

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' POST-TRIAL PROPOSED FINDINGS OF FACT

AND CONCLUSIONS OF LAW

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PROPOSED FINDINGS OF FACT

I. Execution of the Kevin S. Final Settlement Agreement.

1. In 2018, Plaintiffs sued the New Mexico Children, Youth and Families Department (“CYFD”) and the New Mexico Human Services Department (“HSD”) (together referred to as “the State”), alleging that the State has “profoundly and consistently failed to fulfill the federal legal obligations it owes to the foster children entrusted to its care.”¹ PX 61 at P001966. The Complaint detailed an unlawful and dangerous child welfare system that repeatedly failed federal audits and continually “lock[s] New Mexico's foster children into a vicious cycle of declining physical, mental and behavioral health and increasingly inappropriate, restrictive, and punitive placements and treatment.” Id. The Complaint also challenged Defendants’ failure to comply with federal laws that protect children in foster care. PX 61; Tr. Day 2, 252: 20-26 (Schultz).

2. In 2019, State leadership met with Plaintiffs to present the new administration’s vision of child welfare reform. After the presentation, Plaintiffs and Defendants (together the “Parties”) agreed to initiate settlement discussions. The Parties agreed to hire Kevin Ryan as the mediator due to his extensive experience in child welfare administration. PX 1. Over the course of nearly 11 months, the Parties engaged in extended mediation sessions with Mr. Ryan. During the mediation, Defendants were represented by counsel. The Secretaries and senior staff from both CYFD and HSD participated in mediation. Tr. Day 2, 245-256 (Schultz).

3. In exchange for the State’s commitment to take the specific actions set forth in the Final Settlement Agreement (“FSA”), the Plaintiffs agreed to dismiss their lawsuit, including giving up ongoing court oversight. Tr. Day 2, 254-256 (Schultz) and PX 1.

¹ On July 1, 2024, the New Mexico Health Care Authority (“HCA”) was formed by merging several departments including HSD. HCA is responsible for all HSD obligations under the Kevin S. settlement.

4. There are several enforcement mechanisms in the FSA negotiated by Plaintiffs to ensure that children in foster care are provided with safe, appropriate placements and the services they need. Tr. Day 2, 52:17-56:14 (Yanan); Tr. Day 2, 257 (Schultz); Day 3:PM, 86-89 (Clifton). These mechanisms include Implementation Targets (ITs) which are foundational steps the Defendants agreed to take to meet the Target Outcomes (TOs). FSA, PX 1 at P000003. They also include Target Outcomes which are defined as “specific achievements the Defendants agree to meet[.]” FSA, PX 1 at P000004.

5. The Parties specifically negotiated and agreed to adhere to specific completion dates for each Implementation Target and Target Outcome as documented in the FSA. The Parties agreed that these deadlines could only be modified, amended or extended by mutual consent in writing. FSA, PX 1 at P000007. See also Tr. Day 2, 257:2-21 (Schultz). During COVID, the Parties agreed to limited extensions of certain FSA deadlines. PX 15 at P000439. No other deadlines have been extended.

6. The Defendants agreed to develop a Data Validation Plan to be approved by the Co-Neutrals to “set forth a process, including methodology and data sources, for validating Defendants’ progress toward achieving the Implementation Targets and Target Outcomes.” FSA, PX 1 at P000007.

7. The Parties agreed to empower the Co-Neutrals to gather and assess data and issue progress reports that evaluate Defendants’ progress towards the Implementation Targets and Target Outcomes. FSA, PX 1 at P000006, P000008. Tr. Day 2, 257:7-21 (Schultz). In assessing the Defendants’ progress, the Co-Neutrals had to consider data collected under the Data Validation Plan developed by Defendants, any qualitative review protocol, as well as data and information provided by the Parties, third parties, and other relevant sources. FSA, PX 1 at

P000008. Further, the Co-Neutrals were required to consider the introduction statements for each FSA appendix when assessing the State's progress. FSA, PX 1 at P000038, P000042, P000045, P000049. Lastly, the Co-Neutrals considered the goals, or high-level objectives that the Parties included in the FSA to inform and interpret their assessment of the State's progress. FSA, PX 1 at P000003 and P000005.

8. In dismissing the complaint, the Parties agreed that the Arbitrator would have all of the authority of a court to effectuate the purposes of the agreement and to award any relief that a state or federal court in New Mexico could issue with the sole exception of monetary damages. FSA, PX 1 at P000012.

9. Plaintiffs dismissed the complaint on March 26, 2020. *Kevin S. et. al. v. Jacobson et. al.*, Case 1:18-cv-00896-KK-LF (D.N.M. Mar. 26, 2020), ECF 62.

A. The FSA defines the performance standard agreed to by the Parties for complying with the FSA.

10. The Parties specifically negotiated the performance standard, which is "the level of achievement Defendants must meet with respect to each Implementation Target and Target Outcome in order to fulfill the terms of the Agreement." FSA, PX 1 at P000003.

11. Meeting the performance standard is defined as:

"making good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Target or Target Outcome. A finding of good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Target or Target Outcome shall be based on whether Defendants have made all reasonable efforts to achieve each Implementation Target or Target Outcome. This standard is not intended to assess Defendants' subjective intentions, plans, or promises."

FSA, PX 1 at P000003, P000004. *See also*, Tr. Day 2, 274:24-275:16 (Schultz); Tr. Day 2, 68:3-69:2 (Yanan).

12. The State did not produce any witnesses that were present during the FSA

negotiations.

13. Assessment of the State's performance should take into consideration the impact of the failure to comply on the children who are in state custody, and assessment should prioritize actions that directly impact the well-being of children in state custody. Tr. Day 8, 221:9-222:13 (Casados).

14. The performance standard applies to the Defendant Agencies, not their individual employees or agents. The performance standard is not satisfied through the efforts or intentions of individuals, rather the Agencies must provide the resources and oversight necessary to ensure compliance with their obligations. Tr. Day 8, 222:13 (Casados).

B. The Parties agreed that the Co-Neutrals determine whether the State has complied with the FSA performance standard.

15. The Parties authorized mutually agreed upon child welfare reform experts (the "Co-Neutrals") to evaluate and audit Defendants' compliance with the FSA. The Co-Neutrals are empowered to assess Defendants' performance related to the Implementation Targets ("ITs", and Target Outcomes ("TOs,")) which involves complex validation and analysis of large amounts of data, in-depth fact-finding efforts, and the application of specialized knowledge.

16. The Co-Neutrals determine which State actions are reasonable and aimed at achieving substantial and sustained progress by referencing their substantial experience and expertise in system-wide child welfare reform – they do not refer to Defendants' subjective beliefs. Tr. Day 2, 69:16-20; 86:18-87:16 (Yanan); Tr. Day 2, 274:24-275:16 (Schultz). The FSA does not permit Defendants assessing their contract compliance through statements by individual state employees regarding their individual efforts.

17. Because Defendants are contractually required to provide the Co-Neutrals with the information necessary to assess their compliance with their commitments, 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 contracts. FSA, PX 1 at P000007, P000008. Rather, failure by Defendants to provide information they agreed to provide is a breach.

II. The CAP was a remedial contract that was necessary to bring Defendants into compliance with the FSA.

18. After three years of the State failing to make progress on the majority of its FSA commitments, the Parties negotiated the Corrective Action Plain (“CAP”) setting forth basic, remedial activities necessary to protect the children entrusted to the State’s care. The Parties specifically agreed that nothing in the CAP modified Defendants’ obligations under the FSA, including their deadline obligations. CAP, PX 2 at P000052. Each CAP obligation was to be implemented in addition to the FSA. CAP, PX 2 at P000053, P000054, P000056, P000058, P000059, P000060, P000066, and P000072. The Parties also agreed that the Plaintiffs could proceed directly to Arbitration in the event that the State failed to meet its obligations under the CAP. CAP, PX 2 at P000053.

19. The CAP does not specifically incorporate the FSA performance standard. CAP, PX 2 at P000066.

20. The Parties agreed the CAP contained steps that were necessary for the State to take in order to comply with the FSA.

III. CYFD breached its workforce caseload commitments.

A. CYFD committed to implement its workforce development plan by December 1, 2021.

21. In the FSA, the Parties agreed:

CYFD will create a CYFD Workforce Development Plan that will ensure CYFD’s

workforce has adequate qualifications, expertise, skills, and numbers of personnel. The CYFD Workforce Development Plan will describe in writing the expected nature, scope, capacity, and structure of the workforce necessary to meet the obligations described in this Agreement ... It will require that CYFD have a sufficient number of caseworkers to ensure that no caseworker will carry a case load of greater than the current professional standard identified by the Child Welfare League of America (CWLA) ... [The] Co-Neutrals must approve the CYFD Workforce Development Plan. CYFD will develop the Workforce Development Plan by December 1, 2020 and fully implement it by December 1, 2021.

PX 1 at P000044.

22. The Co-Neutrals determined CYFD did not meet the performance standard for Target Outcome App. B, TO 10.1, requiring the creation of the Workforce Development Plan, in 2021. Exhibit 16 at P000513. The Co-Neutrals also found the State did not meet the performance standard for App. B, TO 10.2 (“Implementation of Workforce Development Plan”) in 2021. PX 16 at P000515.

23. On July 7, 2023, CYFD drafted the Workforce Development Plan. Tr. Day 4, 343:15-19 (Foppert). Subsequently, the Co-Neutrals determined CYFD met the performance standard for Target Outcome App. B, TO 10.1, which required the creation of the Workforce Development Plan, in 2022. PX 104 at P002263.

24. In the Co-Neutrals’ 2022 Annual Report, they determined the State did not meet the performance standard for App. B, TO 10.2 (“Implementation of Workforce Development Plan”) in 2022. PX 17 at P000656. This finding was, in part, because the Co-Neutrals were unable to validate CYFD caseworker caseloads due to data quality issues, PX 17 at P000571.

25. CYFD did not challenge the Co-Neutrals’ 2021 or 2022 findings that CYFD failed to implement the Workforce Development Plan and failed to satisfy the performance standard in relation to App. B, TO 10.2 (“Implementation of Workforce Development Plan”).

26. The Co-Neutrals approved the Workforce Development Plan in July 2023. PX 17

at P000570.

27. In the Workforce Development Plan, CYFD committed to implementing the following caseload standard for Investigation Case Workers, starting in 2023:

In 2023 and beyond the standard caseload standard will be no more than 12 cases (families) total; there will be no primary assignments in the first 2 months after completion of New Employee Training (NET); no more than 3 primary assignments at a time during months 3-4 after NET; and no more than 6 primary assignments at a time during months 5-6 after NET.

PX 4 at P000190.

28. In the Workforce Development Plan, CYFD committed to implementing the following caseload standard for Permanency Planning Workers, starting in 2023:

There will be a maximum of 15 children on a caseload at a time; workers will be assigned as primary for no more than 5 children at a time for the 2 months after completion of NET (only transferred cases); no more than 8 primary assignments at a time during months 3-4 after NET (can include new cases); and no more than 12 primary assignments at a time during months 5-6 after NET.

PX 4 at P000190.

29. In the Workforce Development Plan, CYFD committed to implementing the following 2023 caseload standard for Placement Workers, starting in 2023:

Effective July 1, 2022, the caseload standard for Placement Workers will be equal to: 15 adoption cases, or 20 licensed families, or 15 home studies. For workers with mixed caseloads, the standard will weight each piece of work. For example, each adoption case would equal 6.67% of a caseload (1 caseload divided by 15); each family would equal 5% of a caseload, and each home study would equal 6.67% of a caseload. There will be no more than 3-5 licensed family or adoption assignments to workers in months 1-2 following NET. No more than one home study will be assigned in months 1-2 following NET once a worker has completed the SAFE Home Study Training. No more than 5-8 licensed family or adoption cases and not more than 2 new home studies will be assigned during months 3-4 following NET, and no more than 10 licensed family or adoption cases and not more than 4 new home studies will be assigned during months 5-6 after NET. Following completion of month six, the worker can be assigned no more than 20 licensed family cases, or 15 adoption cases, or 15 home studies.

PX 4 at P000190.

30. In the Workforce Development Plan, CYFD committed to implementing the following 2023 caseload standard for In-Home Service Workers, starting in 2023:

No more than 8 families assigned at a time. No more than 2 assignments during months 1-2 following completion of NET; no more than 4 case assignments during months 3-4 following NET; and no more than 6 cases during months 5-6 following NET.

PX 4 at P000191.

31. The Workforce Development Plan details several caseworker needs and priorities, including workload, self-care, and training, as determined by a staff survey conducted in 2022.

PX 4 at P000184-186.

32. The FSA requires the State to complete a written Data Validation Plan that has the approval of the Co-Neutrals. FSA, PX 1 at P000007.

33. “The Co-Neutrals and the State worked together to develop the Data Validation Plan throughout 2020 and 2021. The Co-Neutrals approved the Data Validation Plan on February 16, 2022.” PX 17 at P000579; Tr. Day 4, 343:24-24, 344:1-2 (Foppert).

34. The Data Validation Plan sets forth metrics “developed by the State in collaboration with the Co-Neutrals to set forth a process for validating progress towards achieving the commitments in the Kevin S. Agreement.” PX 3 at P000080.

35. The Data Validation Plan also contains a metric analysis plan under which the Co-Neutrals analyze CYFD’s compliance with the Workforce Development Plan caseload standards. PX 3 at P000154.

36. Under the metric analysis plan, the unit of analysis is “[c]ase assignable caseworkers who have completed New Employee Training.” PX 3 at P000154.

37. Under the metric analysis plan, the target variable to be measured is the percentage “of primary casework staff with caseloads at or below the established caseload

standard for their position and length of time in that position by quarter.” PX 3 at P000154.

38. Under the Data Validation Plan, case assignable caseworkers include the following positions:

- CPS Placement Case Wkr
- CPS INV. CASE WKR
- CPS INV. SR. CASE WKR
- CPS Investigation Case Wkr
- CPS Investigation Sr Case Wkr
- CPS Perm Plg Case Wkr
- CPS Perm Plg Sr Wkr
- CPS PERM. SR WORKER
- CPS PERM. WORKER
- CPS PLACE SR. WORKER
- CPS PLACE WORKER
- CPS Placement Spec
- CPS Placement Sr Wkr
- IHS Practitioner

PX 3 at P000179.

39. Under the Data Validation Plan, non-case assignable staff include, but are not limited to, supervisors, managers, case aides, administrators, and directors. PX 3 at P000156.

B. In the CAP, CYFD agreed to take remedial action to implement the Workforce Development Plan.

40. The Parties agreed that the CAP “sets forth the commitments that CYFD and HSD agree to undertake to come into compliance with the” FSA, PX 2 at P000052.

41. The Parties also 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” in the FSA. PX 2 at P000052.

42. The Parties also agreed that the dispute over the State’s performance with respect to Appendix B, Target Outcome 10 regarding the Workforce Development plan was resolved. PX 2 at P000053.

43. Further, the Parties agreed:

[T]here 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 and will take the actions described below.

- a. By December 31, 2023, no Investigation Case, Permanency Planning, In-Home Services, or Placement worker will have over 200% of the applicable caseload standards documented in the 2023 Data Validation Plan approved by the Co-Neutrals, including trainees with graduated caseloads.
- b. By December 31, 2023, no supervisor will be carrying any cases.
- c. Monthly data reports with data elements agreed to by the Co-Neutrals will be made available to Co-Neutrals, which the Co-Neutrals may validate.

PX 2 at P000053.

44. CYFD negotiated for the 200% caseload standard in the CAP because leadership believed the Agency would be able to satisfy the standard during the CAP period. Tr. Day 2, 172:23-25 – 173:1 (Yanan). Tr. Day 4, 343:4-20 (Foppert).

C. CYFD failed to satisfy its CAP caseload commitments in 2023.

45. On September 18, 2023, slightly over three months before the end of the CAP period, the Co-Neutrals wrote to the State regarding their fall 2023 site visit to New Mexico, stating:

We are appending our letter to the CYFD and HSD Secretaries of September 2022, in which we expressed concerns about challenges we observed during our site visits in New Mexico last year, including high CYFD staff caseloads ... and CYFD's on-call system. In that letter, we made numerous recommendations, which we have discussed repeatedly with State leaders over the past year. 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. We were repeatedly and consistently told the result 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.

PX 9 at P000275.

46. The Co-Neutrals conducted additional site visits in the beginning of 2024. In their January 26, 2024 letter to CYFD, the Co-Neutrals wrote:

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. Last year the parties engaged in extensive discussions to reach agreement on a Corrective Action Plan (CAP) designed to address many of the problems we identified last year and in 2022. The State's weak performance implementing many aspects of the CAP – for example, with respect to caseloads ... appears to have worsened the situation.

PX 12 at P000291.

47. The Co-Neutrals further reported that supervisors were carrying cases and “[m]ost CYFD supervisors and new staff were unaware of the graduated caseload standards and how they should be implemented, and “staff across the state repeatedly reported that the agency’s months-long hiring freeze in 2023 worsened staffing levels[.]” PX 12 at P000293.

48. Then the Co-Neutrals issued their Corrective Action Plan Implementation Memorandum on February 23, 2024, which assessed the State’s performance under the CAP. PX 13 P000298. The Co-Neutrals found that out of the 364 individuals CYFD data showed as being assigned as primary worker on at least one case as of January 5, 2024, 23 percent of the workers “had caseloads compliant with the applicable caseload standards” and 19 percent had caseloads above 200 percent of the standard. PX 13 at P000301.

49. Additionally, the Co-Neutrals determined that, “Forty-six (13%) of the 364 individuals ... were supervisors, 27 others were in a non-case-assignable role, and another 81 (22%) appear to be ineligible to carry cases because there was no record in the submitted data that they completed NET.” PX 13 at P000302.

50. CYFD agrees that by the end of the CAP period, it had not complied with the 200% caseload standard, supervisors were carrying cases, cases were assigned to unknown workers, and cases were assigned to workers that were no longer with the Agency. DX J; Tr. Day 5:PM, 190:13-21 (Meadows); Tr. Day 5:AM, 212:3-9 (Sandoval); Tr. Day 4, 308:18-22 (Foppert); Tr. Day 5:PM, 203:18-25, 204:1-14 (Meadows).

51. CYFD agrees that supervisors continued to be assigned as primary worker on cases on and after January 5, 2024. DX K; Tr. Day 4, 311:10-24; 345:7- 346:4; 368:21-369:4 (Foppert); Tr. Day 5:AM, 89:4-6 (Sandoval); Tr. Day 5:PM, 204:15-22 (Meadows).

D. CYFD did not make good faith efforts, as defined in the FSA, to comply with its workforce caseload commitments in 2023.

52. As further discussed below, CYFD stopped routine hiring of case-carrying staff and supervisors across the state in May 2023 and did not resume routine hiring until the fall of 2023. PX 104 at P002273.

53. Due to issues with the quality of CYFD's 2023 Caseload data, the Co-Neutrals were unable to evaluate CYFD's compliance with its caseload commitments in their 2023 Annual Report using the methodology specified in the Data Validation Plan. Instead, the Co-Neutrals employed the methodology they had used to assess CYFD's Caseload compliance in their CAP Implementation Memorandum. PX 104 at P002266.

54. In their 2023 Annual Report, the Co-Neutrals determined "that of the 204 case-assignable individuals assigned as the primary caseworker for at least one case on January 5, 2024, 82 (40%) had caseloads at or below the applicable caseload standard." PX 104 at P002266. CYFD did not provide the Co-Neutrals with a "NET completion date for 268 of the 364 individuals assigned as primary on at least one case." PX 104 at P002267. Only 200 of those 268 individuals were in case assignable roles. PX 104 at P002267.

55. 46 supervisors were assigned as primary caseworker for at least one case on January 5, 2024. PX 104 at P002268. "2,044 cases had individuals assigned as primary who were not case-assignable at the time of assignment per the Data Validation Plan[.]" PX 104 at P002269.

56. In their 2023 Annual Report, as they had in their 2021 and 2022 reports, the Co-

Neutrals determined the State did not meet the performance standard for App. B, TO 10.2 (“Implementation of Workforce Development Plan”) in 2023. PX 104 at P002265.

57. In making the determination that the State did not meet the performance standard, the Co-Neutrals evaluated State efforts, including noting some progress in the quality of its caseload data in late 2023 and its equity assessment of staff salaries. PX 104 at P002272; 2274.

58. The Co-Neutrals reported that in 2023 CYFD failed to implement Co-Neutral recommendations that would reduce caseworker caseloads and that conditions for CYFD staff deteriorated in 2023, caused in part by the decision to freeze hiring in 2023. PX 9 at P000275; PX 12 at P000291.

59. In December of 2023, the New Mexico Legislative Finance Committee found:

FY24 legislative appropriations included a \$3 million special appropriation to implement the department’s workforce development plan, \$5 million to implement an appropriate placement salary adjustment among Protective Services workers, and nearly \$3 million for additional staff. While CYFD held several recruiting events in FY24, less than \$100 thousand of the special appropriation has been spent, leaving a balance of \$2.9 million unspent as of November 2023. CYFD did not request a reauthorization of the \$3 million special appropriation for workforce in their FY25 budget request.

PX 26 at P000797; Tr. Day 3:AM, 95:4-25 (Sallee).

60. CYFD agrees with the Co-Neutrals' findings as to whether any Target Outcomes were met in 2023. Tr. Day 8, 140:21-45 – 141:1-2 (Casados).

61. As described in more detail below, CYFD agreed it had not provided accurate caseload data and that CYFD implemented a hiring freeze.

E. CYFD’s failure to comply with its workforce caseload commitments is ongoing.

62. In the Co-Neutrals’ October 1, 2024, site visit letter, they wrote that they “continue to be extremely concerned about the barriers to acceptable performance” for the State, including high caseloads. PX 55 at P001786.

63. As of the Co-Neutrals' most recent site visit, CYFD workers continued to “describe their jobs as ‘impossible’ because of the number of children whose cases they are directly managing, and with how many responsibilities they have on each case.” PX 55 at P001788.

64. Supervisors continued to report to the Co-Neutrals that they “directly carry children’s cases, and expressed concern that they have been unable to supervise their staff appropriately.” PX 55 at P001788.

65. As of October 2024, the Co-Neutrals reported they “have never seen so many children’s cases being managed directly by supervisors and managers. PX 55 at P001790.

66. CYFD agrees that throughout 2024 and as of November 2024, CYFD was not in compliance with the 200% caseload standard. Tr. Day 4, 369:8-13 (Foppert); Tr. Day 8; 48:7-9 (Casados); PX 49; DX K; Tr. Day 4, 369: 14-19 (Foppert).

67. CYFD agrees that supervisors and managers continue to carry cases as the primary caseworker. Tr. Day 4, 368:21-25 – 369:1-7 (Foppert). Tr. Day 5:AM, 88:18 - 89:25 (Sandoval); DX K; Tr. Day 4, 345:7-25 (Foppert).

68. CYFD agrees that the Agency continues to struggle with caseworker retention and does not clearly understand the cause of the issue. Tr. Day 8: 136:21-22 (Casados) ; Tr. Day 4, 377:6-25 (Foppert).

69. As of November 2024, CYFD does not regularly collect and summarize caseworker exit interview information in a report for review by CYFD leadership, despite CYFD agreeing to maintain monthly reports about the same in the Workforce Development Plan. Tr. Day 8, 245:18-25 – 246: 1-3 (Casados);and PX 4 at P000218

IV. CYFD and HCA breached their commitments regarding family based placements.

70. In the FSA, the Parties agreed, children in out-of-home placements should be in

the least restrictive, most connected, most family-like setting appropriate for their unique needs.

PX 1 000042. Specifically, the Parties agreed that:

”[b]eginning on December 1, 2020, and on an annual basis by December 31 each year thereafter, the Co-Neutrals will approve a Target Outcome for CYFD to approve a specified number of new culturally reflective foster homes during the following year, and for HSD to approve a specified number of new treatment foster care placements during the following year.”

Id. at 000044. This Target Outcome is directly related to the Target Outcome due the following year on December 1, 2021, requiring every child to be in a licensed foster home setting unless specific findings are made. *Id.* at 000043 ¶ 5.

71. The State urgently needs a pool of trained, safe non-relative resource parents to care for children and prevent placements of children in offices, hotels/motels, and congregate care settings. PX 17 at P000569; Tr. Day 2, 63:17-24, 90:14-22, 91:7-25; 92:1-10 (Yanan); Tr. Day 4, 35:13-21 (Beck).

72. The Co-Neutrals approved a recruitment target for the calendar year 2022 of 178 newly licensed non-relative resource homes. PX 17 at P000643.

73. Out of the Co-Neutrals’ approved target of 178 new non-relative resource homes to be newly licensed during 2022, CYFD recruited 129 homes, only two more homes than in 2021 and significantly below the target. The 2022 Co-Neutrals Report states: “During 2022, the Co-Neutrals spoke with staff from numerous CYFD county and regional offices, resources parents, and community providers and were consistently told about the lack of resources, strategy, and dedicated staff within local office to focus on recruiting non-relative resource homes.” PX 17 at P000640-P000645.

74. The State failed to meet the FSA performance standard related to family-based placements to approve a specified number of new culturally reflective foster homes during 2022.

A. In the CAP, CYFD committed to take remedial action to increase the number of newly available culturally reflective foster homes.

75. The CAP contained essential steps, such as increasing the number of resource families that the State need to take in order to meet the FSA outcomes. Tr. Day 2, 103:2-104:15, 119:12-120:6 (Yanan).

76. In the CAP the State agreed to build out Family Based Placements (foster homes) by taking the following actions.

a. CYFD immediately assigning one placement staff member to focus exclusively on foster placement recruitment in each of five high-needs counties (Bernalillo, Dona Ana, Santa Fe, San Juan, and Chavez/Eddy), which collectively serve well over 500 children in state custody. PX 2 P000054.

b. CYFD will enter into contracts with at least one private provider for resource family recruitment by September 30, 2023 to focus on foster home recruitment and retention with specific capacity focused on growing new foster homes in each county throughout the State. The contract will provide that the private entities will recruit families and support them through the licensing process.

PX 2 at P000054; Tr. Day 2, 118:2-119:11 (Yanan).

B. CYFD Breached its CAP commitments to recruit and retain resource families.

77. The Co-Neutrals found that CYFD had not assigned any placement staff to focus solely or primarily on recruitment in the five specified high needs counties. Co-Neutrals' February 23, 2024 CAP Implementation Memorandum, PX 13 at P000304. When the Co-Neutrals met with placement staff in two of these county offices, none of those interviewed could identify a worker dedicated to resource home recruitment. PX 13 at P000305-P000306 and Tr. Day 2, 121:2-10 (Yanan).

78. The Co-Neutrals also reported that, although CYFD executed a contract to develop a recruitment and retention strategy, the Co-Neutrals were "unable to confirm that specific capacity focused on growing new resource homes in each county throughout the State

has been added pursuant to the CAP commitments.” PX 13 at P000306; Tr. Day 2, 121:11-122:3 (Yanan).

79. In fact, in some high-needs counties such as San Juan County, the net number of resource homes had decreased by the end of 2023, after CYFD had contracted with Mr. Salazar. PX 13 at P0000305; Tr. Day 2, 122:17-123:13.

80. In their annual report for 2023, the Co-Neutrals found that there had been an overall decline in the number of non-relative resource homes in 2023. PX 104 at P002250-2252. The Co-Neutrals noted that CYFD had executed a contract for spider-web networking model but also found that the resource home recruitment plans developed in 2023 and its activities “were unlikely to be effective.” PX 104 at P002252.

81. In 2023, the State’s increase in relative placements failed to offset a decrease in available non-relative resource homes, resulting in a continual decrease in the total number of licensed foster care, specialized foster care, or relative foster care homes since 2021. PX 104 at P002249.

82. Office placements made up nearly one quarter of children’s first placement upon entering foster care. PX 104 at P002212.

C. CYFD conceded it did not comply with its CAP commitments to recruit and retain resource families in 2023.

83. In its March 12, 2024 letter, the State agreed with the Co-Neutrals’ findings regarding family-based placements, writing that the State: “agrees with the Co-Neutrals’ statements regarding family-based placements. PX 21 at P000757.

84. State witnesses agreed that the State had not assigned or hired staff to focus solely or primarily on recruitment in the specified counties, although some assignments were made on a regional basis. Tr. Day 6, 153:10-14, 156:1-10, 160:1-12 (Archuleta-Earp); Tr. Day 8, 144:21-

25, 145:1-18 (Casados).

85. Staff were not assigned solely to recruitment and retention, and even if by region, until after 2024. PX 12 at P000295; PX at 104 P002251-P002252.

86. The State failed to hire a contractor in 2023 that had the resources or a program that was adequate to meet the State's CAP obligations. Tr. Day 2, 121:7-10, 122:7-10 (Yanan); Tr. Day 6, 144:2-12; 158:5-19 (Archuleta-Earp); Tr. Day 8, 144:21-25, 145:1-18 (Casados). Mr. Salazar, the contractor for the CYFD, did not dispute that the number of newly licensed non-relative resource homes was roughly half the number of discontinued non-relative resource homes in 2023, resulting in a net loss. Tr. Day 5, 139:16-140:24 (Salazar).

87. The State reported to the Co-Neutrals that Mr. Salazar's model would not launch in any counties until February 2024. PX 13 at P000306.

88. In a June 21, 2024 report addressed to CYFD Secretary Teresa Casados, Mr. Salazar stated that his "primary challenges in recruitment are staffing shortages, burnout, high caseloads, and an inefficient certification pipeline structure." PX 57 at CYFD.000050.

89. In addition to the decreasing number of safe placements, the number of children being housed in CYFD offices more than doubled in 2023 compared to the previous year. PX 104 at P002163.

90. There are more office placements being made because there are not enough resource families. Tr. Day 6, 215:14-25, 216:1-5 (Archuleta-Earp); Tr. Day 8 148:23-25, 149:1-2, 154:14-24 (Casados).

91. The State confirmed this when they notified the Legislative Finance Committee that the number of resource homes was largely unchanged from February 2023 to February 2024. PX 29 at P001495.

D. CYFD did not make good faith efforts, as defined in the FSA, to comply with its traditional resource home commitments in 2023.

92. Under nonrelative resource home recruitment, the Co-Neutrals agreed to lower 2023 target recruitment benchmarks from 265 (a number derived from a tool to estimate current overall Statewide need) to 190 (the number of new non-relative resource homes recruited in 2019, prior to the pandemic). PX 104 at P002248. Despite lowering the benchmarks, the State recruited 129 homes in total, only reaching 68% of the negotiated target. Id. P002250

93. The State has failed to assign or hire an employee in each county whose sole responsibilities are recruitment and retainment of foster families. Tr. Day 2, 121:7-10, 122:7-10 (Yanan); Tr. Day 6, 144:2-12; 158:5-19 (Archuleta-Earp); Tr. Day 8, 144:21-25, 145:1-18 (Casados).

94. The State failed to present evidence to demonstrate that its contractors will enable the state to meet its CAP and FSA commitments for resource families.

95. The State did not incentivize existing foster families to recruit as recommended by Mr. Salazar. Tr. Day 5:PM, 88:9-12, 88:21-25, 89:1-3, 133:2-6 (Salazar).

96. The State has failed to show that it has a strategy to reduce the backlog of home site reviews that would assist with recruitment.

97. Many of Mr. Salazar's reported recruitment events appeared to be lip service, such as posting a flyer at city or county events without any additional efforts. Tr. Day 4, 52:17-25, 53:1-18 (Beck).

98. CYFD reportedly asks foster parents to take in more children even when they have already said that they feel over-burdened and have recently refused placements, hurting retention. Tr. Day 4, 34:17-25, 35:1-10 (Beck). Additionally, foster parents need more training. Tr. Day 4, 40:12-19, 43:15-17, 76:19-21 (Beck); PX 104 at P002162.

E. CYFD’s failure to comply with its traditional resource home commitments is ongoing.

99. Mr. Salazar’s methodology was ineffective at recruiting and retaining traditional resource home commitments, as there was a net loss of resource homes between July 2023 and November 2023, PX 13 at P000304.

100. Currently, foster parents also report that they often feel unappreciated or out-right hostility from CYFD. Tr. Day 4, 16:20-21, 33:2-16 (Beck).

101. Although State witnesses indicated that the State hired another contractor to help with recruitment, the State failed to present evidence of the contract itself, the scope of the contract, promised deliverables under the contract, nor deadlines under the contract. Tr. Day 6, 191:18-25, 192:1-10 (Archuleta-Earp); Tr. Day 8, 51:23-25, 52:1-12 (Casados).

V. CYFD and HCA breached their commitments regarding Treatment Foster Care.

102. Medicaid is a jointly administered program between states and the federal government. In exchange for federal Medicaid funds, states agree to administer their Medicaid program in accordance with the federal Medicaid Act. Tr. Day 3: PM, 94:5-17 (Clifton); Tr. Day 7, 13:7-14 (Flannery).

103. New Mexico has designated the HCA as the single state entity who is responsible for administering the New Medicaid Program in accordance with the federal Medicaid Act. Tr. Day 3: PM, 94:22-25 – 96:1-2. (Clifton); Tr. Day 7, 200:17-25 – 201:1-2 (Flannery).

104. HCA and other single state entities are authorized to contract with managed care organizations (“MCOs”) to assist with the administration of the State’s Medicaid program, but they may not delegate their oversight obligations and responsibilities. Tr. Day 3: PM, 95:3-13 (Clifton); Tr. Day 7, 201:19-22 (Flannery).

105. As the single state agency, HCA must arrange (directly or through contracts) for children to receive the physical, mental, vision, hearing, and dental services they need to treat health problems and conditions. PX 47; Tr. Day 7, 201:10-15 (Flannery).

106. HCA is responsible for ensuring New Mexico has an adequate network of providers to provide Medicaid services. Tr. Day 7, 201:19-23 (Flannery).

A. HCA has responsibilities under EPSDT.

107. Federal law requires New Mexico, as a state participating in Medicaid, to cover certain mandatory services, including Early and Periodic Screening, Diagnostic, and Treatment (“EPSDT”) services for Medicaid eligible youth participants under the age of 21. PX 47; see also 42 U.S.C. §§ 1396a(a)(10)(a), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r).

108. Through the EPSDT benefit, children’s health problems are to be addressed before they become advanced and treatment is more difficult and costly. Tr. Day 7, 206:1-211:25 (Flannery) (more cost effective to provide services to children in the community).

109. EPSDT requires prompt provision of home and community based Medicaid services such as treatment foster care (TFC), high fidelity wrap around and mobile crisis response to children in foster care who need these services. Tr. Day 7, 204:1-208:25 (Flannery); see also PX 38.

B. HCA has a responsibility to provide an adequate TFC network.

110. Under the FSA, HCA must meet the specified number of new TFC placements approved by the Co-Neutrals. PX 104 at P002254. During 2023, the Co-Neutrals approved 290 new TFC placements but the state only made 183 TFC new placements (63%). PX 104 at P002255. Of the 23 children CYFD referred to MCOs for TFC services, only five (22%) were placed. *Id.*

111. The Parties agreed that children should be in the least restrictive, most connected, most family-like setting appropriate for their unique needs. PX 1 at P000042. As explained by Dr. Davis, a homelike environment is the basis of normal development for a child. A caretaker is an anchor for children and without a consistent caregiver, children lose the calming and reassuring kind of relationship which is the basis of normal development. Tr. Day 4, 169-170; 172-173 (Davis). Children in foster care are more likely to have difficulty with normal social-emotional relationships. *Id.* at 168. TFC can “work wonders” for children in foster care. Tr. Day 2, 54:1-12 (Yanan). Yet, without sufficient TFC placements, children are often left in overly restrictive placements, TFC services are delayed, or children are required to leave their home communities. Tr. Day 2, 43, 148-149 (Yanan).

112. As required by the CAP, Dr. Davis authored a report analyzing the needs of children placed out of state. The report was reviewed by state employees Diana Trujillo and Farra Fong. The first recommendation for improvement was to ensure adequate foster care and treatment foster care homes. The report noted that potential caretakers for children will frequently require special skills to manage children with developmental delays and trauma spectrum behaviors. PX 59 at P001959. As explained by Dr. Davis at the hearing, children need basic home settings upon which to build additional therapies and services. Tr. Day 4, 192:3-18; 206:12-21 (Davis) He also testified that the primary impediment to serving children in New Mexico was the lack of trained and supported foster care and TFC homes. Tr. Day 4, 192:24-193:7 (Davis); see also PX 59 at P0001963 (“Since the need for placement availability applies most frequently to TFC and FC, the sheer scarcity of these services remains the main obstacle.”)

113. The Co-Neutrals’ 2023 Report documents a meeting with TFC agencies where the agencies reported that their ability to serve children in foster care was impacted by the challenges

working with CYFD, the need for additional capacity and support within their agencies, and the need for a larger pool from which to match children to an appropriate and available home. PX 104 at P002256.

114. Although TFC is a Medicaid service, Secretary Armijo believed that CYFD was responsible for recruiting TFC families. Tr. Day 7, 398:1-399:25 (Armijo); DX R at 433 (TFC is listed as a Medicaid benefit). Although HCA was aware that remediation was necessary regarding treatment foster care, HCA's Medicaid Director could not remember the steps Presbyterian committed to undertake to ensure access to TFC services. DX QQ; Tr. Day 7, 259-260 (Flannery). Nor did HCA provide the necessary data to the Co-Neutrals regarding TFC within the CAP timeline as agreed to by the Parties. PX 13 at P000308 (Co-Neutrals report that the State did not provide them with quarterly data on the total number of TFC homes).

VI. CYFD and HCA breached their commitments regarding well-child visits.

A. CYFD and HCA agreed to ensure every child in state custody received a comprehensive well-child visit within 30 Days by December 1, 2021.

115. Federal law requires New Mexico, as a state participating in Medicaid, to cover certain mandatory services, including EPSDT services for Medicaid eligible youth participants under the age of 21. See PX 47. 42 USCA § 1396d specifies the items and services that are included in EPSDT. See PX 47.

116. 8.10.8.17 NMAC provides, in relevant part, “[w]ithin the first 30 days of PSD custody, the child shall have a complete physical examination or, if Medicaid eligible, an early and periodic screening, diagnostic and treatment services (EPSDT).” See PX 46.

117. Most children in State custody in New Mexico are eligible for Medicaid. PX 104 at P002308; Tr. Day 3: PM, 94:20-21 (Clifton).

118. In the FSA, the Parties agreed, “[b]y December 1, 2021, every Child in State

Custody will receive a comprehensive well-child check within 30 Days of entering state custody.” PX 1 at P000051.

119. Under the FSA, well-child visits are equivalent to an initial EPSDT screen. Tr. Day 3: PM, 117:12-16 (Clifton).

120. Plaintiffs bargained for, and the Parties agreed, that all children in state custody would receive a well-child visit within 30 days because they are entitled to receive those services by law. Tr. Day 3: PM, 122:5-21 (Clifton).

121. The Data Validation Plan contains a metric analysis plan under which the Co-Neutrals analyzed the State’s compliance with its well-child visit commitment. PX 3 at P000171.

122. The metric analysis plan specifies that the target variable to be measured is the percentage “of episodes of custody of children that included at least one well-child check within 30 days.” PX 3 at P000171.

123. The metric analysis plan also specifies that “[e]pisodes of custody are used because one child may be in and out of CYFD custody and a well-child check should be completed for each of these episodes.” PX 3 at P000171.

124. The metric analysis plan also specifies that “[o]nly episodes longer than 30 days (the required timeline for the well-child check) will be counted; episodes of custody must both begin and reach 30 days of duration within a reporting year to be included.” PX 3 at P000171.

125. The Co-Neutrals examined whether the criteria specified on HCA’s Keeping Kids Healthy website were met when determining whether well-child visits that were provided are comprehensive as required by the FSA. PX 17 at P000695.

126. HCA’s Keeping Kids Healthy website enumerates the required criteria for a well-child visit: Tr. Day 3: PM 137-138 (Clifton), PX 104 at P002309; Health Care Authority,

Keeping Kids Healthy, <https://www.hca.nm.gov/lookingforinformation/keeping-kids-healthy/> (last visited Dec. 18, 2024).

127. Children may go to a doctor, a nurse practitioner or a physician's assistant for a well-child exam. Children do not need to have a specific complaint to be seen. New Mexico has adopted the examination and screening guidelines recommended by the American Academy of Pediatrics (AAP) and Bright Futures. Tr. Day 7: 382-383 (Armijo); PX 104 at P002309; Health Care Authority, *Keeping Kids Healthy*, <https://www.hca.nm.gov/lookingforinformation/keeping-kids-healthy/> (last visited Dec. 18, 2024).

128. Federal regulations require that providers review a child's development at every well child visit to include the following:

- Medical history;
- Measurements of height, weight and BMI;
- Unclothed physical examination;
- Nutrition screening;
- Vision and hearing screenings;
- Developmental/behavioral assessment;
- Hematocrit/hemoglobin at 9 months and 13 years;
- Lead screening at 12 months and 24 months;
- Immunizations;
- Selective screenings necessary according to risk factors; and
- Anticipatory Guidance.

PX 104 at P002309; Health Care Authority, *Keeping Kids Healthy*, <https://www.hca.nm.gov/lookingforinformation/keeping-kids-healthy/> (last visited Dec. 18, 2024); PX 47.

129. In their 2021 Annual Report, the Co-Neutrals found that 47% of the episodes of custody they examined included a timely well-child visit, which was a lower percentage than that achieved by the State in prior years. PX 16 at P000550.

130. Even though the State issued guidance to CYFD staff in 2021, the Co-Neutrals

concluded that the State did not meet the performance standard for App. D, TO 4 (“Well-Child Checkups”) in 2021. PX 16 at P000550-551.

131. As part of their review of the State's well-child visit performance in 2022, the Co-Neutrals requested well-child records for a sample of children who the State reported had received timely well-child visits in 2022. PX 17 at P000697.

132. In their 2022 Annual Report, the Co-Neutrals found “of all episodes in state custody for children who entered in 2022 and remained in care for at least 30 days, fewer than half (44%) received a timely well-child medical checkup. The percentage of children who timely receive that check-up has steadily decreased every year since 2019.” PX 17 at P000569.

133. When analyzing the State’s well-child visit performance in 2022, the Co-Neutrals requested Well-Child Visit documentation of a sample of children who the State reported had received a visit within 30 days. 37% of the records they received “showed all required applicable elements of a well-child visit were documented.” PX 17 at P000697.

134. Further, the Co-Neutrals found that while “written guidance was sent to staff on implementing this commitment in 2022, the data show this practice was neither routinely nor consistently implemented for children.” PX 17 at P000698.

135. The Co-Neutrals determined the State did not meet the performance standard for App. D, TO 4 (“Well-Child Checkups”) in 2022. PX 17 at P000694.

136. CYFD and HCA did not challenge the 2021 or 2022 Co-Neutrals' findings that State failed to ensure 100% of children who entered state custody received a Well-Child visit within 30 days and failed to satisfy the performance standard in relation to that Target Outcome.

137. In the CAP, which was executed in June of 2023, the State conceded that the process to establish the CYFD Category of Eligibility needed to establish a child’s Medicaid

eligibility currently took up to 30 days “creating delays in receipt of eligibility information by the MCO and in facilitating an appointment for the Well-Child visit.” PX 2 at P000072.

138. As of the date the CAP was executed, the State had not examined in detail the reasons why children in state custody were not receiving timely Well-child visits. Tr. Day 7, 331:1-6 (Armijo).

B. In the CAP, CYFD and HCA agreed to take remedial action to ensure every child in state custody received a comprehensive well-child visit within 30 days.

139. In the CAP, the Parties agreed that the CAP “sets forth the commitments that CYFD and HSD agree to undertake to come into compliance with the” FSA. PX 2 at P000052.

140. The Parties also 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” in the FSA. PX 2 at P000052.

141. The Parties also agreed that the State’s performance with respect to App. D, TO 4 (“Well-Child Checkups”) “is no longer in dispute[.]” PX 2 at P000072.

142. Further, the Parties agreed, “[t]he State will come into full compliance with Target Outcome 4 (100% of children in state custody receiving a Well-Child visit within 30 days) by January 1, 2024; this target is for remedial purposes and does not change the FSA deliverable date.” PX 2 at P000074. The State understood this provision to acknowledge that the FSA deliverable was overdue and remedial action would be taken. Tr. Day 7, 352:12-20 (Armijo).

143. The State also agreed to the following validation protocol, to facilitate the Co-Neutrals’ ability to assess the State’s performance under the CAP:

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.

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.

PX 2 at P000074-75.

144. Process-based Well-Child commitments were also included in the CAP, such as the requirement that “CYFD will establish the CYFD Category of Eligibility (COE) within 6-8 days of the child being received into state custody to ensure timely entry into the Medicaid eligibility system.” PX 2 at P000072.

145. Those process-based requirements were proposed by the State during the negotiation of the CAP. Tr. Day 3: PM, 123:23-25. (Clifton).

146. Other process-based requirements included HCA’s commitment to leverage MCO care coordination to facilitate well-child visits and communication between members of the

child's team by ensuring:

[T]he MCOs contact the member's assigned CYFD Permanency Planning Worker (PPW) within three (3) business days of notification of the child's enrollment and assign a care coordinator to engage with the child and/or the child's team.

The MCO will request contact information for the child's caregiver/resource parent, legal representative (GAL/Youth Attorney), parent/guardian and legal custodian (CYFD) during this contact. The CYFD PPW will provide all information to the MCO to ensure needed coordination with the persons necessary to accompany and attend the child's appointment. (Per LOD-69-1)

To ensure that the Well-Child visit is scheduled to occur within 30 days of entry into state custody, HSD will require the MCO to utilize their internal resources, including the child's assigned care coordinator, a community health worker, a care worker, or a tribal liaison to ensure that the visit is scheduled in collaboration with the child and the child's legal custodian (CYFD PPW), caregiver/resource parent, and parent/guardian (where appropriate) to avoid scheduling conflicts and to ensure that barriers such as transportation and language access have been addressed. Care coordination efforts will be documented.

PX 2 at P000073.

147. CYFD agrees that well-child visits are:

[V]itally important to our ability to ensure the wellbeing of every child/youth entrusted to our care. Research shows children and youth in our care are more likely to be born with low birthweight, be in fair or poor health, have developmental delays or learning disorders, or have medical conditions (i.e., asthma, etc.) requiring the ongoing need for healthcare services and oversight. Further, research shows that serious health conditions effect 80 PERCENT of children/youth in foster care. These screenings help us achieve preventative and comprehensive care to address and mitigate these health disparities.

DX ZZ at 1.

C. CYFD and HCA breached their CAP well-child visit commitments in 2023.

148. On September 18, 2023, the Co-Neutrals wrote to the State regarding their fall 2023 site visit to New Mexico, reporting, "CYFD staff and managers at all levels described substantial service gaps for children ... and with few exceptions, did not describe any meaningful assistance in their cases from HSD or the MCOs." PX 9 at P000278.

149. The Co-Neutrals conducted additional site visits at the beginning of 2024. In their

January 26, 2024 letter to CYFD, the Co-Neutrals wrote:

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. Last year the parties engaged in extensive discussions to reach agreement on a Corrective Action Plan (CAP) designed to address many of the problems we identified last year and in 2022. The State's weak performance implementing many aspects of the CAP ... appears to have worsened the situation.

PX 12 at P000291.

150. During the site visits, "CYFD personnel reported long wait lists for services ranging from well-child medical check-ups to medication management." PX 12 at P000295.

151. During the site visits, CYFD staff also reported:

[R]ole confusion over who is responsible to schedule and facilitate well-child visits, particularly for children whose appointments might be made by the investigation worker prior to the child being assigned to a PPW. While some workers reported receiving reminders to schedule well-child appointments from the EPSDT coordinator, the lack of available providers in certain parts of the state makes scheduling an appointment in a timely manner challenging.

PX 13 at P000315.

152. CYFD staff did not report to the Co-Neutrals that MCO care coordination staff meaningfully assisted them in obtaining well-child visits during either Co-Neutral site visit. PX 9; PX 12.

153. On December 6, 2023, the Co-Neutrals wrote to CYFD and HCA, reporting that the State had provided them with inadequate Well-Child records. Specifically, out of the 225 episodes of custody the Co-Neutrals requested records regarding, the State provided no records in 155 cases, irrelevant records in 9 cases, and incomplete records in 25 cases. PX 10
CONFIDENTIAL at P000282.

154. The Co-Neutrals issued their CAP Implementation Memorandum on February 23, 2024, concluding that the State's data "do not indicate that all children in state custody received a completed well-child visit within 30 days of entering care[.]" PX 13 at P000315.

155. To assess CAP Well-Child Performance, the Co-Neutrals selected a random sample of children who entered into state custody in 2023 and “requested documentation to verify completion of a well-child visit from the State.” The Co-Neutrals also reviewed medical records to assess whether the required components of a Well-Child Visit were documented. PX 13 at P000313-314.

156. As of February 2024, the State still did not provide the Co-Neutrals with all of the Well-Child Visit records required by the CAP. Some of the records requested by the Co-Neutrals were not produced by the State on time, and some were not provided at all. PX 13 at P000315, n. 34; PX 2 at P000074.

157. In the CAP Implementation Memorandum, the Co-Neutrals determined the State was able to produce records verifying the completion of a Well-Child Visit for only:

36 percent (108 out of 303) of the records requested by the Co-Neutrals ... Of the 86 records reviewed for a sample of children who entered care in 2023, a well-child visit occurred within 30 days of entry for 74 percent of those children (64 out of 86 records reviewed) ... All required and applicable elements of a well-child checkup were documented for 51 percent of children in the reviewed sample (55 out of 108 records reviewed).

PX 13 at P000315.

158. CYFD and HCA agree that the State did not ensure 100% of children in state custody received a well-child visit in 30 days in 2023. PX 21 at P000763; Tr. Day 5:AM, 212:10-12 (Sandoval); Tr. Day 8, 79:18-22 (Casados); Tr. Day 6, 365:9-12 (Martinez).

159. HCA agrees that it did not provide all the medical records requested by the Co-Neutrals related to well-child visits in 2023, as required by the CAP. PX 21 at P000763; Tr. Day 7, 354:10-20 – 355:1-4; 365:2-4 (Armijo).

D. CYFD and HCA did not make good faith efforts, as defined in the FSA, to comply with their well-child visit commitments in 2023.

160. In 2023, CYFD and HCA did not implement administrative case management to

facilitate the scheduling of well-child visits, which is a strategy used by other states. Tr. Day 3: PM, 139:2-12 – 140:5-11 (Clifton) (CONFIDENTIAL SESSION TESTIMONY).

161. In 2023, CYFD and HCA did not create or require use of a uniform Well-Child Visit tool in order to facilitate the documentation of the required components of the screening, which is a strategy used by other states. Tr. Day 3: PM, 139:13-18 – 140:5-11 (Clifton) (CONFIDENTIAL SESSION TESTIMONY).

162. In 2023, the CYFD and HCA did not designate an outside organization to furnish case management services for children in state custody, which is a strategy used by other states. Tr. Day 3: PM, 139:19-24 – 140:5-11 (Clifton) (CONFIDENTIAL SESSION TESTIMONY).

163. In 2023, the CYFD and HCA State did not require co-location of MCO staff at CYFD field offices, which is a strategy used by other states. Tr. Day 3: PM, 139:25 – 140:1-11 (Clifton) (CONFIDENTIAL SESSION TESTIMONY). Co-location was previously recommended to the State by the Co-Neutrals. Tr. Day 3: PM, 139:25 – 140:1-11 (Clifton) (CONFIDENTIAL SESSION TESTIMONY).

164. In 2023, HCA did not ensure that its leadership was aware that Well-Child visits within 30 days are required by law, nor that the reason Co-Neutrals request and review Well-Child medical records is to ensure that comprehensive Well-Child visits are provided to children. Tr. Day 6, 372:17-25 – 373:1-21 (Martinez); Tr. Day 7, 356:4-13 (Armijo).

165. In their 2023 Annual Report, the Co-Neutrals concluded:

The State's data indicate well-child checkups occurred for 46 percent of all children who entered state custody in 2023 within 30 days of entering care, an increase from 44 percent in 2022. This remains an overall decline from the State's performance in 2019, 2020, and 2021, during which over 50 percent of children who entered custody received well-child checkups within 30 days of entry.

PX 104 at P002166.

166. In 2023, there were 170 episodes of children's custody with no record of a Well-

Child Visit occurring. PX 104 at P002311.

167. Out of the sample of records requested by the Co-Neutrals from well-child visits that occurred in 2023, 43% showed all applicable elements of the Well-Child Visit as having occurred. PX 104 at P002314.

168. The Co-Neutrals determined the State did not meet the performance standard for App. D, TO 4 (“Well-Child Checkups”) in 2023.

169. The Co-Neutrals determined the State did not meet the performance standard for App. D, TO 4 in 2023, even after acknowledging that the State made efforts and progress in some areas, including issuing LOD #96, hiring a CYFD EPSDT Coordinator, and executing an MOU with the Department of Health. PX 104 at P002308; 2315.

170. The State agrees with the Co-Neutrals’ conclusion that the State did not meet the performance standard in relation to App. D, TO 4 (“Well-Child Checkups”) in 2023. Tr. Day 7, 371:22-25 – 372:1-2 (Armijo); Tr. Day 8, 140:21-45 – 141:1-2 (Casados).

171. HCA agrees there is more the State could do to increase the percentage of children in State custody who receive well-child visits in 30 days. Tr. Day 7, 378:2-12; 411:8-9; 412:6-12 (Armijo).

172. HCA agrees that the State’s performance as to the percentage of children in State custody who received a well-child visit within 30 days decreased from 2019 to 2023. Tr. Day 7, 373:20-25; 374:6-19 (Armijo).

173. HCA agrees there are Co-Neutral recommendations that have been provided to the Agency that it has not implemented. Tr. Day 7, 377:25 – 378:1 (Armijo).

174. HCA agrees that under the Centennial Care 2.0 Contracts, the MCOs were responsible for ensuring that children in state custody received well-child visits within 30 days.

Tr. Day 7, 283:5-8. HCA did not present evidence that it utilized any contract enforcement mechanisms to enforce LOD #96 in 2023. See DX LL.

E. CYFD and HCA's failure to comply with their well-child visit commitments are ongoing.

175. HCA agrees that as of November 2024, the State has not been close to providing well-child visits to all children in State custody within 30 days. Tr. Day 7, 407:10-13 (Armijo). Despite paying PHP significantly higher per member per month rates, less than half of the children in state custody are receiving well-child visits. Tr. Day 7 at 43:7-48:22; 65:11-14 (Flannery).

176. HCA does not track and compile data showing how many children in state custody receive well-child visits at public health offices controlled by the Department of Health. Tr. Day 7, 350:18-22 (Armijo).

177. HCA agrees that there remains role confusion as to who is responsible for scheduling well-child visits. Tr. Day 7, 376:15-18 (Armijo).

178. HCA did not issue a remediation plan to Presbyterian Health Plan regarding its obligations to children in state custody under Kevin S. until May 10, 2024. DX QQ at 4. Tr. Day 7, 378:18-24 (Armijo).

179. Pursuant to the remediation plan, HCA did not require co-location of MCO staff to commence in any New Mexico counties until August 1, 2024. DX QQ at 4.

180. HCA agrees that deadlines should have been included in Presbyterian Health Plan's Remediation Plan but were not included. DX RR; Tr. Day 7, 387:1-10; 390:19-24 (Armijo).

181. HCA did not require Presbyterian Health Plan to collect and report any contextual data regarding why Well-Child visits are not completed in 30 days until July 2024. DX PP; Tr.

Day 7, 61:6-17 (Flannery); Tr. Day 7, 416:19-25 – 417:1; 417:8-22 (Armijo).

182. HCA allows Presbyterian Health Plan to determine what types of contextual data regarding why Well-Child visits are not completed in 30 days to collect and report. Tr. Day 7, 292:15-19 (Flannery).

183. Before July 2024, HCA did not analyze data on why children were not receiving well-child visits within 30 days. DX PP; Tr. Day 7, 413:8-22 (Armijo).

184. The first Presbyterian Health Plan contextual data report, containing data from July to September 2024, was provided to HCA in November 2024. Tr. Day 7, 64:19-25 – 65:1-8.

185. HCA did not include a provision in the Presbyterian Health Plan Turquoise Care contract requiring that all children in state custody receive a Well-Child Visit within 30 days of entering care. DX R; Tr. Day 7, 87:17-25 – 88:1-9 (Flannery).

186. LOD #96-1 sunsetted upon completion of the Centennial Care Program on June 30, 2024. DX MM at 3.

187. After the Presbyterian Health Plan Turquoise Care contract was executed in July of 2024, HCA did not issue a Letter of Direction that specifically addressed well-child visits within 30 days until October 8, 2024. DX NN.

188. HCA has not directed Presbyterian Health Plan to require the providers it contracts with to provide electronic medical records of children in state custody to Permanency Coordinators or Foster Parents, and Permanency Coordinators and Foster Parents do not have access to electronic medical records for children in state custody. Tr. Day 7, 300:11-16; 301:15-19; 303:15-20; 304:15-20; 308:4-10.

189. HCA has not directed Presbyterian Health Plan to require any of the providers it contracts with to hold weekly, or monthly appointment slots open for the purpose of ensuring

there is provider availability to complete well-child visits, even on a pilot basis. Tr. Day 7, 189:6-13 (Flannery).

190. The Turquoise Care contract with Presbyterian Health Plan allows for a provider network which requires patients in rural and frontier areas of New Mexico to travel up to 60 miles to access a health care provider. DX. R at 171; Tr. Day, 7: 262 (Flannery).

VII. CYFD and HCA breached their commitments regarding data.

A. CYFD and HCA breached their commitment to provide data to the Co-Neutrals prior to 2023.

191. In the FSA, in addition to specific data and information reporting requirements connected to each of the various Implementation Targets and Target Outcomes, the Parties agreed “Defendants shall provide to Plaintiffs and the Co-Neutrals any data required to validate the Target Outcomes” and “[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.” PX 1 at P000008.

192. The Parties agreed Defendants would create a Data Validation Plan, to be approved by the Co-Neutrals, by December 1, 2020. PX 1 at P000007.

193. The Parties agreed that “[t]he Data Validation Plan will set forth a process, including methodology and data sources, for validating Defendants’ progress toward achieving the Implementation Targets and Target Outcomes” in the FSA. PX 1 at P000007.

194. The Parties agreed that “in order to create the Data Validation Plan, to set a baseline for the Target Outcomes, and to evaluate progress toward achieving the Implementation Targets and Target Outcomes, the Co-Neutrals and their staff and/or consultants will require reasonable access to information.” PX 1 at P000009.

195. The Data Validation Plan contains both quantitative and qualitative metrics. For

each qualitative metric, the Data Validation Plan sets forth a methodology used to calculate the metric “to ensure that the State and the Co-Neutrals are working with a shared understanding of the State’s performance.” PX 104 at P002175. Qualitative metrics are used “[f]or commitments that cannot be measured strictly by quantitative measures – for example, changes in worker practice following training[.]” PX 104 at P002175. “For some items, both quantitative metrics and qualitative methodologies are necessary.” PX 104 at P002175.

196. CYFD agrees qualitative data is an important component of assessing CYFD’s performance. Tr. Day 5: PM, 184:9-11 (Meadows).

197. The Data Validation Plan contains both primary and secondary metrics. Primary metrics are used to measure progress towards implementation of the FSA. Tr. Day 7: 170:14-16 (Clifton). Secondary metrics are metrics identified by the State that “provide contextual information over a longer horizon than would otherwise be possible[.]” given that the State did not track most of the primary metrics prior to the execution of the FSA. PX 3 at P000093; Tr. Day 7: 170:17-25 – 171:1-2 (Clifton).

198. The State did not create a Data Validation Plan that was approved by the Co-Neutrals until February 16, 2022. PX 17 at P000579.

199. The 2022 Data Validation Plan, as approved, included “deadlines for completion of steps necessary to validate progress[.]” including, but not limited to, requirements that the State develop qualitative metrics for approval by the Co-Neutrals. PX 17 at P000579, n.44.

200. In 2022, the State did not develop the qualitative instruments specified in the Data Validation Plan. PX 17 at P000579.

201. In the Co-Neutrals’ 2022 Annual Report, they found “delays and gaps in the State’s submission of required data has negatively impacted the Co-Neutrals’ ability to assess

performance” and that they were “unable to validate CYFD caseworker caseloads due to inconsistencies between the caseload data recorded in FACTS and actual caseloads reported by staff.” PX 17 at P000571.

202. In the FSA, the Parties agreed that “[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.” PX 1 at P000008. In 2022, “delays and gaps in the State’s submission of required data” negatively impacted the Co-Neutrals’ ability to assess the State’s performance under the FSA. For example, due to issues with the quality of CYFD’s caseload data, the Co-Neutrals were unable to validate caseworker caseloads in 2022 and HCA failed to provide medical necessity documentation for clinical congregate care placements. PX 17 at P000571. CYFD and HCA have not challenged these determinations by the Co-Neutrals.

203. On April 10, 2023, the Co-Neutrals approved a 2023 Technical Revision of the Data Validation Plan. See PX 3.

a. In the CAP, CYFD and HCA agreed to take remedial action to improve their data collection and reporting.

204. In the CAP, the Parties agreed that the State would provide real time data in multiple areas in order to “to improve compliance with the Appendix B Targets above (BTO 2, 3, 4, 6, and 10).” PX 2 at P000059.

205. The Parties agreed “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.” PX 2 at P000059.

206. As part of the State’s real time data commitments, the State agreed to “provide to Co-Neutrals quarterly data on the total number of treatment foster care homes.” PX 2 at

P000059.

207. As part of the State’s real time data commitments, the State agreed to “provide medical necessity determination information for new in-state and out-of-state clinical congregate care placements.” PX 2 at P000059.

208. Medical necessity determination information is generated by the MCOs. Tr. Day 5: PM, 176:23-25 - 177:1-2 (Meadows).

209. Plaintiffs bargained for, and the Parties agreed to, the provision of real time data in the CAP because the State leadership needs to be able to examine real time data in order to make data driven decisions. Tr. Day 3:PM, 174:7-14 (Clifton).

210. CYFD agrees that making data driven decisions is critical to the proper functioning of a child welfare system. Tr. Day 5:PM, 182:22-184:18 (Meadows); Tr. Day 8, 86:3-7 (Casados).

b. CYFD and HCA breached their data reporting commitments in 2023.

211. In their CAP Implementation Memorandum, the Co-Neutrals concluded that the State did not consistently provide CAP data and information within the timelines outlined in the CAP. PX 13 at P000316.

212. The Co-Neutrals determined that in 2023, the State failed to provide all of the well-child records requested by the Co-Neutrals for the CAP period. PX 13 at P000315, n.34.

213. The Co-Neutrals determined that in 2023, the State did not provide the Co-Neutrals with “all medical necessity determination information for new in-state and out-of-state clinical congregate care placements nor quarterly data on the total number of TFC homes despite repeated requests from the Co-Neutrals.” PX 13 at P000316.

214. Due to issues with the quality of CYFD’s 2023 Caseload data, the Co-Neutrals were unable to evaluate CYFD’s compliance with its caseload commitments in their 2023

Annual Report using the methodology specified in the Data Validation Plan. Instead, the Co-Neutrals employed the methodology they had used to assess CYFD's Caseload compliance in their CAP Implementation Memorandum. PX 104 at P002266.

215. CYFD agrees it did not provide accurate and verifiable 2023 caseload data to the Co-Neutrals. PX 21 at P000756; See Tr. Day 5: PM, 163:13-14 (Meadows).

216. CYFD agrees that it did not provide the TFC data required in 2023. Tr. Day 4, 7-11, 346:8-16 (Foppert); Tr. Day 5:PM, 170:10-14 (Meadows).

217. On July 5, 2024, the Co-Neutrals notified the State of several issues with the quality of the State's data used for the Co-Neutrals' 2023 Annual Report. PX 14 at P000325. In May of 2024, the Co-Neutrals notified the State of the data quality issues and requested that the State address the issues and resubmit the data. PX 14 at P000325. The Co-Neutrals concluded many of the same issues existed in the State's resubmitted data. PX 14 at P000325.

218. The Co-Neutrals recommended that the State invest more in its data team "to ensure they have sufficient capacity to produce relevant and accurate data (including resources to manage contracts with external data consultants)."

219. In November of 2024, the Co-Neutrals issued their 2023 Annual Report, in which they concluded that:

As of the writing of this report, the State has not developed many of the required qualitative instruments to be reviewed and approved by the Co-Neutrals. These multi-year delays have resulted in no available performance data for numerous qualitative metrics in 2022 and 2023, and it is very likely these delays will impact the availability of 2024 performance data for some if not all of the outstanding qualitative metrics.

PX 104 at P002175.

220. The Co-Neutrals also reported "Interviews with caseworkers in 2023 revealed substantial discrepancies between the State's system of record and caseworkers' own reports of

their caseloads.” PX 104 at P002265.

221. CYFD leadership has not challenged the results of the Co-Neutrals’ data validation. Tr. Day 5: PM, 12:23-25 - 13:1-2 (Sandoval).

c. CYFD and HCA’s data failures are ongoing.

222. As of October 2024, there were only five staff members on the CYFD quality assurance data team. Tr. Day 5: PM, 186:10-15 (Meadows). A quality assurance team with at least nine filled positions is necessary for the team to have the capability to satisfy its responsibilities. Tr. Day 5: PM, 186:16-20 (Meadows).

223. FACTS is “the primary system of record for CYFD” which “houses child and family demographic information, case planning and service provision information, and placement and licensing information.” PX 3 at P000081-82.

224. In 2017, CYFD began the process of replacing FACTS with a Comprehensive Child Welfare Information System (CCWIS). DX B at 11. Tr. Day 3: AM, 10: 8-10 (Sallee).

225. There have been several delays in completing the FACTS replacement project, as well as cost overruns. Tr. Day 3: AM, 13:4-9 (Sallee).

226. As of October 2022, the FACTS replacement project was not expected to be completed until at least July 2025. DX B at 10.

227. As of November 2024, the CCWIS system meant to replace FACTS is not expected to be functional until the end of 2025, at the earliest. Tr. Day 6, 43:23-25 – 44:1-2 (Baros).

228. The FACTS replacement project is not expected to be complete until 2027. Tr. Day 6, 35:23-24 (Baros).

229. The FACTS replacement project will not replace all the other data systems that CYFD and HCA utilize and rely on to produce data to the Co-Neutrals pursuant to the Data

Validation Plan. Tr. Day 6, 46:20-25 – 47:1-23 (Baros); PX 3 at P000081-84.

230. CYFD has not begun building the capacity into the CCWIS system to collect or produce data corresponding to the metrics in the Data Validation Plan or the data reporting requirements in the CAP. Tr. Day 6, 49:18-25 – 50:1-7; 50:12-19. :1-23 (Baros).

231. CYFD has not committed to building the capacity into the CCWIS system to collect or produce data corresponding to the metrics in the Data Validation Plan or the data reporting requirements in the CAP. Tr. Day 6, 49:18-25 – 50:1-7; 50:12-19. :1-23 (Baros).

232. As of February 2024, CYFD implemented a policy to cease all improvements or enhancements to FACTS. Tr. Day 6, 47:24-25 – 48:1-13 (Baros).

233. HCA presented no evidence that it is making efforts to improve its ability to provide requested well-child visit records to the Co-Neutrals. See DX QQ, RR, SS, NN, KK, MM, LL.

234. The former CYFD Director of Performance and Accountability testified that she left the Agency, in part, because it had pivoted away from data-driven decision making. Tr. Day 5: PM, 181:11-13, 181:20-24 (Meadows).

d. CYFD's internally created charts that have not been validated by the Co-Neutrals cannot be used to determine whether CYFD has performed under the agreements.

235. CYFD agrees that the Data Validation Plan contains the methodology used to define performance under the FSA, as agreed by the Parties. Tr. Day 5: PM, 201:24-25 - 202:1(Meadows).

236. CYFD agrees the Data Validation Plan should be followed when assessing worker caseloads. Tr. Day 5: PM, 209:7-10 (Meadows).

237. CYFD agrees its December 2023 chart titled Individual Staff by % of Caseload Standard is not consistent with the Data Validation Plan. See PX 60 at CYFD 000090; Tr. Day 5:

PM, 192:13-17 (Meadows). For example, CYFD agrees the chart applies a caseload standard to supervisors, even though they are in non-case assignable positions under the Data Validation Plan. Tr. Day 5: PM, 194:2-25 (Meadows). CYFD agrees the chart also does not show if or how cases with no primary worker assigned are accounted for. Tr. Day 5: PM, 195:7-16 (Meadows). CYFD agrees the chart also does not show if all workers accounted for have completed new employee training. Tr. Day 5: PM, 196:14-17 (Meadows).

238. CYFD agrees that its charts contained in its Last 13 Months Report titled Estimated Caseloads contain estimated averages, and not determinations of actual employee caseloads. See e.g. DX U at CYFD 1143. Tr. Day 5: PM, 199:6-23 (Meadows). CYFD agrees the charts do not show whether new employee training completion was accounted for in the creation of the chart. Tr. Day 5: PM, 199:1-3 (Meadows).

239. CYFD agrees that its charts contained in its Last 13 Months Report do not show how many new non-relative resource families were recruited during specific time periods. See e.g. DX U at CYFD 1142. Tr. Day 5: PM, 201:2-14 (Meadows). CYFD agrees the Data Validation Plan contains a metric examining new non-relative resource families. Tr. Day 5: PM, 201:11-14 (Meadows).

240. CYFD agrees that its June 2024 caseload heatmaps likely do not account for unassigned cases or calculate caseloads by type of caseworker, as specified in the Data Validation Plan. Tr. Day 5: PM, 201:20-23 (Meadows).

VIII. CYFD breached the implied covenant of good faith and fair dealing.

A. CYFD breached the covenant of good faith and fair dealing in the CAP caseloads by failing to disclose and implementing a hiring freeze.

241. In the CAP, the Parties agreed that there was “an urgent need to recruit and retain case workers and to come into compliance with the caseload standard required by the [FSA.]”

PX 2 at P000053.

242. CYD instituted a hiring freeze in May 2023. PX 104 at P002162.

243. At the time that CYFD was negotiating the CAP in May 2023 and at the time CYFD agreed to decrease caseworker caseloads in the CAP in June 2023, CYFD knew that it had implemented a hiring pause. PX 2 at P000052; Tr. Day 8; 35:1-12. (Casados); Tr. Day 2, 112:23-113:1(Yanan).

244. CYFD did not disclose to Plaintiffs that there was a hiring pause in place at the time the CAP was executed or before the CAP was executed. Tr. Day 2, 112:23-113:1(Yanan).

245. On September 18, 2023, slightly over three months before the end of the CAP period, the Co-Neutrals wrote to the State regarding their fall 2023 site visit to New Mexico, stating:

We are appending our letter to the CYFD and HSD Secretaries of September 2022, in which we expressed concerns about challenges we observed during our site visits in New Mexico last year, including high CYFD staff caseloads ... 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.

PX 9 at P000275.

246. CYFD agrees that a “hiring pause” was implemented in 2023. Tr. Day 8, 35:1-12; 124:9-12; 125:1 (Casados); Tr. Day 5:AM, 45:6 (Sandoval).

247. CYFD agrees that no supervisors were hired during the hiring pause. Tr. Day 5 AM, 196:4-13 (Sandoval); Tr. Day 8, 41:22-24; 130:6-11 (Casados).

248. The Co-Neutrals noted that the State’s performance worsened in the second half of 2023 in part due to a pause in routine hiring of case-carrying workers between May 2023 and fall 2023. PX 104 at P002160-P002162.

249. CYFD’s actions injured Plaintiffs right to receive the benefits of the CAP. As recently as October 1, 2024, the Co-Neutrals documented their extreme concern about high

caseloads widespread confusion about roles and responsibilities; and the many reports of poor communication from state leaders to frontline staff and horizontally within the Pillar organization structure. PX 55 at P001786.

B. CYFD's actions injured rights under the CAP, and Plaintiffs' organizations have devoted considerable resources to bring and implement the *Kevin s.* litigation.

250. Native American Disability Law Center ("NADLC") was an organizational plaintiff in the *Kevin S.* litigation. PX 61 at P002004.

251. NADLC is a 501 (c) nonprofit organization based in Farmington, New Mexico, that advocates for the legal rights of Native Americans with disabilities. NADLC is a Protection and Advocacy Organization that is part of a system supported by federal allotments to protect the legal and human rights of individuals with disabilities and is authorized by relevant federal statutes to initiate legal action designed to protect the rights of persons with disabilities. 42 U.S.C. § 15041 et seq.; see also 42 U.S.C. § 10805; 29 U.S.C. § 794e. NADLC's mission is to advocate so that the rights of Native Americans with disabilities in the Four Corners area are enforced, strengthened, and brought in harmony with their communities. Tr. Day 2, 39:17-42:18 (Yanan).

252. NADLC has devoted significant organizational resources to identifying and counteracting Defendants' failure to meet their obligations to children in state custody, including failure to implement the Kevin S. FSA. As a direct consequence of Defendants' failure to meet their obligations under the FSA, NADLC has had to divert its scarce resources from other efforts to promote and protect the rights of Native Americans with disabilities. Tr. Day 2, 148:20-149:6 (Yanan).

253. Continued advocacy on behalf of children in state custody necessary to implement *Kevin S.* has and will continue to significantly diminish NADLC's resources and impact its

ability to serve other Native Americans with disabilities in the Four Corners area.

254. Plaintiff Disability Rights New Mexico (“DRNM”) was an organization plaintiff in the *Kevin S.* litigation. PX 61 at P002002-2004.

255. DRNM is a 501(c)(3) non-profit New Mexico corporation, designated as a New Mexico Protection and Advocacy Organization (“P&A”), whose mission is to protect, promote, and expand the rights of persons with disabilities. DRNM is also part of the P&A network of disability rights agencies established by Congress in 1975 and has provided advocacy services to New Mexicans with disabilities since 1979. The Developmental Disabilities Assistance and Bill of Rights Act, the original legislation establishing the P&A systems, authorizes P&As to “pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the state who are or who may be eligible for treatment, services, or habilitation.” 42 U.S.C. § 15043(a)(2)(A)(i) (2004).

256. Children involved in the child welfare system by definition have experienced trauma leading to behavioral and mental health diagnoses. DRNM has devoted significant organizational resources to identifying and counteracting Defendants’ failure to meet their obligations to children in state custody, including failure to implement the *Kevin S.* FSA. As a direct consequence of Defendants’ failure to meet their obligations under the FSA, DRNM has had to divert its scarce resources from other efforts to promote and protect the rights of New Mexicans with disabilities. DRNM provides individual advocacy services to children whose foster parents or *Guardians ad Litem* have had difficulty getting appropriate health care, most particularly behavioral health care. DRNM also provides support and technical assistance to attorneys serving children and youth in the child welfare system. Tr. Day 3:PM, 85-89 (Clifton).

257. Continued advocacy on behalf of children in state custody necessary to implement

Kevin S. has and will continue to significantly diminish DRNM's resources and impact its ability to serve other New Mexicans with Disabilities.

IX. Defendants failed to present evidence in support of their defenses.

A. Hinderance.

258. Bianca Foppert was the only defense witness to discuss the effect of the first arbitration, noticed on October 20, 2023 on CYFD. Tr. Day 4, 330:20-331:21, 333:21-335:5 (Foppert). She did not testify that the State would have fulfilled the CAP promises but for the arbitration. Rather, she indicated that she spent time preparing for the arbitration, but she also testified that she only monitored CYFD's compliance and did not have authority to influence CYFD's execution of its obligations under the CAP. Tr. Day 4, 333:21-335:5; 342:21-343:1 (Foppert).

259. On September 22, 2023, in response to being informed of the hiring freeze, Plaintiffs sought assurances that the State would meet its obligations under the CAP. PX 18.

260. The State responded on October 6, 2023, refusing to provide Plaintiffs with any assurances. PX 19.

261. The Co-Neutrals found prior to the expiration of the CAP that Defendants were not likely to fulfill its obligations under the CAP. PX 9.

262. The Defendants failure to meet the CAP was not caused by the first arbitration.

263. Plaintiffs were justified in bringing the first arbitration based on communications of the Co-Neutrals.

264. Defendants claimed that the first arbitration was premature, inferring that Defendants would be able to meet their CAP obligations during the CAP period. PX 19.

B. Impossibility.

a. CYFD assumed known risks when it agreed to the CAP's caseload standards.

265. CYFD leadership was aware, before the CAP was executed, that issues with the Agency's budget existed. Tr. Day 8, 124:9-25; 126:2-20 (Casados).

266. CYFD did not demonstrate that its 2023 budget deficit was not caused by fiscal mismanagement of Agency leadership.

267. CYFD's budget deficit in 2023 was caused by CYFD's failure to draw down federal funds. Tr. Day 6, 252:22-23; 323:1-7 (Montoya). Tr. Day 3:PM, 53-55 (Sallee).

268. CYFD has hired employees when operating in a deficit. Tr. Day 6, 327:7-8 (Montoya); Tr. Day 8, 129:19-25; 212:1-4 (Casados).

269. CYFD did not demonstrate that leadership was unaware, at the time the CAP was executed, that the Agency received bad publicity that could affect public opinion. Tr. Day 5:PM, 26:4-9 (Sandoval).

270. CYFD did not demonstrate that leadership was unaware, at the time the CAP was executed, that limited public interest in serving as a resource family or applying for employment at CYFD existed.

271. CYFD leadership did not demonstrate that it was unaware, at the time the CAP was executed, that FACTS was an old system of record that made the production of complete and accurate data difficult and resource intensive. Tr. Day 5:PM, 152:16-153:19 (Meadows); Tr. Day 4, 305:15-16 (Foppert); Tr. Day 6, 10:17-19 (Baros).

b. CYFD and HCA assumed the risks when they agreed to their well-child visit commitments.

272. Leadership of CYFD and HCA did not demonstrate that they were unaware, at the time the CAP was executed, that their current well-child visit performance was low or providing

well-child checks for all children in state custody within thirty (30) would be challenging.

273. Leadership of HCA did not demonstrate that they were unaware, at the time the CAP was executed, that provider well-child billing data and medical records are not immediately available for reporting purposes after a visit or that New Mexico suffered from a shortage of medical providers.

274. Is it a legal requirement that all children in state custody receive well-child checkup within 30 days.

275. Leadership of CYFD and HCA did not demonstrate that they were unaware, at the time the CAP was executed, that it took time to receive information regarding the number of TFC homes from TFC agencies.

X. Plaintiffs and their witnesses have specific expertise in the needs of the children in state custody, the New Mexico child welfare system, and the New Mexico Medicaid system and their testimony and opinions are credible.

276. Based on Therese Yanan's legal education and based on her experience, expertise and qualifications representing children in state custody in New Mexico since 2011, Ms. Yanan has specialized knowledge of child welfare practices in New Mexico, including knowledge of the needs of Native American children in state custody and the needs of children from rural New Mexico in state custody. Based on her experience and expertise as the Executive Director of the Native American Disability Law Center (NADLC) for the past 20 years, Ms. Yanan has expertise and experience related to the rights and needs of children, including those in state custody, as they access Medicaid services throughout the state. Ms. Yanan was the plaintiff representative for NADLC and was present during negotiations of the FSA and the Corrective Action Plan (CAP). Tr. Day 2, 42:24-45:17; 48:11-19; 98:18-99:16, PX 65 at P002075-P002076.

277. Based on Ms. Yanan's substantial education, experience, expertise, and qualifications, as well as the thoroughness and rigor of her analysis, which rests on a careful

assessment of the rights and needs of children in state custody, Ms. Yanan's testimony expressed at trial is credible.

278. Based on Andy Schultz's legal education, long history of representing children in foster care in New Mexico for the past 35 years, his experience with policy related to New Mexico child welfare matters, his experience and expertise providing legal education in the area of representing the legal interests of children in foster care, as well as his extensive experience litigating matters related to children in foster care, Mr. Schultz has expertise and experience related to the legal rights of children in state custody in New Mexico. Tr. Day 2, 242:4-244:4 (Schultz). Mr. Schultz was counsel for the plaintiffs in the *Kevin S.* litigation and present during the negotiations of the FSA and the CAP. Tr. Day 2, 248-258 (Schultz), PX 67 at P002079-2085.

279. Based on Mr. Schultz's substantial education, experience, expertise, and qualifications, as well as the thoroughness and rigor of his analysis, which rests on a careful assessment of the rights of children in state custody, Mr. Schultz's testimony expressed at trial is credible.

280. Based on Bette Fleishman's legal and business education, her certification as a child welfare law specialist, her experience, expertise, and qualifications representing children in state custody in New Mexico for the past 11 years, and her appointments to many New Mexico child welfare task forces, Ms. Fleishman has specialized knowledge of child welfare practices in New Mexico, including knowledge of the needs and legal rights of children with mental health-related disabilities and knowledge of the legal rights of Native American children in state custody. Ms. Fleishman was the *Guardian ad Litem* for two named plaintiffs in the *Kevin S.* litigation and was present during negotiations of the FSA. Tr. Day 3:AM, 35-40:10 (Fleishman), PX 64 at P002071-2074.

281. Based on Ms. Fleishman's substantial education, experience, expertise, and qualifications, as well as the thoroughness and rigor of her analysis, which rests on a careful assessment of the rights of children in state custody, Ms. Fleishman's testimony expressed at trial is credible.

282. Based on Sara Crecca's legal education and based on her experience and expertise representing children in New Mexico state custody for the past 23 years through civil litigation and as a *Guardian ad Litem* and through civil litigation, Ms. Crecca has specialized knowledge of child welfare practices in New Mexico, including the rights and needs of abused and neglected children in Bernalillo County. Ms. Crecca served as counsel in the Kevin S. litigation and was present during the negotiations of the FSA. Tr. Day 2, 181-183 (Crecca), PX 62 at P002068-2069.

283. Based on Ms. Crecca's substantial education, experience, expertise, and qualifications, as well as the thoroughness and rigor of her analysis, which rests on a careful assessment of the rights of children in state custody, Ms. Crecca's testimony expressed at trial is credible.

284. Based on George Davis's education and medical training, as well as his 30 plus years of experience and expertise as a Child and Adolescent Psychiatrist certified by the American Board of Psychiatry and Neurology, Dr. Davis has specialized knowledge in the field of child psychiatry and adolescent trauma. Based on his experience providing psychiatric services for children in state custody and children involved in the juvenile justice system throughout the entirety of his medical career, as well as his experience, expertise, and qualifications as a director in various capacities for New Mexico's Children, Youth and Families Department, Dr. Davis has expertise and experience related to the developmental and psychiatric

needs of children in state custody. Tr. Day 4, 155-176 (Davis), PX 72 at P002097-2107.

285. Based on Dr. Davis's substantial education, experience, expertise, and qualifications, as well as the thoroughness and rigor of his analysis, which rests on a careful assessment of the needs of children in state custody, Dr. Davis's testimony expressed at trial is credible.

286. Based on Jesse Clifton's legal education and based on his experience and expertise representing children, including children in state custody, in litigation related to physical and behavioral disabilities, Mr. Clifton has specialized knowledge of the rights of children with physical and behavioral health disabilities and child welfare practices in New Mexico. Based on Mr. Clifton's experience with policy related to children in state custody's disability rights and his expertise as a Staff Attorney and Director of Monitoring at Disability Rights New Mexico, Mr. Clifton has expertise and experience related to children in state custody accessing Medicaid services in New Mexico. Tr. Day 3:PM, 80-94 (Clifton), PX 66 at P002077-2078.

287. Based on Mr. Clifton's substantial education, experience, expertise, and qualifications, as well as the thoroughness and rigor of his analysis, which rests on a careful assessment of the rights of children in state custody to access Medicaid services, Mr. Clifton's testimony expressed at trial is credible.

288. Based on Peter Cubra's legal education, long history of representing children with physical and behavioral health needs in state custody for over 40 years in New Mexico, his experience representing individuals with disabilities in class action litigation, as well as his extensive experience litigating matters related to children in foster care and representing those children's needs in statewide policy committees and related task forces, Mr. Cubra has expertise

and experience related to the legal rights of children in state custody in New Mexico. Tr. Day 4, 87-105 (Cubra), PX 69 at P002088-2090.

289. Based on Mr. Cubra's substantial education, experience, expertise, and qualifications, as well as the thoroughness and rigor of his analysis, which rests on a careful assessment of the rights of children in state custody, Mr. Cubra's testimony expressed at trial is credible.

290. Based on Maralyn Beck's education, her experience with policy related to New Mexico child welfare matters, her personal experience as a former foster parent, and her experience and expertise as the Founder and Executive Director of New Mexico Child First Network, Ms. Beck has specialized knowledge of child welfare practices in New Mexico, including knowledge of the experience and needs of foster families working with children in state custody. Tr. Day 4, 6-56 (Beck), PX at 68 P002086-2087.

291. Based on Ms. Beck's substantial education, experience, expertise, and qualifications, as well as the thoroughness and rigor of her analysis, which rests on a careful assessment of the needs of children in state custody and the foster parents that care for them, Ms. Beck's testimony expressed at trial is credible.

292. Based on Charles Sallee's education as well as his experience and expertise, including as a social worker, as the former Deputy Director, and as the current Director of the New Mexico Legislative Finance Committee ("LFC"), Mr. Sallee has specialized knowledge of fiscal policy analysis, budget requests, government accountability reports and recommendations, including those relating to New Mexico CYFD. Tr. Day 3:AM, 79:11-115:19 (Sallee), PX 70 at P002091-2092.

293. Based on Mr. Sallee's substantial education, experience, expertise, and

qualifications, as well as the thoroughness and rigor of his analysis, which rests on a careful assessment of New Mexico's state budget and legislative finance, Mr. Sallee's testimony expressed at trial is credible.

XI. Authority to arbitrate and powers of Arbitrator.

A. Contract language supports broad powers.

294. The Parties have agreed that the Arbitrator has authority to award relief according to the FSA. 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. PX 1 at P000010. 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.

PX 1 at P000011.

295. The Parties have agreed that the CAP is remedial and is necessary to come into compliance with the FSA. The CAP must be fully implemented for the State to be able to comply with the FSA, 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. PX 2 at P000001-3, 5, 7-9, 15 and 21 and PX at P000001. Finally, an award of specific performance is clearly both appropriate and necessary when taking into account the purpose and objectives of the FSAs and the purpose of the CAP.

296. The Parties have agreed that the Arbitrator may award them reasonable attorney's fees and costs.

297. The FSA specifically allows the Arbitrator to award Plaintiffs reasonable

attorneys' fees and costs. PX 1 at P000012.

B. Previous reforms of New Mexico's child welfare system supports broad powers of the Arbitrator.

298. New Mexico's child welfare systems have been improved through agreements and contracts regarding necessary changes. There are multiple examples of the state administrators reaching agreements with stakeholders and employing measures to address necessary reforms. Tr. Day 4, 91-100 (Cubra).

299. CYFD has specific successful experience relying on an outside factfinder/decisionmaker to achieve meaningful reform. In the *ACLU v. CYFD* case, a problem was identified with the way children were being treated by the system, the problem was recognized by CYFD, a lawsuit was filed, the Parties came together to work out a solution, and to work out a pathway to a better system, and that process was laid out in detailed documents, and there was a legal framework for enforcing the agreements reached. Tr. Day 4, 103-104; 118-119 (Cubra).

300. CYFD successfully resolved the legal claims of the children in *ACLU v. CYFD* because appropriate administrators and elected officials were engaged in the solutions, brought a spotlight to the problems within CYFD, and with appropriate resources were committed to the measures necessary to achieve progress. Tr. Day 4, 105-106 (Cubra)

301. Measurable positive reform requires a clear implementation agreement and the dedication, focus and commitment to follow-through on the reforms. Tr. Day 4, 119 (Cubra).

302. Achieving the goals of the FSA and CAP requires agents of CYFD/HCA with authority to make the changes. Tr. Day 4, 119:1-25 (Cubra).

303. The state has been successful in achieving necessary reform by relying on the expertise of professionals who have guided child welfare systems in other states. Experts who

have operated in good systems and have bureaucratic skills to train, teach and coach are necessary. The experts also must be empowered to effect change. Tr. Day 4, 115:1-25 (Cubra).

304. Substantial system reform requires dedication among high leadership, and some skill and capability to push it forward. Tr. Day 4, 118:1-25 (Cubra).

305. The recommendations of the Co-Neutrals must be followed, and there must be assurances the recommendations are indeed followed. Tr. Day 4, 117:1-25 (Cubra).

306. The Co-Neutral recommendations that the state agrees are necessary should be ordered by the Arbitrator. Tr. Day 4, 123-124; 127 (Cubra).

307. The Arbitrator may appoint a receiver. The Arbitrator may appoint the Co-Neutrals Kevin S. compliance administrators.

XII. Facts that support injunctive relief: It is critical to protect the interests of, and prevent additional harm to, children in state custody.

A. Injunctive relief is appropriate because the State's breaches of the FSA and CAP irreparably harm children in the state's custody, demonstrating the importance of the third party interests being protected.

308. On September 18, 2023, the Co-Neutrals sounded the alarm stating: "Last year we described to the Parties a system that was in *crisis*. This year, based on reports from scores of CYFD employees at all levels and key stakeholders with whom we met, we believe the system is in a *state of chaos*." [emphasis in original]. PX 9 at P000278. At that time, they were calling for immediate action by the State to remedy the failures they identified to "protect children's safety," including reissuing recommendations they had made from the year before. *Id.* at 279.

309. Since sounding this alarm, the Co-Neutrals have declared an emergency and increased their monitoring by performing more site visits and providing additional progress reports. Tr. Day 4, 301:1-9 (Foppert); PX 12; 13; 55. As recently as October 1, 2024, the Co-Neutrals documented their extreme concern "about the barriers to acceptable performance: high

caseloads; staff turnover, children staying/sleeping in CYFD county offices; lack of safe and appropriate family-based placements and community-based services; multiple burdensome and inefficient data systems; widespread confusion about roles and responsibilities; and the many reports of poor communication from state leaders to frontline staff and horizontally within the Pillar organization structure.” PX 55 at P001786.

310. Defendants’ breaches of the FSA and CAP have resulted in unnecessary, ongoing harm to children in state custody today.

B. Injunctive relief is appropriate because of the character of additional third-party interests of child welfare stakeholders and the public and the need to protect those interests.

311. Children, their families, and named plaintiff organizations are not the only people harmed by the Defendants’ failure to perform their FSA and CAP obligations. The Co-Neutrals have underscored the impact of the State’s failure to meet its obligations under the FSA and the CAP on CYFD caseworkers, reporting that excessive caseloads are cited by CYFD caseworkers “as a barrier to child safety, quality work, and job satisfaction.” PX 104 at P002163. The Co-Neutrals have also noted that CYFD’s reorganization into a “Pillar system” in the latter half of 2023, during a significant time of organizational instability, contributed to greater divisions among staff and improperly stretched areas of geographic oversight. *Id.* at 2162.

312. CYFD’s failure to have an adequate number of foster care families, hiring pause and continuous reorganization efforts have dangerously increased rates of children sleeping in CYFD office buildings, requiring CYFD employees without adequate training and other responsibilities to supervise. *Id.* at 2163. During the September 2024 site visit, CYFD staff reported to the Co-Neutrals “high CYFD staff caseloads; lengthy and inefficient hiring processes and insufficient NET training; the agencies’ inadequate supply of family-based placements; the requirement that staff continuously be diverted from their main responsibilities to provide care

for children housed in CYFD offices around-the-clock; and CYFD's on-call system, which varies from county office to county office, but continues to require untrained Permanency Coordinators and/or Licensing and Support staff in many counties to conduct investigations overnight and on the weekends, and not necessarily under the oversight of an Investigative supervisor." PX 55 at P001787. The failure of CYFD to meet its commitments to hire caseworkers and to have sufficient foster homes as required by the CAP and FSA harms CYFD caseworkers.

313. Bette Fleishman explained that the failure to hire enough caseworkers harms lawyers who represent children in abuse and neglect proceedings and courts who adjudicate and manage their cases. For example, trials and court mandated reports are delayed when investigators quit employment mid-way through legal proceedings, or when permanency workers or even their supervisors fail to appear. Tr. Day 3:AM, 27:19-28:16 and 43:17- 48:18 (Fleishman). Currently, most of Pegasus' abuse and neglect hearings are being continued and children's court attorneys are quitting. Tr. Day 3:AM, 53:12-55:5 (Fleishman). The failure of CYFD to have sufficient caseworkers and to provide timely well child checks as required by the CAP and FSA harms the ability of children's lawyers to represent their clients and impedes the ability of the courts to timely adjudicate and manage abuse and neglect cases. Tr. Day 3:AM, 60:5-61:12 (Fleishman).

314. As Maralyn Beck explained, CYFD is failing to meet its obligations to recruit and retain foster parents, including failing to provide basic supports to foster parents. CYFD's failure to pay foster parents timely and correct levels of stipends is negatively impacting the retention of foster families. Tr. Day 4, 20:8-23; 21:8-22:15; 64:2-66:12 (Beck). While foster parents are entitled to respite, they face many unnecessary obstacles to obtain respite. Tr. Day 4

25:14 - 25:21; 28:2-29:6 (Beck). Lack of sufficient CYFD caseworkers as required by the FSA and CAP exacerbates the challenges for foster parents, hurting recruitment and retention. Tr. Day 4, 29:11-30:10 and 81:9-82:16 (Beck). Foster parents are routinely called to accept more children. Tr. Day 4, 35:4-21; 54:9-17 (Beck). The failure to recruit and retain sufficient resource families harms current resource families who are asked to care for more children and are provided with less respite as a consequence.

315. Dr. Davis explained that when a child is removed from their primary home, the most basic system responsibility is to provide another family setting for that child, as it is critical to development and a fundamental requirement of the system. Providing children with family settings reduces human suffering and makes society better. Tr. Day 4, 217:9-218:1 (Davis). The failure of CYFD to have sufficient resources homes harms the public as a whole.

C. Defendants have a demonstrated pattern of failing to act unless faced with imminent legal action.

316. Plaintiffs have consistently communicated their concerns regarding Defendants lack of compliance with the FSA and CAP. PX 18, 20. Among other actions, Plaintiffs have: made themselves available to meet with the Defendants; formally expressed their concerns by initiating the FSA dispute process; entered into lengthy, extensive negotiations resulting in execution of the Memorandum of Understanding; entered into extensive negotiations that resulted in execution of the CAP; and sent correspondence to attempt to resolve problems prior to seeking arbitration Tr. Day 3:AM 41:2-42:14 (Fleishman), Tr. Day 2, 75:18-19 (Yanan); PX 18; PX 20; PX 22; PX 5; PX 2 at P000076-78

317. Defendants have long been on notice of their ongoing failure to comply with their obligations under the FSA. The Co-Neutrals meet with both Parties after each site visit. and provided the Parties with written information related to their in-person visits. PX 7, 9, 12, 13,

and 55. The Defendants attended every All Parties Meeting scheduled by the Co-Neutrals, receiving feedback on required ITs and TOs and approving plans and policies when appropriate. Defendants had an opportunity to meet with the Co-Neutrals and provide comments on every annual Co-Neutral report before the Co-Neutrals finalized each report. The Co-Neutrals have provided the Defendants with specific recommendations or reasonable efforts that the State could take to meet its contractual obligations. PX 7, 9, 12, 13, 15, 16, 27, 55, and 104. *See* Attachment A (list of Co-Neutral recommendations compiled from admitted exhibits).

318. Hiring did not resume until after Plaintiffs put Defendants on notice that they would seek arbitration. PX 104 at P002163. Similarly, HCA did not take even meager steps to ensure Presbyterian Health Plan was fulfilling its EPSDT contractual obligations to children in state custody until after HCA was on notice that Plaintiffs were filing arbitration in 2024. DX QQ.

319. Defendants have a demonstrated pattern of failing to act unless faced with imminent legal action.

PROPOSED CONCLUSIONS OF LAW

I. New Mexico contract law and materiality of terms.

320. “A legally enforceable contract requires evidence supporting the existence of an offer, an acceptance, consideration, and mutual assent.” *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 6, 137 N.M. 57, (internal quotation marks and citation omitted). “The court’s function is to interpret and enforce the contract as made by the parties with reference to the intent of the parties.” *CC Hous. Corp. v. Ryder Truck Rental*, 1987-NMSC-117, ¶ 6, 106 N.M. 577; *Segura v. Kaiser Steel Corp.*, 1984-NMCA-046, ¶ 12, 102 N.M. 535; *Manuel Lujan Ins., Inc. v. Jordan*, 1983-NMSC-100, ¶ 8, 100 N.M. 573; *Schaefer v. Hinkle*, 1979-NMSC-053, ¶ 9, 93

N.M. 129; and *Cochrell v. Hiatt*, 1981-NMCA-152, 97 N.M. 256.

321. The failure of a party to the contract to perform satisfactorily his or her contract promise or duty constitutes a breach of the contract, giving rise to a remedy. *See Restatement (Second) of Contracts* §§ 224, 225.

322. For a breach to be material, it “must go to the root of the contract” or must involve “matters which would render the performance of the remainder a thing different in substance from that which was contracted for.” *Samples v. Robinson*, 1954-NMSC-091, ¶ 14, 58 N.M. 701.

323. The Restatement (Second) of Contracts § 241, entitled “Circumstances Significant in Determining Whether a Failure is Material,” lists the following five factors to determine whether a breach of contract is material:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

II. Settlement agreements are enforceable contracts.

324. Public policy encourages settlement agreements, and the courts have a duty to enforce them.” *Env’t Control, Inc. v. City of Santa Fe*, 2002-NMCA-003, ¶ 19, 131 N.M. 450 (citing *Bd. of Educ. for the Carlsbad Mun. Sch. v. Dep’t of Pub. Educ.*, 1999-NMCA-156, ¶ 14, 128 N.M. 398); see also *Montano v. NM Real Est. Appraiser’s Bd.*, 2009-NMCA-009, ¶ 12, 145 N.M. 494 (citing *Env’t Control, Inc.*, 2002-NMCA-003, ¶ 19, and *Bd. of Educ. for the Carlsbad Mun. Sch.*, 1999-NMCA-156, ¶ 14) (“It is well-settled law that New Mexico courts generally

enforce settlement agreements.”) A settlement agreement cannot be set aside merely because subsequent events prove the settlement to have been unwise or unfortunate for a party. *Id.* (citing *In re Tocci*, 1941-NMSC-015, ¶ 28, 45 N.M. 133).

325. New Mexico law which considers parties to an arbitration agreement to be bound by its terms. PX 1 at P000013. *Christmas v. Cimarron Realty Co.*, 1982-NMSC-079, ¶ 7, 98 N.M. 330 (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. Arbitration is “a contractual remedy for the settlement of disputes by extrajudicial means.” *Id.* ¶ 7 (citing *King County v. Boeing Co.*, 570 P.2d 717 (1977)).

III. Law on CAP’s Performance standard.

A. The CAP’s terms should be strictly enforced.

326. “When performance of a duty under a contract is due, any non-performance is a breach.” *Restatement (Second) of Contracts* § 235 (1981). “The breach may occur either through a total failure to perform or a negligent or incomplete performance.” Committee Commentary to NM UJI 13-822 (citing *Cochrell*, 1981-NMCA-152).

327. “[C]ontract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault.” *Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, ¶¶ 30-31, 118 N.M. 203 (quoting 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 12.8, at 190 (1990) (citing *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750 (7th Cir. 1988)) (“[L]iability for breach of contract is, prima facie, strict liability. That is, if the promisor fails to perform as agreed, he has broken his contract even though the failure [was] in no way blameworthy.”) Contract liability is strict liability, and the obligor is therefore liable for breach of contract even if he is without fault. *Restatement (Second) of Contracts* 11 Intro. Note (1981).

B. Extrinsic evidence should only be used in the CAP was ambiguous.

328. A contractual term is ambiguous “only if it is reasonably and fairly susceptible of different constructions.” *Levenson v. Mobley*, 1987-NMSC-102, ¶ 7, 106 N.M. 399.

“Disagreement between the parties as to what the terms of the contract mean does not in itself establish ambiguity.” *Id.*

329. “In order to determine the meaning of the ambiguous terms, the fact finder may consider extrinsic evidence of the language and conduct of the parties and the circumstances surrounding the agreement, as well as oral evidence of the parties' intent.” *Am. Bank of Commerce v. M & G Builders, Ltd.*, 1978-NMSC-077, ¶ 6, 92 N.M. 250. Evidence may be presented to the fact finder to aid in the interpretation of the agreement, but no evidence should be received when its purpose or effect is to contradict or vary the agreement's terms. *Maine v. Garvin*, 1966-NMSC-140, ¶ 13, 76 N.M. 546; *see also C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶ 16, 112 N.M. 504; *Mark V. Inc. v. Mellekas*, 1993-NMSC-001, ¶ 13, 114 N.M. 778. “The intentions of the parties may be ascertained from the language used, the parties' conduct, and surrounding circumstances.” *Segura*, 1984-NMCA-146, ¶ 12.

IV. Law on the State's defenses.

A. Law on defense of hinderance.

330. New Mexico courts have rejected claims that a party obstructed the performance of the contract by another party when there is no showing that the alleged obstruction caused the breach. *Guest v. Allstate Ins. Co.*, 2010-NMSC-047, ¶ 38, 149 N.M. 74 (found that *Guest* did not prevent insurance company from performing); *see also Deschert v. Allsup's Convenience Store, Inc.*, 1986-NMSC-074, ¶ 12, 104, N.M. 748 (plaintiff was not cause of defendant's performance.) Also, a party may not claim hindrance or failure of cooperation when “the “lack of cooperation” was justifiable. *Restatement of (Second) of Contracts* § 245 (1981).

B. Law on impossibility or impracticability.

331. The doctrine of impracticability, sometime referred to as impossibility, applies in limited factual circumstances where performance by a party “is made impracticable without his fault by the occurrence of an event[,] the non-occurrence of which was a basic assumption on which the contract was made.” *In re Estate of Duncan*, 2002-NMCA-069, ¶ 27, 132 N.M. 426 (quoting *Restatement of (Second) of Contracts* § 261), *rev'd on other grounds by Estate of Duncan v. Kinsolving*, 2003-NMSC-013, 133 N.M. 821. A party asserting an impossibility defense based on a fact that was present at the time a contract was executed must make a showing that when the contract was executed, the “party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made[.]”) *Restatement of (Second) of Contracts* § 266 ; see also UJI 13-840 NMRA, Committee Commentary (“A good discussion of the principles underlying the doctrine of impossibility or impracticability of performance can be found in chapter 11 of the Restatement (Second) of Contracts.”); *Restatement (Second) of Contracts 11 Intro. Note* (1981) (“Determining whether the non-occurrence of a particular event was or was not a basic assumption involves a judgment as to which party assumed the risk of its occurrence.”).

332. In order for Defendants to assert this defense, the condition creating the impossibility must have arisen through no fault of Defendants. *See Summit Properties, Inc. v. Pub. Serv. Co. of N.M.*, 2005-NMCA-090, ¶ 32, 138 N.M. 208 (citing *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 842 (2d Cir. 1975) (noting that party pleading defense of impossibility must show that “it took virtually every action within its powers to perform its duties under the contract”)); *see also Restatement of (Second) of Contracts* § 261 and *Silver Mountain Res., LLC v. Silver Holdings, LLC*, No. 13-CV-0469 SMV/GBW, 2014 WL 11460545,

at *5 (D.N.M. Mar. 7, 2014) (citing *Wood v. Bartolino*, 1944-NMSC-018, ¶ 10, 48 N.M. 175) (The doctrine is not applicable to situations where “a party impliedly assumes a greater obligation to perform despite any impracticability.”).

333. An impracticability defense requires a showing by Defendant that (1) a supervening event made performance on the contract impracticable, (2) the non-occurrence of the event was a basic assumption on which the contract was based, (3) the occurrence of the event was not Defendant’s fault, and (4) Defendant did not assume the risk of the occurrence. *Summit Properties, Inc.*, 2005-NMCA-090, ¶ 32.

334. Additionally, a party asserting an impossibility defense must show that it “took virtually every action within its powers to perform its duties under the contract[.]” *Summit Properties, Inc.*, 2005-NMCA-090, ¶ 32 (citing *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294-95 (Fed. Cir. 2002)).

V. Claim of good faith and fair dealing.

335. Good Faith and Fair Dealing is a claim, not a performance standard, which requires parties to a contract to act in a way that does not injure another party’s rights, benefits, or ability to perform under the contract. *See Bourgeois v. Horizon Healthcare Corp.*, 1994-NMSC-038, ¶ 16, 117 N.M. 434 (citing *Watson Truck & Supply Co. v. Males*, 1990-NMSC-105, ¶ 12, 111 N.M. 57) (Under the covenant of good faith and fair dealing, parties are prohibited from doing “anything that will injure the rights of the other to receive the benefit of their agreement.”); and *Kropinak v. ARA Health Servs., Inc.*, 2001-NMCA-081, ¶ 5, 131 N.M. 128. Violation of the covenant, on its own, “constitutes a breach of contract.” Implied covenant or promise of good faith and fair dealing, 23 Williston on Contracts, § 63:22 (4th ed.); *Apodaca v. Young Am. Ins. Co.*, No. CIV 18-0399 JB/JHR, 2023 WL 7706283, at *17 (D.N.M. Nov. 15, 2023) (quoting *Bourgeois*, *supra*) (the covenant “becomes part of the contract and the remedy

for its breach is on the contract itself.”)

336. “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, 142 N.M. 613. 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*, 1994-NMSC-038, ¶ 16 (citing *Watson Truck & Supply Co.*, 1990-NMSC-105, ¶ 12); *Kropinak*, 2001-NMCA-081, ¶ 5 (citing *Watson Truck & Supply Co.*, 1990-NMSC-105, ¶ 12). Violation of the covenant “constitutes a breach of contract.” 23 Williston on Contracts § 63:22 (4th ed.); *Apodaca*, 2023 WL 7706283, at *17 (quoting *Bourgeois*, 1994-NMSC-038, ¶ 17) (noting the covenant “becomes part of the contract and the remedy for its breach is on the contract itself”).

337. 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*, 1994-NMSC-079, ¶ 31.

VI. Powers of the Arbitrator.

338. The Arbitrator has the authority to award any relief necessary to effectuate the purpose of the FSA that a state or federal court in New Mexico could issue, other than monetary damages. PX 1 at P000012. By Agreement, the Parties have agreed that the Arbitrator can issue injunctive relief, including specific performance, attorney fees, declaratory relief, and appointment of a receiver.

339. As stated above, the Parties have agreed that the Arbitrator has authority to award relief according to the FSA. 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. PX 1 at

P000010. 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.

PX 1 at P000011.

340. When harms are attributable to policies and practices, system wide relief is required. For example, in *D.G. ex rel. Stricklin v. Devaughn*, the Tenth Circuit found that class certification for a class of children in state custody was not defeated by evidence that caseloads of some caseworkers was not excessive; rather plaintiffs alleged the same injury that the result of excessive caseloads resulted in exposure to an impermissible risk of harm. *D.G.*, 594 F.3d at 1193, 1201. System-wide relief is also required under equitable principles. The scope of injunctive relief should match the scope of the violations it remedies.

A. Specific performance.

341. The power of an arbitrator to award specific performance of a contract, as compared to that of a court, is clearer and subject to fewer requirements. It is widely recognized that arbitrators have the authority to order specific performance of a contract. 70 A.L.R.2d 1055 § 2. 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. *Id.* at § 6. Consequently, the power of an arbitrator to award specific performance is not confined to situations in which a court would grant such relief. *Id.*

342. “Specific performance is the actual accomplishment of a contract by a party bound to fulfill 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. Alsop*, 1980-NMCA-035, ¶ 31, 94 N.M. 255

(quoting *Guadalupe Cnty. Bd. of Educ. v. O'Bannon*, 1924-NMSC-008, 26 N.M. 606). 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.); NMSA 1978, § 44-7A-22(c), (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 (quoting *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 40 (8th Cir. 1975)).

B. Attorney fees.

343. 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.” NMSA 1978, § 44-7A-22(b). The Parties have authorized attorney fees.

C. Declaratory relief.

344. The Parties in the FSA agreed that the Arbitrator can issue declaratory relief.

345. *Burguete v. G.W. Bond & Bro. Mercantile Co.*, 1938-NMSC-075, 43 N.M. 97.

“In cases of actual controversy, the courts of record of the State of New Mexico shall have power, upon petition, declaration, complaint, or other appropriate pleadings, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of the final judgment or decree and be reviewable as such.” *Id.*

346. New Mexico law recognizes the important purpose of settling and affording relief

“from uncertainty and insecurity with respect to rights, status and other legal relations[.]” *See* Declaratory Judgement Act, NMSA 1978, § 44-6-14 (1975).

347. “The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” Rule 1-057 NMRA. *See also*, NMSA 1978, § 44-6-9 (In addition to declaratory relief, New Mexico law authorizes further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.); *see also New Mexico Boys and Girls Ranch v. New Mexico Bd. of Pharmacy*, 2022-NMCA-047, ¶¶ 16-18, 517 P.3d 248. A declaratory judgment for Plaintiffs further supports Plaintiffs’ request for attorney fees and costs. NMSA 1978, § 44-6-11 (1975). In any proceeding under the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978], the court may make an award of costs as may seem equitable and just.

D. Injunctive relief.

348. By agreement of the Parties in the FSA, the Arbitrator is authorized to consider relief a state or federal court in New Mexico could award.

349. Under New Mexico law, courts consider several factors to determine whether a permanent injunction is appropriate, including (1) the character of the interest to be protected, (2) the relative adequacy to the plaintiff of the injunction in comparison with other remedies, (3) the delay, if any, in bringing suit, (4) the misconduct of the plaintiff if any, (5) the interests of third persons, (6) the practicability of granting and enforcing the order, and (7) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied. *Cunningham v. Gross*, 1985-NMSC-050, ¶ 11, 102 N.M. 723. *See also, Martinez, et al. v. State of New Mexico*, No. D-101-CIV-2014-00793 (Order by Judge Singleton in Yazzie).

350. Federal courts throughout the country have declared and enforced children’s rights over the very issues at hand in this matter. Decades of court decisions from around the

country have ordered injunctive relief to address child welfare and EPSDT systemic failures. *See, e.g., Lynch v. Dukakis*, 719 F.2d 504, 506 (1st Cir. 1983) (affirming injunction to “provide a case plan and a periodic review of that plan to each child in foster care”); *L.J. By & Through Darr v. Massinga*, 838 F.2d 118, 120 (4th Cir. 1988) (affirming injunction against state and city officials to, inter alia, “expand its medical services to foster children”); *see also O.B v. Norwood*, 838 F.3d 837, 841 (7th Cir. 2016), *aff’g* 170 F. Supp. 3d 1186 (N.D. Ill. 2016) (enforcing reasonable promptness requirement); *Katie A. v. Douglas*, 481 F.3d 1150, 1158-59 (9th Cir. 2007) (finding state’s obligation to cover every type of health care or service necessary for EPSDT corrective or ameliorative purpose allowable under § 1396d(a), though the court could not require services to be bundled); *Rosie D. v. Romney*, 410 F. Supp. 2d 18 (D. Mass. 2006) (finding state’s failure to provide service co-coordination, crisis services, and home-based services violated EPSDT). Further, numerous courts have certified classes of foster children seeking similar types of injunctive relief. *See, e.g., D.G. ex rel Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010); *see also Elisa W. v. City of New York*, 82 F.4th 115, 119 (2d Cir. 2023) (vacating denial of class certification); *see also*, Children’s Rights National Docket, <https://www.childrensrights.org/in-the-courts> (last visited Dec. 12, 2024).

351. Courts routinely reject the argument that such professions of remorse and plans for future compliance can negate a plaintiffs’ showing of irreparable harm. *United States v. Oregon State Med. Soc’y*, 343 U.S. 326, 333 (1952) (“It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption”).

352. Voluntary cessation of a challenged activity may only moot litigation if, “two conditions are satisfied: (1) it can be said with assurance that there is no reasonable expectation

that the alleged violation will recur, and (2) interim events have completely and irrevocably eradicated the effects of the alleged violation.” *Brent Elec. Co., Inc. v. Int’l Brotherhood of Elec. Workers Loc. Union No. 584*, 110 F.4th 1196, 1207 (10th Cir. 2024).

353. Limited progress and future plans do avoid accountability for violations of legal obligations. “A party cannot ‘evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.’ ‘In other words, this exception exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct.’ ‘Courts therefore view voluntary cessation with a critical eye, lest defendants manipulate jurisdiction to ‘insulate’ their conduct from judicial review.’” *Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016).

E. Receivership.

354. By agreement of the Parties, the Arbitrator has the power to appoint a receiver if deemed necessary. “Where cause is properly before court for determination, appointment of necessary receiver is a judicial function.” *Cooper v. Otero*, 1934-NMSC-008, ¶ 28, 38 N.M. 164.

355. “Inherent power of district courts to appoint receivers is power necessary to efficient exercise of jurisdiction granted them by Constitution.” N.M. Const. art. III, § 1, art. VI, § 13; *Cooper v. Otero*, 1934-NMSC-008, ¶ 28.

356. Grounds for appointing a receiver include, “(1) when specific statutory provisions authorize the appointment of a receiver; (2) in an action between or among persons owning or claiming an interest in the receivership estate; (3) *in actions where receivers have customarily been appointed by courts of law or equity*; (4) when a receiver has been appointed for a business entity or other person by a court of competent jurisdiction in another state, and that receiver seeks to collect, take possession or manage assets of the receivership estate located in New Mexico; or (5) *in any other case where, in the discretion of the district court, just cause exists*

and irreparable harm may result from failure to appoint a receiver.” NMSA 1978, § 44-8-4 (1995) (emphasis added).

357. One of the grounds for appointing a receiver includes actions where receivers have customarily been appointed by courts of law or equity. After years of the District of Columbia failing to meet its obligations, as is the case here, the District Court, in *LaShawn A. v. Kelly*, appointed receivers to manage the District of Columbia’s child welfare system. *LaShawn A. v. Kelly*, 887 F. Supp. 297 (D.D.C. 1995). Similar to this case, a class action was filed on behalf of children in state custody whose rights were being violated. *Id.* at 299. Through the various legal proceedings, the Court issued a Remedial Order and Revised Implementation Plan, and entered an order imposing receiverships, with the Center for the Study of Social Policy acting as a court-appointed monitor. *Id.* The Defendants continuously failed to comply or make progress in improving the child welfare system. *Id.* at 299-300. After reviewing the monitor’s assessment of the defendants’ lack of compliance, the court determined it was necessary to impose a full receivership over the child welfare system for the District of Columbia. *Id.* at 316. Defendants’ claims that they were working to rebuild the agency were unconvincing to the Court with the court concluding that “abused and neglected children in the District of Columbia are not receiving the services and protection which are their desert and legal entitlement...Boys and girls who must sleep in the defendants' office building do not receive the attention or resources necessary to provide them with a home for the night. Children who are shuttled from one emergency placement to another do not receive the continuity that their young psyches require. Perhaps most sadly of all, children awaiting adoption do not receive the expeditious help of the defendants in beginning a safer, more stable, and maybe even happier life.” *Id.* at 317. The Court recognized the urgent need to intervene on behalf of the children in defendants’ custody similar

to the need demonstrated in this arbitration. In its opinion, the Court cites other lawsuits where receivers were appointed: “*Swann v. Charlotte–Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S. Ct. 1267, 1275–76, 28 L. Ed.2d 554 (1971). In addition to the venerable cases generated by the school desegregation movement, the plaintiffs cite other recent examples of receiverships imposed to remedy a variety of ills. See, e.g. *Shaw v. Allen*, 771 F. Supp. 760 (S.D.W.Va.1990) (prisons); *Glover v. Johnson*, 934 F. 2d 703 (6th Cir.1991) (same); *United States v. Detroit*, 476 F. Supp. 512 (E.D.Mich.1979) (water-treatment plant); and *Perez v. Boston Housing Authority*, 379 Mass. 703, 400 N.E.2d 1231 (1980) (public housing).” *Id.* at 315.

VII. HCA is responsible for ensuring New Mexico has an adequate network of providers.

358. Medicaid is a jointly administered program between states and the federal government. In exchange for federal Medicaid funds, states agree to administer their Medicaid program in accordance with the federal Medicaid Act. *Starko, Inc. v. N.M. Human Servs. Dep’t*, 2014-NMSC-033, ¶ 6, 333 P.3d 947 (citing *Atkins v. Rivera*, 477 U.S. 154, 157 (1986)).

359. New Mexico has designated the HCA as the single state entity who is responsible for administering the New Medicaid Program in accordance with the federal Medicaid Act. *M.G. through Garcia v. Armijo*, 117 F.4th 1230, 1235 (10th Cir. 2024) (citing 42 U.S.C. § 1396(a)(5)).

360. The HCA and other single state entities are authorized to contract with managed care organizations to assist with the administration of the State’s Medicaid program, but they may not delegate their oversight obligations and responsibilities. *M.G. through Garcia*, 117 F.4th at 1239 (citing 42 C.F.R. § 431.10(e)).

361. The HCA is responsible for ensuring New Mexico has an adequate network of providers to provide Medicaid services. See *Hyden v. New Mexico Hum. Servs. Dep’t*, 2000-NMCA-107, ¶ 15, 130 N.M. 19.

ANALYSIS

I. The CAP and FSA are valid and enforceable contracts.

362. Both the FSA and CAP were created through valid offer and acceptance between the Parties.

363. Both Parties thoroughly negotiated the terms of the FSA and the CAP.

364. The Parties mutually assented to the terms of both the FSA and the CAP.

365. In consideration for Plaintiffs dismissing their federal complaint against Defendants, Defendants promised to satisfy the performance standard and meet the Target Outcomes and Implementation Targets within the time periods specified in the FSA.

366. In consideration for Plaintiffs delaying arbitration for breach of the FSA, Defendants promised to take the steps provided for in the CAP by January 5, 2024.

367. Both the FSA and CAP are enforceable settlement agreements.

368. Both the FSA and CAP are valid contracts.

369. In both the FSA and the CAP, the intent of the Parties to reform the state of the New Mexico child welfare system is articulated through the specific actions and outcomes the Parties agreed would be taken and met.

370. Plaintiffs performed their obligations under the FSA. As such, Defendants received the benefit of dismissal of the initial lawsuit in exchange for the promises in the FSA.

371. Plaintiffs performed their obligations under the CAP. As such, Defendants received the benefit of Plaintiffs not immediately pursuing arbitration and its remedies in exchange for the promises in the CAP.

II. Defendants breached the FSA.

A. Defendants performance under the FSA is determined in reference to the performance standard.

372. The FSA performance standard, rather than the default contract standard of strict liability, applies to the FSA.

B. Defendants breached their caseload, family based placement, well-child visit, and data obligations under the FSA.

373. From 2021 to 2023, Defendants did not satisfy the FSA performance standard as to the majority of the ITs and TOs due during that time period.

374. Defendants never satisfied the FSA performance standard in connection with the implementation of the Workforce Development Plan, the approval of a specified number of new traditional and treatment foster homes, or the provision of timely well-child visits between 2021 and 2023. Accordingly, Defendants did not make good faith efforts, as defined by the Parties in the FSA, to meet those TOs from 2021 to 2023.

375. From 2021 to 2023, Defendants also failed to provide accurate and verifiable data and information to the Co-Neutrals as required by the FSA.

376. These breaches of the FSA are each material breaches.

377. Since 2020, Plaintiffs had made multiple efforts to assist the Defendants in coming into compliance with the FSA, including COVID extensions, the MOU, and the CAP.

378. It is unlikely Defendants will comply with the FSA without intervention by the Arbitrator.

III. Defendants breached the CAP.

A. Defendants' performance under the CAP should be strictly enforced.

379. The CAP is a remedial contract, created after Defendants' admitted breach of the FSA, with separate and specific terms Defendants agreed to undertake to come into compliance

with the FSA.

380. The CAP is unambiguous. While the FSA specifies a standard applicable to Defendants' performance other than the default contract standard of strict liability, the CAP does not specify an alternative standard or incorporate the FSA performance standard. Therefore, any non-performance under the CAP within the time period specified in the CAP constitutes a breach, regardless of fault. This determination is supported by the entirety of the CAP, construed as a whole.

B. Alternatively, extrinsic evidence demonstrates the Parties agreed Defendants would comply with the CAP within the CAP period.

381. To the extent there is any ambiguity in the CAP's language regarding the standard that applies to determine whether Defendants complied with the CAP, the extrinsic evidence demonstrates that the strict liability standard applies to the CAP.

382. Such extrinsic evidence includes the difference between the language in the FSA and the CAP, the Co-Neutrals' analysis in their CAP Implementation Memorandum coupled with their role in the creation of the CAP, the correspondence between the Parties, and the testimonial evidence of the Parties' intent in creating, negotiating, and executing the CAP.

383. Testimony by Defendants' witnesses claiming that Defendants intended to incorporate the FSA performance standard into the CAP is not credible.

384. Testimony by Defendants' witnesses claiming they were unaware Plaintiffs intended for Defendants to take the actions and meet the outcomes specified the CAP within the CAP period when the CAP was executed is not credible.

385. The Parties intended, and mutually assented, that Defendants would take the actions and meet the outcomes specified in the CAP within the CAP period in order to come closer to compliance with the FSA.

C. Defendants breached their CAP caseload, traditional family based placement, treatment foster care, well-child visit, and data commitments.

386. The evidence presented by Defendants regarding their compliance with the subject matter of the CAP regarding actions taken or results achieved before or after the CAP period is not relevant to the determination of whether Defendants breached the CAP. Evidence of actions taken and results achieved between June 30, 2023 and January 5, 2024 is relevant to this determination.

387. CYFD failed to ensure that “no Investigation Case, Permanency Planning, In-Home Services, or Placement worker will have over 200% of the applicable caseload standards documented in the 2023 Data Validation Plan approved by the Co-Neutrals , including trainees with graduated caseloads” by the end of the CAP period. PX 2 P000053. This constitutes a breach of the CAP.

388. CYFD failed to ensure that “no supervisor will be carrying any cases” by the end of the CAP period. PX 2 P000053. This constitutes a breach of the CAP.

389. CYFD failed to comply with the CAP term that “[i]n five high-needs counties (Bernalillo, Dona Ana, Santa Fe, San Juan, and Chavez/Eddy), CYFD will immediately assign one placement staff to focus exclusively on recruitment until at least September 30, 2023. The State will maintain its dedicated public staff in the 5 designated counties at least until the private contractor has fully ramped up its capacity in those 5 designated counties.” PX 2 P000054. This constitutes a breach of the CAP.

390. CYFD failed to comply with the CAP term that “[i]n addition to the assignment of placement staff to focus on the five counties listed above, CYFD will enter into contracts with at least one private provider for resource family recruitment by September 30, 2023 to focus on foster home recruitment and retention with specific capacity focused on growing new foster

homes in each county throughout the State. PX 2 at P000054. This constitutes a breach of the CAP.

391. CYFD and HCA failed to comply with the CAP term that “The Parties agree that care coordinators from managed care organizations (MCOs) need to take a greater role in coordinating Treatment Foster Care (TFC) placements for children in state custody that are enrolled in an MCO. When a child is recommended for TFC, including but not limited to a recommendation from a mental health provider or a request from IPP team, CYFD will submit the information to the MCO to confirm medical necessity by a prior authorization.” PX 2 at P000055. This constitutes a breach of the CAP.

392. CYFD and HCA failed to “ensure that 100% of children will receive a comprehensive Well-Child visit within 30 days of entering state custody” during the CAP period. PX 2 at P000072. This constitutes a breach of the CAP.

393. HCA failed to comply with the CAP term that “[t]he 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.” PX 2 at P000074. The State also did not provide the records requested by January 5, 2024. This constitutes a breach of the CAP.

394. CYFD and HCA failed to “provide to Co-Neutrals quarterly data on the total number of treatment foster care homes” during the CAP period. PX 2 at P000059. This constitutes a breach of the CAP.

395. HCA failed to “provide medical necessity determination information for new in-state and out-of-state clinical congregate care placements” during the CAP period. PX 2 at

P000059. This constitutes a breach of the CAP.

396. These breaches of the CAP are each material breaches.

397. It is unlikely Defendants will comply with the CAP without intervention by the Arbitrator.

D. CYFD breached the covenant of good faith and fair dealing.

398. Both Parties are bound by an implied covenant of good faith and fair dealing that applies to both the FSA and the CAP.

399. CYFD violated the covenant and breached the CAP when CYFD leadership implemented a statewide hiring freeze in May of 2023.

400. CYFD also violated the covenant and breached the CAP when CYFD leadership continued the hiring freeze for months after executing the CAP, promising to fulfill remedial caseload standards to come into compliance with its FSA caseload obligations.

401. These actions constituted deliberate disregard for the potential harm to children in foster care in New Mexico.

IV. The State's defenses fail.

A. Hinderance.

402. Defendants failed to show that Plaintiffs' decision to bring the first arbitration caused Defendants to breach the CAP.

403. CYFD repudiated the CAP when it implemented the hiring freeze.

404. Defendants refused to provide assurance that they would comply with the CAP when requested by Plaintiffs.

405. Plaintiffs' decision to bring the first arbitration was justified and did not cause Defendants to breach the CAP.

B. Impossibility.

406. The legal doctrine of impossibility does not excuse Defendants' failure to perform under the CAP related to CYFD budget issues, bad publicity, lack of public interest in serving as resource families or CYFD employees, limitations of FACTS, lack of healthcare providers, challenges in ensuring all children receive well-child visits in 30 days, lag in receipt of well-child billing data, well-child records or TFC information. Defendants assumed the risk that these conditions would exist during the CAP period.

V. The appropriate remedy must include equitable and declaratory relief.

A. Specific performance is warranted.

407. Specific performance of the CAP is an essential remedy to remediate the State's failure to ensure children in state custody receive the care and resources to which they are entitled.

408. The CAP was specifically designed by subject matter experts and the Parties to address the complex and particular problems the State faces in caring for children in its custody and to help the State come into compliance with the FSA. Add in language from the CAP re steps being essential.

409. Children in state custody have been harmed by the State's failure to implement the FSA and the CAP. To avoid additional injustice and harm to children in the State's custody, specific performance of the CAP must be awarded as a component of any relief provided in this arbitration.

410. Monetary damages awarded in this case would be inadequate. Funds provided to individual Plaintiffs would not be sufficient or helpful in providing the many children in state custody with lasting safety, trauma-informed care, and safeguarded rights.

411. The Parties have agreed that monetary damages cannot be awarded against the

State for its failure to perform

B. Declaratory relief is warranted.

412. The Parties have agreed that the Arbitrator may award declaratory relief.

413. An award of declaratory relief is warranted to clarify rights, status, and other legal relations affected by this arbitration.

C. Injunctive relief is warranted.

414. The Parties have agreed that the Arbitrator may award any relief necessary to *effectuate the purpose of the agreement*, including injunctive relief. PX 1 at P000012.

415. Injunctive relief is warranted to end Defendants' failure to perform their contractual obligations and ensure the rights of children in state custody are respected

416. All seven factors used to determine if an injunction is appropriate weigh in favor of the issuance of injunctive relief.

417. As to the character of the interest to be protected, children in foster care are completely dependent on Defendants for their care and well-being. The importance of having a sufficient number of CYFD caseworkers, appropriate foster care placements, basic health assessments, and data regarding children in state custody cannot be overstated, especially given the dependence of children in foster care on the State for basic care. The first factor weighs in favor of an injunction.

418. The adequacy of an injunction as a remedy also weighs in favor of Plaintiffs. There is no other remedy that would provide adequate relief, without the addition of injunctive relief.

419. There was no delay in bringing this action, so the third factor also weighs in favor of an injunction.

420. The Plaintiffs do not have authority over children in foster care and are not at

fault for the State's nonperformance of their lawful duties, so the fourth factor is inapplicable.

421. The fifth factor looks at the interests of third parties. Here, third parties are served by an injunction. All children who are now in or at risk of coming into the State's foster care program, their families, the stakeholders serving children in foster care including foster parents, and the courts, the employees of CYFD and HCA, and the public as a whole benefit from CYFD having sufficient case workers, CYFD having sufficient resource homes, and children obtaining well-child checks within 30 days. NADLC, Pegasus, and DRNM will also continue to devote their limited resources to addressing Defendants' failure to comply with their contractual and other legal obligations. Such harms are plainly irreparable and cannot be adequately remedied by money damages (which are not available in any event under the FSA). The State as a whole benefits from its most vulnerable children receiving safe placements and needed medical services.

422. The sixth factor, the practicability of granting and enforcing the order or judgment, is met. Crafting an injunction is not without its difficulties, including taking care not to usurp the policy-making role of the legislature, nor to micromanage CYFD and HCA. Yet, CYFD and HCA were represented by counsel, the Secretaries, and senior staff at the FSA negotiations. The Defendants themselves have determined that the FSA represents actions the agencies are required to take to meet their legal obligations to children in foster care. Moreover, while the government may have some discretion over how to best implement their required Implementation Targets and Target Outcomes, the fact that CYFD and HCA must achieve these targets is not discretionary. The State's ability to comply with these obligations has been hampered by changing leadership within CYFD and HCA. An injunction is needed to ensure that both agencies devote the resources and oversight necessary to implement the CAP to allow the

State to comply with the FSA.

423. The seventh factor regarding relative hardships weighs forcefully in favor of Plaintiffs. The children in state custody who are now caught in an inadequate child welfare system and who will remain in a system mired by a lack of caseworkers, lack of resource homes and treatment foster homes, and failure to provide basic health care will continue to be irreparably harmed if essential elements of an adequate child welfare system are not put in place. The Co-Neutrals have documented the irreparable harm children in foster care have suffered due to Defendants' pernicious and persistent non-compliance with their contractual legal obligations. Absent injunctive relief, children in state custody will continue to face an irreparable deprivation of appropriate placements and services that is assured to children under the FSA, as well as federal and state law. Defendants, by contrast, face "constraints" that are, at most, administrative and financial burdens associated with complying with their legal obligations. Importantly, CYFD and HCA accept state and federal monies to meet these obligations and are eligible for additional federal monies that they have failed to access. Balanced against the grave, irreparable damage caused by placing children in unsafe and improper placements and failing to provide them with basic medical screening and treatments, Defendants' professed hardships do not justify the denial of injunctive relief.

424. A permanent injunction is needed to provide a system of accountability to ensure that CYFD and HCA devote the resources and staff necessary to meet their obligations under the FSA and ensure there are sufficient caseworkers, resource homes and treatment foster care homes, and well-child checks with necessary follow-up.

425. The Defendants' eleventh-hour alleged efforts to come into compliance with their obligations under the FSA are woefully inadequate. Having systematically failed to comply with

the FSA for years despite being on notice of the State's failure to meet the performance standard agreed to by the Parties through meetings with the Co-Neutrals, All Parties Meetings, meetings with Plaintiffs, mediation with Plaintiffs, an MOU between the Parties, a CAP, progress letters from the Co-Neutrals and Annual Reports with findings of non-performance year after year, Defendants cannot now avoid injunctive relief with the mere promise to remedy its behavior going forward – or with stopgap measures presented for the first time at Arbitration.

426. The public interest will be served when the Defendants provide adequate care for children in custody. Defendants will do so by complying with their settlement obligations for the benefit of children in foster care.

427. Failure to comply with the State's legal obligations denies the plaintiffs the objectives of their settlement, violates federal statutes and New Mexico law and discriminates against children with disabilities by placing them unnecessarily in congregate care.

D. The appointment of a Receiver is warranted.

428. Defendants' pervasive, chronic, and ongoing failure to perform their obligations under the FSA and CAP – despite having been on notice of such failures and professing to be working on the problem for years – constitutes just cause warranting the appointment of an independent receiver to ensure compliance with the Arbitrator's order.

429. The Defendants' pattern of failing to act unless faced with imminent legal consequences, as well as the longstanding issue of Agency leadership changing at frequent intervals, supports the appointment of a Receiver who can oversee Defendants' implementation of the Arbitrator's order.

430. Defendants will benefit from additional expertise and guidance as the work to implement the Arbitrator's order. An appropriately qualified receiver can assist with the complexity inherent in implementing the actions ordered.

431. The Arbitrator will order the appointment of a Receiver on motion by the Plaintiffs following the entry of the Arbitrator's decision.

432. The Receiver shall have subject matter expertise regarding child welfare administration, Medicaid obligations under EPSDT, and data proficiency.

433. The Receiver shall have authority to hire consultants as needed to assist the Defendants and the receiver in implementing the remedy ordered and ensuring Defendants compliance with the remedy.

434. The salary of the Receiver shall be paid by the Defendants, as the Defendants are responsible for CYFD and HCA's longstanding failure to comply with their legal obligations.

E. Attorney fees and costs are warranted.

435. The Parties have agreed that the Arbitrator may award Plaintiffs attorney fees and costs if they prevail in arbitration.

436. Plaintiffs have prevailed in this arbitration.

437. An award of attorney fees and costs to Plaintiffs are warranted in light of the time and expenses that Plaintiffs have incurred as a result of repeated attempts to resolve Defendants' breaches of the FSA and CAP.

VI. System-wide relief is necessary and appropriate to address Defendants' failures.

438. The relief ordered by the Arbitrator is tailored to remove systemic and programmatic barriers to compliance with the FSA and CAP is necessary for New Mexico's child welfare system to obtain sufficient caseworkers, resource homes, treatment foster care homes, timely medical assessments for children who enter custody, and data needed to support data driven decision making.

PROPOSED JUDGMENT LANGUAGE

IT IS THEREFORE ORDERED THAT:

A. SPECIFIC PERFORMANCE AND ADDITIONAL INJUNCTIVE RELIEF

1. Defendants are ordered to perform the following unfulfilled obligations under the CAP for Caseloads as follows:
 - a. By March 1, 2025, CYFD will ensure that no Investigation Case, Permanency Planning, In-Home Services, or Placement worker will have over 200% of the applicable caseload standards documented in the 2023 Data Validation Plan approved by the Co-Neutrals, including trainees with graduated caseloads.
 - b. By March 1, 2025, CYFD will ensure no supervisor will be carrying any cases.
 - c. By April 1, 2025, CYFD will report all data as previously outlined by the CAP, and requested by the Co-Neutrals, to the Co-Neutrals to ensure compliance with paragraphs a and b above.
 - d. By January 18, 2025, CYFD will amend its 2025 budget request to request 1.3 times more caseworkers than were requested in the last CYFD budget request.
 - e. By June 30, 2025, CYFD will align budgetary resources to prioritize hiring of PSD caseworkers.
 - f. Assign or hire an individual in upper management who is solely focused on the hiring and retention of caseworkers.
 - g. Complete targeted hiring of needed caseworker positions based on caseload data results indicating where and what type of caseworkers are needed.
 - h. Streamline its caseworker application and hiring process, including removing the requirement that all candidates for CYFD senior workers and supervisory positions be interviewed by the PS Deputy Secretary as recommended by the Co-

Neutrals. See PX 7 at P000268; PX 55 at P001788.

- i. Track and examine data about staff resignations as recommended by the Co-Neutrals. See PX 7 at P000268.
 - j. Create a dashboard tracking hiring progress as recommended by the Co-Neutrals. See PX 7 at P000268.
 - k. Engage in proactive over-hiring in anticipation of work surges and expected attrition in each office as recommended by the Co-Neutrals. See PX 55 at P001788.
 - l. Create a new classification of worker and add such positions to handle on-call, emergency, and overnight work as recommended by the Co-Neutrals. See PX 55 at P001788.
 - m. Increase its new employee training capacity so that training for new hires commences every two weeks as recommended by the Co-Neutrals. See PX 55 at P001791.
 - n. Re-examine the pay structure for worker types as recommended by the Co-Neutrals. See PX 7 at P000268.
 - o. Increase its capacity to train new caseworkers as recommended by Ms. Meadows. See Tr. Day 5:PM, 214:5-14 (Meadows).
 - p. Cease all implementation of plans to restructure or reorganize the Agency until reorganization plans are approved by the Co-Neutrals.
2. Defendants are ordered to perform the following unfulfilled obligations under the CAP for Resource Families as follows:
 - a. By February 1, 2025, CYFD will immediately assigning one placement staff

member to focus exclusively on foster placement recruitment in each of five high-needs counties (Bernalillo, Dona Ana, Santa Fe, San Juan, and Chavez/Eddy).

- b. CYFD will have arrangements in place to offer monetary incentives of a reasonable amount to foster families as recommended by Mr. Salazar.
- c. By February 1, 2025, CYFD will have a contract in place to increase home checks for possible foster families to clear the back-log within the next 6 months.
- d. Add a staff position which solely focuses on resource home recruitment to all but the smallest county offices and add staff positions for regional recruitment specialists whose sole duties are to focus on resource home recruitment in the small counties which do not have a county specific resource home recruitment specialist. See PX 55 at P001791.
- e. Identify an individual within CYFD leadership whose responsibilities include providing the county and regional resource home recruiters with resources and guidance as to best practices and providing guidance to all CYFD staff who interface with current resource families as to best practices for encouraging retention. See PX 7 at P000271.
- f. Assign monthly resource home recruitment targets, one for kin and one for non-kin, for each county. See PX 7 at P000271.
- g. On a monthly basis, track the number of gross and net gains or losses of resource homes, (differentiating between kin and non-kin), and report the data in a dashboard format. See PX 7 at P000271.

- h. On a monthly basis, track the number of resource homes awaiting licensure (differentiating between kin and non-kin), and report the data in a dashboard format. See PX 7 at P000271.
- i. On a monthly basis, HCA must report to the Co-Neutrals on actions taken to address:
 - a. TFC provider challenges to working with CYFD;
 - b. TFC agencies capacity and staffing needs;
 - c. Developing a larger pool of TFC families;
 - d. Developing community-based services available to support TFC families in rural areas; and
 - e. HCA will implement any follow-up recommendations from the Co-Neutrals within the timeline set by the Co-Neutrals. See PX 104 at P002256-P00257.
- j. On a monthly basis, CYFD must report to the Co-Neutrals on actions taken to improve relations with TFC providers and resolve school transportation issues that impeding TFC placements. See PX 104 at P002256-P00257. CYFD will implement any follow-up recommendations from the Co-Neutrals within the timeline set by the Co-Neutrals.
- k. CYFD will develop a simple and efficient process to change a child's level designation to provide for enhanced reimbursement based on the complexity of the child's needs. See PX 59 at P001962.
- l. CYFD will redesign the referral process for community based placements to avoid pathologizing children and to allow TFC agencies to meet with placement

staff and children. See PX 59 at POO1961.

- m. CYFD and HCA will contract with qualified evaluators in New Mexico and reserve appointments in advance to ensure access to more accurate clinical information for children with challenging behaviors. See PX 59 at P001960.
3. Defendants are ordered to perform the following unfulfilled obligations under the CAP for well-child checks as follows:
 - a. By February 15, 2025, HCA will produce an independent report authored by an independent pediatrician approved by Plaintiffs with experience in child welfare, analyzing Presbyterian's performance related to providing well child checks to children in state custody from June 2023 to present. [Plaintiffs understand that analysis for 2023 will exclude information related to other MCOs obligated to provide well child checks during 2023]. The independent report will analyze by month:
 - documented care coordination contacts;
 - transportation distances required for children to access appointments;
 - barriers facing caregivers and solutions offered;
 - any child refusal and attempts to engage the child;
 - regional trends;
 - successful strategies for engagement;
 - monthly encounters; and
 - documented communication of well child check information to CYFD and the child's caregiver.
 - b. By March 15, 2025, taking into account the independent report information, the

Co-Neutrals will make specific recommendations including deadlines to improve the rate of well child checks statewide; types, categories and timelines for data collection; required components needed for a new well-child check form; protocols to ensure well child information and referrals are communicated to CYFD, the child's current caregiver, and the court, education for HCA, CYFD, PHP staff and providers, The recommendations may include requiring PHP to pay providers to hold slots in schedule for well child visits for children in state custody, use of traveling providers, protocols for ensuring transportation is provided as needed. The recommendations will require specific outcomes by June 15, 2025.

- c. By April 1, 2025, HCA will negotiate content and deadlines for all remediation agreements with MCOs regarding well-child check visits as set forth in the Co-Neutral recommendations of March 15, 2025.
 - d. By May 1, 2025, Defendants will have co-location sites in at least half of all counties. By November 1, 2025, Defendants will have co-location sites in all remaining additional counties.
 - e. Until the performance standard for the Target Outcome regarding Well Child Visits is achieved, The Co-Neutrals will make quarterly recommendations regarding benchmarks and monitoring requirements for HCA. HCA will monitor and set benchmarks for the PHP contract as recommended by the Co-Neutrals.
 - f. By February 1, 2025, HCA will designate a single person in leadership who is in charge of improving well-child visit compliance.
4. Defendants are ordered to perform that following unfulfilled obligations under the

CAP for Data as follows:

- a. CYFD needs to expand the number of positions in the CYFD quality assurance data team by 50 percent. See Tr. Day 5:PM, 186:16-20 (Meadows); PX 14 at P000325.
- b. CYFD needs to ensure CYFD's CCWIS system is built with the capacity to track and report the metrics in the Data Validation Plan, and the real-time data specified in the CAP.
- c. CYFD leadership needs to increase communication with front line staff regarding how and why data is used to aid decision making. Tr. Day 5:PM, 210:11-25 - 211:1-7 (Meadows).
- d. CYFD needs to develop a data dashboard as described in the CAP and in a format approved by the Co-Neutrals to accurately track CYFD workforce caseload on monthly basis. PX 2 at P000053.
- e. CYFD needs to develop the qualitative instruments specified in the Data Validation Plan and provide them to the Co-Neutrals for approval.
- f. HCA needs to require that Presbyterian Health Plan take proactive steps to obtain well-child visit records for production to the Co-Neutrals when requested.
- g. CYFD needs to ensure CYFD's CCWIS system is built with the capacity to track and report the metrics in the Data Validation Plan, and the real-time data specified in the CAP.
- h. CYFD leadership needs to increase communication with front line staff regarding how and why data is used to aid decision making. Tr. Day 5:PM, 210:11-25 - 211:1-7 (Meadows).

- i. CYFD needs to develop the qualitative instruments specified in the Data Validation Plan and provide them to the Co-Neutrals for approval.
- j. HCA needs to require that Presbyterian Health Plan take proactive steps to obtain well-child visit records for production to the Co-Neutrals when requested.
- k. HCA needs to provide the Co-Neutrals with aggregate and child-specific level data related to TFC as set forth in the CAP on a quarterly basis, and must produce additional data to the Co-Neutrals when requested. PX 2 at P000055-P000056.

B. ADDITIONAL PERMANENT INJUNCTIVE RELIEF

1. Caseloads:

- a. The Co-Neutrals are hereby empowered to develop recommendations that the Arbitrator may consider to order Defendants to specifically perform on caseloads issues, including but not limited to: recommendations regarding underperforming supervisors that need to be terminated; improvements to case worker training; contractors available to assume some caseworkers duties. As necessary to effectuate the purposes of FSA, the Arbitrator shall issue an order to effectuate the Co-Neutral recommendations.

2. Resource Families

- a. The Co-Neutrals are hereby empowered to review and report back to the Arbitrator on all existing contracts that CYFD has with any contractor to improve resource family recruitment and retention. The Co-Neutrals' report shall include any conclusions on whether the contracts are insufficient and make recommendations about other contractors and/or an RFP process to be used by CYFD to ensure more effective contracts. As necessary to effectuate the purposes

of FSA, the Arbitrator shall issue an order to effectuate the Co-Neutral recommendations.

- b. The Co-Neutrals are hereby empowered to identify a contractor to be paid for by the state to develop written training policies for caseworkers to improve the relationship between caseworkers and resource families by May 30, 2025. The Parties will have 30 days to provide feedback to the plan. The Co-Neutral team will work with CYFD to begin incorporating this training for all new employees beginning on August 1, 2025 to be fully implemented by November 1, 2025.
- c. The Co-Neutrals are authorized to develop recommendations that the Arbitrator may consider ordering HCA to specifically perform its obligation to meet its obligations to approve the number of new treatment foster care placements required for 2025. As necessary to effectuate the purposes of FSA, the Arbitrator shall issue an order to effectuate the Co-Neutral recommendations.

3. Well-Child Checks

- a. The Co-Neutrals are hereby empowered to develop a process that will be used by Defendants and their contractors to identify which employee of Defendant is responsible for ensure appointment of well-child checks under particular circumstances and provide recommendations to the Arbitrator on how to improve data issues. As necessary to effectuate the purposes of FSA, the Arbitrator shall issue an order to effectuate the Co-Neutral recommendations.
- b. The Co-Neutrals are hereby empowered to contract with an independent expert to develop a new well-child check for to be used by providers, which shall be presented to the Arbitrator. As necessary to effectuate the purposes of FSA, the

Arbitrator shall issue an order to effectuate the Co-Neutral recommendations.

C. ADDITIONAL RELIEF – RECEIVER

1. In addition to the orders above, the Arbitrator will order the appointment of a receiver on motion by the Plaintiffs following the entry of the Arbitrator's decision.
2. The receiver shall have subject matter expertise regarding child welfare administration and Medicaid obligations under EPSDT.
3. The receiver shall have authority to hire consultants as needed to assist the Defendants and the receiver in implementing the remedy ordered and ensuring Defendants compliance with the remedy.
4. The receiver will have the authority to communicate with CYFD and HSC staff and will have direct access to the Secretary of CYFD and the Secretary of HCA as needed to fulfill the obligations under the Arbitration Decision.
5. The receiver shall work cooperatively with the Co-Neutrals and ensure that the State responds to requests for information, produces all requested data, is otherwise responsive, including promptly responding to any recommendations made by Co-Neutrals.
6. The Defendants shall pay the salary of the receiver, as the Defendants are responsible for CYFD and HCA's longstanding failure to comply with their legal obligations.

D. ATTORNEY FEES AND COSTS

Within 60 days of receipt of an invoice and receipt of a W-9 forms for Martinez, Hart, Sanchez & Romero; Public Counsel; and Barnhouse, Keegan, Solimon & West, Defendants shall pay Plaintiffs' counsel reasonable attorneys' fees and costs.

Dated: December 20, 2024

Respectfully submitted,

PUBLIC COUNSEL

/s/ Tara Ford

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Counsel for Plaintiffs Kevin S., et al.

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused to be served by First Class United States Mail and electronic mail, one true copy of Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law on the Arbitrator and the following counsel, addressed as follows:

Charles Peifer, Arbitrator
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Executed this 20th day of December, 2024.

By /s/ F. Michael Hart
F. Michael Hart

EXHIBIT A

CO-NEUTRAL RECOMMENDATIONS RE: ARBITRATION ISSUES				
Sept. 27, 2022 Co-Neutral Letter to Secretaries Exhibit 7	Sept. 18, 2023 Letter from Co-Neutrals to Secretaries Exhibit 9	Jan. 26, 2024 Letter from Co-Neutrals to Secretaries Exhibit 12	Jul. 4, 2024 Email from Co-Neutrals to Secretaries Exhibit 14	Oct. 1, 2024 Letter from Co-Neutrals to Secretaries Exhibit 55
CASELOADS P000268 “1. Reexamine and streamline the hiring process to address vacancies in offices and within units. Develop a statewide hiring plan, including targets and dates, informed by county-specific needs and opportunities, and assign high-level staff to manage the plan on a routine basis, with a dashboard tracking progress reportable to you on a frequent cadence. Consider specific central office or regional staff assigned to recruit all kinds of needed CYFD field office staff, prioritizing those field offices with the highest turnover rate and/or vacancies. CYFD needs a high-level central office logistics person who is focusing solely on staffing issues and recruitment/retention issues. Publicly highlight least within CYFD) and give credit to field offices when vacancy or turnover rates decline. 2.CYFD county office units should not need to compete with each other over a single applicant who applies for multiple positions, and the County Office Manager should be able to make staffing and hiring	P000275 “We are appending our letter to the CYFD and HSD Secretaries of September 2022, in which we expressed concerns about challenges we observed during our site visits in New Mexico last year, including high CYFD staff caseloads, the agencies’ inadequate supply of family-based placements and CYFD’s on-call system. In that letter, we made numerous recommendations, which we have discussed repeatedly with State leaders over the past year. 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.” CASELOADS and FOSTER PARENT RECRUITMENT P000297 “Last year we made numerous recommendations to the agencies (see attached) and we restate those here because they remain critical opportunities to establish stability in order to advance the Kevin S. commitments. We urge the State first and foremost to take every reasonable	P000291 “Given that Secretary Casados and CYFD leadership visited many of the same offices that we did earlier this month, we believe many of the observations that we outline in this letter will not be surprising. 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.” CASELOADS and FOSTER PARENT RECRUITMENT P000291 “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. We plan to send you an updated memo on the CAP next month after we have completed our assessment of additional data and information. But we do not want to wait until then to communicate	DATA SUBMISSION P000325 ¶3 “However, it has now been more than two months since the data were due. While we will do all we can to make up the time, this unexpected delay will likely push back the production of our yearly report. We anticipate the report’s release may be up to three weeks later than planned. We fully understand that the State data team is stretched thin, which limits their ability to prevent and address data quality issues. As we move forward, we hope you are able to invest more in this team to ensure they have sufficient capacity to produce relevant and accurate data (including resources to manage contract with external data consultants), which is critical for you as you strengthen the system and for us in our accountability role.”	CASELOADS P001788 last ¶ <ul style="list-style-type: none">“We have shared with you the Emergency Room triage methodology that New Jersey, Michigan, and Oklahoma’s child welfare agencies deployed to end their caseload crises – proactive overhiring in anticipation of work surges and expected normative attrition in each office. If CYFD continues to wait for staff to quit before beginning the hiring process for their replacements, the agency will continue to experience a severe shortage of staff, and be burdened by dangerous caseloads that are far higher than the State committed to achieve. And, as mentioned above, determining a new classification of worker and adding positions to handle nighttime investigations and emergency calls would make an enormous positive difference.” P001789 Bullet Point 2 <ul style="list-style-type: none">“None of the states with which we have worked have stopped hiring and training of casework staff in the midst of efforts to reform. And,

<p>decisions based on their overall assessment of the office, caseloads, and needs.</p> <p>3.Reexamine SPO processes and requirements, and collaborate with SPO on developing solutions to the complexity and length of time it currently takes to process applications and make offers of employment, as the long hiring process is resulting in losing candidates for positions and extended vacancies.</p> <p>4.Examine the data regarding which staff resign, when in their tenures they leave, from which offices/locations they exit, and their stated reasons in order to identify barriers to retention. Assure staff who leave are engaged in an “exit interview” (in person or at least by phone) regarding why they are leaving. Some staff suggested a “stay interview” yearly or at specific intervals to determine what kinds of staff stay and why they stay.</p> <p>5.Reexamine pay structure and scale for different types of workers (investigations in particular). Seek a change to the current salary schedule which pays investigators morethan PPWs. Consider paying staff more for having a MSW, but not requiring an MSWfor certain positions if not determined absolutely necessary.</p> <p>6.Work with SPO and the Legislature to create a “temporary pay enhancement” for CYFDcounty office workers to</p>	<p>step as urgently as possible to ensure adequate staffing and repair conditions in the CYFD offices. In addition, we recommend CYFD quickly retain a group of temporary workers, perhaps experienced retirees as other states have done, to move permanency cases toward adoption finalization by completing backlogged disclosures, and hire staff specifically for the CYFD on- call system as other states have done.”</p>	<p>to you our understanding that there currently exist serious risks to child and staff safety, as we underscored when we spoke with you on January 18, 2024.”</p> <p>P000296</p> <p>“However, based on what we learned during our meetings in New Mexico, we believe leadership must take immediate and extraordinary steps to stabilize the conditions in many of the CYFD offices we visited. The unsafe backlog of child abuse and neglect investigations requires the deployment of new, additional resources, such as contracting with retirees and deploying trained staff and managers from CYFD’s central team. Exorbitant caseloads and very high staff turnover warrant hiring goals and performance that are at least 25 percent greater than the number of investigator, PPW, and placement positions currently assessed to be needed. Like other States across the nation that have undertaken the initial phase of systemic reform in the face of crushing caseloads, New Mexico needs to over-hire in order to account for continuing turnover. An influx of new workers requires the State to expand its training capacity and ensure that new personnel can expeditiously begin the process of onboarding and training. We have made these and other recommendations previously, and we are happy to discuss them with you. In sum, the agency must begin acting like there is in fact a crisis that threatens children’s safety and compels new, urgent, barrier-breaking activity.”</p>		<p>in fact, the New Mexico staffing crisis calls for escalating both hiring and expanding/ accelerating training opportunities.”</p> <p>P001790 last ¶</p> <ul style="list-style-type: none">● “We have made numerous recommendations to CYFD in writing, and we restate some of those here because they remain critical opportunities to establish stability in order to advance the <i>Kevin S.</i> commitments. Among the most urgent:<ul style="list-style-type: none">○ We urge the State first and foremost to take every reasonable step as rapidly as possible to ensure adequate staffing and repair conditions in the CYFD offices. Make the priority to hire more staff by getting authority now to increase FTEs, enabling CYFD to hire in excess of assessed need and without a forced vacancy attrition rate in allocated position so you can get ahead of the attrition that will continue until the workforce is stabilized.○ Create and fill new positions that are solely responsible for after-hours investigations and emergencies to relieve current staff of these additional responsibilities.
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<p>incentivize hiring and retention of CYFD county office workers.</p> <p>7.Reexamine “on call” assignments, rotation, and compensation. Staff also reported not being paid overtime if they try to flex hours after being on call the night before. We heard a recommendation for building a separate unit for on-call assignments; this will require additional resources and might not be a solution in every office, but demonstrates problem solving when possible.</p> <p>CYFD County Office Staff Training</p> <p>1.Ensure timely notification of trainings, and not as a late requirement communicated after staff have already scheduled their home visits and work for the day/week. Because court dates and other commitments are often scheduled months in advance, consider publishing a comprehensive 2023 training calendar, published to the field by November 1, 2022.</p> <p>2.Reexamine the content and timing of required training for each type of position, as well as degrees required to apply for positions. We heard that the MSW requirement for family preservation/in-home staff has resulted in no applicants for current vacancies in at least one local office. We also heard the full CYFD New Employee Training (NET) is required for all new</p>				<ul style="list-style-type: none">○ Restaff agency Children’s Court Attorney (CCA) positions...The shortage of attorneys coupled with the high caseloads of Permanency Coordinator workers means that timelines for moving cases to reunification, adoption, and guardianship are reportedly lengthening, negatively impacting children and families, and increasing the burdens on all state staff.○ Immediately add resources to your training capacity so that training for new hires commences every two weeks. Revisit the structure and curricula of the Net training so that some training is done regionally and there is a balance between classroom training and role-specific on-the-job training. CYFD should also create capacity for intensive supervision and assigned coaches/mentors for every new staff.○ Ensure that there is a single person appointed as County Office Manager with broader responsibility for each office.○ Address the pervasive communication issues felt
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<p>positions even if the individual was previously in a different CYFD position and already took the NET recently.</p> <p>3.Ensure appropriate training for staff before being assigned “on call.” We heard of PPW staff being called out in the middle of the night for an investigative response without the proper preparation or training to be in this position.</p> <p>4.Ensure staff required to stay overnight with children/youth in the office have clear training, knowledge, and authority to handle any situations that may arise. We heard of administrative staff and new less-experienced staff being part of the on-call staff required to stay with children/youth in the office overnight.</p> <p>5.Similarly, ensure appropriate training for staff before being assigned a caseload. We heard of PPW staff being assigned a full caseload before they completed NET, and before they were able to complete thorough on the job shadowing and training. Again, as part of your overall assessment of training, the length and content of NET and the balance of classroom-based learning and field-based learning requires urgent re-examination.</p> <p>6.Reexamine and clarify the type of coaching support and communication about coaching to be provided for staff. We heard in one office this is only done via</p>				<p>by CYFD staff at all levels. Revisit how to make CYFD’s Pillar system work for modify it so that the structure supports needed collaboration and decision making, not siloes and isolation as it is now being experienced.</p> <p>RESOURCE PARENTS/FAMILY BASED PLACEMENTS</p> <p>P001791</p> <ul style="list-style-type: none">● Add one position fully dedicated to resource home recruitment to all but the smallest county offices. Add regional recruitment specialists to cover the smaller offices. Provide dedicated recruitment budgets to each local recruiter and offer strategic guidance to them in carrying out their roles.
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<p>Zoom and never in person. Better promote the role and abilities of coaches, and work to build trust between workers and coaches. We heard that some staff do not believe coaches are able to help them with their basic day-to-day tasks (such as conducting an IPP or CANS, improving case notes), but coaches think this is in fact part of their job. If coaches are able to help with these specific job role tasks, there needs to be trust-building activities so that workers feel confident that working with a coach will be beneficial to them and worth their time.”</p> <p>P000271 “4. Consider identifying or adding a specific staff person in each CYFD county office who is charged with and has the dedicated time available to focus on recruiting non-kin resource families. Identify a leader in central office to help these assigned individuals know about best approaches to engaging community members to be willing to be and continue as resource families. Assign recruitment targets for each office and manage the gross and net gains monthly with a dashboard reportable to you on a routine monthly cadence.”</p>				
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