

## 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' CLOSING ARGUMENT**

Defendants entered into the FSA and the CAP because they share Plaintiffs' desire to improve New Mexico's child welfare system. The FSA and CAP touch nearly every aspect of that system, contemplating broad and sweeping changes throughout the many areas of CYFD's mission. It should be clear to anyone who watched the arbitration that the CYFD and HCA employees who testified care deeply about the children they serve.

However, Defendants did not promise- nor could they have- that certain results would be achieved because there are so many variables outside the State's control. CYFD and HCA could only ever make the commitment they made in the FSA and CAP: that the agencies will make good faith and reasonable efforts toward achieving those Target Outcomes.

While the CAP restated some of the Target Outcomes of the FSA, it also required Defendants to take a number of specific actions that the parties hoped would help the State make progress toward those Target Outcomes. Indeed, the Corrective Action Plan was just that: an action plan. Where the CAP set targets, CYFD and HCA made good faith and reasonable efforts to achieve those targets. Where the CAP called for a specific action, Defendants took that action.

In the three areas at issue in this arbitration, the CAP called for dozens of discrete actions, and Defendants complied to the letter with all but one.

The only specific action called for in the CAP that was arguably not taken by CYFD was that it would assign five employees in each of the “high-needs counties” to focus exclusively on resource family recruitment until September 30, 2023. Rather, and due to an honest misunderstanding between Secretary Casados and the Director of Placement, five employees were exclusively focused on resource family recruiting in those counties, but also continued some recruiting activities in other counties in those regions. Further, CYFD had other employees in those counties increase their resource family recruitment efforts. At most, this represents a technical violation of the CAP with no evidence presented that it had any effect on the total number of licensed resource homes.

Every other specific action required by the CAP was taken by Defendants, and even more was done. With respect to CYFD staffing and caseloads, CYFD sought additional funding from the Legislature, increased its number of case aides in an attempt to improve caseworker morale and retention, streamlined the hiring process, and engaged in rapid-hire events. However, CYFD cannot force people to apply for positions or to stay in already-filled positions. Turnover is national problem, and CYFD’s turnover rate is more-or-less in line with national averages. CYFD must compete with private employers and other public entities that can offer a career in social work or child welfare, but can offer more money and less stressful work. CYFD has many hard-working people who care deeply about child welfare and CYFD’s mission, but ultimately those individuals must choose to stay at CYFD, and CYFD cannot force them to stay.

With respect to resource family recruitment, CYFD engaged a private contractor as required by the CAP, but has also brought in additional contractors, assigned local placement

workers in the high-needs counties to assist in recruiting, and created exempt positions to increase recruitment efforts. CYFD is also developing the Foster Care-Plus initiative, which will provide additional training and incentives for resource families willing to take in those children who are more difficult to place. CYFD did not meet its goal of licensing 190 new non-relative resource homes in 2023, but did license 129 new homes. Meanwhile, all agree CYFD has made great strides in placing children in kin foster settings, which are favorable to non-relative placements.

With respect to well-child checks, CYFD and HCA took every single discrete action required by the CAP. Additionally, CYFD hired an EPSDT coordinator dedicated to facilitating and tracking well-child checks and CYFD and HCA created a work group between the agencies that met weekly to discuss well-child checks and individual children who needed them. More recently, the agencies are working through the new Turquoise Care framework to set up colocated care coordinators at CYFD offices to facilitate well-child checks.

And yet, despite taking every action required by the CAP and making other efforts, less than 100% of children received a well-child check within 30 days of entering State custody. This does not show a breach of the CAP, but rather indicates there are countless real-world variables that can cause delay in obtaining a well-child check. Further, as the co-neutrals have verified, even where a child does not receive the well-child check within 30 days, the State continues working with the care providers, the child and the child's team to get the child seen by a provider.

CYFD and HCA are further constrained by the resources given to them by the Legislature. Of course, CYFD would like to pay its staff more and hire more of them. CYFD would like to have many more Case Aides to help relieve clerical and transportation burdens on its case workers. To that end, in September 2023, CYFD made requests to increase its budget and workforce with

specific and express references to complying with the Kevin S settlement. But, as presented during the arbitration, those requests were denied by the Legislature.

CYFD cannot simply conjure qualified applicants for its positions or force existing employees to stay with the agency. CYFD cannot create more families willing to take on the difficult- and very rewarding- work of fostering children. CYFD cannot create more physicians in New Mexico, nor anticipate every logistical challenge that might cause a well-child check to not occur within 30 days.

One could argue that by simply performing those discrete and specific actions required by the CAP, Defendants complied with the CAP. The evidence presented at arbitration was that Defendants took those specific actions, and many more. Secretary Casados and Secretary Armijo have proven themselves to be innovators, and they should be viewed as such.

Defendants can only take those actions that are within their control, and there was ample testimony during arbitration of the many actions taken with respect to the issues at arbitration, whether or not those actions were required by the CAP. Further, there was evidence that the agencies are limited by the resources provided to them by the Legislature. If the Arbitrator finds the targets of the CAP have not been achieved, the Arbitrator should take this opportunity to send a message to Legislature that adequate resources must be provided to CYFD and HCA if they are ever to meet the ambitious targets of the FSA.

As noted by one of Plaintiffs' witnesses, it is much easier to stand on the outside and criticize those who are working every day to serve children in State custody. It is easy for critics and those with a financial interest in this case to describe CYFD as a building on fire. Credit and gratitude should be given to those who do this difficult and important work every day in the face of such criticism; those who have chosen to run into the fire.

The Arbitrator should find Defendants have complied with the terms of the CAP. The Arbitrator should find the Defendants have made- and continues to make- good faith efforts to comply with the targets of the FSA and the CAP. The Arbitrator should find the people who work for CYFD and HCA work very hard and are dedicated to improving child welfare in New Mexico, but face many obstacles and challenges that are outside their control. The Arbitrator should find CYFD and HCA are pursuing their missions honorably but are constrained by the resources given to the by the Legislature. The Arbitrator should find for the Defendants.

Respectfully submitted,

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& STEVENS-BLOCK, P.C.**

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I certify the foregoing was emailed to all counsel  
of record on December 20, 2024.

/s/ Eric Loman  
Eric Loman