

IN THE ARBITRATION OF

KEVIN S., *et al.*,

Plaintiffs,

vs.

NEW MEXICO CHILDREN, YOUTH and
FAMILIES DEPARTMENT, and
NEW MEXICO HUMAN SERVICES
DEPARTMENT, *et al.*,

Defendants.

DECISION AND AWARD

1. Introduction and Summary

In 2018, Plaintiffs, 14 foster children and two nonprofit advocacy organizations, filed suit in the United States District Court for the District of New Mexico against the Cabinet Secretaries of the two departments of state government principally responsible for administering the State's child welfare system, the Children Youth and Families Department ("CYFD") and the Human Services Department ("HSD"). The lawsuit was brought as a class action and alleged that New Mexico had been systematically depriving children in the custody of their state and federal rights.

Plaintiffs and Defendants agreed to settle the lawsuit in a "Final Settlement Agreement," executed on March 6, 2020 ("Kevin S. Agreement" or "Agreement"). The Agreement allowed the State to avoid the expense of costly litigation and the risk of a federal judgment and potential federal oversight of its child welfare system, in return for which the State agreed to meet targets and outcomes that the Parties agreed would help reform New Mexico's child welfare system into one that represented a "trauma-informed system of care" that would meet the needs of New Mexico's diverse children and youth and their families. The Agreement was intended by all Parties to be ground-breaking and transformative and to permit New Mexico to work collaboratively to solve systemic problems that developed over not just years, but decades.

This Decision and Award ("Decision") addresses an Amended Demand for Arbitration made on July 15, 2024, pursuant to the Agreement. The current parties to the Agreement (and this arbitration) are the named Plaintiffs from the federal lawsuit, including Kevin S., Chris W., Jennifer H., Diana D., Brian J., Elliot J., Michael J., Olivia L., Matty B., Justin B., Jackson B., Lucas M., Julian M., and David G., who appear through their next friends Bette Fleishman, Liz McGrath, Ernestina R. Cruz, Matthew Bernstein, Feliz Rael, Georgia Berrenberg, Gabrielle Valdez, Mariel Willow, Ashley S. MacKenzie, and the Defendant Cabinet Secretaries for the New Mexico Children, Youth & Families Department, and New Mexico Health Care

Authority.¹ For clarity of reference, and because the transcript and pleadings submitted in the arbitration referred to the parties as “Plaintiffs and Defendants,” and to Defendants together as the “State,” this Decision will continue to use those terms to refer to the parties.

1.1 Summary of Decision

As a preliminary matter, I agree with Defendants that to prevail in this arbitration Plaintiffs must prove a violation of the Performance Standard established in the Agreement and not just that Defendants failed to comply with commitments they agreed to in a corrective action plan (“CAP”) agreed to by the parties in June 2023. Under the framework agreed to by the Parties, proof that Defendants breached the CAP is evidence that the State is failing to meet its Kevin S. obligations but is not dispositive of whether Defendants breached a Performance Standard under the Agreement.

I do not agree with Defendants however that Plaintiffs are barred from pursuing substantive relief in this arbitration because they initially filed for arbitration before the expiration of all deadlines in the parties’ Corrective Action Plan. I conclude that Plaintiffs had a good faith basis to proceed as they did based on claim of anticipatory breach and in reliance on reports from the Co-Neutrals² that the State’s child welfare system was in a state of “chaos.” In addition, the State has not demonstrated that its ability to meet its CAP commitments was in any material way frustrated by having to respond to the initial arbitration demand.

Turning to the merits of the four substantive issues presented for arbitration, and as discussed fully below, I conclude that the State has failed to meet the Kevin S. Agreement’s Performance Standard in the four areas identified in the Amended Arbitration Notice filed July 15, 2023. Those areas are: (1) CYFD Workforce Caseloads; (2) Resource Family Recruitment; (3) Well-Child Checks; and (4) Data Submissions.

To assist the State in meeting its obligations under the Agreement, I am directing the State to take the actions described in the Remedial Order attached to this Decision. I am also inviting the Parties, and the Co-Neutrals to collaborate and provide additional recommendations on how the State can better perform in meeting its Kevin S. obligations.

1.2 Appointment and Authority of the Arbitrator

Section 9 of the Agreement requires that disputes under the Agreement be resolved through a two-step process involving, first, Alternative Dispute Resolution, and second,

¹ At the time the Agreement was signed, Kevin Blalock was the Secretary of the New Mexico Children, Youth & Families Department. He was succeeded first by (Retired) Justice Barbara Vigil on October 1, 2021, who in turn was succeeded by the incumbent Secretary, Theresa Casados, who became Interim Cabinet Secretary in May 2023 and was confirmed in that role on January 31, 2024. At the time the Agreement was signed, David Scrase, MD was the Secretary of the New Mexico Human Services Department. Upon its establishment on July 1, 2024, the New Mexico Health Care Authority (“HCA”) assumed the obligations of HSD under the Agreement and under the Corrective Action Plan (“CAP”) entered in June 2023. Ms. Armijo became Acting Secretary of HSD in January 2023 and was confirmed as Secretary on February 11, 2024, and became Secretary of HCA upon its creation.

² The Co-Neutrals are child welfare experts appointed by the Parties to monitor and evaluate the State’s performance under the Kevin S. Agreement. See Agreement, at 5.

Arbitration. On December 16, 2023, the Parties stipulated to the appointment of the undersigned to serve as successor Arbitrator to the Hon. James A. Hall, who was the arbitrator identified in the Agreement when it was executed.

1.3 Purpose of This Decision

This document provides the reasoned decision contemplated by Section 9 of the Agreement when the parties submit disputes for arbitration. As a reasoned decision, this document will set out the issues being arbitrated, the facts material to the parties' dispute, the legal and contractual principles applied, and the analysis leading to the Decision and Award.

2. Commencement of Arbitration and Issues

2.1 Commencement of Arbitration and Scope of Claims

This Decision addresses the claims submitted in Plaintiffs' Amended Notice of Arbitration dated July 15, 2024.³ In that Notice, Plaintiffs outline claims for breach of a Corrective Action Plan ("CAP") signed by the parties in June 2023. The Corrective Action Plan itself was entered as part of the Agreement's Alternative Dispute Resolution Process. Indeed, under the Agreement, any dispute whether Defendants have complied with their obligations first must be submitted to mediation where the parties are required to attempt to agree on a Corrective Action Plan. In this case the parties did have a dispute over Defendants' compliance with the Agreement and they did enter a Corrective Action Plan. As framed by Plaintiffs, this Arbitration is intended to address Defendants' alleged failure to comply with the Corrective Action Plan in four areas:

1. **CYFD Workforce Caseloads.** Plaintiffs allege that Defendant CYFD failed to comply with its promise, in the CAP, to ensure that 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. Plaintiffs allege additionally that CYFD failed to ensure that "[b]y December 31, 2023, no supervisor will be carrying any cases."

2. **Resource Family Recruitment.** Plaintiffs allege that the CAP required CYFD and HSD to coordinate and find Treatment Foster Care ("TFC") placements for children in state custody enrolled in a managed care organization and that Defendants are necessarily responsible for recruiting additional TFC placements. Plaintiffs also allege that Defendants failed to meet their commitments in the CAP to ensure that in the five high-needs counties of Bernalillo, Doña Ana, Santa Fe, San Juan and Chavez/Eddy, CYFD immediately assign one placement staff to focus exclusively on recruitment until at least September 30, 2023 and that the State maintain its dedicated staff in the five designated counties at least until a private contractor fully ramped up its capacity in those five designated counties. Plaintiffs also allege that Defendants had failed to 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

³ The Amended Notice amends a Notice of Arbitration dated May 20, 2024, and follows the original Notice of Arbitration dated October 20, 2023, and that Plaintiffs dismissed without prejudice on December 7, 2023.

focused on growing new foster homes in each county throughout the State.

3. **Well Child Visits.** Plaintiffs allege that Defendants failed to demonstrate that they had come into full compliance with a Target Outcome of ensuring that (a) all children in state custody receive a Well-Child visit within 30 days by January 1, 2024 and (b) that all children who entered care before July 1, 2023 and who were still in custody on September 15, 2023 have a completed Well-Child visit by September 15, 2023.

4. **Data Submissions.** Plaintiffs alleged that Defendants failed to meet their commitment, in the CAP, to provide sufficient real-time data to allow monitoring of Defendants' compliance with their obligations under the CAP, including a failure to provide timely data quarterly on the total number of Treatment Foster Care homes and Well Child records for over one-third of children whose records were requested by the Co-Neutral monitors under the Agreement and the CAP.

Plaintiffs' Amended Notice seeks specific performance of Defendants' obligations undertaken in the CAP, "attorneys' fees and costs, and any other relief that the Arbitrator deems fair and proper, including but not limited to relief available under the [Agreement]."

The Parties' opening briefs and preliminary motion practice revealed that they disagree on an important threshold issue: namely, whether the Corrective Action Plan entered by the Parties in June 2023 was enforceable independently of the Agreement or, whether in addition to a finding of breach of the CAP, Plaintiffs would need to establish that Defendants failed to meet an applicable performance standard under the Agreement. It is Plaintiffs' position that the CAP is enforceable independently of any failure to establish a breach of an Agreement performance standard. Plaintiffs' position is that the CAP is independently enforceable on a "strict liability" basis and, indeed, the primary relief Plaintiffs seek in the Amended Arbitration Notice is "specific performance" of the CAP obligations. It is Defendants' position, on the other hand, that the CAP is not independently enforceable and that only a breach of a performance standard under the Agreement can make available any remedy in arbitration. Under the language of the Agreement, liability cannot be predicated on a "strict liability" basis for failure to meet a target; instead, liability arises for failure to meet a Performance Standard. The Defendants meet the Performance Standard regarding the requirements of the Agreement when they make "good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Targets (ITs) and Target Outcome. Good faith efforts, in turn, are proved by "reasonable efforts" to achieve each Implementation Target or Target Outcome" and "are not assessed in relation to Defendants' subjective intentions, plans or promises." Agreement, at 2-3 (Definition of Performance Standard).

Because of the dispute between the parties about the enforceability of the CAP independent of proof that Defendants had breached a performance standard under the Agreement, the Parties at the arbitration hearing presented evidence both on the issues dealing with the State's compliance with the CAP in the four areas identified but also on whether the State had failed to meet the required Agreement performance standard in the areas of (1) CYFD Workforce Caseloads; (2) Resource Family Recruitment; (3) Well Child Visits; and (4) Data Submission Compliance. The arbitration thus proceeded as one where the parties litigated both whether Defendants complied with the CAP and whether they complied with the performance

standard established in the Agreement in the four areas identified in Plaintiffs' Amended Notice.

2.2 Arbitration Proceedings

Plaintiffs filed an initial arbitration notice on October 22, 2023. As will be discussed later in this Decision, Defendants contend that this first Arbitration Notice was premature because it was served before the State's CAP deadline. Defendants contend that Plaintiffs' premature filing of the Arbitration Notice constituted breach of the Agreement, which provides in part: "A Party may not initiate arbitration without having completed the alternative dispute resolution process set forth in Step 1." CAP, Hg Ex. 2, at 10.

The Parties agreed to an arbitration schedule for the initial arbitration demand that included a hearing on the initial notice to begin December 11, 2023.

On December 7, 2023, Plaintiffs filed a notice dismissing the original arbitration notice without prejudice.

Plaintiffs renewed their arbitration notice on May 20, 2024, and filed their Amended Notice on July 15, 2024.

Pre-hearing motion practice addressed the scope and types of evidence to be allowed at the hearing and the scope of discovery that would be permitted. I also granted Plaintiffs' motion to make the arbitration hearing public and accessible by zoom. The parties stipulated to the presentation of testimony and exhibits in closed session where the exhibits themselves were required by the Agreement to be confidential or where the testimony concerned the personal details of individual plaintiffs. All decisions on the pre-hearing motions are reflected in written decisions and are part of the arbitration record.

The arbitration hearing was transcribed by certified court reporters.

The arbitration hearing was held in Albuquerque over a period of eight days in November, 2024. The parties presented 20 witnesses and more than 98 exhibits. The exhibits included the detailed and comprehensive annual reports covering the calendar years 2020, 2021, 2022, and 2023 submitted by the Co-Neutrals.

At the beginning of the first day of the arbitration hearing, Defendants filed a motion to recuse the undersigned as arbitrator. I denied the motion for reasons based on the evidence made part of the record.

The incumbent Cabinet Secretaries, Theresa Casados and Kari Armijo, both attended the arbitration hearing in person.

2.3 Applicable Arbitration Rules

The Agreement does not specify any set of rules to govern the arbitration procedure, except that it adopts from the American Arbitration Association's Commercial Arbitration Procedures as the standard for appealing an arbitration decision. Accordingly, applying NMSA 44-7A-3(a), I determined that the arbitration would be governed by New Mexico's Uniform

Arbitration Act, 44-7A-1 et seq. NMSA 1978.

3. Issues to Be Decided

The issues decided in this arbitration include:

1. Whether the CAP entered June 30, 2023, is subject to enforcement in arbitration without a finding that the State breached its obligations and the performance standard established in the Agreement.
2. Whether Plaintiffs' decision to file an initial arbitration demand before the expiration of the deadline to perform under the CAP constitutes a defense in whole or in part to the claims brought in the Amended Notice of Arbitration.
3. Whether in each of the four areas identified in the Amended Arbitration Notice, the State breached its obligations under the CAP or, if applicable, under the Performance Standard of the Agreement.
4. If the State is subject to liability under either the CAP or the Agreement, the appropriate remedies to be adopted.
5. Whether Plaintiffs are entitled under the Agreement to an award of attorneys' fees and costs.

4. Background

4.1 Background on the Kevin S. Agreement and Its Dispute Resolution Procedures

The Kevin S. Agreement identifies "implementation targets" ("IT"s) and "target outcomes" ("TO"s) and deadlines for each. The targets and outcomes are outlined in four appendices to the Agreement, entitled Trauma-Responsive System of Care (Appendix A), Least-Restrictive and Appropriate Placements (Appendix B), Indian Child Welfare Act (Appendix C), and Behavioral Health Services (Appendix D). The Agreement defines Implementation Targets as process commitments that CYFD and HCA agree to undertake as intermediary and necessary steps toward reaching Target Outcomes. Target Outcomes, meanwhile, are defined as performance commitments toward which CYFD and HCA agree to make good faith efforts to achieve substantial and sustained progress in return for dismissal of the Kevin S. lawsuit.

To assist the Parties in monitoring and certifying the State's progress, they agreed jointly to appoint three child welfare and child welfare system experts referred to as "Co-Neutrals." One of the three Co-Neutrals has since retired and the Parties agreed to continue with the remaining two Co-Neutrals performing the tasks assigned to them under the Agreement. The Co-Neutrals approve the type and nature of data collected and reported by the State and also prepare annual reports, based on the data and on interviews and other information sources, that evaluate the State's progress toward meeting its obligations. As the State meets its implementation targets and target outcomes, and in the case of target outcomes, maintains compliance for 24 months, the Co-Neutrals are authorized to certify that the State has met its

obligations under the Agreement. When the Co-Neutrals certify that Defendants have met the Performance Standard for an Implementation Target or have met the Performance standard for a Target Outcome for a continuous period of no less than 24 months, they may certify the State is no longer subject to monitoring on the Targets and Outcomes. Once the certification process has been satisfied with reward to all Targets and Outcomes, the Agreement expires.

Disputes under the Agreement are resolved through a process involving mediation, corrective action plans (CAPs) and, if necessary, arbitration. In general, any dispute must first be mediated between Plaintiffs and Defendant with the Co-Neutrals serving as mediators. Any dispute over whether Defendants have met an Implementation Target or Target Outcome by the agreed-upon deadlines is subject to being addressed in a negotiated Corrective Action Plan prepared in consultation with the Co-Neutrals. The Parties are prohibited, by the terms of the Agreement, from initiating the arbitration process until the expiration of any time to complete a corrective action plan.

If a dispute remains at the end of the time for performance of a Corrective Action Plan, a party may initiate binding arbitration. Arbitration is the exclusive means for resolving any dispute not resolved through mediation or a CAP.

The Agreement calls for arbitration before a single appointed arbitrator. The Agreement gives the arbitrator “the authority to award any relief necessary to effectuate the purpose of [the] 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.” Agreement, at 11. The Agreement also provides that if Plaintiffs are the prevailing party, the arbitrator, in his discretion, may allow Plaintiffs reasonable attorneys’ fees and costs. *Id.*

4.2 Procedural History Leading to Initial Arbitration Demand

In June 2022, the Parties entered a Memorandum of Understanding setting forth specific actions that Defendants would undertake to improve compliance with the Agreement. The Parties entered into the Memorandum of Understanding based on concerns regarding Defendants’ performance under the Agreement with regard to (1) reducing the number and duration of “office” and other congregant care placements of children and (2) the State’s creation of a Workforce Development Plan to ensure the State had an adequately staffed and trained workforce and (3) the progress toward meeting commitments to develop a plan for supporting children from New Mexico’s Nations, Pueblos and Tribes. In the MOU, the Parties agreed to mediate any disputes regarding compliance with the MOU in December 2022 and to preliminarily discuss any compliance issues arising from the Co-Neutral’s latest annual report which was due to be issued on November 15, 2021 covering the calendar year 2020.

On September 27, 2022, the Co-Neutrals wrote to the HSD and CYFD Cabinet Secretaries with recommendations on how the State could improve its performance under the Agreement in the areas of Workforce Development, Communication, Placement, and Behavioral Health Services, calling for the State to take actions in the “immediate or near immediate” term. The Co-Neutrals’ recommendations were based in part on their recent visits to multiple CYFD offices and meetings with numerous CYFD staff. The 29 recommendations made ranged from

dealing with the lack of “reliable access to internet and effective technology,” to developing a coordinated State plan for hiring and training qualified staff.

On November 15, 2022, the Co-Neutrals issued their 2021 Annual Report, reporting on the State’s performance under the Agreement in the calendar year 2021. The Co-Neutrals noted significant accomplishments in the areas of collaboration with New Mexico’s Nations, Pueblos and Tribes, preparation of grievance protocols, substantial completion of a comprehensive Data Validation Plan, development of a plan for recruitment and retention of Resource families, and publication of guidance prohibiting retaliation. The Co-Neutrals however noted that New Mexico’s investments and efforts must continue in four key areas: (1) strengthening and stabilizing the CYFD and HSD workforces⁴; (2) growing resource family placements; (3) expanding behavioral and mental health services; and (4) strengthening the collaboration and communication with New Mexico’s Nations, Pueblos, and Tribes.

On January 6, 2023, Plaintiffs invoked the Agreement dispute resolution process of the Agreement regarding performance deficiencies identified in the Co-Neutrals’ Report issued November 15, 2022.

The Plaintiffs and Defendants met to mediate their disputes before the Co-Neutrals on several days between the end of March and beginning of June 2023.

By June 30, 2023, the parties entered a Corrective Action Plan. Under the CAP, the State agreed to take specific actions and meet specific objectives that all parties agreed were necessary for the State to comply with the Agreement. All CAP commitments had deadlines on or before December 31, 2023, and the CAP itself expired January 5, 2024.

On September 18, 2023, before the CAP expired, the Co-Neutrals reported to the HSD and CYFD Cabinet Secretaries that, after a week of meetings in New Mexico with CYFD staff and others, conditions that led to 29 specific recommendations the year before, had over the last year become “significantly worse,” including in the areas of high CYFD staff caseloads, the inadequate supply of family-based placements, and CYFD’s on-call system. The Co-Neutrals were deeply concerned about the deterioration of conditions, which they described as including conditions for children that “are currently dangerous.” The letter then provided specific observations regarding the dangerous conditions arising from inadequate staffing, backlogs in investigating reports of child abuse and neglect, unprecedented caseloads, and failure to provide children-needed services. The letter noted that while in 2022 the Co-Neutrals described to the Parties a system “that was in crisis,” the system in 2023 was “*in a state of chaos*.” (emphasis in original). The report concluded by urging the State to “take every reasonable step as urgently as possible to ensure adequate staffing and repair conditions in the CYFD offices” and that CYFD “quickly retain a group of temporary workers, perhaps experienced retirees to move permanency cases toward adoption finalization.”

After receiving the Co-Neutral’s September 18, 2023 report, Plaintiffs wrote to Defendants, referencing the report’s content, and alleged that the State was in breach of the Corrective Action Plan. The Plaintiffs demanded that the State provide written assurances that

⁴ The report noted specifically that then-CYFD Secretary Barbara Vigil told the Legislature in September 2022 that CYFD’s workforce was experiencing a “crisis.” See Report, Exh. 16, at 9.

the State would come into compliance with the CAP and perform “all agreed upon commitments.” Plaintiffs set forth the specific assurances they were seeking and announced that they would request arbitration if the assurances were not provided.

On October 6, 2023, Secretaries Casados and Armijo responded to Plaintiffs by letter, saying that they were confident that the concerns expressed in Plaintiffs’ September 18, 2023 letter were misplaced and noting that the deadline for complying with the CAP’s caseload commitments was not until December 31, 2023. The State declined to provide assurances requested in areas covered by the CAP, but did provide information on recent hiring (260 new staff since June 2023) and did report that Defendants continued to meet with the Co-Neutrals and to refine its data collection and analysis processes.

On October 20, 2023, not satisfied with Defendants’ assurances, Plaintiffs filed their initial Notice of Arbitration.

5. Analysis of Issues to Be Decided

5.1 Whether the CAP entered June 30, 2023, is subject to enforcement in arbitration without a finding that the State breached its obligations and the performance standard established in the Agreement.

The Parties disagree whether the CAP is enforceable independent of the Agreement. Plaintiffs contend that the CAP is independently enforceable. They point to the specific promissory language of the CAP itself and contend that the State can and should be held to perform as it promised to do. Plaintiffs argue that the appropriate remedy for violation of the CAP is “specific performance”; that is, an order compelling the State to meet the commitments agreed to in the CAP. Plaintiffs contend that because the CAP contains no reference to the Performance Standard of the Agreement, they are entitled to a remedy in arbitration for a violation of a CAP commitment without proof that the State failed to use “good faith” and “reasonable efforts” to achieve progress toward meeting an implementation Target or Target Outcome. The State, on the other hand, contends that the CAP is not separately enforceable and that it is properly viewed as part of the Parties’ agreed-to Dispute Resolution Process. Defendants contend that corrective action plans are intended as an intermediate step between mediation and arbitration where the Parties can agree on steps to be taken which, if successful, avoid arbitration and which, if unsuccessful, permit the Parties to move on to the arbitration process. Defendants further argue that no remedy can be assessed for “breach” of a CAP commitment unless there is a finding that the State failed to meet a relevant Performance Standard under the Agreement, including specifically a finding that the State failed to make good faith and all reasonable efforts to achieve substantial and sustained progress toward achieving an Implementation Target or Target Outcome.

I agree with Defendants that the CAP is not independently enforceable.

First, the CAP itself contains no enforcement language, provides no reference to arbitration regarding compliance with it, and contains no mention of remedies or procedures for resolving disputes about compliance. The only reference in the CAP to enforcement, moreover, is in relation to arbitration under the Agreement. The Introduction to the CAP explains that the

parties agree that the CAP “resolves only the identified issues in dispute specifically resolved in the CAP up until the date of execution of this CAP” and that “Plaintiffs will not arbitrate the remaining issues in the 2021 report until the CAP expires.” The only reference in the CAP to what happens if there is a failure to meet a CAP commitment is: “[f]or any commitment set forth in the CAP that the State fails to meet, the Parties agree that Plaintiffs may proceed to arbitration without initiating Step 1 of the Dispute Resolution process set forth in the [Final Settlement] Agreement.”

Second, the CAP entered in June 2023 is, like any other CAP between the parties, part of the Dispute Resolution Procedure under the Settlement Agreement. Before Plaintiffs are permitted to proceed to arbitration to enforce the Settlement Agreement, they must, under Section IX, initiate mediation before the Co-Neutrals. Additionally, “for any dispute over whether Defendants have met the Performance Standard for an Implementation Target or Target Outcome by the agreed-upon deadline, the Co-Neutrals and the Parties shall attempt to agree on a corrective action plan through mediation. No Party shall initiate the arbitration process . . . until the time for Defendants to complete any corrective action plan has expired.” Agreement, at 10. Only after “any time to resolve the disputed issue through a corrective action plan has elapsed [can] any Party . . . initiate binding arbitration.” Agreement at 10.

The structure and content of the Agreement shows that the purpose of the Dispute Resolution Procedure is to protect and enforce the collaboration goals of the Settlement Agreement. The procedure ensures that the Parties address alleged performance deficiencies through collaborative processes--mediation and corrective action plans--before the Parties resort to the adversarial arbitration process. The process also gives the State ample notice of alleged deficiencies and time to take corrective measures free from having to submit disputes to arbitration.

That the CAP commitments are not independently enforceable, however, does not mean the failure to meet them is irrelevant. To the contrary, because the CAP commitments are by definition “strategies that the Parties agree are necessary to implement the [Final Settlement] Agreement,” CAP at 1, the failure to meet them is a failure to do what the Parties agreed was necessary to meet the relevant Implementation Targets and Target Outcomes of the Agreement.

Under the framework agreed to by the Parties, the failure to comply with a CAP is evidence that the State is failing to meet its Kevin S. obligations. Whether an arbitration remedy is available depends of course on one other additional requirement: whether the reason the State failed to meet its obligations is because it failed to meet the Performance Standard of the Agreement. That, in turn, depends on whether the State’s failure to meet the obligations is accompanied by a failure also to make “good faith” and “all reasonable efforts” toward achieving the Implementation Targets or Target Outcomes.

Because I conclude that Plaintiffs are not entitled to the remedy of specific performance of the CAP commitments as a separately enforceable Agreement, the remainder of this Decision will analyze Plaintiffs’ claims in the context of whether the State has failed to meet the Performance Standard for meeting the Implementation Targets and Target Outcomes that the Parties intended to address through the CAP provisions at issue in the Amended Arbitration Notice.

5.2 Whether Plaintiffs’ decision to file an initial arbitration demand before the expiration of the deadline to perform under the CAP constitutes a defense in whole or part to the claims brought in the Amended Notice of Arbitration.

The State argues that Plaintiffs are not entitled to pursue any remedy in this arbitration for breach of the Agreement or the CAP because Plaintiffs breached the Agreement themselves when, before the expiration of the CAP, they filed their first Arbitration Notice. Defendants argue that this filing was a breach of the Agreement, which provides that “[n]o Party shall initiate the arbitration process in Step 2 until the time for Defendants to complete any corrective action plan has expired.” Defendants argue that the October 2023 Arbitration Notice breached the Agreement because the CAP at issue did not expire until January 4, 2024. Plaintiffs argue that they were entitled to file an early Arbitration Notice because the State committed “anticipatory breach.” They support their decision by explaining that their Notice was submitted in response to a report from the Co-Neutrals describing the State’s child welfare system as being in a “state of chaos” and as presenting imminent danger to children in the State’s custody. They argue also that the State, while agreeing to meet hiring goals to achieve specific workload standards for overworked caseworkers, was operating under a “hiring freeze” or “hiring pause” that effectively prevented the State from complying with its workforce commitments. Plaintiffs argue that they were entitled in these extraordinary circumstances to demand arbitration to prevent manifest harm to the children who are the beneficiaries of the Agreement.

There can be no dispute that submission of the initial arbitration demand in October 2023 breached the express provision in the Agreement requiring that demands for arbitration be filed only after the time allowed for Defendants to complete any corrective action plan. The question then becomes whether the doctrine of anticipatory breach can apply under these circumstances notwithstanding the plain language of the Agreement. I conclude that it can.

First, New Mexico law recognizes the doctrine of anticipatory repudiation (also called “anticipatory breach”) as an exception to the general rule that only a party’s failure to perform as promised constitutes a breach of contract. Repudiation occurs when a Party demonstrates a distinct, unequivocal and absolute refusal to perform according to terms of the Agreement. *Viramontes v. Fox*, 1959-NMSC-020, ¶ 20, 335 P.2d 1071. Repudiation can occur as a result of a statement or a “voluntary affirmative act” that would render that party “unable or apparently unable to perform” his commitments. *Haggard v. City of Carlsbad*, 1996-NMCA-003, ¶ 6, 909; see also, NMRA §13-824, committee comment (“repudiation need not be explicit. It may be signified by either words or conduct.”).

Second, in the CAP, the State agreed to work “closely and cooperatively with the Co-Neutrals to ensure progress toward meeting caseload standards” so that, “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” The State also agreed that by December 31, 2023 “no supervisor will be carrying any cases.” The evidence presented at the arbitration however shows that even while negotiating the CAP workload commitments, the State had taken actions virtually assuring that it could not meet its commitments. In May 2023, the State implemented what the Parties referred to in the hearing as a “hiring freeze” or “hiring pause,” which the Co-Neutrals described as a decision to stop hiring all supervisors and senior staff. The Co-Neutrals

reported learning of this decision during meetings leading to their September 18, 2023 letter.

In that letter, the Co-Neutrals reported that:

CYFD supervisors and managers reported that CYFD essentially stopped hiring supervisors and senior staff in May 2023, and did not include these positions in the agency's August 2023 rapid-hire event, despite pervasive supervisor and senior staff vacancies. They reported the vacancies have deprived many caseworkers of adequate supervision and support and some workers currently have no direct supervisors.

The remaining CYFD supervisors with whom we spoke reported they directly carry many children's cases, without exception, and expressed concern that they have been unable to supervise their staff appropriately due to burgeoning workloads. Many described their jobs as "impossible" because of the large number of staff they are assigned to supervise and the substantial number of children whose cases they are directly managing.

The decision to stop hiring supervisors and senior staff was dismaying to the Co-Neutrals who reported that the decision to suspend hiring was in part responsible for "substantial vacancies across the agency in investigative positions, PPWs, senior workers, supervisors and management staff" and that this "created unreasonably large caseloads among caseworkers and supervisors with managers at multiple levels carrying caseloads as well."

In their 2023 Annual Report (dated November 15, 2024), the Co-Neutrals report that the hiring freeze/pause largely continued until September 2023 and that routine hiring did not begin again until October 2023. The same report indicates that the State failed to inform the Co-Neutrals of the cessation of hiring in July, the month the Co-Neutrals approved the State's Workforce Development Plan.

Based on the evidence presented at the arbitration, I conclude that there was an adequate and good faith basis for Plaintiffs to initiate arbitration in October, during the CAP period, on a theory of anticipatory repudiation, based on the reports of the Co-Neutrals. I did, however, consider, as a factual matter the State's argument that its performance under the CAP was hindered because the State had to prepare for the December arbitration and because its senior staff were distracted and disrupted during the CAP period by having to prepare for an arbitration that was dismissed.

Bianca Foppert, who has a critical role in the Kevin S. framework as Change Implementation Manager, is the only State witness to present evidence on the impact of the initial arbitration demand on the State's compliance with the CAP and her testimony does not establish that the initial arbitration demand interfered in any significant way with the ability of the State to perform under the CAP. First, as to Ms. Foppert's own performance, the testimony at the arbitration was that while Ms. Foppert had to spend many long hours, including over weekends and at night, she still "got the job done" when it came to providing needed information to the Co-Neutrals, which is one of her prime responsibilities under the CAP. Ms. Foppert did testify about her need in the fall of 2023 to meet with other staff, with lawyers, and her

preparation of exhibits, all of which changed the focus of how she spent her time, but she did not indicate that this was all wasted time and would not have been required for the later arbitration. Most significantly, the State presented no evidence that, but for the initial arbitration demand, it would have had the ability to meet any of the CAP commitments. There was no evidence offered, for example, that if the State had not been preparing for an arbitration in November and early December 2023, it would have been able to comply with the CAP commitments at issue by the December 31, 2023 deadline. Indeed, with regard to quantitative and objective workload requirements under the CAP, the State remained noncompliant even at the time of the arbitration hearing a year later, in November 2024, as conceded by Department witnesses Bianca Foppert, Secretary Casados, and Deputy Secretary Sandoval.

Accordingly, because Plaintiffs had a good faith basis to proceed with the Initial Arbitration Demand based on claim of anticipatory repudiation and because the State has not demonstrated that its performance under the CAP was in any material way frustrated by having to respond to the initial arbitration demand, I find no basis for concluding that Plaintiffs breached the Agreement or that their having filed an initial arbitration demand leaves them without any remedy under the Agreement.

5.3 Whether in each of the four areas identified in the Amended Arbitration Notice, the State breached its obligations under the CAP or, if applicable, under the Performance Standard of the Agreement.

5.3.1 CYFD Workforce Caseloads

In the CAP CYFD agreed as follows:

[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.

CAP, Exh. 2, at P000053.

The CAP commitment regarding caseworker and supervisor caseloads was intended by the Parties to help bring CYFD into compliance with Target Outcome 10, including 10.1 and 10.2, which require the State to develop a workforce plan that will identify the qualifications and skills and staffing levels necessary to meet the needs of children in state custody and to implement that plan.

The evidence presented at the arbitration established that CYFD failed to meet the CAP commitments regarding CYFD caseworker and supervisor caseloads. The Co-Neutrals reported in a memorandum dated February 23, 2024 that, of the 364 individuals that CYFD data showed as being assigned a primary caseworker on at least one case as of January 5, 2024, only 23% had caseloads compliant with the applicable caseload standards and 19% had caseloads above 200% of the standard. Exh. 13 at P000301. Additionally, the Co-Neutrals reported that 13% of the 364 individuals were supervisors, 27 others were in a non-case-assignable role, and another 22% appeared ineligible to carry cases because there was no record of them having completed New Employee Training.

CYFD's former Director of Performance and Accountability, Sarah Meadows, who prepared the caseload data for the Co-Neutrals, agreed that during the CAP period there was not a time that the Department's data showed the State to be in compliance either with the requirement that no CYFD worker have a caseload exceeding 200% of standard or that there be no supervisors assigned primary case responsibilities for a child.

For reference, the caseload standards referenced in the CAP are shown below with the caseload standards for experienced and newly hired caseworkers starting in 2023, categorized by type of case worker and time since the completion of New Employee Training ("NET"):

Caseload Standards

Caseworker Type	More than 6 months after NET	Months 5-6 after NET	Months 3-4 after NET	Months 1-2 after NET	Months 0-2 after NET
Investigation Case Workers	12 cases (families)	6 primary assignments	3 primary assignments		0 primary case assignments
Permanency Planning Workers	15 children	12 children	8 children		5 children
Placement Workers	15 adoption cases or 20 licensed families or 15 home studies, or a combination of each (weighted)	10 licensed family or adoption cases and 4 new home studies.	5-8 licensed family or adoption cases and 2 new home studies.	3-5 licensed family or adoption assignments; no more than 1 home study (after training)	
In-Home Service Workers	8 families	6 case assignments	4 case assignments	2 case assignments	
Jobs ineligible for primary case assignment	Supervisors, Managers, Case Aides, Administrators, and Directors				
Source: CYFD Workforce Development Plan, Exh. 3, at P000156.					

Quite clearly--and there really was no dispute about this at the arbitration--CYFD remains not only severely understaffed in the areas of caseworkers and supervisors, but also finds itself without having made the progress that it thought was possible when it agreed in June 2023 to meet the CAP staffing requirements. As discussed above, the failure to meet the CAP commitment--which CYFD agreed was necessary to implement the Agreement--means presumptively that the State has failed to make significant and sustained progress toward meeting the relevant Target Outcome 10 of the Agreement.

The Co-Neutrals, who are in the best position to assess compliance with the Agreement's Performance Standard, have reported that the State has not met the Performance Standard of the Agreement regarding the Implementation of the Workforce Development Plan as required by Target Outcome 10.2.

While CYFD concedes that it did not meet the CAP requirements for caseloads, it points to its accomplishments in the areas of workforce development as evidence that it has made and is making reasonable efforts to make progress toward Target Outcome 10, including:

- The successful preparation and approval in July 2023 of the Department's Workforce Development Plan under Target Outcome 10.1 (Exh. 17);
- The reorganization of the Department into separate "pillars" covering investigations, permanency and placement, each with their own management, with the goals of allowing for consistent policies and procedures and making it easier for caseworkers to move from one geographic area of the State to another;
- Negotiating with a state employee union for changes to the rules for posting positions and seeking improvements in the CYFD's human resources department;
- Improvements (also noted by the Co-Neutrals) in addressing issues with the quality of the Department's caseload data;
- Eliminating the requirement of a bachelor's degree for prospective case workers who demonstrate relevant experience;
- Developing a pre-apprenticeship program that allows the Department of Workforce Solutions to help fund new workers at CYFD;
- Submitting, in September 2023, a budget proposal requesting additional positions to fulfill the requirements of the Kevin S. Agreement.
- A rapid-hire event in August 2023 to expand its frontline workforce.

CYFD additionally cites many factors beyond the CYFD's control that help explain why the State has been unable to develop adequate staffing, including:

- Lack of adequate funding from the Legislature for additional positions needed to fulfill the requirements of the Agreement;

- Deficits created by previous CYFD administrations and by failure to receive federal funds at the rate projected by the Legislature, that have left the Department without available funds to hire needed workers;
- Competition for case workers from private employers who can offer higher pay and less stressful working conditions;
- A statewide and national shortage of social workers;
- Adverse publicity about and public criticism of CYFD, hindering morale for existing employees and discouraging new applicants from applying;
- High turnover rates, particularly for newly trained staff.

The Co-Neutrals' annual reports and letters dated September 27, 2022 and September 18, 2023, and other evidence presented at the arbitration, however, show that there are additional factors that prevent CYFD from meeting its workforce goals that are not wholly external to CYFD. These include barriers that impede hiring and other circumstances leading to frustration on the part of CYFD workers:

- The hiring freeze/pause from May to October 2023 during which CYFD either stopped hiring or stopped onboarding both supervisors and Case Workers, leading to lack of workers and supervisors, increased caseloads, and leading to some supervisors having to be assigned as primary case workers. The freeze/pause demonstrably delayed the hiring and onboarding of supervisors and other workers between May and October 2023. The Co-Neutrals noted that when CYFD began onboarding new hires, the number of employees sought to be onboarded exceeded the training capacity of the Department's trainers, leading to further delays in making up for lost time;
- The failure of CYFD, noted by Legislative Finance Committee Director Charles Sallee, by November 2023, to spend \$2.9 million of a \$3 million legislative special appropriation for hiring additional staff and the failure to request reauthorization of that appropriation in the Department's fiscal year 2025 request;
- Frequent turnover in senior management at CYFD;
- Frequent turnover in senior staff in CYFD with loss of experienced managers;
- Frustration on the part of segments of the CYFD workforce with the "Pillar" reorganization which many CYFD employees feel was poorly implemented and impedes teamwork;
- Frustration by CYFD workers with having to wait sometimes lengthy periods to be reimbursed for travel-related costs and emergencies;
- Frustration by CYFD workers with the antiquated software that the Department uses to track caseloads and other pertinent information;

- Elimination of the role of County Office Managers who can “troubleshoot” and work across organizational boundaries to help case workers do their jobs;
- Lack of reliable access by local CYFD offices to internet and effective technology;
- Lack of any active monitoring or analysis by CYFD senior management of the caseworker exit interview information collected as part of the Workforce Development Plan;
- Requiring senior managers all to be interviewed by a single Department Deputy Secretary when that Deputy Secretary has insufficient time to approve the number of new hires needed;
- Requiring case workers, including workers who feel unprepared and untrained, to work overnight to supervise children housed in CYFD offices while awaiting placement elsewhere with the result that the regular work of the CYFD workers is delayed;
- Requiring caseworkers to conduct emergency investigations overnight, including in some cases investigations for which the workers feel unprepared and untrained, because there are not enough overnight workers able to respond to emergencies.

The evidence presented at arbitration demonstrates that the positive steps that have been taken by CYFD have not been sufficient to lead to meaningful progress toward stabilizing the CYFD workforce and employing sufficient numbers of trained workers to meet the State’s obligations to children in State custody. The problem is not that CYFD workers do not care or that they are not trying to address the problem of staff shortages and turnover. They do care and they are doing their best in a system that has underperformed, as nearly all witnesses have testified, for years if not decades.

Under the Kevin S. Agreement it is not the intentions or subjective intent of individual CYFD managers or caseworkers that are the measure of whether CYFD has met the Performance Standard. The Performance Standard, as CYFD witnesses acknowledged, applies to Defendants as Agencies. To meet a Performance Standard, Defendants need to make “good faith efforts to achieve substantial and sustained progress” toward Agreement targets and outcomes. To make good faith efforts, moreover, requires Defendants to make “all reasonable efforts” to achieve the Agreement’s Targets and Outcomes.

What is reasonable, moreover, is not under New Mexico law judged in a vacuum, but needs to be judged by what is at stake if the State fails to meet its commitments. *See, e.g., Cross v. City of Clovis*, 107 NM 251, 254 (1988) (“As the risk of danger that reasonably should be foreseen increases, the amount of care also increases) (tort case); NMUJI 13-1603 (same). Secretary Casados forthrightly agreed that where serious harm could result from the failure to achieve an outcome, then the standard of what is reasonable requires more from the State. She also agreed that the beneficiaries whose interests are at issue in the Agreement and the CAP are not just the named Plaintiffs (some of whom have “aged out” of the system and are no longer in CYFD custody) but instead all the children who are served by the State’s child welfare system.

In this arbitration, the stakes for the beneficiaries served by the Kevin S. Agreement are the highest possible: the failure of the State to have an adequately trained and staffed workforce means that the State is failing children whose lives and emotional well-being are wholly entrusted to the State. The children cannot advocate for themselves; they are already in most cases the victims of abuse and neglect⁵ and therefore already traumatized when they come into state custody. A system that lacks a sufficient number of caseworkers to get them the medical and other therapeutic services they need, including prompt placement in a home-like environment pending their return to their families or adoption with a “forever home,” means that they may well suffer compounding trauma that could last into their adult lives. The State needs sufficient workers so that, when it assumes the legal custody of a child, it has the capacity to help heal trauma and the resources to avoid compounding injury to an already injured child.

The appropriate answer to the question “what is it reasonable to demand Defendants to do” to meet the Agreement’s caseload standards, is “a lot” because much is at stake and the consequences of failure are too great for too many children.

In this arbitration, the evidence demonstrated that the State has not taken “all reasonable efforts” to achieve the Workforce and Caseload standards of the Agreement. It can and must do more if it is to meet its obligations under the Kevin S. Agreement. Many of the recommendations made over the last several years by the Co-Neutrals have either not been implemented or have not been fully implemented, and many of the findings by the Co-Neutrals discussing additional steps that could be taken were not disputed by CYFD in the arbitration.

Measures that in other circumstances, in other Departments, and in other contexts might be sufficient (hiring of consultants, asking for more money, fast-track hiring events, jobs fairs and reorganizations and the other steps that CYFD cited in the arbitration) have proved, in the case of the challenges facing CYFD, inadequate to fix a problem that cannot be addressed by ordinary efforts. The problem of hiring and retention of qualified workers, moreover, requires many things to be fixed at once. A piecemeal or incremental approach that addresses problems serially will not work. The Legislature must fund change. Workers must be recruited, they must be onboarded and trained before they find and take another job; they must be supervised and be supported (for they agree to take on a job that is accompanied by dealing with a lot of trauma), they must have time to learn their jobs before they are given full caseloads, and they need to be treated as the professionals they are: they need not to be asked to do administrative work that can be done by case aides who would cost the State less; they need not to be asked to work overnight doing case investigations for which they are not prepared or trained; they must not be taken away from their job duties to supervise children placed in CYFD offices because there are not enough resource homes to meet the States’ need; and they must not be left uncertain how to get things done for the children they serve. Administrative barriers that frustrate and impair workers’ effectiveness must also be eliminated. If, as Secretary Casados estimated based on her own observations, CYFD workers spend more than half their working time in meetings, the Department must find a way to reduce that burden so workers are free to focus on tasks and activities that directly benefit the children and families they are responsible for serving. It also

⁵ The State cites, in its proposed Findings and Conclusions, Legislative staff reports indicating that the causes of child maltreatment in New Mexico include “parental substance abuse, poverty, domestic violence, parental history of trauma, and other behavioral issues.”

makes no sense for case workers to have to wait months to be reimbursed travel expenses; and they must have access to managers who are not burdened by overflow caseloads and who can provide guidance and assistance in difficult cases. CYFD's workers also need to know that the State has a plan to get ahead of the retirements and resignations of their colleagues that, should they continue, will just lead to further increases in their already excessive workloads and encourage yet more turnover. These plans must be communicated clearly and progress tracked regularly.

In the remedies section of this decision below, I address the remedies that are appropriate to assist the State in making progress to achieve Target Outcome 10.

5.3.2 Resource Family Recruitment

The Defendants agreed in the CAP to address an urgent need to develop additional foster home options for children in state custody. Specifically, CYFD agreed to take the following actions:

- a. CYFD immediately assigning one placement staff member⁶ to focus exclusively on foster placement recruitment in each of five high-needs counties (Bernalillo, Doña 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.

These steps were remedial in nature and intended to help the State move toward compliance with Target Outcome 6 in Appendix B of the Agreement, which calls for CYFD to approve a specified number of culturally reflective foster homes during the following year and for HSD to approve a specified number of new treatment foster care placements each year. Before the parties entered the CAP, the Co-Neutrals had reported in November 2022 that the State had failed to meet the Performance Standard regarding Target Outcome 6 and had, for calendar year 2022, recruited 129 newly licensed non-relative foster homes, some 49 homes short of the 178 homes targeted for 2022. See Annual Report 2022, at 87. The Co-Neutrals reported that their communications with CYFD staff, resource parents, community providers and others revealed that there was a lack of resources, strategy, and dedicated staff within local offices to focus on recruiting non-relative resource homes. See 2022 Annual Report, at 85.

The evidence presented at the arbitration shows that the State did not comply with its obligation under the CAP to hire a full-time Licensing and Support Specialist in each of the five high needs counties. The evidence does show that the State did comply with its obligation to enter into a contract with at least one contractor to focus on foster home recruitment and retention. While that contractor attempted to increase the recruitment of foster home candidates,

⁶ Sometime after the Parties entered the CAP, CYFD changed the job title for "Placement Worker" to "Licensing and Support Specialist."

he found that other parts of the foster home recruitment program would not allow the timely processing of foster home applications and so his attention turned to other ways that he could support the State's efforts to develop resource homes. Unfortunately, despite the efforts of the contractor and the State, the State did not realize the CAP goal of growing foster homes in each county throughout the State. Indeed, as the Co-Neutrals' reports and letters demonstrate, and the State's witnesses confirmed, the State actually lost ground in foster home development in 2023.

Dedicated Placement Workers

Before the arbitration hearing, in a letter sent to Plaintiffs dated March 12, 2024 Secretaries Casados and Armijo reported that "because of staffing vacancies, the assigned placement worker for the five counties did not take place during the designated time. However, the State has since made these appointments." The letter then listed five individuals and their assigned counties. Exhibit 17 at 2.

At the hearing, however, the State's witnesses explained that in connection with the negotiation of the CAP, the State had in June 2023 designated five recruiters (with official titles of "Navigators") to focus on foster home recruitment in the five-needs counties. These Navigators met to discuss their duties on July 21, 2023, according to Jennifer Archuleta-Earp, the Deputy Director of Placement at CYFD. Ms. Archuleta-Earp, however, testified that these Navigators were not Placement Workers (Licensing and Support Specialists) and they did not focus exclusively, as required by the CAP, on foster placement recruitment in each of five high-needs counties.

The Navigator designated to recruit in Santa Fe County, for example, asked to and was permitted to continue as Placement Worker for two families, was assigned as Supervisor in the Santa Fe office, and was responsible for recruiting in all of CYFD's Region 2 which comprises five separate county offices serving, in addition to Santa Fe, the counties of Rio Arriba County, Taos County, Colfax County, Union County, Mora County, Los Alamos County, San Miguel County, and Guadalupe County. Further, because she was a supervisor, the Santa Fe designee was responsible for overseeing the work of other Navigators in her region and with handling the administrative functions of her supervisory role. The State explained at the hearing that other Navigators assisted the Santa Fe designee in recruiting foster homes in Santa Fe, but it is clear that there was no single Placement Worker designated to focus exclusively, as the CAP required, on recruiting in Santa Fe County during the CAP period. The Navigator assigned to Bernalillo County did work exclusively in that high-need county and was assisted by a second worker but left her position sometime between the beginning of the CAP period and the time of the arbitration. At the time of the arbitration, she had not yet been replaced. The Navigator assigned to Doña Ana County did not focus exclusively on that county, and was responsible also for the counties of Catron, Lincoln, Sierra, Grant, Hidalgo, Luna, and Otero. The Navigator assigned to recruit in San Juan County also was responsible for recruiting in McKinley County, Cibola County, Sandoval County, Valencia County, Torrance County, and Socorro County. Again, however, the State explained that there were other staff identified to help the designated recruiters. The designated recruiter for Chaves/Eddy County was not dedicated to focusing on recruitment in Chaves and Eddy Counties but was also responsible for the rest of Region 4, including Lea, Roosevelt, De Baca, Curry, Harding, and Quay counties.

The Co-Neutrals' interviews of personnel in CYFD offices during 2023 confirm that no one was focused actively on recruiting in the five high needs counties. In September 2023, for example, the Co-Neutrals met with Licensing and Support Specialists in two of the five identified county offices and "no one interviewed in either office was able to identify a Licensing and Support Specialist whose sole, or even primary, responsibility was resource home recruitment." The Co-Neutrals were also told that "due to vacancies and the workload of other staff in their units, that in addition to recruitment, they had other substantial assignments such as completing adoption disclosures, providing training for resource parents, and supervising children placed in the CYFD office." 2023 Annual Report, at 102.

Based on the evidence presented at the hearing, CYFD did not comply with its obligation to designate five Licensing and Support Specialists to focus exclusively on recruiting families in the five high needs counties. The State's failure to meet this obligation under the CAP, therefore, means that the State failed to take actions that were "necessary" and needed to be "undertaken in the time set forth in the CAP to improve the State's ability to comply with its commitments." CAP at 1.

Contracts for Resource Family Recruitment

The CAP required,

[in] 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. The contract will provide that the private entities will recruit families and support them through the licensing process.

CAP at 3.

The evidence at the arbitration showed that on July 13, 2023 CYFD did enter into a contract with one contractor to assist in statewide foster family recruitment. The contractor, Jonathan Salazar, was hired to analyze the current state of New Mexico's pipeline for certifying foster homes and develop a recruitment plan to increase the number of available foster homes. He introduced his "spiderweb" model to CYFD, pursuant to which foster families are invited to host events for friends and family who might have an interest in also becoming foster parents. The State held some spiderweb events, but the program had limited success, which Mr. Salazar says is a result of the State being unable, for reasons attributed to legal constraints, to offer incentive payments to foster parents for hosting an event. Mr. Salazar did prepare training materials; he met with at least one advertiser, and he prepared a dashboard to permit CYFD to assess how many new foster home candidates were in the process from application to licensing. He also met regularly with Navigators to discuss how to improve the development of foster homes.

Mr. Salazar explained that when he analyzed the State's recruiting pipeline, his conclusion was that the main problem in foster home development was not in recruitment of

people expressing interest, but with getting candidates from the application stage through the licensing stage. In a memorandum to Secretary Casados in October 2023, Mr. Salazar reported that “currently, it takes 3-6 months to fully license new applicants, and CYFD is struggling to license the existing 216 applications in the pipeline.” See Exh. 102. He believed there were large bottlenecks and delays in training candidates in a timely manner, in conducting home studies in a timely manner, and in getting the background checks completed and paperwork completed. Foster home candidates lost interest because of delays caused by the State’s inability to efficiently convert a foster home “lead” to a licensed home.⁷ Because of concerns that the State couldn’t process the number of leads it had, Mr. Salazar turned to trying to reduce the inefficiencies in the licensing process rather than generating more leads that the State might not be able to act on. Mr. Salazar also explained that the State had no single platform to track foster home leads. Some of the pipeline was tracked in Excel spreadsheets, some in a program called Binti, some by hand. It made it very difficult to tell where people were in the pipeline.

When asked what New Mexico could do that would lead immediately to the development of more foster homes, he recommended, first, that New Mexico create a dedicated certification unit, with dedicated recruiters, trainers, and home study specialists, all reporting to the same person. He said that second, he would make the training for foster home candidates digitally accessible so that foster home candidates can complete their training online. In Oregon, where he worked previously, the State purchased \$59 Chromebooks for this purpose. He also recommended the State adopt an online platform that would match foster families with children and allow foster families to communicate regularly with CYFD staff. Finally, he recommended the State revisit the original Spiderweb model of recruitment, but with the referral incentive component that he thought essential to the success of that program when it was implemented in Oregon.

The deterioration during 2023 of New Mexico’s ability to license an adequate number of suitable foster home placements is demonstrated in the Co-Neutrals’ 2023 Annual Report. There, the Co-Neutrals show that they estimated, based on a nationally-recognized model, that New Mexico’s need for new non-relative foster homes in 2023 was 265 new homes. Notwithstanding that need, the Co-Neutrals approved a target for CYFD of 190 new homes for 2023 after CYFD explained that, based on recruitment levels in prior years, it was not possible to recruit 265 new homes. The Co-Neutrals therefore agreed with CYFD on a target of 190 new homes in 2023, which was the number of new homes successfully licensed by CYFD in 2019 and a number higher than the number of such homes licensed in 2020 and 2021.

Of the 190 targeted homes for 2023, CYFD recruited 129, the same number licensed in 2022.

The Co-Neutrals attribute the failure of the State to meet its target to the “State’s failure to focus adequate capacity on resource home recruitment in each county,” and to the State’s failure to develop, monitor, and implement county-based resource recruitment plans developed in 2023.

⁷ The State offered Exh. EE at the hearing. That Exhibit shows that, during the period September 1, 2023, to August 31, 2024, 41.46% of foster family inquiries were categorized as “Dropout/Withdrawn.”

The consequences of the State's failure to develop an adequate number of resource homes, as the Co-Neutral's report, are severe and dangerous. According to the Co-Neutrals, the lack of suitable foster homes and suitable placement alternatives contributes to the housing of children, including very young children, in CYFD's offices.

The Co-Neutrals report that during 2023, CYFD housed 185 children in CYFD offices, twice the number of office placements in 2022, and more than five times the number of such placements in 2019.

Under the Agreement, moreover, office and other congregate placements are authorized only when the State can demonstrate and document that "extraordinary circumstances" exist. A finding of extraordinary circumstances requires both that a congregate placement is necessary "to protect the safety and security of the child" and that the placement was pre-approved by the CYFD Secretary or PSD Director prior to the placement. The lack of alternative or available placements is an insufficient basis to meet the extraordinary circumstances standard.

The Co-Neutrals, in their 2023 Annual Report, examined the records of 127 unique children who, combined, made up 238 office placements in 2023.⁸ None of these 238 office placements reflected the extraordinary circumstances necessary to protect the safety and security of the child, according to the Co-Neutrals. Additionally, the vast majority of these placements occurred without the prior documented approval of the CYFD Secretary or PSD Director. The documentation examined by the Co-Neutrals shows that the reason children are increasingly housed in CYFD offices is that CYFD simply has an inadequate number of foster homes willing and able and licensed to accept them.

Who are these children? While most of them (64%) are between ages 12 and 17 (middle school and high school age), 16% are age 5 or younger, and 20% are between the ages of 6 and 12. In nearly a quarter of cases in 2023, a child placed in a CYFD office was placed there on their first placement upon entering CYFD custody, whereas in 2022 only 11% of office placements occurred on first entry into CYFD care. The Co-Neutrals offer this trend as demonstrating that office placements are being used only because there is a lack of available foster homes for children.

How long are children having to stay in CYFD offices? According to the Co-Neutrals, 57% of stays are 1 or 2 nights; 19% are 3-6 nights, and 21% are more than 6 nights.

Why is this bad? As the Co-Neutrals explain:

First, CYFD county offices are not licensed for the placement of children and rely on CYFD staff to provide 24-hour supervision and care.

When children are placed in a CYFD office, staff are required to work overtime and at

⁸ A single child can be subject to more than one office placement a year as a result either of leaving state custody and then returning or as a result of being moved from one placement to another during a single period in state custody.

night in addition to their regular full-time duties.

Because a significant number of the children housed in CYFD offices have serious emotional disorders, staff are required to care for children when the staff members have not been adequately trained on how to meet the children's needs. This includes a lack of training on the storage of and administration of medication. Calls to 911 are frequently required and are used for behavior management or crisis intervention. Calls to law enforcement, which could be avoided if there were appropriate placements for these children and adequate treatment provided, adds to the trauma and destabilization of the child.

Every witness asked at the arbitration agreed that housing children in offices is bad. Moreover, the State recorded 52 "critical incidents" involving children housed in CYFD offices. A "critical incident" can be a 911 call, an allegation of harm, an allegation of abuse and/or neglect, an allegation of restraint/seclusion, or a change in licensure of a facility. Most of the reported critical incidents reported in 2023 (88%) were the result of CYFD staff calling 911 in response to a child's behavior within the office.

The most severe impacts of office stays are visited on the children, but the impact is also felt by CYFD staff. Office stays create the need for overtime and nighttime work for already overburdened CYFD workers and supervisors. That work undoubtedly makes the job of working for CYFD more stressful and less attractive for existing and prospective CYFD personnel.

As explained above, it is clear--and CYFD concedes--that it did not comply with the remedial step required by the CAP to provide dedicated Licensing and Support Specialists to develop resource homes in the five highest need counties. And while CYFD did hire Mr. Salazar to assist with statewide recruiting, the work done by Mr. Salazar failed to lead to the development of any additional foster home capacity statewide.

While the State has taken the positive step of developing a plan to implement a program called "Foster Care Plus" to support families that are able and willing to support children with high acuity needs, it is not clear when that program will be functional and actually lead to additional foster homes for children in state custody.

I conclude that the evidence offered at the arbitration shows that, in addition to failing to meet the CAP standards for foster family recruitment, the State has thus far failed to meet Performance Standard 6 in Appendix B of the Agreement. This is the same conclusion reached by the Co-Neutrals in their 2023 Annual Report. See Report, at 96-101.

The remedy to be adopted is discussed in a separate section of this Decision.

5.3.3 Well Child Visits

The Plaintiffs' Amended Arbitration Notice identifies two areas of alleged noncompliance regarding the State's compliance with CAP requirements addressing Well-child visits. The first area at issue is Target Outcome 4 in Appendix D of the Kevin S. Agreement, which requires that 100% of children in state custody receive a Well-Child visit within 30 days, by January 1, 2024. The second relevant CAP requirement obligated the state to provide a

completed well-child visit by September 15, 2023 for all children who entered care before July 1, 2023 and were still in custody on September 15, 2023. CAP at 23-24.

These CAP requirements were intended to assist the State in meeting the Kevin S. Agreement Target Outcome 4 of Appendix D that “[b]y December 1, 2021, every Child in State Custody will receive a comprehensive well-child checkup within 30 Days of entering state custody.”

The Parties agree on the importance of well-child checks. Well-child checks are examinations of a child required to be performed by a physician, physician assistant, or nurse practitioner within 30 days of entry into state custody and are designed to identify the need for medical and behavioral services which can then be made part of the treatment and service plans for those children. To the extent a child is Medicaid-eligible (and most children in state custody are), the well-child check is the means of satisfying the State’s obligation to perform an EPSDT screen that identifies potential physical, mental, developmental, hearing, and vision conditions that require treatment or further diagnostic evaluation. To the extent the need for treatment is identified during an EPSDT screen, the State is legally obligated to provide appropriate treatment and diagnostic services.

To be effective, a well-child visit must be performed soon after the child enters custody. The principal reason is that an undiagnosed or unidentified disease or condition cannot be treated until it is identified. A second reason is that, when a child enters custody, the Courts, caseworkers, and treatment teams are required to prepare and approve treatment plans to address the child’s known needs for care and therapy. A delayed or omitted well-child check may mean that a child is denied needed treatment because the child’s need is identified too late to be incorporated into treatment plans or are not identified at all because the well-child check was never performed.

In their 2021 Annual Report (issued prior to the CAP), the Co-Neutrals noted that of the children who reached their 30th day of custody in the month of December 2021, only 47% had received a well-child checkup on time. This performance, moreover, continued a worsening trend in the rate of timely checkups. For the full years 2019, 2020, 2021, and 2022, the rate at which well-child checks were completed on time declined, respectively, from 58% to 57%, to 53% to 44%.

This trend was surely part of what led the Parties to agree to make the Well Child Target Outcome a Target Outcome also for the CAP. The reason the Parties agreed to a 100% compliance rate (rather than a graduated or phased rate) is that all well-child checks and EPSDT screens are required by state law to be performed within 30 days of a child entering state custody. See CYFD’s Permanency Planning Procedures, 8.10.7 NMAC.

As tracked by the Co-Neutrals for their 2023 Annual Report, the State’s rate of compliance with timely well-child checks in 2023 was better than 2022, but only slightly. In 2023 the State achieved a 46% compliance rate for timely checks for the 889 children entering state custody during the year. Another 25% of these children received a well-child check but received them from 31-90 days late and another 9% received the check more than 90 days late. Critically, however, for 19% of these children, no well-child check at all was recorded as having

been performed.

The State witnesses at the arbitration explained that there are many factors responsible for the rate of noncompliance, including:

Historically a delay lasting from 15-30 days for the MCOs to identify a child in state custody to make them eligible to schedule an appointment with an authorized Provider, and delays in making them eligible for payment through Medicaid;

- Problems with getting appointments with Providers;
- No shows for appointments;
- The practice of some providers of scheduling appointments for new patients further out whereas the same provider would schedule an existing patient sooner;
- Some Providers refusing to provide an appointment if a child has been seen in the calendar year or within one year of the request for an appointment;
- Providers indicating that they do not have availability until after the 30 day period has elapsed;
- Resource parents whose other commitments conflict with what dates are provided for the well-child check;
- Transportation issues that prevent a child from getting to an appointment;

Some children being deemed inappropriate for a well-child checks because they are already in an acute (hospital) setting;

- Reports that some children over the age of 14 are exercising their right to decline a well-child check.

The State also presented witnesses explaining what steps it has taken to improve compliance with well-child checks, including:

- Hiring a statewide EPSDT coordinator in June 2023 to coordinate the efforts to get well-child checks completed on time;

Providing, beginning in July 2024, a single Medicaid Managed Care Organization (MCO) to provide Medicaid services to all children in state custody;

Providing instructions (Letters of Direction) to the MCO to streamline and assign a Medicaid provider number to each child entering custody within the first few days that a child is in custody;

- Entering an Agreement (effective December 21, 2023 to July 1, 2024) between CYFD and the State of New Mexico Department of Health to make Department of Health

facilities, including school-based health centers, available for scheduling and performing well-child checks. See Exh. 105.

- Implementing a pilot “Co-Location” program in San Juan County where the MCO provides care coordinators to spend dedicated time each week in a CYFD office to help schedule well-child visits.
- Providing additional education to CYFD on the importance of well-child checks.

The Co-Neutrals’ Reports, however, show that still more could be done by the State to improve performance of timely well child checks. The 2023 Annual Report, for example, reported that:

“[w]orkers overall reported the lack of available providers in certain parts of the state make scheduling an appointment in a timely manner challenging”; and

“Another barrier cited was role 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 PC.”

Testimony presented at the arbitration hearing also shows that the State did not, during the CAP period, have a good tracking system to permit it to analyze why so many well-child checks are either not performed at all or, if performed, are performed late. The failure during the CAP period to have a good monitoring program meant that the State did not have a comprehensive picture of where the system was breaking down. Without such information, it will be impossible for CYFD and HCA’s leaders to identify how to fix the problem.

Additionally, the tracking that HCA and CYFD have just begun to receive from the single Medicaid provider for children in state custody (Presbyterian Health Plan) continues to show that there is no good tracking of why specific well child checks are not being completed. Exhibit PP at the arbitration shows that PHP reported to Defendants that in July 2024 there were 15 well-child visits reported within 30 days, one well-child visit reported that was late, and 16 visits for which there was no well-child visit recorded. For the month of August, there were 20 visits documented on time, two visits documented late, and 12 visits not documented. Additionally, the summary report provided to the State does not indicate why, for the well child visits not documented, they did not occur. The recent data presented in Exhibit PP suggest that, despite the efforts taken by the State in 2023 and 2024 to try and improve compliance with the well child check requirement, little or no progress has been made. HCA did present memoranda—Exhibits PP, QQ, and RR, for example—that describe plans and “objectives” being discussed to improve well child check performance, but these all are dated after the expiration of the CAP period. There was no clear indication that the plans had even at the time of the arbitration been fully implemented or, if they had been, that they were having much impact on improving performance.

On the evidence presented at the arbitration, I agree with the conclusion of the Co-Neutrals that the State has not met the Performance Standard with regard to Target Outcome 4 of Appendix D in that the State has not demonstrated that it took “all reasonable efforts” to achieve

compliance with the 100% requirement of timely well-child checks.

Remedies will be discussed in a separate section of this Decision.

5.3.4 Data Submissions

In the CAP, the State agreed to the following CAP commitment:

- a. The Parties agree that it is imperative for the State and the Co-Neutrals to have access to real time data to assist the State in meeting the obligations in the Agreement and that the failure to have access to real time data has already delayed needed progress on many deliverables. In order to more effectively monitor the State's progress, CYFD and HHSD agree to provide real time data...

CAP at 8.

In their Amended Arbitration Notice, Plaintiffs allege that the State had breached the CAP by failing to provide:

- 1) Quarterly data on the total number of Treatment Foster Care ("TFC") homes.
- 2) Well-child records for over one-third of children whose records were requested by the Co-Neutrals.

See Amended Arbitration Notice, Exh. FF at 4-5.

In their letter to the parties dated February 23, 2024, the Co-Neutrals reported that:

The Co-Neutrals have received most data identified in the CAP from the State. Some of the provided data required additional clarification or structuring, and the data were not consistently provided within the timelines outlined in the CAP. As of this writing, the Co-Neutrals have not received 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.

Exhibit 13.

While the State's inability in a timely manner to provide all of the data requested by the Co-Neutrals in connection with CAP monitoring is not itself a violation of the Kevin S. Settlement Agreement (because the CAP is not independently enforceable), it is evidence that the State did not take steps it believed and agreed to be necessary to permit the State to make progress in meeting the Implementation Targets and Target Outcomes of the Kevin S. Agreement.

The State's obligation under the Kevin S. Agreement to provide accurate and timely data to the Co-Neutrals is made plain throughout the Agreement. The Agreement additionally

provides that “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.” Exh. 1 at P000008.

In the 2023 Annual Report, the Co-Neutrals state that

The Agreement requires the State to collect data to assess new system practices that were not previously recorded, and to use this data in new and different ways to assess the experiences of children in state custody within both the foster care system (managed by CYFD) and the broader health continuum (managed by HCA). In 2023, the State continued to develop the capacity to do this work, aided by an external contractor (Falling Colors Corporation). Much has been accomplished, and more work remains.

2023 Annual Report, at 26. The Co-Neutrals detail the continuing difficulties the State faces in providing timely and complete data throughout the 2023 Annual Report.

The difficulties cited by the Co-Neutrals regarding CAP data submissions and the 2023 Annual Report are not really disputed. At the arbitration, the State’s witnesses agreed that CYFD and HCA face difficulties in collecting the data required under the Kevin S. Agreement. CYFD witnesses, additionally, testified that it needs roughly an additional four data employees in the Department that produces most of the data for the Co-Neutrals, not just to provide that data, but to maintain the State’s antiquated FACTS system and to anticipate the need eventually to convert to and train employees on a new software system called “CCWIS.”

To some extent the difficulty of obtaining consistently reliable data was demonstrated in some of the evidence presented at the arbitration hearing. For example, Exhibits 60 and Exhibits J and L are CYFD-generated documents providing data regarding the number of CYFD workers having caseloads in excess of 200% of the standards established under the Kevin S. Agreement. But the counts shown in those exhibits appear to omit children in CYFD’s custody who were not assigned a currently employed worker in CYFD’s database even though, obviously, the children represented “cases” needing assignment. The exhibits additionally purport to assign “caseloads” to managers and supervisors, who under the Agreement are not supposed to have primary case assignments. Effectively, these exhibits are reporting ratios of cases per worker that undercount both the number of cases being handled (numerator) and overcount the number of eligible workers eligible to carry them (denominator), with the result that the counts shown are seriously misleading if relied on to assess the Department’s performance with regarding caseloads in excess of 200% of standard.

Additionally, Defendants’ Exhibit EE is a graphic from CYFD’s dashboard published on the internet, at togetherwethrivenm.org, tracking (among other things) the duration of office stays. Exhibit EE contains the statement, based on data for the one-year period ending August 2024, that “only 9% of office stays were for more than three nights.” This report seems to conflict with the Co-Neutral’s finding that, of 238 placements reviewed of children in office stays in the calendar year 2023, 32% were for more than 3 nights. See 2023 Annual Report, at 65. While some difference in the reported percentages could be attributed to significantly shorter

durations in the first eight months of 2024 compared to 2023, there is the potential that the State is relying on performance data that differs substantially from the validated data analyzed by the Co-Neutrals.

To the extent these Exhibits were shared by the Department externally, they risk understating the extent of the problem with both caseloads and office stays. And if the Department's leaders relied on these exhibits to assess the number of workers carrying caseloads in excess of the Kevin S. caseload standards or how long children are subject to office placements, they too, might not have appreciated the severity of the problems facing the Department.

Based on the evidence presented at the arbitration and contained in the 2023 Annual Report of the Co-Neutrals, I find that the State has not met its obligations under the Kevin S. Agreement to provide timely and comprehensive data as contemplated by the Agreement.

5.3.5 Remedies

The Parties agreed in the Kevin S. Agreement that the remedies available in arbitration include:

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.

Agreement, at 11.

Among the remedies Plaintiffs ask for in this arbitration is the appointment of a Receiver to manage New Mexico's child welfare system. I do not find the appointment of a Receiver appropriate or necessary at the present time. First, I am not convinced that actions short of a receivership would be ineffective to help bring the State closer to meeting the targets of the Kevin S. Agreement. This is the first arbitration conducted under the Agreement, and the Parties largely agree that the State has not been able to comply with the commitments of the CAP and to achieve the Target Outcomes at issue in the Amended Arbitration Notice. The Parties have expressed a willingness and intent to continue to work collaboratively with the Co-Neutrals to identify and cooperate in achieving the changes necessary to succeed under the Settlement Agreement. Second, where courts have entertained the appointment of a Receiver—an admittedly drastic remedy—they have done so after “all reasonable alternative measures of change have been exhausted,” and after the Court had a basis to find Defendants in contempt for failing to comply with interim remedial orders that were developed with input from a Court Monitor. *See, e.g., LaShawn A. v. Kelly*, 887 F. Supp. 297 (D.D.C. 1995). Because there have been no prior arbitration proceedings or orders, this is not a case where Plaintiffs can make a case for contempt or where they can demonstrate that remedial orders have proven ineffective.

Though I find no basis at this time for appointment of a Receiver, there is a clear basis for injunctive relief in the form of remedial orders directing the State to take additional measures to come into compliance with the Kevin S. Agreement. I find, based on the evidence presented at

the arbitration, that the children in the custody of CYFD are subject to irreparable harm arising from the State's failure to comply with the Kevin S. Agreement as detailed in this Decision. That harm arises directly from (1) excessive caseloads for CYFD caseworkers and the persistent failure of the State to hire and retain an adequate number of case workers; (2) a failure by the State to develop and maintain an adequate supply of foster homes leading to the State sending children without justification to be housed in congregate settings, including CYFD offices; and (3) children being deprived of their right to timely medical checks that, if performed, would identify medical and behavioral conditions for which the State has a legal obligation to provide treatment.

I find further that there are no legal remedies available to me as arbitrator, short of injunctive relief, that would provide an adequate remedy for the harms now being suffered by children in the State's custody.

In deciding on the precise contours of the remedial injunctive order to be entered, I believe it is important to proceed in a way that, so long as the Parties continue to work in good faith with one another, acknowledges the goals of collaboration and cooperation that were negotiated by the Parties in the Kevin S. Agreement. I also understand that any remedial orders must complement the steps the State is already taking to improve compliance with the Kevin S. objectives and that remedial orders should avoid conflicting with positive initiatives already in process. I also understand that it is important for any remedial order to be fashioned with the benefit of input and advice from the independent Co-Neutrals who have expertise in child welfare system reform and who have been studying and monitoring the State's child welfare system since Parties entered the Kevin S. Agreement in March 2020.

Taking these considerations into account, I am attaching Remedial Order No. 1 to this Decision, which requires the State to take discrete actions to address the shortfalls in performance under the Kevin A. agreement revealed in the arbitration. The Order also invites the Co-Neutrals to provide recommendations with regard to additional actions the State should be required to take to better comply with the Kevin S. commitments in the areas of case worker hiring and retention, development of resource family homes, well child checks, and data submissions. The Order also invites the State and Plaintiffs to provide input and advice regarding the recommendations of the Co-Neutrals. Following receipt of the Co-Neutrals' recommendations and input from the Parties, I will issue one or more additional Remedial Orders as appropriate.

5.3.6 Plaintiffs' Request for Fees and Costs

The Plaintiffs and Defendants were ably represented in the arbitration by experienced counsel who worked hard to prepare and present an enormous amount of information in a short period of time. That included not just the discrete issues raised in the Amended Notice of Arbitration, but also history and context of the New Mexico child welfare system, the challenges that CYFD and HCA face, both currently and historically, and about why the goals of the Kevin S. Agreement are important and what led the Parties to agree to them more than four years ago.

Because I find that Plaintiffs have prevailed in this arbitration in obtaining the relief detailed in this Decision, I am exercising the discretion afforded under Section IX(c) of the

Agreement to find that Plaintiffs are entitled to recover their reasonable attorneys' fees and costs. Plaintiffs should prepare their request and first submit it for Defendants' review. If the Parties cannot agree on the proper measure of fees and costs, Plaintiffs should file an application in this arbitration no later than March 17, 2025. Defendants should respond to any application by March 31, 2025 after which, if they wish, Plaintiffs may file a reply by April 14, 2025. These deadlines may be modified by agreement of counsel or for good cause.

5.3.7 Other Issues and Defenses

Because this Decision reaches the conclusion that Plaintiffs are entitled to relief on their claims for breach of the Performance Standard under the Kevin S. Agreement, it is not necessary for me to address Plaintiffs' alternative claim for breach of the covenant of good faith and fair dealing.

At the arbitration hearing, the parties presented a great deal of evidence on issues other than the four issues identified in the Amended Arbitration Notice, including on the level of the State's compliance with CAP provisions dealing with Treatment Foster Care, Wrap-Around Services, Commitments Focused to Return of Children from Out-of-State Placements, and Behavioral and Mental health services. The Parties offered evidence, usually without objection, on these topics and I was glad that they did so because such evidence helped me understand the consequences for New Mexico's children of a failure to comply with the CAP commitments that were at issue. Thus, to understand why there is an urgent need to build out New Mexico's resource family capabilities and what it is reasonable to expect the State to do in meeting the Performance Standard, it was important to know that the lack of such homes leads to children being housed in offices, in congregate care, and potentially or eventually in out-of-state placements. I also accepted this evidence as relevant to developing a broader understanding of all the interrelated pieces of New Mexico's system of care for children in State custody and so that I would be better prepared to address remedies, if any, that would be appropriate were Plaintiffs to establish that the State was in violation of the Performance Standard of the Agreement.

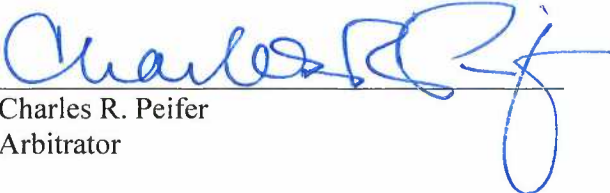
As is clear from the identification of issues decided in Section 5, however, I do not in this Decision address the level of the State's compliance with the Agreement in the areas of Treatment Foster Care, High Fidelity Wraparound Services, or the State's compliance with CAP obligations other than the four identified in the Amended Arbitration Notice.

6.0 Final Award on Liability Issues

This Decision is a final award on the liability issues submitted for arbitration in the Amended Notice of Arbitration dated July 15, 2024. All claims, defenses, or relief not expressly granted herein are hereby denied. This Decision and Award reserves to the arbitrator jurisdiction over remedies.

Pursuant to the Kevin S. Agreement, this Decision and Award should be made public.
See Agreement, Section IX(A)(1)(e).

Dated: January 21, 2025



Charles R. Peifer
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Decision and Award was served via electronic mail on the following persons on the 21st day of January, 2025.

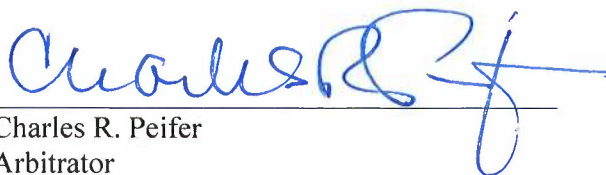
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