

UNITED STATES DISTRICT COURT
DISTRICT OF 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 New Mexico Children, Youth and Families Department, and KARI ARMIJO, in her official capacity as Cabinet Secretary for the New Mexico Health Care Authority,
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 Peifer

PLAINTIFFS' CLOSING ARGUMENT

Plaintiffs reluctantly brought this matter to arbitration. It should not have been necessary. But the State's failures to improve and reform the child welfare system as agreed in the *Kevin S.* settlement are undisputed. New Mexico's foster children themselves – the most vulnerable New Mexicans – should not be required to seek an arbitrator's ruling to remedy the worsening conditions, but four years of broken promises compel the Plaintiffs to undertake this process. That New Mexico Children Youth & Families Department (CYFD) and Human Services

Department / Health Care Authority (HCA)'s breach of each agreement that the parties meticulously negotiated cannot be challenged, and the Defendants' failure to implement the recognized measures necessary to achieve reform continues to put foster children at great risk of harm. The Co-Neutrals' reports and letters assessing progress are not equivocal and describe a system that persists in failure.

The evidence before the arbitrator establishes the Defendants breached the June 2023 Corrective Action Plan (CAP) as well as the Final Settlement Agreement (FSA) and the Plaintiffs are entitled to relief as provided in the FSA and New Mexico law.

In early 2018, long standing concerns regarding failures of the New Mexico child welfare system, particularly as it impacted children in foster care, brought several advocates together to address the very dire conditions New Mexico's foster children encountered and endured. Late that year, a federal lawsuit was filed. (*Kevin S. v. Monique Jacobson*, No. 1:18:cv-00896, Doc #1). In its 95 pages, the lawsuit identified, through named plaintiffs, the adversity foster children were chronically and habitually exposed to in the foster care system. The lawsuit exposed stories and experiences of abused and neglected children in the State's foster care system, each of whom had been judicially identified as abused, neglected and vulnerable, and for whom the law required the State to provide services, including safe placements, quality medical and psychological care, and permanency. Each child identified in the lawsuit represented, through his or her foster care experience, repeated instances where the very entity responsible for nurturing and caring for each child had repeatedly failed, instead inflicting additional unnecessary traumas in violation of state and federal law. Each named Plaintiff's narratives and stories illuminated the experience common to many children in the State's custody, and through the lawsuit, Plaintiffs sought a transformed, reformed and improved child welfare system.

The new State Administration in January 2019 immediately sought a dialogue with the Plaintiffs’ advocates and attorneys, and serious, content-rich discussions commenced. The State Defendants and Plaintiffs’ advocates engaged in lengthy discussions regarding the allegations of the lawsuit, and very quickly, the State expressed its commitment that Plaintiffs and the State “were on the same page” with respect to the serious problems in the child welfare system. A nationally recognized expert (Kevin Ryan) was invited to help mediate a solution, and in March, 2020, a Final Settlement Agreement (FSA) was reached.

This “innovative”¹ agreement was hailed as “groundbreaking”² and transformative³ and set forth specific, agreed upon measures the State would undertake to achieve mutually agreed upon goals. The FSA contract required the State’s actions to be monitored, assessed and facilitated by experts (Co-Neutrals) chosen for their unquestioned knowledge, capability and proven success reforming child welfare systems in other states. The State’s commitment to all aspects of the Agreement was made clear by all State officials, including the Governor. The path forward was well defined, and in exchange for the State’s commitments, the Plaintiffs were persuaded to dismiss the lawsuit.

The Co-Neutrals began to monitor the State’s progress. The Co-Neutrals brought their team of experts to New Mexico and traveled throughout the state meeting with CYFD and Medicaid professionals. They reviewed data Defendants provided and regularly communicated with administration officials (including Cabinet Secretaries) about all aspects of the reform under review. In their first report of progress, published in November 2021, the Co-Neutrals identified areas where the State had made some progress, but cautioned,

¹ CYFD Press Release March 26, 2020, [2020 03 26 Kevin S Settlement Press Release](#)

² NMPolitical Report March 26, 2020

³ New York Times, March 26, 2020, <https://www.nytimes.com/2020/03/26/us/new-mexico-foster-care-lawsuit.html>

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**; (2) **growing resource family placements**; (3) **expanding behavioral and mental health services**; and (4) strengthening the collaboration and communication with New Mexico’s Nations, Pueblos, and Tribes. Meeting the current gaps and challenges in these areas **will require not only the continued commitment and support from agency leaders but continued investment in the commitments of the FSA by the Governor and the Legislature**, as well as collaboration with providers; advocates; New Mexico’s sovereign Nations, Pueblos, and Tribes; front-line workers; and the children and families served.⁴

In their 2022 Report, the Co-Neutrals discussed implementation of the FSA agreements in the calendar year 2021, and reported, “overall . . . the State remained far behind the FSA timeline for most commitments.”⁵ The State failed to address the core impediments to reforming the child welfare system as worker caseloads remained unreasonably high. As a direct result, foster children were being harmed because “case-carrying workers will not be able to monitor the safety of children within their placements, make efforts toward permanency for children, and plan for appropriate services and track delivery unless they have manageable caseloads and appropriate supervision.”⁶ That report was published over two (2) years ago.

The 2023 Co-Neutrals’ Report (reviewing 2022 performance) echoed the same observations – the State was failing to meet its obligations under the FSA, and while some efforts were producing positive results, the Co-Neutrals found the State failed to meet the Performance Standard in the FSA for all but two (2) of the agreed Implementation Targets and had achieved only 5% of the Target Outcomes.⁷ This

⁴ PX 15 P000337.

⁵ PX 16 P000457.

⁶ Id. at P000459.

⁷ PX 104 P002160.

extremely disappointing pace of progress was unacceptable, and the Plaintiffs sought immediate correction. Starting in January 2023, mediation (as required by the FSA) commenced with the goal of identifying and re-focusing the State's efforts. As was articulated from the beginning of *Kevin S.*, progress could not be achieved unless (1) CYFD workers had reasonable and manageable caseloads, (2) the State developed foster placements that were adequate in number, adequately trained, and adequately supported, and (3) the State provided "a consistent screening, assessment, and referral procedure statewide that will facilitate access to medically necessary services for all Children in State Custody."⁸

A Corrective Action Plan (CAP) was negotiated and agreed upon, with both Cabinet Secretaries signing the agreement June 30, 2023. The CAP did not replace any element or aspect of the FSA, but was instead confirmed that "the Parties have 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."⁹ The deadline for completion of the CAP requirements was January 5, 2024.

By September 18, 2023 it was clear to the Co-Neutrals that not only the CAP but the FSA agreements had been breached. Although the January 5, 2024 deadline for all CAP performance was still three months away, the Co-Neutrals observed: "Last year we described to the Parties a system that was in *crisis*. This year, based on reports from

⁸ FSA, PX 1 P000005.

⁹ CAP, PX 2 P000052.

scores of CYFD employees at all levels and key stakeholders with who we met, we believe the system is in a *state of chaos*.”¹⁰

The Co-Neutrals’ alarm caused immediate concerns. Plaintiffs immediately sought assurance from Defendants that there was no retreat from the State’s promises set forth in the CAP. The Secretaries of the defendant agencies responded with a joint letter dated October 6, 2023 in which they reaffirmed not only complete commitment to the CAP promises, but also that the performance mandated by the CAP agreement was required by the January 5, 2024 deadline. There was no equivocation. There was instead clear declaration that the State assumed full responsibility to achieve the CAP progress by the agreed deadline, stating, “The CAP itself is our written assurance of how and when we will meet our commitments.”¹¹

It is undisputed that the January 5, 2024 deadline came and passed and the State failed to meet any of the CAP contract promises. The State fully conceded these facts in their letter of March 12, 2024.¹² The Plaintiffs responded with a Notice of Arbitration, seeking to arbitrate the State’s admitted failures to fulfill its promises set forth in the CAP. After uniform and consistent documentation from the Co-Neutrals confirming the State’s failures to meet the Implementation Targets and Target Outcomes, and the State’s failure to abide by the terms of the MOU and the CAP, with great disappointment and regret Plaintiffs initiated this arbitration. The Plaintiffs’ consistent good faith efforts over the past 44 months have not been met with any measure of good faith performance by the Defendants.

¹⁰ PX 9 P000278.

¹¹ Id. at P000275.

¹² PX 21.

By agreement of the parties, the arbitrator has the authority and obligation to award “any relief necessary to effectuate the purpose” of the FSA.¹³ The exercise of that authority is vital when the rights and well-being of children who are in state custody are at stake. Children in foster care are particularly vulnerable to the government’s unlawful dereliction of its duty to act as they have limited, if any, voice in political and legislative discourse. Children in foster care today and in the future must rely on this arbitration to provide a forum in which their experiences and legal grievances may be heard and remedied. Here, equitable remedies should include declaratory relief, specific performance, a permanent injunction to abate the policies and practices that have caused the failure to perform to include appointment of a receiver to ensure that Defendants allocate the resources and oversee the needed measures to come into compliance with foundational requirements of the FSA, the CAP, and the law.

Respectfully submitted,

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¹³ FSA, PX 1 P000012.

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