2025

KEVIN S. ARBITRATION REPORT

DECISION ENTERED JANUARY 21, 2025

AUTHORED BY THE KEVIN S. PLAINTIFFS IMPLEMENTATION TEAM

Public Counsel

DRNM DISABILITY RIGHTS NEW MEXICO (DRNM)

NATIVE AMERICAN DISABILITY LAW CENTER

MARTINEZ HART SANCHEZ ROMERO

Barnhouse Keegan Solimon & West LLP
Attorneys at Law

PEGASUS Legal Services for Children

ARBITRATION SUMMARY

- The State and Plaintiffs ("the Parties") engaged in an 8-day arbitration hearing.
- The Parties presented 20 witnesses and over 98 exhibits.
- Witnesses included child welfare and Medicaid experts, a child psychiatrist, Director of the Legislative Finance Committee, CYFD and HCA staff, and both Cabinet Secretaries.

Summary of Findings

After assessing the evidence presented during the 8-day arbitration, **the Arbitrator, Charles Peifer, concluded that the State (CYFD and HCA) 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.

The Arbitrator determined 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."

Specific Support for Arbitration Findings

The Arbitrator found that State failed to meet the commitments regarding CYFD caseworker and supervisor caseloads. The evidence showed that from June 2023 to January 2024, the State was out of compliance with the requirement that no CYFD worker have a caseload exceeding 200% of the applicable caseload standard or that there be no supervisors assigned primary case responsibilities for a child.

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 neglect 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."

- Arbitrator Charles R. Peifer

Although the State agreed that it was necessary to hire five full-time Licensing and Support specialists to focus exclusively on recruiting families in each of the five high needs counties, **it did not do so**. The Arbitrator explained the evidence as follows:

- The deterioration 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. The Co-Neutrals therefore agreed with CYFD on a target of 190 new homes in 2023 (the number of new homes successfully licensed by CYFD in 2019).
- **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.**

The State's failure to meet agreed upon standards for foster family recruitment leads to dangerous increases of children sleeping in offices and/or inappropriate congregate care settings. As the Arbitrator noted:

- The consequences of the State's failure to develop an adequate number of resource homes are severe and dangerous. According to the Co-Neutrals, **the lack of foster homes and suitable placement alternatives directly contribute to housing children in CYFD offices, including very young children.**
- **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. "Critical incidents" 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 critical incidents reported in 2023 (88%) were the result of CYFD staff calling 911 in response to a child's behavior in the office.
- The most severe impacts of office stays are on children, but the impact is also felt by staff. **Office stays create the need for overtime and nighttime work for already overburdened CYFD workers and supervisors.**
- While the State has taken the positive step of developing a plan for "Foster Care Plus" to support families that are able and willing to take in children with high acuity needs, it is not clear when that program will be functional or if it will actually lead to additional foster homes.

The State failed to meet its commitment that 100% of children receive a well-child check within 30 days of entering state custody. This failure could, and has, led to children not receiving adequate physical and behavioral healthcare, which in turn jeopardizes their ability to achieve permanency. The Arbitrator explained:

- 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.** An undiagnosed or unidentified disease or condition cannot be treated until it is identified. Additionally, when a child enters custody, 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.

The State does not have the data capacity it needs to analyze compliance and to help improve performance over time. Without such information, it will be impossible for CYFD and HCA's leaders to identify how to fix problems. **Additionally, the State may have relied on inaccurate data to assess and report its compliance with its commitments under Kevin S.** The Arbitrator stated:

- The difficulty of obtaining consistently reliable data was demonstrated in some of the evidence presented at the arbitration hearing. For example, CYFD data regarding the number of CYFD workers with excessive caseloads **purported to assign caseloads to managers and supervisors, who under the Kevin S. Agreement are not eligible to be primary case assignments at all.** Effectively, these exhibits reported ratios of cases per worker that undercount both the number of cases being handled and overcount the number of eligible workers eligible to carry them, resulting in seriously misleading counts.

Key Takeaways

1) 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.

2) The State's lack of progress complying with Kevin S. commitments is not solely because of factors outside of the State's control.

3) The Co-Neutrals are national experts in child welfare system reform and have become experts in child welfare reform in New Mexico.

Key Takeaways (cont.)

4) Many of the Co-Neutrals' recommendations over the years 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.

5) A piecemeal or incremental approach that addresses problems serially will not work.

6) It is critical to fully staff caseworker and case aide positions.

7) The consequences of the State's failure to develop an adequate number of resource homes are severe and dangerous for both the children and its staff.

8) The State must do more to improve its performance of timely well child checks.

9) The Co-Neutrals' validated data and reporting on the State's compliance are the most accurate. To the extent the State is relying on unvalidated data and reports to assess/demonstrate compliance with Kevin S., they risk understating the extent of the problem.

What Now?

The arbitration was a costly effort to prove what the State and Plaintiffs already knew: the State was not in compliance with the CAP or the Kevin S. Agreement and it did not take all reasonable efforts to get back on track.

- **The State should heed the Arbitrator's order to work collaboratively** with the Plaintiffs and Co-Neutrals to get back on track. The time to act is now.
- The Kevin S. Agreement is still the roadmap to system reform and meeting the needs for all children in New Mexico's custody. **Compliance with Kevin S. is the system reform the State needs to focus on.** They are one and the same.
- The Co-Neutrals are national experts with the knowledge to guide the State toward specific actions that will improve conditions for children in custody.
- **The State needs to fully assess its financial need** to meet its Kevin S. obligations **and the Legislature needs to fully fund this need.**

ARBITRATION REMEDIAL ORDER SUMMARY

The remedial order issued with the Arbitrator's Decision orders specific performance and other injunctive relief to address Defendants' performance under the Kevin S. Settlement Agreement. The order focuses on the areas of caseworker hiring and retention, foster family development and retention, well-child checks, and data submission. The order also invites submissions and recommendations from the appointed Co-Neutrals.

Key legislative points include...

Caseloads, Caseworker Hiring and Retention

- **CYFD must take necessary steps to request adequate funding** from the legislature during the 2025 session to fully fund all caseworker and case aid positions to meet caseload standards established under the Kevin S. settlement agreement.
- CYFD must report to the Co-Neutrals how CYFD has spent or plans to spend the $3 million special appropriation made by the legislature.

Data Submissions

- **CYFD must ensure they have taken all necessary steps to request adequate funding from the Legislature during the 2025 sessions** to fully fund the needs of its data team, including hiring additional IT and data specialists as well as other contract services, in supplying data to comply with obligations under the Kevin S. Agreement.

Other Relief

- The Arbitrator will **consider input from the Co-Neutrals on whether CYFD and HCA would benefit from the establishment of an Office of Ombudsman** within CYFD to focus on identifying barriers to workforce development and retention, foster home retention and development, retention of case workers, and reimbursement for caseworkers and foster family expenses. The Ombudsman may investigate the source of issues regarding availability of foster homes so that Department leadership may implement solutions, and help identify where leadership has not clearly explained goals and plans to Department constituents.

Presented by Kevin S.
Plaintiffs Implementation Team

See the Arbitrator Decision, Remedial Order, and other case documents at www.kevinssettlement.com/home-2/reporting-documents.