, 2024, 100% of children in custody will receive well-child visits with a medical provider within 30 days of placement in CYFD custody.⁸¹ The State also agreed to “ensure that all children who entered care before July 1, 2023 and are still in custody on September 15, 2023 have a completed well-child visit by September

⁷⁶ FSA at 14a.

⁷⁷ CYFD, Kevin S. 2019–2020 Report: Quantitative Monitoring Outcomes, 19 <https://www.cyfd.nm.gov/kevin-s-settlement/>.

⁷⁸ *Id.* at 19–20.

⁷⁹ Co-Neutrals’ 2021 Annual Report at 103.

⁸⁰ Co-Neutrals’ 2022 Annual Report at 11.

⁸¹ CAP at 23.

15, 2023.”⁸² The State further committed to provide the Co-Neutrals with information demonstrating its compliance with the well-child visit commitments.⁸³

In their CAP Implementation Memorandum, the Co-Neutrals found the State’s data did “not indicate that all children in state custody received a completed well-child visit within 30 days of entering care.”⁸⁴ More specifically, the Co-Neutrals concluded the State produced records to verify completion of a well-child visit for only 36 percent of the records they requested.⁸⁵ *Id.* These records included, but were not limited to, those for children “who entered care prior to January 1, 2023 who remained in care as of September 15, 2023.”⁸⁶ When the Co-Neutrals examined the records of children who entered care after January 1, 2023 and whose records showed they received a well-child visit, they found that only 74 percent of the visits occurred within 30 days of the child entering care.⁸⁷ When the Co-Neutrals examined the records of all the children whose records showed they received a well-child visit, they found that only 51 percent of the children had received a well-child visit where “[a]ll required and applicable elements of a well-child checkup were documented.”⁸⁸

In the State’s March 12, 2024 letter, it admitted the Co-Neutrals’ conclusions regarding well-child visits were accurate. The State explicitly stated, “Generally, the state agrees with the statements the Co-Neutrals have made regarding well-child visits.”⁸⁹ While the State mentioned that the Co-Neutrals did not consider HSD billing or service dates and noted late data entries, it

⁸² *Id.* at 24.

⁸³ *Id.* at 8, 23.

⁸⁴ CAP Implementation Memorandum at 18.

⁸⁵ *Id.*

⁸⁶ *Id.* at 18, n. 34.

⁸⁷ *Id.* at 18, n. 35.

⁸⁸ *Id.* at 18, n. 36.

⁸⁹ State’s March 12, 2024 Letter at 8.

did not claim any improvement with this additional data. Instead, the State merely pointed out that “the state counts are slightly inconsistent with the numbers reported by the Co-Neutrals,” thereby admitting that the fundamental problems remain unresolved.⁹⁰ The State also conceded that “consistent practice has remained a challenge statewide, although HSD has seen progress toward compliance month over month since implementation of the CAP.”⁹¹

D. Breach of Data Submission Commitments

Under both the CAP and FSA, the State committed to collecting and producing real-time data the Co-Neutrals require to assess the State’s performance under the agreements. These requirements are fundamental to both agreements, given that the information needed to quantify the State’s progress is typically within the State’s exclusive control and the Co-Neutrals’ ability to monitor the State’s progress is the mechanism which renders the agreements meaningful and enforceable.

Under the FSA, the State is required to provide the Co-Neutrals with “any data required to validate the Target Outcomes for the previous calendar year.”⁹² In order to do so, the State must,

[D]esignate an employee to facilitate the Co-Neutrals’ access to information, including access to Defendants’ personnel ... The designated employee will provide the Co-Neutrals and their staff and/or consultants with access to all requested information, including confidential information, and will not have the authority to deny any Co-Neutral’s request for information or access, or otherwise to restrict the Co-Neutrals’ access to information. In addition to ensuring that the Co-Neutrals have remote electronic access to Defendants’ data systems that collect or record information necessary to validate performance under this Agreement, Defendants will respond to any requests for additional information

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² FSA at 7.

from the Co-Neutrals within 14 Days of the request unless the Co- Neutrals agree to a different deadline.⁹³

Crucially, “[i]f Defendants fail to provide accurate and verifiable data in a timely manner, the Co-Neutrals may find that they have not met the Performance Standard” under the FSA.⁹⁴ The Parties agreed in the CAP that “it is imperative for the State and Co-Neutrals to have access to real time data to assist the State in meeting its obligations in the Agreement and that the failure to have access to real time data has already delayed needed progress on many deliverables.”⁹⁵ Regardless, the Co-Neutrals have noted repeated deficiencies in the State’s performance regarding access to information and data reporting.⁹⁶

The CAP contains many specific data reporting requirements. For example, the CAP provides that “[i]n addition to the data regarding treatment foster care to be provided to the Co-Neutrals above in Section 2, the State will provide to Co-Neutrals quarterly data on the total number of treatment foster care homes.”⁹⁷ For well-child visits, the State’s data collection and reporting requirements include:

1. HSD will establish a process with the MCO care coordinators to collect information and report on completion of well-child visits for children.
2. CYFD will ensure case workers are entering completion of well-child visits in FACTS.

⁹³ FSA at 8–9.

⁹⁴ *Id.*

⁹⁵ CAP at 8.

⁹⁶ *E.g.* Co-Neutrals’ 2020 Annual Report at 17 (“While the State did submit data on each of those dates, as of September 1, 2021, the State had not submitted to the Co-Neutrals the final data necessary to validate the baseline or CY2020 performance As of the date of this report, the Co-Neutral team, in collaboration with the State, has identified a number of quality issues in the data submitted”); Co-Neutrals’ 2021 Annual Report at 18 (“Much has been accomplished, and more work remains. The Co-Neutrals continue to work closely with the State and the State’s data partners to improve the quality, completeness, and consistency of the data submitted for validation.”); Co-Neutrals’ 2022 Annual Report at 22 (“The Co-Neutral team conducted extensive qualitative reviews of children’s records and identified discrepancies between information in children’s case records and structured data entered into FACTS. There were some areas in which the data issues were sufficiently limited that validation was still possible and some areas in which the issues precluded any validation.”).

⁹⁷ CAP at 8.

3. CYFD will run monthly reports on performance of completed well-child visits within 30 days of children entering care beginning with all children who enter care on July 1, 2023 and later. CYFD will spot check these reports for accuracy with the data provided by HSD from care coordinators. For the purposes of ensuring compliance, the validation will not include any children in custody less than 30 days.
4. By the 5th of the month following when well-child visits should occur for children newly entering care, the State will provide monthly performance data which has undergone an initial QA check to the Co-Neutrals. For example, performance data for children who entered care in July 2023 will be provided on September 5, 2023, performance data for children who entered care in August 2023 will be provided on October 5, 2023, and so on. The final data submission will be provided on January 5, 2024 for children who enter care in November 2023.
5. The Co-Neutrals will request documentation verifying completion of a well-child visit for a sample of 50% of children, but not more than 25 children. The State will provide the requested information to the Co-Neutrals within 5 business days. Through the validation work, if the Co-Neutrals identify issues, they can request information for more than 25 children in a month. The Co-Neutrals will share validation findings with the State and Plaintiffs.
 - The State will ensure that all children who entered care before July 1, 2023 and are still in custody on September 15, 2023 have a completed well-child visit by September 15, 2023. The Co-Neutrals will request documentation verifying completion of a well-child visit for a sample of 10% of children in the pre-July 1, 2023 cohort. The Co-Neutrals will share validation findings with the State and Plaintiffs.⁹⁸

The Co-Neutrals' CAP Implementation Memorandum concluded the data the State was required to provide under the CAP was "not consistently provided within the timelines outlined in the CAP."⁹⁹ Specific examples of the data reporting violations found by the Co-Neutrals include, but are not limited to, the failure to provide all required quarterly data on the total number of TFC homes, "despite repeated requests from the Co-Neutrals" and failure to provide complete and timely well-child visit data.¹⁰⁰ As discussed previously, out of the well-child visit

⁹⁸ *Id.* at 23–24.

⁹⁹ CAP Implementation Memorandum at 19.

¹⁰⁰ *Id.* at 18–19.

records requested by the Co-Neutrals pursuant to the CAP, only 36 percent of the records the State provided demonstrated a well-child visit took place.¹⁰¹ And this does not mean that the State produced complete records for all the children specified. Instead, nearly two-thirds of the records included no or inadequate proof that a child received a well-child visit but some of the records requested were not produced on time, or at all.¹⁰²

In its March 12, 2024 letter, the State admitted that it “agrees with the Co-Neutrals” regarding the data deficiencies outlined by the Co-Neutrals.¹⁰³ This acknowledgment is a clear admission of the State’s failure to meet its data submission commitments as required by the CAP. In particular, the State has conceded that it provided late data entries regarding well-child visits, and the State did not object to the Co-Neutrals’ statement that it failed to provide some of the requested records at all.¹⁰⁴ The State has also admitted that as of March 12, 2024, it had not submitted all of the quarterly TFC home data required by the CAP.¹⁰⁵ These failures to provide data as required constitute stand-alone violations of the State’s CAP commitments. While the specific data collection and reporting failures by the State discussed above do not represent all such CAP violations that occurred, they are emblematic of the State’s lack of commitment towards even the most basic obligations in the CAP.

E. Breach of Duty of Good Faith and Fair Dealing

Distinct from the contract strict liability and, alternatively, the FSA’s requirement that Defendants meet the FSA Performance Standard, Defendants are bound by an implied covenant

¹⁰¹ *Id.* at 18.

¹⁰² *Id.* at 18, n.34.

¹⁰³ State’s March 12, 2024 Letter at 8.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

of good faith and fair dealing under both the FSA and the CAP. CYFD violated this duty and breached the CAP when agency leadership implemented a statewide hiring freeze of frontline staff and supervisors in May of 2023.¹⁰⁶

“In New Mexico there exists a duty of good faith and fair dealing . . . in every contract.” *Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, ¶ 13, 617, 954 P.2d 45, 49. 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[,]” or from “undercut[ting] another party’s rights or benefits under the contract.” *Bourgeois v. Horizon Healthcare Corp.*, 1994-NMSC-038, ¶ 16, 872 P.2d 852, 856 (citing *Watson Truck & Supply Co. v. Males*, 1990-NMSC-105, ¶ 12, 801 P.2d 639, 642); *Kropinak v. ARA Health Servs., Inc.*, 2001-NMCA-081, ¶ 5, 33 P.3d 679, 681 (citing *Watson Truck & Supply Co. v. Males*, 1990-NMSC-105, ¶ 12, 801 P.2d 639, at 642). Violation of the covenant “constitutes a breach of contract.” 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 *Bourgeois*, 1994-NMSC-038, ¶ 17, 872 P.2d at 857) (noting the covenant “becomes part of the contract and the remedy for its breach is on the contract itself”).

While negligent conduct, on its own, may not constitute a breach of the covenant, “wrongful and intentional affronts to the other party’s rights, or at least affronts where the breaching party is consciously aware of, and proceeds with deliberate disregard for, the potential of harm to the other party” will constitute a breach. *Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, ¶ 31, 118 N.M. 203, 213, 880 P.2d 300, 310. CYFD’s action of *continuing the hiring freeze for months* after signing the CAP and promising to fulfill remedial caseload standards to

¹⁰⁶ Co-Neutrals’ September 18, 2023 Letter at 2.

come into compliance with its FSA caseload obligations constituted deliberate disregard for the potential of harm to children in foster care in New Mexico.

VI. REMEDY

To remedy the State's breaches of the CAP detailed above, Plaintiffs request the Arbitrator order specific performance of the State's CAP commitments, attorney's fees and costs, and any other relief the Arbitrator deems appropriate.

A. Specific Performance is Appropriate

"Specific performance is the actual accomplishment of a contract by a party bound to fulfil it, and is a means of compelling a party to do precisely what he ought to have done without being coerced by a court." *McCoy v. Alsup*, 1980-NMCA-035, ¶ 31, 94 N.M. 255, 261, 609 P.2d 337, 343 (quoting *Board of Education v. O'Bannon*, 26 N.M. 606, 610, 195 P. 801 (1921)).

Specific performance is appropriate when "from a view of all the circumstances of the particular case that it will serve the ends of justice" and "where enforcement of the promise is necessary to avoid injustice." 25 Williston on Contracts § 67:1 (4th ed.); § 44-7A-22(c), NMSA 1978 (noting that an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances). Specific performance should be awarded "where the remedy at law, in this case damages, is inadequate. To be adequate, the remedy at law 'must be as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance.'" *United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 436, 96 N.M. 155, 252, 629 P.2d 231, 328 (quoting *Laclede Gas Company v. Amoco Oil Company*, 522 F.2d 33, 40 (8th Cir. 1975)).

Specific performance of the CAP is necessary to prevent further peril and injustice to New Mexico's foster children and given the history between the Parties. As the Co-Neutrals have found, children in State custody have been harmed due to the State's failure to comply with the FSA over the past four years and due to its failure to comply with the CAP since its execution in

2023. In fact, the State’s failure to meet even initial obligations under the agreements has compounded the harm to children in State custody. Given the complexity of the systemic issues leading to the injuries children in State custody continue to suffer, the remedy that is most likely to prevent further injustice is that requiring the full implementation of the CAP. After all, the CAP was specifically designed to address the specific problems the State faces and to help the State come into compliance with the FSA. The CAP is highly detailed, benefitted from extensive input from both Parties, and was guided by the expertise of the Co-Neutrals. To avoid additional injustice and harm to children in the State’s custody specific performance must be awarded as a component of any relief provided in this arbitration.

Further, 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. Yet, a remedy at law is also not available in this dispute, as the Parties have agreed that monetary damages cannot be awarded against the State for its failure to perform. The FSA specifies that any dispute “arising out of or related to this agreement” is subject to the dispute resolution process set forth in the Agreement.¹⁰⁷ As part of the process, the FSA gives the Arbitrator the authority to,

award any relief necessary to effectuate the purpose of this Agreement, including all types of relief, other than monetary damages, that a state or federal court in New Mexico could issue, such as specific performance, injunctive relief, declaratory relief, and reasonable non-monetary sanctions. If Plaintiffs are the prevailing party, the arbitrator, in his discretion, may allow Plaintiffs reasonable attorneys’ fees and costs.¹⁰⁸

¹⁰⁷ FSA at 10.

¹⁰⁸ *Id.* at 11.

While the CAP and FSA are separate contracts, this dispute over the State’s CAP breaches is related to the FSA and is therefore subject to both FSA’s restriction on the availability of monetary damages and its express allowance of specific performance. Breaches of the CAP are related to the FSA because the Parties have agreed that the CAP is remedial,¹⁰⁹ the CAP must be fully implemented for the State to be able to comply with the FSA,¹¹⁰ and that the FSA must be fully implemented in order to remove children in State custody from imminent danger and prevent the ongoing violation of their rights under multiple laws.¹¹¹ Finally, an award of specific performance is clearly both appropriate and necessary when taking into account the purpose and objectives of the FSA¹¹² and the purpose of the CAP.¹¹³

¹⁰⁹ See CAP at 1, 2, 3, 5, 7, 8, 9, 15, and 21.

¹¹⁰ E.g. CAP at 1 (“This Corrective Action Plan sets forth the commitments that CYFD and HSD agree to undertake to come into compliance with the Agreement between the Parties and to ensure that children currently in state custody are able to benefit from the State’s commitments as outlined in the Agreement.”).

¹¹¹ E.g. FSA at 1 (“The purpose of this Agreement is to set forth a plan and process for CYFD and HSD to improve the current system of care so that it is trauma-responsive and compliant with Section 504 of the Rehabilitation Act; the Americans with Disabilities Act; the Fourteenth Amendment to the United States Constitution; the Medicaid Act’s Early and Periodic Screening Diagnostic and Treatment Services (EPSDT) and Reasonable Promptness Provisions (42 U.S.C. § 1396 *et seq.*); and the Indian Child Welfare Act (25 U.S.C. § 1915(a) & (b)).”); Co-Neutral CAP Memo at 19 (“there are urgent, critical issues threatening child and worker safety”); *Kevin S. Settlement Information*, New Mexico CYFD, <https://www.cyfd.nm.gov/kevin-s-settlement/> (last visited July 15, 2024) (“Our settlement agreement is central to improving the state’s outcomes for children who touch the child welfare system.”).

¹¹² FSA at 1 (“The purpose of this Agreement is to set forth a plan and process for CYFD and HSD to improve the current system of care so that it is trauma-responsive and compliant with Section 504 of the Rehabilitation Act; the Americans with Disabilities Act; the Fourteenth Amendment to the United States Constitution; the Medicaid Act’s Early and Periodic Screening Diagnostic and Treatment Services (EPSDT) and Reasonable Promptness Provisions (42 U.S.C. § 1396 *et seq.*); and the Indian Child Welfare Act (25 U.S.C. § 1915(a) & (b)).”).

¹¹³ CAP at 1 (“The purpose of this Corrective Action Plan (“CAP”) is to partially resolve the areas of dispute as set forth in Plaintiffs’ initiation of the dispute resolution process dated January 6, 2023 and attached as Exhibit A. This Corrective Action Plan sets forth the commitments that CYFD and HSD agree to undertake to come into compliance with the Agreement between the Parties and to ensure that children currently in state custody are able to benefit from the State’s commitments as outlined in the Agreement.”).

B. The Agreement of the Parties Does Not Require the Arbitrator to Find There Is No Other Available Remedy Available at Law.

The power of an arbitrator, as compared to that of a court, to award specific performance of a contract is clearer and subject to less requirements. It is widely recognized that arbitrators have the authority to order specific performance of a contract.¹¹⁴ Because arbitration is almost entirely contractual in nature, the parties are free to authorize the arbitrator to grant equitable relief regardless of whether a court would do so.¹¹⁵ Consequently, the power of an arbitrator to award specific performance is not confined to situations in which a court would grant such relief.¹¹⁶ Here, even if an adequate remedy at law were available, it would not prevent the Arbitrator from awarding specific performance because the Parties agreed specific performance was a permitted remedy.

C. The Availability of Specific Performance Is Fair to the State

The availability of specific performance is fair to the State because the State was able to negotiate the terms of the CAP, agreed to its terms, and has affirmed its commitment to the CAP multiple times since its execution. In contrast, in other child welfare reform cases discussed below, the applicable reform obligations were unilaterally imposed on the States by the courts. Also, the specific performance requested by Plaintiffs here is narrowly tailored to the most crucial and foundational issues in the CAP. As specified in Plaintiffs' Notice of Arbitration, Plaintiffs' request for specific performance is limited to four areas of the CAP: (1) CYFD Workforce Caseloads; (2) Resource Family Recruitment; (3) Well-Child Visits; and (4) the

¹¹⁴ 70 A.L.R.2d 1055 § 2.

¹¹⁵ *Id.* at § 6.

¹¹⁶ *Id.*

State's Data Reporting Requirements.¹¹⁷ Specific performance would also account for any progress the State has already made towards complying with the CAP requirements at issue. To the extent that the State has already made substantial progress towards its commitments, as it has claimed at times,¹¹⁸ it will not need to duplicate those efforts and will have less to achieve in order to comply with an order for specific performance.

D. The Arbitrator's Equitable Powers Are Not Confined to Specific Performance, and the Parties May Also Seek Enforcement of Arbitration Orders

The Arbitrator should award specific performance in this case, but other related relief may also be warranted. While specific performance and mandatory injunctions are functionally similar, the Arbitrator may determine it is necessary to order a mandatory injunction requiring the State to take affirmative action that is outside the contract in conjunction with specific performance of the contract itself.¹¹⁹ Likewise, the Arbitrator may determine that it is also appropriate to enjoin the State from taking future action that is inconsistent with the CAP, such as implementing a frontline staff hiring freeze.¹²⁰ In certain circumstances, it may also be possible for the Arbitrator to order specific performance as to most or some of the CAP, while ordering reformation of other provisions.¹²¹

¹¹⁷ Similarly, should the Arbitrator determine that the CAP is not a separate contract from the FSA and that it is not independently enforceable, relief sought by Plaintiffs in that situation would be limited to the following Target Outcomes in the FSA: Appendix B, Target Outcome 10 (CYFD Workforce Caseloads), Appendix B, Target Outcome 6 (Family-Based Placements), and Appendix D, Target Outcome 4 (Well-Child Visits).

¹¹⁸ *E.g. Legislative Health and Human Services Committee*, New Mexico Legislature, <https://sg001-harmony.sliq.net/00293/Harmony/en/PowerBrowser/PowerBrowserV2/20240714/-1/74978> (last visited July 15, 2024) (presentation by Secretary Teresa Casados to the New Mexico Legislative Health and Human Services Committee, June 6, 2024 that discusses the issue at 2:00:00).

¹¹⁹ *See* 5 Bus. & Com. Litig. Fed. Cts. § 57:3 (5th ed.); 81A C.J.S. Specific Performance § 151.

¹²⁰ *See* 5 Bus. & Com. Litig. Fed. Cts. § 57:3 (5th ed.).

¹²¹ *See* 81A C.J.S. Specific Performance § 151.

While an order for specific performance or injunctive relief does not guarantee the party subject to the order will comply with it, in instances where compliance with such an order is lacking, other related forms of equitable relief such as contempt, sanctions, or receivership may be utilized as progressive enforcement steps. For example, in *M.D. v. Abbott*, a Texas child welfare reform case, Plaintiffs prevailed at trial on its constitutional claims against the State. Order at 6, 30, 31, *M.D. et. al. v. Greg Abbott*, No. 2:11-CV-00084 (S.D. Tex. Apr. 15, 2024). Issues in the litigation included excessive worker caseloads, inadequate and inappropriate placements, and inadequate investigations. *E.g. id.* at 242, 122, 30. The court used special masters to create a number of specific remedial orders for the State to comply with and entered an injunction against the State. *Id.* at 6, 30-31, 280, n. 196. Eventually, due to continued non-compliance by the State, the court held State officials in contempt of court in 2019, 2020, and most recently, in April 2024. *Id.* at 8-9; 422. In the most recent contempt order, which has been temporarily stayed while under appellate review, the court found the Executive Commissioner of the Health and Human Services Commission (“HHSC”) in contempt and ordered her to pay \$100,000 per day until agency leadership could certify that it was complying with the court’s orders. *Id.* at 422- 423. The court also decided to carry forward the Plaintiffs’ motion for partial receivership that was included in their motion to show cause. *Id.* at 424.¹²²

Similarly, courts in other child welfare reform cases have relied on the equitable remedy of receivership to address situations where States fail to comply with court orders. In *LaShawn A. v. Kelly*, the District of Columbia’s failure to meet the requirements of the remedial order

¹²² Similarly, in 2022, a court held the Kentucky Cabinet for Health and Family Services (CHFS) in contempt of court after overburdened caseworkers failed to complete necessary job duties that had been ordered by the court. Brennan Crain, *Barren Judge Finds State Child Protection Agency in Contempt of Court*, WCLU Radio (Feb. 11, 2022, 10:33 am), <https://www.wcluradio.com/2022/02/11/barren-judge-finds-state-child-protection-agency-in-contempt-of-court/>.

negotiated by the parties and approved by the court — addressing issues including staffing shortages and resource home development— led to the court ordering limited receiverships, and eventually the court found the State in contempt of court and imposed a full receivership over the District’s child welfare system. *LaShawn A. v. Kelly*, 887 F. Supp. 297, 298-299, 302, 312, 316 (D.D.C. 1995), *aff’d sub nom. LaShawn A. v. Barry*, 107 F.3d 923 (D.C. Cir. 1996).

In *Gary W. v. State of Louisiana*, the court issued remedial orders regarding the placement of children in inappropriate out-of-state facilities. *Gary W. v. State of La.*, No. CIV. A. 74-2412, 1990 WL 17537, at *1, 28 (E.D. La. Feb. 26, 1990). When the orders were not complied with, the court appointed a partial receiver. *Id.* at *32. In appointing the receiver to assume control in areas where the State had a long history of non-compliance with the court’s orders, the court noted that “[w]hen the usual remedies are inadequate, a court is justified in resorting to a receivership, particularly when it acts in aid of an outstanding injunction.” *Id.* at *32 (quoting *Newman v. State of Alabama*, 466 F.Supp. 628, 635 (M.D. Ala. 1979)). Here, should the Arbitrator award specific performance for the State’s CAP breaches, the order will allow for alternate forms of equitable relief to be used to compel compliance with the CAP in the future should further enforcement be required.¹²³

To conclude, failure by the Arbitrator to provide an adequate equitable remedy for the State’s CAP breaches would render the agreement meaningless and ineffective under the existing circumstances. *See* § 44-7A-22(c), NMSA 1978. Any remedy awarded that does not include

¹²³ Importantly, should the Arbitrator award specific performance, he will not risk being embroiled in a series of disputes as to the State’s compliance with the order, given that the FSA provides, “[i]f the Party against whom the arbitrator rules fails to comply with the arbitrator’s ruling in the time set forth in the arbitrator’s decision, the prevailing party may confirm and enforce the arbitrator’s award pursuant to N.M. Stat. Ann. § 44-7A-23.” FSA at 11.

specific performance or injunctive relief would not constitute an adequate equitable remedy consistent with the purposes of the agreements and justice for New Mexico’s foster children.¹²⁴ However, it may be appropriate for the Arbitrator to award additional equitable relief in conjunction with specific performance. An order awarding specific performance is also a necessary precursor to the availability of additional equitable remedies in the future, should the State continue to disregard its commitments.

Finally, if Plaintiffs prevail in this arbitration, the Parties have agreed that the Arbitrator should award them reasonable attorney’s fees and costs. The New Mexico Arbitration Act also permits attorney’s fees and costs to be awarded if authorized by agreement of the parties or if “such an award is authorized by law in a civil action involving the same claim.” § 44-7A-22(b), NMSA 1978.

VII. CONCLUSION

Defendants have breached the CAP. Plaintiffs respectfully request an award of relief including specific performance, other equitable relief, and reasonable attorneys’ fees and costs.

Dated: July 15, 2024

Respectfully submitted,

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¹²⁴ FSA at 11.

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CERTIFICATE OF SERVICE

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

PLAINTIFFS' OPENING BRIEF

on the following individuals, addressed as follows:

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Executed this 15th day of July 2024 at Albuquerque, New Mexico.

**MARTINEZ, HART, SANCHEZ
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EXHIBIT A

***** NOT FOR PUBLICATION *****

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